

THE HIGH COURT

2008 1138 JR

BETWEEN

J. HARRIS ASSEMBLERS

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

THE ATTORNEY GENERAL

NOTICE PARTY

Judgment of Mr. Justice Hedigan, delivered on the 14th day of July, 2009

1. The applicant in these proceedings is an unlimited company, registered within the State.
2. The respondent is the authority responsible for the prosecution of criminal offences in Ireland. His statutory authority to carry out this function is derived from the Prosecution of Offences Act 1974.
3. The notice party is the legal adviser to the Government and is therefore the chief law officer of the State. By virtue of O. 60, r. 1 of the Rules of the Superior Courts, he is a necessary participant in any action in which the constitutionality of any legislative provision comes under challenge. In the present case, however, the applicant has abandoned its challenge to the constitutionality of s. 50 of the Safety, Health and Welfare at Work Act 1989 ('the 1989 Act') and, as such, the notice party has ceased to take an active role in these proceedings.
4. The applicant seeks the following relief by way of judicial review:-
 - (a) An order of prohibition restraining the prosecution of the applicant which is currently pending before the Circuit Criminal Court;
 - (b) In the alternative, an injunction restraining the respondent from taking any further steps in the said prosecution of the applicant; and
 - (c) A declaration that the conduct of the prosecution by the respondent to date has been such as to deny the applicant its right to a fair trial as guaranteed by Bunreacht na hÉireann and the European Convention on Human Rights.

I. Factual and Procedural Background

5. On the 17th of January, 2000, the applicant sold a Hino Grab/Crane Lorry ('the lorry') to South Midland Construction Company Limited ('the SMC Group'). On the 23rd of November, 2002, while in the ownership of the SMC Group, the lorry was involved in a fatal accident. As a result of this, the lorry was inspected by Mr. Martin O'Dea, a representative from the Health and Safety Authority ('the HAS') on the same date. A public service vehicle inspection was also carried out on the lorry by An Garda Síochána on the 26th of November, 2002, whereafter it was returned to the SMC Group.
6. On the 12th of March, 2003, the HSA contacted the applicant as part of its investigation into the circumstances surrounding the incident of the 23rd of November, 2002. The purpose of this contact was to confirm that the applicant had in fact been the supplier of the lorry to the SMC Group.
7. On the 31st of August, 2003, the lorry was sold back to the applicant by the SMC Group as one of a batch of three vehicles. The applicant was unaware at the time that among those vehicles was the lorry which had been involved in the above fatal accident. On the 4th of September, 2003, the applicant sold this lorry to Mr. Seán Collins of SBC Utilities Limited.
8. Throughout this period, a criminal investigation was being carried out into the fatal injuries accident. In November, 2003 the respondent directed the HSA to initiate a prosecution against the SMC Group.
9. On the 21st of April, 2004, the lorry underwent further inspection by Mr. Martin O'Dea of the HSA, together with representatives from Pilz International Industrial Automation. On the 10th of June, 2004, Mr. O'Dea again inspected the lorry, this time in the presence of Mr. Seán Collins of SBC Utilities Limited. On the following day, the 11th of June, 2004, Mr. O'Dea met with Mr. Brendan Daniels and Mr. Pádraig Walsh, representative employees of the applicant. Both men furnished statements to Mr. O'Dea, prior to which no caution was administered.
10. On the 15th of June, 2004, Mr. O'Dea carried out yet another inspection of the lorry, again in the presence of Mr. Collins. Mr. O'Dea observed that the top proximity sensors of the crane feature on the lorry were absent from their proper location. On the 9th of September, 2004, a further meeting was held between Mr. O'Dea, Mr. Daniels and Mr. Walsh. Again no caution was administered.

11. In early October 2004, Mr. O'Dea's investigation file in respect of the applicant was passed to the HSA's prosecution committee for review. It was then forwarded to the HSA's legal department on the 21st of October, 2004.

12. On the 11th of May, 2005, the SMC Group pleaded guilty to charges of breaching ss. 6(1) and 6(2) of the 1989 Act. A fine of €100,000 was imposed by the Dublin Circuit Criminal Court.

