Neutral Citation Number [2007] IEHC 135

THE HIGH COURT

[2006] No. 808 J.R.

DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND
JUDGE BRIAN SHERIDAN

RESPONDENT

AND
PAUL O'BRIEN

NOTICE PARTY

Judgment of Mr. Justice Feeney delivered on 2nd day of March, 2007

1. I am now in a position to give judgment in this case which was heard earlier this week. The Applicant herein seeks an order of certiorari quashing the order made by the Respondent on 2nd June 2006 dismissing the three summonses against the Notice Party in respect of the attempted evasion of vehicle registration tax and VAT in respect of the motor vehicle 03 D 71900 on the basis of delay.

2. The summonses were dismissed on the grounds of delay. It is alleged by the Applicant that the Respondent's decision was irrational and contrary to law on the following grounds:

3. Three grounds are identified.

> 1. The decision to dismiss the prosecution was irrational based on the facts of the case and in particular having regard to the length of the delay, the chronology of events, the complexity of the prosecution, and the absence of any credible claim of actual prejudice;
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> 2. The Respondent erred in law in dismissing the prosecution on the basis of delay having regard to the length of the delay, the chronology of the events, the complexity of the prosecution and the absence of any credible claim of actual prejudice;
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> 3. The Respondent erred in law and acted irrationally in dismissing the prosecution where he had not heard any of the evidence in the case in circumstance where all of the prosecution witnesses were present in court and where the Notice Party's legal team had not given any notice that they intended to raise the issue of delay.

4. The grounds can be summarised as follows:

> (a) Irrational;
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> (b) An error in law due to length and absence of credible actual prejudice;
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> (c) Erred in law and actually irrational in dismissing without hearing evidence.

5. The chronology of what occurred is as follows:

> 1. 20th January 2004 is the date of the alleged offences;
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> 2. 29th April 2004 is the date when the file was referred to the Customs Investigations Division;
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> 3. May of 2004 is the date when the Applicant's car was detained and he was interviewed. The vehicle was also seized in this month on 20th May 2004, and that is also the date upon which the Notice Party e-mailed an explanation of events;
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> 4. In June 2004 the vehicle was released on certain payments being made;
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> 5. In the period from May to September 2004 statements were taken from various potential witnesses;
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> 6. In November 2004 the investigation had concluded and a file was sent to the Revenue solicitors;
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> 7. On 7th January 2005 the file was sent to the Director of Public Prosecutions;
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> 8. On 18th January 2005 the Director of Public Prosecutions directed a prosecution;
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> 9. On 19th January 2005 the summonses were applied for;
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> 10. On 13th June 2005 a return date for the summons was in court and a trial date of 15th December 2005 was fixed, it being estimated that the case would take an entire day;
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> 11. On 15th December 2005 there was no judge available to hear a full one-day case and the case was adjourned to 2nd June 2006;
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> 12. On 2nd June 2006 the case was dismissed after the issue of delay had been raised. Certain particular or key periods can be identified from the above chronology:
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> Firstly, it appears that there was a six-month period for the investigation from May 2004 to November 2004.
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> Secondly, there appears to have been an eleven-month period from the issue of the summons to the first fixed hearing date on 15th December 2005.
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> Thirdly, there was a six-month delay from the first hearing date to the adjourned hearing date on 2nd June 2006. On that date the prosecution were ready to proceed with all witnesses in attendance. That had also been the position on 15th December 2005.

6. The Notice Party had been charged with three offences, two of which had a time limit of ten years and one which required to be commenced within twelve months when prosecuted in the District Court. Section 1078 of the Taxes Consolidation Act permitted of a ten-year time limit in relation to two of the charged offences.

7. Factually what occurred in the District Court on 2nd June 2006 leading to the dismissal due to the delay is relevant in considering the issues in this case.

8. On 2nd June the case came on for full hearing before the Respondent. The prosecution was ready to proceed with ten witnesses present. At the commencement of the hearing, counsel for the Notice Party herein, that is the defendant in the District Court, raised what was identified as a preliminary point in relation to the issue of delay and expressly relied on the High Court decision of *Director of Public Prosecutions v. Arthurs* [2000] 2 ILRM 363.

