APPROVED

THE HIGH COURT
JUDICIAL REVIEW

2019 No. 387 J.R.

BETWEEN

MATTHEW DOS SANTOS

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered electronically on 26 May 2020

INTRODUCTION

1. The Applicant herein seeks to restrain the further prosecution of criminal charges pending against him, on the basis of prosecutorial delay. The alleged offences are said to have occurred at a time when the Applicant was sixteen years old, and thus a "child" as defined under the Children Act 2001. It is contended that had the Garda investigation been conducted expeditiously, then the Applicant would have been entitled to have the charges against him determined in accordance with the Children Act 2001. This would have afforded the Applicant certain statutory entitlements in respect of *inter alia* anonymity, sentencing principles, and a mandatory probation report. The benefit of these statutory entitlements is not now available in circumstances where the Applicant reached the age of majority prior to the trial of the offences.

2. These judicial review proceedings arise against a legislative backdrop whereby the qualifying criterion for the important procedural protections provided for under the Children Act 2001 is the age of the accused as of the date of the trial of the offences (as

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opposed to his or her age as of the date when the alleged offences are said to have occurred). It is perhaps surprising that the legislation does not expressly address the position of an alleged offender who has transitioned from being a "child" (as defined) to an adult between the date on which the offences are said to have occurred and the date of the hearing and determination of criminal charges arising from those alleged offences. Such an interregnum will arise in a significant number of cases, even allowing for prompt Garda investigations. For example, if an offence is alleged to have been committed by an individual who is a number of weeks shy of his or her eighteenth birthday, it is unrealistic to expect that the offence would be investigated, and the prosecution completed, prior to that birthday. It would have been helpful if the legislation indicated what is to happen in such circumstances.

3. At all events, the Supreme Court has held that, in the case of a criminal offence alleged to have been committed by a child or young person, there is a special duty on the State authorities, over and above the normal duty of expedition, to ensure a speedy trial. See *B.F. v. Director of Public Prosecutions* [2001] 1 I.R. 656 and *Donoghue v. Director of Public Prosecutions* [2014] 2 I.R. 762.

4. The case law indicates that the existence of blameworthy prosecutorial delay will not automatically result in the prohibition of a criminal trial. Rather, 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. Factors to be considered include *inter alia* (i) the length of delay itself; (ii) the age of the accused at the time the alleged offences occurred; (iii) the loss of statutory safeguards under the Children Act 2001; (iv) the stress and anxiety, if any, caused to the child as a result of the threat of prosecution hanging over them; and (v) any prejudice caused to the conduct of the defence.

FACTUAL BACKGROUND

5. The Applicant has been charged with two offences arising out of an incident said to have occurred on 11 June 2017. In brief, it is alleged that the Applicant robbed a named individual of his wallet and mobile telephone, and that, during the course of the robbery, the Applicant produced a knife and threatened the alleged victim, saying "*I'm gonna stab you, you're getting it tonight*".

6. The two offences charged are as follows. First, an offence of robbery pursuant to section 14 of the Criminal Justice (Theft and Fraud Offences) Act 2001. A person is guilty of the offence of "robbery" if he or she steals, and immediately before or at the time of doing so, and in order to do so, uses force on any person or puts or seeks to put any person in fear of being then and there subjected to force. A person guilty of robbery is liable on conviction on indictment to imprisonment for life.

7. Secondly, an offence pursuant to section 11 of the Firearms and Offensive Weapons Act 1990. This section makes it an offence to produce, in a manner likely unlawfully to intimidate another person, any article capable of inflicting serious injury, while committing or appearing to be about to commit an (other) offence.

8. The details of the police investigation have been summarised in an affidavit sworn by Garda Laura O'Brien. (A further affidavit has been sworn by the relevant official in the Office of the Director of Public Prosecutions). The key events in the chronology are as follows.

