

**THE HIGH COURT
JUDICIAL REVIEW**

2006 1313 JR

BETWEEN

C. D.

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of O'Neill J. delivered on the 20th day of March, 2009

The applicant is charged with a number of offences arising out of an incident that occurred on the footpath immediately outside the Kildare Street entrance to Leinster House on 5th August, 2005, in the afternoon at about 2.45pm.

It is alleged that the applicant sexually assaulted Garda Dympna Bourke, contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990, as amended, by trying to grab Garda Bourke between the legs. Garda Bourke was on protection post duty at the entrance to Leinster House at the time. She, it is alleged, fended off the attempt by the applicant by pushing his hand away, with the result, it is alleged, that the applicant's hand brushed off Garda Bourke's thighs.

In addition, the applicant is charged with assault on Garda Bourke, contrary to s. 19 (1) of the Criminal Justice (Public Order) Act 1994.

The indictment raised against the applicant contains four Counts.

Count 1 is in respect of the charge of sexual assault.

Count 2 is for the charge of assault contrary to s. 19 of the Criminal Justice (Public Order) Act 1994.

Count 3 relates to threatening and abusive and insulting behaviour in a public place, contrary to s. 6 of the Criminal Justice (Public Order) Act 1994.

Count 4 alleges an offence of violent behaviour in a police station, contrary to s. 15 of the Police Act 1842. Count 4 is separate to the Leinster House incident and Counts 1, 2, and 3 relate to that incident.

The applicant has entered guilty pleas to Counts 2 and 3, and pleas of not guilty to Counts 1 and 4. The applicant's trial in respect of Count 4 was fixed for 29th November, 2006, in the Dublin Circuit Criminal Court and the applicant was remanded for sentence on Counts 2 and 3 to the Dublin Circuit Criminal Court on 20th January, 2007.

The applicant vehemently denies the sexual assault charge and in these judicial review proceedings seeks an order restraining the respondent from pursuing the prosecution of the applicant on the sexual assault charge.

Leave was granted by this court (Peart J.) on 6th November, 2007, to pursue that relief by way of judicial review.

The ground on which the applicant seeks this review is that by reason of the loss of video footage from one camera, he cannot now get a fair trial. In this regard, the applicant relies on the line of authority stemming from the judgments of the Supreme Court in the case of *Braddish v. the DPP* [2001] 3 I.R. 127.

The respondent resists that case and, in addition, contends that there was delay on the part of the applicant in commencing these proceedings such that the reliefs sought should be refused.

I propose to deal with the substantive issue first.

The evidence establishes that the incident outside Leinster House was captured on CCTV by two cameras; one of these (Camera 1) was positioned close to the pedestrian crossing and facing in towards the entrance to Leinster House. The other camera (Camera 29) was located midway outside the National Museum, looking down Kildare Street and covering the entrance to Leinster House.

As a result of error on the part of the respondent in downloading footage from Camera 29, the incorrect time segment was downloaded with the result that the footage from this camera does not include the lead-up to the incident. Still photographs are available from this camera and are exhibited in the Book of Exhibits with stills from Camera 1 as well.

The relevant footage from Camera 1 was recovered and is intact and available for the trial. This was shown during the hearing of this judicial review application and it shows the entire incident.

Evidence on behalf of the applicant suggested that having regard to the recording rate on Camera 29, some stills were lost. In particular, it was urged on the court that the still immediately preceding Photograph 1 in the exhibit in the Book of Evidence and the still immediately after Photograph 1 were lost. The respondent is not in a position to deny that there was such a loss.

It is the applicant's case that the loss of these two still photographs is crucial because it is the prosecution's case that the sexual

assault is captured in Photograph 1, and, hence, the immediately preceding still which would have been taken a half a second before, would demonstrate if the conduct of the applicant was consistent with the allegation of sexual assault. Similarly, the still photograph immediately after Photograph 1, again, a half a second later, would also demonstrate whether the conduct or movements of the applicant and Garda Bourke showed part of or the aftermath of the alleged sexual assault or were consistent with it.

