THE HIGH COURT
JUDICIAL REVIEW

[2022] IEHC 714

Record No. 2021/757JR

BETWEEN

PETRU PAULETTI

APPLICANT

AND

GARDA CATHAL DUNNE AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Ms. Justice Stack delivered on the 15th day of December, 2022.

Introduction and factual background

1. The applicant seeks, in substance, orders of prohibition against the first and second respondents, preventing them from continuing with the prosecution of the applicant in the matter of *DPP v Petru Pauletti* District Court Record 147406/2018, in which the applicant is charged with an offence contrary to s.13(1) of the Criminal Justice (Public Order) Act, 1964 which provides: -

"It shall be an offence for a person, without reasonable excuse, to trespass on any building or the curtilage thereof in such a manner as causes or is likely to cause fear in another person."

2. In effect, it is asserted by a number of residents of various properties in a gated development in Ballsbridge, that the applicant was peering in their windows at early hours of the morning of 15 May 2018. The two female residents of one of the properties have made statements to the effect that they were terrified by the incident.

3. It is claimed that the applicant had been engaged in similar behaviour on the morning of 14 May 2018, leading the young women who were living in the premises to ask a male friend to come and stay. That evening, they set up a CCTV recording, which will now form part of the evidence in the District Court if the trial goes ahead.

4. The applicant was spotted later that day and information was passed to Garda Dunne, the first respondent, who arrested the applicant, conveyed him to Donnybrook Garda Station, and ultimately released him pending further investigation. When cautioned prior to his arrest, the applicant said he was in the area of the development in question in order to see a woman who he had previously had a relationship with.

5. The applicant was released and Garda Dunne commenced an investigation. He took statements from a resident of the development on 24 June 2018, and from the two young women referred to above and their male friend on 7 August 2018.

6. On 7 August 2018, Garda Dunne was directed to initiate a prosecution against the applicant, and on 10 September 2018 he applied for a summons, getting a return date of 20 December 2018.

7. As a preliminary comment, I do not think the applicant has established any unreasonable pre-charge delay. In addition, as pointed out by Gannon J. in *O'Flynn v. District Justice Clifford* [1988] IR 740 at 744, and approved by Hardiman J. at para.

14 of *McFarlane v. Director of Public Prosecutions* [2007] 1 IR 134, [2006] IESC 11, the applicant himself was entitled to a presumption of innocence and could not be charged on the basis of a mere suspicion. The gardaí therefore must conduct an investigation which is appropriate to the facts and circumstances of the case.

8. Furthermore, the gardaí are entitled to a reasonable period to investigate an offence. While this was not a complex offence, it clearly required the taking of statements from various individuals and, presumably, the viewing of the video evidence created by the women living in the flat and their male friend. I can see no unreasonable delay between the date of the alleged offence and the application for a summons on 10 September 2018.

9. However, once the charge is made against a person, as stated in *O'Flynn v. District Justice Clifford*, *"resort to court procedure is obligatory and must be prompt."*

10. Turning then to the events *post* the issue of the summons, it was served at an address in Dublin 3 which was the address given by the applicant at the time of his arrest. The summons was served on 10 December 2018 by *"delivery by hand"*, which I understand to mean leaving it at the premises, which is a permitted mode of service for the purpose of a District Court prosecution. The summons was served at the address given by the applicant to Garda Dunne at the time of his arrest. There was some suggestion at hearing that the applicant had moved but this is not on affidavit and the evidence therefore is that the summons was left at the correct address.

11. The applicant states rather baldly that *"I was not served with this summons"*, but it is unclear whether he means that he was not served personally, and he does not dispute that the address was the address given nor does he offer any evidence as to why he did not collect the summons when it was left there.

12. Given that the onus is on the applicant, I think he has not discharged the onus on him of demonstrating that there was some defect in service of the summons.

