

IRELAND / JUDGMENT

Savage -v- DPP [2008] IESC 39 (03 July 2008)

[2008] IESC 39

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[2008] IESC 39 Supreme Court Record Number: 120/05 High Court Record Number : 2002 616 JR
Date of Delivery: 03 July 2008 Court: Supreme Court Composition of Court: Denham J.,
Hardiman J., Fennelly J. Judgment by: Denham J. Status of Judgment: Approved
Judgments by Result Denham J. Appeal dismissed - affirm High Court Order Hardiman J.
Appeal dismissed - affirm High Court Order Fennelly J. Appeal dismissed - affirm High
Court Order Outcome: Dismiss THE SUPREME COURT [Appeal No. 120 of 2005] Denham J.
Hardiman J. Fennelly J. Between/ Ciaran Savage Applicant/Appellant and The Director of
Public Prosecutions Respondent Judgment delivered the 3rd day of July, 2008 by Denham
J. 1. Ciaran Savage is charged with the offences of using a vehicle without the consent of
the owner and dangerous driving causing serious injury. In the High Court he sought an
order prohibiting further criminal prosecution against him, on the basis that the Director
of Public Prosecutions has failed to preserve material evidence as the vehicle has been
destroyed. The issue for determination is whether by reason of the absence of the vehicle
(evidence), there is a real or serious risk that he could not obtain a fair trial. The High
Court held that he had failed to discharge the required onus of proof. He has appealed to
this Court on numerous grounds submitting that the learned trial judge erred in fact and
law. I would dismiss the appeal for the reasons set out in this judgment. 2. Ciaran Savage,
the applicant/appellant, "the applicant", has brought this appeal from the refusal by the
High Court of his application to prohibit his trial in the Circuit Criminal Court on two
charges; (i) of using a vehicle without the consent of the owner, contrary to s.112 of the
Road Traffic Act, 1961, as amended, and (ii) dangerous driving causing serious injury (to
his passenger), contrary to s.53(1) of the Road Traffic Act, 1961, as amended. 3. The
chronology of relevant events is as follows:-

- (i) 3rd June, 2001: the accident. (ii) 13th June, 2001: examination of the vehicle by Public Service Vehicle Inspector. (iii) 28th June, 2001: service of Notice of Intention to Prosecute in respect of dangerous driving, having regard to the alleged speed and defects of the vehicle. (iv) 10th July, 2001: the applicant was discharged from hospital, and continued on medication and treatment.
- (v) 25th July, 2001: destruction of the vehicle by An Garda Síochána. (vi) 22nd November, 2001: the victim died. (vii) 22nd November, 2001: application for issuance of the summonses grounding the prosecution, excluding dangerous driving causing death. It appears that the applicant was summonsed in respect of dangerous driving for summary disposal. (viii) 12th February, 2002: application for issuance of the summonses grounding the prosecution for dangerous driving causing serious harm. (ix) 27th February, 2002: return date for the summonses.
- (x) 15th May, 2002: order sending the applicant forward for trial in the Circuit Criminal Court. (xi) 2nd July, 2002: first appearance in the Circuit Criminal Court. As the applicant had not been cautioned the matter was adjourned to 16th July, 2002. (xii) 16th July, 2002: the defence enquired as to whether the vehicle was available for inspection; the matter was adjourned to 30th July, 2002. (xiii) 30th July, 2002: the Director of Public Prosecutions informed the applicant that the vehicle had been destroyed. (xiv) 2nd October, 2002: leave given by the High Court to apply for judicial review. (xv) 16th January, 2003: letter from the Director of Public Prosecutions stating that the prosecution evidence as to the examination of the vehicle will not be tendered and that the condition of the vehicle would not be an issue in the trial. (xvi) 4th March, 2005: application for judicial review heard by the High Court. (xvii) 8th March, 2005: High Court orders that the application be refused. (xviii) 8th March, 2005: ex tempore judgment given by the High Court (Quirke J.), which concluded that the court was not satisfied that the applicant had discharged the onus of proving on the balance of probability that the failure to preserve the vehicle has given rise to a real or serious risk that he would receive an unfair trial and that the relief should be refused. (xix) 22nd March, 2005: the applicant filed a Notice of Appeal to this Court. (xx) 22nd April, 2008: the appeal came on for hearing in this Court, and judgment was reserved. 4. Relief Sought The High Court (Murphy J.) on 2nd October, 2002, granted the applicant leave to apply for judicial review for an order prohibiting the Director of Public Prosecutions from taking any further steps in the criminal proceedings the subject matter of this application. 5. Grounds for application for judicial review The grounds upon which the application was granted were:-
 - (i) Prohibition by way of Judicial Review. The applicant herein has been returned for trial to the Circuit Court in respect of two counts set out in the statement of charges. They are:-

- (a) For that you the said accused on the 3rd June 2001 at Old Kilmainham, Dublin 8 in the Dublin Metropolitan District did unlawfully use a mechanically propelled vehicle, registration number 87 LH 3345 without the consent of the owner thereof, namely, Fabien Boucher, or without other lawful authority. Contrary to Section 112 of the Road Traffic Act 1961 (as amended by Section 65 of the Road Traffic Act 1968 and by Section 3(7) of the Road Traffic (Amendment) Act 1984).
- (b) For that you the said accused on the 3rd June 2001 at Old Kilmainham Road, Dublin 8, a public place in the Dublin Metropolitan District did drive a vehicle, registration number 87 LH 3345 in a manner (including speed) which having regard to all the circumstances of the case (including the condition of the vehicle, the nature, condition and use of such place and the amount of traffic which then actually was or might reasonably be expected then to be therein) was dangerous to the public, whereby it caused serious bodily harm to another person, Debbie Mulhall. Contrary to 53(1) (as amended by Section 51 of the Road Traffic Act 1968) and (2)(a) (as amended by Section 49(1)(f) of the Road Traffic Act, 1994) of the Road Traffic Act, 1961 to 1995. (ii) The applicant was served with a Book of Evidence in respect of the said counts. (iii) At all material times the Director of Public Prosecutions had within its possession and/or power, the said motor vehicle named in the two counts, namely, mechanically propelled vehicle registration number 87 LH 3345. (iv) The Book of Evidence discloses that the Director of Public Prosecutions will be relying on the condition of the motor vehicle as being "dangerously defective" as a significant part of the evidence in attempting to establish in particular Count number 2 herein.
- (v) In addition, the evidence on its face raises questions having a bearing on the cause of the crash. (vi) After this case had been returned for trial, but before the arraignment date the Director of Public Prosecutions informed the applicant herein that there might be a difficulty in respect of certain exhibits or retention of same. (vii) The Director of Public Prosecutions has put the applicant on notice that they no longer have possession or custody of the motor vehicle which was retained by them after the 3rd June, 2001 and same is not now available for inspection. (viii) The Director of Public Prosecutions has failed to comply with the principles of natural and constitutional justice and basic fairness of procedures in failing to preserve all material evidence which would be necessary for the applicant to examine in order to properly present his defence and assess the case against him. (ix) The Director of Public Prosecutions intends, unless prohibited by this Honourable Court, to have this matter so to continue to trial notwithstanding the failure of the Director of Public Prosecutions to comply with the principles of natural constitutional justice and basic fairness and procedures in the manner in which the case is to be presented to the court and the manner in which the applicant is given an opportunity to meet the said case.
- (x) In the event that the matter proceeds to trial the applicant will have been denied access to material which could have assisted the defence case or alternatively damaged the prosecution case. (xi) In the premise the applicant has been denied a right to a fair trial, his position is prejudiced and a trial would not be in due course of law. 5. High Court judgment