9. The legal representative of the prosecution was unaware of such an application until it was made and was unprepared to deal with the delay issue. The Respondent permitted the prosecution's legal representative a short period of time, by means of an adjournment, to return to the office to obtain certain legal authorities.

10. The prosecution's representative when the case was later taken up indicated that it was for the Notice Party accused to establish the issue of delay and that the same was a question of fact. Legal argument supported by oral submissions but absent any evidence took place. The legal argument included extensive reference to case law.

11. Counsel for the Notice Party, that is the accused, submitted that the statements of evidence had been furnished to the defendants under a Gary Doyle order. He submitted it was clear from these statements that at the time the application for tax relief was made, there was an interview with the Notice Party on 20th January 2004 where certain matters were alleged to have been stated by the Notice Party.

12. It was said that his client disputed the content of that interview. He said there was no contemporaneous notes of that interview in the papers furnished, and therefore he submitted that his client had been prejudiced by the lapse of time from the date of that interview in relation to what was said at the interview.

13. That is the full extent to which any attempt was made to identify real or actual prejudice, and it was done by means of submission and not by means of evidence. In reply it was submitted by the lawyer representing the State that the position was such that what was said at the interview was not in issue in the case. It was further submitted that there was other evidence besides the interview with the Notice Party on 20th January 2004 and that in any respect the evidence in the case was primarily documentary evidence.

14. The Respondent rose to consider the matter and requested copies of two recent authorities. After a short period of time, the Respondent returned to court and stated that having read the cases and heard the submissions of the Notice Party's counsel, he was dismissing the charges as he was satisfied that there had been delay in the case.

15. The Notice Party to these proceedings in a replying affidavit set out in some further detail what was said by the Respondent and that has not been contested in any replying affidavit.

16. In that affidavit it was indicated that the Respondent, when he was ruling on the matter, indicated that the accused had established that there had been inordinate and inexcusable delay between the date of the alleged offences and the trial date such as to breach the right to an expeditious summary trial irrespective of the issue of express or implied prejudice by reason of delay.

17. The Respondent also stated that there was a risk that the accused in the District Court might be prejudiced in the conduct of his defence by reason of the delay and the failure to record any contemporaneous notes of the interview on 20th January 2004.

18. This is an application for judicial review by the Applicant. It is not and cannot be an appeal from the Respondent. Nor is it, and there was no application for same, a case stated pursuant to Section 2 of the Summary Jurisdiction Act 1857 as extended by Section 52(1) of the Courts Supplemental Provisions Act 1961. The Applicant takes the onus of establishing that the Respondent acted irrationally or erred in law.

19. The issue of the delay in criminal proceedings, albeit non-summary proceedings, has been comprehensively reviewed by the Supreme Court in recent years. From those authorities certain principles have been set out which are of assistance to this Court in considering summary criminal proceedings.

20. Firstly, it is only in exceptional cases that a criminal trial should be prohibited rather than determined on the merits.

21. It is the case that the effect of the Respondent's decision to dismiss on grounds of delay is equivalent to a prohibition and the same inherent principles would appear to apply and the same competing interests must be considered.

22. In a Supreme Court decision of *DC v. Director of Public Prosecutions* [2005] 4 IR 281, Denham J stated at page 283 as follows:

> "…bearing in mind the duty of the courts to protect the constitutional rights of all persons, in exceptional circumstances the Court will intervene and prohibit a trial. In general such a step is not necessary as the trial judge maintains at all times the duty to ensure due process and a fair trial. The basic assumption to apply in relation to all pending trials is that they will be conducted fairly under the presiding judge. However, in circumstances where there is a real or serious risk of an unfair trial, the courts will intervene so that a defendant may not be exposed to the commencement of the process, it being the assumption that should such a trial commence it would be stopped by the direction of the trial judge because of the real or serious risk of an unfair trial.
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> It is this exceptional jurisdiction which the Applicant wishes to invoke. Such a jurisdiction to intervene does not apply where the Applicant has minutely parsed and analysed the proposed evidence and sought to identify an area merely of difficulty or complexity. The test for this Court is whether there is a real risk that by reason of the particular circumstances that the Applicant could not obtain a fair trial."