13. In addition, an argument was made that there was delay in serving the summons but I do not see how this was so, given that it was left at the address given by the applicant, in a manner which complied with the relevant court rules, ten days before the return date. The matter could not progress until the court date in any event and I fail to see the significance of the fact that the Garda did not serve the summons a an earlier time.

14. On 20 December 2018, the applicant failed to appear in the District Court and a bench warrant was issued for his arrest. On the basis of the affidavit evidence as to the service of the summons, the reason for the garda's belief in the correctness of the address and from the fact that the District Court judge issued a bench warrant, I infer that the District Court judge was satisfied that the summons had been properly served, otherwise he or she would not have issued a bench warrant. In addition, no application to set it aside was every made by the applicant.

15. There is very little detail in the affidavits on either side, but it does not seem to me that the timeline described above (from commission of the alleged offence, to the issue of the summons and the return date of the summons) is indicative of any delay on the part of the prosecuting garda.

16. The next relevant period is from 20 December 2018, until the bench warrant was executed on 14 May 2019. Neither party has given me any information whatsoever as to what occurred within this period, or indeed the circumstances in which the bench warrant was issued. Counsel for the applicant at hearing pointed to the fact that the garda notebook, as disclosed in the District Court proceedings and

exhibited to Garda Dunne's affidavits, shows that the prosecuting garda had a note of the applicant's phone number.

17. However, I have no evidence whatsoever as to whether the garda tried to ring this number or not. If he rang a number of times, leaving messages for the applicant to ring him back so as to arrange to execute the warrant, but got no response and had been given an incorrect address by the applicant, then that would be indicative of the applicant evading execution of the warrant. On the other hand, if the correct mobile number was given and the garda never rang it at all, that might be indicative of delay in executing the bench warrant.

18. I was referred at the hearing of the case to *Cormack v Director of Public Prosecutions* [2009] 2 I.R. 208, [2008] IESC 63 which confirms that a failure by a prosecuting garda to execute a bench warrant promptly or at least within a reasonable time may amount to blameworthy prosecutorial delay. However, in the absence of any evidence whatsoever as to why it took five months to execute the warrant, I do not see how I can make such a finding.

19. The onus is on an applicant in judicial review to prove his or her case, and it was for the applicant to put forward some basis in the affidavits for saying that there was delay in executing the bench warrant, at which point the burden might shift to the respondent to offer a greater explanation or to seek to excuse any culpable delay which had occurred. However, as neither side has addressed the issue, I cannot make a finding of culpable delay on the part of the prosecuting garda.

20. After executing the bench warrant, the applicant was admitted to bail, and the matter adjourned to 24 June 2019, 29 July 2019, 14 October 2019, and 25 November 2019 — all adjournments required by the need for the prosecuting garda to make disclosure. Garda Dunne says in his replying affidavit that *"the reasons for the delay*

in furnishing of disclosure was due to my own indisposition for a period prior to November 25, 2019 when disclosure was completed; where I was absent from work for a period owing to illness."

21. The evidence is therefore somewhat vague and indeed no particular period for which the garda was indisposed has in fact been identified. This is a matter within his own personal knowledge and, the applicant having set out the timeline of adjournments which were necessitated by the need to make disclosure, the onus then shifted to the respondent to give a reason why that delay occurred. The reason is given in a somewhat perfunctory manner, and in the absence of further detail, I would be prepared to infer that, while at least one adjournment might be necessary to allow disclosure to take place, as it ultimately did once the Garda returned to work, the adjournments from June to November 2019 were caused by the failure of the prosecuting garda to make disclosure.

22. The delay of course is not one attracting a high degree of culpability, because the garda says he was unwell, which is unavoidable and in itself, of course, not blameworthy. Blame can only be attached to this delay insofar as, as submitted by the applicant, another garda could have dealt with the matter, and this may well be so. However, at least some of the delay of five months must have been down to the fact that it would always have taken some time for the garda to get a colleague to stand in for him in dealing with the disclosure. I do not think it is necessary to be more precise than to say that the garda was responsible for delay here of the order of three to four months, on the basis that there appears to be no system in place to allow one garda deal with the file of another garda who was unwell.

