

THE HIGH COURT

[2005 No. 673 JR]

BETWEEN

JOHN DEVOY

APPLICANT

AND
THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Judgment of Mr. Justice Diarmuid B. O'Donovan delivered on the 21st day of March, 2006

1. The applicant has been returned for trial to the Circuit Criminal Court in Dublin on the following charges;

1. For that you the said accused, on the 17th day of October, 2001, at 16 Balbutcher Drive, Ballymun, Dublin in the Dublin Metropolitan District, did without lawful excuse damage property to wit; one sitting room window, to the amount of £200, the property of John Cray, intending to damage such property or being reckless as to whether such property would be damaged contrary to s. 2 of the Criminal Damage Act, 1991,

2. For that you the said accused, on the 17th day of October, 2001, at 16 Balbutcher Drive, Ballymun, Dublin in the District Court area of Dublin Metropolitan District, did discharge a firearm being reckless as to whether any person was injured or not contrary to s. 8 of the Firearms and Offensive weapons Act, 1990,

3. For that you the said accused, on the 17th day of October, 2001, at 16 Balbutcher Drive, Ballymun, Dublin in the said District Court area of Dublin Metropolitan District, did have in your possession a firearm, to wit; a shotgun, in such circumstances as to give rise to a reasonable inference that you had not got it in your possession for a lawful purpose contrary to s. 27(a)(1) of the Firearms Act, 1964, as inserted by s. 8 of the Criminal Law (Jurisdiction) Act, 1976 and amended by s. 14 of the Criminal Justice Act, 1984, and as amended by s. 15 of the Offences Against the State (Amendment) Act, 1998, and

4. For that you the said accused, on the 17th day of October, 2001, at 16 Balbutcher Drive, Ballymun, Dublin in the said District Court area of Dublin Metropolitan District, did have in your possession ammunition to wit; shotgun cartridges, in such circumstances as to give rise to a reasonable inference that you had not got in your possession for a lawful purpose contrary to s. 27(a)(1) of the Firearms Act, 1964, as inserted by s. 8 of the Criminal Law (Jurisdiction) Act, 1976 and amended by s. 14 of the Criminal Justice Act, 1984 and as amended by s. 15 of the Offences Against the State (Amendment) Act, 1998.

2. The applicant was arrested on the 18th October, 2001, the day following the date upon which the offences aforesaid were alleged to have been committed and, on the following day; the 19th October, 2001, he was charged with those offences and first appeared in the District Court in relation thereto on the 20th October, 2001, on which date he was remanded in custody, with consent to bail. In fact, he was admitted to bail on the same day and released from custody. Thereafter, from time to time, he was remanded from court to court awaiting the service of a book of evidence and, ultimately on the 17th day of September, 2002, at the Bridewell District Court, Dublin, having previously been remanded on six separate occasions, the charges aforesaid preferred against him were struck out on account of the failure of the prosecution to serve a book of evidence on him.

3. Following the striking out of the said charges on the 17th day of September, 2002, the applicant heard nothing with regard thereto until the 12th day of June, 2003, on which date the said alleged charges were re-entered in the District Court and a book of evidence served on the applicant. By order of the District Court dated the 19th day of June, 2003, the applicant was sent forward for trial on the said charges to the Circuit Criminal Court in Dublin city and, at a hearing before the Circuit Court on the 17th day of July, 2003, the applicant's trial on the said charges was fixed for the 23rd March, 2004. However, some few days before the trial date, the applicant and the court were advised by the prosecution that the order of the District Court dated the 19th day of June, 2003, whereby the applicant had been returned for trial was defective and, accordingly, that the trial listed for the 23rd March, 2004, could not proceed.

4. On the 7th September, 2004, papers were lodged in the High Court on behalf of the prosecution seeking an order of *certiorari* by way of judicial review to quash the said order of the District Court dated the 19th June, 2003, whereby the applicant had been returned for trial on the said charges and, on the following day, an *ex parte* application in that behalf was made to the High Court on foot of which, by order of the High Court dated the 15th day of November, 2004, the said order of the 19th day of June, 2003 was quashed. The matter was re-entered before the District Court on the 3rd day of February, 2005, for the purpose of obtaining a fresh order returning the applicant for trial on the said charges which order was made on the 23rd day of March, 2005 and, on the 13th day of June, 2005, by order of the Circuit Court, the applicant's trial was fixed for the 6th day of February, 2006, being a date which is almost four years and four months since the applicant is alleged to have committed the said offences.

