THE HIGH COURT

[2023] IEHC 275

[Record No. 2022/116 JR]

BETWEEN

J.S.

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Barr delivered on the 24th day of May, 2023.

Introduction.

1. This is an application by way of judicial review, whereby the applicant seeks, *inter alia*, an injunction restraining his continued prosecution by the respondent on one charge of assault causing harm contrary to s. 3 of the Non-Fatal Offences Against the Person Act 1997, as amended, on grounds of delay.

2. In particular, the applicant asserts that from the date of the alleged offences the respondent was on notice that the applicant was a minor, and due to blameworthy prosecutorial delay by the Gardaí and the respondent, the applicant has been deprived of the statutory protections afforded to him under the Children Act, 2001 (hereafter "the 2001 Act"), by virtue of the fact that he reached the age of majority prior to service of the book of evidence upon him.

Background.

3. The prosecution in question is currently pending before the Circuit Criminal Court in Kildare. It arises out of an incident that occurred on 23rd July, 2019 at a Londis shop on Main Street, Maynooth, Co. Kildare. It is alleged that the applicant was with a group of youths, who had entered the shop and began to throw items around. It is alleged that in the process of a staff member attempting to push the youths out of the shop, the applicant assaulted one of the employees working in the shop, by kicking him in the head. That employee suffered injuries as a result of the assault, including the loss of a tooth and extensive bruising to his face.

4. The applicant was born on 13th September 2003, meaning he was 15 years and 10 months at the time of the alleged offence. He was arrested on 27th July 2019, four days after the alleged

incident. He was interviewed upon arrest, and made several admissions in relation to the incident at the Londis shop.

5. On 22nd April, 2021, he applicant was charged with an offence contrary to s. 3 of the 1997 Act, as amended, when he was aged 17 years and 7 months. On 26th April 2021, solicitors for the applicant wrote to the prosecuting Garda in this case and enquired as to why there had been such significant delay in charging the applicant. No response was forthcoming.

6. The applicant was present at Naas District Court on 6th May 2021, when evidence of arrest, charge and caution was given by Sgt. Brian Jacob, before Judge Zaidan. Sgt. Jacob indicated that the DPP had consented to the summary disposal of the applicant's case; however, Judge Zaidan outlined that he did not consider the matter to be minor in nature. The judge noted the applicant's right to bring an application pursuant to s. 75 of the 2001 Act.

7. On that date, when counsel for the applicant had raised the issue of delay in the prosecution of the matter, Sgt. Jacob indicated that there had been delay in obtaining the medical reports concerning the injured party. An order of disclosure was made, which disclosure was to include relevant matters in relation to the delay, about which complaint had been made.

8. On 20th July, 2021, disclosure was received by the solicitors for the applicant. This disclosure contained witness statements, the custody record, and a memorandum of interview; but no information regarding the delay was forthcoming.

9. The s. 75 application was heard on 2nd September, 2021, on which date Judge Zaidan refused jurisdiction to hear the case and remanded the applicant to 14th October 2021 for service of the book of evidence.

10. The applicant reached the age of majority on 13th September, 2021.

11. The book of evidence was served upon the applicant on 14th October, 2021. He was returned for trial, on bail, to the next sittings of the Circuit Criminal Court in Kildare.

12. On 4th February, 2022, solicitors for the applicant wrote to the solicitors for the respondent seeking disclosure of CCTV and an explanation for the delay in prosecuting the applicant. Although the CCTV was forthcoming in a reply on 7th February, 2022; no explanation was given as to the delay question.

13. On the 21st February, 2022, Meenan J. gave the applicant leave to proceed by way of judicial review for the reliefs sought in his *ex parte* docket dated 17th February, 2022.

Chronology.

14. It is necessary to set out a chronology of the investigation of the charges against the applicant, in order to assess the delay in the investigation and prosecution of the matter:

13th September 2003	Applicant was born.
23rd July 2019	Alleged assault of the injured party in the Londis shop.
24th July 2019	Gardaí obtain CCTV footage of the alleged assault.
27th July 2019	Applicant is arrested and interviewed by Gardaí, in which interview he makes admissions.
28th July 2019	Statement is taken from the injured party by the Gardaí.
10th September 2019	Medical reports are requested by the Gardaí.
5th November 2019	Request for medical reports is repeated.
11th November 2019	Medical report is received by the Gardaí from Naas Emergency Department.
25th November 2019	Medical report is received from Dublin Dental Hospital.
4th March 2020	Youth Referral of the applicant approved by Superintendent Wall.
2nd April 2020	Youth Referral of applicant created by Garda Kelly.
31st May 2020	'Skeleton file' of the applicant forwarded for directions.
6th August 2020	Applicant is deemed unsuitable for inclusion in the Youth Diversion Programme.
7th March 2021	File submitted for directions.
14th and 20th March 2021	File returned for amendments.
22nd March 2021	File is re-submitted for directions.
24th March 2021	Inspector McDonald directs that the applicant be charged with s. 3 assault contrary to the 1997 Act.
22nd April 2021	Applicant is arrested and charged with assault.
26th April 2021	Letter is sent to the Gardaí by the applicant's solicitors enquiring about the period of delay in prosecuting the charge.
6th May 2021	First appearance in the District Court, at which the case is remanded for a s. 75 hearing. Disclosure order made.
22nd July 2021	Disclosure received by the applicant's solicitors.

