Neutral Citation Number: [2010] IEHC 7

**THE HIGH COURT**

**JUDICIAL REVIEW**

**2008 1319 JR**

**BETWEEN**

**PASCHAL CARMODY**

**APPLICANT**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**JUDGMENT OF MR. JUSTICE HEDIGAN, delivered on the 22nd day of January, 2010**

1. By order of Peart J. dated the 24th day of November, 2008 the applicant was granted leave to apply for judicial review seeking prohibition of a retrial on certain criminal charges proffered against him.

**Factual Background**

2. The applicant is a doctor who offered a treatment called photodynamic therapy (PDT) from his clinic. It is alleged that between September 2001 and October 2002 the applicant obtained money by falsely representing to a number of his patients that he would cure the cancer they were suffering from using PDT.

3. In February 2004 the applicant appeared before the Medical Council's Fitness to Practise Committee (FTPC) after complaints were received. Following its assessment of the complaints in late February 2004, the Medical Council first communicated with the Gardaí about the issue. In July of that year a full Garda criminal investigation commenced culminating in a file that was sent to the DPP in September 2006. The DPP issued directions in October 2007 and the applicant's trial commenced on June 25th 2008.

4. During the course of the trial, it emerged through cross-examination of a prosecution witness that one of the patients affected was made aware of the applicant's treatment by a former patient Mark Hadden. Mark Hadden had previously appeared as a witness in the Medical Council hearings, in which he strongly supported the applicant and the PDT method. It subsequently emerged that other patients had contact with Mr. Hadden before commencing PDT with the applicant. Mr Hadden had died on the 6th of May 2008, 6 weeks prior to the commencement of the trial, however a transcript of his testimony before the Medical Council was in the possession of the applicant.

5. The applicant was acquitted of some charges, however the jury was unable to agree on eleven counts. In October the DPP informed the applicant that it intended to proceed to retrial on these counts.

**The Applicant's Submissions**

6. The applicant's primary complaints in respect of the impugned decision are as follows. The applicant alleges that Mr. Hadden may have made exaggerated representations extolling the treatment and that it was, in fact, these representations which convinced other patients that the applicant could cure their relatives' cancer, and not the applicant. In the absence of Mr. Hadden, the applicant claims he is denied a crucial witness as to the subject matter of what was discussed with other patients and a marking point to test the credibility of prosecution witnesses. The applicant further claims that there has been excessive delay and, due to the delay in prosecution, the applicant has been especially prejudiced as an important witness has subsequently died, thus adversely affecting the defence.

7. As regards the issue of delay, the applicants pointed to the alleged events occurring between September 2001 and October 2002 yet no charges were issued until December 2007. In particular, Mr. Marrinan SC, for the applicant, focused on the 13 month period during which the file was in the possession of the DPP before directions were issued. It is claimed that as a result of this delay, their ability to defend the action is inhibited in the absence of Mr. Hadden. Counsel for the applicant acknowledged that the case involved gathering of vast swathes of evidence and testimony, but disagreed that the issue was of such complexity that it would take 13 months to formulate appropriate criminal charges.

8. The applicant drew particular attention to the fact that it only emerged in cross-examination during the trial itself that one of the complainants had previously spoken to Mr. Hadden about the treatment. Further to this point, the applicant stressed that in the fifty four volumes of disclosure, no evidence suggested that any patients had prior contact with Mr Hadden and that, consequently, this differentiated the retrial from the original and introduced the spectre of prejudice. The primary contention adumbrated by the applicant is that the significance of Mr. Hadden as a witness emerged after his death. It was stressed that Mr. Hadden's conversations with other patients were critical to refuting the allegations faced by the applicant. Frequent and thorough reference was made to the transcripts from the trial to contextualise Mr Hadden's importance. As a result, it was submitted that the applicant was deprived of a central tenet of his defence wrought by the delay on the respondent's behalf.

9. The applicant's case, therefore, seeks to establish that there was excessive and culpable delay on behalf of the respondent in initiating the proceedings. Furthermore, as a consequence of this delay, the applicant was prejudiced in that a witness who could strongly support his contention, or undermine the prosecution's allegation, was unavailable.

**The Respondent's Submissions**
10. The respondent's primary contentions are as follows. Mr. McDermott, acting for the DPP, emphasised at the outset that the overarching consideration in any judicial review application seeking prohibition is that "exceptional circumstances" must prevail as stated by Denham J in *DC v. DPP* [2005] 4 I.R. 281. It is within the remit of a jury of peers to determine one's guilt or innocence. The applicant's interests are safeguarded by the supervisory role of the trial judge in ensuring due process. The respondent further submitted that the applicant had delayed in seeking judicial review as it was known that Mr. Hadden had died before the initial trial.

