

**THE HIGH COURT**

[2022] IEHC 70  
**RECORD NO. 2020/874JR**

**BETWEEN**

**JASON CERFAS**

**PLAINTIFF**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**DEFENDANT**

**JUDGMENT of Ms. Justice Niamh Hyland delivered on 7 February 2022**

**Introduction**

1. By these judicial review proceedings, the applicant seeks to prohibit his trial for robbery, assault and violent disorder from going ahead. His reasoning is that he was 15 years old when the alleged offences were committed but because of prosecutorial delay, the matter did not come before the Court until after his eighteenth birthday, thus depriving him of the benefit of the Children Act 2001 ("the Children Act"). He argues that because of the resulting prejudice, his trial ought to be prohibited.
2. Applying the principles established by the Supreme Court in *Donoghue v DPP* [2014] IESC 56, I have concluded that, for the reasons outlined below, there has been culpable prosecutorial delay but that the public interest in permitting the trial to go ahead outweighs the disadvantage to the applicant in not having the benefit of the Children Act, particularly where some (though not all) of those benefits are still available to him, albeit now at the discretion of the trial judge.

**Factual background**

3. The applicant was born on 15 June 2002. He has been charged with 3 offences i.e. robbery, assault causing harm and violent disorder arising from events occurring on 5 November 2017.
4. On that date, as part of an ongoing racist and interracial feud in North County Dublin, two teenagers were lured to Gormanstown Co. Meath by other teenagers on the pretence that they had an empty house where they could spend time together. The two teenagers, who I will refer to as AC and JC, met at the train station in Gormanstown, and began walking towards Stamullen. En route, they were attacked by a large group of teenagers consisting of about 20 people. The two teenagers were viciously assaulted, beaten with weapons, stamped on, stripped of much of their clothing and robbed. They were left in a doorway barely conscious. AC suffered a broken nose, fractured ribs, bruising and swelling all over his head and body. The applicant has been charged with assault and robbery of AC. JC had bruising to his face and body, a broken nose, facial fractures and a bleed on the brain which had to be drained. No prosecutions have been brought in respect of the attack on JC, largely it seems because he was not able to identify his assailants given the nature of the attack perpetrated on him.
5. There was no CCTV footage of the attack, although CCTV footage was obtained of persons of interest at Gormanstown train station. A witness to the altercation called the Gardaí. By the time they arrived at the scene, the crowd had dispersed, and AC and JC were not at

the scene. They were subsequently found lying in the doorway of the house of a witness, from where they were taken by ambulance to hospital.

6. Following the incident, there was a lengthy investigation by the Gardaí involving the scrutiny of CCTV footage, analysis of DNA evidence, interrogation of a large amount of social media communications found on the phones of suspects, interviews with the person who had witnessed the assaults and other persons, as well as the arrest, detention and interviewing of nine persons with a tenth suspect providing a voluntary cautioned memo of interview. In all, 28 persons of interest were identified.
7. The evidence in the case demonstrates that on 10 November 2017, a Mr. A was arrested, who identified the applicant. On 23 March 2018 the applicant was arrested and detained by a Detective Garda Leavy. He was interviewed three times on that date. On the third of those interviews, he made important admissions, including that he knew that there was going to be a gang fight on 5 November 2017 before he travelled to Gormanstown, that he went to Gormanstown with a group of other teenagers, that he realised when he saw the two teenagers arriving that it was not a gang fight but nonetheless got involved, that he boxed them both, that he punched AC on the face, that he hit AC when he was on the ground and that he saw him being stripped. He admitted he knew the girls had lured them to the train station. He accepted he was involved in a robbery and beating where two people were left stripped half naked, severely injured and left at the side of a road.

#### **Chronology of steps taken by prosecution**

8. Following the arrest and detention of the applicant on 23 March 2018, it is averred by Detective Garda Morris in his replying affidavit of 9 February 2021 that a file was prepared in relation to some of the young people involved and was forwarded to the State Solicitor in July 2018. However, the DPP did not consider same sufficient, and a composite file was requested dealing with all suspects and the incident in its entirety. It is further averred by Garda Morris that the last person of interest was interviewed by a Garda Leavy on 30 August 2018. On 2 September 2018 a referral to the Juvenile Liason Office was forwarded in respect of the applicant. On 30 September 2018, the applicant was deemed unsuitable for admission to the juvenile diversion program, by reason of the seriousness of the offences with which he was being charged, as well as the fact that he already had five cautions under the program.
9. At paragraph 10 of the affidavit of Detective Garda Morris, he avers that in June 2019, as coordinator of the incident room, he sent a request to members of the investigation team to forward all statements of evidence with a view to compiling an investigation file for submission to the DPP. It may be seen that some considerable time elapsed between the last person of interest being interviewed and the compilation of the statements of evidence and I deal with same below.
10. However, before the file was completed, Detective Garda Morris was detailed for duty in the Special Criminal Court in the CCJ from October to December 2019 and he was not able to complete and submit the file until his return in January 2020. The completed file

