THE COURT OF APPEAL

Neutral Citation Number: [2018] IECA 302

[30/2018]

Edwards J.
Hedigan J.
McCarthy J.

BETWEEN

R

RESPONDENT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

APPELLANT

JUDGMENT of Mr. Justice Hedigan delivered on the 1st day of October 2018

The Appeal
1. This is an appeal against the order of *certiorari* granted by the High Court in respect of the order of Teehan J made on the 22nd of November 2016 whereby he refused the respondent herein liberty to resile from a plea of guilty entered on the 12th of October 2016.

Background
2. The trial of the respondent and her co-accused commenced on the 4th of October in Nenagh Circuit Court. She was charged with assault causing serious harm contrary to s.4 of the Non-Fatal Offences Against the Person Act, 1997, assault causing harm contrary to s.3 of the Non-Fatal Offences Against the Person Act, 1997, and cruelty to children contrary to s.246 of the Children Act 2001. In each count, the injured party was her son, who was four years old at the time the assaults were allegedly committed. The child was admitted to hospital with internal bleeding and life-threatening injuries in July 2010. The respondent pleaded not guilty. She claimed that her son had a fall which caused the injuries.

3. A first trial had ended with the discharge of the jury. The second trial commenced on the 4th of October 2016. Applications for holding the trials of the respondent and her co-accused separately were refused, as was an application to remove the charge of cruelty. Evidence and a number of *voir dire* were heard over six days. The respondent was unsuccessful in all of these. Following the last of these and just before the child victim was to give evidence, on the 11th of October, in the absence of the jury, the trial judge made certain comments regarding a guilty plea. He stated as follows:

> *"I think it is probably only fair to say at this stage- it may well be of only academic interest…that if the accused person were to take a certain course in relation to at least one of the counts against them on indictment and if that were acceptable to the prosecution, assuming no significant convictions of any sort had been accumulated since 2010, I could probably see my way to deal with this matter in a non-custodial way. However, without the advantage of a plea of guilty- with the benefit, I should say, of a plea of guilty, if either or both were to be convicted by a jury in relation to these matters, it is difficult to see at this stage- and I stress as regards everything I say I am subject- it would be subject to anything that anybody might say in either event; I am certainly not pre-judging anything- but that it would be difficult for either to avoid a custodial sentence."*

4. Counsel for the respondent asked for time to take instructions and the judge adjourned the trial to the following day to allow this. On the next day, the 12th of October 2016, the respondent entered a plea of guilty. However by letter dated the 1st of November 2016 the respondent expressed a wish to resile from the plea. An application in this regard was made on the 22nd of November by the respondent seeking leave to vacate the plea, on the basis that the comments made by the judge placed her in an unfair position which resulted in a plea of guilty that was not made in a free, independent and voluntary manner. The trial judge accepted that he gave "strong indications" that a guilty plea would result in a non-custodial sentence but that these were "certainly not absolutes".

5. In refusing the application, the judge noted that the respondent had had time to consider her decision and that she had the benefit of full legal advice from her solicitor, junior and senior counsel prior to entering the plea.

6. On the 13th of February 2017, leave was sought and obtained in the High Court by the respondent for judicial review of the decision of the trial judge on the 22nd of November. The court granted an order of *certiorari*, holding that despite the broad discretion granted to a trial judge in the conduct of a criminal trial, the comments made by the judge on the 11th of October 2016 led directly to her plea of guilty and thus did not accord with the accused's right to a fair trial, as guaranteed by Article 38 of the Constitution. The Director of Public Prosecutions now appeals against the High Court judgment.

