
IRELAND / JUDGMENT

Rattigan -v- DPP [2008]

IESC 34 (07 May 2008)

[2008] IESC 34

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Judgment Title:

Rattigan -v- DPP

Neutral Citation:

[2008] IESC 34

Supreme Court Record Number:

353/06

High Court Record Number

:

2005 647 JR

Date of Delivery:

07 May 2008

Court:

Supreme Court

Composition of Court:

Murray C. J., Denham J., Hardiman J., Geoghegan J., Fennelly J.

Judgment by:

Geoghegan J.

Status of Judgment:

Approved

Judgments by

Result

Concurring

Geoghegan J.

Appeal dismissed - affirm High Court Order

Denham J., Fennelly J.

Murray C. J.

Fennelly J.

Hardiman J.

Outcome:

Dismiss

THE SUPREME COURT

Appeal No. 353/2006

Murray C. J.

Denham J.

Hardiman J.

Geoghegan J.

Fennelly J.

BETWEEN/

BRIAN RATTIGAN

Appellant/Applicant

and

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent/Respondent

JUDGMENT of Mr. Justice Geoghegan delivered the 7th day of May 2008

This is an appeal from an order of the High Court (O'Higgins J.) refusing an injunction against the above-named respondent proceeding with the prosecution of a trial for murder against the above-named appellant, the order having been made in a judicial review application brought by the same appellant.

The original grounds for which leave to apply for judicial review was granted for the most part related to alleged prosecutorial delay but, to some extent, also covered an alleged wrongful failure to electronically record interviews. As a consequence of a later order granting leave to amend the original statement of grounds, there were five such additional grounds permitted, but in their various formulations they all amounted to the one essential allegation that prejudicial pre-trial publicity by the media had arisen and that as a result, there was a real risk of an unfair trial.

Since the judgment of the High Court, there were further newspaper articles which of themselves or alternatively combined with each other and with the earlier articles were alleged to give rise to a risk of an unfair trial. Some of these articles appeared between the judgment of the High Court and the hearing of the appeal before this court. Others appeared after the main hearing of the appeal before this court but on foot of a motion concerning them and requesting that they be taken into account, there was a later sitting of this court to deal with the issue.

What happened in practice was that the alleged offensive articles which had appeared between the judgment and the hearing of the appeal were made the subject matter of two motions on notice grounded on affidavits exhibiting the articles and requesting that they be admitted as additional evidence for the purposes of the appeal. The Director of Public Prosecutions consented to the orders sought in each of these motions. In relation to the articles which appeared after the main hearing of the appeal, this court was requested to hear a similar motion which it did, and on that occasion, the Director of Public Prosecutions adopted a neutral stance, quite properly taking the view that at that stage it was a matter for the court. The court ruled that it would take the matters most recently complained of into consideration in determining the appeal.

I intend first to treat of the matters which were before O'Higgins J. in the High Court.

Let me say, at the outset, that on these matters I find myself in complete agreement with O'Higgins J. The learned High Court judge, in a carefully written reserved judgment, has set out the arguments of both sides on each issue and has given very clear reasons for each of his conclusions. I intend now to summarise his judgment within the structure that he has adopted. First of all, the learned judge summarises the relevant facts. He does this in about three pages to which I would refer for a fuller account. The following is a shortened version. The judge explains that in the early hours of the 25th August, 2001, Declan Gavin was fatally stabbed at the entrance to a fast food outlet in Crumlin in Dublin and a murder investigation commenced. There was evidence that the assailant emerged from a car with a balaclava over his head and stabbed the deceased. Initially, the deceased tried to seek refuge in the fast food outlet but was pursued by the assailant who failed to gain access. A fingerprint of the accused made in blood and which DNA testing linked with the deceased was found on the window of the shop. Despite that, the appellant allegedly told the gardaí that he was never at the fast food outlet. He alleged that he was at his brother's birthday party in a private house. In addition to the fingerprint evidence, the prosecution seek to adduce evidence by three witnesses based on statements which they made when in custody. It will also be the prosecution case that certain observations made by the appellant while he was in custody were tantamount to admissions of involvement in the crime. The appellant was first arrested on suspicion of murder on the 4th September, 2001, under section 4 of the Criminal Justice Act, 1984. He was released the following day without charge. He was again arrested on the 22nd November, 2001 and was questioned in relation to the possession of firearms. On that occasion, he was also questioned about the murder but denied involvement. He was released on the following day. On the 4th February, 2003, the appellant's same brother who was a potential witness was killed. On the 14th March, 2002, the gardaí sent a file to the chief prosecution solicitor which was received there on the 19th March, 2002 and forwarded to the office of the Director of Public Prosecutions on the 21st March, 2002. There is a finding by the learned trial judge that the preparation and sending of the garda file to the chief prosecutions solicitor was done with

"commendable alacrity".

Eighteen months later i.e. in September, 2003, the Director of Public Prosecutions directed that the appellant be charged with murder. That lapse of time forms a substantial part of the prosecutorial delay alleged. I will return to it later in the judgment. On the 18th September, 2003, the appellant was arrested and charged with murder and remanded in custody until the 25th November, 2003. There were a number of subsequent remands due to the failure on the part of the Director of Public Prosecutions to have ready the book of evidence and when the matter came before the District Court for the seventh time, the judge struck the case out. That was on the 18th December, 2003.

Almost sixteen months then elapsed before the appellant was charged again. Alleged excuses for this delay were contained in an affidavit of one of the solicitors in the chief prosecution solicitor's office. The excuses are not impressive. One of the excuses was alleged difficulties caused by the decision of the Court of Criminal Appeal in

DPP v. Bowes

, a judgment delivered on the 22nd November, 2004. As a consequence, some changes were made in the book of evidence and in particular the prosecution sought to rely on fingerprints taken from the appellant while he was in prison for the purposes of comparison with the fingerprint found at the scene of the crime. The appellant has alleged not only that all this delay was blameworthy in a general sense but that in particular the delay resulted in this additional fingerprint evidence being used. I cannot accept this latter argument for reasons to which I will return.

The learned High Court judge was quite rightly, in my view, strongly critical of the Director of Public Prosecutions for the delay between the receipt by the office of the Director of Public Prosecutions of the file in March, 2002 and the direction to prosecute in September, 2003. I do not accept the submissions to the contrary. The learned judge said the following:

"In my view, there has been a culpable and unjustified delay on the part of the prosecuting authorities from the time in March, 2002, when the file was forwarded to the office of the Director of Public Prosecutions and September, 2003, when the prosecution of the applicant was directed. The explanation for the delay in recharging the applicant after the striking out of the case in December, 2003, on the basis that the preparation of the book of evidence was awaited is not satisfactory. It is reasonable to infer that the book of evidence was in a reasonably advanced state of preparation prior to the striking out of the case, as there had been various adjournments of different duration prior to the striking out of the case. In any event one would have thought that following the striking out of the case for failure to furnish the book of evidence that the prosecution would have acted with some degree of urgency."

