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THE HIGH COURT
JUDICIAL REVIEW

[2007 No. 702 J.R.]

BETWEEN

KEITH FARRELL

APPLICANT

AND
THE DIRECTOR OF PUBLIC PROSECUTION

RESPONDENT

Judgment of Mr. Justice Edwards delivered on the 5th day of February, 2008.

Introduction
1. On the 18th of June 2007 the applicant was granted leave by Mr Justice Charlton to apply by of application for judicial review for an injunction restraining the respondent from prosecuting the applicant before the Dublin Metropolitan District Court in respect of 5 offences as set out in Case No 2004/127594, being (in non technical language) the offences of (1) dangerous driving; (2) failing to stop when required to do so by a Garda; (3) drunken driving; (4) assault and (5)the furnishing of a false name to a Garda. The grounds upon which leave was granted may be summarised as prosecutorial delay to the prejudice of the applicant.

Facts
2. The evidence before me consisted of two affidavits of the applicant (and documents therein exhibited), which were sworn on the 15th of June, 2006 and on the 29th day of January, 2008, respectively; an affidavit of the applicant's mother, Eva Farrell, sworn on the 15th day of June, 2006; an affidavit of Garda Padraig Powell sworn on the 24th day of October, 2007and an affidavit of Garda Pat Dunne, (and a document therein exhibited) sworn on the 25th day of October, 2007. From a consideration of the affidavits I am satisfied as to the following facts.

3. The applicant was arrested at 1.10am on the 26th of July 2004 at Coldhurst Crescent, Lucan on suspicion of having committed an offence under section 112 of the Road Traffic Act, 1961. At the time of his arrest he gave a false name and address, stating that he was a Garreth Renynor of 98 Coldhurst Crescent, Lucan. He was taken to Ronanstown Garda Station where he was detained for about three hours. Upon being "booked in" he apparently gave his true name to the member in charge, but also gave an old address instead of his current address. He stated that his address was 22 Cherrywood Crescent, Clondalkin, Dublin 12. However, his correct address at this time was 12 Brandon Road, Drimnagh, Dublin 12. Although the property at 22 Cherrywood Crescent does belong to his mother Eva Farrell, and he had lived there in the past, the property was let out to tenants at this stage. Mrs Farrell has exhibited the letting agreement in her affidavit. Be that as it may, the custody record also shows the applicant was intoxicated and had a large cut to his right temple. He was seen by a Dr Williams in the Garda Station and a sample was taken from him for the purposes of section 49 of the Road Traffic Act 1961 (as amended). It is unclear whether that sample was of blood or urine but nothing turns on it. He refused an offer of transport to hospital to have his wound attended to He was released at 4.10 am.

4. The applicant's mother states that approximately two days later, on 28th July 2004, she called to the Garda Station accompanied by the applicant. She asserts that she confirmed her son's identity to the Gardaí and his then current address. She further states that she specifically "informed the Gardaí that the applicant did not reside at 22 Cherrywood Crescent" and that, although she was indeed the owner of the property at that address, it was being rented to a third party.

5. In response Garda Dunne states that Ronanstown Garda Station does not have any record of a visit by Mrs Farrell at that time and that it would be normal practice to record such visits. Moreover he states that it would also be normal practice to direct the person enquiring to contact the prosecuting member directly, and that he was not contacted.

6. The applicant bears the onus of proof in regard to every major issue of fact, and the standard in that regard is proof on the balance of probabilities. On the basis of the evidence I am left with significant doubts on this point of detail and I find that I am not satisfied to the required standard that members of An Garda Siochána were indeed specifically informed as to the applicant's correct address by his mother on the 28th of July 2004.

7. In any event on the 30th of September 2004 Garda Dunne applied to the District Court office for the issuing of five summonses against the applicant, being in respect of the five offences already mentioned. These summonses were duly issued and were returnable to the Dublin Metropolitan District Court on 31 March 2005. According to Garda Dunne they were apparently served "by hand by Garda Noel Madden on the 9th of January, 2005" at 22 Cherrywood Crescent. Both sides accept that this refers, somewhat euphemistically, to the alleged posting by hand of copies of the summonses through the letterbox at 22 Cherrywood Crescent, and not to service upon the person of the applicant.

