Neutral Citation Number: [2008] IEHC 97

THE HIGH COURT

[2006 No. 1337 J.R.]

BETWEEN

MICHAEL BERRY

APPLICANT

AND
JUDGE AENEUS Mc CARTHY
AND
THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

Judgment of Mr. Justice Gilligan delivered on 14th day of March, 2008

1. By order of this court (Peart J.) as made on the 13th day of November, 2006, the applicant was given leave to apply for the following reliefs.

> A. An order of *certiorari* quashing the order of the first named respondent named herein of 29th September, 2006, convicting and sentencing the applicant herein in proceedings entitled *The Director of Public Prosecutions (at the suit of Garda Patrick J Freeman) v. Michael Berry.*
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> B. A stay on the said order of the first named respondent.
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> C. A declaration that the prosecution against the applicant herein constituted a violation of the applicants right to trial in due course of law as guaranteed by Article 38.1 of Bunreacht na hÉireann, 1937.
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> D. An order providing for costs.
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> E. A declaration that the first named respondents' refusal to dismiss the prosecution of the applicant was in violation of his right to a fair trial as protected by Article 6 of the European Convention on Human Rights and Fundamental Freedoms and also his right to an expeditious trial.

2. The relevant background is that the applicant was prosecuted in proceedings entitled The Director of Public Prosecutions at the suit of Garda Patrick J. *Freeman v. Michael Berry* for *inter alia* two offences of assault, being offences contrary to s. 2 of the Non Fatal Offences against the Person Act 1997, and an offence contrary to s. 2 Criminal Damage Act 1991, being an offence found appropriate to be tried summarily pursuant to summonses which were applied for on the 17th June, 2004, and reissued on the 1st June, 2005, with a return date of the 21st September, 2005, in Naas District Court. The offences were alleged to have occurred on, or about, the 20th December, 2003. The relevant summonses were served on the applicant on the 13th day of July, 2005, with a return date of the 21st September, 2005, but the applicant failed to turn up and a bench warrant was issued for his arrest. The warrant was executed on the 13th day of October, 2005, with a new return date of the 23rd November, 2005. An application was granted, on that occasion, for Morrison and Broderick Solicitors to come on record for the applicant and matters were remanded to the 8th February, 2006, to allow disclosure to be made and for a plea to be given and a hearing date fixed. On the 8th February, 2006, the applicant entered a plea of not guilty and a hearing date of the 30th March, 2006, was fixed. On the 30th March, 2006, the hearing did not proceed as confusion had arisen between Morrison and Broderick Solicitors and counsel instructed, with the result that the applicant was left with no legal representation, the case was not reached, and the matter was adjourned to the 31st May, 2006, for hearing. On the 31st May, 2006 the case was not reached in the list and was, therefore, not heard and was adjourned to the 29th September, 2006. An earlier hearing date of the 4th September, 200, was offered to both parties but that date was not suitable to the prosecution. On 31st May, 2006, a reference was made on the applicant's behalf that an application in relation to delay would be made.

3. The matter came on for hearing on the 29th September, 2006, in Naas District Court before the first named respondent and the first issue raised was that of delay. It is regrettable that at this remove there is no transcript available or even a contemporaneous note as to what occurred in court.

4. The applicant's version of events is that the first named respondent enquired as to the issue of the bench warrant; considered the fact as to whether or not the relevant complaint was made within a six month period; considered the fact that the applicant was under no obligation to make himself available to the Garda authorities between the issue and reissue of the summonses, as he had never been arrested or charged in relation to the subject matter of the summonses; enquired into the delay up to and including the 29th September, 2006, and was satisfied as to the efforts made by the Garda authorities and took the view that the applicants actions may also have contributed to the delay. The first named respondent also took the view that he did not accept that the applicant had actually suffered any prejudice by reason of the delay, which is two years and nine months from the date of the alleged offence to the date of hearing.