23. Secondly, from the recent Supreme Court authorities a further principle can be identified. From the above not only is the prohibition to be permitted only in exceptional cases but also the courts must protect the constitutional rights of all persons.

24. Thirdly, the prohibition or stopping of a trial should not in general be permitted as the trial judge can ensure during a hearing that there is due process and a fair trial.

25. Fourthly, the Court must identify a real risk of the trial being unfair. One of the issues in this case is whether the District Court followed a course of action or procedure which allowed or properly allowed such identification to take place or alternatively relied on argument and assertion rather than evidence. The Respondent's decision was made without evidence notwithstanding that all witnesses were present.

26. In *Director of Public Prosecutions v. Colm O'Sullivan* unreported High Court decision of 11th October 2005, Dunne J stated at page 7 of 8 as follows:

> "It is appropriate to note that there is a distinction between this case and the Arthurs case in that the appeal by way of case stated herein necessarily took place after the conclusion of the hearing of the trial. Accordingly the trial judge had the advantage at that point in time of having heard all the witnesses in the case."

27. In circumstances where the Respondent was addressing his mind to delay by reference to inordinate and inexcusable delay and to the issue of prejudice, it is of importance that the same was done without evidence relating to any possible excuse or identification of any precise prejudice.

28. The Supreme Court recently clarified the correct legal approach to delay. In particular prosecutorial delay in PM v. Director of Public Prosecutions unreported judgment of 5th April 2006. Kearns J in giving the judgment identified that the approach to delay was that even where there is blameworthy delay, an Applicant asserting delay so as to avoid a trial must satisfy the Court that such Applicant has suffered or is in real danger of suffering some form of prejudice as a consequence of the delay in order to prohibit the trial.

29. Kearns J during his judgment quoted from *PM v. Malone* and the judgment of Keane CJ reported in [2002] 2 IR 560 at 581 where Keane CJ stated:

> 'Where, as here the violation of the right has not jeopardised the right of 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 a 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.

30. Kearns J continuing in his judgment stated at page 8 of 10 as follows:

> "I believe that the balancing exercise referred to by Keane CJ in PM v. Malone is the appropriate mechanism to be adopted by a court in determining whether blameworthy prosecutorial delay should result in an order of prohibition. It 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. In most cases pre-trial incarceration will not be an element as an Applicant will probably have obtained bail pending his trial. Secondly, while he may assert increased levels of stress and anxiety arising from prosecutorial delay, any balancing exercise would 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 a trial. As part of the balancing exercise it should also be borne in mind that an order of prohibition may not be the only remedy available in such circumstances. A court may have the ability to direct that a particular trial be brought on speedily and be given priority, although precisely how this would be policed or operated in practice may be problematic."

31. On the facts of this case there was no issue raised whatsoever before the District Court concerning stress or anxiety. It is raised before this Court. Further, the possibility of dealing with any potential prejudice by means other than dismissing the case was not addressed notwithstanding the presence of all the witnesses.

32. The Supreme Court further visited the issue of delay, albeit in a sex-delay case of great antiquity, in *H v. Director of Public Prosecutions* unreported case of 31st July 2006. Murray CJ stated in that case as follows:

> "…the Court is satisfied that it is no longer necessary to establish such reasons for the delay. The issue for the Court is whether the delay has resulted in prejudice to an accused so as to give rise to a real or serious risk of an unfair trial. The Court would thus restate the test as the test is whether there is a real or serious risk that the Applicant by reason of the delay would not obtain a fair trial or that a trial would be unfair as a consequence of the delay. The test is to be applied in the light of circumstances of the case."

