

IRELAND / JUDGMENT

Devoy -v- DPP [2008]

IESC 13 (07 April 2008)

[2008] IESC 13

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[2008] IESC 13 Supreme Court Record Number: 150/2006 High Court Record Number : 2005 No. 673JR Date of Delivery: 07 April 2008 Court: Supreme Court Composition of Court: Denham J., Kearns J., Macken J. Judgment by: Denham J. Status of Judgment: Approved Judgments by Result Concurring Denham J. Appeal allowed - set aside High Court Order Macken J. Kearns J. Appeal allowed - set aside High Court Order Macken J. THE SUPREME COURT [Appeal No: 150/2006] Denham J. Kearns J. Macken J. Between/ John Devoy Applicant/Respondent and The Director of Public Prosecutions Respondent/Appellant Judgment delivered the 7th day of April, 2008 by Denham J.

1. This appeal raises issues of delay in prosecuting criminal offences. It is one of a number of cases which were decided in the High Court at a time when the jurisprudence was being clarified by this Court.
2. This is an appeal by the respondent/appellant, the Director of Public Prosecutions, hereinafter referred to as 'the D. P. P.', from the order and judgment of the High Court (O'Donovan J.) given on the 21st March, 2006, which granted an injunction restraining the further prosecution of John Devoy, hereinafter referred to as 'the applicant', on the charges referred to in this appeal.
3. On the 4th July, 2005 the High Court (McKechnie J.) gave the applicant leave to apply for judicial review on stated grounds.

4. On the 28th March, 2006 the High Court ordered that the D. P. P. be restrained from taking any further steps in the criminal proceedings being the subject matter of this application and bearing Bill Number 353/05 The People at the suit of the Director of Public Prosecutions and John Devoy.
5. The applicant was originally charged on the 19th October 2001 with four offences alleged to have been committed on the 17th October 2001. These charges were: "1. For that you the said accused, on the 17th day of October 2001 at 16 Balbutcher Drive, Ballymun, Dublin in the Dublin Metropolitan District, did without lawful excuse damage property to wit: one sitting room window, to the amount of £200, the property of John Cray, intending to damage such property or being reckless as to whether such property would be damaged. Contrary to Section 2 Criminal Damage Act, 1991
2. For that you the said accused on the 17th day of October, 2001 at 16 Balbutcher Drive, Ballymun, Dublin in said Dublin District Area of Dublin Metropolitan District, did discharge a firearm being reckless as to whether any person was injured or not. Contrary to section 8 Firearms and Offensive Weapons Act, 1990.
3. For that you the said accused on the 17th day of October, 2001 at 16 Balbutcher Drive, Ballymun, Dublin in said Dublin District Area of Dublin Metropolitan District, did have in your possession a firearm, to wit a shotgun in such circumstances as to give rise to a reasonable inference that you had not got it in your possession for a lawful purpose. Contrary to section 27A(1) of the Firearms Act, 1964, as inserted by section 8 of the Criminal Law (Jurisdiction) Act, 1976 and amended by section 14 Criminal Justice Act, 1984, and as amended by section 15 of the Offences Against the State (Amendment) Act, 1998.
4. That you the said accused on the 17th day of October 2001 at 16 Balbutcher Drive Ballymun, Dublin in said District Court Area of Dublin Metropolitan District, did have in your possession, ammunition, to wit:- shotgun cartridges in such circumstances as to give rise to a reasonable inference that you had not got it in your possession for a lawful purpose. Contrary to section 27A(1) of the Firearms Act, 1964, as inserted by section 8 of the Criminal Law (Jurisdiction) Act, 1976 and amended by section 14 Criminal Justice Act, 1984, and as amended by section 15 of the Offences Against the State (Amendment) Act, 1998."
6. The applicant was arrested on the day following the alleged offence, being the 18th October, 2001, was charged on the following day, and appeared in the District Court on 20th October, 2001, when he was remanded in custody, with consent to bail. The same day he was admitted to bail and released from custody. He was remanded from time to time pending the service of the book of evidence. On the 17th September, 2002, the District Court, having remanded him on six occasions, struck out the charges on the basis of the failure to serve the book of evidence. The applicant heard nothing more until 12th June, 2003 when the charges were re-entered in the District Court and a book of evidence served on the applicant. By order of the District Court on the 19th June, 2003 the applicant was sent forward for trial to the Dublin Circuit Criminal Court. At a hearing before the Circuit Court

on the 17th July, 2003 the applicant's trial was fixed for 24th March, 2004. However, some days before the trial date the applicant and the court were advised by the D. P. P. that the order of the District Court dated the 19th day of June, 2003, returning the applicant for trial, was defective and that accordingly the trial listed for the 23rd March, 2004 could not proceed. On the 7th September, 2004, papers were lodged in the High Court on behalf of the D. P. P. seeking an order of certiorari by way of judicial review to quash the order of the District Court dated the 19th June, 2003. On the 15th November, 2004 the High Court quashed the order of the 19th June, 2003. On the 13th June, 2005, by order of the Circuit Court the applicant's trial was fixed for the 6th February, 2006. The applicant then sought an order prohibiting the further prosecution of the charges before the Circuit Criminal Court on the grounds that there had been inexcusable, unwarranted and unconscionable delay by the D. P. P. in processing the charges through the District Court and Circuit Court.

