2006 No IEHC 158

THE HIGH COURT
JUDICIAL REVIEW

[2005 No 1254 J.R.]

BETWEEN

LIAM DONNELLY

APPLICANT

AND
THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Judgment of Mr. Justice O'Neill delivered on the 17th day of May, 2006.

1. The applicant seeks an order prohibiting his trial for perjury which is due to take place in the Dublin Circuit Criminal Court on 16th October, 2006. He is to be tried with a co-accused for the same offence.

2. The background to this matter is as follows:-

The applicant was born on 13th February 1956 he is a member of An Garda Siochána. He was involved in the investigation of the Omagh Bomb in August 1998. Colm Murphy became a suspect. He was arrested under s. 30 of The Offences Against the State Act 1939, on 21st February, 1999. He was taken to Monaghan Garda Station where he was interviewed a number of times inter alia by the applicant and his co-accused. These interviews were not electronically recorded.

In due course Colm Murphy was charged with the offence of conspiracy to cause the explosion at Omagh and was tried for that offence by the Special Criminal Court. That trial took place in Michaelmas Term of 2001. In the course of it, there was a voir dire in which the accused Colm Murphy challenged the admissibility of notes of an interview, which had commenced at 3.45 and ended at 5.45 p.m on 22nd February, 1999. This interview had been conducted by the applicant and his co-accused.

The basis of the challenge on the admissibility of the notes of this interview was, that the applicant had falsely inserted a line into the interview which suggested that, Colm Murphy acknowledged that his wife was a sister of Sile Grew, who was alleged or believed to have a close connection to a Seamus Daly who was suspected of being a leading member of the Real I.R.A. and of being involved in the Omagh Bombing.

It was further put in the cross examination of the applicant that when he learned after the interview that there was no such connection to Sile Grew, he retrieved the interview notes from the exhibits officer and deleted the line in question i.e. line 8.

This line of cross examination was pursued on the basis of evidence to be given by a forensic documents examiner, a Ms. Kim Hughes, who had carried out Electro Static Detection Apparatus analyses (E.S.D.A.), and would give evidence to the effect that this test revealed that an examination and tracing of indentations on the back of the notes revealed that the third page had been rewritten so as to delete line 8 which contained the information about Sile Grew.

The applicant repeatedly denied in cross examination having so altered the notes in question.

On 15th November, 2001 Barr J. delivering the judgment of the court on the application to exclude the notes, held that the notes were inadmissible and that the applicant had inserted false information into the notes and that he had lied under cross examination in denying that he had falsified the notes.

The trial of Colm Murphy concluded on 21st January, 2002, with Colm Murphy being found guilty of the offence charged and he was sentenced to 14 years imprisonment.

He appealed his conviction and sentence and that appeal was heard by the Court of Criminal Appeal between 7th and 9th December, 2004 and the Court of Criminal Appeal gave its judgment on 7th January, 2005, in which it quashed the conviction and sentence of the Special Criminal Court.

On 22nd January 2002 shortly after the end of the trial in the Special Criminal Court a Garda investigation commenced into the allegation of perjury against the applicant and his co-accused. The applicant was interviewed on 27th June, 2002, and on 15th October, 2002. A Garda file was sent to the Director of Public Prosecutions on 4th December, 2002.

The affidavit of Liz Howlin a professional officer, in the office of the Director of Public Prosecutions, sets out in detail the progress of the file in the office of the Director of Public Prosecutions during the period up to 20th December, 2004, when a decision to prosecute the applicant was made by the Director.

It is clear from that affidavit, that the time taken in that office before the decision to prosecute was made, was taken up largely by one problem, namely, the interviewing and obtaining of a Statement from Colm Murphy who was then serving his 14 years sentence in Portlaoise Prison and was awaiting the hearing of his appeal in the Court of Criminal Appeal.

Promptly after the judgments of the Court of Criminal Appeal on 7th January, 2005, the applicant was arrested on the same day and charged with the offence of perjury.

He was sent forward on the 21st February 2005, by the District Court for trial in the Dublin Circuit Criminal Court.

By a letter of 15th February, 2005, the applicant through his solicitor sought disclosure of the E.S.D.A. material put in evidence and details of all tests carried out by Kim Hughes and by Ms. Geraldine Butler, *inter alia*.

By a letter of 11th November, 2005, the Chief Prosecution Solicitor informed the solicitor for the applicant that Kim Hughes had carried out further tests on the interview notes on 25th July, 2005, because the original E.S.D.A. traces could not be found and by a letter of 25th November, 2005, formal notice was given that the original E.S.D.A. traces which had been handed into court in the trial of Colm Murphy as defence exhibits and subsequently came into the custody of Court of Criminal Appeal, could not now be located.

On 21st November, 2005, the applicant applied for and was granted leave by deValera J. to apply for judicial review and an order of prohibition of his trial.

