THE HIGH COURT

Record Number : 2005 No. 162 JR

BETWEEN

ROBERT BYRNE

APPLICANT

AND
THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 22nd day of July 2005

1. The applicant faces a charge, arising out an alleged workplace incident on the 3rd March 2003, of assault causing harm contrary to section 3 of the Non-Fatal Offences Against the Person Act, 1997. After the hearing date for the summary disposal of the matter had been adjourned (not for the first time) on the 3rd February 2005, until 13th July 2005, the applicant applied for leave to commence judicial review proceedings for the purpose of restraining the further prosecution of the charge on the grounds that there has been gross, inordinate and excessive delay in bringing the matter to a hearing which violates the applicant's right to a trial with reasonable expedition. That delay is in the order of two years and four months from the date of the alleged offence.

2. The applicant submits that this delay creates a substantial risk that any trial of the applicant would be unfair and therefore not in accordance with law, and furthermore that the length of the delay since the date of the alleged offence is so excessive and inordinate that it necessarily gives rise to an inference that there is such a real risk of an unfair trial.

3. A further ground relied upon in the Statement of Grounds and upon which leave was granted is that the applicant's ability to defend himself against the charge has been prejudiced to a degree which is constitutionally impermissible.

4. The applicant submits that he has at no stage contributed to or caused the delay of two years and four months. He says, first of all, that the complainant himself delayed in making a decision to pursue the matter of a prosecution of the applicant. He also submits that there has been what I will refer to as 'system delay' on the part of the organs of the State in providing him with a hearing of the charge against him within a reasonable time.

5. I will set out the brief chronology of events which have resulted in this passage of time.

6. The alleged offence occurred on the 3rd March 2003. It was not until the 29th August 2003, that a summons was issued against the applicant, almost six months after the date of the alleged offence

7. The return date for this summons was the 13th February 2004, almost one year after the date of the alleged offence.

8. On that return date the matter was adjourned until the 11th March 2004 as the respondent had not yet provided the necessary direction to have the matter dealt with summarily.

9. On the 11th March 2004, that direction was available, but the matter was further put back to the 2nd April 2004 so that arrangements could be put in place to have video facilities in place as some of the trial would involve the viewing of some security video footage.

10. On the 2nd April 2004 a date was fixed for the hearing of the charge on the 8th September 2004 (half a day being set aside for the case), being one year and six months after the date of the alleged offence.

11. However on the 8th September 2004 the case was not heard as the District Judge assigned to the case was required to deal with other matters in another court in the Richmond Hospital Court complex. The case was once more adjourned, and this time to the 3rd February 2005, almost two years after the date of the alleged offence.

12. On the 3rd February 2005, the case as again not heard as the District Judge assigned to hear the case was again required to deal with other work, and the matter was further put back for hearing until the 13th July 2005. By that date lapse of time would have been in the order of two years and four months in respect of a matter which, although an indictable offence, was one deemed appropriate for summary disposal in the District Court.

13. It must be borne in mind also, given that the applicant has acted with due expedition in relation to these proceedings for judicial review, that if the Court did not restrain the further prosecution of this charge against him, the matter might be at a minimum yet another six months in the system prior to its disposal.

14. Conor Devally SC has referred the Court to a number of cases which he submits supports the view being put forward in this application that the delay which has occurred is such that the further prosecution of the applicant should be restrained on the basis that the applicant's right to a reasonably expeditious hearing has been breached and that therefore any hearing of the charge would not be a hearing in due course of law, as he is entitled to by virtue of Article 38.1 of the Constitution.

15. It is submitted that it is undisputed that the applicant has not contributed in any way to these lengthy delays, and that the prosecuting authorities had all the statements which they needed and the CCTV footage at a very early stage and that there was o reason other than, first of all, the complainant's own delay in deciding to press the charge, and secondly the various delays coming under the heading of system delay. There is no real contest the respondent about this assertion. The issue turns really on how the case law which has developed in this area should be applied to this particular case. Each case must of course turn on its own peculiar facts, and I have set out in detail the various matters which are relevant in that regard.

16. In particular, Mr Devally has referred the Court to, and relies upon the judgment of O'Neill J. in *Director of Public Prosecutions v. Arthurs* [2000] 2 ILRM 363; and also to the judgment of Hardiman J. in *Maguire v. Director of Public Prosecutions* [2005] 1 ILRM 53, in which, Mr Devally submits, the learned judge of the Supreme Court approved of the reasoning of O'Neill J. in Arthurs.

