

THE HIGH COURT

JUDICIAL REVIEW

2010 225 JR

BETWEEN

DEAN SPELLMAN

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Ms. Justice Irvine delivered on the 6th day of October, 2010

Introduction

1. The applicant in the present proceedings seeks, *inter alia*, the following relief:

(a) an order of prohibition or injunction prohibiting the respondent from dealing with the proceedings brought against the applicant on foot of four charge sheets all relating to offences allegedly committed by the applicant at the premises of D.I.D. Electrical, Briarhill Business Park, Galway on 16th December, 2009.

2. Leave to apply for the aforementioned relief was granted by McMahon J. on 1st March, 2010, on the grounds set out at para. E of the statement required to ground the application for judicial review dated 27th February, 2010.

3. At the heart of the within proceedings is the fact that certain CCTV footage, which captured movements outside and inside the premises of D.I.D. Electrical (hereinafter "D.I.D.") on the morning of the alleged offences, is no longer available. Consequently, the applicant maintains that there is now a real and serious risk of him being unable to have a fair trial should the Court fail to make an order of prohibition.

4. There is no dispute between the parties as to how the CCTV footage of approximately one and a half hours duration has become unavailable. It was viewed by Damien Devlin, the store manager of D.I.D., along with Garda Gerard O'Callaghan on the morning of 16th December, 2009, and also momentarily by Garda Liam Walsh, all of whom have made statements. Detective Garda Darragh Browne attended at the premises of D.I.D. on 21st December, 2009, when his request for the relevant CCTV footage was logged by the staff. He returned to collect the same on 27th December, 2009, but was asked, because the store was exceptionally busy, to return on 29th December, 2009. On that date, he was told that the security firm retained all CCTV footage for 30 days and that it would be available for collection on 4th January, 2010. Unfortunately, when he returned on 4th January, 2010, he was advised that the relevant video cameras had not been set up correctly and that consequently the relevant footage had been overwritten after a period of only fifteen days.

5. Of central importance to the applicant's claim is the fact that in the early hours of the morning on the 16th December, 2009, the gardaí had the applicant under surveillance. As a result of that surveillance, the applicant and his girlfriend Sarah Long, who has also been charged with offences arising out of the same events, were observed as being at or near her apartment at 6 Santa Maria, Ballybane, Galway at 3.00am and also at 4.00am.

6. The applicant's solicitor, Valerie Corcoran, in the affidavit she has sworn on the applicant's behalf, states that it is the prosecution's case that the applicant was one of three youths who were involved in this burglary. She refers to the fact that one Patrick Flaherty and one Jonathan King have both pleaded guilty to similar charges to those brought against the applicant. Having read the book of evidence, including the statement of Damien Devlin, Ms. Corcoran states that, whilst the video footage which has been overwritten was of poor quality, it was sufficiently clear to allow Mr. Devlin state that the three individuals involved in the robbery were male and that it was the same three individuals that he saw together on the CCTV footage on a number of occasions. He was also in a position to note a man mounting and later falling from a ladder, whom he stated was wearing white Nike runners.

7. Ms. Corcoran, in stressing the importance of the CCTV footage, also referred to the statements of Garda O'Callaghan and Garda Walsh both of whom described the three men as "youths". She also maintained that Patrick Flaherty and Jonathan King had been identified based upon what was seen on the CCTV footage and that they had both been excluded as the man on the ladder, once again in reliance on what was seen on the CCTV footage. In this regard, she relies on the fact that the applicant was questioned about being on the ladder and whether he cut himself falling from it.

8. As to the evidence, Ms. Corcoran finally refers to the fact that an analysis carried out on blood found at the scene did not match that of Jonathan King, Patrick Flaherty or the applicant and she states that this is material to her client's position that he was not involved in the robbery.

