Neutral Citation Number: [2006] IEHC 153

THE HIGH COURT
JUDICIAL REVIEW

2004 No. 568 J.R.

BETWEEN

JASON O'DRISCOLL

APPLICANT

AND
THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Judgment delivered by Ms. Justice Dunne on the 25th day of January, 2006

1. This is an application for judicial review seeking the following relief:

> 1. An order in the nature of an injunction restraining the respondent herein, his servants or agents from taking any further steps in the criminal prosecution entitled Circuit Criminal Court County and City of Dublin Bill No. 192/00 the People at the suit of the Director of Public Prosecutions and Jason O'Driscoll.
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> 2. A declaration that the failure on the part of the respondent herein to obtain and/or preserve relevant evidence, in particular the motor vehicle allegedly used in the offences alleged, is a breach of the applicant's right to a fair trial in accordance with law.
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> 3. A declaration that the applicant was entitled to be informed of the respondent's decision and/or intention not to preserve the said motor vehicle.

2. Other relief was sought including certain interlocutory relief which it is not necessary to consider.

3. There are two counts in the Bill No. the subject matter of these proceedings. The applicant is charged

> a. That on the 16th/03/2003 at Extra Vision, Greenhills Road, Tallaght, Dublin 24, having entered a building known as Extra Vision, Greenhills Road, Tallaght, Dublin 24 as a trespasser did commit an arrestable offence to wit, burglary therein contrary to s. 12 (1)(b) and (3) of the Criminal Justice (Theft and Fraud Offences) Act, 2001.
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> b. That on the 16th/03/2003 at Extra Vision, Greenhills Road, Tallaght, Dublin 24 did without lawful excuse damage property to wit, an Opel Vectra, registration No. 99 D 54057, belonging to Mr. Fintan Lawlor intending to damage such property or being reckless as to whether such property would be damaged contrary to s. 2 of the Criminal Damage Act, 1991.

4. The applicant has instructed his legal advisors that he will be pleading not guilty to the charges.

Background

5. The case against the applicant alleges that he was involved in a ram-raid on an Extra Vision shop on 16th March, 2003. It is alleged that a dark green Opel Vectra was reversed into the shutters of the Extra Vision shop. The applicant was charged with the offences, as were two co-accused, namely Jason Murtagh and Garreth Connolly. The Gardaí came on the scene almost immediately. One person was apprehended sitting in the back seat of the car, namely Jason Murtagh, who has since pleaded guilty.

6. As stated by the solicitor for the applicant, Yvonne Bambury in her affidavit sworn herein on the 5th day of July, 2004, the evidence against the applicant is primarily identification evidence. Garda Vivienne Saunders stated in her statement which appears in the Book of Evidence that she entered the Extra Vision store and observed two male youths behind the counter in the store. She described the youths and indicated that they fled through a hatch in a connecting door behind the counter of the shop. She was unable to gain access to that part of the shop and went outside to search for the two individuals who fled and she says that she subsequently found two youths hiding under some bushes in the Hibernian Industrial Estate. She said she recognised the two youths as the same as those she had seen moments earlier behind the counter of the Extra Vision store. She described the youths as being red faced, sweating and breathing heavily. She said that the applicant herein was arrested by her colleague, Garda Woulfe, and when arrested was informed as to why he was arrested and that the applicant replied "I know, I know". Subsequently during his detention the applicant did not make any admissions.

7. It is now clear that forensic examination was carried out in respect of the vehicles involved and although it was not clear at the time of the swearing of the affidavit by Ms. Bambury for reasons which will become clear later, it is now the case that the State will be relying on forensic evidence to link the applicant to the driver's seat of the Opel Vectra used in the raid. It is the case that the vehicle concerned having been examined forensically was returned to the owner of the vehicle on or about the 18th March, 2003.

8. Part of the applicant's case as set out in the statement of grounds referred to above was that there had been a failure on the part of the respondent to subject the motor vehicle to forensic testing or other proper examination. In the course of the judicial review proceedings in respect of which leave was granted to apply for judicial review on 5th July, 2004, it became clear that in fact forensic testing had indeed been carried out and a report outlining the nature of the forensic evidence was furnished to the applicant's solicitor in January of 2005. Accordingly, the case before me proceeded on the basis that as the car was returned to its owner within two to three days of the alleged offences, the applicant herein has been deprived of an opportunity to conduct forensic testing in relation to the vehicle in circumstances where the prosecution has had that opportunity and thus, the applicant is not in a position to have a fair trial. It is not the basis upon which leave to apply for judicial review was granted but no issue was taken on this point.

