APPROVED JUDGMENT

THE COURT OF APPEAL
CIVIL

Court of Appeal Record No. 2024/140

Kennedy J. **Neutral Citation Number [2025] IECA 278**

Meenan J.

Collins J.

Oscar (A Pseudonym)

APPLICANT/APPELLANT

-AND-

THE DIRECTOR OF PUBLIC PROSECUTIONS, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

Court of Appeal Record No. 2024/158

THE DIRECTOR OF PUBLIC PROSECUTIONS, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS/APPELLANTS

-And-

Oscar (A Pseudonym)

APPLICANT/RESPONDENT

JUDGMENT of Ms. Justice Isobel Kennedy delivered on the 16th day of December 2025

Introduction

1. This is an appeal brought by the appellant from the judgment and orders of the High Court (Simons J., [2024] IEHC 279) dismissing his application to restrain the respondents from continuing with a prosecution against the appellant on a charge of defilement contrary to s.3(1) of the Criminal Law (Sexual Offences) Act 2006 ("the 2006 Act") and a charge of sexual exploitation contrary to s.3 of the Child Trafficking and Pornography Act 1998, as amended by s.6 of the Criminal Law (Sexual Offences) (Amendment) Act, 2007 and as substituted by s.3(2) of the Criminal Law (Human Trafficking) Act, 2008.
2. The appellant sought and was refused a declaration that s.3 of the 2006 Act was unconstitutional, as well as a declaration that s.3(8) of the 2006 Act must be interpreted to have application where an accused reasonably believed the child complainant to be over 15 years of age and within 2 years of age of the accused.

3. I will refer the individual to whom Simons J. gave the pseudonym "Oscar" as the appellant, and the respondents as "the Director".
4. The Director cross appeals against part of the orders made, however, it was agreed that this be left to another date and so this judgment addresses the appellant's appeal only.
5. The issues in this appeal are to be found in the fact that the appellant was 15 years old at the time of the alleged offences and therefore a child. The primary relief sought and the focus of the within appeal concerns the injunctive relief.
6. The appellant was 15 years of age at the time of the alleged offending and the complainant was 12 years of age. His arrest, interview and charge all occurred prior to his 18th birthday.
7. The judgment in *People (DPP) v PB* [2025] IESC 12 was delivered after the High Court judgment in the within appeal. *PB* concerned the interpretation of s.93(1) of the Children Act 2001 ("the 2001 Act"), and, as this appellant was charged with the alleged offences prior to his 18th birthday, reporting restrictions will continue to apply throughout the proceedings and beyond.
8. The High Court found that there were certain periods of culpable prosecutorial delay, specifically a period of 3 ½ months, being the date from the specialist interview to the date of the appellant's arrest, and a period of 10 months after the file was submitted to the Director's office and the date of charge. The appellant contends the judge ought to have found greater periods of culpable delay. However, the Director submits that the judge in fact found that the period of 2 years and 2 months between the date of the complaint to the date of charge represented a failure to comply with the duty of expedition. The High Court conducted the balancing exercise as laid down

by the Supreme Court in *Donoghue v Director of Public Prosecutions* [2014] 2 IR 762, and found that the prosecution should proceed, but subject to *ad hoc* reporting restrictions.

9. Crucially, the judge found that "*the only potential prejudice suffered by the applicant as a result of the prosecutorial delay is that he has lost the opportunity of availing of the reporting restrictions under section 93 of the Children Act 2001*." [emphasis added]

10. The appellant has filed two motions seeking to adduce fresh evidence relating to stress and anxiety, which I will address hereunder.

The Appellant's Submissions

11. The appellant submits that the prosecution of the appellant was delayed to such an extent that his continued prosecution was unjust and unfair, and not in accordance with minimal standards of constitutional justice, and that the High Court judge erred in refusing to order prohibition of the appellant's trial.

12. The appellant contends that the alleged offending should not be regarded as serious in the "*DOE*" (*DOE v. Director of Public Prosecutions* [2025] IESC 17) sense in that they are not so serious so as to require exceptional prejudice to ground prohibition. He asserts that he did not believe he was committing a criminal offence as he held the belief that the complainant was 15 years old, and that the putative absence of *mens rea* as to the age of the child complainant means that the charge of defilement cannot be regarded as serious. He contends that the learned High Court judge failed to properly address this issue.

