**THE HIGH COURT**

**J.R. 2005 NO. 155**

**JUDICIAL REVIEW**

**BETWEEN**

**DAMIEN MENTON**

**APPLICANT**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**Judgment of Finnegan P. delivered on the 28th day of July 2006.**

1. On this application the Applicant seeks an Order restraining the Respondent from prosecuting the Applicant in respect of an offence which he is alleged to have committed on the 7th March 2003. The Applicant was brought before the District Court on the 19th May 2003. On the 16th June 2003 the Respondent consented to the charge being disposed of summarily. Thereafter the matter was listed for hearing on a number of dates which I will detail hereunder but was ultimately listed for hearing on the 29th June 2005. On the 21st February 2005 the Applicant was granted leave to bring this application for judicial review on the following grounds –

> 1. At the proposed date for hearing there would have been a delay in excess of two years and three months in bringing the complaint to hearing which delay is inordinate, inexcusable and excessive and amounts to breach of the Applicant's constitutional rights to a fair trial in due course of law and/or trial with reasonable expedition.
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> 2. The said delay amounts to a breach of the Applicant's rights pursuant to Article 6 of the European Convention on Human Rights.
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> 3. The said delay is well in excess of the period of time within which summary proceedings should be concluded.

**Chronology**

2. The following is a chronology of relevant events:-

**7th March 2003**

3. The offence with which the Applicant is charged was committed.

**19th May 2003**

4. The Applicant was brought before the District Court on a charge sheet. The matter was adjourned to the 16th June 2003 to enable the Respondent to consider whether further charges should be brought against the Applicant and for the Respondent's directions.

**16th June 2003**

5. The Respondent consented to the charge being disposed of in a summary manner. The matter was adjourned to the 14th July 2003 to allow the Respondent to furnish to the Applicant a copy of the statement made by him while in custody.

**14th July 2003**

6. The District Judge accepted jurisdiction. A date for hearing was fixed for the 5th November 2003 in Court 46.

**September 2003**

7. The Applicant sought from the Respondent CCTV footage.

**5th November 2003**

8. The matter was adjourned to the 16th April 2004 Court 50 as the CCTV footage sought by the Applicant was not then available and Court 46 where the matter was listed for hearing did not have the necessary facilities to display CCTV footage. A copy of the CCTV footage obtained by the Respondent was furnished to the Applicant.

**16th April 2004**

9. The prosecuting Garda had not available the relevant custody record on this date and sought an adjournment. Solicitor for the Applicant informed the District Judge that the Applicant was looking for additional video footage which was not in the possession of the prosecuting Garda. As the CCTV footage was only sought in September 2003 the additional footage sought was not available. The Applicant further informed the District Judge that they had not received certain video stills which had been shown to the Applicant when in custody. The Applicant had been shown three video stills while in custody and these had been furnished. There were two further stills in possession of the prosecuting Garda which were not used during the Applicant's detention which had not been furnished but these were subsequently forwarded to the Applicant when requested. The owner of the vehicle the subject matter of the charge was in court on this date and on consent she gave evidence as to her ownership and lack of consent to use of the vehicle. The matter was adjourned to the 14th May 2004 so that issues in relation to disclosure could be dealt with.

**14th May 2004**

10. The District Judge who had embarked on the hearing was not sitting on this day and the matter was adjourned for mention in respect of the issue on disclosure to the 28th May 2004.

**28th May 2004**

11. On that day the District Judge had a long list and was unable to deal with the issue on disclosure and adjourned the issue for hearing to the 18th June 2004.

**18th June 2004**

12. Legal argument on the issue of disclosure was heard. The District Judge determined that he could not resolve the issue without viewing the video footage in the context of the hearing of the case. The matter was listed for hearing on the 6th September 2004.

**6th September 2004**

13. On this day the District Judge had listed before him his own list but also the list of another District Judge and there was insufficient time to hear this matter. The matter was adjourned for hearing to the 9th February 2005 and a half day of Court time was

set aside for the purpose of hearing the same.

