Neutral Citation Number: [2007] IEHC 460

THE HIGH COURT

[2007 No. 21 J.R.]

BETWEEN

OLIVER WHELTON

APPLICANT

AND
DISTRICT JUDGE CONSTANTINE O'LEARY

RESPONDENT

AND
THE DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

Judgment of Birmingham J. delivered on the 19th day of December, 2007.

Introduction

1. The applicant has been charged with the theft, on the 21st August, 2005, of a sum of money from his employer. On the 11th May, 2006 the applicant was convicted of the offence of theft contrary to s.4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 and on the 3rd October, 2006, he received a sentence of four months imprisonment which sentence was suspended in its entirety.

2. On the 8th January, 2007, the applicant was granted leave to seek judicial review, the relief sought being an order of *certiorari* to quash the conviction and sentence.

3. The grounds on which leave was sought and which are central to the current hearing are formulated in quite elaborate terms. However, there are now broadly two substantial issues before the court – the first of these relates to a delay in charging the applicant following his re-arrest, he being a person who had previously been detained under the provisions of s. 4 of the Criminal Justice Act, 1984 and the second relates to a complaint that there was a failure on the part of the Gardaí to take possession of the entirety of the CCTV evidence available in relation to the shift that the applicant was working when the theft was alleged to have occurred. There is a third ground which might be described as a subsidiary ground in that it relates to the complaint that the judge of the District Court acted improperly in failing to adjourn the proceedings before him in order to allow the applicant's solicitor launch judicial review proceedings in the High Court, as he indicated he wished to do, after the District Judge had ruled against certain legal submissions made on behalf of the applicant.

Facts

4. The general factual background emerges quite clearly from the affidavits that have been exchanged, although there were and remain some areas of disagreement. However, notwithstanding these points of divergence, the picture emerges with sufficient clarity to permit the issues now raised to be resolved. The applicant is a young man, born on the 10th April, 1976 of previous good character. In August, 2005, the applicant was employed at a leisure centre/amusement arcade in Cork. In particular it appears that he was employed carrying out his ordinary functions as a cashier on the 21st August, 2005. His employer identified what he believed to be a shortfall in the takings and proceeded to report the matter to the Gardaí, who commenced an investigation.

5. As part of the investigation, on the 1st September, 2005, the applicant was arrested by Detective Garda Darragh Murray and brought to Bridewell Garda Station in Cork, where he was detained under the provisions of s. 4 of the Criminal Justice Act, 1984. No request was made to extend the detention and the applicant was released without charge a little over three hours after his arrest.

6. The Gardaí received a direction from the Director of Public Prosecutions (DPP) to charge the applicant with the offence of theft and on the 27th October, 2006 the applicant was rearrested. Some of the circumstances surrounding the rearrest have generated quite sharp exchanges between the parties, but the resolution of the legal issues that arise do not require their definitive determination.

7. It is this second arrest, which took place on the 27th October, 2006 which is at the heart of the applicant's case. It seems that around midday on that day, Detective Garda Murray made a telephone call to the applicant and during the course of that call the applicant was informed that the DPP had directed that he should be charged with theft and an arrangement was agreed that the applicant should meet by appointment with Detective Garda Murray for the purpose of being charged with the offence that had been directed and this appointment was made for 16.00 p.m. that day at Anglesea Street, Garda Station in Cork. Following a formal arrest outside Anglesea Street Garda Station at approximately 16.30 hours the applicant was brought by Detective Garda Murray to the Bridewell Garda Station, the journey between the two stations taking approximately 10 minutes. On arrival at the Garda Station, the applicant was introduced to Garda Michael Kiernan, the member of the station party, who was, at the time, performing the role of member in charge for the purpose of the Treatment of Persons in Custody Regulations.

8. The applicant was not formally charged immediately, but instead was placed in a holding cell for a period of fifty-five minutes approximately, being the period between 16.50 hours and 17.45 hours, and the applicant was then charged with two offences under the Criminal Justice (Theft and Fraud Offences) Act, 2001 and was released on station bail to appear before Cork District Court on the 27th November, 2005.