9. On the applicant's behalf it was submitted that if the CCTV footage was now available, having regard to the times that the applicant was observed at his girlfriend's flat, it could prove that he was not one of the three burglars. This, it was submitted, could occur in two ways, namely:-

(a) the CCTV footage might provide direct visual evidence demonstrating that the identity of the third burglar was somebody other than the applicant; or

(b) that all three burglars were on the D.I.D. premises at one or both of the times when the applicant was observed by gardaí at his girlfriend's apartment, thus excluding him as the third man involved in the burglary.

Legal Submissions on behalf of the Applicant.

10. Helpful written legal submissions were filed on behalf of the applicant and these set out the principles which emerge from the long line of authority which now exists in relation to missing evidence. Amongst many others, the Court was referred in particular to the decision in *Braddish v. Director of Public Prosecutions* [2001] 3 I.R. 127 and the decisions of Fennelly J. in *Savage v. Director of Public Prosecutions* [2009] 1 I.R. 185 and *C.D. v. Director of Public Prosecutions* (Unreported, Supreme Court, 23rd October, 2009). A helpful analysis of how these principles apply to the facts of the case was set out in these submissions and it is not necessary to rehearse this in the course of this judgment as it was accepted by both parties that the most important issue was whether the Applicant could demonstrate a real risk of an unfair trial by reason of the lost CCTV footage. This, counsel submitted, had been established on the evidence of Ms. Corcoran.

11. It was submitted that the case law established that where missing evidence was central to the case of the prosecution or the defence an order of prohibition should be made. The applicant contended that the missing CCTV footage was central to the prosecution's case and that this was borne out by the fact that there are a number of statements in the book of evidence made by those who viewed the CCTV footage before it was overwritten. It was submitted that if the CCTV footage was now available, having regard to the facts alluded to in Ms. Corcoran's affidavits, clearly it would have the potential to exculpate the applicant from any involvement in the burglary and that he was accordingly impaired in his ability to defend the charges brought against him. Thus applying the well established principles regarding missing evidence to this case he was entitled to an order of prohibition.

12. The applicant relied upon the fact that the prosecution's case against him was entirely circumstantial and that they had no evidence placing him within the business park at the relevant times. He further maintained that he had at all times protested his innocence and that he had accounted for his movements. Thus the loss of the CCTV footage, in the context of the facts of this case, puts him at a real risk of an unfair trial.

13. Finally, the applicant maintained that the rules of evidence which govern criminal trials cannot afford him adequate protection should the case against him be permitted to proceed. Counsel submitted that the risk of an unfair trial cannot be remedied by any ruling that might be made by the trial judge in the course of the trial nor by any direction to the jury as to the significance to be attached to missing CCTV footage given that what it might have shown is unknown. Accordingly, the only remedy for the applicant is an order of prohibition.

The Respondent's Case

14. The respondent disputed the applicant's assertion that the prosecution case rests on the missing CCTV footage and denied that the unavailability of this evidence places the applicant at a real risk of an unfair trial. Counsel contended that the facts are somewhat more intricate than those referred to by Ms. Corcoran in her affidavits and, whilst she agreed that the evidence against the applicant was circumstantial, that of itself could not justify the Court intervening to grant the relief sought.

15. The affidavits filed on the respondent's behalf set out the evidence which it is intended to advance at the trial. I will try to refer to the evidence in a chronological fashion, but in this regard it is relevant to note that Mr. Devlin, in his statement, maintains that the CCTV footage was running eleven minutes fast:-

