APPROVED **[2023] IEHC 331**

THE HIGH COURT

JUDICIAL REVIEW

Record No.: 2022/388 JR

BETWEEN:

C.L.

Applicant

-and-

THE DIRECTOR OF PUBLIC PROSECUTIONS

Defendant

JUDGMENT of Mr. Justice Rory Mulcahy delivered on the 20th day of June 2023

Introduction

1. In these proceedings, the Applicant seeks orders restraining his continued prosecution on one charge of violent disorder contrary to section 15 of the Criminal Justice (Public Order) Act 1994 or, in the alternative, a declaration limiting the sentencing jurisdiction of the Circuit Court to that of the District Court.

2. The basis of the application is that the Applicant has been charged as an adult in respect of an offence alleged to have been committed when he was a minor. He contends that there was culpable prosecutorial delay in charging him in respect of the offence and that he has been prejudiced by this delay. In particular, he claims that he has lost the benefit of a number of statutory protections available to minors when charged with an offence.

3. The Applicant argues that the prejudice that he has suffered outweighs the public interest in the prosecution of offences and that accordingly it would be appropriate to prohibit his further prosecution. In the alternative, he argues that some of the benefit which has been lost due to the alleged prosecutorial delay should be made good by limiting the sentencing jurisdiction of the Circuit Court to those which might have applied had he been charged as a minor.

4. The parties have each identified a significant number of cases in which the principles established by the Supreme Court in **Donoghue v DPP [2014] IESC 56; [2014] 2 IR 762** have been addressed. In that case, the Court prohibited the trial of the Applicant in circumstances where he was charged as an adult in respect of offences alleged to have been committed when he was a minor. The Court noted the importance of ensuring a speedy trial where an offence is alleged to have been committed by a minor:

> *"[27] The right to a speedy trial is a fundamental part of our criminal jurisprudence 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 s. 96 of the Act to the effect that a period of detention should only be imposed as a measure of last resort. It is undoubtedly in the interests of children and society as a whole that young offenders should be able to avail of the facilities of the juvenile diversion programme, where appropriate, and, so far as possible, to allow for early intervention with young offenders with a view to maximising the opportunity for rehabilitation. 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 B.F. v. Director of Public Prosecutions [2001] 1 I.R. 656. 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."*

5. The Court set out the exercise which requires to be conducted in this type of case. First, there must be an assessment of whether there has been blameworthy prosecutorial

delay. Where there is no such delay, then there is no basis for seeking prohibition. But establishing such delay is merely the first step:

> *"[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."*

6. As made clear in **Donoghue** and illustrated by the multiplicity of cases in which this issue has arisen, each case will turn on its own facts having regard to the alleged delay, the prejudice alleged and the public interest in the prosecution of the offence alleged.

Factual Background

7. Both parties provided a list of the relevant dates in the investigation and prosecution of the alleged offence which were largely consistent with each other. I have set out below the key dates from those chronologies:

02.06.2003	Applicant's date of birth.
23.08.2019	Date of alleged offence. Detective Garda Cogavin and Garda Burke attend incident and meet with injured party.

24.08.2019	Gardaí request CCTV footage.
28.08.2019	Injured party dies of suspected drug overdose.
29.08.2019	Detective Garda Cogavin attends Laboratory Tallaght Hospital and obtains blood samples in respect of the injured party.
	Blood samples conveyed to Dr. Margaret Bolster.
	Dr. Bolster carries out post-mortem on injured party.
	D/Garda Cogavin receives requested CCTV footage.
31.08.2019	D/Garda Cogavin identifies CL and three others subsequently charged on CCTV footage.
02.12.2019	Applicant arrested by Garda Robert Nolan and interviewed in respect of this offence. No admissions were made.
25.01.2020	Garda Statement provided (Garda Robert Nolan)
03.02.2020	Medical report received in relation to the injured party.
10.04.2020	One of the three other individuals was detained and interviewed in relation to the offence. No admissions were made.
21.04.2020	Garda statement provided (Superintendent Brian Daly)
25.04.2020	Garda statement provided (Garda Conor Garland).
05.05.2020	Dr. Bolster's post-mortem report was issued to the Gardaí.
07.05.2020	Clarification report requested by Detective Garda Cogavin
14.05.2020	Another individual (a minor) was arrested and interviewed in respect of the alleged incident.
03.06.2020	Clarification report of Dr. Bolster.
12.10.2020	Garda statement provided (Garda Brian Fahy)
17.11.2020	Garda statement provided (Garda Marie Ruddy)
25.11.2020	Garda statement provided (Garda Robert Nolan)

