Neutral Citation Number: [2011] IEHC 271

THE HIGH COURT

2010 333 EXT

BETWEEN/

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

APPLICANT

- AND -

KRZYSZTOF SLIWA

RESPONDENT

JUDGMENT of Mr Justice Edwards delivered on the 6th day of July 2011

Introduction.
The respondent is the subject of a European Arrest Warrant issued by the Republic of Poland on the 9th of January 2007 and his surrender is sought so that he may be prosecuted in Poland for the single offence particularised in the warrant. That warrant was subsequently endorsed for execution by the High Court on the 30th of August 2010 in this jurisdiction. The respondent was arrested on the 14th of December 2010 by Garda John Butler at 43 Ballmany Mews, Newbridge, Co. Kildare, but does not consent to his surrender to the Republic of Poland. Accordingly, this Court is now being asked by the applicant to make an Order pursuant to s. 16 of the European Arrest Warrant Act, 2003 as amended (hereinafter referred to as "the Act of 2003") directing that the respondent be surrendered to such person as is duly authorised by the issuing state to receive him. In the circumstances the Court must enquire whether it is appropriate to do so having regard to the terms of s.16 of the Act of 2003.

The respondent, as is his entitlement, does not concede that any of the requirements of s. 16 aforesaid are satisfied. Accordingly, as no admissions have been made, the Court is put on inquiry as to whether the requirements of s. 16 of the Act of 2003, both controversial and uncontroversial, have been satisfied and this Court's jurisdiction to make an order directing that the respondent be surrendered is dependant upon a judicial finding that they have been so satisfied. In so far as specific points of objection are concerned, the Court is required to consider the following objections:

> (i) the proposed surrender of the respondent will expose him to double jeopardy in violation of his constitutional right to fair procedures under Irish law, contrary to section 37(1)(b) of the Act of 2003;
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> (ii) the proposed surrender of the respondent would be incompatible with the State's obligations under the European Convention on Human Rights, in particular Article 4 of Protocol 7.

Uncontroversial s. 16 issues
The Court has received an affidavit of Garda John Butler sworn on the 14th of May 2011 and has also received and scrutinised a copy of the European Arrest Warrant in this case. Moreover the Court has also inspected the original European Arrest Warrant which is on the Court's file and notes that it bears this Court's endorsement. The Court is satisfied following its consideration of this evidence and documentation that:

> (a) the person before it is the person in respect of whom the relevant European Arrest Warrant was issued;
>
> (b) the European Arrest Warrant has been endorsed for execution in accordance with s. 13 of the Act of 2003;
>
> (c) as the person named in the European Arrest Warrant is wanted for prosecution no issue can arise as to trial *in absentia* such as to require an undertaking under s. 45 of the Act of 2003;
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> (d) the European Arrest Warrant is in the correct form;
>
> (e) the High Court is not required, under s. 21A, 22, 23, or 24 (inserted by ss 79, 80, 81 and 82 of the Criminal Justice (Terrorist Offences) Act 2005) of the Act of 2003 to refuse to surrender the respondent.

As previously stated, the European Arrest Warrant dated the 9th of January 2007 is a prosecution type warrant and the respondent is wanted in the Republic of Poland for trial in respect of a single charge. At Part E. I of that warrant, the box relating to "organised or armed robbery" is ticked. Accordingly, the issuing state has sought to invoke paragraph 2 of article 2 of the Framework Decision. As the offence is punishable by imprisonment for a maximum period of not less than 3 years, s. 38(1) (b) of the Act of 2003 applies, and correspondence does not require to be demonstrated and legal requirements with respect to minimum gravity are clearly met.

Evidence on behalf of the respondent.
The respondent has filed an affidavit sworn on the 28th of February 2011 setting out the evidential basis for his objections. The thrust of his evidence, which is not disputed by the applicant, is that he was tried before the District Court of Tarnów for the offence the subject of the European arrest Warrant dated the 9th of February 2007, and that following a three day hearing he was, on the 20th of March 2006, duly acquitted. However, the prosecution, as they were entitled to do under the Polish law, successfully appealed this acquittal to the Regional Court in Tarnów. Accordingly, the acquittal was set aside and a re-trial was directed. In support of his evidence that this is what occurred the respondent has exhibited a letter dated the 9th of February 2011 from the Polish lawyer who had defended him in those proceedings before the District Court of Tarnów. This letter does confirm the basic facts as set out by the respondent in his affidavit. However it also states that the respondent's acquittal before the District Court of Tarnów "was not a 'final judgment' ".

S.37 Issues – the respondent's submissions
The respondent's objections are based upon s. 37 of the Act of 2003. He relies in particular on s.37 (1) thereof which, to the extent that it is relevant, provides:

> "37. —(1) A person shall not be surrendered under this Act if—
>
> (a) his or her surrender would be incompatible with the State's obligations under—
>
> (i) the Convention, or
>
> (ii) the Protocols to the Convention,
>
> (b) his or her surrender would constitute a contravention of any provision of the Constitution (other than for the reason that the offence specified in the European arrest warrant is an offence to which section 38(1)(b) applies),
>
> (c) [not relevant]."

It is further provided in subsection (2) of s. 37 that :

> "(2) In this section—
>
> 'Convention' means the Convention for the Protection of Human Rights and Fundamental Freedoms done at Rome on the 4th day of November, 1950, as amended by Protocol No. 11 done at Strasbourg on the 11th day of May, 1994; and
>
> 'Protocols to the Convention' means the following protocols to the Convention, construed in accordance with Articles 16 to 18 of the Convention:
>
> (a) [not relevant]
>
> (b) [not relevant]
>
> (c) [not relevant];
>
> (d) Protocol No. 7 to the Convention done at Strasbourg on the 22nd day of November, 1984."

