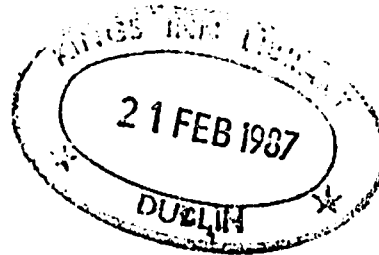


THE HIGH COURT

1985. Record No. 762SS

STATE SIDE



BETWEEN:

THE STATE (AT THE PROSECUTION OF ROBERT BRENNAN)

Prosecutor

and

DISTRICT JUSTICE PETER CONNELLAN AND THE
DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Judgment delivered by the President of the 17th day of June 1986

This is an application brought by the Prosecutor to have made absolute the Conditional Order of Prohibition by Mr. Justice McMahon on the 16th day of December 1985 notwithstanding cause shown on behalf of the Respondents herein.

The facts relevant to this application are deposed to in the affidavits of the Prosecutor sworn herein on the 16th day of December 1985, of Barry Donoghue, a Senior Assistant Solicitor in the Office of the Chief State Solicitor, sworn on the 30th day of January 1986 and of Dermot Russell, a Legal Assistant in the Office of the Chief State Solicitor, sworn on the 30th day of January 1986, and the documents exhibited in and referred to in the said affidavits.

The relevant facts so disclosed are that:-

1. The prosecutor was, in or about the month of March 1983, at the Dublin Metropolitan District Court charged with the

offences that:-

- (a) he did between the 22nd March and 9th September, 1982 within the State feloniously forged a valuable security, to wit a receipt dated the 25th day of August, 1982 in the amount of £680 and signed Jim Pigott, with intent to defraud, contrary to Section 2 of the Forgery Act, 1913.
- (b) he did between the 25th August and 9th September, 1982 at the Department of Agriculture, Kildare Street, Dublin 2 within the Dublin Metropolitan District, feloniously utter to an official of the Department of Agriculture there a forged instrument to wit, a receipt dated the 25th of August, 1982 in the amount of £680 and signed Jim Pigott with intent to defraud contrary to Section 6 of the Forgery Act, 1913, and
- (c) he did between the 25th August 1982 and the 10th September 1982 within the Dublin Metropolitan District, with intent to defraud, obtain from the Department of Agriculture, a payable order in the amount of £680, under, upon or by virtue of a forged instrument to wit a receipt dated the 25th day of August 1982 in the amount of £680 and signed Jim Pigott with intent to defraud contrary to Section 7 of the Forgery Act, 1913.

2. The Prosecutor was admitted to bail in respect of the said charges and in the District Court was remanded from time to time as the Book of Evidence had not been prepared and served in accordance with the provisions of the Criminal (Procedure) Act.

3. Eventually, the Book of Evidence was served and the Prosecutor was returned for trial to the Circuit Court in Dublin dealing with criminal business on the 29th day of March 1984.
4. The Prosecutor appeared for arraignment in respect of the said charges in the Dublin Circuit Criminal Court on the 19th day of October 1984 but at the request of the second-named Respondent, the Director of Public Prosecutions, the arraignment was adjourned on that occasion and on eight subsequent occasions until the 16th day of April, 1985, as an error had been discovered in the return for trial and in the subpoenas issued.
5. At the request of the second-named Respondent, the order returning the Prosecutor for trial was quashed by order of the High Court made on the 16th day of April 1985.
6. In or about the beginning of November 1985, the Prosecutor was served with a notice in the following terms:-

"An Chuirt Duiche, the District Court
Dublin Metropolitan District

Director of Public Prosecutions

Prosecutor

and

Robert Brennan

Accused

Notice to Proceed

Whereas on the 29th day of March 1984 at the Dublin Metropolitan District Court No. 6 Chancery Street, Dublin 7, Justice Peter A. Connellan, Justice of the District Court, did order that the Accused be returned for trial to the Dublin Circuit Criminal Court in respect of the three following offences:-

1. For that you, the said Accused did between the 22nd March and 9th September, 1982 within the State, feloniously forge a valuable security to wit a receipt dated the 25th day of August 1982 in the amount of £680 and signed Jim Pigott with intent to defraud, contrary to Section 2 of the Forgery Act, 1913.

2. For that you, the said Accused did between the 25th August and 9th September 1982 at the Department of Agriculture, Kildare Street, Dublin 2 within the Dublin Metropolitan District, feloniously utter to an official of the Department of Agriculture there a forged instrument to wit, a receipt dated the 25th day of August 1982 in the amount of £680 and signed Jim Pigott with intent to defraud contrary to Section 6 of the Forgery Act, 1913.