17. In his helpful written submissions, Mr Devally has drawn attention to a number of passages from Arthurs indicating that after a careful and thorough analysis of the authorities, the learned judge was satisfied that in a case of a clearly excessive and inordinate delay, it is not necessary that the applicant should have to go so far as to show actual prejudice, but that because of the difficulty of doing so with accuracy or precision, the Court can infer prejudice arising to the applicant because of the length of the delay, and

perhaps other factors such as the nature of the case and the evidence likely to be adduced. The learned judge stated at page 371 of his judgment:

> *"In the present case the delay from the time of the offence to the trial was two years and three months approximately. For summary proceedings a delay of this length is well beyond what would be considered on any view to be an appropriate time frame in which a summary trial should be completed and is in my opinion inordinate and excessive."*

18. The learned judge went on to remark that where there was an initial delay up to the commencement of the prosecution, the authorities had to be particularly vigilant to ensure that further delays in having the matter disposed of were eliminated. That remark seems particularly apt in the present case.

19. At page 376 of his judgement, O'Neill J. stated:

> *"If it is the case that an accused person has a right under the Constitution to a speedy or expeditious trial, a necessary corollary of that right is that there rests upon the State a duty to ensure that all reasonable steps are taken to ensure such a speedy trial is provided. This must necessarily mean conducting the investigation and prosecution in a manner which, in so far as it is reasonably practicable, eliminates unnecessary delay, and must additionally mean that such resources as are necessary for the orderly and expeditious processing of criminal cases through the courts are provided."*

20. At page 377, he stated further:

> *"A failure on one occasion to get a trial on because of an overcrowded court list could be said to be an unfortunate mishap, not necessarily involving any fault on the part of the State. Where, as in this case, this mishap is repeated two further times, the inference that these delays are the result of a failure on the art of the State to have provided adequate resources so that the District Court could deal with the cases before it in an expeditious manner is inescapable."*

21. Tom O'Malley BL on behalf of the respondent, on the other hand, submits that the applicant must, and has failed to in this case, demonstrate that the undoubted lapse of time has in any way resulted in a real risk of an unfair trial. He accepts that of course a speedier trial than would occur in this case is desirable, but without specific and demonstrated prejudice the applicant ought not to be able to obtain the relief he seeks in this application. Mr O'Malley has referred the Court to a number of cases in which the failure by the applicant to satisfy the Court that he was prejudiced by the delay had resulted in the refusal of the relief being sought. For example, he referred to the judgment of McGuinness J. in *Mulready v. DPP* [2001] 1 ILRM 382 in which the applicant was charged with summary offences. In that case, the learned judge found that the only period of delay within a total lapse of time of two years, was a four month period. The learned judge also stated, following a number of cases referred to by her, that "*where delay is alleged as a ground for prohibition, the overall period of delay must be broken down and examined in at least some detail.*" Having examined the periods of delay in that case and having formed a view on which party bore the responsibility for same, the learned judge went on to say:

> *"I accept that a summary case is a summary case and it should be brought on more quickly than a trial on indictment. I nevertheless do not think that a gap of 21 months, particularly when only roughly four months of that was due to the fault of the State, is sufficient to raise an inference that the risk of an unfair trial has been established as a reality."*

22. This Court was also referred by Mr O'Malley to the judgment of O'Caoimh J. in *Carey Finn v Director of Public Prosecutions* [2003] 1 ILRM 217. In that case involving a delay of two years and two months from the date of the offence, there had been no delay at the outset commencing the prosecution, and obtaining a date for the hearing. There was some difficulty in arranging prosecution witnesses for that date and adjournments were granted and this was delay for which the respondent had to be attributed blame. O'Caoimh J. found that the applicant had not established prejudice as a result of this delay and neither was the delay of such a magnitude as to raise an inference that a risk of an unfair trial had been established. The judge was also critical to an extent of the applicant who had delayed to some extent in the commencement of the judicial review proceedings themselves.

23. The dividing line between the cases referred to by Mr O'Malley on the one hand and Mr Devally on the other involves the extent to which actual prejudice must be established by the applicant, especially in a case where the length of the delay and all the circumstances in which it arose do not give rise to an inference of prejudice. The most recent judgment to which the Court has been referred is that of Hardiman J.(with whom Geoghegan J. and McCracken J. concurred) in the Supreme Court in *Maguire v. Director of Public Prosecutions* [supra] . In that case Hardiman J. considered, albeit in the context of a bail application, whether delay in the commencement of a trial was restricted to a consideration of culpable delay on the part of the prosecution. He considered that it ought not to be so restricted, and in coming to that conclusion he referred to the judgment of O'Neill J. in *DPP v. Arthurs*, to which I have already referred. In that case, as I have already referred to, much weight is attached to the duty upon the State to provide a system for the administration of justice, through the adequate provision of resources, which discharges the State's duty to vindicate, as far as practicable, the citizen's right to an expeditious disposal of charges brought against him or her.