23. That finding may well be displaced in another case where there is evidence as to why it is that gardaí do not stand in for each other in this way. There may be well

some sound practical reasons why the gardaí are not able to substitute for each other in this manner. However, no evidence as to the time for which the prosecuting garda was out of work or as to why someone else could not stand in for him has been given.

24. It therefore seems that, up to this point, the applicant is responsible for something approximating to half of the time period which has occurred in bringing the matter for trial (this being the five month period from the initial return date of the summons to the date of execution of the warrant).

25. The matter was next before the District Court on 3 February 2020, at which point the applicant entered a not guilty plea and a hearing date was set for 27 July 2020.

26. The Covid-19 pandemic then struck with full force in this jurisdiction in or about the second week of March 2020, and the hearing date was vacated as part of a block adjournment of all criminal trials where the accused was on bail. On 27 July 2020, a further block adjournment to 24 November 2020 took place. Thereafter, the matter adjourned to 30 April 2021, at which point the matter was able to get a date. The date fixed, due to the backlogs created by the pandemic, was 29 March 2022. Approximately two years of the delay which has arisen in this case, therefore, is down to the Covid-19 pandemic.

27. In the interim, in July 2021, the applicant got leave from this Court to seek the reliefs in the statement of grounds. For the purpose of this application, it is obviously the case that, absent the institution of these proceedings, the case would have been heard on 29 March 2022. Any period elapsing after that date is due to the application for prohibition of the trial and obviously cannot be considered.

Relevant legal principles

28. It is clear from the authorities that there are, broadly speaking, two bases upon which a trial can be prohibited on grounds of delay. First, if there is a real risk to the fairness of a trial, the trial is not one *"in due course of law"* within the meaning of Article 38.1 and cannot proceed. Secondly, if there has been a breach of the right to trial with due expedition, the trial may be prohibited even in the absence of any prejudice to the fairness of the trial.

29. The right to a trial with *"due expedition"* is generally regarded as having been first identified by Gannon J. as another aspect of *"trial in due course of law"*, as required by Article 38.1 of the Constitution, in *The State (Healy) v. Donohue* [1976] IR 325 (at p. 335) in a passage approved on appeal by O'Higgins CJ (at p. 349).

30. The was confirmed in *The State (O'Connell) v. Fawsitt* [1986] IR 362, albeit that the prosecutor succeeded in the Supreme Court on the basis of special prejudice to the fairness of the trial. In *DPP v Byrne* [1994] 2 I.R. 236, it was confirmed that such a right existed, independent of any evidence of prejudice to the fairness of the trial itself. This has been restated more recently by the Supreme Court in *Nash v. DPP* [2015] IESC 32.

31. There is an important distinction in principle between the two rights, however. A breach of the right to trial with due expedition (i.e., delay which does not prejudice the fairness of the trial) does not automatically lead to the dismissal of the charges as the right of the accused is balanced against the public interest in prosecuting crime. However, where the fairness of the trial itself has been prejudiced by delay, no such balancing exercise is conducted.

32. As I understand it, the applicant relies in these proceedings on both the right to a fair trial and the right to trial with due expedition.

i. Real risk to a fair trial

33. It is well-established as a matter of general principle that where delay results in a real and unavoidable risk to the fairness of a trial, the trial will be prohibited: see Hardiman J. in *Nash v. DPP* at para. 25, approving the statement of Denham J. in *B. v. DPP* [1997] 3 I.R. 140, where she stated:

> *"The community's right to have offences prosecuted is not absolute but is to be exercised constitutionally, with due process. If there is real risk that the applicant would not receive a fair trial then, on the balance of these constitutional rights, the applicant's right would prevail."*

34. However, in considering whether a defendant's right to a fair trial in due course of law has been breached i.e., whether the defendant has established a real risk of an unfair trial, it can be recalled that this means an *"inescapably unfair trial, viz. a trial in which the unfairness cannot be avoided by appropriate rulings and directions on the part of the trial judge"*, as stated by Hardiman J. in *Nash v. DPP* at para. 23.

