

IRELAND / JUDGMENT

Perry -v- DPP [2008] IESC 58 (28 October 2008)

[2008] IESC 58

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[2008] IESC 58 Supreme Court Record Number: 164/07 High Court Record Number : 2006 613 JR
Date of Delivery: 28 October 2008 Court: Supreme Court Composition of Court: Denham J.,
Hardiman J., Fennelly J. Judgment by: Fennelly J. Status of Judgment: Approved
Judgments by Result Concurring Fennelly J. Appeal dismissed - affirm High Court Order
Denham J., Hardiman J. Outcome: Dismiss THE SUPREME COURT JUDICIAL REVIEW
Appeal No. 164/2007 Denham J. Hardiman J. Fennelly J. BETWEEN BRIAN PERRY
APPELLANT/APPELLANT -AND- THE JUDGES OF THE CIRCUIT CRIMINAL COURT AND
THE DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENTS/RESPONDENTS JUDGMENT
of Mr. Justice Fennelly delivered the 28th day of October, 2008. 1. Here is yet another
“missing evidence” case. The Gardaí have permitted the destruction of remains of a motor
car driven by the Appellant. He claims that his right to a fair trial on a charge of dangerous
driving causing serious bodily harm has been put at risk. 2. The Appellant obtained leave
to apply for judicial review by order of Peart J dated 25th May 2005. He seeks an order
prohibiting the trial on the charge of dangerous driving causing serious bodily harm
which is pending before the Circuit Court. He failed in his application for judicial review
before McGovern J in the High Court. The High Court judgment is dated 20th April 2007.
He now appeals to this Court. 3. A serious accident occurred at about three o'clock in the
morning of 21st June 2004 at Grace Park Road, Dublin. Garda John Durr of Whitehall
Garda Station arrived at the scene very shortly after the crash. He found a Fiat Stilo motor
car on its side and half way into the garden of a house at Grace Park Road. The Appellant
was standing beside it and a passenger, Ms Rebecca Elliott, was trapped inside. She had to
be cut free. Ms Elliot was seriously injured. 4. It appears from the book of evidence that
Ms Elliot was being given a lift home from town by the Appellant whom she describes as
her “ex-boyfriend.” She was in the back of the car. She remembers coming around the
bend at All Hallows on Grace Park Road. She took off her seat belt to pick up a cigarette

lighter and that is all she remembers. Her statement contains no description of how the car was being driven. 5. There is also a statement from an apparently independent witness, Mr James Higgins, who was walking along Grace Park Road. He heard a car coming towards him "like a bullet." He continues: "I jumped over the garden wall on Grace Pk Rd as I thought he was going to mount the footpath. The car passed me then and he was heading around a sharp bend. I knew by the speed he was going that he wouldn't make it round the bend. Seconds later I heard an unmerciful bang. The car had gone into a skid and a screech coming to the bend. After hearing the collision I was unsure whether he had hit an oncoming car, a parked car or a house. I immediately ran back up the road to see a D2 silver Stilo after demolishing the front wall of a house on Grace Pk Rd and the car was on its side about 305am..... "I didn't get a look of the driver of the car as it was going very fast and it was dark I also think that it was a miracle that there was no other car coming in the other direction in the other direction as we could have been looking at a fatality case the speed the Stilo was doing." (I have made some corrections to spelling and punctuation.) 6. It was accepted at the hearing of the appeal that a jury, properly directed, would be entitled, on the basis of that evidence taken on its own, to convict the Appellant of the offence of dangerous driving causing serious bodily harm. That assumes, of course, that the evidence is given by the witness and is believed and that there is no other evidence to contradict or undermine it. In other words, the possibility remains that evidence will emerge to support an alternative explanation for the accident. 7. I turn now to consider the post-accident events. 8. Both the Appellant and Ms Elliot were taken to hospital. Ms Elliot was very seriously injured. She will be permanently wheel-chair bound. Garda Durr attended at the hospital and followed the procedures necessary to ground a prosecution of the Appellant for driving under the influence of intoxicating liquor. He also asked the Appellant for his driving licence and insurance certificate, which he failed to produce. This appeal is not concerned with these summary offences. It is clear that the Appellant was not notified that he might be prosecuted for dangerous driving causing serious bodily harm. 9. The application for issue of the summons on the charge of dangerous driving causing serious bodily harm was made in December 2004. The summons was dated 10th February 2005 and required the Appellant to appear at Dublin Metropolitan District Court on 8th June 2005. We do not know when it was served. A book of evidence was served and the Appellant was returned for trial at Dublin Circuit Criminal Court on 7th October 2005. Thereafter, his solicitor engaged in correspondence with the prosecution solicitor seeking disclosure and, in particular, seeking access to the crashed motor car. 10. The Appellant relies, for the purpose of the appeal, on the history of disposal of the car. That history is, in several respects, incomplete and, on one issue, hotly disputed. The car was, of course, a complete wreck. Not only was it severely damaged in the accident, but its roof had to be cut off to release Ms Elliot. It was taken to Gannon's recovery yard, which carries out work of this type. This can only have been at the behest of the Garda Síochána, though there is no direct evidence on the point. It was destroyed in early July 2004. It is common case that, although a public service vehicle inspector had inspected it on behalf of the Garda Síochána, the Appellant has had no opportunity to

