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Judgment: approved by the Court for handing down | *Delivered:* **20/06/2003**
(subject to editorial corrections)

IN THE CROWN COURT IN NORTHERN IRELAND

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THE QUEEN

v

REILLY AND R HOGG & SONS LIMITED

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McCOLLUM LJ

[1] This is an application by each of the defendants for a stay of proceedings.

[2] Each relies on Article 6(1) of the European Convention on Human Rights and submits that trial cannot now take place "within a reasonable time" and further that their trial has been prejudiced by delay and should therefore be stayed under the Common Law principles.

[3] The second named defendant also submits that his right to a fair trial has been violated by the addition of a count for manslaughter on the application of the prosecution under Section 22(e) of the Grand Jury Abolition Act (Northern Ireland) 1969.

[4] I shall deal with the delay point first.

[5] Mr Joseph Molloy died on 17 January 2000 as the result of the collapse of a trench in which he was working.

[6] On the following day Mr Kenneth Logan an officer of the Health and Safety Executive visited the scene and took statements from the first-named defendant and from representatives of the second-named defendant.

[7] It appears that consideration was primarily given to the question of prosecuting the first-named defendant for failure to provide liability insurance cover.

[8] The question of manslaughter prosecution seems to have first arisen on 5 September 2000 in the course of a telephone discussion between Mr Logan and their representative of the DPP.

[9] According to Mr Logan's evidence this is the first time that such a prosecution has been undertaken in Northern Ireland.

[10] Mr Kerr QC was consulted and two consultations were held and he gave an opinion on the matter on 31 March 2001.

[11] Further information was obtained and the matter was discussed with police officers and ultimately Mr Richard Hogg of the second-named defendants was interviewed on 23 May 2001. Further interviews took place on 6 June 2001 and Mr Reilly was interviewed on 28 August 2001.

[12] Mr Jack Hogg who appears to be a senior director of the second-named defendants was interviewed on 5 September 2001.

[13] On 5 December 2001 the case was submitted to the Case Preparation Section of the Department of Public Prosecutors.

[14] In that month further advices and directions were sought from Mr Kerr QC.

[15] Mr Richard Hogg was re-interviewed on 18 January 2002 and this led to a further interview of Mr Irwin of Causeway Equipment.

[16] On 23 March 2002 the DPP authorised the institution of proceedings against both defendants and a direction to prosecute was issued on 5 April 2002.

[17] The defendants were returned for trial, the first-named defendant on a charge of manslaughter and also on charges of breach of statutory duty, the second-named defendant on charges of breach of statutory duty only, the Resident Magistrate having refused informations on the manslaughter charge.

[18] An application was presented in October for a voluntary Bill of Indictment and on 21 February 2003 the Crown was granted leave to present a voluntary Bill of Indictment and arrangements were set in train for trial which has come on in May 2003.

[19] It has been submitted that the passage of time since the fatal accident is such that it would be an abuse of the process of the court to try the defendants.

[20] The nature of the right declared by the European Convention has received judicial consideration at the highest level. In Procurator Fiscal, Lunlithgow v Watson & Burrows and HM Advocate v J K Lord Bingham of Cornhill comprehensively reviewed the effect of the European Convention in the following passage:

> "48. Before the second world war there were no international agreements governing the protection of human rights, which was indeed an expression rarely used. Gradually and erratically, as very well described by Professor Brian Simpson in *Human Rights and the End of Empire* (2001), chapters 4 and 5, such protection emerged as an allied war aim. The Universal Declaration of Human Rights 1948 (which contained nothing equivalent to the reasonable time requirement) was one product of that movement; the European Convention on Human Rights and Fundamental Freedoms was a later and much more potent product. Those who negotiated and first signed the convention were not seeking to provide a blueprint for the ideal society. They were formulating a statement of very basic rights and freedoms which, it was believed, were very largely observed by the contracting states and which it was desired to preserve and protect both in the light of recent experience and in view of developments in Eastern Europe. The convention was seen more as a statement of good existing practice than as an instrument setting targets or standards which contracting states were to strive to achieve.
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> 49. Thus the rights guaranteed by the convention were minimum rights. It was, and of course remains, open to any contracting state to provide better protection than the convention requires and, since the convention is a living instrument, the standards guaranteed by the convention are to be reinterpreted in accordance with changing perceptions of individual right. But the standard of protection guaranteed, if a minimum, was to be common. It could not be thought that suspects could be maltreated in country A because such maltreatment was known to be endemic in that country although unacceptable in other contracting states, or that

