Neutral Citation No. [2005] IEHC 193

THE HIGH COURT
JUDICIAL REVIEW

[Record No. 2003 538JR]

BETWEEN

ANDREW COLE

APPLICANT

AND
A JUDGE OF THE NORTHERN CIRCUIT AND THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

Judgment delivered by Macken J. on the 17th day of June, 2005

1. This is an application for judicial review following an order of this court (Gilligan, J.) of 21st July, 2003 granting the applicant liberty to seek an order prohibiting the further prosecution of certain criminal proceedings brought against him and currently pending before a judge of the Northern Circuit. The factual matters are not significantly in dispute insofar as they concern this application.

Background facts

2. Briefly the facts are as follows:

1. The applicant is facing charges of:

(a) Dangerous driving causing death contrary to s. 3 of the Road Traffic Act, 1961

(b) Using a vehicle which was not licensed in accordance with Article 3 of the Road Traffic (licensing of trailers and semi-trailers) Regulations, 1982

(c) Using a vehicle to which the European Communities (Vehicle Testing Regulations), 1991 applied, without the relevant certificate of road worthiness

(d) Failing to use a record sheet in accordance with the provisions set out at Article 15(2) of Council Regulation (EEC) No. 382-85 of 20th December, 1985 as amended

2. The applicant was warned, on the occasion of the accident, that he faced being prosecuted.

3. The charges were first brought before the District Court on 1st November, 2001. Subsequently the applicant's solicitors on 8th November, 2001 wrote to the Superintendent of An Garda Síochána at Letterkenny in County Donegal enquiring as to the whereabouts of the vehicle and requesting access to it for the purposes of being able to have it examined. Further correspondence along the same lines took place, first with the Garda Síochána, then with Flemming Engineering, the applicant's employer being who were the owners of both the cab and the trailer, to whom they were returned, subsequently with a company called McCauley Trucks who appear to have purchased the cab and then finally with a Mr. Ford who purchased it from McCauley Trucks. Correspondence with Mr. Ford remained unanswered.

4. It is a fact, not really contested, that the vehicle was examined by the Gardaí and then, after several days the cab was returned to the applicant's employer, and after some weeks the trailer was returned to the employer, according to the affidavit of Superintendent James Gallagher who has charge of the investigation. According to Superintendent Gallagher this approach was in line with the normal practice at the time.

3. The applicant's case is that in the course of the examination of the vehicle it would appear that the brakes of the trailer failed the tests carried out. In the circumstances the applicant says that an element of his defence which might be considered material to it is now missing because he has been unable to examine the vehicle.

4. Indeed the applicant submits that there was an obligation on the respondent to ensure that the cab and the trailer were retained so that they could be inspected by the applicant and should have been retained up to the time the charges were disposed of.

5. A notice of opposition was filed on behalf of the second named respondent. It pleads that the applicant is not entitled to the relief claimed because his delay in seeking judicial review. On the merits of the application, he it is denied that the applicant has been in any way prejudiced, or that his trial would be contrary to constitutional justice by reason of the failure to make available the vehicle or to retain or preserve it until it was examined on behalf of the applicant.

6. The notice of opposition is grounded on the affidavit of Superintendent Gallagher sworn on 5th April, 2004. In this he avers, in essence, as follows:

(a) He is the Officer with overall charge of the investigation of the accident and having charge of the proceedings.

(b) The charges arise out of a fatal traffic accident which occurred on 10th May, 2001. According to the evidence available, the deceased lady was walking on the right hand side of the road, pushing a push chair in which was her two year old daughter. She was accompanied by two other of her daughters, aged thirteen and ten at the time. The thirteen year old was in turn pushing her four year old niece in a push chair, while the ten year old daughter was walking behind the others.

(c) The deceased was struck from behind by the applicant's vehicle and died at the scene of the accident.

(d) According to the statements in the book of evidence, which were exhibited to the affidavit of Mr. Gallagher, and which he refers to in his affidavit, the case made by the second named respondent depends, insofar as this aspect is concerned, on the evidence of the two daughters and one other motorist. The younger daughter, according to her statement, says she was walking behind her mother and sister when "a lorry was coming wild fast on our side of the road. I ran up a lane a wee bit and screamed at Mummy to get in. She never heard me. I saw the lorry hitting Mammy. Jennifer stayed and I ran up to Gingers to phone for help". The statement of the older girl included the following "We were walking on the right hand side of the road. We came to Doherty's lane. We were crossing the wide bit at the entrance to the

lane. Mummy was in front. I was in the middle and Ann behind me. I went in on the loose stones a little bit. Mum was in on the stones as well. A lorry passed me on my left coming from behind. Ann was screaming behind me. The lorry was very close to me. I saw it hit Mum. She was rolled forward into the hedge. Tara was still in her pram upside down".

