THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 637 JR]

BETWEEN

A.B.

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Twomey delivered on the 4th day of April, 2019

SUMMARY

1. This is a case in which the applicant, aged 19, seeks the prohibition of his trial for the alleged sexual assault of a girl of six years of age, when he was 15 years of age.

2. Since one of the protections which the applicant complains he has lost by virtue of the delay in his prosecution is the right of a child, under the Children Act, 2001 (the "Children Act"), to anonymity, this Court has taken some steps to anonymise this judgment and reduce any identifying details and so, *inter alia*, he is referred to as A.B.

3. The alleged offence occurred when the applicant was aged 15 years and 6 months and so he was two and half years away from his 18th birthday at that time. The applicant argues that as a result of the delay between the date of the alleged offence and the date on which the applicant was charged with the alleged offence, he will have to face trial as an adult for an offence which he is alleged to have committed as a child. He argues that his right to a speedy trial as a child was breached due to blameworthy prosecutorial delay and that he has been prejudiced by virtue of the fact that he will now be tried without being afforded the protections in the Children Act, afforded to children who are prosecuted for offences.

4. This judgment considers first whether there was blameworthy prosecutorial delay and if so, whether the prejudice which results from this delay outweighs the public interest in the prosecution of the offence of an alleged sexual assault on a six year old girl.

BACKGROUND FACTS

5. The applicant is a neighbour of the six year old complainant and it is claimed that he was in a bedroom of the complainant's house along with her younger brother at the time of the alleged offence. It is claimed that the complainant came down the stairs of her home on the date of the alleged offence and that there was blood coming from her vagina and that there were two small cuts either side of her vagina along with a bruise on the upper part of one of her legs. The clothes of the applicant were forensically examined and a bloodstain on his tracksuit bottoms was found to match DNA from the complainant. At paragraph 4 of the affidavit dated 16th October, 2018 of investigating Garda F he states:

> "The complainant said the applicant had touched her. When interviewed the complainant claimed the applicant put his finger up her "ninny", later calling that part of body her "bum". She said it was sore when it happened. [….] At the relevant time the applicant admits being in a room, believed by the prosecution to be an upstairs room in the complainant's house, with the complainant and a young brother of hers. The applicant denies doing anything to the complainant."

6. The key claims made by the applicant at the hearing before this Court is that the delay in his prosecution means that he will be tried as an adult for an offence that is alleged to have occurred when he was a child and so will no longer benefit from the following provisions of the Children Act:

> (i) Section 93 – that he is no longer entitled to the benefit of anonymity as a child defendant.
>
> (ii) Section 96(2) – that he is no longer entitled to the provision that a sentence of detention should be imposed only as a last resort.
>
> (iii) Section 99 – that he is no longer entitled to the provision mandating the obtaining of a probation report where a court is of the opinion that the appropriate sanction is detention.

7. It is proposed first to consider the relevant law and then to analyse the facts of this case in light of the prevailing law.

LAW

8. The leading case on delay in prosecution of offences committed by children is the Supreme Court case of *Donoghue v. DPP* [2014] 2 I.R. 762. This case involved an application for the prohibition of the trial of a person who was 16 years of age at the time of the alleged offence of possessing heroin. That case concerned the finding of a quantity of heroin at the home of the applicant and significantly the applicant admitted responsibility for it. The Supreme Court prohibited the trial of Mr. Donoghue on the grounds of the delay in his prosecution which would have led to his being tried as an adult for an offence which had allegedly occurred when he was a child. The legal principle that there is a special duty owed to children in the prosecution of criminal offences is summarised by Dunne J. at 784:

> "The special duty of State authorities owed to a child or young person over and above the normal duty of expedition to ensure a speedy trial is an important factor which must be considered in deciding whether there has been blameworthy prosecutorial delay. That special duty does not of itself and without more result in the prohibition of a trial. As in any case of blameworthy prosecutorial delay, something more has to be put in the balance to outweigh the public interest in the prosecution of offences. What that may be will depend upon the facts and circumstances of any given case. In any given case, the age of the young person before the courts will be of relevance. Someone close to the age of 18 at the time of an alleged offence is not likely to be tried as a child no matter how expeditious the State authorities may be in dealing

> with the matter. On the facts of this case, had the prosecution of Mr. Donoghue been conducted in a timely manner, he could and should have been prosecuted at a time when the provisions of the Children Act 2001 would have applied to him. The trial judge correctly identified a number of adverse consequences that flowed from the delay. Accordingly, I am satisfied that the trial judge was correct in reaching his conclusion that an injunction should be granted preventing the DPP from further prosecuting the case against Mr. Donoghue. Therefore, I would dismiss the appeal."