35. As is well known, prejudice can be general or specific. General (or presumptive) prejudice arises from the mere passage of time and the presumption that the recollection of witnesses will have dimmed during the period of delay.

General prejudice

36. General or presumptive prejudice is potentially relevant here as a period of at least five years is now likely to have elapsed between the commission of the offence and the holding of any criminal trial, with a lapse of almost four years inevitable at the trial date of 29 March 2022 — a date which had to be abandoned pending determination of these proceedings.

37. However, the applicant has failed to demonstrate an inescapable unfairness in his trial due to the impact on witnesses. The witnesses in this case gave formal statements within a period of a few months of the incident. The evidence will also include CCTV footage taken by the complainants and their friend.

38. In my view, this case is governed by well-established principles which recognise that the trial judge is best placed to assess the witnesses who will give evidence before him or her and, if he or she has a reasonable doubt as to guilt or as to reliability of the evidence of those witnesses by reason of the passage of time, then there is no doubt that the District judge will vindicate the accused's constitutional rights by dismissing the charge. As Charleton J. stated in *Nash* (at para. 23), the law has moved on since the early decisions in the 1990s and early 2000s and *"[t]he trial judge now has the primary role in decisions of this kind and judicial review is rarely appropriate."*

39. Since the decision of the Supreme Court in *Nash*, the Court of Appeal has stated in *R.B. v. Director of Public Prosecutions* [2019] IECA 48, at para. 9:

"Recent jurisprudence has shown a preference for leaving any matter that arguably might give rise to unfairness to the trial judge, and such an approach most

accurately reflects the balance of interest between the accused person and the administration of criminal justice."

40. Indeed, they then reiterated (at paras. 11 and 12):

"The point is so well established in the authorities that it is not necessary to consider it further and both counsel accept that the starting point must be that the prohibition of a trial will be granted only when the circumstances are exceptional, and that each case is decided on its own merits.

In order to succeed in an application for prohibition, an applicant must show that there is a real risk of an unfair trial, and that that risk is not one that can be fairly dealt with by the trial judge in the giving of directions and in the management of the trial."

41. I think it is clear from those authorities that prohibition should not be granted to restrain the trial on the basis of alleged general prejudice. Insofar as the evidence is no longer reliable, the trial judge can vindicate the applicant's right to a fair trial by, if necessary, dismissing the charge.

Specific prejudice

42. As regards specific prejudice, the applicant attempts to establish this by alleging that there has been a failure by the prosecuting garda to seek out the alleged ex-girlfriend of the applicant. However, this point is raised only in submissions, and there is no evidence tendered on this issue. The principles set out above to the effect that prejudice is a matter to be dealt with by the trial judge applies just as much to cases involving special prejudice as those in which only general prejudice is asserted.

43. In any event, for a number of reasons, I do not accept that there is any specific prejudice arising out of this ground.

44. First, if the applicant says that in May 2018 he was in contact with this woman, then he would have been perfectly entitled himself to seek her out or ascertain her whereabouts, and to see if she could or would give evidence to assist him at trial. He has given no evidence whatsoever as to whether he has even considered doing any of this, let alone taking it upon himself to do so.

45. Secondly, there is no evidence that this person is not available as a witness. It was open to the applicant at any time since he was initially charged or, indeed before that, to contact her and retain her details so as to secure her as a witness in his defence. Furthermore, it has not been established that this lady's evidence would be helpful to the accused.