9. The affidavit of Detective Garda Murray sworn in these proceedings indicated that it was always envisaged that the applicant would be formally charged at Bridewell Garda Station, the station from which the investigation had been conducted and that Anglesea Street Garda Station was nominated as a meeting point by the applicant. The applicant takes issue with this and denies that he nominated Anglesea Street Garda Station as a meeting point and says that, from his point of view, this would not have been a suitable meeting point because it was very close to his home, giving rise to the possibility that his presence there would be noticed and would give rise to comment.

10. At the Bridewell Garda Station, an unexpected delay occurred when the printer which generates the charge sheets malfunctioned, as a result of which Detective Garda Murray made a return trip to and from Anglesea Street Garda Station where the charge sheets were printed out. During this period the applicant was placed, as I have indicated, in a holding cell, where he spent some fifty-five minutes. This period in the cell is central to what is probably the primary ground on which relief is sought.

11. The applicant appeared before the District Court on the 27th November, 2005. On that occasion, the applicant's solicitor made available to the presiding judge and to the Inspector of An Garda Síochana who was prosecuting the case written legal submissions and an accompanying book of legal authorities. In these circumstances, not surprisingly, the inspector sought and obtained an adjournment. In the event, the issues canvassed in the written legal submissions were argued before Judge Uinsin McGruairc on the 11th January, 2006, who reserved judgment, delivering a written judgment on 10th February, 2006. In essence, Judge McGruairc took

the view in his written judgment that the proper time and place to adjudicate on the issues raised was at trial rather than by way of preliminary objection. For reasons which I do not really understand, the applicant and his solicitor took the view that the learned District Court Judge was indicating clearly that he was going to find with them.

12. The trial in the District Court commenced on the 2nd May, 2006 and ran for several days.

13. In the intervening period the applicant's solicitor obtained a "Gary Doyle" order with particular reference to witness statements and CCTV footage.

14. After an exchange of correspondence involving the applicant's solicitor, the Chief State Solicitor and the Superintendent of An Garda Síochana at Anglesea Street Garda Station, the applicant was, on the 29th March, 2006 furnished with prosecution statements and photographic stills taken from the CCTV coverage that existed in relation to the 21st August, 2005, the date of the alleged offence at Tudor Leisure Centre. Subsequently, following further contact between the representatives of the parties, the applicant's solicitor was furnished with brief extracts from the CCTV footage referable to the day in question.

15. There was still further contact between the representatives of the parties culminating in the fact that on the 1st May, 2006, a bank holiday and the eve of trial, Detective Garda Murray clarified for the applicant's solicitor that, while there was constant CCTV footage of the applicant's place of employment, the Gardaí had contented themselves to recording just a few minutes being the period identified as the material portion of the tape.

16. When the trial commenced on the 2nd May, 2006, Mr. Sheehan, the solicitor on behalf of the applicant sought to reopen the issues which had been argued earlier before Judge Uinsin McGruairc.

17. At several stages during the subsequent hearing, Mr. Sheehan, on behalf of the applicant, objected to the admissibility of the CCTV footage. In essence the objection and it is essentially the same argument relied on in these judicial review was that the Gardaí were obliged to take possession of the entire footage for the shift concerned and were not entitled to isolate what they saw as relevant and to retain only this portion.

18. On the 11th May, 2006 the summary trial concluded and the applicant was convicted of the offence of theft as charged on Anglesea Street Garda Station charge sheet No. 432096. The question of sentence was adjourned, the preparation of a probation report was directed and on the 3rd October, 2006 the applicant was sentenced to four months imprisonment which was suspended on condition that he enter a bond to keep the peace and be of good behaviour for a period of twelve months.

19. The applicant lodged an appeal against conviction to the Circuit Court and this appeal has been listed for hearing in the Circuit Court in Cork, but has been adjourned to await the outcome of the present proceedings.

The issues in the case
20. The present proceedings have generated a flurry of affidavits some of them quite lengthy. The grounding affidavit for example runs to fifty-four paragraphs.

