Neutral Citation Number: [2007] IEHC 434

THE HIGH COURT

RECORD NO. 2006 NO. 884 J.R.

BETWEEN/

GREGORY CONWAY

APPLICANT

AND
DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Judgment of Mr. Justice John MacMenamin dated the 14th day of December, 2007.

1. The applicant in these proceedings seeks judicial review by way of an Order of Prohibition restraining the respondent from pursuing a prosecution entitled *"The People at the suit of the Director of Public Prosecutions v. Gregory Conway"* presently standing in the Limerick Circuit Court.

2. The applicant is charged with manslaughter, that on 3rd December, 1991 at Palm Court, Limerick he unlawfully killed Denis Quinlivan, contrary to common law. He is also charged with causing grievous bodily harm, malicious wounding, assault causing actual bodily harm and common law assault against the said Denis Quinlivan deceased.

3. Two essential points are raised by the applicant, firstly, that of delay on the part of the prosecution, secondly, delay in the execution of a warrant for the arrest of the accused.

4. Prior to the consideration of any other issue however, it is necessary to clearly state that having been charged on 23rd January, 1992 with the various charges as outlined, the applicant simply avers that he did not appear in Limerick Circuit Criminal Court to answer these charges on 15th June, 1992. By way of explanation he states that at the time he had a drink problem and his life was chaotic. He offers no other explanation for his failure to appear then or subsequently in response to these charges which had already been preferred, processed and been the subject of a return for trial.

5. The applicant deposes that in the month of June, 1992 he travelled to England and resided there for an unspecified period of time. He states that he was in employment and paying taxes while residing in England and was using his proper name at all times. No independent proof of this is adduced.

6. On 26th June, 1992 the applicant's photograph and description were circulated in "Fogra Tora" which was circulated to members of the Gardaí. In 1995 the applicant was arrested in Hackney and interviewed by a member of the English Police Force, described by the applicant as a CID man who came originally from Ireland. The applicant suggests that this was one of a number of opportunities for the respondent to execute the warrant. However, he states he was released without charge from Hackney station in circumstances where, he contends that the detective who interviewed him had knowledge of the manslaughter charge in Limerick by virtue of contact with the Irish police. None of this material is substantiated independently of the applicants own testimony in affidavit.

7. On 8th August, 1996 the bench warrant outstanding in Limerick for his arrest was perfected. It does not appear additional steps were taken during this period to execute the warrant. In fact, once the accused had absconded no specific evidence is now available as to what additional steps were taken by the Gardaí to trace him.

8. The applicant avers that between September, 1997 to December, 1997 that he was residing openly in Dundalk and claiming social welfare. Again, no independent evidence is adduced on this point. Thereafter, he says that he and his girlfriend returned to England. The applicant asserts that the Gardaí knew he had residence in Dundalk and that he and his girlfriend had returned (in circumstances unexplained) to England in December, 1998.

9. In the same month, December, 1998, the applicant pleaded guilty to a charge of manslaughter in England and was sentenced to four and a half years imprisonment. He served the sentence there.

10. The applicant asserts that by use of minimal investigation his location would have been ascertainable.

11. On 11th April, 2005 the applicant was deported to Ireland on foot of a deportation order applied for by the English authorities, having spent a year in pre-deportation detention in England. The applicant again contends that the authorities must have been aware that he was being deported to Ireland owing to this fact.

12. Between April, 2005 and June, 2006 the applicant states he was residing in Dundalk and claiming social welfare. He contends there were opportunities for the Gardaí to execute the warrant. The court has been informed also that the accused was tried and acquitted on a charge of murder in Ireland. On 22nd March, 2006 the applicant was convicted in Dundalk of breach of s. 4 and s. 6 of the Criminal Justice Public Order Act, 1994, the offences having been committed on 20th March, 2006. On 19th April, 2006 the applicant was arrested and detained in relation to a burglary offence in Dundalk. It appears uncontested that between 11th April, 2005 and 16th June, 2006 the applicant was arrested by the Gardaí on a total of five occasions on various charges. Ultimately, on 22nd June, 2006 the Limerick Circuit Court bench warrant issued on 15th June, 1992 and perfected on 8th August, 1996, was executed.