11. The respondent laid out a bipartite test which must be overcome to allow the relief sought. Firstly, it must show that there has been unreasonable or culpable delay. If not then the Court cannot proceed any further. Where the applicant has demonstrated such delay, then he must show that prejudice has been suffered as a result of that delay.

12. The respondent asserts that there has been no delay. In this context, delay can be regarded as any period of time which should not have elapsed. That is, the delay is extraneous to the normal course of such a case. The respondent also stated that in considering delay the Court can look at explained delays together with culpable delays and regard the total in forming an opinion.

13. Relating this to the case at hand, the respondent pleads there was, in fact, no delay that could give rise to an order of prohibition. The respondent emphasised that the investigation was a complex one concerning two people. The subject matter of the investigation was novel to the Gardaí and involved questioning 167 witnesses, 91 exhibits and 54 volumes of disclosure. The affidavit of Detective Sergeant Nevin details the vast amount of evidence gathered from several jurisdictions and the uncertainty as to how far the investigation would go given the unusual circumstances. Furthermore, counsel for the respondent identified that there is no grounding jurisprudence to suggest that a two year investigation is unacceptable.

14. The respondent also denied that there had been any delay thereafter and noted the affidavit of Dara Byrne sworn on behalf of the respondent. The DPP received 27 volumes of detailed files. The files were considered at various levels in the DPP's office at which point the advice of senior counsel was sought. There followed a number of meetings between the respondent, the Gardaí and senior counsel and the receipt and consideration of other advice. Mr McDermott also noted that the Gardaí substantially limited the scope of the investigation after two years. Moreover, when the case came into the list for trial, it was moved ahead of over 30 cases to the top of the list in Ennis Circuit Court in order to ensure a speedy trial.

15. The respondent returned to the bipartite test and stressed that the two prerequisites to an order of prohibition, delay and special prejudice here, were cumulative and that in the absence of delay any possible prejudice would become a moot point. Mr McDermott referred to the Supreme Court decision of *McFarlane (No 1)* [2007] 1 I.R. 134 in which Hardiman J. stated that there lay an onus on the applicant to "engage in a specific way" with the facts of the case in showing that prejudice would result if no prohibition were to be granted. In this respect it was submitted that there was no causal link between the delay and any resulting prejudice and, moreover, that no prejudice existed.

16. Addressing the latter issue, that no prejudice existed, counsel suggested that regardless of what Mr Hadden had told the other patients it was the doctor's responsibility to disabuse people of unrealistic expectations. Secondly, what Mr Hadden said to the other patients, it was argued, was irrelevant to the determination of what the applicant said to the complainants. In any event even if what Mr. Hadden had told the patients was of relevance, his wife was present at the same meeting and would be available to give direct evidence thereof. In addition to this, a transcript of the original trial would be in the applicant's possession.

17. The respondent finally noted that although the applicant undoubtedly was under some degree of stress, this was not a sound basis of prejudice in this case. The facts of the case disclosed that many things likely to cause stress had been happening in the applicant's life, however, in reality, there was nothing to convince the Court that the applicant was suffering any more stress than normal for anyone undergoing a criminal trial. The respondent concluded by contending that there had been no delay in investigating or prosecuting the case nor had any prejudice been suffered by the applicant.

**Decision of the Court**
18. This is an application seeking prohibition on the grounds of delay. The leading authority relevant to this is the Supreme Court decision in *PM v. DPP* [2006] 3 I.R. 172. This case involved a passage of 18 years between the alleged offence and the arrest of the applicant in December 2000. The Supreme Court decided that in such a case, even where there is culpable delay, to obtain the relief sought the applicant bears the onus of satisfying the Court that he has suffered, or is in real danger of suffering, some form of prejudice as a consequence thereof.

19. Kearns J. cited the United States Supreme Court decision in *Barker v Wingo* (1972) 407 U.S. 514 as authority for the proposition that prejudice does not necessarily follow delay in the trial of an accused. Referring to the judgment of Keane C.J. in *P.M. v Malone* [2002] 2 I.R. 560, Kearns J. approved of the "balancing process" utilised in that case. This test stipulates that even if the applicant's right to an expeditious trial is violated, the concomitant public interest that criminals be prosecuted necessitates a higher threshold. That is, the applicant must demonstrate a real risk of an unfair trial flowing from that delay.

