THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 320 J.R.]

BETWEEN

M. S.

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice McDermott delivered on the 17th day of May, 2018

1. The applicant seeks an order of prohibition or an injunction restraining his further prosecution on a charge of rape of M.D., a female, on 19th August, 2014 in a park near his home on Bill No. CCDP0030/2017 presently pending before the Central Criminal Court.

2. The applicant was born on 7th September, 1998 and at the time of the alleged offence was aged 15 years and 11 months. Following an investigation, he was subsequently charged before the District Court on 2nd January, 2017 when he was aged 18 years and 4 months. The complainant was his girlfriend at the time of the alleged offence. The applicant claims that there has been a substantial, unreasonable and unjustifiable delay in the investigation and prosecution of the alleged offence.

3. The following is the relevant chronology of events:-

19th August, 2014 The date of the alleged rape.

10th November, 2014 The complainant's father attended Coolock Garda Station and spoke to an unidentified garda. He informed him that he had a suspicion that his daughter had been raped and was seeking advice. He was advised to speak to his daughter and establish whether she was alleging that an assault had occurred and if so to return to the station.

3rd December, 2014 The complainant's father spoke to Garda Shane Haughney on 3rd December, 2014 when he responded to a call made in relation to a missing person at the complainant's father's residence. He was informed that the complainant had been sexually assaulted on an unknown date in August 2014. Garda Haughney was subsequently assigned as the investigating garda in respect of this allegation the following day, the 4th December.

5th December, 2014 Garda Haughney called to the complainant's father who indicated that his daughter wished to make a statement of complaint to a female garda. Her father wished to speak to the child's doctor prior to the taking of the statement to ensure that she was psychologically fit to do so.

15th January, 2015 The complainant attended at Coolock Garda Station with her father and a statement was taken by Garda Ciara Doyle in the presence of her father and Garda Haughney. The complainant made a complaint of rape and named the applicant as the alleged perpetrator of the offence. She also referred to a number of text messages which she claimed were sent by the applicant to her mobile phone. Garda Haughney sought permission from the complainant to retain her mobile phone which was given. At this stage Garda Haughney indicated to the child's father that he would need to take a statement from him and from the child's mother. The parents were separated and he was informed they wished to make their statements at the same time. The earliest date upon which they could both attend to do so was 4th March, 2015.

4th March, 2015 The parents did not attend and a further appointment was scheduled for 13th March, 2015.

13th March, 2015 Both parents attended the garda station and gave statements. Neither party was able to confirm the date of the alleged assault and it was necessary to arrange a further meeting to take an additional statement. The court was informed that the date of the alleged assault was originally given by the complainant as on or about the 20th August, 2014 which was her mother's birthday. Her father became aware of the alleged assault when her phone went off during a visit to the dentist. He scrolled through her messages and discovered what was said to be an acknowledgment by the applicant that he had sexual intercourse with the complainant without her consent and an apology for his behaviour. A later statement was required in order to confirm the date of the dental appointment.

27th April, 2015 Both parents attended at Coolock Garda Station and gave additional statements which were said to be of assistance in clarifying the date of the alleged assault. Garda Haughney indicates that a number of attempts were made to contact both parents prior to that date which had been unsuccessful. No details are given of these attempts or reasons for their lack of success.

Text Messages and Telephone Data

13th May, 2015 Garda Haughney gave the complainant's mobile phone to Garda Kevin Farrell to perform an XRY analysis. This is an uncomplicated mechanical process whereby the relevant information is downloaded and printed off. Garda Farrell was the designated mobile phone analyst at Coolock Garda station. This was an additional duty to his duties as a member of the Plain Clothes Unit at the station. Garda Haughney contacted him on numerous occasions between 15th January, 2015 and 13th May, 2015 in respect of the mobile phone. Garda Farrell was unable to carry out the relevant analysis until May when he was given the phone. He was too busy on other duties.

17th May, 2015 Four days after receiving the phone Garda Farrell conducted the XRY analysis.

25th May, 2015 A copy of the XRY analysis was furnished to Garda Haughney by Garda Farrell. On the same date Garda Farrell applied for subscriber details in respect of the numbers found as a result of this analysis. This required an application to Crime and Security at Garda Headquarters which had to be processed, approved and submitted to the relevant network operators.

15th June, 2015 Garda Farrell received the relevant information.

16th June, 2015 Garda Farrell forwarded the information to Garda Haughney. Garda Haughney states that additional investigations had to be conducted as a result. The complainant had informed the investigating gardaí that she had received a number of texts from the applicant. In the presence of another juvenile A.B. she telephoned the number from which the texts had been made and a phone in A.B.'s possession rang. Garda Haughney states that as a result he made a number of "unsuccessful attempts" to contact A.B. Apparently the gardaí called to his residence but there was never any response. The matter was not pursued and no explanation of this sequence of events has yet emerged.

24th September, 2015 Following a number of attempts to contact the complainant which proved unsuccessful for reasons which are also unexplained an additional statement was procured from her on 24th September. This was to clarify the date of the alleged offence. Previously the complainant had indicated that it occurred on or about the 20th August, 2014 the date of her mother's birthday. However, she clarified that it occurred on the 19th August.

Interview with the accused

27th April, 2015 to

28th October, 2015 Garda Haughney said that he called to the applicant's home on at least three occasions but the door was not answered. Once again no explanation or detail is given as to why Garda Haughney wished to contact the applicant, the dates upon which he sought to contact him, or the efforts made to contact him. It is not suggested that the applicant was in any sense trying to avoid the gardaí nor is there any evidence to that effect.