9. Mr. Paul A. McDermott appeared on behalf of the applicant in this case and in the course of his written submissions he prepared a very helpful chronology of events in this case. It would be helpful to set out that chronology.

> (i) 16th March, 2003 – Date of alleged offence. The applicant is arrested and detained.
>
> (ii) 18th March, 2003 – the car is returned to its owner.
>
> (iii) 11th December, 2003 – the applicant is charged with burglary and criminal damage.

(iv) 3rd March, 2004 – the charges are struck out.

(v) 31st March, 2004 – the applicant is recharged and a Book of Evidence is served. It is clear from the Book of Evidence that some forensic examination and testing has been carried out in respect of the car. The results are referred to in the book of evidence.

(vi) 2004 – the applicant's solicitor writes to the Chief Prosecution solicitor requesting a forensic examination of the car "that was allegedly damaged" by the applicant.

(vii) 26th April, 2004 – disclosure is provided by the prosecution but no response is made in respect of forensic evidence.

(viii) 30th April, 2004 – the applicant's solicitor writes again seeking a forensic examination of the car.

(ix) 11th May, 2004 – the applicant's solicitor writes again seeking a forensic examination of the car stating "our client instructs us to carry out a forensic examination of the Opel Vectra car …, that is the subject of the second charge against our client in the book of evidence."

(x) 27th May, 2004 – counsel for the prosecution indicates to counsel for the defence that the car was returned to its owner two or three days after the alleged incident.

(xi) 15th June, 2004 – the applicant's solicitor writes seeking an explanation as to what has happened to the car.

(xii) 17th June, 2004 – a response is received from the State but no indication is given as to the whereabouts of the car.

(xiii) 5th July, 2004 – leave for judicial review is sought and obtained.

(xiv) 22nd December, 2004 – in the affidavit sworn by Garda Woulfe it is indicated for the first time that there is finger print analysis available from the inside of the Extra Vision premises.

(xv) 4th January, 2005 – the applicant learns about the forensic report in respect of the car for the first time.

(xvi) 20th January, 2005 – in the affidavit of Ms. Mee it is indicated that a report is awaited from the forensic laboratory.

(xvii) 20th January, 2005 – Ms. Mee swears a supplemental affidavit exhibiting the report from the forensic laboratory.

10. In considering the chronology set out above it is clear that the applicant has been somewhat hampered in formulating this application for judicial review. The judicial review proceedings were formulated on the basis of a complaint that the Gardaí had failed to subject the car in question to an appropriate forensic examination and had handed the car back to its owner with undue haste. Therefore, the case proceeded on the basis that this was a missing evidence case. As a result of the matters which have come to light during the course of these proceedings and in particular, as a result of the information which is now available from the forensic report exhibited in the supplemental affidavit of Ms. Aileen Mee, it is now clear that part of the prosecution case in this case will be visual identification evidence of the applicant by members of the Gardaí in the Extra Vision store and his identification as being the same person who was arrested shortly afterwards by Garda Woulfe but in addition there will also be evidence now as a result of the forensic examination which allegedly places the applicant in the driver seat of the car. Mr. McDermott referred in this regard to the fact that a hair sample was taken from the applicant for comparison with hair from a woollen cap that was found at the scene and in the car that was used in the burglary. This appears from the statement of Superintendent Declan Corburn at p. 91 of the Book of Evidence. Mr. McDermott also referred to the affidavit of Garda Woulfe to the effect that the prosecution has available to it a significant body of evidence against the applicant and pointed out that much of the evidence against the applicant will be visual identification evidence and the evidence provided by the forensic testing. He noted that the fingerprint analysis carried out in the Extra Vision store is negative. Thus he emphasises that forensic testing was of importance in this case.

11. Mr. McDermott also referred to the car in the context of the criminal damage charge. As will be recalled the criminal damage charge relates to the car itself. He made the case that in the Book of Evidence as it stands there is no evidence capable of sustaining the allegation that the car was damaged in the instant. In this regard he referred to the affidavit of Garda Woulfe at para. 10 thereof in which it is stated "evidence as to the damage caused will be tendered as part of the prosecution case, including the photograph of which mention has already been made". There is a reference in that affidavit to a photograph of the car with its owner although the photograph is not an exhibit in the Book of Evidence. Subsequent to the service of the Book of Evidence Ms. Bambury did receive a photograph but it is of poor quality and it is not possible to say whether or not it shows a car. Mr. McDermott makes the case that as the car was handed over to the owner after the incident, the applicant has no means of rebutting whatever evidence might emerge which the prosecution will use in respect of the criminal damage charge and thus he submitted that that charge should not be permitted to proceed.

