Neutral Citation Number: [2007] IEHC 407

THE HIGH COURT

JUDICIAL REVIEW

2006 No. 965 J.R.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

DISTRICT JUDGE CONSTANTINE O'LEARY

AND VARIOUS RESPONDENTS

RESPONDENTS

Judgment of Mr. Justice Roderick Murphy dated the 6th day of December, 2007.

1. Background and Basis of Review

The Judicial Review proceedings before the court involving seven separate Respondents charged with offences contrary to Sections 49 (and in one case Section 13) of the Road Traffic Act 1961 which relates to drunken driving. The Respondents are Rose O'Leary, Edward Power, Kieran Corkery, Kenneth O'Sullivan, Joe O'Brien, Eoin McMahon and Paul Reynolds. The issues in each case are broadly similar.

The offences are alleged to have been committed between 2000 and 2002 and all were dismissed by the first Respondent in June 2006. The principal reason for the delay in these matters coming to trial was because the Defendants in each case sought adjournments to await the outcome of challenges to the Intoxilyzer legislation before the High and Supreme Courts.

The High Court (McKechnie J.) dismissed the challenge on 15th September, 2004. The Supreme Court upheld that decision on 25th July, 2006 and gave its reasons on 25th November, 2006.

On the 15th of June 2006, the first Respondent delivered judgment in the prosecution of *DPP v. Eoin McMahon* and dismissed that prosecution by reason of delay and indicated that he would do so in relation to the other cases where the offences were alleged to have been committed in excess of four years previously by dismissing them in similar fashion unless there was some "*special factor*" applicable in those cases. The applicant submits that in all cases (a) the first Respondent failed to conduct an inquiry into the reasons for the delay (save and insofar as the dates of the adjournments appeared from the Court file); (b) dismissed each case without hearing evidence; and (c) failed to apply the relevant principles applicable to the case in reaching his decision.

The basis upon which the Director of Public Prosecutions seeks to review the decision of the Judge of the District Court in these linked cases is essentially set out at paragraph E (vi) of the Statement of Grounds. The Applicant argues that the learned judge erred in law and/or exceeded his jurisdiction and/or was in breach of natural or constitutional justice by reason of the fact that he:

(i) dismissed the cases without hearing evidence,

(ii) relied on reasons for delay which had not been adduced in evidence before him,

(iii) failed to apply the principles applicable to delay mandated by the Supreme Court in *PM v. DPP.*,

(iv) failed to inquire into the reasons for the delay.

(v) failed to take account of the failure of each accused person to assert his right to an expeditious trial in a timely fashion.

(vi) failed to take into account relevant material.

(vii) took into account irrelevant material.

(viii) failed to identify what "*special factors*" he was prepared to take into account.

The Director was granted leave to apply by way of judicial review for an order of *certiorari* of the orders of the first named respondent dismissing the prosecutions and for an order of *mandamus* directing the first named respondent to hear and determine the aforementioned charge upon remittal to the District Court.

The second respondents had been charged that on (a certain date) (the second named respondent) had driven a mechanically-propelled vehicle in a public place when there was present in his body a quantity of alcohol such that within three hours after so driving, the concentration of alcohol in his breath exceeded a concentration of 35 mg. of alcohol per 100 ml. of breath, contrary to s. 49(4) and (6)(a) of the Road Traffic Act, 1961 as amended.

2. Applicant's submissions

D.P.P. v. Eoin McMahon was eventually listed by the District Court on 15th June, 2006 as the first named respondent had indicated to the solicitor for the second named respondent that it might be an advantage to argue the question of delay.

The first respondent then delivered judgment in that case in which a breach of the right to an expeditious trial had been alleged. The

applicant submits that at the conclusion of that judgment, which was delivered without hearing any evidence, the first named respondent indicated that he would deal with all s. 49 cases where the offences were alleged to have been committed in excess of four years beforehand, by dismissing them in similar fashion unless some "special factor" was applicable.

Other cases were adjourned to 16th June, 2006 when respondents considered the submissions made on behalf of the applicant in *DPP v. Eoin McMahon*. The first named respondent declined to hear evidence but asked to be addressed on whether any "special factors" arose. It was submitted that in September, 2005 a matter had been adjourned on condition that the second named respondent would not raise the question of delay from that date onwards. Accordingly, the case did not meet the four year cut-off point indicated.