The respondent contends that his surrender to Poland will expose him to double jeopardy, because although he was tried and acquitted of the offence the subject matter of the European Arrest Warrant his acquittal was subsequently reversed on appeal. The respondent argues that notwithstanding that the initial judgment of acquittal was not a final judgment, any contemplated re-trial would nonetheless expose him to double jeopardy. He submits that in the circumstances he should not be surrendered to Poland.

In so far as the s.37 objection is based upon a suggestion that the respondent's surrender would constitute a contravention of a provision of the Constitution, the respondent has not pleaded, and counsel for the respondent has been unable to identify, any provision of the Constitution that expressly provides him with protection against double jeopardy. While adamant that his client can claim such protection, counsel for the respondent concedes that he cannot put it further than to suggest that such protection might exist as an aspect of the constitutional right to trial in due course of law, i.e. the entitlement to fair procedures and due process, guaranteed by Article 38(1) of the Constitution; alternatively as an aspect of the constitutional right to trial by jury guaranteed by Article 38(5) of the Constitution, or simply as an unenumerated personal right under Article 40 of the Constitution.

There is no doubt whatever in the Court's mind that there is a constitutional protection against double jeopardy, but it is not an absolute protection. For example, in Ireland there is a long standing entitlement on the part of the prosecution in an indictable matter to appeal an acquittal by direction of the trial judge without prejudice to the verdict in the particular case – s.34 of the Criminal Procedure Act, 1967 (as amended by s. 21 of the Criminal Justice Act 2006). More recently, since the enactment of s.2 of the Criminal Justice Act 1993 (as now amended by s.23 of the Criminal Justice Act 2006) the DPP is allowed to apply to the Court of Criminal Appeal to have a sentence that he considers unduly lenient reviewed. More recently still, s.9(3) of the Criminal Procedure Act 2010 allows the DPP to apply for a re-trial order in a case where a person has been acquitted in circumstances where the DPP is of the view that (a) there is compelling evidence against that person, and (b) it is in the public interest to do so. English statute law contains a similar provision.

Counsel for the respondent, Mr John Fitzgerald B.L., concedes that Irish law allows for prosecution appeals in such circumstances but makes two points in that regard. While accepting that s.34 of the Act of 1967(as amended), s.2 of the Act of 1993(as amended) and s.9 (3) of the Act of 2010 all enjoy the presumption of constitutionality, he says that such a presumption might perhaps at some point be rebutted and that the constitutionality of those provisions has never in fact been declared following a challenge. Secondly, even if double jeopardy is constitutionally permissible to the extent provided for in Irish law it is only permissible to that limited extent. Any rule of procedure, such as that which obtains in Poland, which goes beyond those limits is constitutionally objectionable and contrary to the notions of fair procedures, of due process and of justice as we understand them. He contends that this is true regardless of whether or not the acquittal was a final judgment.

Mr Fitzgerald acknowledges that there is wide protection against double jeopardy in the case of a final judgment. Quite apart from any provision of Irish law, Article 3 of the Framework Decision which specifies grounds for mandatory non-execution of the European Arrest Warrant provides in sub-article 2 thereof that:

> "The judicial authority of the Member State of execution (hereinafter 'executing judicial authority') shall refuse to execute the European arrest warrant in the following cases:
>
> 2. if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State;"

This provision has been implemented in Irish law by means of Article 41 of the Act of 2003 which provides:

> "41.—(1) A person shall not be surrendered under this Act for the purpose of his or her being proceeded against in the

issuing state for an offence consisting of an act or omission that constitutes in whole or in part an offence in respect of which final judgment has been given in the State or a Member State.

(2) A person shall not be surrendered under this Act for the purpose of his or her being proceeded against in the issuing state for an offence consisting of the act or omission that constitutes an offence in respect of which final judgment has been given in a third country, provided that where a sentence of imprisonment or detention was imposed on the person in the third country in respect of the second-mentioned offence—

(a) the person has completed serving the sentence, or

(b) the person is otherwise no longer liable under the law of the third country to serve any period of imprisonment or detention in respect of the offence."

However, Mr Fitzgerald recognises that he cannot bring his client's case within s.41 of the Act of 2003 because even on his own evidence his acquittal in Poland was not a final judgment. If a doubt had been raised in that regard, and in the Court's view it would have been very difficult to argue in favour of such a doubt having regard to the contents of the letter from the Polish lawyer exhibited in the respondent's affidavit, this Court would in any event have been disposed to hold that the respondent's acquittal was not a final judgment having regard to the decision of the Supreme Court in *Minister for Justice, Equality, & Law Reform v. John Renner-Dillon* [2005] IESC 5, and the decision of the European court of Justice in the *Mantello* case, Case c.261/09 of the 16th of November 2010, on the interpretation of Article 3(2) of the Framework Decision.

In the circumstances Mr Fitzgerald has sought to construct an elaborate argument to suggest that this Court in considering double jeopardy should have regard to more than the finality of the judgment. He has drawn the Court's attention to Article 4 of Protocol 7 to the Convention which is in the following terms:

"1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State."

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3. No derogation from this Article shall be made under Article 15 of the Convention."

While conceding that Article 4 of Protocol 7 again frames the prohibition on double jeopardy in terms of a final acquittal or conviction, he points to the terms of Article 4(2) as supporting his suggestion that there may be more to it than the mere desirability of promoting legal certainty. Article 4(2) speaks of the re-opening of a case "if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case" and he says that this reflects the approach of the legislature both in Ireland and in England. He urges that in contrast to this Polish law, in so far as we know, contains no such limitations and that, seemingly, the prosecution have an automatic right of appeal in every case in which an accused has been acquitted regardless of whether or not there is evidence of new facts, or of some fundamental defect in the original proceedings.