12. Mr. McDermott also referred at length to the duty on the part of the Gardaí to seek out and preserve evidence. He makes the argument that the applicant has been deprived of an opportunity of challenging the prosecution's forensic evidence by obtaining his own independent forensic tests. In support of his contentions in this regard, Mr. McDermott referred to a number of the leading authorities in this area namely *Bowes v. D.P.P.* [2003] 2 I.R. 25, *Murphy v. D.P.P.* [1989] I.L.R.M. 71, M*cKeon v. Judges of the Circuit Court* [1989] I.L.R.M. 71. *Scully v. D.P.P.* [2005] 1 I. R. 242 and *Dunne v. D.P.P.* [2002] 2 I.R. 305. He also referred to the decision in *Braddish v. D.P.P. [*2001] 3 I.R. 127. On the basis of the authorities referred to Mr. McDermott has argued that the return of the car shortly after the alleged offence is not fair or reasonable. He laid particular emphasis on the fact that this was done before the Gardaí themselves had any results from the forensic examination carried out by them. He distinguished the facts of the present case from those in the case of *McKeown v. Judges of the Circuit Court* on the basis that in that case it had been held that the applicant was disentitled from seeking similar relief by virtue of the delay in seeking to have forensic examination of the vehicle carried out. It was also held in that case that there was no prejudice to the applicant. Mr. McDermott contends that in the present case the circumstances are different by virtue of the fact that there is forensic evidence from the car which is being relied on by the prosecution and in those circumstances the applicant is prejudiced in that he cannot challenge the said evidence.

13. He referred to the decision of the Supreme Court in the *Scully* case and in particular the statement of Hardiman J. at p. 258 as follows:

> "If forensic inspection takes place at a time when no one is suspected, and the examination itself does not produce a suspect, it would clearly be unreasonable to hold onto the vehicle indefinitely."

14. On this basis Mr. McDermott argued that if someone is suspected as was the case in the present circumstances then the car should be kept or at least not returned until the suspect has been informed.

15. Finally on the issue as to damage to the motor car, Mr. McDermott went through various items in the Book of Evidence which related to damage to the shop premises, to the shutters, to broken glass from the Extra Vision premises and to a number of other matters dealt with in the Book of Evidence as to how damage was done. He also referred to various matters dealt with in the Book of Evidence as to samples being taken and to the exhibits. Having referred to these various matters he reiterated that it was not possible notwithstanding the references made to damage at various points to ascertain what the damage, the subject matter of the second charge, is alleged to be.

16. Mr. McDermott then dealt with the issue of delay. In that context he referred to the statement of opposition filed herein which he said was contradictory. At para. 2 of the statement of opposition it was asserted that the applicant was precluded from relying on the failure to preserve the motor vehicle by reason of his delay in seeking inspection facilities. There was an error in the statement of opposition as to the date upon which the applicant was charged but nonetheless it is accepted that there was a four month gap or delay between the date of charge and the request for facilities. Mr. McDermott noted that the vehicle was returned to its owner on the 18th March, 2003, but commented on the fact that there was no assertion that the owner had sought its return. He pointed out that, somewhat unusually, having asserted that the applicant was precluded from seeking seeking to prohibit his trial by delay in seeking inspection, it was also asserted that the application for judicial review was premature in circumstances where forensic tests were carried out by the forensic science office and that analysis from the forensic science laboratory was awaited.

17. He then referred to the first affidavit of Aileen Mee sworn herein on the 2nd December, 2004. In that affidavit she referred at para. 10 to the contention that there was nothing in the Book of Evidence suggesting that the Opel Vectra was damaged in any way. She averred as follows:

> "The car in question was damaged as it was reversed into the shutters of Extra Vision, thereby allowing the offenders to gain entry. The injured party, Mr. Fintan Lawlor, makes an implied mention of the damage in his statement, where he says at p. 6 of the Book of Evidence 'there was no damage to the car up to when it was stolen on May…'".

18. She went on "evidence as to the damage caused will be tendered as part of the prosecution case, including the photograph of which mention has already been made". Mr. McDermott again pointed out that no photographs appeared as exhibits in the Book of Evidence. Finally a supplemental affidavit was sworn by Aileen Mee on 20th January, 2005, in which the report from the forensic science laboratory was exhibited. The report concluded that the findings supported the allegation that the applicant was in contact with the driver seat of the car used in the burglary.