13. The applicant contends that there were a number of methods by which the extant warrant could have been executed, both at identified locations in Ireland or in the course of, or after, his detention in England. While there is a degree of conflict of evidence in the affidavits as to the extent of the garda efforts, it appears that after the applicant disappeared in 1992 and the application for the bench warrant, few meaningful steps were taken towards his apprehension on the charges in question until his ultimate arrest in 2006. The applicant appears to have resided at varying times in Ireland and England. However, he appears to have used his mother's and father's surnames at varying times. He seeks to account for this on the basis that he grew up with the Conways, his mother's family in Dundalk. The interchangeable use of the surnames Conway and Schmading (his fathers surname) is not easily explained, other than in an effort to conceal his identity while residing in England. No other satisfactory alternative explanation has been proffered.

14. I am satisfied that, on the evidence, the applicant's described conduct forms part of a pattern of behaviour designed to avoid detection, or with that effect, starting with his failure to appear for trial, moving to England, using two different names and residing at various addresses. On his own account, the applicant appears to have had a chronic drink problem, a consequent unclear recollection of events, and frequently to have had no fixed abode, moving from place to place. He deposes that between April and June, 2006 he resided at three addresses in Dundalk, namely Clanbrassil Street, Park Street and with the Simon Community.

15. The applicant states that during the whole of the period from the date of the issue of bench warrant to the 22nd day of June,

2006 it would have been easy to ascertain his whereabouts. He alleges that he was easily locatable. I do not accept this assertion. I consider that the history of events outlined is more consistent with his having been "on the run", as it was phrased by counsel for the respondent. At no stage was there any evidence that the applicant ever sought to render himself amenable to the Irish authorities on the charge of manslaughter or the other charges. I am not satisfied that the applicant's identity or location were either easily ascertainable or available to the members of the Gardaí between 1992 and 2006.

Discretion in judicial review

16. Part of the applicant's case is that he seeks to assert the constitutional right to a speedy trial. I do not believe that it is open to the applicant to make this case in circumstances where, by his own conduct, he prevented the trial from proceeding on 15th June, 1992, ten months after the commission of the alleged offences. The applicant, by his own conduct, absconded. He chose not to avail of the early trial date. I do not believe that the court should exercise its discretion in order to permit the applicant to seek relief on the grounds of delay, having regard to his own admitted conduct. This was not a failure to prosecute giving rise to delay, but a case where the applicant absconded, and failed to render himself available after he had been charged and returned for trial. The position here is quite distinct therefore, from one where there was a long delay after a complaint, or delay in the preparation of the prosecution case after return for trial. The application is therefore declined on discretionary grounds, in addition to the reasons outlined below.

Factual context

17. Even if the applicant had crossed the first hurdle, that of discretion, one must consider the alleged facts which form the basis of the outstanding charges. While it must be emphasised that the following are mere allegations, a witness, Gerard Maloney describes an incident occurring in Limerick after the applicant and a number of associates had been in a public house for a considerable period of time on the day in question. It is alleged that a co-accused Gerald Doyle, became involved in a fight with Denis Quinlivan. The applicant is alleged to have arrived at a garden in an estate, near O'Malley park and joined in with Gerald Doyle, the co-accused, in beating the victim. Thereafter, the applicant is stated to have jumped over a wall into a neighbouring garden, come back holding an oval-shaped garden brick and hit the victim on the head on a number of occasions while he was still screaming and pleading for mercy. Although there may have been other contributory factors, the victim is said to have ultimately died from peritonitis due to traumatic rupture of the small intestine consistent with kicks in the abdomen. In all, it is alleged that the alleged assault lasted for about five to ten minutes.

18. The eye-witness evidence contained in the book of evidence is that of Gerard Maloney, now deceased, Kevin O'Donoghue (who says he found the victim lying in a pool of blood), Jimmy Doyle (deceased), the father of the co-accused Gerald Doyle, and Gerard Maloney who the applicant states in the book of evidence allegedly tried to pull Gerald Doyle off the victim.

