Neutral Citation Number: [2005] IEHC 383

THE HIGH COURT
JUDICIAL REVIEW

[Record No. 2004/1030JR]

BETWEEN

FRANK WARD

APPLICANT

AND
THE DIRECTOR OF PUBLIC PROSECUTIONS AND DISTRICT JUDGE MICHAEL CONNELLAN

RESPONDENTS

AND
THE HIGH COURT
JUDICIAL REVIEW

[Record No. 2004/1136JR]

BETWEEN

LARRY CUMMINS

APPLICANT

AND
THE DIRECTOR OF PUBLIC PROSECUTIONS, JUDGE BRIDGET REILLY, JUDGE DESMOND HOGAN, JUDGE THOMAS FITZPATRICK, JUDGE MICHAEL CONNELLAN AND JUDGE MICHAEL WHITE

RESPONDENTS

AND
FRANK WARD

NOTICE PARTY

Judgment delivered by Ms. Justice Dunne on the 15th day of June, 2005

1. The above entitled proceedings arise out of the same circumstances, the same criminal proceedings and the same decision which are the subject of challenge in these proceedings. By agreement between the parties the two applications for judicial review were heard at the same time. The relief claimed in both sets of proceedings is, in essence, the same and the issues that arise are the same. For that reason it is appropriate that one judgment dealing with the matters that arise in both sets of proceedings should be furnished.

Relief claimed

2. Both parties seek to prohibit or restrain the further prosecution of them in respect of charges arising out of an alleged assault and robbery which occurred on 6th October, 2003 at the car park of the Goat Grill, Goatstown, Dublin 14. In addition both parties seek a declaration that the Director of Public Prosecutions (hereinafter referred to as the D.P.P.) acted in excess of jurisdiction and/or otherwise than in accordance with law in purporting to enter a *nolle prosequi* in respect of criminal proceedings before the Dublin Circuit Criminal Court in circumstances where no bill of indictment had been lodged. A number of other reliefs have been sought including declarations that the D.P.P. has acted otherwise than in accordance with law and has violated the applicant's constitutional right to a trial in due course of law and with reasonable expedition; a declaration that the D.P.P. is guilty of an abuse of the processes of the courts and/or improper motive in entering a *nolle prosequi* in relation to charges against the applicants in circumstances where the applicants were to be recharged immediately upon the entering of the said *nolle prosequi*; a declaration that the re-arrest of the applicants was invalid by virtue of the fact that they were never released following upon the order of the Circuit Court Judge to discharge them in respect of the prosecution then pending. A number of other ancillary reliefs were sought and I will deal with those in respect of each of the applicant as and when those matters arise.

Background

3. An incident occurred in the car park of the Goat Grill, Goatstown, Dublin 14 on 6th October, 2003. The applicants were arrested, charged with five offences and remanded in custody in respect of matters alleged to have occurred on 6th October, 2003. The charges proffered against them were as follows:-

> 1. Intentionally or recklessly causing serious harm contrary to s. 4 of the Non-Fatal Offences Against the Person Act, 1997.
>
> 2. Robbery contrary to s. 14 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.
>
> 3. Possession of Firearms with intent to commit an indictable offence to wit robbery, contrary to s. 27(b) of the Firearms Act, 1964, as amended.
>
> 4. Possession of Firearms with intent to resist arrest contrary to s. 27(b) of the Firearms Act, 1964, as amended.
>
> 5. A further charge of possession of Firearms with intent to resist arrest contrary to s. 27(b) of the Firearms Act, 1964, as amended.

4. On 3rd December, 2003, both applicants were sent forward for trial to the Dublin Circuit Criminal Court in custody in respect of the said charges. There is no dispute between the parties that the order returning the applicants for trial was made without the direction of the D.P.P. as required by s. 45 subs. 2 of the Offences Against the State Act, 1939. The proceedings were first listed before the Dublin Circuit Criminal Court for mention on 18th December, 2003. They were then adjourned to 26th April, 2004, and on that date, the 11th October, 2004 was fixed for the trial of the proceedings between the D.P.P. and the applicants herein. Those proceedings were identified before the Dublin Circuit Criminal Court as Bill No. DUO1183/2003.

5. On 5th October, 2004, the matter was listed for mention before the Dublin Circuit Criminal Court. It was then indicated that the D.P.P. intended to enter a *nolle prosequi* in respect of the matters before the court and this was done despite the objections of counsel for both applicants. Both applicants were then discharged and subsequently re-arrested. There was a further listing of the matter for mention on 8th October, 2004, in the Dublin Circuit Criminal Court for the purpose of vacating the trial date. That application was adjourned to the 11th October 2004. On the 11th October, 2004, a hearing took place before His Honour Judge Michael White. A hearing took place before Judge White during which counsel reiterated their objections to what had passed on 5th October, 2004. Judge White indicated that he was bound by the order of Judge Hogan. On 12th October, 2004 both applicants

appeared at Cloverhill District Court in custody and were again returned for trial to the Dublin Circuit Criminal Court. (It should be noted that initially following their re-arrest, each of the applicants was charged with one offence only and thereafter by the 12th October, 2004, the remaining charges were proffered against them. The charges were identical to those previously charged against the applicant and those matters are now comprised in Bill No. DU01040/2004.)

6. The applicants were granted leave to seek judicial review and the matter came before me for hearing on 27th April, 2005. Both applicants have remained in custody since their re-arrest in respect of these matters.

The applicant's submissions

7. Counsel on behalf of the first named applicant made a number of points in the course of his submissions relating to the conduct of proceedings against his client and the manner in which that conduct is alleged to have interfered with the rights of his client. The first point made in relation to these proceedings is in respect of the *nolle prosequi* entered by the D.P.P. He referred to the common law power to discontinue a prosecution by the entry of a *nolle prosequi* and the relevant provisions of the Criminal Justice (Administration) Act, 1924. Section 12 provides:-

> "12.— At the trial of a prisoner on indictment at the prosecution of the Attorney-General of Saorstát Eireann a *nolle prosequi* may be entered at the instance of the Attorney-General of Saorstát Eireann at any time after the indictment is preferred to the jury and before a verdict is found thereon, and every such *nolle prosequi* shall be in the following form, that is to say:—
>
> > On the day of , at the trial of A.B. on the prosecution of the Attorney-General of Saorstát Eireann on an indictment for..... the said Attorney-General in his proper person, (or by his counsel), stated to the court that he would not further prosecute the said A. B. on the said indictment, where upon it was ordered by the court that the said A. B. be discharged of and from the indictment aforesaid."