13. To expand on the above in terms of the appellant's submissions, the appellant argues his state of mind as to the age of the complainant was of great significance in assessing the seriousness of the offence in that, "*no offence at*

all would have been committed if the facts had been as the Applicant believed them to be, when balancing the public interest in prosecution as against the culpable delay, the public interest in prosecuting him as an adult for an offence for which he did not have a guilty state of mind, is very low".

14. The appellant argues that prohibition ought to be granted on grounds of fundamental unfairness in that he was charged with an offence under s.3 of the 2006 Act (defilement of a child under 17 years). He submits that he believed the complainant to be 15 years old, and does not contend that he should be charged with an offence under s.2 of the 2006 Act (defilement of a child under the age of 15 years), but that the Director may have accepted that he was not guilty of the latter offence, and so did not charge him with that.

15. The unfairness arises, it is said, in that pursuant to s.3(8) of the 2006 Act, if a person aged 15 years has sexual intercourse with a female aged 15 years who consents, he is not guilty of a criminal offence, whereas a person who does the same act believing the female is 15 years old but where she is in fact under 15, is guilty of an offence.

16. I note that this latter proposition does not take account of the fact that the complainant was aged 12 years.

17. The constitutional challenge is related to the above issue, where the appellant contends that s.3(8) of the 2006 Act should be interpreted to mean that a 15-year-old boy who reasonably believes that the person with whom he has sexual intercourse is 15 years old is not guilty of an offence. It is argued that the section as a whole is unconstitutional on the ground that the section necessarily criminalises the appellant's conduct in that his belief as to the complainant being aged 15 is irrelevant.

The Director's Submissions

18. The Director refers to *Donoghue*, and submits that the High Court judge was correct in finding that any potential prejudice to the appellant was insufficient to outweigh the public interest, especially as there is strong public interest in the prosecution of serious offences.

19. Moreover, it is said following *DOE*, it is clear that the appellant will enjoy the benefit of reporting restrictions under s. 93 of the 2001 Act, and therefore there is no prejudice of such a calibre so as to outweigh the public interest in the prosecution of these serious charges.

20. It is noted that the High Court judge correctly interpreted s.3(8) of the 2006 Act in that it does not create a defence of reasonable mistake as to the complainant having attained the age of 15, and that contrary to what is being contended by the appellant, this does not constitute a constitutional unfairness. In dismissing the appellant's constitutional challenge, the judge had regard to the Supreme Court decision in *CC v Ireland & ors* [2006] 4 IR 1, and held that the structure of s.3 of the 2006 Act does not contradict the principles established. The Director submits that if the legislature intended to provide for a defence of reasonable mistake as to age under section 3(8), it would have done so in clear terms.

21. In relation to the appellant's contention that it fell below minimum standards of constitutional fairness for the Director to charge him with an offence under s.3 of the 2006 Act rather than an offence under s.2, as he would have had a full defence if charged with s.2, the Director submits that this argument is self-serving and amounts to little more than special pleading, and further, that this argument is entirely unsupported by any authority.

Background

22. The appellant and the complainant had been communicating through Snapchat and had not met in person. They arranged to meet and engaged in sexual intercourse. The appellant made a number of video recordings of the sexual activity on his phone.

23. Upon their return, they met members of the complainant's family who were concerned as to her whereabouts. The appellant sent the video recordings to one of the complainant's relatives in an attempt to corroborate his assertion that the sexual intercourse had been consensual.

24. A complaint was made to the Gardaí that same night; the area was searched and a number of items of interest including a condom were recovered. The Gardaí took the appellant's phone, and the appellant voluntarily provided his passcode.

25. The complainant's phone and the clothes which she had been wearing were also obtained by the Gardaí. The complainant was examined at a paediatric sexual assault unit the following morning.

26. The appellant contended in interview that he believed the child to have attained the age of 15 years.

The Statutory Provisions

27. The relevant sections of s.3 of the Criminal Law (Sexual Offences) Act 2006, as substituted by s.17 of the Criminal Law (Sexual Offences) Act 2017 provides:-

> *3 (1) A person who engages in a sexual act with a child who is under the age of 17 years shall be guilty of an offence and shall be liable on conviction on indictment—*
>
> *(2) [ ]*

(3) It shall be a defence to proceedings for an offence under this section for the defendant to prove that he or she was reasonably mistaken that, at the time of the alleged commission of the offence, the child against whom the offence is alleged to have been committed had attained the age of 17 years.

