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Supreme Court of Ireland Decisions

Judgment Title: O'Brien v Director of Public Prosecutions

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Judgment by: Denham C.J.

Status of Judgment: Approved

THE SUPREME COURT

Appeal No: 277 & 288/2013

Denham C.J.
Murray J.
MacMenamin J.

Between/

Breifne O'Brien

Applicant/Appellant

and

The Director of Public Prosecutions

Respondent

Judgment of the Court delivered on the 14th day of May 2014, by Denham C.J.

1. This is an appeal by Breifne O'Brien, the applicant/appellant, referred to as "the appellant", from the judgment of the High Court (Kearns P.) delivered on the 16th May, 2013, which refused the primary relief sought by the appellant, i.e. the prohibition of his trial, but ordered that the trial, the subject matter of the proceedings entitled The DPP v. Breifne O'Brien, Bill No. DUDP 1081/2012, pending before the Dublin Circuit Criminal Court, be stayed for a period of twelve months from the 16th May, 2013.

2. The Director of Public Prosecutions, the respondent, referred to as "the DPP", filed a cross appeal in respect of that part of the judgment and order where the High Court granted a temporary stay until the end of the second quarter of 2014.

Background Facts

3. The President described the background facts as follows:-

> "The [appellant] a former businessman, stands charged with 45 charges of theft and deception contrary to ss. 4 and 6 of the Criminal Justice (Theft and Fraud Offences) Act 2001 relating to five complainants namely, Evan Newell, Louis Dowley, Martin O'Brien, Pat Doyle and Daniel Maher, all allegedly committed between the 4th December, 2003 and the 27th November, 2008 at various locations in counties Dublin and Kildare. In essence, it is alleged that the [appellant] operated a pyramid or ponzi type scheme during the course of which he sought and received large sums of money from the five complainants on the basis of fictitious investment opportunities. His alleged *modus operandi* was to seek money from one investor and, having promised that investor a return, when the time came for the return of the investment, if he was not able to convince the investor to reinvest in another further bogus transaction, he would seek a different investor and would use the new investment to pay off the first investment and its bogus return. This process is alleged to have been repeated over a ten to fifteen year period, but in December 2008 it became apparent that the [appellant] was in financial difficulty and was unable to repay sums allegedly invested by the complainants and other investors. It transpired that substantial monies had not been held in the manner agreed or used for the purpose agreed but rather were appropriated to fund various uses including meeting the [appellant's] own personal lifestyle, alleged to be of a lavish and high profile nature."

4. The appellant brought an application by way of judicial review seeking to prohibit his criminal trial on grounds that he could not now, or in the future, receive a fair trial by reason of substantial and ongoing adverse publicity.

The High Court

5. The President of the High Court stated that despite the lengthy interval since the discovery of the appellant's alleged wrongdoing, and the proposed date of trial, it was

argued by the appellant that the adverse and negative publicity surrounding his activities were such as to preclude the possibility that he would ever receive a fair trial, and that the primary relief sought was a complete bar to any trial. However, at the hearing in the High Court, and with the Court's leave, counsel for the appellant indicated to the Court that if they did not receive the primary relief, they would seek a lengthy stay or adjournment of his trial to permit the operation of a "fade factor".

6. The High Court reviewed the material complained of, which was categorised into four headings as follows:-

> (i) remarks by Kelly J. during the course of civil proceedings against the appellant;
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> (ii) a chapter in a book entitled "*Bust: How the Courts Have Exposed the Rotten Heart of the Irish Economy*" by Dearbhail McDonald;
>
> (iii) numerous articles, many of a lurid and sensational nature, contained in newspapers between 2008 and 2012;
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> (iv) a television documentary entitled "Beware Ireland, Con Artists Caught in the Act", first televised on the 29th February, 2012, repeated on the 3rd October, 2012, and again repeated on channel 3e on the 1st January, 2013.

7. The High Court considered each of these categories, and described the material. The learned trial judge also analysed the relevant case-law.

8. The High Court accepted that there had been extensive factual and emotive publicity, and evaluated the potential impact of the material in the context of empanelling a jury, in the second quarter of 2014, to hear and determine the case.

9. The President of the High Court concluded:-

> "I think the television broadcasts, taken in conjunction with the huge volume of printed newspaper articles, are such as to suggest a trial in present circumstances would constitute an appreciable risk of an unavoidably unfair trial having regard to the legal tests outlined about.
>
> I would thus have reservations about a trial proceeding in the immediate future. That said, I see no reason why, after a reasonable interval of time, a trial, suitably managed by a judge who would give all necessary warnings and directions, could not take place.
>
> In the case of this particular application, counsel for the [appellant] indicated that, if his application for a permanent prohibition was unsuccessful, he would in the alternative seek as long a stay as possible to allow the 'fade factor' to operate.
>
> On the unchallenged evidence before the Court, a trial is unlikely to occur before the second quarter of 2014. Counsel for the [appellant] stressed that if an earlier trial date became available due to the adjournment or non-commencement of some other lengthy case, the present case might be leapfrogged to an earlier hearing date.
>
> In those circumstances I will direct a stay on the actual trial of the [appellant] for twelve months from today's date. This need not hold up or

> otherwise affect the making now of arrangements for the holding of the trial in 12 months time. I do not believe any of the material relied upon [by] the [appellant] in making this application justifies granting any more extensive relief, and certainly not the total prohibition of the trial sought on his behalf. However, that is not to say that the [appellant] would be precluded from bringing a further application if, apart from reports of this judgment and decision, there were to be a significant recrudescence of adverse publicity between now and a trial scheduled for the second quarter of 2014."

