Neutral Citation Number [2008] IEHC 16

THE HIGH COURT
IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLE 40.4.2 OF THE CONSTITUTION OF IRELAND
[2008] 8SS

BETWEEN

EAMONN DUNNE

APPLICANT

AND
THE GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

Judgment of Mr Justice Edwards delivered on the 25th day of January, 2008

Introduction

1. On Monday 7th January, 2008 this court sat at 11.00am for the purposes of a vacation sitting. At the sitting of the court an application was made to it on behalf of the applicant, a prisoner then on remand at Cloverhill Prison, for an order pursuant to Article 40.4.2 of the Constitution of Ireland opening an enquiry into the lawfulness of his detention. The application was grounded upon the affidavit of John O'Donohoe, Solicitor, sworn on the 7th day of January, 2008 and was moved by Mr Alan Toale, of counsel. I was satisfied upon reading the said affidavit, and upon hearing the submissions urged upon me by Mr Toale, that the applicant had raised a serious issue, and that it was appropriate to open an enquiry into the lawfulness of his detention. Accordingly, I made an order pursuant to Article 40.4.2 opening an enquiry into the lawfulness of the applicant's detention at Cloverhill Prison and made the matter returnable for 2.00pm on the same day. When the court sat again at 2.00pm, the respondent was represented by Ms. Sunniva McDonagh, of counsel, instructed by the Chief State Solicitor. A certificate was presented to the court on behalf of the respondent certifying in writing the grounds of the detention of the applicant. Predictably, the respondent sought to rely upon a remand committal warrant. The said warrant, dated 3rd January, 2008 was issued under the signature of Judge William Hamill, a Judge of the District Court, and was addressed to the respondent commanding him to lodge the accused in Cloverhill Prison, and detain him there until a sitting of the District Court to be held at Cloverhill Courthouse, Clondalkin, Dublin 22 on the 17th January, 2008 at 10.30am. On the face of it, the said remand committal warrant appeared to be good. However, as the issue raised by the applicant, and to which I will refer in some detail later in this judgment, would, if the applicant was correct, vitiate the jurisdiction of the learned District Judge to remand the applicant at all, the production of the remand committal warrant could not be regarded as being dispositive of the matter. I therefore indicated to the parties that I would require detailed arguments from each side in support of their respective positions and that to facilitate them in researching and preparing their submissions I would adjourn the matter until Friday 11th January, 2008, the first day of Hilary Term. The matter came on before me on Friday 11th January, 2008 and I received outline written submissions from both parties together with oral submissions. I then retired to consider the arguments that had been presented to me and, having done so, found that I was not satisfied as to the legality of the applicant's detention. Accordingly, I ordered his release from detention and I indicated that I would give reasons for my decision in a written judgment on today's date. I now give those reasons.

The Legal Issue raised by the Applicant

2. The evidence that was before me established that the applicant was first arrested on the 2nd November, 2007 and was subsequently charged with conspiracy to commit a crime punishable by law, namely, the theft of cash in an amount of upwards of €900,000. The alleged co-conspirators were co-accused with the applicant. The charge of conspiracy to commit theft was preferred in accordance with a direction received from the Director of Public Prosecutions issued by him on the basis of a preliminary report on the case received from An Garda Siochana. However, he did not at that time have the full Garda file. The applicant, along with his co-accused, was held in custody and they were subsequently brought before the District Court in Kilmainham on the 5th November, 2007, at which time they were remanded in custody to Cloverhill Prison.

3. Thereafter the accused appeared before the District Court from time to time and on each such occasion he was further remanded. In that regard the evidence is that when the applicant was before the District Court on the 5th of November, 2007, and again on the 8th of November, 2007, the State sought further remands on the basis that directions in the matter were awaited from the Director of Public Prosecutions. When the matter was again before the District Court on the 22nd November, 2007 the court was told that directions from the office of the DPP were still awaited. On this particular date the presiding District Judge, of his own motion, refused jurisdiction and further remanded the accused to the sitting of the District Court in Cloverhill on the 20th December, 2007 pending the preparation and service of a Book of Evidence.