Grounds of Appeal
7. The appellant submits the following grounds of appeal. The High Court judge erred:

> a) In overturning by way of judicial review a finding of fact made by the trial judge that the will of the respondent in entering a plea of guilty was overborne. The trial judge was best placed to evaluate the *viva voce* evidence and demeanour of the respondent when hearing the application to vacate the guilty plea.
>
> b) In failing to identify an appropriate ground for quashing on the merits by way of judicial review a discretionary decision made by the trial judge within his jurisdiction in circumstances where she accepted that the trial judge fairly afforded due process in hearing the respondent in relation to her application to vacate the plea.
>
> c) In failing to give weight to the fact at the time the plea was entered, a number of adverse rulings on important *voir*

dire had been made against the defence and that these adverse rulings were clearly relevant to the decision by the respondent, made with the full benefit of legal advice, to plead guilty. In addition, significant medical evidence had been successfully led by the prosecution at the time when the decision to plead guilty was made.

d) In failing to give any weight to the fact that neither the respondent nor her co-accused raised any objection to the intervention by the trial judge but instead fully engaged with counsel for the prosecution and entered pleas of guilty, in effect, in anticipation of avoiding a custodial sentence for the offence of assault causing serious harm that carries a potential sentence of imprisonment for life.

e) In failing to give any or any due weight to the important role of legal advice when it comes to an applicant seeking to vacate a guilty plea. The effect of the judgment is to suggest that the legal advice that the applicant received was either insufficient and/or erroneous in circumstances where the High Court was unaware of the content of that advice. It was highly artificial for the High Court to speculate on the motivation for the guilty plea in circumstances where the applicant decided not to reveal the content of that advice.

f) In failing to apply the principles set down by the Court of Appeal in *DPP v Freeman* [2015] IECA 145, and instead applied a new and separate test, for which there is no legal authority. In effect, the ruling of the High Court judge has the practical effect that the trial judge was bound to accede to any application to vacate the plea because of the comments he made some 24 hours before the plea was entered which said comments were not objected to at the time.

g) In failing to give any weight to the fact that the respondent's co-accused also pleaded guilty in the same circumstances and has never sought to vacate his plea.

h) In failing to take account of the position of the child witness and the fact that any cross examination of such a vulnerable person will necessarily negatively affect any sentence imposed upon conviction. In this regard, the High Court judge gave no consideration to the fact that upon conviction for such a serious offence following cross examination of a child witness, a custodial sentence will in most instances be inevitable.

i) In her conclusion that the intervention of the trial judge was more than an indication of sentence and that it would be "idle" to suggest that the respondent "really had any free choice in the matter". She erred further in concluding that the decision faced by the respondent could not be "assisted by legal advice". In this regard, the High Court judge took no account of the fact that an accused will generally receive a substantially reduced sentence on a plea of guilty and the fact that the respondent availed of a 24 hour period to consider her options with the benefit of legal advice before making her decision to enter the plea.

j) In concluding that the respondent did not have a fair trial in circumstances where no application was made during the course of the trial. The judgment of the High Court, in effect, impugns the comments made by the trial judge in the criminal trial in circumstances where not only did the applicant not raise any complaint against them before that trial judge, but instead she fully engaged with them.

k) In failing to have due regard to the consequences of her decision, and in particular, the impact on a child witness of having to undergo what would be a third criminal trial because of the wish of the respondent to no longer be bound by her plea of guilty, which was entered on the basis of full legal advice.

Submissions of the Appellant

8. The respondent is not entitled to judicial review of a decision made in a criminal trial that has not concluded. In particular the respondent cannot judicially review the decision of the trial judge refusing the respondent leave to resile from her plea of guilty in the said trial. The appellant relies upon the decision of the former President of the High Court in *DPP v Freeman* [2014] IEHC 68. The learned President questioned whether a judicial review could ever lie against a decision of a trial judge to refuse to vacate a guilty plea. Kearns P noted that it has been made clear by the Supreme Court that it is undesirable to seek judicial review during a criminal trial, he stated:

> *"The rationale for such an approach is obvious. If every ruling or decision given by a trial judge during the course of a criminal trial could be challenged by way of judicial review, the resultant outcome would be chaos and the criminal justice system would become totally incapable of operating effectively. At the very least the process could be open to abuse at every turn." (*DPP v Special Criminal Court *[1999] I IR 60).*

