

**THE HIGH COURT**

**[2013 No. 491 J.R.]**

**BETWEEN**

**PATRICK SMYTH**

**APPLICANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS**

**RESPONDENT**

**JUDGMENT of Mr. Justice Cross delivered on the 19th day of December, 2014**

1. This is an application for judicial review to restrain the respondents from proceeding with the trial of the applicant on grounds of delay. In particular, the applicant pleads that the failure to prefer charges for more than fifteen months from the offence was unfair in that it resulted in the applicant facing trial as an adult and not as a juvenile. Leave for judicial review was ordered by Peart J. on 1st July, 2013.

2. The applicant was born on 31st January, 1995, and on 13th January, 2012, some two and a half weeks before his seventeenth birthday he allegedly committed an armed robbery of a betting shop with an adult male.

3. The robbery was captured on CCTV and on 26th January, 2012, the applicant was arrested and during the course of his interview while accompanied by a responsible adult, he admitted his role in the robbery and identified himself on CCTV. This is an admission which the applicant has to date never resiled from.

4. His accomplice was arrested the following day and also admitted his role.

5. The applicant submits that as of 27th June, 2012, there was evidence that fully implicated the applicant in the crime. The applicant was not charged with the offence until 15th April, 2013, having become an adult on 31st January, 2013.

6. The applicant's case is that the offence was not one which required formal proofs from any forensic science laboratory or any other complicated evidence other than the fact of the robbery and his admission and accordingly there was no reason for the delay of fifteen months.

7. As a result of being an adult, rather than a juvenile, the possible consequences for the applicant are:-

(i) He was not dealt with in the District Court as a minor offence- I am satisfied that this ground does not apply as I accept the respondent's submission that the applicant would as a matter of probability have been dealt with as a serious offence, that the DPP never intended to treat it as a minor offence and indeed that a District Judge would have declined jurisdiction even had the DPP agreed to the case being tried similarly.

(ii) He has lost the right to be dealt with anonymously- I accept that this is the case.

(iii) He has lost the automatic right in statute to have a probation report directed - I accept that this is the case.

(iv) He has lost the right that he would have had as a juvenile for the court to be reminded that custody is the last resort in juvenile cases- I accept that this is the case, but I do not agree that, as a matter of probability, this represents any real loss, or prejudice to this applicant, given that the applicant has a criminal record and the serious nature of the offence, it is highly unlikely that any judge dealing with the matter would have imposed other than a custodial sentence.

8. The respondent contends that there has been no delay by the prosecution. I do not accept that submission. I think that any period of longer than say three months after the confession was unreasonable in the circumstances.

9. The next issue is whether the delay as found was culpable. The explanation for the delay is given in the respondent's affidavit of Garda G. Garda G. explains the delay by firstly the need to "seize" the CCTV - I do not find that this is a real reason as the CCTV was clearly available on 26th January, 2013, when the applicant was interviewed and made his admissions. The second reason given by Garda G. is that he required to take the statement of witnesses- the fact of the robbery and possession of the CCTV tapes were, I find, matters which could have been given in statements furnished within a few days.

10. Thirdly, Garda G., to justify the delay, refers to the need for a technical examination - any technical examination would, of its nature, have to be conducted within a day or two of the offence while the scene of the accident was being preserved and I do not find this to be a valid explanation. Garda G's final explanation for the delay is that "door to door" inquiries were carried out - I do not see, and indeed no reason was given for the need for any door to door inquiries.

11. The file was not submitted to the DPP until 16th July, 2012, and I believe no justification for the failure to furnish the file to the DPP by at least the beginning of February has been furnished.

12. I find that a five month delay to be culpable on the part of the prosecutorial authorities prior to the furnishing of the file to the DPP.

13. Apparently, the DPP took from 16th July, 2012 until 5th November, 2012, to raise any inquiries which were answered and furnished to the DPP on 11th December, 2012. A direction to charge was not issued until 6th March, 2013. The applicant was charged on 15th April, 2013. No explanation of the nature of the DPP's request for further information has been given and no explanation has been

given as to why it took so long in the DPP's office to issue his directions. I find that there is at least a further six months of delay from that source and accordingly a total of at least eleven months delay is unexplained culpable delay on the part of the prosecutorial authorities. I note that subsequent to his interview in January 2012, the applicant was sentenced to a period of sixteen months detention in St. Patrick's Institution on another charge and was released on temporary release from 4th December, 2012 and the applicant was then anxious that any outstanding warrants or investigations could be processed and instructed a solicitor to write in relation to same to the authorities to which a response was received confirming the applicant's arrest and admissions in respect of the armed robbery.

14. It is not alleged on the part of the applicant and I do not so find that there has been any deliberate conspiracy to delay his charging until he reached his majority.

15. I find, however, that the applicant has been prejudiced by the delay as outlined above in the lack of any statutory rights to a probation report and in the fact that the offence will no longer be dealt with anomalously and all the ensuing prejudice thereby.