- At approximately 12.45am, the applicant was seen leaving his girlfriend's flat at 6 Santa Maria, Ballybane, Galway with Patrick Flaherty and Jonathan King.
- At 1.30am, the applicant sent a text to his girlfriend and co-accused, Sarah Long, which read "babe, I'm nearly back there now, the key wouldn't work".
- At 1.45am, the applicant was seen again with Patrick Flaherty and Jonathan King at the Santa Maria apartment. They were seen leaving the apartment together, crossing the N6 and heading towards Briarhill Business Park.
- At 2.23am (2.12am when the time is correctly adjusted), the CCTV footage, according to Damien Devlin, showed three males going around the side of the D.I.D. building.
- At 2.37am (2.26am when the time is correctly adjusted), the CCTV footage, again according to Damien Devlin, showed three individuals placing a ladder up against the premises and one of the individuals, who was noted by Mr. Devlin to be wearing white Nike runners, fell off the ladder.
- At 2.45am (2.34am when the time is correctly adjusted), the CCTV footage, so states Mr. Devlin, showed the same three men gaining access to the premises.
- At 2.45am, Sarah Long was seen leaving the same apartment and driving her car to a location on the N6 where she picked up the applicant adjacent to the Briarhill estate at somewhere between 2.45am and 3.00am.
- At 2.49am, Sarah Long received a text from the applicant stating "there is three of us ok."
- At 3.00am, the applicant was seen returning to the flat with Sarah Long. They left a few moments later and she dropped him off at a gate to a field which is at the perimeter to the Briarhill estate.
- At 3.05am, a male in dark clothing was observed approaching the corner of the D.I.D. unit.
- At 3.45am, a male was observed in the laneway at the side of the industrial estate.
- At 4.00am the applicant and Sarah Long were observed returning to her flat carrying a box. One minute later they emerged. The applicant was then carrying a black sports bag containing a heavy object. The weight of the object was discerned from the fact that the applicant used two hands to distribute the weight. Sarah Long again drove him to the gate adjacent to the Briarhill estate.
- At approximately 4.20am (4.09am when the time is correctly adjusted), evidence from the CCTV camera showed the first burglar emerging. Damien Devlin states that moments later they all left by the rear fire exit door. Two went in one direction and the other headed towards Curley's Furniture Store.

- At 4.20am, the applicant was seen walking from Briarhill Business Park to Sarah Long's car which was stopped in the vicinity. The applicant was arrested shortly after getting into the car.
- At 4.30am approximately, Mr. Flaherty and Mr. King were spotted beside the business park. The driver of the patrol car engaged the siren and the two men ran. They were visually identified by Detective Garda Shaun Durkan. Mr. Flaherty and Mr. King made their escape.

16. Apart from the aforementioned timeline of events, Detective Sergeant Beirne, who has sworn two affidavits on behalf of the respondent, refers to the fact that subsequent to these events a consaw and black holdall bag were recovered close to the gate in the field adjacent to Briarhill Business Park, where the applicant was noted on a number of occasions on the morning of the robbery.

17. The book of evidence also includes the statement of Dr. Emily Jordan of the Forensic Science Laboratory, who carried out a forensic examination on a jimmy/jemmy bar left behind at the scene of the burglary. Her statement is to the effect that she found DNA from more than one individual present on the bar. Test results established that Jonathan King's DNA was present. Whilst all of the applicant's DNA elements were present such that he could not be excluded as a contributor to the minor mixed DNA profile found on the bar, I accept, as has been urged by the applicant, that this does not prove that the applicant had ever handled this item of equipment and consequently does not positively connect him to the robbery.

18. Insofar as the applicant maintained that the CCTV footage was of value for the purposes of potentially excluding him as the man on the ladder, Detective Sergeant Beirne, in his affidavit, makes it clear that the reason the applicant was asked about being on the ladder was not because he or anyone else could be seen on the ladder, but rather because when he was arrested he was wearing white runners and Damien Devlin had stated that the video suggested that the man on the ladder was wearing white runners. He also dismissed the suggestion that forensic analysis of certain blood found adjacent to the D.I.D. premises, which did not match the applicant's blood type, was cogent evidence that he was not involved in the burglary. Detective Sergeant Beirne stated that, whilst the applicant was indeed questioned about falling from the ladder and cutting himself, the blood which was tested was not found near the ladder but was found 300 to 400 yards away and was tested because it was thought that it might have been related to the burglary, but had since been discounted as not being relevant.