In *Freeman*, Kearns P noted that judicial review was not a desirable method to vacate a guilty plea, as procedures are still ongoing:

> *"The trial process has not concluded because there has been no sentence yet imposed by the trial judge."*

The appellant submits that the above statements apply equally to the present case. Moreover, Kearns J (as he then was) in the Supreme Court in *DPP v Redmond* [2006] 3 IR 217 stated:

> *"... a judge should not intervene to set aside a guilty plea unless there are quite exceptional circumstances arising in the particular case."*

9. Regarding the nature of judicial review and the concept of a discretionary decision made within jurisdiction, the Circuit Court judge had jurisdiction to decline the application to vacate the plea. The respondent refers to the case of *Dunne v McMahon* [2007] 4 IE 471. In her judgment Laffoy J stated in refusing an attempt to judicially review a decision by a trial judge not to permit a plea to be vacated that:

> *"That finding was open to him and it would be wholly inappropriate for this court to interfere with it. I am satisfied that the respondent acted within jurisdiction, judicially and with due regard to the applicant's constitutional right to a fair trial in refusing to allow him to change his plea."*

10. The nature of a guilty plea has been long recognised by the courts as a formal and public admission of guilt to a criminal offence. A guilty plea is of a grave and final nature, and is close to inviolable in terms of someone later being permitted to vacate that plea. The powerful nature of a guilty plea is illustrated by the following statement of Hardiman J in *DPP v Thomas Hughes* [2012] IECCA 69:

> *"It is an acknowledgment by the accused, fully advised by solicitor and counsel, of his factual and legal guilt of certain of the offences with which he is charged…To state the obvious, but sometimes the obvious requires to be stated, a plea of guilty is "a plea by the accused that he committed the offence". See Murdoch's Dictionary of Irish Law 5th Edition, Tottel Publishing 2009."*

11. The High Court failed to engage with the crucial role of legal advice. If the accused had no access to legal advice then an application to vacate the guilty plea would likely have more merit. However, the respondent here had the benefit of legal advice from a full team of counsel and solicitor when she pleaded guilty. Therefore, this was a carefully thought out decision made by an accused person who was capable of making such a decision.

12. The position of the DPP was made clear in open court by her counsel at this stage of the trial process. The guilty plea entered by the respondent was not made on foot of an impermissible plea bargain arrangement. The plea was entered on the basis that the respondent had been advised that the prosecution was not giving any assurances as regards what they deemed to be an appropriate sentence and that the Director reserved the right to appeal any sentence she might consider unduly lenient.

13. The High Court did not engage with another significant factor, that being the stage of the trial that had been reached. At the time the plea was entered, a number of rulings had been made against the accused, including an application to be tried separately to her co-accused and one to remove the counts of cruelty from the charge. Further, a number of *voir dire* had gone unfavourably for the respondent, and significant medical evidence surrounding the injuries of the child had been given. These factors are likely to have played a large, if not decisive role in the respondent's consideration of her options at the time, and therefore the comments made by the trial judge cannot reasonably be deemed the only influential factor in entering the guilty plea.

14. It is relevant that both the respondent and her co-accused pleaded guilty the day after the trial judge made the impugned remarks. No complaint was made regarding the appropriateness of the judge's intervention by their respective legal teams at the time. The respondent had the opportunity to reflect on the matter overnight, obtained legal advice from her defence team, and only after that did she enter a plea of guilty. The High Court did not appear to engage with the acquiescence of the respondent and her legal team to the judge's comments and it is submitted that this was an error in principle.

15. The appellant disagrees with the High Court judge's analysis that the trial judge was faced with "a rather unusual circumstance" in that he had to determine whether the respondent was pressured to make her plea by his own comments. In any trial an objection made due to perceived bias or an inappropriate remark must be assessed by the judges involved and trial judges should be trusted in dealing with such applications. Indeed the *Freeman* case makes clear that it is only for the trial judge to decide whether a plea should be vacated. The analysis of the High Court judge amounts to an error in law.

