Neutral Citation Number: [2007] IEHC 345

THE HIGH COURT

JUDICIAL REVIEW

[2005 No. 557 JR]

BETWEEN

KEVIN NOLAN

APPLICANT

AND
THE DIRECTOR OF PUBLIC PROSECUTIONS AND
DISTRICT JUDGE PATRICK BRADY

RESPONDENTS

Judgment of Mr. Justice Roderick Murphy dated 19th October, 2007

1. Application
The applicant sought an injunction restraining the Director from prosecuting certain appeals and from restraining the learned District Judge from making any order in relation thereto, on the basis of the overall delay between the dates of the alleged offences (2nd December, 2002) and the date of the purported resumption of the summary trial on 1st June, 2005 – a total of over two years and six months.

The applicant also says that, in particular, the delay from 27th September, 2004 when the matter was part heard to 1st June, 2005 – a period of eight months – amounted to a failure to vindicate his constitutional right to a trial with due expedition.

It was claimed that the learned District Judge had no jurisdiction to hear and determine the case on the 1st June, 2005 as the charges were not properly before the court.

The applicant further claims that he has been prejudiced in that witnesses are not now available or willing to come to court or that their memory will have faded over time. The applicant suffered financial burden, the adjournments have adversely impacted on his business and have caused personal anxiety and psychological distress.

2. Applicant's affidavit, 30th May, 2005
Mr. Nolan says in his detailed affidavit, that on the 2nd December, 2002 he had been charged with certain offences, being drunk and disorderly, being in breach of the peace and failing to leave the vicinity of a public place when directed to do so by a member of An Garda Síochána. He said that in the course of his arrest he was assaulted by a then unknown garda who drew his baton and hit him on the head and broke his elbow, in respect of which he received medical treatment. He made a formal complaint that night. He attended Beaumont Hospital on 4th December.

He says that he was totally innocent of any of the charges and had maintained his not guilty plea at all times since 2002.

On 15th December, 2002 he appeared in court to answer the said charges in respect of which he pleaded not guilty. The matter was adjourned to 28th January, 2004 as a prosecution witness was not available. On the adjourned date the applicant was ill and unable to attend court as he was in hospital for a disc operation to his neck. He was remanded on continuing bail until 8th of July, 2004. While he was still recuperating from that surgery the matter was further adjourned until 27th September, 2004 when he had five defence witnesses present.

At that hearing, Mr. Nolan says that the sole prosecution witness, Garda Collette Dennehy, gave evidence that the applicant was very drunk and was a danger to himself. She had asked him to move on and stated that he pushed her and they both fell to the ground. She received assistance from her colleague, Garda Gilmore. She said that she had asked the applicant to move on and warned him of the penalties for failing to do so.

In cross examination the applicant averred that in the District Court the garda witness said that she had her back to her colleague and did not see her colleague use a baton at any stage or assault or kick the applicant when he was on the ground. She agreed that the applicant had blood on his forehead and that a doctor was called at the garda station.

The applicant averred that, when questioned by counsel for the applicant as to the whereabouts of her colleague, the witness had replied that he had left the force and no longer resided in the jurisdiction, but did not leave over that incident. The applicant said that further cross-examination on that point was not permitted by the learned trial judge as it was not deemed relevant.

The applicant averred that he had been prejudiced in not being permitted to adequately test the prosecution evidence through the cross-examination of the garda witness as to why her colleague had left his employment. Submissions were made by counsel on behalf of the applicant regarding the absence of her colleague as a witness and on the absence of any reference to the term "public place" in the evidence of the garda witness. The garda witness had responded that the place in question was a public place.

The matter was then adjourned to 8th November, 2004 for written submissions despite the objection of the applicant's counsel in relation to five witnesses who had come to give evidence.

The learned trial judge was not sitting on the date of the adjournment and the matter was adjourned to 16th December, 2004 when the matter was further adjourned 5th December, 2005 to Cloverhill District Court, where the applicant appeared with six witnesses including two members of the staff of a licensed premises adjoining the place of arrest. As it was impossible to hear any evidence that day, despite objections from defence counsel, the matter was again adjourned and re-adjourned to 4th April, 2005. The garda witness had informed the applicant's solicitor on 14th February, 2005 that Cloverhill District Court was not in fact sitting on the 4th but would sit on the 5th April, 2005. The applicant was informed by his solicitor on 28th February, 2004 that it would not be necessary for him to attend or have his witness present on 4th April. He was subsequently informed on 1st April, 2005 by his solicitor that he was to attend Cloverhill District Court on Tuesday 5th April, 2005. The applicant contacted his witnesses and informed them that their presence would not be required in the court on 4th April, 2005.

