THE HIGH COURT

JUDICIAL REVIEW

[2018 No. 945 J.R.]

BETWEEN

AURIMAS BERNOTAS

APPLICANT

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Mr. Justice Noonan delivered on the 3rd day of May, 2019

1. In these proceedings, the applicant seeks to prohibit the respondents from further prosecuting him in respect of a number of alleged offences committed when he was a minor. The applicant is now of full age and claims that, as a result of prosecutorial delay, he has been deprived of the advantages that would have accrued to him had he been tried as a minor, thereby rendering his further prosecution unfair.

Facts and Relevant Chronology

2. The applicant was born on 10th June, 1999.

25th February, 2016 – the applicant, then aged sixteen years eight and a half months, was a front seat passenger in a motor car being driven by Valerijis Vins which was stopped by the Gardaí on the M7 motorway northbound at or near Mountrath in Co. Laois. The Gardaí searched the vehicle and found an airgun under the front passenger seat. In the boot of the car, they found a holdall which contained an improvised explosive device known as a pipe bomb, a Glock pistol and a number of rounds of ammunition. The applicant and Mr. Vins were arrested and detained. The articles recovered together with the motor vehicle were removed by Gardaí from the scene for further examination together with a mobile phone in the applicant's possession.

On 26th February, 2016, in the early hours of the morning, on foot of a search warrant granted by the District Court, Gardaí conducted a search of the plaintiff's home. During the course of the same day, the applicant was interviewed on five occasions, with a further two interviews taking place on the following morning. Mr. Vins was also interviewed on multiple occasions over the same period. It emerged from these interviews that on the preceding Tuesday 23rd February, 2016, the applicant and Mr. Vins met with a third person who gave them instructions to travel to Limerick by car, collect the bag in question and deliver it to a location in Dublin.

The applicant eventually told the interviewing Gardaí that he thought he was collecting a grenade but was unaware of the Glock pistol or the ammunition. He said he purchased the airgun himself earlier that day. In these interviews, the applicant suggested that he was under compulsion to comply with the third party's instructions because of a drug debt owed by the applicant to the third party. He repeatedly refused to answer certain questions "for my own safety".

The Gardaí established through their investigations that the meeting in question between the applicant, Mr. Vins and the third party took place at an Apple Green service station near Lusk in Co. Dublin on Tuesday 23rd February, 2016. In the weeks following the interviews, the Gardaí obtained CCTV footage from a number of locations. In late March, 2016, the Gardaí obtained CCTV footage from the Apple Green service station which showed the applicant and Mr. Vins meeting with a third person.

12th May, 2016 – the third person in the Apple Green video was identified as Jonathan Keogh, who was known to the Gardaí.

24th May, 2016 – Jonathan Keogh carried out what is described as the gangland assassination of Gareth Hutch, of whose murder he was subsequently convicted by the Special Criminal Court. Mr. Keogh fled the jurisdiction on the same date.

10th June, 2017 – the applicant attained his majority.

11th June, 2017 – Jonathan Keogh was arrested in the United Kingdom on foot of a European Arrest Warrant.

24th August, 2017 – Jonathan Keogh was extradited from the United Kingdom to Ireland.

13th September, 2017 – the Gardaí requested a warrant for the arrest of Jonathan Keogh for the purpose of interviewing Mr. Keogh in relation to the incident involving the applicant and Mr. Vins.

12th October, 2017 – the Gardaí applied to the District Court for the warrant which was granted.

23rd October, 2017 – Jonathan Keogh was arrested and interviewed by Gardaí on four occasions. He answered virtually every question put to him with "no comment".

19th February, 2018 – statements from Gardaí involved in arresting and questioning Jonathan Keogh were completed.

4th April, 2018 – further Garda statements were made concerning Jonathan Keogh.

14th April, 2018 – the Garda investigation file was completed.

19th April, 2018 – the Garda file was sent via the State Solicitor to the Director of Public Prosecutions.

1st June, 2018 – a copy of the file was sent to the National Juvenile Office.

28th June, 2018 – the National Juvenile Office completed its assessment

31st July, 2018 – the Director of Public Prosecutions issued directions to charge the applicant and Mr. Vins.