7. The High Court found that there had been an inordinate and inexcusable delay by the D. P. P. in processing the charges. The learned High Court judge held:- "I think it unnecessary for the purposes of this judgment that I review in detail all the explanations advanced on behalf of the [D. P. P.] in justification of the delay because it seems to me that the affidavits to which I have referred speak for themselves. However, whatever justification there may have been for the delay in preparing a book of evidence for service on the applicant (notwithstanding that it seems to me that the preparation of the case against the applicant was a relatively simple matter and not at all as complex as was suggested on behalf of the respondent and, accordingly, I have some reservations about the explanation offered in justification of that delay, I am prepared, for the purposes of this judgment, to accept that there was justification for it) the explanation offered for the delay of almost eight months in identifying the defect in the order of the 19th July, 2003 returning the applicant for trial, coupled with the delay of five and a half months between identifying that defect and applying to the High Court by way of judicial review to have that order quashed and aggravated by a further delay of two and a half months between the quashing of that order of the 19th July, 2003 and the re-entry of the matter before the District Court is, in my view, totally unacceptable. Since the passing of the Offences Against the State Act, 1939, the offences involving firearms with which the applicant was charged were required to be tried by the Special Criminal Court unless the Director of Public Prosecutions directed otherwise. Accordingly, in the absence of an indication on the order of the 19th day of July, 2003 returning the applicant for trial, that the Director of Public Prosecutions had directed that the applicant be not sent forward for trial by the Special Criminal Court, it is clear that that order is defective on its face. How this was not noted for a period of almost eight months between the 19th July, 2003 and the 12th day of March, 2004, despite the fact that the case was mentioned in court on three occasions in the interim, is beyond my comprehension and I can see no reasonable excuse for it. Then to compound matters, although it must have been immediately clear to anyone associated with the case that, in the event that the order returning the applicant for trial of the 19th July, 2003, was defective and in the event that the prosecution of the applicant was to continue, it was essential that that order be quashed and the only way to achieve that was by way of

judicial review and yet, another five and a half months passed before an application is made to the court for an order of certiorari to quash that order. In my view, no reasonable explanation has been offered to justify that delay and, to be quite frank, I cannot think of any reasonable justification for it. Then, when on the 15th November, 2004, Ms. Justice Macken of the High Court made an order quashing the said order of the 19th July, 2003 and directed that the matter be remitted back to the District Court, it took another two and a half months to do so. Again, it is my view that no reasonable explanation has been offered for that delay. In the foregoing circumstances, I am satisfied that there has been inordinate and inexcusable delay on the part of the prosecution in prosecuting this applicant and that, therefore, his right to a speedy trial has been infringed." The learned High Court judge having held that there was an inordinate and inexcusable delay, accepted that it did not necessarily follow that he was entitled to the relief sought. Reference was made to *D. C. v. Director of Public Prosecutions*

[2006] 1 ILRM 348 and the determination that given the independent role of the D. P. P., the court will only intervene to prohibit a trial in exceptional circumstances. The learned trial judge referred to the words of Finlay C. J. in *D. P. P. v. Byrne*

[1994] 2 I. R. 236 where he stated:- "Having reached that conclusion, I am driven to the further conclusion that, of necessity, instances may occur in which a delay between the date of the alleged commission of an offence and the date of a proposed trial identified as unreasonable could give rise to the necessity for a court to protect the constitutional right of the accused by preventing a trial, even where it could not be established either that the delay involved an oppressive pre-trial detention, or that it created a risk or probability that the accused' capacity to defend himself would be impaired. This must lead of course to a conclusion that, on an application to prohibit a trial on the basis of unreasonable delay, or lapse of time, failure to establish actual or presumptive prejudice may not conclude the issues which have to be determined." The learned trial judge then held:- "In those circumstances, given that this applicant does not complain of specific prejudice arising from the delay in prosecuting him or, indeed, that his right to obtain a fair trial has being impaired by that delay, it seems to me that, in determining whether or not he is entitled to an order prohibiting the continuance of the prosecution against him, I have to balance the entitlement of the community at large to have him prosecuted for the offences of which he is suspected, against his entitlement to have his right to an expeditious trial vindicated. In that regard, it seems to me that, to use a colloquialism, the authorities are not entitled to play "ducks and drakes" with an accused person and that, to my mind, is what has happened in this case. As I have indicated, I think it incredible that it took eight months to recognise the defect in the order returning the applicant for trial of the 19th July, 2003 and, then, another five and a half months before any step was taken to rectify that defect. Moreover, I think that the excuses offered by the respondent are totally unacceptable. Accordingly, I will make an order restraining the respondent from taking any further steps in the criminal proceedings the subject matter of this application."