8. Mr. O'Higgins S.C. on behalf of the first named applicant then referred to a number of decisions in which s. 12 has been considered. First, he referred to the decision in *The State (Killian) v. The Attorney General* [1957] 92 ILTR 182 where Maguire C.J. stated as follows:-

> "It is contended that s. 12 of that Act prevents the Attorney General exercising any power to enter a *nolle prosequi* until the accused has been given in charge to the jury. Such an interpretation has not been acted upon at any time. The section appears to make it clear that the Attorney General can stay the proceedings at any time up to the conclusion of the trial. Even if it were arguable that the procedure adopted was not strictly regular it would be unjustifiable for this court to do what is asked, namely to interfere with the Attorney General by ordering him to prosecute particularly when he has made it quite clear that he does not consider that he ought to do so."

9. Finlay P. referred to the above passage in *the State (O'Callaghan v. O'hUadhaigh* [1977] I.R. 42 where the practice of entering a *nolle prosequi* before preferment of the indictment to the jury was recognised. There was some reluctance on the part of Finlay P. to follow the dicta referred to above because of the fact that the only power vested in the Attorney General and now in the Director of Public Prosecutions to enter a *nolle prosequi* was contained in the 1924 Act. The matter was raised again by Finlay P. in the case of *the State (Coveney) v. the Special Criminal Court* [1982] I.L.R.M. 284 at p. 288 where he stated:-

> "It is difficult to see what end of justice and in particular what right or interest of the accused could be secured by inhibiting the Director of Public Prosecutions as it now is from entering a *nolle prosequi* before the accused had been given in charge to a jury…having regard to all of these considerations I conclude that the commencement time limit contained in s. 12 appearing as it clearly does appear to limit the rights of the Director of Public Prosecutions to the entry of a *nolle prosequi* until after the accused has been put in charge must be considered as directive in its nature only and not as mandatory and therefore the fact that a *nolle prosequi* has been entered prior to that stage cannot of itself invalidate the entry of the *nolle prosequi.*"

10. Having referred to these authorities it is submitted on behalf of the first named applicant that while the timing of the entry of a *nolle prosequi* as provided for by the Criminal Justice (Administration) Act, 1924 has been broadly interpreted the existence of an indictment is the sine qua non for the valid entry of a *nolle prosequi*. In support of this contention counsel on behalf of the applicant placed reliance on the case of *R. v. The Chairman of the County of London Quarter Sessions ex parte Downes* [1954] 1 QB 1 in which Goddard C.J. rejected an argument that a court had power to quash an indictment because it was anticipated that the evidence would not support the charge; he stated as follows:-

> "Once an indictment is before the court the accused must be arraigned and tried thereon unless
>
> > (a) on motion to quash or demurrer pleaded it is held defective in substance or form and not amended;
> >
> > (b) a matter in bar is pleaded and the plea is tried or confirmed in favour of the accused;
> >
> > (c) a *nolle prosequi* is entered by the Attorney General which cannot be done before the indictment is found; or
> >
> > (d) if the indictment discloses an offence which a particular court has no jurisdiction to try."

11. Reference is made to the 2002 edition of Archbold on Criminal Pleading Evidence and Practice which refers to the above decision in considering the limited discretionary power to prevent any prosecution proceeding. Accordingly it is submitted by counsel that the Criminal Justice (Administration) Act, 1924 proceeds on the basis that an indictment in the appropriate form exists and the power to enter a *nolle prosequi* described arises only in respect of the trial of a prisoner "on indictment". In this context Mr. O'Higgins refers to the decision of Finlay P. in the *Coveney* case (supra) where Finlay P. states at p. 288:-

> "Therefore the fact that a *nolle prosequi* has been entered prior to that stage cannot of itself invalidate the entry of the *nolle prosequi*."

12. In the context of considering the commencement of the time limit contained in s. 12 counsel then referred to the long title to the Act pointing out that it is described therein as "an Act to amend the law relating to indictment in criminal cases and matters incidental or similar thereto." He then referred again to the form of order made when a *nolle prosequi* is entered, namely, to discharge an accused from the indictment. He goes on to refer to the comment of Finlay P. in the case of *O'Callaghan* (supra) where it was stated by Finlay P. in relation to the issue of the reinstituting of proceedings as follows:-

> "The terms of s. 12 of the Act of 1924 relevant to this issue mean that effectively the accused person in respect of whom the *nolle prosequi* have been entered is discharged of and from the indictment specified. This is not conclusive of the question whether he is freed or immune from any subsequent proceedings in respect of the offence which is the subject matter of the indictment."
>
> Further Finlay P. stated that "the entry of a *nolle prosequi* under s. 12 of the Act of 1924 does not of necessity free the accused person from anything other than the proceedings under the precise of identical indictment concerned…"

13. Therefore it is submitted that before a valid *nolle prosequi* can be entered there must be an indictment before the court. Referring again to the importance of the indictment Mr. O'Higgins submitted that this was recognised by the Supreme Court in the context of the consolidation of indictments in the case of *Conlon v. Kelly* [2002] 1 I.R. 10 in which Fennelly J. in referring to three central elements in a criminal trial namely the book of evidence, the return for trial and the indictment stated at p. 15:

> "The criminal process from return from trial onwards attaches central importance to the indictment. It formulates the charge upon which the accused is to be tried."

14. Further reliance is placed on the statement by Walsh on Criminal Procedure at p. 737, para. 15-01:

> "The indictment is a formal document setting out the charge or charges against an accused who has been sent forward for trial on indictment. A valid indictment is an essential pre-requisite for the commencement of a valid trial. If the indictment upon which an accused is tried suffers from a defect which renders it invalid the whole of the subsequent trial proceedings are null and void. The indictment is drafted initially as a bill of indictment by counsel for the prosecution after the accused has been sent forward for trial. The bill of indictment is delivered to the court registrar to be signed. This is known as the preferment of the bill of indictment."

