Neutral Citation Number: [2009] IEHC 29

THE HIGH COURT

2008 1112 JR

TRAN TUAN ANH

APPLICANT

AND

DISTRICT JUDGE GEOFFREY BROWNE,

DIRECTOR OF PUBLIC PROSECUTIONS

AND

GOVERNOR OF CASTLEREA PRISON

RESPONDENTS

Judgment of O'Neill J. delivered the 23rd day of January 2009

In this case the applicant obtained the leave of this Court (Peart J.) to seek, *inter alia*, by way of judicial review an order of *certiorari* and related declarations, quashing the orders of the first named respondent made on 11th July, 2008 whereby the first named respondent extended the time limit for the service of the book of evidence in respect of various charges laid against the applicant.

The Facts
The applicant is a Vietnamese national. On the 21st April, 2008, he was charged with an offence contrary to s.17 of the Misuse of Drugs Acts 1977 to 1984 and an offence contrary to s.12 of the Immigration Act 2004. The charges arose following the search of a house at Castlereagh, Co. Roscommon on 20th April, 2008, on foot of a search warrant. It is alleged that the gardaí discovered that the entire upstairs of the house in question was being used to cultivate cannabis plants. On 13th June, 2008, the applicant was charged with further offences contrary to ss.13, 15 and 15A of the Misuse of Drugs Acts 1977 to 1984. Apart from the offence under s.12 of the Immigration Act 2004, the offences with which he was charged were indictable offences and all of the charges are stated in the charge sheets to have occurred on 20th April, 2008.

The applicant first appeared before the District Court in Galway on 21st April, 2008, and was remanded in custody to appear before Ballaghaderreen District Court on 24th April, 2008. He was further remanded in custody to appear at Harristown District Court on 2nd May, 2008, and further remand orders were made on 16th May, 2008, and on 13th June, 2008. On the latter date an application to extend time for service of the book of evidence in respect of the charge contrary to s.17 of the Misuse of Drugs Act 1977 to 1984 was consented to and granted.

The applicant was represented in court on the aforementioned dates by Ms. Mary Mullarkey, Solicitor. However, the applicant then engaged Mr. Gerard Cullen, Solicitor, to act on his behalf and Ms. Mullarkey came off record on 20th June, 2008. The applicant was further remanded in custody on 20th June, 2008, and on 27th June, 2008, and time was extended for service of the book of evidence on those dates in respect of the charge under s.17 of the Misuse of Drugs Act 1977. On 27th June, 2008, the applicant applied for bail. His application was refused by the first named applicant and he again remanded the applicant in custody to appear before Harristown District Court on 11th July, 2008.

On 11th July, 2008, an application was made by the prosecution to extend the time for service of the book of evidence. It is unclear whether an application for an extension of time was made in respect of all the charges, though it is implicit, from the affidavit of Superintendent Seán Ward, who made the application, that it was. He states at para. 15:-

> *"15. I was present in Court on the 11th of July 2008. It is true that I sought an extension of time for service of the book of evidence. I indicated that the Book of Evidence would be ready for service on the 18th of July at Castlerea District Court. I informed the first Respondent that the investigation had been conducted speedily. I indicated that the file had been submitted to the second Respondent and that directions had been obtained from him to prefer additional charges, which had been done on the 13th of June. I indicated that these charges, together with the Section 17 Charge, would be incorporated into one Book of Evidence."*

The other affidavits are silent on the issue. In light of the foregoing and the fact that extensions of time were granted by the first named respondent in respect of all the charges, I am satisfied that the application for the extension of time was made in respect of all five charges.

The first named respondent made an order extending the time until 18th July, 2008, and he made a further order remanding the applicant in custody until that date. There is a dispute as to what occurred after the application for the extension of time for service of the book of evidence was made. It is the applicant's case that his solicitor objected to the extension of time and called for evidence to be heard in respect of this application. For the State it is contended that the applicant's solicitor consented to the application for the extension of time.

