

**THE HIGH COURT
JUDICIAL REVIEW**

[2021] IEHC 759
[Record No. 2020/158 JR]

BETWEEN

DEAN KINSELLA

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Ms. Justice Miriam O'Regan delivered on the 1st day of December, 2021

Issues

1. The within applicant is seeking to prohibit the continued prosecution of him by the respondent under s.112 of the Road Traffic Act 1961 as amended and further seeks to secure declarations that:
 - (a) there has been blameworthy prosecutorial delay;
 - (b) there has been a breach of his right to an expeditious trial; and,
 - (c) he has been unfairly deprived of safeguards pursuant to the Children Act 2001 (Children Act).
2. Although a claim for damages is also included this was not pursued.

Background

3. The applicant was born on 5 August 2001 and was apprehended on 19 April 2018 in respect of events currently pending before the District Court. At the date of apprehension, the applicant was aged sixteen years and eight months.
4. The applicant together with another individual were travelling on a stolen motorbike when members of An Garda Síochána signalled to them that they should stop, however, both individuals abandoned the bike and fled the scene. The applicant was chased by a member of An Garda Síochána and ultimately apprehended. The applicant subsequently admitted he was travelling on the bike but denied being the driver or that he had stolen the bike.

Jurisprudence

5. The relevant legal test was restated by Dunne J. in the Supreme Court in *Donoghue v. Director of Public Prosecutions* [2014] IESC 56 at p.7, where it was stated that there was no doubt that once there is a finding of blameworthy prosecutorial delay, a balancing exercise must be conducted to establish if there is something additional to the delay itself to outweigh the public interest in the prosecution of serious offences. The facts and circumstances of each case will have to be considered carefully. If the accused is nearing his eighteen birthday one could attach little or no weight to the fact that someone would be tried as an adult. A number of factors would have to be taken into account including the length of delay, the age of the person, the seriousness of the crime, the complexity of the case, and the nature of any prejudice relied on, in addition to any other relevant fact

or circumstance. It was confirmed that it is not enough to rely on the special duty of the state authorities to ensure a speedy trial of a child.

6. In that case and indeed in all such cases the moving party relies on the Children Act.
7. In the instant matter the applicant relies on the following provisions of the Children Act:
 - (a) Section 93(1)(a) which provides that there shall be no report which reveals the name, address or school of the child or any particulars likely to lead to their identification;
 - (b) Section 96 which provides that any penalty imposed should cause as little interference as possible with the child's legitimate activities and pursuits and should take the form most likely to maintain and promote the development of the child and should take the least restrictive form with a period of detention being imposed only as a measure of last resort;
 - (c) Section 99 where the court is obliged if it is of the view that the appropriate penalty would be community sanction, detention or detention and supervision, to adjourn proceedings to request a probation and welfare officer to prepare a report in writing.
8. The applicant states that the loss of anonymity is a most serious loss to the applicant in the circumstances.

Blameworthy prosecutorial delay

9. In the judgment of Mr. Justice McDermott in *M.S. v. DPP* [2018] IEHC 285, para.30 it is stated:

"... The assembly and submission of the file might properly be delayed by a consideration of whether the applicant was suitable for admission to the Divergence Programme and the preparation and consideration of a report in that regard. Since that process should not have taken more than four to six weeks and given that it was inevitable that he would be deemed unsuitable... the considerations of the case under the Divergence Programme should not have taken longer than six weeks..."

