Neutral Citation Number: [2007] 1EHC 155

THE HIGH COURT

[2006] No. 615 J.R.

BETWEEN

J.Q.

APPLICANT

AND

THE PRESIDING JUDGE OF THE DUBLIN CIRCUIT CRIMINAL COURT, THE DIRECTOR OF PUBLIC PROSECUTIONS AND THE COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENTS

Judgment of O'Neill J. delivered the 15th day of May, 2007.

1. In these proceedings the applicant seeks by way of judicial review an order of certiorari quashing the order of conviction made by the first named respondent at the Dublin Circuit Criminal Court on 20th July, 2004 whereby the applicant was convicted of the offence of unlawfully and carnally knowing one S.H. on 24th October, 2002 contrary to s. 1(1) of the Criminal Law (Amendment) Act, 1935. In addition the applicant seeks a declaration that the sentence of four years imprisonment imposed upon him on 15th December, 2005 in respect of this offence is null and void; a further declaration that the applicant is not subject to the requirements of Part II of the Sex Offenders Act, 2001, and also an order of mandamus directing the third named respondent to amend the criminal record of the applicant so as to remove from it the aforesaid conviction.

2. The applicant's statement of grounds in respect of which leave to apply for judicial review was granted by Peart J. on 29th May, 2006, set forth two grounds for seeking the aforesaid relief.

3. These two grounds are as follows:-

> "1. The relief at D(1) – (5) is sought on the ground that:
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> (a) On 23rd May, 2006 in proceedings entitled C.C. v. The Director of Public Prosecutions Ireland and the Attorney General (Record No. 357/04, by order of the Supreme Court, s. 1(1) of the Criminal Law (Amendment) Act, 1935 was declared inconsistent with the provisions of the Constitution of Ireland and accordingly the offence with which the applicant was convicted is unknown to law.
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> 2. The relief that D(6) is sought on the ground that:
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> (a) the applicant was imprisoned on remand in the criminal proceedings the subject matter of this application on 29th June, 2005 and was sentenced (without leaving custody) to four years imprisonment on 15th December, 2005 and remains there to date and so was unlawfully detained in breach of his constitutional right to liberty in that he was at times deprived of his liberty solely on foot of criminal proceedings for the sole offence of unlawful carnal knowledge contrary to s. 1(1) of the Criminal Law (Amendment) Act, 1935, the said statutory provision being null and void and of no effect".

4. Also for hearing before me in these proceedings is a notice of motion in which the applicant *inter alia* seeks an order amending the grounds set out at E in the statement of grounds of the applicant by the addition of the following two grounds at Section E:-

> "(1) A: The applicant honestly believed, at the time of the sexual intercourse with the injured party, Ms. S.J.H., which intercourse is the subject matter of the within proceedings that the said Ms. H. was 17 years of age.
>
> (1) B: The applicant was professionally legally advised on the basis of the law as it then stood prior to his plea of guilty on 20th July, 2004 that there was no defence at law open to him in the criminal proceedings the subject matter of the within judicial review proceedings, as he was admitting intercourse in the conduct of the offence alleged against him. The applicant pleaded guilty as a direct result of the said legal advice".

5. The background to this matter is as follows.

6. On 24th October, 2004 one Ms. H. (hereinafter referred to as the "complainant") was 14 years old and the applicant had sexual intercourse with her. At the time the applicant was 23 years of age. The following day the complainant made a complaint to An Garda Síochána alleging that the applicant had sexual intercourse with her against her will. The applicant was arrested and in the course of interview with members of An Garda Síochána and in a statement, admitted having had sexual intercourse with the complainant but claimed that it was his honest, though admittedly mistaken belief, that the applicant was 17 years of age.

7. In due course the applicant was charged with the offence of unlawful carnal knowledge with the complainant contrary to s. 1(1) of the Criminal Law (Amendment) Act, 1935.