17.12.2020	Another individual was arrested and interviewed in relation to the offence.
28.12.2020	Garda statement provided (Garda Conor O'Neil)
03.01.2021	Garda statement provided (Sergeant Gordon Madden)
09.01.2021	Garda statement provided (Garda Conor Garland)
10.01.2021	Garda statements provided (D/Garda Cogavin and Garda Aiden Gavigan)
11.01.2021	Garda statement provided (Garda Jamie Murtagh)
	File prepared and forwarded to Juvenile Liaison Officer (JLO).
25.01.2021	Garda statement provided (D/Garda Cathal Connolly)
31.01.2021	Garda statement provided (Sergeant Peter Foley)
31.03.2021	Garda statement provided (D/Garda Fergus Burke)
20.04.2021	Garda Juvenile Liaison Officer deems Applicant unsuitable for inclusion in Juvenile Diversion Programme.
23.04.2021	File sent to the DPP.
02.06.2021	Applicant attains majority.
01.09.2021	The DPP directs a prosecution
06.09.2021	Applicant arrested and charged with offence of violent disorder
07.09.2021	A second individual was arrested and charged with the same offence.
13.09.2021	A third individual was arrested and charged with the same offence.
14.09.2021	A fourth individual was arrested and charged with the same offence.
22.09.2021	Applicant's first appearance in Court.

01.12.2021	Book of evidence served, and Applicant sent forward for trial to Circuit Court.
08.02.2022	Letter from Applicant's solicitor to the DPP seeking an explanation for the delay in his prosecution.
10.02.2022	Applicant appeared before Circuit Court.
25.02.2022	Letter from Applicant solicitor to the DPP.
31.03.2022	Applicant appeared before the Circuit Court.
31.03.2022	Letter from Applicant solicitor to the DPP.
04.04.2022	Reply from the DPP to Applicant solicitor.

8. In summary, it is alleged that the offence occurred on 23 August 2019. Two persons are alleged to have been assaulted by a group of three. Within 8 days of the incident the Applicant and three others were identified by the investigating Garda from CCTV footage as having been involved. The Applicant is alleged to have been identified as assaulting one of the injured parties with a baseball bat.

9. The other injured party died within days of the incident from a suspected drug overdose. A post-mortem was carried out and medical reports issued in February 2020 and May 2020. The investigating Garda sought a clarification in light of these reports as to whether the facial injuries suffered in the assault contributed to his death. A clarification report was received in June 2020 noting that the injuries were non-fatal but may have hastened the death of the injured party.

10. Despite being identified in CCTV footage on 31 August 2019, the Applicant was not interviewed until December 2019. The investigating Garda explains that the Applicant was also being investigated in relation to other matters and that to avoid him being arrested and detained on multiple occasions, arrangements were made with the Applicant's mother for him to attend at Ballymun Garda Station on a suitable date to deal with all matters.

11. Two other co-accused were arrested and questioned in April and May 2020, but the fourth co-accused was not arrested and questioned in relation to the incident until December 2020, following a surveillance operation.

12. Thereafter, a file was sent to the Juvenile Liaison Officer to see whether the Applicant was a suitable candidate for the Juvenile Diversion Programme in January 2021. He was deemed unsuitable on 20 April 2021 and the file was almost immediately sent to the DPP for directions. Directions from the DPP were received at the start of September 2021, after the Applicant reached his majority.