15. The next point raised on behalf of the first applicant was in relation to the institution of fresh proceedings. It was conceded on behalf of the applicant that the entry of a *nolle prosequi* does not amount to an acquittal on the merits. It was noted that in the case of *O'Callaghan* referred to above Finlay P. reserved his position on the question as to whether it would be open to the D.P.P. to institute a fresh prosecution arising out of the same alleged offence once a *nolle prosequi* had been entered. Finlay P. did remark that the 1924 Act was not conclusive of the question as to whether an accused was freed or immune from subsequent proceedings in respect of the offence which was the subject matter of the original indictment. The topic was further referred to by Finlay P. in the case of *Coveney* cited above where he cited the Supreme Court decision in the case of *the State (Walsh) v. Lennon* [1942] I.R. 112 where it was stated at page 130, Sullivan C. J.:

> "So far as the argument is based on the entering of the *nolle prosequi* in the Special Criminal Court, we are of opinion that it cannot succeed. In no case has it been decided that the entering of a *nolle prosequi* by the Attorney General is a bar to a fresh indictment for the same offence and it is well established that the discharge of an accused person under a *nolle prosequi* does not amount to an acquittal and in our opinion the law in this respect has not been altered by s.12 of the Criminal Justice (Administration) Act 1924."

16. Accordingly, it was found by Finlay P. that a *nolle prosequi* was not a bar to a fresh indictment for the same offence.

17. It is argued however that the right to institute fresh proceedings is not an untrammelled right. In support of this argument, reference is made to the judgment of Finlay P. at p. 52 of the O'Callaghan case cited above where he stated as follows:

> "If the contention of the D.P.P. is correct the applicant having undergone that form of trial (and remand a waiting trial) and having succeeded in confining the issues to be tried would be deprived of all that advantage by the simple operation of a statutory power on the part of the Director of Public Prosecutions. In this way the applicant would have the entire of his remand awaiting trial set at nought and he would have to start a fresh to face a criminal prosecution in which the prosecution by adopting different procedures could avoid the consequences of the learned trial judge's view of the law. No such right exists in the accused: if the trial judge makes decisions adverse to the interest of the accused the latter cannot obtain relief from them otherwise and by appeal from the Central Criminal Court or by appeal or review in the case of an inferior court. It seems to me that so to interpret the provision of s. 12 of the Act of 1924 is to create such an extraordinary imbalance between the rights and powers of the prosecution and those of the accused respectively and to give the director such a relative independence from the decision of the court in any trial would be to concur in a proposition of law which signally failed to import fairness and fair procedure."

18. The next point raised in relation to this matter related to the return for trial. Again it was conceded by the applicant that in order for the Circuit Criminal Court to have jurisdiction to deal with the matter there must be a valid order returning the accused for trial before the Circuit Criminal Court. The argument was made on behalf of the accused that although there was an infirmity in the return for trial relating to one or more charges that if that infirmity did not affect other charges in the order returning for trial, then the order is severable and that the accused is lawfully before the court on the charges unaffected by the infirmity. In this regard reliance is placed on decision of the Court of Criminal Appeal in *the People (Attorney General) v. Finbar Walsh* 1 Frewen, p. 363. That was a case in which one of the charges contained in the return for trial was suffering from a want of particularity which did not affect other charges referred to in the return for trial. The argument on behalf of the appellant was that as there was a single order returning the appellant, the infirmity in respect of one of the charges affected all of the others because it was a single unitary return for trial which could not be severed. McLoughlin J. at p. 365 stated as follows "Mr. Sheridan takes no exception to the statements of the other charges which are charges for offences under the Firearms Act but he contends that there is not a good return for trial on these charges because he says the order for return for trial on the three charges is one return for trial and if invalid as to one, being, as he contends not severable, is invalid as to all. The court has no hesitation in declining to accept this contention. A District Justice when he has brought before him a number of charges of indictable offences must consider each charge separately from the others and must come to a separate opinion on each charge as to whether he is justified in returning a person for trial on each such charge and the fact that he makes one order returning for trial in respect of several offences cannot in the view of the court make such an order non-severable."

19. In the present case it is accepted by both sides that in circumstances where someone is charged with an offence scheduled under the Offences Against the State Act, 1939 as amended, before that person can be tried before the ordinary courts in respect of that scheduled offence a direction must issue from the Director of Public Prosecutions to that effect and be communicated to the District Court. In the instant case there is no evidence that such a direction issued and/or was communicated to the District Court in respect of the scheduled offences concerning the applicant herein. Thus it is submitted on behalf of the applicant that in those circumstances the first named respondent could have proceeded to try the applicant in respect of the non-scheduled offences which

he faced. It is further submitted that those non-scheduled offences namely intentionally or recklessly causing serious harm contrary to s. 4 of the Non-Fatal Offences Against the Person Act, 1997 and robbery contrary to s. 14 of the Criminal Justice (Theft and Fraud) Offences) Act, 2001 were the substantive charges against the applicants carrying a maximum term of imprisonment on conviction for either offence of life imprisonment. It is further submitted that the firearm charges were ancillary to the offences of causing serious harm and robbery. Accordingly it is argued that the option taken by the D.P.P. in purporting to enter a *nolle prosequi* set at naught the period of time spent in custody by the applicant and had the effect of delaying his trial in circumstances where notwithstanding the difficulty in the return for trial of the applicant the other allegations against him could have proceeded.

20. The next point raised on behalf of the first applicant relates to what is described as the invasion of rights. In this regard counsel on behalf of the applicant relies on the decision in the case of *the State (O'Connell) v. Fawsitt* [1986] I.R. 362 where the principle at issue is identified as follows:-

> "The constitution guarantees to every citizen that the trial of a person charged with a criminal offence will not be delayed excessively; or to express the same proposition in positive terms that the trial will be heard with reasonable expedition."

21. Reliance was placed on the decision of *B.F. v. D.P.P.* [2001] 1 I.R. 656 where Geoghegan J. stated at p. 665:-

> "I take the view that where there is culpable delay on the part of the State authorities then having regard to all the circumstances of the case the delay itself may entitle the accused to an order preventing the trial irrespective of whether there is actual or presumed prejudice."

22. Reliance is also placed on the decision in *P.P. v. D.P.P.* [1999] 1 I.R. 403 at p. 408, also a judgment of Geoghegan J., quoting from Keane J. in P.*C. v. D.P.P.* [1999] 2 I.R. 25 where it is stated by Geoghegan J. as follows:-

> "It is clear from this passage that Keane J. is impliedly acknowledging that different principles may apply to blameworthy delay on the part of the prosecuting authorities. Counsel for the applicant argues that there was such a delay in this case. I think that counsel for the applicant is clearly correct. It is not acceptable and in my view is a breach of a defendant's rights under Article 38.1 of the Constitution for the prosecuting authorities to allow unnecessary delay to occur on a case such as this involving sexual offences committed years ago. The necessarily delayed trial is most unfortunate but it is wholly intolerable that it should be postponed further due to the unnecessary delays on the part of the prosecuting authorities."