In further support of his argument Mr Fitzgerald has opened dicta from the judgments in a number of cases decided by the Irish Supreme Court which, he argues, suggest that double jeopardy is to be regarded under Irish Constitutional law as generally undesirable and contrary to the notion of due process, and that if it is to be permitted at all it can only be permitted in very tightly controlled and circumscribed situations. He relies in particular on *obiter* statements in the dissenting judgments of Finlay P. and Henchy J., respectively, in *The People (Director of Public Prosecutions) v. O'Shea* [1982] I.R. 384, as well as on further remarks of Henchy J in *The People (Director of Public Prosecutions) v. Quilligan (No 2)* [1989] I.R. 46. The Court was also referred to remarks of Barr J in *Feeney v. Clifford* [1989] I.R. 668 and to *D.P.P. v. Independent Newspapers & Ors* [2008] 4. I.R. 88. Moreover, Mr Fitzgerald very properly has also drawn the Court's attention to certain remarks of Hamilton C.J. in *Considine v. Shannon Regional Fisheries Board* [1997] 2 I.R. 404 which, he acknowledges, are against him.

The Court does not propose to review all of the judgments opened to it in the course of this judgment. However, it has considered all of them. It will suffice for the purposes of giving judgment to refer selectively to some of the passages opened to the Court, both for and against the respondent's argument.

In *The People (Director of Public Prosecutions) v. O'Shea* the central issue for determination concerned whether Article 34.4.3 of the Constitution allowed for an appeal from the High Court (Central Criminal Court) to the Supreme Court against all decisions of the lower court including acquittals. It was held that as a matter of principle it did. Both the arguments and the issues in that case were complex and it is not necessary to review them in great detail. However, the decision was a 3:2 decision of a five judge bench and the judgments upon which Mr Fitzgerald primarily relies are those of the dissenting judges. The Court's attention was drawn in the first instance to the remarks of Finlay P. at p.411 of the report. He said there:

"The fundamental question which arises necessarily for determination in this case is whether one of the essential ingredients of trial with a jury, as contained in the Constitution, is the immunity of a verdict of "Not guilty" by a jury arrived at within its jurisdiction and without corruption from appeal to any appellate tribunal. In my view, it is."

The Court's attention was further drawn to the following passage from the judgment of Henchy J at pp 431/432 of the report:

"…I am satisfied, for a variety of reasons, that a quintessential feature of the jury trial required under Article 38, s. 5, is the consequence that when that trial takes place properly within jurisdiction and results in the jury's verdict of not guilty, whether directed by the judge or not, that verdict can never again be questioned in any court by way of appeal or otherwise.

While the accused is normally entitled to a rebuttable presumption of innocence right up to the point when the jury return their verdict of not guilty, from that point onwards that presumption stands irrebuttable. So much and so immediately so, that unless the accused is being validly detained on another charge, the trial judge must order his peremptory release from custody. And after the acquitted person steps out of the courtroom and breathes afresh the air of freedom, even if

> it should emerge afterwards that there is fresh evidence of his guilt, even evidence provided by his own admission of guilt, he cannot be put on trial again for the offence of which he has been found not guilty by the jury. If an attempt were made to re-try him, he could successfully raise the defence known in lawyers' French as *autrefois acquit* . That means that he could raise the plea, in bar of the second trial, that he had previously been acquitted of the same offence, that in consequence the matter was *res judicata*, and that the prosecution were thus irrevocably estopped from subjecting him to such double jeopardy. Unless the prosecution were to admit that the two charges were essentially the same, a jury would have to be empanelled to try that issue, and if the jury were to hold that the two charges were the same, the plea of *autrefois acquit* would prevail and the second trial would be peremptorily stopped by the trial judge.
>
> I am satisfied that the indissoluble attachment to trial by jury of the right after acquittal to raise the plea of *autrefois acquit* was one of the prime reasons why the Constitution of 1937 (like that of 1922) mandated trial with a jury as the normal mode of trying major offences."

The learned Supreme Court judge adds at p.433 of the report:

> "If one were to scrutinise the debates in Parliament and the records of the written and spoken arguments for and against the draft Constitution in 1937, I venture to think that one would not find the hint of an opinion, either from the proponents or opponents of the Constitution, that a verdict of not guilty, emanating from a jury trial mandated by Article 38, s. 5, could be reopened by appeal or otherwise. Indeed, if such opinion had been expressed by any reputable person or body, it is to be arguably contended that the Constitution would never have been enacted by the people.
>
> It was, I believe, a consideration of such matters that led Kenny J. to express the opinion in *The People v. Lynch* [1982] I.R. 64 that an appeal to the Supreme Court from an acquittal by a jury in the Central Criminal Court 'would result in a far-reaching change in our law which, I am convinced, those who enacted the Constitution never contemplated and which is not in accordance with prior Irish authority'."

The basis for Henchy J's strongly held views emerges from a consideration of the earlier part of his judgment in *O'Shea* where he is seen to engage at an early stage with a key component of the appellant's argument. At p. 422 of the judgment Henchy J said:

> "The submission that an appeal lies direct to this Court from a verdict of not guilty in the Central Criminal Court apparently derives from dicta in two of the judgments given in this Court in *The People (Attorney General) v. Conmey*. [1975] I.R. 341 Those dicta may be summarised thus. A jury's verdict, whether of guilty or not guilty, in the Central Criminal Court is a decision of the High Court; under Article 34, s. 4, sub-s. 3, of the Constitution it is provided that this Court shall 'with such exceptions and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court'; no such exception has been prescribed by law in relation to such verdicts of guilty or not guilty: ergo, an appeal lies to this Court from both a verdict of guilty and one of not guilty in the Central Criminal Court."