19. Based on the aforementioned evidence it was the respondent's submission that the CCTV footage, whilst clearly material to the extent that it was sought after the burglary, was not the basis upon which the prosecution was proceeding. There was a large body of telling circumstantial evidence implicating the applicant irrespective of the presence or absence of the video footage.

20. Particular emphasis was laid upon the fact that neither Mr. Devlin, Garda O'Callaghan nor Garda Walsh had identified anybody from the CCTV footage. The only identifications made were those made physically on the night relating to Mr. Flaherty and Mr. King.

Respondent's Legal Submissions.

21. The Court was urged to adopt a position of restraint on the present application based upon the decision of Kearns P. in *Irwin v. Director of Public Prosecutions* [2010] IEHC 232, (Unreported, High Court, Kearns P., 23rd April, 2010) where he described the increase in applications of this nature as being somewhat akin to a cottage industry which was causing some degree of judicial exasperation.

22. It was submitted that prohibition was an exceptional remedy which was rarely granted and placed a high onus upon the applicant to establish a real and serious risk of an unfair trial. Particular reliance was placed upon the principles outlined by Denham J. in *Ludlow v. Director of Public Prosecutions* [2009] 1 I.R. 640 and Fennelly J. in *Savage v. Director of Public Prosecutions* [2009] 1 I.R. 185 and C.D. v. *Director of Public Prosecutions* (Unreported, Supreme Court, 23rd October, 2009). Counsel in oral submission placed emphasis on the decision of Dunne J. in *Fagan v. Judges of the Circuit Court and the Director of Public Prosecutions* [2006] IEHC 151 (Unreported, High Court, Dunne J., 28th April, 2006) and the decision of Charleton J. in *Leahy v. Director of Public Prosecutions* [2010] IEHC 22, (Unreported, High Court, Charleton J., 5th February, 2010) in which orders of prohibition were refused.

23. On the facts of the present case, counsel submitted that there had been no dereliction on the part of the garda authorities in seeking to preserve the CCTV footage. She maintained that the CCTV footage was not, as asserted by the applicant, central to the prosecution's case. She stated that there was telling circumstantial evidence against the applicant regarding his movements during that period of time which was relevant to the burglary and also regarding his being in the company of Patrick Flaherty and Jonathan King in the hours prior to the burglary. She submitted that Mr. Flaherty had in the course of one of his statements implicated the applicant in the burglary and that it was open to the prosecution to call Mr. Flaherty as a witness at trial.

24. Counsel for the respondent argued that the applicant had not engaged with the evidence against him in the book of evidence and that he had not sworn an affidavit as to his whereabouts in the present proceedings. The applicant had not accounted for his movements or presence at Briarhill Business Park on the morning of the burglary when questioned pursuant to s.19 of the Criminal Justice Act 1984.

25. Counsel submitted that neither the prosecution nor the defence could ever be assured that all conceivable evidence would be available at the date of trial and the mere fact that an incident was captured on a CCTV camera and that footage was lost does not mean that any criminal trial arising out of those facts must be prohibited. She stated that the present application amounted to a trawl by the applicant through a book of evidence in search of "the silver bullet" that could put a stop to the trial. She referred to the statement of Mr. Devlin regarding the quality of the CCTV footage to demonstrate that the applicant had failed to show how the absence of such poor quality CCTV footage, from which none of the three youths seen could be identified, could be stated to place him at a risk of an unfair trial. She further relied upon the ability of the trial judge to caution the jury in relation to any evidence that might be given in respect of what was seen on the CCTV footage.

26. To conclude, counsel on behalf of the respondent relied upon the substantial procedural safeguards attaching to the criminal process to protect the applicant from any potential prejudice arising from the loss of the CCTV footage. She referred to the right of the trial judge to withdraw the case from the jury, the degree of proof required prior to conviction, the presumption that a trial judge would make such rulings as might be required to ensure fair procedures, and the possibility for the defence to requisition the trial judge in appropriate circumstances.