8. The applicant says he never received the summonses in question. In that regard his mother says that between May 2004 and May 2005 she received all post and correspondence delivered to the Clondalkin address. However, at no stage did she receive the said summonses.

9. On the present state of the evidence I cannot easily resolve this conflict with regard to the alleged service of the summonses. However, in the absence of evidence from Garda Noel Madden, and from the tenants of 22 Cherrywood Crescent, on balance I feel I must resolve it in favour of the applicant.

10. At any rate when the matter came on before the District Court on the 31st of March 2005 the applicant didn't appear. and a bench warrant was issued in his absence. I am satisfied on the evidence that the Gardaí only made one attempt to execute that bench warrant and that was by calling to 22 Cherrywood Crescent on the 24th of April 2005. They were informed by persons at that address that the applicant was "no longer residing" there. Apparently, they did nothing else to try to locate him. The applicant makes the point that he was living openly within Dublin 12; that he was alternatively unemployed and drawing unemployment assistance or employed and paying PAYE/PRSI; that he was registered with FÁS; that he was the registered owner of a car, that he had bank accounts; and so on, and that with fairly basic detective work he could easily have been located notwithstanding the absence of a precise residential address for him. In response Garda Dunne states:

> "I say that due to constraints on resources available to your deponent for the investigation of the offences the subject matter of this application, I was not in a position to trawl through Social Welfare, FÁS, Revenue, Bank of Ireland or Public Authority records to ascertain the whereabouts of the applicant."

11. The evidence is that the applicant himself became aware of the possible existence of a bench warrant for his arrest when, on the 30th of April 2005, he was in Ronanstown Garda Station, having been arrested by Garda Powell in respect of a separate matter. He says that Garda Powell informed him on that occasion that there was an extant bench warrant for his arrest arising from a failure to appear in Court 51 on the 31st of March. He points out that notwithstanding this Garda Powell released him on station bail in respect of the separate matter previously alluded to, and did not seek to execute the warrant. In response Garda Powell counters that applicant informed him that he knew nothing about the warrant and that it did not relate to him. He (Garda Powell) was aware of another Keith Farrell living in the Clondalkin area and he believed that the warrant might possibly relate to that person. As Garda Dunne, whose case it was, was not immediately available to confirm whether or not the warrant related to the Keith Farrell that Garda Powell had in custody, or another person, Garda Powell decided in all the circumstances not to execute the warrant. He says that he informed the applicant that Garda Dunne was the appropriate Garda to contact if on further reflection the applicant thought the warrant might relate to him. I accept Garda Powell's explanation for not executing the warrant on this occasion as being true, and as being a reasonable one in the circumstances.

12. Arising out of his arrest on the 30th of April, 2005 the applicant was subsequently charged with an offence, and he states that he instructed Michael Staines, Solicitor, to defend him on that matter. He attended with Mr Staines on the 13th of May 2005 and he says that he told Mr Staines about his conversation with Garda Powell concerning the alleged bench warrant. He says he got Mr Staines to write to the Gardaí to enquire about the alleged warrant, and that Mr Staines did so inviting the Garda Powell to produce the warrant on the applicant's next Court date (28th of June, 2005) or, alternatively, to suggest an alternative arrangement for execution of the warrant. A letter to that effect from Mr Staines to Garda Powell, dated 24th of May, 2005, has been exhibited before me. The applicant points out that he was before Kilmainham District Court on three occasions subsequent to that letter, namely on the 28th of June 2005, the 13th of July, 2005 and the 9th of February 2006 and on none of these occasions did Garda Powell either produce the bench warrant to Mr Staines, or attempt to execute it against the applicant.

13. In fairness to Garda Powell his answer to that is that this wasn't his case, and Garda Dunne, whose case it was, remained indisposed for much of this time. The evidence is that Garda Dunne sustained a serious sports injury in August 2005 and was out of work for an extended period.

14. For completeness it should be stated that the charge that the applicant was facing before Kilmainham District Court was struck out on the 9th of February 2006 on the basis of a "poor box" contribution.

15. The applicant contends that he remained worried about what Garda Powell had said on the 30th of April 2005 and as late as the 28th of July 2006 he consulted Mr Staines about it again. Mr Staines apparently telephoned the District Court office on his behalf but was unable to confirm the existence of a bench warrant.

