Neutral Citation: [2015] IEHC 758

THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 615 J.R.]

BETWEEN

DARREN NULTY

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 27th day of November, 2015

1. In *Irwin v. DPP* [2010] IEHC 232 Kearns P. expressed the view that applications for leave to seek judicial review involving prohibition of a criminal trial on the grounds of failure to preserve evidence represented a "*cottage industry*" and, when engaged in as a matter of routine, were "*a grave abuse of the legal process"* in the light of their effect on the rights and interests of victims. He was of the view that in future such applications should be brought on notice to the Director of Public Prosecutions.

2. I would respectfully agree with Kearns P. in this regard. Indeed, in the light of such considerations and the effect of the grant of leave on the rights and interests of third parties, there is much to be said for putting the Director on notice of broader categories of applications for prohibition of criminal trials (going beyond failure to preserve evidence). Such a procedure can often assist (whether by the making of formal submissions or simply by having the court's attention drawn to additional materials) in differentiating the meritorious applications from the unmeritorious at an early stage and thereby preventing undue delays in the criminal process. However in the absence of any general rule having been introduced since the Irwin decision requiring such notice as a matter of course, the court in any event has discretion under O. 84 r. 24(1) (as amended) for good and sufficient reason to put the respondent on notice of an application on a case by case basis.

3. In the present case Mr. Colman Fitzgerald S.C. on behalf of the applicant sought leave *ex parte* to apply for orders of prohibition restraining the Director from further prosecuting the applicant for an offence of burglary contrary to s. 12 (1) (b) of the Criminal Justice (Theft and Fraud Offences) Act 2001 and theft pursuant to s. 4 of that Act. I directed that notice be given to the respondent, following which Mr. James Dwyer B.L. appeared for the Director of Public Prosecutions. Mr. Dwyer did not seek to make any formal submission but drew my attention to some relevant authorities.

Facts

4. The complaint made in this leave application relates to failure to preserve evidence. The underlying criminal matter is still before the District Court and therefore, in the absence of any return for trial or election as to mode of trial as yet, no time issue arises such as would engage the decision in *Coton v. DPP* [2015] IEHC 302.

5. The issue arises from the disappearance of a sum of money from a safe in a public house in Blackrock, County Dublin in March, 2014. It is said that the applicant was one of "a number of" people who were able to access the safe at the material time, although in fact it would appear from the papers that there were only two other such persons, one of whom was the person who made the complaint to An Garda Siochána. The complaint made was that a sum of about €3,623 disappeared from that safe sometime between the early hours of Saturday 1st March, 2014 and Tuesday 4th March, 2014.

6. Garda Robert McNicholas was tasked with viewing CCTV footage obtained from a camera covering the safe from which the money was taken. He did so in the company of, and with the assistance of, the bar manager of the pub, Mr. Alan Fitzpatrick, being the person who made the initial complaint.

7. Garda McNicholas and Mr. Fitzpatrick viewed footage covering a period of several days. The precise period is variously described as from 1st to 3rd March, 2014, or from 28th February to 3rd March, or 28th February to 2nd March, depending on the various statements of the times involved in a witness statement, a précis of evidence and a letter from Garda McNicholas.

8. Having watched the CCTV footage, whatever period it covered, it is said that Garda McNicholas "*consciously and deliberately*" decided to download and save only approximately 30 seconds of footage which records a particular incident which it is not necessary to refer to in detail for the purposes of this judgment. It is said that Garda McNicholas chose not to obtain and preserve the footage showing the safe for the remainder of the period during which the money disappeared.

9. It is said in the statement of grounds that Garda McNicholas "*chose to disregard the potential exculpatory relevance of the remainder of the CCTV footage"* and that *"[t]he remainder of the CCTV has been destroyed or is, in any event, no longer available to the Gardaí".*

10. Garda McNicholas' explanation as stated in correspondence was that "*From viewing the footage of the dates in question, this incident was by (sic) the only suspicious activity that occurred in the course of this investigation … Due to the very large period of time involved it was not possible or feasible to copy all footage from Friday the 28th of February 2014 to Monday the 2nd of March 2014 inclusive."*

11. Following the charging of the applicant there then followed considerable correspondence in relation to disclosure of CCTV by the prosecution. This was accompanied by applications to the District Court to strike out and regarding disclosure. On 27th July, 2015 the applicant's solicitor again applied to have the case struck out on the basis of a contention that the court's order on disclosure had not been complied with. Judge Watkin refused the application and remanded the case to 14th September, 2015 marking disclosure as

peremptory against the prosecution. She also remarked presciently that undisclosed evidence could be dealt with at the trial. There then followed further correspondence and a further unsuccessful strike out application.