The applicant says he was informed by his solicitor that the case was called in his absence on 4th April, 2005, where the garda witness gave sworn testimony that she had received a phone call saying that the court would not be sitting that day. The matter was adjourned peremptorily for 23rd May, 2005. He said he was informed on 27th April, 2005 that the venue had been changed from

Cloverhill to Dolphin House and he so informed his witnesses. On 6th May, 2005 he received another letter from the summons office stating that the case had been re-listed for Dolphin House on 1st June, 2005 for a half to a full day to conclude the hearing.

He had appeared to answer his bail bond on 23rd May, 2005 to be informed that the court was not sitting.

The applicant averred that he had extreme difficulty in securing the attendance of certain witnesses and that his counsel had a commitment on that day in the High Court. He was not legally aided. He gave evidence of the prejudice, stress and anxiety occurring from the assault and the delay which has affected his business and his marriage.

On 30th May, 2005 he applied for and was given leave to seek judicial review by McKechnie J.

3. Statement of Opposition
The Director stated that the applicant was not entitled to the relief claimed in circumstances where the District Court had commenced the trial of the action and had not yet concluded that trial. The applicant had not made out sufficient exceptional circumstances for the High Court to intervene in the District Court trial.

Further, the applicant had no standing to apply to the High Court for an injunction in circumstances where the application had not been made to the trial judge to have the prosecution case dismissed on grounds of delay or irregularity. It was denied that there had been any inordinate, inexcusable or excessive delay in the prosecution. The delay had been caused or contributed to by the applicant seeking adjournments on three occasions for periods totalling some fourteen months.

The trial has been conducted within jurisdiction and with due observance to the applicants rights. The applicant had not been prejudiced.

4. Affidavit of the prosecuting garda
The affidavit of Collette Dennehy sworn 14th October, 2005 verified the statement of opposition lodged on behalf of the D.P.P. in the matter.

She says that she was on duty in the patrol van on the evening of 2nd December, 2002 and received a call-out to a public order matter. On arrival, she observed the applicant in an extremely intoxicated state, roaring and shouting and being very abusive towards her. She asked him to move on in a peaceful and orderly manner pursuant to the provisions of the Criminal Justice Public Order Act, 1994 and informed him of the consequences of failing to do so. He refused to move on and she informed him that he was under arrest. He became very threatening and pushed her out of the way, becoming extremely violent. The applicant struggled and fell to the ground, bringing her with him. Her colleague was holding the applicant on the ground. When the applicant stood up she noticed that he had sustained a graze to his forehead as a result of the fall. He was then placed in the back of the garda van and brought to the garda station. She did not at any stage see the applicant being assaulted on the night in question as he alleged. In relation to the applicant's affidavit, she said that her clear evidence to the court was that she did not see any assault taking place.

She averred that three of the adjournments (from 15th December, 2002 to 1st July, 2003, from 28th January, 2004 to 8th July, 2004 and from 8th July, 2004 to 22nd September, 2004 were at the behest of the applicant and involved total periods of over fourteen months.

5. Counsels' Submissions
The summons office had no jurisdiction to adjourn and remand the case to a new return date. The second named respondent had no jurisdiction to hear and determine the case against the applicant on 1st June, 2005. The charges were not properly before the court as the summons office adjournment to the 1st June, 2005 was bad and made without jurisdiction.

Specifically the summons office repeatedly purported to have jurisdiction to adjourn/remand/change trial venues on 14th February, 2005, 26th April, 2005 and 5th May, 2005.

It was submitted that, as Article 38.1 of the Constitution provides, no person should be tried on any criminal charge save in due course of law.

State (O'Connell) v. Fawsitt [1986] 1 I.R. 362 specifies a right to trial with reasonable expedition.

Counsel referred to authorities in relation to delay as follows:-

> *D.P.P. v. Arthurs* [2000] 2 I.L.R.M. 363, O'Neill J.,
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> *Maguire v. D.P.P.* [2004] 3 I.R. 241, Hardiman J. for the court.
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> *J.K. v. D.P.P.*, (Unreported, Supreme Court, 27th October, 2006) per McGuinness J., and *B.F. v. D.P.P.* [2001] 1 I.R. 656 at 664, where Geoghegan J. held that the right of an accused to a trial with reasonable expedition separate from, and in addition to, his right to a fair trial.