11 June 2017	Date of alleged incident
27/28 July 2017	Garda O'Brien views CCTV footage and identifies the Applicant as a suspect
5 September 2017	Application to arrest the Applicant in circumstances where he was then detained in Oberstown on other offences (Section 42 of the Criminal Justice Act 1999)
8 September 2017	Another co-accused is arrested and questioned

21 November 2017	Applicant released from Oberstown
5 December 2017	Applicant is arrested, by appointment, on suspicion of robbery
18 December 2017	Applicant's brother is interviewed
May 2018	File forwarded to Detective Sergeant
3 June 2018	File amended and returned to supervising Detective Sergeant
30 July 2018	Superintendent reviews file and directs a youth referral
5 August 2018	PULSE referral to Garda Youth Diversion Office
24 September 2018	Garda Youth Diversion Office request "skeleton file"
29 October 2018	Juvenile Liaison Officer's suitability report
30 October 2018	Full investigation file sent to Garda Youth Diversion Office
1 January 2019	File hand delivered to Office of the DPP
31 January 2019	Email from Office of the DPP seeking copy of particular statement
19 February 2019	Applicant's solicitor writes to Kevin Street District Office (Slot for sentencing before the Circuit Court on 11 April 2019)
28 March 2019	Office of the DPP issues a direction that Applicant be charged
9 April 2019	Applicant arrested at Oberstown and brought before District Court. District Court declines jurisdiction pursuant to section 75 of the Children Act 2001
12 April 2019	Applicant turns eighteen years old

9. Garda O'Brien explains that the investigation file had gone missing for a period of time.

> "20. I am not able to accurately provide for every movement of this file from the time I forwarded the file to Detective Sergeant O'Brien on the 3rd June 2018 until it's physical return to my custody on the 31st December 2018. The dates set out in the paragraphs immediately above for the work done on the file, after I sent the file to Detective Sergeant O'Brien on the 3rd of June 2018, are taken from date stamps placed on the original file as it was forwarded from various parties and from updates to the PULSE system. I am aware that for a time the file in this case could not be located. I carried out numerous enquiries with different offices in an effort to locate this file. This file and accompanying referrals appeared to have been misplaced by a member of Garda staff during a transition from Kevin Street to the Juvenile Liaison Officer and National Juvenile Offices. I made every effort by means of phone calls, emails and physical searches to locate the file. During this period of time it is my understanding that the

> forwarding Garda member was absent on intermittent sick leave due to stress related issues and therefore was not in a position to be contacted regarding this file. On the 23rd of December 2018 the file was located in Kevin Street and returned to Kilmainham Garda Station for my attention."

APPLICABLE LEGAL PRINCIPLES

10. The leading judgment on prosecutorial delay in cases involving offences alleged to have been committed by a child is that of the Supreme Court in *Donoghue v. Director of Public Prosecutions* [2014] IESC 56; [2014] 2 I.R. 762 ("*Donoghue*").

11. The judgment in *Donoghue* indicates that the first question to be determined by a court is whether there has been culpable or blameworthy prosecutorial delay. In the event that there has been such delay, then the court must next carry out a balancing exercise.

12. On the facts of *Donoghue*, members of the Gardaí had called to the minor applicant's home where a substance was found which was believed to be heroin. The applicant was aged 16 years at the time. A weighing scales was also found. The applicant immediately took responsibility for the items, and he signed an admission to this effect. The applicant was then arrested, and, during the course of interview, he again took full responsibility for the items found. Subsequently, the items found at his home were forwarded to the forensic science laboratory for an analysis, and it was confirmed that the substance was indeed heroin. A period of one year and four and a half months elapsed between the date of the applicant's arrest and his eventually being charged with an offence under the Misuse of Drugs Act 1977.

13. The Supreme Court, *per* Dunne J., held that, having regard to all the circumstances of the case and bearing in mind the fact that the accused was a child at the time of the commission of the alleged offence, there was ample evidence before the High Court to enable the trial judge to reach the conclusion that this was a case in which there had been significant culpable prosecutorial delay.

14. As appears from the analysis of the delay at pages 770 and 773 of the reported judgment, the Supreme Court attached some significance to the fact that the criminal case was a straightforward one, and that admissions had been made by the accused.

