

THE HIGH COURT

JUDICIAL REVIEW

[Record No.2014/361 JR]

BETWEEN

D. K.

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Ms. Justice Iseult O'Malley delivered the 12th day of November 2015.

Introduction

1. The applicant in this case has been charged with the offence of assault causing harm pursuant to s. 3 of the Non-Fatal Offences Against the Person Act, 1997. He seeks an order of prohibition in relation to the prosecution on the basis of delay between the date of the incident in question and the date of charge. The applicant was a juvenile at the time of the incident. The charge was brought some ten months later, one month after he turned eighteen. The applicant's co-accused was charged with the same offence the day after the incident, and it is argued that no adequate reason has been given for the delay in the applicant's case.

Background facts

2. The applicant was born on the 2nd March, 1996. The incident giving rise to the current charge occurred in a shop on the 7th June, 2013, when he was 17 years old. The injured party was allegedly stabbed by the applicant's co-accused, resulting in him suffering a collapsed lung. When the injured party ran down to the back of the shop in an attempt to escape, the applicant pursued and punched him. The incident was captured on CCTV footage.

3. The co-accused, who was over 18, was arrested and detained a short time after the incident. He made admissions and was charged on the following day, the 8th June, 2013, with assault causing harm, under s. 3 of the Non-Fatal Offences Against the Person Act, 1997 and also with possession of a knife. He was subsequently charged under s. 4 of the Act with the offence of assault causing serious harm.

4. Also on the 8th June, 2013, the applicant presented himself voluntarily at Kilmainham Garda Station with his father. Two days later he was arrested, apparently by arrangement, and detained in Pearse Street station. He was interviewed under caution, in the presence of his father. Having viewed the CCTV footage, he admitted that he had chased the injured party to the back of the store and punched him several times after the stabbing had happened. He expressed disgust at his own actions. However he maintained that he did not know, at the time he involved himself, that his co-accused had a knife in his possession, or that he had used it in the commission of the assault.

5. According to the prosecuting officer, Garda Jennifer Keyes, the applicant and his father were informed when he was being released that a file would be sent to the Director of Public Prosecutions. The file was forwarded to the office of the respondent for directions on the 14th August, 2013.

6. That office responded on the 4th September, 2013, with a request for the CCTV footage and for a certificate from the Juvenile Liaison Officer. Garda Keyes sent the file to the Juvenile Liaison Officer on the 5th September, 2013.

7. On the 4th October, 2013, the DPP gave a preliminary direction, subject to the views of the Juvenile Liaison Officer, that the applicant should be charged with assault contrary to s. 2 of the Non-Fatal Offences Against the Person Act, 1997. An additional statement was to be sought from the injured party with a view to determining whether or not the more serious charge under s. 3 should be preferred.

8. It should be noted here that the offence of assault, under s. 2 of the Act, is a summary offence with a maximum sentence of six months. The s. 3 offence of assault causing harm is indictable and carries a maximum sentence of five years.

9. By letter dated the 12th November, 2013, the Superintendent in charge of the Diversion Programme (often referred to as the Juvenile Liaison Office) determined that the applicant was unsuitable for inclusion in the programme. On the 5th December, 2013, a summons was issued charging the applicant with s. 2 assault. The summons was returnable before the Children's Court on the 3rd April, 2014.

10. According to the prosecuting officer, there was difficulty in contacting the injured party because he was moving between HSE accommodation and the homes of his mother and girlfriend. He missed two appointments with her but eventually attended and made an additional statement on the 4th February, 2014. He was asked whether he thought that the applicant had known, when he came into the shop, that the co-accused had a knife. He said he did not know but assumed he did. He was further asked whether he thought that the applicant knew, when he hit him, that he had been stabbed. He replied: "*I wouldn't say at first but he did at the end.*" This statement was then submitted to the office of the respondent.

11. The applicant's eighteenth birthday was on the 2nd March, 2014.

12. On the 26th March, 2014, the DPP directed that the applicant should be charged with assault contrary to s. 3, and that the matter should proceed on indictment.

13. The applicant was charged with this offence on the 3rd April, 2014, the return date on the summons. As he was now an adult, the District Judge presiding in the Children's Court remanded him for service of a book of evidence.

14. Leave to seek judicial review was granted on the 30th June, 2014.

15. The applicant avers that he is very significantly stressed with the whole of these events, the delay in the process and his pending prosecution. He has no previous convictions and has not come the attention of An Garda Síochána since the incident. As of the date of the hearing in this Court he was studying for his Leaving Certificate and hoped to go on to third level education. He says that his stress and anxiety of his pending prosecution has had a negative impact on his studies and that he was receiving counselling at school. He believes that his situation has had a negative effect on his mother's health and he feels guilt in relation to this.

16. An issue was raised in the affidavits and written submissions arising from the fact that the initial PULSE record of the applicant's date of birth was incorrect, but this was not pursued at the hearing.

Submissions on behalf of the applicant

17. It is submitted on behalf of the applicant that in the circumstances there has been a breach of the special duty to ensure a speedy trial in the case of young persons. The result of the delay is that the applicant has lost the benefit of the various protections afforded by the Children Act, 2001 including the right to a hearing under s. 75 (to determine whether the charge should proceed in the District Court); the right to anonymity and the right to be sentenced under the regime applicable to children.

