Neutral Citation No. [2005] IEHC 135

THE HIGH COURT
JUDICIAL REVIEW

[Record No. 2004/1034JR]

BETWEEN

CILLIAN FENNELL

APPLICANT

AND
THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Judgment of Ms. Justice Dunne delivered the 26th day of April, 2005

1. The applicant in this case seeks an order by way of judicial review restraining the respondent from proceeding with the further prosecution of a summons the subject matter of criminal proceedings entitled *Director of Pubic Prosecutions v. Cillian Fennell* at present pending before the Dublin District Court, case No. 2003/6126.

2. In those criminal proceedings the applicant is charged with an offence pursuant to s. 49(4) and (6)(a) of the Road Traffic Act, 1961 as amended. The alleged offence is alleged to have occurred on 18th December, 2002.

3. It would be useful to set out a summary of the relevant dates in relation to this particular matter and I do so hereunder.

> 18th December, 2002 date of alleged offence.
>
> 21st January, 2003 summons applied for in District Court.
>
> 3rd April, 2003 first return date. Applicant pleading not guilty. Hearing date fixed.
>
> 14th November, 2003 first hearing date. Case adjourned, respondent unable to proceed due to unavailability of witness.
>
> 6th April, 2004 second hearing date. Case adjourned, unavailability of witness on behalf of the respondent.
>
> 9th November, 2004 third hearing date. Case adjourned, not having been reached.
>
> 5th May, 2005 next hearing date.

4. It is agreed by the parties herein that in cases where it is indicated that a defendant is pleading not guilty to a charge, the practice in the District Court is to fix a date for hearing of the proceedings on the return date. Hence, in this case, the proceedings were adjourned on the return date of 3rd April, 2003 to 14th November, 2003. As can be seen above, the matter was adjourned on the first hearing date due to the unavailability of a witness namely Garda Dooley. Apparently, the prosecuting Guard, Garda Mary Lavan only became aware of this on the morning of the hearing. At that stage it was suggested that a hearing date of February, 2004 might be available but this was unsuitable because of the applicant's work commitments and accordingly the second hearing date was fixed. Prior to that hearing date the applicant herein was notified through his solicitor that there was to be an application for an adjournment of the hearing date because again Garda Dooley was unavailable, being on leave at the time fixed for the hearing. Notwithstanding the opposition of the applicant, the matter was adjourned to 9th November, 2004. As can be seen from the time schedule set out above the matter was not reached on the next hearing date the 9th November.

5. The total time between the date of the alleged offence, namely 18th December, 2002 and the new hearing date 5th May, 2005 amounts to two years and five months.

6. Counsel on behalf of the applicant relies on Article 38.1 of the constitution of Ireland which provides:

> "No person shall be tried on any criminal charge save in due course of law."

7. It has long been established that Article 38.1 includes a right to a trial with reasonable expedition. Relying on the decision of the High Court (O'Neill J.) in the case of *Director of Public Prosecution v. Arthurs* [2000] 2 I.L.R.M. 363, he refers to the passage where O'Neill J. reviewed the various authorities in relation to delay and in particular delay in the context of summary proceedings. At p. 371 of his decision O'Neill J. stated:

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

8. In the course of his decision O'Neill J. went on to enumerate two tests in deciding whether there has been excessive delay in a particular case. I quote from his judgment at p. 375:

> "The first of these tests is that the accused person must show that he has or is likely to suffer an actual specified prejudice or that the length of the delay is so inordinate or excessive as to give rise to a necessary inference that there is a real risk that the trial will be unfair. Where an accused person satisfies the above test, it would seem to me that regardless of what reasons may be advanced by the prosecution to justify the delay, be they good or bad, that the accused person's right to an expeditious trial would necessarily be infringed, and hence the accused's constitutional right to an expeditious trial is to be preferred as against the right of the community to prosecute the alleged offence. The second test is one which focuses directly on the causes for the delay or the reasons or excuses that are advanced in order to justify it as distinct from the effect, specific or inferred, which the delay may have on the accused's defence, and would apply in circumstances where in the words of Finlay C.J. at pp. 246-94 of the report in the Byrne case: …failure to establish actual or presumptive prejudice may not conclude the issues which have to be determined…
>
> Here what is envisaged, as is clear from the judgment of Finlay J. are circumstances where the conduct of the proceedings on behalf of the State might range from, at one extreme conduct amounting to downright mala fides across a range including gross carelessness or simple negligence or, as was mentioned in the Barker v. Wingo case and, as in fact occurred in this case, overcrowded courts. These factors are relevant because in themselves they can constitute

> breaches of an accused person's constitutional right to a speedy or expeditious trial. The court must be vigilant to ensure that unwarranted invasion of this right does not occur."