2nd September 2021	Section 75 application is moved and District Judge refuses jurisdiction to hear the case.
13th September 2021	The applicant attains his majority.
14th October 2021	book of evidence is served.
4th February 2022	Applicant's solicitors request CCTV footage and again enquire about delay.
7th February 2022	CCTV is furnished to the applicant's solicitors but no reply is made with regard to delay enquiry.
21st February 2022	Leave to proceed by way of judicial review is granted.

Applicant's Submissions.

15. Mr. Ronan Munro SC, for the applicant, submitted that this was a case in which there was extensive prosecutorial delay on behalf of the respondent. He submitted that this was a case which was factually similar to the case of *Donoghue v. DPP* [2014] 2 IR 762, with this applicant's case being potentially stronger than the applicant's in *Donoghue*, which favoured the granting of the reliefs sought. The applicant in this matter was 15 years and 10 months at the time of the alleged offence; while the applicant in *Donoghue* had turned 16 just three days before the commission of the alleged offence. Counsel also submitted that the offence, while serious in nature, was on the less serious end of offending in s. 3 assaults, evidenced through the DPP's direction that the matter could be dealt with summarily.

16. Counsel submitted that the applicant's case could also be distinguished from the facts in the case of *DPP v. Furlong* [2022] IECA 85, wherein the Court stated that the assessment of the balance of justice, should involve not only an assessment of the charge itself, but also the circumstances of the charge. To that end, it was submitted that this offence did not involve the use of a weapon as *Furlong* had (being a glass bottle), which showed the less serious nature of the charge against this applicant.

17. Counsel submitted that there was no explanation forthcoming from the respondent as to why there had been a delay of 9 months in referring the applicant to the Garda Youth Diversion Programme (hereinafter referred to as 'GYDP'), particularly in light of the simplicity of the investigation involved in this incident.

18. Counsel submitted that the investigation of the alleged assault in these proceedings was not a complex one. It was submitted that all the evidence which was to be led against the applicant at

the trial: being the witness statements, CCTV footage and admissions of the applicant at interview with the Gardaí, had been available to the Gardaí within days of the occurrence of the incident.

19. In those circumstances, he submitted that there could be no excuse for the delay on the part of the gardaí; nor had any explanation been offered, for the 21-month period of delay in charging the applicant with the offence. It was stated that this significant period should be considered culpable prosecutorial delay on part of the respondent, in circumstances where the respondent owed the applicant an elevated duty to prosecute expeditiously, owing to his age.

20. With regard to the prejudice suffered by the applicant, were the court to find that prosecutorial delay existed in this case, counsel submitted that the applicant was significantly prejudiced by the loss of anonymity in the proceedings. He placed heavy reliance on the education and employment history of the applicant as set out in his grounding affidavit, in that regard.

21. In his Statement of Grounds, the applicant outlined the extensive educational opportunities he has availed of, including: undertaking his Junior Certificate in June 2019; and his entry to a Youthreach educational programme from September 2019. The applicant also began working part-time as a kitchen porter in September 2019, until the closure of that restaurant during the Covid-19 pandemic in March 2020.

22. In November 2020, the applicant began working at a grocery wholesaler, having left the Youthreach programme in favour of full-time employment. That employment ceased in May 2021, when the applicant returned to his job as a kitchen porter, on a full-time basis. In October 2021, the applicant ceased his work as a kitchen porter and began working with an industrial cleaning company on a full-time basis. Finally, the applicant had outlined his plans to start an apprenticeship in flooring in February 2022.

23. Counsel submitted that in light of the applicant's career plans and the gravity of a conviction on the applicant's record for an incident which happened when he was 15 years old, the prosecutorial delay had caused significant prejudice to him.

24. Finally, counsel submitted that there was no culpable delay on the part of the applicant in the prosecution of the offence, as had occurred in the *DPP v. Furlong*. Therefore, it was submitted that the balance of justice weighed in favour of granting the injunction restraining the respondent from prosecuting the applicant in this matter.

Respondent's Submissions.

25. Mr. Oisín Clarke BL, for the respondent, outlined that although there had been periods of delay in prosecuting the applicant in this matter, those periods did not amount to culpable prosecutorial delay sufficient to warrant the halting of the prosecution.

26. Counsel submitted that the offence with which the applicant was charged, was serious in nature, which was evidenced by the decision of Judge Zaidan to refuse jurisdiction to hear the matter summarily. He further pointed to the extensive injuries suffered by the injured party in this case, to demonstrate the seriousness of the matter, which he submitted was not dissimilar to the facts in *DPP v Furlong*.

27. Counsel submitted that the respondent should be given some leeway with regard to the administrative delays in creating a referral for the applicant to the GYDP and reaching a conclusion thereon, as those procedures were very important and took time to complete. In that regard, counsel relied on the decision of Simons J. in *Dos Santos v. DPP* [2022] 252 (see paras. 22-23).

28. Counsel submitted that it was best practice for the respondent to await medical reports from an injured party before embarking upon the prosecution of a s. 3 assault claim, which explained some of the delay in prosecuting the applicant.

29. Counsel pointed out that the only prejudice potentially suffered by the applicant related to the loss of procedural benefits pursuant to the 2001 Act. He submitted that the applicant would not suffer any material prejudice were the prosecution to be continued, in circumstances where he had availed of his right to s. 75 application, before he attained the age of majority, and such application had been refused by Judge Zaidan.

30. It was submitted that when the s. 75 issue fell away, the only prejudice remaining was the issue of the loss of the applicant's anonymity. Counsel submitted that that alone, was not sufficient to tilt the balance of justice in favour of prohibiting the trial, when considered in light of the gravity of the offence with which the applicant was charged.

