Neutral Citation Number: [2007] IEHC 349

THE HIGH COURT
JUDICIAL REVIEW

[2006 No. 851 J.R.]

BETWEEN

COLM MURPHY

APPLICANT

AND
THE DIRECTOR OF PUBLIC PROSECUTIONS, IRELAND
AND THE ATTORNEY GENERAL

RESPONDENTS

Judgment of Mr. Justice O'Neill delivered on the 23rd day of October, 2007

1. On the 15th August, 1998 an explosion occurred in Omagh, Co. Tyrone which killed 29 persons and injured some 300 others. The applicant in this case faced two charges before the Special Criminal Court namely, conspiracy to cause an explosion i.e. the Omagh bomb and membership of an unlawful organisation.

2. On the 8th November, 1998, the applicant was first arrested in Kells. The applicant was again arrested on the 21st February, 1999. On the 23rd February, 1999 the applicant was charged with conspiracy to cause an explosion between the 13th and 16th day of August, 1998. The applicant was granted bail by the High Court on 26th March, 1999 and thereafter was remanded on continuing bail. A Book of Evidence was served on the 5th October, 1999. On 31st January, 2000 the applicant applied to the Special Criminal Court for legal aid but this was refused. On the 21st March, 2000 a trial date was fixed for the 16th January, 2001. In the meantime, the applicant through correspondence made repeated requests for disclosure of relevant material.

3. Because another trial exceeded its anticipated time limit, the trial of the applicant could not commence as scheduled on the 16th January and a new date was fixed for the 9th October, 2001. Ultimately, the trial commenced on the 12th October, 2001 and proceeded normally until the 19th November, 2001. On the 19th November, 2001 the presiding judge adjourned the proceedings to the 11th January, 2002 because of the indisposition of a member of the court. The hearing concluded on the 14th January, 2002 and the court delivered its verdict on the 22nd January, 2002. The applicant was found guilty of the conspiracy charge and on the 25th January, 2002 a sentence of 14 years was imposed upon him. Leave to appeal was refused.

4. On the 30th January, 2002 the applicant gave notice of his application for leave to appeal to the Court of Criminal Appeal. His notice of application did not contain the grounds of appeal. These grounds were furnished in October, 2002. In the ordinary way the transcript of the hearing was sought and this was furnished on the 3rd July, 2003. The applicant applied to the Court of Criminal Appeal for legal aid on the 26th April, 2004. This was granted. Following this the applicant delivered legal submissions on the 14th June, 2004. The first named respondent delivered written submissions on the 18th October, 2004. On the 27th October, 2004, a date, the 7th December, 2004 was fixed for the appeal. The appeal was heard from the 7th to the 9th December, 2004 and the Court of Criminal Appeal gave its judgment on the 21st January, 2005 in which it quashed the applicant's conviction and directed a re-trial.

5. A very unusual complication occurred at this point. Two members of An Garda Síochána who had given evidence in the applicant's first trial, were charged immediately after the Court of Criminal Appeal had given its judgment, with perjury alleged to have been committed during the first trial of the applicant. The first named respondent decided to proceed with the prosecution of both of these garda witnesses before the applicant's re-trial. The applicant agreed with this manner of proceeding because he would be gravely inhibited in his cross examination of these two gardaí in a re-trial if that took place before the prosecution of these two gardaí.

6. The prosecution of the applicant in the Special Criminal Court was listed for mention on the 5th April, 2005 and thereafter was adjourned on a number of occasions pending the trial of the two gardaí. On the 25th April, 2006 a trial date was fixed by the Special Criminal Court for the 11th January, 2007. On the 17th July, 2006 the applicant applied to this Court for leave to bring these judicial review proceedings and this Court by its order of the 17th July, 2006 gave the applicant leave to seek the following reliefs by way of judicial review:

> "i. An order of prohibition restraining the second named respondent from conducting the trial of the applicant and/or an injunction restraining the first named respondent from prosecuting the applicant in respect of charges or either of them from which the applicant presently appears before the second named respondent.
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> ii. A declaration that the trial of the applicant would have if it proceeded contravened the rights of the applicant under the Constitution and/or the European Convention on Human Rights in particular article 6 thereof."