have it examined. In an appropriate case, that fact might well be fatal to a prosecution. 11. There is heated controversy, on the affidavits, as to whether the Appellant attended at the recovery yard in June 2004 and gave effective authority for the removal and destruction of the car. It is impossible for this Court to resolve that contested issue. It might have been appropriate to have the respective witnesses cross-examined; alternatively, the matter might be resolved by placing the burden of proof on the Appellant. For reasons that will become apparent, I do not find it necessary to resolve that dispute. In addition, it is undesirable to comment on the evidence or on another disputed issue regarding the ownership of the car in the interests of avoiding the risk of prejudice to a pending trial. 12. I will, in these circumstances, make the assumption most favourable to the Appellant, namely that the wrecked car was in the effective custody or control of the Garda Síochána, who authorised or permitted it to be destroyed without notice to or authority from the Appellant. 13. This brings us to the nub of the case made by the Appellant. He asks the Court to prohibit his trial on the ground that he has been deprived of the opportunity to have the wreck of the car professionally examined with the consequence that there is a real risk that he will not have a fair trial. He grounds that contention, in turn, on a claim that he believes that, immediately before the accident the steering of the car locked. In that way, he submits, he would offer an explanation for the accident other than the alleged speed of his driving. Furthermore, if the steering had locked, even if the car was being driven at excessive speed, the intervention of the steering problem, rather than the latter might be shown, at least possibly, to be the cause of the crash and, thus, the injuries suffered by Ms Elliot. 14. McGovern J referred to the failure of the Appellants to “set out in any detail how the car was affected immediately prior to the accident...” He pointed out that the State do not intend to rely on evidence that that there was a defect in the vehicle which is relevant to the charge. In addition he thought that there had been excessive delay on the part of the Appellant, who had not engaged with the evidence in any meaningful way. 15. An applicant for relief in the form of prohibition of his trial must establish by affirmative evidence or objective analysis of the facts of the case as alleged against him that there is a real risk to the fairness of his trial. The burden rests on the person making that allegation to show that there is an unavoidable risk of an unfair trial. (*Z v Director of Public Prosecutions*

- [1994] I. R. 476 at 506) These principles have been examined and applied most recently in the decisions of this Court in *Savage v Director of Public Prosecutions* (Unreported 3rd July 2008) and *Ludlow v Director of Public Prosecutions* (Unreported 31st July 2008). Prohibition must be based on something substantial. Hardiman J has explained the meaning of “real risk” in several judgments, but in particular, when speaking for the Court in *Scully v Director of Public Prosecutions*
- [2005] 2 I. R. 242 at 252: “The importance of the first adjective in this phrase (i.e. real risk) is that it excludes a risk which is merely remote, fanciful or theoretical.” 16. It is necessary, in application of those dicta, to examine the evidence proffered by the Appellant. 17. The