16. The High Court incorrectly marginalised the role of legal advice by accepting the respondent's argument that the choice she faced "was not going to be assisted by legal advice." The respondent's legal team may have advised her to apply to the trial judge to halt the trial if it was believed that the judge's comments were improper. It must be assumed that the advice received by the respondent was proper and that all of the options available were outlined to her

17. The High Court judgment concluded that the respondent did not have a fair trial. The reasoning for this is unclear. It is not made clear what in fact the trial judge did wrong or what alternative test could apply other than whether or not the respondent freely entered the guilty plea. The conclusion appears to be that no plea of guilty could have been validly entered after the judge's intervention. This amounts to an error of principle and is not a correct application of the law in *Freeman*. Further, this is clearly a disagreement with the judge's intervention yet no challenge was made to the comments made by the judge at the time. Thus the comments made by the judge cannot now be attacked.

18. The High Court did not have due regard to the potential impact on the child victim of quashing the decision of the trial judge, in that there will have to be either a third trial for this case, or else no completed trial. To subject a child witness to such an ordeal is an unsatisfactory outcome. The nature of a child witness is a relevant consideration to a discretionary decision as to whether someone can vacate a guilty plea. Delay is also a relevant factor. Almost three weeks passed before communication was made seeking to vacate the plea, and two and a half months passed before an application for judicial review was made. This delay has not been explained.

19. Judicial review is a discretionary remedy. This was made clear by the Supreme Court in *De Roiste v Minister for Defence* [2001] I IR 190 where it was stated by Denham J:

> *"...there is no absolute right to its use, there are limitations to its application. The granting of leave to apply for judicial review and the determination to grant judicial review are discretionary decisions for the court."*

This is further evident from the judgment in Freeman, where Kearns P concluded that, as the discretion of the court allowed, "considerable delay" was grounds for refusing leave for judicial review.

20. It may be noted that there is nothing inherently wrong with the merits of the impugned comments made by the trial judge, who made clear that be believed that he was doing nothing more than verbalising the position as any lawyer would have understood it to be at that stage of the trial. It was made clear by the Supreme Court in *The People (DPP) v Heeney* [2001] I IR 736, that plea bargaining holds no place in Irish law. However as noted by Walsh in *Criminal Procedure* (2nd ed 2016), that does "not preclude the judge from giving an indication of the difference in level of sentence which a person can on occasion secure in his favour by a plea of guilty." It cannot be said that the comments made by the trial judge in this case breached any principle laid down by the Irish courts in this respect. The judge acted within jurisdiction in the manner in which he exercised his discretion on the issue.

21. Even if it were accepted that the intervention of the trial judge was unusual or unwise, it does not mean that the guilty plea should be disregarded. The will of the respondent was not overborne; she had the benefit of legal advice and time to consider her decision The facts of this case do not come within the exceptional circumstance in which a plea of guilty can be vacated and therefore the appeal should be allowed.

Submissions of the Respondent

22. The appellant's argument in respect of judicial review and error of jurisdiction was not advanced in the High Court, nor is it referred to in the Notice of Appeal, and may not now be advanced in this Court.

23. The High Court held that the trial judge applied the wrong test in law, by failing to appreciate that the proximate cause of the change in the respondent's plea from not guilty to guilty was the intervention he himself made. The conclusion of the trial judge that

there was no evidence of the respondent's will having been overborne at the time she changed her plea to guilty was wrong in law. This is an appropriate ground for judicial review, notwithstanding the discretion afforded to the trial judge.