### **The Law**

16. The parties have furnished extensive submissions on this matter which I have read together with the authorities. The right to a speedy trial, especially in the case of a juvenile, was outlined in the Supreme Court firstly in the case of *B.F. v. Director of Public Prosecutions* [2001] 1 I.R. 656, which principles were applied by Quirke J. in *Jackson & Walsh v. Director of Public Prosecutions* [2004] 1 IEHC 380, and in *A.C. v. Director of Public Prosecutions* [2008] 3 I.R. 398. In that case, the applicant was of prohibition was granted by the High Court where the prosecution had delayed for some fourteen months from the date of the offence before the matter coming before the District Court.

17. It has been accepted by counsel on behalf of the applicant that in more recent years, courts have generally been more reluctant to prevent trials on the grounds of delay in the case of adults and real prejudice must be shown on behalf of an applicant seeking to prevent a trial.

18. The situation in relation to juveniles, it was submitted on behalf of the applicant and I accept, radically altered by the case of *Patrick Donoghue v. Director of Public Prosecutions* (Unreported, Ex Tempore, High Court, Birmingham J., 9th January, 2013) and affirmed in the Supreme Court (30th July, 2014), Appeal No. 075/2013.

19. In the *Donoghue* case, a juvenile was charged with possession of heroin with intent to supply three days after his sixteenth birthday. He admitted the offence at interview and a forensic science laboratory report which established that the material found in his possession was in fact the controlled drug issued some six weeks after the incident. Mr. Donoghue was not charged until sixteen and a half months after the date by which time he had attained his majority. In that case, it was accepted by the decision makers, as I accept in this case, that the applicant would as a matter of probability have pleaded guilty. The prejudice complained of in that case accordingly, as in this case, was a prejudice not so much as to the trial itself but as to the consequences in sentencing.

20. The law in relation, the issue in this case, I find as stated by Dunne J. in the judgment of the Supreme Court, in *Donoghue* at p. 24:-

"Given that this is a case in which I am satisfied that the learned trial Judge correctly determined that there was blameworthy prosecutorial delay, what more must be considered by a court in determining whether or not to prohibit a trial?

It is clear from the authorities referred to above that blameworthy prosecutorial delay alone will not suffice to prohibit a trial. As Keams J. said in *PM v. DPP*, in the passage referred to above:

'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 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.'

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.... Therefore, 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 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.

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. As the learned trial judge said, these are matters of real significance. Having done so he commented:

'Two years in the life of a sixteen year old boy is a very significant period indeed. In a case which is going to be contested and which may end in acquittal, it is highly undesirable that a young person should have an allegation hanging over his or her head for such a protracted period. If the case results in a conviction or if there is a plea of guilty, then the focus of attention is on the capacity of the court to intervene effectively and promote the

rehabilitation of the young offender. If two years or more is to be lost then the court's capacity to intervene effectively will be greatly reduced.'

It is difficult to disagree with the comments made by the learned trial judge above. 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.

Mr. Donoghue has demonstrated that the delay in this case has led to significant consequences for the manner in which he would be dealt with at trial. To paraphrase the words of Keams J. in *PM v. Director of Public Prosecutions*, he has put something more into the balance to outweigh the public interest in having serious charges proceed to trial."

21. In this case, to apply the principles and the balancing exercise set out by Dunne J., the blameworthy delay is somewhat shorter though I do not consider that to be a significant factor. The applicant is somewhat older than Mr. Donoghue and again I do not consider that to be a significant factor.

22. What I do consider to be a significant differential factor in this case as opposed to Mr. Donoghue's case, is that the offence in this case though commanding a similar maximum sentence i.e. life, is one that would be generally regarded as more serious and without the same possible mitigating circumstances as in the serious drug offences with which Mr. Donoghue was charged. As well as the very serious nature of the offence it must also be considered in the balance that this applicant had a criminal record which resulted in a custodial sentence and this would have been the case whenever the matter was likely to have been considered. I must also consider the nature of the prejudice actually suffered by Mr. Smyth due to the capable delay.

23. I do not find that the statutory obligation for the Court to consider a custodial sentence in Mr. Smyth's case had he been dealt with as a juvenile is of real significance. The prejudice that Mr. Smyth suffers therefore, is the loss of anonymity and the loss of the automatic right to have a report from the Probation Services. I accept that these are indeed matters of prejudice notwithstanding the fact that a trial judge would be obliged to order a probation report should he believe that same to be justified. The applicant does not suffer from the other matters of prejudice referred to in the *Donoghue* case. In the circumstances, I do not find that Mr. Smyth has sufficient "in the balance" to outweigh the public interest in having the serious charges proceed to trial.

24. Undoubtedly, Mr. Smyth has put something into the balance but in this case, the prejudice he has suffered is not sufficient to outweigh the public interest in having this matter proceed to trial and accordingly, I must refuse the reliefs sought.