affidavit grounding the application for leave to apply for judicial review was sworn, not by the Appellant, but by his solicitor, Mr John M. Quinn, who swore: “I say that having taken instructions from the applicant on the 23rd September 2005 when the Applicant informed a representative of this firm and Junior Counsel that he believed that the steering had locked on his car resulting in the collision.....” (emphasis added). Leaving aside the fact that Mr Quinn does not even claim to have taken the instruction directly from the Appellant, the use of the verb, “believe” is notable. It is not alleged, even based on hearsay instructions, that the belief is based on any direct event occurring at the time of the accident, rather than some more general speculation. 18. The Appellant himself swore an affidavit in the proceedings on 4th October 2006. The principal object of that affidavit was to respond to and deny the claim that he had personally authorised the destruction of the motor vehicle in June 2004. I have explained that it is not necessary, for the purpose of this appeal to determine that issue. In the course of that affidavit, that Appellant addressed the issue of speed by saying: “Any allegation that the car was driven at speed is incorrect and will be contested in the event of a trial taking place.” His evidence with regard to the suggestion of the steering locking was: “...your deponent feels that the steering locked and your deponent experienced stiffness/heaviness with the steering wheel prior to the accident. I say that it is your Deponent’s belief that the accident was caused as a result of a problem with the steering of the car and not as a result of speed....” (emphasis added) 19. At a later point he recalled: “your Deponent experienced stiffness with the steering wheel at times...” 20. The question is whether the Appellant has discharged the burden of proof which rests on him to show that there is a real risk that he will not have a fair trial. He must demonstrate this by analysis of the evidence or by producing evidence of his own. In the present case, the evidence as presented in the book of evidence suggests speed as the overwhelmingly likely cause of the crash. It could, of course, be suggested at trial that the evidence does not exclude the possibility that, even in the absence of direct evidence, the steering had locked. That would be a speculative line of defence, which might be placed before a jury in the hope of persuading the jury that there was a reasonable doubt as to the cause of the crash. To suggest, however, that the trial should be stopped, because the Appellant has been unable to have the car examined to search for merely possible explanations would be to encourage mere speculation. 21. The quoted passage from the Appellant’s affidavit falls well short of meeting the requirement by reference to the evidence in the case. The Appellant raises an issue as to whether the steering locked and that this event caused the accident. He does not, in his affidavit, say that he experienced anything of the sort. If the steering had actually locked in such a way as to deprive the Appellant of the normal ability to control the car, to steer it around the bend in the road resulting in the car leaving the road and crash into the garden of a house beside the road, it would have been perfectly possible to say so. The statements of the Appellant on affidavit and indeed the original affidavit of his solicitor strongly suggest that the verbs, “believe” and “feel” are carefully chosen. They do not refer to any precise recollection of an event of locking occurring contemporaneously with the accident but rather that the Appellant had experienced some stiffness or heaviness with the steering over time and

was seeking to relate this to the accident. 22. This interpretation is also consistent with other evidence, namely that of Mr David Byrne of Donohoe's Motor City Garage, the original supplier of the car. Mr Byrne says on affidavit that the Appellant complained of a fault with the steering of the car in February 2004 and that the steering column was replaced. The Appellant disputes most if not all of Mr Byrne's evidence, denying, in particular, that he had ever complained about the steering. However, he does not deny that the steering column was replaced in February 2004 and produces a workshop document evidencing that fact. In these circumstances, it would have been material to have been informed whether the "stiffness with the steering wheel at times..." which the Appellant experienced occurred before or after February 2004, but his affidavit is silent on the point. 23. I am satisfied, therefore, that the Appellant has not discharged the burden of showing that he faces a real risk of an unfair trial. I agree, therefore, with McGovern J that the Appellant has not shown how the car was affected prior to the accident. I would not, however, attach significance, as the learned judge appeared to do, to the fact that the State are not relying on any alleged defect in condition of the vehicle. The Appellant states that he "feels" or "believes" that the steering locked and that that was the cause of the accident. If he had produced any evidence that this had happened, it would not have mattered whether the prosecution was relying on the defective condition of the vehicle. 24. It is scarcely necessary to emphasize that the refusal to prohibit the trial does not in the slightest inhibit the Appellant or limit his freedom to raise in his defence to the charge he faces at trial by evidence suggesting that the steering locked or otherwise. The purport of this judgment is that he has not shown that there is any real risk that his trial will be unfair in that or any respect. 25. I would dismiss the appeal and affirm the order of the High Court. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/ie/cases/IESC/2008/S58.html>

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