19. Mr. McDermott then dealt with the issue of delay. He pointed out that as the car in this case was handed back to the owner some two days after the alleged incident, it is unrealistic to expect the applicant to have made an application for an inspection at that time. He referred in that regard to a number of decisions referring to the time within which an applicant should seek inspection namely, *Bowes v. D.P.P.*, *Scully v. D.P.P.* and *Dunne v. D.P.P.*. As the Book of Evidence in this case was not served on the applicant until 31st March, 2004, Mr. McDermott submits that the applicant had no idea as to the nature of the case against him. Indeed he contended that the Book of Evidence did not bring matters much further given the fact that there was nothing in it in respect of the results of forensic testing. Although he had complained about the fact that the Book of Evidence does not appear to disclose that any damage was caused to the motor vehicle he stated that it was not sufficient to make an application to dismiss the proceedings under the provisions of the Criminal Justice Act, 1999, as those provisions deal with a dismiss on the merits. He states that in this case the case should be dismissed because the motor vehicle was not available for examination and that the issue is not an issue to be determined on the merits. The final delay issue dealt with by Mr. McDermott related to the delay in bringing the application for judicial review. In the supplemental affidavit of Yvonne Bambury sworn herein on the 16th day of September, 2005, she made the point in her affidavit that the supply of information from the prosecution made it particularly difficult to know when to seek judicial review. She outlined a number of complaints in that regard. She made the point that it was only in the supplemental affidavit of Ms. Mee that reference was made to the forensic testing of the samples taken from the car being used by the prosecution to support the allegation that the applicant was in contact with the driver's seat of the car. On that basis she expressed the view that given that that situation only became clear with the said affidavit that delay was not something for which the applicant should be criticized. Mr. McDermott reiterated the fact that it is difficult to levy a charge of delay against the applicant in this case in circumstances where it has been asserted on behalf of the D.P.P. in the statement of opposition that the judicial review application is both late and premature.

20. Mr. Michael P. O'Higgins appeared on behalf of the respondent herein. In his oral submissions he made a number of preliminary points in response to the arguments and submissions of Mr. McDermott. He suggested that the line of authorities in cases such as *Dunne* and *Braddish* were not as expansive as might first have appeared. He referred to the concept of reasonableness in considering the principles indicated in such authorities as not permitting an applicant to indulge in speculation as to what might or might not be available on a forensic examination. He pointed out that in the *Scully* case referred to above the issue of delay was considered not solely having regard to the provisions of Order 84 of the Rules of the Superior Courts but also as an indicator of the true worth or value of an inspection. He referred in detail to the judgment of Hardiman J. in that case. He quoted a passage of the judgment at p. 16 as follows: -

> "Delay is significant not so much for its bare length (in this case, for instance, it was considerably less than the unexplained delay in commencing the prosecution) but with the indication that it provides that the case is based on a 'remote fanciful or theoretical' possibility, rather than a real desire to obtain evidence believed to be potentially exculpatory. To put this another way, all the defendant has done here is merely to invoke the possibility that exculpatory evidence at one time existed, that there was something visible on the video, despite the new evidence. He must do more than that. In the words of Finlay C.J. he must '…establish a real risk of an unfair trial…'. The importance of the first adjective in this phrase is that it excludes a risk which is merely remote, fanciful or theoretical. The need to meet this requirement involves a much greater engagement with the actual state of the evidence than is apparent here."

21. Mr. O'Higgins emphasised that in considering the issues that arise in these types of cases it is important that the applicant establishes that there is a real risk of an unfair trial. He pointed out that a person falsely accused would undoubtedly be outraged and therefore he argued that it was important to see how quickly some asserts their right to inspection. In this case he made the point that the accused has not sworn an affidavit and there are no denials that the applicant was the driver of the vehicle. He said that the applicant in the course of his detention frustrated the taking of fingerprints as set out by Garda Woulfe at p. 47 of the Book of Evidence. (It is noted therein that the applicant refused to undergo a retaking of fingerprints.)

22. Mr. O'Higgins added that in the course of his interview with the Gardaí the applicant was asked the question "Were you ever in

motor car 99 D 54057, a green Opel Vectra, were you ever in that car before?

Answer: No comment.

Question: Were you ever in that car before?

Answer: No comment."

23. Thus Mr. O'Higgins pointed out that from the very beginning of this case there was an allegation that the applicant had been in the car and such allegation was clear. Mr. O'Higgins posed the question as to whether it was relevant in this case that the car was returned before the applicant could ask for inspection in circumstances where there was a failure to ask for an inspection for some thirteen months and he added that this failure was indicative of how little reality there would have been to the utility of any inspection. Insofar as the time from which delay is measured he disagreed with the contentions of Mr. McDermott to the effect that delay should be measured from the time the forensic report was received. In his view delay should be considered in all of the circumstances of the case. Whilst he accepted there was delay on the part of the State in producing the results of forensic testing that delay did not explain the thirteen month delay in seeking inspection. He added that in some cases it may be appropriate and indeed necessary to look for inspection before a charge is laid. This issue has to be considered on the facts of each individual case.