The High Court was satisfied on the evidence that the applicant was seriously injured in the accident and was receiving treatment from the date of the road accident until the date when the vehicle was destroyed. For that reason he had not sought or obtained legal advice which would have enabled him to discharge the duty identified in *McKeown v. Judges of the Dublin Metropolitan District Court*

[2003] IESC 26 . The High Court identified the issues to be determined as:-

- (1) Whether or not the vehicle itself, in its physical form, comprised evidence which was relevant evidence to the offences with which the applicant has been charged, and if so
 - (2) whether or not an explanation has been provided by the Director of Public Prosecutions for the absence of the evidence, and if so
 - (3) does the explanation establish that the evidence has no real bearing on the guilt or innocence of the applicant, and
 - (4) in particular and as an overriding consideration, whether or not the applicant has discharged the onus of proving on the balance of probabilities that by reason of the absence of the evidence he will be subjected to a real and serious risk of an unfair trial. The learned High Court judge dismissed the application. He held that the vehicle was retained for some time after the event before being destroyed in accordance with normal garda procedures. He stated:- "It cannot reasonably be suggested that the prosecuting authorities have a duty to preserve all vehicles which are the subject of summary offences under Road Traffic Act. At the time of its destruction this vehicle came within that category. It was only upon the unfortunate death of Ms. Mulhall that the gravity of the offence became apparent." The learned trial judge held that the applicant had failed to discharge the onus of proving that the failure on the part of the State to preserve the vehicle has exposed him to the risk of an unfair trial. He pointed out that the applicant relied on the evidence of Dr Jordan, forensic engineer, in support of his contention that the preservation of the vehicle has compromised his capacity to receive a fair trial. He noted that Dr Jordan indicated that the garda examination supported his contention that:- "... The vehicle was defective in ways which might reasonably not have been noticed by the driver and which might reasonably have caused or contributed significantly to the causation of the impact." The learned High Court judge held:- "I am at a loss to discover therefore how the applicant is disadvantaged in making that case by the absence of the opportunity to examine the vehicle." He held that the applicant may call Dr Jordan and garda expert witnesses on this matter, and concluded that the applicant had failed to discharge the onus of proof. 7. Notice of Appeal The applicant has appealed to this Court, submitting that the learned High Court judge erred in fact and in law in failing to grant the relief sought. Specifically it was pleaded that:- "...
2. The Learned Trial Judge erred in fact and in law in failing to hold:
 - a) that the [applicant's] right to a fair trial had been breached; and

- b) that the [applicant] had been prejudiced in the conduct of his defence by the failure to preserve the vehicle the subject of the proceedings herein or to carry out an appropriate examination thereof.
- 3. The Learned Trial Judge erred in fact and in law in failing to take into account adequately or at all:
 - a) the specific assertions of such prejudice as set out in the affidavit of an appropriately qualified expert on behalf of the [applicant]; and
 - b) the failure by the [Director of Public Prosecutions] to adduce any evidence to contradict or cast doubt upon the said assertions.
- 4. The Learned Trial Judge erred in fact and in law in failing to take into account at all the uncontroverted evidence of the said expert.
 - a) that the calculations and observations in respect of the Garda estimate of the speed of the said vehicle prior to impact were thoroughly unreliable and incomplete; and
 - b) that proper observations, measurements and calculations could have resulted in a reliable estimate of speed of the vehicle prior to impact which could have been of assistance to the defence.
- 5. The Learned Trial Judge erred in fact and in law:
 - a) in failing to hold that the said expert had given sufficient evidence to establish as a matter of high degree of probability that a proper examination of the said vehicle could have yielded evidence helpful to the defence in a trial;
 - b) in holding that the evidence of the said expert did not disclose how a physical examination of the said vehicle could have improved the evidence of the said expert in particular having regard to the uncontroverted evidence of the said expert inter alia in respect of:
 - i) the defective suspension; ii) defective brakes; iii) rust and corrosion; iv) tyre inflation levels and tyre blow-out;
 - v) possible damage from previous collision; vi) estimate of speed prior to impact.
- 6. The Learned Trial Judge erred in fact and in law in holding that the [Director of Public Prosecutions] was not under an obligation to preserve the said vehicle or notify the [applicant] of an intention to abandon the said vehicle notwithstanding the [Director of Public Prosecution's] original intention to charge the [applicant] with a summary offence having regard to:
 - a) the seriousness of the injuries sustained in the accident the subject of the said proceedings;
 - b) the defects in the said vehicle which were apparent on inspection by Gardaí;
 - c) the defects and deficiencies in the manner in which the said inspection was carried out;

- d) the allegations as to the manner in which the said vehicle had been driven; and
 - e) all the circumstances.
7. The Learned Trial Judge erred in fact and in law in failing to take into account adequately or at all:
- a) the fact that the said vehicle had been destroyed before the [applicant] was able to consider his position in respect of possible criminal charges;
 - b) the fact that the [Director of Public Prosecutions] did not inform the applicant that the said vehicle had been destroyed until the 30th of July, 2002.
8. The Learned Trial Judge erred in fact in holding that the [applicant's] legal advisers did not consider a forensic examination to have been warranted as a matter central to the defence. The said finding was not supported by the evidence.
9. The Learned Trial Judge erred in fact and in law in failing or refusing to take into account the evidence of the said expert regarding the potential forensic value of materials other than the said vehicle which as a result of the failures of the investigating Gardaí, was not available to the defence". 8.

