Neutral Citation: [2015] IEHC 302

THE HIGH COURT
JUDICIAL REVIEW

[2013 No. 955 JR]

BETWEEN

PHILOMENA COTON

APPLICANT

AND
THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Kearns P. delivered on the 21st day of May, 2015

In these proceedings the applicant seeks prohibition of her trial before the Central Criminal Court where she stands charged with unlawfully and maliciously causing grievous bodily harm to her husband Christopher Payne with intent to murder him and also with unlawfully and maliciously causing grievous bodily harm to her said husband with intent to do grievous bodily harm. Ancillary reliefs by way of declaration and stay are also pursued.

Having regard to the fact that the incident giving rise to the criminal prosecution occurred on the 13th May, 1988, and having regard also to the subsequent progress of the investigation and prosecution, the applicant seeks relief on grounds of prosecutorial delay.

The respondent contests this claim and has raised by way of preliminary issue the applicant's own delay in bringing this prohibition application in circumstances where the return for trial was ordered on the 20th February, 2013 but no application for relief by way of judicial review then followed until the 18th December, 2013. It is argued that no explanation for the delay was offered to the High Court on the making of the leave application and no application to extend the time provided for by Order 84, rule 21 for bringing such an application was made until the matter came on for full hearing before this Court.

In arguments advanced before this Court, an issue has arisen as to the date or time when the period provided for by Order 84, rule 21 of the Rules of the Superior Courts (Judicial Review) 2011 (S.I. No. 691 of 2011) commences to run in the case of an application for prohibition of a criminal trial. A further consequential issue is whether or not an issue of delay should be dealt with by the High Court at the leave stage or, in the alternative, as a discrete preliminary issue which, if resolved against an applicant, would dispose of the matter in its entirety.

Having regard to the importance of having some clarity on these points, the Court sought and was given evidence with regard to the relevant time periods which, following the bringing of charges for a criminal offence, may be seen to apply for the taking of certain steps in the criminal process, steps which include service of the Book of Evidence, the return for trial and the service upon an accused person of an indictment.

TIMELINE OF EVENTS IN THE PRESENT CASE

On the 13th May, 1988, the prosecution allege that four men entered the applicant's home and administered a serious beating to the applicant's husband, Christopher Payne Snr. while he lay sick in bed. The prosecution maintain that the applicant had a role in this attack and that she and her daughter had arranged for the men in question to carry out the assault. At the time of the beating, Mr. Payne was in very poor health and suffered from severe renal disease. He died on the 28th November, 1988, some six months after the assault.

The applicant remained in Ireland with her children until the trial of the four men was due to commence in July 1989 and attended at the Four Courts as a witness for the prosecution. However, as the perpetrators of the crime pleaded guilty, the applicant was informed that she and her daughter were no longer required as witnesses.

Following the sentencing of the four men, the respondent directed charges be brought against the applicant and her daughter, Sharon, and in that month the applicant and her two children moved to England. In 1991 she married Gregory Coton in England and had a daughter with him. Thereafter the applicant undertook studies in Coventry University and after achieving her "A levels" went on to complete a nursing diploma. In 1998 she worked with the Premier Employment Agency and was placed in a local hospital. In the years 2000-2001, the applicant was employed in a permanent position as a mental health assistant in Calden Centre Mental Health Unit in Coventry.

Her daughter Sharon returned to Ireland with her husband in 2004.

In 2010, a "Cold Case Review" was conducted on the file and on the 8th February, 2012 an arrest warrant issued in Ireland for the applicant. The respondents then applied for a European Arrest Warrant and the applicant was eventually returned to this jurisdiction on foot of this warrant.

On the 11th January, 2013 the applicant was charged with the offences hereinbefore referred to and was brought before Dublin District Court.

The applicant was served with a book of evidence and returned for trial on the same date, namely, 20th February, 2013.

While the High Court granted leave to bring the present application by order dated the 18th December, 2013, the statement of opposition maintains (at para. 4) that:-

> *"It was moved well outside the time-limit prescribed by Order 84, rule 21(1) of the Rules of the Superior Courts which requires that the leave application be moved within three months from the date when grounds first arose. In this regard the following factual matters are of significance. Firstly, the applicant was surrendered from the United Kingdom late in 2012. Secondly, she was charged with the two offences and brought before the District Court on the 11th January, 2013. Thirdly, she was served with the book of evidence and returned for trial on the 20th February, 2013. Fourthly, she was aware at all material times that her daughter had commenced and had finalised High Court judicial review proceedings on related matters. Moreover, no extension of time to seek leave has been sought and no factual basis has been pleaded to support a basis for delaying/for extending time. The application can be dismissed on this basis alone."*

SECONDARY TIMELINE

For the sake of completeness, it is of some relevance to set out the timeline for the sequence of legal proceedings which attended the associated prosecution of the applicant's daughter, Sharon Payne (now Sharon Cullen).