The Law

27. The principles to be applied when considering an application for prohibition based upon "missing evidence" have been outlined in a large number of cases and recently have been succinctly summarised by Birmingham J. in his decision in *Keogh v. Director of Public Prosecutions* [2009] IEHC 502 (Unreported, High Court, Birmingham J., 17th November, 2009). At para. 14 of his judgment he summarised the principles emerging from a long line of case law on the topic in the following fashion:-

"(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)."

28. Further assistance and guidance as to the approach to be adopted by the Court is to be found in the decision of Fennelly J. in *Savage v. Director of Public Prosecutions* [2009] 1 I.R. 185, where he stated (at p. 208) as follows:-

"60(b) The missing evidence in question must be such as to give rise to a real possibility that, in its absence, the accused will be unable to advance a point material to his defence. This is, like the garda obligation to retain and preserve evidence, to be interpreted in a practical and realistic way and "no remote, theoretical or fanciful possibility will lead to the prohibition of a trial" (see *Dunne v. Director of Public Prosecutions* [2002] 2 I.R. 305 at p. 323).

62(d) The application is considered in the context of all the evidence likely to be put forward at the trial..."

Application of these Principles to the Present Case

29. It is clear that the gardaí in the present case set out to preserve all of the available evidence in the case including the video evidence captured by the CCTV cameras at the premises of D.I.D. on the morning of the burglary. Whilst it has been held that the reasons for the loss of that evidence should not be a determining factor on an application for prohibition, it is nonetheless worth recording that I am satisfied that the gardaí attempted to fully comply with their duty to seek out and preserve the relevant CCTV footage. Further, there is nothing suspicious about the circumstances which have led to its unavailability. In this regard, Detective Garda Browne attended at the premises of D.I.D. on 21st, 27th and 29th December, 2009, requesting the CCTV footage. He was assured that the evidence would be preserved for 30 days. He did not obtain it in late December because of the fact that the store was busy but was fully assured that the video would be available for collection on 4th January, 2010. It transpired, however, that the CCTV footage did not become available on 4th January, 2010, because of a programming error which led to the CCTV footage being overwritten 15 days, as opposed to 30 days, following its initial recording. Accordingly, I have concluded that the circumstances in which this CCTV footage has been lost, whilst of relevance to the factual matrix of the case, are not material to the decision as to whether the applicant should be granted the relief which he seeks.

30. As already stated, an order prohibiting a prosecution brought by the Director of Public Prosecutions should only be made in exceptional circumstances and the onus is on the applicant for such relief to demonstrate that the missing evidence would in reality be likely to have a bearing on his guilt or innocence to the point that he can contend that in its absence he is at a real risk of an unfair trial.

31. Applying these principles to the facts of the present case, I am not satisfied that the applicant has discharged the burden of proof such that the trial should be prohibited. It is undoubtedly the case that the CCTV footage which is now missing was real evidence which ought to have been preserved. However, each case must be considered on its own facts and the facts of the present case are very different to many of the cases which the applicant has sought to rely upon in his submissions. In particular, the facts of this case are entirely different to those in *Braddish*. In *Braddish*, it was positively accepted by the gardaí that the CCTV footage, subsequently disposed of after they had obtained an incriminating statement from the accused, was the sole factor which led them to suspect the accused of the crime in the first place. The confession by the accused was hotly contested and, accordingly, the significance of the CCTV footage was of central importance to the case. By contrast, in the present case, the applicant was not suspected of the crimes with which he has been charged because of what was seen on the video. Neither Mr. Devlin nor Garda O'Callaghan were able to identify any of the burglars from the CCTV footage due to the poor quality of the same. Detective Sergeant William Beirne has confirmed that neither Jonathan King nor Patrick Flaherty were identified in that way. Further, Mr. Devlin, in his statement of 4th January, 2010, confirms that the individuals seen on the CCTV footage had no distinctive characteristics due to the night vision camera and that the only distinguishing feature on the video was the presence of the white Nike runners on the man who climbed the ladder.