Submissions

Written and oral submissions were made on behalf of the applicant and on behalf of the Director of Public Prosecutions. 9. Law The applicant relied on the principles of law referred to in *Braddish v. Director of Public Prosecutions*.

[2001] 3 IR 127 ; *Dunne v. Director of Public Prosecutions*.

[2002] 3 I. R.305; *Bowes v. Director of Public Prosecutions*.

[2003] 2 I. R. 25; *Scully v. Director of Public Prosecutions*.

[2005] 1 IR 242 ; and *McFarlane v. D. P. P.*

[2008] IESC 7 , as to the responsibility of An Garda Síochána to seek out and preserve evidence relevant to guilt or innocence of an accused and as to the circumstances in which a failure to do so may ground an order prohibiting a trial. 10. The Vehicle The applicant faces charges that in the early hours of 3rd June, 2001, he was driving a car which it was alleged he took without the owner's permission. The owner of the vehicle was a French National, Emmanuel Fabien Boucher, who was living in Ireland, and who in 2000 bought a red Mazda 87 LH 3345 for £800 and insured it for a year. On 1st June, 2001, he parked the car on Hill Street, off Parnell Street, at about 10 p.m. When he returned at 2 a.m. the car was gone. In a statement Mr Boucher explained that:- "I did not report it stolen because it was not worth reporting and it saved me from having to dispose of the car. The insurance had expired and the car needed a lot of work to pass an M. O. T. I could not afford this so I did not report the theft. I did not give anyone permission to take, use or drive the car. I

assumed that the car was impounded and towed away. I did not think the car had been stolen as it was junk and the exhaust fell off and was in the boot". 11. Evidence destroyed Inspector Thady Muldoon deposed, by affidavit dated 20th March, 2003, that he was an inspector, of Kevin Street Garda Station. He stated that on 25th July, 2001 he directed that a red Mazda 323 which was parked in the yard of Kevin Street Garda Station be destroyed. He did this because the vehicle had been inspected, had not been claimed by its owner, and was in a dangerous condition. The car was in three separate pieces and was of no commercial value. He also deposed that at that time the injured victim was making a recovery in hospital. 12. Eyewitnesses The applicant faces an indictment claiming that in the early hours of 3rd June, 2001, while driving a car which he is alleged to have taken without the owner's permission, he caused the car to crash, thereby occasioning serious injuries to a person who was a passenger in the car. That passenger, Ms. Debbie Mulhall, later died as a result of the injuries sustained. There were numerous eyewitnesses. Two members of An Garda Síochána noticed the car being driven out of town at high speed. In a statement Garda Geraghty stated that as the patrol car approached the entrance of St James's Hospital he saw the vehicle travelling very fast towards the garda car. Witnesses stated that an engine was heard revving. Raymond Rooney stated that an engine was heard racing, as though a car was travelling at very high speed. Sadie Rooney stated that she heard an engine racing, like it was driving very fast, she turned, she heard a loud bang and she saw the light pole falling to the ground and the engine sliding up the street. Therese Kenny made a statement also, she heard engine revving, and she saw the car flying down the street as if it was out of control. The gardaí were on the scene immediately after the crash. There was no other vehicle involved. Ms Mulhall was thrown from the vehicle, and was found lying some distance from the car. The existence of eyewitnesses is relevant in the balancing exercise which is required to be done by a court. 13. Trapped It is also relevant, and a factor, that the applicant was trapped in the car. As a consequence, there is no issue as to whether he was driving or not. Also, this was a single vehicle crash, into a light pole. This is not a prosecution dependent upon circumstantial evidence. 14. Reports Reports on the vehicle exist and are available to the applicant. The vehicle was examined by the Public Service Vehicle Inspector on the 13th June, 2001. Garda Adrian Tucker made a report. As to the mechanical examination, he reports:- "Steering: The steering mechanism was extensively damaged but I am satisfied from my examination that all components were intact pre-impact. Brakes: The brake operating mechanism was extensively damaged but all components were fitted. I found the front brake pads on the left side were extensively worn to an extent that the brake lining material was completely worn away. This would have the effect of reduced brake efficiency, and also create an imbalance between left and right when the brakes were applied. Suspension: The rear suspension shock absorbers were extremely worn with the effect that there was no damping of any shocks experienced at the rear of the vehicle. The suspension bushings at the rear suspension arm and the bushings at the rear anti-roll bar were excessively worn. There was also extensive rust corrosion at the left rear suspension arms and also at the left and right floor and cill panels, in particular at the mounting area for the rear suspension

units. Extensive rust corrosion was also evident at the front cross-member, which had become dislodged from the vehicle. The overall effect of the extensive rust corrosion, both to the front and rear of the vehicle, caused the structure of the vehicle to be weakened considerably, coupled with the worn suspension and shock absorbers, creates a situation whereby the vehicle would be considered extremely unstable and dangerously defective." The applicant engaged Jordan M. & Associates, Consulting Engineers, who have made a number of reports relating to the proposed garda evidence, including as to the site of the accident and the condition of the car, which is favourable to the applicant. These reports refer to the importance of the car as evidence, and argue that it should have been available for inspection. The Director of Public Prosecutions has not disputed any expert evidence to be adduced on behalf of the applicant. The reports of Dr. Jordan, forensic engineer of Jordan M. & Associates, comment on the potential value to the defence of evidence which could have emerged from an examination of the vehicle. Dr Jordan deposed, inter alia, that the applicant had been denied an opportunity to adduce evidence which could have been of significant assistance to the defence of the criminal charges which he is facing. He deposed, at paragraph 7 of his first affidavit:- "7. I say that certain matters arising from the Garda examination of the vehicle in question support the proposition that the vehicle was defective in ways which might reasonably not have been noticed by the driver and which might reasonably have caused or contributed significantly to the causation of the impact. These matters include:

- a) the defective suspension;
- b) defective brakes; and
- c) rust and corrosion.