27th September, 2018 – the applicant was arrested, charged and brought before the District Court on foot of four charges:

(a) Possession of an explosive device (pipe bomb);

(b) Possession of ammunition;

(c) Possession of a firearm (Glock pistol);

(d) Possession of a firearm (air soft gun).

1st November, 2018 – the matter again came before the District Court when the applicant applied to have the charges against him struck out on grounds of delay similar to those advanced in these judicial review proceedings. The District Court refused the application and this decision was not appealed.

12th November, 2018 – the applicant applied to this Court for leave to seek judicial review.

3. As can be seen from the foregoing, the most significant delay occurring in this case was a period of one year and three months from the time Mr. Keogh left the jurisdiction until his extradition back to Ireland.

Prosecution of Minors

4. In *B.F. v. the Director of Public Prosecutions* [2001] 1 I.R. 656, the Supreme Court recognised a special obligation of expedition resting upon the State in the prosecution of minors. The principle was explained by Birmingham J. (as he then was) in *Donoghue v. Director of Public Prosecutions* (Unreported, High Court, 29th January, 2013) :

> "It has long been recognised that there is a particular and special duty on State authorities to provide a speedy trial for a child or young person. That principle was first articulated in the Supreme Court decision of *B.F. v. DPP* [2001] 1 I.R. 656 where judgment was delivered by Geoghegan J. In the case of *Jackson v. DPP* and *Walsh v. DPP*, judgment of Quirke J. 8th December 2004, it was confirmed that the principle was of general application and not confined to sexual offences."

5. This judgment was upheld by the Supreme Court (reported at [2014] 2 I.R. 762) where the court's unanimous judgment was delivered by Dunne J. who noted (at p. 782):

> "[49] The observations of Quirke J. as to society's interest in the speedy prosecution of young offenders are well made and reflect the policy behind the Children Act including the provisions for the diversion of young offenders from criminal activity, to which reference has been made earlier in the course of this judgment. Quirke J. concluded at pp. 18 and 19:-
>
> > 'I take the view that where a criminal offence is alleged to have been committed by a child or a young person there is always a special duty upon the State authorities (over and above its fundamental duty), to ensure a speedy trial of the child or young person in respect of the charges preferred.' "

6. Dunne J. referred with approval to comments by the trial judge concerning the effects of delay in child cases, observing (at p. 783):

> "[53] The learned trial judge in the course of his judgment outlined a number of features that would have applied to Mr. Donoghue had he been prosecuted expeditiously which were no longer applicable given that Mr. Donoghue would be tried as an adult as opposed to a child. They included the loss of anonymity, the fact that s. 96 of the Act (to the effect that a sentence of detention should only be used as a last resort) would no longer apply and the loss of the mandatory requirement to obtain a Probation Report in the circumstances set out in s. 99 of the Act. …
>
> It is appropriate to add that the special duty of expedition on the part of the State authorities in the case of offences alleged to have been committed by a child will be of benefit to the child offender but will also be of benefit to society as a whole if early intervention is effective in diverting the child away from crime. The potential benefit to the child offender and to society as a whole in diverting young people towards a crime free lifestyle will undoubtedly be diminished by delay."

7. The court was however also at pains to point out that the presence of blameworthy delay did not of itself lead to an automatic right to have a trial prohibited. This is clear from the following passage of Dunne J.'s judgment (at p. 783):

> "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 eighteenth 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."

8. The application of these principles is well illustrated in a series of recent judgments of the High Court. *Ryan v. the Director of Public Prosecutions* [2018] IEHC 44 concerned an alleged assault by the applicant who was sixteen years and four months at the time of the offence. Prohibition was refused notwithstanding that the court found there was culpable delay. The same result ensued in *S.W. v. Director of Public Prosecutions* [2018] IEHC 364 where prohibition of a prosecution for assault against a fifteen-year-old was refused despite a finding of delay. In *M.S. v. DPP* [2018] IEHC 285, an alleged rape committed when the applicant was fifteen years and eleven months, again culpable delay was found but prohibition was refused. Most recently in *A.B. v. DPP* [2019] IEHC 214, concerning an alleged sexual assault when the applicant was fifteen, an order of prohibition was refused despite a finding of culpable delay. In *R.D. v. DPP* [2018] IEHC 164, which involved a rape charge against the applicant who was sixteen years and eleven months at the material time, the court refused prohibition, but there on the grounds that no culpable delay had been established.

