THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 331 JR]

BETWEEN:

PAUL DREW

APPLICANT

-AND-

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Mr. Justice Twomey delivered on 18th day of March, 2016.

1. This is an application for judicial review in which the applicant seeks an order of prohibition. The applicant seeks to restrain the respondent from proceeding with a trial for dangerous driving causing death, in which he is the defendant.

2. The applicant pleads, inter alia, there has been;

> (i) an inordinate, unjustifiable and unreasonable delay on the part of the respondent in the prosecution of the proceedings; and
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> (ii) this delay has resulted in a denial of the applicant's right to a fair and expeditious trial.

3. Further, the applicant seeks a declaration that his right to a fair trial, pursuant to Article 38.1° of the Constitution has been breached, by virtue of the said delay.

4. The background to this case is that on the 1st March, 2009, the applicant was arrested at the scene of a fatal road traffic accident at Cromwellstown, Co. Kildare. The applicant made admissions to the Gardaí at that time. Very shortly after the accident, on the 18th March, 2009, the applicant left Ireland for the United Kingdom and adopted a false identity. The High Court issued a European Arrest Warrant on the 25th March, 2009 for the arrest of the applicant for drugs offences and handling stolen property.

5. The applicant was surrendered by the United Kingdom authorities, to Ireland, on foot of a European Arrest Warrant on the 1st June, 2009, for prosecution in Ireland for the drug offences and the offence of handling stolen property. The offence of dangerous driving causing death was not included in the European Arrest Warrant, as the matter was still under investigation when the European Arrest Warrant was issued. The applicant did not consent to extradition, nor did he strenuously object to same. Counsel for the applicant pleaded that the applicant was not advised, nor was he made aware, that his failure to surrender voluntarily would have repercussions. The applicant has given sworn evidence that if he had known there were any negative repercussions for him, he would have consented to his extradition.

6. On the 3rd July, 2009, the applicant pleaded guilty to the unlawful possession of a controlled drug for the purpose of the sale or supply to another person and received a ten year sentence backdated to the 18th March, 2009. Separately the applicant received a five year sentence in relation to handing stolen goods, with the last two years suspended, also backdated to the 18th March, 2009.

7. An application to issue two summonses was made to Naas District Court Office on 28th August, 2009, for dangerous driving and careless driving. The applicant was not produced from custody to Naas District Court and subsequently these two summonses were withdrawn. An arrest warrant pursuant to s. 42 of the Criminal Justice Act, 1999, was granted on the 3rd March, 2010. The applicant was arrested at Mountjoy Prison on the 4th March, 2010. He was taken to, and detained at, Naas Garda Station. The applicant made no admissions and was released without charge.

8. From that day, the 4th March, 2010 until the 6th November, 2014, nothing of significance occurred in relation to this case. On the 6th November, 2014, an application was brought by the D.P.P. in the High Court before Edwards J. to sign a judicial authority request pursuant to Article 27 of the Framework Decision. This application was granted and this request sought permission from the U.K. authorities to prosecute the applicant for offences not contained in the European Arrest Warrant on foot of which he had been previously extradited. This permission was required because under the rule of specialty States seeking extradition of individuals are limited to taking prosecutions for offences specified in the European Arrest Warrant issued in relation to that person. However, under Articles 27(3)(g) and 27(4) of the Framework Decision, it is possible for the extraditing State to consent to the prosecution of an offence, other than that for which the person was surrendered and in this way to dis-apply the rule of specialty. This was the substance of the request made by the High Court on 6th November, 2014.

9. As a result of this request an undated consent from Westminster Magistrate's Court issued sometime after 6th November 2014 and on the 13th March, 2015, the applicant was charged with dangerous driving causing death. The applicant was remanded on the 18th March, 2015, for service of the book of evidence and was served with the book of evidence on the 1st April, 2015. Leave for judicial review was granted to the applicant by Noonan J. on 15th June, 2015.

10. The issue for this court to consider in this judicial review, is whether the delay of just over 6 years between the alleged commission of the offence on 1st March, 2009 and the applicant being charged with that offence on 13th March, 2015 is such that in all the circumstances the trial should now be prohibited from proceeding.

11. It is clear from the Supreme Court decision of Devoy v. DPP [2008] 4 IR 235, that the test to be applied in cases such as this is a two stage test. First the Court must consider whether there is blameworthy prosecutorial delay in this case, and if so, if the public

interest in prosecuting crime takes precedence over the interests of the applicant. On this basis therefore, the first question to be considered is whether the delay in this case was blameworthy on the part of the D.P.P.

12. The critical delay in this case is the delay which occurred between the commission of the alleged offence on the 1st March, 2009, and the application to Edwards J. in the High Court on the 6th November, 2014, to enable the prosecution proceed. This amounts to a delay of 5 years and 8 months. However, as the period between the commission of the offence and being charged with the offence was just over 6 years, this, in my view, is the relevant period of time to be considered when determining whether the prosecutorial delay was blameworthy.