29th October, 2015 Garda Haughney says that contact was made with the applicant who at all times was living at home and an appointment was made with him to attend Coolock Garda Station with his mother at 1.00pm on **10th November, 2015**. Prior to that date his mother contacted the garda and informed him that "he was not going to attend". This averment by Garda Haughney was somewhat unfair to the applicant. It was addressed in the applicant's mother's affidavit of the 8th December, 2017 in which she states that having contacted the applicant's solicitor, Mr. Collier, to request that he attend at the station on the 10th November, Mr. Collier indicated he could not do so at 1.00pm because of prior commitments. Therefore, the appointment was rescheduled for 3rd December, 2015. Counsel for the respondent again confirmed to the court that it is not suggested that the applicant was avoiding the meeting or the gardaí in the course of their investigation. It is clear therefore that as of the 29th October the investigators were satisfied that they had made sufficient progress in the investigation to carry out a comprehensive interview with him.

3rd December, 2015 The applicant and his parents arrived at Coolock Garda Station. At that time the gardaí were dealing with a tiger kidnap case in the area. When Garda Haughney inquired about the availability of facilities for the arrest and detention of the applicant for the proper investigation of the offence (including interview facilities) the member in charge indicated that he was not in a position to facilitate that request due to the situation in the station at that time.

21st December 2015 The applicant agreed to re-attend at the garda station on 21st December, 2015 and did so with his mother whereupon he was arrested, detained and interviewed. Nothing of probative value emerged from these interviews and he was released from custody pending the submission of a file to the Director of Public Prosecutions. Indeed, the Book of Evidence later produced appears to contain a very limited amount of material most if not all of which by that date was in the possession of the investigators. He was then 16 years and three months approximately.

Other relevant events

The court is satisfied that nothing of significant importance occurred between the date of interview and the date upon which the file was submitted to the Director of Public Prosecutions in July 2016 - a period of eight months and that anything additional that might be deemed significant ought to have taken place within a much shorter time-frame. The court does not consider that there was a sense of urgency nor was any priority given to the case up to that date or indeed in the subsequent months. Gardaí were busy with other matters. The delays that occurred may well be because of lack of resources or misunderstandings as to the priority appropriate to such a case or the protocol, if any, under which Pulse operated.

17th December, 2016 The phone data received by the investigators also indicated that contrary to what they had understood to be the position, C.F. another juvenile, was the subscriber from whose phone the text messages which the complainant believed to be from the accused were sent. C.F. accepted that he was the registered owner of the relevant mobile phone and surrendered the phone to the Garda Síochána. An appointment was made with him to take his statement as a matter of urgency. However, it took three months to secure an interview with him.

19th March, 2016 C.F. attended Coolock Garda Station accompanied by his mother to make a written statement concerning the phone.

20th April, 2016 The applicant's solicitor wrote a letter inquiring about the status of the investigation.

27th April to 6th July 2016 See Pulse Issue below

31st May, 2016 The station sergeant replied to the solicitor's letter indicating that a file was being prepared for submission to the Director of Public Prosecutions.

7th July, 2016 The investigation file was forwarded to the District Office for onward submission to the Office of the Director of Public Prosecutions.

4th August, 2016 A direction was received from the Director of Public Prosecutions to charge the applicant with the offence of rape.

7th September, 2016 The applicant turned eighteen.

A delay occurred prior to his charging relevant to matters that arose under the Juvenile Diversion Scheme to which I will return shortly.

6th December, 2016 The applicant was deemed unsuitable for inclusion in the Juvenile Diversion Programme.

2nd January, 2017 The applicant attended by appointment at Coolock Garda Station where he was arrested and charged in respect of the rape offence. He was released on bail to appear in the District Court on 20th January, 2017.

20th January, 2017 The Book of Evidence was not ready, the applicant was further remanded on bail to the 3rd March, 2017.

3rd March, 2017 The Book of Evidence was served and the applicant was sent forward for trial to the Central Criminal Court.

27th March, 2017 The applicant appeared before the Central Criminal Court and sought a trial date which was fixed for 16th April, 2018.

24th April, 2017 The applicant sought leave to apply for judicial review as a result of which the trial date was vacated.

17th April, 2018 The judicial review proceedings came on for hearing before this Court.

The Pulse Issue

4. The case was delayed for a number of months in relation to issues concerning the operation of the Pulse System between the 27th April 2016 and 7th July 2016 in the following way:-

27th April, 2016 Garda Haughney sought directions from the office of the Director of the Youth Diversion Programme at Garda Headquarters as to whether it was appropriate to change the status of the applicant on the PULSE System because he had reservations about placing a juvenile's name on the system as a "suspected offender" in respect of a serious sexual offence when nothing of probative value had emerged from his interviews. In his affidavit he stated that it was not possible to generate a Youth Referral to the Diversion Programme until an accused is deemed a "suspected offender". He said this query was raised solely out of fairness to the applicant as a juvenile because once his status was changed on the PULSE System to that of a 'suspected offender' it would remain on his PULSE record.

10th June, 2016 Since no reply had been received from Superintendent Donnelly he resubmitted his request to the Director of the Youth Diversion Programme.

6th July, 2016 A reply was received from Superintendent Quinn, Director of the Youth Diversion Programme requesting that the file be forwarded to the Office of the Director of Public Prosecutions seeking directions as to whether there was sufficient evidence to charge the applicant. Superintendent Quinn indicated that if the Director of Public Prosecutions believed there was sufficient evidence to charge the applicant, the applicant's status could then be changed on the PULSE to that of "suspected offender" whereupon a "youth referral" would be generated under the Youth Diversion Programme. She indicated that once a "youth referral" was generated the investigation file and a suitability report prepared by a Youth Liaison Officer should be sent to the Office of the Youth Diversion Programme to evaluate whether the application was suitable for inclusion in the Diversion Programme.

7th July, 2016 Garda Haughney on the basis of this information completed the investigation file and forwarded it to the District Office for onward submission to the Office of the Director of Public Prosecutions for directions.

4th August, 2016 The direction to charge the applicant with rape was received.

7th September 2016 The applicant's 18th birthday.