5. In the foregoing circumstances, the applicant seeks an order of prohibition to restrain the further prosecution of those charges before the Circuit Criminal Court on the grounds that there has been inexcusable, unwarranted and unconscionable delay on the part of the respondent in processing the said charges through the District Court and the Circuit Court. In that regard, the applicant asserts that it is well established that, as part of his right to trial in due course of law as laid down by Article 38.1 of Bunreacht na hÉireann, he was entitled to a trial on the said charges with reasonable expedition; a right of which he maintains that he has been deprived because of inexcusable delay on the part of the prosecution. As Murphy J. stated in the course of a judgment which he delivered in a case of *The State (O'Connell) v. Fawsitt* [1986] I.R. at p. 371:

"It seems to me, therefore, that the authorities have established that the Constitution guarantees to every citizen that the trial of a person charged with a criminal offence will not be delayed excessively or, to express the same proposition in positive terms, that the trial will be heard 'with reasonable expedition'."

6. That statement was approved of as being a correct statement of the law by Chief Justice Finlay in the course of a judgment of the Supreme Court which was delivered in that same case. And, as Mrs. Justice Denham stated in the course of a judgment of the Supreme Court delivered in a case of *The D.P.P. v. Byrne* [1994] 2 I.R. (at p. 260):

"Whereas there is no specific constitutional right to a speedy trial, there is an implied right to reasonable expedition under the due process clause."

and

"I am satisfied that this right falls to be analysed on an *ad hoc* basis."

7. In that regard, the applicant does not suggest that, if his trial proceeds pursuant to the said order of the 23rd March, 2005, he will suffer any specific prejudice or that there is any good reason why he would not receive a fair trial. Nevertheless, he maintains that he had a constitutional right to a speedy trial, that that right has been infringed and thwarted by inordinate and inexcusable delay on the part of the prosecution to prosecute him and, accordingly, that the prosecution should be prohibited from taking any further steps in that behalf. Although, in a statement of opposition delivered on behalf of the respondent, it is submitted that the applicant is not entitled to the relief sought herein on the grounds that he was out of time when making his application for judicial review, in the course of the hearing before me, counsel for the respondent indicated that the respondent was not now relying on that point. On the contrary, counsel for the respondent indicated that the respondent's opposition to the relief sought herein by the applicant was based solely on the proposition that, while it is accepted that there are circumstances under which the court would be entitled to prohibit a prosecution on the grounds of prosecutorial delay simpliciter, it would only do so in very exceptional circumstances; circumstances which it was submitted on behalf of the respondent do not arise in this case.

8. In support of the proposition that the prosecution was guilty of inordinate and inexcusable delay in processing the said charges against the applicant through the District Court and the Circuit Court, the applicant pointed to six discreet periods of delay, namely;

1. A delay of almost eleven months between the 20th October, 2001 and the 17th day of September, 2002, while the applicant vainly awaited a book of evidence which was not forthcoming, as a result of which the said charges against the applicant were struck out for failure to serve a book of evidence on the 17th September, 2002,
2. A delay of almost nine months between the 17th September, 2002 and the 12th June, 2003, before the matter was re-entered in the District Court,
3. A delay of almost eight months between the 19th July, 2003 and the 12th day of March, 2004, being the dates on which the applicant was first returned for trial and the date fixed for that trial, before the prosecution informed the Circuit Court and the applicant that they had identified a defect in the order of the 19th July, 2003, returning the applicant for trial,
4. A delay of five and a half months between the 23rd day of March, 2004 and the 7th September, 2004, before the prosecution made an application to the High Court by way of judicial review seeking an order of *certiorari* to quash the said order of the 19th July, 2003,
5. A delay of two and a half months between the 15th November, 2004 and the 3rd February, 2005, being the dates on which an order of *certiorari* quashing the said return for trial of the 19th July, 2003 was made and the date of re-entry of the charges against the applicant in the District Court, and
6. A delay of seven weeks between the re-entry of the matter before the District Court and the 23rd day of March, 2005 when a fresh order whereby the applicant was returned for trial was made; a trial which was fixed for the 6th February, 2006.