In support of that proposition, an unreported judgment in this court delivered by McGuinness J. on 2nd March 2005 in

Blood v. DPP

is cited.

Having thus summarised the facts and having commented adversely on some elements of the delay, he turned to treat of the relevant law. He refers to the two seminal cases

D v. Director of Public Prosecutions

[1994] 2 I. R. 465 and

Z v. Director of Public Prosecutions

[1994] 2 I. R. 476. What the learned High Court judge was correctly adopting is encapsulated in a passage from the judgment of Finlay C. J. in

Z v. Director of Public Prosecutions

cited above to be found at p. 506 of the report.

“This court in the recent case of

D v. The Director of Public Prosecutions

[1994] 2 I. R. 465 unanimously laid down the general principle that the onus of proof which is on an accused person who seeks an order prohibiting his trial on the ground that circumstances have occurred which would render it unfair is that he should establish that there is a real risk that by reason of those circumstances (which in that case also were pre-trial publicity) he could not obtain a fair trial.”

The judge went on to refer to the oft cited passage from the judgment of Denham J. in

D v. The Director of Public Prosecutions

cited above where at page 474 of the report, she said the following.

“The applicant’s right to a fair trial is one of the most fundamental constitutional rights afforded to persons. On a hierarchy of constitutional rights it is a superior right.

A court must give some consideration to the community’s right to have this alleged crime prosecuted in the usual way. However on the hierarchy of constitutional rights there is no doubt that the applicant’s right to fair procedures is superior to the community’s right to prosecute.

If there is a real risk that the accused would not receive a fair trial then there would be no question of the accused’s right to a fair trial being balanced detrimentally against the community’s right to have alleged crimes prosecuted.”

That last passage was expressly approved of by Finlay C. J. in

Z

at 507 of the report but he added:

“With regard to the general principles of law I would only add to the principles which I have already outlined the obvious fact to be implied from the decision of this court in the case of

D v. Director of Public Prosecutions

that where one speaks of an onus to establish a real risk of an unfair trial it necessarily and inevitably means an unfair trial which cannot be avoided by appropriate rulings and directions on the part of the trial judge. The risk is a real one but the unfairness of trial must be an unavoidable unfairness of trial.”

This clarification (which I think is a correct interpretation of it) with slight variations has been expressly repeated in numerous later cases relating to delays in bringing to trial sexual crimes. It has in turn in my view sometimes led to unfortunate and unnecessary consideration by High Court judges as to what might be

“appropriate rulings and directions”

and as to whether there could be such. On a true analysis, there is no such thing as a potentially unfair trial which can be made fair by appropriate directions. If a trial can be made fair by appropriate directions, it was never potentially unfair in the first place. I would respectfully suggest that though well intended there is an element of tautology in introducing the

“appropriate direction”

concept. It can cause unnecessary worry to a trial judge as it famously did in one instance to McGuinness J. The

“appropriate”

directions which are given by a trial judge will be different in each trial depending on the circumstances of the case. It ought to be assumed that any trial judge in any trial will give appropriate directions. If he or she fails to do so, that will be corrected in the Court of Criminal Appeal. I do not think, therefore, that the giving of some kind of special appropriate directions is in any sense an added requirement in a delayed trial or a trial which has been preceded by alleged unfair publicity. That would be a misinterpretation of the dicta of Finlay C. J. The only issue should be whether there is a real risk by reason of the complained of circumstances that the accused could not obtain a fair trial. That issue has to be considered on the assumption that appropriate directions will be given, if possible. Clearly and unequivocally, that right to obtain the fair trial takes precedence over any right of the public to have the accused prosecuted. I do not consider that this principle can be watered down because of the seriousness of the offence as such. But that does not mean that the seriousness of the offence may not be relevant in assessing the risk. This is particularly true of pre-trial publicity cases and I will expand on it later in this judgment when dealing with that aspect. In the case of a complaint of delay, in most instances the issue will be whether there is real prejudice to the defence by reason of the loss of a witness etc. It will usually only arise when the trial is taking place a long time after the alleged crime was committed.

The law on when a trial will be prohibited by reason of blameworthy prosecutorial delay has been dealt with exhaustively in a number of decisions and I do not intend to review them in this judgment. The learned High Court judge correctly relied on the exposition of the law contained in

PM v. DPP

[2006] 3 IR 172

in the judgment of Kearns J. Although they overlap, the right to an expeditious trial and the right to a fair trial are stand alone rights. The learned High Court judge neatly sums up the interest protected by the right to trial with reasonable expedition as being

1. the right to prevent oppressive pre-trial incarceration;
2. the right to minimise anxiety and concern to the accused;
3. the right to limit the possibility that the defence will be impaired.

He goes on to point out that only the third of those rights is relevant to this case. Essentially, the appellant had raised two issues, that is to say, availability of witnesses and the new category of fingerprint evidence. O'Higgins J. carefully analyses the potential significance of each of five potential and now unavailable witnesses suggested by the appellant. I do not think it necessary to do a repeat exercise in this judgment because I agree with the analysis done by O'Higgins J. and there is nothing that I can usefully add. One of the witnesses had been murdered but he had been interviewed by the gardaí and did not provide an alibi for the appellant. The second of the witnesses had died at a stage when the case had been with the Director of Public Prosecutions office for less than a month. The whereabouts of a third witness is completely unknown and it is thought that he has left the jurisdiction. No blame can, therefore, be attached to the prosecution. A fourth witness was shot dead two days before the appellant was charged the second time. This is the witness to which the appellant's legal advisors are attaching the most significance. But that particular witness was also interviewed by the gardaí and did not provide an alibi for the appellant. He continually said that he did not remember anything about the night in question and at one point he said

"I don't know anything about any murder or anything about Brian Rattigan".

As the trial judge also pointed out, significance must be attached to the fact that there were a large number of witnesses at the scene of the crime. The blood fingerprint evidence is very strong independent evidence. The learned High Court judge sums up the position by saying that in all the circumstances of the case, he was not concerned that the unavailability of that murdered witness to give evidence in circumstances where he would have been available were it not for the prosecutorial delay is something which is capable of causing a real and unavoidable danger of an unfair trial. Finally, the fifth witness was also questioned by the gardaí and declined to speak but in particular did not provide an alibi for the appellants. The alleged alibi is that he would have been present with the appellant at the house party in honour of the appellant's

brother. There were, however, a number of people at the party a fact to which the judge correctly attached significance. In short, the trial judge, therefore, took the view that the absence of the five witnesses would not justify prohibiting the trial and I entirely agree.

The later fingerprint evidence to which I have already referred was held by the judge not to be a ground for prohibiting the trial and again I agree with that view. First of all, the alleged delay was not a causal factor in the production of that fingerprint evidence. It was merely what might be described as a

“but for”

factor. But even more importantly, as the learned High Court judge pointed out, the so called problem referred to by the appellant was

“frequently dealt with by trial judges”.