9. Thus, it is clear that in this case there are two steps to be considered, first, whether the prosecution is guilty of blameworthy delay and, if so, is the public interest in this case of prosecuting an offence of sexual assault against a six year girl outweighed by the prejudice that would be suffered by the applicant due to his loss of the protections of the Children Act.

10. It is now proposed to analyse the facts in light of the relevant law.

ANALYSIS OF DELAY

11. The applicant was born in April 1999. In October 2014 a complaint was made by the mother of the six year old girl to the Gardaí that her daughter had been molested by the applicant. In March 2015, the applicant was arrested and interviewed and he gave consent for swabs to be taken for the purposes of DNA analysis. There is no complaint made by the applicant of any delay regarding this, the first part of the investigation. His complaints regarding delay concentrate on three periods which are set out hereafter.

(I) Time incurred in inputting on Pulse system

12. The applicant complains that while a juvenile referral to the Juvenile Liaison Office was created on the Garda computerised information system (the "Pulse system") on the 3rd March, 2015 it took until the 24th July, 2015, a period of 20 weeks, to input an offence code into the Pulse system to allow the referral progress to the Garda Youth Division Office ("GYDO"), which deals with the Juvenile Diversion Programme. In this regard, it is important to note that section 18 of the Children Act requires that:

> "any child who has committed an offence and accepts responsibility for his or her criminal behaviour shall be considered for admission to a diversion programme".

13. As is clear from the judgment of Dunne J. in *Donoghue v. DPP* it is therefore a necessary step in the prosecutorial process, that an assessment be made of whether a child who is alleged to have committed an offence is suitable for admission to the Juvenile Diversion Programme. It is also clear from this judgment that some delay will be necessary in the prosecution of children by virtue of the need to consider their suitability for the Juvenile Diversion Programme. At p. 770 she states:

> "The [Children Act] contains provisions at ss. 17 to 51 in relation to the juvenile diversion programme aimed at preventing young offenders from entering the normal criminal justice system. It is part of the policy underpinning the Children Act 2001 that children should be kept out of the criminal justice system where possible; obviously, some time will be taken in assessing whether an individual is suitable for diversion to the juvenile diversion programme. Inevitably, this must cause some delay in the prosecution of young offenders. No complaint could be made about the delay caused by the necessity to engage with the National Juvenile Office and it is fair to say that no such complaint was made by Mr. Donoghue. Thus, in considering the delay in any case involving a young person, it is important to bear in mind that some allowance must be made for the time taken up by the involvement of the National Juvenile Office."

14. While some reasonably significant period of delay in assessing the suitability of a person for the Juvenile Diversion Programme is to be expected, it is clear from the express wording of s. 18, that it is a prerequisite, for a child's consideration for admission to the programme, that he must *'accept responsibility'* for his *'criminal behaviour'*. In this case, the applicant denied that he did anything to the complainant and it was not suggested by the DPP during the hearing that A.B. was a person who at any time satisfied the conditions of s. 18 by accepting responsibility for his alleged criminal actions. It seems clear therefore that any decision regarding his suitability for admission to the Juvenile Diversion Programme should not have taken anywhere close to 20 weeks, since A.B. was never a viable candidate for that programme.

15. As regards the explanation provided for the 20 week delay in inputting the offence code to allow the referral progress to the GYDO, this is explained by Garda F at para. 10 of his affidavit dated 16th October, 2018 as follows:

> "On 3rd March 2015, the Applicant was arrested by appointment and interviewed at [the Garda Station]. On the same date, I created a youth referral to the Juvenile Liaison Office on the Pulse but it was not forwarded to the Garda Youth Diversion Office ('GYDO') until the 24th July 2015 as it was not until this date that other required information, in this instance an offence code, was inputted by me into the computerised Garda Information system which resulted in the referral progressing to the GYDO. The initial allegation would have been put on initially as an allegation of sexual assault. After investigation it was decided which offence code would be used."