(4) Where, in proceedings for an offence under this section, it falls to the court to consider whether the defendant was reasonably mistaken that, at the time of the alleged commission of the offence, the child against whom the offence is alleged to have been committed had attained the age of 17 years, the court shall consider whether, in all the circumstances of the case, a reasonable person would have concluded that the child had attained the said age.

(5) [ ]

(6) Subject to subsection (8), it shall not be a defence to proceedings for an offence under this section for the defendant to prove that the child against whom the offence is alleged to have been committed consented to the sexual act of which the offence consisted.

(7) [ ]

(8) Where, in proceedings for an offence under this section against a child who at the time of the alleged commission of the offence had attained the age of 15 years but was under the age of 17 years, it shall be a defence that the child consented to the sexual act of which the offence consisted where the defendant—

(a) is younger or less than 2 years older than the child,

(b) [ ]

(c) [ ] [emphasis added]

The Timeline and Culpable Delay

28. There is little need to set out the timeline in any detail. The appellant submits that there were further periods of delay, however, it is apparent that the judge considered the lapse of time between the date of complaint and the date to charge constituted a failure to comply with the duty of expedition. The culpable delay predates the date of charge.

29. The alleged offending occurred 2 years and 4 months before the appellant's 18th birthday. The complaint was made immediately thereafter. Some 5 months elapsed before the specialised interview was conducted, which the High Court found was explained and was not unreasonable. A period of some 3 ½ months passed before the appellant was arrested, which the High Court found unreasonable given the time lapse of 9 months from the date of the allegations. There was a further period of 10 months delay from when the file was submitted to the Director's office to the direction to charge the appellant, and the High Court found this to be unreasonable in the circumstances, as the appellant was due to attain his majority and the case was not complex.

30. The High Court concluded that the lapse of 2 years and 2 months from the date of complaint to the date of charge constituted a failure to comply with the constitutional imperative of reasonable expedition in the instance of the prosecution of a child.

Prohibition/Injunctive Relief and the Concept of Seriousness

31. Where culpable prosecutorial delay is found in the instance of a child defendant, they will need to show that the delay has caused them prejudice

to the extent that they should not be put on trial without the need to go further and establish a real risk of an unfair trial. Ref: *DOE.*

32. *Donoghue* is the leading authority. It is by now well established that the authorities owe a special duty to a young person to ensure a speedy trial but, that culpable prosecutorial delay of itself is insufficient to prohibit a trial. Once there is a finding of culpable prosecutorial delay, a balancing exercise must be conducted to determine if there is some matter, additional to the delay itself, which serves to outweigh the public interest in the prosecution of serious offences.

33. O'Malley J. considered the concept of 'seriousness' in *DOE*. She said at paras. 123 and 124:

> *"[i]t seems that even in cases of blameworthy delay on the part of the authorities the loss of the statutory protections has generally not been seen as a sufficient ground for prohibition where the charge is considered to be serious.*
>
> *The concept of "seriousness" as deployed in Donoghue was not intended to be a legal term of art. It cannot be directly equated with the constitutional distinction between minor and non-minor offences, or with the statutory distinctions between offences that are triable summarily only and offences that can be tried on indictment. Nor can seriousness be assessed by reference to the maximum penalty available for the offence in the abstract-*"

34. O'Malley J. went on to say at para. 125:

> *"[w]hat the Court in Donoghue envisaged was a case-specific, fact based assessment which takes into account the alleged harm done by the*

offence, including harm to any victim, and the presence of any aggravating factors. The outcome of such an assessment will, in turn, feed into the consideration of the question whether the public interest in continuing the prosecution outweighs the damage done to the interests of the accused."

35. And at para. 126 et al:

"The public interest in the proper administration of justice does not depend on the outcome of an individual case so much as on the proper functioning of the process. The fact that a trial ends with the imposition of a non-custodial sentence does not, of itself, imply that the offence was not serious.

The interests of victims, in the sense of their own personal entitlement to vindication of their rights, will be an important element in the consideration of the public interest in continuing with the prosecution. When an offence has caused appreciable harm to an identifiable person or persons, the public at large has an interest in the pursuit of justice through the criminal justice system. [my emphasis].

These considerations will generally favour the prosecution of a serious crime. In such a case prohibition should be seen as an exceptional measure, to be granted only if the delay has caused serious prejudice beyond the norm."