I mentioned early on in the judgment that another ground for the sought after judicial review was a lack of electronic recording. This was essentially a two-fold complaint. It related to statements taken from potential witnesses when in custody on the one hand and interviews with the appellant himself on the other hand. The learned High Court judge rejected the arguments on both points and I agree. He drew attention to the fact that the witness statements could not, as such, be admitted in evidence. The witnesses themselves would have to enter the witness box and give the evidence at the trial. In relation to the interviews with the appellant, the judge pointed out that there was no legal obligation to record and that at the time of the relevant interviews, although video recording equipment was physically available in either Crumlin or Sundrive Road garda station, it had not been commissioned and was not capable of being used. The learned judge quite correctly rejected these grounds of judicial review.

I now turn to the alleged prejudicial pre-trial publicity which O’Higgins J. had to consider. The evidence of this was contained in an affidavit of Mr. Robert Eagar, solicitor for the appellant, sworn the 20th March, 2006. Paragraphs 6-11 inclusive of the affidavit are set out in the judgment. For that reason, I do not propose to reproduce them in this judgment. The complaint related to an issue of the Sunday World newspaper on the 20th November, 2005. It purported to refer to so-called

“war lords”

and

“feuding gang bosses”

and claimed

“to expose the vicious thugs behind tit-for-tat underworld blood bath”.

There was a photograph of the appellant who was alleged by the paper to be the leader of a crime gang involved in a notorious feud which resulted in various murders. The paper then went on to recite some gory details and inside the newspaper there were five more pages devoted to the topic of gangland crime, drug-dealing and murder. The paper heavily commented that the appellant was

“still in control of his gang’s operation from behind bars”

and it said that he was once described by a judge as

“a very dangerous young man”

. The paper alleged that he was still in contact with his

“mob”

through the use of mobile phones and messages. The paper referred to the murder of Declan Gavin and clearly alleged that members of the appellant’s gang were involved. The paper went on to allege that when the gang heard the news of Gavin’s death, they had a party to celebrate. Each gang then got ready for a bloodbath it was alleged.

When dealing with this issue, the learned High Court judge returned to the principles contained in

D v. DPP

cited above and other cases already referred to. What I have already said regarding the legal position, as I see it, in relation to a right to a fair trial applies even more strongly to a case of adverse pre-trial publicity. I would still be concerned about much use of the word

“balancing”

because there is here a well-established hierarchy of constitutional rights and there is no doubt that the right to a fair trial is the superior right. On the other hand, bearing in mind the public’s right to secure a prosecution especially in serious crime, a court would be slow to stop a trial. What I mean by that is that a court will only stop a trial if it is satisfied that the normal safeguard procedures in a trial including the making of appropriate directions will not, in fact, achieve a fair trial. In practice, this will rarely be the case. As far as adverse pre-trial publicity is concerned, the so-called fade factor is most important. If a reasonable time has elapsed between the publicity and the trial the risk is altogether smaller and this will be especially so if a trial is in a city such as Dublin and not in a small town where a crime has been committed. There cannot be complete avoidance of the risk because even in a case where eleven out of the twelve jurors may never have noticed particular names when reading an article, if they did read it or equally probably may have forgotten the names, there may still be one single juror who did know who the accused was and who may remind his or her fellow jurors of the offending article. Quite frankly, every eventuality cannot be catered for. It should also be borne in mind that in the case of a serious crime such as murder where the trial lasts several days or perhaps more, the dangers

of an unfair result based on pre-trial publicity will normally reduce as time goes on. By that time the jury will have become accustomed to their judicial role explained to them

ad nauseam

by the trial judge and counsel on both sides. Furthermore, it must always be borne in mind, as it has been in so many decisions, that there is no evidence to suggest that, in general at least, jurors do not exercise their function properly and with the required independence of mind.

Returning to this case, the trial judge has carefully set out the arguments made before him by Mr. Grehan, S. C. for the appellant and Mr. Collins, S. C. for the Director of Public Prosecutions. Having heard both sides, the learned judge expressed the view that the appellant had not established grounds for prohibiting the trial on the basis of prejudicial pre-trial publicity. Although he accepted that the reporting

“might be described as colourful or even lurid”

and that the newspaper had a wide circulation, he considered that the lapse of time together with the appropriate direction by the trial judge would be more than ample to ensure that there was no risk of an unfair trial. He pointed out that the court had been told that it would be at least November, 2006 i.e. twelve months after the publication of the article before the trial would commence and that after such a length of time, the judge thought it

“highly unlikely”

that the potential jurors would remember the article in general still less the details which concerned the appellant. The judge went further by pointing out that it was, in his view, even less likely that the jurors would remember the details alleged to cause the specific prejudice and that they would associate the appellant with the killing. He also rejected the argument that the photograph would be such as to be memorable to potential jurors.

Yet another matter which influenced the trial judge was the provisions of section 15(3) of the Juries Act, 1976 which was at the time a new provision. Carney J. in

DPP v. Haugh

(No. 1) [2000] 1 I. R. 184 had expressed the view that he could see no reason why a trial judge explaining this subsection to potential jurors should not invite any of them who felt that they could not give the accused a fair trial based exclusively on the evidence adduced and the judge's legal directions to so indicate in order that they could be declared disqualified. This practical application of the subsection received the approval of Kearns J. in another High Court judgment

Redmond v. DPP

[2002] 4 I. R. 133. I also think that Carney J. is correct in suggesting that that particular use of the subsection can be made. After reciting passages in

D v. DPP

cited above on matters which I have already dealt with, the learned trial judge finally concluded that the pre-trial publicity complained of would not give rise to a real risk of an unfair trial given the tools which a trial judge had at his or her disposal to avoid such unfairness.

On the basis of the matters which were before O'Higgins J., I am in agreement with his judgment. In fact I would not be quite as cautious as he was in disregarding arguments made by Mr. Collins based on remarks made by the appellant which if made were tantamount to admissions. Because they were denied, the judge took the view that the alleged admissions did not appear to him to be of assistance in the discharge of his functions. I would agree that that would be so if the admissions were contained in an alleged signed written statement which was going to be disputed at the trial, but in this instance, particular words used in answer to questions in an interview by Detective Sergeant O'Hara were open to a natural inference of an admission provided that the evidence of Detective Sergeant O'Hara was true. I think that the significance to be attached to those kind of inferred admissions is quite different from the significance to be attached to an alleged formal statement of admission in circumstances where that statement is going to be challenged. The kind of answers which are set out in the judgment even though not yet proved to have been made could, I think, reasonably be taken into account. The trial judge himself refers to the judgment of Denham J. in

B v. DPP

[1997] 3 I. R. 140 and in particular the passage at 202:

"If there has been an admission of guilt 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 to be considered by the Court on an application to prohibit the trial on the ground of delay."

However, irrespective of whether I am correct on this point or not, I am satisfied that the trial judge was correct having regard to the factors which he did take into account.