8. At paras. 18, 19 and 20 of an affidavit sworn by the applicant on 23rd November, 2006 for the purposes of grounding the notice of motion for an order giving leave to amend the statement of grounds, the applicant avers as follows:-

> 18. "I say that I had a consultation with my then solicitors, Frank Buttimer and Co. of C. prior to the month of July 2004 in respect of the charge the subject matter of these proceedings. Junior and senior counsel also attended that consultation. It was explained to me by my solicitor in the presence of counsel that admitting intercourse with the alleged injured party, which I did, that there was no defence in law open to me. I was advised that my honest belief as to her age was of no legal relevance to the question of pleading guilty or not guilty. As a result, my honest belief as to her age, was not really discussed as it was not considered relevant.
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> 19. I pleaded guilty as a result of that legal advice which I received, which was, there was no defence open to me.
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> 20. Even in mitigation in sentence my honest belief was not considered highly relevant given that I had also admitted that I thought the injured party looked 14 or 15 years of age."

9. The applicant was to be tried on one count namely that of unlawful carnal knowledge as aforesaid on 20th July, 2004. On that occasion the applicant pleaded guilty to that one count in the indictment. The applicant gave no intimation in advance of his trial of

an intention to plead guilty.

10. The applicant's case was then adjourned to the 20th January, 2005 for sentence. The applicant failed to attend court on this adjourned date and a bench warrant was issued for his arrest. The applicant was arrested near his home in C. on 29th June, 2005 on foot of this bench warrant and was lodged in custody, without bail, until 15th December, 2005 when the adjourned sentencing hearing took place. On this occasion the applicant was sentenced to four years imprisonment to date from 29th June, 2005, the date of his arrest as aforesaid. Leave to appeal that sentence was refused.

11. No application for leave to appeal within the time prescribed was made to the Court of Criminal Appeal.

12. On 23rd May, 2006 the Supreme Court in its judgments delivered that day in the case of *C.C. v. The Director of Public Prosecutions Ireland and the Attorney General* (Record No. 357/04), declared s. 1(1) of the Criminal Law (Amendment), Act 1935 to be inconsistent with the Constitution of Ireland. On 29th May, 2006 (six days later) the applicant made to this court (Peart J.) the ex parte application for leave to apply for judicial review which was granted by order of this court (Peart J.) on that date. On foot of leave granted the applicant issued his notice of motion seeking the aforesaid relief and this notice of motion was returned to this court on 21st June, 2006.

13. In the meantime on 2nd June, 2006 the Supreme Court gave its decision in the case of *A. v. The Governor of Arbour Hill Prison* (Record No. 2006 No. 694 SS) but reserved reasons for its judgment to a later date. The decision of the Supreme Court in the A. case was to hold that the detention of A. pursuant to a conviction under s. 1(1) of the Criminal Law (Amendment) Act, 1935 was not unlawful. In due course on 10th July, 2006 the Supreme Court delivered its reasoned judgments in this case.

14. These judicial review proceedings had been adjourned from 21st June, 2006 to 19th July, 2006 to await the judgments in the *A.* case. On 19th July, 2006 these proceedings were adjourned to 11th October, 2006 to give the applicant's legal team an opportunity to consider the judgments in the A. case.

15. On 11th October, 2006 this court was informed that the applicant had withdrawn his instructions from Frank Buttimer and Company and wished to instruct Joseph Cuddigan and Company Solicitors to act for him. These proceedings were adjourned for one week to allow the former solicitors to come off record. A notice of change of solicitor was filed dated 15th October, 2006.

16. On 17th October, 2006 an application on behalf of this applicant was listed before the Court of Criminal Appeal for an enlargement of time within which to appeal the applicant's aforesaid conviction.

17. On 18th October, 2006 these judicial review proceedings were adjourned for a further two weeks to 1st November, 2006 to allow the applicant's new legal team to consider the viability of the proceedings in the light of the judgments of the Supreme Court in the A. case. On 1st November, 2006 this court was informed that the applicant intended to continue with these proceedings.

18. The application before the Court of Criminal Appeal on 17th October, 2006 was adjourned to the 7th November, 2006. On 7th November, 2006 this application was adjourned until the case management list of 5th December, 2006. On 7th November, 2006 the Court of Criminal Appeal was informed by counsel for the applicant that the legality of his detention was being examined and it was not certain if the application for an enlargement would be made at all. Since then no further steps have been taken to advance any proceeding relative to this matter before the Court of Criminal Appeal.

19. The circumstances revealed in this case are in a very substantial way, similar to those in the *A.* case. The only significant difference between the two is that whereas in the *A.* case, A. acknowledged that he was aware that the complainant in that case was under the relevant statutory age, in this case the application claims that he had a honest but mistaken belief that the complainant in this case was 17 years of age.

