

THE HIGH COURT

JUDICIAL REVIEW

2008 872 JR

BETWEEN

EDWARD KEOGH

APPLICANT

AND

D.P.P.

RESPONDENT

JUDGMENT of Mr. Justice Birmingham delivered the 17th day of November, 2009

1. The applicant is at present charged before the Dublin Circuit Criminal Court on a single charge, that being that he, "on 13th December, 2007 at the laneway at the rear of Black Forge Inn, Drimmagh Road, Dublin 12, had in his possession a "Sarasqueta" make double barrel shotgun, serial number 140435, and two rounds of 12 gauge shotgun cartridges, in such circumstances as to give rise to a reasonable inference that he had not got it in his possession for a lawful purpose, contrary to s. 27A(1) of the Firearms Act, 1964 as amended".
2. The applicant is seeking to prohibit his trial by reason of the non availability of certain evidence. This is one of the many "missing evidence" cases to come before the courts.
3. The factual background to the charge and indeed to the present application as it appears from the book of evidence can be summarised as follows. On the day in question two members of the Garda Síochána, Garda David Forsythe and Garda Sinead Hennessy were on duty in the Crumlin Garda station official patrol car. In the course of their tour of duty, at approximately 11.40 a.m., they received a call from the station that three males on bikes were acting suspiciously at the rear of Elenora's public house in a laneway off Balfe Road, Drimmagh.
4. The Gardaí in question responded to the call and as they entered the laneway in question, saw two motorcycles in an alcove at the rear of a public house known as the Black Forge Inn public house. The motorcyclists were mounted and had their engines running. I pause, to refer to the fact that when argument concluded last Tuesday, I indicated that I would consider visiting the laneway with a view to clarifying the locations of the two public houses appearing to have a relevance to this case, i.e. Elenora's and the Black Forge Inn and I duly did visit the area last Sunday. I found that a useful exercise. In relation to the motorcycles that were visible to the Gardaí one of the motorcycles was white and the driver of this motorcycle was wearing dark clothing and a black helmet. In relation to this motorcyclist, Garda Hennessy, the driver of the patrol car, according to her statement of evidence as it appears in the book of evidence, saw something dark under his right arm, did not fully notice what this was but was sure it was a black bag or sack. So far as the second male is concerned he is described by Garda Forsythe, the observer in the Garda patrol car as wearing a light coloured puffy jacket and jeans, while Garda Hennessy, describes him as wearing dark clothing.
5. It appears both motorcycles revved their engines and drove towards the Gardaí. Garda Forsythe got out of the patrol car and attempted to stop the driver of the black motorcycle but failed in his efforts, and this individual made his escape. Garda Forsythe then attempted to stop the driver of the white motorcycle but was likewise unsuccessful. However, the driver of the white motorcycle, on the prosecution case, the applicant now before the court, lost control and crashed into two parked vehicles. At this point, Garda Forsythe saw a large black courier bag on the ground. It was "... only feet away from where he [the applicant] had come off the motorbike, this bag had not been on the ground when [they] first drove into the laneway and the patrol car would have to have driven over it to go up the laneway". The applicant was then arrested. Garda Hennessy, according to her statement, ran to assist Garda Forsythe with the arrest of the applicant. She says that she then "... observed a large black bag opposite [where the applicant] had crashed his bike into the cars. This was the bag I had seen under his right arm". The bag when examined was found to contain a sawn-off shotgun.
6. The applicant was arrested under s. 30 of The Offences Against The State Act 1939 and was then detained at Crumlin Garda station where he was interrogated on a number of occasions. In relation to the great bulk of questions put to him he made no comment but he did deny having the bag. By way of example in the course of an interview which commenced at 17.28, which was conducted by Gardaí Hennessy and Forsythe, the following exchange took place "Q. I saw you had a black bag under your arm, what was that for? A. I had no black bag. Q. So you're saying the black bag that I also saw under your arm wasn't yours? A. No. Q. So how did it end up beside you, when you were arrested Eddie? A. It wasn't beside me....." Q. Was there anything in the bag? A. I don't know anything about a bag.....? Q. What was in the bag Eddie? A. I don't know anything about a bag.
7. Throughout subsequent interviews the applicant maintained the same position that is to say refusing to answer most questions but denying repeatedly having the bag.
8. During the course of the interviews s. 28 and 29 of the Criminal Justice Act, 2007 were invoked. When asked to account for the presence of the shotgun and cartridges and the stolen motorbike, he declined to comment. When asked to account for his presence, he replied "I don't know anything about a gun, cartridges or a black bag" and later declined to comment. I should clarify in relation to the motorcycle, that while there has been reference to the fact that the bike was stolen, there is no evidence in relation to this in the book of evidence.