21. However, on the basis of the written and oral submissions of the parties, the principle issues in the case would appear to be as follows. On behalf of the applicant it is argued that the second arrest on the 27th October, 2006 and the detention which followed it was unlawful and tainted with illegality. It is contended that the unlawfulness of this arrest and detention deprived the District Court of its jurisdiction to try the applicant. Secondly, it is said that the Gardaí are in default in failing to seek out, preserve and then disclose the entirety of the CCTV footage and it is said, that by reason of this default, the applicant has been denied his right to a fair trial in due course of law, and that, accordingly, the conviction should be quashed. There is, then, as I have indicated, an additional issue raised in relation to the failure of the district judge to adjourn the proceedings in order to facilitate an application for judicial review.

The approach of the notice party
22. In the notice of opposition, the notice party points to the fact that the applicant has appealed his conviction to the Circuit Court and, it is said, in doing so has opted for an alternative remedy and that, accordingly, it is not open to him to maintain the present proceedings.

23. In relation to the substantive issues, he denied that there was any irregularity attaching to the arrest and detention of the 27th October, 2006. So far as the CCTV issue is concerned, the respondent takes the position that all relevant CCTV footage was sought out and was preserved.

24. Finally, it is contended that in so far as judicial review is discretionary, the Court's discretion should not be exercised in favour of the applicant.

The availability of alternative remedies
25. The relevance of the existence of alternative or parallel remedies has been considered by the Superior Courts in contexts that are as different as those involving District Court criminal convictions (as this is), the planning and compensation code and the asylum system.

26. The law in this area has been the subject of a comprehensive review by Feeney J. in the case of *Akpomudjere v. Minister for Justice, Equality and Law Reform*, a judgment of 1st February, 2007.

27. Consideration of the authorities there referred to leads to the conclusion that the availability of a remedy by way of an appeal or even the invocation of the right to an appeal is not per se a bar to relief, but is highly relevant to the question of how the courts discretion should be exercised.

28. The applicant in the present case has explained the decision to lodge a notice of appeal by saying that this was done in order to stay the execution of the District Court order. I could well see how this would be a significant factor if one was dealing with a sentence of imprisonment simpliciter but where, as here, the sentence in question is a suspended sentence the need to suspend such a suspension is less than obvious.

29. In considering the extent to which the availability of the alternative remedy will influence the exercise of the discretion it seems to me that the issues sought to be raised are highly relevant. I also attach significance to the fact that issues relating to a failure to seize or retain evidence are habitually raised by way of an application for judicial review.

30. Furthermore, from the first appearance before the Court, the applicant's solicitor has sought to raise the issue relating to the validity of the second arrest and the implications of that for the District Court proceedings.

31. In the circumstances of this case, I do not believe that the fact that the applicant has lodged an appeal to the Circuit Court precludes him from seeking judicial review nor, do I think that it is a factor that should influence significantly how the court should exercise the discretion that it undoubtedly has.

32. For the sake of completeness only, I should refer to the fact that the original grounding affidavit had referred to the necessity for extending time, though this aspect did not go on to form part of the statement of opposition. Suffice to say that, in the particular circumstance of the case, it was perfectly reasonable for the applicant and his legal advisers to await the outcome of the sentence hearing before deciding on a course of action and this issue does not require further consideration.

The second arrest

33. When a preliminary perusal of the papers indicated to me that the case would to a significant extent, turn on the interpretation of s. 10 of the Criminal Justice Act, 1984, I felt it proper to indicate to the parties that this was an issue I had argued on several occasions. On two occasions, I was assured that this fact did not present difficulty.

34. This matter came on for argument initially on the 15th day of October, 2007. At the conclusion of the argument, I drew the attention of the parties to the fact that the Supreme Court had heard a case which appeared to raise somewhat similar issues and had reserved judgment, the case of *O'Brien v. The Special Criminal Court and the Another* [2007] I.E.H.C. 45 In these circumstances it was agreed that the arguments would not be finalised until after the judgment of the Supreme Court became available.

