THE COURT OF APPEAL

CIVIL **APPROVED**

[431/19]

The President **Neutral Citation Number [2023] IECA 252**

McCarthy J.

Kennedy J.

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

L.E.

APPELLANT

JUDGMENT of the President delivered on the 15th day of April 2020 by Birmingham P.

Introduction

1. This is an appeal from a judgment of the High Court (Simons J.) delivered on 28th June 2019, whereby the Court dismissed an application to prohibit the further prosecution of criminal charges pending against the appellant, LE, on the basis of prosecutorial delay.

2. The alleged offences are said to have occurred at a time when the appellant was 15 years old and thus a "child" as defined under the Children Act 2001. It is contended that had the criminal investigation been conducted expeditiously, then the appellant would have been tried prior to her 18th birthday. The appellant was born on 31st of October 1999, meaning her 18th birthday fell on 31st October of 2017. If the trial had taken place before the end of October 2017, the charges against her would have been determined in accordance with the Children Act 2001. This would have afforded the appellant certain statutory safeguards including *inter alia* anonymity. The benefit of these statutory safeguards is now not available

in circumstances where the appellant has reached the age of majority prior to the trial of the offences.

3. The qualifying criterion for the procedural protections provided for under the Children Act 2001 is the age of the accused as of the date of the trial of the offences (as opposed to his or her age as of the date when the alleged offences are said to have occurred). Thus, an alleged offender who has transitioned from being a "child" (as defined) to an adult between (i) the date on which the offences are said to have occurred, and (ii) the date of the hearing and determination of criminal charges arising from those alleged offences, cannot avail of most of the procedural protections under the Act. The principal exception is in respect of the right to have the record of a criminal conviction expunged under s. 258 of the Children Act 2001, where the relevant date is the date of the offence. This would mean that if the appellant was tried and convicted of an offence as a minor, then she could later have that conviction expunged.

Background

4. The charges that the appellant faces arise out of an alleged incident said to have occurred on the evening of 19th of September 2015, whereby a young male, KW, was assaulted and stabbed. It is alleged that the appellant and the complainant, had an altercation earlier that evening when the complainant intervened in a dispute between the appellant and another young female. The appellant is alleged to have said to the complainant, "I'm going to get you fucking sliced up". It is said that a short time later, the appellant approached the complainant along with a brother of hers and a number of other young males, whereby the complainant was assaulted and stabbed. He was taken to hospital by ambulance and suffered a number of serious injuries. In the aftermath of the incident, the injured party was treated in Beaumont hospital, where he was found to have sustained multiple stab wounds, including a

punctured lung and several other more minor injuries. The Book of Evidence contains a medical report which details that KW had been severely affected, physically, as a result of the assault, and has also missed out on a soccer scholarship in the United States as a result. He was seventeen years of age at the time of the incident.

5. The appellant, her brother, and four other individuals were subsequently charged with offences arising out of the incident just described. The appellant has no previous convictions. The appellant has been charged with the following:

making a threat to kill, without lawful excuse, by any means, intending the other (the complainant) to believe it would be carried out, to kill or cause serious harm to that other, contrary to s. 5 of the Non-Fatal Offences Against the Person Act 1997;

i) violent disorder, contrary to s. 15 of the Criminal Justice (Public Order) Act 1994;

ii) assault causing harm, contrary to s. 3 of the Non-Fatal Offences Against the Person Act 1997.

6. The High Court judicial review proceedings were instituted on Monday 24th July 2017. An *ex parte* application for leave to apply for judicial review was moved that day before the High Court (Heneghan J.). The High Court ordered that the Director of Public Prosecutions be put on notice of the application for leave to apply, and the matter was adjourned for hearing to the following Monday 31st July 2017. In the interim, an affidavit was filed on behalf of the Director by Garda Proudfoot. On the adjourned date, the High Court (Faherty J.) granted leave to apply for judicial review. It seems that the intention at that stage was that the judicial review proceedings would be case managed by Faherty J., with a view to ensuring that the judicial review would be heard and determined prior to the trial before the Circuit Criminal Court, which had been scheduled for 5th December 2017. To this end, a tight timetable for the exchange of pleadings was directed, with both parties being required to file