8th September, 2016 The day after the applicant's 18th birthday Garda Keith Hughes a Juvenile Liaison Officer met with the applicant for the purpose of assessing his suitability for admission to the Diversion Programme. The relevant age for his inclusion in the programme was his age on the date of the alleged offence. At that time the applicant would still have been eligible to participate in the programme had he met all the other relevant criteria.

14th September, 2016 The full investigation file was sent to the Office of the Juvenile Diversion Programme. A decision on the applicant's suitability to participate in the Diversion Programme would be made on the basis of that file and the report prepared by Garda Hughes.

6th December, 2016 Garda Haughney received a report from the Office of the Juvenile Diversion Programme indicating that it had deemed the applicant unsuitable for inclusion in the programme.

5. Garda Haughney then states that a number of attempts were made to arrange for the applicant's attendance at Coolock Garda Station for the purpose of arrest and charge and that an appointment was "finally fixed for 2nd January, 2017". There is no detail of these attempts and it is not suggested that the applicant was endeavouring to avoid Garda Haughney. Indeed, as on all previous occasions the applicant co-operated and attended the station by arrangement on the 2nd January, 2017 when he was arrested and charged.

6. The court is satisfied that there was no reasonable explanation offered for the delay in having the mobile phone analysed. It is a process that took twelve days to access and furnish the relevant material once the phone was accepted by the designated Garda but it took a period of four months to have this relatively straightforward process completed between 15th January and 25th May 2015

because Garda Farrell was engaged in other duties which presumably took precedence over this task.

7. The court is not satisfied that there is any reasonable excuse for the delay between 27th April, 2016 and 6th July, 2016 in respect of the issue concerning the inclusion of the applicant's name on PULSE described above. The response when ultimately obtained was clear. The applicant could not be included in the PULSE System unless the DPP directed that there was sufficient evidence to charge him in which case his status could be changed to that of "suspected offender" on the system. There is no explanation as to why Garda Haughney did not already understand this to be the case and if there was any doubt about it why a superior officer at Coolock Garda Station or someone engaged within the station in juvenile liaison duties was not approached for the relevant information. If there is not a clear protocol in An Garda Síochána in relation to this very important matter, that should be remedied. However, I do not consider there is any reasonable ground for delay in respect of this period on the basis of Garda Haughney's lack of understanding of the appropriate protocol in respect of the PULSE System concerning juvenile offenders.

Juvenile Diversion Programme 4th August 2016 to 2nd January 2017

8. The court has also considered the delay later caused by the referral made under the Juvenile Diversions Programme after a direction was received from the Director of Public Prosecutions to prosecute the applicant on a charge of rape on 4th August 2016. As explained to the court the Programme operates under the provisions of the Children Act 2001 as amended. If the commission of a crime by a child comes to the attention of a garda he/she must prepare a report as soon as practicable under s.22 of the Act for submission to the Director of the Youth Divergence Programme as to the suitability of the child for caution and or supervision rather than prosecution before the courts. The child must accept responsibility for the criminal behaviour alleged following legal advice and be willing to submit to an appropriate form of supervision if that is thought to be appropriate if he/she is to be considered suitable for the programme under s.23.

9. The Juvenile Diversion Programme under Part IV of the Children's Act 2001 provides a system whereby a child who has committed an offence and accepts responsibility for his or her criminal behaviour must be considered for admission to a Diversion Programme. Its purpose is to divert the child away from criminal behaviour by administrating a caution and when appropriate by placing the child offender under the supervision of a Juvenile Liaison Officer: this may involve convening a conference to be attended by the child, family members and other concerned persons. Once an offence is detected the investigating garda may create an incident on PULSE with the child recorded as a "suspected offender" as already discussed. A youth referral is automatically generated and received at the Garda Youth Diversion Office at Garda Headquarters. A report is then requested to assist in deciding on the suitability of the child for inclusion in the programme. This information is considered and a recommendation is issued. If the child is deemed unsuitable a certificate to that effect is issued to the local District Officer who must consider initiating a prosecution or forward the file to the Director of Public Prosecutions accompanied by the certificate from the Director. It is clearly envisaged under the procedure followed by An Garda Síochána that this decision is made prior to the submission of the file to the Director of Public Prosecutions (see Annual Report on the Committee appointed to monitor the Effectiveness of the Divergence Programme 2016 at pp 6-8). This ensures that the Director of Public Prosecutions has a complete understanding of the view taken on this issue by the office of the Director of the Diversion Programme under the Children Act. In this case, that procedure was not followed. It was only following the issuing of the direction to prosecute that the applicant was interviewed for the purpose of assessing his suitability under the scheme.

10. Section 48 of the Children's Act provides that any acceptance by the child of responsibility for criminal behaviour in respect of which he has been admitted to the programme shall not be admissible in civil or criminal proceedings and a child shall not be prosecuted for that criminal behaviour or any related behaviour in respect of which he has been admitted to the programme under section 49. The child's identity is protected under section 51. It is noteworthy that the age relevant to consideration for admission to the programme "shall be the age of the child on the date on which the criminal behaviour took place" under section 23. Thus the applicant could have been considered for acceptance into the programme during and at the conclusion of the investigation even though he had attained the age of eighteen years just after the direction to prosecute was given. The assessment of suitability only began on the 8th September, 2016 (the day after his eighteenth birthday) and was completed on 6th December, 2016. The court notes that in its 2016 Annual Report, the Committee appointed to monitor the effectiveness of the Diversion programme states that 114 juveniles were referred to the Programme in respect of the offence of rape.

11. The investigation file was submitted to the Director of Public Prosecutions without an assessment as to the applicant's suitability for the Programme. Following the decision that the applicant should be charged with the offence of rape a youth referral was generated. An investigation file and a suitability report prepared by a Youth Liaison Officer was sent to the Office of the Youth Diversion Programme in Garda Headquarters to evaluate his suitability for inclusion. This gave rise to a further delay from 4th August, 2016 to 6th December 2016 - a period of four months – and a further delay of a month before the applicant was charged in the District Court on 2nd January 2017- a total period of five months later. It is unclear why the favoured procedure of submitting the file concerning the applicant's potential divergence under the programme with the investigation file to the Director of Public Prosecutions prior to her determination was not followed in this case. It took four months even though it was clear at that stage that he was refusing to accept responsibility for the offence which was a pre-requisite for acceptance into the programme.

