APPROVED **[2020] IEHC 385**

THE HIGH COURT
JUDICIAL REVIEW

2019 No. 120 J.R.

BETWEEN

RONNIE WILDE

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

<u>JUDGMENT of Mr. Justice Garrett Simons delivered on 18 September 2020</u>

INTRODUCTION

1. The Applicant herein seeks to restrain the further prosecution of criminal charges pending against him, on the basis of prosecutorial delay. The alleged offences are said to have occurred at a time when the Applicant was sixteen years old, and thus a "child" as defined under the Children Act 2001. It is contended that had the Garda investigation been conducted expeditiously, then the Applicant would have been entitled to have the charges against him determined in accordance with the Children Act 2001. This would have afforded the Applicant certain statutory entitlements in respect of *inter alia* anonymity, sentencing principles, and a mandatory probation report. The benefit of these statutory entitlements is not now available in circumstances where the Applicant reached the age of majority prior to the trial of the offences.
2. These judicial review proceedings arise against a legislative backdrop whereby the qualifying criterion for the important procedural protections provided for under the

Children Act 2001 is the age of the accused as of the date of the trial of the offences (as opposed to his or her age as of the date when the alleged offences are said to have occurred). It is perhaps surprising that the legislation does not expressly address the position of an alleged offender who has transitioned from being a "child" (as defined) to an adult between the date on which the offences are said to have occurred and the date of the hearing and determination of criminal charges arising from those alleged offences. Such an interregnum will arise in a significant number of cases, even allowing for prompt Garda investigations. For example, if an offence is alleged to have been committed by an individual who is a number of weeks shy of his or her eighteenth birthday, it is unrealistic to expect that the offence would be investigated, and the prosecution completed, prior to that birthday. It would have been helpful if the legislation indicated what is to happen in such circumstances.

3. At all events, the Supreme Court has held that, in the case of a criminal offence alleged to have been committed by a child or young person, there is a special duty on the State authorities, over and above the normal duty of expedition, to ensure a speedy trial. See *B.F. v. Director of Public Prosecutions* [2001] 1 I.R. 656 and *Donoghue v. Director of Public Prosecutions* [2014] 2 I.R. 762.

4. The case law indicates that the existence of blameworthy prosecutorial delay will not automatically result in the prohibition of a criminal trial. Rather, something more has to be put in the balance to outweigh the public interest in the prosecution of offences. What that may be will depend upon the facts and circumstances of any given case. Factors to be considered include *inter alia* (i) the length of delay itself; (ii) the age of the accused at the time the alleged offences occurred; (iii) the loss of statutory safeguards under the Children Act 2001; (iv) the stress and anxiety, if any, caused to the child as a result of

the threat of prosecution hanging over them; and (v) any prejudice caused to the conduct of the defence.

FACTUAL BACKGROUND

5. The Applicant has been charged with a number of offences arising out of an incident said to have occurred on 22 November 2016. In brief, the Applicant had appeared before the High Court at Cloverhill courthouse on that date. Having been refused bail, the Applicant is alleged to have attempted to escape from custody. It is further alleged that, during the course of this incident, the Applicant assaulted three members of An Garda Síochána and damaged a glass door panel at the courthouse.

6. Four charges have been preferred as follows: (i) a charge of criminal damage to the door of the courthouse; (ii) two charges of assault contrary to section 2 of the Non-Fatal Offences Against the Person Act 1997; and (iii) a charge of assault causing harm pursuant to section 3 of the Non-Fatal Offences Against the Person Act 1997. The Director of Public Prosecutions had directed that the offences be dealt with summarily in the District Court, and the District Court has since accepted jurisdiction.

7. The Applicant was born on 30 October 2000, and thus had been 16 years of age at the time of the alleged offences. The Applicant was ultimately charged with the offences on 17 December 2018, that is some two years after the date of the alleged incident. As of that date, the Applicant had already achieved his age of majority.

8. The details of the initial police investigation, and processing of the criminal prosecution have been set out in two affidavits sworn by Garda Sergeant Sinéad Hennigan. An affidavit has also been sworn by a principal prosecutor of the Directing Division of the Office of the Director of Public Prosecutions. This affidavit confirms that a direction to charge was issued on 6 November 2017.