This submission was not accepted by the learned first respondent. It was pleaded that the learned first respondent erred in law and/or exceeded his jurisdiction and/or was in breach of natural and/or constitutional justice by reason of dismissing the case without hearing evidence relying on reasons for delay which were not reasons which had been adduced in evidence before him; failed to apply the principles applicable to delay mandated by the Supreme Court in *P.M. v. D.P.P.* of 5th April, 2006; failed to inquire into the reasons for the delay; failed to take into account the failure of the second respondent to assert his right to an expeditious trial in a timely fashion; failed to take into account relevant material and took into account irrelevant material and failed to identify what special factors he was prepared to take into account.

3. Grounding affidavit

4. The affidavit of Mr. St. J. Galvin, State Solicitor for Cork City, sworn 31st July, 2006 said that the issue regarding the possibility of striking out a large number of pending drunken driving prosecutions first arose at Cork City District Court on 21st April, 2005. On that date the first respondent delivered an interim ruling regarding the issue of delay in the case of *D.P.P. v. Cathal Toal* which he accepted. In that decision the learned trial judge, the first named respondent herein, concluded that he was not aware of any case which was over three years awaiting hearing in the District Court where delay was argued and ruled not a bar to the prosecution proceedings. He adopted that as the cut-off point. This would affect sixteen of the relevant prosecutions pending.

Mr. Galvin said that on the particular facts in the *Cathal Toal* case he was instructed not to offer evidence but was instructed to represent the applicant generally on the issue of delay in other s. 49 cases. A number of these arose on 25th May, 2006. In *D.P.P. v. Reynolds* all the cases were adjourned to 1st June, 2006 and 8th June, 2006 where he referred to P.M. v. D.P.P.; *Barker v. Wingo; Blood v. D.P.P.*; and *D.P.P. v. Anthony Clifford*.

The first named respondent indicated, on 15th June, 2006, that he had issued a press release following a press article in the Examiner on 9th June, 2006, headed "Judge to let drink drivers off over delays". The article had stated that a judge in Cork District Court would treat all cases four years old or more as a group and dismiss them the following week. The article stated that ten similar cases were up for mention in the court. The following weekend it was estimated that there were up to 390 such cases still awaiting to go before Cork District Court alone. All related to the use of intoxilysers. There was a summary report of the cases and references made to comments from an opposition spokeswoman and from the Department of Transport.

The first named respondent's press release stated as follows:

> "I note extensive publicity to the effect that hundreds of prosecutions may be struck out by me today.
>
> I am aware of only nine prosecutions under section 49(4) or section 50(4) of the Road Traffic Act, 1961 or section 13(2) Road Traffic Act, 1978, as amended, listed before me. Of those, only seven are more than four years old.
>
> The total number of section 49(4), section 50(4) and section 13(2) prosecutions pending in this Court is 128.
>
> Of these, only thirteen cases more than four years old are due to be listed before me by the end of July when by arrangement with Judge Riordan since April 1st I will revert to Court 2.
>
> Judge Riordan will deal with such prosecutions as come before him from 1/9/2006 as he thinks fit.
>
> Judge MacGruairc will deal with the cases before him as he thinks fit.
>
> Given the nature of the distribution of work and the mechanics of listing cases in this district, the vast bulk of the cases pending here were never going to come before me. The significance of the number of such cases pending lies in creating the context for dealing with the seven cases more than four years old before me today.
>
> I regret that carelessness in my use of words appears to have created the wrong impression."

Mr. Galvin deposed to the hearing on 15th June, 2005 at 2 p.m. He handed the first respondent a copy of the judgment in *Ward v. Minister for Agriculture* [1997] IEHC 104, where the High Court had adopted a time limit in which a fair trial could be heard at five years and three months.

Mr. Galvin said that the first named respondent declined to hear evidence in the case and proceeded to read out the judgment he had prepared, which is exhibited in the affidavit. That judgment distinguished between significant delay and some delay. Reference was made to *P.M. v. D.P.P. to Barker v. Wingo, D.P.P. v. Clifford, D.P.P. v. Byrne*, and *Clune v. D.P.P.*

The judgment adopted four years as the cut-off point and concluded:

> "Having regard to all the above factors, unless the State can persuade me that there is some special factor in this case which takes it out of the ordinary, I will dismiss it. I will apply the same reasoning, subject to such persuasion, to the thirteen other similar cases pending in Court 3 listed for dates before 31/7/2006."