13. On the 8th of December, 2005, the review of Mr. O'Dea's investigation file by the HSA's legal department was completed and it was transmitted to the office of the Chief Prosecution Solicitor. The Chief Prosecution Solicitor's office responded on the 1st of February, 2006, with a request for further information on behalf of the respondent. Further to this request, a series of additional statements were taken during March and April 2006.

14. On the 27th of May, 2006, the HSA replied to the office of the Chief Prosecution Solicitor with the information that had been requested. A further request for information on behalf of the respondent was made on the 30th of June, 2006, which was complied with by reply dated the 6th of November, 2006.

15. On the 4th of January, 2007, the respondent issued directions to proceed with the prosecution of the applicant. The respondent also directed that additional evidence should be gathered and this was duly compiled and forwarded to the respondent on the 2nd of April, 2007.

16. On the 24th of April, 2007, summonses relating to the sale of the lorry were issued by the District Court. These were served on the applicant on the 22nd of June, 2007 and contained the following charges:-

(a) That the applicant, being a supplier within the meaning of the 1989 Act, and a person to whom section 10(1) thereof applies, did, on or around the 4th of September, 2003, fail to take such steps as were necessary to secure that persons supplied by the applicant with the lorry were provided with adequate information about the use for which it had been designed or had been tested and about any conditions relating to the lorry so as to ensure that when in use, dismantled or disposed of it would be safe and without risk to health, contrary to section 10(1)(b) and section 48(1)(a) of the 1989 Act; and

(b) That the applicant, being a supplier within the meaning of the 1989 Act, and a person to whom section 10(1) thereof applies, did, on or around the 4th of September, 2003, supply the lorry and did fail to ensure that it was designed, constructed, tested and examined so as to be safe and without risk to health when used by a person in a place of work, contrary to section 10(1)(b) and section 48(1)(a) of the 1989 Act.

17. A book of evidence was served on the applicant on the 18th of December, 2007, and on the 19th of December, 2007, the matter was sent forward to the Dublin Circuit Criminal Court for trial on indictment. Thereafter, the applicant sought disclosure of certain documents from the respondent and, following a lengthy period of correspondence, this request was ultimately acceded to on the 28th of July, 2008.

18. By order dated the 13th of October, 2008, Peart J. granted the applicant leave to apply by way of judicial review, on foot of which the applicant now comes before this Court.

II. The Submissions of the Parties

19. The applicant argues that the respondent has acted in breach of its right to natural and constitutional justice in failing to initiate the prosecution which forms the subject matter of these proceedings within a reasonable time. This, in the applicant's submission, was inexcusable and unwarranted in the circumstances and has resulted in prejudice to the applicant in the preparation of its defence to the charges.

20. The applicant further contends that the respondent has acted in breach of fair procedures in failing to inform the applicant, within a reasonable time or at all, that it was under investigation in relation to the offences with which it is now charged. In particular, the applicant submits that its employees ought to have been cautioned before giving statements which now form a central part of the prosecution case against it.

21. The respondent submits that the delay in bringing the prosecution against the applicant in the present case is insufficient, of itself, to warrant an order of prohibition. On this basis, the respondent contends that the applicant is required to demonstrate that some form of prejudice has arisen as against it, by virtue of the lapse of time. In this regard, the respondent suggests that it is clear from the evidence before the Court that the memories of the applicant's employees have not dimmed in relation to the material facts of the prosecution, nor has any particular piece of exculpatory evidence become unavailable. In these circumstances, the respondent maintains that the applicant should stand trial in the ordinary manner in respect of the serious offences with which it is charged.

22. In relation to the applicant's allegation of violations of fair procedures during the investigative phase of the prosecution, the respondent submits that these issues are classically a matter for the trial judge. In all, the respondent submits that there is no defect in the conduct of the prosecution in the present case which cannot be remedied by the trial judge when the matter ultimately comes before him.

