THE COURT OF APPEAL

Appeal No. 2015/223

Kelly J.
Irvine J.
Hogan J.

BETWEEN/

VALERIU SIRBU

APPLICANT/RESPONDENT

- AND -

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT/APPELLANT

JUDGMENT OF Mr. Justice Hogan delivered the 9th day of November 2015

1. This is an appeal from the judgment of Baker J. delivered on 20th March 2015 whereby she granted the applicant, Mr. Sirbu, an order of prohibition restraining his prosecution on indictment: see *Sirbu v. Director of Public Prosecutions* [2015] IEHC 204. The fundamental question is whether the unavailability of missing closed-circuit television ("CCTV") evidence would render the trial of the applicant unfair.

2. Because this appeal presents slightly different factual issues from those not uncommonly found in "missing evidence" cases of this type, it is important to summarise the factual background to this appeal.

3. The applicant is currently facing a single charge of assault under s. 3 of the Non-Fatal Offences against the Person Act 1997 before the Circuit Court. The charge itself arises from an incident which is said to have taken place at a workplace Christmas party on 14th December 2012 which was held at a particular licensed premises. The applicant maintains that he was challenged by the injured party to go outside whereupon he says that he was set upon and attacked by the colleague. He acknowledges that in the ensuing altercation that he struck the colleague twice and kicked him in the head, but he says that he did this in self defence. The colleague was himself seriously injured as a result of the assault and was subsequently hospitalised. The colleague has, however, no memory of this altercation and there were no other witnesses to the attack.

4. It is accepted, however, that the incident was captured by the CCTV positioned outside the public house. Two investigating members of An Garda Siochána, Garda Ciara Geraghty and Garda Eamonn McFadden, called to the licenced premises on the following day and viewed the footage. The footage was also viewed at the time by a Mr. Tony Rice, the finance director of the company which employed both the applicant and the injured party and by Mr. Martin McNulty, the owner of the licensed premises.

5. In his witness statement Mr. McNulty said that the CCTV footage showed "two silhouettes", but that the quality of the footage was not "great." He added:

> "I remember you would see one man strike the other. That man then fell on the ground. I cannot remember the details of the assault but I did see the man kick the [other] man on the ground and then stood over him."

6. In his statement Mr. Rice stated that he was "90% certain that the man who assaulted [the injured party] was Valeriu Sirbu."

7. The evidence clearly establishes that the investigating Gardaí made every reasonable measure to secure the footage. Garda Geraghty has stated that she was assured that there was no immediate risk that the CCTV footage would be overridden. Several efforts were made by the Gardai to contact the installer in the period between the 20th December 2012 and 24th December 2012 to ensure that the relevant footage could be downloaded, but that these efforts were unavailing. Following further efforts to secure the footage it was later confirmed on 27th December 2012 by a security expert retained by Garda Geraghty that the relevant footage had been overridden by subsequent coverage.

8. All of this has meant that the only footage of the incident can no longer be retrieved. As the injured party has no memory of the incident and as there were no other witnesses, the prosecution case rests entirely on the statements of those who happened to see the now missing footage. The applicant contends that this has resulted in a rank unfairness, since the prosecution will have available witnesses whose testimony will be based exclusively on video footage which is denied to him.

9. It should be said immediately that it is clear that the Gardaí took every reasonable steps to secure this footage. It is clear that they were diligent and conscientious in pursuit of this matter. They were assured – and had every reason to accept these assurances – that the footage would not be overridden for a period of three months. Nor was it realistic to suggest that the Gardaí should have seized the hard drive, since this would have posed problems for the licenced premises in terms of both security and insurance. While it is clear from Garda Geraghty's affidavit that she would have taken this step had it been strictly necessary, the very fact that she and the other investigating Garda were led to believe that the footage would be available seems to have dissuaded them from doing do.

