Neutral Citation Number: [2011] IEHC 288

THE HIGH COURT

JUDICIAL REVIEW

2010 304 JR

BETWEEN

ROSEMARIE MOONEY

APPLICANT

V.

JUDGE ANN WATKIN AND THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

Judgment of Mr. Justice Hedigan delivered the 13th day of July 2011

1. The applicant resides at 4 Wheatfield Drive, Clondalkin, Dublin 22. The first named respondent is a Judge of the District Court. The second named respondent is the person charged with the direction, control and supervision of prosecutions in the State and his office is located at Chapter House, 26-30 Upper Abbey Street, Dublin.

2. The applicant the following reliefs:-

> (i) An Order of *Certiorari* by way of application for judicial review quashing the conviction and sentence dated the 25th of February, 2010 made by the first Respondent in respect of the Applicant in connection with the matters prosecuted by or on behalf of the second Respondent on foot of an offence contrary to s. 49 of the Road Traffic Acts as amended alleged to have occurred on the 18th of June, 2004.
>
> (ii) A stay on the operation of the said conviction and sentence pending the determination of the proceedings herein.
>
> (iii) A Declaration that the trial of the Applicant was not in accordance with law and was conducted in breach of the Applicant's constitutional rights having regard to the passage of time between the date of the offence and all the circumstances and the refusal by the Respondent to hear the Applicant in respect of same.
>
> (iv) Such further or other relief as the Honourable Court shall deem appropriate.
>
> (v) The costs of the within proceedings.

3.1 The applicant was charged that on 18th June, 2004, she committed an offence of driving while intoxicated contrary to section 49 of the Road Traffic Act 1961. The applicant failed to appear when the matter was listed for hearing at District Court 53, in the Dublin Metropolitan District and a bench warrant issued for her arrest on the 18th July, 2005. One attempt was made to execute the warrant in November 2005, however the applicant's estranged husband informed the gardaí that she had emigrated. In April 2009, the applicant received a telephone call from a member of An Garda Síochána informing her that the above mentioned warrant was in existence. The applicant met with the prosecuting Garda by arrangement and was brought before District Court 51 where the above mentioned bench warrant was executed. The applicant was released on bail to the 18th May, 2009, on that date the matter was remanded to 15th June, 2009. On the 15th June, 2009, the matter came before District Court 51 and the applicant was assigned legal aid. The matter was remanded to 2nd September, 2009, where it was indicated that a hearing date was necessary and a hearing date of 12th October, 2009, in Court 54 was fixed.

3.2 On 12th October, 2009, the matter appeared in Court 54 for hearing before Judge John O'Neill. The prosecution indicated they were not in a position to proceed. Counsel for the accused sought to have the matter struck out on two grounds. First, the prosecution had not informed the defence of their inability to proceed, and in accordance with the Practice Direction of the President of the District Court, the matter should be struck out. Second, the lengthy delay involved in executing the bench warrant and bringing the matter to hearing generally. Judge O'Neill heard argument from both sides and declined to strike out. He remanded the matter for hearing to the 12th November, 2009. Counsel for the applicant vacated this hearing date and a further hearing date of 10th December, 2009, was granted. The matter appeared on this date before Judge O'Neill. The DPP sought to have the matter adjourned. Counsel for the applicant again sought to have the matter struck out on the same two grounds relied on at the earlier hearing. Judge O'Neill declined to strike the matter out and remanded the matter for a further hearing date of 10th February, 2010.

3.3 On the 10th February, 2010 the matter appeared for hearing before the first named respondent, Judge Watkin. The applicant sought to have the matter struck out on the basis of delay, before the applicant had an opportunity to air this submission Judge Watkin stated that because Judge O'Neill had dealt with that matter on a previous date she had no jurisdiction in regard to the issue. The case proceeded to hearing. The applicant was convicted of an offence contrary to section 49 of the Road Traffic Act 1961. The matter was adjourned for sentence to 25th February, 2010, the applicant received a three year disqualification from driving and a fine of €5,000.