Following a detailed analysis of the decision in *Conmey* he concluded (at p. 425 of the report):

> "The essential facts *in Conmey's Case* were that Conmey did *not* seek to appeal direct to the Supreme Court and he was *not* found not guilty in the Central Criminal Court. Consequently, such opinions as were expressed as to what Conmey's rights would have been if he had sought to appeal direct to this Court, or as to the right of the Director of Public Prosecutions to appeal to this Court had Conmey been acquitted, are no more than peripheral observations deserving, of course, all due respect but not binding on this or any other court."

Henchy J then went on to review both Irish decisions and foreign decisions on double jeopardy, and in particular the jurisprudence of the US Supreme Court in that regard. Following his review of domestic jurisprudence he states (at page 437 of the report) :

> "So far as I can ascertain, the authoritative Irish decisions in both the pre-Constitution and post-Constitution eras show that a plea of previous acquittal will always prevail (save in a statutorily allowed appeal by Case Stated) to defeat any appeal or other proceeding in which it is sought to make a person liable for any offence in respect of which he has already been acquitted within jurisdiction by a court of competent jurisdiction, even where such acquittal has been directed by the trial judge. There is nothing to show that before *Conmey's Case* it had occurred to any judge, counsel or academic writer that this rule had no application to acquittals obtained in the Central Criminal Court, which is the court in which the most serious offences known to the law in this State are tried."

In the course of his review of the jurisprudence of the U.S. Supreme Court he notes (at p. 438 of the report) that:

> "The rationale of the constitutional prohibition against double jeopardy was stated as follows by Marshall J. when delivering the opinion of the Supreme Court of the United States in *Benton v. Maryland* (1965) 395 U.S. 784 at pp. 795-6 of the report:—
>
> > "The fundamental nature of the guarantee against double jeopardy can hardly be doubted. Its origins can be traced to Greek and Roman times, and it became established in the common law of England long before this Nation's independence. See *Bartkus v. Illinois* (1959) 359 U.S. 121 (pp. 151-5) (Black J. dissenting). As with many other elements of the common law, it was carried into the jurisprudence of this Country through the medium of Blackstone, who codified the doctrine in his Commentaries. 'The plea of *autrefois acquit* , or a former acquittal,' he wrote, 'is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence.' Today, every State incorporates some form of the prohibition in its constitution or common law. As this Court put it in *Green v. United States* (1957) 355 U.S. 184 (pp. 187-8), 'the underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.' This underlying notion has from the very beginning been part of our constitutional tradition. Like the right to trial by jury, it is clearly 'fundamental to the American scheme of justice'."

It would seem from that passage that, even if the United States Constitution did not contain an express prohibition against double jeopardy, the United States Supreme Court would still have held that a jury verdict of not guilty, even when directed by the trial judge, is irreversible. I see no reason why this Court should not reach the same conclusion as to the inviolability of such a verdict in the light of our Constitution."

The learned Supreme Court judge went on to consider the constitutional and practical consequences of allowing such appeals, and the statutory background to the then existing system of appeals from decisions in trials on indictment (including s. 34 of the Criminal Procedure Act, 1967 which he regarded as "a clear statutory recognition of the inviolacy of a jury's verdict of not guilty, even when it is directed by the trial judge on a wrong interpretation of the law") . He ultimately concluded (at p. 444):

> "From the foregoing considerations I draw the following conclusions.
>
> > 1. There is no binding precedent to the effect that an appeal lies direct to this Court from an acquittal by a jury in the Central Criminal Court.
> >
> > 2. Such an appeal is not encompassed by the appellate jurisdiction given to this Court by Article 34, s. 4, sub-s. 3, of the Constitution.
> >
> > 3. Such an appeal would be unconstitutional because (a) it would be incompatible with what is necessarily encompassed by the guarantee of trial with a jury set out in s. 5 of Article 38; (b) it would be in breach of the equality before the law guaranteed by s. 1 of Article 40; and (c) it would violate the guarantee in respect of personal rights and protection from injustice given by s. 3 of Article 40.
> >
> > 4. This appeal by the Director of Public Prosecutions against the verdicts of not guilty given by a jury in the Central Criminal Court in favour of the respondent should be struck out for want of jurisdiction."

In the present case, Mr Fitzgerald urges on the Court that while it must be accepted that Irish statute law today allows for appeals against acquittals, and verdict/sentence reviews at the behest of the D.P.P, in some circumstances, and certainly in more extensive circumstances than Henchy J would ostensibly have been comfortable with (i.e. appeals with prejudice under s. 9(3) of the Act of 2010), the circumstances in which such appeals are permitted in law are nonetheless quite circumscribed. He suggests that the reason for this is that double jeopardy, in our constitutional tradition, is about more than ensuring legal certainty; it is ultimately about fairness in the criminal process, and that to allow the prosecution to appeal with prejudice in anything beyond the kind of highly controlled and limited circumstances presently provided for, would be a bridge too far and would have to be regarded as offending against the fundamental right of the citizen to fair procedures and due process guaranteed both under the Constitution and as reflected in certain provisions of international instruments e.g. Article 4(2) of Protocol 7. He urges that because the only ostensible limitation on the right of a prosecutor to appeal under Polish law is that the judgment must not be final the respondent will be still be unacceptably and unfairly exposed to double jeopardy if he is surrendered and, accordingly, that he should not be surrendered on s. 37 grounds. In particular, it is contended that for the reasons stated the proposed surrender of the respondent will expose him to unfair double jeopardy in violation of his constitutional right to trial in due course of law (including the right to fair procedures and due process) and further that it would be incompatible with the State's obligations under the European Convention on Human Rights, as extended by Article 4 of Protocol 7.