Mr. Galvin said that at all times the prosecution was ready to proceed. The only reasonable inference to be drawn from the adjournment sought by the second respondent was that, following legal advice, he deliberately failed to assert his right to a trial within reasonable expedition in the hope of gaining some advantage if the challenges to the intoxilyser legislation were successful.

4. Affidavit of Paul O'Mahony

Paul O'Malley's affidavit of 5th December, 2006 was made on behalf of Mr. Corkery, one of the second named respondents in relation to a sole offence contrary to s. 49(4) allegedly committed by his client on 18th May, 2002, over four years beforehand.

Mr. O'Mahony detailed thirteen adjournments which he believed were not opposed by the State and, further, was with the consent of the State. The only occasion on which a hearing date was fixed was 15th June, 2006.

He did not believe that the applicant was at all times ready to proceed. On 8th June, 2006 his office received a telephone call from the garda station indicating that a prosecution witness would be unavailable for the hearing in the matter on 15th June, 2006 and, later was informed that the matter was for mention on that date and not for hearing. On 13th June, 2006 he appeared before the second named respondent for the purpose of resisting an application to have the hearing date vacated. The first named respondent adjourned the matter to 15th June without hearing their submissions on delay. On that date the garda file of the applicant was not in court and the matter was adjourned to 16th June as the applicant was not ready. On that date the applicant did not seek to call evidence in the said criminal proceedings but made submissions. The first named respondent ruled on the matter and dismissed the criminal proceedings because of the delay in the case.

Mr. Mahoney exhibited a letter from Sergeant McKenna dated 9th June, 2006 which stated that *D.P.P. v. Corkery* was listed for mention and not for hearing as retired Sergeant Laffen was in the Circuit Court.

5. Affidavit of Sergeant Michael Maguire
Sergeant Maguire believed from the information on file and from verbal reports that District Judge MacGruairc had a policy not to deal with any cases that were subject to an intoxilyser challenge in the Superior Courts. A submission had been made to him in an earlier case by a defendant that he should not hear cases for that reason. It was therefore garda policy in relation to adjournments that there would be no objection to an adjournment by the defence to await the outcome of a challenge. The prosecution was, however, prepared at all times to proceed.

On the first appearance in the District Court on 27th February, 2003 an application for an adjournment was moved by the prosecution pending the aforesaid High Court decision. The matter was adjourned on several occasions until the hearing of 15th June, 2006.

It was not until 28th November, 2006 that the Supreme Court delivered the judgment in *McConnell v. Attorney General and the D.P.P.* It had, however, on 25th July, 2006 indicated that the High Court judgment would be upheld and reasons would be given at a later date. The Supreme Court unanimously upheld the judgment of the High Court (McKechnie J.) of 15th September, 2004. Despite the expressed wish of the second respondent to await the outcome of this case he did not in fact request a date for hearing prior to the matter being argued in the Supreme Court.

Sergeant Maguire reiterated that the prosecution was at all times prepared to proceed but did not apply for a date as Judge MacGruairc had made clear what his policy was.

6. Statement of opposition of the second named respondent
The first named respondent had jurisdiction to make the order complained of in the order that he did, in order to protect the rights to trial and due course of law of the second named respondent. He did not exceed his jurisdiction, gave individual consideration, heard extensive submissions on behalf of the applicant and afforded the applicant constitutional fair procedures. The second named respondent was at serious risk of an unfair trial due to prejudice caused by the lapse of four years, which prejudice could be presumed. The applicant had failed to act promptly to bring the judicial review proceedings.

It was too vague and wanting in specificity for the applicant to plead that the first named respondent failed to apply the principles of *P.M. v. D.P.P.* or failed to take into account irrelevant material or failed to take into account the failure of the second named respondent to assert his right to trial with due expedition.

7. Legal submissions on behalf of the applicant
The applicant submitted that the first named respondent held that lapse of time was the same as delay. It was not possible to distinguish the cases if that respondent proceeded to dismissing the cases without hearing them.

The second named respondent applied an arbitrary justice in indicating that he was a four years as a cut-off point unless the State could persuade him that there was some special factor he would dismiss the case. This was to reverse the onus of proof and also a failure to consider whether the defendants had at any relevant period asserted their rights to an expeditious trial.

The applicant relied on the principles of *Barker and Wingo* in relation to blameworthy prosecutorial delay of significance. The test in *P.M. v. D.P.P.* and subsequent cases was the appropriate criteria to be followed.