In the submission of the applicant, the absence of that photographic evidence puts the applicant at risk of an unfair trial because it is submitted that this evidence could be used by the applicant to challenge and defeat the evidence given by Garda Bourke.

There were two civilian witnesses and one garda witness to the incident, or parts thereof. It is clear from their statements that they not see the sexual assault as described by Garda Bourke.

I have viewed the footage from the other camera, *i.e.* Camera 1, which shows the entire incident. It shows the applicant approaching Garda Bourke. He approaches from the Trinity College side and goes around Garda Bourke with the result that she turns from facing outwards towards Kildare Street to facing up Kildare Street towards Stephen's Green and when they become stationary, Garda Bourke is facing the applicant. Both stand at what appears to conversation distance, with the applicant's back facing up Kildare Street. The result of this is that the applicant's back faces Camera 29.

In Photograph 1, which was taken by Camera 29, Garda Bourke is partially obscured from Camera 29 by the applicant. Having regard to the manner in which the applicant approached Garda Bourke, as demonstrated from the footage from Camera 1, it would seem probable to me that the photo still immediately prior to Photograph 1 would have depicted a scene in which the applicant was more directly between the camera and Garda Bourke and in all probability, obscuring most of her body. It would be very unlikely, in my view, that in that situation, the still would have revealed any hand movement of the applicant and particularly of the right hand, between the applicant and Garda Bourke.

When one looks at the position of the applicant and Garda Bourke in Photograph 2, it is apparent that the applicant is in a very similar position to that in Photograph 1. It is clear that very little movement on his part has occurred as between Photograph 1 and Photograph 2. Bearing in mind that the front right side of his body, including his arm and, perhaps, right hand, are obscured in both photographs from the camera, there is little reality, in my view, in suggesting that a photograph taken in between these two photographs *i.e.* a half a second in between, would reveal anything materially different concerning the behaviour of the applicant or his movements.

Garda Bourke is likewise standing in the same position in Photographs 1 and 2, but in Photograph 2, she has pivoted her torso outwards towards the street and presented her left side to the applicant. One cannot see what her left hand is doing because it is obscured from the camera by the applicant's body. She has raised her right hand to her mouth. Again, having regard to the relatively little change in her body position in between the two photographs, I am not satisfied that a photograph in between at a half a second interval would demonstrate anything materially different. It is quite clear from the photographs that the position of Garda Bourke's feet and the applicant's, do not change at all from Photograph 1 to Photograph 2. Also, their position adjacent to the wall or pillar which is immediately beside them, does not change from Photograph 1 to Photograph 2.

Whilst I would readily accept, as is demonstrated in the photographic sequences put in evidence by the applicant, that significant movement can take place in a half a second interval, in this case, having regard to the absence of any significant changes of position on the part of either Garda Bourke, or the applicant, it would seem to me to be highly improbable that there was any significant movement in the time in between these two photographs, or that it would have been captured by Camera 29, bearing in mind the degree of obscuring created by the position occupied by the applicant.

In short, I have come to the conclusion that the two still photographs which the applicant contends are missing would not, in all probability, demonstrate any material changes to the images depicted in Photographs 1 and 2 and would not, in my opinion, be likely to furnish evidence that would impact on the guilt or innocence of the applicant, or that would assist the applicant in his defence. Therefore, I have to come to the conclusion that the absence of these stills does not prejudice a fair trial.

On the question of delay on the part of the applicant, it would seem to me that time, for the purposes of O. 84, began to run against the applicant from 15th May, 2005, when the applicant was told, unequivocally, of the loss of footage.

The applicant was obliged to act promptly, and at any rate within a period of three months from that date. This would have taken the applicant into the long vacation. Ultimately, the application for judicial review was made on 6th November, 2005. If one excludes the long vacation, this is approximately three weeks outside the three-month time limit, a lapse of time that is not adequately explained.

Were it the case that the applicant was in a position to satisfy me that there was a real risk that he would not get an unfair trial, I would conclude that he should have an extension of time. In light of my conclusion that the applicant has not demonstrated that there is a risk of an unfair trial, it necessarily follows that I should refuse an application for an extension of time.

For the reasons set out above, I must refuse the reliefs sought.