4. It should be noted that by virtue of s. 4B (1) of the Criminal Procedure Act, 1967 as amended by s. 9 of the Criminal Justice Act, 1999, the documents listed in that provision (which are collectively commonly referred to as the "Book of Evidence" by judges and lawyers, although the legislation does use that label) are required to be served within forty two days of the accused first appearing in the District Court. However, there is provision in s. 4B (3) of the said Act for the District Court to extend the period within which the Book of Evidence may be served if it is satisfied that (a) there is good reason for doing so, and (b) it would be in the interests of justice to do so. Accordingly, in the absence of any extension granted by the District Court the State were obliged to cause a Book of Evidence to be served on the applicant not later than the 17th December, 2007, that date being forty two days from the date on which the applicant first appeared in the District Court.

5. No Book of Evidence was served by the 17th December, 2007. When the matter came before the District Court on the 20th December, 2007 the prosecutor's representative informed the court that directions were still awaited from the DPP and sought an extension of time for delivery of the Book of Evidence. It should also be stated that even though the State were already out of time at that stage they were nevertheless entitled to seek an extension. They may do so because s. 4B (4) of the aforementioned legislation provides that an application may be made and an extension may be granted under subs. 3 before or after (my emphasis) the expiry of (a) the period of forty two days mentioned in subs. (1), or (b) any extension of the period granted under subs. 3.

6. The prosecution's application for an extension of time was opposed by counsel on behalf of the applicant who pointed out that no directions were necessary as the court had, on an earlier occasion, refused jurisdiction and in the circumstances his client was entitled to be served with a Book of Evidence forthwith.

7. By way of rejoinder the DPP's representative informed the court that the file in question was large and complex and that several issues arose including CCTV analysis, telephone analysis and the consideration of a large body of statements. No evidence was put before the court and the District Judge dealt with the application on the basis of the parties respective submissions. No objection was raised on behalf of the applicant on this occasion to the matter being dealt with on that basis. The District Judge acceded to the prosecution's application and extended the time for service of the Book of Evidence, but in doing so indicated that he was "marking

time as running" as against the State. The applicant was remanded in custody to the sitting of the court in Cloverhill on the 3rd January, 2008. The evidence does not make clear to what date the District Court Judge extended the time for service of the Book of Evidence but I infer that it was also to the 3rd of January, 2008.

8. In any event on the 3rd January, 2008 the case came up again in the District Court list in Cloverhill. When the case was called the prosecution's representative, a Ms. Lisa O'Reilly, Solicitor, attached to the Office of the Chief Prosecution Solicitor, applied for a further extension of time for delivery of the Book of Evidence. The court has before it an affidavit of Ms O'Reilly. Ms O'Reilly confirms that in support of her application for an extension of time she informed the court that the Garda file was still awaited and that the Gardai had amassed over two hundred statements. She states that while she was conveying that information to the court a Detective Garda Brian Hanley was giving her further instructions. He indicated to her that the total number of statements would in fact be around three hundred and she then conveyed that information to the court. She also indicated to the court that the Gardai were preparing a preliminary file for submission to the Office of the Director of Public Prosecutions. She states that in the circumstances, where she was having further discussions with Detective Garda Brian Hanley, the District Court Judge put the matter to second calling. Prior to this she had indicated to the Judge that an analysis of CCTV footage was required, as was phone analysis. She had stated that this was not straightforward and would require some time.

9. Ms O'Reilly further deposed that between first calling and second calling, she had the opportunity of taking detailed instructions from the Gardai. When the matter was called again at second calling she renewed her application for an extension of time and stated the following matters to the District Judge:

· A large volume of forensic material had been gathered and was in the process of being analysed.

· There was a large volume of fingerprint analysis awaited.

· The case involved phone analysis.

· There had been 8 persons arrested in relation to the investigation and that arising out of this, 60 interviews had been amassed.

· There was a large amount of CCTV evidence.

10. She states she had further "evidence" (my emphasis) to put forward to the District Judge, but counsel for the applicant interrupted at this point.

11. Before dealing with the interruption I should make the following comments. It is not clear to the court what exactly Ms O'Reilly meant by the statement "I had further evidence to put forward to the District Court Judge". It can be interpreted in two ways. On one interpretation Ms O'Reilly was of the belief that the facts asserted by her in the course of her submissions in support of her application for an extension of time were receivable by the District Judge as "evidence", and that she had further such assertions to put forward. Another possible interpretation is that she intended to call witness testimony in support of the factual assertions advanced by her in the course of her submission. I am inclined to the view, on the balance of probabilities, that first interpretation is the correct one.