In *D.C. v. D.P.P.* [2005] 4 I.R. 281, Denham J. stated at 283 that only in exceptional cases should the court intervene to prohibit a trial. The test was whether there was a real risk that by reason of the particular circumstances that the applicant could not obtain a fair trial.

The applicant referred also to *P.M. v. Judge Malone* and to *O'H v. D.P.P.* and to *J.A. v. D.P.P.* In relation to delays arising as a result of litigation in the High Court, *T.H. v. D.P.P. and Judge Smithwick*, a decision of the Supreme Court of 25th July, 2005 was relevant.

It is clear that the primary reason for the cases not getting on was that the accused persons were happy to allow their prosecutions to be postponed for a period of years. They hoped to take advantage of a finding that the legislation under which they were being prosecuted was unconstitutional. The High Court and the Supreme Court determined that the legislation was entirely in conformity with the Constitution and the challenges were dismissed.

Three defendants, Ashley McGonnell, Oliver Quinlan and John Purcell proceeded by way of plenary proceedings challenging the intoxilyser legislation. They were unsuccessful and their trials were proceeded with.

8. Submissions of the second respondent
Written submissions were made on behalf of Corkery, O'Leary, O'Brien, Reynolds and McMahon. These may be summarised as follows:

It was submitted that no error was made and if an error was made it was within jurisdiction. *Farrelly v. Judge Devally*, Unreported, High Court, Morris J., July 19th, 1996 applied, where it was held that if the court had a basis on which it would be justified in holding as it did then the High Court would not intervene. The dictum of O'Hanlon J. in *John V. Lennon v. Judge Clifford and D.P.P.* [1993] I.L.R.M. 77 was followed.

Moreover, the applicant was estopped by conduct from claiming relief as the applicant had knowingly and willingly engaged in the procedure seeking the ruling of the High Court and Supreme Court.

The court had a discretion which weighed heavily against granting relief against the decision of the District Judge.

There was no application for an order of prohibition before judgment was delivered. The applicant had engaged in the hearing and outlined what he believed to be the special factors of the case. The applicant had acquiesced. Evidence on affidavit had been filed which showed no fundamental disagreement between the parties as to the number of adjournments. As there was no disagreement between the parties on the reasons for the adjournments it was difficult to see how there was no jurisdiction or if there was an error of law or a breach of natural or constitutional justice.

The onus cannot lie on an accused to assert his rights to an expeditious trial in a timely fashion. It was factually incorrect to allege that the District Judge failed to take into account the alleged failure on the part of the accused to assert his rights to an expeditious trial in a timely fashion.

The applicant had failed to specify the principles mandated in *P.M. v. D.P.P.*, and had failed to specify what irrelevant matters were taken into account.

Only in extreme cases will errors of law cause a decision-maker to exceed jurisdiction.

In relation to one of the judicial review applications, the second respondent's solicitor was contacted by the applicant's solicitor on 2nd February, 2007 and informed that the judicial review proceedings were being withdrawn. However, the following day it was indicated that this representation had been made in error and that further advices were being taken. However, it was not until three months later, 3rd May, 2007, that the matter was finally declared ready for hearing. The applicant had failed to act promptly: *D.P.P. v. Macklin* [1989] I.L.R.M. 113 and *D.P.P. v. Judge Kelly* [1997] 1 I.R. 405.

The applicant had failed to demonstrate any errors or breaches, particularly in circumstances where there was no dispute on the essential facts and the applicant had fully engaged in the procedures in the District Court and was aware of the manner in which the District Judge intended to proceed. The applicant fully engaged in the process.

It would be unfair to proceed some five years after the alleged offences. The applicant's conduct in failing to seek leave promptly gave rise to a fundamental unfairness.

If there had been an error it occurred within jurisdiction.

9. Decision

9.1 Delays arising as a result of Litigation in the High Court
Having carefully considered the evidence on affidavit and the above submissions, the court is of the view that the lapse of time awaiting the High Court and the Supreme Court decision on the challenge to the intoxilyser legislation cannot be equated to prosecutorial delay.

The analogy of delay caused by an application by an accused for judicial review is instructive.