pleadings and affidavits during the long vacation. The state of play as of the date the judicial review proceedings were instituted on 24th of July 2017 was as follows. First, the appellant had not yet reached the age of eighteen years and was, accordingly, still a "child" for the purposes of the Children Act 2001. Secondly, the appellant had had the benefit of one of the most important procedural benefits under the Children Act 2001, the potential of a hearing under s. 75. This provision allows the District Court to deal summarily with a "child" charged with any indictable offence unless the court is of opinion that the offence does not constitute a minor offence fit to be tried or dealt with summarily. This allows for the possibility of an indictable offence to be disposed of on a summary basis. However, in the present case the District Court declined jurisdiction on the facts of the case.

7. The appellant had been allocated a trial date on 5th December 2017. Thus, the appellant would have had the charges against her heard and determined within a period of two years and two months from the date of the alleged incident on 19th September 2015. The reasonableness of this timescale has to be assessed against a background where the appellant had not made any admissions of guilt, the alleged offences involved six suspected offenders and thus entailed a complex investigation, and the offences alleged were of a very serious nature. On 28th November 2017, the appellant applied to vacate the trial date of 5th December 2017, due to a family bereavement, one of her brothers had very sadly been murdered. The trial was later allocated a date of 18th February 2019. On 16th January 2019, the appellant applied to vacate that trial date, as she was pregnant and due to give birth. The appellant subsequently gave birth to a baby on 19th January 2019. On 22nd May 2019, the appellant's partner and father of her child was also murdered.

8. The High Court was satisfied that had matters proceeded as intended *i.e.* with a trial taking place on 5th December 2017, then there would be no question of a finding of culpable or blameworthy prosecutorial delay. However, the trial did not proceed as scheduled on that

date. This was as a consequence, in part at least, of the institution of the judicial review proceedings. As a result of various delays in the pursuit of the judicial review proceedings, the criminal charges have been further delayed until a date in 2020. Therefore, as a result, the appellant and her co-accused found themselves in the position of having to face charges some five years after the date of the alleged incident.

9. In the High Court, the explanation offered on behalf of the prosecuting authorities for this period of delay is that the appellant's mother had led the Gardaí to believe that the appellant had emigrated to England in late September 2015. It was alleged that the appellant's mother informed Garda McGrath that the appellant had gone to England to reside with her sister, and would be attending school there. The appellant's mother, Ms. T, is also said to have undertaken to inform the Gardaí when the appellant returned and to bring her (the appellant) to the Garda Station. The actual position was that the appellant had not emigrated, and returned from a short visit to the United Kingdom on 13th October 2015. Ms. T did not notify the Gardaí of the appellant's return as she had undertaken. The prosecuting authorities' position is that the Gardaí only became aware that the appellant had returned from United Kingdom in May 2016. The affidavits indicate that that revelation came by way of confidential information. It seems that certain confidential information had been provided to a particular garda, and he then passed on this information to Detective Garda Healy. The receipt of this information is not recorded in any of the documentation which has been disclosed to the appellant's legal team. Garda Sergeant Proudfoot explained in her oral evidence to the trial court that details of the receipt of confidential information would not, for obvious reasons, be formally recorded on the PULSE system. It appears that the intelligence which the Gardaí had received in May 2016 also indicated that the appellant was residing with her mother at a new address. The intelligence did not, however, extend to the number of the house within the named housing estate at which the appellant and her mother were said to

be residing. On his return to work in August 2016 following scheduled extended leave, Detective Garda Healy attended at the housing estate. He successfully identified the appellant's mother's house by cross-checking the registration plates of cars in the housing estate against the register of ownership. A car registered in the mother's name was parked outside one of the houses in the estate. Relevantly, the address to which the car was registered had not been updated by the mother to reflect her change of address. Arrangements were then made for the appellant to attend Coolock Garda Station by appointment, which the appellant attended on 8th August 2016. She was arrested and interviewed by the Gardaí (the details of the new address were ultimately updated on the PULSE system in November 2016).