33. The Chief Justice further stated in the same case:

> "Thus the first inquiry as to the reasons for the delay in making a consequence, any question of an assumption which arose solely for the purpose of applications of this nature of the truth of the complainant's complaints against an applicant longer arises. The inquiry which should be made is whether the degree of prejudice is such as to give rise to a real or serious risk of an unfair trial. The factors of prejudice, if any, will depend upon the circumstances of the case. There is no doubt that difficulties arise in defending a case many years after an event, however, the courts may not legislate. The courts may not take a policy decision that after a stated number of years an offence may not be prosecuted. Also, legislature has not itself established a statute of limitations, that itself may be viewed as a policy of the representatives of the people, thus each case falls to be considered on its own circumstances."

34. It is therefore of some relevance that on the facts of this case, two of the three charges in respect of which the Notice Party was being prosecuted in the District Court had a ten-year time limit provided by statute.

35. These recent Supreme Court cases all postdate the decision in Arthurs and while certain different principles apply in relation to delay in summary trials, it is clear that the emphasis on the importance of prejudice in considering whether to stop a criminal trial is now clearly established.

36. The Notice Party in this case relies on the decision and approach of the High Court in *Director of Public Prosecutions v. Arthurs* [2002] ILRM. Particular reliance is placed on four statements within that judgment.

37. Firstly, O'Neill J stated:

> "The selection of certain offences as suitable for summary trial in the District Court carries with it the implication inter alia that the time scale for the completion of such trials are generally to be shorter than in respect of trials on indictment."

Secondly,

> "In the present case the delay from the time of the offence of 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 timeframe in which a summary trial should be completed and is in my opinion inordinate and excessive."

Thirdly,

> "the first of these tests is that the accused person must show that he has or is likely to suffer an actual, specified prejudice or that the length of delay is so inordinate or excessive as to give rise to a real risk that the trial will be unfair. Where an accused person satisfies the above test, it would seem to me that regardless of what reasons may be advanced by the prosecution to justify the delay, be they good or bad, that the accused person's right to an expeditious trial would necessarily be infringed and hence the accused's constitutional right to an expeditious trial is to be preferred against the right of the community to prosecute the alleged offence."

Fourthly,

> "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 is that there rests upon the State a duty to ensure that all reasonable steps are taken to ensure that such a speedy trial is provided. This must necessarily mean conducting the investigation and prosecution in the manner which insofar 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 trials throughout the courts are provided."

38. There are a number of significant matters which need to be considered in the application of those statements to this case.

39. Firstly, the Supreme Court has made it clear that the emphasis must be directed towards prejudice in cases of delay. Therefore the reference by O'Neill J to a person showing that he has or is likely to suffer an actual specified prejudice is of particular importance. This is clearly the central matter for consideration. The courts have shown a reluctance to infer prejudice. It is the person seeking to rely on delay seeking to stop a trial who must satisfy the test of showing real prejudice or the risk of real prejudice.

40. Secondly, the proceedings in this case were not just standard summary proceedings that require to be brought within twelve months but included two charges with a ten-year time limit. This limit recognised the potential complexities of tax-type cases and clearly was a factor to be considered in relation to the time scale for the completion of trials.

41. Thirdly, in considering the issue of excessive delay one should have regard to not only the nature of the charges but also to any explanation available, if appropriate, by evidence to explain delay.

42. Fourthly, on the facts of this case any systemic delay could only relate to the time needed to obtain a full day's hearing and the further time needed to refix such hearing.

43. The duration of a summary trial is a factor to consider in addressing a failure of systems. In considering Arthurs, Dunne J in *Director of Public Prosecutions v. Colm O'Sullivan* as (Unreported, Judgment of 11th October, 2005) page 8 of 8 stated as follows:

> "In relation to the application of the second test enumerated by O'Neill J, I do not think it is a matter simply of looking at the time element involved. As he indicated, one must look at the causes for the delay or reasons or excuses that are advanced in order to justify the delay. In this regard it seems to me that it is worth reiterating the first principle identified by O'Neill J, namely that as an accused person has a right to a reasonably expeditious trial, the corollary of that right is that there is a duty on the State to make adequate provision to ensure that an accused person can have an expeditious trial. Thus one must look again at the reasons for delay advanced in the particular case. It does not seem to me that this is a case in which there was a systemic failure on the part of the State to make adequate provisions for the hearing of the cases. In relation to the first hearing date, it was postponed in advance in somewhat unusual circumstances, that is the holding of a judges conference on the relevant date. The trial date in this case was fixed on the return date, namely 14th March 2003. It is unfortunate that the trial date given coincided with the holding of the judges conference but this was an unusual circumstance and it is as likely as not that at the time of the fixing of the trial date the date for arranged. Thereafter the second trial date was fixed which unfortunately due to an administrative mix-up led to both sides being disappointed when they turned up for hearing on 28th June 2004 even though the case had in fact been listed for 29th June 2004. The case was then listed and heard on 23rd September 2004. Accordingly there was an appropriate reason for the postponement of the first hearing date and the accused was properly notified in advance of the adjournment. The delay caused on the second hearing date was most unfortunate but could hardly be considered as a systemic failure on the part of the State to make adequate provision for an accused to have an expeditious trial. I fully accept that there has been an excessive delay in this case but nonetheless I am not of the view that as a consequence of that delay that there has been an invasion of the accused's constitutional right to an expeditious trial."

44. This Court is satisfied that the decision to dismiss this case given its complexity, the chronology, the availability of all witnesses on two occasions including the date of dismissal, the absence of any enquiries as to the reasons for the delay, the circumstances of the need for a full day to be set aside, the time period provided for in the Tax Acts, and the absence of any proved prejudice being proved and a disregarding of the capacity to deal with any unfairness during a trial which could have taken place on the same day all lead to the conclusion that the decision to dismiss was irrational.

45. Further, in relation to the finding concerning prejudice, this Court is satisfied that such finding was not based on any evidence and there was no basis for finding that the Notice Party had established or proved any real risk to a fair trial and that there was no basis for any such inference.

46. In the case of *Gill v. DJ Peter A Conolon* [1987] 1 IR 541, Lynch J stated at pages 547 and 548 as follows:

> "In these circumstances I have decided what is the proper order for the High Court to make on this application for

> certiorari by way of judicial review. An application for certiorari by way of judicial review is not to be regarded as a readily available alternative to an appeal by way of rehearing to the Circuit Court. See *State (Roche) v. Delap* [1980] IR 170. The ordinary remedy for a person who is dissatisfied with a District Court decision is to appeal to the Circuit Court where a complete rehearing will take place. Alternatively, if the facts of the case are not in issue but a point of law arises then an appeal by way of case stated to the High Court is appropriate. In the present case, however, both facts and law are in issue. Neither the facts nor the law have been adequately heard in the District Court. On an appeal to the Circuit Court therefore the appeal could hardly be said to be by way of rehearing. The case would more truly be heard for the first time. The Applicant and the solicitor would be deprived of the possible advantage of having gone over the whole facts in law and of having heard the submissions and cross-examination of the prosecuting Superintendent in the District Court."

47. It is quite clear that the access to the judicial review remedy of certiorari in cases such as this should only be granted in particular and special circumstances. However, on the facts of this case, given that both facts and law are in issue and also given what occurred, this Court is satisfied that this is one of the appropriate cases in which to grant judicial review.

48. In this case the issue of prejudice was a matter of fact which could have been considered by evidence rather than assertion. To conclude that the Notice Party had established prejudice in the absence of evidence and when all the evidence was available to the Court given that the witnesses were present was to err in law.

49. The district judge, the Respondent, could firstly have proceeded with the case to ascertain factually if there were any excuses for any of periods of delay, and secondly, the Respondent could have heard the evidence so as to ascertain if there was any real prejudice and deal with such if and when it arose or if or when it was established as part of the trial process. Thirdly, to proceed without hearing evidence and to determine that there was inordinate and inexcusable delay in circumstances where all the witnesses were present and where explanations could or might have been proffered in relation to an excuse for any particular period of delay was to err in law.

50. In the light of the above findings, the Court is satisfied that an order for certiorari should be made quashing the order of the Respondent in that the decision to dismiss was irrational and that the Respondent erred in law in failing to establish by evidence the existence of real prejudice prior to concluding that the case should be dismissed.