

## THE HIGH COURT

Between:

RD

Applicant

– and –

The Director of Public Prosecutions

Respondent

**JUDGMENT of Mr Justice Max Barrett delivered on 10th April, 2018.**

1. The applicant is facing a charge of rape and a charge of oral rape arising from the same series of events. Both the applicant and the complainant, who knew each other prior to the alleged events that are the subject of the charges, were children when the alleged events are claimed to have occurred. The applicant was then a boy one month shy of his 17th birthday. The complainant was then a 16 year-old girl. The applicant reached the age of majority in April 2017. He comes now to court seeking, *inter alia*, an order of prohibition in respect of his trial later this year. The essence of the applicant's complaint is that due to alleged delays presenting in the investigation of his alleged offences and in the decision to prosecute him for same, he was not brought to trial prior to his 18th birthday and so loses a variety of mandatory protections that he would have enjoyed under the Children Act 2001, had his case come to trial before he turned 18 years of age.

2. The court has been provided by the respondent with a most comprehensive timeline of relevant events since that night back in March 2016. These are set out in the appendix hereto. The court respectfully does not see in that timeline that there are periods of time presenting therein that amount to culpable prosecutorial delay. The proper investigation of an offence, the consideration of the applicant for the Juvenile Diversion Programme, the decision by the respondent whether to prosecute (and for which crime/s to prosecute) are all matters that take time and to which a degree of care must be brought so as best to serve the interests of the persons directly involved and the legitimate interest of the public in knowing that so far as possible their State seeks to arrive at a just end when allegations of criminal behaviour are made, investigated and prosecuted (if a decision to prosecute is settled upon).

3. There was criticism by counsel for the applicant that the appended timeline, as provided by the State, includes everything up to 'making cups of tea' and, in effect, that not all activity is a substitute for progress. He (counsel) contends that matters progressed in a timely fashion from March 2016 to May 2016 but that between the start of June 2016 and the point in April 2017 when the applicant turned 18 there was culpable delay in the advancement of the investigation. The court does not consider the criticisms made by counsel of the appended timeline to be correct or fair. Nor does it see the alleged culpable delay to present. Specifically, but without prejudice to the generality of the finding just reached, insofar as the time taken for forensic examination is concerned, (i) the Gardaí repeatedly sought to expedite that process by sending chase-up e-mails, and (ii) so far as the respective timelines of the issuance of the first and second Forensic Science Ireland (FSI) reports are concerned, that has been properly explained (the second testing process was a simpler comparative process which took less time than the first, more comprehensive examination). But in truth, even if the court, solely for the sake of argument, was to allow that fully one half of the roughly eleven-month period from June to the succeeding April (so about five months or so) involved culpable delay, and again the court sees no culpable delay to present, that level of delay is well short of the type of delay to which the Superior Courts have historically taken objection, albeit that each case falls to be considered on its own facts. Graph A shows a number of cases to which the court was referred and in which the delay presenting was considered objectionable. (Again, each case falls to be considered on its own facts but Graph A nonetheless is of some interest in this regard).

4. The five-month comparator is shown solely for illustrative purposes: the court considers no culpable delay to present on the facts of the within case. The cases to which Graph A makes reference are as follows:

*(1) F v. DPP [2001] 1 IR 656*

F alleged to have committed sexual offences against two young girls in 1995 when he was 14 years old. F moved to United Kingdom with parents. An Garda Síochána knew of F's whereabouts at all times. An Garda Síochána told F's mother in March 1996 that an application for F's extradition to Ireland would be made. F arrested in February 1998 with view to extradition to Ireland. F returned voluntarily in August 1998. Given the events of March 1996, a culpable delay of 2 years and 9 months was held to arise.

*(2) M v. DPP [2006] IESC 22*

M alleged to have committed three counts of gross indecency between 1982 and 1985. A complaint was made to An Garda Síochána in February 1998. M was arrested and charged in 2000. Prosecuting authorities had been aware of the incidents in 1992 but no complaint was then made. A culpable delay of 10 years was held to present.

*(3) Cullen v. DPP [2014] IESC 59*

Applicant made certain admissions to An Garda Síochána in 1988. Applicant moved with mother to England. Applicant located in Ireland in 2010. Applicant arrested and charged in 2011 with assault causing grievous bodily harm with intent to murder. A culpable delay of 23 years was held to present between the alleged offence and the proceedings.