10. The appellant filed a notice of appeal to this Court on the 24th June, 2013. In the notice, he sought a permanent order of prohibition of his trial, or, in the alternative, an order staying the trial of the appellant for such time as the Court deems appropriate, and a declaration that the criminal prosecution is a violation of the appellant's right to trial in due course of law. The appellant set out nine grounds of appeal, as follows:-

> (i) The learned trial judge erred in law and in fact in holding that the [appellant] herein would be capable of receiving a fair trial at a point in time after May of 2014 or at any point in the future.
>
> (ii) The learned trial judge erred in law and in fact in holding that the comments of Mr. Justice Peter Kelly made in the course of prior civil proceedings and widely repeated in the print broadcast and electronic media, do not give rise to a real and unavoidable risk of unfairness.
>
> (iii) The learned trial judge erred in law and in fact in concluding that the above comments were proportionate and balanced in all of the circumstances and that their making had been permissible and appropriate.
>
> (iv) The learned trial judge erred in law and in fact in holding that the contents of the book entitled *Bust: How the courts have exposed the rotten heart of the Irish Economy*, authored by Dearbhail McDonald, a full chapter of which is devoted to the [appellant] and the allegations made in respect of him, does not give rise or contribute in any significant way to a real and unavoidable risk of unfairness.
>
> (v) The learned trial judge erred in law and in fact in failing to have regard, when reaching his decision in the case, to the extent to which prejudicial material which is unlikely to be deemed admissible in any subsequent criminal trial of the [appellant] has been widely and repeatedly referenced and disseminated in the print, broadcast and electronic media.
>
> (vi) The learned trial judge erred in law and in fact in failing to have any or any sufficient regard, when considering his decision in this case, to the cumulative effect of the prejudicial material, identified by the appellant in these proceedings, in relation to the appellant personally and his alleged involvement in the criminal conduct the subject matter of the said criminal trial.
>
> (vii) The learned trial judge erred in law and in fact in holding that in all the circumstances any risk of unfairness which might arise by reason of the adverse publicity complained of, could adequately be dealt with by way of appropriate judicial warnings and directions.

(viii) The learned trial judge erred in law and in fact in holding that in all the circumstances any risk of unfairness which might arise by reason of the adverse publicity complained of, would dissipate sufficiently with the passage of time or by operation of the so-called "*fade factor*".

(ix) The learned trial judge erred in law and in fact by attaching in his decision, undue weight to both the efficacy of appropriate judicial warnings and directions and the operation of the so-called "*fade factor*", in remedying the impact of adverse pre-trial publicity on the minds of jurors and the attendant risk of unfairness arising therefrom, in the absence of any genuine empirical evidence for same.

Submissions
11. The Court received written submissions from the appellant and the DPP.

Oral Submissions from the Appellant
12. The appellant made oral submissions to the Court, as a lay litigant.

Adjournment Application
13. First, the appellant sought an adjournment on two grounds.

14. The appellant stated that he was a lay litigant, that he could not now afford a legal team, and that he had been unable to obtain legal aid. In those circumstances he sought an adjournment.

15. A person is entitled to legal aid if they fit the established criteria. Applications for legal aid are not a matter within the jurisdiction of this Court. Consequently, this is not a ground upon which to grant an adjournment, and so this application was refused.

16. The second ground upon which the appellant sought an adjournment was his application that the recent decision of this Court in *DPP v. Gormley & White* [2014] IESC 17, was relevant to his case. However, that case is not relevant to the facts and basis of this appeal, and thus is not a ground upon which to grant an adjournment in these proceedings.

Appellant's Submissions on the Substantive Issues
17. The appellant's oral submissions were based on a lengthy document. The Court requested the appellant to file a copy of this document with the Court, which he has done. Thus, with the assistance of this document, the key aspects of the appellant's submissions on this appeal may be identified and considered.

18. The submissions made by the appellant were essentially threefold, although there was a degree of interconnection. These were:-

(i) The breach of the appellant's presumption of innocence owing to the comments of Kelly J. made in the course of civil proceedings in the Commercial Court.

(ii) These comments are in breach of the appellant's entitlement under the European Convention of Human Rights, particularly Articles 6.1 and 6.2.

(iii) The passage of 365 days will not erase the issues Kearns P. considered extant and preventative of a fair and impartial trial at

that time.