8. I say and believe that in respect of these matters (a), (b) and (c) above, it could reasonably have been of significant assistance to the Applicant had I been in a position to assess the extent of those defects and potential impact of each individually and in combination." He refers to the apparent failure of the gardaí to measure the inflation level of the tyres, and to assess whether there was previous collision damage to the vehicle. Also, the possibility of a defective steering mechanism causing the accident is referred to by Dr Jordan. At paragraph 5 of the second affidavit he deposes:- "5. Regarding the steering mechanism, I say and believe:

- (a) that it appears from the extent of the damage to the vehicle apparent from the photographs that it would not be safe to rely on the PSV Inspector's opinion that the steering mechanism was intact prior to collision;
- (b) that as a matter of probability, if I had had an opportunity to examine the vehicle, I would have been able to assert as a matter of strong opinion that it was not possible to come to a reliable conclusion that the steering mechanism was intact prior to the collision;

- (c) however, the corollary of this is that I believe that it is unlikely that I would have been in a position following such examination to establish that the steering mechanism was defective." He deposed that a type of blowout could have caused the accident, and refers to the lack of preservation of the tyres. Having had the benefit of the photographs, in a supplemental affidavit he deposed that the failure to permit a proper examination of the tyres has made it impossible to draw firm conclusions. However, he deposed in paragraph 6 of his second affidavit:- "a) ... re-iterate that the failure to carry out or permit a proper examination of the tyres has made it impossible for firm conclusions to be drawn;
- b) that photograph 2a of 2315/01 does provide clues which indicate that the front right tyre may have deflated due to a blow-out or sudden deflation (which could have precipitated the loss of control of the vehicle) and may not have deflated due to direct impact;
- c) however, that the photographic evidence in respect of this tyre is inadequate since it is confined to an overhead view;
- d) if I had had an opportunity to examine the tyres themselves, as a matter of probability, I would have been in a position to offer a strong opinion as to the causation of the deflation of the right front tyre which could have been of significant assistance to the defence;
- e) that the photographic evidence in respect of the left rear tyre (2316/01 Nos. 9A, 10A, 20A) is sufficient to express the strong opinion that there are signs consistent with the proposition that the tyre deflated as a result of direct impact." While references are made to the difficulties caused by the absence of the vehicle, the reports of Dr. Jordan will be of assistance to the applicant's defence. 15. Condition of Car The Director of Public Prosecutions has decided not to proceed on the issue of the condition of the car. Aonghus Dwane, Senior Prosecution Solicitor, in an affidavit on behalf of the Director of Public Prosecutions, deposed that on the 16th January, 2003, he wrote to the applicant's solicitor stating:- "Please note that in relation to the prosecution herein, I am instructed to inform you that the Director of Public Prosecutions is prepared to proceed with same without tendering the evidence of Sergeant Colm Finn and Garda Tucker pertaining to the alleged dangerous condition of the car. Accordingly, as the condition of the car will not be an issue, please confirm that you will withdraw your application for prohibition". 16. Law In considering the appropriate test, in a situation where evidence has been destroyed pre-trial, it is necessary to consider the circumstances of the case, which may vary considerably, and which will govern each case. In *Murphy v. D. P. P.*

[1989] I. L. R. M. 71 the accused was charged with a number of offences arising out of an incident in April, 1987, in which it was alleged that the accused had been driving a stolen car which was wrecked in the incident. On 14th May, the applicant's legal advisers informed the gardaí that they wished to conduct fingerprint tests on the wrecked car. The gardaí did not carry out any fingerprint check of their own and intended relying on visual identification only. On the 11th June, when the applicant's solicitor phoned the gardaí requesting access to the car for the purpose of fingerprint evidence, he was told that the car had been given

to an insurance company interested in its salvage. The accused sought an injunction to restrain the criminal proceedings on the grounds that the disposal of the car had prejudiced preparation of his defence by the destruction of evidence which might have assisted him in rebutting the visual identification of the gardaí. The Director of Public Prosecutions submitted that the applicant had been afforded an opportunity to inspect the vehicle and had failed to act within a reasonable time, that no purpose could be served by a forensic examination long after the events, and that there was no requirement in law for the prosecution to forensically examine cars in such cases. The facts of that case are clearly distinguishable from those of this case. First, there is no issue of visual identification in this case. Secondly, there was no request within a reasonable time to examine the car. Thirdly, it was not a situation where, a request having been received, the car was destroyed. Fourthly, in *Murphy v. D. P. P.* the gardaí did not carry out any fingerprint check. It is not disputed that the applicant in this case was the driver of the car. In this case the vehicle was examined by the Public Service Vehicle Inspector, which report is available to the applicant. Fifthly, the applicant has his own engineer's report on the Public Service Vehicle Inspector's report, and the gardaí reports. These may be used as evidence in court. Thus the circumstances are different in this case to those in *Murphy v. D. P. P.* This line of case law is grounded on the statement of Palles C. B. in *Dillon v. O'Brien & Davies*

[1887] 20 L. R. Ir. 300, where, at p.317, Chief Baron Palles stated:- "But the interest of the State in the person charged being brought to trial in due course necessarily extends as well to the preservation of material evidence of his guilt or innocence as to his custody for the purpose of trial." In *Murphy v. D. P. P.* Lynch J. referred to the interest of the State as including a duty to preserve "material" evidence. Reference was made to *The Queen v. Lushington Ex Parte Otto*

[1894] 1 QB 420 where Wright J. ruled (at pp. 423 and 424):- "... I take it that it is undoubted law that it is within the power of, and is the duty of, constables to retain for use in Court things which may be evidence of crime ... I think it is also undoubted law that when articles have once been produced in Court by witnesses, it is right and necessary for the Court, or the constable in whose charge they are placed (as is generally the case) to preserve and retain them, so that they may be always available for the purposes of justice until the trial is concluded." The later part of this quotation refers to evidence produced in court by witnesses and the duty to preserve the evidence until the trial is concluded. That is not applicable here. It is the first part of the quotation that is relevant - referring to the retention for use in court of things which may be evidence of crime. Lynch J. referred to the *Lushington* case as judicial recognition of the duty imposed upon the prosecuting authorities to preserve all material evidence. The prosecution are required to observe fair procedures. In *The State (Walshe) v. Murphy*