9. At p. 376 of his judgment O'Neill J. went on to say:

> "If it is the case that an accused person has a right under the constitution to a speedy or expeditious trial, a necessary corollary of that right is that there rests upon the State a duty to ensure that all reasonable steps are taken to ensure such a speedy trial is provided. This must necessarily mean conducting the investigation and prosecution in a manner which, insofar as it is reasonably practicable, eliminates unnecessary delay and must additionally mean that such resources as are necessary for the orderly and expeditious processing of criminal trials throughout the courts are provided."

10. I do not propose to refer to the affidavits sworn in relation to these proceedings but suffice to say that they set out the time involved in these proceedings and it is also fair to say that there is no claim made on behalf of the applicant herein to the effect that there is actual prejudice or that the length of the delay is so inordinate or excessive as to give rise to a necessary inference that there is a real risk that the trial will be unfair. Rather the application herein is brought on the basis of the second test enumerated by O'Neill J. In other words are the factors involved in this particular case applicable to the conduct of the proceedings such that they constitute breaches of an accused person's constitutional right to speedy or expeditious trial.

11. Mr. Burns also referred to the case of *Colin McGuire v. D.P.P.* (unreported) 30th July, 2004, a decision of the Supreme Court which approved the decision of O'Neill J. in the case referred to above. In this particular case having regard to the facts of the case, Mr. Burns argues that the adjournments given in the course of the proceedings herein are such as to be excessive and inordinate and in this regard he refers to the periods of seven months elapsing between hearing dates to support this argument. He adds that the fact that the list is overcrowded on a particular date amounts to a failure to vindicate rights if it leads to an adjournment of the hearing. He referred to a number of cases of which he had knowledge where in circumstances somewhat similar the D.P.P. did not contest a similar application to the one in the present case.

12. On behalf of the respondent in these proceedings it was argued by Mr. Ferriter that in considering the second test enumerated by O'Neill J. it is necessary to ask the question can the delay be justified or excused and in that regard he referred to *D.P.P. v. MacNeill* [1999] 1 I.R. 91, and to the judgment of O'Flaherty J. at p. 96 where it was stated:

> "Regard must be had to the nature of the charge in such a case as this which, as already related, will depend on scientific findings which are unlikely to be disputed. It is clear from a reading of Director of Public Prosecutions v. Byrne that the onus is on a defendant, asserting delay, to show that he has been prejudiced. I do not take the defendant in this case as having discharged that onus."

13. Mr. Ferriter argued that in the present case there was justification for all but one of the adjournments of the proceedings herein. He also pointed out that there was no delay prior to the issue of the summons in this particular case. He argued that in considering the question of delay, that this was not a case in which it could be said that there was an inexcusable delay or to put it another way a delay for which the respondent was legally culpable. On the first return date the problem arose due to the illness of a witness on the first return date, the unavailability of a witness on the subsequent return date and on the third occasion through no fault of either the applicant or the respondent but due to an overcrowded list. He argued that a failure such as that identified in the case of *D.P.P. v. Arthurs* could occur and when it occurs could result in proceedings being prohibited. He contrasted the circumstances that occurred in the *D.P.P. v. Arthurs* case with the present case. As O'Neill J. put it in that case:

> "A failure on one occasion to get a trial on because of an overcrowded court list could be said to be an unfortunate mishap, not necessarily involving any fault on the part of the State. Where, as in this case, this mishap is repeated two further times, the inference that these delays are the result of a failure on the part of the State to have provided adequate resources so that the District Court could deal with the cases before it in an expeditious manner is inescapable. The failure on the part of the State to have made adequate provision for the expeditious conduct of cases in the District Court in question resulting as it did in the adding to an already excessive delay a further nine month delay bringing the total delay to two years and three months, was, in my opinion an unwarranted invasion of the accused's constitutional right to an expeditious trial. In that circumstance, notwithstanding the absence of evidence of prejudice, actual or presumptive, the learned District Judge was obliged to prevent such an invasion of the accused's constitutional right and should have exceeded to the accused's request not to allow the trial to proceed."

14. Mr. Ferriter also relied on the decision of McGuinness J. in *Alan Mulready v. D.P.P.* [2001] 1 I.L.R.M. 382. Although the judgment in that case was given on 1st February, 2000 it did not refer to the decision of O'Neill J. in *D.P.P. v. Arthurs* which was delivered on 21st December, 1999. In considering again the question of delay in respect of summary offences it was held by McGuinness J., *inter alia*, that where delay is alleged as a ground for prohibition the overall period of delay must be broken down and examined in some detail. In this regard the only period of delay in the case for which the State could be held blameworthy was the period between the end of February, 1998 and June, 1998.

15. Having regard to the various authorities opened to me and looking at the facts of this particular case it seems to me that it is clear that delay can amount to an invasion of an accused's constitutional right notwithstanding the absence of evidence of prejudice, actual or presumptive. In considering delay it is necessary to look at the facts of each case. In the present case I do not disagree with the contention that a delay of two years and five months is undesirable. However, in circumstances where there have been reasonable grounds for the delay on at least two occasions, I do not think that the overall delay could be described as excessive.

16. In those circumstances I must refuse the application herein.