Applicants Submissions

4.1 The applicant submits that the first respondent was under a duty to hear and determine the issue of delay. The applicant seeks to rely on the case of Smith v. Judge Thomas O'Donnell & DPP (Unreported, High Court, 27th April, 2004) in which a District Judge made an order extending time for service of a book of evidence and marked the matter peremptory. When the matter was next before the District Court a different District Judge sat. The question arose as to whether the second District Judge was bound by the order of the first. O'Neill J stated at p.5:-

> "In my opinion it was not within the jurisdiction of Judge Smithwick to make an order which would fetter the exercise of

> another Judge of the District Court dealing with an application to extend time granted by the former Judge. If it could be said that Judge Smithwick could lawfully have made such an order, precluding another Judge of the District Court from extending time or fettering that Judge in the exercise of his discretion under the section, that would have the effect of rendering nugatory the judicial discretion necessarily employed in the exercise of the jurisdiction provided for in s.4B (3) and would offend the fundamental principle that a Judge cannot bind another Judge of equal jurisdiction to make a particular order in a matter in which the latter Judge has full jurisdiction and seisin of the matter in question."

It is submitted that Judge Watkin had full jurisdiction and seisin of the matter and that she erred in deciding that because Judge O'Neill had previously addressed the matter she had no jurisdiction to deal with it.

4.2 In the Supreme Court decision of *Corporation of Dublin v Flynn* [1980] IR 357 Henchy J held at 365:-

> "In my judgment the prosecution, in this or in any other criminal charge, is not relieved of the onus of proof in regard to necessary issues by showing that those issues were expressly or impliedly decided against the accused in earlier proceedings. It is the essence of a criminal trial that it be unitary and self contained, to the extent that proof of the ingredients of the offence may not be established as a result of a dispersal of the issues between the Court of trial and another tribunal. Evidence of a previous conviction, whether given as an ingredient of or an element in the charge or given pursuant to a special statutory permission, does no more than provide conclusive proof of that conviction. As to the issues that were decided against the accused in the earlier trial, the conviction does not operate to foreclose those issues in the subsequent trial."

The applicant submits that because a criminal trial is a "unitary process", an accused should not be precluded from relying on a defence simply because it was aired before another District Judge at an earlier sitting.

4.3 There has been a delay of almost four years and eight months in getting this matter to hearing. The law on delay in summary proceedings was dealt with in *DPP v Cormack and Farrell* [2009] 2 IR 408, where Kearns J. stated:-

> *"I would be strongly of the view that courts should not act as legislators to frame a subjective limitation period for the prosecution of criminal offences, even offences of a summary nature and should in every case where delay is established conduct the balancing exercise indicated in Barker v. Wingo (1972) 407 U.S. 514… In this context I see no basis for applying a separate legal regime to summary prosecutions than that which arises in the case of indictable offences."*

He continued at paragraph 48 :

> "Obviously, however, it follows from everything already said that delay will more rapidly become blameworthy and delays of lesser magnitude will be seen as more likely to be intolerable where summary proceedings are concerned."

The applicant submits that a delay of in excess of four years in respect of summary proceedings is intolerable.

4.4 There has also been a delay of almost four years in failing to execute the bench warrant. The requirement to execute bench warrants within a reasonable time was addressed in the case *DPP v Cormack and Farrell* [2009] 2 IR 408, where Kearns J. stated:-

> "In the context of delay therefore, the legal position in relation to the execution of bench warrants may be simply stated. There is an obligation on An Garda Síochána to execute same promptly or within a reasonable time. A failure to do so may amount to blameworthy prosecutorial delay. However, members of the gardaí cannot automatically be assumed to be in default where immediate execution of warrants does not occur, bearing in mind the multiple other duties and obligations requiring to be performed by them. They may encounter all sorts of difficulties when endeavouring to execute bench warrants which are brought about by deceit and false information given to them. Nonetheless, it must be the case that a point in time will arise where the continuing failure to execute a bench warrant will amount to blameworthy prosecutorial delay sufficient to trigger an inquiry into whether an applicant's right to an expeditious trial has been compromised to such a degree as to warrant prohibition."