5. Having considered the various submissions as made to him in respect of the delay involved, the first named respondent declined the application as made on behalf of the applicant to prohibit the proceedings continuing and proceeded to a hearing. This resulted in the applicant being convicted in respect of two assault offences and one offence contrary to s. 2 Criminal Damage Act 1991, in respect of which he was sentenced to terms of imprisonment.

6. The principal submission made on the applicant's behalf is that he has a right to an expeditious trial and that this right has been breached by the failure of the prosecution to afford him a full hearing within a reasonable time in the District Court proceedings.

7. No application was made following the first named respondent's initial ruling on the delay aspect to the effect that the ruling was either going to be appealed, was going to be the subject matter of a judicial review, nor was any application to have a case stated made, and the hearing proceeded.

8. The applicant raises a secondary issue that following the dismissal of the delay application the prosecuting Garda Superintendent asked that the applicant be identified so as to be sure that he was present for the hearing of the summonses against him, and the applicant was accordingly identified in front of the various prosecution witnesses.

9. It is alleged on the applicant's behalf that this was particularly unfortunate and rendered the trial unsatisfactory.

10. It is contended on the respondent's behalf that the applicant is not entitled to the reliefs as claimed and that, in particular, the applicant failed to make a full and accurate disclosure when he sought leave to apply for judicial review, that the identification issue is not of any importance, and that there is no basis for judicial review on account of the alleged excessive delay.

11. There is no doubt that this case is an unusual one because the applicant opted to have the delay issue determined by the first named respondent prior to the hearing of the alleged offences against him, as set out in the various summonses. The first named respondent refused to dismiss the case because of delay; the hearing then proceeded with the applicant being convicted. In the particular circumstances that now arise this court is being asked, in effect, to review the conduct of the trial while the applicant has lodged an appeal, as is his entitlement, against the decision of the first named respondent to the Circuit Court, and will in the particular circumstances be entitled to a full re-hearing of all matters, including the issue of delay.

12. The applicant does not point to a single missing witness, or document, and it does appear that the applicant's defence to the offences, as set out in the summonses against him, was to the effect that he was ambushed, which in effect would mean that a large number of members of the public had not only conspired against him but had perjured themselves in their evidence.

13. The applicant refers to having suffered a degree of anxiety at the delay involved but that anxiety does not reflect any difficulty in the applicant's defence of the proceedings. The applicant alleges that he was not afforded a proper opportunity to make a statement which issue is contested by Garda Freeman, was not made aware that charges were being contemplated against him. This is accepted by Garda Freeman but Garda Freeman takes the view that the applicant had to know of, at least, the possibility of charges being preferred. The fact that there was a delay between the incident and the hearing, which is not disputed as being two years and nine months, that he was hindered in his defence as he did not, on the day of the hearing, have a clear recollection of what actually happened on the night, particularly prior to the injured party allegedly being assaulted. The applicant does make the case that while giving evidence before the first named respondent on the 29th September, 2006, he was unable to answer numerous questions put to him as he could not remember the incident clearly.

14. With regard to the delay the applicant was served with the relevant summonses on the 13th July, 2005, and was clearly aware, from that date, as to the nature of the offences being alleged against him.

15. In her grounding affidavit, Maura McKenna, the applicant's solicitor, refers to the preliminary application which took place before the first named respondent, and in respect of his findings states, as follows at para. 20 and the succeeding paras. of her affidavit:

> "20. I say that Judge McCarthy wanted to know when the bench warrant had been executed as he felt that this was very significant. He stated that as Statute had dictated a six month period, so long as the complaint was made within this period there could be no delay. He accepted that the Applicant was under no obligation to make himself available to the Gardaí between the issue and reissue of the summonses as he had not been arrested nor charged in relation to these matters. He further stated, however, that he was satisfied as to the efforts made by the Gardaí and felt that he was untraceable.
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> 21. I say that Judge McCarthy did not accept that the applicant had actually suffered prejudice by reason of the delay.
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> 22. I say that Judge McCarthy stated that he was satisfied that the Applicant had contributed significantly to the delay particularly as he had taken a bench warrant and he refused to dismiss the case in the circumstances and in the absence of any negligence on the State.
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> 23. I say that Judge McCarthy referred to case law opened before him by Counsel and in particular to *Byrne v. DPP*. He stated that in that case there was no culpability on behalf of the defence and also there was an emphasis on the necessity to avoid system delay. I further say that Judge McCarthy felt that there was no system delay in these matters.
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> 24. I say that Counsel pointed out to the Court that there should not be any necessity to show negligence on the part of the State.
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> 25. I say that Judge McCarthy directed that the hearing begin but prior to it beginning the Superintendent present in the court stated that he wished to confirm that the Defendant was present in court. I further say that the Superintendent specifically identified the Defendant, at this point, while prosecution witnesses were present in court."

16. Garda Freeman in his affidavit, as sworn herein, describes how he gave evidence at the preliminary hearing before the first named respondent and that the judge carefully considered all of the submissions and rejected the application. He avers that no indication was given by the applicant that he wanted to judicially review that decision, or state a case, and so the prosecution evidence commenced.

17. It is only in exceptional cases that a criminal trial should be prohibited rather than determined on the merits. In these proceedings, notwithstanding that the applicant has had a full hearing, this application is equivalent to a prohibition on the proceedings continuing and this Court has a duty to protect the constitutional rights of all persons, and as indicated by Denham J. in *D.C. v. D.P.P.* [2005] 4 I.R. 281 at p. 283:-

> "…in exceptional circumstances the court will intervene and prohibit a trial. In general such a step is not necessary as the trial judge maintains at all times the 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."

18. In the circumstances of this case the applicant chose to make a case in relation to delay in the District Court before the first named respondent and the first named respondent, having heard the evidence, declined to dismiss the case because of delay. The applicant did not seek to judicially review that decision or to seek a case stated. This court has no transcript of the evidence before the first named respondent and, further, does not even have a contemporaneous note of the nature of the evidence adduced. It does appear that the first named respondent heard evidence, made certain findings on the basis of the evidence adduced, held against the applicant and then proceeded to a hearing.

19. The applicant in effect is seeking to review the merits of a hearing that has already occurred in the District Court. He has a right of appeal and it has been indicated that he has, in fact, exercised this right and, accordingly, will be entitled to a full re-hearing of all

aspects, including the delay aspect in the Circuit Court. The applicant maintains his right, as he is entitled to do, to proceed ahead with his appeal against his conviction and sentence to the Circuit Court.

20. In *Lennon v. District Judge Clifford* [1992] 1 I.R. 382, at p. 386, O'Hanlon J. reviewed the relevant authorities and stated:-

> "The general tenor of the decisions is that the High Court is not available as a court of appeal from decisions of other tribunals except where it is given such a function by statute, and that the scope for challenging the validity of orders made by lower courts by way of judicial review proceedings is confined to those cases where reliance can be placed on want of jurisdiction, or excess of jurisdiction; some clear departure from fair and constitutional procedures; bias by interest; fraud and perjury; or decisions containing an error of law apparent on the face of the record."

21. In my view, none of these depictions apply to the present circumstances. Also, clearly any decision taken by the first named respondent is taken within his jurisdiction, from which decision there is a right of appeal to the Circuit Court with a full rehearing.

22. Laffoy J., in *Stokes v. O'Donnell* [1996] 3 I.R. 218, took the view that relief by way of judicial review was confined to those cases where reliance could be placed on want or excessive jurisdiction, on clear departure from fair and constitutional procedures, on bias, on fraud and perjury or on error on the face of the record and was not available, save in the most extreme cases, where only the sufficiency of the evidence before the inferior tribunal was being challenged.