> "[25] When the overall period of delay between March 2010 and August 2011 is being considered, it is necessary to bear in mind the nature of the case (including its complexity), the need to engage with the National Juvenile Office, the period of delay and the reasons offered for that delay. This was a straightforward case on the facts where admissions had been made by Mr. Donoghue. The reasons put forward for the delay in this case are unsatisfactory. The delay in completing the investigation file was not adequately explained. I have no doubt that the statements of the two Gardai mentioned were necessary but as it appears that those statements were required in relation to the period of detention of Mr. Donoghue in Coolock Garda Station, it should have been a straightforward matter to prepare and obtain the statements."

15. The Supreme Court went on to hold that blameworthy prosecutorial delay alone will not suffice to prohibit a trial. Rather, the court must conduct a balancing exercise to establish if there is something additional to the delay itself to outweigh the public interest in the prosecution of serious offences.

> "[52] 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 18th 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."

16. The Supreme Court held that the trial judge was correct to attach significance to the fact that the accused in *Donoghue* would not have the benefit of certain of the protections of the Children Act 2001. Three particular aspects of the Children Act 2001 were referenced as follows. First, the reporting restrictions applicable to proceedings before any court concerning a child (section 93). Secondly, the sentencing principle that a period of detention should be imposed on a child only as a measure of last resort (section 96). Thirdly, the mandatory requirement to direct a probation officer's report (section 99).

17. The Supreme Court then stated its conclusions as follows.

> "[56] 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."

18. The principles in *Donoghue* have recently been considered in two judgments of the Court of Appeal, *A.B. v. Director of Public Prosecutions*, unreported, Court of Appeal, 21 January 2020, and *Director of Public Prosecutions v. L.E.* [2020] IECA 101. These judgments elaborate upon the nature of the prejudice which might be suffered by an accused, and also address whether there are steps which the High Court might take to mitigate the loss of some of the protections provided for under the Children Act 2001. I will discuss these judgments in context when I come to carry out the "balancing exercise" required in delay cases.

CULPABLE OR BLAMEWORTHY PROSECUTORIAL DELAY

19. The first question to be addressed by this court is whether the pace of the investigation between the date of the alleged incident (11 June 2017), and the date upon which the Applicant reached the age of majority, i.e. his eighteenth birthday (12 April 2019), involved culpable or blameworthy delay. For the reasons explained by the High Court (White J.) in *Cash v. Director of Public Prosecutions* [2017] IEHC 234, [12], in determining whether there has been prosecutorial delay in a child's case, it is only appropriate to have regard to events occurring *prior* to an alleged offender having reached the age of majority. As it happens, most if not all of the delay complained of in the present case occurred prior to the Applicant's eighteenth birthday.

20. The carrying out of any criminal investigation will take time: the resources of An Garda Síochána are finite, and it takes manpower to collate and examine CCTV and to arrange to interview any suspects. While the importance of ensuring a speedy trial in the case of alleged youth offenders is well established, there is no obligation on the prosecuting authorities to unrealistically prioritise cases involving minors (see the judgment of the

High Court (Kearns P.) in *Daly v. Director of Public Prosecutions* [2015] IEHC 405, [48]).

21. There is a further procedural step which is unique to youth offenders, and the need to complete this step adds to the lapse of time between the date of an alleged offence and the date upon which charges are preferred. Specifically, juvenile offenders must be referred to the Garda Diversion Programme. This is provided for under Section 18 of the Children Act 2001 as follows.

> 18. Unless the interests of society otherwise require and subject to this Part, any child who —
>
> (a) has committed an offence, or
>
> (b) has behaved anti-socially,
>
> and who accepts responsibility for his or her criminal or anti-social behaviour shall be considered for admission to a diversion programme (in this Part referred to as the Programme) having the objective set out in section 19.

22. Relevantly, one of the criteria under section 18 is that the young offender accepts responsibility for his or her criminal or anti-social behaviour. The making of a referral to the Garda Diversion Programme must normally await the completion of the investigation file. This is because it is only when the full extent of the alleged offence is known that an informed decision can be taken as to whether or not the young offender has accepted responsibility. The making and completion of a referral to the Garda Diversion Programme will take some time, and this has to be taken into account by a court in assessing whether there has been blameworthy or culpable delay.