46. Thirdly, the applicant has not shown that the evidence of this witness would, in any real or concrete way, be relevant to the issues in the trial. The applicant told another resident when asked what he was doing in the estate that he himself was resident there. The statements of various witnesses suggest that there will be evidence at trial of the fact that the applicant was seen loitering around the estate at 6.30am peering in windows (which may not be thought to be the actions of a man visiting somebody with whom he was well acquainted). The applicant's assertion to another person that he was himself living in the estate may be found at trial to undermine his claim that he was visiting an ex-girlfriend.

47. As stated by O'Malley J. in *S. Ó C. v. DPP* [2014] IEHC 65, cited with approval by the Court of Appeal in *R.B. v. Director of Public Prosecutions*, there must be a *"real"* link between the evidence that could have been given by the unavailable witness and the facts in issue or likely to be in issue, at trial. Fanciful,

speculative or hypothetical arguments as to deficiencies in the evidence available at trial could not establish a real risk to an unfair trial, for which prohibition should lie.

48. This approach has since been comprehensively restated by the Supreme Court in *D.P.P. v. C.C.* [2019] IESC 94, where O'Donnell J. stated (at para. 44):

> *"…[T]he assessment of the overall fairness of the proceedings is best carried out at the trial, rather than in advance on the basis of affidavit evidence professionally drafted and speculation as to what might transpire at a trial. The courts came to require that applicants at least directly engage with the case, rather than seek to raise hypothetical issues…."*

49. In my view, the argument of the applicant is entirely fanciful in this instance. It is entirely unclear to me why the evidence of this alleged ex-girlfriend could be relevant in a trial for an offence. The essential constituent element of such an offence are, first, trespass and secondly, that fear is caused by the act of trespass or that it is committed in circumstances which are likely to cause fear. It is difficult to see how the evidence of this lady could only be material to either of those, unless it is contended that she lived at the property in question such that the applicant had express or implied permission to be there. But that cannot be the case as it does not appear ever to have been asserted by the applicant that his ex-girlfriend was living in the property where the two young women were living.

50. Any submission about the non-availability of this lady to give evidence seems to me to fall very far short of the test which the applicant must meet in a case of this kind, which is to show a real risk of unfairness which cannot be avoided by the trial judge.

51. As a result, no specific prejudice which establishes a real risk of an unfair trial has been identified and any general prejudice due to the effect on the recollection of

witnesses by the passage of time can be dealt with by the District judge in the course of the trial. The applicant has not, in my view, even come close to establishing a real and inescapable risk to the fairness of his trial which could not be dealt with by the trial judge and which would therefore merit the grant of prohibition, and I would refuse any relief on these grounds.

ii. Whether there has been a breach of the applicant's right to trial with due expedition

52. The applicant's case therefore stands or falls on the sheer lapse of time, a period amounting to just under four years, before his trial date in the District Court for a summary offence.

53. All delay cases must be considered in light of their specific circumstances, but there are a number of general statements in the authorities which govern that consideration.

Some general considerations

54. First, it is more difficult to identify a breach of constitutional rights in the case of delay *simpliciter*, as opposed to delay where prejudice can be established. Finlay C.J. stated in *Byrne*:

> *"The type of delay which may be involved in this particular form of constitutional right undoubtedly creates difficulties in that it cannot be assessed with any measure of certainty or precision. The delay which is indicative of an improper motive or gross carelessness on the part of*

prosecuting authorities is identifiable, and is different from the mere failure, with which I am at this stage dealing, to render to a person a constitutional right to a trial with reasonable expedition. The delay which has caused, or is likely to cause, significant or serious impairment of an accused person's capacity to defend himself is again readily identifiable and largely may be classified by reason of its consequences on the facts of a particular case. The reasonableness or unreasonableness of a delay which by itself and without any other consequence is an infringement of a constitutional right is much more difficult of definition."

55. Secondly, Denham J. stated in *Devoy v. Director of Public Prosecutions* [2008] 4 IR 235, [2008] IESC 13, Denham J. (at para. 20) that:

"The bar of the test is high because this is a very significant relief - an order prohibiting the public prosecutor from prosecuting an accused."