7. The grounds upon which the applicant was given leave to apply for judicial review were as follows:

> "1. The lapse of time (in itself or taken in conjunction with the specific and/or general prejudice suffered by the applicant) between the institution of proceedings against the applicant and the proposed trial is such that there is a real risk of an unfair trial and/or such a trial would not be a trial in due course of law.
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> 2. Alternatively, the lapse of time is such that the trial, if it proceeds, would contravene the guarantee in article 6 of the European Convention on Human Rights to a trial within a reasonable time."

8. By way of a notice of motion which came on for hearing at the same time as the trial in this matter on the 23rd May, 2007 the applicant sought to amend the grounds upon which he was given leave to apply for judicial review by the addition of the following ground:

> "3. The capacity of the applicant to defend criminal proceedings against him was compromised by reason of his memory impairment to such an extent as to render it unfair and/or in breach of his rights under the Constitution and/or the European Convention on Human Rights to proceed with the trial either at all or after such a lapse of time as has occurred."

9. The basis upon which this amendment was sought was that the applicant had been referred to a psychiatrist, Professor Harry Kennedy for examination in December, 2006 and he, in the course of his examination of the applicant, noted that the applicant had a significant head injury in 1989 as a consequence of which he was of opinion that the applicant suffered from some degree of memory impairment. The applicant was further seen by Dr. John S. Ferguson, a senior clinical forensic psychologist who in his report of 14th

February, 2007 confirmed and detailed the extent of the foregoing memory impairment.

10. Having considered the evidence advanced on the aforesaid motion and having heard the submissions of counsel for both sides, I formed the view that the applicant or his advisors were not aware of the problem highlighted in the application until at the earliest December 2006 and as there was no prejudice to the respondents, they in the meantime having had an opportunity to have the applicant examined by a psychiatrist, Dr. Pender, I came to the conclusion that I should allow the amendment sought and so did by order of 23rd May, 2007.

11. The applicant submits that from the time of his arrest and charging in 1999 until the date fixed for his trial in January 2007 approximately eight years elapsed and that within this period there was culpable prosecutorial delay on the part of the first named respondent and "systems" delay otherwise which cumulatively have had the effect of prejudicing the applicant's defence to such extent that he can no longer get a trial in due course of law as required by Article 38(1) of Bunreacht na hÉireann and he has been denied an expeditious trial as required by Article 6(1) of the European Convention on Human Rights.

12. In addition the applicant submits that the impairment of his memory as outlined in the medical reports of Professor Kennedy and Dr. Ferguson is of such extent as to prejudice him in the conduct of his defence in any future trial.

13. The following statement from the judgment of Kearns J. in the case of *P.M. v. The D.P.P.* [2006] 2 ILRM 361 sets out the test that must be met by an applicant seeking prohibition of his trial where it is established that culpable prosecutorial delay has occurred:-

> "I believe that the balancing exercise referred to by Keane C.J. in *P.M. v. Malone* is the appropriate mechanism to be adopted by a court in determining whether blameworthy prosecutorial delay should result in an order of prohibition. It means that an applicant for such relief must put something more into the balance where prosecutorial delay arises to outweigh the public interest in having serious charges pursued to trial. In most cases, pre-trial incarceration will not be an element as an applicant will probably have obtained bail pending his trial. Secondly, while he may assert increased levels of stress and anxiety arising from prosecutorial delay, any balancing exercise will have to take into account the length of such blameworthy delay, because if it is a short delay rather than one of years the mere fact that some blameworthy delay took place should have of itself justified the prohibition of a trial. As part of the balancing exercise it should also be borne in mind that an order of prohibition may not be the only remedy available in such circumstances, a court may have the ability to direct that a particular trial be brought on speedily and be given priority, although precisely how this would be policed or operated in practice maybe problematic."

14. It is of course to be observed that in addition the applicant contends that the delay has prejudiced his capacity to defend himself.

15. The first essential to be established by an applicant in seeking an order for prohibition on the grounds of prosecutorial delay is that there has been blameworthy prosecutorial delay.

16. In this case, as the above recital of the main milestones in the case indicates, the applicant was brought to trial in the Special Criminal Court on 12th October, 2001 approximately two and a half years following his arrest and charge. During that period the applicant criticises the conduct of the prosecution and claims that either culpable delay or "systems" delay occurred.