31. Further, counsel submitted that those losses were not totally irredeemable to the applicant. It was submitted that, if the applicant is found guilty at his trial, the judge when sentencing him, could take his age and level of maturity at the time of the commission of the offence into account; and the importance of obtaining a probation report, could also be considered. In that regard, counsel relied on the decision of Hyland J. in *Cerfas v. DPP* [2022] IEHC 70, at para. 33. Counsel also relied on *DPP v. AO'F* [2022] IECA 122, being a case wherein the trial judge had considered the age of the defendant at the time of the offence, in his sentencing.

32. Counsel submitted that in circumstances where the applicant had made admissions to the offence with which he had been charged, the balance should weigh in favour of allowing the prosecution to continue. In effect, he submitted that where the applicant had admitted to the offence, it was in the interests of justice that he be prosecuted and convicted for that offence. In that regard, he relied on the *dicta* of Hardiman J. in *S.A. v. DPP* [2007] IESC 43.

The Law.

33. In considering a case involving minor offenders, it is important to bear in mind the words of O'Malley J. in *G. v. DPP* [2014] IEHC 33:-

> "*Children differ from adults, not just in their physical development and lesser experience of the world, but in their intellectual, social and emotional understanding. It is for this reason that it has long been recognised that it is unfair to hold a child to account for his or her behaviour to the extent that would be appropriate when dealing with an adult*."

34. In that case, the applicant successfully sought an order of prohibition of a trial, where he was being charged with sexual offences concerning a young girl. The alleged offences took place when the applicant was 15 years of age. It was not until 4 years, later that the applicant was finally charged. The judge held that there had been prosecutorial delay, admissions had been made and the applicant was facing real prejudice in the case. An order of prohibition was granted.

35. In the seminal decision of *Donoghue v. DPP* [2014] 2 I.R. 762, the Supreme Court affirmed that there is a special duty owed to a minor in relation to a trial with reasonable expedition. Dunne J., delivering the judgment of the court, stated as follows at para. 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."

36. In the *Donoghue* case, members of An Garda Síochána had called to the minor applicant's home, where a substance was found which was believed to be heroin. The applicant was 16 years old at the time and immediately took responsibility and signed an admission to that effect. Subsequently, the items found at his home were forwarded to the forensic science laboratory for analysis, where the substance was confirmed to be heroin. A period of one year and four and a half months elapsed between the date of the applicant's arrest and his being charged with an offence.

37. The case came before the Supreme Court by way of the respondent's appeal from the decision of Birmingham J. in the High Court, where it was concluded that there had been significant culpable delay in the case. On the basis of this conclusion, the judge went on to consider the consequences of the delay in the circumstances of that case. It was noted that in all likelihood the applicant would have benefitted from statutory protections afforded to minor offenders under the 2001 Act and had therefore suffered real prejudice. An order of prohibition was granted in the High Court.

38. The Supreme Court held that having regard to all the circumstances of the case, there had been sufficient evidence before the court to enable the trial judge to reach the conclusion that there had been significant culpable delay in the case. The Supreme Court went on to hold that blameworthy prosecutorial delay alone will not be sufficient to prohibit a trial. The court must conduct a balancing exercise to establish whether any resulting prejudice to the accused, outweighs the public interest in the prosecution of serious offences. The court stated as follows at para. 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."

39. The *Donoghue* decision indicates that the first question to be determined by a court is whether or not there has been any culpable or blameworthy prosecutorial delay in the case. In the event that there has been such delay, then the court must carry out a balancing exercise to establish if there was, by reason of the delay, something additional to outweigh the public interest in the prosecution of seriousness offences. Factors such as the length of the delay, the age of the person to be tried at the time of the offence, the seriousness of the charge, the complexity of the case and the nature of the prejudice relied upon, are to be considered.

40. In ascertaining whether there has been blameworthy prosecutorial delay in the case, the court has had regard to the statement of White J. in *Cash v. DPP* [2017] IEHC 234, which was subsequently reaffirmed by Simons J. in *Dos Santos v. DPP* [2020] IEHC 252, at para. 23. In both cases it was confirmed that the relevant period of time for determining blameworthy prosecutorial delay is that between the date of the alleged offences and when the accused turned 18 years of age. White J. in *Cash v. DPP* stated at para. 12:-

"*There was prosecutorial delay from 2nd February, 2015 up to the date of charge on 7th January, 2016. The applicant reached his majority on 8th July, 2015. I do not consider any delay subsequent to 8th July, 2015 as being relevant to the applicant's challenge in these proceedings. I would not regard the delay as significant culpable prosecutorial delay. Even*

if the respondent prosecuted the matter without undue prosecutorial delay, it would not have concluded by way of indictable trial by jury before the applicant's eighteenth birthday."

41. In the Court of Appeal decision of *L.E. v. DPP* [2020] IECA 101, an appeal against the High Court's refusal to grant prohibition, was dismissed. The applicant in that case was a minor in 2015, when she allegedly committed offences, including assault causing harm, threats to kill and violent disorder. The Court of Appeal upheld the finding of the High Court that there had been no culpable or blameworthy prosecutorial delay. This was in circumstances which concerned a complex investigation with a number of suspected offenders and no admission of guilt. The High Court had held that although there had been "pockets of delay", when looking at the matter overall, there had been no blameworthy or culpable prosecutorial delay. The court also held that the overall cause of the delay lay at the feet of the applicant.

42. In the judgment of the High Court in *Daly v. DPP* [2015] IEHC 405, Kearns P., stated that there can be no obligation on prosecution authorities to unrealistically prioritise cases involving minors. It was stated as follows at page 19:-

"*While the importance of ensuring a speedy trial in the case of juveniles is well established, certain factors may arise in each case which determine how expeditiously this can occur and there can be no obligation on prosecution authorities to unrealistically prioritise cases involving minors. In the view of the Court there was no blameworthy prosecutorial delay in this case*."