- [1981] I. R. 275 Finlay P. ruled (at p.293):- "... there is an obligation on the prosecuting authorities in a charge under s.49 of the Road Traffic Act, 1961 where they become specifically aware that the person charged has not received a copy of the certificate and requires one, to supply him with one in such good time as to provide him with a realistic opportunity to have the specimen which he has retained analysed and to contest the validity or correctness of the certificate which was issued." Thus, as Lynch J. stated in *Murphy v. D. P. P.*, the courts envisage that an accused person be afforded every reasonable opportunity to inspect all such material evidence in order adequately to prepare his defence. In *Murphy v. D. P. P.*
- [1989] I. L. R. M. 71, the Garda were aware of the accused's wish to inspect the car. Lynch J. held, at p.76:- "I am satisfied that being so aware the Gardaí ought not to have parted with possession of the car without examining it forensically or alternatively, they should have notified the applicant's legal representatives of their intention of giving it back. There was no urgent need to return the car to its owner/insurance company." Thus Lynch J. referred to alternative options, such as examination by the gardaí, or informing an accused of the loss of the car. In this case there was an examination by and on behalf of the gardaí - one of the alternative options referred to. The circumstances in *Murphy v. D. P. P.* were the basis of the High Court decision. The accused in that case did not deny that he was unlawfully in the stolen car, but he denied driving it. Thus he sought fingerprint evidence. The prosecution stated that it would rest on the garda visual evidence. But it was the accused's case that his denial would lack the corroboration of fingerprint evidence. Lynch J. held:- "It may well be that nothing would have been discovered by the forensic inspection, but the applicant has been deprived of the reasonable possibility of rebutting the evidence proffered against him. It is also clear that there is no way in which this loss to the applicant of possibly corroborative evidence, can now be remedied by any further inspection of the car. The authorities establish that evidence relevant to guilt or innocence must so far as it is necessary and practicable be kept until the conclusion of the trial. These authorities also apply to the preservation of articles which may give rise to the reasonable possibility of securing relevant evidence." In *Braddish v. Director of Public Prosecutions*
- [2001] 3 IR 127, at issue was a video surveillance tape of a robbery which was no longer available. It was held that such evidence relevant to guilt or innocence must, so far as was necessary and practicable, be kept until the conclusion of a trial. This included the preservation of articles which gave rise to the reasonable possibility of securing relevant evidence. The gardaí have a duty arising from their unique investigative role to seek and preserve all evidence having a bearing or potential bearing on guilt or innocence. Having referred to the circumstances of that case Hardiman J. stated (at p.135):- "It would be difficult to think of evidence more directly relevant than a purported video tape showing the commission of the crime. But in cases where the evidence is not of such direct and manifest relevance, the duty to preserve and disclose has to be interpreted in a fair and reasonable manner. It must be recalled that, in the words of Lynch J., in *Murphy v. Director of Public*

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- [1989] I. L. R. M. 71, the duty to preserve evidence is to do so 'so far as is necessary and practicable'. A duty so qualified cannot be precisely or exhaustively defined in words of general application. Certainly, it cannot be interpreted as requiring the gardaí to engage in disproportionate commitment of man power or resources in an exhaustive search for every conceivable kind of evidence. The duty must be interpreted realistically on the facts of each case". As was pointed out in *Bowes v. Director of Public Prosecutions*
- [2003] 2 I. R. 25 - the focus on this type of application to restrain a trial is on the fairness of the intended trial without the missing evidence, and not on the discovery of shortcomings in the investigative process. In *McFarlane v. D. P. P.*
- [2007] 1 IR 134 the accused sought to prohibit his trial on two issues, (a) prejudicial delay, and (b) during the time which had elapsed certain exhibits had gone missing. The significance of the exhibits was that it was alleged by the prosecution that they were found at the place where a kidnap victim was unlawfully held and that they bore the accused's fingerprints. The items on which the applicant's fingerprints were allegedly found were: (a) a North Connaught Farmer's one litre milk carton with a sell by date of 16th December, 1983, (b) a plastic container, and (c) a cooking pot. These items were no longer in the possession of the gardaí. However, the fingerprints had been photographed in situ by Detective Garda Maguire and these photographs of the impressions were still available. The accused alleged that he was prejudiced because he was not in a position to comprehensively independently evaluate the alleged physical evidence by an independent expert retained on his behalf. It was found that the items were lost because of a want of care by the gardaí. Having analysed the law *Hardiman J.* held (at p.147):- "It therefore appears that, whether the fingerprint on the missing items be regarded as a document, or as an independent item of real evidence, there is ample provision in law for its proof by way of a duly authenticated photograph. ... Quite obviously the gardaí have been in breach of their duty to preserve the evidence, but in this case, unlike the others, this breach has not resulted in the loss of that evidence in an independently verifiable form. ... I would therefore decline to grant relief sought. The reasoning leading to this decision in part depends of an assessment of the case against the applicant as it appears from the book of evidence which the applicant exhibited in these proceedings. Since no part of its contents was contradicted it seems appropriate to have regard to it for the purpose of this judicial review application. Consequently the relief of prohibiting the trial was refused. 17.
- Principles The following are relevant principles:-
- (i) Each case should be determined on its own circumstances. (ii) It is the court's duty to protect due process. (iii) It is the duty of An Gardaí Síochána to preserve and disclose material evidence. (iv) This duty to preserve and disclose material evidence is to do so as far as is necessary and practicable.

- (v) The duty to disclose and preserve, as qualified by Lynch J. in *Murphy v. D. P. P.*, cannot be precisely defined as it is dependent on all the circumstances of the case. (vi) The duty does not require the gardaí to engage in disproportionate commitment of manpower and resources. (vii) In the alternative to keeping large physical objects as evidence, such as motor vehicles, it may be reasonable in certain circumstances for the gardaí to have a forensic report on the object. (viii) The duty should be interpreted in a practical manner on the facts of the case. (ix) If evidence is destroyed the reason for the destruction, whether bona fide or mala fide, is part of the matrix of the facts, but it is not a relevant factor in the test to be applied by the court.
- (x) All of the above are subject to the fundamental test to be applied by the court, that of "real risk" as described by Finlay C. J. in *Z v. Director of Public Prosecutions*

[1994] 2 I. R. 476 at p.506:- "This Court in the recent case of *D v. Director of Public Prosecutions*

[1994] 2 I. R. 465 unanimously laid down the general principle that the onus of proof which is on an accused person who seeks an order prohibiting his trial on the ground that circumstances have occurred which would render it unfair is that he should establish that there is a real risk that by reason of those circumstances (which in that case also was pre-trial publicity) he could not obtain a fair trial." He continued at p.507:- "... where one speaks of an onus to establish a real risk of an unfair trial it necessarily and inevitably means an unfair trial which cannot be avoided by appropriate rulings and directions on the part of the trial judge. The risk is a real one but the unfairness of trial must be unavoidable unfairness of trial." (xi) The focus of the inquiry is on the issue of the fairness of the intended trial, and not on shortcomings in the garda investigation. It is not a garda disciplinary process. 18. Decision There are two charges on which the applicant is before a trial court and which he seeks to prohibit going to trial. The first charge is that of using a vehicle without the consent of the owner. In all the circumstances of this case the destruction of the vehicle is not a factor which gives rise to a real or serious risk of an unfair trial on this charge. The application for the order of prohibition is primarily directed to the second charge, that of dangerous driving causing serious bodily harm to another person. The circumstances now include the decision of the Director of Public Prosecutions not to rely on the condition of the car in the prosecution. I would apply the principles enunciated in the previous paragraph, and dismiss the appeal. This application falls to be determined in all the circumstances of the case. These include:-