It is important to note in these proceedings that, apart from calling to the applicant's residence once in 2005, the Gardaí made no efforts to locate the applicant and execute the bench warrant for four years. The applicant was living openly in Dublin throughout this entire period. It is submitted that the entire circumstances of this prosecution, the length of the delay the inaction of the prosecution in executing a bench warrant and the two adjourned hearing dates all amount to a breach of the applicant's constitutional right to a fair trial.

Respondents Submissions
5.1 It is clear that the applicant raised the issue of delay on three occasions. On two occasions it seems the applicant's submissions on the matter were rejected by the then presiding District Court Judge. Despite the opportunity of proceeding by way of judicial review the applicant did not do so. If it was considered that the delay was so egregious as to mean that there was a real risk that the applicant could not get a fair trial, the appropriate thing to do was to bring an application for judicial review in a timely manner. The applicant must be seen to have delayed and relief should be declined on this basis. The applicant was also incorrect to raise the issue of delay as a preliminary matter. The case *DPP v P O'C* (Unreported, Supreme Court, 27th July, 2006) is authority for the proposition that delay issues are to be raised and adjudicated upon during the course of the District Court hearing.

5.2 The importance of moving with great speed in these circumstances is emphasised in the case of Kenneally *v The DPP* [2010] IEHC 183 where this Court stated as follows:-

> "As is clear from the above, the courts will always be alert to the danger of an interference with the constitutional rights of citizens and will move to protect them where necessary. However, this jurisdiction in relation to criminal trials is one which will only be exercised in exceptional cases. The long line of cases rarely raise any points that might move the court to intervene, as sought. Practitioners should give the most careful consideration, at the earliest possible time, as to whether there is any reality to an application to prohibit the holding of a criminal trial- a very rare action by the High Court. If there is they should move with great speed. In this case delay will almost always result in failure."

The applicant claims that delay has prejudiced her right to a fair trial. If there was an apprehension that there was a risk of an unfair trial the applicant should have moved promptly and not delayed. It is not explained why the applicant waited until the 15th March 2010, to make a claim that she had received an unfair trial. A judicial review application should have been taken after legal aid was

assigned on the 15th June, 2009.

5.3 In *DPP v Judge McDonnell & James Gallagher* (Unreported, High Court, 26th May, 2006) The applicant sought an order of mandamus to compel the District Judge to extend time for the service of a book of evidence. On the 3rd October, 2005, the District Judge had refused to make such an order saying that the issue was *res judicata* as such an application had been refused on the 8th December, 2004. The High Court rejected the applicant's submission that it could only consider time to begin to run from the 3rd October, 2005. The Court refused to grant mandamus by virtue *inter alia* of the failure of the applicant to move the application for review promptly. Dunne J held at 7:-

> "If Mr O'Malley was entitled to mandamus in respect of the order of 3rd October, 2005, it could only be on the basis that there was no proper adjudication in respect of the application for enlargement of time on 8th December, 2004. That being so, it begs the question why was no application for an order of mandamus sought at that time."

In the present case the respondent submits that the failure to have moved the application promptly is fatal to the application for any relief by way of judicial review. It is further submitted that it is perfectly reasonable for the Court to hold that time started to run in this regard from the 15th June, 2009. The appropriate forms of relief to have been pursued in this case is not *certiorari* but an order of prohibition and declaratory relief, these relief's have a three-month time period pursuant to the Rules of the Superior Courts.

5.4 All the applicant advanced in the District Court on the 12th October, 2009, and the 10th December, 2009, in looking to have the prosecution dismissed on grounds of delay, was the length of the delay itself. The respondent submits that such a case was seriously deficient. It has not been suggested that such an argument was going to be added to in any shape of form on the 10th February, 2010. The test as set out in *DPP v Cormack and Farrell* [2009] 2 IR 408, requires much more. Kerans J (as he then was) stated the following:-

> "the unanimous opinion of the US Supreme Court in *Barker v. Wingo* (1972) 407 U.S. 514…emphasised that a defendant's constitutional right to a speedy trial could not be established by any inflexible rule but could be determined only in an *ad hoc* balancing basis in which the conduct of the prosecution and that of the defendant are weighed. As Powell J. stated:-
>
> > "A balancing test necessarily compels courts to approach speedy trial cases on an *ad hoc* basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors; length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."