The applicant advances two grounds in seeking prohibition.

Firstly he submits that the loss of the original E.S.D.A. trace put in evidence in the Colm Murphy trial was a breach by the prosecution of its duty to seek out and preserve evidence relevant to the guilt or innocence of the applicant and that in the absence of that evidence, the applicant cannot now get a fair trial. In this regard reliance is placed upon the judgments of the Supreme Court in the cases of *Braddish v. The D.P.P.* [2001] 3 I.R. 127 and *McFarlene v. The D.P.P.* judgments delivered 7th March, 2006.

Specifically it was submitted on behalf of the applicant that if the prosecution sought to introduce into evidence the photocopy of the original E.S.D.A. trace that the applicant would be prejudiced, because his expert Mr. Raddley would not have had an opportunity to have examined this original trace and to have formed an opinion on it or on what it is said to prove.

Secondly the applicant submits that the delay of three years and three months between the ruling of the Special Criminal Court on 15th November, 2001, and the arrest and charging of the applicant on 7th January, 2005, was an inordinate delay in the prosecution, which had not been explained or excused and had resulted in great stress and anxiety on the applicant for a greater period than was necessary, which should now be brought to an end by the prohibition of any further prosecution.

The applicant does not complain of any delay after his arrest and charging on 7th January, 2005, and the only prejudice he asserts as a result of the earlier delay complained of, is excessively prolonged stress and anxiety.

On this aspect of his case, the applicant relies upon the recent judgments of the Supreme Court in the case of *P.M. v. The D.P.P.* in which judgments were delivered on 5th April, 2006 and in which it was held that delay of itself would not merit an order of prohibition unless it was excessive, blameworthy and prejudicial.

For the respondents it was submitted that the loss of the original E.S.D.A. trace did not involve any breach of the duty of the prosecution to seek out and preserve relevant evidence. It was submitted that this trace was a defence exhibit in the Murphy trial, which went into the evidence in the trial and remained thereafter in the custody of the Court of Criminal Appeal and as a defence exhibit, and the prosecution had no access to it and could not have obtained it until after the Court of Criminal Appeal had delivered its judgment on 7th January, 2005, whereupon every reasonable effort was made to retrieve it.

It was submitted that the applicant has not demonstrated any prejudice to his defence by reason of the loss of this trace. There is no affidavit from his expert Mr. Raddely setting out what disadvantage there is in forming an opinion on whether as alleged there was a falsification of the interview notes.

It is further submitted that the affidavit of Kim Hughes at paragraph 12, which is uncontradicted, makes clear that there are several other traces which though not as clear as the one lost, all clearly demonstrate the same thing, namely that page 3 of the memo was rewritten. In addition to that all of the traces from the subsequent E.S.D.A. tests are available and these also show the same thing.

Insofar as the prosecution would seek to introduce the photocopy of the original trace into evidence in the trial, it was submitted that it was a matter for the trial judge to rule on its admissibility weighing up any alleged unfairness to the accused caused by the loss of the original trace.

It is submitted that the loss of the original trace disadvantages the prosecution only, who in its absence were compelled to rely on proofs of a lesser quality.

On the question of delay, it was submitted that in the first instance the applicants are out of time to make that complaint. It was submitted that they were aware of the alleged delay from 7th January, 2005, and took no step to mount a challenge on that ground until the 21st November, 2005. In that regard they failed to move promptly or within the three month period prescribed by Order 84, and no explanation at all is offered on affidavit to excuse that delay. Hence, relying upon the judgments of the Supreme Court in the case of *Dekra v. The Minister for the Environment and Local Government* [2003] 2 I.R. 270 and *DeRoiste v. The Minister for Defence* [2001] 1 I.R. 190, it was submitted that where no reasons are given to explain and justify the delay, there could not now be an extension of time.

Finally, it was submitted that the delay of three years and three months was not of such inordinate or unconscionable a nature, having regard to the explanation of the unusual and difficult problems that had to be overcome, and as set out in the affidavit of Liz Howlin; in carrying out the balancing exercise, where the delay has not jeopardised the right to a fair trial but has merely caused unnecessary stress and anxiety, as was discussed by Keane C.J. in *P.M. v. Malone* [2002] 2 I.R. 560 at 581, and by Kearns J. recently in *P.M. v. D.P.P.* that this court should prohibit the trial.

Decision

3. In regard to the loss of the E.S.D.A. trace, I am satisfied that there was no fault on the part of the prosecution agencies in that loss. At all time the prosecution knew where it was i.e. in the custody of the relevant court, first the Special Criminal Court and then the Court of Criminal Appeal. The prosecution were entitled to proceed on the basis that when the Court of Criminal Appeal had given judgment in the Murphy appeal, that the original trace would be readily retrieved. Unfortunately that did not happen because it was lost while in the custody of the Court of Criminal Appeal. I am satisfied that all reasonable efforts were made by the prosecution to recover it after judgment was given by the Court of Criminal Appeal, but all this resulted in was the realization that the trace was lost.