23. I do not regard this case as being extreme in any sense.

24. I take the view that the applicant is not entitled to maintain these proceedings by way of judicial review and that the appropriate remedy to be pursued by the applicant in these proceedings is that of an appeal to the Circuit Court

25. For the sake of completeness I will deal with the actual application for judicial review itself.

26. I take the view that, even where there is blameworthy delay, the applicant must satisfy the court that he has suffered, or is in real danger of suffering, some form of prejudice as a consequence thereof, in order to obtain the relief sought. In the particular circumstances of this case the first named respondent found, as a matter of fact, that the applicant had not suffered any prejudice. At its height the applicants case in this regard is to the effect that he had difficulty in remembering clearly the events surrounding the alleged incident. As previously referred herein, however, it is quite clear that he was served with the relevant summonses on the 13th day of July, 2005, and was clearly aware from that date of the nature and extent of the offences being alleged against him.

27. Kearns J., in *P.M. v. Director of Public Prosecutions* [2006] 3 I.R. 172, in the course of his judgment, at p. 184, quoted from Keane C.J. in *P.M. v. Malone* [2002] 2 I.R. 560 at p. 581 where Keane C.J. stated:-

> "Where, as here, the violation of the right has not jeopardised the right to a fair trial, but has caused unnecessary stress and anxiety to the applicant, the court must engage in a balancing process. On one side of the scales, there is the right of the accused to be protected from stress and anxiety caused by an unnecessary and inordinate delay. On the other side, there is a public interest in the prosecution and conviction of those guilty of criminal offences. In all such cases, the court will necessarily be concerned with the nature of the offence and the extent of the delay."

28. Kearns J., continuing in his judgment stated, at p. 185, as follows:-

> "I believe that the balancing exercise referred to by Keane C.J. 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 proceed 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. As part of the balancing exercise it should also be borne in mind that an order of prohibition may not be the only remedy available in such circumstances. A court may have the ability to direct that a particular trial be brought on speedily and be given priority, although precisely how this would be policed or operated in practice may be problematic."

29. Murray C.J. in *H. v. D.P.P.* (Unreported, Supreme Court, 31st July, 2006) visited the issue of delay and prejudice and stated:-

> "…the Court is satisfied that it is no longer necessary to establish such reasons for the delay. The issue for the Court is whether the delay has resulted in prejudice to an accused so as to give rise to a real or serious risk of an unfair trial. The Court would thus restate the test as: The test is whether there is a real or serious risk that the applicant, by reason of the delay, would not obtain a fair trial, or that a trial would be unfair as a consequence of the delay. The test is to be applied in light of the circumstances of the case."

30. O'Neill J., in *D.P.P. v. Arthurs* [2000] 2 I.L.R.M. 363 stated at p. 370:-

> "The selection of certain offences as suitable for summary trial in the District Court, carries with it the implication inter alia that the time scale for the completion of such trials ought generally to be shorter than in respect of trials on indictment."

31. O'Neill J., went on to refer, at p. 371, to the fact that an accused person must show that he has, suffered or is likely to suffer, an actual specified prejudice or that the length of delay is so inordinate or excessive as to give rise to a real risk that the trial will be unfair.

32. In *Fennell v. D.P.P.* (Unreported, High Court, Dunne J. 26th April, 2005) a summary case had been adjourned three times when listed for trial. The date of the alleged offence was the 18th of December, 2002, and the new hearing date was the 5th of May, 2005, a gap of two years and five months.

33. Dunne J., stated:-

> "Having regard to the various authorities opened to me and looking at the facts of this particular case it seems to me that

> it is clear that delay can amount to an invasion of an accused's constitutional right notwithstanding the absence of evidence of prejudice, actual or presumptive. In considering delay it is necessary to look at the facts of each case. In the present case I do not disagree with the contention that a delay of two years and five months is undesirable. However, in circumstances where there have been reasonable grounds for the delay on at least two occasions, I do not think that the overall delay could be described as excessive."