24. The respondent refers to the case of *R v Turner* [1970] 2 QB 321, a decision which arose in the context of "plea bargaining". The English Court of Appeal set out a number of relevant guidelines that have been applied in this jurisdiction, in light of the protection afforded to an accused's right to a fair trial as guaranteed by Article 38.1 of the Constitution. The court in *Turner* noted:

> *"The accused, having considered counsel's advice, must have a complete freedom of choice whether to plead guilty or not guilty…A statement that on a plea of guilty he would impose one sentence but that on a conviction following a plea of not guilty he would impose a severer sentence is one which should never be made. This could be taken to be undue pressure on the accused, thus depriving him of that complete freedom of choice which is essential."*

This is what happened in the instant case. The trial judge indicated his view as to how sentencing could be affected following a plea of guilty. This amounted to undue pressure from the judge.

25. The *Turner* guidelines were further considered in R v Goodyear [2005] EWCA Crim 888, whereby it was noted that a plea must be entered exclusively and voluntarily by the defendant, without improper pressure or bargaining by the judge.

26. In *The People (DPP) v Heeney* [2001] 1 IR 736, the Supreme Court made clear that plea bargaining has no place in Irish law, but that a judge may give an indication of sentence in the event of a guilty plea. This principle was affirmed by Peart J in *Attorney General v Murphy* [2010] 1 IR 445. Insofar as the authorities suggest that this practice may be permitted, they do not cover the circumstances of this instant case, whereby the comments made by the trial judge went beyond a mere indication of sentence. The impact that a guilty plea can have in sentencing falls in the realm of legal advice, however, for a judge to unilaterally offer a custodial versus a non-custodial sentence is materially different. The judge must be conscious of his unique position in a trial and the influential effects his comments would have on the mind of the accused. The judge applied a test that failed to consider his own role and unique position.

27. If there is any reasonable doubt over the free will of an accused person when entering a guilty plea, the constitutional right to a fair trial demands that the plea be vacated. The trial judge applied too high a standard in requiring that the will of the accused must have been overborne. Such a standard would allow for the plea to remain regardless of the true will of the person accused.

28. The intervention made by the trial judge was unwarranted and unexpected. Contrary to the appellant's argument, the prospect of a non-custodial sentence for a s.4 offence where the injured party is a child with serious injuries would not be obvious to any criminal legal practitioner.

29. The appellant's submissions assume that the decision of the respondent to plead guilty was solely based upon legal advice from her defence team, which somehow immunised the respondent from undue pressure from the judge. The difficulty is that an unsolicited comment from a judge such as the one made in this case is so unexpected that it is not for legal advisors to rectify that.

30. The respondent refutes the appellant's submission that how the defence viewed its prospects of achieving an acquittal at that point in the trial was a factor in seeking to vacate the plea. As held in *Byrne v McDonnell* [1997] 1 IR 392, the prospect of an acquittal is not a proper matter for the court to consider when deciding whether to vacate a guilty plea. This argument by the appellant in respect of the medical evidence introduced and the various *voir dire* invites unfair speculation.

31. It is unfair and unrealistic to expect the respondent to have made a more timely objection to the trial judge's intervention, at a time when the respondent was forced to make a difficult choice regarding her plea. To say that the respondent acquiesced to the intervention is incorrect, in circumstances where undue pressure was applied. Further, no issue of delay was pleaded before the High Court. The respondent is simultaneously criticised for not objecting to the comments of the trial judge during the trial but also for seeking judicial review while the trial is ongoing.

32. In all of the circumstances, the decision of the High Court was correct and should not be interfered with.

Decision

33. In this appeal the court has been asked by senior counsel for the appellant at the outset of his oral submissions to determine an issue that may not have been specifically raised or determined in the High Court or specifically raised in the grounds of appeal. It was however dealt with in the appellant's written submissions to this court, notably at paras. 19 and 20 of those submissions. Therein the appellant argues that the respondent herein should not have moved by way of judicial review because the trial process had not concluded. Sentence had not been imposed so the criminal trial had not come to an end. Moreover the appellant relied upon the decision of the President of the High Court in *DPP v. Freeman* [2014] IEHC 68 in arguing that it is questionable whether a judicial review could ever lie against a decision of a trial judge to refuse to vacate a guilty plea. The respondent's answer to this is that this point was never raised in the High Court nor is it a ground of appeal. In such circumstances, may such a point now be advanced on appeal ?

