

THE HIGH COURT

2016 No. 794 JR

Between:

SW

Applicant

– AND –

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

JUDGMENT of Mr Justice Max Barrett delivered on 20th June, 2018.

I

Background

1. On 7th April, 2016, Garda D charged Mr SW (hereafter 'the Applicant') as set out on Charge Sheet 16185764, alleging that the Applicant "[o]n the 14/03/2014 at...Dublin 2...assaulted [a named person (hereafter the 'Complainant')]...causing him harm.... [c]ontrary to Section 3 of the Non-Fatal Offences Against the Person Act, 1997". According to certain statements disclosed to the Defence in the context of the prosecution, the charge, per the statement of grounds arose in the following circumstances:

"On 14th March, 2014...[the Complainant] complained to An Garda Síochána [Garda D]...that he had been assaulted by a number of youths on that date outside his café...The alleged incident was captured on CCTV....

On 21st March, 2014, [the Complainant]...observed a male person walking past his shop whom he believed had been involved in the alleged assault on him on 14th March, 2014....[The Complainant] immediately reported this to a passing member of An Garda Síochána [Garda L]...and showed her CCTV footage of the alleged incident on 14th March, 2014 and of the male person walking past his shop on 21st March, 2014....

On 21st March, 2014, shortly after her aforementioned meeting with [the Complainant]...Garda L met the [A]pplicant...in Dublin and believing him to match the description of the male alleged to have been involved in the alleged assault on [the Complainant]...she took his name and address which he gave as [the Applicant]....The [A]pplicant was fifteen years of age at the time....

On 31st March, 2014, Garda...D attended at [the Complainant's café]...where he obtained CCTV footage from [the Complainant]....On this date, [the Complainant]...informed Garda D of his interactions with An Garda Síochána on 21st March, 2014, although he could not recall the name of the Garda with whom he had spoken....

On 30th May, 2014, Garda...L informed Garda...D of her dealings with [the Complainant]...and the applicant on 21st March, 2014 and provided Garda D with a copy of her notebook entries detailing the same....

On 10th September, 2014, Garda...D attended at...[the Complainant's] café where he took a statement from [the Complainant]....

On 16th September, 2014, Garda...D attended at the home of the [A]pplicant...where he alleges the [A]pplicant made an admission in respect of his involvement in the aforementioned offence prior to being cautioned. Garda D further alleges that following his arrest at 08:15 on that date, the [A]pplicant made further admissions in the Garda car as he was being conveyed to...[a] Garda Station....

The [A]pplicant was detained pursuant to Section 4 of the Criminal Justice Act, 1984. The [A]pplicant's mother declined to attend the Garda Station during his detention and so his social worker, a Ms G, attended the Garda Station to act as his guardian....

The [A]pplicant was interviewed in Garda custody during the course of which interview he made certain admissions....

The [A]pplicant was charged on 7th April, 2016, before the Children Court...in Smithfield, Dublin and he was remanded from time to time thereafter for various purposes, including the furnishing of disclosure, for consideration of jurisdiction under Section 75 of the Children Act, 2001 and for the purpose of an inquiry into the delay in charging the [A]pplicant....

It appears from the Defence file that the [A]pplicant failed to appear on two occasions – 12th May, 2016 and 27th May, 2016 – on which occasions bench warrants were issued for his arrest but that these warrants were executed within one day and four days respectively....

In the course of dealing with the question of delay, the Prosecution provided a document entitled DPP v. [Applicant] – Investigation Timeline. [A form of timeline has also helpfully been provided by counsel for the Applicant in his written submissions and is set out in the Appendix hereto]....

From this timeline, it appears that the Garda investigation file was not completed until 20th October, 2014. This is despite the fact that it appears clear from the statements disclosed to the Defence that the only witnesses in the case were...the Complainant – who displayed no lack of willingness to engage with An Garda Síochána but whose statement was only taken on 10th October, 2014 – and [certain] members of An Garda Síochána....