13. More generally, the investigating Garda has sworn an affidavit in which he advises that he is attached to the District Detective Unit in Ballymun Garda Station. He says that the unit is "incredibly busy" and is responsible for the investigation of the majority of serious crime in the Ballymun sub-district. He says that during the period of investigation of this incident he was involved in a number of other serious investigations, including a fatal road traffic collision, a possession of firearms incident involving juveniles and a rape offence and that these investigations also demanded significant resources and time.

Alleged Delay

14. The Applicant contends that when considered "in the round" it was possible to complete the investigation and charge the Applicant before he reached the age of majority. In this regard, it is noteworthy that almost all the steps necessary to charge the Applicant had taken place prior to his eighteenth birthday. Only the direction from the DPP was awaited by that date. When that was received on 1 September 2021, the Applicant was charged less than a week later. The Applicant makes no complaint of delay by the DPP. In his written submissions he accepts that by the time the file was sent to the DPP on 23 April 2021, there was "no reality" to the DPP making a direction prior to the Applicant reaching his majority.

15. The Applicant contends that this was not a complex investigation. The Applicant was alleged to have been identified in CCTV footage very shortly after the incident. The delay in finding one of the co-accused was not attributable to the Applicant and cannot

justify the delay in concluding the investigation in relation to him. He notes that there is no allegation that the Applicant was involved in the assault on the injured party who subsequently died and that any delay in obtaining the relevant medical evidence in relation to that injured party, even if reasonable, could not justify a delay in relation to the investigation of the Applicant.

16. The Applicant identifies 5 specific periods of blameworthy delay during the investigation that amount to a cumulative period of delay of seventeen months:

- 31.08.2019 – 02.12.2019: The period between the Gardaí identifying the Applicant and first interviewing him in relation to the offence (3 months);
- 02.12.2019 – 03.02.2020: The period between that interview and the receipt of the medical report in relation to the injured party (2 months);
- 03.02.2020 – 10.04.2020: The period between the receipt of the medical report and the arrest of one of the Applicant's co-accused (2 months);
- 14.05.2020 – 17.12.2020: The period between the arrests of the third and fourth co-accused (7 months);
- 11.01.2021 – 20.04.2021: The period for the JLO process (3 months).

17. Each of these steps, the Applicant complains, could have been quicker or, at least, there is no explanation for any delay during these periods.

18. For her part, the DPP asserts that there *was* some complexity to this investigation. Firstly, there were four co-accused, one of whom proved difficult to locate. The Gardaí had to mount a surveillance operation in order to arrest him. Secondly, one of the injured parties died shortly after the incident. Although the death was caused by a drug overdose, it was necessary to have a full understanding of the circumstances of his death. Thirdly, the Applicant was also being investigated in relation to other serious allegations which led to a delay in his being questioned.

19. More generally, she says that it is not appropriate for the Applicant to identify "pockets" of delay and aggregate them for the purpose of establishing blameworthy prosecutorial delay.

20. As explained below, for the Applicant to have avoided all the prejudice alleged to have occurred on account of his having been charged as an adult, it would have been necessary to have completed the overall investigation and to have charged the Applicant in sufficient time for a hearing pursuant to section 75 of the Children Act 2001 ("**the 2001 Act**") to have taken place in the Children Court before his eighteenth birthday. That section 75 hearing would require the Children Court to consider whether it would deal with the Applicant's case summarily notwithstanding that it is an indictable offence. In other words, it would have been necessary for the overall investigation period to have been at least four months shorter than it was. I have little doubt that was *possible*. Whether An Garda Síochána can be blamed for any delay which caused this opportunity to be lost requires a little further consideration.