It is clear therefore that a submission as to delay, grounded solely on a period of alleged delay with nothing more was deficient.

5.5 The applicant herein has a statutory right of appeal. Any such appeal would be a complete *de novo* hearing at which the applicant could again raise her claim as to delay. Any perceived injustice could be remedied by the exercising of this right. A simple appeal to the Circuit Court is the most appropriate remedy. The appeal court is a perfectly adequate forum in which to deal with such points. In *Kay v Lambeth London Borough Council* [2006] 2 AC 465 Lord Bingham summed up the correct approach at paragraph 30:-

> "… the principle that if other means of address are conveniently and effectively available to a party they ought ordinarily to be used before resort to judicial review."

The applicant wants to complain again about how long it took her to be put on trial. This would be a submission the Circuit Court is perfectly able to rule upon. The respondent submits that for all the above mentioned reasons the Court ought decline the granting of relief.

Decision of the Court

6.1 It is alleged that on the 18th June, 2004, the applicant committed an offence of driving while intoxicated contrary to section 49 of the Road Traffic Act 1961. The applicant failed to appear when the matter was listed, and on the 18th July, 2005, a bench warrant issued for her arrest. One attempt was made to execute the warrant in November 2005 however the gardai were informed by the applicant's estranged husband that she had emigrated. In April 2009, the applicant received a telephone call from a member of the Gardaí informing her that the bench warrant was in existence. The matter came before Judge O'Neill in the District Court on the 12th October, 2009, and the 10th December, 2009. On both occasions the DPP sought to have the matter adjourned and the applicant sought to have the matter struck out due *inter alia* to the delay involved in executing the bench warrant and bringing the matter to hearing. On both occasions Judge O'Neill declined to strike out the matter. On the 10th February, 2010, the matter appeared for hearing before Judge Watkin. The applicant again sought to have the matter struck out on the basis of delay. Before the applicant had an opportunity to air this submission Judge Watkin stated that the matter had been dealt with by Judge O'Neill on a previous date and therefore she had no jurisdiction to hear the matter. The matter proceeded to hearing and the applicant was convicted.

6.2 In my view the District Judge was incorrect in deciding that she had no jurisdiction to hear the matter of delay. The fact that Judge O'Neill already addressed delay did not preclude her from dealing with it again. In *DPP (Kenny) v Doyle* [2007] 3 IR 89, it was claimed that because a preliminary issue was aired before a District Judge this precluded a subsequent District Judge on a subsequent date from hearing the same issue. The District Judge posed the following question to the High Court:-

> "Where an issue has been ventilated and decided by a Judge of the District Court, am I, a Judge of the District Court precluded from embarking on a rehearing of the issue."

Dunne J. answered this question in the following terms:-

> "As Henchy J. pointed out in *Corporation of Dublin v Flynn* [1980] I.R. 356, a trial is a unitary process. I find it hard to contemplate how an accused is precluded from relying upon a defence because of a ruling in the earlier trial which collapsed or terminated prematurely in the absence of clear authority that issue estoppel arises against an accused in respect of a defence which may be open to them. In the circumstances it seems to me that the question posed for the opinion of the High Court should be answered;- No."

I gratefully adopt this principle outlined by Mr Justice Henchy and as applied above by Ms Justice Dunne. The District Judge was not precluded from embarking on a rehearing of the delay issue herein.

6.3 The respondent submits that the applicant failed to bring an application for judicial review in a timely manner and that this failure justifies a refusal to grant relief. The respondent argues that an appropriate judicial review application should have been made soon

after legal aid was assigned on the 15th June, 2009. It seems to me that the applicant adopted the correct approach in pursuing the matter of delay through the criminal courts. It is vital for the efficient conduct of criminal matters that they proceed through the criminal courts and are not dispersed between the court of trial and another court. In *Corporation of Dublin v Flynn* [1980] IR 357 at 365, Henchy J. stated:-

> "It is the essence of a criminal trial that it be unitary and self contained, to the extent that proof of the ingredients of the offence may not be established as a result of a dispersal of the issues between the Court of trial and another tribunal."