8. The D. P. P. has brought this appeal from the above judgment. Fourteen grounds of appeal were filed:-
- i) The learned trial judge erred in granting an injunction restraining the further prosecution of the applicant herein. ii) The learned trial judge erred in finding that the D. P. P. had failed to offer any reasonable explanation for the delay in the case. iii) The learned trial judge erred in finding that there had been inordinate and inexcusable delay on the part of the prosecution in prosecuting the applicant and that therefore his right to a speedy trial had been infringed. iv) The learned trial judge erred in failing to balance the entitlement of the community to have the applicant prosecuted for the offences of which he is suspected, against his entitlement to have his right to an expeditious trial vindicated.
 - v) The learned trial judge erred in failing to carry out the aforesaid balancing exercise, and in particular in failing to have regard to the seriousness of the offences charged, the overall extent of the delay involved in context and the weakness of the applicant's case concerning pre-trial stress and anxiety. vi) The learned trial judge erred in finding that there was culpable prosecutorial delay such as to entitle the applicant to the injunctive relief being sought. vii) The learned trial judge erred in failing to pay any regard to the fact that the applicant had made admissions in the case. viii) The learned trial judge erred in granting injunctive relief as against the D. P. P., notwithstanding the absence of any claim of actual prejudice and the paucity of evidence concerning the interference with those rights which the speedy trial right is designed to protect. ix) The learned trial judge erred in concluding that the appropriate remedy in a case of prosecutorial delay alone was an order injunctioning the applicant's trial.
 - x) The learned trial judge erred in taking into account elements of prosecutorial delay which had occurred pre charge. xi) The learned trial judge erred in effectively concluding that an applicant does not have to show that the complaint of delay had any effect. xii) The learned trial judge erred in finding that the D. P. P. had indicated in the course of the hearing that the D. P. P. was not relying on the question of the applicant's delay and non compliance with Order 84 Rule 21 of the Rules of the Superior Courts. xiii) The learned trial judge erred in summarising the D. P. P.'s opposition to the applications as being based solely on the proposition that the court should only in very exceptional circumstances prohibit a prosecution on the grounds of prosecutorial delay simpliciter. xiv) The learned trial judge erred in failing to have due regard and/or attach sufficient importance to the applicant's own delay in instituting these proceedings.
9. Law Since the hearing of this case in the High Court the law as to prosecutorial delay has been restated by this Court. In *P. M. v. Malone*

[2002] 2 IR 560 Keane C. J. referred to the balancing exercise required of the court in situations where prosecutorial delay is alleged. He stated:- "The essential issue for resolution is, accordingly, as to whether the stress and anxiety caused to the applicant as a result of the violation of his constitutional right to a reasonable expeditious trial justifies the

prohibition of the trial proceeding at this stage. If this were a case in which it could be said that his ability to defend himself had been impaired and, as a result, there was a real and substantial risk of an unfair trial then, as pointed out by Denham J. in *D. v. D. P. P.*

[1994] 2 I. R. 465, the applicant's right to a fair trial would necessarily outweigh the community's right to prosecute. 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 the 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." The test to be applied in cases where there has been prosecutorial delay was restated in *P. M. v The Director of Public Prosecutions*, [2006] 3 IR 174, where Kearns J., with whom the other members of the Court agreed, held:- "In conclusion, however, on this issue, I am satisfied that where blameworthy prosecutorial delay of significance has been established by the applicant, then that is not sufficient per se to prohibit the trial, but that one or more of the interests protected by the right to expeditious trial must also be shown to have been so interfered with such as would entitle the applicant to relief." In *O'H v. D. P. P.*

[2007] IESC 12 the principles relating to prosecutorial delay were described by Fennelly J. as follows:- "The essence of the principles established in these cases is that culpable or blameworthy delay on the part of the prosecution does not, in itself, automatically give rise to an order preventing further prosecution. The Court should engage in a balancing operation. It should balance the public interest in prosecuting crime against the interests of the applicant. Where it is not established that there is a real risk that, due to delay, loss of evidence or the like, the applicant will not have a fair trial, the applicant is, nonetheless, entitled to rely on a number of matters outlined and considered in the case-law. One of these is any additional distress that the applicant has suffered as a result of the delay. ... In addition, it will be necessary to consider whether an applicant, such as the Applicant in the present case, is required to place before the court evidence of any additional distress upon which he seeks to rely." The particular circumstances of a case required to be put in the balance. In analysing the circumstances of a case this court has over the last decade on several occasions found the judgment of Powell J., with whom the other members of the U. S. Supreme Court agreed, in *Barker v. Wingo* 407 US 514 [1972], relating to the right to speedy trial under America's jurisprudence, helpful in analysing our jurisprudence. I continue to find it a persuasive precedent.