24. Mr. O'Higgins then referred to the item in respect of which forensic evidence has been taken. There were fingerprints taken from the car. He referred to the other items, namely the fibres from clothes, hair samples and glass. He asked the question as to how the car itself would be of relevance in this context. The actual material taken and subjected to forensic testing by the Gardaí is available for independent testing to be carried out and no request has been made in this regard.

25. So far as the absence of matters in the book of evidence concerning the damage to the vehicle is concerned, Mr. O'Higgins pointed out that Garda Woulfe in his affidavit at para. 10 stated that the car in question was damaged as it was reversed into the shutters of Extra Vision. In the statement of Garda Saunders at p. 18 of the book of evidence she referred to having received a number of exhibits from various Gardaí involved in the investigation in this particular case. One of the items referred to which she received by way of exhibit was the rear driver's sidelight cluster from the Opel Vectra. Accordingly Mr. O'Higgins indicated that there was evidence of damage to the car.

26. Mr. O'Higgins then posed the question as to whether this was in truth a missing evidence case. He pointed out that the car itself would not have been an exhibit. He went on to say that the applicant in this case could not prove through a forensic examination that he was not in the car. The most he might be able to do is to show that there was no evidence to indicate that he was or was not in the car. In other words, one cannot prove a negative through forensic testing. He went on to add that it behoves the applicant to show how he is at a loss in the particular circumstances of this case. The applicant has not shown a direct causal link between the loss of any opportunity to find evidence and the case to be made in his defence. He referred again to the decision in the Scully case and he reemphasised that absent from this case is any indication by the applicant to engage with the facts of the case. In this regard he referred to a passage at p. 14 of the judgment of Hardiman J. in the *Scully* case:

> "…he took no steps to ascertain the position about video surveillance for some seven months. This period of time is wholly unexplained and appears to contravene the duty (identified in the cases) which lies on an accused or his advisors, with their special knowledge of the case from the defendant's point of view, to seek the evidence they require to sustain the defence. Furthermore, having been told (though not in as much detail as subsequently emerged), the reason for the absence of video evidence, they took no steps to challenge this explanation which, if true, is of course an adequate explanation of the absence of relevant video footage…"

27. Mr. O'Higgins contrasted the facts of that case with the decision in the case of *McGrath* referred to above in which the applicant in that case stated what her defence was and how that was prejudiced by the loss of the evidence in that particular case. Mr. O'Higgins submitted that on the facts of this case even had an inspection taken place the applicant could not have proved a negative, namely that he was not in the car. He might have obtained finger prints or hair samples or clothing fibres tending to show the presence of other people in the car. From his point of view such evidence would be of extremely limited value. Inevitably there would have been fingerprints in the car from, for example, the owner or the owner's family. He pointed out that as matters stand the applicant will be able to show that finger prints were taken from the car but the prosecution will not be presenting any evidence in relation to fingerprints against the applicant. He will also be able to show that a number of comparisons were done with fibres from his clothing and that a number of sellotape lifts taken from the car do not link the applicant to the car apart from some navy fibres from the applicant's rugby shirt. Accordingly he will have that evidence. Thus he contended that the applicant had not established a real loss of any opportunity to rebut the prosecution case.

28. Mr. O'Higgins also argued that the appropriate forum in which to deal with all of the matters now raised by the applicant is the trial where these matters would be more appropriately dealt with by the trial judge. He argued that the applicant has not set out why the so called lost evidence is relevant to his defence and has proceeded on the basis of a hypothesis which is unreasonable and inappropriate. The applicant has failed to discharge the onus upon him to demonstrate that on the facts as they are he cannot receive a fair trial.

29. Mr. O'Higgins also referred to the interests of the owner of the vehicle in question and argued that there had to be a balancing act carried out between the interests of the owner of the vehicle and an accused's right of inspection. He accepted that the car in question shouldn't have been returned as quickly as it was but having said that he said that it was necessary for the applicant to show that legal consequences flow from the failure of the State to notify the applicant that the car was being returned.

