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Judgment: approved by the Court for handing down | *Delivered:* **13/09/11**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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-v-

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Before: Morgan LCJ, Higgins LJ and Girvan LJ

MORGAN LCJ

[1] The name of the respondent has been anonymised to protect the identity of the complainant. This is a renewal of an application by the prosecution for leave to appeal the trial judge's decision to stay criminal proceedings against the respondent for rape contrary to 5(1) of the Sexual Offences (NI) Order 2008. The trial judge stayed the prosecution because he held that the respondent's Article 6 rights were breached because of unreasonable delay and the continuation of the prosecution constituted an abuse of process. The Crown submits that the decision is wrong in law and not reasonable. It contends that there has been no breach of Article 6 and that in any event a stay is not the appropriate remedy. At the end of the hearing on 23 March 2011 we allowed the appeal and reserved our reasons which are now set out in this judgment.

Background

[2] The respondent was charged with the rape of the complainant on 21 February 2009. He was arraigned on 10 September 2009 and pleaded not guilty. Because of certain disclosure matters the trial did not commence until 1 February 2010. The jury in that case had to be discharged because of something said by the complainant in her evidence. A new trial date was set for 9 March 2010 but that date had to be vacated as both Crown counsel withdrew from the case for reasons not given in open court. Further efforts at listing the matter for trial were unsuccessful because the complainant was sitting university examinations.

[3] In June 2010 the court was informed that the complainant would be unable to attend to give evidence due to ill-health. A report from Dr. Christine Kennedy, Consultant Forensic Psychiatrist, was furnished to the court. That report concluded that the complainant was unfit to give evidence at that time. The report stated that the complainant met the diagnostic criteria for PTSD which was related to the alleged incident of rape. Dr. Kennedy advised that she would require medical treatment before she could participate in a trial after which she could be re-evaluated as to her fitness to give evidence. The earliest date that she would be fit to give evidence, assuming immediate access to treatment and a favourable outcome, would be January 2011. There was no guarantee that a favourable outcome would be achieved. The defence pointed to the absence of a report of symptoms in the six months immediately following the alleged incident. The Recorder gave directions allowing the defence to have access to the complainant's medical records and the matter stood adjourned until August 2010.

[4] The case was reviewed in August 2010 when the court heard that any medical examination of the complainant on behalf of the defendant would be deleterious to her progress. The court further reviewed the case in November of that year when a report from Dr Tracy Millar, Clinical Psychologist, of 22 October 2010 indicated that the complainant had not been given immediate access to treatment and was still only at the assessment stage. The prosecution's resulting application for adjournment was strenuously opposed by the defendant. The Recorder made a ruling in which he concluded that it was not open to him to fix a date for trial until the complainant was competent to engage with the trial in all aspects. Part of the court's concern in fixing a date arose because Dr. Kennedy stated that efforts to bring the matter to trial had caused deterioration in the complainant's health. The matter was therefore adjourned but no date fixed for trial. That ruling was given in written form on 18th November 2010.

[5] Shortly thereafter the respondent applied to stay the proceedings on the basis that the continuation of the prosecution was a breach of the respondent's Article 6 rights and that in any event it constituted an abuse of process. The Recorder noted that the offence allegedly occurred on 21 February 2009 and the respondent was interviewed about it on 4 March 2009. The first trial commenced in February 2010. Thereafter the case had not proceeded because of the withdrawal of Crown counsel, the educational requirements of the complainant and the ill-health of the complainant. At that time the Recorder held that no trial would be possible before June 2011. That assessment was not in issue at this appeal.

[6] The Recorder noted that none of the delays were caused or contributed to by the respondent. In light of the medical position there was no certainty as to when if at all a trial could take place. At the earliest the respondent would have these matters hanging over him for at least 2 years and 3 months from

the date on which he was interviewed. He noted that this was not a case of great complexity and that there had been no contribution to the delay by steps taken by the prosecution authorities. He rejected a prosecution suggestion that he should review the case in May 2011 and found that the respondent's Article 6 right to a trial within a reasonable time had been breached.

[7] The Recorder then went on to examine the appropriate remedy for the breach. He considered the possibility of compensation which he considered a poor remedy. Other remedies would only arise on conviction. He concluded that the inability at this stage to fix a trial date compounded the breach of the respondent's rights and ordered that the proceedings be stayed. He considered that for the same reasons he was bound to stay the proceedings as an abuse of process.

Consideration

[8] The prosecution sought leave to appeal pursuant to Article 17 of the Criminal Justice (Northern Ireland) Order 2004 (the 2004 Order). Article 26 of the 2004 Order provides that the court may not reverse a ruling on appeal unless satisfied:

(a) that the ruling was wrong in law;
(b) that the ruling involved an error of law or principle; or
(c) that the ruling was a ruling that it was not reasonable for the judge to have made.

