

**THE HIGH COURT****JUDICIAL REVIEW****[2004 No: 186 JR]****BETWEEN****IVOR SWEETMAN****APPLICANT****AND****THE DIRECTOR OF PUBLIC PROSECUTIONS, THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM IRELAND AND THE ATTORNEY GENERAL****RESPONDENTS****Judgment of Mr. Justice de Valera delivered on the 20th day of December 2005.**

1. This is an application for the prohibition of the retrial of the applicant Ivor Sweetman who is charged as follows.

Count no. 1: The murder of Daniel Fanning, contrary to common law.

Count no. 2: Possession of a firearm, contrary to s. 15 of the Firearms Act 1976.

Count no. 3: False imprisonment, contrary to s. 11 of the Criminal Law Amendment Act 1976.

Count no. 4: False imprisonment, contrary to s. 11 of the Criminal Law Amendment Act 1976.

2. The matters which have given rise to these charges occurred on February 6th, 1966. The applicant was arrested on the 15th March, 1966. At his first trial in May of 1977 the applicant was convicted, this conviction was subsequently quashed by the Court of Criminal Appeal. A retrial was order and, after a number of delays, was scheduled for January, 2005.

3. As the dates of the various steps in this matter are of fundamental importance it is necessary to set out in chronological order the most significant,

6th February 1996	Incident at Rosegreen, Cashel, Co. Tipperary, resulting, inter alia, in the death of Daniel Fanning.
15th March 1996	The applicant was arrested at Tallaght, Co. Dublin, under s. 30 of the Offences Against the State Act 1939.
17th March 1996	The applicant was released.
June 1996	The applicant was arrested and charged with murder and firearms offences. The applicant was remanded in custody.
August 1996	The applicant obtained bail and was released from custody.
24th September 1996	The applicant was returned for trial to the Central Criminal Court.
10th February 1997	The applicant's trial commenced at the Central Criminal Court.
11th February 1997	The trial jury was discharged and the applicant released on continuing bail.
21st April 1997	The applicant's trial commenced again with a new jury.
13th May 1997	The applicant was convicted of murder and possession of firearms by a majority verdict. Leave to appeal was refused.
26th May 1997:	An appeal against the refusal was lodged.
23rd October 2000	The applicants appeal was heard in the Court of Criminal Appeal. The court quashed the convictions and ordered a retrial.
24th April 2002	The applicant's solicitor was notified that the case was to be listed the following day in the list to fix dates in order that a date for a new trial could be assigned.
25th April 2002	The 1st December, 2003, was fixed as the date for the retrial.
27th May 2002	The applicant's solicitor was notified that a s. 29 application would be heard on the 16th July, 2002.
16th July 2002	Section 29 application was heard in the Court of Criminal Appeal which declined to certify the matter for appeal to the Supreme Court.
1st December 2003	The applicant's case was called on but because no jury was available the trial was adjourned to the 4th December, 2003.
4th December 2003	The trial was further adjourned to the 8th December, 2003, which date was unsuitable for the applicant as an expert witness, who had been available from the 4th December would not be available after the 11th December.
18th December 2003	Central Criminal Court fixed January 10th, 2005 as the date for the trial.
12th March 2004	Leave to seek judicial review was sought on behalf of the applicant. This application was adjourned generally to allow the applicant to seek, from the President of the High Court, an earlier date for trial.
24th March 2004	The President of the High Court directed the matter to appear in the Central Criminal Court list to fix dates on the 29th March, 2004.
29th March 2004	The Central Criminal Court fixed a new date for the trial on June 14th, 2004.

22nd April 2004	The applicant's solicitor was notified that two important prosecution witnesses would be unavailable for the June 14th trial date.
Date unknown between 22nd April 2004 and June 14th 2004	A new date for trial was fixed on the 18th October, 2004.
28th July 2004	Application for judicial review.

4. The grounds on which the applicant is seeking to prohibit his retrial in this matter are based on the excessive delay which, the applicant argues, has occurred.

5. Counsel on behalf of the applicant has conceded that from the date of the applicants initial arrest (15th March, 1996) until the date of his conviction at the conclusion of the first trial (13th May, 1997) the "criminal justice system proceeded with reasonable expedition".

6. However counsel for the applicant argues that following this conviction the procedures adopted by the Court of Criminal Appeal, the Central Criminal Court and the Office of the Chief Prosecution Solicitor caused unreasonable delay in attempting to arrange and proceed with a retrial.

7. I calculate the periods of delay based on the chronology set out above, as follows

26th May 1997 (Leave to appeal sought) to the 23rd October 2000 (Conviction quashed in the Court of Criminal Appeal and retrial ordered): 40 months.

23rd October 2000 (the quashing of the conviction and the order of retrial) to the 25th April 2002 (the fixing of a date for the retrial): 18 months.

25th April 2002 (list to fix dates) to 1st December 2003 (retrial): 19 months.

18th December 2003 (date for retrial fixed by Central Criminal Court) to the 18th October, 2004 (date fixed eventually, for retrial): 10 months.

8. This amounts to a total of 87 months.

9. It should be noted that although the delay to which the applicant objects commenced on the 23rd October, 2002, the incident which gave rise to his prosecution occurred on the 6th February, 1996, now almost ten years ago.