This averment does not in any real sense give a reason for the delay, to enable this Court determine whether it was justifiable or not. It simply states that the reason the referral to the GYDO did not progress was because of a failure to put in the offence code. However, it does not explain why this was the case. While a short delay might be understandable to obtain the *'required information'* to enable the referral progress, it does not seem to this Court that any good reason has been given for a 20 week delay, which goes beyond what might be considered a reasonable delay.

(II) Time incurred in forwarding file to GYDO

16. The applicant also complains that while the GYDO requested a skeleton file on the 27th July, 2015, with several reminders being sent between September 2015 and May 2016, it was not received by them until the 15th June 2016, some 43 weeks after the initial request. While A.B. therefore complains about this delay which he puts at 43 weeks, the affidavit of Garda F dated 16th October, 2016 states that it was on the 14th August, 2015, rather than the 27th July, 2015, that a request was received from the GYDO for the skeleton file in order to assess the applicant's suitability for the Juvenile Diversion Programme. In his affidavit, Garda F also avers that he forwarded the skeleton file on the 3rd May, 2016, as distinct from the date of receipt suggested by the applicant of 15th June, 2016. However, even accepting Garda F's sworn evidence, this would still lead to a period of delay of approximately 35 weeks.

17. Garda F explains this delay as follows at para. 12 of his affidavit:

> "I forwarded the skeleton file to the Juvenile Liaison Office on the 3rd of May 2016. I say that it took up until then because of my work load. During this period I was also not in work for approximately 159 days through a combination of rest days, leave, sick days and attendance at an official driving course."

18. In the High Court case referenced below of *M.S. v. DPP* [2018] IEHC 285 at para. 34, McDermott J. concluded that the delays in

that case (which also related to a 15 year old boy who because of the delays ended up being tried as an adult for an offence of rape allegedly committed as a child), were described by him as follows:

> "I am satisfied 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."

19. This description seems equally appropriate for this delay of 35 weeks, since the offence itself was not especially complicated and in any case a delay of 35 weeks to forward a file to the Juvenile Liaison Office is not, to use the expression of McDermott J., supported by any satisfactory explanation. The explanation that the investigating Garda was out of work for 159 days for a variety of reasons may justify a short delay, but it is not, in this Court's view, a satisfactory explanation for a delay of 35 weeks, especially when one is dealing with offences alleged to have been committed by children which must be dealt with speedily under the Children Act.

(III) Time incurred in determining inclusion in Juvenile Diversion Programme

20. Finally, the applicant points out that on the 8th July, 2016 the relevant Garda Station received confirmation that the applicant was not suitable for inclusion in the Juvenile Diversion Programme. However, following this confirmation, the applicant complains that the investigation file was not sent for transmission to the DPP until the 19th October, 2016, a period of some 14 weeks.

21. Garda F explains the reasons for this delay in his affidavit of 16th October, 2018 as follows:

> "The period of time it took from receiving confirmation of non-suitability for any youth diversionary program to forwarding on the investigation file to the District Office for onward transmission to the Office of the DPP is explained by the complexity of the file. There were certain matters that had to be addressed including clarifications to contents of the file, for example it was necessary to obtain the injured party's original birth certificate from her parents to confirm that the correct spelling of her name. I was also absent from work on leave on 13/7/16, 21/7/16, 25/7/16 to 31/7/16 and also from 2/9/16 to 29/9/16."

This period of delay is for a lesser period than the other two periods of delay and it is reasonable to have some period of delay in order to seek clarifications required on the file which can take time. If this was the only delay regarding A.B.'s prosecution, it would be unremarkable. However, it is the third period of delay and very similar reasons are given for this delay as are given for the second period of delay, namely the investigating Garda's period of leave of almost 5 weeks (35 days) between 8th July, 2016 and 19th October, 2016, on top of the 159 days of leave to justify the second period of delay between 14th August, 2015 and 3rd May, 2016.