12. Be that as it may, the issue is rendered somewhat academic by the fact that the interruption that was made by counsel for the applicant at this point was to complain that "evidence" was not being offered in relation to the application for an extension of time. According to the affidavit of Mr O'Donohoe, counsel for the applicant submitted to the court that statements by the DPP's representative could not amount to anything more than mere assertions. Ms O'Reilly states in her affidavit that at this point she indicated to the court that she was prepared to call the Gardai to give evidence as to the progress of the investigation. She states that:

> "The judge noted that as an Officer of the Court one was bound not to mislead the Court and he also indicated that every document (whether included in the Book of Evidence or not) would be furnished on disclosure to the defence. He asked me did I wish to call evidence. I indicated that I was prepared to do so."

13. The evidence establishes that what happened next was that counsel for the applicant indicated that if evidence was to be called he would have difficulty in dealing with that evidence without having received advanced notice of what the proposed witness or witnesses intended to say. The effect of his submission was that, in the circumstances as they then obtained, there could be no meaningful cross examination and that it would be futile for the court to hear evidence without the applicant having been given advance notice of the evidence intended to be adduced. While the evidence does not establish that the nature of the suggested futility was spelt out in terms, I am satisfied that the submission in question was intended to refer to, and was understood by the court as referring to, the likelihood that if the prosecution were to call its evidence, without advance notification of the substance of that evidence to the defence, the defence would most likely be seeking an adjournment of the extension of time application with the evidence part-heard, so as to facilitate a proper consideration of the evidence in chief before cross examination and an opportunity to take adequate instructions. However, Ms O'Reilly seems to have interpreted this submission as being a withdrawal by counsel for the applicant of his objection to the absence of formal evidence. I am satisfied that it was not anything of the sort. What counsel for the applicant was effectively saying was (i) I require evidence to be called, (ii) if evidence is going to be called I require advance notice as to its substance, (iii) as I have not yet received notice of the evidence to be adduced I will not be in a position to cross examine today, and (iv) it would be pointless to embark on the taking of evidence today in circumstances where I am inevitably going to be seeking an adjournment at the end of the evidence in chief. On the contrary, it would be better to adjourn en bloc the taking of the evidence in the application, rather than embarking on that exercise and then having to adjourn it part heard to another day.

14. Now this court is not to be taken as expressing any view as to the validity of counsel for the applicant's contention that, in a procedural application of this sort, he was entitled to advance notice of the substance of the prosecution's proposed evidence. The matter is arguable both ways and it is not necessary for me to decide that issue. It is sufficient in this review of the evidence to simply record that such a submission was made.

15. In any event Ms O'Reilly did not proceed to call any evidence. When she indicated to the court that she would not be doing so, the District Judge apparently stated that this would be on her own head. Nevertheless, he then went on to extend the time for delivery of the Book of Evidence by a further two weeks, and consequentially further remanded the applicant in custody for another two weeks.

16. The applicant submits that the purported extension of time for the delivery of the Book of Evidence pursuant to s. 4B(3) of the

Criminal Procedure Act, 1967, as inserted by s. 9 of the Criminal Justice Act, 1999, on the 3rd January, 2008 was unlawful. The applicant contends that the learned District Court Judge was incompetent to extend the time in question in the absence of formal evidence that could have satisfied him that there was a good reason from extending the period and that it would be in the interests of justice to do so. This courts attention was drawn to s. 4B(5) wherein it is stated that where it refuses to grant an extension, the District Court shall strike out the proceedings against the accused in relation to the offence. The applicant makes the point that, if the District Court was not in a position to exercise its discretion in favour of an extension of the period of time for the delivery of a Book of Evidence, the applicant was entitled, by virtue of s. 4B(5) to have the charge against him struck out.

17. For completeness I should state that s. 4B(6) provides that the striking out of proceedings under subs. 5 shall not prejudice the institution of any proceedings against the accused by the prosecutor. Accordingly, if the learned District Court Judge had refused to extend the period for delivery of the Book of Evidence on the 3rd of January, 2008, and as a consequence of that refusal the charge against the applicant had been struck out, the State would have been entitled to come again on the basis of a fresh charge. In those circumstances no pleas such as autrefois acquit, or of issue estoppel, could arise. It would not, of course, inhibit the applicant from possibly raising a delay point in the context of the new charge.

18. In this case, however, the District Judge did extend the period. However, the applicant says he was not entitled to do so in the absence of evidence.