19. In a statement the applicant apparently admits having kicked the victim in the legs, going over the wall into the garden and getting a small rock from a circle of stones. He then went back "into the garden" where "we were beating the child molester", (referring to the victim). The applicant states that he saw the victim was in a bad condition so he threw the stone away.

20. In an interview on 4th September, 1991 the applicant apparently gave a further account of events in answer to questioning by Detective Garda Doherty in Dundalk. Having outlined the background of events prior to the incident, the applicant was asked:

> Detective Garda Doherty: "What happened next?
>
> G. Conway: When I was passing the front gate of the house Gerard Doyle was kicking a fellow who was lying on the ground."

The applicant described having been told by Gerard Doyle that the victim was a child molester.

21. He was asked by Detective Garda Doherty:

> "When you reach the corner house you say you saw Ger beating and kicking him. Did you go into the garden?
>
> G. Conway: All right. Me and Humpy (referring to Mr. Maloney) went in and pulled Ger off him. He was lying on the ground.
>
> Detective Garda Doherty: Did you kick him?
>
> G. Conway: After we pulled Ger away he went back in and started kicking him, I went in as well.
>
> Detective Garda Doherty: What did you do?
>
> G. Conway: I started kicking him as well.
>
> Detective Garda Murphy: Was he lying on the ground all the time?
>
> G. Conway: Yes.
>
> Detective Garda Murphy: Where did you get the rock?
>
> G. Conway: What rock?
>
> Detective Garda Doherty: You know well what he is asking.
>
> G. Conway: All right. I jumped over the wall of the garden across the laneway and into another garden, I got a rock from a ring of stones.
>
> Detective Garda Doherty: What happened next?
>
> G. Conway: I went back into the garden.
>
> Detective Garda Doherty: Did you hit him with the rock?
>
> G. Conway: I did.

Detective Garda Murphy: What happened next?

G. Conway: We left after a while.

Detective Garda Murphy: What was the man doing when you left? Was he lying on the ground?

G. Conway: Yes.

Detective Garda Doherty: Was he moaning?

G. Conway: No.

The book of evidence also contains forensic evidence to the effect that blood from the victim was found on the applicant's shoes and a statement from the co-accused, Gerald Doyle, wherein he admits having assaulted the victim by striking him with his fist, thereafter hitting him in the head, followed by the accused engaging in the actions described earlier.

22. These are matters which may be challenged in evidence. However it is necessary to advert to them in order to provide a context within which the applicant's substantive case here can be now considered.

23. In a supplemental affidavit sworn in these proceedings the applicant's solicitor states that "there are grounds" to exclude the evidence of admissions. There is an opaque allusion to "the words and deeds of gardaí prior and during his detention". It might be inferred that there is a contention here of inducement. But no such suggestion is further borne out in evidence. No basis is outlined as to any other potential legal or constitutional objection to the statement of the accused and/or the contents of the interview. Furthermore, no basis is outlined as to why any objection to the statement and the interview could not now be raised in a future trial as much as it could have been in 1992, had the accused appeared.

24. Continuing with the grounds of alleged prejudice, the applicant states in the course of his affidavit:

> "I say that I have been advised that there are a number of defences open to a person charged with the said offences."

No factual context is provided for any asserted defence. It is unclear whether or not the applicant accepts he was present at the scene of the crime, whether he asserts it was a case of mistaken identity, whether he was acting in self-defence or under provocation.

25. With regard to the elapse of time between his failure to appear for trial and his arrest in 2006, the applicant asserts in his grounding affidavit "I say that I believe that the Irish authorities were not proceeding with the warrant matter on foot of the foregoing". No supporting evidence is offered in order to support this suggestion. It is not asserted that the applicant had "moved on" with his life in the belief that these events were behind him. It has been accepted that the accused continued to interact with the criminal justice system in that, *inter alia*, he was accused and convicted of manslaughter in England for which he served a sentence of four and a half years and also accused and convicted of assault causing grievous bodily harm, for which he was sentenced to eighteen months imprisonment. Thus, I do not consider prejudice can be established in this context.