It is also important in this brief review of the authorities opened to the Court by Mr Fitzgerald to refer to the one authority opened by him which he readily concedes is clearly against him in terms of the argument that he is now putting forward. In *Considine v. Shannon Regional Fisheries Board* [1997] 2 I.R. 404 the Supreme Court was concerned with a challenge to the constitutionality of s.310(1) of the Fisheries (Consolidation) Act, 1959 which grants to the prosecutor of an offence under the Act the right to appeal against an order of dismissal made by the District Court and, by s.310(2) to a judge of the circuit court the power to vary, confirm or reverse such order. Hamilton C.J., giving judgment for the Court, acknowledged that it was the "general rule" as urged upon the Court by counsel for the plaintiff that "in all cases of a criminal kind where a prisoner or defendant is in danger of imprisonment or punishment no new trial will be granted if the prisoner or defendant, having stood in that danger, has been acquitted." He then went on to say:

> "It is, however, clear from a consideration of all the authorities that, while this was the general rule, it was subject to the right of the legislature to provide for an appeal in specified cases."

After going on to review statements of principle from the judgments in *Benson v. Northern Ireland Road Transport Board* [1942] A.C. 520; *G.S. & W Railway Co v. Gooding* [1908] 2 I.R. 429 and *R v. Duncan* [1881] 7 Q.P.D. 198, the former Chief Justice added:

> "It is clear from the foregoing, and many other, authorities that the common law rule that there should be no appeal from an acquittal of a criminal charge was subject to the right of the legislature to provide for such an appeal provided that such right was given in clear and unambiguous language and that a trial 'in due course of law' did not necessarily involve the preclusion of a right of appeal in the event of an acquittal. As stated by O'Higgins C.J. in *The People v. O'Shea* [1982] I.R. 384 at p. 403:—
>
> 'The phrase 'in due course of law' denotes fair and just procedures in the conduct of the trial and the due application of the relevant law: it denotes no more.'

Decision

> The Court is not concerned in this case with the issue that arose in *The People v. O'Shea* [1982] I.R. 384 and on which the Court in that case was divided as to whether an appeal lay from an acquittal by a jury in the Central Criminal Court. The Oireachtas, in s. 44 of the Courts and Court Officers Act, 1995 has restored the position as to such acquittals as was generally thought to exist before the decision of the majority in *O'Shea*. However, the following passage from the judgment of O'Higgins C.J. at p. 397 is relevant to the issue that has arisen in this case:—
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> > 'The Constitution, as the fundamental law of the State, must be accepted, interpreted and construed according to the words which are used; and these words, where the meaning is plain and unambiguous, must be given their literal meaning. Of course, the Constitution must be looked at as a whole and not merely in parts and, where doubt or ambiguity exists, regard may be had to other provisions of the Constitution and to the situation which obtained and the laws which were in force when it was enacted. Plain words must, however, be given their plain meaning unless qualified or restricted by the Constitution itself.'
>
> The Court is satisfied that this statement of the law—although not the inference drawn from it as to appeals from acquittals by juries—is consistent with the view of the minority in the same case that the Constitution should not be read in an uncompromisingly literal fashion if the result would violate the Constitution read as a harmonious whole.
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> It is, accordingly, within the context of that statement setting forth the principle underlying constitutional interpretation

that the Court must approach the interpretation of the provisions of Article 34, s. 3, sub-s. 4 of the Constitution and having ascertained the ordinary, literal meaning thereof consider whether authority can be found within the Constitution itself for giving them a meaning other than their ordinary, literal meaning or whether the provisions of the Act of 1959 violate the provisions of the Constitution read as a harmonious whole.

Article 34, s. 3, sub-s. 4 of the Constitution provides that:—

> 'The Courts of First Instance shall also include Courts of local and limited jurisdiction with a right of appeal as determined by law.'

The said sub-article is clear and unambiguous in providing that the right of appeal from decisions of the courts therein referred to must be determined by law.

The legislature is vested with the sole and exclusive powers of making laws for the State and is free to legislate in any way it chooses, save where such legislation would be repugnant to the Constitution. In pursuance of that power, the legislature enacted the Act of 1959 and in particular the provisions of s. 310 thereof.

This section provided for an appeal to the Circuit Court where any proceedings in the District Court under any provision of the Act are dismissed. This accords with the power given to the Oireachtas by Article 34, s. 3, sub-s. 4 and it has not been established by the plaintiff that the provision of that sub-article are limited or qualified in any way by any other provision of the Constitution or that the provisions of s. 310 of the Act of 1959 violate the Constitution read as a harmonious whole.

Consequently, the appeal in this case must be dismissed."

S.37 Issues – the applicant's submissions

In reply to Mr Fitzgerald's arguments, counsel for the applicant, Ms Elva Duffy B.L. has submitted that it is of critical significance that the respondent's acquittal was not a final judgment. She concedes that double jeopardy is outlawed in most jurisdictions and in many international instruments after a final judgment has been pronounced, but contends that there has been no such final judgment in the respondent's case. In so far as the Convention is concerned, even Article 4 of Protocol 7, notwithstanding sub-article 2 thereof from which the respondent seeks to draw some comfort and support, does not become engaged unless the person concerned has "*already been finally acquitted or convicted in accordance with the law and penal procedure of [the relevant] State*."

