

THE HIGH COURT

2007 508 JR

BETWEEN

JOHN McDONAGH

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Judgment of Mr. Justice Hedigan, delivered on the 12th day of February, 2009

1. The applicant in the present case has been charged with a number of serious offences, namely two counts of burglary and one of dangerous driving. The burglary charges arise from the same incident which is alleged to have occurred on the 9th August, 1999 while the road traffic offence is alleged to have taken place on the 28th October, 2001. The present case concerns only the burglary charges.

2. The applicant failed to appear in court on the 12th May, 2000 in respect of the burglary charges and also failed to attend on the 29th November, 2001 in respect of the dangerous driving. Bench warrants were issued for his arrest on both occasions. These were ultimately executed in January, 2007.

3. The applicant seeks an injunction restraining his prosecution in relation to the burglary charges on the grounds of delay in the execution of the bench warrants. He alleges that the delay was inordinate and excessive and that there is a real and substantial risk that he will not be able to obtain a fair trial as a result. Specifically, he claims that he will be prejudiced by his inability to locate a particular witness, Paddy O'Connor.

4. The principles applicable in cases such as this are clear. In *D.C. v. D.P.P.* [2005] 4 I.R. Denham J. reiterated the principle that it is only in *exceptional* cases that a trial should be prohibited rather than determined on its merits. This is a principle to which I must adhere.

5. In *McFarlane v. D.P.P.* [2008] IESC 7, the Supreme Court provided guidance as to how to balance society's interest in having crime prosecuted and the accused's right to a fair trial. Four factors are relevant: (a) the length of the delay; (b) the reasons for the delay; (c) the role of the applicant; and (d) the existence of prejudice. In the present case, there has undoubtedly been an expiry of several years between the initial charges and the prosecutions based thereon. However, from the evidence, it is clear that the applicant's role in the delay was a central feature; he was throughout an evader of justice. He failed to appear in Bray District Court in May 2000 to answer the burglary charges. A bench warrant was issued for him using the address he had given which was 20 Mooney Terrace, Kilcormack, County Offaly. He subsequently was charged on the 28th October, 2001 with dangerous driving and remanded to 29th November, 2001. On this occasion, he initially gave a false name, an incorrect address and a false date of birth. His wife corrected the first two but he never corrected the last detail. He failed to appear and a bench warrant was issued against him on that charge also. Efforts to execute the warrants failed and eventually the local Gardaí ascertained that he was not in fact residing at the address his wife had given either. Gardaí attempted to trace him through a halting site in Templemore but this also proved fruitless. Gardaí then pursued their investigations and eventually these took them to 27 St. Joseph's Park, Dunsink Avenue, Finglas. Efforts to execute the warrant here also failed as he did not appear to be residing there either. It was the evidence that there were quite a number of warrants outstanding against a large number of persons named John McDonagh and residing in St. Joseph's Park but they all had slightly different addresses and birth dates. It seems to me that the applicant is no fool and carefully gave incorrect details of name, age and address in order to throw the Gardaí off the scent. Enquiries from the English Social Services indicate that the applicant was living in London and claiming full time job seekers allowance and income support at addresses in London from the 14th May, 2001 to the 12th September, 2002. On his own evidence, save for a five month break from 20th February, 2002 to the 4th July, 2002, the applicant was signing on with the Department of Social and Family Affairs in Dublin. I expect the Gardaí will notify the relevant social welfare authorities here and in the UK of this apparent anomaly.

6. I have read the affidavits of Garda McDonnell, Sergeant Bergin, Detective Garda Hanley and Sergeant Moore. I have also heard their evidence in cross examination. I am satisfied from this evidence that the pursuit of the applicant was considerably hampered by his provision of a false name and date of birth on the 28th October, 2001 and also his change of addresses which included a substantial period living outside of the jurisdiction. During the initial period from 2000-2002 after the issuance of the bench warrants it seems to me that the applicant stayed out of sight as much as he could until the heat was off. In October, 2002 his details were placed on the PULSE system. The Gardaí continued to monitor that system throughout the following years with a view to locating the applicant. Following this appearance on the PULSE system, the Gardaí executed the outstanding bench warrants. On the evidence, it seems to me that, at the very least, the substantial delay that has occurred was due to the effort made by the applicant to evade justice.

7. Finally, I cannot accept that any prejudice has arisen as against the applicant in the present case which can be attributed to culpable prosecutorial delay. I do not think that the Gardaí can be held responsible for the fact that the applicant has lost contact with a potential witness, Paddy O'Connor. His evidence it is argued by the applicant would show he had been previously in the house in question and therefore his fingerprints would naturally be found there. This putative evidence would be of questionable exculpatory value however. Mrs. Margaret Smyth, whose house was burgled, states in the Book of Evidence herein that the biscuit tin from which the applicant's fingerprints were taken was kept locked at all times in the gun press. Therefore even if the applicant had been previously in the house, his fingerprints would not have appeared on the tin. To this extent, it seems the applicant has failed to engage with the evidence. As to

the possibility of this witness being able to provide an alibi for the applicant, it is his own efforts to evade justice that are responsible for any loss of contact that may have occurred.

8. *In Z. v. D.P.P.* [1994] 2 I.L.R.M. 481, Finlay C.J. explained the test for prejudice in the following terms:

"[W]here one speaks of an onus to establish a real risk of an unfair trial it necessarily and inevitably means an unfair trial which cannot be avoided by appropriate rulings and directions on the part of the trial judge. The risk is a real one but the unfairness of trial must be an unavoidable unfairness of trial."

10. It seems to me that any inability to find, and thereby to call, Paddy O'Connor may be dealt with by the trial judge who may balance the applicant's role in the reasons for that inability with any prejudice caused.

11. In terms of the balance to be struck, on the other side of the scales the court must weigh the interest of society in the prosecution of serious crime. Burglary has throughout the whole of human civilisation been considered one of the most serious crimes known to the law. In many societies it has attracted the imposition of the death penalty, frequently attended by gruesome barbarities to demonstrate the loathing of people for the violation of the sanctity of their homes. More civilised times have moderated the severity of these penalties but society's detestation for this particular crime has not lessened. The devastation caused to the lives of those whose homes have been violated by criminals seeking to live off the hard work of others is incalculable. Victims of burglary have frequently described their inability to ever enjoy again a sense of security in their home after a burglary. Added to this must be the fact that three guns were stolen. This places this particular crime at the highest level of gravity.

12. What little there is on the scales on the side of the applicant in this case is in my view heavily outweighed on the other side by society's interest in prosecuting this particular offence. I have no hesitation whatever in refusing the relief sought.