III. The Decision of the Court

(a) Delay

23. The issue of blameworthy prosecutorial delay is one which has been subjected to considerable judicial scrutiny in recent years. In the decision of *Devoy v. DPP* [2008] IESC 13, Kearns J. engaged in a lengthy and informative analysis of the applicable principles. He stated as follows:-

"The principles governing prosecutorial delay in Irish Law have been laid down in a number of Irish cases including *P.M. v. Malone* [2002] 2 I.R. 560 and *P.M. v. DPP* [2006] 3 I.R. 172 and may be summarised as follows:-

(a) Inordinate, blameworthy or unexplained prosecutorial delay may breach an applicant's constitutional entitlement to a trial with reasonable expedition.

(b) Prosecutorial delay of this nature may be of such a degree that a court will presume prejudice and uphold the right to an expeditious trial by directing prohibition.

(c) Where there is a period of significant blameworthy prosecutorial delay less than that envisaged at (b), and no actual prejudice is demonstrated, the court will engage in a balancing exercise between the community's entitlement to see crimes prosecuted and the applicant's right to an expeditious trial, but will not direct prohibition unless one or more of the elements referred to in *P.M. v. Malone* [2002] 2 I.R. 560 and *P.M. v. DPP* [2006] 3 I.R. 172 are demonstrated.

(d) Actual prejudice caused by delay which is such as to preclude a fair trial will always entitle an applicant to prohibition.

Much of the Irish Law on this topic has been derived from the seminal decision on prosecutorial delay delivered by the U.S. Supreme Court in *Barker v. Wingo* 407 US 514 (1972). The principles laid down by the U.S. Supreme Court were referenced to the constitutional guarantee of a "speedy" trial contained in the Sixth Amendment of the U.S. Constitution.

That case emphasised that in considering the right to a speedy trial there could be no inflexible rule and that every case must be met on an ad hoc basis in which the conduct of the prosecution and that of the defendant are weighed. In that context, the U.S. Supreme Court identified four factors which should be assessed in determining whether a particular defendant has been deprived of his constitutional right to a speedy trial:-

(a) The Length of the Delay

Unless there is a delay which is presumptively prejudicial, there is no necessity for an enquiry into the other factors that go into the balance. The length of delay which will demand an enquiry is necessarily dependent upon the particular circumstances of the case. Thus the delay which can be tolerated for an ordinary street crime is considerably less than for a complex conspiracy case.

(b) Reasons for Delay

Different weights should be assigned to different reasons. A deliberate prosecution attempt to delay the trial in order to hamper the defence should weigh heavily against the prosecution; more neutral reasons such as negligence or over-crowded court rooms might weigh less heavily but must nonetheless be considered, given that the ultimate responsibility for such circumstances rests with the State rather than the defendant. A valid reason, such as a missing witness, might serve to justify delay.

(c) Role of the Applicant

An applicant's assertion of his right to a speedy trial is entitled to strong evidentiary weight in determining whether he is being deprived of his constitutional right; a failure to assert the right may make it more difficult for an applicant to prove that he wanted or was denied a speedy trial. In this context the U.S. Supreme Court noted that delay may sometimes operate to the advantage of a defendant.

(d) Prejudice

Among the interests of defendants which the speedy trial right is designed to protect are: (i) the prevention of oppressive pre-trial incarceration; (ii) the reduction of anxiety and concern of the accused and (iii) most importantly, the limitation of any possibility that the defence will be impaired.

I do not regard this statement of principles as being different in any significant way from those contained in the Irish decisions on prosecutorial delay. In my view these principles apply with equal force where systemic delay is under consideration. Both forms of delay affect an accused person in the same way. Furthermore, the template or framework outlined in *Barker v. Wingo* setting out how these principles should be applied strikes me as both logical and practical for courts or judges when assessing individual cases. I have separately indicated these views in *McFarlane v. Director of Public Prosecutions* (Unreported, Supreme Court, 5th March, 2008)."

