THE HIGH COURT

[2023] IEHC 274

[Record No. 2022/81 JR]

BETWEEN

D.K.

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Barr delivered on the 24th day of May, 2023.

Introduction.

1. This is an application by way of judicial review, wherein the applicant seeks, *inter alia*, an injunction restraining his continued prosecution by the respondent on one charge of assault causing harm, contrary to s. 3 of the Non-Fatal Offences Against the Person Act 1997, as amended, on grounds of delay.

2. In particular, the applicant asserts that from the date of the alleged offence the respondent was on notice that the applicant was a minor, and due to blameworthy prosecutorial delay by the Gardaí and the respondent, the applicant has been deprived of the statutory protections afforded to him under the Children Act, 2001 (hereafter "the 2001 Act"), by virtue of the fact that his prosecution was brough on for hearing prior to the time when he reached the age of majority.

Background.

3. The prosecution in question is currently pending before the Circuit Criminal Court in Kildare. It arises out of an incident that occurred on 23rd July, 2019 at a Londis shop on Main Street, Maynooth, Co. Kildare. It is alleged that the applicant was with a group of youths, who entered the shop and began to throw items around. It is alleged that while a member of staff was attempting to push the youths out of the shop, the applicant assaulted one of the staff members, by kicking and punching him in the face. That employee suffered injuries as a result of the assault, including the loss of a tooth and extensive bruising to his face.

4. The applicant was born on 1st February 2003, meaning he was 16 years and 5 months, at the time of the alleged offence. He was arrested on 25th July 2019. He was interviewed upon arrest, and made several admissions in relation to the alleged offence.

5. The applicant reached the age of majority on 1st February, 2021.

6. The applicant was charged with an offence contrary to s. 3 of the Non-Fatal Offences Against the Person Act 1997, as amended, on 22nd April 2021, when he was 18 years old.

7. The applicant was not present at Naas District Court on 6th May 2021, when evidence of arrest, charge and caution was given by Sgt. Brian Jacob, before Judge Zaidan. Sgt. Jacob indicated that the DPP had directed that there could be summary disposal of the applicant's case. However, Judge Zaidan held that he did not consider the matter to be minor in nature, and thus, refused jurisdiction to hear the case.

8. Judge Zaidan adjourned the proceedings to allow the applicant's co-accused to bring applications pursuant to s. 75 of the 2001 Act. The applicant, having turned 18 years old, was not able to move such an application. On 22nd July, 2021, Judge Zaidan refused jurisdiction to hear the case and adjourned the case for service of the book of evidence.

9. The book of evidence was served upon the applicant on 14th October, 2021. He was returned for trial, on bail, to the next sittings of the Circuit Criminal Court in Kildare.

10. By order dated 14th February, 2022, Meenan J. gave the applicant leave to proceed by way of judicial review for the reliefs sought in his *ex parte* docket dated 2nd February, 2022.

Chronology.

11. It is necessary to set out a chronology of the charges against the applicant in order to assess the delay in the investigation and prosecution of the matter:

1st February 2003	Applicant was born.
23rd July 2019	Alleged assault of the injured party in the Londis shop.
24th July 2019	Gardaí obtain CCTV footage from the Londis shop.
25th July 2019	Applicant is arrested and interviewed by Gardaí, in which interview he makes admissions.
28th July 2019	Statement is taken from the injured party by the Gardaí.
10th September 2019	Medical reports are requested by the Gardaí.
5th November 2019	Request for medical reports is repeated.
11th November 2019	Medical report is received by the Gardaí from Naas Emergency Department.
25th November 2019	Medical report is received from Dublin Dental Hospital.

7th January 2020	Youth Referral of the applicant approved by Superintendent Wall.
13th January 2020	Youth Referral of applicant created by Garda Kelly.
26th February 2020	'Skeleton file' of the applicant forwarded for directions.
11th April 2020	Applicant is deemed unsuitable for inclusion in the Youth Diversion Programme.
1st February 2021	Applicant attains his majority.
7th March 2021	File submitted for directions.
14th and 20th March 2021	File returned for amendments.
22nd March 2021	File is re-submitted for directions.
24th March 2021	Inspector McDonald directs that the applicant be charged with s. 3 assault contrary to the 1997 Act.
22nd April 2021	Applicant is arrested and charged with assault.
6th May 2021	First appearance in the District Court, at which the case is remanded for a s. 75 hearing of the applicant's co-accuseds.
2nd September 2021	Section 75 application is moved by the co-accused and District Judge refuses jurisdiction to hear the case.
14th October 2021	book of evidence is served upon the applicant.
14th February 2022	Leave to proceed by way of judicial review is granted.

Applicant's Submissions.

12. Counsel on behalf of the applicant, Mr. James Dwyer SC, submitted that there was culpable prosecutorial delay in this case, for which the respondent had offered no explanation.

13. Counsel submitted that there was no explanation forthcoming from the respondent as to why there had been a delay of several months from July 2019 to January 2020 in referring the applicant to the Garda Youth Diversion Programme, when all the information required for that referral, was at the disposal of the Gardaí within days of the incident.

14. Counsel submitted that the investigation to be conducted in light of the alleged assault perpetrated by the applicant in these proceedings, was not a complex one. It was submitted that all the evidence, which was to be led against the applicant at the trial; being the witness statements, CCTV footage and admissions of the applicant at interview with the Gardaí, was available to the Gardaí within days of the occurrence of the incident.