10. Accordingly, I take it from reliance on this judgment that in a matter where it was inevitable that the relevant individual would not be deemed suitable for admission to the programme, assembly of a file might be delayed by four to six weeks, and thereafter the consideration within the programme should not take longer than six weeks.
11. The applicant says there was a delay between the date of the offence on 19 April 2018, and 17 October 2018 when the referral to the Garda Youth Diversion Office was created. The applicant asserts this amounts to a six month period of delay. It appears to me that the applicant has not taken into account the following delay factors:
 - (1) that the statement of the owner was not taken until 15 May 2018; and,

- (2) a period of time for consideration as to the suitability of the applicant for admission to the programme.
12. It is noted that no explanation from the respondent for any delay was forthcoming and it is considered that the matter was straightforward once the statement of the owner of the motorcycle was secured.
13. Bearing in mind the views expressed by McDermott J. and reliance thereon by the applicant it appears to me (there being no suggestion that the applicant would inevitably be deemed unsuitable) that an allowance of a period of approximately two months from the date of securing of the statement of the owner would be considered reasonable and accordingly there appears to be a period of three months unexplained.
14. There was a further asserted delay between 17 October 2018 when a referral was submitted to the Garda Youth Diversion Office and a response from the programme on 31 January 2019. The applicant seeks to suggest that the entire period comprised delay by the respondent, who in turn argues that the DPP cannot be fixed with this delay period within the programme.
15. Bearing in mind the views expressed by McDermott J. aforesaid it does appear:
- (a) some allowance must be afforded for consideration of the file while within the programme, and, the intervening Christmas and holiday period; and,
 - (b) a further allowance when calculating the time in assessing blameworthy prosecutorial delay.
16. Accordingly, it does appear that there was an unaccounted delay period of approximately seven weeks – in this regard it is clear that McDermott J. did approach the time within the programme as giving rise to prosecutorial delay.
17. The third period of delay is said to be from the response of the programme on 31 January 2019 to the submission of the file to the DPP on 12 May 2019. Again the applicant seeks to include the entire period of three and a half months. It appears to me that in affording the respondent some time to prepare the file for the DPP there is an unexplained period of approximately seven weeks.
18. The final period of delay is said to be between 12 May 2019 when the DPP received the file and 16 July 2019 when the direction issued to prosecute the applicant. I am satisfied that a period of approximately one month in this straightforward prosecution is unexplained and comprises delay.
19. Based on the foregoing there appears to be a period of approximately seven months of unexplained delay.
20. The applicant was charged approximately three weeks before his eighteenth birthday.

21. Although this period is modest, without criticism of the individual gardaí involved, it does seem that the delay was potentially significant. It does appear that the progress of the file should have been expedited.
22. In *Donoghue* there was a period of one year and four and a half months between the date of finding of the heroin and the charge being preferred against the accused. In that matter the Court was satisfied as to the existence of prosecutorial delay.

Prejudice to the applicant

23. The loss and prejudice to the applicant has been set out above.
24. In *L.E. v. DPP* [2020] IECA 101 Birmingham P. accepted that the loss of anonymity (s.93 of the Children Act) comprises a significant disadvantage which should be considered in a balancing exercise.
25. The applicant argues that the facts in this case are more sympathetic to the applicant than in *Donoghue* where the applicant was found with heroin which might attract a life sentence as opposed to an offence under s.112 of the Road Traffic Act 1961 as amended, which it is argued, without trivialising it, is a minor offence as opposed to a more serious offence. In *Donoghue* the order of prohibition was granted.
26. I am not satisfied that the facts of the within matter are more sympathetic or mirror *Donoghue* in the manner contended for by the applicant for the following reasons:
 - (1) In *Donoghue* the DPP had directed that the matter might be dealt with summarily. It is of course the case that such direction did not guarantee a summary disposal of the charge.
 - (2) When the heroin was found in *Donoghue* the accused immediately took responsibility and signed an admission. His mother also signed a note reflecting the position. During the course of the subsequent interview the accused again took full responsibility for the items found. In the instant matter the applicant attempted to evade An Garda Síochána and was apprehended. An Garda Síochána will allege that he was the driver of the motor vehicle, however, this has been denied by the applicant. The applicant's account of purchasing the motorbike the previous day was particularly evasive.
 - (3) Section 75 of the Children Act was engaged and was particularly significant in *Donoghue*. At para. 17 of the judgment of Dunne J. it is stated "Birmingham J. concluded that the prospects of Mr. Donoghue staying in the District Court would have been significantly better had the case come before the Court in 2010. Thus he concluded that there had been unacceptable delay in the case giving rise to serious consequences and on that basis an injunction was granted restraining the DPP from proceeding with the trial."