21. In **Furlong v DPP [2022] IECA 85**, the Court of Appeal considered an appeal by the DPP from the High Court (Barr J) of an Order prohibiting the trial of the Applicant in circumstances which bear some similarities to the instant case. The Court (Birmingham P) noted that the High Court had conducted a detailed review of the various stages of the investigation which he said had "*much to recommend it, not least because of the assistance it offers to an appellate court which is provided with detailed information about the trial court's reasoning process*." However, the President went on to observe (at paragraph 21):

> *"For my part, I am more inclined to step back and view the situation in the round. I say this because it seems to me that in many cases, there will be a degree of swings and roundabouts, in the sense that if particular tasks are carried out with considerable expedition, this may allow the pace to drop at other stages of an investigation. Conversely, there may be cases where, if it is established that some aspects of the investigation were not conducted with the expedition that would be expected, an obligation arises to pick up the pace and make up for time lost at other stages."*

22. Whether one takes a granular approach to the assessment of the progress of the investigation or "steps back", one is driven to the conclusion that there was some blameworthy prosecutorial delay in charging the Applicant. Although it is apparent from the detailed timeline set out above that the investigation was always being progressed, what is missing is the same feature that was missing in **Furlong**, any evidence of awareness of the fact that the Applicant was approaching his majority. As stated by Birmingham P:

> *"22. What one would like to see, and what seems to me to be absent in this case, is an awareness on the part of the Gardaí that their suspect was a juvenile due to attain majority at a particular stage, and that it was desirable, if practicable, to conclude the investigation before the suspect turned eighteen years of age. In saying that, I recognise and wish to acknowledge that there will be many cases where that will not be practicable. Further investigations may be complex or sensitive. As a force, An Garda Síochána, and no doubt, individual Gardaí, have very significant caseloads and it would be unrealistic and inappropriate to approach matters as if Gardaí were in a position to deal with a particular investigation on an exclusive basis. Other cases being worked on may be of greater importance and will naturally demand higher priority. However, what concerns me in the present case is that I do not observe an awareness on the part of Gardaí that they were dealing with a suspect who was a juvenile, and linked to that awareness, a desire to deal with matters with the level of expedition required so as to make having the matter dealt with before the suspect attained his majority a realistic prospect."*

23. Nowhere is it apparent in the progress of the investigation that regard was had to the fact that the Applicant was approaching his majority. In my view, had this been a consideration for the Gardaí at all during the investigation, steps could have been taken to ensure that the Applicant was charged in a timely manner.

24. For this purpose, I do not accept, insofar as it is contended otherwise by the Applicant, that it would have been appropriate to conclude any investigation without having obtained all necessary medical evidence regarding the deceased injured party simply because there was no allegation that the Applicant was directly involved in assaulting that injured party. The offence charged is violent disorder, and it seems clear that insofar as there was a possibility that the incident on 23 August 2019 alleged to have involved the Applicant may have in any way been a factor in the injured party's death, that was clearly a matter which needed to be fully investigated prior to any charge being preferred. The Applicant has made no complaint in relation to the period it took to gather that evidence.

25. Since the gathering of that evidence – the clarification report from Dr. Bolster – was not complete until 3 June 2020, it does not appear to me that any of the delay alleged to have occurred prior to that date could have contributed to the delay in the Applicant being charged. In any event, insofar as there was a delay in questioning the Applicant

in relation to the incident the subject matter of these proceedings, this seems to have been occasioned by an attempt to facilitate the Applicant by interviewing him in relation to a number of matters at the same time. I do not agree with the Applicant's contention that I must ignore this explanation for any delay in interviewing the Applicant by reason of section 48 of the 2001 Act, which renders certain admissions and facts in relation to the Juvenile Diversion Programme inadmissible. The evidence relied on by the Respondent is only of the timing of interviews in relation to other investigations – it does not involve any evidence of any alleged criminal behaviour by the Applicant, still less of criminal behaviour in respect of which the Applicant has been accepted to the Juvenile Diversion Programme that might fall within the exceptions to the admissibility of evidence identified in section 48.