9. The key events in the chronology are as follows.

22 November 2016	Date of alleged incident
18 April 2017	Applicant is interviewed under caution
2 May 2017	Skeleton file sent to Garda Youth Diversion Office
11 May 2017	Applicant deemed unsuitable for diversion programme
16 May 2017	Application for summonses
31 August 2017	File sent to Director of Public Prosecutions
14 September 2017	DPP's Office requests copies of CCTV footage
15 September 2017	Return date for summonses (not served)
27 October 2017	CCTV footage received by DPP's Office
6 November 2017	Direction to charge issued
22 January 2018	Application to reissue summonses
15 June 2018	Return date for summonses (not served)
30 October 2018	Applicant turns eighteen years old
17 December 2018	Applicant charged with offences while attending court on another matter

10. As appears, the Applicant had been interviewed under caution on 18 April 2017. A transcript of that interview has been exhibited in these proceedings. It appears therefrom that it was put to the Applicant that he had kicked a pane of glass in the lobby of the courthouse and had broken it. It was also put to the Applicant that he had struck out and headbutted a member of An Garda Síochána, causing his lip to bleed. Both of these allegations were denied by the Applicant and described as "lies".

11. The chronology indicates that whereas the police investigation had been carried out promptly, there was a considerable delay in progressing the criminal prosecution thereafter. An Garda Síochána had initially decided to employ the summons procedure, rather than charging the Applicant directly, i.e. the charge sheet procedure. The summons procedure involves an application to the Courts Service for the issuance of a summons. Such summonses are generally then served by the local gardaí. On the facts of the present case, neither the original nor the reissued summonses were actually served

on the Applicant. A decision was then taken to charge the Applicant directly. This was done when he attended court for another, unrelated matter on 17 December 2018.

12. The Applicant's side has been critical of An Garda Síochána for initially seeking to rely on the summons procedure. It is said that the Applicant had had a series of court appearances during the relevant period, and could have been charged directly on any of these occasions. Indeed, this was the method which was, ultimately, employed by An Garda Síochána on 17 December 2018. The Applicant's solicitor has also deposed that, during the period November 2016 to March 2018, the Applicant had been detained at Oberstown Children Detention Campus for an aggregate of 235 days. His whereabouts were thus ascertainable with certainty for this period.

13. In response, it is said that, for at least part of the time, the Applicant had been reported as a missing person. In her second affidavit, the Garda Sergeant, very fairly, accepts that the Applicant had had interactions with members of An Garda Síochána during the period between November 2016 and October 2018, and concedes that some opportunities for progressing the prosecution had been lost.

APPLICABLE LEGAL PRINCIPLES

14. The leading judgment on prosecutorial delay in cases involving offences alleged to have been committed by a child is that of the Supreme Court in *Donoghue v. Director of Public Prosecutions* [2014] IESC 56; [2014] 2 I.R. 762 ("*Donoghue*").

15. The judgment in *Donoghue* indicates that the first question to be determined by a court is whether there has been culpable or blameworthy prosecutorial delay. In the event that there has been such delay, then the court must next carry out a balancing exercise.

16. On the facts of *Donoghue*, members of the Gardaí had called to the minor applicant's home where a substance was found which was believed to be heroin. The applicant was

aged 16 years at the time. A weighing scales was also found. The applicant immediately took responsibility for the items, and he signed an admission to this effect. The applicant was then arrested, and, during the course of interview, he again took full responsibility for the items found. Subsequently, the items found at his home were forwarded to the forensic science laboratory for an analysis, and it was confirmed that the substance was indeed heroin. A period of one year and four and a half months elapsed between the date of the applicant's arrest and his eventually being charged with an offence under the Misuse of Drugs Act 1977.

17. The Supreme Court, *per* Dunne J., held that, having regard to all the circumstances of the case and bearing in mind the fact that the accused was a child at the time of the commission of the alleged offence, there was ample evidence before the High Court to enable the trial judge to reach the conclusion that this was a case in which there had been significant culpable prosecutorial delay.