10. The position of the appellant's mother had changed during the course of the proceedings. Her initial position, as set out in her affidavit of 21st June 2018, had been to the effect that the only discussion of the appellant's visit to the United Kingdom had been by way of telephone conversation:

> "I say that the appellant travelled to England on 28th September 2015 and returned on 13th October 2015. I say further that I was in communication with her almost every day during the period she was in England.
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> 10. I say that I can recall receiving a phone call from a Garda who, I was given to understand, was the Garda Juvenile Liaison Officer, while my daughter was away in 2015. I do recall a conversation about bringing her to the Garda Station on her return. I may have stated that I would bring my daughter to the Garda Station when she returned but I have no clear memory of same. I did not say at any time that she emigrated to the United Kingdom or that she would be attending school there. That was not the case and was never contemplated as being a possibility."

The implication of this averment is that there had been no face-to-face discussion on this issue. However, during cross-examination on the content of her affidavit at the trial hearing

on 20th June 2019, the appellant's mother conceded that her affidavit contained a number of mistakes. In particular, she stated that the telephone conversation described in her affidavit did not take place in September 2015, but had occurred sometime subsequent to February 2016, *i.e.* after she had moved to her new house. The mother accepted that she did, in fact, have a face-to-face conversation with Garda McGrath at her house towards the end of September 2015. At this stage, the appellant was in the United Kingdom. The mother accepted under cross-examination that she had told Garda McGrath that she would bring the appellant to Coolock Garda Station for questioning on her return from the United Kingdom. She also confirmed that Garda McGrath had given her his contact details. The mother maintained, however, that she did not indicate to Garda McGrath that the appellant had emigrated to the United Kingdom.

11. Garda McGrath made the following averment in his affidavit of 27th September 2017:

> "I say that shortly after the alleged offence I met with the mother of the appellant in order to arrange an interview with the appellant. I was informed by the appellant's mother that the appellant was no longer in the jurisdiction and that she was in fact in the United Kingdom. The appellant's mother informed me that the appellant was going to live with a relative in the UK and attend school there. The appellant's mother undertook to inform me as soon as the appellant returned to the Republic of Ireland, but failed to do so. I did leave my contact details with the appellant's mother but she never contacted me to advise me that the appellant had returned to Ireland."

The Court found, that on the balance of probabilities, the recollection of Garda McGrath as set out in his affidavit is more likely to be accurate than that of the mother. Garda McGrath's version of events also appeared to be corroborated by an entry in the PULSE system. An updated entry on 9th October 2015 includes the following narrative: "L.E. has been sent to England to live confirmed with her mother [name redacted]. Will question her on her return."

12. Garda Sergeant Proudfoot, who was the incident room co-ordinator, explained in her oral evidence on 20th June 2019 that the approach initially adopted by the Gardaí had been to seek a direction from the Director to charge the appellant. The existence of a decision to charge would then allow a European Arrest Warrant ("EAW") to be issued seeking the surrender of the appellant from the United Kingdom. This approach was confirmed by Detective Garda Healy during the course of his cross-examination on 20th June 2019.

13. In considering whether delay was culpable or blameworthy, the judge had this to say:

> "I am satisfied that the conduct of the investigation between September 2015 and February 2016 when the directions were received from the DPP was reasonable, and that there was no culpable or blameworthy prosecutorial delay. It was reasonable for the Gardaí to rely on the representation made by the appellant's mother that her daughter had emigrated, and to respond by seeking a direction to charge the appellant with a view to applying for her surrender by way of an EAW. The appellant's mother had been co-operative with the Gardaí in all of her prior dealings with them. In particular, it seems that the mother had been instrumental in ensuring that the appellant's brother had attended at the Garda Station as requested in September 2015. Against this factual background, there was no reason for the Gardaí to assume that the mother's statement to the effect that the appellant had emigrated was incorrect.
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> …
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> On the specific facts of the present case, I am satisfied that the conduct of the investigation during the period between the date of the alleged offences and the receipt of directions from the DPP dated 10 February 2016 did not involve any culpable or blameworthy delay. In particular, I am satisfied that the reliance placed upon the representation and undertaking of the appellant's mother of September 2015 was reasonable when coupled with an intention to seek the appellant's surrender.