26. Thus, it does not seem to me that there was blameworthy delay on the part of the prosecution up to 3 June 2020. However, the prosecution was required to be mindful at that point that the Applicant had just turned seventeen and that it had already taken 10 months to progress the investigation to that point. It was, in my view, practicable to have concluded the investigation from that point in sufficient time to have charged the Applicant well in advance of his eighteenth birthday.

27. In this regard, although some Garda statements were taken during the six months between the receipt of the clarification report from Dr. Bolster and the interview of the final co-accused, the investigation seems to have fallen into abeyance pending that co-accused being located. I accept entirely that the Gardaí were taking positive steps to locate that co-accused and even mounted a surveillance operation, but time was running as far as the Applicant was concerned and steps could and should have been taken to address this.

28. To have allowed more than six months to elapse in the investigation of the Applicant for this reason may have been justifiable if the Applicant had not been approaching his majority, but it seems to me that it amounts to blameworthy delay when that fact is taken into account. Put another way, in simply allowing that period to elapse with nothing of substance happening as regards the investigation *of the Applicant*, the Gardaí failed to show an awareness of the significance of the fact that the Applicant's majority was approaching. Had there been such an awareness, it might, for instance, have been

possible to have commenced the JLO process in respect of the Applicant sooner, thus facilitating the completion of the investigation much earlier. Section 23 of the 2001 Act regulates admission to the Juvenile Diversion Programme. There is nothing therein which required all potential co-accused to have been identified, located, and interviewed prior to consideration being given of admission to the Programme of another co-accused. Had the Applicant's file been referred to the JLO during the six-month period after Dr. Bolster's report was received, it seems likely that the Applicant could have been charged in sufficient time prior to his eighteenth birthday for a hearing pursuant to section 75 of the 2001 Act to take place.

29. As the authorities make clear, delay by itself is not sufficient to ground a claim for prohibition, an applicant must put something more 'in the balance'. In this case, the Applicant points to the loss of statutory protections which would have been available to him under the 2001 Act.

Alleged Prejudice

30. The Applicant alleges the loss of a number of statutory protections which would have been available to him had he been charged as a minor. The protections afforded by the 2001 Act are a statutory recognition of the different considerations which apply to the prosecution of children. As observed by O'Malley J in **G v DPP [2014] IEHC 33**:

> *"91. The starting point for the discussion must be the acknowledged existence of the special duty imposed upon the prosecution authorities to deal expeditiously with cases against children and an examination of the rationale for such a duty. This involves, to some extent, a statement of the obvious.*
>
> *92. 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. Further, it has been accepted since, at least, the enactment of the Children Act of 1908, that the fact that these aspects of personality are still developing means that intervention at an early stage, rather a purely punitive approach, may assist in a positive outcome as the child reaches adulthood.*
>
> *93. This is not to say that the law regards adults as incapable of development or change - the principle of rehabilitation is a cornerstone of sentencing and penal policy. It is an acknowledgment of the fact that a child is in the process*

of development. It is the policy of both the legislature and the courts, therefore, to assist in that process in a positive way where practicable. This policy is one that respects both the rights of the child as an individual and the public interest in steering a child offender into a more law abiding path.

94. It is for these reasons that the Children Act, 2001 provides the range of protections that it does. For example, the provisions in relation to anonymity do not just protect children, guilty or innocent, from what might for them be the intolerable burden of publicity. They also ease the process of rehabilitation in the case of a guilty child, permitting him or her to grow to adulthood without having to deal with that burden."

31. The protections under the 2001 Act, the loss of which the Applicant relies on for the purpose of establishing prejudice, are the following:

- Loss of entitlement to jurisdictional hearing (section 75)
- Loss of anonymity (section 93)
- Loss of automatic referral to the Probation Services if convicted (section 99)
- Loss of obligation to consider detention as a last resort if convicted (section 96)

Loss of benefit of section 75 – jurisdiction hearing

32. Section 75 of the 2001 Act states:

(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.

