

THE HIGH COURT

[2023] IEHC 384

[Record No. 2021/333JR]

BETWEEN

YUI OROBOR

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTION

RESPONDENT

JUDGMENT of Ms Justice Miriam O'Regan delivered on 4th July 2023.

Issues

1. In these proceedings the applicant is seeking to prevent further prosecution of an offence against him under s.3 of the Non-Fatal Offences Against the Person Act 1997 as set out in charge sheet no. 22071174. The alleged offence is to the effect that he, together with two other individuals, on 28 May 2017 in Athy, County Kildare assaulted a third party (hereinafter “the complainant”) causing him harm contrary to s.3 aforesaid which left the injured party with a black eye, a split lip and a swollen head.

Background

2. The applicant was born on 1 January 2001 and accordingly was 16 years and 4 months at the date of the incident. He obtained his majority on 1 January 2019. The

applicant first appeared before the District Court on foot of the charge sheet on 23 February 2021. He is the only individual charged with the offence in circumstances where one of the other individuals cannot be located and the third individual was admitted to the juvenile liaison programme.

Although an offence under s.3 aforesaid can carry with it a penalty of up to five years imprisonment, in this matter both the District Court and the respondent have agreed that the matter can proceed in the District Court, consequently there is now a cap of one year in respect of the potential incarceration of the applicant.

The applicant's claim in damages in the event that prohibition is not granted has been withdrawn. Furthermore, although it was argued that the charging of the applicant in the instant circumstances amounts to an abuse of process having regard to the rule in *Henderson v Henderson* [1843] 3 HARE 100, it has been acknowledged on behalf of the applicant that the rule is more applicable to civil cases. The nearest comparable in relation to criminal cases being that of oppressiveness by reason of successive trials as against the accused.

Proceedings

3. In the events, briefly, the applicant's case is to the effect that by reason of culpable prosecutorial delay on the part of the respondent the applicant has lost the benefit of the protections afforded to a child under the Children's Act 2001 and in the circumstances there has been a breach of the applicant's right to an expeditious trial. Insofar as the Children's Act is concerned the following safeguards have been lost: -

- (a) right of anonymity (s.93(1)(a));

(b) right under s.96 whereby the sentence or penalty imposed would take the least restrictive form with the period of detention being imposed only as a measure of last resort; and

(c) the availability of a probation and welfare officer report in the event that community sanction potential was considered the appropriate penalty.

In respect of the period post 1 January 2019 when the applicant turned 18 years it is argued that the prosecutorial delay thereafter gave rise to prejudice by reason of the inability of the applicant to get on with his life and put this incident behind him.

4. The parties are in agreement that the Court's task is first to identify if there is blameworthy prosecutorial delay in the matter. In such event, the Court is then obliged to conduct a balancing exercise to determine if there is something additional to the delay itself to outweigh the public interest in the prosecution of serious offences.

The matters to be taken into account in any necessary balancing exercise would include but not be limited to the length of the delay, the age of the accused 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 all other relevant facts and circumstances (*Donoghue v DPP* [2014] 2 IR 762).

5. In *BF v The Director of Public Prosecutions* [2001] 1 IR 656, Geoghegan J indicated that where a criminal offence is alleged against a child there is a special duty on the state authorities over and above the normal duty of expedition to ensure an expeditious trial. This too must be weighed in the balance in the event of a balancing

exercise.

6. Leave to maintain the within proceedings and amend the initial statement of grounds was granted on 23 April 2021. At that time the applicant's address was the Midlands Prison and his solicitor swore the grounding affidavit bearing date 15 April 2021. The only affidavit furnished herein by the applicant is that of 9 April 2021 being an affidavit of verification of the content of the grounding affidavit of his solicitor Ms McManus.

7. Although in para. 2 of the statement of grounds it is suggested that the culpable prosecutorial delay has given rise to a real and unavoidable risk of an unfair trial, however this line of prejudice was not pursued in submissions.

8. In the grounding affidavit of Ms McManus aforesaid at para. 5 it is recorded that on 23 February 2021, when the matter came before the District Court, the district judge enquired as to the reason for the delay and the prosecuting member stated that this delay was not in any way attributable to the applicant. This averment has not been countered in the affidavit of Sergeant Paul Daly of 12 November 2021 in support of the statement of opposition. Ms McManus states that she was instructed that the applicant was separately prosecuted and effectively acquitted of the charge arising from the same event which had been finalised in Athy District Court on 10 September 2019.

At para. 8 of the grounding affidavit, Ms McManus states that in fact the allegation of assault on a Ms M was ultimately struck out for want of prosecution.

In this regard, it is argued by the respondent that the applicant was the only accused involved in the Ms M assault, which resulted in a speedier conclusion of the investigation and therefore could not be considered the same event notwithstanding that the alleged assault on Ms M occurred on the same evening.