The test for a leave application on notice
12. The general threshold for the establishment of legal grounds for a leave application is of course that of arguability (*G. v D.P.P.* [1994] 1 I.R. 374). In *Damache v. D.P.P.* [2014] IEHC 139 Edwards J. reviewed recent caselaw and stated that even in a leave application on notice, the appropriate test remains that of a showing of an arguable case, which I would apply as being the current position (although from time to time, the question has been posed as to whether there is any case for the adoption of a higher threshold, a question I referred to in Gallagher v. D.P.P. [2015] IEHC 644).

13. In *G. v. D.P.P.,* at p. 377, Finlay C.J. listed the matters which an applicant had to show. One of those was arguability as to the grounds of the application. A separate one was that an applicant must show "*if there be an alternative remedy, that the application by way of judicial review is, on all the facts of the case, a more appropriate method of procedure".*

14. The test that judicial review be the appropriate remedy is not, on the basis of that formulation, subject to the threshold of arguability. The court considering leave must be of the view that judicial review is the appropriate mode of proceeding, not that it is merely arguable that this is the case.

15. A proposition might itself be arguable but the court might take the view that another forum is the appropriate place to make that argument.

Key requirements to obtain relief in relation to failure to preserve evidence
16. In the present case, the Director drew to my attention a number of relevant authorities, particularly the Supreme Court decision in *Byrne v. DPP* [2011] 1 I.R. 346 and the recent decision of the Court of Appeal in *Sirbu v. DPP* [2015] IECA 238.

17. The two consequences of Byrne that are particularly relevant for present purposes, and that, it seems logical to conclude, need to be satisfied even at the leave stage, are:

> (i). that an applicant must engage with the facts in order to demonstrate the relevance and significance of the evidence alleged to be missing, and
>
> (ii). that regard must be had to the consideration that the primary onus of ensuring the right to a fair trial is vindicated lies with the court of trial.

Whether the applicant has engaged with the facts so as to reach the threshold of arguability
18. The present case bears a striking similarity to the Supreme Court decision in *Whelton v. O'Leary* [2011] 4 I.R. 544, in which the Garda member concerned viewed all CCTV footage, in the company of the accused's employer, and only retained 3 minutes and 36 seconds of footage. Fennelly J. described the actions of the member by saying that he "*selected only those parts which were incriminating, insofar as the applicant was concerned*". The applicant therefore complained *"that he was thus unfairly depicted as simply taking money from the till, whereas he advanced an innocent explanation"* (at p. 548). He went on to hold that a duty to take possession of or copy the entire hard drive showing the full CCTV "*would involve a significant extension of the obligations of the prosecution authorities … They cannot be blamed for failing to recover material which they had no reason to believe to be of any relevance to the guilt or innocence of the applicant*" (at p. 559). In the absence of anything to show that the Garda decision as to what was and was not relevant in the present case was unlawful, the Whelton decision is sufficient to dispose of any contention that the present application is arguable.

19. Of course a prosecution decision that particular evidence is not relevant may be unreasonable. Leaving aside for a moment the question of whether the reasonableness of such a decision is best tested at the trial or in the theoretical vacuum of a prohibition application, unmoored from a full understanding of the facts as they have been set out in the course of the prosecution case, an applicant must discharge an onus to show that an unfairness necessarily arises on the facts.

20. The grounding affidavit is sworn by the applicant's solicitor Mr. John Neville of John Neville & Co., Solicitors, and not by the applicant himself. It is said however that the applicant intends to swear an affidavit of verification. This was not been put before me when the hearing of the leave application resumed on notice. The phrase "*affidavit of verification*" can mean different things to different lawyers. Some construe it as a one-line approval of the solicitor's affidavit, others as a more narrative first-person statement of the facts. The one-line "*affidavit of verification*" option is an unhelpful and inappropriate form in which to make a positive statement of the defence case, as it creates too much distance between the applicant and the positive averment he or she has to make as to how the trial has been compromised beyond repair. It is for the applicant, and not a legal professional engaged on his behalf, to state positively how his defence is significantly and necessarily hampered in a way that cannot be addressed at the trial, by reference to the actual defence case which he intends to put up. The only details in this regard are that the applicant "*denies any criminality"* including "*a denial of theft as contemplated by the Respondent*" (para. 4). This is opaque and is certainly not a statement of the defence case. It is simply a re-casting of the obvious point that the applicant intends to plead not guilty. Even overlooking the fact that this matter is sworn to by the applicant's solicitor only, it is not a statement as to whether the defendant intends to deny at trial that the incident identified on the CCTV took place, or whether he will accept it took place but has an innocent explanation and if so what that explanation is, and what he thinks happened to the money. His solicitor complains at para. 7 of his affidavit that the missing portions of the CCTV could have shown who else accessed the safe or was "acting suspiciously in or about the safe during the relevant period". That this is a mere possibility is again is only a statement of the obvious and I would not infer from it that the accused will be making a positive allegation at his trial that someone else accessed the safe and removed the money, especially bearing in mind that he has only identified two other people who had access to the safe. In the absence at a minimum of a positive statement of the defence case by the accused, the mere possibility that someone else acted suspiciously in the vicinity of the safe is at most a jury point.