15. He submitted that in these circumstances, there could be no explanation, nor was any explanation offered, for the 11-month delay in charging the applicant with the offence. It was stated that this period of time, should be considered culpable prosecutorial delay on part of the respondent, in circumstances where the respondent owed the applicant an elevated duty to prosecute expeditiously, owing to his age.

16. It was submitted that as a result of the delay in this case, the applicant had suffered tangible prejudice in losing the procedural protections provided by the 2001 Act. Counsel outlined that the applicant had lost the following: his right to a s. 75 hearing; his right to reporting restrictions; the requirement that he be accompanied by a parent or guardian; his right to have the proceedings heard in private; that any potential sentence would interfere with the applicant's legitimate activities and pursuits, as little as possible; that detention be imposed only as a measure of last resort; the stipulation that a court take into account as mitigating factors a child's age and maturity level when determining penalty; the stipulation that a court have regard to the child's best interests; the possibility of a conditional discharge; the mandatory referral for a probation report; the possibility of a community sanction under the Act; the possibility of a deferment of any detention order; and the prohibition on imprisonment.

17. Counsel submitted that owing to the length of delay in the case, the significant prejudice to the applicant in the loss of the procedural protections and the obligation on the respondent to prosecute matters involving a minor with expedition, the balance of justice favoured allowing the relief sought.

18. Counsel submitted that the facts of this case could be distinguished from those in *DPP v. Furlong* [2022] IECA 85, where the applicant had contributed to the delay by failing to attend an appointment for arrest with the Gardaí and had caused significant injuries to an elderly woman in the assault, which involved the use of a weapon, being a bottle that had been thrown by the accused. Counsel submitted that in this case, the applicant had not contributed to the delay and the injuries of the injured party were not as significant as in the *Furlong* case, nor had any weapon been used.

19. Counsel submitted that the respondent's submission that these matters could be aired before the trial judge hearing the matter, was not well-founded, owing to the fact that the trial judge could not restore the procedural protections to an accused who has 'aged out'.

20. Finally, counsel submitted that the applicant's case was illustrative of a systemic failure on the part of the respondent and An Garda Síochána, to prosecute claims involving minors with

expedition, in order to ensure that children are able to avail of the statutory protections created for them.

Respondent's Submissions.

21. Counsel for the respondents, Mr. Clarke BL, accepted that while the prosecution of the applicant could have been conducted more expeditiously, it did not constitute culpable prosecutorial delay sufficient to warrant termination of the criminal proceedings against the applicant.

22. Counsel submitted that it was best practice for the respondent to await receipt of medical reports on the injured party, before embarking upon the prosecution of a s. 3 assault charge, which explained some of the delay in prosecuting the applicant.

23. Counsel submitted that the offences were serious in nature and therefore the public interest in the prosecution of such offences, warranted refusal of the reliefs sought. In illustrating this point, counsel pointed to the fact that Judge Zaidan had refused jurisdiction to hear the proceedings, on the basis that the offences were sufficiently serious to warrant a jury trial. Counsel also pointed to the fact that the maximum sentence for the offence was 5 years.

24. Counsel also noted that one of the applicant's co-accuseds, had received his s. 75 hearing; wherein Judge Zaidan had again refused jurisdiction to hear the case. He submitted, in all likelihood, the applicant would have also been unsuccessful in a s. 75 hearing, given that the offences arose out of precisely the same factual scenario. In those circumstances, it was submitted that the prejudice suffered by the applicant in not having his s. 75 hearing, fell away.

25. Counsel submitted that many of the applicant's concerns as to the prejudice that would be incurred in 'aging out' were remediable by the trial judge at the sentencing stage. Factors such as the applicant's age and maturity at the time of the offence and the discretion of the trial judge to order a probation report, alleviated some of the prejudice suffered by the applicant. Counsel relied on *Cerfas v. DPP* [2022] IEHC 70 in that regard.

26. In relation to the balance of justice, counsel submitted that this was a case in which the balance was in favour of allowing the prosecution of the applicant to continue, owing to the serious nature of the offence with which he was charged and the minimal prejudice that would be suffered by the applicant in 'aging out'. To that end, counsel relied on *Daly v. DPP* [2015] IEHC 405; *Kelly and O'Malley v. DPP* [2009] IEHC 200; *Smyth v. DPP* [2014] IEHC 642; and *Ryan v. DPP* [2018] IEHC 44.

27. Counsel submitted that in circumstances where the applicant had made admissions to the offence with which he had been charged, the balance should weigh in favour of allowing the prosecution to continue. In effect, he submitted that where the applicant had admitted to the offence, it was in the interests of justice that he be prosecuted for that offence. In that regard, he relied on the *dicta* of Hardiman J. in *S.A. v. DPP* [2007] IESC 43.

The Law.

28. In considering a case involving minor offenders, it is important to bear in mind the words of O'Malley J. in *G. v. DPP* [2014] IEHC 33:-

> "*Children differ from adults, not just in their physical development and lesser experience of the world, but in their intellectual, social and emotional understanding. It is for this reason that it has long been recognised that it is unfair to hold a child to account for his or her behaviour to the extent that would be appropriate when dealing with an adult*."