Was there culpable delay here?

9. As the above chronology demonstrates, the most significant delay complained of by the applicant in this case was that occasioned by the absence of Mr. Keogh from the jurisdiction for a period of approximately one year and three months. The applicant attained his majority during this period and therefore any subsequent delay is of less relevance. The applicant contends that all the evidence necessary to prosecute him had been gathered by the Gardaí within a period of about three months and there was, thereafter, no impediment to proceeding with a prosecution which would likely have been concluded before the applicant's eighteen birthday. It was argued on the applicant's behalf that there was no necessity for the Gardaí to interview Mr. Keogh before bringing the prosecution because, *inter alia*, it is not intended that he be called as a witness in that prosecution. There is no statement from Mr. Keogh in the Book of Evidence. It was said that the making of admissions by the applicant underscores the fact that there was nothing standing in the way of a prosecution proceeding.

10. The investigation in this case concerned very serious offences involving possession of explosives and firearms. Both the applicant and his co-accused, Mr. Vins, made clear in the course of their interviews with Gardaí that the criminal enterprise concerned was orchestrated and directed by Mr. Keogh and furthermore, that they acted under compulsion out of fear for their own safety. The applicant refused to identify Mr. Keogh, again according to himself for his own safety. The investigation was clearly complex in that it involved, *inter alia*, ballistics and forensic analysis of the evidence and the harvesting of CCTV from a number of locations with a view to trying to verify the applicant's story and identify the third person involved.

11. Having done so, it would in my view be entirely unreal to suggest that the Gardaí should have left matters at that and proceeded to conclude the investigation. Indeed, had they done so, they would not only have been open to significant criticism by the applicant at trial but potentially to an application for prohibition on the different ground that they had failed to garner all the available evidence. Before Mr. Keogh was interviewed, it was perfectly possible that he might have said that the applicant acted under duress at his instruction or alternatively he might have denied that he gave any instruction to the applicant or Mr. Vins.

12. In the event of course, he did neither of these things but that was not something that could have been known in advance. The Gardaí have an obligation to conduct as full and complete an investigation as reasonably possible into a given crime, particularly one as serious as in this case. The suggestion that, having apprehended some of the alleged perpetrators only, notwithstanding their knowledge that others were potentially involved, they should conclude their investigation appears to me to be an unstateable proposition.

13. It would indeed be a somewhat extraordinary state of affairs if the applicant were prosecuted and convicted, then to have the sentencing judge enquire from the Gardaí as to the background to the criminal enterprise involved only to be told that they had decided not to investigate further once they apprehended the applicant. It is difficult to see how such a prosecution would not have been open to the objection by the applicant that the Gardaí had failed to obtain evidence which could, at least potentially, be exculpatory of the applicant. Although admissions were made by the applicant, these were partial only and did not extend, for example, to the Glock pistol or the ammunition of which he denied any knowledge. This too was a matter upon which light might have been shed by Mr. Keogh and here again, it would have been a dereliction of duty by the Gardaí not to attempt to apprehend and interview Mr. Keogh before proceeding against the applicant.

14. In two cases arising from the Planning Tribunal, *Cosgrave v. DPP* [2012] 3 I.R. 666 and *Kennedy v. DPP* [2012] 3 I.R. 744, both applicants sought prohibition on grounds of delay. The prosecution sought to justify the delay on the basis that the central witness against both applicants was himself the subject of criminal proceedings and the outcome of those should be awaited before the prosecutions against the applicants should be required to proceed. In giving the majority judgment of the Supreme Court in *Cosgrave*, Denham C.J. noted (at p. 705):

> "[59] There has been delay in the prosecution of the current charges on corruption. However, the reason for the delay, the fact that the first respondent waited until Frank Dunlop was prosecuted and convicted before he brought these charges, grounded on the evidence of Frank Dunlop, is reasonable. Indeed, if this prosecution had been brought prior to the prosecution of Frank Dunlop it would have left the prosecution open to challenge as to the status of Frank Dunlop as a witness."