However, once the option of seeking the surrender of the appellant by way of a European Arrest Warrant had been excluded in February 2016, a new approach was called for on the part of the Gardaí. A direction to charge the appellant could not be obtained until the requirements of the juvenile diversion programme under Part 4 of the Children Act 2001 had first been complied with. This necessitated that the appellant be interviewed. The Gardaí were obliged to make reasonable efforts to ascertain the whereabouts of the appellant, and whether she would be available for interview in the jurisdiction. Even if the appellant had emigrated to the United Kingdom, it would be reasonable to assume that she might return home from time to time to visit her family. An obvious first step would be to contact the appellant's mother and inquire as to her daughter's whereabouts."

14. On 23rd April 2018, the appellant presented at Beaumont hospital, having taken an overdose of Paracetamol tablets. Medical notes from this event refer to her intense suicidal ideation. The High Court heard of the mental health difficulties with which the appellant suffers. With respect to this, and the vulnerable nature of the appellant, which, it was argued, would be significantly exacerbated if the prosecution were to proceed, the Court had this to say:

"[l]eading counsel on behalf of the appellant, Ronan Munro, SC, places particular emphasis on the judgment of the High Court (Dunne J.) in *A.C. v. Director of Public Prosecutions* [2008] 3 I.R. 398. The appellant in that case was described as having had 'an extremely troubled background'. In particular, it seems that the appellant had been engaging in self-harm and other adverse behaviour. The appellant had been placed in a number of residential and foster placements by the Health Service Executive, all of which broke down. The appellant had then been detained for her own safety. The High Court described the appellant as a young person with particular

vulnerability, and stated that the fact that she had been subject to an order for her detention spoke volumes in this regard.

The High Court in A.C. cited the judgment of Fennelly J. in *M.O' H v. Director of Public Prosecutions* [2007] 3 I.R.299 to the effect that it is stressful for any individual to have to face criminal proceedings, and that in order to prohibit a trial there would have to be something more than normal, something extra caused by the alleged prosecutorial delay. On the facts of A.C., the High Court accepted that the delay in the case had not been the cause of the appellant's current state of difficulty but that in her vulnerable state, the delay in dealing with the prosecution can only have exacerbated the situation. The court concluded that the case came within the category of wholly exceptional circumstances where it would be unfair or unjust to put an accused on trial. An order of prohibition was granted.

The facts of the case before me are entirely distinguishable to those under consideration in *A.C. v. Director of Public Prosecutions*. The relevant medical reports have been set out at paragraph 24 above. As appears therefrom, whereas the Appellant has, undoubtedly, suffered from mental health difficulties in the past, these were of a different order than those suffered by the appellant in A.C.

Moreover, the medical reports confirm that—much to the credit of the Appellant and her mother—the Appellant has made significant progress since the time when she was first referred to the Child and Adolescent Mental Health Office in September 2015.Whereas the prospect of facing a criminal prosecution will inevitably impose stress and anxiety upon an accused person, this cannot, of itself, be a reason to prohibit a criminal trial. The medical condition of an appellant would have to be wholly exceptional to justify an order of prohibition. This threshold has not been met on the facts of the present case."

The Court found that while there were "pockets" of delay, there was no culpable prosecutorial delay. Further, a trial date had been allocated to the appellant. In considering the gravity of the offences, which allows for a sentence of up to ten years, the Court held that there was a clear public interest in allowing the prosecution to proceed.