18. Counsel for the applicant stresses that in claiming that the delay was blameworthy, he does not suggest malice or gross negligence. Rather, the argument is that the cumulative delay in processing the matter was culpable in legal terms in the context of an offence which, he submits, is either a s.2 assault or at the lowest end of the scale under s.3.

19. There is criticism of the fact that the respondent waited for the additional four months spent trying to get a further statement from the injured party.

20. It is accepted that the direction to charge under s. 2 could not have been acted upon until the Juvenile Liaison Officer's decision was made, and that the prosecuting garda acted expeditiously when she received that decision. However, it is argued that the decision to charge by way of a summons, returnable for a date after the applicant's birthday, gave rise to a breach of his rights. The case is made that what should have happened is this: the applicant should have been brought before the Children's Court on the s. 2 charge once the Juvenile Liaison Officer's decision had been made on the 19th November, 2013. It would have been open to the prosecution to ask that court not to finalise matters at that stage, and reserve the right to prefer a further charge, but the presiding judge could have ensured that the case progressed with proper expedition while the applicant was still a child.

21. It is submitted that if the matter had been brought to court before the date on which that statement was made, reports could have been obtained in the meantime in preparation for the sentencing process. It would have been open to the judge to set a deadline, by way of fixing a sentence date, and "*everything would have been ready to go*" on receipt of the statement. Refusal by the prosecution to cooperate could have given rise to other remedies on the part of the applicant, but he could have had no reason to complain about the new charge if it had stayed in the Children Court.

22. It is submitted that the effect of the foregoing is that the applicant has suffered irremediable prejudice in that the provisions of the Children Act have been rendered inapplicable to him. The most important right that would have been available to him was the procedure provided for in s. 75 of the Act, whereby the Children's Court may in certain circumstances decide to deal summarily with a child charged with an indictable offence. The applicant has also lost the right to anonymity conferred by s. 93 of the Act, the protection of the sentencing principles specifically formulated for child offenders and the right, in certain circumstances, to have his conviction treated as (in effect) expunged after a period of time under s. 258.

Submissions on behalf of the respondent

23. The respondent denies that the applicant was not charged in an expeditious manner and submits that there was no blameworthy prosecutorial delay in the case. The co-accused was charged immediately pursuant to the powers delegated by the respondent to the Gardaí in cases of assault. However, since the applicant was a minor when the offence was committed, he had to be considered for suitability under the Diversion Programme before the matter could be progressed. He could not, therefore, have been charged at the same time as the co-accused. It was also necessary to give serious consideration to the issue of the applicant's complicity, which required the taking of a further statement from the injured party. There is, it is submitted, no reality in the suggestion that the s.2 charge could have been dealt with before final directions were given.

24. Counsel says that, unlike those cases involving child offenders where the courts have granted prohibition, there has been no period of unexplained delay.

25. It is submitted that it was necessary to apply for the summons before the limitation period expired (which would have occurred on the 7th December, 2013). However there is no reality to the suggestion that the s. 2 charge should have been dealt with before the final direction was given. This court cannot be certain as to what progress could have been made if that course of action had been taken, and should not trespass upon or attempt to micro-manage the statutory functions of the respondent.

26. It is submitted that there is no principle of law that requires in all cases that an offence committed by a minor must be tried while the accused is still a minor. Such a principle would be unworkable both in law and in practice. However, the fact that an offence was committed by a person who was a minor at the time is a factor that can be taken into account by the court of trial or sentence.

27. The respondent says that the applicant has not discharged the onus of proving that there is a real risk of an unfair trial in this case, and that the public interest lies in proceeding with the prosecution.

Delay in prosecuting children

28. The leading authorities in this area are the decisions of the Supreme Court in *B.F. v. The Director of Public Prosecutions* [2001] 1 I.R. 656 and *Donoghue v. The Director of Public Prosecutions* [2014] IESC 56.

29. *B.F.* was a case involving serious sexual assaults alleged to have been committed against two young children by a 14-year old boy. The delay in charging him (which included time spent in extraditing him, his parents having taken him abroad) amounted to just under three years. In granting an order of prohibition the Supreme Court held that, having regard to the age of the alleged offender, there had been unnecessary and culpable delay. At p.666 Geoghegan J. (giving the judgment of the court) said:

"In this connection counsel for the appellant have referred to a judgment of the High Court (Geoghegan J.) in P.P. v. Director of Public Prosecutions [2000] 1 I.R. 403. In that case I held that where there was quite clearly culpable delay on the part of the garda authorities in relation to the prosecution of sexual offences which had occurred a long time

previously, the trial ought to be prohibited even if prejudice was not proved. It seemed to me that in these cases of sexual offences committed a long number of years previously it was particularly incumbent upon the State authorities not to contribute to further delay. I took the view that that was a circumstance where the delay should lead to prohibition notwithstanding the absence of prejudice. The decision was not appealed to the Supreme Court. To some extent by analogy, I also take the view that in the case of a criminal offence alleged to have been committed by a child or young person as in this case, there is a special duty on the State authorities over and above the normal duty of expedition to ensure a speedy trial, having regard to the obvious sensitivities involved."

