

**THE HIGH COURT**

[2021] IEHC 819

[2020 No. 341 JR]

**BETWEEN**

**MICHAEL WARD**

**APPLICANT**

**AND**

**THE JUDGES OF THE DUBLIN CIRCUIT CRIMINAL COURT**

**FIRST NAMED RESPONDENTS**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**SECOND NAMED RESPONDENT**

[2020 No. 342 JR]

**BETWEEN**

**DARREN FOLEY**

**APPLICANT**

**AND**

**THE JUDGES OF THE DUBLIN CIRCUIT CRIMINAL COURT**

**FIRST NAMED RESPONDENTS**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**SECOND NAMED RESPONDENT**

[2020 No. 343 JR]

**BETWEEN**

**PHILIP McCABE**

**APPLICANT**

**AND**

**THE JUDGES OF THE DUBLIN CIRCUIT CRIMINAL COURT**

**FIRST NAMED RESPONDENTS  
AND  
THE DIRECTOR OF PUBLIC PROSECUTIONS  
SECOND NAMED RESPONDENT**

[2020 No. 465 JR]

**BETWEEN**

**LUKE CRONIN**

**APPLICANT**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**JUDGMENT of Mr. Justice Meenan delivered on the 5<sup>th</sup> day of November, 2021**

**Background**

1. Each of the above named applicants are facing criminal charges arising from events that took place at the Oberstown Children’s Detention Campus (Oberstown) Lusk, County Dublin on 20/21 September 2016. An account of the events is set out in an affidavit sworn by John Delaney, a member of An Garda Síochána, as follows: -

“6. By way of short summary, it is alleged that during the extended period in issue, which commenced roughly in the early evening on the 20<sup>th</sup> September and finished early morning the following day, the four accused ransacked the Unit. Makeshift weapons were deployed to break through doors so as to gain access to rooms, to leave the unit or gain access it was believed to the roof. Two of the accused managed to break into co-accused Darren Foley's room and free him. Darren Foley had been placed in a particular room, isolated from others, when he had recently returned to Oberstown as it was believed he may have contraband on him. Accused persons went on to smash out the door into Luke Cronin's room. Amongst other fixtures and fittings, kitchen equipment,

cupboards, plates and a tv were smashed. Windows were also smashed with glass shattering endangering staff, including at one point the Director of Oberstown, Mr. Pat Bergin who with others throughout the episode was trying to diffuse the situation and bring the incident safely to a close. The accused were observed intermittently taking these tablets and also observed making up and smoking cannabis joints. Staff understandably feared for their personal safety and some staff members reported injury from interaction with some of the accused. In this regard for example Ms. Nicola Nixon made a statement to the effect that her wrist was twisted by an accused when it seems she was trying to get control of a locking mechanism and Mr. David Collins had scrapes and abrasions on his stomach from grappling with another of the accused. He confirmed that during the incident he feared for his own safety and that of his colleagues. He had worked at Oberstown it seems for 25 years and described the incident as ‘quite scary’.”

2. The criminal charges against each of the applicants were brought pursuant to s.2 (1) of the Criminal Damage Act, 1991. A chronology of the various steps taken in the prosecution of these charges against the applicants is as follows: -

- “21/09/16 Garda Jim O’Byrne, Garristown Garda Station and Garda Conor McSkeane, Lusk Garda Station respond to the report of criminal damage at Oberstown. A pulse incident is created and investigation commenced
- 21/09/16– Statements taken from injured parties, staff and other evidence gathered  
28/11/16
- 29/11/16 Darren Foley was arrested by Garda O’Byrne on foot of a warrant issued pursuant to s.42 of the Criminal Justice Act 1999 (‘s,42 Warrant’) at Oberstown Childrens Detention Campus. He was

detained at Balbriggan Garda Station. The Applicant made ‘no comment’.