36. Turning now to the argument being advanced by the appellant concerning the issue of seriousness of the alleged offending; he contends that the seriousness of the offending must be assessed to include the appellant's

mens rea; that the issue of the seriousness of the offending is contingent on his state of mind.

37. Gravity of an offence from a sentencing perspective is generally assessed with reference to culpability and the harm done. However, seriousness in this context is not necessarily determined with reference to a potential sentence. As noted by O'Malley J. in *DOE*, "*the public interest in the proper administration of justice does not depend on the outcome of an individual case so much as on the proper functioning of the process*".

38. What is clear is that a determination of "seriousness" is a fact-based assessment which takes the relevant facts into account, which may include the alleged harm done, including harm to any victim. I believe that reference to "harm" here in *DOE* does not include impact on the victim - as that is understood, evidence of which tends to become known at the sentence stage - but harm in the general sense. Such an assessment clearly must involve a consideration of the aggravating factors alleged.

39. The public interest in the prosecution of allegations of a sexual nature against a child is very high. Allegations of a sexual nature cover a broad span of activity in terms of gravity. The offences may extend from that of rape by an adult of a child, to that of touching outside clothing by young people proximate in age. The appellant's argument is that the issue of his *mens rea* should inform the question of seriousness.

40. His assertion that the High Court judge failed to properly engage with this proposition is one with which I cannot agree and which is not borne out by a consideration of the judgment, where the judge commences his discussion of this aspect at para. 56:

"There was some discussion at the hearing before me as to the extent, if any, to which the court of judicial review is entitled to form a view on the seriousness of the specific offences alleged by assessing the nature of the defence asserted. Counsel on behalf of the applicant submitted that the court would be entitled to take account the asserted defence of mistaken belief as to the complainant's age. The implication being that the public interest in prosecution in the present case might be less strong than in a case with more extreme facts."

41. The judge went on to state that the usual approach is to take the prosecution case at its height, and then sets out the nature of the activity alleged against the appellant.

42. The judge was of the view that, if proven, the offences would constitute serious criminal offences.

Conclusion on the Issue of Seriousness

43. There is a very high public interest in the prosecution of sexual offences against a child. As observed by Fennelly J. in the *CC* case at para. 141, *"there is a moral component in the legislative policy underlying statutory protection of young girls".* In accordance with *DOE,* the concept of seriousness is assessed on a fact-based, case by case basis and in doing so, one cannot ignore the age of the child complainant. She was very young indeed, aged 12 years, and so this is an innately serious offence alleged - having sexual intercourse with a 12-year-old child. I cannot find an error in the approach of the High Court on this aspect of the appeal.

44. This prosecution involves sexual intercourse with a minor, who as a matter of fact, was aged 12 years at the time. The public interest in such a prosecution

is very high indeed. Section 3 of the 2006 Act specifies that it is an offence to engage in sexual activity with a child under the age of 17 years. Engaging in sexual intercourse with a child of 12 years of age, if proven, is an intrinsically serious offence. The alleged offence of exploitation involving videoing the act is also an intrinsically serious offence; if proven, the videoing of sexual intercourse with a 12-year-old child cannot be said to be anything but a very serious offence.

45. The appellant's contention that the offence alleged is rendered considerably less serious because of *his* belief that the complainant was 15 years old is an entirely subjective view and ignores the other factors at play, including the age of the complainant, which in and of itself makes the offence, if proven, innately serious. Moreover, in reality, while s.3(3) of the 2006 Act provides for a defence of mistake as to age in accordance with the *CC* case, the appellant's own view that he believed the child to be 15 years of age effectively means that he had the necessary *mens rea* for the offence under s.3; he knew the complainant was under 17 years of age.

46. The proposition advanced by the appellant in written submission is that the offences alleged were not so serious so as to require exceptional prejudice to ground prohibition. It is said that the High Court judge failed to engage in a case specific, fact-based assessment of seriousness, particularly where it appears that the appellant did not believe he was committing an offence as he believed "with good reason" that the complainant was 15 years old.

47. That, in essence is the argument and one with which I cannot agree. The suggestion that a court should assess the concept of seriousness, which of its nature must be assessed objectively, from the subjective view of an applicant for judicial review would undermine the principle that the law applies equally

to all citizens. It would replace what is an objective, and thus ascertainable, test by one that was of an opaque, and therefore uncertain, character. There is, moreover, no authority for such a novel proposition.