23. Reliance is also placed on the decision of McKechnie J. in the case of *Knowles v. D.P.P.* unreported 6th April, 2001 at p. 17 where it is stated:-

> "…in the constitution of Ireland there is no express right parallel to that contained in the 6th Amendment but the right to a trial with reasonable expedition undoubtedly has a constitutional basis, namely Article 38.1. …Such a right whether expressed positively as a right to a speedy trial or as a right to a trial with reasonable expedition or negatively as a right to trial without undue or excessive delay is now so well established in our constitutional jurisprudence that its protection can be readily enforceable at this status and level of importance. However, this right also has an existence in the common law."

24. At p. 20 he goes on to say:-

> "If this be correct the right is a stand alone right, the breach of which in itself and without more can in the appropriate circumstances attract the required and necessary relief. In saying this I fully appreciate that it belongs to the family of rights, duties, obligations and responsibilities which are deducible from Article 38.1 of the Constitution and furthermore I clearly acknowledge that the right must also be considered in the context of that composite article when it is appropriate to do so. Nevertheless if circumstances so warrant the right in isolation could be invoked and relied upon. If I am right in this it must follow that one so relied upon as a stand alone right there is no necessity if an invasion is established to further consider it in the overall context of Article 38.1 and thus no requirement to satisfy any residual test as for example whether the accused person can receive a trial 'in due course of law'. This question of course must also be posed, but in my view it is not a compulsory adjunct where a breach of the former right has been successfully relied upon."

25. Accordingly counsel on behalf of the first named applicant relies on the jurisprudence in relation to "delay" cases in the context of the necessary delay caused by the entry of the *nolle prosequi* albeit that the time period involved is not as significant as in the reported cases dealing with this particular issue. However, it is argued that by entering the *nolle prosequi* having noted the difficulty in relation to the return for trial, the first named respondent has adopted the course which sets at naught the period the applicant spent in custody and has condemned him to a further period in custody. In this context it is argued that the first named respondent had available to him the option of proceeding to have the applicant tried on the trial date in relation to the non-scheduled offences. It is pointed out that the circumstances here are that at the time the *nolle prosequi* was entered the trial was imminent, the accused was in custody and that as a consequence there is delay. In the particular circumstances the applicant had been in a position to proceed with the trial. The delay caused was not caused by any action or inaction on his part.

26. Two further points were raised on behalf of the first named applicant. The first of those related to the question of re-entry. It was pointed out that the provisions of s. 45(2) of the Offences Against the State Act, 1939 as amended does not provide for re-entry. The only provision in relation to re-entry is contained in s. 4(a) of the Criminal Procedure Act, 1967 as amended. It is argued that the circumstances in which re-entry takes place is limited to the circumstances referred to in s. 4(a). The final point raised relates to the use of the abbreviated form of the title of the Director of Public Prosecutions on the stamp setting out the direction of the D.P.P. under s. 45(2) on the order sending the applicant forward for trial following his re-arrest. In this regard reliance is placed on the decision of the Supreme Court in the case of *D.P.P. v. Kemmy* [1980] I.R. 160. Reference was made to a passage in that judgment at p. 164 where it was stated as follows:-

> "Where a statute provides for a particular form of proof or evidence on compliance with certain provisions, in my view it is essential that the precise statutory provisions be complied with. The courts cannot accept something other than that which is laid down by the statute, or overlook the absence of what the statute requires. To do so would be to trespass into the legislative field. This applies to all statutory requirements; but it applies with great general understanding to penal statutes which create particular offences and then provide a particular method for their proof."

27. Of all the points raised in relation to this particular case, it seems to me that this particular point is entirely without merit. The

acronym "D.P.P." is so well known and so clearly understood as not to require any further explanation. The use of the full title could not in my view be described as a form of proof or evidence of compliance with provisions of a statute. The use of the acronym cannot have prejudiced, misled or in any way confused the applicant herein. In opening the case on behalf of the first named applicant Mr. O'Higgins described this as an unpleasant case and an unattractive case on the merits. I would hesitate to describe any case in that way but so far as this particular point is concerned I think Mr. O'Higgins is correct.

28. Mr. McEntee S.C. appeared on behalf of the second named applicant. He referred to the short period of time between the entry of the nolle prosequi and the re-arrest of the accused. (In fact, in the case of his client, Mr. Cummins was arrested the following day and charged, following the lawful termination of a sentence he was then serving.) He said that there was no practical difference in the status of the accused during the short time difference. He accepted that the factual situation in each case was identical and that the legal situation was identical and he adopted the submissions of Mr. O'Higgins. He also made the point that as the Circuit Court had no jurisdiction of any kind in relation to the scheduled offences it could not make any order on foot of them. He said that the correct approach to be taken by the State in relation to these matters was to bring judicial review proceedings to quash the return for trial. His essential point was that it was inconceivable that a case could be disposed of by the entry of a *nolle prosequi* without an indictment before it. In effect he argued that all that could be *nolled* in those circumstances were the charges that had been in the District Court. Having regard to the provisions of s. 12 he stated that it clearly required an indictment to be in existence before a *nolle prosequi* could be validly entered in respect of any relevant criminal charges.

29. Relying on the challenge to the validity of the *nolle prosequi* it is argued that the original charges remain in existence and accordingly the applicant could not be recharged. In effect he argues that there are in existence two sets of charges in relation to this particular matter and that accordingly this is a breach of the provisions of Article 38.1 which states:-

> "No person shall be tried on any criminal charge save in due course of law."

30. He referred to the decision in the case of *D. v. Director of Public Prosecutions* where it was stated by Denham J. [1994] 2 I.R. 465 at p. 474:-

> "On the hierarchy of constitutional rights there is no doubt that the applicant's right to fair procedures is superior to the community's right to prosecute."

31. Finally he referred to the question of delay.

The respondents' submissions

32. Mr. McDonagh S.C. on behalf of the D.P.P. made a number of points in relation to the arguments raised by the applicants. The first point that he commented on is the fact that the *nolle prosequi* was still in place. Although the applicants challenged the right of the D.P.P. to enter the *nolle prosequi*, he pointed out that there is no application before the court to quash the *nolle prosequi*. He went on to deal with a number of specific points raised in the submissions made on behalf of the applicant.