9. In four affidavits respectively sworn on behalf of the respondent by Patrick J.B. Geraghty, a solicitor attached to the criminal trials section of the Chief Prosecution Solicitors Office, on the 10th November, 2005, by Gemma Moran, a senior prosecution solicitor attached to the judicial review division of the Chief Prosecution Solicitors Office, on the 15th December, 2005 and Detective Garda P.J. Walsh of the Garda Síochána, on the 10th November, 2005 and the 1st March, 2006, the reasons for the several delays of which the applicant complains are explained and the several deponents purport to justify them suggesting that they were neither inordinate or inexcusable. In the light of those affidavits, it was submitted on behalf of the respondent that, in reality, the delay of which the applicant complains was not excessive and that, in any event, he has not demonstrated that that delay had any meaningful effect; either on his entitlement to a fair trial or upon any interests which a speedy trial was designed to protect. While conceding that it is not part of his case that the delay of which he complains would deprive him of a fair trial, the applicant rejected the several explanations advanced on behalf of the respondent in justification of that delay. In that regard, I think it unnecessary for the purposes of this judgment that I review in detail all the explanations advanced on behalf of the respondent in justification of the delay because it seems to me that the affidavits to which I have referred speak for themselves. However, whatever justification there may have been for the delay in preparing a book of evidence for service on the applicant (notwithstanding that it seems to me that the preparation of the case against the applicant was a relatively simple matter and not at all as complex as was suggested on behalf of the respondent and, accordingly, I have some reservations about the explanation offered in justification of that delay, I am prepared, for the purposes of this judgment, to accept that there was justification for it) the explanation offered for the delay of almost eight months in identifying the defect in the order of the 19th July, 2003 returning the applicant for trial, coupled with the delay of five and a half months between identifying that defect and applying to the High Court by way of judicial review to have that order quashed and aggravated by a further delay of two and a half months between the quashing of that order of the 19th July, 2003 and the re-entry of the matter before the District Court is, in my view, totally unacceptable. Since the passing of the Offences Against the State Act, 1939, the offences involving firearms with which the applicant was charged were required to be tried by the Special Criminal Court unless the Director of Public Prosecutions directed otherwise. Accordingly, in the absence of an indication on the order of the 19th day of July, 2003 returning the applicant for trial, that the Director of Public Prosecutions had directed that the applicant be not sent forward for trial by the Special Criminal Court, it is clear that that order is defective on its face. How this was not noted for a period of almost eight months between the 19th July, 2003 and the 12th day of March, 2004, despite the fact that the case was mentioned in court on three occasions in the interim, is beyond my comprehension and I can see no reasonable excuse for it. Then to compound matters, although it must have been immediately clear to anyone associated with the case that, in the event that the order returning the applicant for trial of the 19th July, 2003, was defective and in the event that the prosecution of the applicant was to continue, it was essential that that order be quashed and the only way to achieve that was by way of judicial review and yet, another five and a half months passed before an application is made to the court for an order of *certiorari* to quash that order. In my view, no reasonable explanation has been offered to justify that delay and, to be quite frank, I cannot think of any reasonable justification for it. Then, when on the 15th November, 2004, Ms. Justice Macken of the High Court made an order quashing the said order of the 19th July, 2003 and directed that the matter be remitted back to the District Court, it took another two and a half months to do so. Again, it is my view that no reasonable explanation has been offered for that delay.

10. In the foregoing circumstances, I am satisfied that there has been inordinate and inexcusable delay on the part of the prosecution in prosecuting this applicant and that, therefore, his right to a speedy trial has been infringed. In this regard, by order of the High Court dated the 4th day of July, 2005, made herein by Mr. Justice McKechnie, the applicant was given liberty to apply by way of

judicial review for an order of prohibition.