23. Similarly, the requirement to submit a file for directions to the Office of the Director of Public Prosecutions will also take some time, and that Office must be allowed a reasonable period within which to issue its directions.

24. Even allowing for all of these steps, however, the delay of some twenty-two months between the date of the alleged offence on 11 June 2017, and the subsequent charging of the Applicant on 9 April 2019, was inordinate. It is also possible to identify culpable delay at each of the various stages of the investigation and prosecution.

25. The offences alleged to have been committed by the Applicant, while certainly serious in nature, did not necessitate a complex or painstaking investigation. The individual said to have been the victim of the robbery, and his friend, had provided very detailed statements to An Garda Síochána. The incident had occurred on a LUAS tram and on the platform of a LUAS stop. An Garda Síochána were able to harvest video footage of the incident from CCTV cameras on the tram and other cameras in the vicinity. The investigating garda was able to identify the Applicant (and his two co-accused) from this video footage. This identification took place a matter of weeks after the incident. Yet charges were not preferred for almost twenty-one months thereafter.

26. It seems that one of the co-accused had been arrested and interviewed early in September 2017, that is, within three months of the date of the incident. A further period of three months elapsed, however, before the Applicant and the second co-accused (the Applicant's brother) were interviewed. This delay appears to have stemmed in part from the fact that the Applicant had been detained in Oberstown Children Detention Campus ("*Oberstown*") for part of this period. The investigating Garda had made an application for a warrant pursuant to section 42 of the Criminal Justice Act 1999 but, for reasons which are not explained, this does not seem to have come to anything. (This statutory provision allows a child detainee to be arrested and detained in connection with the investigation of other offences). The delay between September and December 2017 was unreasonable.

27. There is then a further, largely unexplained, delay between December 2017 and the making of a reference to the Juvenile Diversion Programme in August 2017. It seems that even then the paperwork was not in order, and the Juvenile Liaison Officer had to seek further information from the investigating gardaí. A decision that the Applicant was not suitable for the Programme was ultimately made in November 2018.

28. Thereafter, there was a delay in transmitting the file to the Office of the Director of Public Prosecutions. Again, it appears that the paperwork submitted was not in order, and the Office sought further information. The relevant email seeking this information appears to have been missed by An Garda Síochána. At all events, the Office was in a position to issue a direction to charge the Applicant on 28 March 2019.

29. Leading counsel for the Applicant, Mr Seamus Clarke, SC, has drawn particular attention to the letter of 19 February 2019 from the Applicant's solicitor to the Superintendent of Kevin Street Garda Station.

> "We understand that there are a number of outstanding prosecutions pending for Mr Dos Santos in various districts at present. We are most anxious that if prosecutions are to be brought that they be done so in advance of his 18th birthday on the 12th April 2019.
>
> Mr Dos Santos is due for sentence before Judge Codd in the Circuit Court on the 11th April 2019 and the issue of outstanding prosecutions was flagged by counsel acting on behalf of Mr Dos Santos. Judge Codd said that if other matters were to proceed on indictment she would be in a position to deal with them on the 11th April 2019 alongside his existing Circuit Court case.
>
> If any prosecution is to proceed against Mr Dos Santos, whether summarily or on indictment we would ask that they be progressed without any further delay so that Mr Dos Santos does not lose the protection of the Children's Act 2001."

30. Counsel submits that it had still been open to the prosecuting authorities in February 2019—notwithstanding the cumulative delay to that date—to take steps to ensure that the Applicant had the benefit of the protections under the Children Act 2001. Specifically, the availability of a hearing date on 11 April 2019 before the Circuit Court

meant that the charges against the Applicant could have been determined in accordance with the sentencing principles and reporting restrictions applicable under the Children Act 2001. (This submission appears to have been made on the tacit assumption that the Applicant would be pleading guilty to the charges).

31. In the event, the prosecuting authorities did not have the matter listed before the Circuit Court. Instead, the Applicant was brought before the District Court on 9 April 2019. This allowed him the benefit of a section 75 hearing, but not of the other protections under the Children Act 2001. The District Court exercised its discretion to send the Applicant forward to trial on indictment.