24. In the same case, Kearns J. went on to emphasise the exceptional nature of the remedy of prohibition in the context of the criminal justice process. He stated:-

"In the context of prohibition this is not to say that an Irish court must readily or too easily resort to prohibition, whatever about other remedies, when vindicating rights under Article 38.1. Under our jurisprudence, as noted by Denham J. in *D.C. v. DPP* [2006] 1 ILRM. 348, prohibition is a remedy to be granted only in exceptional circumstances. The court does not adopt a punitive or disciplinary role in this context. Further, any court called upon to prohibit a trial must give due weight to the gravity and seriousness of the offence when exercising this jurisdiction. It must analyse the causes for delay with great care, weighing up and balancing the role of both the prosecution and the applicant and their respective contributions to delay. In this context not every delay is significant and not every delay warrants the description of being blameworthy to such a degree as to trigger an enquiry by the court under *P.M. v. DPP* or *Barker v. Wingo*. In my view an applicant should ordinarily adduce and place before the court some evidence of what is the norm in terms of time taken for the particular proceedings or the identified process or processes within it which are the subject matter of complaint. This is information which is readily available from the Courts Service with regard to various forms of proceedings."

25. In addition to the specific principles relating to prosecutorial delay and the remedy of prohibition, the court is obliged in the present case to have regard to the general presumption that, were the case to be permitted to proceed, the trial judge would act fairly in respect of the applicant. In *People (DPP) v. Z* [1994] 2 I.R. 476, Finlay C.J. expressed the following view at page 507:-

"With regard to the general principles of law I would only add to the principles which I have already outlined the

obvious fact to be implied from the decision of this Court in *D. v. The Director of Public Prosecutions*, that where one speaks of an onus to establish a real risk of an unfair trial it necessarily and inevitably means an unfair trial which cannot be avoided by appropriate rulings and directions on the part of the trial judge. The risk is a real one but the unfairness of trial must be an unavoidable unfairness of trial."

26. In construing the facts of the present case in light of these legal principles, it seems to me, firstly, that the prosecutorial delay in question is not so severe as to merit, by itself, an order of prohibition. The delay between the 4th of September, 2003, when the alleged offences are said to have occurred, and the 24th of April, 2007, when the summonses were ultimately served, is undoubtedly a lapse of time deserving of the court's attention but does not seem to be so egregiously lengthy as to entitle the applicant to the relief sought without any further consideration of the circumstances.

27. The court is therefore obliged to consider whether any specific prejudice has arisen as against the applicant which has affected, or will affect in the future, his ability to mount a defence to the criminal charges in question. In this regard, it is clear that there are no problems relating to the unavailability of witnesses or of documentary evidence. The applicant's submissions in relation to the issue of prejudice are, in essence, confined to general claims that the memories of its employees may have dimmed or become confused by subsequent events. This, in my view, is not a proposition that is supported on the evidence before the court. Indeed, two of the applicant's employees were capable of providing quite detailed recollections, on affidavit, of the events surrounding the sale of the lorry, for the purposes of the present proceedings. I am unable, therefore, to accept that any tangible or appreciable prejudice has arisen in the present case.

28. Given that the delay at hand is insufficient to justify an order of prohibition by itself, and since no demonstrable prejudice has been proven, it falls for the court to implement the balancing test envisaged by the Supreme Court in *Devoey*. In doing so, the court must weigh the community's entitlement to see that criminal offences do not go unpunished against the applicant's right to an expeditious trial in due course of law. This exercise must, of course, be performed in view of the circumstances of the case as a whole.

29. It seems to me that the delay in the present case is a significant one and one which has not been contributed to by any fault on the part of the applicant. However, a considerable portion of the period which elapsed prior to the service of the summonses has been adequately explained in the affidavit of Mr. O'Dea. I accept his evidence to the effect that diligent investigations were taking place between April and October 2004, and that almost the entire calendar year of 2006 was spent obtaining further evidence and directions in respect of the then putative prosecution of the applicant. The period of some 14 months from October, 2004 until December, 2005, however, has been explained only by virtue of a backlog of work within the HSA's legal department. This, to my mind, is not a satisfactory justification and amounts to a *prima facie* violation of the applicant's right to an expeditious trial. The organs of state have a clear and unmistakable duty, both under Article 38.1 of Bunreacht na hÉireann and Article 6 of the European Convention on Human Rights, to conduct the administrative aspects of a criminal investigation efficiently and without undue delay.