The Law
Section 9 of the Criminal Justice Act 1999 (the Act of 1999) amended the Criminal Procedure Act 1967 (the Act of 1967) by inserting the following provision after s. 4 of the Act of 1967, to regulate the procedure for proceedings relating to indictable offences. It states as follows:-

> *"4B. – (1) Where the prosecutor consents to the accused being sent forward for trial, the prosecutor shall, within 42 days after the accused first appears in the District Court charged with the indictable offence or within any extension of that period granted under subsection (3), cause the following documents to be served on the accused or his solicitor, if any:*
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> *(a) a statement of the charges against the accused;*
>
> *(b) a copy of any sworn information in writing upon which the proceedings were initiated;*

(c) a list of the witnesses the prosecutor proposes to call at the trial;

(d) a statement of the evidence that is expected to be given by each of them;

(e) a copy of any document containing information which it is proposed to give in evidence by virtue of Part II of the Criminal Evidence Act, 1992;

(f) where appropriate, a copy of a certificate under section 6(1) of that Act;

(g) a list of the exhibits (if any).

(2) As soon as the documents mentioned in subsection (1) are served, the prosecutor shall furnish copies of them to the District Court.

(3) On application by the prosecutor, the District Court may extend the period within which the documents mentioned in subsection (1) are to be served if it is satisfied that-

there is good reason for doing so, and

(b) it would be in the interests of justice to do so.

(4) An application may be made and an extension may be granted under subsection (3) before or after the expiry of-

(a) the period of 42 days mentioned in subsection (1), or

(b) any extension of that period granted under subsection (3).

(5) Where it refuses to grant an extension, the District Court shall strike out the proceedings against the accused in relation to the offence.

(6) The striking out of proceedings under subsection (5) shall not prejudice the institution of any proceedings against the accused by the prosecutor."

The documents listed in s. 4B (1) (a)-(g) are colloquially referred to as the book of evidence.

Counsels' Submissions
Mr. O'Higgins S.C., for the applicant, submitted that if this Court accepted that the applicant's solicitor objected to the application for an extension of time and called for evidence, then a question of law arose as to the correct legal interpretation of s. 4B of the Act of 1967, as inserted by s. 9 of the Act of 1999. In this regard he submitted that the correct interpretation is that if evidence is called for and not produced, then the District Judge will not be competent to adjudicate further in the application. He contended that the twin test provided for under the section, namely, that the District Judge be satisfied that there is *"good reason"* for extending time and that it would be *"in the interests of justice"* to do so, can only take place in the context of proven or agreed facts. The requirement of satisfaction, he argued, could not be achieved in a vacuum but only upon the basis of sufficient sworn evidence. He relied heavily on the decision of Edwards J. in *Dunne v. Governor of Cloverhill Prison* [2008] IEHC 16 (Unreported, High Court, 25th January, 2008) as authority for this proposition. He submitted that the decision in *Dunne* is a correct statement of the law, in that, evidence is required before a District Judge can make an order extending time under s. 4B of the Act of 1967, where the extension is opposed by the accused. He submitted that this decision should be followed in light of the doctrine of *stare decisis*, which requires a court of equal jurisdiction to follow an earlier decision of the court, unless it can clearly be shown the earlier decision was wrongly decided. He submitted that the circumstances in which a court of equal jurisdiction may depart from a previous decision of the same court, as outlined by Parke J. in *Irish Trust Bank Limited v. Central Bank of Ireland* [1976-7] ILRM 50, do not exist in this case.

Mr. O'Higgins urged the Court to reject the second named respondent's contention that as the impugned order of 11th July, 2008, is now spent, having expired on 18th July, 2008, when a further order was made remanding the applicant in custody which is not challenged, that this Court should not intervene to quash a spent order as to do so would be futile. He submitted that if this so-called *"futility"* argument were accepted by this Court it would have the effect of frustrating the clear intention of the Oireachtas, as set out in s. 4B of the Act of 1967, which is, where the forty two day period has expired and where no extension order has been made, that the proceedings should be struck out. In addition, he submitted that the failure of the District Judge to correctly apply s.4B of the Act of 1967, had continuing consequences for the applicant, namely, that the criminal proceedings against him were unlawfully extended and that when the applicant re-appeared in the District Court on the 18th July, 2008, that Court had no jurisdiction to deal with the applicant as the charges should have been struck out. He characterised what occurred in the District Court on 11th July, 2008, as an error of law which involved a custodial remand being made on foot of an unlawful order. Mr. O'Higgins cited the Supreme Court decision in *Howard v. District Judge Earley and Ors* (Unreported, Supreme Court, 4th July, 2000) which held that the circumstances of the case would dictate whether an order of *certiorari* should be made.

