Neutral citation no. [2005] IEHC 54
**2004 No. 631 JR.**

**THE HIGH COURT**

**BETWEEN**

**DESMOND KIERNAN**

**APPLICANT**

**AND**
**THE DIRECTOR OF PUBLIC PROSECUTIONS**
**DISTRICT JUSTICE DAVID MAUGHAM**

**RESPONDENTS**

**Judgment by Mrs. Justice Macken delivered on the 3rd day of March, 2005**

1. This is an application by way of judicial review in which the applicant seeks to restrain the further prosecution of certain criminal proceedings against him in respect of motoring offences and the trial of which is pending before the second named respondent.

2. The matter at issue concerns the following. At the completion of the prosecution case against the applicant, as accused, on 23rd January, 2002, the solicitor for the applicant applied to the second named respondent for a direction that the charge against his client be dismissed. The second named respondent requested written submissions on the legal issues raised, which were duly exchanged, and further argument was made, in the period set out more fully below.

3. The applicant and the first named respondent are agreed that no ruling has yet been made on that application by the second named respondent. The applicant claims that his position, as accused, is thereby severely prejudiced, having regard to the overall delays in the completion of the trial.

4. On 26th day of July, 2004 O'Neill, J. granted the applicant leave to proceed by way of judicial review for:

> (a) an order of prohibition restraining the second named respondent from further hearing or determining of the charge which is more particularly described below and which at that time was present before the District Court, Arva, Co. Cavan; and
>
> (b) an injunction restraining the first named respondent from proceeding with the further prosecution of that charge.

5. He also granted interim relief staying any further proceedings in respect of the said charge pending the determination of the within proceedings.

6. The order was granted on the grounds, *inter alia*, that the offence being an exclusively summary one as to its prosecution, the delay involved denied the applicant his right to have the prosecution dealt with summarily; the further prosecution of the summary charge would be contrary to natural and constitutional justice; there was a reasonable and substantial risk that any judgment would be unfair due to the unconscionable lapse of time since the hearing of the applicant's application for a ruling; the failure by the first named respondent to bring the matter to a conclusion, or of the second named respondent to give his ruling on the applicant's request for a direction gave rise to a reasonable apprehension of unjustness and unfairness in the conduct of the prosecution; and finally, the applicant's ability to defend himself had been materially prejudiced.

7. In his Notice of Opposition, the first named respondent denies that there had been any excessive delay in the prosecution of the charge the subject matter of the trial. He pleads that all bar one adjournment in the District Court was either at the instigation of the applicant or were due to circumstances beyond the control of either party and that he was ready to proceed with the matter at all court sittings save one. In the premises, he pleads that there has been no excessive delay by him in the matter. Further the first named respondent denies that the applicant's ability to defend himself has been prejudiced to a degree which is constitutionally impermissible.

8. He says further that insofar as any alleged prejudice has been caused to the Applicant that prejudice stems from the applicant's own behaviour in seeking frequent and lengthy adjournments.

**The Facts**

9. According to the affidavits sworn in these proceedings, although there is some dispute on the detail, the facts, and in particular the chronology of dates in the hearing of the matter, may be summarised as follows:

10. The applicant was charged that on 29th October, 2000 he drove a mechanically propelled vehicle contrary to s. 49(3) of the Road Traffic Act, 1961 as inserted by s. 10 of the Road Traffic Act, 1995. The charge is essentially one by which he is accused of having more than the permitted amount of alcohol in his system while driving a motor vehicle. The summons in respect of the offence was applied for on 31st January, 2001, and appears to have been served promptly thereafter.

11. According to his affidavit sworn on 22nd July, 2004, Mr. Michael Corry, solicitor for the applicant, who was defending him on the charge, the following is what occurred in terms of hearing dates and adjournments. The first scheduled court date was 29th February, 2001 which was adjourned due to weather. Further adjournments in March and April, 2001 occurred due to the outbreak of foot and mouth disease, and again on 23rd May, 2001, on that occasion at the request of the defendant, when it was adjourned until 26th September, and again until 24th October, 2001 when it was not reached.

12. It was eventually adjourned to 23rd January, 2002 when the prosecution case was heard. An application was thereupon made on the applicant's behalf and repeated on 27th February, 2002, for a direction. The second named respondent requested that the parties file written submissions on the legal issues raised.

13. Written submissions were furnished on behalf of the applicant on 23rd April, 2002 and the matter was adjourned on the following day to 23rd October, 2002. The first named respondent's submissions were furnished on 16th October, 2002, and the matter was again adjourned until 22nd January, 2003 to allow the applicant consider and reply to those submissions, which was done on 11th November, 2002.