It further appears from the said timeline that the Garda file was submitted to the Superintendent of...[a named] Garda Station for directions whilst awaiting a suitability report from a Juvenile Liaison Officer. This process appears to have gone through various stages prior to Garda D receiving correspondence from the Director of the Juvenile Liaison Diversion Programme no earlier than 13th June, 2015, fifteen months after the date of the alleged offence....

It further appears that on 18th June, 2015, Garda D spoke to the [A]pplicant's brother (but not the [A]pplicant himself) by telephone and arranged an appointment at...[a named] Garda Station which was not kept by the [A]pplicant or his brother. On 19th August, 2015 and 15th October, 2015 the Garda called to the [A]pplicant's home but there was no answer....

The [A]pplicant was before Court 55 on 11th November, 2015, on which date the Garda intended to charge the [A]pplicant but the Garda was unable to attend due to a collision on the M50 Motorway....

It further appears from the said timeline that on 8th January, 2016 – twenty-two months after the alleged offence – Garda D met the [A]pplicant at his home. Due to the funeral of his friend, the [A]pplicant was not arrested but arranged an appointment with the Garda for 11th January, 2016 at...[a named] Garda Station with his brother. The [A]pplicant and his brother did not keep that appointment and on that date the Garda spoke to the [A]pplicant's brother (but not the [A]pplicant himself) and arranged a further appointment with the [A]pplicant and his brother for 14th January, 2016 at...[a named] Garda Station which the [A]pplicant and his brother did not keep....

[The Applicant avers in his affidavit evidence that he was too upset over his friend's death to understand the need to attend the Garda Station on 11th January, 2016, and also that he does not, apparently, recall R mentioning the other appointments to him.]

It further appears from the said timeline that the [A]pplicant had a case listed before Court 55 on 22nd January, 2016, on which date Garda D intended to charge him but the [A]pplicant was in fact excused on that date. A full two months later on 21st March, 2016, the Garda called at the [A]pplicant's home but the [A]pplicant himself was not there. The Garda spoke with the [A]pplicant's brother (but not the [A]pplicant himself) by telephone and made an appointment for...[a named] Garda Station on 24th March, 2016 on which date the [A]pplicant and his brother did not attend....

Garda D ultimately charged the [A]pplicant on 7th April, 2016 at Court 55, Disclosure was provided to the [A]pplicant's solicitor on 5th May, 2016....

The case appeared in Court 55 on numerous occasions including for the purpose of a hearing under Section 75 of the Children Act, 2001 where the District Court considered and accepted jurisdiction to try the [A]pplicant in respect of that charge....

The [A]pplicant subsequently turned eighteen years of age on 7th July, 2016....

The case was further adjourned for argument in respect of prosecutorial delay. Having heard argument from both sides, the learned District Judge reserved his decision and later delivered a written judgment with neutral citation [2016] IEDC 14....

In the said judgment, the learned District Judge sets out the history of the case but in place of dates employs reference only to seasons, i.e., 'spring of 2014', 'autumn 2014', 'summer 2015', 'winter 2015', 'spring 2016', 'summer 2016', and 'autumn 2016'....

The learned District Judge goes on in the said judgment to set out the applicable law including the following finding:

'29. I would like to point out from a practice point of view that while the High Court has an inherent jurisdiction to order prohibition of a trial, the Children Court, being a court of statute, has no such jurisdiction. The issue in the Children Court can only be dealt with at trial stage though an applicant has always the right to apply to the High Court for such an order'....

The learned District Judge concludes with the operative part of the judgment entitled 'Decision' in which he holds:

'48. In this case, I believe the issue of delay in bringing this case to trial was substantially due to the prosecution up to the beginning of 2016 and thereafter the delay [is] substantially due to the accused. The child who is alleged to have committed the offence is now an adult. Despite the significant delay by the prosecution, the Court should enter into a balancing exercise as laid down by the Courts as to the duty to prosecute against any prejudice to the accused. On that basis, I believe [...] that in the event if a conviction or a plea of guilty the issue of prosecution delay should be taken into account as a significant mitigation factor without prejudice to any other mitigation factors that the accused may plead. In this regard in the event of a sentence, the Court would also have to consider the issue of detention [including the issue of suspended sentence] as a last resort noting the difference in age of the accused at the date of the alleged offence as well as now.