30. Mr. McDermott in reply stated that it was difficult to see how the respondent could argue that the relevance of the car in this case was questionable in circumstances where the prosecution will be relying on evidence from the car. He made the comment that the applicant merely had to establish reasonable doubt in respect of the various elements of the evidence against him. He stated that any expert used by the applicant cannot have the same access to the vehicle as the applicant and that therefore the prosecution is in a more favourable position in this case. The defence is not limited to doing the same kind of inspection as the State has carried out. He referred to two specific matters which would have been of assistance to the applicant. He stated that fibres from the clothing of the other co-accused might have been found in the car which would have assisted the applicant in this case in attacking credibility of that co-accused. Mr. McDermott argued that a physical examination could have shown that. He said that all that can be done on behalf of the applicant by means of such evidence is to raise a reasonable doubt. Insofar as the issue of delay is concerned in seeking an inspection he pointed out that it is only with the benefit of forensic evidence that the prosecution can positively state that the applicant was in the car. He argued that it was unfair to suggest that the applicant should pre-empt the prosecution by seeking inspection in the possibility that it might be relevant. He argued that it was only when reports of a forensic nature came to

hand that it was possible to consider this aspect of the matter. This case involved a real complaint about the missing evidence and was not a case in which the applicant was attempting to trip up the Gardaí as referred to in the judgment of Hardiman J. in the case of Scully. He pointed out that Ms. Bambury in her affidavit stated that she had only become aware of the possibility of forensic evidence existing in this case after the service of the Book of Evidence herein. That occurred on 31st March, 2004, and one week later Ms. Bambury requested inspection.

31. So far as the question of criminal damage is concerned he pointed out that it was still not clear to the applicant what part of the car is alleged to have been damaged. He queried whether there was to be additional evidence in relation to the car and the damage allegedly done to it and if so where was that additional evidence.

32. Reference was also made in the course of the submissions by both sides as to the level of intelligence of the applicant. It was submitted that he was in fact of low intelligence. In this regard Mr. O'Higgins pointed out that there was no cogent evidence of any kind before the Court that that applicant couldn't have given instructions. Ms. Bambury in her supplemental affidavit sworn on the 16th day of September, 2005, stated that the applicant was of very low intelligence, had difficulty in communicating coherent instructions to her and had a minimal understanding of events. It is also clear from that affidavit that while the applicant was in custody he had a phone call from someone in the office of Michael Steins and Company Solicitors. The purpose of raising this particular issue was to demonstrate the unreality of someone in the position of the applicant whilst in detention seeking to have an inspection of the car. I do not think this particular issue is of much assistance in determining the principle issue to be decided in this case. It is perhaps unreal to suggest that an applicant whilst undergoing questioning in the garda station on a s. 4 detention is likely to demand an inspection. That seems to me to be beside the point. It has been conceded that the car should not have been returned when it was. However accepting that is so the question still remains as to whether the applicant has established a real risk of an unfair trial in the absence of an opportunity to carry out an inspection of the car and subject it to forensic testing.

The Law

33. The onus of proof on an applicant for an order of prohibition is clear in cases such as this. In *Z v. Director of Public Prosecutions* [1994] 2 I.R. 476 Finlay C.J. quoted with approval the statement of Denham J. in *D. v. Director of Public Prosecutions* [1994] 2 I.R. 465 where she stated:-

> "The applicant's right to a fair trial is one of the most fundamental constitutional rights afforded to persons. On a hierarchy of constitutional rights, it is a superior right.
>
> A court must give some consideration to the community's right to have this alleged crime prosecuted in the usual way. However, on the hierarchy of constitutional rights, there is no doubt that the applicant's right to fair procedures is superior to the community's right to prosecute. If there was a real risk that the accused would not receive a fair trial then there would be no question of the accused right to a fair trial being balanced detrimentally against the community's right to have the alleged crimes prosecuted."

34. In the course of his judgment in the *Z* case Finlay C.J. went on to say, having quoted from the passage of Denham J. in *D. v. Director of Public Prosecutions* referred to above,:-

> "With regard to the general principles of law I would only add to the principles which I have already outlined the obvious fact to be implied from the decision of this court in D*. v. Director of Public Prosecutions*, that where one speaks of an onus to establish a real risk of an unfair trial it necessarily and inevitably means an unfair trial which cannot be avoided by appropriate rulings and directions on the part of the trial judge. The risk is a real one but the unfairness of trial must be an unavoidable unfairness of trial."

35. That is clearly the underlying principle to be applied in respect of an application for judicial review such as the present one.