22. For completeness, it is to be noted that there is no complaint by the applicant regarding the speed at which the prosecution was progressed thereafter and in February 2017, the applicant was charged with the offence of sexual assault. Shortly after the applicant turned 18 years of age in April 2017, there was a hearing pursuant to section 75 of the Children Act before a judge of the Children Court. Although the applicant was a child at the date of the offence but an adult at the time of his 'section 75 hearing', nonetheless it is clear from the transcript, and it is common case, that the judge treated the applicant as if he was a child for the purposes of determining whether the court should accept jurisdiction under section 75. Accordingly, in this regard the applicant received the same protections under the Children Act as if there had not been any time lag between the date of the offence and the date on which he was charged. Thus, there is no allegation of the applicant being prejudiced in relation to the decision of the judge in the Children Court to accept or refuse jurisdiction under s. 75 of the Children Act.

Blameworthy prosecutorial delay for this aggregate time lag of 69 weeks

23. It seems to this Court that in relation to each of the three periods of delay, being the 20 week delay, the 35 week delay (based on the sworn evidence of Garda F) and the 14 week delay, a total of approximately 69 weeks, that while some delay was to be expected, no satisfactory explanation has been given for the extent of this delay. The cumulative effect is that this Court concludes that the delay in the prosecution of an alleged offence by a child, who is entitled to a speedy trial in view of his young age, was blameworthy.

ANALYSIS OF ALLEGED PREJUDICE

24. The next issue is whether this delay is such as to override the public interest in the prosecution of the alleged offence of sexual assault, so as to justify its prohibition. In considering this aspect of this case, this Court relies in particular on the judgment of McDermott J. in *M.S. v. DPP*, in which a boy of 15 years and 11 months was charged with the rape of his girlfriend, and sought to prohibit his trial on the grounds of delay which led to his being tried as an adult and therefore the loss of protections under the Children Act. As in this case, McDermott J. found that the prosecutorial delay was blameworthy as he held at para. 34 that the delay was *'inordinate, inexcusable and unexplained or unsatisfactorily explained'*. Accordingly, it was necessary for McDermott J. to consider the *'balancing exercise'* referred to by Dunne J. in the Donoghue case. For this purpose, at para. 35, McDermott J. outlines the prejudice alleged to be suffered by the applicant arising from the delay in that case as follows:

> "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."

25. Although the offence in *M.S. v. DPP* was rape, and in this case it is the offence of sexual assault, A.B. relies, with some minor differences, on the same prejudices relied upon in *M.S. v. DPP*, namely the loss of anonymity under s. 93 of the Children Act, the loss of the principle that detention should be imposed on a child only as a last resort under s. 96(2) and the loss of the mandatory obtaining of a probationary report under s. 99. These same prejudices were considered in detail by McDermott J. in *M.S. v. DPP*.

26. In the *M.S. v. DPP* case, McDermott J. concluded the balancing exercise by finding that there was not sufficient prejudice to M.S. to outweigh the public interest in prosecuting the offence of rape and so he refused to order the prohibition of his trial for rape. His reasoning is relevant to this case and so is set out in some detail hereunder. At para. 39, McDermott J. quotes from the decision in the Court of Appeal case of *DPP v. J.H.* [2017] IECA 206 in which Mahon J. stated that:

> "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.'"

27. In *M.S.* McDermott J. goes on to further consider *DPP v. J.H.*:

> "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). (emphasis added)
>
> 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.
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> 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."

28. In this case, there are some similarities with the *M.S. v DPP* case in which the trial was not prohibited as well as differences from the *Donoghue* case, where the trial was prohibited.

- In *M.S. v DPP* and in this case, the two applicants were both in their fifteenth year at the time of the alleged offence. M.S. was 15 years and 11 months old and A.B. was 15 years and six months old. The applicant in the Donoghue case was just three days after his 16th birthday when the alleged offence occurred, so there is no great difference between the ages of the three applicants in the three cases.

- Like the applicant in *M.S. v. DPP*, where the boy was charged with rape, A.B. is charged with a sexual offence. A sexual offence is of a very different order than a drug offence for which the Supreme Court prohibited a trial in the *Donoghue* case.