14. Two adjournments occurred throughout 2003, either because the matter was not reached (on 22nd January) or because the second named respondent, who had seisin of the case, was not sitting through illness (on 24th September).

15. On 28th January, 2004 the court was again adjourned due to inclement weather, and ultimately the matter came before the District Court on 5th February, 2004. A summary of the submissions already made on behalf of the applicant was made by his solicitor to the court. The matter was again adjourned until 24th March, 2004. In the meantime further submissions were furnished by the first named respondent on 22nd March. The matter was adjourned until 23rd June, 2004, submissions in reply were furnished on behalf of the applicant on 3rd June, 2004.

16. Arva District Court did not sit on 23rd June, 2004 due to illness and the court list was adjourned until 27 July, 2004. A schedule of the above dates was exhibited to Mr. Corry's affidavit.

17. The above summary is contested by the first named respondent by the affidavit sworn on his behalf on 27th October, 2004 by Inspector Noel Cunningham, who had responsibility for the prosecution of the case.

18. He avers to the fact that the first adjournment was sought on behalf of the applicant due to the unavailability of his legal advisor. He agrees that the District Court did not sit due to bad weather or to the outbreak of foot and mouth disease, or during several periods due to the illness of the second named respondent. But, he says, that the prosecution was in a position to proceed on 23rd May, 2001, and indeed on all other dates save for one occasion in April, 2002 when he says an adjournment was sought due to the failure of the applicant to furnish submissions which it had been directed to do.

19. He says that the matter was not reached on some dates and that adjournments were sought on behalf of the applicant on several occasions, and further that the applicant continued to seek an adjournment in March, 2004 notwithstanding that the first named respondent's further submissions "contained nothing new".

20. In turn these averments of Inspector Cunningham are disputed by Mr. Corry, in his further affidavit of 18th November, 2004. He denies in particular that the applicant was the cause of a number of substantial delays. His affidavit sets our further details of the exchanges between his office and the first named respondent, additional averments concerning the exchanges of submissions, and he says that the additional submissions of the first named respondent were substantially at variance with the earlier submissions and therefore it could not be said that the further submissions filed on behalf of the applicant were unwarranted. Further, he disputes several of the factual matters contained in Inspector Cunningham's affidavit.

21. It is clear to me from the foregoing matters and also from the exchanges of letters between the parties (other than the second named respondent) that, for the most part and leaving aside the adjournments which took place due to bad weather, illness of the second named respondent, or the outbreak of foot and mouth disease, all of the other adjournments, save the last one sought, were either consented to between the parties or alternatively the party seeking the adjournment was able to persuade the second named respondent that an adjournment was appropriate or necessary.

22. Delay arising from the agreed adjournments between the parties cannot in my view be considered as being the fault of one party or the other par the purposes of an application such as this, and those granted by the second named respondent for the purposes of allowing the parties file submissions, or to permit one party to consider and respond to the submissions of the other party, cannot be invoked to lay the blame for inordinate delay on one or other of the parties, unless the adjournment periods were not complied with, which for the most part does not appear to be the case. There remains, always, an obligation on the court to ensure cases are not adjourned for an unduly long period of time or on too frequent a basis. That obligation is now even more pertinent having regard to international conventions now forming part of Irish law.

23. For the purposes of this judgment it is not, in fact, necessary for me to go through each and every dispute in the sequence of delays. It is clear that there was a lengthy delay between the commencement of the trial and the date just prior to the application for leave to issue these proceedings. It is also obvious from the affidavits filed that this was due, in part, to the fact that the District Court did not sit on certain dates, for various legitimate reasons.

24. In the above circumstances, despite the fact that there is some dispute between the parties on the causes of the delay in the course of the trial, I propose to deal with the matter on the basis that the trial was not disposed of for a period in excess of 40 months from the date of the first court hearing, and, at the date of the commencement of these proceedings in mid 2004, over 30 month since the date on which the ruling was first in January, 2002 has yet been made.

**The Legal Submissions:**
25. In support of his claim, Mr. Devally for the applicant argued that, although it was unusual to bring such an application in the course of a trial which is extant before the District Court, nevertheless in the present case, notwithstanding that, this case falls into the category of exceptional cases in which this is permitted.