The applicant unsuccessfully raised the issue of delay on the 12th October 2009 and the 10th of December 2009. On the 10th February, 2010, Judge Watkin indicated that she would not deal with the matter of delay at all. This precluded counsel from raising the matter. Just over a month later on 15th March, 2010, the applicant applied for judicial review. It seems to me that in these circumstances it cannot be said that the applicant failed to pursue relief in a timely fashion.

6.4 The respondent argues that the applicant should have raised delay as a preliminary issue. In *PO'C v DPP* (Unreported, Supreme Court, 27th July, 2006) Denham J held at 8:-

> "There is no doubt that the trial court has a general and inherent power to protect its process from abuse and that this power includes a power to safeguard an accused person from oppression or prejudice. However, this applies during the course of a trial and does not establish a right to a separate, discrete, preliminary process at the commencement of a trial to inquire into issues of delay."

I agree with the submission of the respondent that the proper time to raise this matter of delay was during the course of the trial and not as a preliminary issue. I do not however agree with the respondent that this misunderstanding as to the operation of the relevant law makes the applicants case unstateable. When the applicant sought to raise delay as a preliminary matter Judge Watkin indicated that she would not deal with the matter of delay at all. This precluded counsel from raising the matter during the course of the trial.

6.5 Where summary proceedings are concerned delay is less tolerable than proceedings involving indictable offences. In DPP v Cormack and Farrell [2009] 2 IR 408, Kearns J. stated:

> "..it follows from everything already said that delay will more rapidly become blameworthy and delays of lesser magnitude will be seen as more likely to be intolerable where summary proceedings are concerned."

In this case the delay in executing the bench warrant has not been explained. The pressing need to execute arrest warrants is clear from the case *Dunne v DPP* (High Court, unreported, 6th June, 1996) where Carney J. stated as follows:-

> " A warrant of apprehension is a command issued to the Gardaí by a Court established under the Constitution to bring a named person before that Court to be dealt with according to law. It is not a document which merely vests a discretion in the Guards to apprehend the person named in it; it is a command to arrest that person immediately and bring him or her before the Court which issued it."

The extent of the obligation on gardaí to execute bench warrants is clear from the case of *DPP v Cormack and Farrell* [2009] 2 IR 408, where Kearns J. (as he then was) stated as follows:-

> "I am satisfied that the judgments of the various High Court Judges to which I have referred emphasise the obligation on the gardaí to execute bench warrants promptly. By way of example it is not open to gardaí to take no active steps or simply wait for the wanted person to fall gratuitously into their laps by being arrested in relation to some other offence. Equally, the issuing of a warrant need not trigger a national manhunt, nor need it involve the deployment of totally disproportionate time and resources in an effort to execute the warrant."

A bench warrant is a command to the gardaí, it requires more than visiting the house of a wanted person on one occasion in a four years period as occurred in this case.

6.6 It seems to me that an appeal to the Circuit Court could have provided the applicant with an alternative remedy. The Circuit Court would have been perfectly able to entertain the applicant's complaint about delay. However at this stage if the court found that a failure to pursue an alternative remedy disentitled the appellant to relief, this might result in the appellant receiving a conviction six years after the incident complained of and confirmed today fully seven years after.

In *Gilroy v. Flynn* [2005] 1 ILRM at 294 Hardiman J. stated:-

> "The Courts, quite independently of the action or inaction of the parties, have an obligation to ensure that the rights and liabilities, civil or criminal, are determined within a reasonable time"

There is a duty on the Courts to ensure proceedings take place in an expeditious manner. As noted above, this is even more important in summary proceedings. The criminal proceedings in this case were not determined within a reasonable time. The delay in executing the bench warrant was both inordinate and not satisfactorily explained. Applying normal delay rules, the question of the balance of justice must be considered by the court. There seems no doubt to me that such balance requires that this long delayed matter should now be terminated. I will therefore grant the relief sought and quash the conviction made in the District Court and grant an order staying any further proceedings.