

THE HIGH COURT

[RECORD NO 2017/266 JR]

BETWEEN

JUDICIAL REVIEW

BETWEEN

MORGAN RYAN

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Ms. Justice O'Regan delivered on the 1st day of February, 2018**Issues**

1. This is an application for judicial review by way of application for an order of prohibition restraining the respondent from proceeding with the trial of the applicant on grounds of delay. In particular the applicant asserts that there is a failure on the part of the respondent to prefer charges for a period of eighteen months since the date of commission of the alleged offence to the date of charging the applicant with the offence and this delay is unfair and prejudicial to the applicant on the basis that it results in the applicant facing a trial as an adult and not as a juvenile.

2. Leave was granted to maintain the within judicial review proceedings on the 27th March 2017.

Background

3. The applicant was born on the 27th February, 1999 and the respondent asserts that the applicant committed an offence on the 4th July, 2015 in the District Court area of Drogheda in that he assaulted a third party, causing him harm contrary to s. 3 of the Non-Fatal Offences Against the Person Act, 1997. He was aged 16 years and 4 months at this time. Such offence carries a potential five year custodial sentence.

4. An Garda Síochána were called on the evening of the offence and subsequently took statements from a number of parties including the injured party on or before the 23rd July, 2015 when the within applicant was identified as one of two assailants.

5. An Garda Síochána called to the applicant's mother's premises (hereinafter "the premises") where they believed the applicant resided, on the 23rd July, 2015 however there was no-one present.

6. Garda Pádraig O'Rourke states that further activity on the file did not occur between that date and the 8th October, 2015 when he again called to the premises because of an intervening workload including a murder investigation and a further serious criminal investigation in addition to general workload.

7. An Garda Síochána again called to the premises on the 16th October, 2015 and again on the 6th November, 2015 when they were informed that the applicant was in a care home. When An Garda Síochána called again in December, 2015, the applicant's mother indicated that she was not in a position to provide them with contact details for the applicant. An Garda Síochána called again on the 4th January, 2016 to execute a bench warrant which issued in respect of an unrelated matter and the applicant was present and was arrested. He was subsequently released on bail. An Garda Síochána state that between the 7th January, 2016 when the applicant's co-accused presented himself to An Garda Síochána and the end of November, 2016 the matter was being advanced. On 2nd November, 2016, directions were received from the DPP to prosecute the applicant contrary to s. 3 of the Non-Fatal Offences Against the Person Act, 1997, aforesaid. Subsequent to the directions from the DPP several attempts were made to locate and charge the applicant and it was not until the applicant's mother was informed that An Garda Síochána would keep calling to her that she subsequently contacted the applicant's solicitor who contacted the Gardai on the 22nd December 2016, and arranged to have the applicant present on the 2nd January, 2017 for the purposes of charge.

8. Subsequently the applicant came before the District Court on the 20th January, 2017.

9. At para. 14 of the affidavit of Garda O'Rourke, there is an uncontested assertion that he was aware that the applicant had been reported missing from the care home on numerous occasions between the 30th October and the 23rd November 2015. Further, on the 8th December, 2015, An Garda Síochána attended the Children's Court when the applicant was due to appear on an unrelated matter however the applicant failed to appear in court and a bench warrant issued for his arrest.

10. At para. 6 of the grounding affidavit of Mr. Feran of the 22nd March, 2017, solicitor on behalf of the applicant, it is stated that at the time the applicant was charged with the offence, (the 2nd January, 2017) he was detained at Oberstown Campus on foot of other charges.

11. Both parties have tendered oral submissions to the court on the 12th January, 2017, in addition to having tendered written submissions, with reference to various jurisprudence. I have read and considered in detail all such submissions and jurisprudence.

The law

12. It is uncontested that the onus of proof lies with the applicant and in the event that there is a dispute on affidavit evidence same cannot be resolved in favour of the applicant (see para. 29 of the judgment of McMenamin J. of 14th December, 2007 in *Conway v. The DPP* [2007] IEHC 434 and cases therein referred to).

13. I am satisfied that the jurisprudence to be applied in this matter is the judgment of Dunne, J. in *Donoghue v. The DPP* [2014] IESC 56, being a Supreme Court judgment delivered on the 30th July, 2014 together with the preceding judgment of Birmingham J. in *Donoghue v. The DPP* (unreported, High Court, 09/01/2013). Further, the Court of Appeal decision in *Smyth v. The DPP* (unreported, Court of Appeal, 2015) and the preceding judgment of Cross J. in *Smyth v. The DPP* [2014] IEHC 642 (The Court of Appeal having approved Cross J.'s assessment of the manner in which the judgment of *Donoghue* was applied) is also of considerable relevance.

14. At para. 8 of the judgment of Cross J., in *Smyth v. The DPP* aforesaid, it is indicated that any period longer than say three months after the confession of the accused was unreasonable in the circumstances. He subsequently found that there was culpable delay on the part of the prosecutorial authorities in furnishing the file to the DPP and further delay in the DPP issuing directions. Cross J. ultimately found there was a total of at least eleven months' delay which he classified as unexplained culpable delay on the part of the prosecutorial authorities.

(I) Blameworthy delay

15. In the instant matter in my view the delay between the 23rd July, 2015, when a statement had been secured by the respondent from the injured party and the 8th October 2015, when Garda O'Rourke attended the applicant's residence was not sufficiently explained by other serious commitments. This delay therefore amounts to blameworthy delay of approximately two and a half months, notwithstanding that he did call to the premises on the 23/07/2015; however there was no one present on that date.