Ms Duffy submits that the judgment of Finnegan J in *Minister for Justice, Equality, & Law Reform v. John Renner-Dillon* [2005] IESC 5 is of considerable assistance. The *Renner Dillon* case concerned an application to the Irish High Court by the UK authorities under s. 22(7) of the Act of 2003 for consent to further prosecute a respondent who had already been surrendered to the U.K. on foot of a European Arrest Warrant for an offence in respect of which he had, some years previously, been acquitted. However, the Crown later successfully appealed against that acquittal under s. 76 of the English Criminal Justice Act 2003 which allows for such appeals to be taken. The respondent opposed the s.22(7) application on the grounds that the proposed re-trial contravened the ne bis in idem principle and s.41 of the Irish Act of 2003. Giving judgment in the High Court in relation to the s. 22(7) application Peart J said:

> "The resolution of the question arising on this application is to be found in the meaning to be given to "finally judged" or "final order". While obviously an acquittal or a conviction can be considered a final order, that is not the end of the matter. I must interpret s. 41 of the Act in conformity with the aims and objectives of the Framework Decision under the well-known principles of conforming interpretation stated by the European Court of Justice in *Pupino* (see (Case C-105/03) *Criminal proceedings against Pupino* [2005] ECR 1-5285), provided that to do so is not *contra legem*. As Fennelly J. stated in his judgment in the Supreme Court in *Minister for Justice, Equality and Law Reform v. Stapleton*:
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> > 'It is clearly established that this Court is obliged to interpret provisions of the 2003 Act, so, far as possible, in the light of and so as not to be in conflict with provisions of the Framework Decision (see (Case C-105103) Criminal proceedings against Pupino [2005] ECR 1-5285.) The corner stone of the entire system is, of course, the principle of mutual recognition of the judicial decisions and mutual trust of the legal systems of the other Member States.' *(*my emphasis*)*
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> In my view there is nothing in the Framework Decision which indicates that one objective of that instrument is to protect a person, whose surrender is sought by an issuing state, from being surrendered for the purpose of being tried for an offence in respect of which he has been already acquitted in that issuing member state, and where it is beyond doubt that such a trial will not take place until the earlier acquittal has been quashed and a retrial ordered in accordance with the procedures available in the issuing state.. In such a circumstance it is perfectly clear that the surrendered person is not faced with double jeopardy. He will not be tried again in the face of an extant acquittal for the same offence. That mutual trust in the legal system of the United Kingdom referred to by Fennelly J. above mandates that this Court presumes, and may safely do so if I may say so, that the respondent will not be exposed to a double jeopardy.
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> Where a person is convicted of an offence, and appeals successfully against that conviction and is ordered by an appeal court to be retried for the same offence, it cannot possibly be said that the accused is exposed to a double jeopardy; yet until that conviction was quashed it exists as a "final order". But it was never a final order in the sense of one that could never be set aside, as the convicted person has a right of appeal.
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> In the same way in the present case, the acquittal for the 1982 offence was a "final order", but given the jurisdiction to set aside an acquittal at the suit of the DPP in the United Kingdom, it is not necessarily a final order for all time and in all circumstances, since under certain circumstances, such as the emergence later of fresh and compelling evidence, it may be set aside and quashed."

At pp.12/13 of the unreported Supreme Court judgment in the *Renner Dillon* case Finnegan J summarises the judgment of the learned High Court judge. He makes no criticism of the views expressed therein and expresses no dissention from them. Then at p.14 of the judgment he notes:

"Underlying the Framework Decision is the objective of establishing a system of free movement of judicial decisions in criminal matters within an area of freedom, security and justice, the mutual recognition of judicial decisions and a high level of confidence between Member States. *Altaravicius v. Minister for Justice Equality and Law Reform* [2006] 3 I.R. 148, *Minister for Justice Equality and Law Reform v. Stapleton* [2007] I.E.S.C. 30.

In this regard decisions of the European Court of Justice in cases on Article 54 of the Schengen Agreement are relevant. Cases on Article 54 consistently recognise that Contracting Parties should recognise the criminal laws in force in other Member States even when the outcome would be different if its own national law had been applied: *R. v. Gozutok and Brugge* [2003] C.M.L.R. 2, *Van Esbroeck* [2006] 3 C.M.L.R. 6 at para 30."

The *ratio decidendi* of the decision of the Supreme Court dismissing the appeal in *Renner Dillon* is contained at pp 20/21 of the unreported judgment of Finnegan J where he states:

"From the judgment in *Mantello* it is clear that "finally judged" in the Framework Decision has an autonomous meaning in the law of the European Union. Where under the law of the issuing Member State a judgment, in this case a judgment of acquittal, does not definitively bar further prosecution or as stated in *Mantello* 'constitute a procedural obstacle to the possible opening or continuation of criminal proceedings in respect of the same acts against that person', then that person has not been finally judged. A judgment which does not definitively bar further prosecution does not constitute a ground for mandatory non-execution of a European arrest warrant.

It is clear that the acquittal of the appellant of the offence does not definitively bar the commencement of further criminal proceedings in respect of the offence under the law of the United Kingdom by virtue of the Criminal Justice Act 2003 section 76(1). Accordingly it cannot be said that the appellant has been finally judged in respect of the offence. Accordingly the grounds for mandatory non-execution of the European arrest warrant in Article 3.2 of the Framework Decision do not apply. Section 41 of the European Arrest Warrant Act 2003 transposes into Irish law Article 3.2 of the Framework Decision and must be given conforming interpretation. Having regard to the decision in *Pupino* the phrase 'final judgment' in section 41(1) must bear the autonomous meaning ascribed by the European Court of Justice to 'finally judged' in Article 3.2 of the Framework Decision. The judgment of acquittal in respect of the offence accordingly is not 'a final judgment' within the meaning of section 41 of the Act of 2003. The surrender of the appellant is not prohibited by section 41(1) of the Act of 2003. While before the Court of Appeal in the United Kingdom counsel for the prosecution considered the judgment of acquittal to be a final judgment until such time as it should be quashed this is not determinative for the purposes of this application: it is clear on the jurisprudence of the European Court of Justice that for purposes of the European arrest warrant the judgment of acquittal is not a final judgment, as in *Mantello* the acquittal does not constitute 'a procedural obstacle to the possible opening or continuation of the criminal proceedings.'