24. I am of the view that the delay in the present case, both in terms of its overall length and the fact that no part of that period can be blamed on any action or lack of it on the part of the applicant, gives rise to an inescapable inference that the applicant is prejudiced, especially where the greater part of the delay is caused by a system which was unable to provide a trial within a reasonable time.

25. My view is informed also by the development in recent years of the jurisprudence adverted to by O'Neill J. in Arthurs, that there is a duty on the State, albeit a duty shared with the parties to the litigation, be it criminal or civil in nature, to ensure as far as practicable that matters are disposed of without unnecessary and blameworthy delay on the part of the authorities in a broad sense.

26. However, where as in this case, no blame can be attached to the respondent or staff working under his direction, or to members of An Garda Siochana in the manner and time frame within which they investigated the complaint, but rather the delay is as in this case to a large extent a system delay due to the inability of the system to provide a hearing of the charge within a reasonable time in all the circumstances, this delay cannot be a means of escape for the prosecution from the inference that there has been a prejudice to the applicant. All agencies and organs of the State have to play their part in the vindication of the applicant's constitutional rights. In the present case there is also the initial delay in having the summons brought, and this arise I am told because of a delay on the part of the complainant in making a decision as to whether the charge should be brought. That too is delay which must inure to the benefit of an accused in the overall weighing of the competing rights in this case. It is also a delay which ought to have ensured that, where there had already been some delay in bringing the matter forward initially, this case did not suffer the sort of delays which

bogged it down thereafter.

27. When one looks at the reasons for some of the delay, and indeed the major part of the delay in this case, which has resulted from pressure of work paced on the District Judge on the day set for the hearing of the applicant's summary trial – a day on which half a day was set aside and on which special arrangements were made for the viewing of video evidence – one must be drawn inevitably to the conclusion that whether a person's constitutional right to a hearing of a charge against him or her within a reasonable time, being thereby a trial in die course of law, is a matter of chance or even accident. In such a system, where lies the guarantee of that constitutional right? It goes without saying that some allowance must be made for the imperfect world which the law and the administration of justice inhabits. It is as liable to the occasional mishap, human error, or accident as any other walk of life, and a reasonable allowance must inevitably be extended to the prosecution authority in all its guises to take account of these factors in a fair way, so that the smallest hiccup in the system does not unreasonably interfere with the other competing constitutional right in these situations, namely the right of the public at large to have persons brought to trial and dealt with for offences alleged against them.

28. But the present case is far removed from such a situation. Here we have delay upon delay for no reason other than firstly some dilatoriness on the part of the complainant, but thereafter a litany of delay caused by a system in the District Court which appears at least in the present case, but I fear also in many more, where the workload in that Court was such that a case such as this, specially fixed for hearing many months previously, could not be heard because there was no judge available. This happened on more than one occasion and for similar reasons, greatly adding to existing delay up to that point. This cannot be acceptable as a system for administering justice, and if the Court was to refuse relief in such a case, it would serve only to condone such a system and to place the burden of such inefficiency on the applicant rather than on the State who is best placed to bear it, being the party in a position to do something about it in the way that it organises itself.

29. This is not a case in which the applicant has been shown to have not cooperated with the authorities in the matter of the matter complained of. At all times he has been available and ready to have the matter proceeded against him. I consider that where the reason for the delay is that put forward in this case – system delay for the most part – the Court can regard the period of two years and four months more seriously than where the same delay may have occurred for more excusable reasons. In other words, there could be, and indeed there have been shown to be, cases where a delay of this order may not entitle the applicant to an order restraining his further prosecution. But where there has been the sort of utterly culpable delay, as in this case, it is open to the Court to infer prejudice, even where the applicant may not have even attempted to demonstrate any. The applicant has simply averred in his grounding affidavit that he contends that because of the delay his trial will be unfair. He has not gone on to say in what way the unfairness will or may manifest itself.

30. I would be prepared to say in the present case that the length of the delay itself when combined with the reasons for same, results in a situation where, of itself and without either actual prejudice being made out or even inferred, there has been a breach of the applicant's right to an expeditious hearing of the charge, a right independent of the right to a fair hearing, such that his further prosecution ought to be restrained. Indeed, I note that in his learned and comprehensive judgment in Arthurs, O'Neill J. referred to the judgment of Finlay CJ in *DPP v. Byrne* [1994] 2 IR 236 where at page 245 the learned Chief Justice stated as follows in the context of a summary offence:

> *"……instances may occur in which a delay between the date of the alleged commission of an offence and the date of a proposed trial identified as unreasonable would give rise to the necessity for a court to protect the constitutional right of the accused by preventing the trial, even where it could not be established either that the delay involved an oppressive pre-trial detention, or it created a risk or probability that the accused's capacity to defend himself would be impaired. This must lead of course to a conclusion that, on an application to prohibit a trial on the basis of unreasonable delay, or lapse of time, failure to establish actual or presumptive prejudice may not conclude the issues which have to be determined."* (emphasis added)

31. I am of the view that the burden resulting from delay or lapse of time – system delay in particular – need not one, in an appropriate case, which ought to be borne by way of an onus upon an applicant, who complains about it, to establish prejudice or an inference of prejudice.

