

IRELAND / JUDGMENT

Toohey -v- DPP [2008] IESC 64 (03 December 2008)

[2008] IESC 64

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[2008] IESC 64 Supreme Court Record Number: 65/07 High Court Record Number : 2005 1378 JR
Date of Delivery: 03 December 2008 Court: Supreme Court Composition of Court: Denham J., Hardiman J., Finnegan J. Judgment by: Finnegan J. Status of Judgment: Approved
Judgments by Result Concurring Finnegan J. Other (see notes) Denham J., Hardiman J.
Outcome: Allow And Set Aside Notes on Memo: Allow and set aside on Charges 1 & 2.
Dismiss on Charge 3. THE SUPREME COURT JUDICIAL REVIEW 65/07 Denham J.
Hardiman J. Finnegan J. BETWEEN LIAM TOOHEY APPLICANT/RESPONDENT and THE
DIRECTOR OF PUBLIC PROSECUTIONS AND THE JUDGES OF THE CIRCUIT COURT
APPELLANTS/RESPONDENTS Judgment of Mr Justice Finnegan delivered on the 3rd day
of December 2008 On the 9th November 2004 at 7.30 a.m. a serious road traffic accident
occurred at Dunmain, Co. Wexford between a MAN rigid truck and a Citroen Saxo motor
car. The driver of the motor car sustained serious injuries. Arising out of the accident the
respondent on this appeal, the driver of the MAN truck, was charged with the following
offences:-

1. Dangerous driving causing serious bodily harm contrary to section 53(1) and (2)(a) of the Road Traffic Act 1961 as amended.
2. Dangerous driving contrary to section 53(1) and (2)(b) of the Road Traffic Act 1961 as amended.
3. Using a mechanically propelled vehicle where the pneumatic tyre fitted to the same, namely the right front tyre, was excessively worn contrary to Article 16(7) of the Road Traffic (Construction, Equipment and Use of Vehicles) Regulations 1963 as amended and section 102 of the Road Traffic Act 1961 as amended. The following is a brief chronology of events:-
9th November 2004 Date of accident. 10th November 2004 The MAN truck was returned to its

owner and shortly thereafter repaired. 30th November 2004 The respondent was arrested, furnished a cautioned statement and was interviewed at New Ross Garda Station. 26th April 2005 The respondent charged with the offences. 24th May 2005 Book of Evidence delivered to the respondent's solicitor. 9th August 2005 Further evidence delivered to the respondent's solicitor. 29th August 2005 Further evidence delivered to the respondent's solicitor. 22nd September 2005 Further evidence delivered to the respondent's solicitor which included two statements of Garda Stuart O'Sullivan the Public Service Vehicle Inspector stationed at Wexford Garda Station. 30th September 2005 Further evidence delivered to the respondent's solicitor consisting of photographs of inter alia the MAN truck. HIGH COURT PROCEEDINGS On the 19th December 2005 the respondent sought and was granted leave to apply by way of an application for judicial review the relief sought being an order of prohibition restraining the prosecution of the respondent on the charges hereinbefore mentioned. The grounds relied on are set out in the statement of grounds as follows:- "1. The motor vehicle which the applicant was driving (his employer's vehicle) has been examined by An Garda Siochána but has not been preserved in its post-accident condition.

2. An allegedly defective tyre on the vehicle has been disposed of and is not available for inspection.
3. The applicant has lost the opportunity to have the vehicle forensically examined." The application was grounded upon the affidavit of Anthony J. O'Malley the respondent's solicitor. The chronology set out above is derived from the same. The Book of Evidence and the additional evidence served are exhibits to the affidavit and from the same the case to be made against the respondent appears as follows:- 1. Cautioned statement of the respondent . The relevant portion of the statement is as follows:- "I saw the car coming against me and drove on, on my own side of the road. I heard a bang. I then pulled the truck down to my right on to the opposite side of the road and hit the bank. The bang of impact. I am one hundred per cent sure I was on my own side of the road when the bang happened, which obviously was the impact. I am not saying that Alan Kavanagh came across the road at me. Before the impact I remember hitting the bank on my side of the road. It's a high bank. When I hit the bank I pulled down the steering to the right. It didn't cause me to lose control. The bang off the bank and the impact happened at nearly the same time. I was so much on my own side I was nearly scraping the bank." 2. Statement of evidence of Garda John O'Leary He attended the accident scene and made a sketch map. On the sketch map he identifies fresh tear marks on the carriageway some three feet eight inches from the right hand side of the road viewed from the direction in which the respondent was travelling. From this he concludes that the point of impact was on a line drawn across the carriageway at this point. Some eight feet along the carriageway from this line in the direction in which the respondent was travelling the Citroen Saxo is shown with its rear imbedded in the ditch and on its correct side of the road. Again, viewed from the direction in which the respondent was travelling, he marks debris from the Citroen Saxo for a distance of some twenty six feet all situate close to the right verge of the road. Continuing in the same direction the MAN truck is shown with its front imbedded in the same ditch, that is, on its incorrect side of the