20. Because of the very broad range of similarity it is appropriate to quote certain passages from the judgments of the Supreme Court in the A. case.

21. From the judgment of Murray C.J. as follows:-

22. At p. 5:

> "*A.*'s case was finally decided in 2004, he was found guilty, after a plea, and sentenced to prison. The case was over and the decision final. There is no appeal outstanding. In these proceedings he seeks to mount a collateral attack on that final verdict. At no stage prior to or in the course of his prosecution proceedings did he seek to impugn the lawfulness of his prosecution or conviction by reason of any constitutional frailty. A collateral attack arises when a party, outside the ambit of the original proceedings seeks to set aside the decision in a case which has already being finally decided, all legal avenues, including appeal, having being exhausted, for reasons that were not raised in the original proceedings but for reasons arising from a later court decision on the constitutionality of a statute".

23. At p. 38:-

> "The General Principle
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> In a criminal prosecution where the State relies in good faith on a statute in force at the time and the accused does not seek to impugn the bringing or conduct of the prosecution, on any grounds that may in law be open to him or her, including the constitutionality of the statute, before the case reaches finality, on appeal or otherwise, then the final decision in the case must be deemed to remain lawful notwithstanding any subsequent ruling that the statute, or a provision of it, is unconstitutional. That is the general principle.
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> I do not exclude, by way of exception to the foregoing general principle, that the grounds upon which a court declares a statute to be unconstitutional, or some extreme feature of an individual case, might require, for wholly exceptional reasons related to some fundamental unfairness amounting to a denial of justice, that verdicts in particular cases or a particular class of cases be not allowed to stand.
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> I do not consider that there are any grounds for considering this case to be exceptional to the general principle. Mr. A., like all persons who pleaded guilty to or were convicted of an offence contrary to s. 1(1) of the Act of 1935 had available a full range of remedies under the law. They could have sought to prohibit the prosecution on several grounds including

that the section was inconsistent with the Constitution. Not having done so they were tried and either convicted or acquitted under due process of law. Once finality is reached in those circumstances the general principle should apply …".

24. From the judgment of Denham J. at p. 19:-

> "In conclusion the general principle is that a declaration of invalidity of a law applies to the parties in the litigation or related litigation in which the declaration is made, and prospectively, but that it does not apply retrospectively, unless there are wholly exceptional circumstances. The applicant in this case was not a party in *C.C. v. Ireland and Others* (nor has he commenced related litigation, or any form of group action, nor are there wholly exceptional circumstances. Consequently, the applicant is not entitled to the retrospective application of the declaration of unconstitutionality".

25. From the judgment of McGuinness J. at p. 9:-

> "In common with Geoghegan J. I agree with the statement of Denham J. that a court is required to differentiate between the declaration of unconstitutionality and retrospective application of such a decision and that as a consequence it is as a matter of construing the Constitution to determine how such decision should be applied in a manner consistent with the principles of the Constitution. I also agree that when a law has been treated as a valid law, for decades it is impossible, unjust, and contrary to the common good, to reverse the many situations which have been affected over the decades. I concur with the view of Geoghegan J. that concluded proceedings based on an enactment subsequently found to be unconstitutional cannot normally be reopened. This approach is in accordance with common law principles of finality and legal proceedings.
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> I would not exclude exceptions to this normal rule but any such exception should be based on the clear demands of justice in the particular case. I do not consider that the present case on its facts is in any way such an exception. The applicant was convicted of an offence which consisted of sexual intercourse with a girl under the age of consent. At no stage has he denied that the act of sexual intercourse with this girl took place. There is no suggestion that he was denied due process in the course of his trial. He did not at the time challenge the constitutionality of the relevant section or take any of the other steps which might in law have been open to him. The case was decided in accordance with the law applicable at the time and it is not now open to attack. I agree with the Chief Justice in what he has stated concerning the general principle governing criminal prosecutions where the State has relied in good faith on a statute in force at the time and concerning the application of those principles."