Submissions on behalf of the DPP

19. On behalf of the DPP, it was submitted, in essence, that a jury properly directed can fairly try this case; that there is no real or demonstrated risk that a jury, properly directed, will decide this case on anything other than the evidence properly adduced in the trial. The DPP submitted that there was no requirement in the first instance to allow a period of "fade" in order to safeguard the appellant's fair trial rights, particularly with regard to the limited impact of the most recent television broadcast on 3e with an apparently low viewership, the historic nature of the balance of the other publicity relied upon, and the commonsense intelligence that a jury brings to bear in dealing with a case on the basis of the evidence adduced. It was submitted that juries can be relied upon to discharge their duties carefully and cognisant of the court's directions. It was also submitted that the order made was unnecessary in that the evidence before the Court was that the case would not come on for hearing before the second quarter of 2014 in any event.

Decision

20. In this appeal, the appellant, while advancing the threefold aspects of his appeal, relied significantly on the European Convention on Human Rights, referred to as "the ECHR", and cases from the European Court of Human Rights, referred to as "the ECtHR". This appears to have been a nuanced difference to the case advanced in the High Court.

21. The Court has considered carefully the documents in the case, the exhibits which set out the printed media coverage complained of, and the DVD of the TV programme which has been viewed by the members of the Court.

Charge

22. The appellant was charged on the 20th September, 2012, and in November, 2012. He had been arrested first on the 7th July, 2011, and released.

23. Much of the publicity complained of by the appellant occurred before he was charged.

24. Under s. 4A of the Criminal Justice Act, 1967, as inserted by s. 9 of the Criminal Justice Act, 1999, provisions relating to indictable offences are set out. There are provisions providing that the proceedings are not to be published or broadcast in accordance with s. 4J of the Act of 1967, which provides as follows:-

> "4J.—(1) No person shall publish or broadcast or cause to be published or broadcast any information about a proceeding under this Part other than—
>
> (a) a statement of—
>
> (i) the fact that the proceeding has been brought by a named person in relation to a specified charge against a named person, and
>
> (ii) any decision resulting from the proceeding,
>
> and
>
> (b) in the case of an application under section 4E for the dismissal of a charge against the accused, any information that the judge hearing the application permits to be published or broadcast at the

request of the accused."

25. Marie McGonagle in *Media Law* (Roundhall, 2003, 2nd edn.) at p. 257 refers to the section as follows:-

> "The purpose of the restriction is undoubtedly to protect the accused and ensure his/her right to a fair trial. However, it could be argued that it is phrased in very broad terms and is overly restrictive in its reach. In practice, the section that it replaces was constantly breached, not necessarily in a prejudicial manner but certainly in a technical sense. The Law Reform Commission, however, recommended no change. [Consultation Paper on Contempt of Court, 1991, at p. 248; and Report on Contempt of Court (LRC 47 - 1994) at para 6. 36]."

While not determining that the section is overly restrictive, the view as expressed is of interest.

26. Once the criminal process has been commenced by a charge, there is a clear responsibility on all publishing and broadcasting bodies not to disrupt these court proceedings. This responsibility includes not publishing material which creates a real risk of an unfair trial. Publication of such information may be a contempt of court.

27. Also, there is a duty on the DPP, as the prosecutor on behalf of the people, to take all reasonable steps to protect a fair trial. This duty includes, where necessary, instituting proceedings for contempt of court.

28. Although a letter was written, prior to the hearing of the High Court on the appellant's application, to certain media organisations, the DPP took no legal proceedings, or any proceedings, in this case.

29. The first and second of the appellant's threefold submissions will be taken together and considered by the Court. These are:- (i) the alleged breach of the presumption of innocence of the appellant owing to the comments of Kelly J.; and (ii) that these comments are in breach of the appellant's entitlement under the ECHR, particularly Articles 6.1 and 6.2.

30. The presumption of innocence is a fundamental principle under the Constitution, embedded in the right to a fair trial, and in the right to due process. Consequently, it is an inherent aspect of Article 38.1° of the Constitution. However, the appellant commenced his legal argument by reference to the ECHR and decisions of the ECtHR.

Case-law of the ECtHR

31. In this appeal the appellant laid stress on the ECHR. In particular, the appellant submitted that the comments of Kelly J. breached rights as protected under Articles 6.1 and 6.2.

32. Articles 6.1 and 6.2 of the ECHR provides as follows:-

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable and impartial tribunal established by law…
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

33. The European Convention on Human Rights Act, 2003, referred to as "the Act of 2003", expressly provides in s. 4 that judicial notice shall be taken of the ECHR provisions

and of:-

> "(a) any declaration, decision, advisory opinion or judgment of the European Court of Human Rights established under the Convention or any question in respect of which that Court has jurisdiction,
>
> (b) any decision or opinion of the European Commission of Human Rights so established on any question in respect of which it had jurisdiction,
>
> (c) any decision of the Committee of Ministers established under the statute of the Council of Europe on any question in respect of which it has jurisdiction,
>
> and a court shall, when interpreting and applying the Convention provisions, take due account of the principles laid down by those declarations, decisions, advisory opinions, opinions and judgments."