26. He submitted that the charge is a summary one and the applicant is therefore entitled at law to have it dealt with in a summary manner, including summary as to duration of the trial. In support of this contention, he relies on the cases, *inter alia*, of the *Director of Public Prosecutions v. Byrne* [1994] I.R. 236 and *Director of Public Prosecutions v. Cahalane* [1994] I.R. 262.

27. He argued that, as was clear from the dates referred to above, no ruling had been made in the matter by the middle of 2004 and that it was only after that very lengthy period of time had elapsed that these proceedings were commenced.

28. He referred to *Director of Public Prosecution v. Byrne*, [1994] 2 I.R. supra., where it was held that a 10 month delay in disposing of a case did not, per se, give rise to a right to set aside the prosecution. However, he submitted that in the present case unfairness was a real prospect because, *inter alia*, it would be impossible for the applicant, if unsuccessful, to deal with or respond to or even recall what had been said by the prosecution witnesses, or for the court to recall their demeanour, and he argued that that for so long as such difficulties remained, the trial should not be permitted to proceed further.

29. He argued that there is a real gap in the Notice of Opposition in that it pleads that the first named respondent did not do anything to delay the trial. However, Mr. Devally contended that this was not the test, the test being rather whether the actual delay is unreasonable, and in this case it was certainly so.

30. Counsel also relied on the decision of O'Neill, J. in *Director of Public Prosecutions v. Arthurs* [2000] 2 ILRM 363, in which the hearing had been delayed for two years and three months, which was considered inordinate and excessive, citing the following extract:

> "In the present case the delay from the time of the offence to the trial was two years and three months approximately. For summary proceedings a delay of this length is well beyond what would be considered on any view to be an appropriate

time frame in which a summary trial should be completed and is in my opinion inordinate and excessive."

31. Mr. Devally also invoked that case as authority for the proposition that inordinate and excessive delay may justify a criminal trial being terminated where it is established either that the accused will suffer a specific prejudice or where the delay is so long that it would be constitutionally impermissible to allow it to proceed, and he argued that the applicant fell squarely under both headings.

32. Applying these criteria, he submitted that it was the second named respondent who sought written submissions after oral submissions had already been made more than once. While the reasons for adjournments were variously because of the out- break of foot and mouth disease, illness or because there was no sitting, or to respond to submissions filed, nevertheless, he argued that the second named respondent is obliged, notwithstanding such events, to deliver justice within a reasonable period of time, according to the case law, pointing also to the fact that the second named respondent has not sought to make out any case in defence of his failure to rule on the application made.

33. For the first named respondent, Mr. Ferriter, B.L., argued that as a general principle of law, an application of this type should not be made during a trial, and that the applicant should not have "jumped the gun" so to speak, in particular when this possible approach was never even mentioned to the second named respondent during the course of the trial.

34. He further submitted that the authorities clearly show that the circumstances giving rise to any application of the type now made must be of such a nature as to be considered truly exceptional, and he relies in support of his contention, on the decision of the Supreme Court in *DPP v Special Criminal Court* and *Ward v Special Criminal Court* [1999] 1 I.R. 60 (hereinafter referred to as "*Ward v Special Criminal Court*")..

35. In the present case, he argued that no specific prejudice had been adduced by the applicant. He submitted there is no direct authority on an application such as this where there has been no decision actually made by the second named respondent.

36. Moreover, Mr. Ferriter argued, that as late as five months before the application for judicial review was sought, the applicant was well able, through his legal advisers, to make detailed submissions, and therefore could not be said to be prejudiced by delay. And finally, if there was any infirmity arising by reason of delay, which the first named respondent did not accept, he argued that the applicant would have a remedy during the currency of the trial itself, or on appeal.

37. In reply, Mr. Devally argued that the first named respondent appeared to suggest that the second named respondent should and could review the effect of his own handling of the trial, which was not an option available at law in the circumstances of the present case.

**The Law**

38. The issues in this case are twofold. Firstly, has there been inordinate delay. Secondly, in the event there has been such delay, has the applicant established the likelihood of real prejudice such that his right to a fair trial could not be guaranteed, and in such event, is the Applicant entitled to the orders sought. A question arises on this latter matter as to whether delay, even if considered inordinate, and even if arising in the course of a trial, can be remedied by an application for judicial review at this time.

39. I consider it is appropriate to start with the last matter namely whether, even assuming that there is inordinate delay, the remedy now sought by the applicant is one which is permitted, or ought in this case to be entertained.

40. It is common case between the applicant and the first respondent that an application for a direction was made at the end of the case for the prosecution. It is common case also that the second named respondent sought written submissions, and equally it is clear that those submissions were furnished by both parties, the latest being a letter on behalf of the applicant furnished on 3rd June, 2004. No ruling has been delivered by the second named respondent since then.