12. However, having regard to the fact that the applicant never evinced a willingness to admit to the offence he could not have qualified as a suitable candidate under the scheme. Consequently, he suffered no discernible prejudice vis-à-vis the divergence scheme as a result of the sequence of events outlined. However, it clearly delayed the charging of the applicant. Of course, if the appropriate sequence had been followed it is likely that a period of weeks would in any event have been occupied in compiling the appropriate suitability assessment prior to the submission of the file. It is likely that that would have occurred much earlier sometime prior to 7th July 2016 and probably during the period lost by the unnecessary delay in making inquiries about the Pulse process. The later delay of four to five months that followed the decision to charge the applicant would likely not have occurred.

An Uncomplicated case

13. The Book of Evidence served on the applicant contains five witness statements namely those of the complainant, her father, her mother, Garda Haughney and Garda Kevin Farrell. The exhibits to be relied upon are the text messages and the subscriber details for the phone from which they were sent. The disclosure of other relevant materials had not been addressed prior to the initiation of the judicial review application though on the evidence this is likely to be very limited. It is clear that the case though very serious was not very complicated.

Delay

14. The applicant complains that his right to a trial with reasonable expedition or a speedy trial under Article 38.1 and 40.3 of the Constitution has been breached and seriously prejudiced because of the failure by An Garda Síochána to investigate this case and the failure of the Director of Public Prosecutions to consider and prosecute the case with reasonable expedition. Counsel for the applicant submits that he has been denied the benefit of a number of the protective provisions available to alleged child offenders under the Children's Act 2001 and through no fault of his own has been deprived of a right to be tried and if convicted, sentenced as a child. It is contended that because of the delay, the further prosecution of the applicant would breach his right to have the criminal

proceedings against him investigated, prosecuted and concluded before he reached the age of eighteen years and that the delay was inordinate, inexcusable and unexplained.

15. In *Director of Public Prosecutions v. Donoghue* [2014] 2 I.R. 762 the applicant admitted responsibility for a quantity of heroin found at his home when he was sixteen years old. Sixteen months later he was charged with an offence contrary to s. 15 of the Misuse of Drugs Act, 1977. There was no prospect of his being tried before his eighteenth birthday and consequently if tried he would be prosecuted and if convicted, sentenced as an adult. The High Court restrained his further prosecution because there had been a significant prosecutorial delay in breach of the particular and special duty on State authorities to provide a speedy trial for a child. The respondent appealed to the Supreme Court and submitted that the delay though significant did not fall into the category of culpable delay. It was held by the Supreme Court dismissing the appeal that in the case of a criminal offence alleged to have been committed by a child or young person there was a special duty on the State authorities over and above the normal duty of expedition, to ensure a speedy trial, having regard to the sensitivities involved, as reflected in the statutory provisions under the Children Act 2001. What might be excusable delay in respect of an adult in a given case might not be acceptable in the case of the prosecution of a child. However, blameworthy prosecutorial delay alone would not be sufficient to prohibit a trial. The court must conduct a balancing exercise to establish if there was by reason of the delay something additional to the delay itself to outweigh the public interest in the prosecution of serious offences. In that regard factors such as the length of the delay, the age of the person to be tried at the time of the offence, the seriousness of the charge, the complexity of the case, and the nature of the prejudice relied upon should be considered. Although there might well be adverse consequences flowing from the fact that the person facing trial was at the time of trial an adult having attained the age of eighteen years, those consequences might nonetheless be outweighed by the public interest in having the matter brought to trial. The Supreme Court also held that while some allowance had to be made for the time taken for the completion of an appropriate reference of a juvenile to the National Juvenile Office an unexplained subsequent delay in obtaining statements from the gardaí and bringing charges might be regarded as blameworthy.

16. The case advanced in these proceedings is based for the most part on the consequences that flow for the applicant because he is now before the Central Criminal Court as an adult rather than as a child because of the unreasonable and unacceptable prosecutorial delay in the investigation and prosecution of the case. It is not alleged that the delay has prejudiced a fair trial of the applicant before a jury in the Central Criminal Court to the extent that it affected the ability of a jury properly instructed to deliver a verdict on the facts of the case: there is no issue of prejudice caused by the delay such as might be occasioned by the death of a witness, enfeebled or faded memory, an inability to procure evidence or advance an alibi because of the passage of time. The central focus of the case is on the loss of the advantages available to the applicant as an alleged child offender under the Children Act due to the passage of time and which for the most part relate to the sentencing regime applicable to him, if convicted.

17. It is submitted that the applicant if prosecuted and convicted as an adult will lose the benefit to the following sections of the Children's Act 2001:-

> (i) s. 93 which provides that no report may be published identifying the applicant;
>
> (ii) s. 96 which provides that any penalty to be imposed on a child should cause as little interference as possible with his legitimate activities and pursuits and should take the form most likely to maintain and promote the development of the child and the least restrictive form that is appropriate in the circumstances and in particular, that a period of detention should be imposed only as a measure of last resort;
>
> (iii) s. 99 which provides that where detention is contemplated a court must adjourn the proceedings to obtain a Probation Officers report;
>
> (iv) s. 143 which provides that the court shall not make an order imposing a period of detention on a child unless it is satisfied that detention is the only suitable way of dealing with him.