56. Thirdly, it is clear from the Supreme Court authorities that a consideration of this right requires that position of the accused be weighed in the balance against the right of the community to prosecute offences: see Keane C.J. in *P.M. v. Malone* [2002] 2 IR 560, where he stated (at p. 581):

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

57. Fourthly, the respondents rely heavily on the statements in the Supreme Court authorities that delay under this heading must be *culpable* delay. In *P.M. v. Malone*, Keane C.J. discussed the availability of prohibition in circumstances where there was no actual or presumptive prejudice to the fairness of the trial in terms of the consequence for the accused of *"significant and culpable delay to which he has not contributed"*. Kearns J. subsequently stated in *P.M.v. Director of Public Prosecutions* [2006] 3 IR 172, [2006] IESC 22 (at para. 33) that it was *"blameworthy prosecutorial delay"* which would warrant the balancing exercise established in *P.M. v. Malone*.

58. Similarly, in *Devoy v. Director of Public Prosecutions*, Kearns J. stated (at para. 61):

> "*Not every delay is significant and not every delay warrants the description of being blameworthy to such a degree as to trigger an enquiry by the court under* P.M. v. DPP *or* Barker v. Wingo*."*

59. In *Nash*, also, Clarke J. restated the principles relevant to delay and referred to *"culpable"* delay as ground for dismissal, even where no prejudice to the fairness of the trial could be demonstrated.

60. I therefore agree that the applicant must establish culpable delay on the part of the respondents or the State more generally, in order to trigger the necessary balancing process.

61. In this regard, it must be noted that there are, as Finlay C.J. stated in the passage already quoted, different degrees of culpability. In *Barker v. Wingo* (1972) 407 U.S. 514, which has informed the development of the law in this jurisdiction, the US Supreme Court distinguished between deliberate attempts to delay a trial and more neutral reasons such as negligence or overcrowded courtrooms. The degree of

culpability is part of the balancing exercise which is conducted if sufficient culpable delay is proven.

62. Fifthly, reliance was placed on the statement of Denham J. in *Devoy* (at para. 20), that the one or more of the interests of the accused which were protected by the right must be shown to have been so interfered with as to entitled the applicant to relief. The notion of the applicant's *"interests"* is derived from the analysis in *Barker v. Wingo,* which referred to the interests protected by the right to a speedy trial as being: (i) the prevention of oppressive pre-trial incarceration; (ii) the reduction of anxiety and concern of the accused; and (iii) most importantly, the limitation of any possibility that the defence will be impaired.

63. In considering the effects of pure delay, i.e., where prejudice to the trial cannot be shown, the third of these is irrelevant. Furthermore, this applicant, like many accused, is on bail. Lengthy pre-trial incarceration is not therefore relevant, albeit that a requirement to adhere to bail conditions over a very lengthy period may not be desirable and may only be relevant either under the first heading as a less severe restriction of liberty, or alternatively under the second as a factor which would increase the anxiety and concern of an accused. These general considerations form the starting point for a more detailed assessment of the delay here, the reasons for it, and the effect on the applicant.

Whether there is sufficient culpable delay to trigger the balancing process

64. Cases turning on delay *simpliciter*, where an impact on the fairness of a trial is not asserted or proven, tend to relate to systemic delays within the courts system or errors by the prosecution which lead to legal difficulties which must be resolved

before the trial can be listed: see for example *Devoy*, where an error in the return for trial was not noticed for some time.

65. *Byrne* provides a further example, where the delay had been caused by the District Court office which had taken seven months to issue the summons, notwithstanding a prompt application by the prosecuting garda. While the majority in that case held that the overall delay of ten months was simply not long enough to lead to the prohibition of the trial, the Supreme Court unanimously held that the prosecution would be liable for delays by State authorities — even where it had no control over those delays.