41. It is undoubtedly true that, as a matter of principle, a decision on a ruling of the nature sought in the course of the applicant's trial should be delivered with reasonable expedition. Otherwise, the possibility exists that the trial itself may become unfair, since – as counsel for the applicant submits – at a certain point in time the ability of the accused to defend himself may become impaired to such an extent that a fair trial can no longer be guaranteed. Such a result is not permissible in light of the constitutional guarantee to a fair trial and the jurisprudence interpreting that right as encompassing within its ambit, a trial with reasonable expedition.

42. While that constitutional guarantee has been applied or considered most often in cases where there has been a delay between the commission of an alleged offence and the time of a charge, and/or where there has been delay between the charging of an accused and the commencement of the trial, it must apply equally to the actual course of the trial itself as much as to those periods referred to. I can see no reason in law why, once the trial has commenced, it is not also to be the case that that trial should be completed with reasonable expedition, although of course what is meant by that will depend on the circumstances of each case, a matter well established in the jurisprudence of both this Court and of the Supreme Court in analogous delay cases of the more common type already mentioned. And I would add that this must also apply particularly in a case of a summary nature.

43. Even if there is no reason in law why the same principle of reasonable expedition should not also apply to the course of the trial itself, including a summary trial, that principle must also be balanced against the right and entitlement of the trial judge to handle the trial as he considers proper and appropriate, it being well established that a trial judge has a wide discretion as to how a criminal trial should be handled, as was recognised by Finlay, J. in the case of *Director of Public Prosecutions v. Byrne*, supra.

44. However, merely because a trial judge has a wide discretion as to the handling of the trial, it does not necessarily follow that no application for judicial review may ever be made in the course of a trial. It seems to me that that possibility may exist, according to the case law. Nevertheless, while such an application may be possible, if such a right does exist, it is nevertheless a right which is available only in vary rare and exceptional circumstances.

45. I refer in that regard to the case of Ward v Special Criminal Court, supra, invoked by Mr. Ferriter, in which a decision of the trial judge in the course of a trial was the subject of judicial review. The High Court found that such an application could only be made in exceptional circumstances. Moreover, as is clear from the head note, the court held that in the overwhelming majority of cases, it is appropriate for any question of judicial review to be left over until after the conclusion of the trial. On appeal, the Supreme Court, affirmed that latter view. I refer in particular to the judgment of O'Flaherty, J. where, in reliance on the dictum of O Dalaigh C.J. in *The People (Attorney General) v. McGlynn* [1967] I.R. 232 at p. 239 he cited:

> "The nature of a criminal trial by jury is that, once it starts, it continues right through until discharge or verdict. It has the unity and continuity of a play. It is something unknown to the criminal law for a jury to be recessed in the middle of a

trial for months on end, and it would require clear words to authorise such an unusual alteration in the course of a criminal trial by jury"

46. O'Flaherty, J. continued:

> "While this statement applies to criminal trials with a jury, it should be regarded as a precept that should, as far as practicable, be followed in respect of all criminal trials subject to the jurisdiction of courts to grant cases stated on occasion.
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> However, the situation that prevailed here is that while counsel for the prosecution had been invited by the court to 'open' the case, this was purely for the purpose of giving the members of the court an idea of what the case was about. Essentially, the ruling that was sought and given was by way of preliminary ruling before the trial was embarked upon.
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> I would endorse everything that Carney J. said about the undesirability of people repairing to the High Court for judicial review in relation to criminal trials at any stage (and certainly not during their currency), but, in the exceptional circumstances of this case, and having regard to the importance that there be a definitive ruling on this matter of informer privilege, it was right that Carney J. should have entertained the application at first instance and for us to hear it on appeal."

47. The decision in the case of Ward v Special Criminal Court, supra, was also applied by unanimous decision of the Supreme Court in the more recent case of *Mellett v Reilly and DPP*, unreported, 26th April 2002, in which Hardiman, J. stated, referring to that earlier case, and citing the above extracts, stated:

> "Although Judicial Review was found to be available in the very unusual circumstances of that case, which had not progressed beyond the opening and in which no evidence had been heard, I believe the foregoing extracts correctly express the principle generally applicable."