32. The affidavits sworn on behalf of the respondent established that the applicant was under surveillance in the hours leading up to the burglary. As can be seen from the chronology set out earlier in this judgment, it was the applicant's movements late in the

evening of 15th December, 2009, and in the early hours of the morning of 16th December, 2009, and the people he was with over the relevant period which led him to fall under suspicion. Insofar as the Court has asked to infer from the fact that the applicant was questioned about him being the burglar who was seen to fall from a ladder, as evidence of the fact that he was in some way identified as that person from the CCTV footage, Detective Sergeant Beirne, in his supplemental affidavit, makes it clear that the only reason he was questioned in this fashion was because the man on the ladder was noted to be wearing white Nike runners and the applicant, unlike Mr. King or Mr. Flaherty who were wearing boots on their arrest, was wearing white Nike runners when he was arrested. Jonathan King and Patrick Flaherty were arrested following a chase adjacent to Briarhill Industrial Estate at about 4.30am.

33. It is common case that following the commission of a crime, for a myriad of different reasons, not all of the evidence that might or should be preserved will be available at the trial. Those attending the scene of a crime may unwittingly disturb or contaminate available evidence. A delay in discovering the commission of a crime or in the commencement of an investigation may result in documents or other objective evidence being destroyed or no longer being available. Relevant witnesses may die prior to the trial. These are matters that were referred to by Fennelly J. in his dissenting judgment in *Dunne v. Director of Public Prosecutions* [2002] 2 I.R. 305. In the course of his judgment, he stated that merely because certain evidence may have been in the hands of the gardaí at some stage before it was lost or later became unavailable can have no bearing on whether its absence might render any subsequent trial unfair. The fairness or unfairness of the trial due to the loss of that evidence is the same whether or not that evidence ever came into the hands of An Garda Síochána. What must be examined is the effect of the loss of that evidence on the trial.

34. In his decision in *C.D. v. Director of Public Prosecutions* (Unreported, Supreme Court, 23rd October, 2009), Fennelly J. advised as follows:-

"24. As has been emphasised many times, this type of application must be considered in the context of all the evidence likely to put forward at the trial. The key question whether there is a real risk of an unfair trial cannot be viewed in vacuo. Evidence is never perfect. Neither the prosecution nor the defence can be assured that all conceivable evidence will be available."

35. The burden of proof is on the applicant in the present proceedings to establish that the missing CCTV footage, having regard to all of the evidence, places him at a real risk of an unfair trial. He must demonstrate that the risk which he relies upon, to quote Hardiman J. in *Dunne v. Director of Public Prosecutions* [2002] 2 ILRM 241, is neither "remote, theoretical nor fanciful."

36. The applicant's principal argument is to the effect that if the CCTV footage was still available the same might exclude him as one of the three perpetrators of the burglary at the D.I.D. premises by providing visual identification of the presence of a third party other than him.

37. I must assume at this juncture that at the trial the prosecution will seek to put forward evidence in line with what is in the book of evidence. This includes two statements made by Mr. Devlin and also one made by Garda O'Callaghan, both of whom viewed the CCTV footage and were not able to identify any of the three individuals whom they could see at the exterior of the premises. The most they could say was that the three figures they saw were male and were "youths". The statement of Mr. Devlin dated 4th January, 2010, confirmed that the individuals had no distinctive characteristics. It is entirely speculative to suggest on the evidence available on this application that had the CCTV footage been preserved there would be a real possibility that it might identify an individual such that the applicant could be ruled out as one of the three potential burglars. The hypothesis put forward by the applicant in this regard is to my mind not supported by any evidence whatsoever and is entirely hypothetical and without foundation.