16. On the 27th of October 2006 the applicant was stopped by Gardaí in connection with a suspected road traffic offence and was arrested and conveyed to Lucan Garda Station. While there it was discovered there was an outstanding bench warrant against him. He was released on condition that he present himself subsequently in District Court No 52 in the Richmond Hospital. He did so and the warrant was executed by arrangement on this occasion. The applicant says that the execution was on the 31st of October 2006, whereas Garda Dunne says it was on the 28th of October, 2006. Nothing turns on this discrepancy.

17. Finally, the applicant contends that as a result of the delays in this case he has suffered unnecessary stress and anxiety. In support of this he has exhibited the report of a Mir Michael Dempsey, Senior Clinical Psychologist, dated 28th of November 2007. In his report Mr Dempsey describes receiving a history from the applicant of subjective feelings of depression, lack of self confidence, a tendency towards self criticism, irritability, and difficulty in concentrating. The applicant claimed to be anxious about the outcome of the case and the possibility that he may not be able to secure employment if he loses his licence. Mr Dempsey concluded that "Mr Farrell is reporting mild symptoms of depression in relation to the dilemma he is in." He was advised to moderate his drinking.

Delay

18. I have been referred by the parties to a large no of cases including *Director of Public Prosecutions –v- Barry Byrne* [1994] 2 I.R. 236; *Director of Public Prosecutions –v- Liam Arthurs* 2000[ILRM 363; *Maguire –v- Director of Public Prosecutions* 2004 3 IR 241; *Director of Public Prosecutions –v- Anthony Byrne* (Unreported High Court, O'Caoimh J, 26 June 2002); *Cillian Fennell –v- Director of Public Prosecutions* [2005] IEHC 135; *Robert Byrne –v- Director of Public Prosecutions*[2005] 2 IR 310; *BF –v- Director of Public Prosecutions* [2001]1 IR 656; *Shane Dunne –v- Director of Public Prosecutions* (Unreported High Court, Carney J, 6 June 1996); *Bazoka –v- Judges of the Dublin Metropolitan District* [2004] IEHC 126; *State (Flynn) –v- The Governor of Mountjoy Prison* (Unreported High Court, Barron J, 6 May 1987); S*tephen Cormack –v- Director of Public Prosecutions* [2007] IEHC 122; P*atrick Conroy –v- the Attorney General and Michael J Keaveney* [1965] 1 IR 411; and *Thomas Enright –v- Ireland and the Attorney General* [2003] 2 IR 321.

19. Somewhat surprisingly I was not directly referred to *either State (O'Connell) –v- Fawsitt* [1986] IR.362 or to *P.M.-v- Director of Public Prosecutions* [2006] IESC 22. I have had regard to the judgments in both of these cases as well as to the cases to which I was referred. I raised the potential relevance of *P.M.* with counsel for the applicant as he was making his submissions and he accepts it is relevant.

20. I am satisfied on the evidence that there has been delay in this case. Not all of the delay can be characterised as unjustifiable prosecutorial delay. I consider that the applicant himself was in large measure responsible for much of the delay. He provided an out of date address and, while this may not have been the sole cause of the summonses not reaching him, I am satisfied that it was a major factor. Moreover, when he was informed by Garda Powell in April of 2005 that he might be the subject of an outstanding warrant he did not contact Garda Dunne as Garda Powell suggested he should do. Having said all of that, I am also satisfied that there has been an element of culpable prosecutorial delay. I am satisfied that the Gardaí did not do enough to attempt to execute the warrant. In this regard I should refer to the remarks of Carney J in *Shane Dunne –v- Director of Public Prosecutions* (Unreported High Court, Carney J, 6 June 1996) where he stated:

> "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 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 it 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."

21. 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, for example, by being arrested in relation to a further crime rather than taking any steps to find him."

22. These remarks have been cited with approval by the High Court on many occasions, for example by Peart J in *Bazoka –v- Judges of the Dublin Metropolitan District* [2004] IEHC 126 and by Feeney J in *Stephen Cormack –v- Director of Public Prosecutions* [2007] IEHC 122.

23. I regard Carney J's remarks as entirely apposite in the present case. I do not consider Garda Dunne's explanations as to why there was no positive attempt to locate the applicant, beyond simply calling to 22 Cherrywood Crescent, on one occasion, to be satisfactory. The Gardaí could, and should, have done more. I also think that Garda Powell should have responded to, or at least acted upon, Mr Staines letter. The applicant had two Court appearances, namely on the 28th of June 2005, and on the 13th of July, 2005, *before* Garda Dunne sustained his unfortunate injury in August of 2005. These were lost opportunities to establish if the applicant was indeed the man named in the warrant.