36. In missing evidence cases there is now a large body of authorities. Counsel have referred to the decision in the case of *Scully v. The Director of Public Prosecutions*, a judgment of the Supreme Court (Hardiman J.) In the course of his judgment at p. 256 Hardiman J. quoted from the comments of the trial judge in considering the extent to which the duty to seek out and/or preserve evidence went in the context of a criminal prosecution. The trial judge had said:

> "Some sort of common sense parameter of reasonable practicality must govern any determination of the scoop of the duty on the Gardaí when seeking out or preserving evidence. This must of necessity imply that some margin of appreciation be extended to Gardaí when investigating crime to determine what they may reasonably consider to have some possible relevance in establishing guilt or innocence. What is the alternative? Is it for the accused person or his legal advisors to dictate the parameters? Alternatively, must the Gardaí go on seeking out and preserving any and every possible piece of evidence which might, by the remotest chance, admit of being relevant in some fashion at subsequent trial? I think not. To set the bar too high for the Gardaí in seeking out and/or preserving evidence is more likely in my opinion to frustrate the administration of justice and due process than to uphold it."

37. Earlier the trial judge in that case had stated:

> "for example in the instant case, which is effectively confined to the issue of the video, might it not have equally have been submitted and argue that the requirements to keep all evidence having some possible relevance to guilt or innocence demanded that Mr. McGovern's van be preserved on the off chance that at some future time a person might be apprehended and charged at which point he might seek to claim he was entitled to have had an examination of the van carried out for finger prints or other evidence which might conceivably have exculpated him? If that be so, might there not also be a requirement to keep and preserve any vehicles parked in the immediate vicinity where Mr. McGovern's van had been parked on the night in question, for precisely the same reason, namely that one or more of such vehicles might have yielded up similar information."

38. Having commented on those passages from the learned trial judge in that case

39. Hardiman J. stated :

> "I wish to emphasise my entire agreement with what the learned trial judge says in the passages just cited. The examples which he gives… are excellent examples of what is meant by the phrase in my judgment in Dunne to the effect that no 'remote, fanciful or theoretical' possibility should lead to a prosecution being prohibited. One is concerned first and last, whether there is a real risk of an unfair trial. Obviously this question will depend on the individual circumstances of each

> case. Of the reported cases, Bowes is the best example of the nightmare scenario envisaged by the learned trial judge here and in that case relief was of course refused both in the High Court and in this Court. Similarly, I would refuse relief in the present case because in the uncontroverted circumstances the relevance of the video tape is purely theoretical and the applicant's own delay in seeking it demonstrates his consciousness that this is so."

40. In considering the facts of this case, I have already observed that the nature of the case as it progressed before me changed as the case went on. Initially as the pleadings in the case show the case was first envisaged as a case in which the complaint was that (a) the car had not been retained or preserved and (b) that no forensic testing had been carried out in relation to the car. (See para. 28 of the grounding affidavit of Yvonne Bambury.) Eventually, it became clear that not only had forensic testing been carried out but the results of that testing were ultimately made available to the applicant. Whilst I accept that in the circumstances of this case it is clear that the applicant has not had an opportunity to carry out forensic testing on the vehicle itself and there is always the possibility that such an inspection could possibly have thrown up something of evidential value to the applicant, it seems to me that when dealing with this aspect of the case, the applicant is clutching at straws. It is the case that as a result of the forensic examination, the prosecution will rely on findings from the forensic examination to support the conclusion that the applicant was in contact with the driver's seat of the car. The fibres which led to that conclusion are available and can be examined by or on behalf of the applicant. Insofar as it has been argued on behalf of the applicant that because the prosecution have had the opportunity to examine the car and they have not had a similar opportunity, that is not in my view sufficient to show that the applicant will suffer a real risk that he will not receive a trial in due course of law. To quote again the words of the trial judge in the *Scully* case (Kearns J.) and approved by Hardiman J.:

> "This must of necessity imply that some margin of appreciation be extended to Gardaí when investigating crime to determine what they may reasonably consider to have some possible relevance in establishing guilt or innocence. What is the alternative? Is it for the accused person or his legal advisors to dictate the parameters?"

41. Given the facts and circumstances of this particular case and the arguments on behalf of the applicant is it not also arguable that the scene of the burglary, namely the Extra Vision store should have been preserved if the arguments in relation to the car are correct. We know that the Gardaí carried out a fingerprint examination of the store. We also know that glass from the Extra Vision store was examined. The purpose of that examination was to establish whether the applicant had been in contact with broken glass from Extra Vision. Should that also have been preserved in situ.? Clearly to do so would be extremely impracticable. It is in those circumstances that I think that the contention that where a forensic inspection and test has been carried out by the Gardai, the object of that testing, in this case, the car should be preserved for similar testing by an accused is unrealistic and impracticable. As a result of the testing that was carried out, real evidence has been found, namely the fibres. That is available for inspection. The test results can be challenged by an expert of the applicant's choosing. It is hard to see notwithstanding the careful arguments of Mr. McDermott what further testing can achieve. As far as it goes, he has said that he is entitled to have the same opportunity to inspect and test as the prosecution. That is not what the relevant authorities have decided.