4. I am therefore satisfied that there was no failure on the part of either the Gardaí or the Director of Public Prosecutions or the Chief Prosecution Solicitor, to discharge the duty on them to seek out and preserve relevant evidence.

5. That being so it can be said that the applicant has failed to satisfy the first part of the test in seeking prohibition on this ground.

6. Can it be said that the applicant is so disadvantaged in his defence by the loss of this trace, that he cannot now get a fair trial?

7. I am satisfied that the applicant has wholly failed to demonstrate any such disadvantage.

8. Firstly there is no evidence on affidavit which sets out such a disadvantage, or from which a disadvantage could reasonably be inferred. The height of any suggestion came by way solely of a submission by Mr. Coffey S.C. for the applicant to the effect that Mr. Raddley the applicant's expert was deprived of the opportunity of examining and forming an opinion on the original trace now lost.

9. In the absence of any evidence from Mr. Raddley setting out how he would be disadvantaged in this way, in my view that submission cannot be accepted.

10. Apart from that, the original trace is only one of several traces available which according to the uncontradicted evidence of Kim Hughes, all demonstrate the same thing, namely that page 3 of the notes was rewritten.

11. Presumably Mr. Raddley can examine all of these and also the original notes and form an opinion on the central question, i.e. were the notes rewritten in the manner testified to by Ms. Kim Hughes.

12. Mr. Coffey took particular exception to the prospect of a photocopy of the original trace being put in evidence by the prosecution. In my view the applicant can challenge the admissibility of that photocopy and it is a matter peculiarly within the jurisdiction of the trial judge to determine whether there would be any unfairness to the applicant by its admission and hence whether to exercise his discretion to exclude it. This is a problem that can and should be dealt with by the trial judge and as was set by Finlay C.J. in *D.... v.The D.P.P.* [1994] 1 I.L.R.M. 435

> "…….. an onus to establish a real risk of an unfair trial … necessarily and inevitably means an unfair trial which cannot be avoided by appropriate rulings and directions on the part of the trial judge. The risk is a real one but the unfairness of trial must be an unavoidable unfairness of trial."

13. Here any risk of unfairness can be dealt with by the trial judge and thus it cannot be said at this stage in advance of the trial that there is now established an unavoidable unfairness.

14. I am satisfied that the applicant has failed to establish any disadvantage to him by the loss of the original trace or that there is any risk of an unfair trial which cannot be dealt with by the trial judge. Indeed I am of the view that it is the prosecution only that is disadvantaged by this loss, they now being unable to rely on the best quality proof that might have been available to them.

15. This brings me to the delay issue.

16. The first issue which must be confronted here is whether the applicant is now out of time to pursue that issue by way of judicial review.

17. There is no doubt that the applicant was aware of his grievance in this regard from January, 2005. Indeed he wrote a letter seeking an explanation of this delay in February, 2005.

18. I am satisfied therefore, that time must be considered to have run against him on this complaint from soon after the date of his arrest and charge on 7th January, 2005, that is to say not later than 15th January, 2005.

19. The application for leave was made on 21st November, 2005, ten months from when time began to run and seven months outside the period of three months prescribed by Order 84 (21) of the Rules of the Superior Court, for seeking prohibition. Apart from the foregoing, clearly the applicant failed to move promptly on this issue, which was, of course, his primary obligation.

20. The applicant has offered no explanation on affidavit for this delay and in the absence of any such explanation which could excuse or justify the delay, in my view I am bound by the authority of the judgments of the Supreme Court in the *DeRoiste* and *Dekra* cases, to hold that the applicant is not now entitled to an extension of time to enable him to pursue a judicial review on the ground of alleged delay on the part of the respondent during the period of three years and three months from 15th November, 2001 to 7th January, 2005,

21. I am also satisfied that whilst there was some culpable delay during that period, which I would estimate, having regard to the very unusual if not unique problem that existed in preparing the prosecution in this case, to be no more than a year approximately.

22. In my view having regard to the fact that the only prejudice alleged is the prolongation of stress and anxiety, the culpable delay involved is not of such an inordinate or unconscionable length as to warrant tilting the balance which must be kept between the public right to prosecute and the applicant's right not to be subjected by delay to unnecessary stress or anxiety, in favour of prohibiting the trial.

23. In this regard it must also be borne in mind that the initiation of a public prosecution for perjury by taking the step of arresting and charging the applicant for that offence before the Court of Criminal Appeal had given its judgment on the Murphy appeal would have been a very difficult and potentially hazardous move and it is not surprising it was not done until the Court of Criminal Appeal had given its judgment. In that context it can be said that in fact no time was ultimately lost in bringing the prosecution of the applicant to trial.

24. For all of these reasons I must refuse the relief sought.