10. Decision The learned trial judge was correct in determining that the High Court should interfere only with the right of the D. P. P. to prosecute in exceptional circumstances. However, he then fell into error in the test to be applied. 10.1 This case was determined by the High Court at a time of transition in the jurisprudence, when the law was being clarified by this Court. In these circumstances the High Court did not apply the correct test, which was restated in *P. M. v. The Director of Public Prosecutions*

[2006] 3 IR 174. This test requires that in circumstances where there was blameworthy prosecutorial delay, a further step is required to be taken by the Court, this step was not taken by the High Court. To prohibit a trial, in addition to the finding of blameworthy prosecutorial delay one or more of the interests protected by the right to an expeditious trial must be shown to have been so interfered with as to entitle the applicant to relief. The bar of the test is high because this is a very significant relief - an order prohibiting the public prosecutor from prosecuting an accused. In this case the second step required by the test was not taken. Indeed the learned trial judge stated that the applicant did not complain of any specific prejudice, and that he did not complain that his right to a fair trial had been impaired by the delay. 10.2 Counsel on behalf of the D. P. P. pointed to four features in this case as indicating that an order of prohibition should not be granted: (a) there is no prejudice to the applicant; (b) there is no case made out in the affidavits that the applicant has suffered stress and anxiety; (c) there is no claim by the applicant that he asserted his right to an expeditious trial before seeking judicial review, and (d) the alleged admissions.

- (a) The issue of prejudice is at the core of the jurisprudence upon which a court would prohibit a trial. It is a seam of law to protect an accused and the integrity of the legal system. The applicant does not complain of specific prejudice in this case. Thus the general jurisprudence requires to be considered and I will address this later in the judgment.
- (b) This is not a case where grounds of stress and/or anxiety were advanced by the applicant in tandem with the delay so as to require relief.
- (c) Nor was there any assertion by the applicant that he sought an expeditious trial prior to launching the application for judicial review. This concept is distinct from that of delay in seeking judicial review - which, in all the circumstances of the case, I consider irrelevant at this time. In such a situation the conduct of the applicant is not determinative, but is a factor to be weighed in the balance. There are alleged admissions made by the applicant, which appear in the book of evidence. These admissions have yet to be proved. It is open to the applicant to contest the admissibility of any admissions at his trial. However, this Court, in an application to prohibit a trial, is entitled to have regard to this factor. In *B. v Director of Public Prosecutions*

[1997] 3 I. R. 140 at p.202 I stated that:- "If there has been an admission by the accused of all or any of the alleged crimes this will be a factor for consideration. If the admission is contested that is also a matter for consideration by the court on an application to prohibit

the trial on the ground of delay." Thus in this case the fact of an admission, and the attitude of the applicant, are relevant factors in all the circumstances of the case. 10.3 The delay in this case was inordinate and blameworthy. 10.4 However blameworthy delay by the prosecution, while it should be regretted and is not best practice, does not per se give rise to an order prohibiting a trial. An additional factor is required, see *P. M. v. The Director of Public Prosecutions*

[2006] 3 IR 174, the Court will interfere to prohibit a trial only in exceptional circumstances. In *Director of Public Prosecutions v. Byrne*

[1994] 2 I. R. 235 at p.245 Finlay C. J. stated that instances may occur between the date of the alleged commission of an offence and the date of a proposed trial identified as unreasonable could give rise of necessity for a court to protect the constitutional right of an accused by preventing the trial. In an application to prohibit a trial on the basis of unreasonable delay, failure to establish actual or presumptive prejudice may not conclude the issues which have to be determined. However, each case should be considered on its own circumstances. The factors of a case will determine whether the court will grant the exceptional remedy of prohibition of a trial. In this case the applicant is charged with serious offences, there are apparent admissions, prior to bringing the application for judicial review the applicant took no steps seeking an expeditious trial, and there is no evidence of stress and anxiety such as to require the prohibition of a trial. The circumstances of this case include that there is no real or serious risk of an unfair trial and the applicant has not made out a case of infringement of a personal interest. In light of the factual matrix it would not be proportionate to prohibit the trial of the applicant. Applying the appropriate test as stated in *P. M. v. The Director of Public Prosecutions*

[2006] 3 IR 174, the applicant is not entitled to an order prohibiting his trial.

11. Conclusion For the reasons given I would allow the appeal, and reverse the decision of the High Court. Thus the trial of the applicant may proceed. JUDGMENT of Mr. Justice Kearns delivered the 7th day of April, 2008 This is an appeal from the Order of the High Court (O'Donovan J.) which restrained the trial of the applicant on grounds of prosecutorial delay. The criminal charges brought against the applicant arise from events said to have occurred on 17th October, 2001 at Balbutcher Drive, Ballymun, Dublin. It is alleged that on that occasion the applicant discharged a shotgun at the sitting room window of an occupied dwelling house at the said address. The applicant was arrested on 18th October, 2001 and was charged the following day with possession of a firearm, discharging a firearm, possession of ammunition and criminal damage. In a written statement made shortly after his arrest and dated 19th October, 2001, the applicant made a full confession in relation to the offences. At no stage has the applicant specifically queried the accuracy or admissibility of this statement although he does assert that he is not guilty of the offences. The applicant appeared in the District Court on 20th October, 2001 on which occasion he was remanded in custody, with consent to bail. Later that day he was admitted to bail and released from custody. Thereafter he was remanded from time to time in the District Court whilst awaiting