In *Arthurs* a delay of two years and three months was held to be "well beyond what would be considered on any view to be an appropriate time frame in which a summary trial should be completed and it is in my opinion inordinate and excessive" (at 371).

Reference was also made to *D.C. v. D.P.P.* [2005] 4 I.R. 281 and to *P.M. v. D.P.P.* [2006] 3 I.R. 172, in relation to prosecutorial delay.

The European Convention on Human Rights provides that everyone is entitled to a fair and public hearing within a reasonable time. *Pelissier and Sassi v. France*, No. 25444/94, 67, ECHR 1999-II found that the reasonableness of the length of proceedings is to be assessed in the light of the particular circumstances of the case.

In relation to the applicant's entitlement to claim relief by way of judicial review, counsel submitted that the statement of opposition was entirely unfounded having regard to the facts of the case.

In *D.P.P. v. Special Criminal Court* [1999] 1 I.R. 60 referred to exceptional circumstances where judicial review should be allowed during the currency of a criminal trial. Counsel submitted that there is a distinction between a jury trial and summary proceedings where there is an eight month long period between the initial hearing and the purported resumed hearing which deprived the action of all unity and continuity.

In *Landers v D.P.P.* [2004] 2 I.R. 363, Ó Coaimh J. applied the constitutional right to a fair trial in granting prohibition mid-trial in circumstances where the District Court Judge had acted inappropriately and concluded:-

> "I must conclude in the unusual circumstances of this case that it is appropriate that the further prosecution before the respondent judge should not continue. That the relief sought in these proceedings is an order restraining the first named respondent from further conducting the trial of the applicant on the complaint and a stay on the proceedings pending the determination of this judicial review application and I believe that if the matter is to proceed it would have to proceed before some other member of the District Court." (p. 9 of the judgment of 2nd May 2003 in injunction proceedings before Ó Caoimh J.)

It was submitted that District Court procedure was relatively simple. (*D.P.P. v. Doyle* [1994] 2 I.R. 286). The applicant claims to have suffered actual prejudice in relation to availability of witnesses, lapse of time, financial burden, impact on his business and personal anxiety and psychological distress.

Counsel for the applicant submitted that the unique circumstances of the case showed a catalogue of breaches of law, failure to list the case in accordance with law, gross delay involving repeated adjournments not of the applicant's making and the time taken for the hearing.

6. Submissions on behalf of the D.P.P.
6.0 Three issues arose. First, whether there has been inordinate delay in the prosecution of the charges against the applicant. Second, in the event that there has been such delay, whether the applicant has established the likelihood of real prejudice such as the right to a fair trial not being guaranteed. Thirdly, whether delay, even if considered inordinate, could be remedied by an application for judicial review in mid-trial.

6.1 On 27th September, 2004, after the cross-examination of Garda Dennehy, counsel on behalf of the applicant indicated to the court that he wished to make a number of legal submissions regarding the alleged absence of any reference to the term "public place" in the evidence of the garda and to the fact that her companion, Garda Gilmore, was not available as a witness and that the defence was prejudiced thereby. This led to the District Judge to adjourn the case to 8th November, 2004 for written submissions, despite objections by defence counsel, and also directed that a State Solicitor come into the case.

In relation to delay, *D.P.P. v. O'Sullivan* (Dunne J., October 11, 2005) refused the application where summary proceedings took place over two years and three months from the date of the alleged offence. In *D.P.P. v. Barry Byrne* [1994] 2 I.L.R.M. 363, a ten-months delay in disposing of the case did not, per se, give rise to a right to set aside a prosecution. Finlay C.J. stated at 247:

> "In regard to general principles I would conclude that an appellate court, such as we are in relation to these proceedings, should with considerable caution interfere with the discretion of a judge of the trial court involved on her decision as to what is or not is unreasonable delay, having regard to the particular insight which such a judge would have of the consequence of the trial which is proposed and of the state of affairs in regard to the services attached to the court concerned."

Denham J., at 258, stated that there was no evidence before the court of specific prejudice occurring to the respondent because of the delay.

In *O'Sullivan* it was noted that the delay of approximately eleven months was longer than the period of time identified by O'Neill J. in *Arthurs* constituting a failure on the part of the State to have made adequate provision for the expeditious conduct of cases in the District Court.