Thirdly, Mr. O'Higgins, emphasised the importance of giving sworn evidence and the right to cross-examination as they provide vital safeguards in the administration of justice, particularly in criminal proceedings. He cited the case of *Mapp v. Gilhooley* [1991] 2 I.R. 253 which served as a graphic example, in his submission, of where the courts deemed to be a nullity an entire proceeding on the sole ground that unsworn evidence had been given. That was a civil case, and hence the standard ought to be all the more stringent in a criminal case, he submitted. He contended that the test in s. 4B of the Act of 1967, required that sworn evidence be given and that such evidence must be subject to cross examination and not to permit this, as occurred here, would infringe an accused person's rights under Article 38.1 of the Constitution and Article 6 of the European Convention on Human Rights. The importance of cross-examination was highlighted in two cases cited by Mr. O' Higgins: by Fennelly J. in *The People (Director of Public Prosecutions) v. Kelly* [2006] 3 I.R. 115 and by Gannon J. in *The State (Healy) v. Donoghue* [1976] I.R. 325.

Fourthly, Mr. O'Higgins contended that there was no need to extend time for the summary offence. He submitted that there was an error on the face of the record as the charge under s.12 of the Immigration Act 2004, was included in the order to extend time. With regard to the three charges that were added on 13th June, 2008, he submitted that time had not run for serving the book of evidence. Nonetheless, he noted that the District Court order records that five extensions were granted. He submitted that the inclusion of the three additional charges in these circumstances also constituted an error on the face of the record. He submitted that the first named respondent could not have granted extensions in respect of the aforementioned four charges.

Ms. McDonagh S.C., for the second and third named respondents, submitted that the evidence given on affidavit and orally could be reconciled, in that, it was open to the Court to accept that an objection was made by the applicant's solicitor to the extension of time but that it related to the length of time the applicant was in custody and not to the service of the book of evidence. She observed that it was the investigating officer himself who informed the Court of the relevant reasons as to why the extension of time should be granted. He could have given evidence if there was an objection to the extension sought on the ground that no evidence was given.

Secondly, she submitted that the Act of 1999 is not a penal statute but, rather, an Act that regulates procedural matters and that s. 4B of the Act of 1967, on a proper construction, does not provide for the calling of evidence in order for a District Judge to be satisfied that there is good reason to grant the extension of time. She pointed out that there was no mention of the term *"evidence"* in that section. The nature of the application to extend time, she submitted, was procedural and she argued that it was the District Judge who must be satisfied that there is good reason for so doing. She continued that for the accused to be permitted to cross examine a garda or any other witness called by the prosecution in the context of an application for extension of the time for service of the book of evidence would be inappropriate in certain circumstances e.g. if there was a difficulty processing some element of technical evidence or difficulty in contacting witnesses. Therefore, she submitted that as a matter of common sense and of law there could not be requirement for evidence.

Thirdly, Ms. McDonagh urged this Court not to follow the decision of Edwards J. in *Dunne v. The Governor of Cloverhill Prison* [2008] IEHC 16 (Unreported, High Court, 25th January, 2008) as that case arose by way of an application for *habeas corpus* and its facts are distinguishable from the present case. In addition, she argued that the authorities cited to the learned judge in *Dunne* were not authorities for the proposition that evidence must be heard on a contested application to extend time for the service of the book of evidence. She suggested that Edwards J. was influenced by the House of Lords decision in *Blyth v. Blyth* [1966] 1 All E.R. 524 in interpreting the word *"satisfied"* and in construing s.4 B of the Act of 1967, as requiring evidence to be tendered in applications for extensions of time. She pointed out that the relevant statute at issue in the *Blythe* case, s.4 (2) of the Matrimonial Causes Act 1950, itself provided for the giving of evidence to satisfy the Court of the matters set out in that section and expressly stated that the Court be satisfied *"on the evidence"*, in contrast to the statute at issue in this case. She submitted that the Court need not be confined to considering evidence and that there was an obligation on the Court to consider all the circumstances of the case. She relied on the case of *P.O.C. v. Director of Public Prosecutions* [2005] IEHC 103 (Unreported, High Court, Finlay Geoghegan J., 11th March, 2005) in support of this contention.

As regards the applicant's submission that there was an error on the face of the order of the District Court of 11th July, 2008, Ms. McDonagh submitted that the reference to the charge under s.12 of the Immigration Act 2004 and the three subsequent charges of 13th June, 2008, is *"surplusage"* and did not affect the jurisdiction of the first named respondent to make the orders sought nor the validity of the orders themselves.