43. In *SW v. DPP* [2018] IEHC 364, the applicant unsuccessfully sought prohibition. In refusing the reliefs sought, Barrett J. listed the following as relevant factors when conducting the necessary balancing exercise:-

"*In deciding whether or not to grant any of the reliefs that the Applicant has come to court seeking, the court is especially mindful of the following factors:*

(i) the need for expedition in the criminal process when dealing with children (see, inter alia, in this regard, BF v. DPP [2001] 1 IR 656, Jackson v. DPP & Walsh v. DPP [2004] IEHC 380, C (A Minor) v. DPP [2008] 3 IR 398, G v. DPP [2014] IEHC 33, and Donoghue v. DPP [2014] IESC 56);

(ii) the court's finding that there has in the within case been culpable prosecutorial delay, albeit of a limited duration;

(ii) [sic] *the fact that, as recognised in AP v. DPP [2011] 1 IR 729, 745, "The primary function of deciding to initiate or to continue a prosecution is conferred on the Director of Public*

Prosecutions" (albeit that this Court must ultimately vindicate the Applicant's constitutional right to an expeditious trial);

(iii) the contention of the DPP that the public interest in seeing that serious offences are prosecuted outweighs the factors presented by such delay as may be (and has been) found to arise in this case;

(iv) the fact that the delay presenting in this case is not due to any dereliction of duty, gross negligence, strategy or tactic on the part of the State;

(v) the fact that there is no identifiable prejudice presenting for the Applicant notwithstanding such culpable delay as has occurred;

(vi) the fact that, as recognised in Blanchfield v. Hartnett [2002] 3 IR 207, 226, the court must presume, until the contrary is demonstrated, that the proceedings of a criminal trial will be conducted fairly and properly; there is no reason to believe that the contrary will apply here;

(vii) the fact that if the Applicant pleads or is found guilty, (a) the trial judge has the power to order the preparation of a probation report, (b) it is a principle of sentencing that a period of imprisonment will only be imposed as a last resort.

(viii) the fact that this is a case in which the evidence against the Applicant is compelling: there is CCTV footage of the incident and identification of the applicant; and

(ix) the fact that this is a case in which there has been an uncontested admission; as Hardiman J. noted in SA v DPP (Supreme Court, 17th October, 2007), para.19, "[I]t would…be extraordinary to prohibit a trial in circumstances where the defendant admits a significant amount of behaviour of a criminal nature."

44. Turning to the various statutory protections which the applicant is alleged to have been deprived of as a result of the delay in the investigation, the relevant provisions of the 2001 Act are: s.75 (court's jurisdiction to deal with indictable offences summarily); s.93 (reporting restrictions); s.96 (detention as a last resort), and s.99 (mandatory probation report). While it is not necessary to recite these individual provisions in their entirety, the court has had regard to them in considering the potential prejudice the applicant will suffer, having been deprived of them by virtue of "aging out".

45. With regards to the loss of anonymity pursuant to s.93 of the 2001 Act, it was confirmed by McDermott J. in *Independent Newspapers v. I.A*. [2018] IEHC 120 that there was no provision

extending the benefits of reporting restrictions when a child passes the threshold age limit of eighteen years in the course of criminal proceedings. He stated:-

> *"43. While it is clear that the protection conferred by s. 93 continues for life in respect of a child who is prosecuted, convicted and sentenced under the age of eighteen, there is no specific provision extending those benefits when a child passes the threshold age limit of eighteen years in the course of the criminal proceedings. Thus for example, a child whose eighteenth birthday occurs in the middle of criminal trial or is convicted the day after his eighteenth birthday would not have the protection of s. 93 or the sentencing regime that would apply to a child. These specific protections under the Children Act 2001 only apply to a child – a person under eighteen years of age. In cases where offences committed by a child are only detected when they enter adulthood, he/she does not obtain the benefit of any of the provisions of s. 93 or any other provisions of the Children Act. There may be good policy reasons to vest in a court a discretion to extend the protections of anonymity in cases which overlap the transition between childhood and adulthood but this has not been addressed by the Oireachtas which has confined the protections to those under eighteen years. This is consistent with the well-established principles of sentencing applicable to an adult who has committed an offence as a child but comes to be sentenced as an adult considered in the case law set out above.*
>
> *44. The court must uphold the provisions of Article 34.1 of the Constitution that justice shall be administered in public 'save in such special and limited cases as may be prescribed by law'. The restriction on publication or reporting matters that might tend to identify a child is specifically limited to persons under eighteen years. In Irish Times Ltd. v. Ireland [1998] 1 I.R. 359 the Supreme Court held that it was a fundamental right in a democratic State and a fundamental principle of the administration of justice under Article 34.1 that the people have access to the courts to hear and see justice being done save for limited exceptions. Any order restricting the contemporaneous reporting of legal proceedings by the press must be viewed as a curtailment of access by the people […]"*

46. This was later followed by Simons J. in the High Court decision of *L.E. v. DPP*, who, upon interpreting s.93, held that reporting restriction were not available in the case of an adult accused. The decision of Simons J. was upheld in the Court of Appeal in *DPP v. L.E*. [2020] IECA 101, where Birmingham P. stated as follows:- *"I do accept that the loss of anonymity is a significant*

disadvantage. However, it is necessary to put in the balance against that the seriousness of the case […]"

47. Similarly in *Dos Santos* and *T.G*. the court held that the prejudice suffered by the applicant was the loss of anonymity and reporting issues. In both cases, however, the balance weighed in favour of the trial proceeding and the prejudice was not sufficient to halt the prosecution, when considering the public interest in the prosecution of serious offences.