*(4) Donoghue v. DPP [2014] 2 IR 762*

Heroin found in applicant's house. One year and four-and-a-half months later the applicant was charged with an offence under the Misuse of Drugs Act 1977. The delay meant there was no prospect of the applicant being tried in the Children Court. (The period of culpable delay was between 12½ - 14½ months). In the within case, of course, the alleged offences are of such seriousness that they would only ever have been tried before the Central Criminal Court. Moreover, it seems to the court notable that the heroin was discovered three days after Mr Donoghue's birthday, so effectively 2 years before he turned 18). By contrast, the alleged offences in the within proceedings occurred when the applicant was but a month shy of 17. That being so, it seems to the court that it would have been quite remarkable if – allowing for the proper investigation of an offence (something in which the applicant has the keenest of interests), the consideration of the applicant for the Juvenile Diversion Programme, and the decision by the Director of the Public Prosecutions whether to prosecute – the within matter could ever have come to trial before the applicant was 18. [ There is *perhaps*

something of a policy issue presenting for the other branches of government in the fact that (a) the necessary time it takes properly to investigate allegations of serious criminality and to bring such allegations to trial, if a trial ensues, has the result that (b) sometime after a child goes beyond the age of 16, there is, in practice, a curtailment of the mandatory statutory protections that such child can thereafter expect of the criminal justice system because (c) if and when such serious matters come to trial that child will likely have crossed the threshold of majority. ]

(5) *G v. DPP [2014] IEHC 33*

Two rape offences alleged to have been committed just before the 16th birthday of the accused. He made full admissions but was not charged until he was 20, yielding a culpable four-year period between the complaint (and admission) and charge.

5. What if the court is wrong? What if the appended timeline does involve culpable prosecutorial delay, albeit, at the very best, culpable delay of only a very few months? It is clear from the judgment of Denham CJ in *Cullen* that, when it comes to children and young offenders, they have a right to what she refers to, at para. 55 of her judgment, as a “speedy trial” (referencing *F v. DPP*). It is also clear from the judgment of Dunne J. in *Donoghue v. DPP*, para.52 that “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”. A consequence of this, Dunne J. continues, is that “in any given case a balancing exercise has to be carried out in which a number of factors will have to be put into the melting pot, including the length of the 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”. Here:

- the length of any, if any culpable delay (and the court emphasises that it sees none) at most extends to a number of months that can be counted on one hand.
- insofar as the age of the applicant is concerned, he was but one month shy of 17 at the time of the alleged offences and, in our criminal justice system as it is structured at this time, the court does not see that there was any prospect of such serious offences being properly investigated (with the requisite forensic evidence being obtained), the prospect of juvenile diversion being fully explored and the matter coming to trial, before he turned 18 years of age.
- with regard to the seriousness of the charges, they are clearly very serious.
- as to the complexity of the case, it may be as counsel for the applicant contended that the facts of this case are not especially complex (though that is not in any way to mitigate the seriousness of the alleged offences). Equally however, the court notes and accepts the submission by counsel for the respondent that the investigation of the applicant’s alleged offences was prolonged by the fact that the applicant chose to exercise his right to silence when questioned. No criticism has been made or is made of the fact that the applicant chose to exercise that right – he was fully entitled to do so – but a consequence of his electing so to proceed was that the investigation of the facts of the alleged offences (uncomplex as they may be) took longer than might have been the case if he had been more forthcoming at interview. That is not to criticise the applicant; it is simply stating a fact.
- when it comes to the prejudice contended for, the non-availability of mandatory protections that would otherwise have been available to the defendant under the Children Act 2001, had he been tried before he was 18 years old are accepted by the court to be a prejudice if they are lost by virtue of culpable prosecutorial delay, of which the court, again, sees none to present in the circumstances of the within application.
- even if the court is wrong (and it does not consider that it is wrong) and the appended timeline does involve (brief) culpable prosecutorial delay, albeit not delay that would have yielded a trial before the applicant turned 18 years of age, the court does not see any prejudice presenting that would be sufficient to outweigh the public interest in having the charges of which the applicant is accused proceed to trial. In this regard, the court is mindful that (i) the applicant is entitled to receive a fair trial in accordance with law, and that (ii) while the mandatory protections arising under the Children Act 2001 do not present for a person beyond the age of 18 (in fact as McDermott J. notes in *Independent Newspapers (Ireland) Ltd and ors v. IA* (Unreported, High Court, 16th February, 2018), para. 43, they cease even if an accused passes the threshold of 18 years in the course of trial), following a guilty verdict (a) it remains open to the trial judge to order a probation report (if s/he considers that appropriate), (b) it is an accepted principle of sentencing that incarceration is imposed only as a last resort, (c) reporting restrictions can, following on the decision in *McD v. DPP [2016] IEHC 210*, still be imposed by the trial judge (though there is a notably delicate line to be drawn in this regard when one considers, *inter alia*, Art.34.1 of the Constitution and also the rightful demands of the media in their exercise of that freedom of expression which all of us enjoy), and (d) the period of duration on the sex offender register can be brought to bear in the determination of any sentence that might fall to be imposed in the event of any (if any) conviction.
- one further factor to which the court has had regard is the extent of the discretion that the respondent enjoys when it comes to deciding whether to prosecute and for what offences. While the courts must protect constitutional rights and ensure due process, the primary function of deciding to initiate or maintain a prosecution and, all else being equal, the person best placed to make an informed decision in this regard, is the respondent, not a judge. (See in this regard *P v. DPP [2011] 1 I.R. 729*).