Ms. McDonagh also submitted that the cases dealing with what is required in a criminal or civil trial, such as *Mapp v. Gilhooley* [1991] 2 I.R. 253 and *The People (Director of Public Prosecutions) v. Kelly* [2006] 3 I.R. 115, do not apply in this case, as what is at issue in this case is a pre-trial procedural statutory provision which requires a District Judge to be satisfied of certain matters. In the context of a sensitive criminal investigation she stated that an accused did not have an unfettered right to cross-examine a garda in a pre-trial procedure and although she conceded that there may be times when a District Judge might require to hear evidence this was not such a case.

It was further submitted that the order of 11th July, 2008, was now spent as it expired on 18th July, 2008, when a fresh order was made remanding the applicant in custody. She surmised that declaratory relief and/or relief by way of *certiorari* would not now assist or benefit the applicant and would serve no useful purpose. She relied on the case of *The State (Lynch) v. Ballagh* [1986] I.R. 203 where the Supreme Court declined to quash an order of *certiorari* in circumstances where the prosecutor was brought before the Court pursuant to a District Court rule that was *ultra vires* the District Court Rules Committee but was subsequently lawfully remanded.

Issue of Fact
The first question which falls to be determined is whether there was a specific objection by the applicant's solicitor to the prosecution's application for an extension of time for service of the book of evidence, on the grounds that evidence is required to be given in such an application to justify the extension of time. If it is accepted that this objection was made, the question arises as to whether s.4B (3) of the Act of 1967, as inserted by s. 9 Act of 1999, requires evidence to be given where there is a contested application for an extension of time. In the case of *Dunne v. Cloverhill Prison* [2008] IEHC 16 (Unreported, High Court, Edwards J. 25th January, 2008) this Court answered the latter question in the affirmative.

In any contested application which impacts on a person's liberty and where the facts relevant to the matter in issue are not uncontested, the only way the contested issue can be resolved is by way of evidence. The evidence on affidavit in this application is as follows:-

(a) Affidavit of Gerard Cullen, Solicitor
Mr. Cullen gave his account as to what occurred in Harristown District Court on 11th July, 2008, in his affidavit, sworn on 17th July, 2008. The relevant paragraphs are paragraphs 11-13 which state:-

> *"11. On the 11th July, 2008, I again appeared before the First Named Respondent at Harristown District Court. The prosecuting garda asked for an extension of the forty two days time period required to serve the Book of Evidence. He requested that the Applicant be remanded for a further time until the 18th July 2008. The First Named Applicant acceded to the request without any evidence being stated to justify the extension of time. I pointed out to the court that there was no evidence grounding the application for an extension of time. I also pointed out that the evidence in this context required either a sworn affidavit or oral evidence (subject to cross-examination) and that neither had occurred.*
>
> *12. I also stated to the court that the Applicant had been in custody for three months. The prosecuting garda stated that an extension of time had previously been agreed to by Ms. Mullarkey on the 20th June, 2008. The First Named Respondent did not say anything. I then enquired if the extension of time was being granted in the absence of any evidence. The First Named Respondent replied 'Of course'.*
>
> *13. Finally, I also stated to the court that I had applied for bail on the prior occasion and the matter was before the court. The First Named Respondent replied 'and it was refused'. I then enquired whether there was any point in renewing the application for bail and the First Named Respondent stated that there was not.*

…."

(b) Affidavit of Superintendent Seán Ward
Superintendent Ward outlined his recollection of events in his affidavit sworn on 6th October, 2008. Paragraphs 15-16 read as follows:-

> *"15. I was present in Court on the 11th of July 2008. It is true that I sought an extension of time for service of the book of evidence. I indicated that the Book of Evidence would be ready for service on the 18th of July at Castlerea District Court. I informed the first Respondent that the investigation had been conducted speedily. I indicated that the file had been submitted to the second Respondent and that directions had been obtained from him to prefer additional charges, which had been done on the 13th of June. I indicated that these charges, together with the Section 17 Charge, would be incorporated into one Book of Evidence. There was no objection to this by Mr. Cullen. I also say that I informed the first Respondent that I had outlined the exact position in regard to the investigation each time the case appeared in court. I say that Harristown District Court is a remand court for Castlerea Prison and it has long been the practice that books of evidence are served at the local District Court. Generally, Presiding Judges at Harristown District Court, which is attached to Castlerea Prison, restrict themselves to remanding cases of persons detained in Castlerea prison and do not deal with any other business.*
>
> *16. I have considered paragraph 11 of Mr. Cullen's Affidavit. I believe he did ask the first Respondent what the grounds were for the application to extend time for the service of the Book of Evidence were. I do not recall Mr. Cullen pointing out to the first Respondent that it would be contrary to law for him to extend time for the service of the Book of Evidence unless a sworn affidavit or oral evidence were proffered. I say this because if Mr. Cullen had said this, I personally would have given sworn evidence because I was the officer in charge of the investigation and I was fully aware of all of the facts. Mr. Cullen did not ask me to give evidence on this issue. Indeed this is borne out by Mr. Cullen's affidavit. I do not believe that Mr. Cullen objected to my application for an extension of time. Nor do I believe that he objected to the first Respondent making an order in that regard in the absence of evidence. The first Respondent remanded the Defendant to Castlerea District Court on the 18th July 2008 for service of a Book of Evidence."*