The Garda evidence affidavit of Garda Michael Murphy

26. Owing to the elapse of time the miasma of vagueness is by no means confined to the applicants case. The State accepts it is not now possible to outline what precise efforts were made to locate the applicant, or to identify what enquiries took place with other agencies, here or elsewhere. Garda Murphy says that at no stage during the intervening period did the Gardaí in Limerick know the applicant's location. No information has been adduced independent of the applicant himself to suggest the Gardaí in Limerick knew that the accused was in England. However, it is noteworthy that the accused appears to have been arrested more than once in Dundalk in the year 2006 without the outstanding charge of manslaughter in Limerick being noticed. It also states that in September 1997, he transferred his social welfare from Limerick to Dundalk where he lived until December of that year without being traced by Gardai.

27. Thereafter, he returned to England in or about December, 1997, pleading guilty to the manslaughter charge in or about December, 1998 and served a sentence for this as well as, subsequently, an eighteen months sentence for causing grievous bodily harm without any request being made for his extradition.

28. The grounds upon which the applicant relies may be summarised as follows:

> (1) that the Gardaí could have executed the warrant between 15th June, 1992 to 22nd June, 2006 with the exercise of minimal effort;
>
> (2) there is no explanation for the delay in executing the warrant;
>
> (3) that the delay is now of such magnitude it would be unconscionable to proceed with the prosecution of the applicant;
>
> (4) that the alleged statement of the applicant, the memorandum of interview and the forensic evidence might be excluded;
>
> (5) that by reason of the passage of time and the death of as garda witness Detective Sergeant Brown, who had charge of the investigation, the capacity of the applicant to challenge evidence is now diminished;
>
> (6) that Gerard Maloney, witness No. 6 in the book of evidence and Jimmy Doyle, witness No. 14, are now deceased. It is asserted that if they were alive and "willing to tell the truth" they would have given evidence exculpating the applicant;
>
> (7) the former State Pathologist, John Harbison, will not be able to give evidence.

The law on onus of proof

29. In *D.C. v. The D.P.P.* [2005] 4 I.R. 281, Denham J. reiterated the principle that it is only in exceptional cases that a trial should be prohibited rather than determined on its merits. The passage is now so well known as not to require recital. No cross-examination was

sought by the applicant. As pointed out by Ó Caoimh J. in Carey *Finn v. D.P.P.* (The High Court, Unreported, 10th July, 2002, Ó Caoimh J.) areas of dispute confined to affidavit evidence cannot be resolved in favour of the applicant. Where there is a conflict on affidavit the remedy available to the applicant is to serve a notice to cross-examine. The applicant chose not to do so in the instant case. Therefore, it is not possible to resolve any dispute of fact in his favour.

Findings on evidence

30. I find first, the contention that the applicant's location and identity were easily ascertainable has been disputed by the Gardaí in affidavit. In the absence of other evidence there is a failure to discharge the onus of proof. Second, it is clear that there has been here a failure on the part of the applicant to engage with the facts. A perusal of the book of evidence might well lead to the conclusion that the death of the two witnesses who inculpated the applicant was a benefit rather than a detriment to the accused. It is not in any way sufficient to establish prejudice to state that had they been available for cross-examination they might have "spoken the truth" and no more and thus exonerated the accused. This case is simply not made out in evidence. The onus of proof is not discharged.

31. Third, the evidential basis for any potential exclusion of highly material evidence is similarly not made out. It is insufficient to merely assert that there are "grounds" to exclude evidence without identifying in detail how it is suggested any such admissions, statements and other forensic evidence would, or even might be excluded. Fourth, sinister observations apply in relation to the non-specific nature of the defences upon which the accused intends to rely. On these issues the applicant has failed to discharge the onus of proof. If I have erred in these conclusions I would add the following on the issue of prejudice.

