

## THE HIGH COURT

2008 No. 256 SS

IN THE MATTER OF SECTION 52 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961  
BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS  
(AT THE SUIT OF GARDA RICHARD M. HORAN)

PROSECUTOR

AND  
THOMAS O'MALLEY

DEFENDANT

**JUDGMENT of Mr. Justice Gilligan delivered on the 1st day of May, 2008**

1. This is a consultative case Stated by Judge Mary Devins and for ease of reference I set out hereunder the details of the case stated.

(1) At a sitting of Ballinrobe District Court on the 4th December, 2007, Thomas O'Malley (hereinafter "the accused") appeared before me to answer a summons, which alleged that, the accused:

"On the 13th day of June 2004, at Frenchbrook, Kilmaine, County Mayo in the District Court area of Ballinrobe, District No 3, drove a mechanically propelled vehicle with registration number and letters 94 MO 871 in a public place while there was present in your body a quantity of alcohol such that within three hours after so driving, the concentration of alcohol in your breath exceeded a concentration of 35 microgrammes of alcohol per 100 millilitres of breath contrary to Section 49(4) and (6)(a) of the Road Traffic Act, 1961, as inserted by Section 10 of the Road Traffic Act, 1994 as amended by the Road Traffic Act, 2002."

A copy of the summons appears as **appendix 1** to this case stated.

(2) The accused had previously been before me at Ballinrobe District Court on 21st March, 2006, wherein I heard a preliminary application on behalf of the accused to dismiss the charge or stay the proceedings on the basis that the prosecutor had failed to seek out and preserve certain documents and materials concerning the Lion Intoxilyser machine, which the accused claimed would have assisted him in his defence of the charge. I note that a detailed request for disclosure had been sent to the Garda Superintendent on the 1st March, 2006, and a reminder issued on the 16th March, 2006, and the Superintendent furnished so much of the documentation as was in his possession or procurement. A copy of that request for disclosure appears as **appendix 2** to this case stated, together with the response from the Superintendent to same.

(3) On 21st March, 2006, I heard evidence on behalf of the accused from Dr. Mark Jordan, a consultant forensic engineer and I also heard evidence from Mr. Eoin O'Donoghue, a representative of the Medical Bureau of Road Safety. I heard that Dr. Jordan wanted relevant technical data concerning the design, functioning and operation of the machine. He wanted to explore the possibility that the machine might be unreliable.

(4) I had previously heard evidence from Dr. Jordan at Belmullet District Court on 9th February, 2005, in a different case, *D.P.P. v. Brendan Burke*, wherein his evidence was not contradicted as no expert evidence had been called by the prosecutor. Dr. Jordan is a chartered engineer and he has extensive qualifications and experience in relation to machine design and his expertise in relation to the intoxilyser has not been challenged and I find him competent.

(5) I held that the materials made available to the accused were incomplete. That conclusion led me logically and inevitably to adjourn the proceedings to allow the defence draft an appropriately detailed application for disclosure. That was drafted and furnished to the prosecutor.

A copy of that full request for disclosure appears as **appendix 3** to this case stated.

(6) I subsequently dismissed the prosecution against Mr. Burke on account of a failure to make discovery.

(7) On the said 21st March, 2006 due to a failure of the prosecution to make full disclosure of the requested materials in the instant case, I was of the opinion that a question of law arose such that I intended to seek the guidance of the High Court as to whether in light of the failure to supply all the material sought I should accede to the accused's application and stay the prosecution or dismiss the charge. I sought the agreement of both parties to furnish to me a draft of the proposed case stated.

(8) The case was adjourned from time to time and I had directed that the matter would be finalised on 18th July, 2006 when the matter was listed at Ballinrobe District Court. Whereas the accused's solicitor had a draft case stated prepared, I was not furnished with an agreed draft by the prosecution. A copy of the accused's initial draft case stated is attached at **appendix 4** to this case stated.

(9) The case was adjourned from time to time. I understood that the prosecutor was awaiting the advice of counsel and I also noted that a decision of the Supreme Court in a relevant case, *D.P.P. v. McGonnell* was awaited. The decision in the *McGonnell* case [2007] 1 I.L.R.M. 321, was ultimately delivered on 28th November, 2006.

(10) On 12th October, 2007, the case came before Swinford District Court and on that date Mr. Seamus Hughes, State Solicitor, for the prosecution informed the court that the State could not identify a point of law in the Defence version of the case stated. I then adjourned this case and the other intoxilyser cases to Ballinrobe District Court on 4th of December, 2007 for hearing peremptory against the State, I at that stage withdrew the initial case stated to the High Court, and the defence looked for their costs in relation to same, this application was also adjourned.

(11) The case was again listed before me at Ballinrobe District Court on 4th December, 2007. A number of other cases were also listed on the same date having been previously adjourned upon the application of the various accused pending the resolution of the issues in the within case. Similar disclosure had been sought by the accused in those cases and had been responded to by the prosecutor as in the instant case.

(12) On the said 4th December, 2007, I heard an explanation from the prosecutor for the delay with the previous proposed case stated. I find that the prosecutor had delayed the prosecution since March, 2006 and that the delay was inordinate. Repeated adjournments were given to enable the prosecutor prepare the draft case stated.