15. The court reached the same conclusion in *Kennedy* on the basis that if the prosecution had proceeded before Mr. Dunlop's case was dealt with, there could be a perception that he was simply giving evidence to secure some benefit for himself and his status as a witness could have been undermined.

16. Accordingly, I am satisfied that the applicant has failed to demonstrate that there was any culpable delay arising in this case. However, if I were to be wrong in reaching that conclusion, I propose to consider the outstanding issues that arise.

Where does the Balance Lie?

17. In pointing to the disadvantages the applicant argues he will suffer because he will not now be tried as a child, the applicant relies on a number of sections of the Children Act, 2001:

> (i) Section 93 which provides that no report may be published identifying the applicant. The loss of the benefit of this

section is certainly a detriment but as noted by Barrett J. in *R.D. v. DPP*, reporting restrictions can, following on the decision in *McD v. DPP* [2016] IEHC 210, still be imposed by the trial judge.

(ii) Section 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 should take the least restrictive form that is appropriate in the circumstances; in particular, a period of detention should be imposed as a measure of last resort. Again as noted by Barrett J. in *R.D. v. DPP*, it is an accepted principle of sentencing that incarceration is imposed only as a last resort. In determining whether any benefit might have accrued to the applicant under this section, one must have regard to the reality of this case. The offences in question are very serious and although partial admissions have been made by the applicant in respect of two of them, the other two, possession of the Glock and possession of ammunition, are denied. Having regard to this and the fact that, as emerged for the purposes of the now abandoned bail application, the applicant has eighteen previous convictions, seventeen for offences committed while on bail, the possibility of a non-custodial sentence seems somewhat remote. It must also be born in mind that if the applicant is convicted, the sentencing judge would have to have regard to the fact that the applicant was a minor at the time the offences were committed.

(iii) Section 98 empowers a court dealing with a child offender to impose a range of sanctions including a reprimand, a fine, an order that the parent or guardian be bound over, a compensation order, a parental supervision order, an order that the parent or guardian pay compensation or an order imposing a community sanction. Again all of these must be viewed as unlikely for the same reason as identified in the preceding sub paragraph.

(iv) Section 99 which provides that where detention is contemplated a court must adjourn the proceedings to obtain a probation officer's report. Here again Barrett J. has noted in *R.D. v. DPP* that it still remains open to the trial judge to order a probation report if considered appropriate.

(v) Section 143 which provides that the court shall not make an order imposing a period of detention on a child unless satisfied that detention is the only suitable way of dealing with him. Here again, this seems no more likely than a remote possibility.

(vi) Section 258 which provides that the applicant if convicted as a child would be entitled to have the conviction expunged from his record subject to certain conditions. This would undoubtedly amount to a potential disadvantage to the applicant.

18. All of these matters must be placed on one side of the scales. On the other must be placed the public interest in the prosecution of serious offences which these undoubtedly are. This is all the more so in the context of the averments contained in the affidavit of Garda Sourke that the background to the incident in respect of which the applicant stands charged is the transfer of weapons and explosives on behalf of persons involved in lethal gangland activity. The applicant took objection to this description at the trial on the basis that gangland activity does not feature in the Book of Evidence in the prosecution against him. However, in my view the Gardaí are entitled in opposing this application on the civil side to draw all relevant matters to the court's attention, of which this is clearly one.

19. Another matter to be weighed in the balance is the admissions made by the applicant in respect of the explosives and the air pistol. In the present case, it is not denied that these admissions were made but rather they are relied upon by the applicant to support his contention that they militated against the delay which allegedly occurred. In discussing the significance of admissions in delivering the judgment of the Supreme Court in *S.A. v. DPP* [2007] IESC 43, Hardiman J. noted (at para. 19):

> "To look at these admissions from another point of view, it would in my opinion be extraordinary to prohibit a trial in circumstances where the defendant admits a significant amount of behaviour of a criminal nature."