18. As appears from the analysis of the delay at pages 770 and 773 of the reported judgment, the Supreme Court attached some significance to the fact that the criminal case was a straightforward one, and that admissions had been made by the accused.

> "[25] When the overall period of delay between March 2010 and August 2011 is being considered, it is necessary to bear in mind the nature of the case (including its complexity), the need to engage with the National Juvenile Office, the period of delay and the reasons offered for that delay. This was a straightforward case on the facts where admissions had been made by Mr. Donoghue. The reasons put forward for the delay in this case are unsatisfactory. The delay in completing the investigation file was not adequately explained. I have no doubt that the statements of the two Gardai mentioned were necessary but as it appears that those statements were required in relation to the period of detention of Mr. Donoghue in Coolock Garda Station, it should have been a straightforward matter to prepare and obtain the statements."

19. The Supreme Court went on to hold that blameworthy prosecutorial delay alone will not suffice to prohibit a trial. Rather, the court must conduct a balancing exercise to establish

if there is something additional to the delay itself to outweigh the public interest in the prosecution of serious offences.

> "[52] There is no doubt that once there is a finding that blameworthy prosecutorial delay has occurred, a balancing exercise must be conducted to establish if there is by reason of the delay something additional to the delay itself to outweigh the public interest in the prosecution of serious offences. In the case of a child there may well be adverse consequences caused by a blameworthy prosecutorial delay which flow from the fact that the person facing trial is no longer a child. However, the facts and circumstances of each case will have to be considered carefully. The nature of the case may be such that notwithstanding the fact that a person who was a child at the time of the commission of the alleged offence may face trial as an adult, the public interest in having the matter brought to trial may be such as to require the trial to proceed. Thus, in a case involving a very serious charge, the fact that the person to be tried was a child at the time of the commission of the alleged offence and as a consequence of the delay will be tried as an adult, may not be sufficient to outweigh the public interest in having such a charge proceed to trial. In carrying out the balancing exercise, one could attach little or no weight to the fact that someone would be tried as an adult in respect of an offence alleged to have been committed whilst a child if the alleged offence occurred shortly before their 18th birthday. Therefore, in any given case a balancing exercise has to carried out in which a number of factors will have to be put into the melting pot, including the length of delay itself, the age of the person to be tried at the time of the alleged offence, the seriousness of the charge, the complexity of the case, the nature of any prejudice relied on and any other relevant facts and circumstances. It is not enough to rely on the special duty on the State authorities to ensure a speedy trial of the child to prohibit a trial. An applicant must show something more as a consequence of the delay in order to prohibit the trial."

20. The Supreme Court held that the trial judge was correct to attach significance to the fact that the accused in *Donoghue* would not have the benefit of certain of the protections of the Children Act 2001. Three particular aspects of the Children Act 2001 were referenced as follows. First, the reporting restrictions applicable to proceedings before any court concerning a child (section 93). Secondly, the sentencing principle that a period of detention should be imposed on a child only as a measure of last resort (section 96). Thirdly, the mandatory requirement to direct a probation officer's report (section 99).

21. The Supreme Court then stated its conclusions as follows.

> "[56] The special duty of State authorities owed to a child or young person over and above the normal duty of expedition to ensure a speedy trial is an important factor which must be considered in deciding whether there has been blameworthy prosecutorial delay. That special duty does not of itself and without more result in the prohibition of a trial. As in any case of blameworthy prosecutorial delay, something more has to be put in the balance to outweigh the public interest in the prosecution of offences. What that may be will depend upon the facts and circumstances of any given case. In any given case, the age of the young person before the courts will be of relevance. Someone close to the age of 18 at the time of an alleged offence is not likely to be tried as a child no matter how expeditious the State authorities may be in dealing with the matter. On the facts of this case, had the prosecution of Mr. Donoghue been conducted in a timely manner, he could and should have been prosecuted at a time when the provisions of the Children Act 2001 would have applied to him. The trial judge correctly identified a number of adverse consequences that flowed from the delay. Accordingly, I am satisfied that the trial judge was correct in reaching his conclusion that an injunction should be granted preventing the DPP from further prosecuting the case against Mr. Donoghue."