49. I also make an order prohibiting the identity of the accused under section 45(1) if the Courts (Supplemental Provisions) Act 1961 as if he were a child under eighteen years of age".

2. Arising from the foregoing, the Applicant makes, in essence, the following case. The Applicant was 15 years of age at the time of the alleged offence but is now 18 years of age. As a juvenile, the Applicant was entitled to the benefit of the Children Act 2001, which is no longer applicable to him as an adult defendant facing a criminal charge. In all the circumstances, the Applicant contends that the DPP and the relevant members of An Garda Síochána are guilty of culpable prosecutorial delay in this case, resulting in significant prejudice to the Applicant. The Applicant further contends that there is no adequate explanation for the delay in prosecuting the Applicant. And, the Applicant contends, in reaching his decision, the learned District Judge failed to balance the relevant factors of the case, including (a) the length of the delay, (b) the age of the Applicant at the time of the alleged offence and at the time of the District Court judgment, (c) the seriousness of the charge and, in particular, (d) the fact the Complainant had apparently not required medical attention, (e) the fact that the alleged incident was captured on CCTV, and (f) the nature of the prejudice relied upon by the Applicant and the surrounding circumstances of the case. Consequent upon the foregoing, the Applicant maintains that there is a real and serious risk that his trial on the above-mentioned charge will be unfair, and that in the particular circumstances of this case, the balance of justice requires the intervention of this Court and, per the notice of motion: "i. An Order of Prohibition prohibiting the further prosecution of the [A]pplicant on foot of a charge contrary to section 3 of the Non-Fatal Offences Against the Person Act 1997 set out on Charge Sheet numbered 16185764...ii. An Interim and/or Interlocutory Injunction and/or Stay preventing the further prosecution of the said charge until further Order...and/or the determination of this action", as well as certain related reliefs.

II

Delay

3. The court has had regard to the survey of periods of objectionable delay undertaken by it in *RD v. DPP* [2018] IEHC 164. Regrettably, the court cannot avoid the conclusion that there has been culpable prosecutorial delay in the within case, albeit of limited duration. The following periods of concern present:

(i) the Applicant was identified as a suspect one week after the alleged incident (on 21/03/2014), on which date he provided his details to Garda L. The lapse in time from 21/03/2014 to 30/05/2014, when Garda L provided the details to Garda D is due to internal Garda communications.

(ii) there is no good explanation for the period between 30/05/2014 and 10/09/2014 when Garda D attended the Complainant's premises for the purpose of taking a statement.

(iii) to the extent that it is maintained (and it is maintained) that there was difficulty in locating the Applicant between 14/03/2014 and 16/09/2014, the Applicant (who was resident in HSE-run accommodation in a Dublin suburb at this time) was reported missing to the Gardaí on 21 occasions during that timeframe and was, therefore, found or returned on at least 20 occasions. So it seems he was capable of being located during this time, albeit not perhaps at his family home address.

(iv) there is no good explanation for (a) the lapse in time from 20/10/2014 to 19/01/2015 when Garda H sought a copy of the file in order to prepare a suitability report; (b) the lapse in time from 20/01/2015 to 18/03/2015, i.e. from when Garda H was sent the copy file to when he completed his suitability report; (c) the lapse in time from 18/03/2015 to 13/04/2015 when Garda H provided his report to Garda D; (d) the lapse in time from 13/04/2015 to 27/04/2015 when the Acting Superintendent directed on the file; (e) the lapse in time from 30/04/2015 to 22/05/2015 when the Director deemed the Applicant unsuitable for inclusion in the programme; (f) the lapse in time from 22/05/2015 to 13/06/2015 when Garda D received notification of that decision.

(v) there is no good explanation for the time lapse between 11/11/2015 (the date when Garda D was unable to attend the Children Court) and 08/01/2016.

(vi) there is no good explanation for the time lapse between 22/01/2016 when the Applicant was not present at court (as he had been excused) and Garda D's call to the Applicant's family home on 21/03/2016.