(e) According to Superintendent Gallagher a driver also came forward and his statement is included in the book of evidence and is intended to be relied upon. In his statement this witness says that at about 7.40 p.m. he saw a woman walking on the road who had a buggy with her. As he approached a place called Maggie's Pub he saw a lorry coming towards him at speed on the bend. He looked up and pulled well into the left. The lorry did not slow down or deviate despite the fact that the witness was on the road. He said if he had not pulled into the left there would have been a collision. In his statement he said he recalled it was a flat bed lorry. The next day he measured the distance in his car from Maggie's Pub to where he had seen the woman and this was almost two miles.

(f) According to Superintendent, the applicant made a statement concerning the matter in which he stated, *inter alia*:

> "I saw a woman and children walking. They were walking two abreast. One of the children made to run out to the middle of the road. The woman seemed to look around and just go after the child. I braked when I saw the child starting to step out. The woman followed her on out and just came on out to the middle of the road and the side of the lorry struck her".

7. According to the affidavit evidence, not challenged in any way, the applicant agreed that he was driving the vehicle and agreed he had been involved in the accident and that the vehicle had struck the woman.

8. It is not for this court to express any concluded view whatsoever in relation to any of these various statements. The proceedings, assuming that the matter proceeds to trial, will be dealt with on oral evidence with all appropriate cross-examination of the matters which arise in the course of such proceedings. For the moment it is sufficient to say that, according to the second named respondent, the dispute between the parties as to the circumstances in which the deceased died and as to the circumstances in which she was hit by the applicant's vehicle is one which will depend on a resolution of two entirely opposing versions of the events, which versions have been synopsised above.

9. However, the second named respondent argues that in any event, nothing in the application now presented by the applicant can affect any of the charges, apart from the charge of dangerous driving causing death and that an order of prohibition cannot, on the applicants own case, be made in respect of any of the other three charges. This was not seriously countered by counsel on behalf of the applicant.

10. As to the charge of dangerous driving causing death, the applicant submits that the condition of the vehicle may be a material factor in the charge of dangerous driving in certain circumstances. Therefore an independent finding which would be contrary to that of Garda McDaid, who found that the brakes on the trailer were defective, could provide or contribute to the defence of that charge, in the applicant's favour.

11. Mr. Phelan S.C. on behalf of the applicant says that there was a failure of the second named respondent to comply with his obligations towards the applicant to ensure a fair trial by failing to maintain the vehicle so as to enable the applicant have it examined. Nor he submitted was any offer made by the second named defendant to the applicant to make the vehicle available for inspection as ought to have been the case prior to its release. In that regard Mr. Whelan relied on two cases, namely *Bowes v. Director of Public Prosecutions* (2003) 2 I.R. 25 and more particularly the case of *McGrath v Director of Public Prosecutions* reported jointly with the latter case, which he says is on all fours with the present case.

12. He submitted that as a result of the failure by the second named respondent to comply with his obligations towards the applicant to ensure a fair hearing, evidence has been lost and therefore as a result of that missing evidence the applicant is put at serious disadvantage of rebutting the case which has been made against him. In regard to this latter argument he relies on the case of *Murphy v. Director of Public Prosecutions* (1989) I.L.R.M. 71.

13. Counsel for the applicant submitted that the solicitor acting on behalf of the applicant moved as soon as it became clear that the charges were being brought. The charges were brought on 1st November and as early as 8th November the solicitors acting on behalf of the applicant had written to the Superintendent of the Garda Síochána in Letterkenny seeking to know the whereabouts of the vehicle and requesting access to the same. The request was in respect of an articulated truck consisting of a cab (called also a tractor unit) and a flat bed trailer thus making it absolutely clear what was involved.

14. Mr. Whelan on behalf of the applicant says that it would not have been possible to have sought the information earlier and moreover it was only when the book of evidence was served in the month of January, 2002 that the allegation concerning the defective brakes on the trailer was made known and that as early as 11th February, 2002 the applicant's solicitor again wrote seeking to have inspection facilities.

