Neutral Citation: [2014] IEHC 23

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 124 J.R.]

BETWEEN

PAUL O'DONOGHUE

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Ms. Justice Baker delivered on the 22nd day of January, 2014

1. The applicant in this case seeks to prohibit the prosecution of his trial at the Cork District Court on charges contrary to s. 15(3) of the Misuse of Drugs Act 1977 to 1984. He seeks an order of prohibition on the grounds that the respondent has been guilty of a delay of some four years in processing the charges against him.

2. The sequence of events is not disputed. On 13th January, 2009, Garda Michael O'Halloran and three other gardaí executed a search warrant at the applicant's then home at Model Farm Road, Cork. An amount of cocaine and cannabis is alleged to have been found and the applicant was arrested and detained under the relevant legislation. The applicant was interviewed and made some admissions during the course of the interview. He was released on the same date without charge. Four summonses were issued out of the Cork District Court on 21st September, 2009.

3. Garda O'Halloran in his second affidavit sworn on 14th January, 2014, explains the delay between January 2009 and the issue of the summons in September 2009 as having arisen from the fact that the gardaí were awaiting a certificate from the Forensic Science Laboratory. Directions were issued to prosecute in August 2009, although a certificate had not been issued on that date.

4. In January 2010, the gardaí attempted to serve the summons on the applicant at his address at Model Farm Road, Cork. Garda Michael O'Halloran in his first affidavit says that he was told by a person at that address that the applicant no longer lived there and that no further information was given to the gardaí on that date.

5. In the events, the summons was not served until November 2012 when it was served on the applicant's father at his address in Midleton, Co. Cork. Certain dates between January 2010 and November 2012 must be noted as follows:-

> (a) Garda O'Halloran says in his first affidavit that enquiries carried out by him in February 2010, revealed that the applicant was about to move to Australia. In fact, the applicant did go to Australia for a period of approximately a year but he did not go until February 2011. One year passed between the date when the gardaí believed that the applicant was about to or had already left for Australia and the date when the applicant actually did travel.
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> (b) The applicant returned from Australia in January 2012.
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> (c) The parents of the applicant moved from their former family home in Midleton in the summer of 2011 to other premises, also in Midleton.
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> (d) In April 2012, the applicant came to the attention of the gardaí in Midleton for other reasons and four months later in August 2012, Garda O'Halloran became aware of this and took steps to establish the whereabouts of the applicant.

6. Four years elapsed between the alleged offence and serving of the summons. One unsuccessful attempt at service was made in that four year period. The applicant was out of the jurisdiction for one year during the period and service could not have effected on him during that period.

The Law

7. In *McFarlane v. DPP* [2008] 4 I.R. 117, the Supreme Court considered the principles that applied to so-called prosecutorial delay. An accused is entitled to a fair trial and implicit within that right is a right to a trial within a reasonable time. Equally, the community has a right and an interest in the prosecution of criminal offences. It is the interplay between these frequently conflicting rights that has led to a considerable body of case law on prosecutorial delay. The leading cases are *Cormack v. DPP* [2009] 2 I.R. 208 and *McFarlane v. DPP* (cited above). At para. 132 of McFarlane, Kearns J., (as he then was), set out the four principles which he says have been established in relation to prosecutorial delay in Irish law. These are as follows:-

> *"(a) inordinate, blameworthy or unexplained prosecutorial delay may breach an applicant's constitutional entitlement to a trial with reasonable expedition;*
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> *(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;*
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> *(c) where a period of significant (as distinct from minor) blameworthy prosecutorial delay less than that envisaged at (b), 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…*
>
> *(d) actual prejudice caused by delay which is such as to preclude a fair trial will always entitle an applicant to*

prohibition."

8. The applicant does not assert that there is actual prejudice caused by the delay in this case. He does not in particular suggest that he has suffered any stress or anxiety as a result of the delay, or that there has been any likely impairment to his memory or that of other witnesses. Furthermore, the applicant has not been in prison in the intervening years. What the applicant asserts is that he does not have to show actual prejudice and he is correct in this. The law recognises that in certain circumstances the delay might be such that prejudice to the constitutional and other rights of an accused to a fair trial will be imputed or presumed merely on account of the delay and without any subjective or actual prejudice to the applicant.

9. The jurisprudence on prosecutorial delay has arisen from two separates rights protected by the Constitution: the right to a fair trial and the right to a trial with due expedition. Different interests are protected under each head as explained by Fennelly J. in *McFarlane*.

10. The applicant does not contend that prejudice of the first type exists. He does not seek to show what might be called a subjective or personal prejudice and there is no argument before me that evidence is lost or that witnesses who might have assisted the accused in the defence of the charge are no longer available. What the applicant asserts rather is that should the trial now be allowed to proceed that he would be denied the right to an expeditious trial, a right that has been recognised as distinct and separate from subjective prejudice and which arises from the requirements that the courts "uphold" the general public interest in the speedy prosecution of crime *per* Gannon J. in *O'Flynn v. District Justice Clifford* [1988] I.R. 740 at 743.