4. Taken individually, some of the lapses in time identified above may not appear particularly serious. Moreover, the court is alive to the fact that tasks do take time to complete, especially when they have to be completed by already busy Garda officers. Even so, it seems to the court that cumulatively, the various lapses of time identified above do constitute culpable prosecutorial delay. However, such culpable prosecutorial delay as presents is of limited duration and it need not necessarily follow (and here does not follow) from that conclusion that an order of prohibition must now issue. (See, *inter alia*, in this regard *PM v. DPP* [2006] 3 IR 172 and the reference therein, at 180, to the observation by Powell J., for a unanimous United States Supreme Court in *Barker v. Wingo* (1972) 407 US 514, 519 that "*the deprivation of the right to a speedy trial does not per se prejudice an accused person's ability to defend himself*").

III

Prejudice?

5. The Applicant claims that his ability to contest the charge confronting him has been materially impaired. However, for the reasons set out hereafter, the court struggles to see that any prejudice of any nature presents for the Applicant:

(i) it is not clear that the Applicant intends to contest the charge against him;

(ii) the age of the Applicant at the time of the alleged offence is a factor that a sentencing court would be obliged to take into account when sentencing (if the Applicant pleads guilty or is convicted);

(iii) the Applicant was under 18 years of age when he was charged and when the District Court accepted jurisdiction; the Applicant therefore benefitted from s.75 of the Act of 2001 ("*Jurisdiction of [Children Court] to deal summarily with indictable offences*"). (*Forde v. DPP* [2017] IEHC 799, a case concerned with circumstances where a child was under 18 years of age at the time of an alleged offence and over 18 years when charged, a case on which the Applicant sought to place reliance, is not therefore on point).

(iv) while the Applicant complains of loss of reporting restrictions, the District Judge has made an order prohibiting the identity of the accused under s.45(1) of the Act of 1961, consistent with the judgment in *McD v DPP* [2016] IEHC 210, a judgment by which this Court is bound.

(v) there is no reason why the Children Court cannot – fairly, justly and in accordance with law – deal with a child who turns 18 years of age;

(vi) the District Judge (at paras. 43-49 of his judgment) considers various applicable provisions of the Children Act 2001 (including provisions of the Act of 2001 referenced by the Applicant in his statement of grounds) and was of the view that no prejudice would be done to the Applicant by his case proceeding in the District Court. The court accepts the contention of counsel for the Applicant that the views and conclusions of the District Judge are in no way binding on this Court. Yet although the court fully acknowledges the foregoing to be the position from a precedential point of view, from a practical perspective it would seem folly of the highest order for a judge of the High Court not to pay careful regard to the judgment of a District Judge who deals regularly with prosecutions of children and who, to borrow a phrase used by counsel for the DPP at hearing, has therefore the advantage of being 'the man on the ground', with the practical insights which the District Judge's being such necessarily brings – albeit that the High Court enjoys (and it does enjoy) complete freedom to act as it considers appropriate in light of applicable law.

IV

Balancing Exercise

6. Given the foregoing, how ought the court to proceed as regards the application now made? 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;

(iii) 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);

(iv) 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;

(v) 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;

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

(vii) 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;

(viii) 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.

(ix) 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

(x) 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".

7. To the court's mind, any fair-minded assessment and balancing of the above factors can only lead to the conclusion that, notwithstanding such culpable prosecutorial delay as the court has found to present in the within proceedings, this is not a case in which it would be appropriate to grant the order of prohibition sought. It follows that the injunction/stay sought is redundant as no further order falls to issue apart from any, if any order for costs in respect of which application may be made and, save as to costs, the application has now been determined.

APPENDIX

Summary Timeline of Events

14/03/2014. Date of alleged offence. Alleged incident captured on CCTV. Complaint made to An Garda Síochána (Garda D).

21/03/2014. Complainant sees male passing his premises whom he believes was involved in assault on him and reports this to Garda L. Complainant shows Garda L CCTV footage of the alleged incident and also of the male passing his premises on 21/03/2014. Garda L later meets the Applicant, believes him to match the individual captured on the CCTV footage and requests his name and address which the Applicant provides. The Applicant was 15 years of age at this time.