the service of a Book of Evidence. On 17th September, 2002, the matter having been remanded on six occasions, the charges preferred against the applicant were struck out by reason of the failure of the prosecution to serve a Book of Evidence. On 12th June, 2003 the charges were re-entered in the District Court and a Book of Evidence was served on the applicant. By order of the District Court dated 19th June, 2003, the applicant was sent forward for trial on the said charges to the Circuit Criminal Court in Dublin City. At a hearing before the Circuit Court on 17th July, 2003, the applicant's trial on the said charges was fixed for 23rd March, 2004. However, some several days before the trial began, the applicant and the court were advised by the prosecution that the order returning the applicant for trial which had been made in the District Court on 19th June, 2003 was defective. Accordingly the trial date was vacated. On 7th September, 2004, papers were lodged in the High Court on behalf of the prosecution seeking an order of certiorari by way of Judicial Review to quash the said order of the District Court dated 19th June, 2003. The High Court made such order on 15th November, 2004, following which the matter was re-entered before the District Court on 3rd February, 2005. A further return for trial was made by order of the District Court on 23rd March, 2005. On 13th June, 2005 the applicant's trial was fixed for 6th February, 2006. It will be seen therefore that the period of time taken by the prosecution from time of charge to proposed date of trial was of the order of four years and four months. It is not suggested in these proceedings that the applicant himself caused or contributed to the period of time taken. He did not however at any stage seek early disposal of his case. By order of the High Court (McKechnie J.) dated 4th July, 2005 the applicant was granted leave to seek an Order of Prohibition (or in the alternative an Injunction), to restrain the respondent from taking any further steps in these criminal proceedings. The applicant's case was that there had been inexcusable, unwarranted and unconscionable delay on the part of the second named respondent in processing the said charges through the District Court and the Circuit Court, a delay which had not been contributed to by the applicant and which had deprived the applicant of a trial in accordance with his constitutional right under Article 38.1 of the Constitution to a trial in due course of law, that is to say a trial with reasonable expedition. The applicant did not make any case that he had suffered actual prejudice in terms of his ability to defend the charges, other than to state, perhaps oddly in light of his confession, that his memory of the details of the events, circumstances and individuals involved in the said charges had diminished through the passage of time. The applicant did spend four months in custody at one stage following the bringing of charges but Mr. Roger Sweetman, Senior Counsel for the applicant, accepted that this arose because the applicant breached the terms of his bail and no reliance was placed by or on behalf of the applicant on this fact during the hearing of this appeal. The High Court (O'Donovan J.) delivered judgment on 21st March, 2006. Finding in favour of the applicant, O'Donovan J. stated:- "...given that this applicant has not complained of specific prejudice arising from the delay in prosecuting him or, indeed, that his right to obtain a fair trial has been impaired by that delay, it seems to me that, in determining whether or not he is entitled to an order prohibiting the continuance of the prosecution against him, I have to balance the entitlement of the community at large to have him prosecuted for the offences of which he

is suspected, against his entitlement to have his right to an expeditious trial vindicated. In that regard, it seems to me that, to use a colloquialism, the authorities are not entitled to play “ducks and drakes” with an accused person and that, to my mind, is what has happened in this case. As I have indicated, I think it incredible that it took eight months to recognise the defect in the order returning the applicant for trial on 19th July, 2003 and then another five and a half months before any step was taken to rectify that defect. Moreover, I think that the excuses offered by the respondent are totally unacceptable. Accordingly, I will make an order restraining the respondent from taking any further steps in the criminal proceedings the subject matter of this application.” On behalf of the respondent, Mr. Michael O’Higgins, Senior Counsel, argued that the judgment of O’Donovan J. must now be seen as incorrect in the light of the decision of this court in *P. M. v. D. P. P.*

[2006] 3 IR 172 . Not only had no specific prejudice been suffered by the applicant, he had further failed to put into the balance any other factor to which the court could have regard when considering if blameworthy prosecutorial delay should lead to a prohibition of a trial. No case had been made out in evidence to suggest that the applicant had suffered heightened states of stress or anxiety. Furthermore, the applicant had never asserted his right to an early trial. While the applicant had spent some four months in custody during the various remand periods, this was entirely due to his own fault as he had failed to comply with the conditions attaching to his bail. Mr. O’Higgins suggested the court was entitled, in the course of exercising its discretion, to take into account the fact that the applicant had signed a written statement after caution in which he admitted the offences in question, the same being a statement which had not since been challenged in any way. He further asserted that there was a strong public and community interest in seeing crimes prosecuted, particularly serious crimes involving the use of firearms. While accepting there had been prosecutorial delay of about sixteen months in this case, he submitted that such a period of delay should not be seen as so significantly blameworthy as to outweigh the community interest in seeing the particular offences prosecuted to conclusion. Counsel for the applicant did not take issue or quarrel with Mr. O’Higgins’ computation of the period of blameworthy delay on the part of the prosecution as amounting to sixteen months. He was content to rest his case on a single proposition as follows: the right to an expeditious trial is a constitutional right of significance which imposes a positive duty on the State to ensure a citizen is brought to trial with reasonable expedition. That had not happened in the instant case in which there had been gross carelessness by the State leading to a delay of such magnitude that the finding of the High Court should remain undisturbed. DELAY: THE FACTS In the course of his judgment, O’Donovan J. broke down the different periods of alleged delay in the following manner:-

- (a) There was a delay of almost eleven months between 20th October, 2001 and 17th September, 2002 while the applicant, having been charged, awaited service of a Book of Evidence. Failure to serve that Book of Evidence led to the charges being struck out on 17th September, 2002.