Reference has also been made to s. 8 of the Sex Offenders Act 2001 in respect of the mandatory periods of registration and monitoring of persons convicted of sexual offences which are prescribed for offenders under the age of eighteen which are one half of the period applicable to adults. It should also be noted that the applicant, as an adult accused of rape, is entitled to anonymity unless convicted of the offence under s.8 of the Criminal law (Rape) Act 1981 as amended, at which stage he loses that protection unless its revelation would disclose or tend to disclose the identity of the complainant: a similar provision was not available to the applicant in Donoghue which concerned a drugs offence. If convicted when a child the applicant would have a life-long protection of his identity.

Prosecutorial Delay

18. In *Donoghue* Birmingham J. in the High Court concluded that there had been significant prosecutorial culpable delay. He held that had the case come before the court in a timely manner, the accused would have benefited from the provisions of the Children's Act including anonymity. He considered this to be of particular significance when considered in combination with the provisions of s. 258 of the Act which provided that convictions would be spent after three years in certain circumstances and for certain purposes in respect of persons (including adults) who are convicted in respect of offences which they committed when a child. Other provisions were relied upon such as s. 75 which enabled the District Court to exercise a jurisdiction to deal with the child's case summarily and when determining that matter to take account of his/her age, level of maturity and any other facts that the District Court considered relevant. In addressing these issues Dunne J. delivering the judgment of the Supreme Court stated that when considering the overall period of delay it was necessary:-

> "… to bear in mind the nature of the case (including its complexity), the need to engage with the National Juvenile Office, the period of delay and the reasons offered for that delay. This was a straightforward case on the facts where admissions had been made by Mr. Donoghue. The reasons put forward for the delay in this case are unsatisfactory. The delay in completing the investigation file was not adequately explained. I have no doubt that the statements of the two gardaí mentioned were necessary but as it appears that those statements were required in relation to the period of detention of Mr. Donoghue in Coolock Garda Station, it should have been a straightforward matter to prepare and obtain the statements."

19. The learned judge continued:-

> "27. The right to a speedy trial is a fundamental part of our criminal jurisprudence and requires no further elaboration here but the question of a special duty on the State authorities over and above the normal duty of expedition in the case of an offence alleged to have been committed by a child or young person merits some comment. Geoghegan J. in the passage cited above [*B.F. v. Director of Public Prosecutions* [2001] 1 I.R. 656 at p. 666] referred to the obvious

> sensitivities involved in respect of children or young person's coming before the courts. Those sensitivities are reflected in the Children Act 2001 by measures such as those relating to the juvenile diversion programme and those contained, *inter alia*, in s. 96 of the Act to the effect that a period of detention should only be imposed as a measure of last resort. It is undoubtedly in the interests of children and society as a whole that young offenders should be able to avail of the facilities of the juvenile diversion programme, where appropriate, and, so far as possible, to allow for early intervention with young offenders with a view to maximising the opportunity for rehabilitation. These aims cannot be achieved if there is avoidable delay in the prosecution of young offenders. For that reason, I am satisfied that for the purpose of considering whether or not there has been blameworthy prosecutorial delay in the case of a child or young person, one must take into account the special duty identified by Geoghegan J. in *B.F.* .... However, it is important to emphasise that this duty is only one of a number of factors, including, *inter alia*, the seriousness of the offence and the complexity of the case, to be taken into account in considering whether or not there has been blameworthy delay in any given case. What may be excusable delay in the case of an adult in any given case may not be acceptable in the case of a child alleged to have committed such an offence."

The court was satisfied that in all the circumstances there was ample evidence before the High Court to enable the trial judge to reach the conclusion that this was a case of "significant, culpable prosecutorial delay."

20. In this case a period of just short of two years passed between the date of complaint on 15th January, 2015 and the date of charge on 2nd January, 2017. A period of four months elapsed before the phone handed over by the complainant for an XRY analysis was sent for analysis on the 13th May, 2015. It is said that the garda carrying out the analysis was under pressure at work during this time. He worked in the same garda station and the exercise to be carried out was a straight forward mechanical process to extract the text messages and obtain subscriber details in respect of the numbers from which they were sent. Garda Haughney received the technical analysis from Garda Farrell on the 25th May, 2015 and subscriber details on the 16th June. I am satisfied that this process ought to have been and could have been completed promptly: it is not unrealistic to require that this simple downloading take place within one month of the phone being made available.

21. Though Garda Haughney called to the applicant's house between April 2015 and October 2015, no note or message was left and there does not appear to have been any speed on his part in interviewing him concerning the offence. In any event the delay in the analysis and examination of the phone meant that he may not have been in a position to do so until 16th June, 2015.

22. There also seems to have been a lack of urgency in interviewing the witness C.F. who was the subscriber of the phone from which the text messages were sent to the complainant's phone. He was contacted on 17th December 2015 but not further approached until the 17th March, 2016 nine months after the subscriber details were obtained from Garda Farrell. A statement was obtained from C.F. on 19th March, 2016. It was not included in the Book of Evidence. This was a straightforward task.

23. A.B. who had previously been nominated as the subscriber on the phone from which the messages had been sent to the complainant's phone was never interviewed.

24. It is clear that by October 2015 the investigation had reached the stage where it was thought to be necessary to interview the applicant. The gardaí procured his attendance at the station for the purpose of arrest and detention for the proper investigation of the offence. All the relevant evidence had by that time been gathered to enable them to conduct an appropriate interview and present him with the fruits of their investigation.

25. The court is satisfied that there was no reasonable basis or excuse for the delay in submitting the complainant's phone for analysis by Garda Farrell at the earliest opportunity. It took a very short period to carry out that analysis and furnish the relevant information to Garda Haughney. I do not accept that the explanation offered for this delay namely that Garda Farrell had other work to attend to in that period was in any way satisfactory considering the very high importance of investigating sensitive cases involving an alleged child offender with speed and more especially, when the case engages the highly sensitive issues surrounding an alleged child offender and an allegation that a female child of somewhat similar age was raped. This element of the investigation did not proceed with reasonable expedition.