(c) Evidence of Mr. Tony McGlynn, Solicitor
Mr. McGlynn, Solicitor, in his affidavit sworn on 9th October, 2008, recollected the following at paras. 3-4 which state:-

> *"3. I say that the Solicitor for Tran Tuan Anh, Mr. Cullen objected to any extension of time for service of the Book of Evidence.*
>
> *4. I say that while I cannot remember the specific details of the legal arguments advanced at the hearing, I formed the judgment that Mr. Cullen's arguments were based on a requirement for evidence to ground any application for any extension of time to serve the book of evidence and on the Judgment of Mr. Justice Edwards in the Dunne case."*

In his oral evidence in cross examination to this Court on 26th November, 2008, Mr. McGlynn stated that on 11th July, 2008, he recalled Mr. Cullen making an objection to the matter being adjourned and that he heard him rely on the decision Edwards J. in *Dunne*. He stated that Mr. Cullen referred to the fact that evidence could be given by affidavit and that he would be fairly sure the word *"objection"* was used by him at the outset before making his submission. He further stated that he remembered Mr. Cullen indicating that sworn evidence could be given or that evidence could be given by affidavit and that he was not personally aware at that time that evidence could be given on affidavit in respect of such an application.

(d) Evidence of Mr. Alan Gannon, Solicitor
Mr. Gannon, Solicitor, stated as follows in his affidavit sworn on 10th October, 2008, at paras. 3-4:-

> *"3. I say that the Solicitor for Tran Tuan Anh, Mr. Cullen, objected to any extension of time for service of the Book of Evidence."*
>
> *4. I say that Mr. Cullen's objection was based on the need for evidence to ground any application for any extension of time to serve the book of evidence and on the Dunne case.*
>
> *5. I say that Mr. Cullen claimed that there was no such evidence before the Court."*

On 26th November, 2008, Mr. Gannon gave oral evidence by way of cross examination on his affidavit to this Court. He said that he was in Harristown District Court every Friday. He stated that he remembered Mr. Cullen referring to the *Dunne* case because, at that time, he was not familiar with it and that he himself had previously made submissions that the terms of the Act of 1999, required that evidence be given to the Court if an objection was made to an extension of time. He said that he was not one hundred per cent sure that the word *"objection"* was used by Mr. Cullen but that it was clear that he was objecting to the prosecution's application.

(e) Ms. Duy-Linh Geraghty, interpreter for the applicant
In her affidavit sworn on 10th October, 2008, Ms. Geraghty gave the following evidence at paras. 2-4:-

> *"2. I say that in the course of the hearing, Mr. Cullen, Solicitor for the Applicant, objected to any extension of time for the service of the Book of Evidence.*
>
> *3. I say that Judge Browne did not accept Mr. Cullen's legal arguments.*
>
> *4. While I cannot recall the detail of the arguments I say that in the course of his legal arguments objecting to any extension of time for service of the book of evidence, Mr. Cullen used the terms 'sworn affidavit'."*

In her oral evidence given in cross examination on her affidavit, Ms. Geraghty recalled the prosecution asking for an adjournment and Mr. Cullen disagreeing with it. She again stated that the term *"sworn affidavit"* was used by him.

Conclusion on the Factual issue

From the above it is clear that an application for the extension of time for the service of the book of evidence was made by Superintendent Ward on 11th July, 2008, and the first named respondent granted the extension of time in the absence of evidence being given to justify the extension of time. Having regard to the affidavit evidence in this application, I am satisfied that the applicant's solicitor complained to the first named respondent about the lack of evidence and called for evidence to be given and despite it remaining unclear as to whether the actual word *"objection"* was used by him, it was implicit in what he said to the first named respondent that he was, in fact, objecting to Superintendent Ward's application on the ground that evidence was required to satisfy the Court of the matters set out in s.4B of the Act of 1967.