9. The relevant history subsequent to the day of the incident is as follows:

(i) Just over a week after the incident in the laneway, the applicant's solicitors wrote on 21st December, 2007 to Garda Forsythe. The relevant part of that letter was as follows:-

"Mr. Keogh instructs us that he believes there should be CCTV footage in relation to the incident which would be exculpatory of him. We hereby call on you to seek out and preserve this footage and look forward to hearing from you in this regard".

(ii) On a date unknown between December 13th and December 28th, Garda Forsythe attended at a branch of the Bank of Ireland which was close by seeking CCTV footage. Some footage was obtained from the bank but as it turned out is of no relevance.

(iii) On a date unknown but which it is suggested may have been in early January, 2008, Garda Hennessy went to the Elenora public house to inquire about the availability of CCTV footage. On this occasion, according to the affidavit she has sworn in the present proceedings, she spoke to Mr. Christy Keane, the owner of the premises and he explained to her that while there was a camera in the laneway, due to the position of the camera and the resulting glare from the camera, the footage would not be viewable.

(iv) On the 28th April, 2008 the solicitors for the respondent wrote to the solicitors for the applicant. Enclosed with that letter was a copy of CCTV footage from the Bank of Ireland, Drimnagh Road. The letter dealt with various disclosure issues, requests for Garda notebook entries and the like, it also commented as follows:-

"I am instructed that CCTV was sought in the vicinity of the arrest of Edward Keogh. The Bank of Ireland, 177 Walkinstown Road, the Black Forge Inn and the Elenora public house were found to have CCTV on their premises. I am further instructed that the CCTV system from the Black Forge Inn does not cover any part of the laneway or the "alcove" where the motorcycles were parked.

The CCTV system from the Elenora has one camera positioned in the laneway at the rear of the premises and that this camera points in the opposite direction to the area in which Edward Keogh was arrested. Garda Hennessy was informed that the footage recorded by this camera could not be viewed (please see enclosed statement of Christy Keane, owner of the Elenora pub in this regard)". The statement referred to in that letter was in these terms.

"My name is Christy Keane, and I am the owner of the Elenora pub on Drimnagh Road. There is a laneway running along the back of the pub. We have one CCTV camera on the side of the pub. We also have one CCTV camera on the laneway of the pub. We do not have the footage for that day, the 13th December, 2007. We have an old system and we do not keep the footage after fourteen days, we also cannot download the system without a technician call-out. There is a problem with the back camera on the back laneway. The position of the camera is affected by the lights and there is a glare, and therefore could not view the footage anyway".

(v) The applicant's solicitor responded to the letter of 28th April, 2008 with a number of requests, including, of relevance to the present application, a request for CCTV footage from the Elenora public house for a twenty-four period. This request was repeated in subsequent correspondence. Sample footage was eventually obtained. In the aftermath of this footage, a statement was provided by Mr. Paul Fitzsimmons, bar manager of the Elenora public house. He refers to viewing stills from the footage and being genuinely surprised at the quality. He also explained that while he had previously been asked to obtain this footage by Garda Hennessy he did not know how to do so and had believed that it would be necessary to call out a technician, but since then, as he put it, had figured out how to do it. So far as the reference to glare, is concerned, he accepted that in daylight hours this would not have affected the camera.