**30th January 2005**
14. The prosecuting Garda was injured in a road traffic accident while on duty. The Applicant was informed by fax and letter that in consequence she would be unavailable to attend the hearing on the 9th February 2005 and that an adjournment would be sought.

**9th February 2005**
15. The Respondent applied for an adjournment which application was granted a new date being given for hearing the 29th June 2005.

**21st February 2005**
16. The Applicant applied ex parte for leave to apply by way of an application for judicial review which application was granted.

**The Law**
17. In *Byrne v The D.P.P.* The High Court Unreported Peart J. 22nd July 2005 the facts are as follows. The offence with which the Applicant was charged was committed on the 3rd March 2003. The summons was issued on the 29th August 2003 with a return date of the 13th February 2004. The matter was adjourned to the 11th March 2004 and then to the 2nd April 2004 as video equipment would be required. It was given a date for hearing the 8th September 2004 and on that date the Judge was unable to hear the case as he was required to sit in another court and the matter was adjourned to the 3rd February 2005 when the same occurred and the matter was further put back for hearing to the 13th July 2005. The Applicant commenced Judicial Review proceedings seeking to prevent the trial going ahead on grounds of delay reliance being placed on *D.P.P. v Arthurs* (2000) I.L.R.M. 363 and system delay which would extend to two years four months by the new date fixed for hearing. The Applicant contended and it was accepted that no part of the delay was attributable to him. Peart J. held that there is a duty on the State, albeit a duty shared with the parties to the litigation, be it criminal or civil in nature, to ensure as far as practicable that matters are disposed of without unnecessary and blameworthy delay on the part of the authorities in a broad sense. In this case he was satisfied that the major part of the delay resulted from pressure of work placed on the District Judge on the day set for the hearing, a day on which half a day was set aside and on which special arrangements were made for the viewing of video evidence. Peart J. went on to say –

> "It goes without saying that some allowance must be made for the imperfect world which the law and the administration of justice inhabits. It is as liable to the occasional mishap, human error, or accident as any other walk of life, and a reasonable allowance must inevitably be extended to the prosecution authority in all its guises to take account of these factors in a fair way, so that the smallest hiccup in the system does not unreasonably interfere with the other competing constitutional rights in these situations, namely the right of the public at large to have persons brought to trial and dealt with for offences alleged against them."

18. He found that a date specially fixed for the hearing of the case was not honoured because there was no Judge available on two occasions and this added to existing delay up to that point. He was satisfied that the delay when considered in relation to the reasons for the same amounted to a denial of the Respondent's constitutional right to a trial within a reasonable time due to the lack of a sufficiently resourced District Court.

19. In *D.P.P. v Arthurs* (2002) I.L.R.M. 363 the facts are as follows. The offence was committed on the 27th October 1995. A warrant issued on the 26th June 1996 and the Respondent was brought before the District Court on the 14th August 1996. On the 18th December 1996 the District Judge consented to summary disposal of the matter. A date for hearing was given for the 8th April 1997. The case was not heard on that day because of the length of the District Court list and was adjourned to the 2nd October 1997 when the same occurred again and the matter was adjourned until 6th November 1997. On the 6th November 1997 again because of the length of the list the case was not reached and was adjourned to the 13th January 1998. The Respondent on that date objected to the case being heard on the ground of excessive delay and applied for a dismissal. That application was heard over two days on the 13th and 14th January 1998 and the District Judge stated a case to the High Court. The delay involved was two years and three months from the date of the offence. In the course of his hearing O'Neill J. dealt with system delay and his finding on this issue is summarised in the head note to the report as follows –

> "The failure on the part of the State to have made adequate provision for the expeditious conduct of cases in the District Court in question, resulting in adding to an already excessive delay, was an unwarranted invasion of the Accused's constitutional right to an expeditious trial. Accordingly, notwithstanding the absence of evidence of prejudice, actual or presumptive, the District Court Judge was obliged to prevent such an invasion of the Accused's constitutional right and should have acceded to the Accused's request not to allow the trial to proceed.
>
> For summary proceedings a delay of two years and three months was well beyond what would be considered to be an appropriate timeframe in which a summary trial should be completed and was an inordinate and excessive delay. The selection of certain offences for summary trial in the District Court carries with it an implication that the time scale for the completion of such trials ought generally be shorter than in respect of trials on indictment."