state censorship of the media was acceptable in country B where it has always existed although unacceptable among other contracting states. So to hold would be repugnant to and subversive of the whole notion of an international convention to protect human rights and fundamental freedoms. If there were any room for doubt on this point, it would be resolved by the language of the convention itself, which refers in article 7(2) to `the general principles of law recognised by civilised nations' and in articles 8, 9, 10 and 11 to limitations and restrictions `necessary in a democratic society'. The convention looks to an objective, common measure of protection.

50. In *Stögmüller v Austria* (1969) 1 EHRR 155 (p 191, para 5) the court highlighted the need for

prosecution of defendants detained in custody see paragraph 33 above. The reason is obvious. Until convicted a defendant is presumed to be innocent. Such a person should not be deprived of his liberty save when and for so long as good grounds for his detention are reasonably thought to exist (article 51(1)(c)) and he should be brought to trial as soon as reasonably practicable. The Strasbourg case law makes plain the object of the reasonable time requirement: to ensure that accused persons do not lie under a charge for too long and that the charge is determined *(Wemhoff v Federal Republic of Germany* (1986) 1 EHRR 74, 90, para 58: see para 43 above). Both the reasonable detention provision and the reasonable time requirement confer independent, freestanding, rights. A violation of either right may be found in the absence of any prejudice to the fairness of the defendant's trial. This was made explicit in *Eckle v Federal Republic of Germany* (1982) 5 EHRR 1, 24, para 66: see paragraph 40 above. It is implicit in the Strasbourg judgments, which consider alleged violations of the reasonable detention provision and the reasonable time requirement without reference to the fairness ingredient of article 6(1) and, where there is a challenge to the fairness of the trial, consider that aspect quite separately.

51. The reasonable detention provision and the reasonable time requirement confer important rights on the individual, and they should not be watered down or weakened. But the individual does not enjoy these rights in a vacuum. His is a member of society and other members of society also have interests deserving of respect. This was recognised by the court in *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35; 52 when, in paragraph 69 of its judgment, it referred to the striking of a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights, the search for which balance was said to be inherent in the whole of the convention. See also *Soering v United Kingdom* (1989) 11 EHRR 439 at p 465, para 89; *B v France* (1992) 16 EHRR 1 at p 34, para 63. It was again recognised in *Doorson v The Netherlands* (1996) 22 EHRR 330, 358 when, in paragraph 70 of its judgment, the court spoke of the need in appropriate cases to balance the interests of the defence against those of witnesses or victims called upon to testify. While, for the reasons already given, it is important that suspects awaiting trial should not be detained longer than reasonably necessary, and proceedings (including any appeal) should be determined with reasonable expedition, there is also an important countervailing public interest in the bringing to trial of those reasonably suspected of committing crimes and, if they are convicted, in their being appropriately sentenced. If the effectiveness and credibility of the administration of justice are jeopardised by excessive delay in bringing defendants to trial, they are liable to be jeopardised also where those thought to be guilty of crime are seen to escape what appear to be their just deserts.

52. In any case in which it is said that the reasonable time requirement (to which I will henceforward confine myself) has been or will be violated, the first step is to consider the period of time which has elapsed. Unless that period is one which, on its face and without more, give grounds for real concern it is almost certainly unnecessary

to go further, since the convention is directed not to departures from the ideal but to infringements of basic human rights. The threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed. But if the period which has elapsed is one which, on its face and without more, gives ground for real concern, two consequences follow. First, it is necessary for the court to look into the detailed facts and circumstances of the particular case. The Strasbourg case law shows very clearly that the outcome is closely dependent on the facts of each case. Secondly, it is necessary for the contracting state to explain and justify any lapse of time which appears to be excessive.