24. Of course, the mere existence of culpable prosecutorial delay is not dispositive of the matter. It is also necessary to consider whether or not the applicant has been prejudiced by the delay and, if so, whether the nature and degree of any prejudice is so great as to outweigh the public interest in the prosecution continuing.

Prejudice
25. In this case the applicant does not contend that he has suffered either actual or presumptive prejudice to his ability to defend himself. Rather, he contends that he has suffered unnecessary stress or anxiety by reason of the delay and is thereby prejudiced.

26. Prejudice of this kind was considered in *P.M. v. The DPP* [2006] IESC 22. Kearns J., who delivered the principal judgment (with which Murray C.J., Denham J. and Hardiman J. all concurred) stated as follows:-

> " In a nutshell, therefore, the appellants sole point on the appeal is to invite this court to determine whether, in a case of blameworthy prosecutorial delay, there is nonetheless an obligation on an applicant to establish in addition some degree of prejudice referable to the breach of his right to an expeditious trial which would entitle him to a prohibition order."

27. Kearns J. noted that it was common case that every person charged with a criminal offence is entitled under the Constitution to a trial with reasonable expedition. He referred to *Barker v. Wingo* 407 U.S. 514 [1972] a unanimous United States Supreme Court decision in which that court observed that the right to a speedy trial is "generically different from any of the other rights enshrined in the Constitution for the protection of the accused". He pointed out that the decision in that case clarified that in addition to ensuring fair procedures for accused persons, there was a societal interest in providing a speedy trial separate from and sometimes opposed to, the interest of accused persons. It was pointed out that deprivation of the right to a speedy trial may even work to the advantage of an accused person and that delay was not an uncommon defence tactic, since it had the effect of weakening the prosecution case, upon which the burden of proof ultimately lay at the criminal trial. It followed therefore that the deprivation of the right to a speedy trial did not per se prejudice an accused person's ability to defend himself. The United States Supreme Court regarded the right to a speedy trial as vaguer than other procedural rights in that it was impossible to determine with precision the circumstances in which it had been denied. As a consequence it adopted a balancing test the operation of which compelled courts to approach speedy trial cases on an ad hoc basis. It identified at least four factors to be taken into account: the length of the delay, the reason for the delay, the accused's assertion of his right and prejudice. Under the last of these four headings, Powell J. identified three interests protected by the right to a trial with reasonable expedition:-

> (i) The right to prevent oppressive free trial incarceration,
>
> (ii) The right to minimise anxiety and concern to the accused, and
>
> (iii) The right to limit the possibility that the defence would be impaired.

28. In *P.M.*, Kearns commented that absence of evidence of prejudice has in some instances led the High Court and the Supreme Court to decline to stay trials even in the face of gross and culpable prosecution delay. He cited the following example:-

> "Thus in *McKenna v. the Presiding Judge of the Circuit Criminal Court*, the High Court, (Kelly J.) found that there was: 'inordinate and inexcusable delay' of five and half years for which the Director of Public Prosecutions was responsible. However, in that case the court refused to prohibit the applicant's trial because he had failed to demonstrate how that delay interfered with any interest protected by the expeditious trial right."

29. *McNamara v. MacGruairc* (Unreported, Supreme Court, 5th July, 2001) was also cited as being a case in which a similar approach was adopted. Kearns J. also referred to the case of *P.P. v. The DPP* [2001] 1 I.R. 403 wherein the consequences of post complaint delay were considered to be of particular significance. In that case Geoghegan J. cited the following passage from the judgment of Keane J. in *P.C. v. DPP* [1999] 2 I.R. 45 at p. 68.

> "Manifestly, in cases where the court is asked to prohibit the continuance of a prosecution on the ground of unreasonable delay, the paramount concern of the court will be whether it is has been established that there is real and serious risk of an unfair trial: that, after all, is what is meant by the guarantee of a trial 'in due course of law'. The delay may be such that, depending on the nature of the charges, a trial should not be allowed to proceed, even though it has not been demonstrated that the capacity of the accused to defend himself or herself will be impaired. In other cases, the first enquiry must be as to what are the reasons for the delay and, in a case such as the present where no blame can be attached to the prosecuting authorities, whether the court is satisfied as a matter of probability that, assuming the complaint to be truthful, the delay in making it was referable to the accused's own actions."