Prejudice

32. In *P.M. v. D.P.P.* [2006] 3 I.R. 172, the Supreme Court found that even where blameworthy delay was found to exist on the part of the prosecution, the applicant must then go on to satisfy a court that he has suffered or is in real danger of suffering some form of prejudice as a consequence of this delay in order to obtain relief. Kearns J. observed that the deprivation of a right to a speedy trial does not, per se, prejudice the accused person's ability to defend himself having outlined the balancing exercise. As pointed out by that Judge the balancing exercise referred to by Keane C.J. *P.M. v. Malone* [2002] 2 I.R. 560, in determining whether blameworthy prosecutorial delay should result in an order of prohibition:

> "means that an applicant for such relief must put something more into the balance where prosecutorial delay arises to outweigh the public interest in having serious charges pursued to trial."

33. I do not consider that on the evidence, which also conflicts on this issue, blameworthy delay has been proved as a matter of probability. Furthermore, as observed earlier in the instant case even if delay did occur, a court cannot be blind to the fact that the precipitating factor for this was the applicant's own conduct. The applicant cannot assert a right to an expeditious trial in circumstances whereby his own conduct has actually frustrated that right. Any prejudice asserted, even if accepted on foot of the evidence is too general to constitute specific prejudice.

34. If I am incorrect in these findings, I would hold that I do not consider that any concept of "presumptive prejudice" on grounds of delay alone, such as identified by Peart J. in *Bakoza v. Judges of Dublin Metropolitan District Court*, (the High court, Unreported, 14th July, 2004) has outlived the decision of the Supreme Court in *P.M.* outlined above. I consider that the law as it now stands is that specific prejudice must be demonstrated in order to substantiate an allegation of delay.

35. In *Cormack v. D.P.P.* (The High Court, Unreported, 27th July, 2006) Feeney J. having noted that the decision in *P.M.* was now the applicable law stated:

> "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."

Feeney J. continued:

> "On the facts of this case the applicant has failed to do so. His assertion of prejudice was 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 trial over and above the mere fact of some blameworthy delay."

That judge concluded:

> "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."

36. While this decision is under appeal, I consider that the principles outlined by Feeney J. are applicable in the instant case.

37. Turning again to the alleged admissions, of the applicant, the decision of the Supreme Court in *S.A. v. D.P.P.* (the Supreme Court, 17th October, 2007, Unreported) is apposite. Delivering the judgment of that court, Hardiman J. stated that:

> "It appears to me that these admissions are a significant factor in the present case. Admissions, depending on their context may vary greatly in their significance on an application like this. An unrecorded and disputed allegation may be of little or no significance unless it terms or context make it very compelling. Disputed allegation of admissions to gardaí will normally be verified by recording: an omission in the record will call for explanation. However, in the present case the admissions do not appear to have been denied or glossed in any way so that it seems reasonable to take them at face value. …"

He added later:

> "… To look at these admissions from another point of view, it would in my opinion be extraordinary to prohibit a trial in circumstances where the defendant admits a significant amount of behaviour of a criminal nature. Without doubt his ability to be more precise as to the individuals involved, and perhaps about other features, is due to lapse of time, but, having regard to the admissions, that lapse of time would itself appear to be caused or contributed to by the defendant's

> activities. In those circumstances I do not consider that the demands of justice or the requirement of a fair trial require that the respondent be prohibited from prosecuting any of the charges against the applicant."

38. It must be accepted that these comments were made in the context of undisputed admissions and in the context of a prosecution for sexual assault after a long elapse of time. Different considerations might well come to bear also in circumstances where admissions are "hotly disputed" or not independently verified.

39. In the instant case there is apparently first a statement by the applicant describing the events and his own role in them. This statement was signed by the applicant who confirmed it was correct. A question and answer session followed, outlined earlier.

40. In the statement of grounds of opposition it is stated that the applicant would seek to have the "question and answer and forensic evidence arising from his arrest ruled inadmissible". But no reference is made to the statement of the applicant in the book of evidence. There is no reference to the "admissions" of any type in the applicant's grounding affidavit. Nor is there a reference to these in the grounding affidavit sworn by the applicant's solicitor. Thus, when the applicant sought leave, no factual basis was presented to the court to grant that part of the statement of grounds which deals with the question and answer and forensic evidence.

41. Ultimately, in a supplemental affidavit sworn by his solicitor, there was an averment to the following effect:

> "I say and believe and as a result of instructions from the applicant that there are grounds upon which the alleged statement of the applicant, the alleged memorandum of interview of the applicant and the alleged forensic evidence against the applicant might be excluded."