was forwarded to the DPP's office on 28 February 2020. It comprised almost 450 pages and sought directions in relation to a total of 28 young people.

11. On 21 April 2020 the DPP directed three charges be brought against the applicant and a query was sent seeking clarification on 12 May 2020. A reply was received on 26 May 2020 and the applicant was charged on 30 May 2020.
12. The applicant turned 18 on 15 June 2020. He was released on station bail to appear on 19 June 2020 before Drogheda District Court but because of Covid-19, he did not appear and the case was adjourned. The book of evidence was served on 26 August 2020 and an order was made returning the applicant for trial to Trim Circuit Court on 7 September 2020. By that stage he was of course over 18 and the consequences of that from the point of view of the proceedings are discussed below.

### **History of the proceedings**

13. An application for leave for judicial review was brought on 19 November 2020. An Order is sought by way of judicial review prohibiting the prosecution of the applicant as well as various declarations, an order staying the proceedings and damages. The application was grounded upon the affidavit of Peter Connolly, solicitor for the applicant, sworn on 17 November 2020 and the verifying affidavit of the applicant sworn on 18 November 2020. On 24 November 2020 Peter Connolly swore a second affidavit, this time to ground an application to extend time to apply for leave for judicial review pursuant to Order 84, rule 21(4) of the Rules of the Superior Courts. Mr. Connolly averred that he had filed all relevant papers with the Central Office on 19 November 2020 in contemplation of moving the application, within time, on 23 November 2020 but that he had overlooked the requirement to email digital copies of said papers to the Central Office address provided.
14. He averred that he realised this inadvertence as of Friday 20 November 2020 but given that ex parte leave applications were heard remotely, he was not in a position to mention the matter to the sitting judge. On 30 November 2020, Mr. Justice Simons granted leave to seek judicial review and in so doing ordered that the applicant be granted an extension of time. I do not therefore need to deal with the extension application as this has already been determined by Simons J.
15. Garda Dermot Morris then swore his affidavit on 9 February 2021 and the respondent lodged a statement of opposition dated 23 February 2021.

### **Arguments of the parties**

16. The applicant's case justifying his application for a prohibition of his trial is a simple one. It is that, had the prosecution being advanced in a timely manner, the likelihood is that the case would have been heard and determined against him before he reached his eighteenth birthday on 15 June 2020. In such a case, he would have been able to avail of all the protections of the Children Act. These are identified at paragraph 11 of the applicant's legal submissions as follows;

"a. *The right to make submissions on the issue of jurisdiction i.e. to have the case dealt with summarily in the Children Court (s.75).*

- b. *The requirement to be accompanied to Court by parent or guardian (s.91).*
  - c. *Reporting restrictions and requirement of anonymity (s.93 & s.252).*
  - d. *An in-camera hearing (s.94).*
  - e. *That any sentence should cause as little interference as possible with the child's legitimate activities and pursuits (s.96(2)).*
  - f. *That any sentence should take the least restrictive form (s.96(2)).*
  - g. *That detention be imposed only as a measure of last resort (s.96(2)).*
  - h. *The stipulation that a Court may take into consideration as mitigating factors a child's age and level of maturity in determining penalty (s.96(3)).*
  - i. *The stipulation that when dealing with a child a Court shall due regard to inter alia the child's best interests (s.96(5)).*
  - j. *The possibility of a conditional discharge order upon a finding of guilt (s.98).*
  - k. *The mandatory referral for a Probation and Welfare Report (s.99).*
  - l. *The possibility of Community Sanction (s.115).*
  - m. *The possibility of a deferment of any detention order (s.144).*
  - n. *The prohibition on imprisonment (s.156)."*
17. In oral argument, particular emphasis was placed upon the loss of the benefit of section 75 of the Children Act in respect of jurisdiction, i.e. the fact that it is the District Judge who decides whether the accused is tried summarily or on indictment. It was argued by counsel for the applicant that, having regard to a likely guilty plea by the applicant, given his admissions, the District Court judge would very likely have accepted jurisdiction in this case and the matter would most likely have been resolved in the District Court.
18. Next, counsel laid particular emphasis on the sentencing provisions applicable to convictions under s.96 of the Children Act, including s.96(2) which provides that 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 least restrictive form appropriate in the circumstances, and that a period of detention should be imposed only as a measure of last resort. Reference was also made to the provisions of the Act in relation to community sanctions, probation orders and deferred orders.
19. Finally, counsel also identified the mandatory referral for a probation and welfare report under the Children Act and the loss of that benefit to the applicant.
20. The applicant relies upon the case of *Donoghue*, in which the Gardaí found a quantity of what was suspected to be heroin in the house of a minor. The applicant in that case