It was not a matter of simply looking at the time element involved but at the causes for the delay or reasons or excuses that were advanced in order to justify the delay.

Unquestionably there had been considerable delay in expediting the proceedings as a whole. Had it not been for the ill health of the applicant leading to the matter being adjourned on two occasions, the matter would have disposed of many years ago.

A period of delay of eight months arose out of the fact that the second named respondent thought it necessary or appropriate to adjourn proceedings in order for written submissions to be prepared on points of law in the course of the trial.

It was submitted that, while it was unfortunate that delay had occurred, this was not attributable to any systemic delay or fault on the part of the State authorities. Several of the incidences of delay would fall into the category of more "neutral reasons" referred to by Powell J. in *Barker v. Ringo* referred to by Finlay C.J. in *D.P.P. v. Byrne* at 246.

6.2 In the present case it was submitted by the respondent that delay was not prejudicial to the accused. The court must conduct a balancing exercise between the community's right to have the charge prosecuted and the accused's entitlement not to have his rights interfered with to a constitutionally unacceptable degree.

The unavailability of former Garda Gilmore for cross-examination did not arise from the delay in the proceedings. He was already unavailable when the matter was first heard on 27th September, 2004 at which time no application appeared to have been made to the trial judge. On subsequent occasions no application was made that the applicant was prejudiced on the grounds of delay.

Moreover, only one witness, a Mr. Fitzpatrick, is cited as saying that he had a definite intention not to attend court on 1st June, 2005.

Counsel further submitted that, as a matter of general principle, if and when any infirmity arises by reason of delay, the defendant would have a remedy during the currency of the trial itself, or, on appeal, and this should be relied upon in the first instance.

6.3 -It was most inappropriate, as a matter of law, to seek to bring judicial review proceedings during the trial. In *Ward v. The Special Criminal Court* [1999] 1 I.R. 60, any question of judicial review should be left over until after the conclusion of the trial. In *Kiernan v. D.P.P. & Anor.* [2005] IEHC 54, Macken J. refused to grant an injunction by way of judicial review to stop a summary prosecution on the grounds of delay in circumstances where the judicial review application was brought well after the case had opened, following the Supreme Court decision of *Mellet v. Reilly and the D.P.P.* (Unreported, 26th April, 2006) where Hardiman J. endorsed the exceptional nature of the jurisdiction.

7. Decision of the court
7.1 It is common case that the court, in judicial review proceedings, has a discretion whether or not to grant the relief sought.

This is not a case where there has been inordinate delay in commencing a prosecution. No complaint has been made with regard to the earlier appearances before the District Court to answer the charges.

The health of the applicant and his recuperation caused some initial delays. There were also delays regarding the availability of prosecution witnesses at the earlier adjournment stage.

It seems that the main delays complained of related to the adjournments granted by the learned District Judge in relation to submissions. While these, of course, may have originated from the applicant's counsel making submissions after the evidence given by Garda Dennehy, it would seem to this Court to have been within the jurisdiction of the trial judge.

Overall there was a delay of 30 months between the incident and charge on 2nd December, 2002 to the date of the resumed hearing on 1st June, 2005.

There had been no undue delay in respect of the original hearing on 27th September, 2004 given the illness of the applicant.

The applicant had raised the issue of what constitutes a public place and this caused the learned trial judge to adjourn the matter, partially heard, to a further date. No application appears to have been made to have the applicant's witnesses heard on 27th September, 2004.

Garda Collette Dennehy, in her affidavit, says that three of the adjournments, from 15th December, 2002 to 1st July, 2003, 28th January, 2004 to 8th July, 2004 and 8th July to 27th September, 2004, were at the behest of the applicant and totalled over 14 months.

Of the 21 months period from incident and charge to the hearing of 27th September, 2004, two-thirds accordingly, consisted of adjournments sought by the applicant.

The adjournment thereafter was to enable the legal issue of what constituted a "public place" and whether the alleged offence was committed in a public place.

It was unfortunate that the delay in reconvening the hearing took a further 8 months. There were adjournments which were not met and some degree of confusion in relation to venue. In an ideal world all cases should be dealt with on assigned dates. The reality of the pressures of workload in the courts and particularly in the District Court, do not meet the ideal despite the best efforts of judges.

The court has had regard to the statutory provisions, to the Consolidated District Court Rules and to the legal precedents submitted by counsel.