I must now turn to consider the publicity relied on by the appellant which took place since the judgment. As I have already indicated, this is contained in affidavits grounding three motions on notice, two of them served and filed before the main hearing of the appeal and the third after the main hearing but brought to the attention of the court in a special post-appeal sitting.

The first of these motions was dated the 15th March, 2007. It was grounded on an affidavit of Robert Eagar, referred to above. He referred to the fact that on the 8th May, 2006, an application to attach the editor and publishers of the Sunday World for contempt came on for hearing in the High Court. On the same date, senior counsel for the Sunday World and its editor offered an undertaking not to publish material calculated to interfere with the trial process in being in which the appellant stood accused of the murder of Declan Gavin. On that basis, the contempt proceedings were adjourned until after the determination of the judicial review application, the subject matter of this appeal. The affidavit goes on to recite that in breach of the undertaking, an article was published by the Sunday World on the 10th December, 2006, entitled

“The A & E Hitmen”

and subtitled

“Armed Gardaí called in to stop gangland attempt on prisoner’s life”

which was in turn accompanied by a photograph of the appellant handcuffed to a prison officer allegedly identifying him as

“Gangsters: Brian Rattigan (main pic).”

Mr. Eagar then goes on to depose that in distinctive white print set against a black background beneath the main article was an item entitled

“Toll rising in gangland feud.”

He said that that article referred to

“the two drug gangs”

and the extreme violence between them even by Dublin standards. The two key players were alleged to be the murdered victim in this case, Declan Gavin, and Joseph Rattigan, the brother of the appellant. Having gone on to describe how both gangs dealt in cocaine, there was reference to Gavin being rumoured to be an informer for the gardaí and to his being stabbed to death in the crime the subject of these proceedings. The article goes on to refer to the fact that the appellant was charged with the murder, but that before that he was shot in his home but survived having lost a kidney and spleen. There is reference to the brother Joseph being shot dead just as the appellant was getting out of hospital. The article then alleged that the appellant was jailed on drugs and firearm offences but still ran his gang from Portlaoise Prison. Further inter-gang murders were referred to and one of those murdered was called

“Brian Rattigan’s chief enforcer”.

Gruesome details were given as to some of these murders. The affidavit explains that following on this the appellant successfully applied to the High Court for an interlocutory injunction restraining the Sunday World and its editor from publishing any material concerning the appellant and/or any material concerning the murder of Declan Gavin pending the trial or alternatively, pending the determination of contempt proceedings which had been brought. It was strongly alleged that an undertaking which had been given in those contempt proceedings had been flagrantly breached.

I will postpone commenting further on the contents of this affidavit until after I have outlined the content of the two other motions. The second motion was dated the 2nd August, 2007 and was likewise grounded on an affidavit of Robert Eagar. This motion referred to allegedly objectionable pre-trial articles in the Sunday Tribune and the Daily Mail respectively. On the 25th July, 2007, the High Court had granted the appellant leave to bring an application to attach the editors and publishers of those newspapers for contempt based on the publication of material allegedly

prejudicial to a trial of the appellant in that they connected him with the killing of Declan Gavin and associated him with alleged gangland murders and other criminal activities and personalities and went on to state that he was currently serving a prison sentence for possession of drugs and shooting at gardaí. Mr. Eagar had alerted the office of the Director of Public Prosecutions with a view to the Director himself bringing contempt proceedings. He was merely informed that the Director's office was considering what view to take. The appellant proceeded with his application to the High Court. On the return date, the solicitors acting for both of the newspapers gave verbal undertakings to the court in accordance with undertakings they had already given in correspondence. By a letter of the 29th June, 2007, the solicitors for the Tribune newspaper plc., proprietors of the Sunday Tribune stated that the article complained of appeared to have been the result of

“a very serious error by our client in understanding the position of your client”

. The letter went on to contain an unreserved apology and an undertaking that there would be no repetition of any of the material in the articles complained of until the criminal proceedings had been determined. A much more limited undertaking was given by the solicitors for Associated Newspapers Limited, proprietors of the Daily Mail on the 30th July, 2007. They did undertake not to publish any material relating to the appellant's involvement in the killing of Mr. Gavin or on the background to his death prior to the conclusion of the contempt of court proceedings.

The Sunday Tribune article was published on the 24th June, 2007. The affidavit explains that it nominated the appellant as leader of a crime gang and stated that he had

“been identified as the killer”

of Declan Gavin. Full details are set out in the affidavit with the articles exhibited. In paragraph 11 of the affidavit, Mr. Eagar puts forward six aspects of the article in particular which he says was calculated or tended to influence or prejudice jurors. These were:

- (a) The allegation that the applicant is the leader of a crime gang involved in a notorious feud which resulted in the murders referred to.
- (b) The presentation in chronological order of the murders alleged to have arisen from the gangland feud with the murder of Declan Gavin coming first in time and appearing to have started a string of retaliation murders.
- (c) The implication that the appellant was involved in other murders including the murders of Darren Geoghegan and Gavin Byrne on the 13th November, 2005, Wayne Zambra on the 19th August, 2006 and of Paul Warren on an unspecified date.
- (d) The publication of details of the alleged feud which it says resulted in the applicant losing a kidney and his spleen as a result of a gun attack and the murder of his brother Joseph and his friends, some of whom might have been called as witnesses at the trial of the applicant.
- (e) The implication that

“his gang”

has joined forces with another and is involved in importing drugs and firearms into the jurisdiction.

- (f) The statement that the appellant is currently serving a sentence for possession of drugs, which would normally not be admissible in evidence at the appellant’s trial for murder.

The affidavit goes on to particularise the publications in the Daily Mail. I do not propose to set these out in the judgment as to do so would obviously have an adverse effect on the fair trial factor. It is sufficient to set out the five aspects of the Daily Mail article which Mr. Eagar claims in the affidavit were calculated or would tend to influence or prejudice jurors. These are:

- (a) The allegation that the appellant is the leader of a crime gang involved in a notorious feud which resulted in murders including the murder, the subject matter of these proceedings.
- (b) The allegation that that murder

“sparked off”

a gangland feud.

- (c) The implication that the appellant was involved in other murders.
- (d) The publication of details of the alleged feud which resulted in murders of persons who could be potential witnesses at the trial on behalf of the appellant.
- (e) Stating that the appellant is currently serving a sentence.

Again, before making any further comment, I will outline the contents of the affidavit grounding the third motion. This is the motion which was brought after the main hearing of the appeal. The notice of motion which is before me at least is dated

“the day of October, 2007”

and was brought for a hearing at 11.15 on the 25th October, 2007. The motion is grounded on an affidavit sworn by Mr. Eagar on the 24th October, 2007. The affidavit refers first to the contempt proceedings brought against the Daily Mail and the undertaking given in court by their solicitors in the same terms as was contained in the letter of the 30th July, 2007. The affidavit goes on to state that notwithstanding the undertaking, an article was published in the Irish Mail on Sunday which is published by the same publishers as the Irish Daily Mail. I will not, unnecessarily, set out in this judgment the details of what was contained in that article but it is essentially a reference back to the previous stories in the Daily Mail and the name of the appellant features prominently. In this instance, Mr. Eagar sets out five objectionable aspects.