16. I am not satisfied that there is culpable delay on the part of the prosecutorial authorities in respect of the period which the applicant was detained in a care home but was frequently absconding; further I am satisfied that it was reasonable of Garda O'Rourke to expect to charge the applicant when he was due to appear in the District Court on the 8th December, 2015, on an unrelated matter but was unable to do so as the applicant did not appear and in those events I do not see that there is any blameworthy delay on the part of the prosecutorial authorities from the 8th October, 2015 to the 4th January, 2016 when the applicant was arrested in his home.

17. I am not satisfied with the explanation furnished by the respondent in respect of the delay as between the 4th January, 2016 when the applicant was arrested and the 2nd November, 2016 when directions were received from the DPP. In accordance with the judgment of Cross J. in *Smyth v. The DPP*, which was as aforesaid subsequently approved by the Court of Appeal a period of no longer than three months should have elapsed between the arrest of the applicant and the decision of the DPP. Accordingly there is a period of some seven months delay during the course of 2016 which may be classified as blameworthy prosecutorial delay

18. I am not satisfied that there is any blameworthy delay on the part of the prosecutorial authorities as between receipt of the directions from the DPP and ultimate charges being preferred as against the applicant on the 2nd January, 2017, given attempts made by Garda O'Rourke to locate the applicant as identified in paras. 29 and 30 of his replying affidavit of the 30th June 2017.

19. Accordingly the blameworthy delay on the part of the prosecutorial authorities in this matter amounts to approximately nine and a half months.

(II) Balancing exercise

20. By reason of the delay aforesaid I am satisfied that the relevant balancing exercise as between the public interest in having serious charges proceeded with and the prejudice to the applicant by reason of the delay should be undertaken.

21. In accordance with the judgment of Dunne J. in *Donoghue v. The DPP* aforesaid, at p. 24 etc, in conducting the balancing exercise matters which should be taken into account include the length of the delay, the age of the applicant at the time of the alleged offence, the seriousness of the charge, the complexity of the case and the nature of any prejudice relied on. It is important that each case be assessed on its own facts and merits.

22. The possible prejudice to the applicant might be summarised as follows: -

- (1) The potential to have the charges dealt with in the District Court as opposed to the Circuit Court.
- (2) The statutory entitlement to a probation report.
- (3) Anonymity.
- (4) The possibility of a non-custodial sentence being imposed by reason of the fact that the applicant would be a juvenile at the date of trial (the relevant legislation providing that a sentence of detention should only be used as a last resort).

23. In *Donoghue v. The DPP*, Birmingham J. felt the relevant accused was prejudiced on all four grounds aforesaid, and in that case there was a lapse of sixteen months before the applicant was charged with the offence notwithstanding that the applicant had made an immediate admission and within in or about two weeks the forensic analysis was available. However, given that I have afforded an allowance to the prosecutorial authorities of some three months following the securing of relevant statements from witnesses, the difference in delay as between the instant matter and the case before Birmingham J. might be considered to be three and a half months which is not of much significance.

24. I accept that the applicant has lost the right to be dealt with anonymously.

25. I accept that the applicant has lost the automatic right by statute to have a probation report directed by the trial judge.

26. I am not satisfied that the matter would have been dealt with in the District Court and in this regard I note that when the matter did come before the District Court, the District Court refused jurisdiction. Furthermore on balance in this regard I accept that in accordance with the submissions made on behalf of the respondent the DPP would not have consented to the matter being dealt with in the District Court. In these circumstances I am not satisfied that any prejudice arises against the applicant by reason of the delay in this regard.

27. I am satisfied on balance that even if the trial of this matter had occurred when the applicant was still a juvenile nevertheless he was likely to receive a custodial sentence given matters referred to at para. 6 of the affidavit of Mr. Feran and the matters referred to at paras. 14 and 16 of the affidavit of Garda O'Rourke (referring to other charges against the applicant and the fact that he had already been detained at Oberstown) and accordingly the applicant has not been prejudiced in this regard.

28. A number of additional matters arise in or about the balance as between the right of the applicant aforesaid and the public interest in prosecuting serious offences namely: -

- (1) I am satisfied that the applicant was being evasive and was responsible for the delay as between the October, 2015 and January, 2016, a period of almost three months.

(2) In January, 2017 the applicant was detained in Oberstown on foot of other charges but on balance the trial of these charges would not have been concluded prior to the 27th February, 2017 when the applicant attained eighteen years. Further, the fact that he was detained pending trial on those charges is relevant.

(3) The within offence is not as serious an offence as the offence under consideration in the matter of *Smyth v. The DPP*, (the injured party suffered large swelling to his forehead, extensive bruising to his face together with a fractured nose, a 3cm long laceration to his chin which was sutured and a laceration to his lower lip) nevertheless it is an offence which carries the potential of a sentence of five years. I note that a sentence of 5 years or more is classified as a serious offence.

The prejudice to the applicant is loss of right of anonymity and loss of statutory right to a probation report. This is balanced against the public interest in charges of serious offences proceeding to trial. Bearing in mind that the within offence is not as serious an offence as the offence in *Smyth v. The DPP*, however unlike the facts in *Smyth* the applicant was responsible for delay for a period of almost 3 months and in January 2017 he was detained on other charges likely to be concluded after his 18th birthday. I am not satisfied that the applicant has established that the balancing scale is tipped in favour of prohibition.

Conclusion

29. In conclusion therefore, although I am satisfied that there is blameworthy delay as aforesaid on the part of the prosecutorial authorities, having conducted the balancing exercise as aforesaid, it is clear that the applicant will be prejudiced to some extent as identified above by reason of the delay, however I am also satisfied the prejudice is outweighed by the public interest in having the matter proceed to trial and accordingly I refuse the reliefs sought.