The Legal Issue
It now falls on the Court to examine whether s. 4B (3) of the Act of 1967, requires that evidence be given to enable the District Judge to make a determination under s. 4B (3) as to whether there is good reason for extending time for service of the book of evidence and whether it would be in the interests of justice to do so in a case where the application to for an extension of time is opposed.

In *Dunne v. The Governor of Cloverhill Prison* [2008] IEHC 16 (Unreported, High Court, Edwards J., 25th January, 2008) the issue which arises in this case was considered.

That case was a *habeas corpus* application and it came before the Court before the impugned order had expired. In it an application was made by a solicitor from the Office of the Chief Prosecution Solicitor to the District Court for an extension of time for service of the book of evidence on the accused. It was indicated to that Court that evidence could be called as to the progress of the investigation. However, counsel for the applicant complained that if evidence was to be called that he would have difficulty in dealing with that evidence, having not received prior notice of what the proposed witnesses intended to say. The District Court Judge proceeded to extend the time for the delivery of the book of evidence and remanded the applicant in custody for a further two weeks. It was the applicant's case that the extension of time in the absence of formal evidence was unlawful.

At p. 20 of his judgment Edwards J. identified the *"key requirement"* as being that the District Court be satisfied as to the matters specified in s. 4B (3) of the Act of 1967. The Court then considered the meaning of *"satisfied"*. He did not consider that there was any technical meaning attaching to the word "*satisfied*". He then referred to a passage from a speech in the House of Lords in *Blyth v. Blyth* [1966] 1 All E.R. 524, which considered the meaning of that term in the context of s.4 (2) of the U.K. Matrimonial Causes Act 1950 which states:

> *"If the court is satisfied on the evidence that…"*

Edwards J went on to cite with approval the following passage from the speech of Lord Pearson at p.541. It states:-

> *"The phrase used in s. 4 (2) of the Act of 1950 is simply 'is satisfied', with no adverbial qualification. The formula 'satisfied beyond reasonable doubt' has been a very familiar one for a great many years, and if that meaning had been intended the formula could and should have been used. The phrase 'is satisfied' means, in my view, simply 'makes up its mind'; the court on the evidence comes to a conclusion which, in conjunction with other conclusions, will lead to the judicial decision. There is no need or justification for adding any adverbial qualification to 'is satisfied'."*

Edwards J., in interpreting s.4B (3) of the Act of 1967, reached the following conclusion at pp.20-21:-

> *"It seems to me that there are, of necessity, three components to an application for an extension of time pursuant to s. 4B (3). To be successful an applicant must satisfactorily address all three. The first component involves establishing the factual matrix underpinning the application, because such applications do not take place in a vacuum. The second component involves persuading the District Judge that on the basis of the facts as established there is 'good reason' for extending time. The third component involves also persuading the District Judge that on the basis of the facts as established it would be in the interests of justice to extend the time.*
>
> *Applications by the DPP for extensions of time pursuant to s. 4B (3) occur routinely in the District Court. In many, perhaps even most of these cases the facts put forward as giving rise to the need to seek the extension are not disputed. In such instances, the application is dealt with on the basis of asserted facts, without evidence being received in support of those assertions, and the judge determines the matter on the basis of submissions by the parties directed only towards the second, and/or the third, of the components that I have mentioned. There is no necessity for evidence in such circumstances because the accused is, by his conduct in not calling for the adduction of evidence, deemed to accept the facts as asserted, and to have waived his right to insist on proof of them.*
>
> *However, in any particular case, an accused is entitled if he wishes to put the DPP on proof of the factual matrix underpinning his application. If he does so, the circumstances alleged to exist must then be established in evidence. Further, the accused must be afforded an opportunity of testing the evidence put forward in the crucible of cross-examination, and to call evidence in rebuttal if he wishes. If evidence is called for, and is not produced, the District Judge will thereafter be incompetent to adjudicate further on the application, as consideration of second and/or third component issues can only take place in the context of established (or accepted) facts. As I have said neither 'good reasons' nor 'the interests of justice' can exist in a vacuum."*