53. The court has identified three areas as calling for particular inquiry. The first of these is the complexity of the case. It is recognised, realistically enough, that the more complex a case, the greater the number of witnesses, the heavier the burden of documentation, the longer the time which must necessarily be taken to prepare it adequately for trial and for any appellate hearing. But with any case, however complex, there comes a time when the passage of time becomes excessive and unacceptable.

54. The second matter to which the court has routinely paid regard is the conduct of the defendant. In almost any fair and developed legal system it is possible for a recalcitrant defendant to cause delay by making spurious applications and challenges, changing legal advisers, absenting himself, exploiting procedural technicalities, and so on. A defendant cannot properly complain of delay of which he is the author. But procedural time-wasting on his part does not entitle the prosecuting authorities themselves to waste time unnecessarily and excessively.

55. The third matter routinely and carefully considered by the court is the manner in which the case has been dealt with by the administrative and judicial authorities. It is plain that contracting states cannot blame acceptable delays on a general

> want of prosecutors or judges or courthouses or on chronic under-funding of the legal system. It is, generally speaking, incumbent on contracting states to organise their legal systems as to ensure that the reasonable time requirement is honoured. But nothing in the convention jurisprudence requires courts to shut their eyes to the practical realities of litigious life even in a reasonably well-organised legal system. Thus it is not objectionable for a prosecutor to deal with cases according to what he reasonably regards as their priority, so as to achieve an orderly dispatch of business. It must be accepted that a prosecutor cannot ordinarily devote his whole time and attention to a single case. Courts are entitled to draw up their lists of cases for trial some time in advance. It may be necessary to await the availability of a judge possessing a special expertise, or the availability of a courthouse with special facilities or security. Plans may be disrupted by unexpected illness. The pressure on a court may be increased by a sudden and unforeseen surge of business. There is no general obligation on a prosecutor, such as that imposed on a prosecutor seeking to extend a custody time limit under section 22(3)(b) of the Prosecution of Offences Act 1985, to show that he has acted `with all due diligence and expedition.' But a marked lack of expedition, if unjustified, will point towards a breach of the reasonable time requirement, and the authorities make clear that while, for the purposes of the reasonable time requirement, time runs from the date when the defendant is charged, the passage of any considerable period of time before charge may call for greater than normal expedition thereafter."

[21] In discussing the extent of delay that might be regarded as infringement of a defendant's right under Article 6(1) in HM Advocate & Anr v R [2003] 2 WLR 343 at paragraph 80 Lord Hope of Craighead said:

> "80. The conclusion which I would draw from an examination of the Convention right in the context of what Parliament has laid down in section 57(2) of the Scotland Act 1998 – and it has been said that, in law, context is everything – is

> that the stage at which the concerns of the individual, of society and of the system of criminal justice as a whole must be taken into account is the state when one is considering whether the right to a determination of the criminal charge within a reasonable time has been breached. That there has been such a breach has been conceded in this case. I make no criticism of that decision. But, as I indicated in *Mills v HM Advocate* [2002] 3 WLR 1597, 1607-1608, paras 29 and 30, concessions on this point ought not to be made in the future without taking full account of the observations which are set out in the Board's judgment in *Dyer v Watson* [2002] 3 WLR 1488. It should be remembered also that we are dealing in this case with what may be called `pure' delay. There has been no suggestion of prejudice, nor – to put the matter in convention terms – has it been suggested that in consequence of the delay the applicant will not receive a fair trial. The statutory protections for an accused are such that complaints of delay before trial unaccompanied by allegations of prejudice are seldom likely to arise in Scotland, for the reasons explained by Lord Rodger. But I suggest that, if the issue is raised, the question whether the threshold has been crossed should be examined in the way that the judgment in *Dyer v Watson* has indicated with caution and with full regard to the consequences as to remedy which, in the case of proposed or continuing acts, section 57(2) of the Scotland Act 1998 makes inevitable."