What consequences might flow, if any, from a protracted series of adjournments in such an application? The question arose in the context of the pending judicial review in *T.H. v. The DPP and Judge Smithwick*, unreported decision of the Supreme Court of the 25th of July 2006. The relevance of this decision to the cases under review is that the Applicant in that case sought to take advantage of the fact that his own judicial review proceedings had taken a protracted period of time to be heard. By analogy, the Notice Parties in these proceedings were, in effect, taking advantage of another persons' litigation and then seeking to rely upon the length of time which that litigation took in order to stop their trial.

In the case of *T.H.*, the Applicant had commenced Judicial Review proceedings in 1997. A number of arguments were raised as to the conduct of the Director of Public Prosecutions and his representative before the District Court in December, 1996, and early January, 1997. Though the High Court rejected all arguments based upon the original Statement of Grounds, it prohibited the trial as a result of the fact it had taken seven years to dispose of the case in the High Court and that a fair trial could not be assured. The Supreme Court allowed the appeal of the D.P.P. Fennelly J., on behalf of the Court, held that as the applicant had been the initiator of the Judicial Review process, there was, in principle, a lack or merit on his part. There was no *'prosecutorial delay'*.

Fennelly J. pointed out that the High Court had reviewed the conduct of the litigation with a view to attributing fault or for delay and had implicitly attributed:

> "blame especially to the [DPP] whenever an adverse decision is made. It is undoubtedly the case that the [DPP] strongly contested the application for judicial review. He sought adjournments and extensions of time. He failed in some motions and succeeded in others. At times, there was no doubt that there was unnecessary delay on the part of the [DPP]. On the other hand and equally clearly, large periods of delay were the responsibility of the applicant. All in all the conduct of the proceedings by the [DPP] was not unusual. The application was hard fought but that was the right of the [DPP]. In this case, it was his duty to oppose an unjustified claim. I do not think it is right to scrutinise the various steps taken in the litigation with a view to assigning blame when a party unsuccessfully but bona fide takes or opposes a step in the procedure."

A little later in the judgment, having summarised a number of matters, he states:

> "This conclusion makes no allowance at all for the normal and the legitimate cut and thrust of litigation or for the fact that some of the delay was simply due to the fact that the case was not reached in the court list."

Again having reviewed further matters Fennelly J. commented:

> "The overwhelming impression left by a consideration of this history is that, while there was significant delay on the part of the [DPP] the principal if not the only reason for the failure to get the prosecution on was that the applicant had brought unfounded judicial review proceedings. In the course of those proceedings, he conducted a sort of war of attrition with the appellant in the respect of discovery, from which he secured minimal benefit. Almost all of the delay was due to the discovery process."

Fennelly J. concluded that the criminal prosecution of the applicant should not be prevented for the following reasons:

> "Firstly he is overwhelmingly the party responsible for the delay. Secondly, for reasons already given, the applicant is unable to point to any real risk of an unfair trial. Thirdly, the applicant is able, at most, to refer to some prolongation of the natural stress and anxiety necessarily associated with a pending criminal trial. Fourthly this is insufficient to displace the public interest in his being prosecuted."

9.2 The principles of *Barker v. Wingo* (1972) 407 US 514 have been adopted in this jurisdiction as being those relevant to a Court considering whether to prohibit a trial on grounds of a breach of the constitutional right to an expeditious trial. The following statement of Powell J. has been approved recently in *Blood v. The DPP* (2005) IESC 8 and *PM v. DPP* (Supreme Court, 5th April, 2006):-

> "A balancing test necessarily compels the courts to approach the speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."

In regard to prejudice, the Court identified three of the interests of the Defendant to be protected as:-

> a. to prevent pre-trial incarceration;
>
> b. to minimise anxiety and concern to the accused, and
>
> c. to limit the possibility that the defence will be impaired.

Powell J. further stated:-

> "Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die, or disappear during a delay, the prejudice is obvious. There is also prejudice if the defence witnesses are unable to recall accurately events in the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown."

The first Respondent however lost sight of the fact that a balancing test would only be appropriate where *'blameworthy delay'* by the prosecution had been established on the evidence. While the first Respondent referred to the challenges to the Intoxilyzer legislation, he held that the prosecution, the Court, the Superior Courts and the Defence all contributed to the delays which occurred. He appears to have held the view that lapse of time (for all and any of these reasons) equated to 'blameworthy delay by the prosecution'.

Even if there were such delay, none of the second named respondents have demonstrated facts which would satisfy the court that they would be unduly prejudiced by the considerable delay that has occurred.