30. Geoghegan J. commented on the passages quoted as follows:-

> "It is clear from this passage that Keane J. is impliedly acknowledging that different principles may apply to blameworthy delay on the part of the prosecuting authorities. Counsel for the applicant argues that there was such delay in this case.

> I think that counsel for the applicant is clearly correct. It is not acceptable and, in my view, is a breach of the defendant's rights under Article 38.1 of the Constitution for the prosecuting authorities to allow unnecessary delay to occur in a case such as this, involving sexual offences committed many years ago. The necessarily delayed trial is most unfortunate, but it is wholly intolerable that it should be postponed still further due to unnecessary delays on the part of the prosecuting authorities."

31. Kearns J. commented that that case was noteworthy for the fact that the complainant at the time of the alleged offences was aged only 15 or 16 years and the offences were not reported for a further 18 years. The blameworthy prosecutorial delay between the date of complaint in November, 1995 and the arrest of the applicant in April, 1998 was characterised by a Garda investigation conducted, as Geoghegan J. found: "in a lackadaisical and slovenly fashion". Central to the reasoning in this case is the notion that where there has already been a long lapse of time between the alleged delays and the date of complaint, considerable and unnecessary additional delays on the part of the prosecuting authorities are not to be tolerated.

32. Kearns J. went on then to review the case of *P.M. v. Malone* [2002] 2. I.R. 560 in which interference with a right to speedy trial was treated somewhat differently. In that case the court found "significant and culpable delay" to which the accused did not contribute. The court found as a fact that in the particular circumstances of that case the delay would not jeopardise the accused's right to a fair trial but that it had caused unnecessary stress and anxiety to the applicant. Keane C.J. said the following at p. 581 of the judgment:-

> "If this were a case in which it could be said that his ability to defend himself had been impaired and, as a result, there was a real and substantial risk of an unfair trial then, as pointed out by Denham J. in *D. v. DPP* [1994] 2 I.R. 465, the applicant's right to a fair trial would necessarily outweigh the community's right to prosecute. 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. On the other side there is the 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."

33. Kearns J. expressed the view that the balancing exercised referred to by Keane C.J. in *P.M. v. Malone* was the appropriate mechanism to be adopted by a court in determining whether blameworthy prosecutorial delay should result in order of prohibition. He stated that it meant that the applicant for such relief must put something more into the balance where prosecutorial delay arises to outweigh the public interest in having serious charges proceed to trial. Further, while an applicant may assert increased levels of stress and anxiety arising from prosecutorial 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.

34. Returning to the present case, in so far as the applicant seeks to rely upon stress and anxiety the evidence put before me is far from impressive. Stress and anxiety are not always prejudicial phenomena. Everybody experiences some stress and anxiety in their lives. This is part of the human experience. Indeed, a modicum of stress can be a good thing, serving to motivate the individual to achieve a goal or objective. Stress and anxiety can also be bad for one. They can precipitate, or potentially precipitate, serious illnesses such stroke or heart attack, or cause a mental breakdown. Moreover they can be oppressive of an individual to such an extent as to impair his/her performance of mental tasks or of skilled work, or his/her general enjoyment of life. I believe that for stress and anxiety to be taken into the balance in the manner referred to by Kearns J they must be pathological, with entirely negative effects, and seriously prejudicial. In my view these phenomena must exist at the level where they are impinging on a person's right to bodily integrity, in the sense of causing illness, physical or mental (or at least predisposing the person to development of such illness), or of causing significant oppression. In my view the evidence in this case does not remotely approach what is required.

Decision

35. With regret, I must refuse the applicant's claim for prohibition. I do so primarily because I am not satisfied as to the existence of prejudice to the degree necessary to outweigh the public interest in these prosecutions proceeding. I should state that while there has been culpable prosecutorial delay, and that is to be deprecated, nevertheless the extent or degree of delay has not been gross. There has been unacceptable delay but not gross delay. Finally, I have also taken into account that the applicant himself is partially responsible for the delay. I therefore dismiss the applicant's claim and I will hear submissions with respect to costs.