22. The principles in *Donoghue* have recently been considered in two judgments of the Court of Appeal, *A.B. v. Director of Public Prosecutions*, unreported, Court of Appeal, 21 January 2020, and *Director of Public Prosecutions v. L.E.* [2020] IECA 101. These judgments elaborate upon the nature of the prejudice which might be suffered by an accused, and also address whether there are steps which the High Court might take to mitigate the loss of some of the protections provided for under the Children Act 2001. I will discuss these judgments in context when I come to carry out the "balancing exercise" required in delay cases. See paragraph 33 *et seq*. below.

CULPABLE OR BLAMEWORTHY PROSECUTORIAL DELAY

23. The first question to be addressed by this court is whether the pace of the investigation between the date of the alleged incident (22 November 2016), and the date upon which the Applicant reached the age of majority, i.e. his eighteenth birthday (30 October 2018),

involved culpable or blameworthy delay. For the reasons explained by the High Court (White J.) in *Cash v. Director of Public Prosecutions* [2017] IEHC 234, [12], in determining whether there has been prosecutorial delay in a child's case, it is only appropriate to have regard to events occurring *prior* to an alleged offender having reached the age of majority. As it happens, most if not all of the delay complained of in the present case occurred prior to the Applicant's eighteenth birthday. The Applicant was ultimately charged on 17 December 2018.

24. The carrying out of any criminal investigation will take time: the resources of An Garda Síochána are finite, and it takes manpower to collate and examine CCTV and to arrange to interview any suspects. While the importance of ensuring a speedy trial in the case of alleged youth offenders is well established, there is no obligation on the prosecuting authorities to unrealistically prioritise cases involving minors (see the judgment of the High Court (Kearns P.) in *Daly v. Director of Public Prosecutions* [2015] IEHC 405, [48]).

25. There is a further procedural step which is unique to youth offenders, and the need to complete this step adds to the lapse of time between the date of an alleged offence and the date upon which charges are preferred. Specifically, juvenile offenders must be considered for admission to the Garda Diversion Programme. This is provided for under Section 18 of the Children Act 2001 as follows.

> 18. Unless the interests of society otherwise require and subject to this Part, any child who —
>
> (a) has committed an offence, or
>
> (b) has behaved anti-socially,
>
> and who accepts responsibility for his or her criminal or anti-social behaviour shall be considered for admission to a diversion programme (in this Part referred to as the Programme) having the objective set out in section 19.

26. Relevantly, one of the criteria under section 18 is that the young offender accepts responsibility for his or her criminal or anti-social behaviour. The making of a referral to the Garda Diversion Programme must normally await the completion of the investigation file. This is because it is only when the full extent of the alleged offence is known that an informed decision can be taken as to whether or not the young offender has accepted responsibility. The making and completion of a referral to the Garda Diversion Programme will take some time, and this has to be taken into account by a court in assessing whether there has been blameworthy or culpable delay.

27. Similarly, the requirement to submit a file for directions to the Office of the Director of Public Prosecutions will also take some time, and that Office must be allowed a reasonable period within which to issue its directions.

28. Even allowing for all of these steps, however, the delay of more than two years between the date of the alleged offence on 22 November 2016, and the subsequent charging of the Applicant on 17 December 2018, was inordinate. Whereas the alleged offences are undoubtedly serious, the investigation of same would have been a relatively straightforward matter. The alleged offences relate to a single incident, whereby the Applicant is said to have sought to escape from custody. By definition, there was no difficulty in identifying the Applicant. The incident is said to have involved an assault on a number of members of An Garda Síochána, and the causing of criminal damage. The incident took place at a courthouse, and there had been CCTV footage available. As most of the witnesses to the incident were members of An Garda Síochána, they too would have been readily identifiable.

29. Indeed, the investigation of the offence did proceed with reasonable despatch. The Applicant had been interviewed; the CCTV footage obtained; and a referral had been

made to, and decision received from, the Garda Youth Diversion Office, all within six months of the date of the alleged incident. It is the delay *thereafter* that is unreasonable.