33. In the first place, he disagreed with the suggestion on behalf of the applicants that they would spend up to an extra ten months or so in prison by virtue of the entry of the *nolle prosequi* as being unsustainable. He accepted that there would be a prolongation of time in custody before the trial but disagreed that it would be of the length suggested by and on behalf of the applicants. He also referred to the suggestion that there should have been some form of consultation by the D.P.P. with the accused in each case prior to dealing with the matter by way of entering a *nolle prosequi*. He pointed out that the proceedings are adversarial and that it would be wrong in those circumstances for the D.P.P. to ask the accused to waive any rights they may have. He noted that there was no suggestion or complaint made by or on behalf of the applicants to the effect that there was mala fides on the part of the D.P.P. He went on to say on this point that the court should not be asked to accept that the applicants would have waived their rights in relation to the apparent defect; in other words, that the matters should have been permitted to proceed before the Circuit Court and then see what would happen thereafter. He argued that the accused couldn't give the Court a jurisdiction by consent which it didn't have.

34. The principle argument made by Mr. McDonagh was that in this case there was a defective return for trial. It was his view that the defect was such as to call into question the validity of the entire return for trial. As a consequence he argued that it wasn't open to the D.P.P. to make the assumption that there might be a guilty verdict in respect of the charges or that somehow it would have been permissible to proceed on the non-scheduled offences and then to purport at a different stage whether by entering a *nolle prosequi* or in some other way to try the accused on scheduled offences. In those circumstances he posed the question as to whether the steps taken by the D.P.P. were permissible in law and what were the options open to the D.P.P. having regard to the rights of the applicants. In essence his argument is that the D.P.P. having spotted the defects in relation to the return for trial, could not stand by and do nothing to try and remedy the defects; to follow that course would result in the two applicants never standing trial for the offences concerned. Alternatively, he argued that the D.P.P. could take steps to address the defect in the manner in which he did. He said that this was done expeditiously.

35. In dealing with the entry of the *nolle prosequi* he argued that the contention on behalf of the applicants that the same cannot be entered until after the indictment is served is wrong in law. Further he argued that so long as the *nolle prosequi* entered in this case stands unchallenged this argument cannot be made. He refers to the *O'Callaghan* decision referred to above which he argues does not preclude the entry of a *nolle prosequi* prior to the commencement of a trial. He referred to the judgment of Finlay P. in the *O'Callaghan* case at p. 50 where it was stated by Finlay P. having referred to the fact that in the instant case before him he was dealing with a situation in which the validity of the entry of the *nolle prosequi* and that an order was made in pursuance of it and in compliance with the terms of s. 12 of the Act of 1924. He then went on to say as follows:-

> "…I must approach the issues of law before me upon the basis that a valid *nolle prosequi* was entered in accordance with s. 12 of the Act of 1924."

36. He also referred to the *Coveney* decision referred to above and in particular the passage in the judgment of Finlay P. at p. 288 as follow:-

> "Having regard to all of these considerations I conclude that the commencement time limit contained in s. 12 appearing as it clearly does appear to limit the right of the Director of Public Prosecutions to the entry of a *nolle prosequi* until after the accused has been put in charge of the jury must be considered as directive in its nature only and not as mandatory and that therefore the fact that a *nolle prosequi* has been entered prior to that stage cannot of itself invalidate the entry of the *nolle prosequi.*

37. He argued that the reliance by the applicants on the case *of R. v. The Chairman of the County of London Quarter Sessions ex parte Downes* referred to above was misconceived in that one must look at the statutory framework relevant to the English proceedings and to the Irish proceedings. The English statutory framework appears to have more in common with the return for trial. As the same procedure is not applied in both jurisdictions he argued that the case was of no assistance. Even if he was wrong in his argument he said that there was again an order of the court, namely, a *nolle prosequi* which has not been challenged. He went on to argue that a *nolle prosequi* was not a bar to fresh proceedings. Insofar as it has been argued on behalf of the applicants that this infringes the constitutional rights of the applicants he argues that the contentions in this regard are wrong. He referred to the decision of Murphy J. in the case of *Kelly v. D.P.P.* [1996] 2 I.R. p. 596 at p. 604 where it is stated:-

> "It is, however, the clear law that no power of the Director can be exercised in such a way as to constitute an abuse of the right of the defendant to a fair trial. This is the second submission made on behalf of the applicant and one which is based essentially on the judgment of this court in the *State (O'Callaghan) v. O'hUadhaigh* [1977] I.R. 42.
>
> *O'Callaghan* does establish that – as the applicant contends – the prosecution of an accused anew on charges which had been withdrawn by virtue of a *nolle prosequi* entered by the Attorney General could – and in that case did – involve such a degree of unfairness to the accused person as to deprive him of his basic rights of justice on a criminal trial."

38. He (Murphy J.) then went on to set out the facts of the *O'Callaghan* case and to refer to the judgment of Finlay P. in *the State (O'Callaghan) v. O'hUadhaigh* where having recited the facts Finlay P. reviewed the powers of the Attorney General and the Director of Public Prosecutions in relation to the entry of a *nolle prosequi* and the consequences of so doing, Murphy J. at p.606 then stated as follows:-

> "He expressly declined (at p. 51) to adjudicate upon the issue as to whether it was possible for the Director of Public Prosecutions to institute a fresh prosecution arising out of the same alleged offence where a *nolle prosequi* had been entered. He did, however express a tentative view in the following terms:- 'The existence of this alternative method of procedure, which is sometimes experienced in practice, does tend to suggest that the discharge created by the entry of a *nolle prosequi* under s. 12 of the Act of 1924 does not of necessity free the accused person from anything other than the proceedings under the precise or identical indictment concerned and does not free him from the institution of entirely fresh proceedings arising out of the same alleged offence'."

39. Murphy J. at p.607 then observed as follows:-

> "It seems to me that the *ratio decidendi* of the decision of the then President was that the Director of Public Prosecutions could not exercise, or more correctly did not possess, a statutory power which would enable him to renew a prosecution in relation to the same subject matter as one terminated by a *nolle prosequi* where to do so would deprive the accused of his basic rights of justice at a criminal trial. In particular he held on the facts of the case before him, that to renew a prosecution in respect of the matter which had proceeded to the point where the trial judge had adjudicated on the significant issues therein in a manner adversely to the contention of the Director and in favour of the accused would constitute such an injustice."