33. In **DPP v Forde [2017] IEHC 799**, the Court (Faherty J) addressed the question of whether the reference in section 75(1) of the 2001 Act to a "child charged" included a person who was under 18 at the time of the alleged offence, but over 18 at the time of charge. The Court held that a "child charged" for the purpose of section 75 did not include a person over 18 at the time of the actual charging of the alleged offence. Moreover, the Court held that section 75(2) must also be interpreted as applying only

to persons who are under 18 at the time that any hearing pursuant to section 75 takes place:

> *"Thus, all of these subsections, insofar as they refer to 'child' must, in my view, inform how s. 75(1) is to be construed, namely that in order for the Children's Court to entertain an application to deal summarily with 'a child charged with an indictable offence...', the person must be a child at the time of charging and at the s.75 hearing. I am satisfied that 'a child charged', as set out in s. 75, means a person who is currently charged with an offence and who is at the time in question (the s. 75 hearing) under the age of eighteen. No caveat has been added that the benefit of s. 75 continues for a person over 18 years on the basis that they were a child when the alleged offences were committed."* (at paragraph 42)

34. For this reason, to have obtained the benefit of section 75, the Applicant would have to have been charged in sufficient time to facilitate the Children Court hearing to take place.

35. The significance of the statutory protection of section 75 was acknowledged by Barr J in **Furlong v DPP [2021] IEHC 326** (at paragraph 81):

> *"… the most significant of these is the loss of the opportunity to have his case considered by a District Court Judge pursuant to s.75 of the Children Act, 2001. Here is no guarantee that the District Court Judge would have accepted jurisdiction. However, the loss of that chance is a significant loss to the applicant, because had the District Court Judge accepted jurisdiction in the matter, the level of penalty would have been considerably less than that faced by the applicant on a trial on indictment in the Circuit court; a maximum sentence of one year, as against a maximum of five years in the Circuit Court."*

36. In the Applicant's case, the maximum penalty he will face is ten years, i.e. double that at issue in **Furlong**, and therefore there can be little doubt that the loss of the benefit of a section 75 hearing is a disadvantage to him. The extent to which it is a disadvantage does require some speculation as to the likelihood that the District Court would have accepted jurisdiction had a section 75 hearing taken place. In **Furlong**, the High Court accepted that there was a "*reasonable prospect of the District Court Judge accepting jurisdiction*". The Court of Appeal accepted that the High Court had been correct to approach the matter on that basis.

37. In that case, the Applicant's solicitor had sworn an affidavit to the effect that there was a "strong likelihood" that the District Court Judge would have accepted jurisdiction. The solicitor's evidence is notably more circumspect here; he refers only to the "possibility" of the District Judge accepting jurisdiction. Even this 'possibility' is premised on the District Court being swayed by a guilty plea, but without any confirmation that such a plea would have been forthcoming.

38. It seems that the District Court has accepted jurisdiction in respect of one of the co-accused and I also note that the Applicant has no previous convictions. However, given the seriousness of the offence charged and the Applicant's alleged role, including the use of a baseball bat as a weapon to beat one of the injured parties, and in light of the appropriately measured evidence of the Applicant's solicitor, it does not seem to me that it was more likely than not that the District Court would have accepted jurisdiction. Put otherwise, it seems to me that, on the balance of probabilities, the District Court would have refused jurisdiction.

39. In the circumstances, although the loss of an opportunity to make an application to have the matter dealt with summarily is clearly a disadvantage to the Applicant, I do not think that it can be given the same weight in the balancing exercise as was the loss of that opportunity in **Furlong**.