6. Counsel for the respondent complains that leave to bring the within judicial review application was only made one day within the three-month time limit to seek leave. To this the court’s respectful response is that the applicant had until the very last moment of that three-month period within which to bring his leave application and he brought it in time. Limitation periods cut both ways.

7. The principal reliefs sought by the applicant in the within application are (i) an order of prohibition preventing the respondent from prosecuting the applicant in the prosecution currently pending before the Central Criminal Court (bill number CCDP0080/2017), (ii) further, or in the alternative, an injunction restraining the respondent from so prosecuting, and (iii) a declaration that the delay in prosecuting the applicant is incompatible with the applicant’s rights under the Constitution. For all of the reasons aforesaid, the court declines to grant the said reliefs.

## Appendix

### Timeline Provided by Counsel for the Respondent

**21/03/2016.** Report received by An Garda Síochána concerning alleged offences. Locus of alleged offences designated a crime scene. Scene examined and certain items found. Complainant accompanied to hospital for testing. Statement taken from first person to whom complainant complained.

**22/03/2016.** Statement taken from mother of complainant

**23/03/2016.** Search warrant applied for re. premises to rear of which the alleged offences occurred. Certain CCTV footage from local business obtained.

**24/04/2016.** Certain CCTV footage from local business obtained.

**30/04/2016.** Complainant returns from trip away; statement taken.

**31/04/2016.** Statement taken from witnesses x 3.

**01/04/2016.** Statement taken from witness concerning certain text messages with complainant. Certain exhibits submitted to FSI.

**03/04/2016.** Statement taken from witness.

**04/04/2016.** Statement taken from witnesses x 2.

**05/04/2016.** Statement taken from witness.

**06/04/2016.** Search warrant sought for home of applicant.

**11/04/2016.** Search of applicant's home. Applicant arrested and detained. 3 x interviews with applicant.

**20/04/2016.** Second statement taken from complainant.

**22/04/2016.** Mobile phone of complainant examined.

**02/05/2016.** Clinical examination report issues from examining nurse.

*Court Note: In the within judicial review application, the applicant maintains by reference to his summary chronology (which is more truncated than that provided by counsel for the respondent) that up to 02/05/2016 there was nothing amiss with the pace of matters. His complaint relates to about 09/06/2016 onwards. (That last date is the next date that appears after 02/05/2016. As can be seen hereafter, the chronology provided by counsel for the respondent lists a few additional matters between 02/05/2016 and 09/06/2016).*

**11/05/2016.** Statement taken from party re. retrieval of CCTV footage from local business.

**20/05/2016.** Statement taken from relative of complainant. Certain exhibits submitted to FSI.

**22/05/2016.** Clarifying statement taken from mother of one witness.

**25/05/2016.** Second statement taken from witness.

**02/06/2016.** Phone downloads from certain witnesses arranged.

**03/06/2016.** Certain administrative tasks undertaken.

**09/06/2016.** Email sent to FSI seeking update on evidence forwarded on 20/04/2016. E-mail request to have mobile phone records downloaded from phones of certain witnesses. E-mail request to mobile phone provider re. any insurance claims made on applicant's phone.