- (i) The car was inspected by the Public Service Vehicle Inspector and the gardaí, and these reports are available to the applicant. (ii) The applicant has obtained and may utilise expert reports on these reports and query the evidence of the car. (iii) The applicant has means, therefore, to put in evidence the condition of the vehicle, as a defence, if he so wishes. Bearing in mind the charge, and all the circumstances, which include the P. S. V. Inspector's report, the garda evidence, and the forensic engineer's evidence obtained by the applicant and available to the applicant, I am not satisfied that the applicant has established that there is a real risk, by reason of the absence of the car, of an unfair trial arising from the

destruction of the car. 19. Best Practice It would be best practice for An Garda Síochána to give notice, to inform an accused, or a potential accused, of the intention to destroy a vehicle, or evidence which may reasonably be materially relevant to a trial, giving such person time to have the vehicle, or evidence, examined, if they so wished. Such a notice could be served at the same time as a Notice of Intention to Prosecute. The notice could inform of the place where the vehicle was, that it could be examined, and of the intention to destroy the vehicle at a future date, perhaps one month hence. The receipt of such a notice, at the same time or shortly after the Notice of Intention to Prosecute, would alert a person to the situation and give time to have the car examined if they so wished, or to make a reasonable request that it not be destroyed. 20.

Conclusion

For the reasons given I would dismiss the appeal. JUDGMENT of Mr. Justice Hardiman delivered the 3rd day of July, 2008. I have read the judgments of Denham J. and Fennelly J. in this case and am generally in agreement with them and with the order proposed for the disposal of this case. I wish however to make a number of observations of my own and therefore venture to prepare this short judgment. I am in agreement with the summary of the various decisions in this area offered in the judgment of Fennelly J. I favour the refusal of relief in this case because I cannot see that the evidence on behalf of the applicant, and in particular the expert evidence of Dr. Jordan, leads to the conclusion that the destruction of the vehicle has confronted the applicant with an unavoidable risk of an unfair trial. The applicant has not committed himself to any particular line of defence, and is entitled to refrain from doing so. From the terms in which the evidence of Dr. Jordan is expressed one might think that a possible viable line of defence, in his mind, is that, in Dr. Jordan's words: "The vehicle was defective in ways which might reasonably not have been noticed by the driver and which might reasonably have caused or contributed significantly to the causation of the impact". Dr. Jordan has however indicated that various of the features of the car post accident, which were observed and recorded by the gardaí, support the conclusion quoted. To that extent there is not merely no demonstrated risk of an unfair trial but there is positive evidence that the garda evidence may support one of the defences which may be relied upon the applicant. It is obvious that any professional witness be he a doctor, an engineer, or otherwise would prefer personally to see the item in respect of which his opinion is sought. But this will not always be possible, as most obviously in the case of a medical witness asked to opine about the cause of death of a deceased and long buried person. In that particular context a protocol has grown up whereby a doctor performing a post-mortem will record what he finds in very considerable detail specifically so as to permit another practitioner to form his own, independent opinion. Dr. Jordan as a defence witness in a criminal trial will (as Fennelly J. has pointed out) be enabled and entitled to raise possibilities properly arising on the evidence which may favour the defendant: there is no suggestion that he is handicapped in doing so in the evidence before the Court. The foregoing finding is sufficient to dispose of this case. However in all the circumstances and having regard to the not inconsiderable number of "missing evidence" cases that come before the Courts I wish to say that the fact that relief is being denied in this case does not

support the proposition that it was legitimate to destroy or dispose of the motor vehicle involved in the accident. It was not. It is never legitimate to dispose of or to lose, evidential material which may have a bearing on guilt or innocence. Moreover, I note that one of my colleagues has very properly emphasised that the destruction of the vehicle in this case was done in a routine way, and was certainly not done for the purpose of avoiding a professional inspection by or on behalf of the defendant. I am quite prepared to accept that this is so. But I wish to stress that it is not an answer to a complaint that a defendant has been denied evidence which carries a reasonable possibility of rebutting the case made against him, that the loss of such evidence is due to blindly following routine, or simple failure to understand its significance, rather than out of malice. The test in these cases as emerges clearly from the decisions cited and summarised in the judgment of Fennelly J., is whether there is a real risk of an unfair trial. If there is no such real demonstrated risk, relief will not be granted simply to encourage the gardaí to retain evidence as a general practice. Equally, if a real danger of an unfair trial is established, relief will not be denied simply because the gardaí were faithfully if blindly following some procedure or routine. The granting or withholding of relief in these cases is not intended to be in any way punitive or exoneratory of the gardaí or other investigators: the right to seek this relief derives from the right to a fair trial, that is the sole consideration. Finally, I wish expressly to agree with what Denham J. has said at paragraph 19 of her judgment under the heading “Best Practice”. This is by no means the first exhortation which this court has given along these lines: exhortations to the proper custody to evidentially significant items have come from the Court for the past five years or so without any apparent effect. If the eminently practical and extremely straightforward suggestion of Denham J. were followed by gardai as a matter of routine, cases like the present would be avoided. They are nearly always cases of some difficulty because, of course, an innocent defendant will protest bitterly at the absence of possibly exoneratory evidence while, as I have said in another case, a guilty defendant will do his best to imitate those sentiments. It is difficult to ensure that all innocent defendants will get relief and all guilty defendants will be refused it because the Superior Courts, when their jurisdiction is invoked, must deal with these matters on a completely different basis, to that of a trial Court. Ciaran Savage JUDGMENT of Mr. Justice Fennelly delivered the 3rd day of July, 2008. 1. The background facts and the history of the proceedings have been explained and summarised in the judgment which has been delivered by Denham J. I gratefully adopt them. I will refer to particular facts only where necessary. 2. The appellant claims that there is uncontroverted expert evidence that material destroyed by Gardai and information they failed to glean from that material could have assisted the defence in crucial and specific ways. In short, the appellant has been deprived of the opportunity of having an expert examination of the motor car which he was driving at the time of the accident which resulted in injury to and ultimately to the death of his passenger. 3. It is not disputed that the applicable threshold where an application is made to prohibit a criminal trial is that contained in the judgment of Finlay C. J. in *Z. v Director of Public Prosecutions*