29. In that case, the applicant successfully sought an order of prohibition of a trial, where he was charged with sexual offences concerning a young girl. The alleged offences took place when the applicant was 15 years of age. It was not until 4 years later, that the applicant was finally charged. The judge held that there had been prosecutorial delay, admissions had been made and the applicant was facing real prejudice in the case. An order of prohibition was granted.

30. In the seminal decision of *Donoghue v. DPP* [2014] 2 I.R. 762, the Supreme Court affirmed that there is a special duty owed to a minor in relation to a trial with reasonable expedition. Dunne J., delivering the judgment of the court, outlined at para. 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."

31. In the *Donoghue* case, members of An Garda Síochána had called to the minor applicant's home, where a substance was found, which was believed to be heroin. The applicant was 16 years old at the time. He immediately took responsibility for the substance and signed an admission to that effect. Subsequently, the items found at his home were forwarded to the forensic science laboratory for analysis, where the substance was confirmed to be heroin. A period of one year and four and a half months elapsed between the date of the applicant's arrest and his being charged with an offence.

32. The case came before the Supreme Court by way of the respondent's appeal from the decision of Birmingham J. in the High Court, where it was concluded that there had been significant culpable delay in the case. On the basis of this conclusion, the judge went on to consider the consequences of the delay in the circumstances of that case. It was noted that in all likelihood the applicant would have benefitted from statutory protections afforded to minor offenders under the 2001 Act and had therefore suffered real prejudice. An order of prohibition was granted in the High Court.

33. The Supreme Court held that having regard to all the circumstances of the case, there had been sufficient evidence before the court to enable the trial judge to reach the conclusion that there had been significant culpable delay in the case. The Supreme Court went on to hold that blameworthy prosecutorial delay alone will not be sufficient to prohibit a trial. The court must conduct a balancing exercise to establish whether any resulting prejudice to the accused, outweighs the public interest in the prosecution of serious offences. The court stated as follows at para. 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."

34. 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 of seriousness 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.

35. In ascertaining whether there has been blameworthy prosecutorial delay in the case, the court has had regard to the statement of White J. in *Cash v. DPP* [2017] IEHC 234, which was subsequently reaffirmed by Simons J. in *Dos Santos v. DPP* [2020] IEHC 252, at para. 23. In both cases it was confirmed that the relevant period of time for determining blameworthy prosecutorial delay, is the period between the date of the alleged offences and when the accused turned 18 years of age. White J. in *Cash v. DPP* stated at para. 12:-

"*There was prosecutorial delay from 2nd February, 2015 up to the date of charge on 7th January, 2016. The applicant reached his majority on 8th July, 2015. I do not consider any delay subsequent to 8th July, 2015 as being relevant to the applicant's challenge in these*

proceedings. I would not regard the delay as significant culpable prosecutorial delay. Even if the respondent prosecuted the matter without undue prosecutorial delay, it would not have concluded by way of indictable trial by jury before the applicant's eighteenth birthday."

36. In the Court of Appeal decision in *L.E. v. DPP* [2020] IECA 101, an appeal against the High Court's refusal to grant prohibition, was dismissed. The applicant in that case was a minor in 2015, when she allegedly committed offences, including assault causing harm, threats to kill and violent disorder. The Court of Appeal upheld the finding of the High Court that there had been no culpable or blameworthy prosecutorial delay. This was in circumstances which concerned a complex investigation with a number of suspected offenders and no admission of guilt. The High Court had held that although there had been "pockets of delay", when looking at the matter overall, there had been no blameworthy or culpable prosecutorial delay. The court also held that the overall cause of the delay lay at the feet of the applicant.

37. In the judgment of the High Court in *Daly v. DPP* [2015] IEHC 405, Kearns P., stated that there can be no obligation on prosecution authorities to unrealistically prioritise cases involving minors. It was stated as follows at page 19:-

"*While the importance of ensuring a speedy trial in the case of juveniles is well established, certain factors may arise in each case which determine how expeditiously this can occur and there can be no obligation on prosecution authorities to unrealistically prioritise cases involving minors. In the view of the Court there was no blameworthy prosecutorial delay in this case*."

38. In *SW v. DPP* [2018] IEHC 364, the applicant unsuccessfully sought prohibition. In refusing the reliefs sought, Barrett J. listed the following as relevant factors when conducting the necessary balancing exercise:-

"*In deciding whether or not to grant any of the reliefs that the Applicant has come to court seeking, the court is especially mindful of the following factors:*

(i) the need for expedition in the criminal process when dealing with children (see, inter alia, in this regard, BF v. DPP [2001] 1 IR 656, Jackson v. DPP & Walsh v. DPP [2004] IEHC 380, C (A Minor) v. DPP [2008] 3 IR 398, G v. DPP [2014] IEHC 33, and Donoghue v. DPP [2014] IESC 56);

(ii) the court's finding that there has in the within case been culpable prosecutorial delay, albeit of a limited duration;

(ii) [sic] *the fact that, as recognised in AP v. DPP [2011] 1 IR 729, 745, "The primary function of deciding to initiate or to continue a prosecution is conferred on the Director of Public Prosecutions" (albeit that this Court must ultimately vindicate the Applicant's constitutional right to an expeditious trial);*

(iii) the contention of the DPP that the public interest in seeing that serious offences are prosecuted outweighs the factors presented by such delay as may be (and has been) found to arise in this case;

(iv) the fact that the delay presenting in this case is not due to any dereliction of duty, gross negligence, strategy or tactic on the part of the State;

(v) the fact that there is no identifiable prejudice presenting for the Applicant notwithstanding such culpable delay as has occurred;

(vi) the fact that, as recognised in Blanchfield v. Hartnett [2002] 3 IR 207, 226, the court must presume, until the contrary is demonstrated, that the proceedings of a criminal trial will be conducted fairly and properly; there is no reason to believe that the contrary will apply here;

(vii) the fact that if the Applicant pleads or is found guilty, (a) the trial judge has the power to order the preparation of a probation report, (b) it is a principle of sentencing that a period of imprisonment will only be imposed as a last resort.