19. I will now proceed to consider the detailed arguments presented on both sides.

The applicant's submissions.
20. As indicated, I have had the benefit of outline written submissions, amplified and supplemented by oral submissions, and I will summarize them as best I can. At the hearing before me on the 11th January, 2008 senior counsel for the applicant, Mr Gerard Hogan, submitted that it is clear from the wording of s. 4B(1) of the Criminal Procedure Act, 1967 (as inserted by s. 9 of the Criminal Justice Act, 1999) that where an accused is sent forward for trial or where, as in this case, jurisdiction was refused, the prosecution has forty two days from the date of the first appearance of the accused before the District Court within which to serve upon the accused the documentation comprising the Book of Evidence which previously would have formed the basis of a preliminary examination. An examination of the now abolished procedure under s. 6(1) of the Criminal Procedure Act, 1967 shows that it was silent as to the imposition of any time limit for the service of the Book of Evidence, save in this regard, namely, that Order 24, r. 10(1) of the Rules of the District Court provided that this was to be done within thirty days of the first appearance of the accused before the court. Under this procedure, the court had the power to extend the time. Similarly, s. 4B (3) of the 1967 Act, as now inserted, makes provision for an extension of time. However, both parts of the sub-section must be complied with. Mr Hogan argues than an appreciation of this statutory imperative leads inexorably to the question as to how, then, is the first part to be satisfied? He says that this is a crucial question, for in the event that it is not attended to with particularity the second part cannot be operated and/or acted upon, in suspension or in isolation.

21. It was submitted that if the District Judge before whom the application for the extension is made is to be persuaded that there is good reason for so doing, there must be actual evidence before him with which he must be satisfied. Bald or empty assertions on the part of the DPP's representative cannot be sufficient, for in the absence of some manner or form of formal proof, mere assertion as made carries no evidential weight. Critically, the accused is otherwise deprived of the right to challenge through cross examination the accuracy of the claims now being made. It was submitted that there is a world of difference between untested assertions as to the number of witnesses, or the complexity of the case, as justifications for the necessity for such an extension and evidence given on oath and tested through cross examination. It was submitted that this denial of the applicant's right to cross examination amounted to a violation of his constitutional right to fair procedures. In support of this submission I was referred to the *People v. Kelly* [2006] IESC 20. Counsel for the applicant contends that this is especially true in the present case where assertions sought to be relied upon by the State were not based on the DPP's solicitor's personal familiarity with the file, but rather had arisen from a hastily convened consultation in the body of the court (the case having been called) between the said solicitor and members of An Garda Siochana.

22. Counsel for the applicant draws attention to the definition of "evidence" contained in Blacks Law Dictionary, Fifth Edition. It is defined in that work as any species of proof, or probative matter, legally presented at the trial of an issue, by the act of the parties and through the medium of witnesses, records, documents, exhibits, concrete objects etc, for the purpose of inducing relief in the minds of the court or jury as to their contention.

23. Counsel also referred the court to the case of *Smith v. Judge O'Donnell and the Director of Public Prosecutions* [2004] IEHC 72. In this case the applicant was charged with a number of charges under The Firearms Act of 1964 as amended, and The Explosive Substances Act, 1883 as amended. He brought a case before the High Courts seeking, *inter alia*, an order of *Certiorari* quashing an order of Judge O'Donnell extending time for the service of a Book of Evidence upon him in circumstances where another District Judge had previously extended time on a peremptory basis. The application was heard by O'Neill J., and much of the case turned upon the meaning and effect of the expression "peremptory". O'Neill J. held that use of the adjective "peremptory" or adverb "peremptorily" as used in the context of that case did not have a defined legal effect, and did not oust the jurisdiction of the District Court Judge to hear and determine the application for an extension of time, and for that purpose to exercise his judicial discretion to consider whether or not there was good reason for extending time and whether it would be in the interests of justice to do so. Counsel for the applicant makes the point that it is clear from the judgment of O'Neill J. that evidence had been adduced before the District Court in support of the States application for an extension of time, with a view to satisfying the court as to the twin requirements specified in s. 4B (3). In that regard O'Neill J. stated:

> "I am also satisfied that there is no evidence adduced in this application which would persuade me that the exercise by the second named respondent of his discretion under the provisions of s. 4B (3) was otherwise than in accordance with law. There was ample evidence (emphasis added) before the second named respondent on which he was entitled to reach his conclusion and there is no allegation made of irrationality in that conclusion."