15. The High Court then made the following comment:

> "[…] I have concluded that there was no culpable or blameworthy prosecutorial delay in this case. Lest I be incorrect in this finding, I have also conducted, on a *de bene esse* basis, the balancing exercise required by the judgment of the Supreme Court in *Donoghue v. Director of Public Prosecutions*. I have concluded that the balance lies in favour of allowing the prosecution to proceed. Accordingly, I propose to make an order dismissing the judicial review proceedings in their entirety.
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> The Appellant has reached the age of eighteen years since the institution of the proceedings and, accordingly, the title of the proceedings should be amended to reflect the fact that they are now being pursued in the Appellant's own name.
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> I also propose to make an order *pro tem* restricting the reporting of any matter which would identify the Appellant. I think that it is necessary to do this, otherwise any right of appeal against my finding that Section 45 of the Courts (Supplemental Provisions) Act1961 should not apply to these proceedings would be rendered nugatory.
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> There is to be no reference to the Appellant's name, to her address or to the area where she now resides. Reference can be made to the fact that the Appellant is from Coolock, and to the events of the alleged incident on 19 September 2015. Reference can also be made, in general terms, to the fact that the Appellant has suffered from mental health difficulties."

Grounds of Appeal

16. The grounds of appeal submitted by the appellant in her Notice of Appeal are as follows:

The High Court judge erred in fact and/or law in:

i) Failing to find that the right to trial with due expedition of the appellant was breached by the criminal proceedings;

ii) Failing to find that there existed exceptional circumstances which made it unfair or unjust to put the appellant on trial;

iii) Making findings of fact not supported by evidence, including impermissible findings based on hearsay evidence;

iv) Failing to take into account periods of delay properly, thereby weighing those periods unfairly in favour of the respondent;

v) Refusing to take into account in assessing delay, events and information arising after leave was granted in the judicial review proceedings;

vi) Failing to find that An Garda Síochána had breached their duty to make reasonable inquiries to locate the appellant at the material times, in particular, between the 19th of September 2015 and August 2016.

The Appeal

17. The appeal hearing took place in the Court of Appeal on 4th February 2020. The appellant's submissions may be pared down to the following core points. Senior Counsel for the appellant argued that the judgment of Simons J. did not take into account the cumulative effect of the delay complained of in this case, and the vulnerability of the appellant. He described this as a "hybrid case", which, to the Court's understanding, means that there is a dual element to this case, that being the delay, and the vulnerable nature of the appellant.

Counsel for the appellant argued that the High Court judge erred in considering the factors of delay and the appellant's mental health separately, rather than together and in the circumstances as a whole.

18. Counsel referred to the psychiatric reports outlining the personal difficulties the appellant has faced, at the time and prior to the alleged offence. Further, the appellant faced personal tragedy occurring post-granting of leave, which the High Court said ought not to be taken into account. Due to the surrounding circumstances, namely the birth of the appellant's child, and the unlawful killing of her child's father, the trial of the appellant did not take place in 2017 due to applications made by her. Counsel stressed that these are external events which are not blameworthy of either party, but are clearly relevant to the case being made with respect to her fragile mental health. Counsel says that the effect of these events must be taken into account, and that there remains a significant risk that the appellant's mental state would deteriorate pending trial.

19. The leading authority on prosecutorial delay in cases involving offences alleged to have been committed by a minor is *Donoghue v. DPP* [2014] 2 IR 762, where the Supreme Court indicated that the first question to be determined by a Court is whether there has been culpable or blameworthy prosecutorial delay. In the event that there was such a delay, the Court must then carry out a balancing exercise. The appellant submitted that the Gardaí are obliged to make reasonable efforts and attempts to make contact with a suspect. Counsel said that this was not done in this case with the efforts made to locate the appellant falling below what would be expected. Further, there is a special duty on behalf of the State to expediate children's trials. Counsel said that there was no real evidence to say that this was done or that an earlier trial date could not have been organised. He referred to the *dicta* of O'Malley J. in *G v. DPP* [2014] IEHC 33, whereby she stated that the court system is "sufficiently flexible" to prioritise the cases of minors.

20. The appellant argues that there was a lack of urgency in carrying out the prosecution herein. The Gardaí became aware of the possibility that the appellant had emigrated to England through a conversation with the appellant's mother but failed to follow this up. Counsel complained of what appears to have been an unsatisfactory lack of communication in the Gardaí with respect to this case. Opportunities to proceed with the case were not taken and there was an absence of reasonable attempts to source the appellant. Further, counsel stated that the evidence of Garda Proudfoot given in the High Court was found wanting, as she could not answer certain questions asked of her satisfactorily. While counsel accepted that the appellant did not exactly make efforts to expediate matters herself, and failed to appear for a Juvenile Liaison Office appointment; the appellant cannot be expected to exonerate the Gardaí for their lack of reasonable efforts to make headway with the prosecution. Counsel argued that it would be an extremely unattractive position to place an onus on the appellant's mother to notify Gardaí of the appellant's return to Ireland, and for the Gardaí to not be expected to make their own efforts to locate the appellant outside of that. The onus lies with the State to make reasonable efforts.