There is too, the broad reference to the words and deeds of gardaí referred to earlier. But no other legal or evidential basis is established as to any legal objection to this material. The applicant neither discharged the onus of proof nor engaged with the facts.

42. Moreover, insofar as any issue may arise in relation to the statements and memoranda of interviews, these are matters which might more appropriately be dealt with by the trial judge in the context of the facts and circumstances of the case.

Memory
43. While it was alleged that the applicant's memory has been diminished through the passage of time, no attempt was made to link this memory loss to any particular line of defence. Again I consider this is therefore simply "bald assertion".

44. It is asserted that the applicant is unable to remember the details of the events and circumstances and individuals surrounding or involved in the charges. But no attempt was made to link this to any particular line of defence. These assertions are made moreover, in the absence of any medical or psychological evidence. As pointed out by O'Neill J. in *Colm Murphy v. The D.P.P.* (The High Court, Unreported, 23rd October, 2007) to simply assert memory loss is an insufficient basis in order to prohibit a criminal prosecution.

Witnesses
45. It is asserted that the applicant is not in a position to instruct his solicitor as to other witnesses who might have been in a position to assist him in recalling relevant matters or who might themselves have been able to offer evidence in his defence. No identification whatever is made of these persons, or what they might say. The assertion is made in the absence of any factual context.

46. While Detective Sergeant Brown is deceased, the applicant does not demonstrate upon what basis this is stated to constitute prejudice.

47. With regard to the absence of Professor Harbison, there is evidence from Detective Garda Murphy that the Director of Public Prosecutions will call another pathologist to review his findings. No specific prejudice is shown.

48. In his supplemental affidavit the applicant's solicitor states that he has received instructions that if Gerard Maloney and Jimmy Doyle were still alive and if they were willing to tell the truth, they would have given evidence exculpating him in respect of the charges. This proposition is stated to be so by the applicant's solicitor, "If the applicant's instructions are correct".

49. It has not been shown that any instructions or evidence raise a defence or link that defence to Gerard Maloney and Jimmy Doyle. The applicant has not disclosed the nature of this defence or what it is that the late Mr. Maloney and Mr. Doyle would say if they had been willing to tell the truth. I do not consider that this is sufficient to make out prejudice, particularly so when Gerard Maloney, in the book of evidence gives an apparently clear account of what is stated to be the applicant's role in the death of the victim. The absence of a witness furnishing this testimony could not in any way constitute specific prejudice.

50. Similar observations apply in relation to the absence of Jimmy Doyle who placed the applicant at the scene and appeared to have sought to prevent the co-accused, Gerald Doyle, from assaulting the victim.

The Public Interest
51. In *B. v. D.P.P.* [1997] 3 I.R. 140, Denham J. stated:

> "It is not the applicant's interests only which have to be considered. It is necessary to balance the applicant's rights to reasonable expedition in the prosecution of the offences with the community's right to have criminal offences prosecuted." at pp. 195/196

52. The offences charged are undoubtedly serious, including the death of a man. The applicant's circumstances are not such as to be a material consideration. No demonstrable prejudice has been established. The evidence does not show any misconduct on the part of the Gardaí or absence of *bona fides*. The conduct of the applicant, as can be seen, substantially contributed to the delay. All of these must be considered and weighed in the light of the right of the public to have offences prosecuted. The right of the public outweighs asserted prejudice not evidentially established.

53. In summary, I consider that this is an application which in the first instance should be refused on discretionary grounds by reason of the applicant's own conduct in absconding from custody and leaving the jurisdiction. On the state of the evidence it is not possible to conclude that culpable delay has been made out either on credibility or on the balance of probability. Even if delay were substantiated, it has not been demonstrated that the applicant has suffered any prejudice. The asserted prejudice is insufficient to ground an application for judicial review. Finally, the nature of the charges, the absence of *mala fides* taken together with the factors

just outlined demonstrate that the right of the public to have offences prosecuted in this case outweighs in this instance any asserted right of the accused. The application for judicial review is declined.