34. The appellant argued that there had been a breach of his rights under the ECHR. The ECHR does not form part of domestic law, and there is of course no cause of action or claim for a breach of the Convention as such. However, the Court considered his submissions for comparative purposes to ascertain whether the protection provided under the Constitution comprises elements of Articles 6.1 and 6.2 of the ECHR. Arising from the Act of 2003, judicial notice is taken of the provisions of the ECHR and the principles laid down in that document, in addition to the judgments of the ECtHR.

35. The appellant referred the Court to a number of cases of the ECtHR, including the following, which were of assistance to the Court.

36. In *Eckle v. Germany* (Application no. 8130/78, 15 July 1982) the ECtHR held that the difficulties of an investigation and the behaviour of the applicants did not, on their own, account for the length of the proceedings exceeding a reasonable time in breach of Article 6.1 of the ECHR. Unreasonable delay is not in issue before this Court, and the decision is therefore not relevant and, accordingly, references in the judgment to procedures are not relevant either.

37. The appellant relied on *Deweer v. Belgium* (Application no. 6903/75, 27 February 1980). The applicant in this case claimed to be a victim of "the imposition of a fine paid by way of settlement under constraint of provisional closure of his establishment" contrary to Article 6.1 of the ECHR. The issue was whether the manner in which the law was applied in the specific circumstances was compatible.

38. The ECtHR considered the issue of "charge" at para. 42 and stated:-

> "In 'criminal' matters, the 'reasonable time' stipulated by Article 6 par. 1 (art. 6-1) 'necessarily begins with the day on which a person is charged' (see the Neumeister judgment of 27 June 1968, Series A no. 8, p. 41, par. 18). And the 'reasonable time' may on occasion 'start to run from a date prior to the seisin of the trial court, of the 'tribunal' competent for the 'determination ... of [the] criminal charge'(see the Golder judgment of 21 February 1975, Series A no. 18, p. 15, par. 32)."

39. The ECtHR reviewed the relevant Belgian law and held, at para. 46:-

> "There accordingly exists a combination of concordant factors conclusively demonstrating that the case has a criminal character under the Convention. The 'charge' could, for the purposes of Article 6 par. 1 (art. 6-1), be defined as the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence. In several decisions and opinions the Commission has adopted a test that appears to

> be fairly closely related, namely whether 'the situation of the [suspect] has been substantially affected' (Neumeister case, Series B no. 6, p. 81; case of Huber v. Austria, Yearbook of the Convention, vol. 18, p. 356, 67; case of Hätti v. Federal Republic of Germany, ibid., vol. 19, p. 1064, 50, etc.). Under these circumstances, the Court considers that as from 30 September 1974 the applicant was under a 'criminal charge'.
>
> Article 6 (art. 6) was therefore fully applicable by virtue of the last-mentioned phrase."

40. The applicant in *Deweer* agreed to settle his case. However, in the circumstances, the ECtHR held at para 54:-

> "To sum up, Mr. Deweer's waiver of a fair trial attended by all the guarantees which are required in the matter by the Convention was tainted by constraint. There has accordingly been breach of Article 6 par. 1 (art. 6-1)."

41. The ECtHR held that the question whether Article 6.2 and Article 6.3 were observed was absorbed into the question. The finding of a breach of Article 6.1 dispensed the Court from also examining the case in light of Articles 6.2 and Art. 6.3.

42. The *Deweer v. Belgium* decision does not assist this Court on the issues raised before it on this appeal as there is no question of settlement in the proceedings or constraint on the appellant.

43. The appellant relies on the above mentioned authorities to support the contention that, as Kelly J. referred the case to the Garda Síochána on the 19th January, 2009, that constitutes the effective date of charge.

44. However, the Court dismisses this submission. It is not a ground of appeal. Addressing the matter, notwithstanding, it is clear from the quotation above that 'charge' for the purpose of Article 6.1 of the ECHR is official notification given to an individual by the competent authority of an allegation that he or she has committed a criminal offence.

45. In this case, in civil proceedings, a judge merely indicated that he was referring the papers to the Garda Bureau of Fraud. That is not official notification to the appellant by the competent authority of an allegation that he has committed a criminal offence.

46. The appellant was arrested first on the 7th July, 2011, and released. He was charged on the 20th September, 2012, and in November, 2012, in accordance with the procedure set out previously in this judgment. The referral to the Garda Bureau of Fraud of the papers by Kelly J. in the civil proceedings before the Commercial Court was not the date of charging the appellant in criminal proceedings.

47. The appellant submitted that he supported his appeal with a range of decisions of the ECtHR which set out the fundamental requirement in a democratic society that the courts inspire confidence in the public and, importantly, as far as criminal proceedings are concerned, above all in the accused. The appellant submitted that, following the remarks of Kelly J., he has little prospective confidence in the impartiality of a tribunal convened to "criminally try him on the charges currently before the Court".

48. The DPP has argued that decisions of the ECtHR raised by the appellant are not relevant to his appeal. The Court has considered this submission together with the submissions of the appellant.