26. From the judgment of Hardiman J. at p. 2:-

> "The first and salient distinction between *C.C.*'s case and this one is that *C.C.* raised his ultimately successful challenge to the constitutionality of s. 1(1) of the 1935 Act before his trial. Neither the present applicant nor any other person up to the time of *C.C.*'s case did this. For reasons discussed at length below, this is a huge obstacle in the way of any attempt to piggy back on the declaration granted in *C.C.*'s case, all the more so for an applicant who pleaded guilty in the court of trial. But the present applicant, for reasons arising from the specific facts of his case, meets a still greater obstacle first: he is relying on a declaration that is based on a *Jus Tertii*, a right which he himself never possessed …"

27. At p. 43:-

> "But when one comes to discuss the circumstances in which "force and effect" may require to be given to things done, prior to the declaration, under the struck down provision, one must approach the issues on a case by case basis (see *Murphy* at p. 315). On the facts of *A.*'s case it appears to me highly relevant that A., who fully accepted the facts alleged against him and the validity of the law which criminalised those facts, now seeks his release on the basis of a declaration to which he himself could never have been entitled. His release would be a "windfall" to which he has no entitlement in justice while at the same time being an negation of the closure, solace and vindication already accorded to a victim of a grave crime, and an affront to true social order. Having regard to the terms of the Preamble to the Constitution and of Article 40.3.1 and 2 these appear to me to be constitutional interest requiring, like the rights of the applicant, vindication by the courts in an appropriate case. They were so vindicated by the sentence imposed in November 2004, by an order requiring the detention of the applicant for a term of years. But this order must fall unless it is one of those things done under the void statute to which force and effect may still be given.

28. At p. 47:-

> "A is here attempting to do what no one has done before: to set up a declaration based on the right of a third party in order to invalidate a past and closed transaction, his criminal trial. This cannot be done because, on the long established and unchallenged jurisprudence the trial and sentence are things which require to be given continued force and effect. A's release would require a departure from that line of authority which I am satisfied there is no warrant for doing. I am satisfied, in other words that A is now and always has been detained in accordance with law".

29. At p. 50:

> "A principle
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> This judgment recalls that no one has yet succeeding in impeaching a conviction or sentence arising under a statutory provision which, later, another person succeeds in having declared unconstitutional; the principles giving rise to the established power to continue to give force and effect to such an order of the court; the very great imperative, especially in a grave case of crime against an individual person, to preserve such an order, and the totally exceptional circumstances, involving justice, oppression or departure from natural justice, which might prevent that being done in a particular case.
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> These propositions, and the constitutional provisions and decided cases on which they are based enable one to derive a principle of non retrospectively in the effect of a declaration of inconsistency or invalidity of a statutory provision on concluded cases (other than in relation to which the declaration is granted) save in exceptional individual cases of the sort mentioned. This is wholly consistent with the decisions of the courts for more than three decades, prior to which the issue does not appear to have arisen. During that period no exception to which the researches of counsel can point has been found.

I have read what the learned Chief Justice has said with regard to the general principle mentioned above, and with regard to the nature of any exceptions to it. I very respectfully agree with him and like him for the reasons given above, do not consider that the present case could possibly qualify as an exception. On the contrary the requirements of justice strongly demand that force and effect be given to the sentence justly imposed on the applicant here. The "compulsion of public order and the common good" (*Murphy*) p. 314 require no less".

30. From the judgment of Geoghegan J.:

"At p. 1;

"I believe that on any reasonable interpretation of Bunreacht na hEireann, convictions and sentences pursuant to enactments not declared unconstitutional, are at the very least deemed to be lawful at the time of the relevant court orders and must be treated as remaining lawful following on a declaration of unconstitutionality …"

31. At p. 10:-

"I entirely agree, however, with the view then expressed by O'Flaherty J. that the approach of the majority in *Murphy v. The Attorney General* while holding that the declarations of invalidity operated ab initio, produced more or less the same result. There were severe limitations on the right to recover back tax. I also agree with the conclusion of O'Flaherty J. at p. 143 of the reports stated as follows:-

"The correct rule must be that laws should be observed until they are struck down as unconstitutional".

In this connection I see no difference post 1937 legislation and pre 1937 legislation. A judge bound under his declaration on taking office to uphold the laws would not be entitled of his volition to disregard a pre 1937 statute on the basis of his or her own theory that the enactment was inconsistent with the Constitution. Unless and until there is a formal declaration to that effect those laws are binding. They are binding because they must <u>be deemed</u> to be valid and constitutional. Thus in the case of a prosecution under s. 1(1) of the Criminal Law (Amendment) Act, 1935 instituted and completed before any declaration of inconsistency had been made by this court, a "good order" interpretation of the Constitution must clearly require that orders and warrants made in a completed criminal case under the impugned provision must continue to be deemed valid. As the Chief Justice points out in his judgment, in this respect the position is no different than the common law practice which has never been constitutionally challenged, that a decision which effectively changes the law does not confer any right to reopen previous court decisions …".