- (b) A further delay of almost nine months then ensued before the matter was re-entered in the District Court on 12th June, 2003.
- (c) A further period of almost eight months then elapsed before the applicant was first returned for trial on 12th March, 2004. As already noted, the prosecution informed the Circuit Court shortly before the date fixed for trial that a defect had been identified in the order of 19th July, 2003, which returned the applicant for trial. The trial date, therefore, had to be vacated while this error was rectified. However, a delay of five and a half months then occurred before the prosecution made an application to the High Court by way of judicial review seeking an order of certiorari to quash the said order of 19th July, 2003. Thereafter there was a delay of two and a half months between the 15th November, 2004 and 3rd February, 2005 being the dates on which an order of certiorari quashing the said return for trial on 19th July, 2003 was made and the date of re-entry of the charges against the applicant in the District Court. There was then a delay of seven weeks between the re-entry of the matter before the District Court and the 23rd March, 2005 when a fresh order was made returning the applicant for trial. A trial date was later fixed for 6th February, 2006. The learned trial judge referred to affidavits sworn by Gemma Moran, senior prosecutions solicitor attached to the Judicial Review Division of the Chief Prosecution's Solicitors Office, together with affidavits sworn by Detective Garda P. J. Walsh of the Garda Siochana on 10th November, 2005 and 1st March, 2006, wherein the reasons for the several delays were explained. In this regard, O'Donovan J. stated:- "However, whatever justification there may have been for the delay in preparing a Book of Evidence for service on the applicant (... I am prepared ... to accept there was justification for it). The explanation offered for the delay of almost eight months in identifying the defect in the order of the 19th July, 2003 returning the applicant for trial, coupled with the delay of five and a half months between identifying that defect and applying to the High Court by way of judicial review to have that order quashed, and aggravated by a further delay of two and a half months between the quashing of that order of 19th July, 2003 and the re-entry of the matter before the District Court is, in my view, totally unacceptable." The defect in the order returning the applicant for trial was the simple failure, on the face of the order, to state that the respondent had directed that the applicant be not sent forward for trial by the Special Criminal Court. O'Donovan J., noting that the case had been mentioned in court on three occasions before the error was noted, found that the delay in adverting to the error was "beyond my comprehension and I can see no reasonable excuse for it". O'Donovan J. then continued:- "Then to compound matters, although it must have been immediately clear to anyone associated with the case that, in the event that the order returning the applicant for trial of 19th July, 2003, was defective, and in the event that the prosecution of the applicant was to continue it was essential that the order be quashed and the only way to achieve that was by way of judicial review and yet, another five and a half months passed before an application was made to the court for an order of certiorari to quash that order. In my view, no reasonable explanation has been offered to justify that delay and, to be frank, I cannot think of any reasonable justification for it." The learned trial judge further noted that, when on 15th November, 2004, the High Court made

an order quashing the defective order and directing that the matter be remitted back to the District Court, it took another two and a half months to do so. He concluded that no reasonable explanation had been offered for that delay. Having regard to the acknowledgement by counsel on behalf of the respondent during the course of this appeal that there was prosecutorial delay for a period of approximately sixteen months for which there is no adequate explanation, this Court is satisfied that such delay must be seen as significant and blameworthy to such a degree as to warrant the application of the balancing test be reference to the legal principles identified by this Court in *P. M. v. Malone*

[2002] 2 I. R.560 and *P. M. v. DPP*

[2006] 2 ILRM.361. In this regard counsel for the applicant has invited the Court to approach the issue on the basis that the applicant would be entitled to prohibition if the Court was satisfied that the blameworthy delay was due, as he put it, to the “ gross carelessness ” of the State. He invoked in support the judgment delivered by the High Court in *DPP v. Arthurs*

[2000] 2 ILRM.363. DECISION Article 38.1 of the Constitution provides:- “No person shall be tried on any criminal charge save in due course of law”. It is well established in Irish law that the right thus guaranteed includes a right to a trial with reasonable expedition. A period of delay may be so substantial and such a manifest breach of an applicant’s constitutional rights in this context that the court may prohibit a trial even in the absence of proof of actual prejudice. As Finlay C. J. stressed in *D. P. P. v. Byrne*