(viii) the fact that this is a case in which the evidence against the Applicant is compelling: there is CCTV footage of the incident and identification of the applicant; and

(ix) the fact that this is a case in which there has been an uncontested admission; as Hardiman J. noted in SA v DPP (Supreme Court, 17th October, 2007), para.19, "[I]t would…be extraordinary to prohibit a trial in circumstances where the defendant admits a significant amount of behaviour of a criminal nature."

39. Turning to the various statutory protections which the applicant is alleged to have been deprived of as a result of the delay in the investigation, the relevant provisions of the 2001 Act are: s.75 (court's jurisdiction to deal with indictable offences summarily); s.93 (reporting restrictions); s.96 (detention as a last resort), and s.99 (mandatory probation report). While it is not necessary to recite these individual provisions in their entirety, the court has had regard to them in considering the potential prejudice the applicant will suffer, having been deprived of them by virtue of "aging out".

40. With regards to the loss of anonymity pursuant to s.93 of the 2001 Act, it was confirmed by McDermott J. in *Independent Newspapers v. I.A*. [2018] IEHC 120 that there was no provision extending the benefits of reporting restrictions when a child passes the threshold age limit of eighteen years in the course of criminal proceedings. He stated:-

> "*43. While it is clear that the protection conferred by s. 93 continues for life in respect of a child who is prosecuted, convicted and sentenced under the age of eighteen, there is no specific provision extending those benefits when a child passes the threshold age limit of eighteen years in the course of the criminal proceedings. Thus for example, a child whose eighteenth birthday occurs in the middle of criminal trial or is convicted the day after his eighteenth birthday would not have the protection of s. 93 or the sentencing regime that would apply to a child. These specific protections under the Children Act 2001 only apply to a child – a person under eighteen years of age. In cases where offences committed by a child are only detected when they enter adulthood, he/she does not obtain the benefit of any of the provisions of s. 93 or any other provisions of the Children Act. There may be good policy reasons to vest in a court a discretion to extend the protections of anonymity in cases which overlap the transition between childhood and adulthood but this has not been addressed by the Oireachtas which has confined the protections to those under eighteen years. This is consistent with the well-established principles of sentencing applicable to an adult who has committed an offence as a child but comes to be sentenced as an adult considered in the case law set out above.*
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> *44. The court must uphold the provisions of Article 34.1 of the Constitution that justice shall be administered in public 'save in such special and limited cases as may be prescribed by law'. The restriction on publication or reporting matters that might tend to identify a child is specifically limited to persons under eighteen years. In Irish Times Ltd. v. Ireland [1998] 1 I.R. 359 the Supreme Court held that it was a fundamental right in a democratic State and a fundamental principle of the administration of justice under Article 34.1 that the people have access to the courts to hear and see justice being done save for limited exceptions. Any order restricting the contemporaneous reporting of legal proceedings by the press must be viewed as a curtailment of access by the people […]*"

41. This was later followed by Simons J. in the High Court decision of *L.E. v. DPP*, who, upon interpreting s.93, held that reporting restriction were not available in the case of an adult accused. The decision of Simons J. was upheld in the Court of Appeal in *DPP v. L.E*. [2020] IECA 101, where

Birmingham P. stated as follows:- *"I do accept that the loss of anonymity is a significant disadvantage. However, it is necessary to put in the balance against that the seriousness of the case […]"*

42. Similarly in *Dos Santos* and *T.G*. the court held that the prejudice suffered by the applicant was the loss of anonymity and reporting issues. In both cases, however, the balance weighed in favour of the trial proceeding and the prejudice was not sufficient to halt the prosecution, when considering the public interest in the prosecution of serious offences.

43. In relation to the balancing exercise limb of the test envisaged by Dunne J. in the *Donoghue* case, there have been a number of High Court cases where, notwithstanding the court's finding of blameworthy delay, prohibition has been refused by the court upon conducting a balancing exercise and having come to the conclusion that the balance lay in favour of allowing the prosecution to continue.

44. In *Ryan v. DPP* [2018] IEHC 44, which concerned an alleged assault by the applicant, who was sixteen at the time of the offence, O'Regan J. found that there was prosecutorial delay of approximately nine and a half months, but nonetheless refused the reliefs sought having conducted a balancing exercise. It was concluded that the prejudice the applicant would experience was the loss of anonymity and the loss of a statutory right to a probation report; however, the balance tipped in favour of the public interest in prosecuting charges in respect of serious offences.

45. In *SW v. DPP*, the offences of assault were alleged to have been committed when the applicant was fifteen years old. The applicant had turned seventeen by the time he was charged. Barrett J. held that although culpable prosecutorial delay amounted to approximately 2 years, it was not appropriate to grant an order of prohibition, as he failed to find sufficient prejudice present in the applicant's case.