21. Counsel for the appellant then moved on to the medical reports provided to the court in respect of the appellant. The reports set out her medical history. The appellant's medical situation pre-dates the time of the alleged offence, and she has a history of self-harming. Counsel argued that the public interest does not lie with allowing a prosecution to go ahead against a vulnerable young woman who has not offended since the alleged incident, and who is working towards rehabilitation after the difficult events in her life. It is said that a criminal trial would not be conducive to her rehabilitation. Counsel argued that this is an exceptional case in all of the circumstances whereby there is evidence of blameworthy prosecutorial delay.

22. Senior Counsel for the respondent relied on the judgment of the High Court in full. She stated that Simons J. noted that accusations of culpable delay are a serious matter, but the High Court found that no culpable or blameworthy prosecutorial delay existed, and if there was an element of culpable delay, it was for a very short period. Much of the delay was due to the actions of the appellant, who did not actively seek an early hearing, but sought to have trials adjourned, unlike in *AC v. DPP* [2008] 3 IR 398, where the solicitor for the accused youth had asserted the accused's pre-trial rights.

23. Counsel for the State disagreed with the appellant's assertion that the Gardaí failed to make reasonable efforts in the prosecution of this case, when in reality the Gardaí made considerable efforts in the overall investigation, including Garda Healey locating the appellant's mother after she had changed address without notice to An Garda Síochána.

24. The respondent argued that the public interest clearly lies in prosecuting a serious offence as alleged in this case, in which the appellant played an instrumental role. Counsel differentiated the present case with *AC,* which involved a very unwell individual, who carried out an offence against property to which they made admissions. There is clearly no comparison with the present case, in circumstances where Simons J. held that the appellant's circumstances do not meet the threshold of *AC,* and the appellant is alleged to have carried out a non-fatal offence against a person, resulting in life-altering injuries, and no admissions have been made.

25. In respect of delay, the respondent submitted that delay in of itself is not enough to prohibit a trial, as held by Kearns J. (as he then was) in *PM v. DPP* [2006] 3 IR 172. The court must look at matters in the round, including the length of the delay and the reason for the delay. Counsel referred to the US Supreme Court case of *Barker v. Wingo* 407 U.S. 514 (1972), whereby the Court held that is it not sufficient to prohibit a trial due to the stress and anxiety that one would be expected to suffer from the prospect of facing trial, but that the

prejudice must be unnecessary stress inflicted on the accused. Counsel said that the same principle applies in this jurisdiction.

26. Counsel for the respondent proceeded to address the protections for minors which will not now be available to the appellant facing trial as an adult. She pointed out that if the stage of considering sentence is ever reached, that the trial judge would be expected to have regard to the age of the accused at the time the offence was committed, as well as her age as she appeared before the Court. It should not be presumed that a trial judge would not take the relevant factors into account. The appellant was allocated a trial date in 2017, which was vacated at her request. Counsel argued that the appellant had an opportunity to be tried as a minor, but that opportunity is now lost. This argument, however, was questioned by the High Court judge, who doubted that this would have been realistically possible, by referring to the absence of any admissions of guilt, the fact that the alleged offence involved six suspected offenders, and the complex nature of the case and investigation.

27. The respondent argued that this is not an exceptional case. Counsel accepted that the appellant is a vulnerable young woman who has faced unfortunate events in her life, but this is not a case for a court to intervene in the prosecution of what is a serious alleged offence. It was submitted that to do so would set a precedent across a wide range of cases where an accused has faced tragic life events.

