THE COURT OF APPEAL

(CIVIL)

Neutral Citation Number: [2017] IECA 105

RECORD NO. 397/2016

Birmingham J.
Mahon J.
Edwards J.

BETWEEN/

J. S.

APPELLANT

- AND–

THE DIRECTOR OF PUBLIC PROSECUTIONS AND JUDGE AINGEAL NI CHONDUIN

RESPONDENTS

JUDGMENT of Mr. Justice Mahon delivered on the 30th day of March 2017

1. The appellant was charged with sexually assaulting Mr. A. at an apartment block in Dublin 17 on the 6th January 2013 contrary to s. 2 of the Criminal Law (Rape) Amendment Act 1990, as amended by s. 37 of the Sex Offenders Act 2001.

2. The prosecution was listed in the Dublin District Court before the second named respondent on the 17th December 2014 for a preliminary ruling as to whether the trial could proceed on the basis that there was a real and substantial risk of an unfair trial in consequence of the deletion of video evidence in the circumstances described below. The second named respondent rejected the appellant's application to prohibit the trial, and she directed that it proceed before another judge on a later date.

3. Unfortunately neither a transcript of the proceedings in the District Court, or any note of the second named respondent's reasons for her decision are available. It was apparently the case that the appellant fully participated in the District Court hearing and no issue was raised as to the second respondent's jurisdiction to hear and determine the matter to the extent that she did.

4. On the 10th January 2015 Noonan J. granted the appellant leave to apply for judicial review for an Order of Prohibition against the first named respondent taking any further steps in the prosecution of the appellant for the alleged offence. In his judgment of the 5th February 2016 McDermott J. refused to grant the appellant the relief sought, or any relief, and on the 24th February 2016 he granted both respondents their costs against the appellant. The appellant has appealed the entire of the High Court decision save to the extent that the learned trial judge held that the issue relating to the lost evidence in the case was a matter that could be determined by way of judicial review. There is no cross appeal.

5. Early on the morning of the 6th January 2013, the complainant arrived back to his apartment block having returned from work. He parked his car in the underground car park and made his way to the elevator. On arrival at the elevator entrance he noticed the appellant standing there, apparently waiting for the lift. The complainant says that he knew the appellant only to see as a fellow resident of the apartment complex, but had never previously spoken to him. The complainant went on to describe that as both men waited for the arrival of the elevator the appellant said to him *"Is it true what they say, guys with big cars have big cocks"*. He alleged that the appellant then grabbed and squeezed his crotch until he, the complainant, forcefully pulled his hand away. The complainant then pushed the appellant away from him before walking away and using the stairs rather than the lift in order to avoid further contact with him. Further the complainant maintained that when he reached his own apartment floor the appellant was waiting in the corridor. In the corridor, the complainant, who was concerned that he had once again run into the appellant, took his photograph with his mobile phone. The complainant then left the corridor and walked back down the stairs. Shortly afterwards he came back up the lift but was again confronted with the appellant when the lift door opened. He decided to call 999. At about the same time, the appellant video recorded the complainant on his telephone. This video recording was later seen by Gda. Healy (who arrived in response to the 999 call), and it was his recollection that the video footage showed the complainant walking down the apartment corridor being filmed from behind, and nothing else. None of the video footage directly related to the earlier incident at the elevator door, and which is the subject of the assault charge.

6. Gda. Healy said he spoke to both men. He said that following caution, the appellant advised him that:-

> *"…the events complained of did happen and he was drunk and only messing and stated "it was only a bit of fun".* "

7. Gda. Healy viewed the video footage and the photograph. In his presence the appellant deleted the footage from his mobile phone and the complainant deleted the photograph from his mobile phone. Gda. Healy recorded in his notebook the deletion of the video footage. The appellant signed an acknowledgment that he had deleted all the video footage from his phone voluntarily, and had not been forced to do so by the gardaí. He said he did so on the understanding that a complaint would not be pursued by the appellant. Gda. Healy's notebook also recorded the complainant as stating:-

> *"I do not wish to make an official complaint at this time to gardaí."*

This notebook was signed by the appellant, complainant and Gda. Healy.

8. For his part, the appellant accepts that while standing at the elevator door he had made a remark to the complainant largely similar in content to that alleged by the appellant. However, he denied grabbing the complainant's crotch but acknowledged that he had flicked his right hand towards the complainant's crotch and *"connected"* with him, describing it as *"only a tap"*. He said he had been drinking and maintained that what he had said and done was only intended as a joke and he did not consider himself to have

committed a sexual assault. He said he later video recorded the complainant in the corridor because he was concerned that the complainant might knock on the door of an old lady's apartment which he had falsely pretended to the complainant was his apartment.