- (a) An allegation that the appellant is the leader of a crime gang involved in a notorious feud which resulted in certain specified murders including the murder, the subject matter of these proceedings.

- (b) Specific reference to that particular murder in the context of the gangland feud.
- (c) The references to other specified murders which had appeared in the previous articles with a reference to one of the victims being allegedly a key member of an alleged gang headed by the appellant.
- (d) The publication of a purported motive for the murder, the subject matter of these proceedings.
- (e) The nomination of the appellant as a
“feared criminal”.

Mr. Eagar, having written to the Director of Public Prosecutions in closing the article and requesting the Director to consider prosecuting the Irish Mail on Sunday for contempt of court received merely a bland acknowledgment of his letter from the Director and again no decision by the Director to bring such proceedings. I will have some comments to make on this aspect of the matter before I end this judgment.

However, Mr. Eagar also wrote to the editor of the Irish Mail on Sunday on the 9th October, 2007, warning him of the intention of the appellant to bring contempt of court proceedings. A reply was then received from William Fry, solicitors for Associated Newspapers stating that their client did not accept that their report had undermined the appellant's

“right to be presumed innocent in connection with the charges he faces in connection with the murder of Declan Gavin”

. The letter further stated that the appellant was

“currently in prison on serious charges which have been the subject of significant publicity”

and that his trial,

“should it take place, is sometime away.”

The letter then went on to state that the report

“did not, on any reasonable reading, directly link (the appellant) to Mr. Gavins's killing.”

The letter went on to state that notwithstanding the view of the clients that the report was

“wholly legitimate”

, the clients were prepared to agree not to repeat the references to (the appellant) unless and until the murder charges are disposed of. Given the heavily qualified nature of the undertaking, the appellant proceeded with the contempt motion and on the 22nd October, 2007, the High Court granted leave to bring a motion seeking to attach the editor and publishers of the Irish Mail on Sunday for contempt which motion was returnable for Friday, 26th October, 2007. At the time of writing, I have no information as to the current status of that motion.

I have now to consider whether the contents of the affidavits contained in these three post-judgment motions should make any difference to the view taken by O'Higgins J. and already approved of by me in so far as it was based on the evidence before him that the injunction sought against the Director of Public Prosecutions ought not in all the circumstances be granted. Before I express an opinion on this question, I find that I face two dilemmas but have come to the conclusion that I must face them head on and arrive at a firm conclusion as to how I deal with them.

The first is that contempt of court proceedings are pending in the High Court in relation to some of the matters complained of concerning pre-trial publicity. In my view, nothing that is said in this or any other judgment on this appeal should affect those proceedings one way or the other. But although that is so, it does not mean that I should refrain from expressing adverse views in relation to some of the publicity in so far as it would appear to me to be necessary to do so in the context of the matters which I have to decide. In any contempt proceedings however arising out of the same matters, the High Court judge dealing with such proceedings should, in my view, consider all aspects of the matter

de novo

. At any rate, the element of overlap is somewhat illusory. The difference between proceedings to stop a trial on the grounds of potential unfairness on the one hand and contempt of court proceedings arising out of the same publication on the other hand have been particularly well explained in judgments of the High Court of Australia in a case referred to in passing by the learned trial judge namely,

R. v. Glennon

(1992) 173 CLR 592. In the joint judgment of Mason C. J. and Toohey J. which effectively, expressed the majority view, the following passage appears.

“Contempt of court arising from pre-trial publication, on the one hand, and appeals from conviction or from a refusal to order a stay based on pre-trial publication, on the other, differ in at least one important respect. A finding of contempt in such a situation depends upon proof that the publication has, as a matter of practical reality, a real (or clear) and definite tendency to interfere with the administration of justice, that is, to prejudice a fair trial. That was the test applied by a majority of the court in

Hinch

(1987) 164 CLR at pp 34, 37, 70; but cf. pp 23-25. The question whether a contempt has been committed has ‘to be determined at the time of publication and not by reference to subsequent events’ as Toohey J. observed in

(there is then listed a number of Australian cases which I do not find it necessary to set out in this judgment).

That time may be well in advance of the actual trial and even before the date for trial is known. Thus a conviction for contempt depends upon findings of fact and inferences drawn at that time on the basis of evidence then available.”

This distinction seems to me to be equally applicable in Irish law. It follows that a newspaper may be guilty of a flagrant contempt of court on the basis of potentially prejudicing a fair trial and yet it may be inappropriate at the end of the day to stop the trial for any one of a number of reasons but especially if a considerable lapse of time has ensued in the meantime. The law is quite simple and newspapers and other organs of the media should not have all that much difficulty in ensuring compliance with it. If a person has been charged with a crime, that has an immediate effect on the manner in which the crime can be reported. It must not be reported or discussed in a way in which it could potentially prejudice jurors in a trial. While the fade factor may be relevant and indeed is relevant in considering whether a trial should be enjoined altogether, it is not a relevant matter which a newspaper or other organ of the media is entitled to take into account in its reporting of the crime. It simply must adopt the long established rules of protection of the person charged with the crime to which I have referred. These rules are quite different from those applicable in say the United States of America.

The second dilemma with which I am faced is that consideration of a so-called fade factor for the purposes of determining whether the trial should be stopped, in theory at least could be affected by the reporting of a judgment or judgments in this appeal. While I have done my best to avoid going into too much lurid detail of the contents of the complained of newspaper articles, it is wholly unavoidable that I have had to refer to them to some extent. I am inclined to think that there can be only one answer to this problem. If an accused launches judicial review proceedings to have his trial stopped on the grounds of adverse pre-trial publicity, he must assume the risk of any additional prejudice arising from the reporting of his own judicial review proceedings. That would seem to be the only way in which justice can be administered in an orderly fashion.

In arriving at my final conclusion on the proceedings based on the additional evidence, I am of opinion that I must consider as of this date the dangers of an unfair trial and indeed accept that some further time will elapse before a trial will commence. It would seem to me that as a matter of probability, some potential jurors will not have ever taken in the name of the appellant in the first instance but there is, of course, a danger that when the facts of the case are opened, they may make the association even if they did not remember the name. There are some who will neither remember the name nor make the association. The newspaper accounts exhibited had been so vivid that there must be a possibility at least that some association will be remembered by one or more jurors and, of course, there is the further possibility, if not likelihood, that one juror in the know may inform his or her colleagues. I am unimpressed by arguments that in some of the accounts, the appellant is merely viewed as a gang leader or in some way connected with the crime but not the perpetrator of the crime. Nevertheless, in a very serious murder trial such as this which is likely to last for quite some time in which therefore the jurors will have become fully attuned to the seriousness of their own position and the seriousness of the functions which they have to perform and above all the long period which will have elapsed from

the time of the publication of the articles even the later ones, I do not consider that it would be either appropriate or necessary for this court to grant the injunction sought.