49. The applicant in *Kyprianou v. Cyprus* (Application no. 73797/01, 15 December 2005) alleged a breach of a number of articles of the ECHR, including Articles 6.1 and 6.2. The

applicant was a lawyer defending a person accused of murder before the Limassol Assize Court. He was subsequently convicted and imprisoned for contempt of court. The applicant claimed that although the domestic court had provided the opportunity for him to make submissions on the issue of contempt, they had been limited to the issue of mitigation of penalty. It was contended that the judges of the Limassol Assize Court had failed to satisfy the requirement of impartiality under both an objective and subjective test.

50. The appellant drew the attention of this Court to p. 29 of the decision, which was a consideration by the ECtHR of the issue of subjective bias. This aspect of the case was directed to the judges' personal conduct. The ECtHR examined a number of aspects of the judges' conduct. The Court was referred to the specific language adopted by the judges and held:-

> "… the emphatic language used by the judges throughout their decision conveyed a sense of indignation and shock, which runs counter to the detached approach expected of judicial pronouncements. In particular, the judges stated that they could not 'conceive of another occasion of such a manifest and unacceptable contempt of court by any person, let alone an advocate' and that 'if the court's reaction is not immediate and drastic, we feel that justice will have suffered a disastrous blow'."

The ECtHR held that the Limassol Assize Court had failed to satisfy the objective and subjective tests for impartiality, and held that the domestic court was not impartial within the meaning of Article 6.1 of the ECHR. While the applicant had raised Article 6.2, the ECtHR held that as it had already found that there was a violation of Article 6.1 of the ECHR, the Grand Chamber considered no separate issue arose under this heading and therefore did not address the presumption of innocence issue raised by the applicant.

51. The above case is not applicable to the circumstances of this appeal. The statements of Kelly J. were made in a civil court, after the appellant had not contested the matters brought by plaintiffs before that Commercial Court. These were not the criminal proceedings and indeed Kelly J. has no role as a judge in the criminal proceedings. Consequently, the issue of alleged bias by Kelly J. has no relevance to the criminal trial of the appellant, except as to the issue of pre-trial publicity, which will be addressed further in this judgment. There arises no issue of pre-judgment or bias in this appeal.

52. The appellant referred the Court to *Minelli v. Switzerland* (Application no. 8660/79, 25 March 1983) and in particular para. 37 of that decision. The applicant in *Minelli* was a journalist who had published an article in the 'National Zeitung' containing accusations of fraud against a company, Télé - Répertoire S.A. and its director, Mr. Vass. The facts recounted by the applicant had previously been the subject of an article by another journalist, Mr. Fust, in the daily newspaper, 'Blick'. The company and Mr. Vass brought a criminal complaint of defamation against both journalists. The Zurich Assize Court decided it could not hear the complaint against the applicant because the absolute limitation period of four years had expired. The domestic court also held that the applicant should bear two thirds of the costs. This finding was based on an article of the Swiss Code of Criminal Procedure which provided that the losing party bear the costs of the proceedings and pay compensation to the other party in respect of his expenses, save in such special circumstances which warrant departure from the rule. The Zurich Assize Court held that it must make a costs order reflecting the judgment that would have been given had the limitation period not expired. It held that it was to be assumed that if the proceedings had not been prevented by reason of the expiration of the limitation period that the criminal complaint would "very probably lead to the conviction of the accused".

53. In the circumstances of that case, the ECtHR stated, commencing at para. 37:-

> "37. In the Court's judgment, the presumption of innocence will be violated

if, without the accused's having previously been proved guilty according to law and, notably, without his having had the opportunity of exercising his rights of defence, a judicial decision concerning him reflects an opinion that he is guilty. This may be so even in the absence of any formal finding; it suffices that there is some reasoning suggesting that the court regards the accused as guilty. The Court has to ascertain whether this was the case on 12 May 1976.

38. The Chamber of the Assize Court based its decision on Article 293 of the Zürich Code of Criminal Procedure, which, in the case of a private prosecution for defamation, permits a departure, in special circumstances, from the rule that the losing party is to bear the court costs and pay compensation to the other party in respect of his expenses (see paragraph 19 above). In the light of Zürich case-law, it found that in the present case "the incidence of the costs and expenses should depend on the judgment that would have been delivered" had the statutory period of limitation not expired. To decide this point, it had regard to four matters (see paragraph 13 above): the fact that the case was virtually identical to that of the journalist Fust, which had resulted on 2 September 1975 in a conviction (see paragraph 10 above); the seriousness of the applicant's accusations against Mr. Vass; the applicant's failure to verify his allegations; and the negative outcome of the 1972 prosecution of Mr. Vass (see paragraph 9 above).

For these reasons, which were set out at length and cannot be dissociated from the operative provisions (see the above-mentioned Adolf judgment, Series A no. 49, p. 18, § 39), the Chamber of the Assize Court concluded that, in the absence of limitation, the 'National Zeitung' article complained of would 'very probably have led to the conviction' of the applicant. In setting out those reasons, the Chamber treated the conduct denounced by the private prosecutors as having been proved; furthermore, the reasons were based on decisions taken in two other cases to which, although they concerned the same facts, Mr. Minelli had not been a party and which, in law, were distinct from his case.