35. Section 10 of the Criminal Justice Act, 1984 provides as follows:

> 10. (1) Where a person arrested on suspicion of having committed an offence is detained pursuant to section 4 and is released without any charge having been made against him, he shall not -
>
> (a) be arrested again for the same offence, or
>
> (b) be arrested for any other offence of which, at the time of the first arrest, the member of the Garda Síochána by whom he was arrested suspected him or ought reasonably to have suspected him, except on the authority of a justice of the District Court who is satisfied on information supplied on oath by a member of the Garda Síochána not below the rank of superintendent that further information has come to the knowledge of the Garda Síochána since the person's release as to his suspected participation in the offence for which his arrest is sought. A person arrested under that authority shall be dealt with pursuant to section 4.
>
> (2) Notwithstanding anything in subsection (1), a person to whom that subsection relates may be arrested for any offence for the purpose of charging him with that offence forthwith".

36. On the 1st of September, 2005, the applicant had been arrested and detained under the provisions of s. 4 of the Criminal Justice Act, 1984. Therefore he could only be rearrested for the purpose of charging him forthwith with the offence involved forthwith. It should be noted what s. 10(2) says and also what it omits not say. It provides that a person maybe arrested for the purpose of charging him with the offence (emphasis added). The section does not provide that a person arrested maybe arrested, lawfully a second time, if he is in fact charged with the offence forthwith.

37. In this case it is not in dispute that the purpose of the appointment arranged for Anglesea Street Garda Station was to facilitate charging. Indeed as much was stated by the applicant in his comments at paragraph 9 of his affidavit of the 24th December, 2006 where he says bluntly "I say that the purpose of this appointment was to charge your deponent". If there was any doubt about this aspect, then that doubt is removed when one comes to consider the supplemental legal submissions on behalf of the applicant filed in the aftermath of the *O'Brien v The Special Criminal Court and Another* case. There, at paragraph 1, it is stated "it will be further recalled that on the 27th October 2005 the applicant was rearrested by prior appointment with the prosecuting member Detective Garda Murray at Anglesea Garda Street Station at 16.30 hours pursuant to s. 10(2) of the 1984 Act for the purpose of being charged forthwith with an offence contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001 and taken to the Bridewell Garda Station where he was eventually charged at 17.45 hours following a period of detention of approximately one hour" (emphasis in original). The same point is made at para. 5 of the written submission which states as follows "As outlined above, the applicant was rearrested pursuant to s. 10(2) of the 1984 Act for the purpose of being charged forthwith" (emphasis in original). As I have already indicated the applicant was not charged in Anglesea Street Garda Station but instead was brought from there to the Bridewell Garda Station which is some ten minutes away to be charged there because the Bridewell was the station from which the investigation was conducted. At the Bridewell station, a delay in charging occurred when the printer malfunctioned as a result of which Detective Garda Murray found it necessary to go from the Bridewell to Anglesea Street to have the charges printed and then to return from there to the Bridewell. The effect of all of this is that the applicant spent some fifty-five minutes in a cell. Much attention has focused on this period during which the applicant was placed in a cell, and it has been the subject of trenchant criticism from Mr. Sheehan on behalf of the applicant. These criticisms have focused on the duration of the detention, 55 minutes, and the nature of the detention i.e. in a cell. As Mr. Sheehan puts it rather succinctly the criticism is of both the quantity and quality of the detention. The affidavits before the Court suggest that, as a matter of routine, persons who are at the station and about to be charged with an offence are placed in a cell until the paperwork is ready. As Detective Garda Murray puts it in his affidavit of 5th April, 2007 such persons are not allowed to roam freely around the Garda Station. It appears that the effect of the printer's malfunction was that the applicant was detained for approximately 25 minutes longer than in the normal course of events. For my part, I would deprecate any suggestion that persons should be placed in a cell as a matter of routine or, indeed, a matter of administrative convenience. If an individual represents no security risk then I can see no reason why it would be necessary to place him in a cell and why he could not be simply left to await developments in the public area of the station. In this case, the applicant had made himself available for arrest and charging by appointment and it must have been obvious to all concerned that he was going to be released on station bail. In these circumstances, I believe it would have been preferable if he had simply been left in the waiting area or some other suitable location, such as an interview room that was not in use.