admitted responsibility but was not charged for sixteen months. The High Court found there was culpable delay in the prosecution and granted prohibition in circumstances where the loss of the protections afforded to children was prejudicial. The Supreme Court went on to uphold the grant of prohibition. The applicant's written submissions identify the following principles:

*"The Donoghue decision indicates that the first question to be determined by a court is whether or not there has been any culpable or blameworthy prosecutorial delay in the case. In the event that there has been such delay, then the court must carry out a balancing exercise to establish if there was, by reason of the delay, something additional to outweigh the public interest in the prosecution in serious offences. Factors such as the length of the delay, the age of the person to be tried at the time of the offence, the seriousness of the charge, the complexity of the case and the nature of the prejudice relied upon are to be considered. Significantly, the court in Donoghue accepted that the loss of the protections contained in the Children's Act 2001, can itself justify the court prohibiting a trial. This principle has been applied most recently in Sean Furlong v DPP [2021] IEHC 326."*

21. It is worth emphasising that both parties agree that the correct approach to a case of this nature is that identified in *Donoghue*. The applicant also relies upon the cases of *Dos Santos v DPP* [2020] IEHC 252, *Cash v DPP* [2017] IEHC 234, *Furlong v DPP* [2021] IEHC 326, and the decision of the Court of Appeal in *DPP v LE* [2020] IECA 101.
22. In short, the applicant identifies there was a culpable prosecution delay from September 2018, that this delay resulted in the applicant losing the protections afforded by the Children Act, and that the provisions in respect of jurisdiction and sentencing under that Act would have been particularly significant in the light of the likely guilty plea of the applicant.
23. The respondent argues first that there was no prosecutorial delay. In this respect counsel points to the particular nature of the incident on 5 November 2017. She points out that pre-planned incidents are more difficult to prosecute since there will be an attempt to avoid evidential material being available and that this should not work to the benefit of accused persons by allowing them to have their trials quashed due to the time required to investigate such incidents. She notes that in this case 28 persons of interest were identified, that there were no fewer than 10 Gardaí involved on the applicant's file alone, that the investigation report was 450 pages long, that there were complex interconnected investigations and that the nature of the assaults meant that the 2 injured persons could not identify their assailants.
24. In respect of the period of delay focused upon by the applicant i.e. from the end of August 2018 until June 2019, when material started to be collected for the file, she points out that it is averred that the investigation was ongoing and that because of the difficulties of identifying people due to, *inter alia*, the use of masks and hoods to obscure faces and the use of nicknames and first names only, that it was important that the investigation remained open.

25. In relation to the balancing exercise required if I conclude there is prosecutorial delay, counsel for the respondent points also to the particularly serious nature of the charges and the viciousness of the attacks. She points to the public interest in the perpetrators of the offence including the applicant being charged and brought to justice. She focuses on the seriousness of the injuries suffered by the victims. She points also to the admissions made by the applicant in his interview. In relation to the detriment suffered by the applicant, she points out that although the applicant loses the benefits of the Children Act, in practice many of those approaches will still be available to him at his trial in the Circuit Court. I deal with those arguments in my consideration of the balancing exercise below.