46. The case of *Dos Santos v. DPP* [2020] IEHC 252, concerned an alleged offence of robbery and carrying a weapon with intent to commit an offence, when the applicant was sixteen years old. In was held by Simons J. that the delay of approximately twenty-two months was inordinate and without justification, but nonetheless he allowed the prosecution to proceed. The reliefs sought were refused in circumstances where the court held that the prejudice which had accrued, did not outweigh the public interest in allowing the prosecution to proceed.

47. In *Wilde v. DPP* [2020] IEHC 385, a case involving alleged criminal damage and assault offences, which took place while the applicant was aged sixteen and in custody, Simons J. held that

the delay of more than two years was excessive. He nonetheless found that the balance of justice lay in favour of allowing the prosecution to proceed.

48. In *Furlong v. DPP* [2022] IECA 85, the applicant had failed to keep an appointment with the Gardaí in which his arrest was to be executed by arrangement. Birmingham P. viewed this action as significant, and determined that in all likelihood the applicant would have received a s. 75 hearing, had he kept that appointment. Effectively, the Court of Appeal found that the applicant had contributed to the delay, and therefore contributed to the prejudice he suffered as a result of 'aging out', which was to weigh in favour of allowing the prosecution to continue (see paras. 38-40).

49. In *Furlong*, the Court, in its assessment of the seriousness of the charges levelled against the applicant, also analysed at the circumstances surrounding the commission of the offence, particularly the witness statements and the statement of the injured party, rather than merely the fact of a s. 3 charge alone (see paras. 35-37).

50. In *Cerfas v. DPP* [2022] IEHC 70, Hyland J. outlined that certain procedural losses incurred by an applicant when they 'age out', are not completely irremediable at the trial of the action, and this factor should be taken into account in analysing the prejudice suffered by the applicant. She stated as follows at para. 33:-

> "*[…] 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."

Conclusions.

Has there been Culpable Prosecutorial Delay?

51. In determining the question of whether there has been any culpable prosecutorial delay, it is necessary to have regard to the events which occurred between the date of the alleged offence on 23rd July, 2019, when the applicant was aged 16 years and 5 months, and the date when the applicant turned 18 years, being 1st February, 2021: see *Cash v DPP* [2017] IEHC 234 and *Wilde v. DPP* [2020] IEHC 385.

52. The *Donoghue* case makes it clear that there is a special duty placed on the gardaí to investigate offences that involve minors with particular expedition. However, it has also been held in a number of cases that the gardaí cannot be expected to drop everything and give an unrealistic priority to the investigation of offences allegedly carried out by a minor: see *dicta* of Kearns P. in *Daly v. DPP* and Birmingham P. in *Furlong* at para 22.

53. One also has to have regard to the age of the minor at the date of the alleged offence. The closer he or she is to 18 years, the less time that is available to the gardaí to conclude their investigation. If the child is reasonably close to the age of 18 years, it may be unrealistic to expect that the investigation can be concluded and the matter can be brought to trial, prior to his or her attaining the age of majority. One also has to have regard to the complexity of the investigation. That is why each case must be looked at on its own facts.

54. While this was a serious offence, involving an attack on a shop assistant by three youths, the investigation of the offence was not a complex one. The gardaí were called to the scene of the offence on the day that it occurred. On the following day, they obtained CCTV footage of the incident. On the day after that, the applicant was arrested, detained and interviewed. He made a number of admissions in the course of that interview and apologised for the incident. On 28th July, 2019, a statement was taken from the injured party.

55. For some unknown reason, there was a delay in seeking a medical report in relation to the injured party's injuries, until a first request for same was made on 10th September, 2019. That request was repeated on 5th November, 2019. Medical reports were received from Naas Hospital on 11th November, 2019 and from the Dental Hospital in Dublin, on 25th November, 2019.

56. It is also of relevance that these medical records were not subsequently included in the

book of evidence which was served upon the applicant on 14th October, 2021. It is clear that the respondent had available to it, all of the information it viewed as necessary for the prosecution of the offence within a short period of time.

57. The steps that were taken by the investigating gardaí during 2020 and down to the time when the applicant turned 18 years of age on 1st February, 2021, have been set out earlier in the chronology section of the judgment.

58. It is noteworthy that in the replying affidavit which was filed on behalf of the respondent, being the affidavit sworn by Garda Andrew Kelly on 21st July, 2022, no excuse or explanation was given for any delay that occurred in the investigation and prosecution of the matter. Garda Kelly merely exhibited a chronology of the steps that had been taken in the investigation and prosecution of the offence. He denied that there was any prosecutorial delay. He stated that the prosecution had been conducted as expeditiously as possible. He stated as follows at paragraphs 5 and 6 of his affidavit:

> "*5. It is my understanding and belief that any of the issues complained of by the applicant are more appropriately dealt with by the trial judge at first instance. I further believe that the complaints made by the applicant do not amount to a wholly exceptional circumstances, which is the standard required before this Honourable Court will consider prohibiting the applicants trial.*
>
> *6. In all the circumstances, the prosecution was conducted as expeditiously as possible and, accordingly, the applicant is not entitled to the reliefs sought or any reliefs.*"

59. The court is satisfied that there were two periods of culpable delay between the date of the alleged offence, and the date when the applicant turned 18 years of age. Firstly, the period of nine months between the date of the alleged offence on 23rd July, 2019 and April 2020, when the response was received in relation to the possible referral of the applicant under the GYDP. Given that the essential elements in relation to the investigation of the offence were to hand literally within days of the commission of the offence, and in the absence of any explanation for the delay between that period and the submission of the file to the GYDP in January 2020, followed by the further delay of four months in delivering a response thereto; the court finds that this nine-month period constitutes culpable delay on the part of the prosecution.