3. For that you, the said Accused did within the 25th day of August 1982 and the 16th September 1982 within the Dublin Metropolitan District with intent to defraud obtain from the Department of Agriculture a payable order in the amount of £680 under, upon or by virtue of a forged instrument, to wit, a receipt dated the 25th August 1982 in the amount of £680 and signed Jim Pigott with intent to defraud, contrary to Section 7 of the Forgery Act, 1913.

And Whereas the said Order for return for trial incorrectly sighted the name of the Accused as Robert Byrne

And Whereas on the 16th day of April 1985 Mr. Justice Sean Gannon in lieu of directing a State Side Order of Certiorari to issue did order that Justice Peter Connellan on service on him of the learned

Judge's Order should send before the Honourable High Court for the purpose of being quashed the said return for trial dated the 29th day of March 1984 and all records and entries relating thereto and that the same be quashed on return without further order.

And Whereas the said order of return for trial has now been returned to the Honourable High Court and quashed
Take Notice that on the 15th day of November 1985 at 10.30 a.m. an application will be made on behalf of the Prosecutor at District Court No. 5, Chancery Street, Dublin 7 to fix a convenient date for the hearing and determination of the said charges in accordance with law.

And take further notice that should the said accused fail to appear at District Court No. 5 at the said time and date an application will be made on behalf of the Prosecutor to the District Court for a warrant to issue for the arrest of the said Accused.

Signed

Louis J. Dockery
Chief State Solicitor,
Dublin Castle
Dublin 2

and addressed to Robert Brennan, the Prosecutor herein, and to the Chief Clerk, Dublin Metropolitan District Court, Chancery Street, Dublin 7. "

7. On the 16th day of December, 1985 the Prosecutor herein applied to the High Court and obtained an order directing that an order of prohibition do issue directed to the Respondents

in the title hereof named prohibiting them from proceeding further against the Prosecutor on the charges set forth in paragraph 2 of the Prosecutor's affidavit on the grounds that:-

- (a) there was undue delay on the part of the second-named Respondent herein in obtaining the absolute order of Certiorari referred to in the Prosecutor's affidavit until the 16th day of April 1985, and
- (b) there was undue delay from the date of the said absolute order of Certiorari namely the 16th day of April 1985 to the date that the notice of intention to proceed was served on the Prosecutor namely the month of November 1985, unless cause shown to the contrary.

The Respondents have purported to show cause by the affidavits of Mr. Russell and Mr. Donoghue herein before referred to.

The affidavit of Mr. Dermot Russell deals with the delay in having the defendant returned for trial quashed.

In his affidavit he states that the error was discovered in or about the 19th day of October 1984, that on the 23rd day of November 1984 instructions issued from the Office of the Director of Public Prosecutions to the Chief State Solicitor's Office to instruct Counsel to have the said returned for trial quashed, that Junior Counsel was instructed on the 3rd day of December 1984 to advise in the matter and to draft the necessary grounding affidavit for the purpose of the application to quash the said order returning the Prosecutor for trial, that Counsel advices and draft affidavit was received on the 6th of February 1985, that after consultation with Counsel the final format of the affidavit was settled and sworn for the purposes of the application to the High Court and that on

the 16th day of April 1985 the order was made by the High Court.

In his affidavit, Mr. Russell denies that there was any undue delay in obtaining the absolute order of certiorari of such a nature that would entitle the Prosecutor herein to an absolute order of prohibition.

Mr. Donoghue deals in his affidavit with the delay between the obtaining of the Order quashing the return for trial and the service of the notice of intention to proceed.

In his affidavit he states that a communication was received in the Chief State Solicitor's Office on the 29th day of April 1985 from the second-named Respondent herein directing that a notice of intention to proceed with the charges against the Prosecutor be served on the Prosecutor in accordance with the practise directed by Chief Justice O'Dalaigh in The State (Hayden) .v. Good 1972 I.R. 351.

No steps seem to have been taken on foot of such direction because Mr. Donoghue states that on the 21st of June 1985 he received a similar communication from the Office of the Director of Public Prosecutions.

He was also directed to contact the appropriate member of the Garda Siochana who had served the order upon the Prosecutor.

In his affidavit he states that he is in the District Court Section of the Office of the Chief State Solicitor, is involved in the preparation of cases before the Court, that the volume of work dealt with by the criminal courts in Dublin have increased dramatically in recent years and due to pressure of work, he was unable to draft the notice to proceed until the end of September 1985, appeared five months after the original direction had emanated from the Director of Public Prosecutions.

