THE HIGH COURT
JUDICIAL REVIEW

RECORD NO. 819 JR/2004

BETWEEN

EAMONN DUNNE

APPLICANT

AND
HIS HONOUR JUDGE McMAHON

RESPONDENT

AND
THE DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

Judgment of Miss Justice Laffoy delivered on 27th February, 2006.

The application
1. By order of this Court (Johnson J.) made on 8th October, 2004, the applicant was given leave to apply by way of application for judicial review for an order of *certiorari* in respect of a decision made by the respondent on 26th July, 2004. That was a decision of the respondent refusing, in the circumstances which I will outline later, to allow the applicant to change is plea from guilty to not guilty on charges which had been prosecuted in the Circuit Criminal Court. The applicant made the application for leave in person. The ground on which he was given leave to apply to have the decision quashed was stated in the order to be "whether the respondent ought to have allowed the Applicant change his plea from guilty to not guilty on Bill Number 0825/2003". In the short statement grounding his application for leave the applicant asserted that the respondent had acted in excess of and without jurisdiction, invoking the decision of this Court (Keane J.) in *Byrne v. Judge McDonnell* [1997] 1 I.R. 392 and Article 38.1 of the Constitution.

Factual background
2. The verifying affidavit sworn by the applicant merely contained an averment verifying the facts referred to in the statement. Although the Supreme Court in its order dated 1st July, 2005 remitting this matter to the High Court for determination gave the parties liberty to file such affidavits as they might agree, no further affidavit was filed by the applicant. The following outline of the factual background to the application is based on the affidavit of Dara Byrne, a solicitor in the office of the Chief Prosecution Solicitor, filed in verification of the statement of opposition of the notice party, the Director of Public Prosecutions (the Director), and the transcripts of the proceedings in the Circuit Criminal Court on 4th May, 2004, 28th June, 2004 and 26th July, 2004. The relevant facts as disclosed by those documents are as follows:

· The applicant was charged in the Circuit Criminal Court with ten offences: three counts of possession of a controlled substance, contrary to s. 3 of the Misuse of Drugs Act, 1977 (the Act of 1977); five counts of possession for the purpose of supply, contrary to s. 15 of the Act of 1977; and two counts of possession of a firearm without a certificate, contrary to s. 2 of the Firearms Act, 1925.

· The trial commenced on 24th February, 2004. The applicant was represented by a solicitor and counsel on legal aid. The applicant pleaded not guilty on all counts. On the second day of the trial the applicant changed his plea to guilty on counts 2 (possession of ephedrine) and 5 (possession of cocaine for supply). A n*olle prosequi* was entered on the remaining counts. The case was remanded to 26th April, 2004 for sentence.

· On 26th April, 2004 the applicant, who apparently appeared in person, indicated to the respondent that he wished to change his plea from guilty to not guilty. The Director objected. The applicant was asked to put the Director on written notice of his application. The matter was adjourned to 4th May, 2004 for that purpose.

· On 4th May, 2004 the applicant appeared in person before the Circuit Criminal Court. He informed the court that he had discharged his counsel. The solicitor assigned to him from the Legal Aid panel was still on record. The respondent inquired into the extent to which the applicant was waiving his right to legal aid and whether he was doing so intelligently and understandingly. He then ruled that the applicant was intelligently and understandingly waiving his right to legal aid and that the waiver extended to the rest of the case. The court then turned to the substance of the applicant's application to change his plea. The applicant had filed a written submission in the Circuit Court office and had furnished a copy of it to the Chief Prosecution Solicitor. When asked, the applicant informed the respondent that he did not wish to make any oral supplementary argument or submission. Counsel for the Director then made submissions. An issue which arose out of those submissions was that the applicant's written submission was open to the interpretation that the applicant was blaming his legal team who had represented him at the hearing for the fact that he had changed his plea. Counsel for the Director submitted that, if that were the case, the members of the legal team were entitled to notice and were entitled to be given an opportunity to be heard. The respondent accepted that submission and directed that the solicitor and counsel should be put on notice, should be furnished with a copy of the applicant's written submission and that they should be given an opportunity to respond in whatever way they thought appropriate. They were also to be furnished with a copy of the transcript of that day's proceedings. The respondent also dealt with a further point made by prosecuting counsel, namely, that the written submission did not have the status of evidence. He informed the applicant that he would have to give evidence to the court as to what went on between him and his legal team and what objection he was taking to their position. The matter was adjourned.