60. It is noteworthy that in the replying affidavit, the investigating Garda has not asserted that there was any difficulty in obtaining witness statements, or other relevant exhibits, such as CCTV footage of the incident. Even allowing for the fact that there was some delay in obtaining medical

reports, which were not ultimately included in the book of evidence, that does not excuse the delay in referring the matter for consideration under the GYDP.

61. The second period of culpable delay occurred in the period between April 2020, when the applicant had been deemed unsuitable for the diversion programme, and March 2021, when the file was forwarded to the DPP; during which time the applicant had turned 18 years, on 1st February 2021. No reason has been offered on behalf of the respondents as to why the applicant was not charged immediately in April 2020. Even in the chronology put forward by Garda Kelly in his affidavit, there is no indication that any of the steps taken during that period, could not have been taken earlier, or were even relevant to the investigation of the applicant's involvement in the crime.

62. In all the circumstances, and having regard to the lack of any explanation or excuse for the periods of delay from the respondent, I hold that that period amounted to culpable prosecutorial delay.

63. The court is supported in that finding by the findings made by the President of the Court of Appeal in his judgment in *DPP v. Furlong*, which was a case that was very similar in circumstances to the present case. In that case, the applicant was charged with offences contrary to s. 3 of the 1997 Act. As in this case, the gardaí had the benefit of CCTV footage and statements from the injured parties within a number of weeks of the commission of the offence. In that case, where the offence had occurred on 22nd May, 2017, the court held that it was not unrealistic to hold that the investigative phase could have been concluded by Halloween, or shortly thereafter, i.e. within a period of approximately 5/6 months. The Court of Appeal held that the trial judge had been correct in finding that there was blameworthy prosecutorial delay in that case.

The Balancing Exercise.

64. The fact that the court has found that there was culpable prosecutorial delay in this case, is not the end of the matter. The court is obliged to carry out a balancing exercise between the loss of procedural advantages that have been caused to the applicant as a result of the delay on the part of the prosecuting authorities; as against the public interest in having serious crimes investigated and prosecuted.

65. The first thing which the court has to note, is that the alleged offence in this case, was serious in nature. In this regard, the court has had regard to the statement made by the injured party, Mr. Mohammed Rana, on 28th July, 2019. In that statement, he stated how he had seen a

number of youths attacking one of his fellow workers in the shop. He had come out of the kitchen and shouted at the youths and they had run away. A few minutes later, they came back into the shop. He stated that they were throwing things around the shop. He told the youths to go away. He gave the following account of how he was assaulted by them:

> "*They started hitting the glass and the wall beside the door. I can't exactly [remember] what happened then, but as I tried to get them out, I felt punching or kicking to the left side of my face and mouth. I couldn't tell which one of them it was. I felt bleeding in my mouth. I put my hand up. I felt something in my mouth, I saw blood on my hand and my front bottom tooth came out into my hand. I think the group of boys got scared when they saw the bleeding. They left the shop.*"

66. Mr. Rana stated that as a result of the assault, he lost one tooth, other teeth were loosened, and he had bruising and swelling around his left eye. While the applicant alleged in his interview with the gardaí, that Mr. Rana was holding a knife at the time that he struck him, that was denied emphatically by Mr. Rana in a statement that he subsequently made to the gardaí.

67. It is not for this court to resolve any conflicts of evidence that may arise at the trial. Suffice it to say, the court is satisfied that for a shopworker to be assaulted by a number of youths and to receive the injuries that have been described by Mr. Rana in his statement, has to be seen as a serious offence.

68. It was accepted on behalf of the applicant, that it is not sufficient for him to merely establish that there was culpable prosecutorial delay. He must go further and establish that as a result of that delay he has suffered prejudice due to the fact that he attained his majority prior to the time when the criminal trial could reasonably have been expected to have been held; and that this prejudice is sufficient to outweigh the public interest in having the prosecution proceed. In this regard, the applicant has submitted that he has lost significant protections that would otherwise have been available to him under the 2001 Act, had he been brought to trial within the 18 month window between the date of the alleged offence, and his attaining his majority.

69. In particular, it is submitted that the applicant has lost two significant procedural rights that would have been available to him if his trial had been brought on by for hearing while he was still a minor. First, he lost the right to make submissions on the issue of jurisdiction in the course of an application under s. 75 of the 2001 Act. Section 75 of the 2001 Act provides as follows:

> *75.—(1) Subject to subsection (3), the Court may deal summarily with a child charged with any indictable offence, other than an offence which is required to be tried by the*

Central Criminal Court or manslaughter, unless the Court is of opinion that the offence does not constitute a minor offence fit to be tried summarily or, where the child wishes to plead guilty, to be dealt with summarily.

(2) In deciding whether to try or deal with a child summarily for an indictable offence, the Court shall also take account of—

(a) the age and level of maturity of the child concerned, and

(b) any other facts that it considers relevant.