He states that in early October he sent his draft for endorsement and received it back on or about the 24th day of October 1985 and that he then contacted the member of the Garda Siochana to arrange service of the notice.

The original notice was sent to the Garda concerned on the 1st day of November 1985 for service upon the Prosecutor and service was effected.

Counsel on behalf of the Prosecutor has submitted that because of the inordinate delay which has elapsed since the Prosecutor was charged with the offences, including the delay before he was returned for trial, the delay in taking the appropriate steps to have the order returning him for trial quashed when the error in the order was discovered, namely a delay from the 19th day of October 1984 to the 16th day of April 1985, and the further delay in serving the notice of intention to proceed with the hearing of the offences against the Accused, namely from the 16th day of April 1985 to a date in November 1985, the Prosecutor's constitutional right to reasonable expedition in the prosecution of the offences with which he has been charged has been infringed and that the Respondents should now be prohibited from proceeding further against them in respect of the said charges.

The question with regard to the right of an accused person to an expeditious trial has been dealt with in detail by Mr. Justice Murphy in the case of The State (at the prosecution of James O'Connor), Prosecutor and His Honour Judge Seán McDermott Fawsitt and the Director of Public Prosecutions, Respondents (unreported but delivered on the 16th day of October 1985).

In the course of his judgment, he stated that:-

"The Irish Constitution unlike the American Constitution, the Jamaican Constitution and the Canadian Charter of Rights

and Freedoms Constitution Act, 1982 does not contain any express provision dealing with the right of an accused person to an expeditious trial".

However, he refers to the analysis of Article 38(i) of the Constitution by Mr. Justice Gannon in the case of The State (Healy) and Donoghue 1976 I.R. Page 325.

This sub-Article provides that:-

"No person should be tried on any criminal charge save in due course of law".

In the course of his judgment, Mr. Justice Gannon stated at Page 335 that:-

"By mentioning these rights, I am not to be taken as giving a complete summary, or as excluding other rights such as the right to reasonable expedition and the right to have the opportunity for preparation of the defence. The rights I have mentioned are such as would necessarily have a bearing on the result of a trial. In my view, there are rights which are anterior to and do not merely derive from the Constitution but the duty to protect them is cast upon the Courts by the Constitution".

As stated by Mr. Justice Murphy, the views of Mr. Justice Gannon were upheld and if anything extended by the judgments in the Supreme Court and in particular that of the then Chief Justice, Mr. Justice O'Higgins, at Page 349 of the said Report.

Having considered that and other cases, Mr. Justice Murphy went on to state that:-

"It seems to me, therefore, that the authorities have

established that the Constitution guarantees to every citizen that the trial of a person charged with a criminal offence will not be delayed excessively or to express the same proposition in positive terms that the trial will be heard with reasonable expedition".

In dealing with the question of delay, Mr. Justice Murphy stated:-

"The nature of the delay must be considered, as has been already pointed out, having regard to the circumstances of the case. Clearly, it is material to consider whether the delay is being measured between when the charges were first brought and when the trial occurs or whether a re-trial is to be conducted in accordance with the directions of an appellate court. It is equally obvious that consideration must be given to the nature of the charge itself. Minor offences can and should be dealt with summarily. Serious charges will take longer to present. Clearly, there are many charges which of their nature tend to be complex and involve numerous witnesses and documentation. The charges such as were presented in the Paul Singer matter would require considerable time for preparation would be understandable and of necessity acceptable. Again, it would be important to consider whether the accused was detained in custody or not. Another factor which may be of very considerable importance in many cases is the attitude of the accused. Not infrequently the accused seeks or acquiesces in an adjournment of his trial either to postpone the day of reckoning or for other reasons. At the end of the day, the test will be whether in all the relevant circumstances reasonable expedition was achieved."

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It is, however, material to bear in mind that in reaching that conclusion the Court has to recognise as O'Higgins C.J. pointed out in delivering the decision of the Supreme Court in the Criminal (Jurisdiction) Bill, 1975, 1977 I.R. 129 that the phrase "in due course of law" which imports the requirement of reasonable expedition itself requires a fair and just balance between the exercise of individual freedoms and the requirements of an ordinate society".

I agree with the statement of Mr. Justice Murphy that the authorities have established that the Constitution guarantees to every person that the trial of a person charged with a criminal offence will not be delayed excessively or to express the same proposition in positive terms, that the trial will be heard with reasonable expedition and that the nature of the delay must be considered having regard to the circumstances of the case.