## **Findings**

### **Delay**

26. It is clear from the case law that where young people are being charged, there is a distinct obligation on the prosecution to avoid delay in bringing forward the charges. This is made absolutely clear in *Donoghue*:

*"The right to a speedy trial is a fundamental part of our criminal jurisdiction and requires no further elaboration here but the question of a special duty on the State authorities over and above the normal duty of expedition in the case of an offence alleged to have been committed by a child or young person merits some comment. Geoghegan J. in the passage cited above referred to the obvious sensitivities involved in respect of children or young persons coming before the courts. Those sensitivities are reflected in the Children Act 2001 by measures such as those relating to the Juvenile Diversion Programme and those contained, inter alia, in Section 96 of the Act to the effect that a period of detention should only be imposed as a measure of last resort ... These aims cannot be achieved if there is avoidable delay in the prosecution of young offenders. For that reason, I am satisfied that for the purpose of considering whether or not there has been blameworthy prosecutorial delay in the case of a child or young person, one must take into account the special duty identified by Geoghegan J. in the case of B. F. v Director of Public Prosecutions. However, it is important to emphasise that this duty is only one of a number of factors, including, inter alia, the seriousness of the offence and the complexity of the case, to be taken into account in considering whether or not there has been blameworthy delay in any given case. What may be excusable delay in the case of an adult in any given case may not be acceptable in the case of a child alleged to have committed such an offence."*

27. Here, I am satisfied that from the date of the incident being 5 November 2017 up until 30 September 2018 when the applicant was deemed unsuitable for admission to the juvenile diversion program, there was no delay. The investigation was a complex one and required considerable investigative work on the part of the Gardaí.
28. However, it is hard to avoid the conclusion that there was culpable prosecutorial delay between the end of August 2018 and June 2019. There is no evidence before me of any steps being taken during that time although it is said the investigation remained open.

The affidavit evidence of Detective Garda Morris in relation to that period of time is as follows:

*"...a substantial number of persons of interest and possible suspects had only been identified to Gardaí by way of nickname or Christian name. Therefore, the investigation remained ongoing in the hope that further persons of interest/suspects might be identified, located and interviewed" (paragraph 8).*

29. Given the imperative of moving with expedition in cases involving young persons, I cannot accept that the necessity of keeping the investigation ongoing justified a period of 10 months where no concrete steps have been identified. It is necessary for the Gardaí to balance the imperative of expedition with the desirability of continuing to investigate the matters, particularly in a complex investigation. In this case, when filing replying affidavits in these proceedings, the DPP was aware that delay was a core part of the applicant's challenge. Nonetheless, no evidence was provided of any activity during this time period, as distinct from the very detailed account of the activity between the date of the incident and the end of September 2018. In those circumstances, without evidence of any steps being taken during that period, I conclude this was a period of unexplained delay. Because of the context in which this delay occurred i.e. the prosecution of a minor, I must conclude it was culpable delay.
30. I find there was a further period of culpable delay from October to December 2019 when, on his own averment, work ceased on the file because Detective Garda Morris was detailed for duty in the Special Criminal Court. That was not a matter over which he had any personal control and no blame can be attributed to him. But no explanation has been proffered by the DPP to explain why a different person could not have been assigned to take over the duties of Garda Detective Morris during this time, given the context. Thus, where the DPP has an onus to expedite a prosecution, but despite this permits a file to languish without explanation where the person responsible is diverted to other duties, a finding of delay can be expected.
31. Accordingly, I conclude there were two periods of culpable delay, being 30 September 2018 to June 2019 and October to December 2019.

### **Balancing of interests**

32. Having concluded that there is culpable delay I must now turn to the second part of the test in *Donoghue* and consider whether the prejudice (or disadvantage as it is characterised by the respondents) of not being able to avail of the Children Act is outweighed by the public interest in the prosecution going ahead. The case law post *Donoghue* has been carefully reviewed by Barr J. in *Furlong*, including the decision in *Dos Santos* and the High Court and Court of Appeal decisions in *L.E.* Having considered the various cases, he concluded as follows: *"All cases stand on their own merits and particular factual matrix, and thus this court must conduct its own examination in ascertaining whether there was delay and possible resulting prejudice to the applicant"*.