17. In my view in determining whether or not blameworthy delay has occurred the court must look at the overall time taken to accomplish the relevant prosecutorial steps. In the course of any prosecution a variety of diverse circumstances will arise which will require varying degrees of time to be dealt with. The prosecution in this case was a difficult one and a considerable volume of material had to be prepared and furnished to the applicant. In my view in the process of this, there is no evidence of any blameworthy delay whatever. Delay did occur as a result of the original trial date having to be abandoned. This resulted in a delay from 16th January, 2001 to the 12th October, 2001. In the first place, the first named respondent had no responsibility at all for this period of delay. Secondly, the failure to get a case on as anticipated on one occasion could not in my view lead to a conclusion that the second named respondent was culpably in default of its obligation to provide the necessary resources to the Special Criminal Court to carry out its function.

18. In my view the period of time between the charging of the applicant and the commencement of his trial on the 12th October, 2001 could not be said to be in the circumstances of this prosecution, inordinate or constitute blameworthy delay.

19. The applicant complains of the delay occasioned by the adjournment of his trial from 19th November, 2001 to the 11th January, 2002 occasioned by the indisposition of a member of the court. In my view this period of delay, in the context of a trial conducted by judges alone, and having regard to the reasons for it could not amount to culpable delay on the part of the second named respondent.

20. The next period in respect of which culpable prosecutorial delay or "systems" delay is complained of by the applicant is the period from the delivery of its verdict by the Special Criminal Court on the 22nd day of January, 2002 or the imposition of the sentence of 14 years on the 25th January, 2002 and the hearing of the appeal in the Court of Criminal Appeal, which hearing commenced on 7th December, 2004 and continued until the 9th December, 2004 with the judgment of the court given on the 21st January, 2005.

21. Undoubtedly delay occurred in this period but in my view, on the evidence before me the applicant was responsible in very large measure for that delay. Firstly although the applicant's notice of application was timely, he did not furnish his grounds of appeal until October 2002. The applicant complains about the absence of the official transcript until 3rd July, 2003. In my view this complaint is unmeritorious. The applicant was in possession of transcripts which were made available throughout the trial and hence there is no basis for suggesting that the applicant was not in a position to advance his appeal until he got the official transcript on 3rd July, 2003. The applicant seeks to justify the delay in furnishing his written submissions on the basis that the applicant was not given legal aid until 24th April, 2004. Thereafter his written legal written submissions were delivered on the 14th June, 2004, almost two and a half years after the commencement of his application for leave to appeal. The applicant seeks to suggest that the delay in processing application for legal aid was immaterial because in any event the Court of Criminal Appeal could not have accommodated an appeal of the length involved before Easter of 2004. I am wholly unable to accept such an explanation for the delay that has occurred. As late as 3rd February, 2004 the case was listed in the Case Management list to ascertain readiness to proceed having regard to the legal aid application. The applicant had not lodged the necessary papers for the legal aid application. Thus the case was adjourned to the Case Management list of 2nd March, 2004. What had been required of the applicant in this regard was to complete a statement of means, which one would have thought would not have presented a difficulty at that time.

22. I am of opinion that there was inordinate and unexplained delay on the part of the applicant in advancing his application for legal

aid and that this delay in turn inevitably affected the onward progress of the application for leave to appeal, in the Court of Criminal Appeal list. Had the applicant pursued his application for legal aid in a timely fashion, it is probable that his appeal would have been prepared far sooner and been given a date for hearing far sooner than occurred. I am satisfied that all of this delay was occasioned by inaction on the part of the applicant.

23. The first named respondent filed his written submissions in the Court of Criminal Appeal on 18th October, 2004. In my view there was no blameworthy delay on his part in the period taken to complete these submissions, having regard to the complexity of the issues.

24. It is quite clear that there was no delay from then to the beginning of the appeal on 7th to 9th December, 2004.

25. I am satisfied therefore that in the period from the commencement of the appeal process in February 2002 until the hearing of the appeal on 7th December, 2004 there was no blameworthy delay on the part of the first named respondent nor was there any culpable "systems" delay on the part of the second named respondent. Insofar as there was delay in this period it was entirely the fault of the applicant.

26. The two year period from January 2005 until January 2007 when a date was fixed for the re-trial was entirely explained by the prosecution of the two Garda witnesses in the first trial of the applicant for perjury. The applicant acquiesced in this manner of proceeding and consented to various adjournments along the way. In my view he cannot now complain about this delay.

27. I am satisfied that notwithstanding the lengthy period that has elapsed since the applicant was charged with the offences concerned, there has not been any blameworthy delay on the part of either the first or second named respondents. That conclusion would be sufficient to dispose of the applicant's complaints in respect of delay but in deference to the submissions made I should add the following.