[1994] 2 I. R.236, an excessive or inordinate length of time might of itself raise an inference that the risk of an unfair trial arises as a reality. While Finlay C. J. was careful to acknowledge that the type of delay which might be involved in this particular form of constitutional right cannot be assessed with any measure of certainty or precision, he observed by way of example that the delay which might be tolerated for an ordinary street crime would be considerably less than for a serious and complex criminal offence. He also stressed that a delay which was indicative of an improper motive or gross carelessness on the part of the prosecuting authorities might be seen as qualitatively different from the mere failure to render to a person a constitutional right to a trial with reasonable expedition. In this regard, he did not distinguish between the activities of members of the Garda Síochána, as agents of the prosecuting authority, and the activities of other State servants engaged in the administration of the Court Services. From the applicant’s point of view the effect is the same. All of these issues have been comprehensively addressed in the recent judgments delivered in this Court in *McFarlane v Director of Public Prosecutions* (Unreported, Supreme Court, 5th March, 2008). In *D. P. P. v. Arthurs*

[2000] 2 ILRM 363 , the High Court (O’Neill J.) prohibited the trial of the applicant in the case of summary proceedings for assault where a delay of two years and three months had passed from the date of the alleged offence to the date of the hearing. The case had been adjourned on three occasions in the District Court because of the length of court lists on

dates when the case was scheduled to be heard. O'Neill J. stated as follows (at p.377):- "A failure on one occasion to get a trial on because of an overcrowded court list could be said to be an unfortunate mishap, not necessarily involving any fault on the part of the State. Where, as in this case, this mishap is repeated two further times, the inference that these delays are the result of the failure on the part of State to have provided adequate resources so that the District Court could deal with the cases before it in an expeditious manner is inescapable. The failure on the part of the State to have made adequate provision for the expeditious conduct of cases in the District Court in question resulting, as it did, in the adding to an already excessive delay a further nine months delay, bringing the total delay to two years and three months, was, in my opinion, an unwarranted invasion of the accused's constitutional right to an expeditious trial. In that circumstance, notwithstanding the absence of evidence of prejudice, actual or presumptive, the learned District judge was obliged to prevent such an invasion of the accused's constitutional right and should have acceded to the accused's request not to allow the trial to proceed." Unfortunately O'Neill J. did not elaborate on the criteria relied upon by him to determine what constitutes an exorbitant delay in the context of the constitutional right but simply treated the amount of delay as being so egregious as to warrant the ultimate sanction of prohibition. Because it was a summary case involving a minor offence there may have been some justification for the approach by the learned High Court judge, but ordinarily I would be of the view that, absent impairment of any of the rights guaranteed by Article 38.1, the period of blameworthy delay must be very substantial before a court intervenes to actually stop a trial. Further, there should be some evidence adduced to indicate what the normal timeframe is for a particular proceeding or a step within it, as otherwise a judge brings only a subjective view of his own to the exercise. Where a significant deviation from a norm can be established it represents a better and safer method of appraisal of what is excessive delay and what is not. The principles governing prosecutorial delay in Irish Law have been laid down in a number of Irish cases including *P. M. v. Malone*

[2002] 2 I. R.560 and *P. M. v. DPP*

[2006] 3 I. R.172 and may be summarised as follows:-

- (a) Inordinate, blameworthy or unexplained prosecutorial delay may breach an applicant's constitutional entitlement to a trial with reasonable expedition.
- (b) Prosecutorial delay of this nature may be of such a degree that a court will presume prejudice and uphold the right to an expeditious trial by directing prohibition.
- (c) Where there is a period of significant blameworthy prosecutorial delay less than that envisaged at (b), and no actual prejudice is demonstrated, the court will engage in a balancing exercise between the community's entitlement to see crimes prosecuted and the applicant's right to an expeditious trial, but will not direct prohibition unless one or more of the elements referred to in *P. M. v. Malone*

[2002] 2 I. R.560 and P. M. v. DPP

[2006] 3 I. R.172 are demonstrated.

- (d) Actual prejudice caused by delay which is such as to preclude a fair trial will always entitle an applicant to prohibition. Much of the Irish Law on this topic has been derived from the seminal decision on prosecutorial delay delivered by the U. S. Supreme Court in *Barker v. Wingo* 407 US 514 [1972]. The principles laid down by the U. S. Supreme Court were referenced to the constitutional guarantee of a “ speedy ” trial contained in the Sixth Amendment of the U. S. Constitution. That case emphasised that in considering the right to a speedy trial there could be no inflexible rule and that every case must be met on an ad hoc basis in which the conduct of the prosecution and that of the defendant are weighed. In that context, the U. S. Supreme Court identified four factors which should be assessed in determining whether a particular defendant has been deprived of his constitutional right to a speedy trial:-
- (a) The Length of the Delay Unless there is a delay which is presumptively prejudicial, there is no necessity for an enquiry into the other factors that go into the balance. The length of delay which will demand an enquiry is necessarily dependent upon the particular circumstances of the case. Thus the delay which can be tolerated for an ordinary street crime is considerably less than for a complex conspiracy case.
- (b) Reasons for Delay Different weights should be assigned to different reasons. A deliberate prosecution attempt to delay the trial in order to hamper the defence should weigh heavily against the prosecution; more neutral reasons such as negligence or over-crowded court rooms might weight less heavily but must nonetheless be considered, given that the ultimate responsibility for such circumstances rests with the State rather than the defendant. A valid reason, such as a missing witness, might serve to justify delay.
- (c) Role of the Applicant An applicant’s assertion of his right to a speedy trial is entitled to strong evidentiary weight in determining whether he is being deprived of his constitutional right; a failure to assert the right may make it more difficult for an applicant to prove that he wanted or was denied a speedy trial. In this context the U. S. Supreme Court noted that delay may sometimes operate to the advantage of a defendant.
- (d) Prejudice Among the interests of defendants which the speedy trial right is designed to protect are: (i) the prevention of oppressive pre-trial incarceration; (ii) the reduction of anxiety and concern of the accused and (iii) most importantly, the limitation of any possibility that the defence will be impaired. I do not regard this statement of principles as being different in any significant way from those contained in the Irish decisions on prosecutorial delay. In my view these principles apply with equal force where systemic delay is under consideration. Both forms of delay affect an accused person in the same way. Furthermore, the template or framework outlined in *Barker v Wingo* setting out how these principles should be applied strikes me as both logical and practical for courts or judges when assessing individual cases. I have separately indicated these views in *McFarlane v*