24. Counsel for the applicant submits that if one accepts that evidence may be adduced before a court in one of two ways, namely either by means of oral testimony or sworn affidavit, save in circumstances where, exceptionally, evidence may be offered and accepted by certificate, O'Neill J's. reference to "ample evidence" must surely be understood to mean, and be interpreted to mean, that when the matter of the extension was canvassed before the District Court there was available to that court material from a source such as a witness, a record, a document, an exhibit or other concrete matter which was sufficient in substance to induce in the mind of its recipient, the learned District Court Judge, a belief as to its contention.

25. The applicant submits that in the present case the learned District Court Judge, ought not to have granted an extension of time in the absence of actual evidence. All he had before him were assertions.

26. It is further submitted that even though an application for an extension of time for the preparation and service of the Book of Evidence is a procedural matter, it is nevertheless a matter of great importance, and in practice an extension of time will often determine, or certainly influence, matters such as whether an accused remains at liberty. In the circumstances the statutory provision in point should be strictly construed, so says the applicant. In support of this proposition the court is referred to the decision of the Supreme Court in the case of *Philip Clarke v. The Member in Charge of Terenue Garda Station,* [2001] 4 I.R. 171 at 178. The *Clarke* case involved an interpretation of s. 4 of The Criminal Justice Act, 1984 and the obligations of the Gardai in that regard. Particular reliance is placed on the following quotation from the judgment of Keane C.J.:

> "While the 1984 Act and the regulations made thereunder seriously abridge a person's right to liberty and should be strictly construed, that does not mean that they have to be interpreted in the manner proposed on behalf of the applicant."

27. While the particular interpretation of the 1984 Act, and regulations made thereunder, that was being contended for by the applicant in the *Clarke* case is of no relevance in the present case, and was in any event rejected by the Supreme Court, the point made by the applicant is that a statutory provision which purports to authorise or render legal something which would tend to prejudice an individual's constitutional rights should be strictly construed. In the *Clarke* case the right in question was the right to liberty. In the present case the right in question is the right to a speedy trial. The applicant maintains that by setting a time limit of forty two days for the service of the Book of Evidence s. 4B (1) is directed towards vindicating the accused's right to a trial with reasonable expedition. Since s. 4B (3) provides that a court may extend the forty two day period on an exceptional basis, and such an extension is necessarily going to be to the prejudice of an accused's right to a trial with due expedition, it is a provision that must also be strictly construed, so says the applicant.

28. Counsel further points to the use of the word "satisfied" in s. 4B (3). He submits that it is clear from the decision of Blaney J., in *Kiberd v. Hamilton* [1992] 2 I.R. 257at 265, that the High Court will quash any decision made pursuant to a statutory provision of this variety unless it can be established that the decision in question was made (a) *bona fide*; (b) is factually sustainable and (c) is not irrational. The applicant concedes that the bona fides of the District Judge is not in question. Neither can it be said that his decision was irrational. According to the applicant the issue in this case is one of factual sustainability. The applicant says that the only way in which a decision maker can establish the factual sustainability of a proposed course of action is by receiving evidence as to the facts. The applicant further says that the court should note that in the case of Order 84 applications it has frequently been stated that an applicant seeking to have time extended on the grounds that there are "good reasons" to do so must establish this by means of evidence and lay the factual foundations before the court. Accordingly, where the time limit prescribed by O. 84 r. 21(1) has expired, and the court is being asked to extend time, the correct approach, per Hederman J. in *O'Flynn v. Mid Western Health Board* [1991] 2 I.R. 223 is that:

> "…the judge should be furnished with the reasons for the delay in the grounding affidavit and he should decide whether there are grounds for excusing the delay. Even if leave is granted at the *ex parte* stage, nonetheless, when the trial judge comes to hear the matter he must adjudicate upon whether the delay was reasonable and such as may be excused or not."

29. The applicant submits that if this is a requirement in respect of a procedural step involving an application to extend time in civil proceedings, it must apply a fortiori to a procedural step of a similar nature in a criminal prosecution.

The respondent's submissions

30. The respondent also provided the court with outline written submissions, and counsel made oral submissions expanding upon or amplifying these. Much of the respondents written submissions were directed towards an argument that the applicant's proceedings were misconceived and should have been framed as an application for a judicial review rather than as an application for an enquiry under Article. 40.4.2 of the Constitution or *habeas corpus*. I determined that issue in the course of the hearing before me on the 11th January, 2008 and ruled against the respondent. I gave my reasons for doing so at the time, and that aspect of the matter is now concluded. Accordingly, it is not necessary for me to refer to those parts of the respondents written submissions dealing with that issue.