There are some further aspects of the case which I should mention. I do not think it is seriously in dispute that whoever committed this crime, it was in a general way a gang warfare crime. Even if there is no identification in the media of a particular person charged as having committed the crime, the general events which will have surrounded the crime are bound to attract publicity and it is impossible to avoid some risk that a juror may remember reading about those events but that would not necessarily be tantamount to prejudicial publicity against the particular accused.

I think that I should also add that in any case where there is independent forensic evidence implicating an accused a court in considering whether there is a risk of an unfair trial and whether it should prohibit the trial is entitled to take that factor into account. In this particular case, the prosecution are putting forward what purports to be strong independent evidence in the form of a blood fingerprint.

Finally, I would like to make this comment. The prohibiting of a trial by a court cannot be adopted simply to punish the media. The contempt of court laws are more than adequate for that purpose and are the appropriate vehicle to use for that purpose. I find it surprising that the Director of Public Prosecutions who clearly has an interest by virtue of his office in the fair administration of justice in a criminal trial had not at least up to the time of the hearing of the appeal embarked on any contempt of court proceedings but left the accused to do so himself. The Director of Public Prosecutions, of course, would not be bound to bring such proceedings simply at the behest of an accused but there is nothing in the papers before me to indicate that he had formed any particular view or had even adequately considered the matter. In making this comment, I am relying on the affidavits of Mr. Eagar in the various motions. It would seem appropriate for the Director of Public Prosecutions to adopt a more pro-active role in the area of contempt of court proceedings where adverse pre-trial publicity is concerned. However for the reasons indicated, I would dismiss the appeal.

JUDGMENT of Murray C. J. delivered the 7th day of May 2008

I agree with the conclusions of Geoghegan J. for the reasons set out in his Judgment and I just wish to add a few brief observations. If the appellant had established that there was a real and substantial risk of an unfair trial, that would determine the appeal in his favour according to the well established case-law of this Court as cited by Geoghegan J., and none of which has not been put in issue in this appeal. According to that case-law there are no exceptional circumstances which would permit a trial to proceed in the face of such a finding. However, for the reasons set out in that judgment including the actual

“fade factor”

referred to by Geoghegan J., I do not think that there is such a risk, in the circumstances of this case.

I also agree that serious delay in proceeding with a prosecution is not on its own a ground for restraining a criminal trial for grave crimes from proceeding unless there are certain consequences for the accused or the administration of justice which have been laid down by this Court in successive authorities and referred to by Geoghegan J., in his judgment. As the authorities demonstrate there is no reluctance on the part of this Court or the Judiciary generally to stay proceedings setting out the reasons for such a stay, irrespective of whose conduct is involved, where the law and the interests of justice so require.

Finally, in accord with Geoghegan J., I would express no view on the admissibility of any evidence at the trial since that will be a matter exclusively for the trial Judge. In particular I leave over for another case the circumstances, if any, in which a statement of an accused which has not been electronically recorded might be excluded from evidence at a trial for that reason alone, when and if that matter arises for determination by this Court.

JUDGMENT of Mr. Justice Hardiman delivered the 7th day of May, 2008.

This is a most complex and disturbing case. After anxious consideration, I have come generally to agree with the persuasive judgment of Mr. Justice Geoghegan which, as I read it, turns very much on the specific circumstances of this case. I am however gravely concerned that anyone learning merely of the result of the case might be misled into thinking that, as a general proposition, gross and unexplained delay by the Director of Public Prosecutions leading to prejudicial events will attract severe verbal condemnation by the courts but will not actually lead to a trial being prohibited and equally that lurid and grossly prejudicial publicity plainly suggesting the complicity of the accused in the crime with which he is charged will attract strong verbal condemnation from the courts but equally never, in practice, have the consequence of preventing a trial taking place. Because of these concerns I venture to offer this short judgment of my own, while agreeing with the judgment of Mr. Justice Geoghegan and the order there proposed. I am also, independently, concerned that the impression may be given that other irregularities, specifically failure to record interviews by the gardaí, is anything other than a very grave matter which, in the ordinary course, should lead to the disallowance of any admissions allegedly made during the unrecorded interviews.

A most unusual case.

This is a most unusual case in several respects. The crime itself was an appalling one: the deceased was murdered, one might almost say assassinated, on the public street before a large and various gathering of people some of whom knew one or more of the persons in the car from which the killer emerged. In the face of this picture of brutal and apparently totally self confident lawlessness, it is good to be able to acknowledge the presence of mind, courage and decency of one of those at the scene, the doorman of a fast food restaurant who admitted the deceased, who was still ambulatory but in a dying condition, and locked the door of the premises after him thus preventing the entry of the killer. Thus excluded, the latter struck the window with his hand, leaving a mark of the hand outlined in blood on the window. This handprint will obviously be a significant feature of the trial, if it is permitted to continue. Like Mr. Justice Geoghegan, I

consider that it is a significant feature on this application as well.

Two disasters.

Despite the aggravated and acute nature of the case and the great public concern it caused, it was treated with an absolute lack of urgency by the office of the Director of Public Prosecutions. The case was, as the learned trial judge remarked, processed with admirable dispatch by the gardaí and the State Solicitors' office. The gardaí sent the file to the latter office on the 14th March, 2002, who were able to forward it to the Director of Public Prosecutions on the 21st March of that year. But the Director failed to give his directions as to what was to be done in the case until eighteen months later, in September 2003. The accused was then arrested, charged and spent something over two months in custody. The case was remanded on a number of occasions due to a failure on the part of the Director of Public Prosecutions to have the Book of Evidence ready within the statutory time or in any of the numerous extensions of time which he was granted. These extensions became shorter as time went on, as the Director maintained that the book was almost ready; but it was never actually produced. The case was struck out on the 18th December, 2003.

Though this event did not operate as a bar to the further prosecution of the accused it was a grave set back to the State and it should certainly have led (as no doubt the learned District Judge who struck the case out intended) to great dispatch in dealing with the matter thereafter. But nothing of the sort occurred. Some sixteen months elapsed before the appellant was charged again. No convincing reason whatever was given for this and the Director was eventually compelled to fall back, as an excuse for these cumulative delays, on "systemic failures". In my view, this phrase means absolutely nothing. It communicates no answer to the question "Why was this serious case so grossly delayed?" It fully justified the learned trial judge's observation:-

"... there has been a culpable and unjustified delay on the part of the prosecuting authorities from the time in March, 2002 when the file was forwarded to the office of the DPP and September, 2003 when the prosecution of the applicant was directed. The explanation for the delay in recharging the applicant after the striking out of the case in December 2003, on the basis that the preparation of the Book of Evidence was awaited, is not satisfactory."