32. In summary, I am satisfied that the period of twenty-two months which elapsed in this case was excessive. At almost every stage of the process, there was culpable delay on the part of the prosecuting authorities. Certainly, when taken in aggregate the delay is inordinate and there is no justification for same. What should have been a straightforward investigation took far too long. The fact that the investigation file seems to have gone missing within An Garda Síochána for a significant period of time is especially concerning.

33. As correctly observed by counsel for the Applicant, even when the prosecuting authorities were alerted in February 2019 to a practical solution which would have allowed the Applicant to be sentenced by the Circuit Court on 11 April 2019, i.e. prior to his reaching the age of majority, this was not availed of.

BALANCING EXERCISE: PREJUDICE ALLEGED BY APPLICANT

34. In circumstances where I have concluded that there has been culpable or blameworthy prosecutorial delay, it is next necessary to carry out the balancing exercise as set out by the Supreme Court in *Donoghue.*

LOSS OF PROTECTIONS UNDER THE CHILDREN ACT 2001

35. The principal prejudice alleged by the Applicant is the loss of certain procedural entitlements under the Children Act 2001. Specifically, the Applicant submits that *but for* the prosecutorial delay, the charges against him would have been heard and determined in accordance with the Children Act 2001. In particular, it is suggested that if the Applicant had chosen to plead guilty, the matter could have been brought before the Circuit Court in short course and before the Applicant had attained the age of majority. Specifically, it is said that the two charges the subject-matter of these judicial review proceedings could have been dealt with by the Circuit Court (Her Honour Judge Codd) at the hearing scheduled for 11 April 2019.

36. I will address each of the sections relied upon by the Applicant under separate sub-headings below.

(i) Sentencing Principles

37. The Applicant submits that had the matter been determined before he attained the age of majority, he would have been entitled to the benefit of Section 96(2) of the Children Act 2001 which indicates that a custodial sentence should be imposed upon a juvenile offender as a matter of last resort.

38. Section 96 in full reads as follows.

> "96. (1) Any court when dealing with children charged with offences shall have regard to—
>
> (a) the principle that children have rights and freedom before the law equal to those enjoyed by adults and, in particular, a right to be heard and to participate in any proceedings of the court that can affect them, and
>
> (b) the principle that criminal proceedings shall not be used solely to provide any assistance or service needed to care for or protect a child.
>
> (2) Because it is desirable wherever possible—

> (a) to allow the education, training or employment of children to proceed without interruption,
>
> (b) to preserve and strengthen the relationship between children and their parents and other family members,
>
> (c) to foster the ability of families to develop their own means of dealing with offending by their children, and
>
> (d) to allow children reside in their own homes,
>
> any penalty imposed on a child for an offence should cause as little interference as possible with the child's legitimate activities and pursuits, 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 only as a measure of last resort.
>
> (3) A court may take into consideration as mitigating factors a child's age and level of maturity in determining the nature of any penalty imposed, unless the penalty is fixed by law.
>
> (4) The penalty imposed on a child for an offence should be no greater than that which would be appropriate in the case of an adult who commits an offence of the same kind and may be less, where so provided for in this Part.
>
> (5) When dealing with a child charged with an offence, a court shall have due regard to the child's best interests, the interests of the victim of the offence and the protection of society."

39. On the facts of the present case, the practical significance of the loss of section 96(2), is very limited for the following two reasons.

40. First, the fact that the alleged offences had occurred at a time when the Applicant had been a minor is something which will be taken into account by a sentencing court in any event, i.e. even in the absence of the direct applicability of section 96(2). This issue has recently been addressed by the Court of Appeal in *A.B. v. Director of Public Prosecutions*, unreported, Court of Appeal, 21 January 2020. Birmingham P. stated as follows.

> "16. I agree with the High Court judge that if the stage of considering sentence is reached, then the judge in the Circuit Court would be

> required to have regard to the age and maturity of the appellant at the time of the commission of the offence. The judge will be sentencing him as a person who, aged fifteen and a half years, offended. Obviously, his age and maturity will be highly relevant to the assessment of the level of culpability. In these circumstances, I do not see the fact that s. 96(2) of the Children's Act, which stipulates that a sentence of detention will be a last resort, and s. 99, which mandates the preparation of a probation report, will not be applicable, as having any major practical significance."