38. On the 24th day of October, 2007, the Supreme Court delivered judgment in the case of *O'Brien v. The Special Criminal Court and Another* which was pending when this case was first argued before me. Mr. O'Brien was a person who was charged before the Special Criminal Court with the offence of membership of an unlawful organisation. He was originally detained pursuant to the provisions of s. 30 of the Offences Against the State Act, 1939, as amended, and, during the course of that detention, the Gardaí received a direction from the D.P.P. that he should be brought before the Special Criminal Court to be charged with the offence of membership.

39. On receipt of this direction, Mr. O'Brien was released from his s. 30 detention but was immediately rearrested under s. 4 of the Criminal Law Act, 1997.

40. This rearrest took place at 8.35 p.m. on the 8th April, 2007, Holy Thursday evening and Mr. O'Brien was brought before the Special Criminal Court to be charged on the following day, Good Friday, some 15 hours after the rearrest had taken place.

41. The judgments of the Supreme Court clearly establish that references to charging "forthwith" impose a more exacting or stringent obligation than would have been the case had the words "as soon as practicable" being used. Indeed, Fennelly J. specifically commented that he found it impossible not to regard the timetable achieved as being as soon as practicable.

42. The factual differences between the *O'Brien* case and the current case are clear. When rearrested on Holy Thursday evening Mr. O'Brien was not being arrested for the purpose of being charged forthwith but rather he was being arrested so that he could be detained overnight prior to being brought to the Special Criminal Court on the following day. Ms. Phelan has informed me that on Monday the 10th December, 2007. In a case called *O'Reilly v. The D.P.P.* O'Neill J. held that a delay in charging of one hour was such that the charging was not "forthwith". No report of what seems to have been an ex tempore ruling is available but it seems that the additional factors present in this case, of the printer not working leading to an unexpected and unintended delay, did not apply.

43. In this case it has been expressly accepted on a number of occasions that the accused was arrested for the purpose of being charged forthwith and while arguably he was not actually charged forthwith he was thereafter charged as soon as practicable.

44. It must be stressed that the present case is not one where there was a lengthy delay post arrest, or a delay which was unexplained which might lead to the inference that the arrest was nor for the purpose of charging forthwith. Here the delay was of limited duration and an explanation was offered to the applicant at the time.

45. In my view it is not correct that because somebody has been placed in a cell for 55 minutes, which could have been avoided, the District Court, as a result, loses jurisdiction to try the person. Whatever arguments that might conceivably arise when the person was brought before the court immediately following the detention, as a person in custody, there is no reality to the argument when, as here, the individual was released on station bail and subsequently presented himself at the District Court.

46. The view I have formed appears to me to be in accordance with a considerable line of authority. In *State (Attorney General) v. Judge Fawsitt* [1955] I.R 39 at p. 43 Davitt P. commented as follows:"

> "The usual methods of securing the attendance of an accused person before the District Court, so that it may investigate a charge of an indictable offence made against him, is by way of arrest or by way of formal summons, but neither of these methods is essential. He could, of course, attend, voluntarily, if he so wished; so far as the exercise of the Court's substantive jurisdiction is concerned it is perfectly immaterial in what way his attendance is secured so long as he is present before the District Justice in Court at the material time. Even if he is brought there by an illegal process, the Court's jurisdiction is none the less effective."

47. This passage was quoted with approval by Gannon J. in *D.P.P. v. Stuart Clein* [1981] ILRM 465 who went on to reach a similar conclusion, though it must be said, as Mr. Sheehan has pointed out, that the case may not be directly in point as it involves a summons as distinct from a charge sheet. However, the case of *D.P.P. (McTiernan) v. Bradley* [2000] 1 I.R. 420 was a charge sheet case where it was common case that the arresting Garda did not have the power of arrest he purported to exercise. Having reviewed a number of authorities, McGuinness J. concluded that in cases where proof of a valid arrest was not an essential ingredient to ground a charge, the jurisdiction of the District Court to embark on any criminal proceeding was not eafected by the fact that an accused person had been brought before the court by an illegal process and the court should consider whether there has been a deliberate and conscious violation of the accused's rights, prior to embarking on the hearing. While there is no requirement that violation should be malicious or mala fides, before a violation will be regarded as conscious and deliberate, I do believe that concept is far distant from a malfunctioning printer.