I have to say that this is a case which reflects grave discredit on the Director of Public Prosecutions in his official persona. The bland formula with which it was explained, "systemic failure", appeared to me to reflect a confidence on the part of the Director that, though the Court might use harsh words about the delay it would not actually grant relief on foot of it. I wish to say in the strongest terms that but for a unique feature of the case, to be discussed below, I would have favoured granting relief on the basis of the long and wholly unexplained delay. The first delay appeared to the learned District Judge to merit the striking out of the case. This serious indication of judicial concern and displeasure had absolutely no effect and a further delay of almost equal length occurred despite the fact that one is entitled to infer that the Book of Evidence, which had already been worked on for well over a year, must have been (and was said to have been) in an advanced state of preparation at the time the case was struck out. The seriousness of the case, which was urged with apparent earnestness on the court as a reason for

refusing relief had absolutely no effect on those responsible for the internal organisation of the office of the Director of Public Prosecutions. Moreover, one reads with some surprise in some of the newspaper articles complained of that the gardaí apparently felt driven to share with a newspaper the fact that they had written on several occasions to the Director of Public Prosecutions, but without evoking any reaction.

I also wish to say that the phrase “systemic delay” is not only meaningless, it is a caricature of a meaningless bureaucratic phrase and is almost an insult to any tribunal to which it is offered. It would be infinitely better and more straightforward to say that the Director of Public Prosecutions and his officers can offer no explanation, which is the fact.

In my view this is an unforgivable and unexplained delay, suggesting a contempt for the views of the courts and (if the newspaper account may be believed) of the gardaí. If the courts were to tolerate delay such as this they would in my opinion be making themselves part of the problem and not part of the solution.

Nevertheless there are two features of the case which make me unwilling, despite the apparent inconsistency with what I have said above, to grant the appellant relief on the ground of prosecutorial delay. These are the irrelevance of this delay to a dramatic and (at this stage) wholly unchallenged and unexplained piece of evidence: the bloody hand mark which has been forensically linked to the accused. I fully accept that the accused is under no obligation to attempt to challenge or explain this evidence in these proceedings but the fact that he has not done so leaves this dramatic evidence untouched for purposes of these proceedings. I fully accept what has often been said, that the appellant’s right to a fair trial is, in a hierarchy of constitutional rights, superior to the community right to have a crime prosecuted. Nor do I accept what is sometimes said in cases such as these, that trials will be prohibited only in exceptional circumstances: they will and must be prohibited in every case where there is a real risk that the defendant will not obtain a fair trial. Whether such occasions will be common or exceptional is very much under the control of the gardaí and the Director of Public Prosecutions. But I consider that the evidence of the bloody handprint, in its unchallenged and unexplained condition, is itself an exceptional factor which cries out for a proper forensic consideration, and one capable of deciding the general issue by itself, which is unaffected by delay or publicity.

The second reason which would prevent my granting relief is linked to the first. It is that those matters on which the applicant relies as showing prejudice following from the delay, other than newspaper articles, are wholly unimpressive, for the reasons set out in the judgment of Geoghegan J. with which I agree. The newspaper material will be considered below.

I wish to make it perfectly clear that in my opinion but for those exceptional circumstances the Director’s wholly unexplained period of delay and the publicity which took place in this period, would lead to the granting of relief. This case cannot properly, in my view, be adduced in support of the proposition that a cumulative delay of thirty-four months, which is wholly unexplained, cannot ground an entitlement in the person who suffers it.

Other matters.

I agree, again for the reasons given by Geoghegan J., that no entitlement to relief on the grounds of non-recording of certain garda interviews has been established. In any event, I consider that the admissibility of the contents of such interviews would be a matter for the trial judge. I wish to say however that I would take most seriously a case where it was established that garda interviews had not been recorded. For many years the greatest loss of reputation suffered by our system of criminal investigation and criminal justice, and indeed by that of the neighbouring jurisdiction, was a series of cases where it transpired that people accused of grave crimes had been “verballed”, that is had material in the nature of confessions attributed to them which they either did not say at all or which distorted their actual words so as to give a quite false impression. This matter was considered in some detail at the Court of Criminal Appeal in

D. P. P. v. Connolly

[2003] I. R.1 and I wish to repeat what was said there, particularly at the end of the judgment. This subject was taken so seriously, and became such a scandal, that the government in the late 80s established a committee under the chairmanship of the late Judge Frank Martin S. C. to look into what preventative measures were necessary to protect persons in custody, and indeed gardaí. In the case referred to, the Court of Criminal Appeal discussed this report at p.10 and drew attention to its findings that, in a Canadian jurisdiction where recording had become routine, allegations of “verballing” and of the obtaining of admissions by threats (whether to the prisoner or to another person) physical brutality or trickery had dried up almost entirely. This has been the position, too, in Ireland since recording became routine, something which occurred a disturbing number of years after statutory provision for it had been made. I would regard with horror any slow drift back to non-recording on the basis of a confidence that the courts would not, in practise, do anything meaningful about it. I wish to stress that in my opinion non-recording should normally mean exclusion and that only in this way can the courts ensure that recording will in practise be routine.

It is fair to point out that this is an old case, late in coming before the Courts because of the prosecution’s delay. Accordingly, it may not be a reliable guide to contemporary garda practice in the matter of recording. I am prepared to assume that it is not. But the recording of interviews in garda stations must be assiduously policed by the courts.

On a related matter, I have to express some disagreement with the judgment of Mr. Justice Geoghegan in relation to what he describes as “inferred admissions”. There are in this case certain remarks, attributed to the accused, which are not in form admissions. But they have two other qualities. Firstly some of them, though not direct admissions, are nearly so and are additionally so callous as to be repulsive. Secondly, I do not agree that these indirect admissions (for such they certainly are) should be taken into account on an application such as the present on a basis different and, (from the prosecution point of view) more permissive basis than if they were signed written statements of admission. I am not quite clear as to the significance of this

passage:-

“I think that the significance to be attached to those kinds of inferred admissions is quite different from the significance to be attached to an alleged formal statement of admission in circumstances where that statement is going to be challenged. The kind of answers which is set out in the judgment even though not yet proved to have been made could, I think, reasonably be taken into account”.

I can see no grounds for distinguishing between the two types of admission. The “inferred admission” is couched in language of such callousness, on occasions, as to doubly damn the accused. Moreover, an “inferred admission”, that is a statement which though not a confession tends to suggest guilt, especially if expressed in colloquial form, can be even more convincing than a direct admission because it may seem to the tribunal of fact that if an interrogator was so unscrupulous as to “verbal” a prisoner, he would surely put a direct and unambiguous admission into his mouth rather than something from which guilt has to be inferred. The indirect statement may thus disarm suspicion and be more readily accepted than a direct confession about which a series of cases of miscarriages of justice have made even many laymen sceptical. Inferred admissions have this effect in a number of recorded cases such as

D. P. P. v. Pringle

[1995] 2 I. R. 547.

The newspaper publicity.

During the very long period where the progress of this court case was inexplicably delayed, it was the subject of a good deal of newspaper publicity. I had at first proposed to append some of this material to this judgment as an appendix. However, because (as Mr. Justice Geoghegan points out) there is a contempt of court application pending in this matter, I have not done so. Moreover, the repetition of the material complained of appears unwise in view of the conclusion I have come to about that material.