Ms Duffy submits that the respondent's case is predicated on the understanding, with which she has no issue, that in order for this Court to be justified in departing from its obligation under the Framework Decision to surrender the respondent there must be a clear and unambiguous difficulty with our own Constitution such that the respondent's surrender would constitute a contravention of it. However, she submits that the respondent has failed to establish any such contravention. In so far as counsel for the respondent has sought to construct an argument that his client's surrender would offend against the Constitution he has had to rely principally on *obiter* statements contained in dissenting judgments, the strongest of which are contained in the judgment of Henchy J in the *O'Shea* case. However, counsel for the applicant points out that the majority in the *O'Shea* case recognised the possibility that an appeal against an acquittal, with appropriate safeguards to protect against unfairness, would not necessarily offend against the Constitution. In particular the Court was asked to note the following passages from the judgment of O'Higgins C.J. at pp 404/406:

"While, in my view, Article 34, s. 4, sub-s. 3, of the Constitution gives to this Court an appellate jurisdiction in respect of all verdicts resulting from criminal trials in the Central Criminal Court, this means no more than that the Court is given a competence to entertain such appeals. How, and to what extent, that competence will be exercised is a matter for decision by the Court. A clear practice has developed in relation to appeals brought in respect of civil jury trials. I see no reason why that practice, with appropriate changes, should not apply to appeals resulting from jury trials on criminal charges. Verdicts which are arrived at properly and are supported by evidence, while in theory appealable, would not be disturbed. This Court would be bound by findings of fact made at the trial. A conviction would be open to challenge on the sufficiency of the evidence relied on to support it, or on the trial judge's directions or rulings on law. An acquittal duly recorded by a jury on a consideration of the evidence would be immune. Where, however, as in this case, the acquittal resulted from a direction given by the judge, so that the verdict was recorded as a result of the judge's decision and not that of the jury, the Court would consider the appeal in the same manner as a similar appeal in a civil action. If the direction should not have been given, the verdict would be set aside in the same manner as a judgment in favour of a defendant where a case had been wrongly withdrawn from a jury in a civil action. As in civil actions, a new trial would be ordered.

It has been suggested that all this imposes intolerable burdens on those facing criminal charges in the Central Criminal Court, and that the personal rights of accused persons may in some way be breached. I cannot see any substance in such suggestions. We have advanced very far from the days when the lonely prisoner, with inadequate means, faced at his trial the full resources of the State which accused him. To-day such a prisoner has access, at the expense of the State, not only to the finest professional assistance but also to all other scientific and technical aids required for his defence. The hardship which he faces is the charge and the trial. In any event, whether an added burden is imposed or not, the appeal stems from the Constitution and can, if thought proper in this particular instance, be altered by appropriate legislation. It should be remembered that the Constitution is concerned with justice and, in the context of this case, with criminal trials being fairly conducted in due course of law. While these considerations provide safeguards for the person accused, they also guarantee to the State which accuses him, and which has a duty to detect and suppress crime, that he will be tried fairly and properly on the evidence adduced against him and in accordance with law. If, as a result of an error made by the trial judge, the jury is not permitted to consider the evidence or the charge brought against an accused or to pronounce on his guilt or innocence, can it be said that justice has been accorded to the State and to society? In my view, it cannot and, if this be so, a situation would exist which the Constitution prohibits.

It was also suggested in the course of the argument that, even if this Court had jurisdiction under the Constitution to entertain appeals from acquittals, it could not order a new trial. This was said to be so because of the alleged application and dominance of the plea of *autrefois acquit* in the event of such a new trial. In my view, this suggestion is based on a misapprehension, both as to the extent of this Court's jurisdiction and power under the Constitution, and as to the circumstances in which the plea of *autrefois acquit* applies. If the Constitution confers on this Court a particular appellate jurisdiction, it may be assumed that it also confers the necessary powers to make that jurisdiction effective to remedy

> what is complained of. From a practical point of view this Court will not be concerned with verdicts of acquittal properly arrived at by a jury on the merits. Its jurisdiction will only be invoked where a mis-trial or a non-trial has taken place as a result of an erroneous ruling or direction by the trial judge. If in such circumstances the Court deems it just that a new trial be held, it has an inherent power so to order and no plea in bar can be effective to prevent such taking place. Further, I doubt whether, in any event, the basis or reason for the plea exists where the acquittal has been directed by the judge wrongly. The plea is founded on natural justice and is based on the common-law maxim *nemo debet bis vexari . . . pro una et eadam causa* ."

Counsel for the applicant further relies on the passages from Considine already referred to in support of her content that the a prosecution appeal against an acquittal does not necessarily offend against our Constitution, and that rather than approaching the question of double jeopardy as being fundamentally objectionable in an absolutist or doctrinaire way the core or central issue with which the Court should be concerned is fair and just procedures in the context of the trial.