42. I think it is fair to criticise the prosecution in this case for having returned the vehicle to its owner so promptly in circumstances where it does not appear that there was any urgency in doing so. This was a case in which there was a suspect available to the Gardaí and was not a case in which no suspect had been identified who could be notified of the intention to return the vehicle. Nonetheless the mere fact that the vehicle is returned without giving the opportunity to the applicant to inspect and examine same is not in my view a reason to prohibit a trial.

43. It is worth contrasting the facts of this particular case with a number of the decided cases of a similar nature. I have already referred at length to the case of *Scully*. That case concerned video tape evidence. As was stated by Hardiman J. in that case video tape from a camera in place at or near a crime scene is an unusually direct sort of evidence. The order was refused in that case because it became clear that the tape in that case would have been of no value in that it did not cover the area in which the alleged robbery took place. In the case of *McGrath v. D.P.P.* [2003] 2 I.R. 25 in which a joint judgment was given with the case of *Bowes v. D.P.P.* the applicant in the McGrath case had sought an inspection of a motorcycle in circumstances where she was charged with dangerous driving causing death arising from a collision with her car and the motorcycle. The prosecution evidence against her was very limited. In that case it was argued that the motorcycle, had it been examined, might have revealed a defect which could explain the accident which occurred thus leading to the view that the accident had not been caused by the dangerous driving of the applicant. In the circumstances the trial was prohibited. In the *Bowes* case, the applicant had sought leave to inspect a motor vehicle which had been involved in circumstances where the applicant had been charged with an offence of possession of drugs for sale and supply. It appeared from the book of evidence that the Garda Technical Bureau had carried out a forensic examination of the vehicle and found what they believed to be the applicant's fingerprints on a number of items in the boot of the car. They also found a single fingerprint of the applicant in the car. After the examination was carried out the car was stored for a period of time and thereafter scrapped. Insofar as the *Bowes* case was concerned Hardiman J. made the comment:

> "The fact is that the case against the applicant in the first appeal is based on the finding of the drugs in the car of which he was the driver and an alleged oral statement immediately after the finding, which if admitted and accepted by the jury, might be sought to demonstrate knowledge of the contents of the boot. I cannot see what any forensic examination would do to rebut this evidence and therefore conclude that the application in the first applicant's appeal falls at this first hurdle and need not be discussed further."

44. Undoubtedly this is a case in which a complaint could be made by the applicant had the vehicle in this case not been forensically tested by the Gardaí, particularly in respect of the criminal damage charge as there is no eye witness evidence available to place him in the car. There was no direct evidence of any kind which could have connected the applicant with the car without forensic testing. The eyewitness evidence of the Gardaí, if accepted by a jury, puts the applicant in the Extra Vision Store. The Gardaí did not observe the applicant in the car at any time. Accordingly in the absence of forensic testing, the charge in relation to criminal damage to the car could only be maintained against the applicant on the basis of circumstantial evidence.

45. As I have already indicated, it is not the case that an applicant for judicial review is automatically entitled to prohibition where the prosecution has had the benefit of forensic examination of a vehicle and the applicant has not. There are many cases where that will not be possible or reasonable. I have pointed out that the applicant did not seek to have an inspection of the Extra Vision premises although that was subject to forensic examination. The question still comes back to the basic requirement that the applicant must show that there is a real risk that by reason of the circumstances he cannot obtain a fair trial. This has not been demonstrated in any by the applicant. He has not been deprived of the opportunity of challenging the forensic evidence available to the prosecution. In those circumstances it does not seem to me that this is a case that comes within the principles that require a trial to be prohibited.

46. I should make one final comment. The vehicle in this case was forensically examined before its return to its owner on the 18th

March 2003. The forensic report was made available to the Chief Prosecution Solicitor's Office on the 11th November 2004 and ultimately was received by the Applicant's Solicitors in January 2005. That delay was explained in the Affidavit of Alison Mee at Para.7 to be due to the fact "that the scientist assigned to the case was on term leave for the summer." It appears from the statement of Garda Ross at p. 88 of the Book of Evidence that he delivered a number of evidence bags to the Forensic Science Laboratory on the 17th March 2003. It does seem to be rather a long time to wait for the report.

47. Given that I am refusing the application for judicial review, it does not seem to me to be necessary to consider the issue of the applicant's delay in this particular case.