9.3 No Blameworthy Prosecutorial Delay of Significance
Had the first Respondent correctly applied the principles of *Barker v. Wingo*, he would not have laid the blame for the delays at the feet of the prosecution without having allowed evidence as to who caused delay and, having heard such evidence, adjudicating thereon. If there was no blameworthy prosecutorial delay, then there was no breach of the Respondent's right to an expeditious trial. Accused persons cannot rely on their own acquiescence in awaiting the outcome of the challenges to legislation in order to assert blameworthy prosecutorial delay on the part of the DPP. This is especially so as they undoubtedly would have sought to benefit from any advantage arising to them had the challenges to the intoxilyser legislation been successful.

There was no evidence of the causes of delay before the first Respondent. Even if there were some blameworthy prosecutorial delay this of itself would never be sufficient to restrain a trial. In *PM v. Malone*, Kearns J. stated at page 16:-

> "I believe that the balancing exercise referred to by Keane CJ in *P.M. v. Malone* (2002) 2 I.R. 560 is the appropriate mechanism to be adopted by a Court in determining whether blameworthy prosecutorial delay should result in an Order of prohibition. It means that an applicant for such relief must put something more into the balance where prosecutorial delay arises to outweigh the public interest in having serious charges pursued to trial. In most cases, pre-trial incarceration will not be an element as an applicant will probably have obtained bail pending his trial. Secondly, while he may assert increased levels of stress and anxiety arising from prosecutorial delay, any balancing exercise will have to take into account the length of such blameworthy delay, because if it is a short delay rather than one of years, the mere fact that some blameworthy delay took place should not of itself justify the prohibition of a trial."

At page 18, he continued:-

> "In conclusion, however, on this issue, I am satisfied that where blameworthy prosecutorial delay of significance has been established by the applicant, then that is not sufficient per se to prohibit the trial, but that one or more of the interests protected by the right to the expeditious trial must be shown to have been so interfered with such as would entitle the applicant relief."

9.4 *The Minister for Justice, Equality and Law Reform v. Roger Michael Gardener* involving an interpretation of the provisions of the European Arrest Warrant Act 2003. One of the objections raised on behalf of the Respondent to the request that the Respondent be extradited on foot of a warrant under the Act was that the passage of time since the date of the alleged offences was so long that he could not receive a fair trial or a trial within a reasonable time. He relied on "*presumed prejudice*" resulting from the length of delay in seeking the surrender and emphasised that there had been no explanation for the delay. In the course of submissions, the case of *PM v. The DPP*, referred to above, was cited. Counsel for Gardener submitted that the test to be applied was whether there was a real risk of an unfair trial, but it was also submitted that establishing actual prejudice was not necessary and that *inter alia* recent case law including *PM v. The DPP*, did not preclude a finding of "*presumed prejudice*" in the absence of actual prejudice being identified. It was submitted that all the circumstances of the case had to be considered and it was conceded that all the circumstances including the fact that no actual prejudice had been identified and established by the Respondent. In giving judgment on the issue, Peart J. had this to say:

> "The court is satisfied first of all that the only delay which ought to even be considered in this case is blameworthy prosecutorial delay. … In relation to prosecutorial delay Mr. Munro has submitted that prejudice is not an absolute requirement and that prejudice may still be presumed in such a case, even in the absence of any evidence by the

> respondent of actual prejudice. I cannot agree with such a benign view. The judgment most helpful to the question of prosecutorial delay is that of Kearns J. in *PM v. DPP*."

In the instant case, it is submitted that the second named respondent failed to consider whether the accused persons in each case had in fact established blameworthy prosecutorial delay, but rather he appeared to proceed on the basis that wherever there has been an inordinate lapse of time, the 'balancing test' should be undertaken by the Trial Judge.

Such an approach would, in effect, amount to the assertion of a jurisdiction on the part of a Trial Judge to decide if a particular prosecution was in the public interest or not. In the first place, for the purposes of the application of *PM v. DPP*, it is necessary for the accused person seeking to have the matter dismissed by reasons of delay to establish on the evidence that there has been blameworthy prosecutorial delay. In light of what actually occurred in these cases as recounted in the affidavits filed on behalf of the DPP and not in essence or matters material contradicted on behalf of the accused persons, it is clear that the first named Respondent erred in law and indeed acted outside his jurisdiction and applied the incorrect legal test.