[22] Irrespective of the outcome of the trial, a person's human rights are breached by failure to observe the reasonable time requirement. This fact gives some indication of the nature of the delay which is liable to cause such a breach.

[23] Despite the fairness of the trial itself, and a result favourable to the defendant, if he can establish that the proceedings did not conclude within a reasonable time, he has an enforceable claim against the state for delay.

[24] A delay that has caused no injustice or prejudice but is nonetheless a breach of the citizen's human rights would necessarily be an inordinate and inexcusable delay.

[25] The right is not one to a trial as soon as possible or even as soon as practicable, but to trial within a reasonable time.

[26] It is clear from the authorities that no general rule can be laid down for the period of delay that might constitute a breach of Article 6(1).

[27] However, to my mind, only delay which indicated real neglect, error, inefficiency or lack of resources on the part of the prosecuting authority, resulting in considerably greater passage of time that normally experienced in that type of case would raise a case for redress under Article 6(1).

[28] In the present case the proceedings have taken a good deal longer than was strictly necessary had they been instituted with all due expedition.

[29] However the case can be distinguished from many criminal cases in that in most serious criminal cases involving injury to the person or death it is obvious from the time of the occurrence itself that some person should be prosecuted.

[30] In the case of an industrial accident this is not necessarily so and indeed as I have already commented this is the first prosecution for manslaughter arising from such an accident.

[31] In my view it was correct for the authorities to act with caution and to consider each step carefully before taking it.

[32] There has been a succession of delays but in my view having regard to all the circumstances of the case there has not been such a delay as to amount to a breach of the Convention rights of the defendants.

[33] The common law right is of course distinct in the sense the matter is not to be decided solely by reference to the length of delay but is to be decided on the basis of the effect of the delay on the fairness of the trial.

[34] In this case the defendant was asked to give an account of the accident on the day following and was subsequently interviewed by the police.

[35] The matters at issue concern the nature of the precautions taken to protect the life of Mr Molloy.

[36] In my view the passage of time since the occurrence is not such that anyone concerned in this matter would have any difficulty in remembering the significant facts which are not matters of split second recollection.

[37] I am satisfied that the delay has not prejudiced the defendants or either of them.

[38] The second defendant makes a further point that the exercise by the court of its powers under Section 2(5) of the Grand Jury Abolition Act (Northern Ireland) 1969 constitutes an abuse of the process of the court since the defendant is not normally heard at such an application and this defendant was not in fact heard.

[39] Generally speaking a defendant does not have a right to be heard upon the issue of whether he is to be prosecuted on a particular charge.

[40] The procedure is that the charge is preferred and proceeds to trial with a number of safeguards which protect the defendant against groundless charges.

[41] In the case of an indictable offence the most usual safeguard is that a magistrate considers the evidence before committing the defendant for trial. However as Section 2(2) of the Grand Jury Abolition provides there are other ways in which a charge may properly be brought. Under 22(b) a person already committed for trial may have further charges brought which are founded on facts or evidence disclosed in the depositions but the judge has the power to disallow or quash any indictment or count presented by virtue of that sub-section and under 2(2)(e) an application may be made to a Crown Court judge for presentation of an indictment and under 2(2)(f) the Attorney General may direct the presentation of such an indictment.

[42] These different methods of bringing a case before the court on indictment provide adequate measure of protection to a proposed defendant against groundless accusations.

[43] Mr Simpson QC for the defendant submitted that following the exercise of a power under Section 2(2) a defendant was deprived of the opportunity of having the judge order an entry of `no bill' under Section 2(3) of the Act.

[44] However in my view that power is always exercisable by the presiding judge.

[45] I have considered it in this case in the light of the further submissions made by Mr Simpson and I am satisfied that there is a case fit to be tried upon indictment against this defendant.