- [1994] 2 I. R. 476, which Denham J has cited in her judgment. The burden of proof is on the applicant to show that he faces a real or serious risk that he will not have a fair trial. That risk must be one which cannot be avoided by the trial judge by means of appropriate directions and rulings. 4. There is a comparatively novel jurisprudence concerning the effects of lost or missing evidence. The principal cases are *Murphy v Director of Public Prosecutions*
- [1989] 1 I. L. R. M. 71; *Braddish v. Director of Public Prosecutions* ;
- [2001] 3 IR 127 ; *Dunne v Director of Public Prosecutions*;
- [2002] 3 I. R.305; *Bowes v. Director of Public Prosecutions* ; *McGrath v. Director of Public Prosecutions*
- [2003] 2 I. R. 25; *Scully v. Director of Public Prosecution*;
- [2005] 1 IR 242 ; and *McFarlane v. Director of Public Prosecutions*
- [2007] 1 I. R. 134. Hardiman J delivered the principal judgment in all but the first these cases. 5. The following is an attempt to summarise the principal points relevant to whether a court will make an order prohibiting a trial. a. It is the duty of the prosecution authorities, in particular An Garda Síochána, to preserve and retain all evidence, which comes into their possession, having a bearing or potential bearing on the issue of guilt or innocence of the accused. This duty flows from their unique investigative role as a police force. (*Braddish* at page 133). The extent to which that duty extends to seeking out evidential material not in the possession of the gardaí does not arise in the present case (but see *Dunne*); b. The missing evidence in question must be such as to give rise to a real possibility that, in its absence, the accused will be unable to advance a point material to his defence. This is, like the garda obligation to retain and preserve evidence, to be interpreted in a practical and realistic way and “no remote, theoretical or fanciful possibility will lead to the prohibition of a trial.” (*Dunne* page 323); c. The fact that the prosecution intends to rely on evidence independent of the missing evidence at issue in order to establish the guilt of the accused does not preclude the making of an order of prohibition. In *Dunne*, the prosecution intended to rely on a confession. This did not defeat the applicant’s complaint of the failure of the gardaí to take possession of a video tape covering the scene of the robbery; d. The application is considered in the context of all the evidence likely to be put forward at the trial. The court will have regard to the extent to which aspects of the prosecution case are contested. In *Bowes*, the fact that the motor car in which the applicant was alleged to have been travelling had been lost by the gardaí was insufficient, when the applicant did not contest the fact that he was driving it and the charge related to possession of drugs found in the boot of the car. In *McGrath*, the court had regard to the “circumstantial” character of the prosecution case of dangerous driving. In *McFarlane*, the existence of photographic evidence of the missing fingerprints was highly material to the complaint that the original items had been lost by the gardaí; e. The applicant must show,

by reference to the case to be made by the prosecution, in effect the book of evidence, how the allegedly missing evidence will affect the fairness of his trial. Hardiman J said in McFarlane (page 144) that: "In order to demonstrate that risk there is obviously a need for an applicant to engage in a specific way with the evidence actually available so as to make the risk apparent." f. Whether the applicant, through his solicitor or otherwise makes a timely request of the prosecution for access to or an opportunity to have the articles at issue expertly examined may be highly material. In Bowes, the "very belated" request was critical to the refusal of relief. On the other hand, in Dunne, no request was made until some five months after charge, and long after there was any possibility of producing the video tape. In that case, however, Hardiman J stated (at page 325): "There is.....a responsibility on a defendant's advisers, with their special knowledge and information, to request material thought by them to be relevant." However, a suspect or an accused person will be unable to make a timely request, if the gardaí have destroyed or parted with possession of the material. Thus, they must give consideration to the likely interests of the defence before making such decisions; g. The essential question, at all times, is whether there is a real risk of an unfair trial. (Scully page 257). The court should focus on that issue and "not on whose fault it is that the evidence is missing, and what the degree of that fault may be." (Dunne page 322). 6. In the light of these principles, I propose to consider the complaint in the present case. I do so bearing in mind that the ultimate issue is whether there is a real risk that the appellant will not have a fair trial by reason of the failure of the gardaí to preserve the motor car. In the present case, that question depends on whether the expert witness to be called on behalf of the appellant will be less able to cast doubt on the prosecution case because he has been unable to inspect the car. 7. The first issue concerns the circumstances in which the car was disposed of. The date of the alleged offences is 3rd June 2001. The appellant was found by the gardaí trapped in the car more or less immediately after the accident. There is not and could not be any issue but that he was the driver. The appellant was served with a notice of intention to prosecute for various road traffic offences on 28th June 2001. The notice contained the following particulars:

1. Did drive the vehicle while the vehicle was seriously defective
2. Did drive the...vehicle at a speed in excess of the legal limit of 30mph in a manner which was dangerous to the public
3. Did drive at a speed given the vehicle defects which have rendered the vehicle uncontrollable. 8. The gardaí had the car destroyed, without reference or notice to the appellant, on 25th July 2001. The appellant was himself seriously injured in the accident. He suffered a dislocated hip and serious head injuries. 9. Inspector Thady Muldoon has sworn an affidavit explaining that the motor car was destroyed "because the vehicle had been inspected, had not been claimed by its owner and was in a dangerous condition." He said: "The car was in three separate pieces, was of no commercial value, the owner had no interest in same, at that stage the injured party was making a recovery in hospital, and the

vehicle was disposed of in the normal manner.” 10. The Inspector does not appear to have adverted at all to the fact that a necessary step, the service of notice of intention to prosecute, in the initiation of a prosecution against the appellant had taken place. Less than four weeks after service of that notice and before charging, the car was destroyed. At that stage, the defective condition of the vehicle was clearly going to be material, even if that is no longer the case. The appellant was most unlikely to have engaged a solicitor. In my opinion, the gardaí committed a breach of their obligation to preserve potential evidence. They ought not to have had the car destroyed without considering the possible interests of the appellant. That conclusion, of course, does not determine the matter. It is necessary to consider whether the appellant has established that he faces the real risk of an unfair trial by reason of the absence of the motor car. 11. Here it is, of course, highly material that the prosecution, on 16th January 2003, notified the appellant that it would proceed without tendering the evidence of the witnesses as to the condition of the car and that the condition of the car would no longer be an issue. Thus, the prosecution is confined to alleging that the car was being driven in a manner, including speed, which was dangerous to the public. It was presumably in response to this altered state of the prosecution that the appellant filed two affidavits and reports from his engineering expert, Dr Mark Jordan. 12. Before turning to the expert evidence on which the appellant relies, it is material to point out that, unlike M cGrath, this is not a case based on circumstantial evidence. Firstly, there is clear evidence that the motor car which the appellant was driving had been stolen on 2nd June. It belonged to a Frenchman living in Dublin. The book of evidence shows that there is substantial eye-witness evidence, if believed by the jury, as to how the car was being driven immediately before the accident. That evidence includes that of two gardaí in a patrol car. In summary, this evidence is to the effect that the car was being driven at very high speed, that it was not slowing down and that the driver was losing control. There are five civilian witnesses to support that general picture, though their evidence is in the main based more on hearing the sound of the high revving of the engine. 13. Thus, the nature of the case the appellant is facing, assuming, of course, that the evidence in the book of evidence is believed, is that, immediately prior to the accident he was driving a stolen car at high speed and going out of control to such an extent as to attract the attention of two gardaí on duty and several civilian witnesses. The appellant will be fully entitled to contest that evidence at his trial. This Court can only note its presence in the book of evidence and the extent to which the appellant indicates that he wishes to contest it. He has not suggested that he contests any of the evidence of fact. I emphasise that he remains entitled to do so at trial, but the present application must be considered on the assumption that the evidence will be led by the prosecution. 14. The experienced expert engaged by the appellant proceeded, in his report, from the premise that: “This case involves the collision of a car apparently driven by [the appellant] after apparent loss of control at Old Kilmainham on June 3rd 2001.” 15. Dr Jordan’s report, verified by his affidavit, explores the possibilities of causation of the collision of the car with the lamppost. It is concerned only with the technical aspects. At no point does Dr Jordan refer to the independent evidence. 16. Dr Jordan’s report and affidavit contain a number of criticisms of the gardaí for their failure, as he sees it, to carry out certain