30. It is not the function of the High Court to attempt to dictate how An Garda Síochána carries out its investigations nor to "micro manage" those investigations. I refrain, therefore, from making any finding on the question of whether An Garda Síochána were correct in deciding to go by way of the summons procedure. Whatever the rights or wrongs of that decision, however, in the events that transpired there has been inordinate delay in the prosecution. For reasons which are not entirely clear, neither the original nor the reissued summonses had been served on the Applicant. This is not a case where the Applicant had been deliberately evading service or arrest. The unfortunate reality is that the Applicant spent a large period of that time in custody at Oberstown, and had also been before the courts on a number of occasions at scheduled appearances. (For completeness, it is to be noted that the Applicant did fail to attend on at least one occasion, and was subject to a bench warrant). An Garda Síochána very fairly acknowledge that some opportunities for progressing the prosecution had been lost.

31. In summary, I am satisfied that the period of more than two years which elapsed in this case was excessive.

BALANCING EXERCISE: PREJUDICE ALLEGED BY APPLICANT

32. In circumstances where I have concluded that there has been culpable or blameworthy prosecutorial delay, it is next necessary to carry out the balancing exercise as set out by the Supreme Court in *Donoghue.*

LOSS OF PROTECTIONS UNDER THE CHILDREN ACT 2001

33. The principal prejudice alleged by the Applicant is the loss of certain procedural entitlements under the Children Act 2001. Specifically, the Applicant submits that *but for* the prosecutorial delay, the charges against him would have been heard and determined in accordance with the Children Act 2001. I will address each of the sections relied upon by the Applicant under separate sub-headings below.

(i) Sentencing Principles

34. The Applicant submits that had the matter been determined before he attained the age of majority, he would have been entitled to the benefit of Section 96(2) of the Children Act 2001 which indicates that a custodial sentence should be imposed upon a juvenile offender as a matter of last resort.

35. Section 96 in full reads as follows.

> "96. (1) Any court when dealing with children charged with offences shall have regard to—
>
> (a) the principle that children have rights and freedom before the law equal to those enjoyed by adults and, in particular, a right to be heard and to participate in any proceedings of the court that can affect them, and
>
> (b) the principle that criminal proceedings shall not be used solely to provide any assistance or service needed to care for or protect a child.
>
> (2) Because it is desirable wherever possible—
>
> (a) to allow the education, training or employment of children to proceed without interruption,
>
> (b) to preserve and strengthen the relationship between children and their parents and other family members,
>
> (c) to foster the ability of families to develop their own means of dealing with offending by their children, and
>
> (d) to allow children reside in their own homes,

any penalty imposed on a child for an offence should cause as little interference as possible with the child's legitimate activities and pursuits, should take the form most likely to maintain and promote the development of the child and should take the least restrictive form that is appropriate in the circumstances; in particular, a period of detention should be imposed only as a measure of last resort.

(3) A court may take into consideration as mitigating factors a child's age and level of maturity in determining the nature of any penalty imposed, unless the penalty is fixed by law.

(4) The penalty imposed on a child for an offence should be no greater than that which would be appropriate in the case of an adult who commits an offence of the same kind and may be less, where so provided for in this Part.

(5) When dealing with a child charged with an offence, a court shall have due regard to the child's best interests, the interests of the victim of the offence and the protection of society."

36. On the facts of the present case, the practical significance of the loss of section 96(2), is very limited for the following two reasons.

37. First, the fact that the alleged offences had occurred at a time when the Applicant had been a minor is something which will be taken into account by a sentencing court in any event, i.e. even in the absence of the direct applicability of section 96(2). This issue has recently been addressed by the Court of Appeal in *A.B. v. Director of Public Prosecutions*, unreported, Court of Appeal, 21 January 2020. Birmingham P. stated as follows.

> "16. I agree with the High Court judge that if the stage of considering sentence is reached, then the judge in the Circuit Court would be required to have regard to the age and maturity of the appellant at the time of the commission of the offence. The judge will be sentencing him as a person who, aged fifteen and a half years, offended. Obviously, his age and maturity will be highly relevant to the assessment of the level of culpability. In these circumstances, I do not see the fact that s. 96(2) of the Children's Act, which stipulates that a sentence of detention will be a last resort, and s. 99, which mandates the preparation of a probation report, will not be applicable, as having any major practical significance."