33. Applying that approach here, and considering the various factors identified in Donoghue, I conclude that the prejudice in not being able to avail of the benefits of the Act is outweighed by the public interest in the trial going ahead. Before considering the latter interest, it is necessary to analyse closely the nature of the prejudice to the applicant. First, as pointed out by counsel for the respondents, the disadvantage to the applicant is not wholly irremediable. It is certainly true that the Children Act mandates certain approaches in relation to the trial, including the mandatory obtaining of a report by the probation services, and prohibits imprisonment of a person under 18, as well as providing for a wide range of options in relation to sentencing, including deferment of the sentence. However, I accept that submission of counsel for the respondent that many – although not all – of these approaches will be open in principle to the Circuit Court in the applicant’s trial if it goes ahead. The applicant’s legal team will be able to rely upon his age at the time of the trial, his age at the time of the attack, and the importance of obtaining a probation report given that he is a young person who is not been incarcerated to date. If he is convicted – and counsel for the applicant stressed that had he remained subject to the Children Act he would most likely have pleaded guilty – the importance of avoiding incarceration will undoubtedly be relied upon given the fact that he has no previous convictions. In other words, the applicant will lose the certainty of the protections of the Children Act; but some of those benefits remain available to him, albeit dependant on the exercise of discretion on the part of the Circuit Court judge rather than being an entitlement as they would have been under the Children Act.
34. Turning to each of the specific prejudices identified by counsel for the applicant, there is undoubtedly a prejudice to the applicant in not having his trial proceed under the Children Act in relation to jurisdiction. The applicant has lost an advantage in that the District Court could have directed he would be tried summarily for the three offences for which he is charged, although the matters would not necessarily have remained in the District Court, given the seriousness of the offences and the brutality of the attack. The elapse of time has meant he has lost the opportunity to persuade the District Court judge that his case should be tried summarily. This is undoubtedly a disadvantage; but in my view, it cannot be treated as so great a disadvantage that it outweighs the public interest in his trial, as discussed below.
35. In relation to the loss of the benefit of the sentencing provisions and the mandatory obligation to obtain a probation report in the Children Act referred to above, Barr J. observed as follows:

*"The court does not view the loss of these statutory provisions as being of great prejudice to the applicant, due to the fact that were he to be tried as an adult, the court is still entitled to have regard to his age and level of maturity at the date of the offence, in the event that he is convicted and is being sentenced. In addition, the court can always direct that a probation officer’s report be obtained and the general principle that detention is to be seen as a sanction of last resort would also apply. Accordingly, the loss of these two matters on a statutory basis does not appear to the court to represent a significant prejudice to the applicant."*



36. A similar approach was taken by Simons J. in *Wilde v. DPP* [2020] IEHC 385, following *A.B. v. DPP*, unreported, Court of Appeal, 21 January 2020, where Birmingham P. noted as follows:

*"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 those circumstances, I do not see the fact that s.96(2) of the Children 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."*

37. Following that approach, in weighing the prejudice, it seems to me likely that the age and the maturity of the applicant will be considered by the trial judge even absent the protections of the Children Act and it is also very likely that a probation report will be ordered for the same reasons. In those circumstances, I find that the loss of these two matters does not represent a significant prejudice to the applicant.
38. I turn now to the other side of the scales i.e. the interest of the public, including the victims, in having the matter go to trial, as opposed to there being no trial of this matter. As observed in *Donohue* at page 7;

*"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."*

39. The applicant has admitted to the following matters: going to the location with the intention of engaging in a fight; knowing that the victims had been lured to the spot by a prearranged plan in the context of an interracial feud; punching the first victim in the face; punching him while he was on the ground; and seeing him being stripped and his possessions removed. The assault took place where the two victims were attacked by a very large gang of youths, between 15 and 20. The victims were left on the ground, clearly badly injured and no attempt was made by the applicant to assist them or alert anyone to their situation. AC suffered a broken nose, fractured ribs, bruising and swelling all over his head and body. The applicant has also been charged with robbery of AC's possessions. In those circumstances, it is difficult to avoid the conclusion that it would not be in the public interest if the applicant avoided trial for this matter.
40. In coming to this conclusion, I have considered the following factors: the length of the delay, the age of the applicant at the time of the offence and now, the fact that he would have benefited from the regime under the Children Act had the delay not taken place, the nature of the prejudice and the seriousness of the offence.

41. Having carried out this balancing exercise, I am satisfied that the public interest in the prosecution of serious offences outweighs the disadvantage to the applicant of losing the benefit of the Children Act.

**Conclusion**

42. For the reasons set out above, I conclude there has been culpable prosecutorial delay in this matter. However, although there are various factors which tip the balance in favour of permitting the prosecution to proceed. Accordingly, I refuse the relief sought by the applicant.
43. In relation to costs, the matter will be listed at a time convenient to the parties for oral submissions in this respect. Written submissions are not required.