Neutral Citation Number: [2006] IEHC 122

THE HIGH COURT

[2005 No. 835 JR]

BETWEEN

STEPHEN CORMACK

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Judgment delivered by Mr. Justice Feeney on Thursday, 27th July, 2006

1. The applicant in this case seeks an order of prohibition prohibiting the Director of Public Prosecutions from taking any further steps in prosecution of the applicant in respect of three charges set out in Blanchardstown charge sheets. Those charge sheets are exhibited herein and consist of one charge sheet dated 28th July 2002 relating to an allegation of (a) intoxication in a public contrary to Section 4 of the Criminal Justice Act and Public Order Act, 1994 and (b) having without lawful authority or reasonable excuse an article, to wit a lump hammer, for the purpose of causing injury to or incapacitating a person contrary to Section 9.4 of the Firearms and Offensive Weapons Act, 1990.

2. The other charge sheet is dated 9th February 2003 and relates to an allegation that the applicant stole property, to wit a large pink Valentines teddy bear, to the value of €65.30 contrary to Section 4 of the Criminal Justice Theft and Fraud Offence Act of 2001.

3. The central facts giving rise to this application are as follows: On 10th February 2003 a trial of the two offences alleged on the charge sheet dated 28th July 2002 was due to be heard in the District Court. The applicant failed to appear and a bench warrant was issued for the applicant's arrest, a lawyer representing the applicant was present on that occasion.

4. A week later on the 17th February 2003 the applicant failed to appear in court in respect of a remand date for the offence alleged on the charge sheet dated 9th February 2003 and a bench warrant for his arrest was issued.

5. The explanation offered for both failures to attend is that the applicant was under the influence of alcohol and did not remember the dates he was due in court.

6. It is the delay in the execution of these two bench warrants which ground the application for relief herein. After the issue of the two bench warrants in February 2003, no steps appear to have been taken to enforce either of them or to apprehend the applicant until April 2004, other than one visit to the applicant's stated address in approximately early March 2003 when the house was unoccupied and no message was left.

7. From March 2003 to April 2004 no attempt whatsoever was made and then it occurred as a result of an instruction from a Superior officer.

8. In April 2004 Garda Karl Smith called to the applicant's stated address, which was his mother's house, and spoke to her. She indicated he was not living there and did not have

an address but undertook to make contact with him and to inform him of the fact that Garda Smith was "looking for him".

9. A week later another call was made to the house and the mother again indicated that she would have the applicant call to the station. She was as good as her word and within days the applicant attended the Garda station. Garda Smith was busy with more urgent work when the applicant called and was unable to execute his warrant.

10. It is common case that the applicant agreed to return and he swears that he did so on the following day. Garda Smith is unaware of this second call.

11. There is no doubt that within a few weeks of a real attempt being made to contact the applicant in April 2004 that he had voluntarily attended at the Garda station and apparently even returned when requested to do so. No further attempt to execute either warrant was made for another 12 months.

12. In April 2005 Garda Caplice called to his address and nobody was present.

13. What brought matters to a head was not any attempt to enforce the warrant but the fact that the applicant chose to go to the Garda station following receipt of a letter concerning the estreatment of his bail. He went to deal with that matter offering to pay half the money due and the rest later.

14. At that stage, on 26th April 2005 the warrants were executed and the applicant was arrested and brought before the court the following day.

15. Due to certain logistical matters, on the prosecution side, an absent witness and a sick Garda, the cases were adjourned to a hearing date of 27th June 2005 and during the period of adjournment this application was commenced.

16. From the foregoing, a number of matters would appear clear. If the applicant had not absented himself in February 2005 on the two occasions when his cases were listed, those cases in all probability would have been disposed of within a short number of months.

17. Secondly, during the following year, February 2003 to February 2004, the applicant did nothing to remedy his non-attendance. The fact that he was legally represented on one occasion of his non-attendance should have ensured that no matter how forgetful due to alcohol consumption that he would have been aware of a missed court date.

18. Thirdly, the guards were entirely inactive in endeavouring to enforce the warrants for over a one year period.

19. Fourthly, that when any real effort was made the applicant was amenable to attend the Garda station within a matter of weeks and demonstrated that any true effort to enforce the warrants would have been likely to have succeeded.

20. Fifthly, the Gardaí allowed a further year in April 2004 to April 2005 to pass without any attempt to execute the warrants. The period of delay in executing the warrants under scrutiny in this case is some two years and for the bulk of that period and certainly for the final year the delay was either entirely caused or greatly contributed to by the inaction of the Gardaí.