31. Insofar as the respondent's submissions sought to address the central issue in the case, the respondent had this to say. The respondent contends that the applicant is incorrect in suggesting that s. 4B (3) of the Criminal Procedure Act, 1967 as inserted by s. 9 of the Criminal Justice Act, 1999, requires to be strictly construed. The respondent says that the statute in question is not a penal statute in that it does not create an offence and merely regulates procedural matters. The respondent makes the point that the applicant was not standing trial on the 3rd January, 2008 when the District Judge extended time for the service of the Book of Evidence. Moreover, the application in question did not involve the liberty of the appellant per se. While conceding, in answer to a question in that regard from the bench, that the apparent purpose of the imposition of a forty two day time limit within which a Book of Evidence must be served was to vindicate an accused's right to a trial with due expedition, it was argued that that fact would not, of itself, create an imperative that the provision should be strictly construed.

32. Counsel for the respondent points out that although the applicant complains that the District Judge should have had "evidence" before making his decision; there is no statutory requirement in this regard. Moreover, the respondent contends that this submission ignores the fact that in the District Court the applicant submitted that the "evidence" of the Garda would not be of any additional value. (In that regard I have already indicated in the course of outlining the facts of the case that I am satisfied that Ms O'Reilly was mistaken about, and misunderstood, the substance of the submission made to the District Judge, by counsel for the applicant.) In any event the respondent submits that s. 4B (3) itself does not refer to the calling of evidence but merely states that the judge must be satisfied that there would be "good reason" for extending the time and also that it would be "in the interests of justice" to do so. The courts attention was drawn to the case of *DPP v. Kenny* [1980] I.R. 160 at 164 wherein O'Higgins C.J. stated:-

> "Where a statute provides for a particular form of proof or evidence in compliance with certain provisions, in my view it is essential that the precise statutory provisions be complied with. The courts cannot accept something other than that which is laid down by the statute, or overlook the absence of what the statute requires. To do so would be to trespass into the legislative field. This applies to all statutory requirements; but it applies with greater general understanding to penal statutes which created particular offences and then provide a particular method for their proof."

33. In the course of her submission to the Court, counsel for the respondent emphasised again and again that it is important to bear in mind that it is the District Judge and not the applicant for the extension who must have the "good reason". The respondent reiterates that as no particular form of proof or evidence is specified in the section, there was, accordingly, no breach thereof.

34. The respondent's submissions also seek to deal with the analogy drawn by counsel for the applicant with applications for an

extension of time in O. 84 cases. The respondent states that the establishment of "good reason" for the extension of time does not have to be exclusively by means of affidavit evidence. The courts attention was drawn to the following quotation from the judgment of Ms Justice Denham in the case of *De Roiste v. The Minister for Defence and Ors* [2001] 1 I.R. 190, wherein she states that at p. 208:-

> "In analysing the facts of the case to determine if there is a good reason to extend or to allow judicial review, the court may take into account factors such as; (i) the nature of the order or actions the subject matters of the application; (ii) the conduct of the applicant; (iii) the conduct of the respondent; (iv) the effect of the order under review on the parties subsequent to the order being made and any steps taken by the party subsequent to the order to be reviewed;
>
> > (v) any effect which may have taken place on third parties by the order to be reviewed; (vi) public policy that proceedings relating to the public law domain take place promptly except when good reason is furnished. Such list is not exclusive."

35. Now it should be stated that in response to this, Mr Hogan S.C. on behalf of the applicant, stressed that in the *De Roiste* case the court had before it the most detailed evidence.

36. Counsel for the respondent also cited the case of *POC v. The DPP* (unreported, High Court, Finlay Geoghegan J., 11th March, 2005) as a further example of matters other than evidence being taken into account by a court in deciding whether there was "good reason" for extending time. In the *POC* case the applicant for an extension of time did not put any affidavit before the court seeking to explain his delay. Nevertheless the learned Judge felt that she could deal with the matter. Finlay Geoghegan J took into account the uncertainty of the law relating to the jurisdiction of the trial judge to entertain an application to stay an indictment by reason of delay. She balanced against the failure to give reasons for the delay the seriousness of the issue to be tried. Further she indicated that there was an overriding obligation on the court to consider where the balance of justice lay and in particular whether it lay in favour of allowing the application to proceed or against it.