Loss of benefit of section 93 – anonymity

40. Section 93(1) of the 2001 Act provides 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.*

41. In **LE v DPP [2019] IEHC 471** an application for prohibition, the High Court (Simons J) held the benefit of reporting restrictions was not available in the case of an adult

defendant irrespective of whether the offence in question was alleged to have been committed when that person was a child:

> *"80. With respect, 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 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."*

42. This interpretation was affirmed by the Court of Appeal in **AB v DPP (unreported, Court of Appeal, Birmingham P., January 21, 2020)** and again confirmed in the Court of Appeal in **LE** at paragraph 30. Thus, the Applicant has clearly lost the protection afforded by section 93.

43. In **LE**, both the High Court and Court of Appeal accepted that the loss of anonymity was a "significant disadvantage". Although this reflects a legislative choice which is, in a sense, 'baked in' to the legislation, as no provision is made for adults charged in respect of offences alleged to have been committed when they were minors the loss must be regarded as a significant disadvantage in this case too.

Mandatory approach to sentencing

44. Section 96(2) of the 2001 Act provides:

> *(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.*

45. The Applicant relies on this provision and particularly the mandatory requirement that detention must be imposed only as a last resort in the case of minors. It is said that this amounts to a significant disadvantage. The Applicant also relies on the fact that, since the Applicant is no longer a child, the Circuit Court judge will not be obliged to request a probation report in the event that he is convicted, as required by section 99 "*where a "court is satisfied of the guilt of a child*".

46. It appears from the statutory language in both sections 96(2) and 99, that the mandatory provisions only apply if the person in question is a child at the time of sentencing. In order for this to be considered a benefit "lost" by the Applicant, it is necessary to assume that in the absence of delay, the Applicant's case would have been sentenced before he reached his majority. I am not convinced that that was ever very likely.

47. However, even assuming for present purposes that the Applicant might reasonably have expected to get the benefit of these provisions had the prosecution progressed in a more timely way, any disadvantage is one which can be ameliorated by the Circuit Court if

the issue of sentencing arises. In **Cerfas v DPP [2022] IEHC 70**, the Court (Hyland J) when considering similar concerns expressed the following view (at paragraph 33):

> *"[T]he 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."*

48. I fully accept, as noted by the High Court (Simons J) in **TG v DPP [2019] IEHC 303**, that this falls short of the statutory protections afforded by the 2001 Act, but it does, in my view, somewhat mitigate any prejudice suffered by the Applicant.

Balancing Exercise

49. The principal prejudice suffered by the Applicant is the loss of reporting restrictions in circumstances where section 93 of the 2001 Act will not apply. It does not appear to me that this prejudice can be remedied. The other prejudice relied on by the Applicant all relate to issues which will occur only if the question of sentencing arises and can, at least to a certain extent, be ameliorated by the Circuit Court, in the exercise of its discretion, having regard to the age of the Applicant at the time of the offence.

50. On the other side of the scales is the undoubted public interest in the prosecution of offences. The offence charged here is very serious. It is an offence which in the ordinary course is triable on indictment only and carries a maximum sentence of 10 years. The evidence – CCTV footage of the incident – appears strong, and the interests of the

injured party must also be considered. Although I have found that there was culpable delay in this case, it seems to me that the culpability is at the lower end of the scale; had this investigation been of a person alleged to have committed the offence as an adult, I do not think that the progress of the investigation could have been faulted.

51. It seems to me that if the Applicant's trial were prohibited, he would obtain a 'windfall' benefit escaping prosecution altogether, which he would not have obtained even had he been charged and dealt with in the District Court as a minor.

52. Taking all these factors into account, I am satisfied that the public interest in the prosecution of this serious offence outweighs the prejudice to the Applicant occasioned by the prosecutorial delay, and in particular, the loss of the benefit of section 93 of the 2001 Act.

53. For completeness, I should address the Applicant's argument that the Court should seek to ameliorate any prejudice by making an Order limiting the sentencing jurisdiction of the Circuit Court to that of the District Court; in effect, the Applicant asks the Court to mirror certain of the potential effects of a section 75 hearing. The Applicant contends that the jurisdiction to make such an Order exists and relies in that regard on the decision of the High Court (Hogan J) in **BG v Judge Murphy (No. 2) [2011] 3 IR 748**.