21. Finally, a sixth matter to take into account is that the extent of the prejudice relied upon by the applicant is limited to a general averment contained in paragraph 16 of his grounding affidavit to the effect, and I quote:

> *"That the delay has been such as to prejudice me in my defence as I have a very dim memory of the dates in question."*

22. There is no attempt to provide any specific instance of prejudice, nor is it explained as to whether the applicant's memory was ever other than a dim one of “the dates in question”.

23. It is argued on behalf of the applicant that the Gardaí are obliged to execute warrants with expedition and to take reasonable steps to enforce warrants. It is claimed that the facts of this case demonstrate a clear failure on the part of the guards to so act and that they should so act as it is essential to speedily execute warrants, not just to ensure that citizens are brought to court to answer for the offences alleged, but also to ensure a speedy and fair trial. It is the alleged breach of a right to an expeditious hearing which is claimed to ground the orders sought herein.

24. In the *Bakoza -v- Judges of the Dublin Metropolitan Court and the DPP* 2004 1 EHC, 126. (14th July 2004)Peart J quoted certain authorities concerning warrants starting with a reference to the statement of Carney J. in *Dunne -v- the Director of Public Prosecutions,* unreported High Court decision of 6th June 1996. Wherein Carney J stated in relation to a warrant the following:

> *"A warrant of apprehension is a command issued to the Gardaí by a court established under the Constitution to bring a named person before that Court to be dealt with according to law. It is not a document which merely vests a discretion in the Gardaí to apprehend the person named in it, it is a command to arrest that person immediately and bring him or her before the Court which issued it. That is a command rather than merely an authority or permission to arrest can clearly be seen from the terms of the warrant in the instant case.*
>
> *In that case, the learned judge noted that the terms of the warrant specified that the person was to be arrested and bring him without any delay before me or another justice or peace commissioner to be dealt with according to the law."*

25. The learned Trial Judge Carney J went on to state:

> *"I have on more than one occasion formed the view that the Guards do not have a full appreciation of the mandatory duty they were under to execute warrants and a full appreciation that warrants are commands to arrest and not merely authorities*

to arrest. It seems to me from time to time that the Gardaí have sat on a warrant and waited for the wanted person to gratuitously fall into their laps, by example, being arrested in relation to a further crime rather than taking any steps to find him."

26. There was also reference in Peart J's judgment to the case of T*he State Flynn -v- The Governor of Mountjoy Prison*, an unreported High Court decision of 6th May 1987 wherein Barron J stated:

> *"I have no doubt that if there had been any real effort made to find the defendant he would have been found and the warrant executed."*

27. The facts of this case demonstrate a set of circumstances where there was little real effort to execute the warrants and it can be truly said that to a large extent the Gardaí waited for the applicant to fall into their lap and that if any real effort had been made that the applicant would have been available to the Gardaí.

28. This Court is led to the same conclusion as to delay as Peart J was in the *Bakoza* case, that is that the delay is an inordinate delay.

29. That, however, is not an end to the matter. It is to be noted that two of the three offences contained in the charge sheets are triable either summarily or on indictment. These are cases where there is no provision for statutory limitation, even if being tried in the District Court. See *DPP O'Brien -v- Timmons*, 2004 4 IR, 545.

30. It is clear from the judgment of Peart J in *Bakoza* that even where there is an inordinate delay that the Court in considering such delay and the issue of prohibition must make a judgment or an assessment to balance the competing factors of delay impeding the possibility of a fair trial and the public interest in the prosecution of persons charged with criminal offences and if guilty their conviction.

31. It is a correct statement of the law that where there is culpable delay, as is the case here, on the part of the State, then having regard to all the circumstances of the case the delay itself may entitle the accused to an order of prohibition. This can arise whether there is actual or presumed prejudice. See O Caoimh J. *Finn -v- the DPP* 2003 1 ILRM at 217 and in particular the reference at page 225 relying on the statement of Geoghegan J in the Supreme Court in *BF -v- DPP* (2001) I IR, 656. Where Geoghegan J stated:

> *“For it is clear that very lengthy delay can of itself be sufficient to cause the Court to presume prejudice."*

32. The type of approach to cases involving substantive delay, which is analogous to the facts of this case, to be followed by the Courts was identified by Denham J in *DPP -v- Byrne* 1994 2 IR, 236 where she stated at page 259:

> *"The Court has to balance the freedom rights of the accused and the requirements of an ordered society. Whereas there is no specific Constitutional right to a speedy trial*

there is an implied right to reasonable expedition under the due process clause. An accused is entitled to have a trial free of abuse of process and I am satisfied that this right falls to be analysed on an ad hoc basis."