· The matter was next before the court on 28th June, 2004. On that occasion, the counsel who had defended the applicant at the hearing appeared. He informed the court that both he and the solicitor who had instructed him were appearing as a matter of courtesy to the court and to be of any assistance which they could within the confines of the privilege which the applicant enjoyed over his instructions to them. On the hearing of this application, the applicant informed the court that counsel was absent on that occasion. That is patently not the case. Prosecuting counsel indicated that he still did not know the basis on which the applicant wished to change his plea and that he wished to cross-examine him, which raised the issue whether the applicant was waiving the privilege attaching to communications between him and his legal team. The applicant indicated that he did not intend to rely on what transpired between himself and his lawyers. He intimated that he was relying on the decision in *Byrne v. Judge McDonnell* as the basis of his entitlement to change his plea. At the suggestion of prosecuting counsel, the respondent asked the applicant whether he wished to be legally represented by a different legal team to argue the issue. The upshot of this was that the respondent granted the applicant legal aid. At the applicant's request, the solicitor who had acted for him previously was assigned.

The respondent also granted a certificate for senior counsel. The matter was adjourned to enable the applicant to instruct senior counsel.

· The substantive application was heard on 26th July, 2004. The applicant was represented by senior counsel, who called the applicant to give evidence. In his direct evidence the applicant testified that on the first day of the trial he had received an offer via his legal team to plead to not having a certificate for an air gun and a few tablets found in the car and he was told to think about it. On the next day when he came back he was told the deal had changed and it was possession with intent to supply, but he would get a suspended sentence. He testified that he did not understand the difference between the two sets of charges. After thinking, he did not want to plead to possession with intent to supply. The applicant was cross-examined by prosecuting counsel who sought clarification as to whether the applicant was saying that he did not understand what he pleaded guilty to, or that he did understand it but that he was misled by his legal team. The applicant testified that he did not understand. When asked whether that was because it was not explained to him by his solicitor and counsel, he answered "possibly". He then testified that, as far as he was aware, he was pleading guilty to no certificate for an air gun and possession of the tablets that were in the car. Earlier in the course of cross-examination the applicant accepted that the words "with intent to supply" were part of the charge that was read out to him by the registrar before he pleaded guilty. Following the applicant's evidence, submissions were made on his behalf by senior counsel, and submissions were made on behalf of the Director. The respondent then ruled on the application, making the following points:

- The trial judge has a discretion to allow the accused to change his plea at any time during the trial, and that he was satisfied that he had a wide discretion on the matter.

- The onus is on the accused to furnish the court with good and sufficient reason why the court should accede to his request.

3. The respondent reviewed the factual context and the applicant's evidence. He concluded, in essence, that the respondent understood what he was doing when he changed his plea in the course of the trial. He distinguished the *Byrne v. Judge McDonnell* authority and he refused to allow the applicant to change his plea.

The applicant's submissions
4. The applicant, who appeared in this Court in person, informed the court that he was relying on the fact that he had given evidence before the respondent. He submitted that there was uncontroverted evidence in relation to the ambiguity of the advice he had received. It was in this context that he submitted that the counsel who represented him at the trial did not show up. As I have said, this was patently not the case. The applicant submitted that he should have been given the benefit of the doubt. There was sufficient justification for changing his plea before the respondent and he should have been afforded the benefit of the doubt.