Ms Duffy further submits that even if the quashing of the respondent's acquittal with the consequence or subsequent direction that he should be retried would not have been possible or permissible in Ireland on account of our constitutional law and tradition, that would not of itself mean that the respondent's surrender should automatically be refused. In counsel for the applicant's submission a mere difference in constitutional law or tradition, or a mere difference in national law or criminal justice procedures, would not be sufficient to justify non-surrender. For non-surrender to be justified the difference complained of would have to amount to a fundamental defect that would seriously endanger the respondent's right to a fair trial and such as would lead to a denial of fundamental or human rights. Counsel for the applicant submits that the respondent has not established that the quashing of the respondent's acquittal and his proposed re-trial would be unjust and unfair, or that it would lead to a denial of his fundamental or human rights. It does not follow from the fact that aspects of the criminal justice system and trial process of another member state are different to ours that the other member state's criminal justice system and trial process is unfair.

In support of this argument, counsel for the applicant relies on the judgment of Murray C.J. in *Minister for Justice, Equality and Law Reform v. Brennan* [2007] 3 I.R. 732, and in particular the following passages at paragraphs 39 and 40 of his judgment:

> "The manner, procedure and mechanisms according to which fundamental rights are protected in different countries will vary according to national laws and constitutional traditions. The checks and balances in national systems may vary even though they may have the same objective, such as ensuring a fair trial. There may be few, if any, legal systems which wholly comply with the precise exigencies of our Constitution with regard to these matters. Not all for example will provide a right to trial by jury in exactly the same circumstances as our Constitution does in respect of a trial for a non-minor offence. Rules of evidence may differ. The fact that a person would be tried before a judge and jury in this country for a particular offence could not in my view, be a basis for refusing to make an order for surrender solely on the grounds that in the requesting state he or she would not be tried before a jury. The exceptions which we have to the jury requirement, as in trials before the Special Criminal Court, acknowledges that a fair trial can take place without a jury even though it is constitutionally guaranteed for most trials in this country.
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> That is not by any means to say that a court, in considering an application for surrender, has no jurisdiction to consider the circumstances where it is established that surrender would lead to a denial of fundamental or human rights. There may well be egregious circumstances, such as a clearly established and fundamental defect in the system of justice of a requesting state, where a refusal of an application for surrender may be necessary to protect such rights. It would not be appropriate in this case to examine further possible or hypothetical situations where this might arise. The sole matter which I wish to make clear here is that the mere fact that a trial or sentence may take place in a requesting state according to procedures or principles which differ from those which apply, even if constitutionally guaranteed, in relation to a criminal trial in this country does not of itself mean that an application for surrender should be refused pursuant to s. 37(2) of the Act."

Decision

The Court agrees with counsel for the applicant that under the Irish Constitution double jeopardy is not to be regarded as being objectionable per se, however it is objectionable and must be regarded as contravening the guarantee of trial in due course of law in the Constitution if it potentially gives rise to a fundamental unfairness such as could lead to a defendant's wrongful conviction or otherwise constitute a denial of his fundamental or human rights. As was stated by O'Higgins C.J. in *The People v. O'Shea* [1982] I.R. 384 at p. 403:—

> "The phrase 'in due course of law' denotes fair and just procedures in the conduct of the trial and the due application of the relevant law: it denotes no more."

Accordingly, any exposure to double jeopardy without safeguards to protect against potential unfairness and denial of rights must be regarded as objectionable. The reasons for this are largely self evident, and many of them were identified by Marshall J in the quote from *Green v. United States* referred to in his judgment in *Benton v. Maryland*, which in turn was cited by Henchy J in *The People v. O'Shea* and quoted earlier in this judgment. First, a defendant must be protected against the possibility of wrongful conviction in circumstances where there may be repeated attempts to convict him. As pointed out by Thomas O'Malley in the Irish Criminal Process (Round Hall, 2009 at para 4.74) "after one or more trials, the prosecution will have a very good idea of the defence being advanced and at a later trial may be able to build a case which, while not conclusive of the accused's guilt, might convince a court or jury to convict". Secondly, regard must be had to the legal values of certainty and finality of proceedings, and an appropriate balance needs to be struck in that regard. Thirdly, the accused should not be unnecessarily or excessively subjected to the ordeal, embarrassment, expense, anxiety and insecurity of repeated attempts to convict him. That is not to say that a person should never be retried. Again it is a question of an appropriate balance being struck in the interests of fairness and justice. While it is not a rule of law, there is a convention in Ireland that an accused should only be re-tried twice. Fourthly an accused should not face multiple punishments for the same offence – an aspect of double jeopardy that would certainly offend against all notions of fairness and justice.

In this Court's view the single most effective safeguard against potential unfairness and denial of rights in circumstances where an accused may be exposed to a degree of double jeopardy is a requirement that an accused may not be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State. The respondent in this case has the benefit of that protection. He has not been finally acquitted or convicted. There is an on-going criminal process and the proposed re-trial results from the lawful decision of an appellate court prior to the rendering of a final judgment. Once all appeals have been exhausted he will not be subject to further re-trial because a final judgment will have been rendered at that point. While prosecution appeals against an

acquittal may be available in a wider range of circumstances in Poland than they are here, and the evidence in that regard is far from clear, such difference is not fundamental in circumstances where a prohibition exists, as all sides accept it does, on double jeopardy following final acquittal or conviction.

This Court also must bear in mind the presumption that the Polish State, which is a signatory to, and has ratified, the European Convention on Human Rights will respect the respondent's fundamental rights and therefore will not subject him to unfair double jeopardy. The decision of the Supreme Court in *Brennan* makes it clear that absent evidence of some fundamental defect in the criminal justice system of the issuing state mere differences in national laws or procedures, or constitutional laws and traditions, will not be sufficient to prevent a respondent from being surrendered.

In all the circumstances of the case I am of the view that the respondent has not made out the objections raised by him under s.37 of the Act of 2003, either under the Convention, or under the Constitution, and that it is appropriate to direct his surrender to the issuing state.