10. The general principles governing the legal issues in this case are not really in doubt. It is clear that the Gardaí are under a duty to seek out and preserve all evidence bearing on the guilt and innocence of an accused: see *Braddish v. Director of Public Prosecutions* [2001] 3 I.R. 127. It is, however, also clear that this duty is not an absolute one and is tempered by considerations of practicability, feasibility and the availability of resources: see, *e.g., Bowes v. Director of Public Prosecutions* [2003] 2 I.R. 25, *CD v. Director of Public Prosecutions* [2009] IESC 70 and *Wall v. Director of Public Prosecutions* [2013] IESC 56, [2014] 2 I.L.R. M. 1.

11. Just as importantly, it is also clear that the remedy of prohibition to restrain a prosecution in a lost evidence case is an exceptional one. As O'Donnell J. stated in *Byrne v Director of Public Prosecutions* [2010] IESC 54, [2011] 1 I.R. 346, 356:

> "In my view, having considered the decided cases, the position has now been reached where it can be said that other than perhaps the very straight forward type of *Braddish* case, it would now require something exceptional to persuade a court to prohibit a trial."

12. This approach is also evident in the judgment of Dunne J. in *Kearns v. Director of Public Prosecutions* [2015] IESC 23 where, approving the passage from the judgment of O'Donnell J. in Byrne which I have just quoted, she stated that the question was whether "there is a genuine risk of an unavoidably unfair trial." In that case the Supreme Court refused to prohibit the trial of the applicant on a burglary charge where the critical evidence was a finger print taken by Gardaí from a camera box. The camera box itself was not preserved: nor did the Gardaí take any photographs of the camera box containing the finger print. There was a dispute between the experts (which was not resolved in the absence of cross-examination in the High Court) as to whether the very taking of the fingerprint would have left any residue. The Court concluded that in these circumstances the issue of any potential prejudice was best left over to the trial judge who would have an opportunity of hearing the witnesses regarding the effect of taking a finger print from the camera.

13. A recent case where the Supreme Court found that such exceptional features were present which merited the grant of an order restraining the prosecution is *Stirling v. Collins* [2014] IESC 13. In *Stirling* the contention was that the applicant had engaged in apparently random acts of criminal damage in Dublin city centre. The applicant had been identified by one Garda observing CCTV coverage at a remote location. The observing Garda contacted a colleague by telephone and that Garda colleague then arrested the applicant on suspicion of engaging in acts of criminal damage. These acts were said to consist of kicking a phone box and windows and shutters.

14. Critically, however, there were no eyewitnesses to these incidents, so that the case against the applicant rested entirely on the CCTV footage, along with the testimony of the observing Garda. The applicant stoutly maintained his innocence and contended that he was the victim of mistaken identity. Unfortunately, as MacMenamin J. put the matter in his judgment, it emerged later that "An Garda Síochána had lost or mislaid that vital video-footage in circumstances never fully explained."

15. MacMenamin J. concluded that this was indeed an exceptional case where the Court was presented with no alternative other than to prohibit the trial:

> "This is not just a case where prejudice and, therefore, risk, is probable, but rather it is inevitable. The entire essence of the prosecution and defence must be identification; the only objective verifying evidence has become lost through neglect and failure to preserve the material. None of the "list" of issues identified by counsel for the appellant, set out earlier in the judgment, can, therefore, be properly pursued at trial. Instead, a District Court judge will, inevitably, be faced with a procedural impasse; the reliability of the main witness as to fact cannot be tested in the most obvious way. The defence will be prevented from relying on evidence, which it was the duty of the Gardaí, not only to preserve, but to make available both to the defence and to the court…. To the extent that the precept of continuity applies, it must, in this exceptional instance, yield to the vindication of the appellant's constitutional right to a fair trial in the circumstances where the trial simply should not proceed. This is because a main building-block of the case, material plainly within the reasonable scope of the investigation, has been lost by the prosecution."

16. In her judgment Baker J. considered that *Stirling* was a dispositive authority. In my judgment, however, there are, however, subtle but important differences between that case and the present one which bear some emphasis.