28. The applicant complained of two types of prejudice arising from the delay namely ongoing and increased stress and anxiety caused by the delay and prejudice to his defence on the re-trial.

29. Insofar as the former is concerned, the stress and anxiety from which he suffers is described in the following passage from the report of Professor Kennedy:

> "At interview, Mr. Murphy described somatic and cognitive symptoms of anxiety which occurred particularly in social settings and of the characteristics of social anxiety which may at times be of phobic intensity. This is complicated by symptoms arising from high blood pressure and the side effects of medication prescribed for him at times in the past. The psychiatric symptoms of social anxiety in my opinion are related to these ongoing proceedings and are likely to be further exacerbated in both intensity and duration by delay. An element of these symptoms arises from the reality of the social stigma, isolation and rebuffs Mr. Murphy has experienced. Accordingly the early resolution of these proceedings is likely to lead to a resolution of his anxiety symptoms."

30. It is to be expected that facing a prosecution in respect of a serious criminal offence gives rise to considerable and understandable anxiety and stress. It is inevitable that where the crime to which the prosecution is related is of such a horrific nature as to have outraged the entire community, a person charged and facing prosecution will suffer some degree of social stigma and isolation and will encounter rebuffs.

31. The symptoms of stress and anxiety that are described by Professor Kennedy appear to me to be in the context of this criminal prosecution, entirely predictable and not at all unusual or out of the ordinary. In my view it simply cannot be said that because the applicant suffers a type and level of anxiety and stress as described by Dr. Kennedy that there could on that basis be a prohibition of the prosecution. If it were the case that blameworthy prosecutorial delay could lead to an order of prohibition, where the stress and anxiety suffered is no more than is to be expected in the circumstances, the inevitable consequence would be that prosecutorial delay, per se, would in effect be sufficient to obtain a prohibition of the trial. In my opinion where stress and anxiety is relied upon as the prejudice justifying prohibition it must be of a wholly different order and degree than the stress and anxiety which one would expect to find in someone facing prosecution for serious criminal offences.

32. The applicant also contends that a result of the delay his capacity to defend himself in the re-trial is impaired to such an extent that he cannot get a fair trial as required by Article 38(1) of the Constitution and Article 6(1) of the European Convention on Human Rights.

33. There is no suggestion that any of the evidence which was available for the first trial has been lost as a result of delay. No witnesses have died or become unavailable. The applicant's principal concern is that the case has now become a "stale" case with the consequence that memories will have dimmed and that even though ample written material is available to enable witnesses to refresh their memory, the spontaneity in the evidence in the first trial will have been lost. Furthermore the applicant is concerned that in respect of many of the points of defence which were advanced through cross examination in the first trial the applicant will now be disadvantaged because the element of surprise will have been lost.

34. I am unable to ascertain in the evidence or the submissions advanced on behalf of the applicant any disadvantage to the applicant in his defence arising from the passage of time that has ensued. All of the elements of defence that were available to the applicant in the first trial remain available to him. It is of course an inevitable feature of a re-trial following the quashing of a conviction that there may be some loss of "spontaneity" in the evidence and some loss of surprise so far as certain lines of cross examination are concerned. That however is an unavoidable feature of a re-trial and cannot be a ground for prohibition. Insofar as passage of time may dim memory, in a criminal prosecution, such as this there is a wealth of written material which can help refresh memory.

35. I have come to the conclusion therefore that even if the applicant had been in a position to establish blameworthy delay on the part of either the first or second named respondent, he has failed to demonstrate any prejudice arising from that delay.

36. This brings me finally to consider the applicant's submission relevant to the amended ground for leave namely that as a result of a brain injury suffered in an accident in 1989 he now suffers from memory impairment such that he cannot now be fairly tried for these offences.

37. As is clear from all of the medical opinions and indeed from the submissions of the applicant no issue arises here as to the applicant's fitness to plead. As is equally clear if any such issue did arise it would be a matter for the trial judge to deal with it.