Director of Public Prosecutions (Unreported, Supreme Court, 5th March, 2008). When applying the test, the court must, however, keep certain considerations in mind. On the one hand, the court must remember that degrees of dilatoriness which may have been acceptable in the past may no longer be tolerated since the European Convention on Human Rights Act, 2003 gave effect in this jurisdiction to the provisions of the Convention, including the right under Article 6 to a trial with reasonable expedition. This right must be given real effect. In the context of prohibition this is not to say that an Irish court must readily or too easily resort to prohibition, whatever about other remedies, when vindicating rights under Article 38.1. Under our jurisprudence, as noted by Denham J. in *D. C. v. DPP*

[2006] 1 ILRM.348, prohibition is a remedy to be granted only in exceptional circumstances. The Court does not adopt a punitive or disciplinary role in this context. Further, any court called upon to prohibit a trial must give due weight to the gravity and seriousness of the offence when exercising this jurisdiction. It must analyse the causes for delay with great care, weighing up and balancing the role of both the prosecution and the applicant and their respective contributions to delay. In this context not every delay is significant and not every delay warrants the description of being blameworthy to such a degree as to trigger an enquiry by the court under *P. M. v. DPP* or *Barker v. Wingo*. In my view an applicant should ordinarily adduce and place before the court some evidence of what is the norm in terms of time taken for the particular proceedings or the identified process or processes within it which are the subject matter of complaint. This is information which is readily available from the Courts Service with regard to various forms of proceedings. Turning to the instant case and adopting the template and principles elaborated in both the Irish cases and *Barker v. Wingo*, one may commence by saying that there is undoubtedly a significant period of blameworthy delay in this case. This is not disputed by the respondent. Quite clearly, the court must thus engage in a balancing exercise between the right of the community to have this serious crime prosecuted to a conclusion and the various rights on the other hand which the constitutional guarantee is designed to protect. In this regard, the applicant cannot point to any element of actual prejudice affecting his conduct of the defence. He has not led medical evidence to support any claim of increased stress or anxiety arising from the various delays. His counsel accepts that he cannot rely upon periods of incarceration which were brought about by his own failure to honour and observe conditions set for his bail. Further, the crime alleged in the instant case is one of the utmost gravity, involving the use of a shotgun which was fired through the living room window of an occupied dwelling house. He has not himself sought an early date for his trial. Also the court cannot ignore the fact that the applicant has made a full confession admitting the offences in question. That this is a factor for consideration in this process was stressed by Denham J. in *B. v. D. P. P.*

[1997] 3 I. R. 140 at 202 and, as was observed by Hardiman J. in *S. A. v. DPP*

[2007] IESC.43:- "... It would in my opinion be extraordinary to prohibit a trial in circumstances where the defendant admits a significant amount of behaviour of a criminal nature." While this confession may be challenged and perhaps even ruled out in the criminal trial itself, no challenge of any sort has been made to its admissibility and accuracy up to the present time. The applicant merely asserts, without more, that he is not guilty of the offence. It must therefore be seen as a factor of relevance to be taken into account in the balancing exercise. Having conducted this balancing exercise I am satisfied that the interests of justice lie in favour of allowing the trial to proceed. I would, therefore, allow the appeal herein. One final point: while there was no discussion about the point in this appeal, it seems to me that, where systemic delay is alleged by an applicant, the relevant State agency should be given an opportunity of being heard given that the Director of Public Prosecutions has no hand, act or part in the provision of judges, courtroom facilities or back-up staff and thus may not be in a position in a given case to explain or excuse a breakdown or failure in one or more of these areas which may give rise to delay. The failure of a court to sit or the absence of facilities at a particular location or at a particular time may be amenable to an explanation from the responsible authority which would strongly suggest that no order for prohibition be made. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/ie/cases/IESC/2008/S13.html>

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