15. It is also contended on behalf of the applicant that when the applicant was interviewed on 28th May, 2001, which was eighteen days after the date of the accident, and after the inspection of the vehicle on behalf of the second named respondent, no suggestion was made to the applicant in the course of that interview that the brakes on the trailer were defective, and therefore he was not on notice of any allegation of the type contained in the book of evidence which only became available in January, 2002. In the circumstances the applicant was entitled because there was a material part of the evidence missing, to have an order of prohibition of the type sought in these proceedings.

16. For the second named respondent Mr. McDermott B.L. contended that there was no question of this case being a "missing evidence" case, in particular when the applicant does not say that he didn't know where the vehicle was, such that inspection could have taken place without difficulty. The case was not like the situation where a video recorder had been wiped clean, nor was it a case in which the vehicle had been sent to the scrap yard and had been destroyed nor at the relevant time had it gone to any third party.

17. Moreover, it is submitted that the applicant having been warned immediately of the likelihood of charges being brought against him, in respect of all three charges, and the vehicle, that is to say the cab and the trailer having been returned to the applicant's employer very shortly afterwards, the applicant well knew where both the cab and the trailer could be found, and either took no steps to inform his solicitor or did disclose the whereabouts of the vehicle but no steps were taken to inspect it. The correspondence in the present case is drafted so as to give the impression that the case concerns a missing evidence case, but in fact it is not a missing

evidence case the location of the vehicle was at all times known to the applicant from the very beginning.

18. The said respondent submits that, as to the charge itself, it does not follow that the existence of the trailer or the state of the brakes on it, is or will be material to the case. At present what is known is that there is an allegation that the applicant was driving too fast, that he was on the wrong side of the road, that his vehicle hit the mother who died, and that the applicant stopped his vehicle further on. At that stage, according to counsel for the second named respondent, what was concerning the applicant was whether a witness had "seen anything", and counsel for the respondent argues that this was very indicative of the attitude of the applicant.

19. Counsel also contended that when one considered the statement of the applicant, which had not been sought to be altered, changed or denied in any way, the applicant was in effect saying that he was driving the vehicle, at an ordinary speed. One of the children ran out on the road, the mother ran out into the middle of the road after the child, without looking, and the mother was thereupon hit by the side of the vehicle. In his statement, there is no suggestion whatsoever that the brakes on the trailer had failed or that the brakes on the trailer having failed, had in any way affected him, nor indeed did he say that he had tried to brake. On the contrary what he had stated was that he did not stop for some distance after the accident so that he could pull into the side of the road at a safe place, and that any skid marks on the road were not his.

20. Mr. McDermott argued that the application which is being sought in the present case is a very serious one in that it seeks to prohibit the normal procedures which apply in the case of a charge of dangerous driving causing death. He says that such an application therefore cannot be based on speculation. There must at this time, in the course of the judicial review application, be a sufficient amount of material before the court upon which it can be said that the danger to the applicant arising from the failure of the second respondent, if he had an obligation, to preserve the vehicle up to the determination of the trial or even to the date of the charges, is not acceptable at law. All the applicant could say in the present case is that there is a possibility that if he had an opportunity of examining the vehicle, an engineer might come to a different view to the view expressed by Garda McDaid consequent upon the tests already carried out by him.

21. Mr McDermott submitted that in *Bowes, supra*., the position was that evidence had actually been destroyed and destroyed after there was a clear intention to examine that evidence disclosed. There was no warning of a prosecution at all, and there was speculation as to what the engineering evidence might show. In the present case one must look at what actually occurred. The vehicle was returned to its owner, the applicant's employer, for whom the applicant continued to work on a daily basis. Both the cab and the trailer were returned and the applicant has acknowledged that he knew that this was where the vehicle was.

22. Mr. Whelan in reply submitted said that it isn't necessary for the applicant to show actual or real prejudice. What is required is that the vehicle which the applicant says may be an essential part of the defence, must remain available whether or not he is in a position to establish that its absence would be prejudicial to him.

Conclusions

23. First, before considering the arguments advanced, I draw attention to the fact that the second named respondent raised an additional objection to this application, namely, delay in the bringing of these proceedings. I propose to deal with the question of delay at the end of this judgment and to deal with the merits first, because of the particular explanation put forward as to why no application was made sooner.

24. As to the merits, in the first place, I agree with the second named respondent's contention that the issue which arises for consideration on this application does not affect the charges now extant against the applicant, with the exception of the first charge. None of the remaining charges depend in any way on the alleged missing evidence, and it was not argued otherwise on behalf of the applicant. This judgment therefore concerns only a determination as to whether the applicant is entitled, at this stage, to an order prohibiting the further prosecution of the first of the charges against him.