From the above it is clear that the learned Judge found that there were three components to an application for an extension of time: establishing the factual matrix underpinning the application; persuading the District Judge that on the basis of the facts established that there is *"good reason"* for extending time; persuading the District Judge on the basis of the facts established it would be *"in the interests of justice"* to extend the time. In addition, he found that those facts must be established in evidence if the accused person opposed the application. Although this case arose by way of an application for *habeas corpus*, it does not appear to me that it should be distinguished on its facts. It involved an application for an extension of time, that was opposed and notwithstanding that the reason for that opposition were somewhat different to this case, an extension of time was granted in the absence of evidence to support the application for the extension. For a District Judge to be satisfied that there is *"good reason"* and that it is in *"the interests of justice"* to extend the time for the service of the book of evidence pursuant to s. 4 B (3) of the Act of 1967, it is axiomatic that he or she be made aware of the factual background underlying such an application. The question is in what form can those facts be relayed to the Court?

Where an accused person enjoys a constitutional right to an expeditious trial, which is, in practical terms, protected in s.4B (1) of the Act of 1967, by the imposition of a statutory time limit for the service of the book of evidence, I am of opinion, that if an application is made to extend that statutory period and it is opposed, it is incumbent on the prosecution to provide evidence, as to the reasons

for the extension to enable the accused person to cross-examine and to call evidence in rebuttal, if appropriate, rather than simply relying upon the assertion of those facts from the well of the Court.

In this case the applicant had been in custody for a period of nearly three months on 11th July, 2008, and had consented to the extension of the time for service of the book of evidence on three previous dates (13th June, 2008, 20th June, 2008 and 27th June, 2008). As said earlier, I am satisfied that the applicant's solicitor had at the very least by necessary implication objected to the granting of the extension by reference to the absence of evidence and having opposed the application for a further extension of time, in my view, the applicant having been in custody for nearly three months pending the completion of the procedures set out in the Act of 1967, the minimum required to protect his constitutional rights to liberty and to an expeditious trial was that evidence be given to support the reasons or grounds put forward by the prosecution as justifying the extension sought. Without the giving of evidence an accused person is in no position to meaningfully challenge the application for the extension and hence an accused person's rights to liberty and expeditious trial may be defeated simply by that default, an eventuality which simply should not happen in a Court which, *inter alia,* is charged with the duty of vindicating those rights. It is not sufficient that recourse can be had to this Court, either by way of an enquiry under Article 40.4 of the Constitution or a judicial review application, to vindicate those rights. This should happen in the District Court within the statutory procedure set out in s. 4B of the Act of 1967. As mentioned earlier the clear purpose of the 42 day time limit is in itself to vindicate an accused person's right to an expeditious trial as required by Article 38.1 of the Constitution. It would be strange indeed, in this context, where a complaint arose concerning breaches of either of the above two rights, in a contested application for an extension of the 42 day time limit, that it would not be necessary for the District Judge hearing such objection to adhere to the most basic and fundamental requirement, in the judicial determination of disputed facts, namely, to ascertain the true facts through the time honoured process of hearing evidence on oath or statutory declaration, this evidence being tested by cross examination.

I am satisfied that in a contested application for an extension of this time limit, unless the there is no dispute as to relevant facts, there is an obligation on a District Judge to determine the matter in dispute on the basis of evidence given on oath or upon the making of the prescribed statutory declaration. I respectfully agree with the conclusion and reasoning of Edwards J. in the *Dunne* case.

Futility Argument
The second and third named respondents make the case that the purported extensions granted on 11th July, 2008, have expired and that, as a result, there is no point in this Court making an order of *certiorari*.

Section 4B (3) of the Act of 1967, sets forth an important procedural step in the criminal law process. It is the function of the courts to ensure that constitutional justice is respected and afforded to those that come before the courts and indeed that the statutory scheme is complied with. In cases such as this case, by the time the matter comes to be litigated in the High Court, the order impugned will invariably be spent. If this Court were to overlook procedural invalidities on the basis that the impugned order is spent and that there is now a fresh remand curing the defect, in my opinion, the necessary function of this Court of correcting serious procedural invalidity by way of judicial review would become unacceptably neglected.