32. At p. 13;

"As suggested by O'Flaherty J. the Constitution must be interpreted as deeming orders in completed proceedings prior to a declaration of unconstitutionality to be lawful. A provision that must be deemed lawful is by definition unlawful. It remains the position therefore, that s. 1(1) of the Criminal Law (Amendment), Act 1935 was notionally never in force from and after the coming into being of the present Constitution, but orders made in proceedings completed under it must as a matter of reasonable and orderly interpretation of the Constitution be deemed lawful…"

33. At p. 23;

"In conclusion, I am of the view that the concluded proceedings whether they be criminal or civil based on an enactment subsequently found to be unconstitutional cannot normally be reopened. As I have already indicated I am prepared to accept there may possibly be exceptions. But in general it cannot be done. Nor as the Chief Justice and Hardiman J. have pointed out is there any precedent for a collateral challenge of this kind. I am also firmly of the opinion that if the law were otherwise there would be a grave danger that judges considering the constitutionality or otherwise of enactments would be consciously or unconsciously affected by the consequences, something which in the view of Walsh J. and endorsed by O'Higgins C.J. should not happen."

34. In addition to the foregoing the following passages from the judgment of Henchy J. in the case of the *State (Byrne) v. Frawley* [1978] I.R. p. 349 is relevant;

"As the United States Supreme Court has held on a number of cases, it does not necessarily follow that court orders lack binding force because they were made in proceedings based on a unconstitutional statute. So far as the present case is concerned, because of its particular circumstances it is not necessary to decide whether a person who was convicted by a jury recruited under the Act of 1927 and who did not raise the unconstitutionality of the jury, either at the trial or collaterally in the High Court before conviction, could have later successfully impugned his conviction on that ground. Whether he could have done so or not, it would seem that he would now be debarred from doing so. It is now over two years since the widely reported decision of this court in the *DeBurca* case made it common knowledge that juries in criminal cases tried prior thereto were recruited under unconstitutional provisions. Yet, since then, no such convicted person (other than the prisoner in this case) has instituted proceedings to have his conviction or sentence set aside on that ground. Such retrospective acquiescence in the mode of trial and in the conviction and its legal consequences would appear to raise an insuperable barrier against a successful challenge at this stage to the validity of such a conviction or sentence."

35. From the judgment of O'Flaherty J. in the case of *Murphy v. The Attorney General* [1982] I.R. 241, the following passage is relevant;

"The correct rule must be that laws should be observed until they are struck down as unconstitutional. …from that date all citizens are required to tailor their conduct in such a way as to conform with the obligation of the particular statute. Members of society are given no discretion to disobey such laws on the ground that it might later transpire that the law is invalid having regard to the provisions of the Constitution. Every judge in taking office promises to uphold "the constitution and the laws"; the judge cannot have a mental reservation that he or she will only uphold those laws that will not some day be struck down as unconstitutional. We speak of something as having "the force of law". As such, the law forms a corner stone of rights and obligations which define how we live in an ordered society under the rule of law. A rule of constitutional interpretation which preserves the distinct status of statute law which, as such, is necessitated by the requirements of an ordered society and by "the reality of the situation" (to adopt Griffin's J.'s phrase) should have the effect that laws must be observed until struck down as unconstitutional. The consequences of striking down legislation

can only crystallise in respect of the immediate litigation which gave rise to the declaration of invalidity."

36. As was stated by the Chief Justice the general principle is that in a criminal prosecution the final decision in the case must be deemed to be and remain lawful notwithstanding a subsequent ruling that the relevant statute or a provision of it is unconstitutional, and where the accused did not seek to impugn the bringing or conduct of the prosecution on any grounds that were open to him in law, including the constitutionality of the statute. An exception to that general principle, which it would appear can only occur in the rarest of circumstances, where as was stated by Murray C.J. some extreme feature of an individual case might require, for wholly exceptional reasons related to some fundamental unfairness amounting to a denial of justice, that a verdict in a particular case or verdicts in a particular class of cases be not allowed to stand.