Sharon Payne was fifteen years of age in May 1988 at the time of the alleged offences.

She was also charged and brought before the courts for what the prosecution contended was her role in the assault on her father.

She commenced judicial review proceedings seeking prohibition of her trial. Her case was successful in the High Court in June 2013 before O'Malley J. and the Supreme Court dismissed an appeal brought by the respondent on the 16th October, 2014.

There were special circumstances which arose in Sharon Payne's case, the principal one being her age at the time of the offence and the clear requirement for speedy prosecutions in the case of young offenders. Thus at para. 118 of her judgment in Sharon Cullen's case (*Cullen v. the Director of Public Prosecutions* [2013] 6 JIC 1701) O'Malley J. stated:-

> *"It seems to me that the overwhelming consideration is that the special duty to deal with young offenders as closely as possible to the time of their offences has been seriously breached to the extent that what is now proposed is to try a 40-year old in relation to the words and intentions (not actions) of a 15-year old in circumstances where she is not to blame for the delay. Such a trial would, as described by the Supreme Court in B.F. v. D.P.P. take on a 'wholly different character' to any trial that would have been embarked upon when she was at or near the age of 15. Were she to be convicted, the purpose of the sentencing process would also be radically altered. Although many of the protections afforded to young offenders under current legislation did not exist at the time there were significant features such as the fact that she could have been imprisoned only in very limited circumstances. Sentencing of a girl of her age would have focussed very largely on the issue of rehabilitation, which is at this stage manifestly irrelevant.*
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> *Having regard to the importance of the special duty in relation to young persons and the breach of that duty which has been established in this case, I consider that the proposed process to be unfair to the point that it should not be permitted to proceed."*

That consideration has no particular significance in the instant case, given that the applicant herein was almost 35 years of age in May 1988 and having regard also to the consideration that detailed admissions were made by the applicant in a cautioned statement dated the 15th May, 1988 which was contained as part of the book of evidence. Nonetheless, considerations of delay affect this case in a variety of ways, not least in the context of the disputed entitlement of the applicant to bring and maintain her application to prohibit her trial on the serious charges brought against her.

DELAY

Order 84, rule 21 of the Rules of the Superior Courts (Judicial Review) 2011 (S.I. No. 691 of 2011), which came into effect on 1st January, 2012, is framed in terms which show a clear intent to reduce delay and to further limit time periods which previously existed for applications for judicial reviews under the same order prior to its amendment.

> Rule 21 as it previously existed provided simply:-
>
> *"(1) An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the applications first arose, or six months, where the relief sought is certiorari, unless the court considers that there is good reason for extending the period within which the application shall be made."*

The rule as thus framed allowed the courts a wide measure of discretion to extend time when, regardless of the applicant's inactivity in seeking relief at an earlier time, there appeared to be "good reason" for doing so. The amended rule now provides:-

> *"21. (1) An application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose.*
>
> *(2) Where the relief sought is an order of certiorari in respect of any judgement, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgement, order, conviction or proceeding.*
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> *(3) Notwithstanding sub-rule (1), the Court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made, but the Court shall only extend such period if it is satisfied that:—*
>
> *(a) there is good and sufficient reason for doing so, and*
>
> *(b) the circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either—*
>
> *(i) were outside the control of, or*
>
> *(ii) could not reasonably have been anticipated by the applicant for such extension.*
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> *(4) In considering whether good and sufficient reason exists for the purposes of sub-rule (3), the court may have regard to the effect which an extension of the period referred to in that sub-rule might have on a respondent or third party.*
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> *(5) An application for an extension referred to in sub-rule (3) shall be grounded upon an affidavit sworn by or on behalf of the applicant which shall set out the reasons for the applicant's failure to make the application for leave within the period prescribed by sub-rule (1) and shall verify any facts relied on in support of those reasons."*

THE TICKING CLOCK

The first question that must be considered is whether or not the applicant is out of time to bring this judicial review application. If so,

a further question arises whether or not this Court should extend the time for doing so notwithstanding that no application for an extension of time for this purpose was made to Peart J. when leave was sought in this case on the 18th December, 2013. This Court was told that the issue of applicant delay was not addressed as an extension of time was "not deemed necessary" on account of the fact that an indictment had not yet been served on the applicant. Counsel for the applicant argued that the time for seeking prohibition only starts to run from that date, a proposition said to derive from certain *dicta* in the well known case of *C.C. v. Ireland* [2006] 4 I.R.1.