30. It must be considered, therefore, whether the *prima facie* breach of the applicant's rights is sufficient to overpower the community interest in the present case. The offence with which the applicant is charged is undoubtedly a serious one. The jurisprudence of the Irish Courts is replete with instances in which the supply of unsafe machinery and work equipment has directly resulted in the death or serious injury of employees in the conduct of their regular daily tasks. In the present case, the lorry has already been involved in one fatal accident while in the possession of the SMC Group. It thus seems to me that the prosecution of corporations and individuals who culpably engage in the supply of such hazardous devices is a matter of the utmost public importance. On this basis, I cannot accept that the period of blameworthy delay which did occur in the present case is of sufficient gravity to warrant the prohibition of the applicant's trial.

(b) Fair Procedures in the Conduct of the Investigation

31. The general principles surrounding the privilege against self-incrimination and the right to silence are well-established and do not require further rehearsal here. Circumstances may arise, in the context of a criminal investigation, in which it would amount to a violation of the personal rights of an individual to fail to caution him as to the significance of any inculpatory statement which he might make. This is what the applicant alleges occurred in the present case, in the course of the interviews which were held between Mr. O'Dea and its employees. The significance of any errors made in this respect, however, is primarily relevant to the admissibility at trial of the evidence obtained by virtue of the breach. That issue is something which is classically a matter for the trial judge alone. In *Ryan v. DPP* [1988] 1 I.R. 232, the High Court considered the position of an inculpatory statement of the accused, which the prosecution was seeking to tender in evidence at his retrial, in circumstances where it had been ruled inadmissible during the accused's first trial. Barron J. noted the role of the High Court in a judicial review application and stated the following at page 234:-

"There is no jurisdiction in this Court whether by way of judicial review or otherwise to make rulings in advance upon matters which may or may not arise in a trial before another tribunal. Such rulings form no part of the supervisory jurisdiction of this Court. If the prosecution seek to introduce the particular statements in evidence, it is solely a matter for the trial judge, having regard to the course of the trial before him and the submissions made by either party, to rule upon the admissibility of such statements."

32. Once again, in considering the applicant's submissions on this point, the court must have regard to the presumption that the trial judge will act fairly and exclude all inadmissible evidence, which I have referred to previously. In addition to this, there are numerous other safeguards in the criminal process which will ensure that no injustice is done by virtue of the failure of Mr. O'Dea to caution the applicant's employees. These include:

- (a) the facility of an application for a direction to the trial judge;
- (b) the higher standard of proof in criminal cases;
- (c) the scope for explanation and warnings in the judge's charge as well as the possibility of requisitions based thereon;
- (d) the availability of an appeal to the Court of Criminal Appeal;

(e) the possibility of a consultative case stated during the course of the trial; and

(f) the scope for the judicial review of any serious errors of law, or unreasonable decisions, made during the course of the trial.

It seems to me therefore, that the issue of the admissibility of the statements provided by the applicant's employees ought to be left over until the trial of the action when it may be more appropriately dealt with by the trial judge.

IV. Conclusion

33. It is clear that there may be cases in which the delay in prosecuting an applicant will be such that prejudice will be presumed and the court will direct prohibition without further enquiry. Alternatively, the delay may not rise to such an egregious level but a court may nonetheless decide, in light of the existence of some form of prejudice, to bring a halt to the criminal proceedings. The present case does not fall within either of these categories. Furthermore, that infringement which has occurred of the applicant's right to an expeditious trial is heavily outweighed by the public interest in seeing that offences such as that at issue are fully prosecuted. The importance of safety in the workplace is a consideration of the utmost importance in contemporary society.

34. Any issues as to the admissibility of the evidence which the respondent intends to rely upon during the course of the prosecution may be properly dealt with by the trial judge, in the exercise of his duties and his discretion. The safeguards that exist within the regular criminal process render it a more favourable forum from the applicant's perspective, and an altogether more appropriate environment, within which to adjudicate on such evidentiary questions.

34. In light of the foregoing, I cannot accept that the delay in the present case has been such as to warrant the making of an order of prohibition by this Court. I will therefore refuse the relief sought.