48. It is clear that the judge approached the issue in the correct way and considered the facts alleged. He had access to the book of evidence, and undoubtedly considered it and took the prosecution case at its highest. The assessment of seriousness is a fact-based analysis of the alleged harm as a result of the offending and the presence of aggravating factors, in accordance with *DOE.*

49. I find no error in the trial judge's analysis.

Prejudice

50. Having concluded there was culpable prosecutorial delay, the High Court proceeded in accordance with the dicta in *Donoghue* to carry out the balancing test.

51. The judgment of the High Court predates the judgment of the Supreme Court in *PB.* The appellant was charged with these offences prior to his 18th birthday. The commencement of the proceedings is the date of charge and as a consequence of *PB*, reporting restrictions pursuant to s.93(1) of the 2001 Act will apply to the appellant, subject to s.93(2) of the 2001 Act. As the protection under the 2001 Act will last beyond the conclusion of the proceedings, the appellant's contention of potential prejudice in this regard falls away.

52. The High Court found this to be the only potential prejudice suffered by the appellant as a result of the culpable delay. The remaining issues of potential prejudice concern the sentencing regime applicable to a child and the

mandatory ordering of a probation report. The appellant had the benefit of a s.75 hearing under the 2001 Act.

53. As found by the High Court judge and in accordance with *DOE*, I do not find that these remaining matters cause any material prejudice to the appellant. Invariably, a sentencing court will take account of the fact that the offences were committed by the accused when they were a child, and proceed accordingly. Whilst the ordering of a probation report becomes discretionary once a person ages out, this is insufficient in my view to amount to material potential prejudice for the purposes of the balancing exercise.

54. The appellant's contention that the High Court failed to properly take into consideration the public interest in rehabilitating children is not borne out. It is clear the court applied the correct legal principles and took all relevant factors into account in refusing the relief sought.

55. One must have regard to the public interest in determining whether to prohibit a trial for a serious offence. In that respect, the entitlement of the victim to vindicate their rights is an important element. Ref. *DOE.* There is an interest in the public at large in the proper administration of justice and so in cases such as the present, constituting a serious crime, prohibition is an exceptional measure which will only be granted where the culpable delay has caused "*serious prejudice beyond the norm*". Ref. *DOE*.

Conclusion on Prejudice Alleged Before the High Court

56. It appears to me that as the appellant will retain his anonymity, this impacts in a significant way on the within appeal for injunctive relief/prohibition. I would give limited weight to residual matters of alleged prejudice contended for under the 2001 Act.

The Constitutional Fairness Argument

57. The appellant is not contending that he should have been charged with s.2 of the 2006 Act, but says that it appears he would not be guilty of that offence, as he believed the child complainant to be aged 15 years and that the Director may well have accepted that.

58. It is argued that it was fundamentally unfair to charge him with an offence contrary to s.3 of the 2006 Act where he believed the child to have attained 15 years and so, as he is charged with an offence under s.3, he is denied the defence he would have had as to mistake as to age if he had been charged with s.2 of the 2006 Act.

Discussion and Conclusion

59. This is a novel proposition and is not supported by any authority. It is entirely a matter for the Director as to what charges are directed. She may decide to prefer a lesser charge than the evidence might support, as in the present case. Such a decision will only be subject to intervention in the most exceptional of circumstances.

60. I do not agree with the appellant that the judge erred in distinguishing the decision of the Supreme Court in *GE v Director of Public Prosecutions* [2009] 1 IR 801. The facts of *GE* were entirely different, where the applicant therein was initially charged with unlawful carnal knowledge under the old regime (s.2(2) of the Criminal Law Act 1935). A decision had been taken not to charge him with rape. Following the judgment of *CC*, a *nolle prosequi* was entered on the s.2(2) count and he was subsequently charged with rape. As can be seen, there was a significant difference between the two charges preferred, whereas that just does not arise in the present case. The Director

exercised her discretion to prefer the lesser charge under s.3 of the 2006 Act, a matter quintessentially within her discretion.

61. The fact that the appellant does not have the defence of mistake as to age available to him does not render the decision to charge him with the lesser offence unfair. As a matter of reality, if he were charged with s.2 of the 2006 Act, and relied at trial on the defence of mistaken belief, it appears to me that potentially he could be convicted of the lesser offence of s.3 under the alternative verdicts rule as provided for by s.9 of the Criminal Law Act 1997.