38. Secondly, it seems to me that there was no real likelihood of the Applicant—assuming, for the purposes of argument only, that he were to be found guilty of the alleged offences—would have received a non-custodial sentence even with the benefit of the sentencing principles under section 96. As appears from the discussion of the timeline earlier, the Applicant has, sadly, already been convicted of a number of offences and had been detained in Oberstown for large periods of time. It seems likely, therefore, that, if convicted, a further custodial sentence would be imposed in any event, even if the Applicant had had the benefit of being tried as a child.

39. I rely in this regard on the judgments in *Smyth v. Director of Public Prosecutions* [2014] IEHC 642; *Ryan v. Director of Public Prosecutions* [2018] IEHC 44, [27]; and *Bernotas v. Commissioner of An Garda Síochána* [2019] IEHC 296, [17], all three of which judgments appear to suggest that the putative loss of the benefit of section 96 may be of less significance in the context of an accused who already has a criminal record and who is, therefore, more likely to have received a custodial sentence even if he had the benefit of section 96.

(ii) Reporting Restrictions

40. The second protection said to have been lost is that of the reporting restrictions imposed under section 93(1). The subsection in full reads as follows.

> "(1) In relation to proceedings before any court concerning a child —
>
> (a) no report which reveals the name, address or school of any child concerned in the proceedings or includes any particulars likely to lead to the identification of any such child shall be published or included in a broadcast or any other form of communication, and
>
> (b) no still or moving picture of or including any such child or which is likely to lead to his or her identification shall be so published or included."

41. Section 93 must be read in conjunction with section 258 (non-disclosure of certain findings of guilt). Section 258 allows for criminal offences of certain classes which were

committed by a person while under the age of eighteen to be what might be colloquially described as "expunged" after a period of time. The combined effect of the two sections is that a person who has committed an offence while a child will be able to have their conviction expunged subsequently, in circumstances where there will not have been any reportage of the original conviction. However, the practical benefit of section 258 would be undermined if the trial of an adult being prosecuted in respect of offences alleged to have been committed as a "child" were to be conducted without any reporting restrictions.

42. Certainly, in the case of a trial which attracted publicity, there would be a risk that the existence of the otherwise expunged criminal convictions would be discoverable by anyone conducting a search on the internet by reference to the accused person's name. Thus, for example, if the accused applied for a job, the potential employer might locate references online to the convictions which have formally been expunged.

43. The loss of the reporting restrictions has been described by the Court of Appeal in *Director of Public Prosecutions v. L.E.* [2020] IECA 101 as a "significant disadvantage". This disadvantage has to be weighed against other considerations, such as, in particular, the seriousness of the offence alleged.

(iii) Mandatory Probation Report

44. The third alleged prejudice is the loss of a right to a mandatory probation report under section 99. I do not regard this as a particularly serious detriment in circumstances where the trial court would, in any event, have a discretion to seek such a report. In this regard, I adopt the approach taken in *R.D. v. Director of Public Prosecutions* [2018] IEHC 164 and *Bernotas v. Commissioner of An Garda Síochána* [2019] IEHC 296. The question of a probation report has also been addressed in the passage from *A.B. v. Director of Public Prosecutions* cited above.

Summary

45. In summary, therefore, I have concluded that the principal prejudice suffered by the Applicant as a result of the prosecutorial delay is that he has lost the benefit of the reporting restrictions under section 93 of the Children Act 2001. The other complaints made do not, to my mind, represent a real prejudice. In particular, I do not think that the loss of the sentencing principles under section 96 is significant on the facts of the present case where it seems to me that—in the event of a conviction—a custodial sentence would have been likely even with the benefit of section 96(2). Similarly, I do not think that the loss of the requirement for a mandatory probation report is significant.

CONSTITUTIONAL DIMENSION

46. Counsel for the Applicant, Mr Padraig Dwyer, SC, has placed some emphasis on Article 42A of the Constitution of Ireland. Reference was made in particular to the following provisions.