- 30/11/16 Michael Ward was arrested by Garda Jim O'Byrne on foot of a s.42 warrant at Oberstown Childrens Detention Campus. He was detained and interviewed at Balbriggan Garda Station, made some admissions and was later released and returned to Oberstown
- 31/01/17 Luke Cronin was arrested by Garda O'Byrne on foot of a further s.42 warrant at Oberstown Detention Campus. He was detained and interviewed also at Balbriggan Garda Station, made no comment and was later released and returned to Oberstown
- 03/02/17 Philip McCabe was arrested by Garda Jim O'Byrne on foot of a s.42 warrant at Oberstown Childrens Detention Campus. He was detained and interviewed at Balbriggan Garda Station, made no comment and was later released and returned to Oberstown
- April 2017 Garda Jim O'Byrne retires from An Garda Síochána
- May 2017 Garda Joseph Carolan, Garristown Garda Station is appointed as investigating member
- March 2018 Due to the lack of progress with the investigation a decision was made for the investigation file to be completed by Detective Garda Sarah Ormond of the Incident Room, Balbriggan Garda Station
- March 2018- Investigation progressed, further statements taken, youth referrals  
-Nov 2018 created and suitability reports requested from local Juvenile Liaison Officers
- 10/10/18 Suitability report for Luke Cronin received by NJO

December 2018- The investigation file with appendices was sent by email from Detective Garda Sarah Ormond to Detective Sergeant Dave Kemp who forwarded same by email to District Office, Balbriggan for onward transmission to the National Juvenile Office. On 20/12/18 District Clerk Aoibhinn O'Reilly forwarded the investigation file with appendices to Superintendent Tony Twomey

February 2019- Suitability reports for Michael Ward, Darren Foley and Philip McCabe which had been prepared by local Juvenile Liaison Officers were received by the National Juvenile Office.

-April 2019

05/04/ 2019 A hardcopy file was submitted to the District Office, Balbriggan Garda Station for onward transmission to the National Juvenile Office it having become apparent in March 2019 that the National Juvenile Office had not received the investigation file

23/04/19 All 4 accused deemed unsuitable for a juvenile diversionary programme

02/09/19 Investigation file forwarded for directions to Director of Public Prosecutions from Incident Room, Balbriggan

24/10/19 DPP directions received to charge the 4 accused

04/11/19 Garda John Delaney appointed as investigating member

January 2020 Enquiries made into the location of the 4 accused

14/01/20 Philip McCabe charged before Blanchardstown District Court and remanded to District Court 55. Philip McCabe was on bail on other matters when charged

27/01/20 Luke Cronin, Darren Foley and Michael Ward all charged before

District Court 55. All three were at the time serving sentences in various prisons throughout the country and were produced by the prison service for the purpose of charge”

### **Judicial Review proceedings**

3. At the time of the alleged offences, each of the applicants were minors and were being detained in Oberstown. The applicants claim that there has been serious delay in the prosecution of these offences and, as a consequence, they have been deprived of a number of safeguards which they would have had under the Children Act, 2001 (“the Act of 2001”). Should these prosecutions proceed, the applicants will be tried as adults.

4. Each of the applicants was granted liberty to seek certain reliefs by way of judicial review. These reliefs were: -

- (i) An order of prohibition preventing the further prosecution of the applicants; and
- (ii) A declaration that the prosecution of the applicants is invalid.

5. The respondents have each filed Statements of Opposition and replying affidavits.

### **Principles to be applied**

6. There are a number of authorities which set out clearly the principles which a court should apply on an application such as this. The first authority is the decision of the Supreme Court in *Donoghue v. DPP* [2014] 2 I.R. 762. In this case a quantity of heroin was found at the applicant’s home and the applicant admitted responsibility for it. The applicant was sixteen years old at the time. One year and four and a half months later the applicant was charged with an offence under s.15 of the Misuse of Drugs Act, 1977. The delay in charging the applicant meant that there was no prospect of the applicant being tried before his eighteenth birthday and that, as a result, he would be

tried as an adult. Giving the judgment of the Court, Dunne J. set out a two stage process which the Court should follow. Firstly, the Court must determine whether there has been blameworthy prosecutorial delay. If there has been such a delay, then the Court carries out a balancing exercise to determine whether the applicant is entitled to halt the prosecution. At para. 52 Dunne J. stated: -

“[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 be 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.”

7. These principles have been applied more recently in judgments given by Simons J. in *Dos Santos v. DPP* [2020] IEHC 252 and *Wilde v. DPP* [2020] IEHC 385. Simons J. makes the observation in both that it is surprising that the legislation (the Act of 2001) “*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. ...*” I endorse this observation.

8. In *Wilde v. DPP* Simons J. states: -

“(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.

...

(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.”

9. As part of the balancing exercise, the Court has to consider the various safeguards that are afforded to minors under the Act of 2001. The first are the provisions of s. 96, as amended, which provide: -

“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.”

**10.** The foregoing indicates that a custodial sentence should be imposed upon a juvenile only as a matter of last resort.