Having regard to the importance of having clarity on this issue - which features frequently in applications to prohibit trials - the Court invited the filing of further evidence to clarify exactly what is meant by "date of service of indictment" and the significance or otherwise of that date in the context of the time for making an application for prohibition. Two affidavits were thus filed, the first being that of Raymond Briscoe, Senior Prosecution Solicitor and Professional Officer in the Office of the Director of Public Prosecutions. He has worked as a prosecution solicitor for over fourteen years and is familiar with the practice and procedure of the Central Criminal Court with regard to the steps involved in bringing prosecutions in that court to trial. He deposes that it is the practice in the Office of the Chief Prosecution Solicitor that the solicitor in the Superior Criminal Court Section would take carriage of and have responsibility for the management of the Central Criminal Court file from the date of the return for trial to the completion of the trial in the Central Criminal Court. He deposes:-

> *"After a suspect has been returned for trial and the case file has been transferred to the Superior Criminal Court Section it is at this stage that trial counsel are briefed. It is commonly the case that counsel advises a further count is added against the accused or that existing counts are amended. For this reason an indictment is rarely lodged prior to the trial of the accused and it is my experience that in the majority of cases which come before the Central Criminal Court the indictment is lodged on the date of trial."*

Mr. Domhnall Forde is also a Prosecution Solicitor in the Office of the respondent who is familiar with the practice and procedure in the District Court with regard to the service of books of evidence in indictable matters and the subsequent return for trial of those matters. He deposes that the work of the prosecution solicitor in the District Court section in relation to the preparation and service of the book of evidence involves compiling from the Garda file the necessary information which must be contained in the book of evidence. Under the relevant statutory provisions the prosecution is allowed a period of 42 days from the date when the decision is reached as to whether the prosecution will proceed on indictment, although extensions to the 42 days may be granted by the District Court. It is the practice of the Office to endeavour to have the books of evidence available within that time. In the event that the District Court refuses to grant an extension of time and the book of evidence is not available to be served on the accused, the prosecution can be struck out without prejudice to it being re-entered. He deposes that it is his experience that in a large majority of cases the service of the book of evidence and the return of trial now happen at the same time.

In the *C.C.* case, there does not appear to have been any evidence offered to assist either the High Court or the Supreme Court as to when an indictment is normally provided to an accused person. In the High Court, after a considered analysis of relevant legal authority, Smyth J. found that the appropriate date from which time should run was the date of the return for trial. The application for prohibition, being brought as it was a mere 7 days before the trial was due to commence, (and being thus an "eleventh hour" application of the type later deplored by the Supreme Court in various "missing evidence" cases) was also significantly out of time by reference to the date of return for trial. Nevertheless, Smyth J. extended time in *C.C.*, relying upon the "good reason" saver in O.84 on the basis that matters of considerable importance to the administration of justice arose on the point being litigated, namely, whether s.1(1) of the Criminal Law (Amendment) Act 1935 provided a defence of reasonable mistake and, if not, was it inconsistent with the Constitution. Perhaps focusing more on this legal issue, the Supreme Court in a few short sentences dismissed objections that the application was out of time. Denham J. stated in that case (at p.8):-

> *"On this preliminary issue I am in agreement with Geoghegan J. that as the indictment had not been served in either case neither applicant was out of time to seek leave for judicial review."*

Fennelly J. (at p.53) simply stated:-

> *"… I agree with Geoghegan J. that the application for judicial review was not out of time."*

At pp. 38-39, Geoghegan J. for his part stated:-

> *"It may well be that, because the trial judge embarked on a consideration of the substantive issues, the notice of appeal in the CC case does not contain any appeal relating to the time point though the notice of appeal in the P.G. case does. The time point in each case was argued before this court on appeal. I would differ with the view of the trial judge that either applicant was out of time. It is not necessary to go into the details of the periods which he considered applicable. It is sufficient to say that in neither case has an indictment yet been served. The time in my view would only commence to run from the service of the indictment. Neither application for leave to bring judicial review proceedings was, therefore, out of time."*