40. The argument of Mr. McDonagh was that the facts of the present cases are somewhat different to those which arose in the O'Callaghan case in where a significant ruling had been made in the course of a trial in favour of the accused. Accordingly, he argued that no disadvantage was suffered by the applicants in relation to the matter.

41. The next argument raised by Mr. McDonagh was in relation to the question of delay. He argued that it was inappropriate to import issues relating to delayed prosecution into the facts of the present cases. He accepted the principle set out in the case of *the State (O'Connell) v. Fawsitt* referred to above and referred also to the judgment of McKechnie J. in the case of *Knowles v. Malone* and Others referred to above. He argued that the passage quoted from the judgment of McKechnie J. was not the *ratio decidendi* of the particular case and that it was not of particular assistance in support of the arguments contended for by the applicants herein. He also referred to a number of other decisions referred to on behalf of the applicants in this regard. In particular he referred to the decision in the case of *B.F. v. D.P.P.* [2001] 1 I.R. 656 and in particular to the head note of that decision in which it was held by the Supreme Court

> 1. That where there was culpable delay on the part of the State authorities, then having regard to all the circumstances of the case, the delay itself could entitle to the accused to an order preventing the trial, irrespective of whether there was actual or presumed prejudice.
>
> 2. That in view of the special circumstances of the age of the alleged offender it was of the utmost importance that if it were decided to proceed to prosecute the appellant, there should have been no delay so that a trial would have taken place while memories were fresh and while the appellant was reasonably close to the age at which he was alleged to have committed the offences.

42. Mr. McDonagh argued that these were not cases of general application. Insofar as a right to a speedy trial is involved there are different periods of time and different circumstances that may be relevant. First, there is the period of time before the matter comes to the attention of the police. Second, there is the length of time that may elapse following the commencement of proceedings. He accepts that whilst the principles in the *O'Connell v. Fawsitt* case and indeed in the American decision in *Barker v. Wingo* are relevant that the applicants herein have failed to bring the cases within those principles. He argued that the lapse of time brought about by the entry of the nolle prosequi in this particular case is well within the parameters of what is acceptable. By way of analogy he argued that one should contemplate in this particular situation what would happen in the event of normal proceedings following the usual course where for example a jury may disagree following a trial. In those circumstances the trial would go back for a period of some months and he asks if the lapse of time brought about by the present circumstances is such that it triggers the balance test resulting from delay which are derived from the decision of Powell J. in *Barker v. Wingo* and which are set out in *O'Connell v. Fawsitt* at p. 366 having referred to this he argues that one of the essential prerequisites is that there should be demonstrable prejudice to the accused. And he asked the question in the context of this particular case where is the prejudice. He accepts that there is delay but argued that the length of delay occasioned as a result of the entry of the *nolle prosequi* would be of the order of three to four months only. He said that there were very good reasons for the conduct of the D.P.P. which resulted in the delay and that those reasons are not challenged as lacking *bona fides*. In considering the question of delay it has been stated that in balancing the interests of the accused it is also necessary to have regard to the community's right to have criminal offences prosecuted (*B. v. D.P.P.* [1997] 3 I.R. 104 at 195 to 196). He also relies on the judgment of Harriman J. in the case of *Scully v. D.P.P.* unreported Supreme Court 16th March, 2005 in which it was stated as follows:-

> "Applications on this basis must be discountenanced in the interest of the public right to prosecute but also in the interests, of the integrity of the jurisdiction, in a proper case, to restrain a prosecution on the basis that significant evidence has been ignored or destroyed."

43. He argues that the accused in this particular situation are in no different position to a party whose trial has collapsed and who then have to be re-tried. He says that the contention that because an accused will spend an extra three months or so in custody means therefore that they cannot be prosecuted is not a proposition that has ever been entertained in this jurisdiction. Finally he referred briefly to the ex tempore decision of Ó Caoimh J., unreported, 24th February, 2003, in the case of *Paul Whelan v. Brady & Others* which arose following the decision in the case of *Zambra v. McNulty* [2002] 2 I.L.R.M. 506, in which the D.P.P. entered a *nolle prosequi* in circumstances where, as a result of the decision in *Zambra*, the D.P.P. was faced with the prospect, when the proceedings in the *Whelan* case were coming on for hearing in the Circuit Criminal Court that there was a defect in the proceedings. Ó Caoimh J. stated as follows:-

> "In the circumstances it was entirely right and proper for the third respondent on 29th May to enter a *nolle prosequi* since it would have been futile to continue with the proceedings at that time. That decision was entirely correctly made. The applicant was thereafter recharged upon identical charges and sent forward for trial under the procedures in operation post October, 2001."

44. Mr. McDonagh also referred to the decision of the Supreme Court in the case of *P.M. v. Malone and D.P.P.* [2002] 2 I.R. 560. That decision was referred to as being an example of the application of the balancing test referred in *O'Connell v. Fawsitt*. Reference was made to the passage of the judgment of Keane C.J. at p. 580 where it is stated as follows:-

> "There remains the question as to whether the unarguable violation of the constitutional right of the applicant to a reasonably expeditious trial was of such a nature as to necessitate the prohibition of trial at this stage. I am satisfied that this is not a case in which it has been demonstrated that the capacity of the accused to defend himself at such a trial would necessarily be impaired by the delay that has occurred."

45. In other words Mr. McDonagh argued that if the question of delay triggers the balancing exercise referred to then in the present case there is no reason shown which would require on balance that the case involving the two applicants had to be stopped.

Replies

46. In reply on behalf of the first named applicant the point was made that the State in this particular case are approaching the matter on the basis that the return for trial is bad. It was argued that the return was in fact valid but that it lacked the necessary stamp from the Director of Public Prosecution to the effect that the ordinary courts were suitable to deal with the matters at issue. It was argued that as the District Court is a court of record the fact that the matter is not referred to on the order is neither here nor there. It is argued that the return for trial is not thereby invalidated. It was further pointed out that there was nothing in the affidavits before this court to indicate one way or another whether the question of the D.P.P.'s consent was dealt with one way or another.

47. It was pointed out that there was nothing in the submission of the D.P.P. to the effect that a return for trial is not severable. In the case of *Glavin v Gov. of Mountjoy Prison*, 1991 2 I.R. 421, it was pointed out that the return for trial was defective because the judge making the return was not at the time entitled to act as a judge.