20. What constitutes "delay" will vary from case to case and is to be determined from the prevailing circumstances. In this case, the Gardaí first became aware of the allegations in February 2004 and began a full criminal investigation in July of that year. Although the alleged offences relate back to 2001 and 2002, the nature of the alleged wrongdoing could not have become apparent for some time. The Gardaí, as evidenced by the affidavit of Det. Sgt. Nevin, accumulated an enormous number of witness accounts and documentary evidence. Indeed, a separate container had to be acquired to store some exhibits. A decision was also made, after two years, to restrict the number of complaints investigated so that a file could be sent to the DPP as soon as possible. No evidence has come before the Court of any unreasonable period of delay during this Garda investigation.

21. Counsel for the applicant placed particular emphasis on the delay on behalf of the DPP in issuing directions. It is necessary to assess the timeline of events in light of the actions of the respondent and the nature of the case. The

affidavit of Dara Byrne deals thoroughly with this aspect of the case. In addition to receiving 27 volumes concerning the case, there was uncertainty about what charges would best be proffered and if sufficient evidence existed to support any charges. The DPP engaged in a thorough process involving advice from senior counsel, meetings between the DPP and Gardaí and consideration of the file at many levels within the DPP's office. Once charges had issued, the case was expedited through the judicial system and given high priority.

22. While the course of the investigation took longer than might be wished by the applicant, I do not believe that any delay present could be considered excessive when viewed in light of the nature of the case and the scope of investigation. It seems to me that a difficult and complex investigation was progressed with all due expedition. I therefore find that no delay capable of giving rise to an unfair trial has occurred in this case.

23. In finding that there has been no delay, it is not necessary to consider the issue of prejudice. As the Court, however, has heard extensive submissions in this regard I think it appropriate that I should go on and express a view on this aspect of the case.

24. To establish prejudice, it is incumbent upon the applicant to demonstrate a "real and serious risk of an unfair trial" as stated in *McFarlane (No 1).* It is insufficient to rely on a theoretical or improbable form of prejudice. An unambiguous factual nexus must be shown to connect the delay and the prejudice suffered on the facts of the specific case. I do not believe this has been achieved by the applicant.

25. The applicant has sought to show that he is prejudiced in receiving a fair trial as Mr Hadden, a former patient who spoke with several other patients of the applicant, is deceased. Counsel for the applicant argued the significance of Mr Hadden's evidence as to his conversations with other patients was intrinsic to the refutation of the allegations against the applicant. As Mr Hadden's contact with other patients only emerged during the trial, and after his death, it was impossible to further explore this line of reasoning. I am unconvinced that any prejudice has been suffered in this respect for several reasons.

26. I would first refer to the judgment of the Supreme Court in *P.H. v DPP*, (Unreported, 29th January, 2007). This states that prohibition will not be available for prejudice suffered merely if it relates to evidence the essence of which can be obtained from other sources. Mr Hadden's wife has given an account of the conversation between her late husband and the applicant that mirrors the testimony given by Mr Hadden before the Medical Council's Fitness to Practise Committee. Furthermore, as Mr Hadden had previously given evidence in favour of Dr Carmody before the Medical Council, his significance as a witness should have been quite apparent to the applicant before his first trial if it was his intention to mount a defence on the grounds argued before this Court. Notably, no application to prohibit that trial was then made. Finally, in this regard, it was agreed by a number of the witnesses for the prosecution that they spoke to Mr Hadden. The applicant is arguably in a more advantageous position now because he can avail of the transcripts of this testimony should any issue as to credibility arise in the retrial.

27. Secondly, the charges faced by the applicant relate to representations allegedly made by him to the patients in respect of which the criminal action is brought. Mr Hadden's testimony could, in no way, go to the proof of the conversation had between the applicant and a third party. Moreover, there is witness testimony admitting that patients and their families were elated after hearing of Mr Hadden's experience of PDT. One witness describes being on "cloud nine" and feeling extremely optimistic. This seems to me to amount to direct evidence with a strong correlation to the sort of evidence that might have been given by Mr Hadden.

28. The essence of the case faced by the applicant is: What did the applicant say to his patients? In this respect, the testimony of Mr Hadden would be irrelevant. Moreover it must be noted that it is the duty of any doctor to honestly and competently advise his patients. This encompasses the responsibility to disabuse them of any fanciful or unrealistic expectations borne by the patient. In light of this, the proposed value of Mr Hadden as a witness is dubious and I do not accept his absence as a witness in this case creates the kind of risk of an unfair trial necessary to constitute the prejudice required for this Court to prohibit a retrial even had I found the requisite delay.

**Conclusion**

29. In light of the foregoing, the Court is satisfied that the applicant is not entitled to the reliefs sought. There was no demonstrable delay above and beyond what would naturally arise in a case of this complexity, nor was it apparent that any prejudice has been suffered by the applicant. In finding there to be no excessive delay, the application can not succeed.