48. In relation to the balancing exercise limb of the test envisaged by Dunne J. in the *Donoghue* case, there have been a number of High Court cases where, notwithstanding the court's finding of blameworthy delay, prohibition has been refused by the court upon conducting a balancing exercise and having come to the conclusion that the balance lay in favour of allowing the prosecution to continue.

49. In *Ryan v. DPP* [2018] IEHC 44, which concerned an alleged assault by the applicant, who was sixteen at the time of the offence, O'Regan J. found that there was prosecutorial delay of approximately nine and a half months, but nonetheless refused the reliefs sought having conducted a balancing exercise. It was concluded that the prejudice the applicant would experience was the loss of anonymity and the loss of a statutory right to a probation report; however, the balance tipped in favour of the public interest in prosecuting charges in respect of serious offences.

50. In *SW v. DPP*, the offences of assault were alleged to have been committed when the applicant was fifteen years old. The applicant had turned seventeen by the time he was charged. Barrett J. held that although culpable prosecutorial delay amounted to approximately 2 years, it was not appropriate to grant an order of prohibition, as he failed to find sufficient prejudice present in the applicant's case.

51. The case of *Dos Santos v. DPP* [2020] IEHC 252, concerned an alleged offence of robbery and carrying a weapon with intent to commit an offence, when the applicant was sixteen years old. In was held by Simons J. that the delay of approximately twenty-two months was inordinate and without justification, but nonetheless he allowed the prosecution to proceed. The reliefs sought were refused in circumstances where the court held that the prejudice which had accrued, did not outweigh the public interest in allowing the prosecution to proceed.

52. In *Wilde v. DPP* [2020] IEHC 385, a case involving alleged criminal damage and assault offences, which took place while the applicant was aged sixteen and in custody, Simons J. held that the delay of more than two years was excessive. He nonetheless found that the balance of justice lay in favour of allowing the prosecution to proceed.

53. In *Furlong v. DPP* [2022] IECA 85, the applicant had failed to keep an appointment with the Gardaí in which his arrest was to be executed by arrangement. Birmingham P. viewed this action as significant, and determined that in all likelihood the applicant would have received a s. 75 hearing in the prosecution of the case had he kept that appointment. Effectively, the Court of Appeal found that the applicant had contributed to the delay, and therefore contributed to the prejudice he suffered as a result of 'aging out', which was to weigh in favour of allowing the prosecution to continue (see paras. 38-40).

54. In *Furlong*, the Court, in its assessment of the seriousness of the charges levelled against an applicant, also analysed at the circumstances surrounding the commission of the offence, particularly the witness statements and the statement of the injured party, rather than merely the fact of a s. 3 charge alone (see paras. 35-37).

55. In *Cerfas v. DPP* [2022] IEHC 70, Hyland J. held that certain procedural losses incurred by an applicant when they 'age out', were not completely irremediable at the trial of the action, and held that this factor should be taken into account in analysing the prejudice suffered by the applicant. She stated as follows at para. 33:-

> "*[…] it is necessary to analyse closely the nature of the prejudice to the applicant. First, as pointed out by counsel for the respondents, the disadvantage to the applicant is not wholly irremediable. It is certainly true that the Children Act mandates certain approaches in relation to the trial, including the mandatory obtaining of a report by the probation services, and prohibits imprisonment of a person under 18, as well as providing for a wide range of options in relation to sentencing, including deferment of the sentence. However, I accept that submission of counsel for the respondent that many – although not all - of these approaches will be open in principle to the Circuit Court in the applicant's trial if it goes ahead. The applicant's legal team will be able to rely upon his age at the time of the trial, his age at the time of the attack, and the importance of obtaining a probation report given that he is a young person who is not been incarcerated to date. If he is convicted – and counsel for the applicant stressed that had he remained subject to the Children Act he would most likely have pleaded guilty - the importance of avoiding incarceration will undoubtedly be relied upon given the fact that he has no previous convictions. In other words, the applicant will lose the certainty of the protections of the Children Act; but some of those benefits remain available to him, albeit dependant on the exercise of discretion on the part*

of the Circuit Court judge rather than being an entitlement as they would have been under the Children Act."

Conclusions.

Is there prosecutorial delay on part of the Respondent?

56. In determining the question of whether there has been any culpable prosecutorial delay, it is necessary to have regard to the events which occurred between the date of the alleged offence on 23rd July, 2019, when the applicant was aged 15 years and 10 months, and the date when the applicant turned 18 years, being 13th September, 2021: see *Cash v DPP* [2017] IEHC 234 and *Wilde v. DPP* [2020] IEHC 385.

57. The *Donoghue* case makes it clear that there is a special duty placed on the gardaí to investigate offences that involve minors with particular expedition. However, it has also been held in a number of cases that the gardaí cannot be expected to drop everything and give an unrealistic priority to the investigation of offences allegedly carried out by a minor: see *dicta* of Kearns P. in *Daly v. DPP* and Birmingham P. in *Furlong* at para 22.

58. One also has to have regard to the age of the minor at the date of the alleged offence. The closer he or she is to 18 years, the less time that is available to the gardaí to conclude their investigation. If the child is reasonably close to the age of 18 years, it may be unrealistic to expect that the investigation can be concluded and the prosecution can be brought to trial, prior to his or her attaining the age of majority. One also has to have regard to the complexity of the investigation. That is why each case must be looked at on its own facts.