37. For the applicant in this case it was submitted by Mr. Devally S.C. that the circumstances revealed in the evidence in this case establish that the applicant is entitled to assert that his case is one of those exceptional cases which require that a conviction be quashed.

38. It was submitted by Mr. Devally that the applicant should only be convicted of an offence of which he was "mentally guilty" and in this regard he relied upon the judgment of Hardiman J. in the case of *C.C. and P.G. v. Ireland* (Unreported, Supreme Court, 12th July, 2005). He further submitted that the denial to the applicant of an opportunity to have raised the defence of honest mistaken belief as to the age of the complainant, and to have had an opportunity to contest that defence and have it adjudicated upon by a jury, and to be put in a position as he was, of submitting to a conviction without having had the opportunity to have had contested that defence, amounted to a grave injustice inflicted upon him, which ought not to be sheltered from redress, merely by the public interest in the upholding of "good order" in the administration of justice. In other words "good order" in the administration of justice should not subvert justice itself.

39. It was further submitted that the amendment sought in the notice of motion before the court whilst not arising out of the discovery of new facts, did arise from entirely new legal information coming from the judgments of the Supreme Court in the A case. The initial application for judicial review was brought within six days of the judgments of the Supreme Court in the C case and the application to amend was brought promptly after the judgments of the Supreme Court in the A case and well within the sixth month time period, running from the date of the judgments in the A case, as prescribed in O. 84, r. 21 of the Rules of the Superior Court 1986.

40. It was further submitted in the alternative that if the court were not disposed to grant the amendment that the applicant's complaint in respect to the denial to him of an opportunity to raise and contest the defence of honest mistaken belief as to the age of the complainant, is to be properly taken as an essential or necessary ingredient or aspect of the complaint originally made in the grounds put forward in the applicant's statement to ground his application for judicial review.

41. For the respondents it was submitted by Mr. Bermingham S.C. that the applicants application for amendment was nothing more than an ex-post facto attempt to bring his case within the ambit of the judgments of the Supreme Court in the A case; that in the original statement of grounds and verifying affidavits nothing at all was said about the advice the applicant had been given or about mistaken belief as to the age of the complainant. It was submitted that the criminal proceedings were finally and conclusively determined and that the application to extend time for appeal was brought after the judicial review proceedings were launched and has not been pursued in the Court of Criminal Appeal and hence nothing has happened to detract from the finality or conclusiveness of the applicant's conviction. It was submitted that the applicant has failed to satisfy the essential elements of the test for obtaining an amendment of grounds in a statement of grounds for the purposes of judicial review namely he does not now rely upon new facts which were unknown at the time that the application for judicial review was originally brought, and the application to amend has not been brought promptly or within the time limit prescribed for judicial review applications.

42. On the substantive issue it was submitted that the applicant embraced the jurisdiction of the court and acquiesced in his conviction and he did not raise any defence of honest mistaken belief either by the purposes of his trial or for the purpose of an appeal to the Court of Criminal Appeal, and he did not take judicial review proceedings to prohibit his trial.

43. It was further submitted that a mistake as to the age of a complainant or an honest belief in that regard is not at all an exceptional circumstance. On the contrary, it is the most common feature of this type of offence and is an essential part of the rationale underpinning the strict liability aspect of the offence.

44. It was submitted that the exception referred to in the judgments of the Supreme Court to the general principle was in reality a precautionary exception aimed at unforeseen circumstances arising out declarations of unconstitutionality of other criminal statutory provisions rather than s. 1(1) of the Criminal Law (Amendment) Act, 1935 and it was submitted that there were indeed no known or foreseeable circumstances which could create an exception as envisaged by the judgments of the Supreme Court in relation to s. 1(1) of this Act.

45. It was submitted that the circumstances revealed in this case were fairly and squarely within the ambit of the judgments in the A case and there was no real difference between the two cases and accordingly it was submitted that this applicant should be treated in a similar manner.

46. The grounds upon which judicial review is sought as set out in the applicant's statement of grounds are limited and confined to a complaint that simply by virtue of the fact that s. 1(1) of the Criminal Law (Amendment) Act, 1935 had been declared unconstitutional, that this statutory provision was null and void and of no effect and hence the offence of which the applicant had been convicted was unknown to the law and therefore he should have his liberty restored.