13. Mr. Briscoe in his affidavit of the 22nd October, 2015, on behalf of the D.P.P., avers that he addressed Edwards J. in relation to the delay, although it is to be noted that this was an ex parte application. Mr. Briscoe avers that the reason for the delay was the lack of certainty about the appropriate legal mechanism to be used to facilitate the prosecution of the applicant following his surrender on foot of a European Arrest Warrant, which issued for unrelated offences, in circumstances where the rule of speciality had not been waived by the applicant.

14. It is common cause that this uncertainty arose from the fact that s. 80 of the Criminal Justice (Terrorist Offences) Act 2005 inserted a provision into law for 'incoming Article 27(4) requests', namely where a foreign judicial authority seeks the consent of the Irish judicial authorities to prosecute an offence for which a person was extradited from Ireland. However, there was no provision in Irish law to deal with 'outgoing Article 27(4) requests', namely where the Irish judicial authorities seek the consent of the foreign judicial authority to prosecute an offence for which a person was extradited to Ireland, as in the case of the applicant.

15. As regards this Court's consideration of the delay, it is to be noted that it took the D.P.P. 5 years and 8 months to come up with a solution to the legal issue with which it was faced, which legal issue prevented it from prosecuting the applicant in a timely fashion. The proposed solution that the D.P.P. came up with, was to decide to apply to the High Court to interpret the Criminal Justice (Terrorist Offences) Act 2005 in relation to 'incoming Article 27(4) requests' in a purposive manner, so as to allow 'outgoing Article 27(4) requests' to be made in the same manner as 'incoming Article 27(4) requests', namely by signing a judicial authority request to that effect. This approach was clearly successful, since Edwards J. duly signed the 'outgoing Article 27(4) request' in relation to the applicant.

16. Since persuading the High Court to take this purposive interpretation was the only issue which stood in the way of the D.P.P. bringing the prosecution earlier, it is reasonable to ask, could the D.P.P. have come up sooner with this solution of asking the High Court, to take a purposive interpretation of the Irish law on the matter? Since reliance was placed on the judgment of the European Court of Justice in Maria Pupino (C-105/03) [2005] ECR I-5285 in the D.P.P. making its application to the High Court, and as the Pupino Case dates from the 16th June, 2005, it seems to me that the answer to that question must be yes, since the D.P.P. could have come up with this legal solution at any time after the 1st March, 2009, and did not have to wait until the 6th November, 2014, a period of 5 years and 8 months, to do so. If it had done so sooner, it seems clear that this would have led to the earlier prosecution of the applicant. In such circumstances, the applicant would not have had to face being charged in this case a full six years after the commission of the offence. Thus, this Court regards the prosecutorial delay in this case as being 'blameworthy' in the sense that that term is used in the Devoy v D.P.P.

17. This Court would emphasise that this is not meant to be a personal criticism of the staff of the D.P.P. They have come up with what appears to be an elegant solution to a legislative problem not of their making. It is only with the 20:20 vision of hindsight (namely of this Court now knowing that the proposed solution was going to work), that this Court can have the privilege of pronouncing that this approach should have been taken sooner. This Court is acutely conscious of how easy it is to be wise after the event in situations such as these. For this reason, this Court takes the view that the prosecutorial delay in this case was 'blameworthy' in the sense that with the benefit of hindsight the solution should have been tried earlier, and not in the sense of affixing any individual blame on the officials in the D.P.P.'s office, who came up with the elegant solution to a legislative problem, outside of their control.

18. However the prosecutorial delay is 'blameworthy' in the legal sense, by which this Court means that certain consequences flow from such a finding, in light of Devoy v D.P.P. These consequences are that in an application for the prohibition of a trial, a finding of blameworthy delay leads to the second limb of the test in Devoy v D.P.P. having to be considered. Thus, in accordance with the principles set out in Devoy v D.P.P., this Court must now consider whether the public interest in prosecuting the alleged crime in this case takes precedence over the interests of the applicant.

19. According to Devoy v D.P.P., one of the main reasons to justify the prohibition of a trial on grounds of blameworthy prosecutorial delay is that the applicant's ability to defend himself has been impaired by the delay, or that there is a real or substantial risk of an unfair trial arising from the delay. Significantly, in this case, the applicant is not alleging that the delay has impaired his ability to defend himself or that there is a risk of an unfair trial arising from the delay.