The CCTV issue.

48. In truth, there is little disagreement between the parties on the legal principles applicable. Following on from the decisions of the Supreme Court in *Braddish v. D.P.P.* [2001] 3 I.R. 127 and *Dunne v. D.P.P.* [2002] 2 I.R. 305 it is now beyond doubt that arising from their unique investigative role and as a necessary corollary of their right to seize evidence, that it is the duty of the Garda Siochána to seek out and preserve all evidence having a bearing or potential bearing on the issue of innocence or guilt of a suspect and this principle extents to the preservation of articles which may give rise to the reasonable possibility of securing such evidence.

49. The extent of that duty is to be interpreted realistically and in a fair and reasonable manner having regard to the facts of an individual case. Where it is alleged that the Gardaí have been in breach of that duty it is necessary to demonstrate a real risk, as distinct from a risk which is merely remote or fanciful or theoretical, that a fair trial could not take place. In essence as some of the cases put it, this requires the applicant to engage with the evidential framework. Two Supreme Court decisions delivered on the same day but with very different outcomes give a good indication of how these principles apply in practice. These are the cases of *James Bowes v. Director of Public Prosecutions* [2003 2 I.R. 25and the case of *Deirdre McGrath v. Director of Public Prosecutions*. The case against James Bowes related to the alleged possession of heroin for supply. The prosecutions case was that the applicant had been stopped at James' Street, while driving a Honda Accord car and that the car was searched with a substantial quantity of heroin found in the boot of the car. The Gardaí took possession of the car and disposed of it about a year later. On the morning when the case was listed for trial in the Dublin Circuit Court, counsel on behalf of the applicant applied in the High Court for leave to seek judicial review. In the case of Deirdre McGrath the applicant was the driver of a motor car which was involved in a road traffic collision involving a motor cycle where the motor cyclist lost his life. From an early stage, the applicant's solicitor who had consulted counsel in this regard, sought facilities for an engineering inspection of the motor cycle. However before this could happen the motor cycle was disposed of. There are a number of significant differences between the two cases including the time at which an inspection was sought. For present purpose, the most significance is the degree of relevance which an examination of the respective vehicles would have in the view of the Supreme Court. In the case of Bowes, the prosecution's case did not turn on the car itself, nor in the manner of its driving, but on the proposition that drugs were found in the boot of the vehicle immediately after the defendant had been driving it. In contrast, the case against Mrs. McGrath related directly to the manner of her driving. The accident was unwitnessed and the applicant's efforts to reconstruct the circumstances of the accident with expert advice floundered as the consulting engineer engaged commented that he was unable to ascertain the collision configuration i.e. the relative direction of movement of the vehicles because he did not have access to the motor cycle. In a situation where the case against Mr. Bowes depended on the finding of the drugs in the car as well as certain alleged oral admissions, the Supreme Court was of the view that there was no reality to the complaint and as it was put, considered that Mr. Bowes's application fell at the first hurdle. In contrast, the Supreme Court was of the view, in the McGrath case that the importance of a technical examination of both vehicles was obvious and that in the

circumstances Ms. McGrath had suffered the loss of a reasonable prospect of obtaining evidence to rebut the case made against her by reason of the Gardái having parted with the motor cycle.

50. I will return to the question of the suggested significance of the CCTV footage. At this stage I will simply record the fact that the solicitor on behalf of the applicant moved promptly and subsequently with great persistence to obtain access to the CCTV footage. This might suggest that in the view of the applicant's advisors the material had a potential relevance, and this a factor I must bear in mind.

51. In this case while the grounding affidavit dealt very fully indeed with the request for access to the CCTV footage and with what was capable of being provided from a technical point of view, little enough information is provided as to the suggested relevance of the material in issue, and indeed the treatment of this aspect is rather coy. However, by reference to the affidavits exchanged and to the oral submissions in court it is possible to identify the relevance contended for.