62. There was no basis in any event in my view for the High Court to infer that the appellant would have a complete defence to an offence under s.2 of the Act, and certainly no basis for speculating that the reason the Director directed the appellant be charged with the lesser offence was that she must have accepted the appellant's contention that he believed the complainant to be 15 years old. Such speculation is entirely unfounded.

63. Insofar as an equality argument is advanced, this in effect amounts to an invitation to this Court to ignore the *actus reus* of the offence; that is, sexual intercourse with a child under the age of 17 years, who was in fact 12 years of age, and instead to consider that the appellant had the same level of knowledge regarding age as a person who had sexual intercourse with a child who was *actually* aged 15 years. In other words, to focus entirely on the *mens rea* of two individuals. For that reason, I am satisfied that the appellant has not chosen an appropriate comparator, such that the equality argument advanced on his behalf fails.

64. I am not persuaded that the High Court judge erred in his analysis or conclusions on this issue.

The Motions

65. What remains on this aspect of the within appeal is a consideration of whether to permit fresh evidence to be adduced.

66. The application for leave to apply for judicial review was made on the 4th December 2023 and the case was heard by the High Court on the 23rd April 2024. The appellant has since filed two motions, the first on the 29th November 2024 and the second on the 12th November 2025.

67. The first motion in time seeks leave to adduce evidence of a consultant neuropsychologist speaking to the adverse effects of the pending charges on the appellant. The assessment of the appellant was conducted on the 30th June 2024. From the affidavit sworn grounding the motion, it is averred that during a consultation on the 14th May 2024, the appellant's father stated that the appellant was suffering mental health issues due to delay.

68. The report of the consultant neuropsychologist concludes that the appellant has mental health difficulties present since childhood, but that the delay has exacerbated those symptoms and that he presents with PTSD as a result of the legal concerns over the past 3 years.

69. The second motion seeks to adduce a letter from a consultant psychiatrist regarding the appellant's involuntary inpatient admission due to mental health issues, and stating the chronic worry experienced by the appellant regarding the within charges. The psychiatrist notes that the unresolved charge is a major source of stress for the appellant.

70. The appellant submits that the argument was advanced before the High Court that the appellant had suffered stress and anxiety due to the delay which is now evidenced by the report and letter.

71. The Director opposes the admission of fresh evidence and contends that there is no suggestion in the neuropsychological report which could not have

been adduced before the High Court, relying on the decision in *Murphy v Minister for Defence* [1991] 2 IR 161.

Discussion

72. On a perusal of the statement of grounds, the amended statement of grounds and the order granting leave to bring judicial review proceedings, there is no ground upon which leave was sought or granted concerning stress and anxiety as a result of prosecutorial delay.

73. The only reference to stress and anxiety is contained in the High Court judgment, where the judge refers to the jurisprudence as to what may be put in the balance to outweigh the public interest in the prosecution of serious crimes. In this respect, he includes stress and anxiety, but it does not appear to have been argued in the High Court.

74. This Court was referred to the Supreme Court decision of *Lavole v O'Donnell* [2008] 1 IR 651, where Murray C.J. stated at para.18;-

> *"In principle judicial review proceedings should be confined to the grounds upon which leave was granted. This is what the rules require and is necessary for the efficient and fair conduct of litigation. It is open to a party to such proceedings to apply for an order amending or extending the grounds for judicial review but that was not done in this case. Furthermore, this court is exercising its appellate jurisdiction and is not a court of first instance."*

As a consequence, the Supreme Court declined to address an issue finding that it was neither necessary nor appropriate to do so.

75. This is the same situation which applies in the present case, and that is arguably the end of the matter. On application of the criteria in *Murphy*, the

appellant fails the second of those criteria, in that it cannot be said that the evidence would probably have had an important influence on the result of the case, as the particular ground now asserted was not a ground on which leave to seek judicial review was granted.

76. In any event, special leave would be required to adduce the neuropsychological report. The special grounds upon which the Court of Appeal will exercise its power to permit further evidence of this nature were considered in *Lynagh v Mackin* [1970] IR 180, and in *Murphy*:

1. The evidence sought to be adduced must have been in existence at the time of the trial and must have been such that it could not have been obtained with reasonable diligence for use at the trial;
2. The evidence must be such that if given, it would probably have an important influence on the result of the case, though it need not be decisive;
3. The evidence must be such as is presumably to be believed or, in other words, it must be apparently credible, though it need not be incontrovertible.