In para. 9 of the grounding affidavit, Ms McManus indicates that the delay and default on the part of An Garda Síochána is more difficult to comprehend where the applicant has been before the courts on a number of occasions in recent times and has been in custody awaiting trial for unrelated offences since 27 July 2020 in respect of an alleged assault and threats. Since 11 March 2021 the applicant has been serving a custodial sentence of nine months for assault causing harm. The applicant received a six-month sentence for criminal damage on 28 July 2020 and was remanded in custody with consent to bail in respect of a charge of threat to kill on 18 June 2020. The respondent in turn refers to this litany contained in para. 9 aforesaid as evidence that any breach of a right to anonymity is seriously diluted if not eliminated.

9. In the affidavit of Sergeant Daly, the deponent identifies that at the time of the investigation of this incident he was involved in forty other investigations and was part of a team investigating a number of serious historical sexual abuse cases involving three juvenile complaints. In addition, he was on restricted hours and duties due to recovery from a serious foot injury.

At para. 6 Sergeant Daly states that he made a number of enquiries in an attempt to locate witnesses and discovered a particular witness from whom he took a statement on 6 August 2017.

The first summons against the applicant issued on 7 July 2018 and in accordance with para.15 of Sergeant Daly's affidavit it is stated that on 21 February

2019 the summons was returned due to an inability to locate the applicant at the address in which the applicant furnished. Thereafter in paras. 16 to 18 reference is made to the reissue of the summons on 4 June 2019 and 7 December 2019 and again on 21 May 2020.

10. Ms McManus responded to Sergeant Daly's affidavit aforesaid by a replying affidavit of 8 February 2022 when she complained that she did not accept that other duties was a proper excuse for the delay and further identified at para. 5 that there was no attempt to serve the summons on her. She suggested that the applicant resided in Athy and it would not have been difficult to locate him in the handful of housing estates where the applicant could have been residing.

The respondent complains that these averments are vague, general and also there is no evidence before the court to the effect that the respondent knew that Ms McManus acted for the applicant.

At para. 6 Ms McManus says that the applicant could easily have been discovered if enquiries were made by the respondent of the Irish Prison Service.

11. There is a further affidavit of Sergeant Daly of 27 April 2022 limited to the effect that summonses once applied for are sent to the court for processing before being sent to the relevant garda station for service. An investigating garda only finds out about the service or non-service when either the summons is returned, or PULSE has been updated to reflect the non-service.

Timeline

12. The complainant made a complaint to An Garda Síochána on 28 May 2017 and two days later forwarded pictures of his injuries. Thereafter, enquiries as to witnesses were made and a statement from a witness was taken on 6 August 2017. On 5 October 2017, there was a referral to the juvenile liaison officer and on 15 October 2017 a voluntary caution statement of the applicant was made, in which, a partial admission was made by the applicant.

On 17 November 2017, the applicant was charged in respect of the alleged assault on Ms M.

On 22 February 2018, a voluntary cautioned statement of one of the other two individuals charged with the instant offence was taken and that individual was subsequently admitted to the juvenile liaison programme.

On 7 May 2018, a file was forwarded by the investigating garda to his supervising sergeant which resulted in a direction to summons the applicant on 20 June 2018. In the meantime, on 28 May 2018 there was a direction from the juvenile liaison office to the effect that the applicant was unsuitable.

On 7 July 2018, the summons was applied for. Successive summonses issued as aforesaid without having been served. Ultimately on 23 February 2021 the applicant was charged with the offence before the District Court and on 19 April 2021 the within judicial review proceedings were initiated.

Blameworthy Prosecutorial Delay

13. The within incident occurred on 28 May 2017 and the applicant was subsequently charged with the offence on 23 February 2021, three years and eight months after the offence notwithstanding that the statement of complaint was made on the date of the alleged incident. There was a period of approximately nineteen months

between the date of the alleged incident and the applicant attaining his majority and a further period in excess of two years before the applicant was charged with the offence.

The investigation was relatively straightforward, and the initial delay appears to have been securing a voluntary cautioned statement from one of the other individuals involved in the incident which occurred on 28 May 2017. There was also an issue with securing CCTV which might assist in the investigation.

14. Given that by February 2018 a statement of a witness, a statement of the applicant and a statement of one of the other two individuals involved was to hand, it is not clear why the file was not forwarded to the prosecuting garda's superior prior to 7 May 2018. Accordingly, there does appear to be approximately a two and a half month delay in this regard. Notwithstanding that the direction from the juvenile liaison office did not issue until 28 May 2018, it does appear to me that in the events up until that date the total period of what might be considered blameworthy prosecutorial delay was a period of approximately two and a half months.

The direction to summons the applicant did not issue until 20 June 2018, some three weeks later, and the summons was not applied for until 7 July 2018. The only evidence between this date and the return of the summons on 21 February 2019 is contained in para.15 of Sergeant Daly's first affidavit to the effect that it was returned due to an inability to locate the applicant at the address on the summons, that being the address on which the applicant claimed to be residing.