road. The sketch map shows a tyre mark forty six feet in length commencing at the centre line of the road and continuing to the left front wheel of the truck which is imbedded in the ditch on its incorrect side of the road. In his statement he records that the road was damp: the tyre mark was not a skid or brake mark. He noted a scuff mark on the ditch on the respondent's side of the road some thirty two feet before the line of impact again in the direction in which the respondent was travelling. He noted that the front tyre on the driver's side of the MAN truck was completely worn. At the scene of the accident the respondent gave the following account to Garda O'Leary:- "I was travelling along the road, as I came round the bend there I just saw the car hit the car and swerved. I can't recollect whether I was on the wrong side or he was." 3. Statement of Garda Stuart O'Sullivan, Public Service Vehicle Inspector Two statements were delivered by way of additional evidence, one relating to the MAN truck and the other to the Citroen Saxo. He inspected the MAN truck on the 10th November 2004. It had heavy impact damage to the off-side front shearing the front axle spring mounting and rear of spring chassis mounting bolts. The off-side front tyre thread depth was one millimetre. While the statement is dated 26th February 2005 it was not delivered to the respondent's solicitor until the 22nd September 2005. 4. Photographs A book of photographs was delivered by way of further evidence on the 30th September 2005. The book includes photographs of the MAN truck, five in number. The tyre alleged to have insufficient thread is not clearly discernible in any of the photographs. Three of the photographs show damage to the right front of the MAN truck. The respondent's solicitor also exhibits correspondence. By letter 29th April 2005 he sought copies of all prosecution witness statements and unused material. Not receiving a response he sent a reminder on the 13th May 2005. The request was ultimately dealt with by letter dated 9th August 2005. By letter dated 12th August 2005 the respondent's solicitor sought the tacograph removed from the MAN truck and also video tapes relating to two of the four interviews conducted with the respondent. While it is unclear if the additional tapes were ever furnished nothing turns upon this. By letter dated 28th September 2005, that is after receipt by way of additional evidence of the Public Service Vehicle Inspector's report on the MAN truck and the photographs, the respondent's solicitor sought to arrange for a consulting engineer to inspect the MAN truck and report on the same. It emerged in correspondence that on the day following the accident the MAN truck had been returned to the owner, that is the respondent's employer, that the same had been repaired shortly thereafter and the tyres replaced and that the allegedly defective tyre was not available for inspection. Finally the respondent's solicitor exhibits a report obtained from an engineer retained on behalf of the respondent. In short due to the unavailability of the MAN truck in its damaged condition he is unable to carry out a reconstruction of the accident. In the statement of opposition the appellants relied upon delay on the part of the respondent in seeking inspection and delay in applying for leave and denied that the respondent faces a real and serious risk of an unfair trial by reason of the matters complained of. On behalf of the appellants Garda John O'Leary swore an affidavit in like terms to his statement of evidence contained in the Book of Evidence. JUDGMENT OF THE HIGH COURT By Order of the High Court on the 17th January 2007 the appellants were restrained from further prosecuting the respondent on the

three charges. From this judgment the appellants appeal. NOTICE OF APPEAL The grounds of appeal relied upon by the appellants are as follows:-