33. She went on in her judgment to identify four factors which could be of assistance to the Court in carrying out that ad hoc exercise by reference to an American authority, those four factors were: Length of delay, reasons for delay, the defendant's assertion of his right and prejudice to the defendant.

34. In the *Bakoza* case Peart J on similar facts and relating to a similar time period of delay and based on a bald assertion of prejudice which failed to establish actual prejudice went on to conclude: (at p. 10)

> *"Since I am not satisfied that the applicant has made out a case which establishes in spite of the delay actual prejudice to him in his ability to conduct his defence because he has failed to elaborate in any manner whatsoever how he is prejudiced beyond a bold assertion of prejudice, I am left with the question of whether in this case the delay which has occurred is of a sufficient length to give rise to a presumption of prejudice to the extent that a fair trial cannot be guaranteed.*
>
> *I believe that there are a number of matters which the Court must have regard in this case when making that judgment.*
>
> *Firstly, the applicant is a non-national. Secondly, the nature of the charge involving involving being intoxicated at the time of the alleged offence means that whatever about the applicant having any chance of remembering what happened closer to the time of the event it can be presumed that as time goes by any memory of those events will fade. Thirdly, whoever is responsible for the delay and I have found that both sides bear some responsibility, the fact is that the alleged offence occurred by now over three years ago. category which could be termed serious, although all crimes are serious in a strict sense and this is a factor to be considered when weighing up the competing interests, namely society's right to proceed against accused persons and the person's right which is guaranteed under the Constitution to a fair trial of the alleged offence within a reasonable time.*
>
> *While credibility and bona fides of this applicant is in doubt, in my view, nevertheless I believe that the balance is in favour of granting the order sought in view of the casual time which is elapsed and for the reasons which I have given. I order accordingly."*

35. However, since Peart J came to that decision and determined the appropriate balance the Supreme Court has reconsidered delay in the case of *PM -v- DPP* Supreme Court decision of 5th April 2006. In that decision, Kearns J noted that:

> "In the case of *PM -v- Malon*e (2002) 2 IR 560 at 581 Keane CJ had stated:

> *"Where as here, the violation of the right has not jeopardised the right to a fair trial but has caused unnecessary stress and anxiety to the applicant the court must engage in a balancing process. On one side of the scales there is the right of the accused to be protected from stress and anxiety caused by an unnecessary and inordinate delay and the other side there is a public interest in the prosecution and conviction of those guilty of criminal offences.*
>
> *In all such cases the Court will necessarily be concerned with the nature of the offence and the extent of the delay."*

36. Kearns J went on in the *PM* decision to conclude:

> *"I believe that the balancing exercise referred to by Keane CJ in PM -v- Malone is the appropriate mechanism to be adopted by a Court in determining whether blameworthy prosecutory delay should result in an order of prohibition. It means that an applicant for such relief must put something more into the balance where prosecutory delay arises to outweigh the public interest in having serious charges pursued to trial.*
>
> *In most cases pre-trial incarceration will not be an element as the applicant will probably have obtained bail pending his trial.*
>
> *Secondly, while they may assert increased levels of stress and anxiety arising from prosecutory delay any balancing exercise will have to take into account the length of such blameworthy delay because if it is a short delay rather than one of years the mere fact that some blameworthy delay took place should not of itself justify the prohibition of trial.*
>
> *As part of the balancing exercise it should also be borne in mind that an order of prohibition may not be the only remedy available in such circumstances."*

37. The approach of the Supreme Court results in this Court being placed in a somewhat different position than existed at the time of the *Bakoza* case and in particular as to the emphasis on the issue of presumption of prejudice. This Court must look to see if the applicant has put material before this Court which is more than mere delay to outweigh the public interest in having charges prosecuted. It can be said that certainly in relation to at least one of the charges against the applicant that the charge could be identified as being of a serious nature, albeit capable of being tried summarily.

38. On the facts of this case the applicant has failed to do so. His assertion of prejudice is bald, the time period of culpable delay is not such that prejudice is manifest and this Court is left in the position that there is no material available to it to justify the prohibition of the trials over and above the mere fact of some blameworthy delay.

39. Therefore, on the approach outlined by Kearns J in the Supreme Court this Court must determine that in carrying out the balancing exercise that the appropriate conclusion is

that this application should fail given the magnitude of the delay and the absence of prejudice and the Court so concludes.

40. In those circumstances the application for judicial review is declined.