17. First, the failure to secure the missing evidence in the present case was most definitely not the fault of the Gardaí and, moreover, the circumstances in which the missing tape came to be irreversibly overridden have been fully explained. By contrast, the missing evidence in *Stirling* was most definitely the fault of Gardaí and this had occurred in circumstances which were never satisfactorily explained.

18. Second, the particular defence advanced in Stirling was of critical significance, since it was one of mistaken identity. Taken at its height, therefore, the prosecution case rested on the remote identification of a youth by an observing Garda based on CCTV footage which was no longer available and in circumstances where there were no eyewitnesses to the incidents which were the subject matter of the criminal damage charge. It is little wonder that MacMenamin J. considered that the risk of prejudice was not only probable but inevitable. In essence, therefore, in a prosecution which rested entirely on whether the correct person had been identified as the perpetrator of the acts of criminal damage, the preservation of the footage was essential if there was to be any effective cross-examination of the observing Garda who, it must be again recalled, identified the applicant from a remote location and who was not an eyewitness. This is precisely why, echoing the subsequent language of Dunne J. in *Kearns*, there was a genuine risk "of an unavoidably unfair trial" in that case.

19. By contrast, the present case is different. The applicant freely accepts that he was the person seen on the CCTV footage in the altercation with the injured party so that, critically – and unlike the defence in Stirling - identification is *not* an issue. His case is rather one of self-defence and he has already made a statement to this effect. In contrast, therefore, to the position in *Stirling*, the applicant's ability to advance the self defence case is not entirely dependent on having access to this CCTV footage. The footage was, moreover, seen by at least three persons, each of whom have made slightly different statements as to both the quality of the footage on the one hand and the sequence of the events which they witnessed when viewing the now lost CCTV footage on the other. The applicant is thus aware in advance of what these witnesses said they saw on the video.

20. None of this is to deny that the loss of the footage is most unfortunate. Nor can it be said that this loss does not have the potential to hamper the applicant in his defence of the charge. Nevertheless, I do not think that the present case is one where there is, in the words of Dunne J. in Kearns, a genuine risk of an "unavoidably unfair trial", so that the prosecution would have to be prohibited on some ex ante basis.

21. Rather the present case is one where any potential prejudice to the accused is best assessed by the trial judge who, of course, is bound to uphold the applicant's constitutional rights to basic fairness of procedures (Article 34.1 and Article 40.3.1) and to trial in due course of law (Article 38.1). This was the very point which was made by Dunne J. in *Kearns*, since a determination of this issue adverse to the applicant in judicial review proceedings emphatically does not mean that there has been a judicial determination to the effect that the missing evidence is no longer relevant or that it is non-prejudicial to the defence.

22. In the present case, any potential unfairness to the applicant is capable of being addressed by a judicial ruling or rulings at the

trial. Depending on the run of the evidence at the trial, this might (or, for that matter, might not) require the trial judge to exclude certain prosecution evidence relating to the video footage. A decision to exclude some or all of that evidence might well be required if it were to transpire that the applicant's counsel could not effectively cross-examine prosecution witnesses. It is not necessary for this Court to anticipate the types of circumstances in which this issue which possibly arise beyond saying that it would be obviously prejudicial if these witnesses were to depart in a material way regarding what they said they saw on the CCTV beyond what is already contained in their statements.

23. In these circumstances it is sufficient to state that I have no reason to believe that the trial judge will not be alive to such potential unfairness and astute to ensure that any dangers to the fairness of the trial presented by the missing footage will be addressed by appropriate rulings.

Conclusions

24. Like Baker J. in the High Court, I recognise that the missing evidence has the potential to create an unfairness to the applicant. For my part, however, I am not persuaded that the missing evidence in the present case means that the trial will inevitably be unfair or that such potential unfairness cannot be satisfactorily addressed by means of appropriate judicial rulings. That is the essential point of difference between the decision of Baker J. and my own, since I am not convinced that these potential difficulties are such that the prosecution should be prohibited on some ex ante basis.

25. It follows, therefore, that I believe that, for the reasons stated, the appeal should be allowed.