1. That the learned trial judge erred in law in holding that the respondent ran a serious risk of not getting a fair trial by virtue of the fact that the vehicle driven by the respondent and a tyre from the said vehicle which is alleged to have been excessively worn were not preserved for inspection by or on behalf of the respondent prior to the trial of the respondent.
2. That the learned trial judge erred in law and in fact by failing to give any or any adequate consideration to the existence of photographs of the said vehicle taken by a member of the Gardai who was a Public Service Vehicle Inspector at the scene of the collision which led to the prosecution here.
3. That the learned trial judge erred in law and in fact in holding that the Gardai failed in their duty to preserve relevant evidence for the purpose of the prosecution herein.
4. That the learned trial judge erred in law and in fact in failing to dismiss the application for orders of prohibition and declaration by way of judicial review by virtue of the unwarranted delay on the part of the respondent in making enquiries about the availability of the said vehicle and tyre for inspection.
5. That the learned trial judge erred in law and in fact in failing to dismiss the said application for orders of prohibition and declaration by way of judicial review on account of the failure of the respondent to apply promptly for leave to proceed by way of judicial review in accordance with the terms of Order 84 of the Rules of the Superior Courts 1986. THE APPELLANT'S SUBMISSIONS The appellant's submissions as modified by supplemental submissions and the submissions before this court are concerned solely with the issue of whether there is a real risk of an unfair trial. It was submitted that critical in the case against the respondent is that all evidence points to the MAN truck having been on its wrong side of the road at the time of impact. The court was referred to the evidence of the tyre mark on the ground close to the line of impact, the position of the vehicles after impact and the distribution of debris along the respondent's incorrect side of the road as evidence of the impact having occurred on the respondent's incorrect side of the road. The extensive damage to the front of the Citroen Saxo was concentrated on the driver's side. In the course of argument it was conceded and an undertaking given that the Public Service Vehicle Inspector would not be called to give evidence in relation to damage to the MAN truck nor would the photographs of the MAN truck be put in evidence on the charges of dangerous driving causing injury and dangerous driving simpliciter. The chronology set out above was not disputed. He would be called to give evidence on the charge relating to the tyre which charge will be dealt with at the same time as the other charges but it was not suggested and would not be suggested that the condition of that tyre had any relevance to the accident. SUBMISSIONS ON BEHALF OF THE RESPONDENT The respondent relied upon the decisions of this court in *Bowes v Director of Public Prosecutions*, *McGrath v Director of Public Prosecutions*

[2003] 2 I. R. 25, *Savage v D. P. P.*

[2008] IESC 39 and *Ludlow v D. P. P.*

[2008] IESC 54 . It was the duty of the appellant to preserve the MAN truck in its damaged condition to afford the respondent an opportunity to have the same inspected and likewise the allegedly defective tyre. The prosecution case depends upon a reconstruction of the accident and for the purpose of that reconstruction the MAN truck and the allegedly defective tyre were available to the Public Service Vehicle Inspector. In their absence it is not possible for an engineer retained by the respondent to reconstruct the accident. As a result there is a real risk of an unfair trial on all three charges. THE LAW The relevant principles of law are well established. In *Savage v Director of Public Prosecutions* (unreported) Supreme Court 3rd July 2008 Denham J. set them out as follows:- “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 Garda Síochána to preserve and disclose material evidence. (iv) The duty to preserve and disclose material evidence is to do so so far as is necessary and practicable.

(v) The duty to disclose and preserve as qualified by *Lynch J. in Murphy v D. P. P.*

[1989] I. L. R. M. 71 cannot be precisely defined as it is dependant on all the circumstances of the case. (vi) The duty does not require the Gardai 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 Gardai 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 page 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 enquiry is on the issue of the fairness of the

intended trial, and not on the shortcomings in the Garda investigation. It is not a Garda disciplinary process.” *McGrath v D. P. P.* [2003] 2 I. R. 25 concerned a charge of dangerous driving causing death in which a motor cycle was involved. The accident occurred on the 21st March 1999. On the 5th August 1999 the motor cycle was released to a dealer. A summons alleging the offence was served on the 24th September 1999. The motor cycle was broken up for parts the engine being removed in November 1999 and the tyres in January 2000. The Book of Evidence was served on the 17th January 2000. On the 1st February 2000 application was made for facilities to inspect the motor cycle. In the course of his judgment Hardiman J. at page 41 observed:- “Accordingly, I conclude that the applicant in the second appeal has suffered the loss of a reasonable prospect of obtaining evidence to rebut the case made against her by reason of the Gardai having parted with the motor cycle. I do not consider that, by delay or otherwise, she has disintitiled herself to relief. This leads to the conclusion that the respondent’s further prosecution of her should be restrained. I am conscious of the fact that this in turn would mean that serious allegations, arising out of an accident which resulted in fatality, will not be litigated to a conclusion because of the risk of unfairness. Dangerous driving causing death is an offence whose seriousness has been underlined by the fairly recent increase of the maximum penalty to ten years imprisonment. Experience shows that it is almost unique, among offences not requiring a specific intent, in carrying a real possibility of a significant custodial sentence for a convicted person of good character. One would hope that its very seriousness would, in future cases, ensure that items of manifest evidential potential are properly preserved. These two cases tend to indicate that there may be a need for a more cohesive practice among the Gardai in the preservation or disposal pre-trial of evidence which is potentially relevant to the defence. In criminal proceedings the adoption and observance of suitable guidelines might assist in avoiding pre-trial litigation of this nature.” In *Ludlow v Director of Public Prosecutions* (unreported) Supreme Court 31st July 2008, a case of dangerous driving causing death, the case against the applicant was that certain tyres on his vehicle were excessively worn. A report of the Public Service Vehicle Inspector was relied upon to establish that the tyres were indeed worn and that the effect of their so being would contribute to the loss of direction control of the vehicle. In relation to this evidence Hardiman J. had this to say:- “This is admissible as the PSV Inspector’s expert opinion. It can only be answered by expert testimony. If the defendant’s expert is to give evidence on a footing of equality with the prosecution’s expert he must have the opportunity to examine the items which the prosecution’s expert examined. Otherwise the effect of his evidence will be undermined by the simple but devastating question ‘You never saw the tyres, did you?’ His evidence will be merely speculation and could not hope to stand against that of an expert who saw the relevant items.” In that case as in the present the relevant tyres were disposed of promptly and without the opportunity to inspect the same being afforded to the applicant the accident having occurred on the 9th October 2002 and the vehicle with tyres attached returned to its owner on the 8th or 9th October 2002. The central role attributed to the condition of the tyres in the accident was not communicated to the defendant until the 29th October 2003 by which time the tyres