70. Secondly, the applicant alleges that he has lost the benefit of the reporting restrictions and the requirement of anonymity, as provided for under ss. 93 and 252 of the 2001 Act.

71. In addition, the applicant submits that he has lost the benefit of the mandatory nature of a number of procedural provisions that are provided under the 2001 Act for minors who are facing criminal prosecution, as follows: that the proceedings are to be held in private; that any sentence should cause as little interference as possible with the child's legitimate activities and pursuits; that any sentence should take the least restrictive form; that detention be imposed only as a matter of last resort; the stipulation that the court may take into consideration as mitigating factors a child's age and level of maturity in determining penalty; the stipulation that when dealing with the child a court shall have due regard to, *inter alia*, the child's best interests; the possibility of a conditional discharge order upon a finding of guilt; the mandatory referral for a probation report; the possibility of a community sanction under the 2001 Act; the possibility of a deferment of any detention order; and the prohibition on imprisonment.

72. In response to those submissions, it has been submitted on behalf of the respondents, that in relation to the loss of the right to make a s. 75 application, this loss was more theoretical, than real, due to the fact that in this case the DPP had directed that there could be a summary disposal of the matter, but the District Court judge had declined jurisdiction, holding that it was not suitable to be deemed a minor offence. Furthermore, when a s. 75 application had been made on behalf of one of the applicant's co-accused, the judge had refused to accept jurisdiction. It was submitted that in these circumstances, the likely outcome of any application on behalf of the applicant pursuant to s. 75, would have resulted in a refusal to accept jurisdiction by the District Court judge.

73. In relation to the loss of the right to have reporting restrictions and the right to anonymity, it was submitted that that had to be weighed against the public interest in the prosecution of serious offences. It was submitted that in this case, the alleged prejudice suffered by the applicant

due to the loss of that statutory benefit, was outweighed by the serious nature of the offence with which he was charged. It was further submitted that in this case, the applicant had not made the case that due to the overall delay in proceeding with the prosecution of the matter, he had suffered any real or tangible prejudice in the conduct of his defence at the criminal trial.

74. In relation to the loss of the other procedural benefits under the Act, it was submitted that all that had happened by his attaining his majority prior to the trial, was that these matters were no longer mandatory to be taken into account, or mandatory steps to be taken. It was always open to the judge to have regard to these matters at the sentencing stage, notwithstanding that the applicant would be sentenced as a young adult.

75. In particular, it was submitted that the case law established that where the court was sentencing an adult in respect of crimes committed while he or she was an infant, the court had to have regard to the age and maturity of the convicted person at the time when he or she committed the offence: see *Cerfas v. DPP*.

76. Before looking at the loss of the right to anonymity and the loss of the potential s. 75 hearing in this case, it was noteworthy that in the *Furlong* case, the Court of Appeal recognised that the loss of these rights could amount to a significant disadvantage. Birmingham P. stated as follows at paragraph 34:

> "*In my view, the combined loss of anonymity and a potential s. 75 hearing does amount to a significant disadvantage. However, that conclusion is itself not determinative. In DPP v. LE [2020] IECA 101, I commented: "I do accept that the loss of anonymity is a significant disadvantage. However, it is necessary to put in the balance against that the seriousness of the case…""*

77. Turning to the consideration of these matters in this particular case, I find that the submission put forward by Mr. Clarke BL in relation to the theoretical nature of the loss of the right to make a s. 75 application in this case, to be compelling. The fact that the district court judge had already declined to accept jurisdiction in the case, when the DPP had consented to summary disposal of the matter; combined with the fact that the same judge declined jurisdiction when the applicant's co-accused made a similar application and when there was no material difference between the culpability of either accused in relation to the alleged offence; I find that on the balance of probabilities, any s. 75 application that would have been made by the applicant to have the matter dealt with summarily, would probably have been unsuccessful. Accordingly, the loss of the right to make that application, which undoubtedly arose as a result of the prosecutorial delay

this case, does not in reality amount to a significant prejudice suffered by the applicant.

78. However, I find that the loss of the right to anonymity is a significant prejudice. At the time of the alleged offence, the applicant was aged 16 years and 5 months. There was ample time to bring his case on for hearing before he reached his majority. Had that been done, he would have had the benefit of reporting restrictions on the criminal proceedings and, more particularly, he would have had the benefit of anonymity. Given that criminal proceedings in the Circuit Criminal Court are often reported in both the local and national newspapers, which circulate both in hard copy and online, and given the permanent nature of the reporting of matters online, this has to be seen as a significant prejudice.

79. In former times, where the reporting of cases only took place in hard copy versions of newspapers, the phrase "Today's newspaper, is tomorrow's fish and chip wrapping", was apposite. It meant, that for a young person who was convicted of a criminal offence, in the past, when there was only reporting in hard copy news format, there was a good chance that his conviction would be forgotten within a relatively short period of time. Now, once the matter is reported on the internet, that matter will remain accessible and searchable against the person's name forever. That is a significant handicap to impose on a young person, both in his or her future employment prospects and also in the social and other aspects of his life; because a future partner, a friend, or even children and grandchildren, who do a search against his or her name, will forever be informed of the conviction. As such, I hold that the loss of anonymity is a significant prejudice for a young man in the applicant's position.