9. The complainant reconsidered overnight his earlier decision (as recorded in Gda. Healy's notebook) not to initiate a formal complaint in relation to the appellant's conduct. He decided to make a formal complainant on the 7th January 2013, and he was interviewed by the investigating gardaí on the 15th January 2013. The appellant was formally interviewed by the gardaí on the 26th March 2013. The direction from the first named respondent to prosecute was made approximately twelve months later, and two months than that, the appellant was arrested and bailed in advance of the hearing in the District Court.

10. The learned High Court judge identified the relief sought by the appellant as follows:-

> (i) An *Order of Certiorari* quashing the decision of the first respondent to proceed with the prosecution of the appellant,
>
> (ii) alternatively, an *Order of Certiorari* quashing the determination of the second respondent that the deletion of the video evidence was not prejudicial to the appellant, and
>
> (iii) an injunction prohibiting the first named respondent for further prosecuting the appellant.

11. While the issue of the jurisdiction of the second respondent to hear and determine what was in effect a preliminary issue in the prosecution, (whether or not the trial should be prohibited because of the missing video evidence), may have been argued to some extent in the High Court, the issue has not been flagged as being live in this court. In any event, the learned High Court judge did not make an adverse finding on the issue, and proceeded to determine the judicial review proceedings on the basis of a review of the second respondent decision, essentially an appeal of that decision on its merits.

12. In general terms, a decision by an alleged victim of a crime, taken in the immediate aftermath of the alleged offending behaviour, not to make a formal complaint with a view to initiating a prosecution, is reversible. In practice it occasionally happens that a so called injured party will wish to pursue a matter in respect of which his initial decision was to leave well alone, after a period of reflection and, possibly, following discussion with others. It is perhaps in the area of sexual crime that one often comes across examples of complainants initially deciding not to make a formal complaint but later changing their mind and doing so. That initial decision will frequently be put down to a desire to avoid family conflict or (as in this case) embarrassment. A reversal of such a decision, however, may be open to review if, as a consequence of making it, the alleged offender acts to his detriment. In this case, the appellant maintains that, in the belief that the complaint was being dropped, he acted to his detriment by deleting the video footage in that he can no longer rely on it as evidence in his defence. In essence, he maintains that he and the complainant agreed that he would delete the video footage and that in return no prosecution would follow.

13. The overriding principle relevant to any prosecution, including a prosecution which is the result of a complainant changing his or her mind about making a formal complaint in the first instance, is the right to a fair trial. In this case, the appellant maintains that because he deleted the video footage by agreement with the complainant the prospect of his getting a fair trial has been severely undermined.

14. The issue of missing evidence in criminal cases is one that arises from time to time. It often does so in circumstances where evidence has simply gone missing because of carelessness, or where evidence that could have been obtained, was not obtained, and is later unobtainable. For example, CCTV footage which could have been secured in the immediate aftermath of the commission of an offence is subsequently and unintentionally deleted and therefore n*ot available for the trial. A good example is to be found in the case of* Braddish v. DPP [2001] 3 I.R. 127 where video evidence of the accused committing a robbery offence in a shop was seized by gardaí. The accused then confessed to the robbery. When later charged with the offence, and when a request was made by the accused's solicitor to see the tapes in question, it transpired that the gardaí had returned them to the shop owner following the accused's acknowledgment of his involvement, and were no longer available.

15. In his judgment in *Braddish* Hardiman J. endorsed the principle set down in Murphy v. DPP [1987] ILRM 71 that evidence relevant to guilt or innocence including material that may give rise to a reasonable possibility of securing relevant evidence must be retained, as far as is necessary and practicable until the conclusion of the trial.

16. These cases, and indeed the others referred to by the learned High Court judge in the course of his judgment are of only limited relevance in the instant case, as Gda. Healy did not secure the video footage in circumstances where its deletion was agreed by the appellant on the basis that there would be no prosecution.

17. The learned High Court judge referred to the case of *Enright and Finn v. DPP* [2008] IESC49, and in particular the judgment of Denham J. (as she then was). He noted her approval of the view expressed by the learned High Court judge in that case, when he stated:-

> *"It would necessarily follow in my view that where there is an inculpatory statement and where it is not contended that that statement is anything other than voluntary, the weight to be attached to that statement should be against the granting of an order of prohibition, and so it is in this case."*

18. In the instant case, the appellant made certain admissions to Gda. Healy in the course of his interview. He confirmed the version of events detailed by the complainant to a significant extent although, importantly, but differed as to the extent and duration of his physical contact with the complainant. He nevertheless accepts that there was physical contact. While it may be unfair to describe the appellant's statements to the investigating garda as been inculpatory, they certainly fall to be considered in that category to some extent at least.

19. Ultimately it is necessary to consider the likely evidential value of the deleted video footage. To what extent might its availability have assisted the appellant in his trial in the District Court? Put another way, does its unavailability create a real risk of an unfair trial?