31/03/2014. Garda D attends the Complainant's premises and retrieves CCTV footage of the alleged incident. The Complainant informs Garda D of his dealings with another garda on 21/03/2014, though he cannot recall her name.

30/05/2014. Garda L informs Garda D of her dealings with the Complainant on 21/03/2014, and provides Garda D with her notebook entries in relation to same.

10/09/2014. Garda D attends the Complainant's premises and takes a statement from him.

16/09/2014. Garda D attends the home of the Applicant where he alleges that the Applicant made an admission prior to caution, following which he was arrested. Garda D alleges that the Applicant made further admissions en route to the Garda Station. In the course of interview at the Garda Station, the Applicant makes certain admissions.

10/10/2014. Garda D receives statements from Garda L and member-in-charge on 16/09/2014.

20/10/2014. Garda investigation file completed. Garda D emails Juvenile Liaison Officers at certain Garda Stations requesting Juvenile Liaison Officer Suitability Reports.

19/01/2015. Garda H, a Juvenile Liaison Officer, emails Garda D requesting a copy of the file.

20/01/2015. Garda D forwards file to Garda H.

18/03/2015. Garda H completes suitability report.

13/04/2015. Garda H provides suitability report to Garda D.

27/04/2015. Acting Superintendent directs on file.

30/04/2015. File plus suitability report sent to Director, Juvenile Diversion Programme.

22/05/2015. Director of Juvenile Diversion Programme deems the Applicant unsuitable for inclusion in the Programme.

13/06/2015. Garda D receives correspondence from Director of Juvenile Diversion Programme indicating that the Applicant is not suitable for inclusion in the Programme.

18/06/2015. Garda D calls to the Applicant's home but the Applicant is not present. Garda D speaks to the Applicant's brother, R., by telephone and arranges for Applicant to call to Garda Station on 23/07/2015.

23/07/2015. Applicant does not attend the scheduled interview.

19/08/2015. Garda D calls to Applicant's home but there is no answer.

15/10/2015. Garda D calls to Applicant's home but there is no answer.

11/11/2015. Applicant is before Children Court on a separate matter. Garda D intends to charge the Applicant on that date but is caught up in road traffic incident.

08/01/2016. Garda D calls to the Applicant's home. The Applicant is at home. Due to the funeral of a close friend, an arrangement is made for the Applicant and his brother, R., to attend at the Garda Station on 11/01/2016.

11/01/2016. Applicant and his brother fail to attend at scheduled interview. Garda D speaks to R. and meeting is re-scheduled for 14/01/2016.

14/01/2016. Applicant and his brother do not attend scheduled interview.

22/01/2016. Applicant is before Children Court on an unrelated matter. Garda D intends to charge Applicant there but applicant has been excused from attending court.

21/03/2016. Garda D calls to Applicant's home but Applicant is not present. Garda D speaks to R and arranges for R and Applicant to attend at Garda Station on 24/03/2016.

24/03/2016. Applicant and his brother do not attend scheduled interview.

07/04/2016. Applicant charged by Garda D with assault causing harm.

05/05/2016. Garda D provides disclosure to Applicant's solicitors.

12/05/2016. Applicant fails to attend in Children Court. Bench warrant issues.

c.13/05/2016. Bench warrant executed. Applicant admitted to bail.

27/05/2016. Applicant fails to appear in Children Court. Bench warrant issues.

c.31/05/2016. Bench warrant executed. Applicant admitted to bail and remanded to 29/06/2016 to obtain a date for the hearing of a delay argument.

29/06/2016. Children Court considers jurisdiction pursuant to s.75 of the Children Act 2001 and accepts jurisdiction. Applicant is remanded to 27/07/2016. Applicant is remanded to 27/07/2016 for delay argument.

07/07/2016. Applicant turns 18.

27/07/2016. Bail application. Applicant remanded to 26/09/2016 for delay argument.

26/09/2017. Children Court hears delay argument.

05/10/2017. Children Court declares written judgment on delay issue rejecting the Applicant's contentions that the charge ought to be dismissed as a result of delay.

17/10/2017. Leave to seek judicial review granted. Stay on further prosecution of charge.