Thereafter, the successive summonses were issued and the applicant ultimately charged on 23 February 2021. The nature of any intermediate investigation by the gardaí to locate the applicant has not been identified. Accordingly, there does appear

to me to be blameworthy prosecutorial delay after the issue of the summons on 7 July 2018 of at least four months prior to the applicant attaining his majority. The subsequent period of just over two years until the applicant was charged on 23 February 2021 remains unexplained and in my view comprises an additional period of culpable prosecutorial delay.

15. Although the period of approximately six and a half months delay prior to the applicant attaining his majority might appear modest, nevertheless, it was such that if such delay had not occurred it is possible that the applicant would have been dealt with as a minor in the Children's Court. As previously indicated the final two-year period of delay, identified aforesaid, was said to be prejudicial to the applicant because of his inability to get on with his life and put this matter behind him. Para 9. of the grounding affidavit of Ms McManus is particularly relevant in this respect, as is the fact that there is no affidavit of the applicant on this issue.

16. I am satisfied that no case has been presented on behalf of the applicant, on the balance of probabilities, that pursuing a summons against the applicant in respect of the subject incident as opposed to the inclusion of this charge in the charge against the applicant concerning Ms M, is oppressive, they being different alleged offences and different alleged perpetrators involved.

Balancing Exercise

17. The following matters are relevant in determining if the prosecutorial delay aforesaid together with the asserted prejudice as set out above outweigh the public interest in the prosecution of the within offence: -

(1) although a s.3 offence might potentially carry with it imprisonment of up to five years the fact that it has been agreed that the matter could proceed on a summary basis has reduced the potential penalty to a one-year imprisonment at most;

(2) although the matter, if it proceeds, will proceed in the District Court on a summary basis, there will be a gap in excess of six years since the date of the alleged offence and the date of a summary disposal before the District Court;

(3) there is a special duty to expedite the prosecution in respect of children or young adults;

(4) the workload of Sergeant Daly and his injury during the course of the investigation;

(5) the prejudice to the applicant for the period 1 January 2019 to date of service of the charge on him on 23 February 2021 is said to have prevented the applicant from getting on with his life although in the grounding affidavit of Ms McManus of 13 April 2021 at para. 5 she states that the applicant instructed her that he had assumed that the matter was concluded and he had been separately prosecuted and effectively acquitted arising from the same event which had been finalised on 10 September 2019. In these events, coupled with the content of para 9. of the grounding affidavit and the lack of affidavit by the applicant in this regard, it is difficult to see how the outstanding charge had the asserted impact of an inability to get on with the applicant's life;

(6) the investigation was not a complex one;

(7) the applicant was aged 16 years and 4 months at the date of offence;

(8) the applicant has lost the right to anonymity which would have been available to him under the children's legislation. However, unlike the applicant in *JS v DPP* [2023] IEHC 275, such loss is not as oppressive or prejudicial than if the applicant since his majority had not come to the attention of An Garda Síochána or was not convicted or charged with other offences which might be recorded or reproduced in the media or online. This is not, as contended for by the applicant in submissions, an additional penalty for those subsequent offences, but rather, a reflection of the reality of the situation.

The victim of the assault has an interest in the trial proceeding;

(9) there is no evidence that delay has impaired a fair trial;

(10) there is a general public interest in the prosecution of criminal offences;

(11) although the ability of a non-custodial sentence was far greater when the applicant was a juvenile under sentencing guidelines the trial judge must consider the matter on the basis of the age of the applicant at the date of the offence.

(12) there is a loss of a statutory right to have a probation report although it is not the case that a probation report would not necessarily be ordered;

(13) the applicant has made a partial admission only in his statement to An Garda Síochána and has not indicated whether or not he intends to plead guilty;

(14) the total prosecutorial delay amounts to two years and six and a half months;

(15) in my view no element of exceptionality arises;

(16) the possible oppression by not being included in the charge concerning Ms M has not been made out;

(17) the final two years of prosecutorial delay did not in my view amount to any additional prejudice on the applicant for the reasons set out in para 17(5) above.

18. It is accepted that the onus is on the applicant to tip the balance in favour of prohibition of the trial as opposed to allowing the trial to proceed.

19. Having regard to all of the foregoing it does appear to me that in the instant circumstances the applicant has not established that the preponderance of the above factors favours a prohibition of his trial and in those circumstances the relief claimed is refused.

20. As this judgment is being delivered electronically, with regards to the issue of costs, as the respondent has been entirely successful, it is my provisional view that they should be entitled to their costs, to be adjudicated in default of agreement. As the parties have not had an opportunity to make submissions as to costs, I shall allow the parties the opportunity to make written submissions of not more than 1,000 words within 14 days of this judgment being delivered should they disagree with the order proposed. In default of such submissions being filed, the proposed order will be made.