25. The charge of dangerous driving causing death is an extremely serious charge and an accused is entitled to have available to him all appropriate evidence to assist him in his defence. That is the very reason why, in order to guarantee an accused a fair trial, to which he is entitled as a constitutional right, a prosecution is obliged, for example, to furnish to a defendant, all relevant documents, whether they assist the prosecution case or not. That is also why, in appropriate cases, there is an obligation on the prosecution also to preserve evidence, as missing evidence may have as its consequence an encroachment on the defendant's right to a fair trial, and if its absence would lead to a serious risk of an unfair trial, the constitutional guarantee available to a defendant may not be capable of being assured. A court may, in such circumstances prohibit the further prosecution of the charges in question.

26. What is in issue between the parties is, firstly, whether the evidence in question is truly missing evidence as that is understood in the jurisprudence, and secondly as to whether, even assuming it could be said to be missing evidence, the evidence is material evidence vis a vis the charge, and in consequence, whether there is a real and serious of an unfair trial for the applicant.

27. The right in a defence to have material evidence maintained and available is not only long established, but has been reiterated on several occasions in the recent past in this jurisdiction, and in particular in several judgments of the Supreme Court. The first of these recent judgments is *Murphy v Director of Public Prosecutions* (1989) I.L.R.M. 71 in which Lynch J. stated:

> "The authorities establish that evidence relevant to guilt or innocence must, so far as is necessary and practicable, be kept until the conclusion of the trial. These authorities also apply to the preservation of articles which may give rise to the reasonable possibility of security relevant evidence."

28. That case concerned the theft of a car and the defendant wished to have it checked, in particular for fingerprints. The reasons for this were self evident, but the vehicle had not been retained by the gardai, and they themselves had carried out no forensic examination of it. In the circumstances the court held that the defendant had been deprived of the reasonable possibility of rebutting the evidence proffered against him, and the loss to him of possible corroborative evidence could not be remedied in any other way. The decision in the above case has since been followed and cited with approval in several judgments, including *Dunne v Director of Public Prosecutions* (2002) 2 I.R. 305.

29. The arguments as to whether this is missing evidence or not are set out above, the respondent in particular contending that it is not. Essentially he says that the evidence was always freely available to the applicant, was returned to the very place where the applicant was employed and continued to be employed and therefore he could at any time have had it examined. This argument is based in part on the fact, undisputed at this stage, that the applicant had been warned of the intention to prosecute him at the time of the accident. Therefore, it is said, he knew full well that that being so, and not being under any other impression, and also not being affected in any way at the time of the warning, by extreme trauma consequent upon the accident in respect of which he is

charged with dangerous driving causing death, had ample opportunity to have the vehicle, consisting of a cab and a trailer, examined. Nor was it necessary for him, unlike the position in other cases, to await the date when charges were actually made against him, as the warning had been sufficiently clear.

30. The applicant argues on this point that he was entitled to await the charges before taking any steps to have the vehicle examined, and says that this entitlement is clear from the jurisprudence, citing Dunne v Director of Public Prosecutions, supra. In that regard.

31. I am not satisfied that, on the jurisprudence, it is always the case that a defendant is entitled to await the actual charges, as is contended for. Indeed it is implicit in the judgments in the case of *McGrath v The Director of Public Prosecutions* (2003) 2 I.R. 25 that the court took into account the fact that in the immediate aftermath of the accident the applicant was in a state of extreme trauma and undergoing treatment for this. In the present case, no evidence was tendered to suggest that the applicant was in such a situation, and the evidence, at it stands at present, is to the contrary, although I do not have to make any conclusive finding in that regard.

32. Nor do I find in the jurisprudence that the prosecution is obliged always to retain the evidence in question until the final disposal of the charge, as is contended for by the applicant, although that may be necessary in certain circumstances. It may well be sufficient to ensure that the evidence is available to the defendant in circumstances in which it can be inspected on behalf of the defendant well prior to trial and then disposed of. It all depends on the circumstances of the particular case and the evidence in question. In the present case, the evidence is said to be the vehicle which the applicant was driving at the time. This was composed of a cab and a trailer. The cab was returned to the defendant's employer very shortly after the accident, and its subsequent history has been recorded above. As to the trailer, this was returned a little while later, also to the applicant's employer.

33. While it is true that the main argument made on the part of the applicant is that the cab and the trailer should have been maintained by the prosecution until the disposal or determination of the action, the applicant would also have been entitled, on his argument, to have the trailer maintained and available for examination once charges were brought, and up to the time when it had been examined on his behalf.