38. The alternative proposition is that there is a real possibility that the CCTV footage might have captured the three burglars together at the premises of D.I.D. at 3.00am or 4.00am when the applicant was seen at his girlfriend's flat thus excluding him as one of the culprits. In this regard, Mr. Devlin, in his statement, records that he saw three men access the D.I.D. premises at 2.45am and that thereafter very little could be seen on the CCTV footage only flash lamps. He stated that the inside cameras on the premises were not infrared. He next observed one male carrying the safe outside at about 4.20am and then later two men leaving the premises over a wall whilst another man left in another direction. In his supplemental statement made on 6th July, 2010, Mr. Devlin stated that he only saw three men entering the shop. Thereafter he did not see three men together in the shop as the inside cameras were not night-enabled. He did not watch all of the CCTV footage but did fast forward it to see any movement which was present. In his statement he indicates that he could not say whether all three men stayed there from the time they went inside.

39. In addition to the aforementioned evidence of Mr. Devlin, Garda O'Callaghan also viewed the CCTV footage and in his statement he does not mention any movements of the burglars between the times referred to by Mr. Devlin. Neither did Mr. Devlin or Garda O'Callaghan mention the three men being together outside of the premises at either 3.00am or 4.00am. Accordingly, on the applicant's hypothesis he is asking the Court to accept that both Mr. Devlin and Garda O'Callaghan may have failed to observe the three burglars together at times other than those mentioned in their statements and that, for some unknown reason, decided not to make any note or mention of this fact. I cannot accept that if the CCTV footage had not been lost that there is a possibility that it would have shown the three burglars together at the premises of D.I.D. at either 3.00am or 4.00am. This, to my mind, is a fanciful, hypothetical and unrealistic proposition.

40. Having regard to the overall facts of this case, I cannot accept, unlike in many of the other decisions relied upon, that the CCTV footage is central to this case. Clearly it should have been preserved until the trial of the action. However, I am not satisfied that the applicant has discharged the burden of proof which is upon him on an application such as the present one. I am driven to conclude that the applicant has done what has been criticised by Kearns P. in his recent decision in *Irwin v. Director of Public Prosecutions* [2010] IEHC 232, (Unreported, 23rd April, 2010) in that he has sought to identify a shortfall in the prosecution proofs in the hope of being in a position to halt the trial. He has considered what possible scenario would provide him with a defence to these criminal charges and has gone on to suggest that the CCTV footage, if available, might bear out his hypothesis. I reject the applicant's submission that the CCTV footage is likely to have a bearing on his guilt or innocence and I believe that any prejudice as may arise due to the fact that the CCTV footage has been lost can be more than adequately protected by the substantial procedural safeguards which may be availed of by the applicant at the time of his trial.

41. Finally, I should say that in reaching my decision I have not relied on the possibility that evidence may be given by Mr. Flaherty, who at some stage implicated the applicant in the burglary but later denied his involvement. I do so because there is no statement by Mr. Flaherty in the book of evidence and it is my understanding that the Court on an application such as this must confine itself to that which is in the book of evidence.

42. I have concluded that the applicant in the present case has latched on to the happenstance of the missing CCTV footage in an effort to attempt to show that he has a real risk of an unfair trial. However, he has not discharged the burden of proof in this regard and I believe that the scenario that he has put forward is one which is hypothetical and one which is not borne out by the evidence.

43. Insofar as the applicant states that if the CCTV footage was available, the same might exclude him due to the possibility that the three individuals might be identifiable. This hypothesis is one which I believe is entirely speculative and fanciful having regard to the fact that the CCTV footage was viewed by three people including one independent witness *i.e.* Mr. Devlin and two members of An Garda Síochána, and none of them were able to identify any of the three individuals seen at the premises on the night in question. Hence, I could not possibly be driven to conclude that if the CCTV footage was still available that it might provide a defence to the accused on this basis.

44. Accordingly, I refuse the application.