26. I am also satisfied as a matter of probability that most of the important evidence ought to have been available and gathered by the investigators by February/March 2015 (including the phone data) apart from a number of short additional statements which did not advance the matter very much further. These were obtained from the complainant's parents in April and September and from C.F. on 19th March 2016. I am satisfied that the investigating gardaí ought then to have been in a position to proceed to the next stage of the investigation, namely the arrest and detention of the applicant and the conduct of interviews with him. Instead this process was not initiated until 29th October 2015.

27. A period of eight months then passed following the interview with the applicant between 21st December 2015 and 7th July, 2016 when the investigation file was forwarded to the Garda District Office for onward transmission to the Office of the Director of Public Prosecutions. Directions were received to charge the applicant with the offence of rape on 4th August, 2016. This was not done until 2nd January, 2017. In the meantime, two extensive periods were devoted to issues concerning PULSE and the Juvenile Divergence Scheme as outlined above.

28. On 27th April, 2016 one year and three months after the complaint had been made against the applicant a direction was sought by Garda Haughney from the Director of the Youth Divergence Programme as to whether he should enter the juvenile applicant as a "suspected offender" on the PULSE system in circumstances where he was alleged to have committed a sexual offence to which he had not admitted. Having sought guidance, he did not receive a reply until two and half months later on 6th July, 2016. The court is not satisfied that the explanations offered either for the inquiry made or for the delay in replying to it are reasonable. PULSE is a well-known system for recording data within An Garda Síochána. It has not been adequately explained to the court as to why there should be a delay in respect of such a simple inquiry as to whether the applicant ought to have had his details entered upon the system or not. One might have thought that a protocol existed in relation to such matters or if not, that a senior officer acting in a supervisory and advisory role could have supplied the necessary information promptly within Coolock Garda Station or within the garda division or in Garda Headquarters. There is no reasonable basis upon which that query could not have been answered within a matter of days at most. I am satisfied that this was an entirely wasted period of unjustifiable delay.

29. Nothing of substantive importance to the garda investigation occurred thereafter between 21st December, 2015 and the submission of the file to the Director of Public Prosecutions on 7th July 2016 apart from the taking of the statement from C.F. on 19th March. Once again there is an unexplained and unreasonable delay in taking the statement from C.F. who had been contacted about this matter on 17th December, 2015.

30. The court is therefore satisfied that there was an unjustifiable and unsatisfactory additional delay between the 21st December 2015 and the 7th July 2016. A further period of seven months passed without much if any advance in the processing of the case. The material relevant and sufficient for submission to the Director of Public Prosecutions was available. Once the interviews were concluded the relevant materials were available for submission to the Director of Public Prosecutions for the purpose of seeking her directions. The assembly and submission of the file might properly be delayed by a consideration of whether the applicant was suitable for admission to the Divergence Programme and the preparation and consideration of a report in that regard. Since that process should not have taken more than four to six weeks and given that it was inevitable that he would be deemed unsuitable, the court is satisfied that following the conclusion of interviews with the applicant, which ought reasonably to have taken place in February /March 2015 the considerations of the case under the Divergence programme should not have taken longer than six weeks and the case should have been ready for submission to the Director of Public Prosecutions at the latest within four to six weeks of the receipt of that recommendation. The court is cognisant that it should not impose unrealistic timeframes in such cases but I am satisfied that the file in this relatively uncomplicated case should have been submitted to the Director no later than the end of May 2015. The Director issued a direction that the applicant be charged in this case within five weeks of receipt of the file. Therefore, I am satisfied that it was reasonable to expect that the entire process up to that point should have been concluded by the end of June or beginning of July 2015. That is approximately twelve months prior to the date upon which the direction was actually given and thirteen months before the applicant's eighteenth birthday. He would under that time frame most likely have been charged within a month of the receipt of the direction in or about August 2015.

31. From the time when he was first charged it took two months to prepare the and serve the Book of Evidence and a further month before he appeared for mention in the list in the Central Criminal Court for mention. On that timeframe he could reasonably have expected the charge to have been laid in the District Court by late October or early November 2015.

32. Since the applicant wished to contest the charge as is, of course his right, a trial date would then have been fixed. A trial date was fixed in his case initially for 16th April 2018 approximately one year after his first appearance before the Central Criminal Court. If that time frame is taken to apply (and there is no reason to conclude it would not) he would likely have obtained a trial date in or around November 2016. He would have been eighteen years old by then. It was submitted that if the applicant had been underage when he appeared for the first time in the Central Criminal Court he would have been afforded some priority in obtaining a trial date but I am not satisfied on the evidence that this is necessarily so or that he could have been accommodated with a trial date prior to the end of July 2016. Even if he had there is no guarantee that other factors might not have intervened to interrupt the smooth conclusion of the trial before his eighteenth birthday and that if convicted the sentencing process would have been concluded by the end of July.

33. The court is not satisfied that the passage of time after the applicant attained the age of eighteen up to the date of charging should be regarded as a period of unreasonable delay. There is no suggestion that following his first appearance in the District Court there was any unreasonable or unjustifiable delay in the processing of the case through the District Court or before the Central Criminal Court or in the service of the Book of Evidence.