59. While this was a serious offence, involving an attack on a shop assistant by three youths, the investigation of the offence was not a complex one. The gardaí were called to the scene of the offence on the day that it occurred. On the following day, they obtained CCTV footage of the incident. On 27th July, 2019, the applicant was arrested, detained and interviewed. He made a number of admissions in the course of that interview. On 28th July, 2019, a statement was taken from the injured party.

60. For some unknown reason, there was a delay in seeking a medical report in relation to the injured party's injuries, until a first request for same was made on 10th September, 2019. That request was repeated on 5th November, 2019. Medical reports were received from Naas Hospital on 11th November, 2019 and from the Dental Hospital in Dublin, on 25th November, 2019.

61. It is also of relevance that these medical records were not subsequently included in the

book of evidence which was served upon the applicant on 14th October, 2021. It is clear that the respondent had available to it, all of the information it viewed as necessary for the prosecution of the offence within a short period of time.

62. The steps that were taken by the investigating gardaí during 2020 and down to the time when the applicant turned 18 years of age on 13th September, 2021, have been set out earlier in the chronology section of the judgment.

63. It is noteworthy that in the replying affidavit which was filed on behalf of the respondent, being the affidavit sworn by Garda Andrew Kelly on 21st July, 2022, no excuse or explanation was given for any delay that occurred in the investigation and prosecution of the matter. Garda Kelly merely exhibited a chronology of the steps that had been taken in the investigation and prosecution of the offence. He denied that there was any prosecutorial delay. He stated that the prosecution was conducted as expeditiously as possible. He stated as follows at paragraphs 5 and 6 of his affidavit:

> "*5. It is my understanding and belief that any of the issues complained of by the applicant are more appropriately dealt with by the trial judge at first instance. I further believe that the complaints made by the applicant do not amount to a wholly exceptional circumstances, which is the standard required before this Honourable Court will consider prohibiting the applicant's trial.*
>
> *6. In all the circumstances, the prosecution was conducted as expeditiously as possible and, accordingly, the applicant is not entitled to the reliefs sought or any reliefs.*"

64. When considering whether there was culpable prosecutorial delay in this case, the court has to have regard to the fact that on 23rd July, 2019, the applicant was aged 15 years and 10 months; CCTV was obtained by the gardaí on the following day. The applicant had been identified almost immediately. He was arrested and detained, by arrangement, within a short period, on 27th July, 2019, at which time he made certain admissions and an apology. A statement from the injured party was obtained on 28th July, 2019. The court is satisfied that in these circumstances, the investigation of this alleged offence, was not a complex investigation from the Garda point of view.

65. The court agrees with the submission made by counsel on behalf of the applicant, that by that time, the investigation was sufficiently completed to allow for a referral to the GYDP. In the events which transpired, that referral was not made until 2nd April, 2020. The court holds that this delay of eight months, was inordinate, inexcusable and amounted to blameworthy prosecutorial delay.

66. It was not until 6th August, 2020, that the applicant was deemed unsuitable for inclusion in the GYDP; that period seems unreasonably long. The file was not submitted for directions until 7th March, 2021. The court holds that this further delay of seven months, was inordinate and inexcusable. It amounted to culpable prosecutorial delay.

67. The court finds that these periods of delay were inexcusable, due to the fact that Garda Kelly in his affidavit, has not given any excuse, credible or otherwise, in relation to the periods of delay that occurred in this case. He simply recited in a table, the chronological steps taken by the gardaí in the investigation of this matter. He denied that there had been any delay.

68. This court is satisfied that there was culpable prosecutorial delay in the preparation and prosecution of the case against the applicant. The court is supported in that finding by the findings made by the President of the Court of Appeal in his judgment in *DPP v. Furlong*, which was a case that was very similar in circumstances to the present case. In that case, the applicant was charged with offences contrary to s. 3 of the 1997 Act; arising out of an assault in a shop. As in this case, the gardaí had the benefit of CCTV footage and statements from the injured parties within a number of weeks of the commission of the offence. In that case, where the offence had occurred on 22nd May, 2017, the court held that it was not unrealistic to hold that the investigative phase could have been concluded by Halloween, or shortly thereafter, i.e. within a period of approximately 5/6 months. The Court of Appeal held that the trial judge had been correct in finding that there was blameworthy prosecutorial delay in that case.

69. While there was some delay in obtaining the medical reports in relation to the injured party, which did not come to hand until 11th and 25th November, 2019, it is noteworthy that the applicant did not attain his majority until 13th September, 2021. When one has regard to the fact that at the date of the commission of the alleged offence, he was aged 15 years, 10 months; and given the speed with which the necessary evidence was compiled after the commission of the alleged offence; it is difficult to understand how it came to be that the prosecution of the applicant for the alleged offence did not occur before he reached the age of 18 years; as a result, he "aged out" and lost a number of the protections and advantages that are provided for under the 2001 Act.

70. In the circumstances of this case, the court is satisfied that there was culpable prosecutorial delay.

<u>The Balancing Exercise.</u>

71. The fact that the court has found that there was culpable prosecutorial delay in this case, is not the end of the matter. The court is obliged to carry out a balancing exercise between the loss of procedural advantages that have been caused to the applicant as a result of the delay on the part of the prosecuting authorities; as against the public interest in having serious crimes investigated and prosecuted.