27. It is clear from the foregoing that although ss. 93, 96 and 99 were also engaged in *Donoghue* nevertheless it appears that it was s.75 which tilted the balance in favour of prohibition. Section 75 has not been engaged in the instant matter.
28. In *Devoy v. DPP* [2008] IESC 13 Kearns J. in the Supreme Court commented that "It would in my opinion be extraordinary to prohibit a trial in circumstances where the defendant admits a significant amount of behaviour of a criminal nature." The applicant in that matter asserted that he was guilty of the offence and the Court was satisfied that must be seen as a factor of relevance in the balancing exercise.
29. The respondent has highlighted a number of relatively recent Superior Court judgments where notwithstanding the engagement of the Children Act 2001, nevertheless, the trial was not prohibited e.g. *Daly v. DPP* [2015] IEHC 405; *Dos Santos v. DPP* [2020] IEHC 252; *T.G. v. DPP* [2019] IEHC 303; *Ryan v. DPP* [2018] IEHC 44; *Wilde v. DPP* [2020] IEHC 385 and others.
30. In the case of *Wilde* aforesaid in the course of conducting a balancing exercise the Court addressed the argument that the offences were not serious and were to be dealt with as minor offences to be disposed of summarily before the District Court. The Court considered the argument to be well made. However, factors which militated against prohibition were that the applicant had attempted to evade custody and had assaulted three members of An Garda Síochána while in a courthouse. The Court found that there was a public interest in ensuring the integrity of court proceedings and the health and safety of those involved, and to ensure that discipline and order are maintained at courthouses. The Court was of the view that this issue was especially significant when there was no suggestion that the applicant's ability to defend the proceedings had been prejudiced by the delay. Finally, it was said that the applicant had not made a full admission. Based on these factors it was held that the balance of justice lay in favour of allowing the prosecution to proceed.
31. The relevant facts and circumstances to be taken into account might be considered as follows:
- (1) The issue of the potential to have the charges dealt with in the District Court as opposed to the Circuit Court does not arise.
 - (2) There is a loss of a statutory entitlement to have a probation report. (s.99)
 - (3) There is a loss of anonymity. (s.93)
 - (4) The possibility of a non-custodial sentence was greater when the applicant was a juvenile. (s.96)
 - (5) The applicant asserts that he has got on with his life since the relevant alleged offence.
 - (6) The applicant has made a partial admission only.

- (7) The applicant did attempt to evade apprehension by An Garda Síochána.
 - (8) There is no suggestion that the applicant's ability to defend the charge has been prejudiced by the delay.
 - (9) The injured party recovered the cost of the motor vehicle from the insurance company once it was deemed to be a write-off, however, the injured party has suffered an increase of €500 per annum in respect of their insurance premium.
 - (10) There has been a delay on the part of the prosecution of approximately seven months.
 - (11) It is not clear that the District Court proceedings would have been disposed of within eight months from the date of charging (this period affording an allowance of seven months in respect of delay and one month between the date of charging and the applicant's eighteenth birthday).
 - (12) The offence is not a very serious crime, however, it is an offence that is triable on indictment with a potential five-year incarceration penalty (in this regard it is noted that the District Court has accepted jurisdiction). A sentence of five years or more is classified as a serious offence.
 - (13) The theft of a motorcycle or motor vehicle can involve serious criminality.
 - (14) The owner of the motorcycle was robbed and suffered a loss and accordingly has an interest in the trial proceeding.
 - (15) An element of exceptionality does not appear present (*Devoy v. DPP*).
 - (16) There is a general public interest in the prosecution of criminal offences.
32. It does not appear to me in all the circumstances, and bearing the jurisprudence aforesaid in mind, that the preponderance of the weight of the instant relevant factors favours the trial proceeding and the applicant has not tipped the balance in favour of a prohibition of his trial.
33. The relief claimed is refused.