34. I am satisfied therefore that the delays identified by the court in the investigation of this uncomplicated case were inordinate, inexcusable and unexplained or unsatisfactorily explained: they amounted to blameworthy prosecutorial delay in the case of a child. The Supreme Court has identified the special duty owed by State authorities to children over and above the normal duty of expedition in such cases because of the sensitivities involved in dealing with children in the criminal courts and the societal and public interest in early intervention with young offenders to ensure the maximum opportunity for rehabilitation. In the case of an alleged serious sexual offence committed by one minor upon another the sensitivities of the case are even more obvious. This is the type of case that should have attracted a very high priority. It is unacceptable that the importance of expedition in this investigation was made subservient to priorities given to other cases by the phone analyst while doing his other work and that the attendance of the juvenile for interview was postponed because the station could not accommodate it. Furthermore, the confusion and lack of communication within An Garda Síochána concerning the operation of the Pulse system and the Divergence Programme was an important aspect of the delay in the case. The priority to be given to such investigations and the great importance, sensitivity and care which they should be accorded must be supervised and directed by the officers in charge at the station and in the division and communicated to those working in the stations and on the investigation. Investigators must be given to understand and have confidence that they will be afforded all forensic and technical assistance and resources necessary and any advice and support which they need when requested and in a timely way. Otherwise similar unjustifiable and unreasonable delays like those which occurred in this case will be repeated to the detriment of a complainant, persons under investigation and public confidence in the efficient investigation of such serious offences. However, it is not the function of the court on this application to grant relief simply in order to censure failings which it perceives in an investigation or to mark its disapproval of delay: it must apply the relevant principles. The question remains whether on the basis of the court's findings and applying the relevant principles the trial ought to be prohibited or injuncted.

The Balancing Exercise

35. It is clear from the authorities that culpable prosecutorial delay is insufficient of itself to justify restraining the further prosecution of a charge in the absence of a real prejudice giving rise to a risk of an unfair trial or some other wholly exceptional circumstance (*H. v. DPP* [2006] 3 I.R. 575 *per* Murray C.J. at paras. 47 to 49 and 54). A trial is not concluded until sentence has been imposed. The sentencing stage of the criminal trial must be conducted in accordance with fair procedures and law under Article 34, 38.1 and 40.3 of the Constitution (*The State (Kiernan) v. District Justice de Burca* [1963] I.R. 348 *per* Davitt P. at p. 357, *Nevin v. Crowley* [2001] 1 I.R. 113 and Kelly 'The Irish Constitution' 3rd Edition at paras. 6.5120 and 6.5121). In this case the prejudice alleged to have accrued to the applicant is said to arise from the loss of statutory rights to a person under eighteen years of age, a child under the Children Act 2001. As set out earlier the prejudice is said to consist of the applicant's loss of protection of his anonymity under s. 93. He also claims that if tried and convicted as an adult he will lose the benefit of the sentencing provisions of ss. 96 and 99. These provide that any penalty to be imposed on a child shall cause as little interference as possible to the child's legitimate activities and pursuits and take a form most likely to maintain his/her development and least restrictive in the circumstances: a period of detention should be imposed only as a measure of last resort. In addition, a probation officers report is obligatory when detention is contemplated. The benefit of s. 143 would also be lost under which the court must not make an order imposing a period of detention on a child unless satisfied that it is the only suitable way of dealing with him/her. Furthermore, if the applicant had been convicted and sentence had been imposed for rape when he was under eighteen years, he would require to be registered and monitored as a sex offender for a period which is one half the length of that applicable to an adult. It is submitted that these factors constitute a real prejudice and give rise to a fundamental unfairness at the trial of the applicant at the sentencing stage, if he is convicted. It is submitted that these factors are relevant to the balancing of issues and rights when the court is considering whether to grant relief.

36. In *Donoghue*, Dunne J. outlined the approach to be taken by the court on this issue:-

> "51. It is clear from the authorities referred to above that blameworthy prosecutorial delay alone will not suffice to prohibit a trial. As Kearns J. said in *P.M. v. Director of Public Prosecutions* [2006] IESC 22, [2006] 3 I.R. 172, at p. 185,

para. 33, …: -

> "An applicant for such relief must put something more into the balance … to outweigh the public interest in having serious charges proceed to trial."

Geoghegan J. in the course of the same case made the point, at p. 177, para. 10, that:-

> "If there is serious blameworthy prosecutorial delay that is one factor in itself and of itself that must be put into the melting pot when the balancing exercise is being considered."

> 52. There is no doubt that once there is a finding that blameworthy prosecutorial delay has occurred, a balancing exercise must be conducted to establish if there is by reason of the delay something additional to the delay itself to outweigh the public interest in the prosecution of serious offences. In the case of a child there may well be adverse consequences caused by a blameworthy prosecutorial delay which flow from the fact that the person facing trial is no longer a child. However, the facts and circumstances of each case will have to be considered carefully. The nature of the case may be such that notwithstanding the fact that a person who was a child at the time of the commission of the alleged offence may face trial as an adult, the public interest in having the matter brought to trial may be such as to require the trial to proceed. Thus, in a case involving a very serious charge, the fact that the person to be tried was a child at the time of the commission of the alleged offence and as a consequence of the delay will be tried as an adult, may not be sufficient to outweigh the public interest in having such a charge proceed to trial. In carrying out the balancing exercise, one could attach little or no weight to the fact that someone would be tried as an adult in respect of an offence alleged to have been committed whilst a child if the alleged offence occurred shortly before their 18th birthday. Therefore, in any given case a balancing exercise has to carried out in which a number of factors will have to be put into the melting pot, including the length of delay itself, the age of the person to be tried at the time of the alleged offence, the seriousness of the charge, the complexity of the case, the nature of any prejudice relied on and any other relevant facts and circumstances. It is not enough to rely on the special duty on the State authorities to ensure a speedy trial of the child to prohibit a trial. An applicant must show something more as a consequence of the delay in order to prohibit the trial."

37. It is clear that the protection of the applicant's anonymity could be lost if he is convicted as an adult under s. 8 of the Criminal Law (Rape) Act 1980 but not if he is acquitted. It is also clear that he will lose the benefit of ss. 96 and 143 of the Children Act which provide mandatory guiding principles in the sentencing of those under eighteen and might be thought to have a significant bearing on the imposition of sentence in a rape case where in respect of an adult there is a different emphasis in the sentencing principles to be applied: as stated by Finlay C.J. in *People (DPP) v. Tiernan* [1988] I.R. 250 at p. 253:-

> "… it is not easy to imagine the circumstance which would justify departure from a substantial immediate custodial sentence for rape and I can only express the view that they would probably be wholly exceptional."