34. The delay in this case of two years and nine months is undesirable. However, in my view, no real issue of prejudice has been raised by the defendant, and quite clearly he is not able to point to any specific issue of prejudice such as a missing witness or missing document. The height of his case is that he may have had some difficulty in remembering specific aspects surrounding the alleged incidents that occurred on the occasion in question. As previously discussed, however, I am satisfied that the applicant was well aware from the date of the service of the summons upon him, on the 13th July, 2005, as to the nature of the allegations against him. I am not satisfied that there is any exceptional matter that would justify the criminal proceedings herein being prohibited rather than determined on the merits, and in the circumstances of this case in the Circuit Court by way of appeal from the finding of the first named respondent. I do not consider that there is a real risk that by reason of the particular delay of two years and nine months the applicant could not obtain a fair trial. Further, I am satisfied that even if I am incorrect in this view, the Circuit Court Judge, who will have the benefit of hearing oral evidence, will be able to identify any real risk of the trial being unfair.

35. In engaging in a balancing process, in this instance, on one side of the scales there is the right of the accused to be protected from stress and anxiety caused by an unnecessary and inordinate delay, and his right to a fair trial within a reasonable period of time and, on the other side, there is a public interest in the prosecution and conviction of those guilty of criminal offences. In the circumstances of this case I have regard to the nature of the offence and the extent of the delay. In the exercise of my discretion, and having regard to the fact that no issue of actual prejudice is, identified, the balancing process must favour the public interest in the prosecution and conviction of those guilty of criminal offences. On the facts of this case I see no justification for the granting of the reliefs sought by the applicant and I refuse the application.

36. I do not consider that there is any basis to the submission as made on the applicant's behalf that in some way the hearing of the offences as laid against him in the various summonses was unfair, or in breach of his constitutional rights by reason of him identifying himself at the request of the prosecuting Garda. There is no indication as to the significance of this action before the first named respondent, or as to the nature of any cross examination that may have been carried out, other than that, while no immediate objection was made when the prosecuting Garda asked to confirm that the defendant was present in court, objection was made by counsel for the applicant as soon as the first prosecution witness, Ms. Jessica Carroll, was asked if she could identify the defendant. It is alleged that Ms. Carroll was given no opportunity to describe the alleged person prior to this question being put to her. There is no indication as to the nature of any further cross examination that may have taken place, or as to the importance of the identification issue, or as to the applicants' position regarding his alleged identification. I do not accept that there is any substance to the submission as made that the action of the prosecuting Garda rendered the hearing of the offences in some way materially unfair to the applicant or was in breach of his constitutional right to a fair trial.

37. The respondent makes the case that there was a failure on the part of the applicant to make full disclosure when leave was sought, and that, in particular, he failed through his solicitor to indicate that his claim that he was not permitted to make a statement in his defence is patently untrue; that he should have told the judge who granted leave; that the defence he ran in the case was that he had been ambushed, that when seeking leave the applicant did not give any description of or exhibit the evidence against him; that he omitted all mention of the fact; that he had made a voluntary admission to the Gardai of throwing a rock at the injured party whom he is alleged to have assaulted and that he claimed that he was not made aware of the charges against him until the Autumn of 2005. The evidence of Garda Hanlon, however, was that she personally served the summonses on the applicant on 13th July, 2005. It is alleged on the respondent's behalf that the judge, from whom leave was granted, was given a very selective account of where matters stood.

38. There is no doubt that the long established rule requiring *uberrimae fidei* on the part of an applicant ought to be strictly applied. However, in the circumstances of this case, I am not satisfied that the application seeking leave to apply for judicial review contained material misstatements of fact or sought in some way to conceal material matters or failed to make sufficient or candid disclosure and in the circumstances, I do not accept the submissions as raised in this regard on the respondents behalf.

39. Accordingly, I decline to grant the applicant the reliefs as sought and dismiss the proceedings.