9.5 In *DPP v. Judge Sheridan and Paul O'Brien*, Feeney J. quashed an order of Judge Sheridan to dismiss on the basis of delay. The facts in *DPP v. Sheridan and O'Brien* are of particular significance for the issues raised in the cases before the Court. The Applicant sought an order of Certiorari quashing an order of Judge Sheridan of the 2nd of June 2006, dismissing three charges against Paul O'Brien in respect of the attempted evasion of Vehicle Registration Tax and VAT on the basis of "*delay*". The grounds upon which relief was sought were summarised by Feeney J. as, *inter alia*, erred in law and acted irrationally in dismissing without hearing evidence.

Feeney J., in the course of giving judgement, stated:

> "That is the full extent to which any attempt was made to identify real or actual prejudice, and it was done by means of submission and not by means of evidence. In reply it was submitted by the lawyer representing the State that the position was such that what was said at the interview was not in issue in the case. It was further submitted that there was other evidence besides the interview with the Notice Party on the 20th of January 2004, and that in any respect the evidence in the case was primarily documentary evidence. The Respondent rose to consider the matter and requested copies of two recent authorities. After a short period of time the Respondent returned to court and stated that having read the cases and heard the submissions of the Notice Party's counsel he was dismissing the charges as he was satisfied there was delay in the case."

In the present cases the first named respondent did not hear evidence. Moreover, he appeared to reverse the onus of proof in requesting special circumstances.

9.6 In *D.C. v. The DPP* [2005] 4 I.R. 281 Denham J. stated at page 283 as follows:

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

9.7 The foregoing judgments bear a similarity to many of the issues arising in the instant case. In the matters currently before the Court, the Director of Public Prosecutions relies not merely upon the absence of evidence of prejudice, but also on the lack of fairness in the procedures adopted by the first named Respondent. It is apparent from the affidavit evidence the nature and the extent of the material that would have been before the first Respondent, had he dealt with the matter "on the evidence".

Given the reasons for "*delay*" contained in the affidavits filed before the Court, it is clear that no "*blameworthy delay*" has occurred. The Judge of the District Court appears to have equated *'lapse of time'* with *'blameworthy prosecutorial delay'*. It is undoubtedly the case, it is submitted, that the accused persons involved failed in a most significant fashion to assert their right to an expeditious trial. Whether all the blame for the lapse of time should be laid at the door of the accused persons or whether the approach of the Judge of the District Court who would have had primary responsibility for managing the list was a contributory factor, it is submitted that no blameworthy delay at all arose on the part of the prosecuting authorities. It was not "*blameworthy*" to accept rulings of a duly appointed Judge of the District Court in respect of the adjournment of cases. It is submitted that where accused persons were not asserting their right to a speedy trial and where the prosecution was at all material times ready to proceed, it could hardly be said to be "*blameworthy*" to have acquiesced in adjournments to facilitate accused persons or indeed the Court. The lapse of time involved was not as a result of inadequately funded District Courts or Summons Offices as in *DPP v Barry Byrne*. Judicial decisions were taken to adjourn cases and no 'blame' can attach to the prosecution in that regard.

It is seems to the court that the primary reason for the cases not getting on was that the accused persons were perfectly happy to allow their prosecutions to be postponed for a period of years as they hoped to take advantage of a finding that the legislation under which they were being prosecuted was unconstitutional. The High Court and then the Supreme Court determined that the legislation was entirely in conformity with the Constitution and the challenges were dismissed, in an ex tempore ruling by the Supreme Court in July 2006 with reasons delivered in November.

9.8 It is perhaps of signal importance that the three individuals, Ashley McGonnell, Oliver Quinlan and John Purcell, who had taken the three sets of plenary proceedings which were heard and determined together by the Superior Courts (in which identical challenges had been mounted to the Intoxilyzer legislation), and who were unsuccessful, themselves all were subject to their trials taking place after the Supreme Court had delivered its judgment. It would indeed be most curious if Ashley McGonnell, Oliver Quinlan and John Purcell were required, as they were, to undergo summary trials subsequent to 28th November 2006, their constitutional challenges having been dismissed whilst the Notice Parties in these proceedings, who had not taken any risk, financial or otherwise, but rather who had hoped to take advantage of the litigation conducted by McGonnell, Quinlan and Purcell were to have their cases dismissed for reasons of '*delay*'.

9.9. Accordingly, the court will make an order in terms of the reliefs sought.