However, it seems that many of the factors which are addressed under the Children Act will likely be considered at the sentencing stage of any young adult convicted of a serious offence committed when he/she was under eighteen years. Thus a sentencing court will have regard to the age of the applicant in this case both at the time of the alleged commission of the offence and, if convicted, at the time of sentencing. It is also likely that a probation report would be sought to assist when considering the sentence appropriate to his circumstances. Therefore, I consider much less weight attaches in reality to loss of the benefit of s. 99 which requires the court to seek a probation report if a sentence of detention is contemplated.

38. The very serious nature of a rape offence is clear from the fact that it attracts a maximum penalty of life imprisonment and the numerous judgments concerning sentences appropriate to conviction for rape emphasising the appropriateness of a custodial sentence, including *Tiernan* quoted above.

39. The issue of delay in a trial with a jury is dealt with by very extensive directions which have been developed to ensure that due account is taken of the difficulties caused for an accused in such cases. This is a factor often emphasised in the delay jurisprudence in that a trial judge has full jurisdiction to address these issues both in his/her charge to the jury and if necessary by stopping the trial if the fairness of the trial cannot otherwise be protected by an appropriate ruling. Similarly, the trial judge is also entitled to take into account the sentencing regime and principles that apply to a young adult who has been convicted of an offence committed when he/she was under eighteen years. In *Director of Public Prosecutions v. J.H.* [2017] IECA 206 it was submitted that the appellant though an adult at the time of sentencing ought to have been sentenced as a fifteen year old, his age at the time of the commission of a sexual offence the subject of the prosecution. In particular, it was submitted that the sentencing judge ought still to have applied the principles set out under ss. 96 and 143 of the 2001 Act: custody should have been in considered only as a last resort. Mahon J., having considered the rehabilitative aim of ss. 96 and 143 stated:-

> "14. The same concerns will not however necessarily be present (if indeed present at all) in circumstances where a child offender is being sentenced as an adult. In such a case, a sentencing court is free to approach sentencing in a different and less constrained manner than if the offender was still a child. In such circumstances, the court is not concerned, in general terms, with the potential detrimental effect of a custodial sentence on the offender, at least to the same extent as it would in the case of a child.
>
> 15. What is relevant in the context of sentencing is the fact that the appellant, although now an adult, committed the crimes in question when he was fifteen years old. A sentencing court is required to assess the offender's level of maturity at the time of the commission of the offence and to accordingly access[sic] his culpability as of that time. …
>
> 17. Of particular relevance to the instant case, is another English Court of Appeal decision to which Mr. Hartnett has drawn the court's attention. In *R v. Ghafoor* [2002] EWCA Crim 1857, the court said:-
>
> > 'The approach to be adopted where a defendant crosses the relevant age threshold between the date of the commission of the offence and the date of conviction should now be clear. The starting point is the sentence that the defendant would have been likely to receive if he had been sentenced at the date of the commission of the offence. It has been described as 'a powerful factor'. That is for the obvious reason that … the philosophy of restricting sentencing powers in relation to young person's reflect both (a) society's acceptance that young offenders are less responsible for their actions and therefore less culpable than adults and, (b) the recognition that in consequence, sentencing them should place greater emphasis on rehabilitation, and less on retribution and deterrence than in the case of adults. It should be noted that the 'starting point' is not the maximum sentence that

could lawfully had been imposed, but the sentence that the offender would have been likely to receive.'"

In *J.H.* the accused was convicted of two sexual assaults and two rapes committed when he was fifteen years old and the complainant was eleven years old. He was twenty-three years old when convicted. The sentencing judge imposed sentences of six and twelve months imprisonment in respect of the sexual assault and two years and four years imprisonment in respect of each rape count to be served concurrently. The final two years of the four years sentence was suspended. The Court of Appeal had regard the appellant's young age and associated lack of maturity and judgement at the time when the offences were committed as strong mitigating factors and noted his cooperation with the garda investigation, his plea of guilty and the absence of previous convictions: it reduced the sentence to one of eighteen months imprisonment with the final six months suspended. It is clear therefore that appropriate sentencing principles apply which will take into account the age and maturity of the applicant if he is convicted as a young adult of the rape offence. The entire background and circumstances of the offence and the investigation would of course be relevant to the determination of the appropriate sentence. A sentencing court will have regard to the applicant's personal circumstances at that time and engagement when requested by An Garda Síochána, and all other relevant aspects of the case which might assist the court in considering the nature of the penalty to be imposed bearing in mind the prospects for his rehabilitation given his young age as set out in the authorities cited (see also *People v. M.H.* [2014] IECA 19).

40. The court is satisfied that this case is distinguishable from that in *Donoghue*. Firstly, the *Donoghue* matter might have proceeded more swiftly having regard to the full admissions made in that case. In this case the accused has taken a trial date which necessarily involves a degree of uncertainty as to when the trial might conclude: while I am satisfied that it is reasonably possible that a trial date might have been set for a date prior to his eighteenth birthday I am not satisfied that all matters would necessarily have been completed while he was still a child. Crucially, I consider the offence with which the applicant is charged to be much more serious than that charged in the *Donoghue* case. Furthermore, the accused continues to have the benefit of the anonymity protection as an adult unless he is convicted: that protection did not apply to a person charged with a drug offence committed as a child if tried as an adult. However, each case must be considered on its own circumstances and does not fall to be determined by cases involving different facts.

41. I am satisfied applying the appropriate balancing test that taking account of the very serious nature of the alleged offence and the principles of sentencing that will be applied to the applicant as a young adult who committed an offence when under the age of eighteen years, if he were to be convicted, that the delay in this case is not sufficient to outweigh the public interest in allowing this charge to proceed to trial. There is no suggestion that there is any real risk of an unfair trial except in respect of the sentence that may be imposed if the accused is convicted: that is a contingency that may not arise. Consequently, for all of the above reasons I refuse the relief sought.