

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 376 J.R.]

BETWEEN

JOSEPH CASH

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice White delivered on the 31st of March, 2017

1. This is an application by way of judicial review seeking an order of prohibition restraining the respondent from further prosecuting the applicant on foot of a Circuit Court indictment, Bill No. WXDP0012/2016, or in the alternative an injunction restraining the respondent from further prosecuting the applicant on that Bill number. The Charge, alleged on the indictment is that the applicant did on the 17/7/2014 at Ballypreacus, Bunclody, Enniscorthy, Wexford in said District Court Area of Gorey, having entered a building known as the home of Martin Carroll as a trespasser did commit an arrestable offence to wit theft therein, contrary to Section 12(1) (b) and (3) of the Criminal Justice(Theft and Fraud Offences) Act 2001.

2. The applicant filed a statement of grounds seeking an application for judicial review on 31st May, 2016, alleging that on the date of the offence on 17th July, 2014, he was seventeen years and nine days old and due to substantial delay on the part of the respondent, her servants or agents, the applicant has been deprived through no fault of his own of the right to be tried and if convicted sentenced as a child as he did not reach his maturity until 8th July, 2015. It was alleged that the prosecution of the applicant is in breach of his right to a trial with reasonable expedition as guaranteed by Article 38.1 of Bunreacht na hÉireann bearing in mind the particular onus on the State and, *inter alia*, the respondent to prosecute and conclude criminal matters involving minors with reasonable expedition. It is further alleged that the prosecution is in breach of the equality guarantee provided for in Article 40.1 of Bunreacht na hÉireann.

3. This Court by leave order of 4th July, 2016, granted leave to bring the application. A motion was issued on 14th July, 2016, originally returnable for 26th July, 2016.

4. The respondent filed and served a statement of opposition on 7th October, 2016, asserting that the prosecution conducted the investigation and prosecution of the offence with respect to the applicant with all due expedition. It was alleged that any delays caused in the case were caused by difficulties locating the applicant and his failure to appear in court at the appointed times and in prosecuting this case, the respondent is discharging her function by having crime prosecuted on behalf of the public and brought to a conclusion in accordance with law, and that the balance of justice lies in favour of proceeding with the prosecution. The respondent asserts that the court should exercise its discretion to refuse relief. The public interest should be served in ensuring that those accused of relatively serious offences should be prosecuted in accordance with law.

5. There were a number of affidavits sworn in the proceedings. The grounding affidavit was sworn by Conor McGowan, Solicitor on 30th May, 2016 on behalf of the applicant. His mother, Ellen Cash, deposed affidavits on 30th May, 2016, and 21st December, 2016. The applicant did not swear any affidavit in these proceedings. Garda James Killeen, the investigating garda deposed an affidavit on 10th October, 2016, and Garda Magdalena Tezesimiech, a garda officer from Ballyfermot deposed an affidavit on 30th January, 2017.

6. The court is satisfied to rely on the evidence as set out on the affidavits of Garda James Killeen and Garda Magdalena Tezesimiech. The applicant personally has not contradicted any of this evidence. His mother is not in a position to contradict the evidence of Garda James Killeen.

7. The background to the criminal charge was that Martin Carroll who lived at Ballypreacus, Bunclody, Co. Wexford when returning home on Thursday, 17th July, 2014, at approximately 9pm saw that the front door of his dwelling house was open. A male ran out and around the back of the house. He had a white t-shirt and jeans. Mr. Carroll saw his face and identified him as being small and around fifteen to sixteen year old. He saw three males run down the side of the house across a front lawn. Later in Bunclody Village, Mr. Carroll identified the applicant as being one of the youths who ran away from the house.

8. Garda Antoinette Byrne interviewed the applicant who appeared to be physically shaking and appeared nervous. He gave his name as Joseph Cash, date of birth 8th July, 1997 of 23 Labre Park, Ballyfermot, Dublin 10. As Garda Byrne spoke to him he became agitated and then ran away. Garda James Killeen who was investigating the matter on 2nd September, 2014, attended at 24 Labre Park, Ballyfermot but no one was present. He ascertained that the applicant was due in Blanchardstown District Court on 15th September, 2014, but did not appear on that date and a bench warrant was issued for his arrest. On that same date, Garda Killeen went to the applicant's home but no one was at home. On 17th September, 2014, Garda Tezesimiech called to 24 Labre Park and spoke to the applicant's mother, Ellen Cashe. On 12th December, 2014, the bench warrant which had been issued from Blanchardstown District Court was executed and the applicant was remanded back to Blanchardstown District Court on 9th January, 2015. On 9th January, 2015, the applicant failed to appear in court and the matter was remanded to 2nd February, 2015, in his absence. On 2nd February, 2015, Garda Killeen travelled to Blanchardstown District Court and arrested the applicant and brought him to Ballyfermot Garda Station where he was detained and questioned.

9. The applicant exercised his right to make no comment on the allegations. The file was submitted to the DPP on 23rd April, 2015. Additional information was sought on 18th June, 2015, from the State Solicitor received by Garda Killeen on 7th July, 2015. The file was returned to the State Solicitor for Wexford on 19th July, 2015. Directions from the DPP to charge the applicant were received on 25th August, 2015. The applicant had been deemed unsuitable for inclusion in the juvenile diversion programme on nine previous occasions. Garda Killeen obtained updated directions on 29th September, 2015. On 1st December, 2015, Garda Killeen attended the Children's Court in Smithfield for the purpose of charging the applicant. On that date, the applicant was charged by another gardaí with a different matter and he immediately left the court before Garda Killeen had the opportunity of placing the charges against the applicant. A bench warrant was issued on that date for the applicant in Court 55.

10. On 10th December, 2015, the applicant was arrested and brought to court on foot of a bench warrant issued on 1st December, and was remanded back to District Court 55 on 7th January, 2016 and on that date, Garda Killeen attended and charged the applicant with the offence which is the subject matter of this application.

11. Taking into consideration that this was an offence committed in Enniscorthy, Co. Wexford and the investigating garda was based there and the behaviour of the applicant in evading justice, I do not attribute any blame or prosecutorial delay to the respondent from 17th July, 2014, to 2nd February, 2015. The applicant need only blame himself for any delay.

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.

13. The relevant legal principles are set out in the Supreme Court judgment *Donohue v. Director of Public Prosecutions*, a judgment of Dunne J. delivered on 30th July, 2014.

14. In the conclusion of her judgment, Dunne J. stated:- "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 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. 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 learned trial judge correctly identified a number of adverse consequences that flowed from the delay."

15. This is not a case in which the public interest or the balance of justice would dictate that this Court should prohibit the applicant's trial.

16. The relief is accordingly refused.