20. In the course of his Judgment at page 376 O'Neill J. said –

> "If it is the case that an Accused person has a right under the Constitution to a speedy and expeditious trial, a necessary corollary of that right is that there rests upon the State a duty to ensure that all reasonable steps are taken to ensure such a speedy trial is provided. That must necessarily mean conducting the investigation and prosecution in a manner which, insofar as is reasonably practicable, eliminates unnecessary delay, and must additionally mean that such resources as are necessary for the orderly and expeditiously processing of criminal cases through the courts are provided."

21. At page 377 he said –

> "A failure on one occasion to get a trial on because of an overcrowded court list could be said to be an unfortunate mishap, not necessarily involving any fault on the part of the State. Where, as in this case, the mishap is repeated two further times, the inference that these delays are the result of a failure on the part of the State to have provided adequate resources to that the District Court could deal with the cases before it in an expeditious manner is inescapable. The failure on the part of the State to have made adequate provision for the expeditious conduct of cases in the District Court in question resulting, as it did, in the adding to an already excessive delay a further nine months delay bringing the total delay to 2 years and three months, was in my opinion, an unwarranted invasion of the Accused's constitutional right to an expeditious trial. In that circumstance, notwithstanding the absence of evidence of prejudice, actual or presumptive, the Learned District Judge was obliged to prevent such an invasion of the Accused's constitutional right and should have acceded to the Accused's request not to allow the trial to proceed."

22. I accept the propositions which I have quoted from the Judgment of O'Neill J. as a correct statement of the law. Where delay occurs of the nature referred to the onus is on the part of the State to explain and justify the same. It is clear that notwithstanding delay if that delay occurs notwithstanding the taking of all reasonable steps or by reason of unforeseeable or unavoidable occurrences the mere fact of excessive delay, at least in the absence of prejudice, will not prevent a trial going ahead.

**The Delay in this Case**

23. There is no delay up to the 14th July 2003 on which date the District Judge accepted jurisdiction and fixed the date for hearing for the 5th November 2003 in Court 46. However the case could not proceed on that date as there are no facilities for displaying video footage in that court. The onus is on the Respondent in this case to explain or excuse the delay. It may be that the video footage form no part of the prosecution case and was required by the Applicant in which case there was an onus on the Applicant to draw to the District Judge's attention that such facilities would be required. As no explanation is available to me however I must assume that the responsibility rested on the prosecution to ensure that the hearing was fixed for an appropriate court. The delay between the 5th November 2003 and the 16th April 2004 must be attributed to the Respondent. The period of delay is four months.

24. On the 16th April 2004 the matter could not proceed. There were two reasons for this. While CCTV footage had been furnished to the Applicant on the 5th November 2003 the Applicant required further footage and two stills taken from video footage. I do not know when these were requested. The second reason was that the custody record was not available. Insofar as I am aware that record would not normally form part of the prosecution case in the District Court and I am prepared to assume that it must have been requested by the Applicant but I do not know when the same was requested. Information as to when the request was made for further video footage and for the stills and for the custody record should have been disclosed in the Respondent's Affidavit but was not. In these circumstances I cannot attribute the consequent delay to the Applicant. The matter was adjourned to the 14th May 2004 a further delay of one month. Due to the number of cases in the list the District Judge was not in a position to take up the case and it was adjourned to the 18th June 2004 a further delay of one month. These adjournments together account for a further two months delay.