48. Further, at the time of entry of the *nolle prosequi* both accused were insistent that they required their trials to proceed. Finally insofar as the issue of delay is concerned it was stated that it was somewhat glib to suggest that a delay of three or four months was within acceptable margins and therefore it was not necessary to consider the matter further. Mr. O'Higgins argued that on the contrary it is necessary to look at the facts of each case. In the particular circumstances of this case the accused remain in custody. They are in jail in respect of an allegation and are entitled to the presumption of innocence. So far as the point has been made on behalf of the D.P.P. that the State acted expeditiously when they discovered the mistake, it is argued that the mistake should have been observed sooner.

Conclusions

49. As can be seen from the submissions referred to above, one of the key issues in this case is the entitlement of the D.P.P. to enter a *nolle prosequi*. It is accepted on behalf of the applicants that notwithstanding the provisions of s. 12 of the Criminal Justice (Administration) Act, 1924 that the practice of entering a *nolle prosequi* before the indictment has been proffered to the jury is one of long standing and has been recognised in a number of cases which were referred to at length in the submissions. Equally it is not disputed that the terms of s. 12 are directive in nature and not mandatory. (See the State (*Coveney) v. the Special Criminal Court* referred to above.) It is interesting to look at the history of the power to enter a *nolle prosequi*. In his book on Criminal Procedure it is considered by Professor Walsh. At para. 16-49, on p. 812 he states:-

> "The Attorney General had a common law power to stop the prosecution of an accused by entering a *nolle prosequi*. Today it would appear that the source of the power lies in s. 12 of the Criminal Justice (Administration) Act, 1924 which stipulates that the D.P.P. may enter a *nolle prosequi* at the trial of an accused at any time after the indictment is proffered to the jury and before a verdict is found. The practice at common law has been to enter the *nolle prosequi* before the indictment was proffered. Although the exercise of the power under s. 12 appears to be confined to the periods between the preferment of the indictment and the verdict of the jury, the practice of entering it before the indictment is proffered has continued."

50. He then referred to the decision of Finlay P. in the case of *the State (O'Callaghan) v. O'hUadhaigh* and to the decision in the *Coveney* case. He goes on to say that despite the formal words of s. 12, "it is perfectly lawful for the D.P.P. to enter a *nolle prosequi* before the indictment has been proffered." He went on to point out that there was no definitive list of situations in which the *nolle prosequi* can or cannot be applied. He pointed out that previously it was often used by the Attorney General to block private prosecutions which were not deemed to be in the public interest. Nowadays he points out that it is often used where the D.P.P. considers for one reason or another that the charge should not proceed immediately to trial. (See para. 16-50.)

51. Nonetheless the point at issue raised on behalf of the applicants is that there must be in existence an indictment for the valid entry of a *nolle prosequi*. As already referred to counsel for the first named applicant relies in particular on the decision in the English case of *R. v. The Chairman of the County of London Quarter Sessions ex parte Downes* where it was stated by Goddard C.J.:- "Once an indictment is before the court the accused must be arraigned and tried thereon unless…. (c) a *nolle prosequi* is entered by the Attorney General which cannot be done before the indictment is found." Mr. McDonagh on behalf of the D.P.P. pointed out that the statutory framework which Goddard C.J. was dealing with is different to that which applies in this jurisdiction and I have to say that I

agree with that view. I do not find any particular assistance from that decision.

52. It is difficult having regard to the long standing practice of entering a *nolle prosequi* before an accused has been put in charge to deduce from any of the authorities cited a requirement that there must be an indictment before the court before the *nolle prosequi* can be entered. One is forced to ask the question what benefit would accrue to an accused by having to postpone the entry of a *nolle prosequi* in order to have an indictment drafted and put before the court? As was stated by Finlay P. in the State (*Coveney) v. the Special Criminal Court* at p. 288 "it is difficult to see what end of justice and in particular what right or interest of the accused could be secured by inhibiting the Director of Public Prosecutions as it now is from entering a *nolle prosequi* before the accused had been given in charge to a jury…". In the passage immediately following that which I have just referred to, Finlay P. went on to say "in a case such as the present where the entry of a *nolle prosequi* is a precedent to the institution of fresh proceedings in respect of the same charge its early rather than its late entry merely achieves one of the known objectives of justice, namely the speedy dispatch of criminal proceedings. Furthermore, expense incurred by an accused in his own defence and the anxiety associated with a pending criminal charge would be intensified if strict adherence were in all cases paid by the Director of Public Prosecutions to the provisions of the section appearing to provide that it was only when the accused has been put in charge of the jury that he could and should enter a *nolle prosequi*."

53. It may be of assistance to consider briefly what, in fact, occurs following an order returning an accused for trial in the Circuit Court. The practice may vary on Circuit but in Dublin Circuit Criminal Court, the matter is listed for mention usually within a couple of weeks from the date of the return. The accused's Solicitor and the Chief Prosecution Solicitor are notified of the date for mention and the accused is cautioned to appear or, if in custody, arrangements are made to produce him in court. Thereafter, the matter may be adjourned from time to time while preliminary matters are dealt with, for example, disclosure. Then, if the accused is to plead guilty, an arraignment date is fixed. If it is indicated that a not guilty plea will be entered, a trial date will be fixed. All of these procedural steps take place without an indictment having been produced to the court. The existence of the indictment is a sine qua non for the arraignment of an accused before the court (see the passage from Walsh on Criminal Procedure at p. 737 thereof quoted above) and for a trial, of course, but I would have to say that having regard to the decision of Finlay P. referred to above that it is not a sine qua non for the entry of a *nolle prosequi*. I can find nothing in any of the authorities opened to me which support that contention. On the contrary, the passage quoted from the judgement of Finlay P. in the preceding paragraph seems to me to support the contention that the D.P.P. could be criticised for delaying the entry of a *nolle prosequi* to await the preparation of an indictment. To conclude otherwise would, in my view, render the decision in the case of *The State (Coveney) v Special Criminal Court* meaningless. Furthermore, it is a longstanding practice that occurs on a regular basis. Given the time that may elapse before a trial date or an arraignment date is fixed, it could involve even further delay in disposing of the matter. Accordingly, I cannot accept the arguments on this point.