72. The first thing which the court has to note, is that the alleged offence in this case, was serious in nature. In this regard, the court has had regard to the statement made by the injured party, Mr. Mohammed Rana, on 28th July, 2019. In that statement, he stated how he had seen a number of youths attacking one of his fellow workers in the shop. He had come out of the kitchen and shouted at the youths and they had run away. A few minutes later, they came back into the shop. He stated that they were throwing things around the shop. He told the youths to go away. He gave the following account of how he was assaulted by them:

> "*They started hitting the glass and the wall beside the door. I can't exactly [remember] what happened then, but as I tried to get them out, I felt punching or kicking to the left side of my face and mouth. I couldn't tell which one of them it was. I felt bleeding in my mouth. I put my hand up. I felt something in my mouth, I saw blood on my hand and my front bottom tooth came out into my hand. I think the group of boys got scared when they saw the bleeding. They left the shop.*"

73. Mr. Rana stated that as a result of the assault, he lost one tooth, other teeth were loosened and he had bruising and swelling around his left eye. While the applicant alleged in his interview with the gardaí, that Mr. Rana was holding a knife at the time that he struck him, that was denied emphatically by Mr. Rana in a statement that he subsequently made to the gardaí.

74. It is not for this court to resolve any conflicts of evidence that may arise at the trial. Suffice it to say, the court is satisfied that for a shopworker to be assaulted by a number of youths and to receive the injuries that have been described by Mr. Rana in his statement, has to be seen as a serious offence.

75. It was accepted on behalf of the applicant, that it is not sufficient for him to merely establish that there was culpable prosecutorial delay. He must go further and establish that as a result of that delay he has suffered prejudice due to the fact that he attained his majority prior to the time when the criminal trial could reasonably have been expected to have been held; and that this prejudice is sufficient to outweigh the public interest in having the prosecution proceed. In this regard, the applicant has submitted that he has lost significant protections that would otherwise have been

available to him under the 2001 Act, had he been brought to trial within the 26 month window, between the date of the alleged offence, and his attaining his majority.

76. The applicant alleges that he has lost the benefit of the reporting restrictions and the requirement of anonymity, as provided for under ss. 93 and 252 of the 2001 Act.

77. In addition, the applicant submits that he has lost the benefit of the mandatory nature of a number of procedural provisions that are provided under the 2001 Act for infants who are facing criminal prosecution, as follows: that the proceedings are to be held in private; that any sentence should cause as little interference as possible with the child's legitimate activities and pursuits; that any sentence should take the least restrictive form; that detention be imposed only as a matter of last resort; the stipulation that the court may take into consideration as mitigating factors a child's age and level of maturity in determining penalty; the stipulation that when dealing with the child a court shall have due regard to, *inter alia*, the child's best interests; the possibility of a conditional discharge order upon a finding of guilt; the mandatory referral for a probation report; the possibility of a community sanction under the 2001 Act; the possibility of a deferment of any detention order; and the prohibition on imprisonment.

78. In relation to the loss of the right to have reporting restrictions and the right to anonymity, it was submitted that that had to be weighed against the public interest in the prosecution of serious offences. It was submitted that in this case, the alleged prejudice suffered by the applicant due to the loss of that statutory benefit, was outweighed by the serious nature of the offence with which he was charged. It was further submitted that in this case, the applicant had not made the case that due to the overall delay in proceeding with the prosecution of the matter, he had suffered any real or tangible prejudice in the conduct of his defence at the trial of the action.

79. In relation to the loss of the other procedural benefits under the Act, it was submitted that all that had happened by his attaining his majority prior to the trial, was that these matters were no longer mandatory to be taken into account, or mandatory steps to be taken. Counsel for the respondent submitted that it was always open to the judge to have regard to these matters at the sentencing stage, notwithstanding that the applicant would be sentenced as a young adult.

80. In particular, it was submitted that the case law established that where the court was sentencing an adult in respect of crimes committed while he or she was an infant, the court had to have regard to the age and maturity of the convicted person at the time when he or she committed the offence: see *Cerfas v. DPP* and *DPP v. AO'F*.

81. The court is satisfied that in this case, the loss of the right to anonymity is a significant prejudice. At the time of the alleged offence, the applicant was aged 15 years and 10 months. There was ample time to bring his case to trial before he reached his majority. Had that been done, he would have had the benefit of reporting restrictions on the criminal proceedings and, more particularly, he would have had the benefit of anonymity. Given that criminal proceedings in the Circuit Criminal Court are often reported in both the local and national newspapers, which circulate both in hard copy and online, and given the permanent nature of the reporting of matters online, this has to be seen as a significant prejudice.

82. In former times, where the reporting of cases only took place in hard copy versions of newspapers, the phrase "Today's newspaper, is tomorrow's fish and chip wrapping", was apposite. It meant, that for a young person who was convicted of a criminal offence in the past, when there was only reporting in hard copy news format, there was a good chance that his conviction would be forgotten within a relatively short period of time. Now, once the matter is reported on the internet, that matter will remain accessible and searchable against the person's name forever.

83. That is a significant handicap to impose on a young person, both in his or her future employment prospects and also in the social and other aspects of his life; because a future partner, a friend, or even children and grandchildren, who do an internet search against his or her name, will forever be informed of the conviction. As such, I hold that the loss of anonymity is a significant prejudice for a young man in the applicant's position.

84. The court accepts the submission that was made by counsel on behalf of the applicant, that these considerations are particularly apposite in the applicant's case, given his education and employment history, as set out earlier in the judgment. That clearly demonstrates that he is a young man who has made attempts to better himself through education and has engaged in employment on a proactive basis. The loss of the right to anonymity would have considerable negative consequences for him in his future employment prospects.