In this way the Chamber of the Assize Court showed that it was satisfied of the guilt of Mr. Minelli, an accused who, as the Government acknowledged, had not had the benefit of the guarantees contained in paragraphs 1 and 3 of Article 6 (art. 6-1, art. 6-3). Notwithstanding the absence of a formal finding and despite the use of certain cautious phraseology ('in all probability', 'very probably'), the Chamber proceeded to make appraisals that were incompatible with respect for the presumption of innocence."

Accordingly, the ECtHR found that there had been a violation of Article 6.2.

54. However, no such circumstances arise in this case. The particulars are entirely different, and distinguishable. The appellant is charged with criminal offences and has not yet had his trial. The question of his guilt or innocence has not yet been determined, and he is presumed innocent of the criminal charges. Kelly J. did not make any decision of criminal guilt, and did not make any finding as to the probability of the success of any criminal proceedings, as was then the case, if instituted. Thus, in contrast, in the *Minelli* case a court made a costs findings in favour of an unsuccessful party on the basis that a conviction in the case of the applicant was probable (if no limitation period applied) It was the references to the probability of a conviction in that case that constituted a violation of the presumption of innocence. Furthermore, the prosecution's case was treated as having been proved. In contrast, in this case, Kelly J. referred to *prima facie* evidence in civil proceedings that will not be treated as having been proved in the forthcoming trial.

55. The Court's attention was also brought to the decision in *Allenet de Ribemont v. France*, (Application no. 15175/89, Strasbourg 10 February 1995). In that case, some of the highest ranking officers in the French Police Force referred to the applicant, without any qualification or reservation, as being one of the instigators of the murder of a member of Parliament, and thus an accomplice in the murder. The ECtHR considered this to be a declaration of his guilt, which encouraged the public to believe him guilty, prejudged the assessment of the facts, and thus found that there was a breach of Article 6.2.

56. However, the facts of that case are different and distinguishable from this case. Notably, in *Allenet de Ribemont* the statement announcing the guilt of the applicant was made at a press conference reported by two news programmes on two French television channels, and those making the statements were two high ranking police officers and the Minister of the Interior. Further, the two police officers making the statements were conducting the investigation of the crime with which the applicant was subsequently charged.

57. Thus, this case may be distinguished by factors including that, in the *Allenet de Ribemont* case, the assertions of guilt were made in public press conferences, by two high ranking police officers who were directly involved in the criminal investigation. In contrast, in this case, the remarks made by Kelly J. were in the context of civil proceedings, which the appellant did not oppose, and where there was a subsequent referral to the police for investigation. Further, the remarks of Kelly J. do not constitute "clearly a declaration" as to the appellant's guilt, as was found in the *Allenet de Ribemont* case.

58. The decision of the ECtHR in *Burkevicus v. Lithuania* (Application no. 48297/99, 26 March 2002), was also brought to the attention of the Court. Commencing at para. 49, the ECtHR held:-

> "49. The Court recalls that the presumption of innocence enshrined in Article 6 § 2 of the Convention is one of the elements of a fair criminal trial guaranteed- by Article 6 § 1. It will be violated if a statement of a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved so according to law. It suffices, even in the absence of any formal finding, that there is some reasoning to suggest that the official regards the accused as guilty. Moreover, the presumption of innocence may be infringed not only by a judge or court but also by other public authorities (Daktaras v.Lithuania, no. 42095/98. In the above mentioned Daktaras case the Court emphasised the importance of the choice of words by public officials in their statements before a person has been tried and found guilty of an offence. Nevertheless, whether a statement of a public official is in breach of the presumption of innocence must be determined in the context of they particular circumstances in which the impugned statement was made (ibid.).
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> 50. The Court notes that in the present case the impugned statements were made by the Prosecutor General and the Chairman of the Seimas in a context independent of the criminal proceedings themselves, i.e. by way of an interview to the national press.
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> The Court acknowledges that the fact that the applicant was an important political figure at the time of the alleged offence required the highest 'State officials, including the Prosecutor General and the Chairman of the Seimas, to keep the public informed of the alleged offence and the ensuing criminal proceedings. However, it 'cannot agree with the Government's argument that this circumstance could justify any use of words chosen by the officials

in their interviews with the press.

…

51. Furthermore, the statements at issue were made just a few days following the applicant's arrest, except one impugned statement of the Chairman of the Seimas which was made more than a year later (see § 30 above). However, it was particularly important at this initial stage, even before a criminal case had been brought against the applicant, not to make any public allegations which could have been interpreted as confirming the guilt of the applicant in the opinion of certain important public officials.