21. It is true that with limited statutory exceptions, a defendant does not need to state the defence case in advance, although whether the system ought to allow such room for ambush of the prosecution, or indeed whether this procedure is compatible with the positive legal obligations of the State to victims, is something that must be considered on another day. But if a defendant applies for prohibition by way of judicial review, he or she takes on a positive onus of proof in that regard, part of which must be to engage with the facts as they relate to the case which the defence wishes to make. This must involve a positive statement of what the defence theory of the case is, which has not been done here.

22. The grounding affidavit of the applicant's solicitor asserts at para. 7 that there was "potential exculpatory relevance of the remainder of the CCTV footage". This is not further explained by reference to any particular exculpatory matter. The applicant's solicitor goes on to say that the remainder of the footage "*might well be helpful to the defence"* (para. 13, emphasis added). But in what precise way this would be likely to be so is not specified, an omission that is particularly striking in the absence of any explanation by the applicant himself in these proceedings for the incident which is recorded on the material which has been preserved. The account he gave when in custody, while exhibited, is not of evidential value for present purposes, even assuming that it could be construed as a consistent account, in the absence of an affidavit from him.

23. I am afraid that I must regard the averments that have been put forward as little more than mere expressions of hope or speculative assertions which fail in any real way to engage with the facts. The applicant has made no clear case, let alone provided evidence in that regard, as to how the additional hours of CCTV footage would have assisted his case, or indeed what the defence case actually is. I take the view that the application has failed to cross the threshold of arguability and that the applicant falls at the first hurdle.

Whether the matter is more appropriate for the court of trial

24. The second element of the Byrne decision is that of the appropriateness of leaving such matters to the court of trial. This was dealt with in further detail in the Sirbu case, where Hogan J., relying on the judgment of Dunne J. in Kearns v. DPP [2015] IESC 23, took the view that the essential test was whether "*there is a genuine risk of an unavoidably unfair trial."* In Byrne, Kearns and Sirbu, the consideration that "*the issue of any potential prejudice was best left over to the trial judge*" (per Hogan J. in Sirbu at para. 12) is reflected to a greater or lesser extent.

25. The position would be otherwise if the risk of an unfair trial was inevitable (see *Sterling v. Collins* [2014] IESC 13).

26. In the present case the trial judge will have ample power to deal with any potential unfairness. If the court of trial is satisfied that it would be unfair to admit the CCTV evidence such as it is, it will be excluded, although I stress that nothing has been put before me to establish that its admission would be unfair to that extent. In any event, even if the CCTV footage is allowed to be adduced in evidence, the applicant will have the opportunity to cross-examine Garda McNicholas and Mr Fitzpatrick in relation to the undisclosed portion. This is not a case where nothing is known about the unpreserved evidence. There will be two witnesses who have viewed all of it, albeit that their evidence cannot now be checked against the footage itself. Any other persons who appeared, on their account, or indeed on any version of events, in that lost footage can presumably be made available as witnesses for one side or another if necessary. But the trial court is in a position to address the matter if there would be any unfairness to the applicant.

27. It seems to me that in the circumstances as they now appear, there is no *inevitability* of unfairness to the applicant. At most there is a vague and speculative possibility in that regard which seems on the material before me to have little merit. This is a matter that must be left to the court of trial on the authority of *Byrne, Kearns and Sirbu.*

28. Mr. Fitzgerald has submitted that the ratio of Sirbu was that the non-disclosure in that case was not the fault of the State, whereas in this case there was such fault. I do not accept that submission. That the failure to preserve evidence in Sirbu was not the fault of the State was indeed emphasised (repeatedly) in the decision. Such emphasis must be read as simply an acknowledgment in fairness to the Garda members involved in that case and should not be viewed as a statement of the *ratio*. In the absence of a knowingly unconstitutional act, it does not seem to me to make any difference whose "fault" the failure to preserve the evidence is, because the ratio in Sirbu is clearly the test as set down in Kearns as to whether there is a genuine risk of an unavoidably unfair trial.