77. It appears without going into detail regarding the report that the appellant's difficulties had existed since childhood, and that is relevant in terms of assessing whether the report could have been obtained with due diligence prior to the High Court hearing. I am satisfied that it could and moreover, that if the issue of stress and anxiety due to the passage of time was a feature, then one would expect it to be included in the grounds seeking leave. It appears the issue did not arise until the 14th May 2024, following a date in the Circuit Criminal Court. I have already addressed the second criterion.

78. The issues front and centre in the present case were those which arise in cases of minors charged with offences where there is a lapse of time, and so reach majority by the time the matter comes to trial. While the first motion issued prior to the judgment in *PB,* leaving aside the constitutional challenges, the entire focus of the within proceedings rested with the loss of procedural safeguards when one ages out.

79. The appellant cannot now seek to mend his hand by recasting his case.

80. No special leave is required to admit the material the subject of the second motion, and the Court has a discretion to admit the evidence in the interests of justice. This is particularly so if such evidence could have an important bearing on the outcome of the appeal.

81. It is clear that the letter discloses that the appellant is in a difficult situation from a mental health perspective, however, the situation remains that if stress and anxiety were attributable to the delay in the proceedings, one would have expected that to form part of the grounds seeking leave. Setting that requirement to one side for the moment, it appears from the letter that the appellant has a recent diagnosis of a mental health disorder. It is said that stressors contributed to an episode of mental ill health.

82. In order to succeed on the basis of stress and anxiety, an applicant needs to have evidence that the delay itself has caused levels of stress and anxiety beyond that which a person facing a criminal charge could be expected to feel.

83. It is most unfortunate that the appellant has a mental illness recently diagnosed. However, while stress exacerbates his condition, it has not been shown that the delay in charging the appellant has caused him the type of

stress and anxiety which when placed in the balance would necessitate the prohibition of the trial.

84. Accordingly, I reject the applications to admit fresh evidence.

Constitutional Issues

85. In summary, the reliefs sought are as follows:

> ***"A declaration of unconstitutionality of s.3(1) of the 2006 Act*** *due to the failure to provide for a defence of honest but mistaken belief that the complainant was over 15 years of age, in circumstances where the Applicant has been charged with that offence and not defilement of a child under the age of 15 contrary to section 2(1) of the 2006 Act.*
>
> ***A declaration*** *that the defence under s. 3(8) must be interpreted to apply where the accused reasonably believed the child to be over 15 years of age and within 2 years of the age of the accused."* [Emphasis added]

Discussion

Mens Rea

86. The argument is advanced that the appellant did not have the necessary *mens rea* to commit the offence under s.3 of the 2006 Act, as he held a reasonable belief that the complainant was 15 years old.

87. The appellant seeks to rely on *CC* in support of his argument but as noted by the High Court Judge the crucial difference between s.3 of the 2006 Act and the issue in *CC* is that the *mens rea* requirement was "*wholly abrogated*" in the latter.

88. The core offence contrary to s.3 is engaging in a sexual act with a child under the age of 17 years, where an accused either knows this, or is reckless as to

whether the child was or was not underage. There are different ways of approaching *mens rea* which the legislature may address by creating a defence such as mistake as to age. An accused cannot be convicted of an offence contrary to s.3 absent *mens rea*. I do not find any error in the judge's analysis in this regard.

The Young Person's Defence

89. The young person's defence under s.3(8) of the 2006 Act may be pleaded only in respect of an offence contrary to s. 3, it does not apply to an offence under s.2 of the Act.

90. Consent on the part of a child is no defence, except where the child is aged at least 15 years old and actually consented to the sexual act. An accused may plead consent where at the time of the alleged offending, the accused was younger or less than 2 years older than the child. The subsection is a concession which permits a defence to be raised in a certain factual scenario.

91. The appellant submits that he should be entitled to rely upon a defence of *"reasonable mistake"* in relation to the complainant's age and that s.3(8) should be interpreted in this manner. If not so interpreted, he argues that s.3 is unconstitutional.

