

## THE HIGH COURT

Record Number: 2005 No. 671 SS

BETWEEN

RICHARD ATHERTON

ACCUSED

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

**Judgment of Mr Justice Michael Peart delivered on the 21st day of December 2005**

1. This is a case stated to this Court by District Judge Bryan Smyth arising out of the prosecution of the accused person on the following charge, namely that he:

*"did on the 19th May 2003 at 12 Island View, Malahide, Co. Dublin in said District Court Area, without lawful excuse damage property, to wit, mature hedging plants belonging to Colm Hughes intending to damage such property or being reckless as to whether such property would be damaged."*

2. The question posed in the Case Stated is:

*"If the complainant arranges for continuous video surveillance of the front of his private residential property from the upstairs window of a neighbour's house across the street which results in video evidence that incidentally includes adjacent frontage of the accused's private dwelling and its curtilage which can be seen from the public thoroughfare, is the evidence obtained:*

*(i) in breach of any constitutional rights of the accused;*

*(ii) unlawfully, and*

*(iii) if the answer to (i) and/or (ii) is in the affirmative, is the evidence admissible in a criminal trial?"*

3. In his Case Stated the District Judge has stated that when the case came on before him there was evidence from a Garda that the complainant had approached him complaining that his neighbour, the accused had cut his hedge without his permission and had caused damage to it, and that when the Garda interviewed the accused and put certain questions to him about the complaint, the accused had given an account of builders and landscapers who caused some damage before he stopped them, and was unable to account for further damage. According to the Case Stated, it appears that the Garda stated also that at that stage he showed the accused some video footage, and the Garda began to give evidence of what was appearing in the video, when Counsel for the accused objected to the introduction of an account of what was on the video.

4. It appears also that in his evidence the Garda stated that when he was first approached by the complainant about this damage he said to the complainant that there was not enough evidence against the accused to bring a prosecution, and he also said that video evidence was then discussed, and that in due course the complainant returned to the Garda Station with video footage purporting to contain footage of the alleged unlawful conduct of the accused.

5. From the Garda's evidence it appeared that the complainant had arranged for a fixed video camera to be set up in the upstairs front of a house across the road from the complainant's house, and which is attached to the accused's house. They are adjoining semi-detached houses across the road from where the video camera was set up. The camera was set up to record a single frame which captured the view of the front of the accused's house including his front door, his front driveway, his front garden and that part of the garden hedge between his front garden, and the front garden of the complainant's house. This video camera was set up on a continuous 24 hour basis. The Garda stated in his evidence that footage captured on this video included being able to see inside the accused's front door when it was opened, but that this was what he called 'incidental footage'. He also stated that if the curtains were open one could see inside the front windows, and when asked, the Garda confirmed that 70% of the video frame consisted of the front of the house, with the remainder consisting of the garden and the hedge, but he stated that the front of the house was incidental. The Garda also stated that everything that is seen on the video camera was capable of being seen from the street itself, albeit that one might have to stand up on a step-ladder to do so.

6. Against this background the accused seeks to argue that the video footage or evidence of what it contains should not be admissible on the ground that it has been obtained in breach of the accused's constitutional rights, inter alia, the right to privacy attaching to the right to the inviolability of the dwelling (including its curtilage) referred to in Article 40.5 of the Constitution as follows:

*"The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law."*

7. Michael O'Higgins SC has submitted that even where, as may be the situation in the present case, the video footage identifies the applicant as being the person causing damage to the complainant's hedge, the manner in which that evidence has been garnered must be examined by the Court in just the same way as an inculpatory statement made by an accused person can be examined as to its admissibility. He submits that in such circumstances where there has been a breach of a person's constitutional rights in the manner in which the evidence has been obtained, this Court should intervene and declare it to be inadmissible at trial, unless there are some excusing circumstances which would allow into evidence that which would otherwise be excluded. Such circumstances in his submission would have to be extraordinary and excusing and in that regard, Mr O'Higgins has referred to the decision in *The People (DPP) v. Kenny [1990] 2 IR, 110*. He has also referred to the judgment of Denham J. in *D. v. The DPP* in which she stated that in a hierarchy of rights the right to a fair trial was a superior right.