25. On the 18th June 2004 the hearing resumed and a legal issue as to non disclosure was dealt with. The District Judge was not in a position to give a decision on this issue until he should hear the evidence and the matter was adjourned to the 6th September 2004. I do not consider this period of delay to be culpable. The District Judge at that time had sesin of the matter having commenced upon the hearing and his availability accordingly was essential to the hearing continuing. Further delay occurred on the 6th September 2004. The matter was given a date to resume the hearing on the 9th February 2005 a further period of five months. In respect of this adjournment I am told that due to the non availability of a District Judge the District Judge before whom the matter was part heard was obliged to deal with two lists. This delay may not have been culpable in that the situation may have arisen as a result of illness of a District Judge or his absence for personal reasons such as a bereavement: however I am given no information as to why the District Judge was required to deal with two lists. Again as the onus is on the Respondent I must attribute culpability to the Respondent a further delay of five months.

26. The inability of the matter to proceed on the 9th February 2005 when a half day was set aside to hear the same was due to an accident both in the legal and colloquial sense and no culpability attaches in respect of this.

27. In these circumstances I have periods of delay of four months, two months and five months for which the Respondent is culpable and this total period of ten months is what I must have regard to in the context of the overall lapse of time. I have regard to the expeditious manner in which the prosecution was commenced and in which it proceeded up to the 5th November 2003. I also have regard to the circumstance that the adjournment from the 9th February 2005 to the 29th June 2005 added to the overall timescale bringing the same to a total of two years and three months. It is reasonable to have regard to the month of August 2004 as the vacation period for the District Court.

28. In his Judgment in *D.P.P. v Arthurs* O'Neill J. described the State's duty as being to ensure that all reasonable steps are taken to ensure that a speedy trial is provided. In determining what is reasonable one must have regard to the nature of the District Court a court of limited and local jurisdiction dealing with a range of civil cases and minor criminal offences. Of their nature most cases are dealt with by the District Judge in a short period of time and a large number of cases can be dealt with each day. There are of course cases which require greater time then the generality and the Applicant's case would appear to be one such. In terms of volume in the relevant year 2004 the District Court dealt with some 71,000 civil claims and 340,000 criminal prosecutions some 45,000 of which were indictable cases dealt with summarily. It is inevitable and it seems to me not necessarily culpable that longer cases and particularly indictable cases being dealt with summarily may not be suitable for accommodation within ordinary lists: in this case to deal with an application with regard to disclosure it was necessary to set aside one half day for the hearing.

29. In the second passage which I cited from the Judgment of O'Neill J. I have regard to the sentence –

> "The failure on the part of the State to have made adequate provision for the expeditious conduct of cases in the *District Court in question* resulting …".

30. This suggests to me that there was before O'Neill J. some evidence of the inability of the District Judge in that particular District Court to deal with overlong lists was endemic. I have no such evidence here.

31. Taking into account the matters which I mention but in particular the lapse of time to date, the expeditious manner in which the earlier stages of these proceedings were conducted by the Respondent, the unfortunate circumstance of the prosecuting Garda's accident, the nature of the evidence required in terms of video footage, the issue as to disclosure dealt with by the Judge but which he felt unable to deal without hearing the entire case I conclude that the culpable delay of 11 months while borderline is not sufficient to bring the Applicant within the decision in D.P.P. v Arthurs. It must not be taken from the decision in Arthur's case that every criminal proceeding in the District Court must be concluded within two years and three months: each case must be looked at in the light of its own particular circumstances.

**Observation**

32. Applications such as these should be made to the trial Judge and only in exceptional circumstances should they proceed by way of Judicial Review. It is not necessary as in the case of a trial by jury that the proceedings have the unity and continuity of a play: O'Dalaigh C.J. in *The People (Attorney General v McGlynn).* If the application is made to the trial Judge and refused the matter can be dealt with on appeal or alternatively by an application for Judicial Review of the District Judge's decision: see *Ward v Special Criminal Court* 1999 1 I.R. 60. In my view the delay occasioned by an application for Judicial Review can be avoided in many cases by availing of this alternative course. This is a factor which the Court should take into account in looking at the overall lapse of time in deciding on an application for leave to bring proceedings by way of Judicial Review in circumstances such as the present.

**Determination**
33. I refuse the Applicant the relief which he seeks.