The Conditional Order of Prohibition was granted by Mr. Justice McMahon on two grounds:-

- (a) that there was undue delay on the part of the second-named Respondent herein in obtaining the absolute order of certiorari referred to herein until the 16th day of April 1985,
- (b) that there was undue delay from the date of the said absolute order of certiorari namely the 16th day of April 1985 to the date that the notice of intention to proceed was served on the Prosecutor namely the month of November 1985.

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The facts which are relevant to the consideration of the question whether the delay in this case is such as, in all the circumstances, to be of such a degree as to amount to an infringement of the Prosecutor's constitutional right to have his trial heard with reasonable expedition are:-

1. The offences with which the Prosecutor is charged are alleged to have been committed between the 22nd day of March 1982 and the 9th day of September 1982;
2. The accused was charged in respect of the said offences before the District Court in the month of March 1983, admitted to bail and remanded from time to time until the Book of Evidence was prepared;
3. The Prosecutor was returned for trial to the Dublin Circuit Criminal Court on the 29th day of March 1984, in excess of 12 months after he had been first charged in the District Court;
4. He appeared for arraignment before the Dublin Circuit Criminal Court on the 19th day of October 1984 but, as an error had been discovered in the Order returning him for trial to that court, the matter was adjourned on at least eight occasions.
5. Eventually, on the 16th day of April 1985 the Order returning him for trial was quashed by order of the High Court.
6. On the 26th day of April 1985 a communication was received in the Chief State Solicitor's Office from the Director of Public Prosecutions directing that a Notice of Intention to proceed with the charges against the Prosecutor be served on the Prosecutor in accordance with the practice directed by Chief Justice O Dalaigh in The State (Hayden) .v. Good 1972 I.R. Page 301.

7. The said Notice of Intention to proceed was not endorsed until the 24th day of October 1985 and was not served on the Prosecutor until the beginning of November 1985.

The delays in this case were:-

- (1) A period of approximately 12 months in preparing the Book of Evidence and securing an order for the Prosecutor's return for trial;
- (2) A period of approximately 6½ months between the date of return for trial and the date of arraignment in the Dublin Circuit Criminal Court;
- (3) A period of 6 months in dealing with proceedings to have the defective return for trial quashed by the High Court.
- (4) A further period of 6 months to prepare and serve a Notice of Intention to proceed.

Though the Conditional Order of Prohibition was granted in respect of the delays set out at (3) and (4), such delays must be viewed in the context of the time which had previously elapsed between the dates of charging in the District Court and of arraignment in the Circuit Criminal Court.

I have read and considered the affidavit of Dermot Russell sworn on the 30th day of January 1986 in which he sets out the reasons for the delay in obtaining the order of the High Court quashing the return for trial in this case and am not satisfied that the delay therein was of such a degree as to amount to a deprivation of the Prosecutor's constitutional right to have his trial heard with reasonable expedition.

However, once that order was made, and having regard to the fact that a period in excess of two years had elapsed from the date upon which the Accused was charged there was an obligation on the second-named Defendant to vindicate the Prosecutor's constitutional right to have his trial heard with reasonable expedition and to ensure that the matter was expeditiously dealt with from there on.

I have read and considered the affidavit of Barry Donoghue sworn on the 30th day of January 1986 in which he deposes to the reasons for the delay between the 16th day of April 1986 and the service of the Notice of Intention to proceed on the Prosecutor on the 9th day of November 1986, a period of nearly 7 months, and can find nothing therein to justify this delay in executing a comparatively simple procedure namely the preparation of a Notice of Intention to proceed and the service thereof on the Prosecutor.

I accept, as stated by the Supreme Court in the course of his judgment on the Criminal (Jurisdiction) Bill, 1977 I.R. Page 129, that the phrase "in due course of law" which imports the requirement of reasonable expedition itself requires a fair and just balance between the exercise of individual freedoms and the requirements of an ordinate society.

I am, however, satisfied that there was no reasonable justification for the delay in preparing and serving the Notice of Intention to proceed on the Prosecutor, that such delay constituted an infringement of the Prosecutor's right to have his trial heard with reasonable expedition and that the reason given therefor namely, pressure of work, does not provide a justification for such delay and consequent infringement of constitutional rights.

Consequently, I will grant the application brought by the
Prosecutor to have made absolute the Conditional Order of Prohibition
made by Mr. Justice McMahon on the 16th day of December 1985.

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