11. The public interest is two-fold, however, and the public also has an interest, which can in certain cases be a conflicting interest, in ensuring the prosecution of crime.

12. It is clear from the jurisprudence of the Irish Courts that a court hearing a prohibition application must balance all of these rights and interests and must do so by reference to the circumstances of the individual accused.

13. Delay which does not cause actual prejudice can have consequences such as those identified by Keane C.J. in *P.M. v. Malone* [2002] 2 I.R. 560 and quoted with approval by Kearns J. in *McFarlane*, so when an accused is imprisoned pending trial or where he can show that the delay has caused anxiety or concern, the delay will cause what is described as a presumed prejudice and breaches the second category of constitutional right, that of the right to a speedy trial. Neither of these specific factors is present in this case. The applicant asserts rather that the delay is one which is far outside the acceptable range for the bringing of summary charges. This, he says, is a case of presumed prejudice and breaches his right to an expeditious trial even without actual prejudice whether in the context of the trial itself or in his everyday life. The delay, he says, is such that his right as a citizen to an expeditious trial has been breached and thus he relies on the public's interest in the speedy administration of justice. He says in essence that on any reasonable test there has been an excessive delay and accordingly, his constitutional rights have been infringed.

14. The circumstances of this case are similar to those that arose in the Supreme Court decision of *Devoy v. DPP* [2008] 4 I.R. 235, where equally the applicant was not in a position to show subjective or actual prejudice arising from what was undoubtedly a significant delay in bringing a prosecution. The applicant in that case equally made the argument that he had been deprived of an expeditious trial in accordance with his constitutional rights. As Kearns J. in that case said the jurisprudence in the Irish Courts has been much influenced by the principles enunciated in the US Supreme Court in *Barker v. Wingo* 407 US 514 [1972]. The US Supreme Court emphasised that while there is what in the US was described as "a right to a speedy trial", there is no inflexible rule, or as counsel for the respondent put it in this case, no "tariff" such that a delay of a particular length will always result in an order of prohibition. Kearns J. quoted with approval the four factors identified in the US Supreme Court decision as follows:-

> (i) The length of the delay: the length must be considered in the light of the particular circumstances of the case, and included in this proposition is the inference that in the case of a summary prosecution, a long delay is less easily justified.
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> (ii) The reasons for the delay. The State must justify the reasons for the delay, and different weights will be assigned to different reasons.
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> (iii) The role of the applicant.
>
> (iv) Prejudice, by which is meant actual or subjective prejudice.

15. In *Devoy*, the Supreme Court refused prohibition although the Court held that there was "*undoubtedly a significant period of blameworthy delay*". The Court engaged in the exercise of balancing the conflicting and different interests and rights which I have described above. The Court took note of the fact that the applicant had made a confession but I note also that the Court noted that the crime was one of the utmost gravity. In this, the instant case can be distinguished in that the State has opted to prosecute summarily.

16. In *Cormack v. DPP* [2009] 2 I.R. 208, the Supreme Court considered whether a separate legal regime ought to apply to an application to prohibit a summary trial. Kearns J. took the view in that case that a separate legal regime did not exist but he did say that a delay which might be tolerable in a trial on indictment would be less so where summary proceedings were concerned. I am bound by that decision and, subject to what I say below, the fact that these proceedings are summary proceedings does not of itself in the circumstances mean that the trial must be prohibited.

The Application to the Facts of this Case

17. Several periods of delay have been identified as relevant to the matter that I must consider.

> 1. The initial period of one year between the search and the failed attempt to serve. I find that this is not a blameworthy delay.
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> 2. The period between the attempted first service and the date when the applicant actually moved to Australia. There is in my mind a culpable delay arising from the failure of the respondent to act quickly in seeking to ascertain the whereabouts of the accused when what is described as "confidential information" became available that the accused intended to move to Australia. A period of a full year passed between the time when this information became available and the actual departure for Australia.
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> 3. The accused spent a year in Australia and there is nothing blameworthy or indeed unusual in this. There is absolutely no suggestion that the applicant fled or went to Australia to avoid prosecution. Spending a year in Australia is something

that many young Irish people commonly do.

4. The accused returned to Ireland and came to the attention of the gardaí for unrelated reasons in April 2012. A further period of four months elapsed between that date and the renewal of the summons. This period of four months, whilst small in itself, is to my mind blameworthy and not explained.