47. It is quite clear that these simple grounds do not advance or embrace anything beyond that. In particular it is quite clear that in these grounds there is no reliance on the complaint which is now the kernel of the applicant's case, namely that he was denied the opportunity to raise and contest a defence of honest mistaken belief as to the age of the complainant.

48. Hence I am satisfied that the complaint now sought to be made by the applicant is a new or fresh ground and is not to be treated as necessarily implied in the original grounds.

49. It is plainly obvious that this new complaint arises on foot of the judgments of the Supreme Court in the A case and seeks to place the applicant's case in that very exceptional category of cases mentioned in the judgments in the Supreme Court.

50. It was conceded by Mr. Devally that the facts relied upon for this fresh complaint are not new in the sense that they were known when the original judicial review application was launched but what was new was the legal significance of these facts in the light of

the judgments of the Supreme Court in the A case.

51. It is a fact that the state of the law as held by the Supreme Court in the A case was in fact the state of the law when these judicial review proceedings were commenced. Nevertheless, I would be inclined to accept that the consequences of a declaration on constitutionality of a statutory provision and in particular whether such a declaration had or had not retrospective effect, were not prior to the judgments of the Supreme Court in the A case, developed in our jurisprudence.

52. It would appear to me that where a significant change in the law or development in the law occurs, that this will in all likelihood attach legal significance to facts and the absence of knowledge of that significance can be of as much importance, as the knowledge of the facts themselves, in the context of reliance upon these facts for the purposes of judicial review proceedings.

53. I would accept therefore that was only after the development of the law in the judgments of the Supreme Court in the A case that the significance of the complaint now made by the applicant in regard to honest mistaken belief as to the age of the complainant, became apparent. It would in my opinion be unreal, artificial and contrary to the interests of justice to fix the applicant with a full understanding of the law as set out in the judgments of the Supreme Court in the A case, at the time that these judicial review proceedings were originally commenced on the 29th May, 2006.

54. I am satisfied that the fresh complaint now sought to be made by the applicant in regard to honest mistaken belief is based upon the facts the true significance of which was not known to the applicant until after the 10th July, 2006.

55. The notice of motion seeking the amendment is dated the 24th November, 2006. The relief sought in these proceedings is an order of *certiorari* and therefore the time limit is six months, which would have commenced run on the 10th July, 2006. Obviously the application to amend was brought within that time limit thus the residual issues is whether or not the applicant moved promptly as required by O. 84, r. 21.

56. In my view having regard to the novel nature of the issues to be considered, and the intervention of the long vacation, it could not be said that the applicant has failed to act promptly.

57. Accordingly I am satisfied that I should grant the relief sought in the notice of motion dated the 24th November, 2006 and permit the amendments sought.

58. As is clear the nature of any exception to the general principle outlined by Murray C.J. in the *A* case must be of a very rare nature indeed. Otherwise a conviction obtained in accordance with the law prevailing at the time cannot be set aside. In my view the circumstances advanced by the applicant as being exceptional in this context fall far short of what is required. I agree with the submission of Mr. Bermingham that in cases of this kind, an honest mistaken belief as to the age of the complainant it is not exceptional at all. To allow circumstances such as this to be considered as "exceptional" would be to call in question the validity of very large numbers of convictions under s. 1(1) of the Act of 1935. Clearly nothing of this kind was envisaged in the judgments of the Supreme Court in the A case.

59. As was said in the judgments in the Supreme Court an applicant such as in this case is not entitled to the benefit of a declaration of unconstitutionality obtained by another litigant in separate litigation, and no precedent has ever existed for so doing. If it were the case that this could be done it would catastrophically undermine the fundamental principle that there must be finality and conclusion to all court proceedings civil and criminal.

60. In this case the applicant has no complaint whatever to make about the conduct of the criminal proceedings in which he pleaded guilty to this offence. It is not disputed that the conviction against him was in all respects in accordance with the law as it was known at the time of his conviction. For the reasons which are set out amply in the judgments of the Supreme Court in the *A* case, notwithstanding that the statutory provision under which he was convicted was found to be unconstitutional and not carried forward as part of our law after the 1st January, 1937, his conviction has to be deemed to have been lawful and cannot now be set aside unless the rarest and most exceptional circumstances are shown to exist.

61. Clearly in the my opinion the applicant has failed to do this and hence this application for judicial review must be refused.