37. Finally, although the respondent's case is first and foremost that there was no error of law in this case, it was submitted that even if there had been an error of law the applicant would not be entitled to be freed on *habeas corpus* simply because such an error had occurred. It was submitted that the error of law, if any, was in error within jurisdiction and is therefore not amenable to review. In support of this position the respondent draws the courts attention to the judgments in the cases of *The State (Abenglen Properties Ltd) v. Dublin Corporation* [1984] I.R. 381; *The State (Keegan) v. Stardust Victims Compensation Tribunal* [1986] I.R. 642 and *Ryan v. Compensation Tribunal* [1997] 1 I.R.M. 194.

38. I should state that by way of rejoinder counsel for the applicant sought to reject any suggestion that the learned District Judge made an error of law within jurisdiction. On the contrary, the applicant strongly contends that the District Judge acted in excess of jurisdiction and that his error was of such a fundamental nature as to create an imperative for the immediate release of the applicant from custody. This was because if the application to extend the time had been refused, as it should have been, the court would have been obliged by virtue of s. 4B (5) to strike out the proceedings against the accused. He contends that there would have been no other option open to the District Judge by virtue of the plain and unambiguous wording of that provision.

Decision

39. I am of the view that counsel for the applicant is right in his contention that evidence as to the circumstances in which the State felt it necessary to apply to the District Judge for an extension of time to deliver a Book of Evidence in this case was indeed required.

40. Section 4B (3) of the Criminal Procedure Act, 1967 as inserted by s. 9 of the Criminal Justice Act, 1999 provides that:-

> "On application by the prosecutor, the District Court may extend the period within which documents mentioned in subs. (1) are to be served if it is satisfied that –
>
> > (a) there is good reason for doing so, and
> >
> > (b) it would be in the interest of justice to do so."
>
> The key requirement is that the District Judge be "satisfied" as to the matters specified. Of course this begs a question as to "by what means is a District Judge to be satisfied?"

41. I do not consider that there is any technical meaning attaching to the word "satisfied". In that regard I would adopt the approach of Lord Denning when he considered the word "satisfied" as used in the s. 4(2) of the English Matrimonial Causes Act 1950 in the case of *Blyth –v- Blyth* [1966] 1 All E.R. 524. at 536 H.L... Lord Denning stated:-

> "The phrase used in s. 4(2) of the Act of 1950 is simply "is satisfied", with no adverbial qualification. The formula "satisfied beyond reasonable doubt" has been a very familiar one for a great many years, and if that meaning had been intended the formula could and should have been used. The phrase "is satisfied" means, in my view simply "makes up its mind"; the court on the evidence comes to a conclusion which, in conjunction with other conclusions, will lead to a judicial decision. There is no need or justification for adding any adverbial qualification to "is satisfied"."

42. It seems to me that there are, of necessity, three components to an application for an extension of time pursuant to s. 4B (3). To be successful an applicant must satisfactorily address all three. The first component involves establishing the factual matrix underpinning the application, because such applications do not take place in a vacuum. The second component involves persuading the District Judge that on the basis of the facts as established there is "good reason" for extending time. The third component involves also persuading the District Judge that on the basis of the facts as established it would be in the interests of justice to extend the time.

43. Applications by the DPP for extensions of time pursuant to s. 4B (3) occur routinely in the District Court. In many, perhaps even most, of these cases the facts put forward as giving rise to the need to seek the extension are not disputed. In such instances, the application is dealt with on the basis of asserted facts, without evidence being received in support of those assertions, and the judge determines the matter on the basis of submissions by the parties directed only towards the second, and/or the third, of the components that I have mentioned. There is no necessity for evidence in such circumstances because the accused is, by his conduct in not calling for the adduction of evidence, deemed to accept the facts as asserted, and to have waived his right to insist on proof of them.

44. However, in any particular case, an accused is entitled if he wishes to put the DPP on proof of the factual matrix underpinning his application. If he does so, the circumstances alleged to exist must then be established in evidence. Further, the accused must be afforded an opportunity of testing the evidence put forward in the crucible of cross-examination, and to call evidence in rebuttal if he wishes. If evidence is called for, and is not produced, the District Judge will thereafter be incompetent to adjudicate further on the application, as consideration of second and/or third component issues can only take place in the context of established (or accepted) facts. As I have said neither "good reasons" nor "the interests of justice" can exist in a vacuum.