had already been disposed of and ten months later the unavailability of the tyres was communicated by the prosecution to the defence. In these circumstances an order of prohibition was granted. DISCUSSION At the hearing before this court the appellants undertook that the evidence of the Public Service Vehicle Inspector would not be relied upon in relation to the charges of dangerous driving causing serious injury or dangerous driving simpliciter but would be relied upon in relation to the separate charge relating to the alleged defective tyre which would be heard at the same time. Further the photographs of the MAN truck would not be relied upon. In these circumstances in relation to the charge of using a mechanically propelled vehicle with an excessively worn tyre contrary to the Road Traffic (Construction Equipment and Use of Mechanical Vehicles) Regulations 1963 Article 16(7) the position is precisely the same as in *Ludlow v Director of Public Prosecutions*. It was reasonable and practicable and necessary that the tyre be preserved to enable it to be inspected and this was not done. The respondent has been prejudiced in his defence in that he is being denied the availability of an expert witness. There is a real risk of an unfair trial. I would affirm the order of the learned High Court judge and prohibit the further prosecution of this charge. The position with regard to the charges of dangerous driving causing serious injury and dangerous driving simpliciter is somewhat different. The case against the respondent is that he drove his vehicle on to his incorrect side of the road and there collided with the oncoming Citroen Saxo. The evidence to be adduced by the prosecution will consist of his statement at the scene of the accident, his cautioned statement and the evidence of Garda John O'Leary as to what he found at the scene of the accident. It is not suggested that an excessively worn tyre caused or contributed to the accident. Garda O'Leary will give evidence that the MAN truck was damaged at the front to the right side. This evidence is of no assistance in determining whether that damage was caused by contact with the Citroen Saxo rather than the ditch on the respondent's incorrect side of the road nor is it of assistance in determining where on the road, that is, on the respondent's correct or incorrect side, the accident occurred. It is the prosecution case that the accident occurred on the respondent's incorrect side of the road. No expert evidence will now be called by the prosecution as to the damage to the MAN truck: there will be no expert reconstruction of the accident for the respondent to rebut. The Citroen Saxo was available for inspection on behalf of the respondent by an expert at all reasonable times. However for the Public Service Vehicle Inspector to attempt a reconstruction of the accident on the basis of his inspection of this vehicle without reference to the MAN truck would also represent a real risk of unfairness as the respondent's expert has been denied inspection of the MAN truck: the nature of the damage to the MAN truck and paint or other marks on the same would assist the respondent's expert in a reconstruction of the accident and afford the opportunity of rebutting the Public Service Vehicle Inspector's expert evidence. There can be no expert reconstruction of the accident based on an inspection of the vehicles by the Public Service Vehicle Inspector. Having regard to the undertaking on behalf of the appellants recorded above there will not be any expert reconstruction of the accident given in evidence. The prosecution case against the respondent is that he drove on to his incorrect side of the

road and there collided with the Citroen Saxo. The respondent has not satisfied me that absent the evidence of the Public Service Vehicle Inspector there is a real risk of an unfair trial by reason of his inability to obtain an expert report on the MAN truck. This being the case in relation to the charges of dangerous driving causing serious injury and dangerous driving simpliciter I would allow the appeal and set aside the Order of the learned High Court judge prohibiting the further prosecution of these charges. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/ie/cases/IESC/2008/S64.html>

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Prepared on 26 October 2026 · Esheria