10. The right to an expeditious trial is a fundamental principle of law. In *P.C. v. The Director of Public Prosecutions* [1999] 2 I.R. Keane J. stated "The right of an accused person to a reasonably expeditious trial has been recognised as an essential feature of the Anglo-American system of criminal justice for many centuries." This principle must also apply to a retrial such as is the situation in the matter under review. In *J.O'C. v. The Director of Public Prosecutions* [2000] 3 I.R. Hardiman J. stated five principals in relation to the striking out of civil cases for delay. These may be summarised as follows,

1. A lengthy delay between the event giving rise to litigation and the trial risks in justice.
2. Delay may deprive a defendant of his capacity to be effectively heard.
3. Delay may be so great as to being contrary to natural justice and an abuse of the process of the court in requiring a defendant to defeat an allegation of negligence that would have taken place years before the trial.
4. The court may dismiss a claim because a long lapse of time, whether culpable or not, will necessarily create an injustice, or amount to an absolute and obvious injustice.
5. Delay will be particularly undesirable where disputed facts will have to be ascertained from the oral testimony of witnesses recounting what they recall of the past.

11. Hardiman J. went on to state "It can scarcely be doubted that the principles summarised above are applicable to criminal cases as well; it would be strange indeed if the courts were less solicitous of a person in peril of his liberty and reputation by reason of having being charged with a criminal offence."

12. In *the State (O'Connell) v. Fawsitt* [1986] I.R. Finlay CJ stated "I am satisfied that if a persons trial has been excessively delayed so as to prejudice his chance of obtaining a fair trial then the appropriate remedy ... is by an order for prohibition".

13. In considering a question of prejudice I am satisfied in applying the principles of *J.O'C. v. The Director of Public Prosecutions to the findings in the State (O'Connell) v. Fawsitt* that prejudice in matters of excessive delay in a criminal trial can be presumed in the absence, as in the matter under consideration, of any specific prejudice.

14. As I have set out above the period of time which elapsed between the applicant's arrest, and the judicial review proceedings can be divided into four periods:

The first period: 15th March, 1996, to the 13th May, 1997, the initial arrest to the date of conviction in the Central Criminal Court.

The second period: The 26th May, 1997, to the 23rd October, 2000, the period from the appeal to the quashing of the conviction in the Court of Criminal Appeal.

The third period: The 25th April, 2002, to the 1st December, 2003, the period from the list to fix dates to the proposed trial date.

The fourth period: The 18th December, 2003, to the 18th October, 2004, (the 25th July, 2004), the period from the postponed retrial date to the eventually selected trial date interrupted by the application for judicial review the subject matter of this judgment. No satisfactory explanation has been advanced on behalf of the respondents as to why in these

excessive delays took place and the fact that some of the delay, particularly in December, 2003, can be attributed to the applicant (who was exercising his legitimate right to ensure that witnesses who he considered to be essential to his defence were available for the trial) is of little or no significance. Examining the four periods of delay there is no explanation for the forty month period between seeking leave to appeal and the hearing in the court of Criminal Appeal, in the second period of delay between the quashing of the conviction and the fixing of a date for retrial, a period of eighteen months, there is again no explanation and no reason for the delay has been given. In the third period, from the list to fix dates to the date of trial, a period of nineteen months no explanation is available to explain this delay.

15. I have already pointed out that in the period post December, 2003, some, at least, of the delay was occasioned by the applicant himself but in circumstances where the applicant was in a position to proceed with the trial when originally scheduled in December, 2003, and taking into consideration that the applicant was entitled to insist on the appropriate witnesses being available to give evidence on his behalf this reasonably short period of delay (in the region of approximately three months) does not significantly effect the overall delay period.

16. On the 31st December, 2003, the European Convention on Human Rights was incorporated into Irish law by the enactment of the European Convention on Human Rights Act 2003. Article 6(1) of the Convention states "In the determination of his civil rights and obligations or of any criminal charge against him everyone is entitled to a fair trial within a reasonable time ..." the definition of "a reasonable time" must, to some extent at least, depend on the circumstances of each individual case. In the present proceedings, as already noted, no explanations for delay have been advanced. In the matter of *McMullan v. Ireland* application no. 4229 the European Court of Human Rights held that delays considerably less than the delays in this matter constituted a failure to proceed within a reasonable time and found that there had, therefore, been a breach of article 6(1) of the Convention. Although this was a case concerning a civil wrong the principle, just as in *J.O'C. v. The Director of Public Prosecutions*, must also apply to criminal trials.

17. In the *McMullan* case the Irish government offered no explanation for the periods of delay.

18. I am therefore satisfied that in the circumstances of this matter the delay has been excessive (and unexplained) and the applicant has been deprived of his right to an expeditious trial and I will grant the order of prohibition as sought by the applicant.

19. Despite the absence of any explanation for the delays already enumerated it is clear that some part at least of this delay was caused by the overwhelming pressure on the, then, inadequate facilities of the legal system. The government had an obligation to "organise [its] legal system so as to enable the courts to comply within a reasonable time..." – *Milasi v. Italy* [1988] 10 E.H.R.R.

20. Since the events of May, 1997, to December, 2003 – July, 2004, significant improvements have been made in court waiting times through better management and facilities and the systemic delays of that period are now, thankfully, a thing of the past.