8. Mr O'Higgins has referred the Court also to a Report of the Law Reform Commission Report in 1998 where that body considered, inter alia, the right to privacy and the surveillance of the home or other private premises, and in particular to the fact that the report refers to the fact that the right to freedom from surveillance is at its closest to being absolute when a person is at home. This is in contrast to a reduced right to privacy when a person is in a public place. I note one paragraph in this report and contained in written submissions referred to by Mr O'Higgins, and which appears at p.27, para. 2.13 of the report states:

*"...Persons who are in public places must accept that they are subject to the ordinary and natural incidents of everyday communal living. Thus the taking of casual photographs in a public place should not normally be held to be an invasion of a the privacy of a person who happens to be captured by such a photograph merely because he or she is present in that place at the relevant time."*

9. Mr O'Higgins referred to a further passage in that part of the report dealing with the question of the inviolability of the dwelling, as follows:

*"..Hence, although the protection afforded by the right attaches to a dwelling, it primarily avails persons who inhabit or simply visit dwellings. Such persons need not have any property interest in a particular dwelling to benefit from this right. This points to a presumption of a very strong protection of privacy within the confines of a 'private dwelling'. The right would seem to be equally capable of violation whether by physical intrusion or by using long-range audio or video devices." (emphasis added)*

10. Mr O'Higgins has submitted that where a person is subjected to surveillance while at home, the objective of detection or prevention of crime must, be measured against the right of a person to privacy as enshrined in Article 40.5 of the Constitution the Constitution, based on the inviolability of the dwelling. He submits that this extends to the right to exclude the watching eye assisted by video recording equipment.

11. Mr O'Higgins has referred the Court to the judgment of Finlay C.J. in *Kane v. Governor of Mountjoy Prison* [1988] I.L.R.M. 724 – a case involving an extreme amount of overt surveillance of the applicant whose movements around the streets of Dublin were being closely followed by members of An Garda Síochána in anticipation of the issue of an extradition warrant. He points out also that the surveillance was in a public place and not the private dwelling of the applicant. In that case the efforts of the Gardai to keep track of the applicant were regarded as reasonable in the circumstances of that case, but Mr O'Higgins submits that it cannot be assumed that such extreme measures would always be regarded as reasonable.

12. In the context of covert surveillance, Mr O'Higgins referred to *Kennedy v. Ireland* [1987] IR 587, wherein it was held that a deliberate and conscious and unjustified interference with private telephone communications was a breach of the constitutional right to privacy, albeit that in some circumstances, which were found not to exist in that case, the exigencies of the common good may require and justify such an intrusion and interference with the right.

13. He refers also to the lack of any statutory regulation of the video surveillance of a person in his/her home, and that there is no procedure by which any application can be made to a court for permission to carry out such video surveillance, such as exists in relation to obtaining a search warrant. Mr O'Higgins has submitted that since the coming into force from the 31st December 2003 of the European Convention on Human Rights Act, 2003, this Court is bound by the provisions of s. 2 thereof which provides as follows:

*"2. – (1) In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention."*

*(2) This section applies to any statutory provision or rule of law in force immediately before the passing of this Act or any such provision coming into force thereafter."*

14. He submits that even though the offence in this case is alleged to have taken place on the 19th May 2003, it is the date on which the matter came before the National Court, i.e. the District Court, namely the 21st January 2004 which is relevant, and that therefore the provisions of Article 8 of the Convention, and the case-law of the European Court of Human Rights is relevant for consideration, and in this regard he has referred to a number of judgments of that Court. I do not propose setting out that case-law in any detail. Mr McDermott for the respondent has submitted in answer to this aspect of Mr O'Higgins's submissions, that since the alleged offence occurred before the Act came into force, the Convention has no relevance to the action of the complainant in carrying out the video surveillance, and that its relevance is confined at best to the obligation upon the District Judge under that Act, namely as stated in s. 4 of the Act, to take judicial notice of the Convention provisions and of the judgments etc. of that Court, and that in this case it is clear that the District Judge has done that since he has specifically referred to this case-law in his Case Stated. Mr O'Higgins has on the other hand submitted, nevertheless that this Court should look at the case-law of that Court for guidance when determining whether in this case the surveillance of the applicant was in breach of his rights.

15. Referring to the Garda's evidence that 70% of the video footage was of the front of the applicant's house and 30% of the garden and hedge, Mr O'Higgins submits that it cannot simply be regarded as "incidental" since presumably the intention of the complainant in setting up the camera in the way he did, was to capture footage not only of the person cutting the hedge in question, but also of that person, assuming it was going to turn out to be the applicant, emerging from and returning to the house, via the front door. He submits therefore that the capturing of the front of the applicant's house was not incidental, but was deliberate. That submission is relevant to the evidence of the Garda also that when the front door of the house was open, one could see into the house itself, as well as of course through any windows which did not have its curtains drawn over. These matters are submitted to be very relevant to the question of the breach of the applicant's right of privacy in his home.