**10/06/2016.** E-mail reminders sent to various Gardaí re. their witness statements.

**11/06/2016.** Statement received from garda witness #19. Reply received from mobile phone provider.

**15/06/2016.** Statement received from garda witness #23.

**19/06/2016.** E-mail received concerning difficulty with downloading certain mobile phone data.

**21/06/2016.** E-mail to garda superintendent concerning said difficulty. Statement received from garda witness #25.

**11/07/2016.** E-mail reminders sent to certain Gardaí re. their witness statements.

**13/07/2016.** E-mail reminders sent to certain Gardaí re. their witness statements.

**19/07/2016.** E-mail exchange concerning difficulty with downloading certain mobile phone data.

**20/07/2016.** Request for statement of evidence from garda witness.

**23/07/2016.** Phones from certain witnesses handed in to An Garda Síochána for downloading.

**27/07/2016.** Reports on said downloading received.

**01/08/2016 & 02/08/2016.** E-mail reminders sent to certain Gardaí re. their witness statements.

**03/08/2016.** Statement received from garda witness #9.

**04/08/2016.** Request for statement of evidence from garda witness.

**06/08/2016.** Statement received from Garda O'C.

**08/08/2016.** Statement taken from forensic nurse re. initial complaint made by relative of complainant. Statement received from garda witness #12.

**17/08/2016.** Statement received from Garda C. Report received from FSI re. alcohol testing of complainant.

**31/08/2016.** Further statements taken from complainant.

**01/09/2016.** Statement received from Garda D.

**08/09/2016.** First comprehensive report received from FSI. FSI request applicant's clothing from night of alleged offence.

**09/09/2016.** Said clothing submitted to FSI.

**16/09/16.** Statement received from Garda McH. Reminder sent to Garda McG re his witness statement.

**21/09/2016.** Second statement received from garda witness #9. Second statement taken from complainant's stepfather.

**22/09/2016.** E-mail reminder sent to named garda concerning the applicant's phone and Snapchat subscriber details. Statement received from garda witness #6. Second comprehensive report from FSI re applicant's clothing.

**06/10/16.** Interim investigation file submitted to garda in charge.

**08/10/16.** File forwarded to superintendent.

**09/10/2016.** Juvenile referral created for applicant on PULSE system.

**10/10/2016.** First statement received from garda superintendent.

**17/10/2016.** Garda Juvenile Liaison Officer contacts applicant's father with view to meeting concerning potential entrance of applicant into Juvenile Diversion Programme.

**20/10/2016.** Garda Juvenile Liaison Officer meets with applicant and his parents. Applicant and parents seek time to consider.

**27/10/2016.** Applicant declines to enter into Juvenile Diversion Programme. (It remains unclear to the court why, if the applicant was declining to enter into the Juvenile Diversion Programme, this required to be the subject of a later formal direction in this regard. That direction came on 29/11/2016. However, there is no suggestion that there was anything other than an observation of due internal process in this regard and there may be good practical reason why such a direction is required).

**17/11/2016.** Report received regarding drug testing of toxicology of witness #20.

**29/11/2016.** Direction received by garda superintendent that applicant unsuitable for inclusion in Juvenile Diversion Programme.

**05/12/2016.** Investigation file forwarded by garda superintendent to State Solicitor.

**03/03/2017.** Further statement taken from complainant.

**06/03/2017.** Further statement taken from complainant.

**07/03/2017.** Second statement taken of Garda L.

**08/03/2017.** Third statement taken of witness concerning certain phone calls made to same by complainant.

**19/04/2017.** Correspondence received by garda superintendent from State Solicitor with directions from Director of Public Prosecutions.

**29/04/2017.** E-mail request seeking FSI report regarding certain exhibits.

Court Note: The entry for 29/04/2017 is the last entry for April 2017 in the chronology provided by counsel for the respondent. As the applicant turned 18 during April 2017, it does not appear to the court to be necessary to recite the chronology beyond this point. The applicant was charged on 10/05/2017.