5. The applicant referred the court to:

· Sections 13(2) and (4) of the Criminal Procedure Act, 1967. He did not explain the relevance of these provisions. Concerned as they are with the procedure where an accused pleads guilty in the District Court to an indictable offence and is sent forward for sentence to either the Circuit Criminal Court or the Central Criminal Court, they do not appear to me to have any relevance to the circumstances of this case.

· Article 38.1 and Article 40.1 of the Constitution. He submitted that any administrative difficulty which allowing an accused to change his plea could give rise to would be outweighed by the accused's right to a fair trial under Article 38.1.

· The following authorities:

- An undated newspaper report of the sentencing in the Central Criminal Court of a man who had been convicted of rape, in which the trial judge was reported as having stated that he did not, and could not, hold it against the defendant that he had pleaded guilty initially before changing his plea and undergoing the trial.

- The decision of the Court of Criminal Appeal in *The People (DPP) v. B.* [2002] 2 I.R. 246, to which I will return later.

- The decision of Keane J. in *Byrne v. Judge McDonnell*, to which I will return later.

The Director's submissions
6. Counsel for the Director submitted that whether an accused person is allowed to change his plea is a matter of discretion for the trial judge, who has a broad discretion. He submitted that the onus is on the accused to advance good and sufficient reason why he should be permitted to change his plea. He referred the court to the commentary, and the authorities cited, in Walsh on *Criminal Procedure* (Thomson Round Hall 2002) at p. 118. He submitted that the respondent was, as a matter of law, entitled to refuse to allow the applicant to change his plea. The conduct of the hearing of the applicant's application to change his plea was unimpeachable. To quash the decision, the court would have to be satisfied that the respondent strayed outside jurisdiction or failed to exercise the jurisdiction in a judicial manner.

7. It was submitted that *Byrne v. McDonnell* is distinguishable on the facts, because in that case the applicant was not represented at the material time. It was submitted that it is clear from the judgment of Keane J. that what he was concerned about was the absence of legal representation. By contrast, in the instant case, the applicant pleaded not guilty, with the benefit of legal representation he changed his plea on the second day of the trial, after prosecution evidence had been heard, and he subsequently at the sentencing stage, when the trial was over, applied to change his plea back to not guilty. Insofar as the applicant was relying on the decision in *Byrne v. Judge McDonnell* as authority for the proposition that there is an absolute entitlement on the part of an accused person to change his plea at any time up to the time of sentence, it was submitted that that cannot be the law. Such an absolute entitlement exercisable at any stage could bring the criminal justice system into disrepute and result in administrative chaos.

Conclusions
8. On the basis of the two recent Irish authorities to which the applicant referred, I am satisfied that a trial judge has a discretion to allow an accused to change his plea from guilty to not guilty before the case is disposed of by sentence or otherwise and the paramount consideration in the exercise of that discretion is to ensure that the constitutional right of the accused to a fair trial is protected.

9. In *Byrne v. Judge McDonnell*, the applicant had appeared in the District Court on a charge of failing to pay the correct bus fare. He was unrepresented. He pleaded guilty. Having heard the evidence of the bus inspector of the circumstances of the offence, including the fact that the applicant had refused to give his name and address either to the bus inspector, or later to the members of the Garda Síochána who were called to assist the bus inspector in removing the applicant from the bus and to arrest the applicant, the applicant was convicted of the offence charged and was remanded in custody until the following day for sentencing. At that stage a solicitor was assigned under the Legal Aid scheme to represent the applicant. On the following day, the solicitor requested that the applicant be allowed to change his plea and that he be allowed to call a further witness in his defence. Both requests were refused. An adjournment was also refused. The judge then sentenced the applicant to seven days' detention. The applicant's application for *certiorari* quashing the conviction and sentence was successful. In his judgment, Keane J. addressed the issue of the entitlement of an accused person to change his plea in the following passage at p. 402:

