

THE HIGH COURT

DUBLIN

JOHN KELLY

and

DIRECTOR OF PUBLIC PROSECUTIONS

2009 23 JR

Applicant

Respondent

JUDGMENT DELIVERED BY MR. JUSTICE HEDIGAN ON FRIDAY 27TH NOVEMBER 2009

The application today is for an order of prohibition of his criminal trial by the Applicant.

The facts grounding this application are set out in the papers which have been submitted to me, and which are conveniently summarised in the submissions of both sides.

These proceedings are the third attempt to prohibit his trial on criminal charges relating to drugs offences. This third application is based upon the fact that since the original trial certain exhibits have gone missing. These included, most significantly, for the purposes of this case:

- (1) receipts; carbon paper; plastic bags; garden forks; gloves;
- (2) carpet mat from the boot of the Applicant's car;
- (3) car keys;
- (4) vehicle licensing certificate;
- (5) black swatch; and
- (6) original statements.

In relation to all of the statements, he claims that he has been deprived of the chance to inspect the missing items and, notably, to be able to demonstrate that no fingerprint evidence was found on any of the lost items.

In relation to the statements he complains the originals are no longer available. He claims in his proceedings, though not at the hearing today, that he is therefore not on notice of the case against him. He claims the original statements being unavailable means the copies that are cannot be authenticated.

The law applicable is well known to the Court and can be summarised for the purposes of this application:

- (1) The onus is on the Applicant to show circumstances that occurred such as create a real risk he would not receive a fair trial. To do this he must engage directly with the evidence to show how he would be prejudiced.
- (2) The Court's jurisdiction is one to be exercised only in exceptional cases. The place for argument in criminal proceedings is at the trial.
- (3) The circumstances must be such that the possible injustice is such as could not be cured by appropriate rulings of the trial judge.

In relation to the absence of various of the items. In the first place, photographic evidence exists; secondly, the only prejudice which has been alleged today is that of the absence of fingerprint evidence of the Applicant's on the wrapper. If anything, it seems to me the absence of such evidence, which absence is already established, can only redound to the advantage of the Applicant. In any event, it is clearly something that can be dealt with by the trial Judge.

Secondly, the absence of the carbon paper found in the boot of the Applicant's car and the staining therefrom, which appeared on the cellophane wrapping and which was to prove the link between the Applicant's car and the wrapped cannabis blocks, also can only redound to the advantage of the Applicant. Any conceivable injustice arising therefrom is capable of being dealt with by the trial judge.

In relation to the missing original statements: Firstly, the Applicant cannot argue he was not on notice of the case against him. There is no new evidence against him and he already has had one full trial. The typewritten copies, which, in my judgment, are copies within the meaning of section 30 of the Criminal Evidence Act 1992, exist and can be proved by the evidence, if necessary, of the typist who transcribed them and who remains available.