18. I am mindful of the strong dicta of Denham J. in *B. v. DPP* [1997] 3 I.R. 140 at p. 202 that an admission is a factor for consideration, as would be the fact that the admission is contested, which is not the case here. The Supreme Court in *S.A. v. DPP* [2007] IESC 43 (Unreported, Supreme Court 17th October, 2007), suggested that an admission is a "*significant factor*". The admission in this case is recorded and, at least in respect of two out of four charges, highly significant. Hardiman J. suggested that it would be "*extraordinary to prohibit a trial in circumstances where the defendant admits a significant amount of behaviour of the criminal nature*" (quoted with approval by Kearns J. in *Devoy*).

19. The applicant urges me to take into account the fact that there are clear admissions in only two of the four charges. The respondent suggests that I can, from the transcript of the interview with the accused, interpret some of his answers as being tantamount to admissions on three and possibly even four of the charges on that analysis. I do not accept that I can on the hearing of this application enter upon an analysis of the interview with the accused, nor extrapolate from that interview that certain admissions may be imputed from what was said.

20. However, it seems to me that I must take into account the fact that there are admissions on two of the charges and the fact of these admissions is a matter of some significance in the light of the Supreme Court judgments quoted above. There is nothing to prevent the accused from seeking to persuade the trial judge that the admissions should not be admitted at the trial for whatever reason, but that is not a factor relevant to this application. It seems to me, having regard to the dicta of the Supreme Court, and in particular that of Hardiman J. in *S.A.*, that it would be "*extraordinary*" to prohibit a trial where there is an admission, that the courts regard an admission as a weighty factor in the balancing of interests. This weight or significance arises in my view as an index of the right of the public to prosecute a crime.

21. What the court is charged with protecting is the right to a fair trial protected by the Constitution. This role is primarily one for the trial judge and it is now settled law that the superior courts should intervene only in exceptional cases. I note the dicta of O'Donnell J. in the Supreme Court decision of *Byrne v. DPP* [2010] IESC 54, where he says that "*something exceptional*" is required to persuade a court to prohibit a trial. In that case, the Supreme Court made it clear that the primary power or duty to ensure fairness is one which lies with the trial court which will assess the evidence as it actually develops in the course of the trial and that court is capable of remedying any injustice in the course of the trial, and indeed an appeal will lie from the trial judge.

22. Applying the test identified by the various judgments referred to above, I am of the view that the applicant must fail in his application. It is undoubtedly the case that a delay of four years, even when one excludes the period when the applicant was in Australia, is excessive and to some extent blameworthy and particularly so in the context of a summary trial. No actual prejudice has been shown and none of the other personal factors outlined in the case law exist. I must balance all of the interests and rights. On one side of the balancing exercise is the existence of a confession, the fact that the gardaí did try to serve the summons on one occasion but failed, the fact that the applicant moved house, and indeed that his parents subsequently did so. On the other side of the equation is the general constitutional right to fairness and expedition in the conduct of criminal justice, and that the accused cannot reasonably be blamed for any of the delay in service. I do not accept the argument made by counsel for the respondent that the accused ought to have notified the gardaí of his change of address. The factors weighted in favour of prohibiting the trial are not sufficient to outweigh the factors on the other side of the equation.

23. I am not satisfied in the circumstances that the applicant can show that on a true balancing of all of the factors that the delay of itself and, in the absence of actual prejudice, is such that a trial should be prohibited.

24. I am also conscious of the dicta of O'Donnell J. in *Byrne* (above) that in the case of a summary trial a trial judge may dismiss for delay and in that case, O'Donnell J. suggested that the court in The *State (O'Connell) v. Fawsitt* [1986] I.R. 362, expressly limited its decision on delay to a trial on indictment. That judgment accepted that in the case of summary trials, it may be that an equal or alternative remedy would be an application to the trial judge to dismiss on the grounds of delay. O'Donnell J. in *Byrne* made the point that not only would such an application to the trial judge be an alternative remedy but also would potentially be cheaper and speedier than an application to the High Court for judicial review. More significantly he said the following:-

> "It might also have the not insignificant benefit of permitting the issue of the fairness of the trial to be determined by the court of trial of the particular case, a court with unrivalled experience of similar trials and indeed the court with the constitutional obligation of ensuring a fair trial."

25. The dicta of O'Donnell J. must be read in the context of other dicta, some of which I have mentioned above, that suggest that the appropriate forum for the protection of the rights of an accused to a fair trial is the trial court itself and not the superior courts. I cannot ignore both the dicta of O'Donnell J. in *Byrne* and the jurisprudence which suggest that the jurisdiction of this Court on judicial review is one that must be sparingly exercised. In those circumstances, I hold that the applicant has not made out a case for judicial review in the form of prohibition and I make this finding expressly without prejudice to the right of the trial judge to hear and determine a challenge to the fairness of the trial when it eventually comes on to be heard.