**11.** Section 93 of the Act of 2001, as amended, sets out reporting restrictions, as follows: -

“93 (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.  
...”

**12.** Section 99 of the Act of 2001 provides for a mandatory probation report.

Finally, s. 75 of the Act of 2001 provides: -

75. (1) Subject to *subsection (3)*, the Court may deal summarily with a child charged with any indictable offence, other than an offence which is required to be tried by the Central Criminal Court or manslaughter, unless the Court is of opinion that the offence does not constitute a minor offence fit to be tried summarily or, where the child wishes to plead guilty, to be dealt with summarily.

(2) In deciding whether to try or deal with a child summarily for an indictable offence, the Court shall also take account of—

(a) the age and level of maturity of the child concerned, and

(b) any other facts that it considers relevant.

(3) The Court shall not deal summarily with an indictable offence where the child, on being informed by the Court of his or her right to be tried by a jury, does not consent to the case being so dealt with.”

### **Application of principles**

**13.** The first matter which I have to consider is whether or not there was blameworthy prosecutorial delay. At para. 2 above, I have set out the relevant chronology. It is clear that all the relevant statements from the parties involved were taken promptly in a period of some two months between September and November

2016. There then followed a period of delay. For a period of time between approximately March 2018 and April 2019, the applicants were deemed unsuitable for a juvenile diversionary programme. This was not entirely surprising, but it did take, in my view, an unreasonable length of time for this decision to be taken. In his affidavit, Garda John Delaney accepts that no substantial progress was made in the period May 2017 to March 2018 and that “*the failure to progress these investigations materially during this period is a delay for which there is no justifiable explanation...*”.

**14.** I therefore conclude that there was blameworthy prosecutorial delay in the prosecution of these offences. I now have to consider where the balance of justice lies.

**15.** The first matter that has to be considered is the seriousness of the offences. I have already set out the narrative of the events alleged to have given rise to the offences. For the staff at Oberstown, these events cannot have been anything other than very frightening, directly threatening their own personal safety. Oberstown is a place of detention. As Simons J. stated in *T.G. v. Director of Public Prosecutions* [2019] IEHC 303, a case that involved serious disturbances in Oberstown and a claim of prosecutorial delay: -

“70. In performing the balancing exercise mandated by the Supreme Court in *Donoghue*, it is necessary to weigh this prejudice against 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. First, the offences occurred at a time when the applicant was 17 years of age. As noted in *Donoghue*, the age of the applicant is something to be taken into account. Secondly, the offences alleged are very serious offences. They include a charge of arson under the Criminal Damage Act 1991. The offence of arson under subsection 2(1) carries a maximum penalty of imprisonment for life. Thirdly,

there is a particular public interest in the prosecution of these alleged offences as they involve a disturbance at a children detention centre. It is essential to the rule of law to ensure that discipline and order are maintained at prisons and other places of detention.”

**16.** I am satisfied as to the serious nature of these offences and that there is a significant public interest in their prosecution.

**17.** It is also the case that none of the applicants are alleging that the prosecutorial delay has prejudiced their ability of defending the charges against them. (See *A.B. v. DPP* (Unreported, Court of Appeal, 21 January 2020)).

**18.** I will now consider the situation of each of the applicants: -

**(i.) Michael Ward:**

**19.** At the time of the alleged incident, this applicant was sixteen years and nine months, his date of birth being 27 December 1999. Thus, he would have been eighteen years old on 27 December 2017. At that point, statements had been taken from relevant parties, staff and evidence gathered. However, suitability reports had not been received from the local juvenile liaison officers. In his replying affidavit, Garda John Delaney lists Michael Ward’s previous convictions. Unfortunately, these are numerous. In light of this, were he to be convicted of the offence charged, it is difficult to see how the provisions of s. 96 of the Act of 2001, as amended, concerning sentencing, would benefit him. It is also difficult to see any prejudice that would arise in the case of this applicant from the absence of a mandatory probation report.

**20.** As for the provisions of s. 75 of the Act of 2001, no evidence has been offered by or on behalf of the applicant that he was below the average level of maturity of a person of his age, or that he could otherwise satisfy the requirements of s. 75. However,

it is the case that, had the applicant been tried as a child, he would have had the benefit of reporting restrictions under s. 93 of the Act of 2001.