28. In reply, counsel for the appellant stated that whilst the delay in this case was relatively short, there are significant consequences for the appellant, namely the loss of her anonymity. Counsel argued that the present case involves exceptional circumstances involving a vulnerable young accused and prosecutorial delay, making it a hybrid of the circumstances in *Donoghue*, and that of *AC*. It is in the public interest to enforce the special duty towards children in the criminal justice system and to facilitate their rehabilitation.

Discussion and Decision

29. In my view, the conclusion of the trial judge that there was no culpable or blameworthy prosecutorial delay was one that was certainly open to him. It seems to me that the starting point for consideration of this issue has to be the fact that the appellant's trial was scheduled to commence in the Circuit Criminal Court in Dublin on 5th December 2017. I agree with the High Court judge that had the trial proceeded on that occasion, it would not have been possible to argue that matters had been significantly delayed. It must be appreciated that this was a case of some complexity with six co-accused. It is also a case of considerable seriousness. The appellant has pointed to the fact that she was not charged with the offence until April 2017, almost a year after her brother was charged. There are two points to be made. First of all, the fact that she was charged after her brother has not had any practical effect, in that she was allocated the same trial date and the trial could have proceeded on 5th December 2017. Secondly, insofar as it is the case that she was charged considerably later than her brother, some of this is down to her own actions and the actions of those associated with her. To the extent that there was a divergence of recollection between Garda McGrath and the mother of the appellant as to what was said and when it was said in relation to the appellant going to England, the judge preferred the account of Garda McGrath. He came to that view, having heard the appellant's mother give evidence and heard her being cross-examined. It was a conclusion that was fully open to him. There was another way in which the appellant prolonged the process, in that she failed to attend for a Juvenile Liaison Officer meeting, there had to be an assessment as to whether she was a suitable candidate for admission to the Juvenile Diversion Programme before a decision could be taken to charge her.

30. Once the judge concluded, as he did, that there had not been blameworthy or culpable prosecution delay, that was sufficient to dispose of the application for judicial review.

Nonetheless, he went on to consider the balancing exercise contemplated by the Supreme Court in the *Donoghue* case. He points out that the principal prejudice alleged by the appellant is the procedural entitlements which would have been available under the Children Act 2001. The applicant, in the High Court, and now the appellant, complains about the fact that she will not now have the benefit of the reporting restrictions provided for under s. 92(1) of the 2001 Act. It would seem that in the High Court, there was some discussion as to whether the loss of anonymity could be mitigated by the trial court making an order that the criminal proceedings against the applicant be heard otherwise than in public. It seems that counsel on behalf of the DPP had submitted that the Court would have jurisdiction to make such an order pursuant to s. 44 of the Courts (Supplemental Provisions) Act 1961. In the High Court, Simons J. was not satisfied that s.45(1) of the Courts (Supplemental Provisions) Act 1961 could be interpreted in that way. His approach diverged from that taken by a colleague in an earlier case. In the course of my judgment in *AB v. DPP* (Court of Appeal, Unreported, 21st January 2020), I indicated that I felt that the approach taken on this issue by Simons J. in the present case was the correct one, and I remain of that view. 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, bearing in mind that the complainant suffered serious injury, and the consequences therefrom. Also relevant is the fact that on one view, the appellant might be seen, on the prosecution case, to have been the instigator of the incident. The High Court judge considered the arguments that had been advanced to him that the applicant had a history of mental health difficulties, and that this constituted an exceptional circumstance which would make it unfair or unjust to allow the trial proceed. He was of the view, and it is a view with which I could not disagree, that the applicant appeared to have made significant progress from the time when she was first referred to the Child and Adolescent Mental Health Office in September 2015. He recognised that a criminal prosecution will inevitably pose

stress and anxiety upon an accused person, including the applicant, but that this, of itself, could not be a reason for prohibiting a criminal trial. Again, with that conclusion, I am once more in agreement.

31. Overall, I am quite satisfied that this is not a case where the interests of justice would be served by prohibiting the trial.

32. Accordingly, I would dismiss the appeal. As the events of the COVID-19 pandemic required this judgment to be delivered electronically, the views of my colleagues are set out below.

Agree: McCarthy J

Agree: Kennedy J.