The Supreme Court reiterated this view in *McFarlane (No. 2)* [2008] 4 I.R. 117 where Kearns J. delivering the court's judgment said (at p. 167):

> "…where an applicant has made admissions in the course of an investigation the court should be entitled to have regard to that fact. That is not to say that the admissions may not be contested or ruled out at trial, but in the context of a quite different application on the civil side an uncontested admission is a factor which must go in to the balancing exercise."

20. Having regard to all these factors, I am satisfied that the public interest in prosecuting the applicant substantially outweighs any prejudice he will suffer as a result of being prosecuted as an adult.

Collateral Attack

21. As noted in the chronology above, an application was made to the District Court by the applicant on the 1st November, 2018 to dismiss the charges against him on the grounds of delay. This is described at para. 52 of Garda Sourke's affidavit. She avers that during the hearing before the District Court:

> "Oral evidence was given by the Gardaí by way of opposition to the application. It was outlined that the investigation was complex with significant forensic evidence and CCTV. Evidence was also given in respect of the third person identified through CCTV, Jonathan Keogh referred to above, who Gardaí believe played a significant role in this crime and who subsequently fled this jurisdiction. Details were also provided surrounding his arrest and detention in relation to this crime. Having considered the submissions made by the defence, the court refused the application. In giving its reasons, the court stated that the delay was not inordinate due to the nature of the offence which was under investigation."

22. As I have already noted, the grounds advanced for the application before the learned District Judge appear in substance to be the same as those relied upon in this application. No appeal was taken from the order of the District Court nor was it sought to challenge that order when this application was made twelve days later. The applicant is now out of time to do so. If the applicant were to be successful in this challenge, this would in effect amount to a reversal of the order of the District Court in the absence of an appeal or challenge by judicial review. Such a procedure is impermissible and amounts to an abuse of process as explained in the judgment of Clarke C.J. in *Sweetman v. An Bord Pleanala* [2018] IESC 1 (at para. 7):

> "The rationale behind the collateral attack jurisprudence is clear. A party who has the benefit of an administrative decision which is not challenged within any legally mandated timeframe should not be exposed to the risk of having the

validity of that decision subsequently challenged in later proceedings which seek to quash the validity of a subsequent decision on the basis that the earlier decision was invalid. Like consideration would apply to a State decision maker who has rejected an application or other similar decisions.

The requirements of legal certainty make clear that a person who has the benefit of a decision which is not challenged within whatever time limit may be appropriate is entitled to act on the assurance that the decision concerned is now immune from challenge subject to very limited exceptions such as fraud and the like."

23. The Chief Justice continued (at para. 7.5):

> "…I am satisfied that the proper approach for the court to take is to consider whether, taking the scheme as a whole and having regard to its express terms and any additional matters which can properly be implied, it can be said that it is clear that a particular question or issue is to be definitively determined at an earlier stage so that there is no possibility to have that issue or question re-opened at a later stage. In such a case it is appropriate to require anyone who wishes to challenge that initial decision to do so within any relevant statutory time limit or time provided for in Rules of Court. Any failure to do so within such time limit, including any extended time limit which the court may, in accordance with its jurisdiction, permit, will render the initial decision incapable of challenge and will further preclude any challenge to any subsequent decision made in the process which is based on a contention that the initial decision was not lawfully made."

24. That these principles apply equally on the criminal side is clear from the judgment in *A. v. Governor of Arbour Hill Prison* [2006] 4 I.R. 8 where the applicant sought relief pursuant to Article 40 of the Constitution on the basis that the offence for which he was convicted and sentenced had been declared unconstitutional in other proceedings. His case was dismissed on the basis that, *inter alia*, he was not entitled to mount a collateral attack on his conviction, having never sought to directly challenge it at the appropriate time.

25. The applicant in this case is now out of time to challenge the decision of the District Court either by way of appeal or judicial review and may consequently not now seek to do so indirectly by seeking to relitigate the same issue in these proceedings as already determined by the District Court.

Conclusion

26. For the reasons I have identified, I am satisfied that there was no culpable delay in this case but even if there was, the public interest in prosecuting the applicant outweighs the prejudice to him as a result of the prosecution not proceeding during his minority. I am also satisfied that this challenge constitutes an impermissible collateral attack on a previous unchallenged decision of the District Court and for that additional reason also must fail. I therefore propose to dismiss this application.