20. It is known and accepted by all concerned that the deleted video footage reveals nothing about the alleged assault at the underground car park elevator entrance. Although the precise words used by the appellant when he addressed the complainant at the elevator entrance slightly differ to the words alleged by the complainant, the appellant accepts that he made a lewd comment in the nature of, to use terminology recently made famous by a certain U.S. politician, 'locker room talk'. Nothing in the deleted video footage would have thrown any light on the extent or duration of the appellant's contact with the complainant's crotch (and in

circumstances where contact of some nature is admitted by the appellant). It is not suggested that the video footage included any discussion or reference to what had occurred earlier at the elevator entrance. All the deleted video footage did show, by all accounts, was a back view of the complainant as he walked down the apartment corridor, the corridor itself, and some doors to apartments. The appellant also maintains that the video footage picked up the complainant making the 999 call and, again according to the appellant, it recorded the complainant telling him, the appellant, to stop hitting him as he was making the call. However, in his affidavit, Gda. Healy stated that the video footage which he looked at briefly before it was deleted did not show the complainant making a 999 call. It simply showed him walking down a corridor. However, and importantly, there exists a transcript of the 999 call.

21. In my view, the deleted video footage could only have been of peripheral relevance to the prosecution of the appellant. Ultimately, the issue as to whether or not a sexual assault occurred is a matter upon which a judge would be required to decide on the basis of oral evidence from both men as to what occurred at the car park elevator entrance.

22. I do not see any particular relevance to the issues with which this case is concerned of the allegation that the complainant accessed the appellant's PULSE record prior to and / or subsequently to the incident in question. Irrespective of whether accessing the PULSE records in this way was or was not improper, it is not a matter of particular relevance to these proceedings.

23. Reference was made in the court below and in this court to the case of *Evieston v. DPP* [2002] 3 I.R. 260. That case involved a reversal by the DPP of his earlier decision not to prosecute a dangerous driving causing death case following representations made by the family of the deceased. The facts of that case are certainly very different to the facts of the instant case. Nevertheless, it is however apt to quote from the judgment of Keane C.J. when he stated at p. 298:-

> *"As I have already said, the anxiety and stress which must certainly have been caused by the applicant by the initiating of the prosecution in the present case, following the communication to her of a decision by the respondent not to prosecute, would not, of itself, afford her legal grounds for an injunction restraining the continuance of the prosecution. Moreover, assuming that the doctrine of equitable estoppel applies in a case of this nature, one could not say that there followed in the legal sense some detriment to the applicant which would render inequitable the continuance of the prosecution, since her ability to defend the proceedings had not in any way been impaired. Different considerations would have arisen if, for example, on receipt of the respondent's first decision, the wheel and tyre had been disposed of. In such a case, one could conceive of a prosecution being restrained either on the basis of an equitable estoppel having arisen or since the applicant could not be deprived of her constitutional right to a trial in due course of law because of the loss of evidence resulting from the respondent's actions.*
>
> *I am also satisfied that the doctrine of legitimate expectations could not have been successfully invoked in this case. Deep and natural disappointment may well be the result of another person's action, as in this case, but that cannot of itself justify the invocation of this doctrine. In general terms, there must at least have been a legitimately founded expectation that a particular procedure would be followed and an alteration in this procedure without prior notice to the person concerned. That is not what happened in this case."*

24. In *Byrne v. DPP* [2010] [2011] 1 I.R. 346, quoting the head note, the Supreme Court identified the following principles as being applicable where an application for prohibition founded on an absence of evidence was made.

> *(i) It was the duty of the prosecution authorities to preserve and maintain all evidence coming into their possession having a bearing or a potential bearing on the issue of guilt or innocence of the accused;*
>
> *(ii) the missing evidence in question must be such as to give rise to a real possibility that, in its absence, the accused would be unable to advance a point material to his defence;*
>
> *(iii) the fact that prosecution intended to rely on evidence independent of the missing evidence at issue in order to establish the guilt of the accused did not preclude the making of an order of prohibition;*
>
> *(iv) the application was to be considered in the context of all the evidence likely to be put forward at the trial;*
>
> *(v) the applicant must show, by reference to the case made by the prosecution, how the allegedly missing evidence would affect the fairness of his trial;*
>
> *(vi) whether the applicant made a timely request of the prosecution for access to or an opportunity to have the article at issue expertly examined might be highly material; and*
>
> *(vii) the essential question, at all times, was whether there was a real risk of an unfair trial.*

25. The circumstances in the instant case are, to say the least, unusual. In particular the circumstances in which the video footage came to be deleted does not indicate *mala fides*, and there was no reason why Gda. Healy ought to have insisted on the video footage remaining intact. Of primary importance however, is the fact, as I believe it to be, that the deleted video footage was only of peripheral relevance to the defence of the case. The evidence as to whether or not a sexual assault took place is dependant upon the oral evidence to be given by the complainant and, should he so elect, the appellant also.

26. For the reasons stated, I would dismiss the appeal.