48. Several matters seem to me to stem from the judgment in Ward v Special Criminal Court case, which have an impact on my decision as to whether this court should, in the present case, grant the judicial review sought. While that case had been "opened" it was found nevertheless, on a correct analysis of what had occurred, that the trial had only "commenced" in the sense that an outline of what the case was about had been given, so that it could not be said that that application for judicial review had been made in the case "mid trial". This is in stark contrast to the position in the present case, where the application was made to this Court after the end of the prosecution case, and many months after the initial exchanges of written submissions on the legal issues raised. In the present case, the application is truly made "mid trial", and is therefore not, in my view, permitted pursuant to the principles applied in the latter case, and confirmed in the *Mellett* case.

49. The second difference concerns the question of the exceptional nature of the issue to be determined in the case of DPP v Special Criminal Court, supra. In that case, the issue, being one concerning the legal status of "informer privilege", and the manner in which that must be balanced against rights, in particular the right to life which might be threatened in the event of disclosure of information emanating from the informer, was of remarkable importance, and was one of the reasons given by the Supreme Court for permitting, against the norm, judicial review in the course of a criminal trial, even assuming it could be said to have been made mid trial, which of course does not appear to be the true position. In the present case the issues, while important and relevant in the context of criminal law matters, even in the context of the constitutional right to a fair hearing and an expeditious trial, do not in my view rank at all on the same level of "exception" as that arising in the *DPP v Special Criminal Curt* case. It is quite clear that the principles governing the constitutional guarantee of a fair trial and the right, within that, to a trial with reasonable expedition, are well established. While it might be said that the principles governing delay which occurs in the course of trial itself have not been fully addressed in the jurisprudence to date, the appropriate principles can be invoked without difficulty by analogy with established case law.

50. And thirdly, it is important to recall that in the latter case, there was in fact a decision of the Special Criminal Court which was the actual subject of the judicial review. That court had ruled on the question of the disclosure, not to the accused but to his legal advisers, and it was in respect of that definitive ruling that an application was made by way of judicial review to quash the decision of the High Court.

51. In the present case, on the other hand, there is no ruling whatsoever. It is true of course that a ruling is not always necessary in the case of delay. Rather it is the very absence of activity which grounds the application. But the non existence of a ruling brings me to another circumstance which sets this case apart from those relied on to support an "exceptional" circumstance. In the present case it is said that the delay is bound to cause the applicant prejudice, both specific and presumed. I do not accept that this is so. That is only likely or possible in the case of one hypothesis, that is to say, if the ruling by the second named respondent were against the applicant.

52. Since, however there has as yet been no decision at all on the ruling sought, it is entirely speculative at this stage to presume that the necessary prejudice, being an essential element in these applications, will exist or is likely to exist. This Court cannot and, in my view, should not, anticipate or presume the likely decision which the second named respondent will make on the applicant's application for a ruling.

53. Not only do I consider the application to be premature, but it is also an appli-cation which is being made *quia timet*. In the *Mellett* case, supra, the Supreme Court found that the trial judge had considered the application to be a *quia timet* application and the Supreme Court agreed, citing *Clune and others v DPP* (1981) ILRM 17, in which Gannon J. decided that neither an injunction against the DPP nor an order of prohibition against a judge of the District Court was available on that basis, in the following terms:

> 'An Order of Prohibition directed to court will not be granted *quia timet* to prevent any court lawfully established in the State from commencing the hearing of any cause or matter entrusted to its consideration by the legislature. There is, and must be, a presumption that a District justice will apply himself to his functions and duties in accordance with his oath of office and within the limits of his jurisdiction with justice and fairness to the best of his ability.'

54. In the Supreme Court Hardiman, J. continued:

> "I would hold that this approach is equally applicable to an order sought to prevent the continuance of, rather than the commencement of, summary trial."

55. In the above circumstances, it seems to me that, even if I am wrong in my view that the jurisprudence does not establish an

entitlement to bring judicial review proceedings "mid trial", as I conclude from the DPP v Special Criminal Court and Mellett v DPP, supra., and even if I were wrong in finding that, if such entitlement does exist, the present case does not fall into the "exceptional" category governing such an application, the applicant cannot in my view succeed in any event at this time. The time at which any possible prejudice to the applicant might be established has not yet been reached, prejudice either specific or presumed being an ingredient essential to a successful claim that there has been or will be an unfair trial. Notwithstanding therefore, that there has been considerable delay in the course of the trial, the application is in law premature, in my view.

56. And it is equally clear that, the application, being *quia timet*, cannot either be be permitted, on the application of the clear jurisprudence of the Supreme Court in that regard, as confirmed in the recent decision of *Mellett v DPP*, supra.

57. For the foregoing reasons, I refuse the reliefs sought by the applicant.