> "It is clear that, in the present case, the District Judge did not contemplate the possibility of custodial sentence until after the plea of guilty had been entered and he was made aware of the circumstances surrounding the commission of the offence. At that stage, it was clearly open to the District Judge to permit the applicant to change his plea of guilty and this was in effect what [his solicitor] urged him to do the following day. While no authorities were opened to me on the question, it seems clear that in any trial, whether summary or on indictment, the trial judge can permit a person who has pleaded guilty to change that plea at any time before the case is finally disposed of by sentence or otherwise: see *Archbold on Criminal Pleading Evidence and Practice* (1995 re-issue, vol. 1 at 2-185) and *S (an infant) v. Recorder of Manchester* [1991] A.C. 481.
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> The District Judge in the present case might very well have been entitled to take the view that the evidence of the juvenile liaison officer was relevant only to the question of mitigation and could not affect the guilt or innocence of the defendant. I am satisfied, however, that as soon as the possibility arose of a custodial sentence being imposed, the applicant should have been permitted to change his plea to one of 'not guilty' so as to ensure that he was properly represented from the beginning of his trial and not merely when it came to the question of sentence."

10. The applicant laid particular emphasis on the last sentence in the above quotation, suggesting, as I understand it, that it is authority for the proposition that an accused has an absolute entitlement to be allowed change his plea before the case is absolutely disposed of by sentence or otherwise, when there is a possibility of a custodial sentence. That, in my view, is not a correct interpretation of the decision. What Keane J. held was that a defendant in the position of the applicant, who was facing a possible custodial sentence, was entitled, as a matter of right, to legal assistance in his defence. As the applicant was not permitted to change his plea, and start again as it were, that right was breached and the conviction and sentence could not stand.

11. The breadth of a trial judge's discretion to permit an accused to change his plea is illustrated by the decision of the Court of Criminal Appeal (which, unlike a judge in this Court hearing an application for judicial review, stands in the shoes of the trial judge) in *The People (Director of Public Prosecutions) v. B.* In that case the defendant had pleaded guilty to charges of rape, sexual assault and carnal knowledge arising out of an admitted incestuous relationship he had with his half-sister. At the time he entered his pleas of guilty, both he and a senior counsel, on whose advice he acted, were unaware of a number of statements which were not in the original book of evidence and also one important exhibit, namely a form of diary kept by the complainant. The defendant sought to set aside his guilty plea in respect of the count of rape and the count of sexual assault, although he had already served his sentence in respect of the latter. The Court of Appeal set aside the convictions and ordered a retrial on the count of rape. In delivering the judgment of the court, Geoghegan J. described the case as "unique". He concluded (at p. 251) as follows:

> "However, in the light of the undoubted fact that he had strongly expressed the wish to plead not guilty to senior counsel, we think it quite probable that, had advice been given to him as to all the pros and cons of a plea, in the full knowledge of the facts, he may have pleaded not guilty. The court further considers that had the defendant pleaded not guilty, it might be that a jury would have taken the view that the complainant was a highly unreliable and possibly unstable witness.
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> In the light of this, the court considers it would not be safe to allow the conviction to stand and will order a retrial."

12. The question which arises in this case is whether, in exercising his discretion, the respondent had due regard for the applicant's constitutional right to a fair trial. In my view, he had. He took measures to ensure that, if it was the applicant's case that either his lawyers misled him or did not represent him competently, that he could make that case in a manner which would withstand challenge from the lawyers who were to be afforded an opportunity to be heard. Further, notwithstanding that the applicant earlier had chosen to waive his right to legal aid, he granted the applicant legal aid for the substantive hearing of the application to change his plea and certified for senior counsel to argue his case. He heard the evidence of the applicant and he heard submissions on his behalf. In a comprehensive, reasoned ruling he explained why he was not allowing the applicant to change his plea. He found as a fact that the applicant understood what he was doing when he changed his plea, with the benefit of legal advice. That finding was open to him and it would be wholly inappropriate for this Court to interfere with it. I am satisfied that the respondent acted within jurisdiction, judicially and with due regard to the applicant's constitutional right to a fair trial in refusing to allow him to change his plea.

Decision

13. The application is dismissed.