- While it is the case that rape is a more serious offence than sexual assault, it is clearly the case that sexual assault is still a serious offence. This is reflected in the maximum prison sentence of 14 years for the offence for which A.B. is charged. In addition, in this instance, the alleged offence committed by A.B. is particularly serious since it is the alleged sexual assault of a very young child. While not as serious as rape, it is nonetheless a serious offence and it seems self evident that the more serious the offence, the greater the public interest in the prosecution not being prohibited, even where there has been blameworthy prosecutorial delay. Hence this is a factor against the prohibition of the trial in this case.

- Like the applicant in the *M.S.* case, the applicant in this case did not make full admissions, and so A.B.'s case is, like the *M.S.* case, equally distinguishable from the Donoghue case, where the accused did make admissions. Due to the admissions made by the applicant in the Donoghue case, as noted by Dunne J., the case could have proceeded more swiftly to trial while he was a child. This leaned in favour of a prohibition of the trial in the Donoghue case, which factor was not present in *M.S. v. DPP* and is not present in A.B.'s case.

- Similar to the applicant in *M.S. v DPP*, A.B. relies in particular, if not solely, on the loss of three protections under the Children Act if he is tried as an adult, namely the loss of anonymity, the non-application of the sentencing principles

applicable to children and the loss of the mandated probation report.

• However, first, as regards anonymity, it is open to the trial court to grant anonymity to A.B. in this case on the grounds that if this matter had been prosecuted expeditiously, A.B. would have been granted anonymity automatically under the Children Act. It is to be noted that Judge O'Connor in the Children Court has already granted A.B. rights under the Children Act even though he was an adult at that time in the context, not of anonymity, but of a determination of whether that court should accept jurisdiction under s. 75 of the Children Act. This is because Judge O'Connor treated A.B. as if he was a child for this purpose, even though he had reached adulthood by that stage. Hence this alleged prejudice of loss of anonymity can be eliminated by the trial judge and therefore it is not regarded as sufficient to justify the very serious step of prohibiting a trial. Indeed, in this judicial review, this Court has sought to preserve the applicant's identity for the very reason that although he is now an adult, the alleged offence was committed when he was a child, leading to this Court's conclusion that he should be entitled to the protection of anonymity which goes with that fact.

• Secondly, as is clear from McDermott J.'s judgment in *M.S. v. DPP*, if A.B. were to be found guilty, the starting point in any sentencing of him is that the sentence take account of his age and maturity at the time of the commission of the offence. In this context A.B. argues that he will be prejudiced by his loss of a mandatory probation report. However, as noted by McDermott J., the trial judge is likely to apply the principles applicable to the sentencing of children and so is likely to order a probation report. At para. 37 of his judgment, he stated:

> "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."

For this reason, it seems clear to this Court that this prejudice regarding the mandating of probation reports, alleged to be suffered by A.B. can be alleviated by the trial judge and therefore is not sufficient to justify the very serious step of prohibiting a trial.

• Thirdly, as regards A.B.'s claim that he would be denied the benefit of s. 96 of the Children Act regarding a detention being a last resort, it follows from McDermott J.'s statement that it is likely that many of the factors addressed under the Children Act are likely to be considered by the sentencing judge, that the trial judge is likely to apply the principle of detention being a last resort to any sentence that he might impose.

•There is also something of significance in this case which does not appear to have existed in the *M.S.* case, which militates against prohibition, namely that there is independent DNA evidence which links A.B. to the alleged offence. In *Nash v. DPP* [2012] IEHC 359, in considering the relevance of the existence of DNA evidence implicating an accused, Moriarty J. relied on the Supreme Court judgment in *Rattigan v. DPP* [2008] 4 I.R. 639 where, in the course of considering the weight of independent forensic evidence, Geoghegan J. stated at p. 667:

> "I think that I should also add that in any case where there is independent forensic evidence implicating an accused a court, in considering whether there is a risk of an unfair trial and whether it should prohibit the trial, is entitled to take that factor into account. In this particular case, the prosecution are putting forward what purports to be strong independent evidence in the form of a blood fingerprint."

In this case, this Court takes the view that the blood of the complainant on the tracksuit of A.B. amounts to independent forensic evidence which weighs against prohibition, particularly where one is dealing with the serious offence of an alleged sexual assault on a six year old girl.

CONCLUSION

29. For all of these reasons, this Court refuses the order of prohibition in this case.