41. Secondly, it seems to me that there was no real likelihood of the Applicant—assuming for the purposes of argument only that he were to be found guilty of the alleged offences—would have received a non-custodial sentence even with the benefit of the sentencing principles under section 96. The Applicant has already been convicted of a number of offences and had been detained in Oberstown. The Applicant is currently in custody in Wheatfield Prison. It seems likely, therefore, that, if convicted, a further custodial sentence would be imposed in any event, even if the Applicant had had the benefit of being tried as a child.

42. I rely in this regard on the judgments in *Smyth v. Director of Public Prosecutions* [2014] IEHC 642; *Ryan v. Director of Public Prosecutions* [2018] IEHC 44, [27]; and *Bernotas v. Commissioner of An Garda Síochána* [2019] IEHC 296, [17], all three of which judgments appear to suggest that the putative loss of the benefit of section 96 may be of less significance in the context of an accused who already has a criminal record and who is, therefore, more likely to have received a custodial sentence even if he had the benefit of section 96.

(ii) Reporting Restrictions

43. The second protection said to have been lost is that of the reporting restrictions imposed under section 93(1). The subsection in full reads as follows.

> "(1) In relation to proceedings before any court concerning a child —
>
> (a) no report which reveals the name, address or school of any child concerned in the proceedings or includes any particulars likely to

> lead to the identification of any such child shall be published or included in a broadcast or any other form of communication, and
>
> (b) no still or moving picture of or including any such child or which is likely to lead to his or her identification shall be so published or included."

44. Section 93 must be read in conjunction with section 258 (non-disclosure of certain findings of guilt). Section 258 allows for criminal offences of certain classes which were committed by a person while under the age of eighteen to be what might be colloquially described as "expunged" after a period of time. The combined effect of the two sections is that a person who has committed an offence while a child will be able to have their conviction expunged subsequently, in circumstances where there will not have been any reportage of the original conviction. However, the practical benefit of section 258 would be undermined if the trial of an adult being prosecuted in respect of offences alleged to have been committed as a "child" were to be conducted without any reporting restrictions. Counsel on behalf of the Applicant, Mr Clarke, SC, submits that sentencing hearings are often reported by the media, if not in the print edition of a newspaper, then in the online version.

45. Certainly, in the case of a trial which attracted publicity, there would be a risk that the existence of the otherwise expunged criminal convictions would be discoverable by anyone conducting a search on the internet by reference to the accused person's name. Thus, for example, if the accused applied for a job, the potential employer might locate references online to the convictions which have formally been expunged.

46. The loss of the reporting restrictions has been described by the Court of Appeal in *Director of Public Prosecutions v. L.E.* [2020] IECA 101 as a "significant disadvantage". This disadvantage has to be weighed against other considerations, such as, in particular, the seriousness of the offence alleged.

(iii) Mandatory Probation Report

47. The third alleged prejudice is the loss of a right to a mandatory probation report under section 99. I do not regard this as a particularly serious detriment in circumstances where the trial court would, in any event, have a discretion to seek such a report. In this regard, I adopt the approach taken in *R.D. v. Director of Public Prosecutions* [2018] IEHC 164 and *Bernotas v. Commissioner of An Garda Síochána* [2019] IEHC 296.

Summary

48. In summary, therefore, I have concluded that the principal prejudice suffered by the Applicant as a result of the prosecutorial delay is that he has lost the benefit of the reporting restrictions under section 93 of the Children Act 2001. The other complaints made do not, to my mind, represent a real prejudice. In particular, I do not think that the loss of the sentencing principles under section 96 is significant on the facts of the present case where it seems to me that—in the event of a conviction—a custodial sentence would have been likely even with the benefit of section 96(2). Similarly, I do not think that the loss of the requirement for a mandatory probation report is significant.