66. The longest period of delay here, from February 2020 to the eventual trial date of March 2022, was not caused by *mala fides* or gross carelessness by the prosecuting garda, nor even by any systemic deficiency or default by any State authority, but was occasioned by the Covid 19 pandemic. In *Devoy*, Kearns J. referred to *Barker v. Wingo* with approval, noting that delays due to prosecutorial attempts to hamper the defence would weigh more heavily than delay caused by more neutral reasons such as negligence or overcrowded courtrooms. These latter reasons would weigh less heavily but must still be considered, as the State was ultimately responsible for them. On the other hand, some delay might be justifiable.

67. Delay by reason of the large scale public health emergency which occurred not only in this country but around the world in early 2020 cannot, in my view, be regarded as culpable delay. It was, in effect, an event of *force majeure* over which the State had no control.

68. The applicant attempts to attribute blame to the State in its response to the pandemic, and specifically by reference to the fact that, throughout the pandemic, matters relating to those in custody proceeded. The applicant says that, given his trial

had already been delayed by two years, his trial ought to have been prioritised, notwithstanding the pandemic. However, there is no evidence whatsoever that the applicant's position was in any way exceptional.

69. Given the numbers of people affected by the measures taken in response to the pandemic, and in light of the comments of Kearns J. in *Devoy* as to the need for evidence of the position of an applicant *vis-à-vis* the normal timeline for the hearing of a summary trial, I would need specific evidence in order to regard the applicant as being in any way exceptional. In fact, I strongly doubt that his case was in any way exceptional.

70. In any event, the State was not responsible for the emergence of a novel Coronavirus and the consequent public health emergency. This had obvious consequences for court hearings which require – even for summary offences, triable without a jury – relatively large numbers of people, most of whom do not know each other and would not otherwise meet, to gather in one room.

71. The starting point, therefore, in establishing culpability in the manner in which the District Court dealt with criminal cases for the first year of the Covid 19 pandemic is that there is an onus on the applicant to demonstrate that the arrangements made for a small portion of criminal trials was unreasonable. The applicant has not tendered any evidence on this point, and indeed it is difficult to see how any such evidence could be comprehensive. However, the essential point is that there is, in my view, no basis for saying that the State acted unreasonably.

72. I was asked in the course of the hearing to take judicial notice of the fact that certain matters proceeded in the Courts of Criminal Justice in Dublin 8 from the very beginning of the pandemic. However, it was agreed instead that the Notices which had been published by the President of the District Court during the pandemic, advising as

to which types of cases would be heard, would be submitted to me after the hearing of the application.

73. It is clear from the District Court Notices which were submitted, and which were dated 2 June 2020 to 25 March 2022 (and therefore cover the period from the initial trial date that to that ultimately fixed), that in 2020, there were block adjournments of criminal cases in the District Court other than: those where the accused was in custody on the charges before the court, part-heard cases, prosecutions for alleged breaches of Domestic Violence Orders which had occurred during the pandemic, and cases where there were garda witnesses only. The Notice dated 6 January 2021 advised that all scheduled criminal hearings would be vacated and relisted for mention in March 2021 to fix dates for hearings. Only hearings involving the prosecution of alleged breaches of domestic violence orders, cases where the accused was in custody, and hearings involving only State witness would proceed, if it was safe to do so.

74. Those Covid Notices demonstrate that only very limited categories of cases went ahead during the pandemic. The applicant was on bail and in respect of a summary offence which was not within the limited category which it was decided should proceed during the pandemic.

75. The applicant complains that his case should have been prioritised because there had already been delay. As stated above, I am of the view that there was limited prosecutorial delay of only a few months in the applicant's case. It is difficult to see how this limited period of delay should have entitled the applicant to priority during the pandemic. There is no evidence as to how many people were in a similar position to the applicant but, given the limited period of delay, it may have been quite a large number.