11. While, as I have indicated, it is my judgment that there has been inordinate and inexcusable delay on the part of the prosecution in processing the said charges against the applicant, it does not, in my view, necessarily follow that he is entitled to the relief sought herein. In that regard, in an unreported judgment of the Supreme Court delivered on the 21st day of November, 2005, in a case of *D.C. v. Director of Public Prosecutions*, Mrs. Justice Denham stated:

"The Constitution and the State, through legislation, have given to the Director of Public Prosecutions an independent role in determining whether or not a prosecution should be brought on behalf of the People of Ireland. The Director, having taken such a decision, the courts are slow to intervene. Under the Constitution, it is for a jury of twelve peers of the applicant to determine whether he is guilty or innocent. However, bearing in mind the duty of the court to protect the constitutional rights of all persons, in exceptional circumstances, the court will intervene and prohibit a trial."

12. Accordingly, as counsel for the respondent submitted in this case, the court is only entitled to interfere with the right of the Director of Public Prosecutions to prosecute an individual in exceptional circumstances. The usual grounds for prohibiting a trial where it is established that the rights of the accused have been infringed is that, as a result of that infringement, the accused will suffer specific prejudice in the presentation of his defence or that, for some other reason, he cannot obtain a fair trial. In other words, demonstrable prejudice or a real risk that an accused person cannot obtain a fair trial arising from delay on the part of the prosecution trumps the entitlement of the Director of Public Prosecutions to continue the prosecution and transcends the communal interest to see that suspects are duly prosecuted. As Keane J. (as he then was) stated in the course of a judgment of the Supreme Court delivered in a case of *P.C. v. The Director of Public Prosecutions* [1999] 2 I.R. (at p. 68):

"Manifestly, in cases where a court is asked to prohibit the continuance of a prosecution on the ground of unreasonable delay, the paramount concern of the court will be whether it has been established that there is a real and serious risk of an unfair trial; that, after all, is what is meant by the guarantee of a trial 'in due course of law'."

13. However, Mr. Justice Keane, when he became Chief Justice, also recognised that, insofar as an accused person was concerned, the impairment of his ability to defend himself is not a necessary prerequisite to obtaining an order prohibiting his prosecution on the grounds of prosecutorial delay. In that regard, in the course of a judgment of the Supreme Court delivered in a case of *P.M. v. Malone* [2002] 2 I.R. (at p. 572), he stated:

"It does not follow that the impairment of his ability to defend himself is a necessary precondition to the successful invocation by him of the discrete constitutional right to a speedy trial."

14. That seems to me to reflect the views previously expressed by Chief Justice Finlay in the course of a judgment which he delivered in a case of *D.P.P. v. Byrne* [1994] 2 I.R. (at p. 236) when he stated:

"Having reached that conclusion, I am driven to the further conclusion that, of necessity, instances may occur in which a delay between the date of the alleged commission of an offence and the date of a proposed trial identified as unreasonable could give rise to the necessity for a court to protect the constitutional right of the accused by preventing a trial, even where it could not be established either that the delay involved an oppressive pre-trial detention, or that it created a risk or probability that the accused's capacity to defend himself would be impaired. This must lead of course to a conclusion that, on an application to prohibit a trial on the basis of unreasonable delay, or lapse of time, failure to establish actual or presumptive prejudice may not conclude the issues which have to be determined."

15. In those circumstances, given that this applicant does not complain of specific prejudice arising from the delay in prosecuting him or, indeed, that his right to obtain a fair trial has being impaired by that delay, it seems to me that, in determining whether or not he is entitled to an order prohibiting the continuance of the prosecution against him, I have to balance the entitlement of the community at large to have him prosecuted for the offences of which he is suspected, against his entitlement to have his right to an expeditious trial vindicated. In that regard, it seems to me that, to use a colloquialism, the authorities are not entitled to play "ducks and drakes" with an accused person and that, to my mind, is what has happened in this case. As I have indicated, I think it incredible that it took eight months to recognise the defect in the order returning the applicant for trial of the 19th July, 2003 and, then, another five and a half months before any step was taken to rectify that defect. Moreover, I think that the excuses offered by the respondent are totally unacceptable. Accordingly, I will make an order restraining the respondent from taking any further steps in the criminal proceedings the subject matter of this application.