FINDINGS OF THE COURT ON BALANCING EXERCISE

49. In performing the balancing exercise mandated by the Supreme Court in *Donoghue*, it is necessary to weigh (i) the prejudice caused to the Applicant by the loss of the statutory reporting restrictions, against (ii) the public interest in the prosecution of offences. There are a number of aspects of the present case which point strongly in favour of allowing the prosecution to proceed, as follows.

50. First and foremost, the offences alleged are very serious offences. The circumstances of the robbery as set out in the book of evidence involve the Applicant producing a Stanley knife and threatening the alleged victim, saying "*I'm gonna stab you, you're getting it*

tonight". The alleged victim has stated that he was in fear of his safety. The District Court declined to deal with the alleged offences summarily under section 75 of the Children Act 2001, and the Applicant has, instead, been sent forward for trial in the Circuit Court. The offence of robbery under section 14 of the Criminal Justice (Theft and Fraud Offences) Act 2001 carries a maximum penalty of imprisonment for life. There is a significant public interest in ensuring that alleged incidents of "knife crime" are prosecuted.

51. Counsel for the Applicant has cited the judgment of the Court of Appeal in *Director of Public Prosecutions v. Byrne* [2018] IECA 120 which suggests that a life sentence is likely to be reserved for only the very worst and most egregious offence of robbery. In practice, the effective range of custodial penalties caps out at fifteen years, or thereabouts, for all but the most exceptional cases. On the facts of *Byrne*, the robbery, which had been committed by a juvenile offender, involved the grazing of the victim with a knife and a threat to kill the victim by the offender as he left the scene. The Court of Appeal indicated that, allowing for the offender's age, a headline sentence of four and a half years would be appropriate.

52. Although the victim in the present case did not suffer any physical injury, the circumstances of the offence as alleged—which include the threat to stab the victim and a subsequent attempt by the three accused to re-board the tram which was only prevented by the tram driver locking the doors against them—are such as to suggest that a similar headline sentence would apply in the case of conviction.

53. Secondly, the Applicant's ability to defend the proceedings has not been prejudiced. For reasons similar to those indicating that the police investigation should not have been complicated, the issues to be determined at trial will also be straightforward. There are two witnesses of fact, the victim and his friend. There is also extensive video footage

from CCTV cameras located within the tram and elsewhere in the vicinity. This has, of course, been made available to the Applicant. Any defence which he may wish to run has not been affected by the delay.

54. Thirdly, in contrast to the accused in *Donoghue*, the Applicant has not made any admissions. Rather, it is clear from the transcript of the police interview in December 2017 that the Applicant at first denied having any recollection of the incident, and, even when confronted with video footage, continued to deny that he had produced a knife.

55. Finally, the impact of the delay has to be seen in the context of the Applicant's personal circumstances during the twenty-two month period from the date of the incident to the date of charges being preferred. The Applicant had been detained in Oberstown in respect of other criminal offences for much of that period, and had been sent forward on indictment to the Circuit Court in respect of other, unrelated charges. This history can, of course, have no bearing whatsoever on the presumption of innocence which the Applicant is entitled to and continues to enjoy in respect of the charges arising out of the alleged incident of 11 June 2017. It is to be noted, however, that the objectives, which the obligation to pursue criminal prosecutions against alleged juvenile offenders expeditiously is intended to serve, include (i) the avoidance of stress and anxiety being caused to a child as a result of a threat of prosecution hanging over them for a prolonged period of time, and (ii) the early rehabilitation of a child.

56. In this connection, the Supreme Court in *Donoghue* cited with approval the following comments of the trial judge in that case. (See [2014] 2 I.R. 762 at page 784).

> "Two years in the life of a 16 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."

57. The Supreme Court then stated as follows.

> "It is difficult to disagree with the comments made by the 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."

58. These potential benefits apply with less force to a serial offender, such as the Applicant, who has already been detained during the relevant period in respect of unrelated offences. It cannot realistically be said that an early trial of the charges arising out of the incident on 11 June 2017 would have been likely to advance the cause of the Applicant's rehabilitation or his diversion away from crime. It is also noteworthy that, unlike for example the applicant in *Director of Public Prosecutions v. L.E.* [2020] IECA 101, there has been no evidence that the charges have caused the Applicant any especial worry or anxiety.