In this case, in the absence of evidence to justify the extension of time, the appropriate result of the application to extend time should have been the refusal of the application, the striking out of the charges and the release of the applicant from custody. Whilst I appreciate that Superintendent Ward was in court and in a position to give evidence if required to do so, notwithstanding the objection of the solicitor for the applicant, the first named respondent determined the application for the extension of time clearly on the basis that no evidence was necessary. In so doing he robbed himself of the competence to make the necessary judicial determination and acted *ultra vires* in proceeding to extend the time. The inevitable consequence of this was that the applicant was denied a striking out of the charges and a release from custody. The continuation of the detention of the applicant in what became unlawful custody is a consequence which cannot be overlooked by this Court.

Where the consequence of the invalidity raised may have been a serious breach of an accused person's constitutional rights, in my opinion, this Court should be slow to accede to the futility argument. Ms. McDonagh, in support of this argument, relied on the judgments of the Supreme Court in *The State (Lynch) v. Ballagh* [1986] I.R. 203. In my opinion this case is properly to be distinguished. In it the Court unanimously refused to quash an order of the District Court remanding an accused on bail on the grounds that in turning up to the District Court at the time, in respect of which he had been given station bail, the accused cured any defect in the recognisance entered into by him. Four of the five judges held that the recognisance was void as it was based on a rule of the District Court which the Court held was *ultra vires* and void. Nevertheless, as he had been charged with the offence of which he was accused, when he came before the District Court, the Supreme Court held that the District Court was lawfully seized of his case and had ample jurisdiction to remand him on bail. An additional factor weighing in the refusal of relief was the fact that he was remanded on bail and hence there was no substantive interference with his constitutional rights.

It is quite clear that the reasoning of all five judges in refusing the relief was not at all based on any suggestion expressed or necessarily to be implied that relief would be futile because the impugned order was spent and replaced with another order, valid in itself. Relief was refused in that case because the Supreme Court concluded that the District Court had ample jurisdiction to make the order that was impugned in those proceedings.

In my opinion, the facts and the legal problem brought up in the *The State (Lynch) v. Ballagh* are wholly different to the facts and issues encountered in this case.

Reliance was also placed on the case of *Barry v. District Judge Fitzpatrick and Director of Public Prosecutions* [1996] 1 ILRM 512. In that case a remand on bail in excess of 8 days made without the consent of the accused was held to have been made in excess of jurisdiction. That notwithstanding Keane J. as he then was in the High Court held, that as the order impugned was of a temporary nature and was spent no useful purpose would be served by quashing the impugned order. His decision was upheld by a majority in the Supreme Court. In my view this case should properly be distinguished for the reason that in that case the order impugned was simply a remand on bail and hence there was no risk of an infringement of constitutional rights. In contrast in this case, the extension of time challenged has the potential effect of delaying the proceedings and thus infringing the applicant's right to an expeditious trial and secondly the denial of a strike out of the proceedings, which should ensue if the extension of time cannot be granted, meant that the applicant was kept in custody when his liberty should have been restored. These are consequences which in my opinion are of a different order and magnitude to those encountered in the *Barry* case and for the purpose of the exercise of the court's discretion on whether to grant the order of certiorari sought require that this case be distinguished from the approach adopted in that case.

Error on the face of the record
Extensions of time for service of the book of evidence were made in respect of all five charges. It is clear that it was not appropriate for the charge under s.12 of the Immigration Act 2004, to be the subject of such an order, it being a summary offence and as such,

outside the remit of s. 4B of the Act of 1967. In addition, the applicant drew the attention of the Court to the fact that the statutory time limit of forty two days had not expired in respect of the three additional charges preferred on 13th June, 2008, when the impugned order was made on 11th July, 2008. However, s. 4B(4) makes it clear that an application for an extension may be brought and that the extension may be granted under s.4 B (3) before or after the expiry the period of forty two days mentioned in subsection (1). Therefore, the only potential defect on the face of the order relates to the inclusion of the s.12 charge.

As it had been intimated by the prosecution, apparently without objection from the solicitor for the applicant, that the s.12 charge would be included in a single book of evidence with all the other charges, it necessarily followed that pursuant to ss.4B(1)(a),(b),(c) and (d) of the Act of 1967 a statement of that charge together with any sworn information relating to it, a list of the witnesses relevant to it and copies of their statements would be included in the book of evidence. That being so it was right, in my opinion, that the s.12 charge would be included in the orders extending the 42 day limit. In this respect there is not, in my opinion, any defect on the face of the order in respect of the s.12 charge.

For all of the reasons set out above I am satisfied that I should grant an order of *certiorari* quashing the orders of the first named respondent made on 11th July, 2008 extending the 42 day time limit for service of the book of evidence.