38. The injury to the plaintiff's memory was discussed in considerable detail in the report of Dr. Ferguson the Neuro Psychologist. Some passages from his report are worth quoting:

> " … I would not expect Mr. Murphy to be compromised in being able to recall important episodic or factual information from his past (even post head injury); he would not appear to have difficulties with the permanent storage of such information. The specific impairment in short term memory would affect his ability to *temporarily* remember *immediately presented information* especially if it is not repeated or presented at a slow pace; the condition is unlikely in some interrogative styles. In the stressful conditions of such a police interview, he could become confused easily, and be unable to remember important aspects of the interview as he cannot store the verbal information long enough for it to stay in memory. Mr. Murphy speed of processing verbally presented information is also poor, and would further impede his ability to remember important aspects of an interview, both during the interview process itself, and he is also likely to forget aspects of the interview after it is finished due to the cumulative effects of not being able to process the verbally presented information at the time. This assessment can only conclude that Mr. Murphy is likely to experience difficulties with the temporary storage of verbally presented information in his "working" or "immediate" memory. Within the process of a stressful rapidly paced interrogative interview style, Mr. Murphy is likely to fail to process and remember certain information *spoken to him*, this is information he has no control over. I cannot however conclusively state that Mr. Murphy will experience difficulty recalling anything *he has said* in previous interviews with police. This would after all be information generated verbally by him, it is unlikely to be new or "novel" information, but based upon semantic memory and his knowledge and experience; and it is ultimately verbally presented information that he has control over. Nevertheless because of the result of stress he may have been under during his previous interviews, there may have been some difficulties recalling aspects of discussion in general.
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> Regarding prognosis, it is unlikely that if a right cerebral hemisphere lesion has occurred as a result of head injury, Mr. Murphy's stated deficits will fully recover to his pre-morbid levels of functioning. However, continued development of effective compensatory strategies for his poor short term memory and processing speed should result in some improvement in symptom management and general coping ability. The findings of this assessment of intellectual function are consistent with those of previous testing in 1990, recent to the road traffic accident. There does not appear to have been any decline in functioning during this time, or as is also noteworthy, any improvement."

39. From this evidence I would infer that the applicant's memory difficulty is limited to a short term difficulty in absorbing information verbally presented to him in a fast paced interrogative style interview. He has no difficulty in recalling events or information from his past including his post-accident past and has no difficulty in recalling what he himself has said in the past.

40. I am satisfied that the memory impairment which afflicts the applicant has not at all affected his ability to recall relevant events and in particular his participation in interviews with members of An Garda Síochána and to instruct his legal team accordingly. Thus insofar as an important part of the State case against the applicant is an admission allegedly made by him in the course of one interview, it would seem to me that his memory impairment would not affect his ability to remember something as important at this, allegedly said by him. It is noteworthy that in this regard no memory difficulties apparently impinged upon his defence in the first trial.

41. The difficulty which the plaintiff has it would appear would affect him in an interview type situation perhaps when being cross examined. This did not arise in the first trial but should it arise in the second trial, if the applicant has any difficulty in coping with questions that are put to him or the manner in which they are put, there is no doubt that if his difficulty is drawn to the intention of the court, an appropriate strategy will be devised to give the applicant a fair opportunity to hear, absorb, fully understand and respond to the questions.

42. Apart from his participation in the interviews and his defence is relevant to that, the other elements of defence advanced on his behalf in the first trial through cross examination, that is to say, the attacks on various prosecution witnesses for one reason or another, are not at all affected by the applicant's memory impairment.

43. It is of course to be observed in passing that the applicant's memory difficulty goes back to 1989 and was there during the first trial and therefore it is entirely unconnected to the applicant's complaints about delay.

44. I have come to the conclusion that there is nothing in the evidence of Professor Kennedy or Dr. Ferguson which gives rise to a concern that the applicant's memory impairment is such that he cannot now have a fair trial.

45. This brings me finally to his complaint of a breach of his rights under article 6(1) of the European Convention on Human Rights.

46. So far as the applicant enjoys a right under article 6(1) of the Convention to an expeditious trial that right was not part of our domestic law prior to the coming into effect of the European Convention on Human Rights Act, 2003. That Act did not have retrospective effect as was held by the Supreme Court in *Dublin City Council v. Fennell* [2005] 1 I.R. 604. Hence any consideration of a breach of this right is limited to the period after the coming into effect of this Act. As already discussed in this judgment I have come to the conclusion that there was no culpable delay on the part of either the first or second named respondent in the period since the coming into effect of this Act. Accordingly I am satisfied that there has been no breach of the applicant's rights under article 6 of the Convention.

47. In conclusion therefore I must for the reasons given above refuse the reliefs sought in these proceedings.