59. The Applicant's previous convictions are also relevant in assessing the alleged prejudice said to have been caused by the loss of the sentencing principles otherwise applicable under section 96 of the Children Act 2001. See paragraphs 37 to 42 above.

60. In all the circumstances, I am satisfied that the four factors identified above outweigh any prejudice accruing to the Applicant as a result of the loss of the reporting restrictions under section 93 of the Children Act 2001. The balance of justice lies in favour of allowing the prosecution to proceed.

REPORTING RESTRICTIONS?

61. There has been some debate in the earlier case law as to whether the loss of anonymity under section 93 of the Children Act 2001 could be mitigated by the High Court making an order pursuant to section 45 of the Courts (Supplemental Provisions) Act 1961. The judgment of the High Court (Humphreys J.) in *M. McD. v. Director of Public Prosecutions* [2016] IEHC 210 suggests that section 45(1) is in deliberately wide terms, and is not confined to proceedings relating to persons who are children at the time the matter comes before the court.

62. In my own judgment in *L.E. v Director of Public Prosecutions* [2019] IEHC 471, I respectfully expressed a contrary view.

> "I am not satisfied that Section 45(1) of the Courts (Supplemental Provisions) Act 1961 can be interpreted in this way. It is well established that statutory exceptions to the constitutional imperative that justice should be administered in public must be strictly construed, both as to the subject matter and the manner in which the procedures depart from the standard of a full hearing in public. See *Gilchrist v. Sunday Newspapers Ltd.* [2017] IESC 18; [2017] 2 I.R. 284. It seems to me that in circumstances where the Oireachtas has made express provision under Section 92 [*recte*, section 93]of the Children Act 2001 for restricting the reporting of criminal proceedings involving offences alleged to have been committed by children, but has omitted to extend that protection to cases where the hearing takes place *after* the child has become an adult, weight should be given to this legislative preference. It is not open to this court to sidestep this legislative preference by calling in aid the *general* provisions of Section 45(1) of the Courts (Supplemental Provisions) Act 1961. The specific circumstances in which criminal proceedings in respect of offences alleged to have been committed by minors can be held otherwise than in public is regulated under the Children Act 2001. There is an obvious tension between the principle that justice be administered in public, and a desire to shield child defendants from publicity lest it frustrate their rehabilitation or undermine their future prospects in life. The compromise chosen by the Oireachtas is to provide anonymity in cases where the defendant is still a 'child' as defined at the time of the criminal proceedings. If the child has reached the age of majority, then they are confined to the benefit of Section 258 of the Children Act 2001. Section 258 provides, in effect, that criminal convictions for offences committed as a child shall be expunged after a period of three years. This is subject to certain exceptions, e.g. it does not

> apply to an offence which is required to be tried by the Central Criminal Court, or where the defendant has been dealt with regarding an offence in that three-year period."

63. The passage above has since been cited with approval by the Court of Appeal in *A.B. v. Director of Public Prosecutions*, unreported, Court of Appeal, 21 January 2020.

64. I do not propose, therefore, to make any order seeking to restrict the reporting of any hearing in respect of the two charges pending against the Applicant arising out of the incident of 11 June 2017.

CONCLUSIONS

65. For the reasons set out in detail herein, I have concluded that there has been culpable or blameworthy prosecutorial delay in the present case. There are, however, a number of factors which tip the balance in favour of allowing the prosecution to proceed. These are set out at paragraphs 49 to 60 above. Accordingly, the application for judicial review is dismissed.

66. The attention of the parties is drawn to the practice direction issued on 24 March 2020 in respect of the delivery of judgments electronically, as follows.

> "The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."

67. The parties are requested to correspond with each other on the question of the appropriate costs order. In default of agreement between the parties on the issue, short written submissions should be filed in the Central Office within fourteen days of today's date.

Appearances

Seamus Clarke, SC and Marc Thompson Grolimund for the Applicant instructed by Keenan & Company
Niall Nolan for the Respondent instructed by the Chief Prosecution Solicitor

Approved
Garrett Simons