**21.** In conclusion, in the case of Michael Ward, even if it was the case that his trial ought to have taken place before he reached the age of eighteen, the only prejudice that I can see he suffered is a loss of reporting restrictions. In my view, the seriousness of the offence and the fact that the other safeguards in the Act of 2001 would not have been of benefit to the applicant results in the balance of justice lying against granting the reliefs sought.

**(ii) Darren Foley**

**22.** This applicant was seventeen years and two months at the time of the alleged offence and, thus, would have been eighteen years on 16 July 2017. This was some ten months after the date of the alleged offence. Given the seriousness of the offence and the involvement of other co-accused, it is unlikely that the investigation and subsequent court proceedings would have concluded in ten months. This being the case, it is unlikely that this applicant would have had the safeguards under the Act of 2001.

**23.** As for the issue of sentencing under s. 96 of the Act of 2001, it is the case that this applicant adopted a position of “*no comment*” when interviewed by the Gardaí. I refer to the following passage of the judgment of Birmingham P. in *A.B. v. DPP*, where he stated: -

“... 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 his culpability. In these circumstances, I do not see that the fact that s. 96 (2) of the Children’s Act, which stipulates that a sentence of detention is a last resort, and s. 99, which mandates the preparation of a

probation report, will not be applicable, as having any major practical significance.”

24. Further, no evidence has been adduced that this applicant may have been in a position to rely on the provisions of s. 75 of the Act of 2001.

25. Therefore, as far as this applicant is concerned, I don't believe that it was likely that his court proceedings could have concluded in a period of some ten months. I am also satisfied given the seriousness of the offence charged, notwithstanding the loss of the benefit of reporting restrictions, that the balance of justice lies against granting the relief sought.

**(iii) Philip McCabe**

25. The applicant was some seventeen years and nine months at the time of the alleged offence. This means that to avail of the safeguards of the Act of 2001, the investigation and subsequent court proceedings would have had to have concluded within a period of approximately thirteen weeks. As was stated by Dunne J. in *Donoghue v. DPP*: -

“... In any given case, the age of the young person before the courts will be of relevance. Someone close to the age of eighteen 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. ...”

26. Therefore, I am satisfied that on this factor alone this applicant is not entitled to the reliefs sought.

27. In respect of the issue of sentencing in the case of this applicant, it should also be noted that he adopted a position of “*no comment*” when interviewed by Gardaí. I repeat the passage already cited from the judgment of Birmingham P. in *A.B. v. DPP*, as set out above. This applicant has deposed to no facts as would enable him to benefit

from the provisions of s. 75 of the Act of 2001. He has accepted that he would not have had the benefit of reporting restrictions.

**28.** In conclusion, as far as this applicant is concerned, it is highly unlikely that investigation and subsequent court proceedings would have concluded in a period of some thirteen weeks. Even if this had happened, the balance of justice would lie against granting the reliefs sought.

**(iv) Luke Cronin**

**29.** This applicant was seventeen years of age at the time of the alleged offence and turned eighteen years on 7 September 2017. In my view, it is unlikely that an investigation and subsequent court proceedings would have concluded within a period of approximately twelve months. Again, I refer to the passage of Dunne J. in *Donoghue v. DPP*, referred to above.

**30.** Even though it is unlikely, given the timeframe, that this applicant would have had the safeguards of the Act of 2001, I will look at where the balance of justice lies. As already stated, this applicant is charged with a serious offence and, as I have already stated, there is a public interest in the prosecution of such an offence. Once again, this applicant adopted a position of “*no comment*” when interviewed by the Gardaí. This applicant had a criminal record and has served several periods in custody/detention. Once again, I refer to the said passage from the judgment of Birmingham P. in *A.B. v. DPP*. Taking these matters, it seems to me that the provisions of s. 96 of the Act of 2001 in relation to sentencing would have been of little benefit to the applicant. It would also follow that a probation report on him would have had limited value.

**31.** As was the case of the other applicants, this applicant deposed to no facts as might entitle him to avail to the provisions of s. 75 of the Act of 2001. Like the other applicants, this applicant would not have had the benefit of reporting restrictions.



**32.** In conclusion, even in the unlikely event that had the investigation and subsequent court proceedings concluded within a period of twelve months, I am satisfied, for the reasons stated, that the balance of justice lies against granting the relief sought.

**Conclusion**

**33.** By reason of the foregoing, I will refuse the reliefs sought by each of the applicants. As this judgment is being delivered electronically, the parties have fourteen days to make submissions as to costs. I will list the matter on Wednesday, 24 November 2021 to deal with the issue of costs.