> 1 The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.
>
> […]
>
> 4 1° Provision shall be made by law that in the resolution of all proceedings—
>
> > i brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or
> >
> > ii concerning the adoption, guardianship or custody of, or access to, any child,
>
> the best interests of the child shall be the paramount consideration.

47. These rights are, self-evidently, important rights, and ones to which this court must, and does, have careful regard. The emphasis which the judgment in *Donoghue* places on the

need for expedition is a special duty on the State authorities, over and above the normal duty of expedition, to ensure a speedy trial, is entirely consistent with these rights. (The judgment in *Donoghue* had been decided shortly before the introduction of Article 42A by way of constitutional referendum in 2015).

48. It should be noted, however, that Article 42A envisages that effect will be given to these constitutional rights by way of legislation. (See, by analogy, *In the matter of JB (A minor)* [2018] IESC 30).

49. The Oireachtas has put in place legislation, i.e. the Children Act 2001, which recognises the special needs of children and seeks to adapt the criminal law accordingly. It is a feature of this legislation that the qualifying criterion for many of the important procedural protections is the age of the accused as of the date of the trial of the offences (as opposed to his or her age as of the date when the alleged offences are said to have occurred). The legislation does not extend all of these protections into adulthood. The Applicant is no longer a child, and, as such, has no statutory right to some of these protections. No challenge has been made to the validity of the legislation.

50. It must also be open to question whether the imperative that "the best interests of the child shall be the paramount consideration" is applicable to criminal proceedings. The structure of Article 42A.4 indicates that it is directed to proceedings for the "safety and welfare" of a child, or for the adoption, guardianship or custody of, or access to a child. The constitutional issues engaged by the prosecution of criminal offences require some consideration of the rights of the victims of crime and of the public interest in the prosecution of criminal offences. This balance is properly struck by section 96(5) of the Children Act 2001 as follows.

> "(5) When dealing with a child charged with an offence, a court shall have due regard to the child's best interests, the interests of the victim of the offence and the protection of society."

51. In summary, whereas there is a constitutional dimension to the carrying out of the balancing exercise, this is inherent in the *Donoghue* test and no further adjustment is required.

FINDINGS OF THE COURT ON BALANCING EXERCISE

52. In performing the balancing exercise mandated by the Supreme Court in *Donoghue*, it is necessary to weigh (i) the prejudice caused to the Applicant by the loss of the statutory reporting restrictions, against (ii) the public interest in the prosecution of offences. There are a number of aspects of the present case which point strongly in favour of allowing the prosecution to proceed, as follows.

53. The first issue to be considered is the seriousness of the offences. Counsel for the Applicant has drawn attention to the fact that the offences are to be dealt with as *minor* offences to be disposed of summarily before the District Court. This, it is said, distinguishes the circumstances of the present case from those of cases such as, for example, *Dos Santos v. Director of Public Prosecutions* [2020] IEHC 252.

54. This submission is well made. However, notwithstanding the fact that the offences are to be tried as minor offences, some weight must nevertheless be attached to the particular circumstances in which the offences are said to have occurred. The alleged incident involved an attempt to escape from custody in a courthouse setting, and is said to have involved an assault on three members of An Garda Síochána. There is a public interest in ensuring the integrity of court proceedings, and the health and safety of those involved in transporting detainees to and from courthouses. It is essential to the rule of law to ensure that discipline and order are maintained at courthouses. It would tend to undermine the rule of law if the Director of Public Prosecutions were to be restrained from pursuing prosecutions for offences such as those alleged in the present case. This

is especially so where there has been no suggestion that the Applicant's ability to defend the proceedings has been prejudiced by the delay.

55. Thirdly, in contrast to the accused in *Donoghue*, the Applicant has not made a full admission. A transcript of the interview with the Applicant on 18 April 2017 has been exhibited in these proceedings. As appears therefrom, it had been put to the Applicant that he had kicked a pane of glass in the lobby of the courthouse and had broken it. It had also been put to the Applicant that he had struck out and headbutted a member of An Garda Síochána, causing his lip to bleed. Both of these allegations were denied by the Applicant and described as "lies".