34. I will return to the question of the materiality of the evidence the subject of the application, as to the availability of the trailer for inspection, the following is the position. Superintendent Gallagher avers in his affidavit that "On 14th May the trailer was returned to Flemming Engineering. It has been ascertained by the Gardaí that the trailer was still in their possession as of 28th February, 2003". That averment has not been challenged or countered by or on behalf of the applicant.

35. Having regard to that unchallenged averment, it is noteworthy to note that no explanation has been furnished by the applicant as to why, between the months of May, 2001 and at least the month of February, 2003 almost two years later, no attempt was made by the applicant or on his behalf, to seek inspection of the trailer which was, on the uncontested evidence and at least until that date, in the hands of the applicant's employer, there being no suggestion that it would not have been available from that source. Nor has it been claimed that the cab of the vehicle in question, which according to its history was sold prior to the date of the charges, was nevertheless essential to the establishment of the status of the brakes on the trailer.

36. In these circumstances, I am not satisfied therefore that the applicant has established that he was not in a position to ascertain whether the brakes might have shown the same result as were found on examination by the gardai, or might perhaps have shown a different result which might have assisted the applicant in his defence, or was disadvantaged by reason of the fact that the vehicle was returned to his employer before the charges were made against him.

37. However, in case I am incorrect in the view I have taken in that regard, and the applicant would in law have been entitled to have the vehicle detained and preserved by the gardai, and made available to him prior to its being returned to its owner, I now consider the materiality of the evidence which is alleged to have been missing, having been so returned. The arguments on this are set forth above. The applicant contends that he is entitled to the examination on the basis that such an examination might throw disclose evidence which would assist him in his defence, I particular evidence which would counter the results of the tests carried out on the trailer brakes by Garda McDaid. Mr. Whelan argues, however, that it is not necessary for him to establish that it would definitely do so at this point in time.

38. The respondent on the other hand says that some materiality or relevance to the defence must be established. Mr. McDermott argued that the applicant cannot proceed on the basis of mere speculation, but must produce some evidence at the time of this application. He says that the state of the evidence for either side is as follows:

(a) The applicant was driving too fast;

(b) He was driving on the wrong side of the road;

(c) The applicant hit a pedestrian walking on the side of the road the applicant had crossed to, with fatal consequences;

(d) The witnesses to the accident, will support this version of events

(e) There was no suggestion by the applicant either at the scene of the accident or at any stage that his brakes failed;

(f) There was no suggestion that he had tried to brake and he denied the skid marks on that side of the road were his;

(g) The case made by the applicant is the complete opposite, that is to say that the woman who died had run out to the middle of the road, chasing a child who had run out;

(h) The applicant could not avoid the woman who in consequence was hit.

39. In these circumstances the second named respondent argues that the brakes on the trailer, or their condition, does not form any part of the defence of the applicant to the dangerous driving charge, and are therefore no at all material. The applicant instead has proceeded on the basis of pure speculation.

40. It seems to me that the correct approach to adopt for the purposes of assessing whether, notwithstanding that the trailer was in the hands of the applicant's employer at least until early 2003, long after the charges were brought, on the assumption as to preservation I have set forth above, is to be guided by the helpful jurisprudence in that regard found in the judgments of the Supreme

Court on the matter.

41. The issue was considered in detail in the recent case of Scu*lly v Director of Public Prosecutions* unreptd. 16 March 2005. The facts in that case were markedly different to those here, but the principles enunciated, particular under the title "Duty and Discretion" in the judgment of Hardiman, J. are clear. Having cited extracts from the judgment of the learned trial judge with approval, he stated:

> "The example which he gives in the passage first cited are excellent examples of what is meant by the phrase in my judgment in *Dunne* to the effect that no "remote fanciful or theoretical" possibility should lead to a prosecution being prohibited. One is concerned, first and last, with whether there is a real risk of an unfair trial. Obviously this question will depend on the individual circumstances of each case. Of the reported cases, *Bowes* is the best example of the nightmare scenario envisaged by the learned trial judge here, and in that case relief was of course refused both in the High Court and in this Court. Similarly I would refuse relief in the present case because in the uncontroverted circumstances the relevance of the video tape is purely theoretical and the applicant's own delay in seeking it demonstrates his consciousness that this is so."