54. The next issue that was raised related to the institution of fresh proceedings against the applicants. Clearly, as submitted by counsel on behalf of the applicants, the right to institute fresh proceedings is not an untrammelled right. Reference was made to the decision of Murphy J. in the case of *Kelly v. The Director of Public Prosecutions*. In turn that decision relied heavily on the decision on Finlay P. in the case of *the State (O'Callaghan) v. O'hUadhaigh*. Having considered the authorities referred to it seems to me that the issue one has to consider is whether the institution of fresh proceedings by the D.P.P. in a particular case resulted in the accused losing any advantage by virtue of rulings in his favour in the course of the trial by the entry of a *nolle prosequi*. As was stated by Murphy J. in the *Kelly* case at p. 608 "There has been no adjudication on any issue and no gain by the applicant of which he will be deprived. All that can be put forward on behalf of the applicant in the present case is that the summary proceedings, having been instituted outside the statutory time limits, were void and if the summary proceedings had been heard by the judge of the District Court they would have been struck out on those grounds. Such a strike out would of course have been on what O'Dalaigh C.J. described in *the Attorney General (O'Maonaigh) v. Fitzgerald* [1964] I.R. 458 as a "jurisdictional acquittal" and would not have created an estoppel in favour of the applicant." . I cannot see any procedural advantage or gain accruing to the applicants of which they have been deprived as a result of the decision of the D.P.P. to enter a *nolle prosequi*. Accordingly, I cannot see any impediment to the institution of fresh proceedings by the D.P.P.

55. One of the other key arguments raised by counsel on behalf of the applicants related to the return for trial in the particular case. It was conceded that for the Circuit Criminal Court to have jurisdiction to deal with the case there must be a valid order returning the accused person for trial. However the point was made that the D.P.P. could have opted to proceed with the trial before the Circuit Court in relation to the non scheduled offences. The argument was that a defect in relation to one or more of the charges which does not affect the other charges does not prevent the charges on the return being severed, thus allowing the matter to proceed. Reliance was placed by counsel on the decision in the case of *the People (Attorney General) v. Walsh*, supra. In my view, counsel for the applicants have mistaken what was at issue in that particular case. The difficulty there was the want of particularity in respect of one of the charges on which the accused had been returned for trial. Here, the problem relates not to an infirmity in respect of the form of charge or one or other of them, but rather, the infirmity relates to the return for trial itself. Section 45(2) of the Offences Against the State Act, 1939 provides as follows:-

> "Whenever a person is brought before a justice of the District Court charged with a scheduled offence which is an indictable offence and such justice receives informations in relation to such charge and sends such person forward for trial on such charge, such justice shall, unless the Attorney General otherwise directs, send such person forward in custody or with the consent of the Attorney General at liberty on bail for trial by a special criminal court on such charge."

56. Although it has been suggested on behalf of the applicants that the D.P.P. could have proceeded with the non-scheduled offences notwithstanding the absence of evidence indicating that the appropriate direction had issued from the Director of Public Prosecutions permitting the accused to be tried before the ordinary courts in respect of the scheduled offence I have to say that I cannot agree with that submission. There must be a doubt as to the entitlement of the District Court to make a valid return for trial to the Circuit Criminal Court in respect of scheduled offences having regard to the provisions of s. 45 subs. 2 of the Offences Against the State Act, 1939 as amended. Section 4A (1) of the Criminal Procedure Act 1967 as amended by the Criminal Justice Act 1999 provides as follows:-

> "4A (1) Where an accused person is before the District Court charged with an indictable offence, the Court shall send the accused forward for trial to the Court before which he is to stand trial (the trial court) …"

57. In this case, having regard to the provisions of S. 45(2) of the Offences against the State Act 1939, as amended, the accused should have been sent forward to the Special Criminal Court absent a direction from the D.P.P. to the contrary. The trial court derives its jurisdiction from the return for trial. Normally, the D.PP.'s directions are made known to the trial court by means of a stamp on the return for trial. What arose in this case seems to me to be an entirely different situation to that in the Walsh case where the problem was a want of particularity in one of the charges referred to in the return for trial. The problem here related to the actual order returning the accused for trial. I cannot see how severing the order returning for trial could have resolved the difficulty. Finally I do

not think that there is any assistance to be found on this point by considering the weight to be attached to the particular offences comprised in the return for trial. It is entirely a matter for the D.P.P. to consider what charges should be brought in respect of any given set of circumstances and it seems to me that to hold that the director should have proceeded to trial in respect of the non scheduled offences (always assuming that he could have done so) would in my view amount to an interference with the discretion of the D.P.P. to decide who and what should be charged.

58. Inevitably the consequence of entering a *nolle prosequi* is that the accused have lost the trial date that had been fixed in respect of these matters. There is a necessary time lag between the reinstitution of these proceedings and the fixing of a new trial date in respect of these matters. In those circumstances can it be argued that this amounts to a breach of the applicant's right to a trial with reasonable expedition? Given that the applicants are both in custody awaiting trial it is important to ensure that there is no undue delay in obtaining a new trial date. It is to be noted that following the entry of the *nolle prosequi*, fresh proceedings were commenced against the first named applicant on 5th October, 2004, and against the second named applicant on 6th October, 2004. A new return for trial was made on 12th October, 2004. On the basis that both sides would have been ready for trial on 11th October, 2004, it is to be presumed that there are no preliminary matters outstanding (such as disclosure) which would delay matters. Although reference has been made to the jurisprudence on delay I do not think that this is a case in which it could be argued that there is excessive delay in bringing the applicants to trial or where it could be argued that there is culpable delay on the part of the D.P.P. or of State authorities in relation to the prosecution of this matter. It is accepted that the delay involved as a result of the entry of the *nolle prosequi* in this particular case is not as significant as in the reported decisions on delay but the point is made that the D.P.P. could have proceeded in respect of the non scheduled offences before the Circuit Court thereby adopting the course least invasive of the rights of the applicants. The situation has arisen in this case where it is necessary not only to consider the rights of the applicants to an expeditious trial but also to the community's right to have criminal offences prosecuted. In attempting to weigh in the balance these conflicting rights I am not satisfied that the delay necessitated by the entry of the *nolle prosequi* is such as to overbear the community's right to have criminal offences prosecuted.

59. It was also argued that if the entry of the *nolle prosequi* was invalid for the reasons argued by the applicants then there are in existence two sets of charges against the applicants. In the light of the conclusions set out above, it is not necessary to consider this argument.

60. Finally, I have come to the conclusion that the applicants are not entitled to the reliefs sought herein.