10. For completeness sake and before returning to the position in relation to the Elenora public house I should just say that it is accepted that there is no relevant footage from the Black Forge Inn. In relation to the Elenora public house, the position is that one camera located at the side of the premises is not on the laneway where the confrontation occurred and which is named as the scene of the offence but rather on another "sub-laneway", as it has been described, linking that laneway with the Drimnagh Road. However, the camera apparently covers some 4.3 metres of the laneway where the alleged offence occurred and it is approximately 32 metres from the location where the confrontation occurred, and it is said that its coverage of the portion of the laneway that it does cover is of poor quality, as it is very much in the background of the image captured by the camera.

11. So far as the other Elenora camera is concerned, which is a camera at the back of the premises on the corner of the laneway where the alleged incident occurred and the sub-laneway running down the side of the Elenora pub, it is the footage from this camera, that was originally thought to have been affected by glare so as to be unviewable but when a sample was obtained was found to be of better quality than expected. The camera in question is located approximately 81 metres from the point at which the applicant was arrested and it is said "is pointing in a direction away from where the applicant was arrested and would not have covered it".

12. In summary the position would seem to be that while neither camera covers the actual location where the arrest was made, there would have been some CCTV footage of the laneway at the back of the Elenora public house, the location to which the Gardaí were sent, on foot of the complaint of suspicious activity.

13. As I have pointed out this is one of many "missing evidence" cases to come before the courts. So many judgments have been given on the topic, that at this stage there is little dispute about the legal principles applicable. However, the situation is often less straightforward when it comes to applying those principles to the facts of particular case.

14. From these cases, these principles would seem to emerge:

(1) It is the duty of the Gardaí, arising from their unique investigative role, to seek out and preserve all evidence, having a bearing or potential bearing on the issue of guilt or innocence. That is so whether the prosecution proposes to rely on the evidence or not and regardless of whether it assists the case the prosecution is advancing

or not. (*Per* Hardiman J. in *Braddish v. D.P.P.* [2001] 3 I.R. 129 at p. 133).

(2) The duty imposed on the Gardaí is not limited to preserving. It is to seek out and preserve. (*Dunne v D.P.P.*, [2002] 2 I.R. 305).

(3) The duty cannot be interpreted as requiring the Gardaí to engage in disproportionate commitment of manpower or resources in an exhaustive search for every conceivable kind of evidence. The duty must be interpreted realistically on the facts of each case. (*D.P.P. v. Braddish*, *per* Hardiman J. at page 135).

(4) "Before a court could be asked to prohibit a trial on the grounds that there was an alleged failure to seek out and preserve, it would have to be shown that any such evidence would be clearly relevant, that there was at least a strong probability that the evidence was available, and that it would in reality have a bearing on the guilt or innocence of the accused's person. It would also be necessary to demonstrate that its absence created a real risk of an unfair trial." (*Dunne v. D.P.P. per* McGuinness J. at p. 309).

(5) An order prohibiting a prosecution brought by the D.P.P. should be made only in exceptional circumstances. (*R. C. v. D.P.P.*, [2009] IESC 32 *per* Denham J. at para. 10).

(6) If evidence has not been obtained or no longer exists, the reason for its absence is part of the matrix of the facts but is not a determining factor in the test to be applied. (*R.C. v. D.P.P. per* Denham J. at paragraph 24).

(7) If a trial is to be prohibited there is an onus on an applicant seeking such an order to establish that there is a real risk of an unfair trial which cannot be avoided by rulings and directions by the trial judge, the risk must be real and the unfairness of trial must be unavoidable. (*R.C. v. D.P.P., per* Denham J. at paragraph 24).

(8) Common sense parameters of reasonable practicality must govern any determination of the scope of the duty of the Gardaí when seeking out or preserving evidence and remote possibilities arising from the loss of evidence should not be allowed to trip up the prosecution or justify stopping the trial from taking place. (*McFarlane v. D.P.P.* [2007] 1 I.R. 134, *per* Kearns J. at page 152).