measurements, observations and calculations, for example failure to measure and record inflation pressure on the tyres and to assess whether there was evidence of possible previous collision damage. These points have no bearing on the question of prohibition of the trial, where, to the extent that they are sound or good points, the appellant will be fully entitled to advance them at trial. They are relevant here only insofar as they tend to support the claim that the appellant is at a disadvantage—that he risks not having a fair trial—because he cannot examine the car. 17. Dr Jordan concentrates, in his report, on three points. Generally, they relate to the possibility of establishing that the accident was caused by physical defects in the car which a driver, particularly an inexperienced one, might reasonably not notice. 18. The first concerns the suspension. In his report, he quotes the PSV inspector as reporting that the state of the suspension was catastrophic, “with no damping at all in the rear, and anti-roll bar bushings in a poor state.....” Dr Jordan thinks that none of this would have been noticeable to a driver not well acquainted with the car. The brakes were equally defective and, in Dr Jordan’s view, the inspector was correct in indicating that this would cause a braking imbalance. On neither of these points does Dr Jordan suggest that the defence is at a disadvantage by reason of lack of opportunity to examine the vehicle, presumably because the Inspector’s report sufficiently establishes facts upon which an opinion favourable to the defence can be based. It is for the trial judge to give such rulings and directions as will enable these aspects of the PSV Inspector’s report to be placed before the jury, without prejudicing the position that the prosecution is not relying, as against the appellant, on the defective condition of the vehicle. 19. The second issue relates to the steering. Here Dr Jordan says that there are reasonable grounds for suspecting that the PSV Inspector was incorrect in his opinion that the steering mechanism was intact before the accident. He says that he would like to be in a position to verify this for himself. His report says: “There was extensive damage at the front of the steering mechanism, and there was also significant corrosion and wear in the suspension. This could implicate the steering mechanism and linkages to the front road wheels such as to introduce the possibility of a disrupted linkage.....leading to loss of control.” 20. Clearly, there must have been extensive “damage at the front.” I cannot see, however, that this statement raises a serious possibility of a pre-accident steering failure. At least it does not do so expressly. Having seen photographs of the wrecked car, Dr Jordan swore a supplemental affidavit to the effect that, “if [he] had had an opportunity to examine the vehicle, [he] would have been able to assert as a matter of strong opinion that it was not possible to come to a reliable conclusion that the steering mechanism was intact prior to the collision.” Such a consequence of the loss of opportunity to examine evidential material is far removed from what was involved in cases such as *Braddish*, where the video tape, if it had been available, would, as emphasised by Hardiman J, have borne directly on the guilt or innocence of the accused. Dr Jordan can go no further than to assert an uncertainty. 21. The third point is the possibility, raised by Dr Jordan, that the front right tyre blew out spontaneously on the bend before the impact and that “this is what caused the loss of control.” He refers to the PSV Inspector’s view that the right front tyre deflated due to impact and says access to the wreck would have allowed him “to exclude this possibility or indeed to confirm its potential as a

cause of the accident.” However, in his supplemental affidavit he refers to garda photographs which had been exhibited in a further affidavit which had been sworn on behalf of the State. Referring to one of these photographs Dr Jordan says that it provides “clues which indicate that the right front tyre may have deflated due to a blow-out or sudden deflation (which may have deflated due to direct impact).” Although he suggests that the photographic evidence is inadequate, being confined to an overhead view, and suggests that he would have been able to express a strong opinion if he had been able to examine the tyres, I believe that Dr Jordan has not shown that he is significantly handicapped by the absence of personal direct examination. In addition, I think it is always essential to consider the matter in context. A particularly striking aspect of that context is the evidence of one eyewitness, Teresa Kenny. According to her statement, she will swear that: “I heard a real hard engine revving as the car was coming along – I turned to see if it was a robbed car. I could see this car flying down the street as if it was out of control. It looked as if it was swerving from side to side. As I was looking I heard a loud bang and the car seemed to explode...” 22. The interests of a fair trial demand that the prosecution case be heard and the prosecution witnesses called in the normal way. Dr Jordan makes no attempt to explain evidence of this kind or to explain how it is consistent with the technical possibilities he raises. 23. More fundamentally, arguments of this type raise real concern that applications for prohibition may transmute into a type of criminal trial in reverse. A witness, particularly an expert witness, speculates as to possible explanations for certain facts. It is perfectly permissible at a trial for the defence to call expert evidence as to the possible explanations for any aspect of the case. 24. Dr Jordan, as an expert witness, suggests at least three alternative possible hypothetical explanations for the accident. None is related to any evidence from the appellant. That is the appellant’s right. None relates to the body of independent evidence, which is nowhere mentioned by Dr Jordan. In response to the specific question upon which he was asked to report as to whether it was “reasonably possible that the impacts occurred in a manner other than suggested in the Book of Evidence,” his report says: “It is possible.” His explanations for this conclusion do not, at any point, refer to the eye-witness evidence. 25. It has not been shown to my satisfaction that the appellant will be unable to put forward these explanations at the trial. The concern of Dr Jordan is to raise possibilities, which is a perfectly legitimate role for an expert to play at the trial. The appellant has not, in my view, made out a sufficient case that he will not have a fair trial. I would dismiss the appeal. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/ie/cases/IESC/2008/S39.html>

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