30. An argument to the effect that the principle of *B.F.* was confined to cases of sexual offences was rejected by Quirke J. in *Jackson and Walsh v. Director of Public Prosecutions* [2004] IEHC 380.

31. It must be borne in mind that *B.F.* was decided before the coming into force of the Children Act, 2001. In *Donoghue v. Director of Public Prosecutions* the Supreme Court affirmed the existence of the special duty concerning children. It was noted by the Court, in the judgment given by Dunne J., that the sensitivities referred to by Geoghegan J. were now reflected in the provisions of the Children Act. The aims of the legislature, which were intended to be of benefit to society as a whole as well as to child offenders, include the principle that children should be sentenced to detention only as a last resort and that they should where possible be enabled to avail of the Diversion Programme. These aims could not be achieved if there was avoidable delay in the prosecution of young offenders. The special duty in such cases must therefore be taken into account, along with other factors including *inter alia* the seriousness of the offence and the complexity of the offence, in considering whether or not there had been blameworthy prosecutorial delay.

32. In *Donoghue* the applicant had been found, three days after his sixteenth birthday, in possession of a significant quantity of heroin. He made immediate, full admissions. Forensic analysis was completed within a fortnight. He was not charged for a further sixteen months. The hearing to determine, pursuant to s.75 of the Children Act, whether the matter should be dealt with summarily did not take place until ten weeks before the applicant's eighteenth birthday. The District Judge refused jurisdiction.

33. The Supreme Court considered the separate periods of delay involved and the explanations given. The first period was due to the necessity to consider whether the applicant was suitable for the Diversion Programme, and it was held that some allowance had to be made for the fact that this would take some time. However, the explanation for the time taken to complete the investigation file – that there had been difficulty in getting statements from two gardaí who had been transferred – was not adequate. The delay of some two and half months between the receipt of directions from the DPP and the charging of the applicant was not, on the facts, attributable to him and was inadequately explained.

34. Having ruled, therefore, that the High Court judge had been correct in finding blameworthy delay, the court went on, at paragraph 54 of the judgment, to consider the consequences of that finding. It was necessary to carry out a balancing exercise, in order to establish if there was something more than the delay itself that would outweigh the public interest in the prosecution of the offence. Breach of the special duty would not in itself, 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. 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.

35. The judgment continues:

"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 eighteenth birthday. Therefore, in any given case a balancing exercise has to be carried out in which a number of factors will have to be put into the melting pot, including the length of delay itself, the age of the person to be tried at the time of the alleged offence, the seriousness of the charge, the complexity of the case, the nature of any prejudice relied on and any other relevant facts and circumstances. It is not enough to rely on the special duty on the State authorities to ensure a speedy trial of the child to prohibit a trial. An applicant must show something more as a consequence of the delay in order to prohibit the trial."

36. The court referred to the loss of rights under the Children Act identified in the High Court judgment and agreed that they were matters of real significance. It said in conclusion:

"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."

Discussion and conclusions

37. It is clear from the foregoing that the undoubted duty on the part of the prosecution authorities to ensure a speedy trial in cases involving children is not breached simply by reason of the fact that a person who commits a crime as a child is not dealt with before reaching the age of 18. The first question is, therefore, whether the facts of the case disclose some blameworthy delay.

38. In my view they do not. It is accepted that the applicant's case had to be referred for assessment for the Diversion Programme, and that the prosecuting garda was not dilatory in dealing with the file and in applying for the summons on receipt of directions. Neither the Juvenile Liaison Officer nor the office of the respondent appears to have delayed in their consideration of the matter. It was also a case where the question of the extent of the applicant's complicity in the harm alleged to have been caused to the injured party was not particularly straightforward. I make no comment on this issue, or on the significance of the additional information gleaned from the second interview with the injured party – that is not a matter for this court. I simply observe that it was reasonable,

in the context of the case, to further investigate this issue. I also observe that some victims of crime (as is the case with some offenders) may lead disorganised or chaotic lives. That does not mean that offences against them should not be properly investigated.

39. The real complaint made is that the respondent should have brought the matter before the Children's Court more expeditiously. However, I am not entirely clear as to the mechanism proposed for bringing this about. The offence under s.2 of the Non-Fatal Offences Against the Person Act, 1997 is triable summarily only. In those circumstances it would be arguably illegal and almost certainly improper to have arrested the applicant for the purpose of charging him and bringing him before the court. If the suggestion is that the prosecuting garda in some way chose or controlled the return date of the summons, and deliberately or negligently delayed it, that case should have been made.

40. In any event I agree with counsel for the respondent that the decision made by the respondent to proceed with a preliminary charge was one within her powers and was reasonable in the circumstances of the case. It is not for this court to determine what would have happened in the District Court, had a different course of action been taken, in the absence of blameworthy neglect of the special duty cast upon the respondent. There is no suggestion that the applicant was given the impression that this was a final decision, or that he was in any way misled as to his position.

41. I therefore refuse the relief sought.