15. Against the background of these principles, I identify the following aspects as relevant.

(1) The initial report to the Gardaí, to which Garda Hennessy and Garda Forsythe responded was that three males on bikes were acting suspiciously at the rear of Elenora's public house in a laneway off Balfe Road.

(2) While three individuals were reported as acting suspiciously, only one person was subsequently arrested and two others made their escape.

(3) There is no actual evidence, though there is obviously suspicion, that the firearm retrieved at the scene was in the joint possession of the three men.

(4) The only direct evidence that the applicant was in physical possession of the black bag in which the firearm was found, is that of Garda Hennessy. She saw something under the right arm, that she did not fully notice what it was, but was sure it was a black bag or sack.

(5) Given that Garda Hennessy did not fully notice what was under the biker's right arm, it appears reasonable to conclude that this was not the focus of her attention.

(6) That the black bag was located only a few feet away from where the applicant came off his bike, and that according to the evidence of Garda Forsythe it was not on the ground where it was located at the time when the Gardaí entered the laneway, and had it been, the Gardaí would have had to drive over it, constitutes significant evidence.

(7) The Gardaí were at all times aware that the offence that they were investigating, possession of a firearm in suspicious circumstances was a very serious one. They were also aware from the earliest stages of the investigation that the suspect was denying involvement. This is a relevant consideration in deciding what resources need to be allocated to a particular investigation.

(8) Evidence that the applicant was or was not in possession of the bag at a place close by to the scene of the arrest and close in time would be highly relevant. If the footage had been obtained and had shown the applicant in possession of the black bag outside Elenora's public house, that would have been of enormous assistance to the prosecution. Conversely, if he was not shown in possession of the bag or indeed, if the bag was in the possession of one of his two companions, that would have been of considerable assistance to the defence.

(9) Given the terms of the report to the Gardaí that three males were acting suspiciously at the rear of Elenora's public house, there must be a high likelihood that had the CCTV footage been available that the suspicious activity would have been captured on film.

(10) In the nature of things CCTV footage does not remain available indefinitely. So, if footage is to be obtained the Gardaí are required to act expeditiously in seeking it out.

16. The respondent has relied on the case of *Matthews v. DPP* [2007] IEHC 1 (Unreported, High Court, MacMenamin J., 14th December, 2007). That was a case where a serious assault occurred in the middle of the street. There were public houses on either side of the street but the belief was that their cameras would not cover activity in the middle of the street. Some four and a half years after the incident an engineer was engaged who concluded that the position of the cameras was such that they should cover the entire street. At para. 46 MacMenamin J. commented as follows:-

"In the instant case the applicant's argument, no matter how attractively presented, ultimately invites the court to

embark on a series of hypotheses commencing with the proposition that **if** the video cameras were operating on the night in question **and** they would have captured relevant evidence, un-obscured by other people, that such evidence might have exonerated the accused. Here the ultimate test, however, is whether the applicants have discharged the onus of proof which, ultimately devolves upon them. For the reasons outlined, I conclude they have not. To conclude otherwise involves equating a hypothesis with a probability."

17. Like MacMenamin J., I believe that the key test is reasonableness. In a situation where Gardai had a report that three men were engaging in suspicious activity outside Elenora's public house, I believe that it would have been reasonable to expect that the Gardai would have sought out CCTV footage from that public house and would have done so at an early stage. I think there is a reasonable probability that the suspicious activity which gave rise to the complaint would have been captured on film. If the three individuals were shown on film, it appears very likely indeed that it would have been possible to identify which of the three men, if any, had the black bag. If that evidence was available, then that was evidence of enormous significance. That being so, in summary, the position is that material that was potentially highly relevant to the question of guilt or innocence was readily available but was not sought until too late. The delay in seeking out the footage occurred, notwithstanding that the solicitor for the applicant had disclosed a keen interest in CCTV footage within eight days of the arrest. A case, where valuable objective evidence might have been available, and as a matter of probability was available, will instead, if it proceeds, depend on the testimony of a single garda witness. That is not a satisfactory state of affairs. In these circumstances, I believe that this case is one of those rare ones where a trial should be prohibited.