7.2 Section 24(6)(b) of the Criminal Procedures Act, 1967 provides in the event that there is no sitting of the court that:

> "Where a person has been remanded on bail and there is no sitting of the court on the day to which he has been remanded, that person shall stand so remanded to the sitting of the court next held in the same District Court area."

No issue was taken at the time.

Order 2, rule 3 of the Consolidated District Court Rules provides that:

> "3(1) Where a judge is not in attendance at the time appointed for the holding of a court the clerk may, in pursuance of a direction received from such a judge on or before the day and time so appointed, adjourn the holding of such court and the hearing of the proceedings thereat in accordance with such direction.
>
> (2) Where no such direction is received by the clerk and no judge is in attendance one hour after the time appointed for the holding of the court, the clerk shall adjourn the holding of such court and the hearing of the proceedings thereat to the next court to be held in the court area.
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> (3) The clerk shall post a notice of adjournment (Form 2.1, Schedule b) on the door of the courthouse and shall retain a copy thereof.
>
> (4) All persons whose attendance shall have been required by any summons, order, civil summons, recognisance or notice at the court so adjourned shall be deemed to have had notice of such adjournment and shall be obliged to attend on the day to which such adjournment shall take place, without the issue or service of any further summons, order, civil summons, recognisance or notice."

No application was made at any stage to the learned District Judge that the trial should halt due to delay.

Moreover, if the applicant's witnesses were available on 23rd May then there could not be a stateable argument for prejudice by delay in relation to 1st June following. In respect of the five or six witnesses then available only one, Mr. Fitzpatrick, has indicated he will not be available. The matter was proceeding in the absence of Garda Gilmore before any delay occurred. The issue of costs has not been ascertained or quantified and the issue of personal difficulties, while regrettable, would not appear to have arisen in relation to the delay.

There would appear to be no distinction to be made in relation to a summary trial and a trial on indictment in relation to an application for judicial review during the course of a trial.

7.3 In *People (Attorney General) v. McGlynn* [1967] I.R. 323 at 329, O'Dhalaigh C.J. held:

> "The nature of a criminal trial by jury is that, once it starts, it continues right through until discharge or verdict. It has the unity and continuity of a play. It is something unknown to the criminal law for a jury to be recessed in the middle of a trial for months on end, and it would require clear words to authorise such an unusual alteration in the course of a criminal trial by jury."

The Supreme Court commented:

> "While this statement applies to criminal trials with a jury it should be regarded as a precept that should, as far as practicable, be followed in respect of all criminal trials subject to the jurisdiction of the Courts to grant cases stated on occasions …

I would endorse everything that Carney J. said about the undesirability of repairing to the High Court for judicial review in relation to criminal trials at any stage (and certainly not during their currency) …"

Although judicial review was found to be available in the very unusual circumstances of that case, which had not progressed beyond the opening and in which no evidence had been heard, I believe the foregoing extracts correctly express the principle generally applicable.

There is no evidence of the nature of *Landers v. The Director of Public Prosecutions* or *Gilmartin v. Murphy* that the District Judge had acted inappropriately or would not conduct the matter fairly. There was no evidence that the District Judge would not consider a direction as being inappropriate with regard to delay. No application for such direction was made to the District Court.

It seems to this Court that the application is premature and contrary to precedent. It is of the nature of a *quia timet* and inappropriate for criminal proceeding where it will interrupt the trial and fetter the discretion of the District Judge.

In *Clune and O'Dare and Ors. v. D.P.P.* [1981] I.L.R.M. 17, Gannon J. decided that neither an injunction against the D.P.P. nor an order of prohibition against a judge of the District Court was available on that basis. In relation to the latter he said:

> "An Order of Prohibition directed to court will not be granted *qui timet* to prevent any court lawfully established in the State from commencing the hearing of any cause or matter entrusted to its consideration by the Legislature. There is, and must be, a presumption that a District justice will apply himself to his functions and duties in accordance with his oath of office and within the limits of his jurisdiction with justice and fairness to the best of his ability."

This approach is equally applicable to an order sought to prevent the continuance of summary trial.

The delay, in any event, was not analogous to that of the delay in *D.P.P. v. Arthurs* which was pre-trial delay. Delay after the case commences is in a different category.

7.4 It does not seem to the court that it would be unfair to allow the learned District Judge to continue with the case notwithstanding the delay and further delay occasioned by the present application.

In the circumstances the court will refuse the application.