(13) I was informed that since the previous date when the matter was before me, the prosecutor had replied to the detailed request for disclosure on behalf of the accused, and the only real outstanding issue in relation to disclosure was the software code for the Lion Intoxilyser.

(14) Whereas I was informed that Mr. David Reynolds, the Deputy Director of the Medical bureau of Road Safety and Mr. Paul Williams, the Head of the Forensic Support Unit of Lion Laboratories Limited were in court and available to deal with the reliability of the Lion Intoxilyser machine, and the relevancy of the request for the software code, I declined to hear their evidence.

I noted that the accused objected to my hearing their evidence on the basis that the prosecution case had closed. However, I noted submissions on behalf of the prosecutor and I ruled that the prosecution case had not yet opened as I had not heard any evidence on the charge.

(15) I note that the purpose of the request for disclosure is to investigate the reliability of the apparatus to ascertain the circumstances (if any) in which the said apparatus can be unreliable. The accused desires to establish the "forensic integrity" of the machine with a view to arguing that the machine is unreliable.

(16) I was informed and I found as a fact that the software code was not in the possession, power or procurement of the prosecutor. I

was informed and found that whereas the original software code is in the possession of Lion Laboratories Limited in the United Kingdom, the Medical Bureau of Road Safety holds a copy of the software code for use as a contingency in stipulated circumstances and the Bureau is contractually prohibited from divulging it to any third party.

(17) It was submitted that the software code is not relevant to the determination of the case as the intoxilyser machine is available for testing in its entirety and 35 tests have been conducted on the machine on behalf of different accused at various locations in the State in the past four years.

(18) It was further submitted that the software code was not in the power or procurement of either the Gardaí or the Director of Public Prosecutions, and I could not, as a matter of law, make an order for disclosure in criminal proceedings against a third party.

(19) I noted that the Medical Bureau of Road Safety is a State entity and it is not a third party in the ordinary sense.

(20) In light of the overall circumstances of the matter and the delay which has occurred to date, and mindful that there are a number of cases backing up the present case I believe it to be in the interests of justice that I seek the opinion of the High Court.

The opinion of the High Court is respectfully sought on the following questions:

1. Am I entitled as a matter of law to make an order for disclosure against a third party in criminal proceedings and is there power to make an order against the Medical Bureau of Road Safety in the instant case?
2. Does the prosecutor's extensive delay in this matter since March, 2006, constitute an abuse of process, such as to warrant a dismissal of the charge?
3. Does all that which has happened in this matter give rise to prejudice on account of delay such that the instant case and all the other related cases should be dismissed?

2. Counsel for both parties correctly agree that the answer to the first question has to be "no". It is a well established principle that an order for disclosure against a third party cannot be made in criminal proceedings. *D.P.P. v. Sweeney* [2002] 1 I.L.R.M. 532. *D.H. v. Groarke* [2002] 3 I.R. 522.

3. As regards the second question the District Judge having heard certain evidence came to the conclusion as set out at para. 12 of the consultative case stated, that the prosecutor had delayed the prosecution since March, 2006, and that the delay was inordinate. This finding on its own, in my view, does not constitute an abuse of process such as to warrant a dismissal of the charge and the second question in my view has also to be answered "no".

4. The question of prosecutorial delay has now been extensively dealt with and clarified in the recent Supreme Court decision in *McFarlane v. D.P.P.* as delivered on 5th March, 2008. Keams J., in his judgment fully reviews the law pertaining to prosecutorial delay and the important aspect of actual prejudice to the applicant being demonstrated and the question of any impairment to a defendant's other rights such as are guaranteed by the constitutional right to a trial in due course of law. In essence following *Barker v. Wingo* in the US Supreme Court, the emphasis in coming to a conclusion in respect of prosecutorial delay identifies four factors to be assessed, being the length of the delay, the reasons for delay, the role of the applicant, and prejudice. These are all matters which in my view the District Judge would have to consider and take into account prior to coming to a conclusion as regards whether or not the charge preferred against the defendant should proceed or be dismissed on the grounds of alleged prosecutorial delay. The views of Keams J., in *McFarlane* would however, have to be borne in mind wherein he states:-

"Prohibition is nonetheless to my mind a remedy which, in the absence of actual prejudice, should only be granted where a serious breach of either the applicant's rights under Article 38.1 of the Constitution or article 6(1) of the European Convention on Human Rights is established. I would accept that a distinction may require to be drawn between breaches of the right which give rise to an entitlement to obtain prohibition and lesser transgressions which may conceivably give rise to some other remedy, such as one in damages. However, any entitlement to a remedy in damages for breach of a constitutional right to an expeditious trial is a matter that will require very full and careful consideration in an appropriate case. This is not such a case. The Court is here concerned only with a claim for prohibition."

5. In these circumstances I do not consider it necessary to answer the third question, because in effect the first part of the third question has already been answered and it is a matter for the District Judge to come to a conclusion having heard the evidence and applying the law in respect of prosecutorial delay as set out in *McFarlane* to the facts. I do not consider that the instant case can govern any other related cases having regard to the answers in the negative to questions one and two.