92. In particular, he submits that s. 3(8) is unconstitutional in that if he had a reasonable belief that the complainant was 15 years of age or older and that she had consented to sexual intercourse, he must have a complete defence to a charge under s. 3. In considering this submission I will set out, again, the relevant provisions of s. 3 of the 2006 Act as follows:-

> *3 (1) A person who engages in a sexual act with a child who is under the age of 17 years shall be guilty of an offence and shall be liable on conviction on indictment-*

(2) [ ]

(3) It shall be a defence to proceedings for an offence under this section for the defendant to prove that he or she was reasonably mistaken that, at the time of the alleged commission of the offence, the child against whom the offence is alleged to have been committed had attained the age of 17 years.

(4) [ ]

(5) [ ]

(6) Subject to subsection (8), it shall not be a defence to proceedings for an offence under this section for the defendant to prove that the child against whom the offence is alleged to have been committed consented to the sexual act of which the offence consisted.

(7) [ ]

(8) Where, in proceedings for an offence under this section against a child who at the time of the alleged commission of the offence had attained the age of 15 years but was under the age of 17 years, it shall be a defence that the child consented to the sexual act of which the offence consisted where the defendant—

(a) is younger or less than 2 years older than the child,

(b) [ ]

(c) [ ] [emphasis added]

93. The appellant is charged under section 3(1). Section 3(3) provides for a defence of mistaken belief. This statutory provision is the response of the Oireachtas to the Supreme Court decision *CC.*

94. The appellant submits that he ought to be entitled under the Constitution to a defence of reasonable mistake so as to bring him within the provisions of s. 3(8).

95. In considering this submission, I have to consider the proper interpretation of s. 3(8). As will be seen, this statutory provision is of no assistance to the appellant.

96. Under s. 3(8), even if the appellant were reasonably mistaken that the complainant had attained the age of 15, to avail of the defence of consent, the appellant would have had to be younger or less than two years older than the complainant at the time of the alleged offence. Moreover, the complainant must be at least 15 years old. These are conditions precedent to the invocation of the defence and are factual matters unrelated to any mental element on the part of an accused person.

97. At the relevant time, the complainant was 12 years of age. Whatever the appellant may have believed, she could not, at law, consent to the sexual act. As the learned High Court judge observed at para. 79 of the judgment under appeal, that is so irrespective of any mistake, reasonable or otherwise, on the appellant's part. Secondly, as a matter of fact, the appellant was neither younger nor less than 2 years older than the complainant. Thus, irrespective of what he honestly believed the age of the complainant to be, the appellant did not meet the requirements of s. 3(8).

98. For the appellant's submission of unconstitutionality to succeed, it would require the court to, in effect, rewrite s. 3(8) to include a provision for honest mistake. This is not permissible. Article 15.2.1 of the Constitution provides: -

> *"The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State."*

99. The submission of the appellant would require the court to trespass into an area clearly reserved for the Oireachtas.

100. Further, I would fully endorse the following passage from para. 77 of the judgment under appeal:-

> *"First, the existence of an express defence of reasonable mistake to age under subsection 3(3) militates against the implication of a similar defence under subsection 3(8). The omission of similar statutory language is properly regarded as deliberate. It is apparent from the structure of section 2 and section 3 of the Act that the Oireachtas was fully alive to the question of mens rea when creating the new categories of child sexual offences. This is consistent with the legislative history: the Criminal Law (Sexual Offences) Bill 2006 was introduced and enacted within a single week, in response to the judgment of the Supreme Court in CC v Ireland (No. 2) [2006] IESC 33, [2006] 4 IR 1. Against this backdrop, the omission, from subsection 3(8) of a reasonable mistake defence is significant. This is an appropriate case, therefore, to apply the maxim expressio unius est exclusio alterius, i.e., to express one thing is to exclude another. This maxim was applied by the Supreme Court (per Geoghegan J.) in CC v Director of Public Prosecutions (No. 1) [2005] IESC, [2006] 4 IR*

1 (at paragraph 160 of the reported judgment). The presence of a statutory defence (namely, that the accused person had a reasonable cause to believe that the girl was of or above the age specified) to one charge, coupled with its absence in the case of another related charge, was held necessarily to imply that the enacting legislature did not intend such a defence to be available in the case of the latter offence."

101. By reason of the foregoing, I am satisfied that the trial judge correctly interpreted s.3 of the Act, and was correct in dismissing the appellant's claim of unconstitutionality.

102. Accordingly, for the reasons stated, the appeal is dismissed.