54. In that case, BG was charged with an indictable offence of sexual assault contrary to section 2 of the Criminal Law (Rape) (Amendment) Act 1990. His mental capacity was in doubt. The DPP consented to summary disposal in the District Court, however, the Court had a doubt as to whether the Applicant understood the nature of the offence and therefore the Applicant's fitness to plead had to be determined by the Circuit Court in light of the relevant provisions of the Criminal Law (Insanity) Act 2006. BG challenged the constitutionality of the legislation on the basis that even if the Circuit Court were to find him fit to plead he would not be able to avail of summary disposal of the trial as would have been available had there been no question as to his mental capacity; this option had been closed once he had been sent forward to the Circuit Court. BG argued that the situation discriminated unfairly against persons whose mental capacity was in doubt, contrary to Article 40.1 of the Constitution which provided for equality before the law.

55. Hogan J identified that the statutory scheme gave rise to an unconstitutional lacuna:

> *"It seems plain that, by reason of what would appear to be a mere accidental oversight in the course of statutory drafting, the Oireachtas has inadvertently failed to have proper regard to the rights and interests of those who are either mentally ill or whose mental capacity is in doubt. Specifically, it can be said that the Oireachtas has through this inadvertence failed to provide a mechanism whereby persons charged with indictable offences whose fitness to plead is later established can obtain the benefit of a guilty plea before the District Court*
>
> *[…]*
>
> *The legislation has thus unintentionally yielded an anomaly which it is impossible to justify. It follows, accordingly, that by reason of this failure, the Oireachtas has violated the constitutional command of equality before the law as required by Article 40.1."*

56. It was in those particular circumstances that the Court granted a declaration that is, in outline at least, similar to the relief sought in the present case:

> *"In the event that an accused including the applicant, in relation to whose case a District Court Judge has decided that it was suitable for summary disposal on a plea pursuant to s. 13(2) of the Criminal Procedure Act 1967 and the Director of Public Prosecutions had consented to summary disposal on a plea pursuant to the said s. 13(2), is found fit to be tried by a Judge of the Circuit Court in accordance with s. 4(4) of the Criminal Law (Insanity) Act 2006 and thereafter pleads guilty to the charge of sexual assault of a female, contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990, as amended, for the sentencing judge to apply a maximum sentence of more than the equivalent sentence that would have been available to the District Court under s. 13(3) of the Criminal Procedure Act 1967, as amended, would be to breach an applicant's constitutional right to be held equal before the law under Article 40.1 of the Constitution of Ireland."*

57. It seems to me that very different considerations apply where the Order sought is not directed towards overcoming a constitutional lacuna, but rather is directed to what might be considered, on one view, a legislative choice. It does not seem to me that it would be appropriate for this Court to trespass on the jurisdiction of the Circuit Court in relation to sentencing save in exceptional circumstances of a type which arose in BG.

58. In any event, even if there were some general jurisdiction to make an Order of the type sought, this would be a wholly inappropriate case for so doing. Such an Order rests on the proposition that the person affected has an *entitlement* to be treated in a particular

way. Hogan J so held in **BG** and concluded that the legislation breached BG's constitutional rights by not protecting that entitlement. There is no such entitlement to a limitation on sentence in this case. At most, it is an entitlement to have the District Court consider whether such a limitation is appropriate. *i.e.* by considering whether to accept jurisdiction. In this case, far from concluding that it was inevitable that the Children Court would have accepted jurisdiction, I have concluded that on the balance of probabilities the Children Court would not have accepted jurisdiction. In those circumstances, it could not be appropriate to make the Order sought.

59. Having regard to the foregoing, I refuse the reliefs sought by the Applicant.

60. I propose listing the matter at 10.30 on 11 July 2023 for the purpose of dealing with any applications in relation to costs.