52. On the date of the alleged offence, the applicant was working as a cashier at the Tudor Leisure Centre. It appears the reference to the leisure centre is somewhat euphemistic and that the premises are in the nature of an amusement arcade. A fellow employee was working the same shift. The arcade owner identified what he believed to be a shortfall in the takings and reported this situation to An Garda Síochána. Initially, the employer seems to have regarded the co-worker of the applicant as a suspect but at the trial in the District Court rejected a suggestion from the solicitor for the applicant that this co-worker might have been responsible for the theft.

53. Some 3 minutes and 36 seconds of footage comprising seven individual clips were made available to the applicant and it is accepted that, certainly viewed in isolation, this footage is very damaging from the perspective of the applicant in that it shows him in his cashier's kiosk on three separate occasions taking currency notes from the till and placing these notes in his left trouser pocket. However, on behalf of the applicant it is submitted that while the clips at first sight might appear very suspicious this not really so. Is said that there was in existence a practice whereby from time to time when the cash float in the till was insufficient to meet a payout to a winning customer, employees would loan to the cash float on a temporary basis or would exchange small denominations for large denomination notes and the staff members would then repay themselves at a later stage. It is of significance that in the course of the District Court proceedings a fellow employee, Mr. Camebridge, gave evidence in support of the applicant to this effect and his evidence was uncontroverted.

54. It is suggested that the video evidence, if available in its entirety might show suspicious conduct on the part of the co-worker and/or bolster the evidence of Mr. Cambridge and so serve to dispel the suspicion that would otherwise arise on viewing isolated extracts.

55. I am afraid I find the argument advanced to establish a potential relevance for the non-retained video material somewhat unconvincing and contrived.

56. While I accept, of course, that it is not for the Gardaí to decide that evidence prima facie relevant would not assist the defence and therefore need not be retained, I find it very hard to see how the video material could have the relevance contended for.

57. Even if the video showed additional instances of the applicant taking money from the till and placing it in his trousers, it is hard to see how this could assist the defence. Again, if a co-worker was seen to engage in similar conduct, it is hard to see how this would be of assistance, more particularly given that originally it was suspected that the applicant and the co-worker had together been helping themselves to the contents of the till. In passing, one cannot avoid commenting that it seems unlikely in the extreme that any such activity was caught on video, since any such activity would have been of intense interest to the Gardaí. They would have been likely to view any such activity involving the applicant as supporting their investigation and any activity of a suspicious nature involving someone other than the applicant as meriting investigation. If the CCTV material for the 21st August, 2005, has the relevance contended for it would seem that the same arguments as to relevance can be made in respect of every shift worked. I am of the view that requiring the retention of footage when no crime is being committed would be a radical and unwarranted extension of the obligations imposed on the Gardaí.

58. While I do not believe that the failure to obtain or make available the entire video deprives the applicant of his right to a fair trial, it is obvious that there are issues as to the weight to be attached to that video evidence, more particularly this is so in the light of the evidence given on behalf of the applicant before the court in relation to work practices which might provide an innocent explanation for what would otherwise seem to be suspicious behaviour.

59. In the District Court, and if the matter goes on appeal to the Circuit Court the issue is simply whether the explanation that has been offered might reasonably be true. That, this is the case has a relevance as to the significance to be attached to the retained footage. However, issues as to weight and indeed issues as to admissibility are matters for the court. One can imagine that arguments would be addressed to the court of trial suggesting that little weight should be placed on the extracts available given that that it is not possible by reference to the balance of the footage for the evening in question, or indeed footage for other days, to say whether the activity shown was routine or highly unusual for the workplace concerned. These are not issues which require or justify intervention of this court by way of judicial review. Accordingly I would refuse relief on this ground.

The failure to adjourn.

60. There remains, the third issue relating to the failure of the judge of the District Court when requested to do so, to adjourn the proceedings. I can dispose of this argument very briefly. In my view, a judge of the District Court who has embarked on a case enjoys a wide discretion as to whether to adjourn , when requested to do so, or whether to proceed with the case to a conclusion. I am entirely satisfied that the judge in this case was acting well within his discretion in deciding to proceed.

61. In summary I am of the view that the applicant has not made out any entitlement to judicial review and I will dismiss the application leaving the applicant to his remedy by way of appeal in the Circuit Court.