42. Although it was alleged on the part of the applicant that, in the event of his expert having an opportunity of examining the trailer brakes, this might throw up a different result than that found by the garda expert, and this might assist the defence, I do not think that this gets over the hurdle of establishing that the relevance of the vehicle or more particularly the trailer, is more than theoretical. A consideration of what was in issue in *McGrath, supra*, makes it clear what an applicant must present to the Court. In that case, the expert view as to the materiality of the missing evidence was clear. The consultant engineer was able to state that not having been able to examine the motorcycle he was "unable to ascertain the collision configuration, i.e., the relative directions of movement of the vehicles … ." I should add that the motorcycle in question was that of the other party to the collision in respect of which the applicant had been charged, had been broken down and its parts sold on. The judgment then continued:

> "This would have been helpful in providing evidence of where on the roadway the collision took place. He says that he is unable to deduce the closing impact speeds of the two vehicles because the damage profiles have been destroyed. He is unable to check instrumentation and equipment settings for clues as to the speed of the motorcycle prior to the accident and is unable to eliminate satisfactorily any mechanical condition of the motorcycle which might have contributed to the cause of the collision. He says that, for example, he was unable to eliminate that the motorcyclist may have been dazzled or blinded by the sun's reflections in his mirror."

43. While it might well be considered that such an extensive explanation of the materiality of the evidence is the ideal, nevertheless some real and finite evidence as to the materiality of the evidence must be presented to the Court. The theoretical possibilities presented on behalf of the applicant in this case do not establish that the alleged missing evidence, even assuming it to be missing, is material in the sense in which this is used in the jurisprudence. While it is true that the respondent in this case is, in reality, going to rely on the witnesses to the event, I have taken into account that the test is not whether the prosecution think that the vehicle is not relevant, and that this is not a factor which can determine whether or not the alleged missing evidence is material, as is also clear from the jurisprudence, and in particular the case of *Scully, supra*.

44. As to the information made available to the court in support of the alleged materiality of the vehicle, in the affidavit sworn by Mr. Dorrian on behalf of the applicant, on this point, he avers:

> "The condition of the vehicle is under certain circumstances a material factor in the charge of dangerous driving. An independent finding contrary to that of Garda McDaid could provide or contribute significantly to a defence to this charge. The circumstances upon which the defect, if any, occurred, such as that it no(sic) have arisen during the course of the journey, could provide or contribute significantly to a defence of this charge on behalf of the applicant."

45. In the present case, there is no suggestion either in the statement of the applicant to the gardai, or even at the present date, that the applicant contends the accident occurred because he was unable to brake, nor that when he tried to brake, the brakes did not work, nor is any other claim made in relation to the condition of the brakes. It is no doubt a theoretical possibility that, upon examination, something might be found which, in theory, might be of assistance to the applicant. That is not sufficient, however, to establish that missing evidence would have been material to the defence.

46. I find, in the foregoing circumstances that the plaintiff has not made out a case that he cannot be guaranteed a fair trial, in accordance with his constitutional right by reason of the fact that the evidence in question was not retained by the gardai, either until the disposal of the charges, or until the charges were brought, or was not made available to him before being returned by the gardai to the applicant's employer.

47. I wish now to refer to the second ground upon which the second named respondent objects to the relief sought, but I do so only in passing. This is an objection based on the alleged delay in bringing the application for leave to issue review outside the time provided for in the Rules of The Superior Courts, and in any event not promptly, as is required by law. This issue frequently in cases such as this, but because of the peculiar practices which operated in relation to issues of this nature, at least in the area in which this case would be set down for trial, I deal with it only briefly.

48. It was explained to the Court on behalf of the applicant, and no seriously contested by the second named defendant, that the practice in relation to matters such as this had not been consistent as between one area and another, and that in the circuit court area in which the present matter would be heard, the practice for some time had been that an application of this nature would be made directly to the trial judge at the commencement of or shortly before the trial, seeking the same type of prohibition order. It was also explained to the court that it was only in the recent past, and shortly prior to the application files in the present case, that the appropriate manner in which to proceed had been clarified by The High Court, that is to say, that the application should always be made by means of a judicial review application.

49. While I do not criticise the second named respondent for having made the case he did, namely that delay should preclude the applicant, and there was indeed quite serious delay, the explanation tendered on behalf of the applicant as to the practice operating up until shortly before this application was lodged, and to which there has been some reference in judgments of this Court, and which was not really seriously challenged – even if the practice was the wrong practice – is sufficient for me to adopt the approach that, in the particular circumstances of the present case, and having regard to the findings which I have already made, it is not necessary for me to address further the plea of delay raised by the second named respondent.

50. In the foregoing circumstances, I reject the application for judicial review.