16. Paul Anthony McDermott BL for the respondent resists this application. He refers to the fact that this is a consultative case stated, and not an appeal by way of case-stated from the decision of the District Judge. In that regard he refers to findings of fact and of law made by the learned judge, such as that the filming of the front of the applicant's house was "incidental" to the taping of the hedge, and that on the facts of the case the interests of the prevention and detection of crime outweighed any right of the accused in respect of his privacy. He also submits that the judge correctly performed a balancing of rights, and that unless the accused is contending for an absolute right rather than a right that was qualified, the judge was correct in deciding that the evidence could be used. Mr McDermott submits that the only basis on which the video evidence could be excluded is if it represents the fruits of some unlawful and unconstitutional conduct by the complainant. He also refers to the fact that it was not in fact the accused person who was the object of the surveillance, but rather the hedge owned by the complainant.

17. Mr McDermott submits that the real issue is to consider what was the purpose of this filming, and that it was to film the hedge in order to see who was cutting it. That is also the conclusion, he submits, of the learned District Judge when he concluded that the footage of the front of the house was incidental, albeit constituting 70% of the frame. He submits that there can be nothing unlawful about a person filming his own property. In relation to Mr O'Higgins submission related to the decision in *DPP v. Kenny*, Mr McDermott submits that the decision in *Kenny* was in relation to the manner in which the Gardai perform their responsibilities, and that such a strict rule as was laid down in that decision should not be extended to a situation between two neighbours as in the present case.

18. Mr McDermott submits also that even if there has been some incidental breach of the accused's constitutional rights, which of course he denies, it is also submitted that for that to render the evidence inadmissible there would have to be a causal link between the breach of the right and the evidence obtained. In that regard, he submits that in the present case what was being filmed was the hedge the property of the person doing the filming, and that any invasion of the rights of the accused by filming the front of his house did not result in the obtaining of the film of the hedge being cut. He refers in that regard to the judgment of Finlay C.J. in *The People (DPP) v. Healy* [1990] 2 IR 73, wherein he stated:

*"The vital issue which arises, therefore, if a breach of the right of access to a solicitor has occurred as a result of a conscious and deliberate act of a member of the Garda Síochána, is as to whether there is a causative link between that breach and the obtaining of an admission."*

#### **Conclusions:**

19. I am satisfied that the taking of video footage of the hedge and in so doing the front of the accused's house is not an act which constitutes an unconstitutional invasion of the right to privacy as contended by Mr O'Higgins. First of all, it is obvious that the front of the accused's house is something which is visible from the public road – perhaps only with the use of a ladder, but nonetheless visible. It is certainly visible from the upstairs of the house opposite, from which the footage was taken. In my view there is no meaningful distinction between the evidence of what was happening to the hedge in the garden opposite that house being given in the form of video footage, and that very same evidence being given by the owner of the house opposite if he arranged things so that he was standing at the same window as the camera was set up at and observing himself what was happening. He would undoubtedly be permitted to give evidence viva voce of anything which he observed happening in the garden into which he was looking, and it could not possibly be seriously contended that if that person also saw the accused re-entering his house through the front door, and while the door was open saw also into the hallway, that in some way that person had breached the accused's right to privacy by seeing what he saw. The camera has done no more and no less than that.

20. Of course, a different view might easily be taken if the act of setting up the camera in the required position involved a trespass upon the property of the person to be observed. That is a different matter altogether. But that is not the position in this case. The point was made by Mr O'Higgins that this camera in the way it was set up had the capacity to see into rooms at the front of the accused's house if the curtains were open. But in my view the problem with that submission is that the same arises if a person were to place himself at the window opposite and in the event that the owner happened to leave the curtains open.

21. I do not believe either that the accused's application is assisted by the evidence given by the Garda that up to 70% of the footage contained in the frame of the video is taken up with the front of the accused's house, rather than the hedge itself. One way or another I cannot see that there has been any breach of the accused's right of privacy in relation to his dwelling and its curtilage – especially in the absence of any trespass or other unlawfulness. It is not necessary in these circumstances to consider whether the balancing of the rights was correctly undertaken by the District Judge was correctly carried out. There simply has been no breach as far as I can see, and therefore no justification of a breach need be investigated and considered.

22. I therefore answer the questions posed by the learned District Judge as follows:

(i) the evidence by the complainant by means of the video surveillance referred to is not in breach of the constitutional rights of the accused, and

(ii) same has not been obtained unlawfully.

Question (iii) therefore does not arise.

23. The submissions based on the report of the Law Reform Commission are really not relevant to this Court's consideration. They are of interest certainly, but such a report contains very valuable expressions of views and opinions as to what if any legislative changes ought or could be made by the Oireachtas into the law relating to privacy rights, but that is all. The report is not in any way persuasive in the present situation.