52. The applicant relies on two statements of the Prosecutor General, the first made on the day on which leave was sought from the Seimas to institute criminal proceedings against the applicant, in which the Prosecutor General confirmed that he had 'enough sound evidence of the guilt' of the applicant, and the second, two days later, when he qualified the applicant's 'offence as an attempt to cheat'. . While the statements, in particular the reference to the applicant's guilt, give some cause for concern, the Court accepts that they may be interpreted as a mere assertion by the Prosecutor General that there was sufficient evidence to support a finding of guilt by a court and, thus, to justify the application to the Seimas for permission to bring criminal proceedings.

53. Of more concern are the statements made by the Chairman of the Seimas to the effect that he entertained no doubt that the applicant had accepted a bribe, that he had taken money 'while promising criminal services', and that he was a 'bribe-taker'. In this respect the Court has had particular regard to the fact that the Seimas had lifted the applicant's parliamentary immunity to enable criminal proceedings to be instituted against him.

The Court does not agree with the Government that all the Chairman's references to 'bribery' were irrelevant to this application. It is undisputed that the facts of the offence committed by the applicant, whilst subsequently classified by the prosecutors and the courts as an attempt to cheat, had frequently been interpreted by the media and the general public, prior to the applicant's conviction, as 'bribery' (see, for instance, § 30 above). It has not been contended by the Government that, by stating that the applicant was a "bribe-taker', the Chairman of the Seimas was not referring to the criminal proceedings in question. In the Court's view, this remark could therefore be interpreted as confirming the Chairman's view that the applicant had committed the offences of which he was accused.

While the impugned remarks of the Chairman of the Seimas were in each case brief and made on separate occasions, in the Court's opinion they amounted to declarations by a public official of the applicant's guilt, which served to encourage the public to believe him guilty and prejudged the assessment of the facts by the competent judicial authority.

54. There has therefore been a breach of Article 6 § 2 of the Convention."

59. The facts of the above case and this appeal are different. In *Burkevicus*, the impugned statements were made by the Prosecutor General in an interview by the press, just a few days after the applicant's arrest for obtaining property by deception. The Prosecutor General included that he had "enough sound evidence of the guilt" of the applicant. The ECtHR was satisfied that this could be interpreted as a "mere assertion" that there was

sufficient evidence to support the bringing of criminal proceedings.

60. However, it was the statements made by the Chairman of the Seimas, including that he had no doubt that the applicant had accepted a bribe, and that he was a bribe taker, that caused the ECtHR concern. It was held, as set out above, that the statements of the Chairman of the Seimas were declarations by a public official of the applicant's guilt, which encouraged the public to believe him guilty, and was a breach of Article 6.2 of the ECHR.

61. However, *Burkevicus* is also distinguishable from the case before the Court, for the following reasons. The impugned statements in *Burkevicus* included those of the Chairman of Parliament in a public interview to the national press. The Chairman, in public, stated that he had "no doubt" but that the applicant was guilty. This was an unequivocal statement of the applicant's guilt. There was no such statement in this case. Also, it is noteworthy, that the Prosecutor General's statement to the effect that he had "enough sound evidence" of the guilt of the applicant, was taken by the ECtHR to be a mere statement of the justification for the institution of proceedings.

Irish Law

62. The right to a fair trial is a constitutional right rooted in Article 38.1° of the Constitution, which contains as an element of that right the presumption of innocence.

63. The relevant law as to the right to a fair trial is well established in cases including *Savage v. DPP* [2009] 1 I.R. 185; *Devoy v. DPP* [2008] 4 I.R. 235; *Z. v. DPP* [1994] 2 I.R. 476; *D. v. DPP* [1994] 2 I.R. 465; *Redmond v. DPP* [2002] 4 I.R. 133; *DPP v. Haugh* [2000] 1 I.R. 184, *Rattigan v. DPP* [2008] 4 I.R. 639.

64. There is no necessity to restate the law, other than to state that the courts intervene to prohibit criminal proceedings in circumstances where, it is established that there is a real risk that by reason of the circumstances of the case the applicant could not obtain a fair trial. The onus rests upon the applicant who seeks to prohibit his or her trial. The appellant in this case submitted that he could not receive a fair trial due to the prejudicial pre-trial publicity. The individual's right to a fair trial is a superior right to that of the community to prosecute, and a trial should not proceed if there is a real risk to a fair trial. However, the right of the community to prosecute, especially serious crime, and the position of victims, must also be considered by the Court

65. As Geoghegan J. stated in *Rattigan v. DPP* [2008] 4 I.R. 639 at para. 50:-

> "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 pretrial 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 pretrial 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."

Conclusions

66. In this case, where the issue is prejudicial adverse publicity, there are several elements of the publicity, as set out previously, and they include:-

(i) the statements by Kelly J. in the Commercial Court;

(ii) the media coverage, including those statements;

(iii) a chapter in the book written by Dearbhail McDonald entitled "*Bust: How the Courts Have Exposed the Rotten Heart of the Irish Economy*";

(iv) the television documentary entitled "Beware Ireland, Con Artists Caught in the Act", televised on the 29th February, 2012, repeated on the 3rd October, 2012, on channel TV3, and repeated on channel 3e on the 1st January, 2013.