29. Mr. Fitzgerald also submitted that the actions of Garda McNicholas in this case were "*conscious and deliberate…as that phrase is meant in law*", by which I take it he is referring to the test set out in The People (D.P.P.) v. J.C. [2015] IESC 31 regarding exclusion of unconstitutional evidence, specifically that there be a knowing intention to breach the applicant's constitutional rights, as opposed to a conscious and deliberate act which contrary to the intention of the Garda member involved, turns out to be unconstitutional. Apart altogether from the fact that there is no evidence whatsoever in the present application from which it could be said to be even arguable that these actions were conscious and deliberate in the J.C. sense, the fact that reliance is being placed on the law relating to exclusion of evidence only reinforces the conclusion that the present application is in essence an application to exclude the CCTV excerpt as evidence. It is not clear to me that an excerpt from CCTV must necessarily be excluded merely because other portions were not preserved. As a matter of logic, it is hard to see why this must be the case, especially if the trial judge takes the view that the portion preserved is highly relevant and the other portions were not. If admitted, the point then becomes one for the jury to consider in the context of the case overall. There are of course cases where failure to preserve evidence would impinge on the fairness of the trial, but this must be shown to be the case on the particular facts. In any event the admission or otherwise of the CCTV footage is a matter for the trial judge and not an appropriate matter for judicial review. Insofar as the applicant may wish to mount a generalised objection that his defence has been hampered by a failure by the prosecution to preserve evidence that would have significantly assisted the defence, that can be pursued at the trial. Whether such an application has merit or not can be left to the trial judge. From the material presented to me, no unfairness has been established, let alone an inevitability of unfairness.

30. The need to have primary recourse to the trial judge has been repeatedly emphasised, not only in Irwin, Byrne, Kearns and Sirbu, but also in numerous other cases. In the recent case of *M.L. v. D.P.P.* [2015] IEHC 704 (13th November, 2015) , referring to Z. v. D.P.P. [1994] 2 I.R. 476, Noonan J. stated that:

> *"In applications to prohibit a criminal trial, it is well settled since Z. v. DPP that the onus rests upon the applicant to show that he faces a real or serious risk that he will not have a fair trial. Further, the risk has to be one which could not be avoided by the trial judge by means of appropriate directions and rulings. The fact that evidence is missing, even if it might be evidence favourable to the accused, is not of itself sufficient to warrant the grant of an order of prohibition"* (para. 20).

31. He went on to say that "*only in exceptional circumstances will the court intervene to prohibit a criminal trial*" (para. 22) and "[a]s has been stated time and again, the fairness of the trial is primarily a matter for the trial judge" (para. 25).

32. In *Byrne*, O'Donnell J. was critical of the fact that the judicial review on a missing evidence point in that case had held up the trial of the offence for more than six years (at p. 360). The expression of such a concern must have an impact on how the court should approach a prohibition application even at the leave stage, and perhaps particularly at that stage. Indeed the risk of undue delay is a general consideration that applies to any application for prohibition of a criminal trial, not simply as regards failure to preserve evidence.

33. The criminal trial is a mechanism to vindicate the legal, constitutional, EU and ECHR rights of a victim of crime. The strengthening of these rights has been a growing theme in recent legal developments, such as the Victims Directive 2012/29/EU. These rights

include the positive rights arising from the State's "*obligation to conduct an effective prosecution*" (Söderman v Sweden (Application no 5786/08) European Court of Human Rights 12th November 2013) para. 88). To allow a criminal trial to be de-railed unnecessarily by judicial review, when the matter complained of either lacks merit or could be dealt with more proportionately within the trial, creates the potential for such delay or interference with the criminal process as to bring the performance of this obligation to victims into question.

34. The applicant therefore also falls at the second hurdle I have described, in that judicial review is not the most appropriate remedy to pursue this complaint.

Order

35. For the foregoing reasons I will order:

(i). that the application for leave to seek judicial review be dismissed;

(ii). that (given that the Director did not substantively participate save in the limited sense described and accordingly that there is insufficient basis for her to be awarded costs) there will be no order as to costs.