56. In all the circumstances, I am satisfied that the three factors identified above outweigh any prejudice accruing to the Applicant as a result of the loss of the reporting restrictions under section 93 of the Children Act 2001. The balance of justice lies in favour of allowing the prosecution to proceed.

REPORTING RESTRICTIONS?

57. There has been some debate in the earlier case law as to whether the loss of anonymity under section 93 of the Children Act 2001 could be mitigated by the High Court making an order pursuant to section 45 of the Courts (Supplemental Provisions) Act 1961. The judgment of the High Court (Humphreys J.) in *M. McD. v. Director of Public Prosecutions* [2016] IEHC 210 suggests that section 45(1) is in deliberately wide terms, and is not confined to proceedings relating to persons who are children at the time the matter comes before the court.

58. In my own judgment in *L.E. v Director of Public Prosecutions* [2019] IEHC 471, I respectfully expressed a contrary view.

> "I am not satisfied that Section 45(1) of the Courts (Supplemental Provisions) Act 1961 can be interpreted in this way. It is well

> established that statutory exceptions to the constitutional imperative that justice should be administered in public must be strictly construed, both as to the subject matter and the manner in which the procedures depart from the standard of a full hearing in public. See *Gilchrist v. Sunday Newspapers Ltd.* [2017] IESC 18; [2017] 2 I.R. 284. It seems to me that in circumstances where the Oireachtas has made express provision under Section 92 [*recte*, section 93]of the Children Act 2001 for restricting the reporting of criminal proceedings involving offences alleged to have been committed by children, but has omitted to extend that protection to cases where the hearing takes place *after* the child has become an adult, weight should be given to this legislative preference. It is not open to this court to sidestep this legislative preference by calling in aid the *general* provisions of Section 45(1) of the Courts (Supplemental Provisions) Act 1961. The specific circumstances in which criminal proceedings in respect of offences alleged to have been committed by minors can be held otherwise than in public is regulated under the Children Act 2001. There is an obvious tension between the principle that justice be administered in public, and a desire to shield child defendants from publicity lest it frustrate their rehabilitation or undermine their future prospects in life. The compromise chosen by the Oireachtas is to provide anonymity in cases where the defendant is still a 'child' as defined at the time of the criminal proceedings. If the child has reached the age of majority, then they are confined to the benefit of Section 258 of the Children Act 2001. Section 258 provides, in effect, that criminal convictions for offences committed as a child shall be expunged after a period of three years. This is subject to certain exceptions, e.g. it does not apply to an offence which is required to be tried by the Central Criminal Court, or where the defendant has been dealt with regarding an offence in that three-year period."

59. The passage above has since been cited with approval by the Court of Appeal in *A.B. v. Director of Public Prosecutions*, unreported, Court of Appeal, 21 January 2020.

60. I do not propose, therefore, to make any order seeking to restrict the reporting of any hearing in respect of the four charges pending against the Applicant arising out of the events at Cloverhill courthouse on 22 November 2016.

CONCLUSION AND FORM OF ORDER

61. For the reasons set out in detail herein, I have concluded that there has been culpable or blameworthy prosecutorial delay in the present case. The delay centres on the

progression of the criminal prosecution, i.e. post-investigation, and the failure to charge the Applicant until 17 December 2018. The relevant chronology is set out at paragraph 9 above. There are, however, a number of factors which tip the balance in favour of allowing the prosecution to proceed. These are set out at paragraphs 52 to 56 above. Accordingly, the application for judicial review is dismissed.

62. The attention of the parties is drawn to the practice direction issued on 24 March 2020 in respect of the delivery of judgments electronically, as follows.

> "The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."

63. The parties are requested to correspond with each other on the question of the appropriate costs order. In default of agreement between the parties on the issue, short written submissions should be filed in the Central Office within twenty-eight days of today's date.

Appearances

Padraig Dwyer SC and Keith Spencer for the Applicant instructed by Connolly Finan Fleming Solicitors
Niall Nolan for the Respondent instructed by the Chief Prosecution Solicitor

Approved
Garrett Simons