67. The Court has considered each of these forms of the pre-trial publicity from the aspect of the Constitution of Ireland and has taken into consideration the ECHR and the decisions of the ECtHR brought before the Court by the appellant for comparative law purposes. Indeed, the submissions by the appellant to this Court were primarily in relation to the statements of Kelly J. and the jurisprudence, as opened, of the ECtHR.

68. The statements of Kelly J. in the Commercial Court in and around January, 2009, included a reference to '*prima facie* evidence' of criminal activity, a referral of the papers to the Garda Bureau of Fraud, a comparison of the appellant to the character Montague Tigg in the novel Martin Chuzzlewit by Charles Dickens, references to the "Irish Bernie Madoff" and that the appellant had fallen on his sword, and a reference to the Shanahan stamp scandal.

69. The first and second ground of the appellant's threefold submissions are that (i) there was an alleged breach of the presumption of innocence of the appellant owing to the comments of Kelly J., and (ii) that these comments are in breach of the appellant's entitlement under the ECHR, particularly Articles 6.1 and 6.2.

Presumption of Innocence

70. In relation to the first submission, the Court accepts that there was unsatisfactory publicity. While some of Kelly J.'s comments were justified by the uncontested material and the findings of fact in the civil proceedings based on the evidence before him, they were not wise comments, and the learned judge ought to have considered the possibility that there would be subsequent criminal proceedings. However, the question for this Court is to determine whether such observations would prejudice a trial now so as to give rise to a real risk of an unfair trial.

71. Applying the exacting constitutional principles of due process of law, the right to a fair trial, and the presumption of innocence, the circumstances are not such as to prohibit the criminal trial of the appellant. While the statements of Kelly J. in the Commercial Court were strong, and were reported widely, they arose in a civil case where the appellant had not opposed the applications of his creditors in relation to facts indicating a type of ponzi scheme. The judge made no decision in relation to any criminal trial, other than to refer papers to the Garda Bureau of Fraud, so that consideration could be given as to whether an investigation was warranted. Kelly J. will not be a judge on any criminal trial of the appellant. In the said civil proceedings, the appellant did not challenge the allegations,

and it was the alleged facts, which were not contested, which were the primary genus of the publicity. Thus, indeed, the appellant is relying on the fact that he did not contest the proceedings in the Commercial Court to stop his criminal trial. The statements made in the Commercial Court by the High Court judge were based on the evidence before him, including the fact that the appellant did not contest the facts. For example, Kelly J. said that there was *prima facie* sufficient evidence before him to refer the matter to the Garda Bureau of Fraud. It is then for the DPP to determine if there is to be a prosecution, and if she so determines, there is then a criminal trial, at which a basic principle is the presumption of innocence.

72. The fact that certain comments made by Kelly J. were not wise, does not mean that a person can no longer be prosecuted, in circumstances where it is possible to ensure a fair trial notwithstanding the comments and related media publicity.

73. The essential issue for this Court is to determine whether there is a real risk of an unfair trial of the appellant in June 2014, or later. A very long period has elapsed since the remarks were made. This period is sufficient to allow public memory to fade. Applying the principles of the Constitution, the appellant is presumed innocent, and there is no real risk in the circumstances to a fair trial. Consequently, the Court would dismiss this submission.

The passage of time

74. The third submission by the appellant was that the passage of 365 days would not erase the issues that Kearns P. considered extant and preventative of a fair and impartial trial at that time.

75. The issues raised in this appeal require a delicate balance. There was publicity arising from the statements of Kelly J., the book, and the TV programme. It must be acknowledged that there was a damaging aspect to that publicity. However, time has since elapsed. The statements of Kelly J. were made in and around January 2009, most of the sensational articles printed were between 2009 and 2012; the book was published in 2010; and the television documentary was screened twice in 2012, while the repeat in January 2013 on the 3e channel had low audience figures.

76. The circumstances giving rise to the civil proceedings, and the fact that the appellant did not refute the proceedings, were a cause of public concern. Such cases come before the courts. The media should strive better to contain reporting prior to criminal proceedings, when they may be anticipated. The DPP has a duty to apply for rulings of the courts to protect a fair trial. However, it remains a matter for the courts to achieve a balance in all such cases.

77. In the circumstances of this case, the fact that years have passed since the bulk of the publicity, the application of the fade factor, the fact that a trial judge sitting in a criminal court will be in a position to give directions to the jury, and to ensure that there is a fair trial, leads this Court to the conclusion that there is no longer a real risk of an unfair trial, and that the appellant enjoys the constitutionally protected presumption of innocence in any trial. The Court would dismiss the appeal. Consequently, the trial of the appellant may proceed at any time from June 2014.

Cross Appeal

78. The DPP filed a cross appeal in respect of that part of the judgment of the High Court which granted a temporary stay until the end of the second quarter of 2014. By the efflux of time, since the judgment of the High Court and the hearing of this appeal, that stay became a reality for the year. Thus, there is no issue to be determined in relation to that stay, and the cross appeal will also be dismissed.