With considerable diffidence, I venture to suggest that these observations could scarcely be regarded as a full or reasoned analysis of why the date of service of an indictment should be the operative date for the commencement of the time provided for by Order 84. Given the fact that the evidence before this Court clearly demonstrates that the indictment is normally served at the start of a trial, fixing this time as the relevant date when time begins to run simply makes no sense. It would mean that, regardless of gross delay by an applicant, a trial might have to be called off at the twelfth hour - just as it is about to begin – at a time when all preparations have been completed, with legal teams instructed and potentially vulnerable witnesses in attendance, and when precious court time has been set aside and allocated to the trial. This flies in the face of every requirement for an efficient criminal justice system, not least the interests of the victims of crime for whom the adjournment of an upcoming trial may be fraught and stressful.

Furthermore, and even more illogically, any application brought to prohibit a trial before service of an indictment could, by application of this method of determining when time begins, be actually deemed premature.

In contrast, at the date of return for trial, the accused has sight of all the evidence which may be offered against him at his subsequent trial. He has everything he needs to determine whether grounds for making an application for judicial review have arisen. This Court can see no reason why the date of service of an indictment on the morning of a trial should be preferred to the date of the order returning him for trial. The indictment contains no "information" which would provide grounds for making an application and is derived only from the information and proposed evidence contained in the book of evidence.

Smyth J. sensibly concluded in *C.C.* that the grounds for making an application for judicial review should properly be considered to

arise on the date when an applicant is sent forward for trial by a judge of the District Court. He noted that in *Patrick L. v. D.P.P.* (Unreported, High Court, 16th April, 2002) Herbert J. had taken a similar view and in *S.K. v. D.P.P.* [2007] IEHC 45, O'Neill J. was also of the view that the operative date for the purpose of the time running is the date on which an applicant is returned for trial. A similar conclusion was arrived at by Quirke J. in *B.T.F. v D.P.P.* in a case which, though reversed on appeal by the Supreme Court ([2005] 2 I.R. 559) on other grounds, was not disturbed in respect of his finding that the calculation of time should be deemed to commence when the order for return for trial is made. Against a backdrop where there may in the past have been some degree of uncertainty and confusion on this issue, the Court would be firmly of the view that practitioners should focus henceforth on the date of return for trial as the key date for the commencement of time for judicial review proceedings brought to prohibit a trial.

That an outer time limit of three months from that date is not absolute is perfectly clear from the terminology of the amended Order 84 which permits an extension of the period provided for if the Court is satisfied that there is "good and sufficient reason" for doing so and that the circumstances that resulted in the failure to make the application were outside the control of or could not reasonably have been anticipated by the applicant for such extension.

For example, a notice of additional evidence served after the return for trial, but before the trial itself, might have the effect that the applicant is severely prejudiced because he has no capacity to deal with evidence intended to be offered from a particular witness or to deal with evidence of a particular type, so that his grounds for making an application arise only from that time. It is not difficult to think of other examples where latitude would be extended.

There is thus no inflexible rule and there is sufficient latitude within the terms of O.84, r.21 to permit a judge of the High Court to grant an exception where the same is sought and where the circumstances outlined in rule 21 may be seen to apply.

The Court has difficulty with the contention that, even if the court is satisfied that the application is made out of time, and if it refuses to extend the time, it should nonetheless proceed to deal with the merits of the case. If an applicant loses eligibility to apply, why should the court deal with his case as though he had nonetheless crossed that threshold and is in fact eligible? In this context the following quotation from Ryan J. in the case of *Broe v. D.P.P. and Ors* (Unreported, High Court, Ryan J., 4th December, 2009 (at pp. 20-21)) seems apposite:-

> *"A person seeking judicial review is required to move promptly – Order 84 rule 21 (1). It is important that official acts that are challenged are declared valid or void as early as possible. If the review takes place in timely fashion people who are affected suffer less disruption of their affairs. In criminal proceedings, the community has an interest in seeing the matter brought to a conclusion and so does the victim and other witnesses.*
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> *An applicant's failure to raise objection to a much earlier event until the eve of his trial militates against his application, particularly where a technical breach and not a matter of substantive justice is in issue. Even in the latter case, as Henchy J. observed in the State (Byrne) v. Frawley [1978] I.R. 326 at 350:-*
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> > *'What has been lost in the process of events is not the right guaranteed by the Constitution but the prisoner's competence to lay claim to it in the circumstances of this case.'"*

