

## THE HIGH COURT

[2015 No. 460 J.R.]

BETWEEN

PHILLIP BLASZCZYK

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

**EX TEMPORE JUDGMENT of Ms. Justice O'Regan delivered on the 13th day of July, 2016**

1. This matter comes before the court pursuant to leave afforded by Noonan J. in the High Court on 27th July, 2015, to the applicant by way of leave to apply by way of judicial review to prevent his trial in the Circuit Court. The trial is in relation to an offence alleged to have been committed under s. 52 of the Road Traffic Act 1961, as amended. The incident complained of occurred on 23rd May, 2014.

2. The application of the applicant is for a declaration that by reason of the failure of the gardaí to seek out and preserve the applicant's motor vehicle and/or take adequate photographs of the damage to his vehicle, particularly the underneath of same, or to take adequate measurements of the locus of the accident, he has been denied his right to a fair trial as guaranteed by Article 38.1 of the Constitution.

3. The application was brought and was grounded upon the affidavit of the applicant's solicitor, Aidan Leehy, and at para. 8 of his grounding affidavit, he states that for reasons unknown to him, the gardaí allowed the applicant's motor vehicle to be destroyed, whereas they appear to have retained the motor vehicle of Ms. Ryan, who was the other party to the relevant road traffic accident.

4. Subsequently, the State having put in its statement of opposition to the application, the applicant himself swore an affidavit in March 2016, and at para. 8, he complains that at no stage, prior to the destruction of the vehicle by the gardaí, was he advised that a prosecution was to be instituted or was pending nor was he advised to have the vehicle examined and photographed.

5. The sequence of events is to the effect that the accident occurred on 23rd May, 2014, and the applicant gave a statement to the gardaí on 24th May, 2014. Neither he nor the other motor vehicle driver remembers the details of the incident.

6. It appears that in early June 2014, the applicant attended at Kenneally Panel Beating in Cahir where his vehicle had been towed following the incident. In this regard, there is a statement of Robbie O'Brien furnished in the grounding affidavit of Phillip O'Sullivan on behalf of the State and the content of this statement is not denied.

7. It appears that the applicant attended at the panel beating yard about two weeks following the incident and he was looking to take some parts from the vehicle but they did not suit. He advised Robbie O'Brien to dispose of the car. Robbie O'Brien indicated that it would be scrapped and the applicant said that that was fine. The applicant had with him the log book to the vehicle, although it is in the name of his wife, and he handed over the log book to Robbie O'Brien and took receipt of the sum of €120 for the car.

8. The motivation of the applicant in organising the destruction of the car at that time is immaterial as appears from the judgment in *Savage v. Director of Public Prosecutions* [2009] 1 I.R. 185.

9. The applicant was brought before the District Court on 27th November, 2014, when he was charged under s. 52 of the Road Traffic Act 1961, as amended, with driving without due care and attention, resulting in serious bodily harm. The book of evidence was served on 26th November, 2015, and on 10th March, 2015, the applicant indicated that he would be pleading not guilty.

10. On 27th March, 2015, the applicant's solicitors wrote a letter seeking confirmation that the vehicles were available for inspection.

11. The within application was then processed on 27th July, 2015, following receipt of a letter from the applicant's engineer of 17th July, 2015, to the effect that he could not give an opinion or assist without seeing the motor vehicle or photographs of the underneath and he also complained of the lack of measurements on the road.

12. I do note that there is a forensic report and, in fact, this acknowledges that the content is the garda opinion, however, it is a matter for the trial judge to determine as to the circumstances.

13. Insofar as the case law is concerned, there is a body of case law on missing evidence and I accept the prosecution's suggestion that this case law had evolved since it was considered in the early 2000s.

14. In the case of *Savage*, the Supreme Court considered the rules to be applied in determining whether or not the lost evidence was such as would preclude a fair trial. Denham J. (as she then was) indicated that:

- a. each case should be determined in its own circumstances;
- b. it was the court's duty to protect due process;
- c. it was the duty of An Garda Síochána to preserve and disclose material evidence as far as is necessary and is practicable;
- d. this duty cannot be precisely defined;

e. it does not require a disproportionate commitment by the gardaí of manpower and resources;

f. in relation to large vehicles such as motor vehicles, in the alternative, it may be reasonable for the gardaí to have a forensic report.

14. The court went on to state that the duty should be interpreted in a practical manner on the facts and if there is evidence of destruction, the reason for the destruction is not a relevant factor in the test to be applied.

15. Ultimately, the fundamental test is; is there a real risk that the fairness of the intended trial will be compromised. The court indicated that it should be noted that this is not a garda disciplinary process.

16. The matter was reviewed again by the Supreme Court in the subsequent case of *Ludlow v. Director of Public Prosecutions* [2009] 1 I.R. 640, which was later on that year, Denham J. indicated that best practice would be for An Garda Síochána to give notice to inform an accused, or potential accused, at the time of giving an oral warning of the intention to destroy the vehicle. She indicated that the notice could indicate where the vehicle was, where it could be examined, the intent to destroy, and this then would afford an applicant an opportunity to examine the evidence if he so wished or make reasonable requests that it would not be destroyed.

17. The applicant relied on the case of *Stirling v. Collins* [2014] 1 I.R. 602 as establishing that when the evidence is lost as in the instant circumstances that this would jeopardise the fairness of the trial. In fact, *Stirling* was subsequently considered by Hogan J. in the case of *Sirbu v. Director of Public Prosecutions* [2015] IECA 238. In that case, Baker J. believed that *Stirling* was dispositive and agreed that the trial should be prohibited. However, that judgment was overturned in the Court of Appeal and I believe that that judgment of the Court of Appeal is particularly relevant.

18. The circumstances are that the incident occurred on 14th December, 2012, and was captured on CCTV. Apparently, the gardaí made every reasonable measure to secure the footage and were assured that there was no immediate risk to same. They made several attempts to contact the controller between 20th and 24th December, 2012, and subsequently, on 27th December, 2012, it was discovered that the footage had been destroyed, in that there was a taping over of the evidence.

19. Hogan J. found that most definitely the loss of evidence was not the fault of the gardaí. He also felt that the applicant's ability to advance the self defence case was not entirely dependent on having access to the CCTV footage. He said the loss of footage was most unfortunate and it could not be said that the loss does not have the potential to hamper the applicant in his defence. However, the difficulty was not such as to create a genuine risk of an unavoidable unfair trial so that the prosecution would have to be prohibited.

20. In my view, as in the case of *Sirbu*, the fault was not that of the gardaí. I believe that in this instance, it was not the fault of the gardaí that the vehicle became destroyed. The applicant was clearly advised as to where the vehicle was and he clearly had an opportunity to examine it, if he so wished. He was not under any compulsion to direct the destruction of the vehicle but he did so in any event.

21. In addition, I am satisfied that the applicant's claim is not entirely dependent on the vehicle. There are photographs, there are marks on the road and the credibility of the forensic report and conclusion can be tested with suitable evidence before the court.

22. The Supreme Court has indicated in the case of *Kearns v Director of Public Prosecutions* [2015] IESC 23 that it is for the trial court to preserve and protect the rights guaranteed under the Constitution and, therefore, in my view, it would not be appropriate to interfere with the trial, if it does take place, and that it will be for the trial judge to determine what measures must be taken to ensure that no prejudice, or minimal prejudice, is effected to the applicant in the circumstances.

23. I am satisfied that in accordance with the statement of opposition of the State, that the applicant in this matter does not meet the threshold to secure an order of prohibition at this time.