85. The court has not lost sight of the fact that under s. 258 of the 2001 Act, where a person is convicted of an offence while they were a minor, the record of that offence will be expunged after a period of three years. No reference to the conviction can be made in any subsequent judicial proceedings. However, that provision does not prevent the fact of his conviction, remaining searchable on the internet.

86. It is in these circumstances, that the permanent record of the conviction that will remain on the internet, if the applicant is convicted as an adult, will be a substantial impediment to the applicant's employment prospects throughout his life.

87. The court holds that were the applicant to be convicted of the s. 3 assault and were that to be reported on the internet; it is highly likely that he would find it difficult to obtain employment in the retail or hospitality sectors. The court views this as significant prejudice to a young person embarking on their career and beginning to make their way in the world.

88. It is this disadvantage, which highlights the very serious prejudice which this applicant has suffered by not having had his criminal trial proceed before he reached his age of majority. Had that been done, he would have benefited from the right to anonymity and therefore, would not have carried the badge of having acquired a conviction with him for the rest of his life. Thus, his loss in this regard is far from theoretical.

89. Insofar as it was argued that the fact of the applicant having made admissions, should weigh in the balance against making the order of prohibition sought by the applicant; the court does not regard that argument as being well-founded. The respondent sought to rely on the *dicta* of Hardiman J. in *S.A. v. DPP* in support of their submission. Those *dicta* were made in a different factual context. There, the applicant was trying to prevent his trial on historical sex abuse charges, on grounds of delay. He asserted that due to the period of time and the delay in prosecuting him, he could no longer get a fair trial. It was in that context that Hardiman J. made his comments about the relevance to the issue of guilt or innocence, that the fact of the applicant having made admissions, had to be considered.

90. In the present case, the key issue is whether there was undue delay in concluding the prosecution of the case, such that the applicant 'aged out' of certain procedural benefits that would have been available to him under the 2001 Act. The fact that he made admissions, made the investigation of the offence easier for the gardaí. The making of admissions does not weigh against the applicant's case to have the trial halted because he has lost benefits under the 2001 Act due to delay on the part of the prosecuting authorities.

91. In relation to the loss of the mandatory nature of the other procedural benefits that are accorded to people who face criminal trials as minors, as set out in the 2001 Act, much reliance was placed on the fact that a court when sentencing a young adult, could take the steps that were provided for on a mandatory basis prior to sentencing an infant, such as obtaining a probation report;

and could also have regard to the age and maturity of the person at the time that they committed the offence, when imposing sentence.

92. Insofar as it is suggested by the respondents that one can ignore the loss of the mandatory nature of these provisions, merely because some of them may be replicated on a discretionary basis in the context of a conviction as a young adult, that seems to me to be an incorrect basis for disregarding the loss of the mandatory nature of the procedural benefits. I do not agree that they can be airbrushed out of the equation, simply because they may be available to the applicant on a discretionary basis by the trial judge. While they are not irredeemably lost, they are no longer mandatory provisions that must be applied by the sentencing judge. The loss of the mandatory nature of the provisions, is itself prejudicial to the applicant.

93. Notwithstanding the public interest in the prosecution of serious offences, in carrying out the balancing exercise in this case, I have come to the conclusion that the appropriate order to make is an order prohibiting the future prosecution of the applicant on the charges arising out of the events on 23rd July, 2019. I have reached that conclusion due to the fact that the applicant was considerably less than the age of majority at the time that he allegedly committed these offences; the investigation was all but complete within a very short period of time after the date of the offences and no credible explanation has been forthcoming why the gardaí and the prosecuting authorities did not bring this matter to trial well in advance of the applicant attaining his majority.

94. As a result of their failure to do so, he has lost a very significant right, being the right to anonymity. For the reasons set out above, I regard the loss of this right for a young person as being very significant. In addition, he has lost the mandatory nature of the procedural benefits that are provided for in the trial of minors under the 2001 Act, particularly at the sentencing stage. The fact that some of these may not be irredeemably lost, does not mean that he has not suffered a prejudice in that regard.

95. This case is in many respects similar to the circumstances that arose in the *Furlong* case. While in that case, the Court of Appeal did not prohibit the trial of the applicant, notwithstanding that there was considerable culpable prosecutorial delay, it is clear from reading the judgment of the court, that one of the factors which weighed heavily in their consideration of the circumstances in that case, was the fact that some of the delay was due to the failure of the applicant to attend for an interview with the gardaí, which had been arranged with his mother prior to that time. No explanation had been forthcoming why the applicant did not keep that appointment.

96. The effect of the failure on the part of the applicant to keep that appointment had a significant knock-on effect in relation to the prosecution of the case, due to the fact that the investigating Garda was detailed to go on a training course in Templemore College shortly after the date on which the interview was due to be held. By the time that he returned from that course the applicant was undergoing a sentence of detention for another matter. This caused further delay, due to the fact that the gardaí had to make an application to the court for permission to interview him while in detention.

97. In this case, it is accepted that the applicant did not contribute to any delay that arose in the investigation and prosecution of the case against him. In addition, there was no weapon used in this case. Therefore, it is appropriate to distinguish the *Furlong* decision from the present case.

98. Looking at the entire circumstances in this case, I am satisfied that the appropriate order to make is that set out at para. 1 of the applicant's *ex parte* docket dated 17th February, 2022.

99. As this judgment is being delivered electronically, the parties will have three weeks within which to file a brief written submissions on the terms of the final order and on costs and on any other matter that may arise.

100. The matter will be listed for mention at 10.30 hours on 15th June, 2023 for the making of final orders.