20. However, as is clear from Devoy v D.P.P. this does not end the matter in this Court's consideration of whether to prohibit a trial. It is clear from that case that other prejudice may be taken into account and in this regard the applicant's case is that the delay has caused him a significant prejudice, namely:-

• his rehabilitation has been affected by his being charged with this offence so close to his release from prison on the offences for which he has been convicted;

• his possibility of obtaining remission or enhanced remission on his current sentence has been reduced, if not eliminated, by virtue of his being charged with this offence at this late stage;

• the possibility of his receiving a concurrent sentence for the trial of dangerous driving is practically eliminated by virtue of the fact that he will have served all, or substantially all, of his sentence for the offences for which he is currently in custody, by the time of his trial on the dangerous driving offence;

• he has been moved from the Training Unit to the main body of Mountjoy Prison, apparently as a result of being charged with this new offence and as such, he is unable to continue his third level studies even though he has proven to be an exceptional student. (In this regard, it is to be noted that the applicant is the first person ever to have achieved a higher diploma while in custody).

21. In weighing up this prejudice against the public interest in prosecuting crime, Devoy v D.P.P. also makes clear that the court is entitled to take into account the seriousness of the offence at issue. In this case the applicant is charged with the very serious offence of causing the death of another person and this Court must be cognisant of this fact.

22. Devoy v D.P.P. also makes clear that the court is entitled to have regard to the alleged admissions made by the applicant in the book of evidence. Regard to these admissions by this Court is permitted, even if those allegations are to be contested at the trial, as is clear from the Supreme Court case of Enright v. Finn & The D.P.P. [2008] IESC 49. In this regard, it is alleged in the book of evidence that the applicant admitted to Gardaí that he had been driving the vehicle which had crashed and caused the death of one of the passengers.

23. At the hearing before this Court, it was stated that the applicant left the jurisdiction within a matter of days of the crash and operated under an assumed name before being arrested under the European Arrest Warrant and this evidence was not contested on behalf of the applicant. In this respect, the applicant's actions were a factor, albeit an indirect one, in the delay which occurred. This is because if he had not left the jurisdiction to operate under a false name, it is likely that there would have been no delay in his being prosecuted for this offence. This is because there would of course been have been no need to extradite the applicant (and consequently no need for the D.P.P. to have to consider how to deal with the lacuna in Irish law on 'outward' Article 27(4) requests). While not a determinative factor in this Court's decision, this fact cannot be ignored in any consideration of this case.

24. In making its decision, the Court is very conscious of the considerable delay which has been suffered by the applicant and the prejudice he has suffered. However, the Court is also conscious of the exceptional circumstances which should exist for a trial to be prohibited, as is clear from the case of C(D) v. D.P.P. [2005] 4 I.R. 281 at 283, where Denham J, as she then was, stated:-

> *"The applicant in this case seeks to prohibit a trial in which he is the accused. Such an application may only succeed in exceptional circumstances. The Constitution and the State, through legislation, have given to the respondent an independent role in determining whether or not a prosecution should be brought on behalf of the people of Ireland. The respondent having taken such a decision, the courts are slow to intervene. Under the Constitution it is for a jury of twelve peers of the applicant to determine whether he is guilty or innocent. However, bearing in mind the duty of the courts to protect the constitutional rights of all persons, in exceptional circumstances the court will intervene and prohibit a trial.*
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> *In general such a step is not necessary as the trial judge maintains at all times the duty to ensure due process and a fair trial. The basic assumption to apply in relation to all pending trials is that they will be conducted fairly, under the presiding judge. However, in circumstances where there is a real or serious risk of an unfair trial, the courts will intervene so that a defendant may not be exposed to the commencement of the process, it being the assumption that should such a trial commence it will be stopped by the direction of the trial judge because of the real or serious risk of an unfair trial."*

25. Counsel for the applicant accepted that the application which he was making in this case was, in the words of Denham J., an exceptional application to make, albeit that he felt that the circumstances in the applicant's case warranted the exceptional remedy he sought.

26. In view of the foregoing, this Court believes that all of the prejudice suffered by the applicant as a result of the blameworthy prosecutorial delay, primarily;

- the effect on his rehabilitation;
- the loss of remission;
- the loss of the possibility of his having his sentences run concurrently; and
- his removal from the prison Training Unit,

are matters which can be fairly considered by the sentencing judge if the applicant were to be found guilty of the offence of dangerous driving causing death. This Court would specifically mention the exceptionally positive rehabilitation of the applicant, with the applicant being the first prisoner ever to achieve a higher diploma while in custody. This Court believes that this is a matter which can be fairly taken into account by the sentencing judge, in the event of a conviction.

27. For these reasons, and in light of the seriousness of the offence - where a life has been lost through the alleged actions of the applicant, the admissions made by the applicant, the exceptional circumstances which must exist for a trial to be prohibited and the fact that the applicant is not alleging that the delay has impaired his ability to defend himself or that there is a risk of an unfair trial arising from the delay, this Court decides that the prejudice that the applicant has suffered is not sufficient to outweigh the public interest in having this prosecution proceed to trial and therefore that the applicant's right to a fair trial has not been breached. Accordingly, the relief sought is refused.