32. Delay of the kind established in the present case is one caused by the lack of a sufficiently resourced District Court which has shown itself, even allowing a reasonable measure of allowance for normal and expected human and system frailty, unable to deal adequately with its workload.

33. This leads me to another matter which is worth consideration. Among the constitutional rights which a person enjoys are the right to a fair trial, and a right to a trial in due course of law, which includes a trial which is reasonably expeditious in all the circumstances. Each is an independent right, though where a specific prejudice can be shown arising from an excessive delay, that delay can impinge on the right to a fair trial also. To that extent there can be, but need not be, an overlap.

34. But the right to an expeditious hearing is an independent right, and in my view one which does not require a specific prejudice to be made out in order to make out a breach thereof. That is recognised by the acknowledgement that in certain circumstances prejudice can be inferred. But prejudice is often considered only in the context of an impairment to the ability to defend against the charge brought. If prejudice is so confined, it does not in my view properly acknowledge the importance of other factors at play in the context of delay. If a person has a constitutionally recognised right to an expeditious hearing of a charge brought against him or her, and such has not occurred, it is hard to see why the onus should be on the person charged to establish prejudice in order to have that right to an expeditious hearing vindicated, as opposed to his or her right to a fair trial.

35. One of the other factors at play is the effect on a person charged with an offence of having the matter hang over them for a long time. Every person charged with an offence enjoys the presumption of innocence until convicted. It is only right, in the light of that fact, that the Court's consideration should be in the context of a person who has not been so recidivist in his behaviour in the times past as to have become immune to the effects of having charges brought against him or her. It must be assumed for these purposes that a person has a life to lead, whether a family life, a business or employment life or whatever, and that there is an onus on those who seek to prosecute charges to do so in as short a timeframe as is reasonable, so that any charge which has the capacity to lead that life normally, is interfered with to the least extent reasonably possible. This question of the effect of charges hanging over a person has been referred to in some of the judgments to which I was referred. For example, Ms. Justice McGuinness referred to it in her learned judgment in *Mulready v. DPP* (supra) in the following way at page 388:

> *"With regard to pre-trial anxiety and concern, it is, of course, clear that anyone who is facing up to a criminal charge, whether summary or indictable, is going to suffer from pre-trial anxiety and concern, and it is, of course, desirable that*

that should be as short as possible. However, the length of time that has elapsed in this particular case is really not enormously long compared with, for instance, persons facing trials on indictment in the Central Criminal Court on rape or murder charges, which are serious charges giving rise to more pre-trial anxiety and concern."

36. I would just comment that in the present case that the applicant by electing, as was his right, to have the matter dealt with summarily, and to which course the respondent consented, made a choice which had the reasonable expectation attached to it that it would be dealt with in a manner which was immeasurably faster and less formal than a trial on indictment. In that expectation he was sadly disappointed.

37. This question of pre-trial anxiety was also the subject of observation by Kelly J. in his judgment in *McKenna v. The Presiding Judge of the Dublin Circuit Criminal Court and the DPP,* (unreported) High Court, 14th January 2000, where the learned judge commented as follows:

"I have no doubt but that any person facing criminal charges suffers anxiety and concern. The present case is no exception in that regard. The applicant however on his own evidence was from the end of 1994 until June 1998 'firmly of the view that no prosecution was being proceeded with'. Accordingly, little anxiety concerning an imminent prosecution was suffered by him during that period in respect of which the complaint of delay is now made……"

38. There is no such situation in the present case, since from a very early stage the applicant was aware that the process of prosecution was under way.

39. Without wishing to overstate the extent of the anxiety and strain which a prosecution will be presumed to cause, even in relation to a summary charge, or an indictable charge being dealt with summarily, and of course bearing in mind that each case must be considered on its own individual facts and circumstances, the number of times that the present applicant turned up in court for his trial only to find that it could not take place, just be assumed to have caused him great anxiety and in my view sufficient o constitute an oppressiveness which, were this delay being considered in the context of an application for discharge under s. 50(2)(bbb) of the Extradition Act, 1965, as amended, might well be regarded as delay rendering it oppressive to return the applicant to the requesting state.

40. I therefore grant the relief sought by the applicant at paragraph D 1 of his Statement of Grounds filed herein.