The learned trial judge applied the adjective “lurid” to the material complained of. I do not think anyone could quibble with that description. But the constitutional rights of persons, including but not limited to persons employed in the media, extends to a right to publish material which is wrong headed, ignorant, biased, prejudiced or simply wrong. What is not permitted, and cannot be permitted while we adhere to the system of trial by evidence, not prejudice, is the publication of material which states, or necessarily implies, that a defendant in a criminal case is guilty of the offence with which he is charged. This material is of that sort.

The basis upon which such material is not permitted to be published is that it interferes with the right of every citizen to a fair trial before a jury unaffected by loud unreasoned assertions of the defendant’s guilt. The applicant, and every citizen, is entitled to have the evidence against him, if any, presented in court in his presence and that of his representatives so that no improper evidence is admitted against him and he is able to make an immediate answer to any proper evidence adduced against him. Publishing one sided statements to the effect that the defendant is guilty of the crime in question, or that the defendant is an associate, or a leader, of other persons

who are guilty of the crime, or of similar crimes, destroys the citizen's right to a fair trial. Since Ireland is committed, both by its constitution and by the European Convention on Human Rights which it has incorporated into its law to provide a fair trial, it must of necessity inhibit publications which are inconsistent with such a fair trial. There are, in particular, two types of publications that tend to prejudice the right to a fair trial. The first is a publication of a sort which will make it difficult for the jury or other tribunal of fact to approach the case with an open mind for example because it suggests information which is not proven in evidence or strongly proclaims the guilt (or the innocence) of a defendant. The second and quite different type of contempt which interferes with the constitutional right to a fair trial is published material of a sort which, by repetition or otherwise, so affects the person about whom it is written as to hamper his ability properly to conduct his defence. The fairness of a trial may also be interfered with by publications which are heavily partisan towards someone else involved in a case: for example, constantly favouring an alleged victim by for example publishing flattering photographs of him or his distressed relatives, referring to him by his Christian name perhaps prefixed with words such as "little" or "lovely", while referring to the defendant by a surname or in some other peremptory way, or the constant publication of a "leaked" information tending to favour one side over the other are examples of publications interfering with a fair trial.

Effect of publications.

In recent times it has become fashionable to consider that publications which prejudge the result of cases have their effect exclusively on jurors and are incapable of having any untoward effect on judges. This may be controversial. Both sides to this particular controversy were well rehearsed in the case of

Cullen v. Tobin

[1984] I. L. R. M. 577 where the Supreme Court took the view that judges were immune from such pollution. The High Court judgment of Barrington J. on this topic is a cogent statement of another of point of view.

I do not think I am wrong in detecting, in recent years, a great caution on the part of the judiciary in penalising the media in respect of pre-trial publications. Even gross cases may avoid criticism or redress on the basis that jurors will not remember the publication at all (the so called fade factor) and may not have read it in the first place; that jurors will be instructed to disregard any material relevant to the case other than what they have heard in the courtroom and it should not be assumed they will not be able to comply with this instruction; and that people tend to exaggerate the likely effect of what is in the newspapers anyway.

I do not accept any of these propositions. Neither do I accept their converse: there is a considerable need for serious research into these topics and for ceasing to rely on guess work or vague impressions. Moreover, there is some evidence of concern, by frank and outspoken journalists, as to the effect such publications. Dealing specifically with criminal trials, Mr. John Waters wrote in the Irish Times on the 28th January of this year:

“We should be concerned that publicity surrounding controversial trials may sometimes have a greater role in the determining their outcomes than anything laid down in law.

There is little doubt that the magnification of the circumstantial, the hunch, or unadorned popular prejudice is in some cases creating consequences which the facts do not support”.

Although I have no information about the specific cases which Mr. Waters goes on to discuss in his article, I wish to express my sense of the importance of the general proposition quoted above.

Nor is the law of contempt, in my view, in any way unreasonably restrictive of freedom of speech, whether that of the media or of anyone else. There is ample scope to discuss crime in general. What is not permitted is to prejudice, in one way or the other, the fair trial of an individual who, at the time the publication is made, has already been charged. I have no doubt that the media in general would be supportive of the proposition that a person charged with a crime is entitled to a fair trial for that crime, free from what Mr. Waters goes on to call “... the background radiation of rumour, innuendo and superficial impression [which] can create conditions in which certain elements of the media and/or population refuse to accept the outcome of a trial and demand the continued punishment of an accused long after the tariff of the court has been paid”.

The principles which the court applies in such cases are long established. They were applied in difficult circumstances in the 1998 case of Fr. Patrick Ryan, whose extradition to the United Kingdom on terrorist charges including murder was sought. But the Attorney General considered that it would be improper, and an abuse of the process of the courts, to initiate extradition proceedings. Part of the reason for this was the publication of lurid material about Fr. Ryan in English newspapers. The Attorney General said:-

“The material in questions consists of references to Patrick Ryan which have appeared in newspapers, particularly newspapers with a large circulation and on radio and television, over a protracted period. They consisted,

inter alia

of attacks on Patrick Ryan’s general character, often expressed in intemperate language and frequently in the form of extravagantly worded headlines, and also assertions of his guilt of the offences comprised in the warrants - and, indeed, assertions of his guilt of other offences in respect of which no charges have been brought”.

Many aspects of this general description could be applied to the material complained of in this case.

The Attorney General went on to describe certain political comment in a foreign legislature, an aspect absent from the present case.

He continued:-

“Every citizen has a constitutional right to a fair trial... The right to a fair trial includes a right to protection against the creation of prejudice or animosity in the minds of potential jurors, such as would effectively deprive a person of the right to a non-biased trial. The presumption of innocence is not a procedural rule governing the onus of proof at trial. It is a fundamental principle of substantive law. Any decision to prosecute implies no more than that there is an issue to be tried as to whether the person charged is guilty or not guilty... Having regard to the extreme nature and extent of the prejudicial material published the Attorney General has had to conclude that this prejudice is irredeemable.

No direction to the jury by the trial judge to ignore the prejudicial material to which they have been exposed could be effective in removing the bias which has been created

”. (Statement of the Attorney General December 14 1988).

I wish respectfully to express my agreement with the principles outlined in the above statement.

I also wish specifically to express my agreement with what was said in the judgment of Mr. Justice Geoghegan as to the responsibilities of the Director of Public Prosecutions in this regard.

It is undesirable to say more about this particular case because of the pendency of contempt proceedings. And while these proceedings are pending, it is premature to conclude that no remedial action, short of stopping the trial of an offence which correctly causes great public concern. But I think it appropriate, after a period of years in which egregious publications have attracted no sanctions from the courts to state plainly that there is an obligation on every citizen to protect, or at least not to interfere with, the rights of every other citizen to a fair trial. This obligation required the specific and serious consideration of the media and the courts.

Brian Rattigan and the D. P. P.

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Prepared on 26 October 2026 · Esheria