45. In this instance Ms O'Reilly applied for an extension of time relying upon the alleged existence of certain circumstances. Her application was vehemently opposed by counsel for the accused. A two-tier objection was advanced:

> (i) it was pointed out to the District Judge that the Court was being asked to deal with the matter on the basis of mere assertions and that there was no evidence before the Court to support the assertions advanced; and
>
> (ii) it was suggested that if the asserted circumstances did exist, an extension of time was in any case unnecessary and inappropriate and ought to be refused.

46. The first tier of the objection was addressed to the first component that I have spoken about, namely, the factual matrix allegedly underpinning the application. The second tier was addressed to second and/or third component issues.

47. I am satisfied that the first tier of the objection had the effect of putting the D.P.P. on formal proof of the existence of the circumstances alleged. As the D.P.P's application was predicated on the existence of the circumstances in question, and as Ms O'Reilly's assertions were not being accepted at face value so that the DPP was being put on proof of same, the District Judge needed to be in receipt of evidence that the circumstances in question did in fact exist, before he could competently address his mind to second and/or third component issues.

48. This begs yet another question, namely, as to what quality of "evidence" was required?

49. Phipson on Evidence, 15th edition, at para 1-03, states:

> "Evidence, as used in judicial proceedings, has several meanings. The two main senses of the word are: first, the means, apart from argument and inference, whereby the court is informed as to the issues of fact as ascertained by the pleadings; secondly, the subject matter of such means. The word is also used to denote that some fact may be admitted as proof and also in some cases that some fact has relevance to the issues of fact. In a real sense evidence is that which may be placed before the court in order that it may decide the issues of fact." ……."Evidence, in the first sense, means the testimony, whether oral, documentary or real, which may be legally received in order to prove or disprove some fact in dispute."

50. In the light of this quotation, I have given careful consideration to the question as to whether the factual assertions advanced by Ms O'Reilly in this case could be regarded, by themselves, as an acceptable form of evidence, albeit of an informal and unsworn variety, on a procedural issue such as this was, particularly having regard to the fact that Ms O'Reilly is an Officer of the Court. However, I do not think so. To characterise what was urged as evidence would be a radical step in itself, but even if it were possible to regard the assertions made as the evidence of Ms O'Reilly, to so hold would be likely to provoke a myriad of objections to the admissibility of that type of evidence, both in principle (e.g., the unjustifiable absence of the oath, the non-availability of cross-examination, or, if allowed, difficulties in facilitating effective cross-examination and so on), and also in the particular circumstances of this case, (e.g., the proffering of hearsay received from members of An Garda Siochana, as described in Ms O'Reilly's affidavit before this Court). I am therefore of the view that the quality of the evidence required to be received by the District Justice in the circumstances of this case, was admissible evidence of the formal sworn variety and, in the absence of the accused's agreement, nothing less could have sufficed.

51. I find further support for this view in the submission of Mr Hogan, which I accept, that s. 4B is directed towards vindicating an accused's right to a trial with reasonable expedition. That being so I believe that it is appropriate to construe it strictly, notwithstanding that it is not a penal provision within the narrow sense of that description. In the circumstances the requirement for judicial "satisfaction" cannot be afforded a liberal or loose interpretation. There must be a solid basis for such satisfaction. To adopt Mr Hogan's submission, the judge's decision must be factually sustainable. Factual sustainability requires establishment of the facts, either by means of agreement, or in default of agreement, by judicial ascertainment on the basis of formal evidence.

52. In conclusion, I consider that the District Judge was incompetent to extend the time for service of a Book of Evidence in the circumstances of this case. In the absence of evidence as to the circumstances allegedly justifying the requested extension he was obliged to dismiss the application. He exceeded his jurisdiction in extending the time in circumstances where there was simply no material before him on foot of which he could have been judicially satisfied that the statutory preconditions in s. 4B (3) were fulfilled. As, by virtue of s.4B (5), the validity of the further remand of the accused depended upon the existence of a valid s. 4B (3) extension, and as the extension was invalid, the remand was also bad. The accused was entitled to have, and ought to have had, the charge then pending against him struck out.

53. For these reasons I concluded on the 11th of January that the accused was in unlawful detention and I directed his release from custody.