[9] The Recorder noted that the purpose of the reasonable time guarantee was stated in Stogmuller v Austria (1969) 1 EHRR 155 as being to protect people against excessive delays: in criminal matters especially, it is designed to avoid that a person charged should remain too long in a state of uncertainty about his fate. In Dyer (Procurator Fiscal, Linlithgow) v. Watson and Another [2004] 1 AC 379 Lord Bingham suggested how the assessment of whether there had been a breach of the guarantee should be approached at paragraph 52.

> "In any case in which it is said that the reasonable time requirement . . . 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, gives 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."

[10] Where it is appropriate to examine the period in question Konig v Federal Republic of Germany (1978) 2 EHRR 170 indicates that it is necessary to have regard to the complexity of the case, the applicant's conduct and the manner in which the matter was dealt with by the administrative and judicial authorities. Complexity is not confined to the legal or factual issues in the case. In Andreucci v Italy [1992] ECHR 12955/87 a complaint was made about a period of 4 years 6 months to deal with a relatively straightforward assault case. The Court noted that there had been periods of unexplained delay but took into account the number of witnesses who had to be interviewed and the fact that one of them had to give evidence on commission. It concluded that there had been no breach of the reasonable time guarantee. Although the convention does not itself define a timeframe outside which a breach is established Andreucci is an example of the high threshold before a violation can be established.

[11] Applying these principles to this appeal we do not consider that the period of 20 months between February 2009 and the Recorder's ruling of November 2010 is a period that would normally give rise to real concern that there had been a breach of a convention right in a Crown Court case. We should make it clear, however, that we would expect the majority of such cases to be disposed of well before such a period had elapsed.

[12] The Recorder's concern arose in particular because he could not fix a trial date and the earliest date for the hearing was June 2011 which was 2 years and 3 months after the respondent had been interviewed under caution. We accept that in a case such as this it was open to the Recorder to take the view that he should look at the detailed facts and circumstances. The reason for the delay from June 2010 was the unavailability of the complainant and chief prosecution witness because of her medical condition. The respondent sought to call into question the medical position but no finding adverse to the complainant was made by the Recorder and we agree that there is no proper basis for us to make such a finding.

[13] At paragraph 19 of the ruling it was stated that this was not a case of great complexity. Although that was true of the legal and factual issues in the case it was not in our view correct in relation to the prosecution presentation of the case. The complainant is an essential prosecution witness. It would not

be sufficient for her evidence to be admitted as hearsay having regard to her central role in the proof of the case. The unavailability of a witness on medical grounds is a matter relating to the complexity of the trial which ought to be taken into account in determining whether there has been a breach of the reasonable time guarantee. If it had been taken into account in this case as we consider it should have been, we are entirely satisfied that the high threshold necessary to establish a breach would not have been crossed.

[14] We note that the Recorder also stayed the proceedings as an abuse of process. He noted the caution about acceding to such applications expressed by Carswell LCJ in Re DPP's Application [1999] NI 106.

> "**1.** The jurisdiction to stay must be exercised carefully and sparingly and only for very compelling reasons: *Ex parte Bennett* [1994] 1 AC 42 at page 74, per Lord Lowry.
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> **2.** The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct: *ibid*.
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> **3.** The element of possible prejudice may depend on the nature of the issues and the evidence against the defendant. If it is a strong case, and *a fortiori* if he has admitted the offences, there may be little or no prejudice: see *Ex parte Brooks* (1984) 80 Cr App R 164 at page 169, per Sir Roger Ormrod."

[15] Since the hearing of this case the Court of Appeal in England and Wales has reconsidered the basis upon which a case might be stayed as an abuse of process for delay in CPS v F [2011] EWCA Crim 1844. The court restated the principles which were clear from the earlier cases and in particular affirmed that an application to stay for abuse of process on the grounds of delay must be determined in accordance with *Attorney-General's Reference (No 1) of 1990*. It cannot succeed unless, exceptionally, a fair trial is no longer possible owing to prejudice to the defendant occasioned by the delay which cannot fairly be addressed in the normal trial process. The presence or absence of explanation or justification for the delay is relevant only insofar as it bears on that question. In this case there was no suggestion that a fair trial would not be possible at a later date. We were satisfied that there was nothing exceptional which required departure from the normal rule and in those circumstances a basis for a stay as an abuse of process was not made out.

[16] We concluded, therefore, that the ruling was wrong in law. We gave leave, allowed the appeal and reversed the ruling.