76. Were the President of the District Court to have listed summary trials where there had been a delay of some months in making disclosure, I suspect that many cases would have had to be listed for hearing. However, in reality, the requirements of persons in the applicant's position had to be balanced against more urgent matters, particularly cases where the accused was remanded in custody and the need to protect victims of domestic violence, given the sad fact that incidents of domestic violence become more common in a pandemic. In my view, there is no basis for finding anything blameworthy in the manner in which certain cases were prioritised during the pandemic.

77. As a result, there is only a limited period of culpable delay, relating to the period where the prosecuting garda was unwell and out of work. This is not sufficient to trigger the balancing exercise applicable where prohibition is sought on the basis purely of delay.

78. Before leaving the topic of delay, I want to address a specific point that was made in the Statement of Grounds, which suggested in reliance on a series of authorities that, once a period of four years had passed, prohibition was available to restrain a trial for a summary offence.

79. Insofar as it was suggested that *Director of Public Prosecutions v. Arthurs* [2000] 2 I.L.R.M. 363 is authority for the proposition that a summary trial may be dismissed for delay once a period of two years has elapsed post-charge, I think it is clear that this has been disapproved by the Supreme Court in *Devoy* and in *Cormack v. Director of Public Prosecutions* [2009] 2 I.R. 208, [2008] IESC 63. In *Devoy*, Kearns J. stated that the courts were not in a position to *"frame a subjective limitation period for the prosecution of criminal offences, even offences of a summary nature"*

and that it would be necessary to apply the balancing approach as set out in *P.M. v. Malone* and subsequent cases.

Whether the public interest in prosecution in this case would outweigh any culpable delay

80. Even if I were to regard the delay here as being culpable based on an allegation that it reacted irrationally or excessively to the public health emergency in March 2020 – and I do not – it is well settled that the applicant must then satisfy a balancing test, in the course of which he has to meet a very high bar, that his right to a trial with due expedition outweighs the public interest. Generally, that public interest has been in the prosecution and conviction of persons guilty of criminal behaviour. As Clarke J. stated in *Nash*, the default is that cases will be decided on their merits, which in criminal cases, gives due regard to the rights of victims.

81. In conducting the necessary balancing exercise, I would stress that any attempt to classify the crime of which the applicant was accused as being in some way trivial in nature would be in my view entirely misconceived. Should the statements of the female witnesses be given in evidence and accepted at trial – and that is entirely a matter for the trial judge which is why I couched it in conditional terms – then they were caused a great deal of fear and anxiety and feared for their own personal safety. Although ultimately a matter for the District judge conducting the trial to find whether fear was caused or whether the circumstances of any trespass committed by the applicant was likely to cause fear, it is certainly not unreasonable to think that young women who are in the course of getting up, getting dressed, and going to work, would

feel fear at the sight of an unknown male trespasser peering through their windows. This may have been particularly the case when it happened two mornings in a row.

82. Again, I stress that any findings on these issues are for the District judge, but for the purposes of this judgment, it is necessary to consider on the basis that the allegations may ultimately be proven, the public interest in prosecution. It seems to me that the circumstances of this case are such that there is a clear public interest in prosecution so as to vindicate the dignity, privacy and safety of women in their own homes.

Conclusion

83. In my view, there is no breach of the applicant's rights in this case. The delay which occurred in bringing the applicant to trial was primarily due to a global public health emergency which necessitated extraordinary responses by the State, including the courts. This is not something for which the State can be blamed, notwithstanding the best efforts of the applicant's counsel to establish that his particular client should have been treated differently from other persons who were, in March 2020, remanded on bail and awaiting trial in the District Court. It has not been established that this applicant was in so exceptional a situation that his trial should have proceeded, notwithstanding that to conduct such a trial would have posed a risk to public health.

84. There is no specific prejudice to fairness of the applicant's trial, and any general prejudice arising out of the passage of time and its effect on the recollection of witnesses can and should be dealt with by the District judge at trial. The obligation to ensure that the applicant gets a fair trial remains and will be vindicated by the trial judge.

85. I therefore refuse the reliefs sought.