80. The court has not lost sight of the fact that under s. 258 of the 2001 Act, where a person is convicted of an offence while they were a minor, the record of that offence will be expunged after a period of three years. No reference to the conviction can be made in any subsequent judicial proceedings. However, that provision does not prevent the fact of his conviction, remaining searchable on the internet.

81. It is in these circumstances, that the permanent record of the conviction that will remain on the internet, if the applicant is convicted as an adult, will be a substantial impediment to the applicant's employment prospects throughout his life.

82. The court holds that were the applicant to be convicted of the s. 3 assault and were that to be reported on the internet; it is highly likely that he would find it difficult to obtain employment in the retail or hospitality sectors. The court views this as significant prejudice to a young person embarking on their career and beginning to make their way in the world.

83. It is this disadvantage, which highlights the very serious prejudice which this applicant has suffered by not having had his criminal trial proceed before he reached his age of majority. Had that been done, he would have benefited from the right to anonymity and therefore, would not have carried the badge of having acquired a conviction with him for the rest of his life. Thus, his loss in this regard is far from theoretical.

84. Insofar as it was argued that the fact of the applicant having made admissions, should weigh in the balance against making the order of prohibition sought by the applicant; the court does not regard that argument as being well-founded. The respondent sought to rely on the *dicta* of Hardiman J. in *S.A. v. DPP* in support of their submission. Those *dicta* were made in a different factual context. There, the applicant was trying to prevent his trial on historical sex abuse charges, on grounds of delay. He asserted that due to the period of time and the delay in prosecuting him, he could no longer get a fair trial. It was in that context that Hardiman J. made his comments about the relevance to the issue of guilt or innocence, of the fact that the applicant had made admissions.

85. In the present case, the key issue is whether there was undue delay in concluding the prosecution of the case, such that the applicant 'aged out' of certain procedural benefits that would have been available to him under the 2001 Act. The fact that he made admissions, made the investigation of the offence easier for the gardaí. The making of admissions does not weigh against the applicant's case to have the trial halted because he has lost benefits under the 2001 Act due to delay on the part of the prosecuting authorities.

86. In relation to the loss of the mandatory nature of the other procedural benefits that are accorded to people who face criminal trials as minors, as set out in the 2001 Act, much reliance was placed on the fact that a court when sentencing a young adult, could take the steps that were mandated on a mandatory basis prior to sentencing an infant, such as obtaining a probation report; and could also have regard to the age and maturity of the person at the time that they committed the offence, when imposing sentence. Insofar as it is suggested by the respondents that one can ignore the loss of the mandatory nature of these provisions, merely because some of them may be replicated on a discretionary basis in the context of a conviction as a young adult, seems to me to be an incorrect basis for disregarding the loss of the mandatory nature of the procedural benefits. I do not agree that they can be airbrushed out of the equation, simply because they may be available to the applicant on a discretionary basis by the trial judge. The loss of the mandatory nature of the provisions, is itself prejudicial to the applicant.

87. Notwithstanding the public interest in the prosecution of serious offences, in carrying out

the balancing exercise in this case, I have come to the conclusion that the appropriate order to make is an order prohibiting the future prosecution of the applicant on the charges arising out of the events on 23rd July, 2019. I have reached that conclusion due to the fact that the applicant was considerably less than the age of majority at the time that he allegedly committed these offences; the investigation was all but complete within a very short period of time after the date of the offences and no credible explanation has been forthcoming why the gardaí and the prosecuting authorities did not bring this matter to trial well in advance of the applicant attaining his majority.

88. As a result of their failure to do so, he has lost a very significant right, being the right to anonymity. For the reasons set out above, I regard the loss of this right for a young person as being very significant. In addition, he has lost the mandatory nature of the procedural benefits that are provided for in the trial of minors under the 2001 Act, particularly at the sentencing stage. The fact that some of these may not be irremediably lost, does not mean that he has not suffered a prejudice in that regard.

89. This case is in many respects similar to the circumstances that arose in the *Furlong* case. While in that case, the Court of Appeal did not prohibit the trial of the applicant, notwithstanding that there was considerable culpable prosecutorial delay, it is clear from reading the judgment of the court, that one of the factors which weighed heavily in their consideration of the circumstances in that case, was the fact that some of the delay was due to the failure of the applicant to attend for an interview with the gardaí, which had been arranged with his mother prior to that time. No explanation had been forthcoming why the applicant did not keep that appointment.

90. The effect of the failure on the part of the applicant to keep that appointment had a significant knock-on effect in relation to the prosecution of the case, due to the fact that the investigating Garda was detailed to go on a training course in Templemore College shortly after the date on which the interview was due to be held. By the time that he returned from that course, the applicant was undergoing a sentence of detention for another matter. This caused further delay, due to the fact that the gardaí had to make an application to the court for permission to interview him while in detention.

91. In this case, it is accepted that the applicant did not contribute to any delay that arose in the investigation and prosecution of the case against him. In addition, there was no weapon used in this case. Therefore, it is appropriate to distinguish the *Furlong* decision from the present case.

92. Looking at the entire circumstances in this case, I am satisfied that the appropriate order to make is that set out at paragraph 1 of the applicant's notice of motion dated 21st February,

2022.

93. As this judgment is being delivered electronically, the parties will have three weeks within which to file a brief written submissions on the terms of the final order and on costs and on any other matter that may arise.

94. The matter will be listed for mention at 10.30 hours on 15th June, 2023 for the making of final orders.