While the Supreme Court in *B.T.F. v. D.P.P.* [2005] 2 I.R. 559, expressed the view that the issue of delay on the part of an applicant should not ordinarily be dealt with as a preliminary issue, that particular authority was only opened to the Court on the hearing of the issue itself. That approach may be warranted in some cases because of their unique facts, but the administration of justice can only benefit from the early elimination of last minute applications brought wildly outside the time periods provided for by law. Very considerable changes have been effected to Order 84 since 2005 and to the legal landscape on delay generally which has become markedly less tolerant of delay than was the case 10 years ago. Any other approach means that the High Court must, in every instance, carry out a full analysis of all the facts and arguments in the case, an exercise which has the effect of setting at naught, or at least neutralising, the secondary legislation contained in Order 84, rule 21. Indeed it makes for further delays in completing cases. It seems more sensible that where a judicial review application is manifestly out of time that the judge, at the hearing of the leave application, should require that the respondent be put on notice so that the point can be argued at that stage. Otherwise, as in this case, the issue is often passed over *sub silencio* in circumstances where leave is granted on the extremely low threshold of arguability. If an issue under the Statute of Limitations can be first dealt with in this way, I fail to see why a similar procedure should not be available in judicial review also.

EXTENSION OF TIME

In the further submissions filed herein, the applicant has argued that the Court should extend time in this case because there is good and sufficient reason for doing so and that the circumstances which resulted in the failure to make the application were outside the control of or could not reasonably have been anticipated by the applicant on the particular facts of this case.

In this regard the Court has little difficulty in accepting the applicant's contention that the unusual factual history of this case is of itself a good and sufficient reason for extending the time under Order 84, rule 21.

However, and as already noted, an applicant who seeks an extension must also show circumstances either outside his control or circumstances which could not reasonably have been anticipated. In this regard the respondent has argued that the applicant was aware long before the date of return for trial that she had been brought back from the U.K. for the sole purpose of facing charges arising out of the attack on her late husband.

In this case the delay between the return for trial on the 20th February, 2013 and the granting of leave on the 18th December, 2013 is less than 10 months, and the applicant has averred on affidavit that she raised the possibility of bringing judicial review proceedings with her then solicitor, Michael Staines & Co., on the 7th June, 2013 which was less than four months after the return for trial. Up to that point the possibility of bringing judicial review proceedings had not been specifically addressed by her legal advisors. Her legal representation changed in June 2013 when she transferred solicitors to Lorraine Stephens & Co., one of the main reasons for so doing being the fact that her daughter had informed her that from what she knew judicial review was a possible option in her case. Rather less impressively, the applicant also points to any delay which occurred between July and December 2013 as having arisen because of the intervention of the long vacation when the courts were closed during the months of August and September. Judges of the High Court are available and sit on every day during that period.

However, as this judgment is being given in a case brought against a backdrop of some past uncertainty about when time should properly be considered to have commenced to run, the Court must factor this consideration into its decision as a matter of fair

procedure in this particular case. Thus the Court accepts that, as the applicant's trial is not scheduled to take place for many months, this application is not an "eve of trial application", still less is it a situation of a judicial review being brought during the currency of a commenced criminal trial. Further, there is no suggested prejudice to a third party or to the Director of Public Prosecutions which, under rule 21, is also a relevant matter for the purposes of an extension of time.

Finally, there has been a finding by both the Supreme Court and the High Court in the case of the applicant's daughter that Garda investigations in this case were delayed and were marked by a number of features which are the subject of particular comment in submissions filed on behalf of the applicant in this case, so that a real and substantial issue on prosecutorial delay does, at this stage at least, seem to arise.

In all of the circumstances, and in circumstances where this Court has endeavoured, however inadequately, to lay down a benchmark for future applications, the Court will, on the particular facts of this case, extend the time so that the full arguments seeking prohibition may be heard. Such a ruling will not prevent the respondent from arguing at the full hearing that the applicant's delay in moving the prohibition application is so egregious as to warrant the refusal of relief in the exercise by the Court of its discretion.