34. The approach of the courts to allowing arguments not raised in the High Court to be opened before an appeal court has evolved more recently. For many years the decision in *Movie News Limited v. Galway County Council* (unreported, Supreme Court, 25 July 1977) was considered to have set a high bar to such a course of action. However, in the more recent case of *Lough Swilly Shellfish Growers Co-operative Society Limited & Atlanfish Limited & Danny Bradley & Robert Ivers* [2013] IESC 16, delivering the unanimous judgment of the Supreme Court composed of Hardiman and Clarke JJ., O'Donnell J. stated as follows at para. 25:

> *"…However, with respect to the judgment of Henchy J. in Movie News the proposition that the objection to any argument of a new point in an appeal is grounded in the constitutional right of appeal, is not beyond argument. Indeed, if it were so, it is hard to see how it could admit of the exceptions, unless the exceptions were themselves mandated by the Constitution.*
>
> *26. The Constitution requires that there be an appeal to the Supreme Court. However it says nothing about the content or nature or procedure of that appeal. Fundamentally, what it requires therefore is that the correctness of the decision and resolution of the case in the High Court be capable of being reconsidered in a court of appeal. The appeal actually provided, which is something less than a full rehearing, is plainly compatible with the Constitution. Even an appeal in a case concerned only with a point of law is not limited to a rerun of the case heard in the High Court with the substitution of judges of the Supreme Court for the judge of the High Court. It is for example, common case for the Supreme Court to receive much more elaborate and detailed argument than that advanced in the High Court, and to be referred to*

case law and materials not presented to the High Court, and in some cases post-dating the High Court hearing. There is furthermore an established jurisdiction in the Supreme Court to admit fresh evidence either on interlocutory appeals, or on full appeals. See Order 58 Rule 8 of the Rules of the Superior Courts and Fitzgerald v. Kenny [1994] 2 I.R. 383. By definition this means that the Supreme Court will hear matters never advanced in the High Court. In cases where injunctions or orders are made, whether interlocutory or final, the Supreme Court may take into account matters which have occurred since the High Court hearing in considering the appropriateness of the order to be made. Again, while it is normally both desirable and helpful that the Court has the benefit of the considered views of the High Court judge in any particular point which is the subject matter of an appeal, that desirable objective cannot be said to be an absolute prerequisite to a valid appeal. In a case where a number of points are argued but the High Court considers that the case can be disposed of on only one, the Supreme Court may, if it considers necessary, consider the points which were argued, even if not decided, in the Supreme Court. See the observations of Murray J. in Dunne's Stores v. Ryan [2002] 2 IR 60. In A.A. v. The Medical Council [2003] 4 IR 302 at p.308 Keane C.J. said:

> *"… the court is not automatically precluded in every case from considering such an issue simply because it has not been subject of a determination by the High Court Judge. Whether a party is to be precluded from advancing again arguments which were relevant to an issue in the case and on which he relied in the High Court must, in the interests of justice, be determined according to the circumstances of the particular appeal before this court."*

Accordingly a certain sensible flexibility is exercised by the Court depending on the demands of the case, and a similar approach could be considered when a point is sought to be argued which was not advanced in the High Court though closely connected to points which were argued, and which would not have any implication for the evidence adduced in the High Court.

27. What the Constitution requires is an appeal which permits the Supreme Court to consider whether the result in the High Court is correct. The precise format and procedure of any such appeal is not dictated by the Constitution. While that object is often and best achieved by a careful analysis of the argument in the High Court and the High Court's adjudication of said argument, it does not follow that the constitutional appeal must always be limited to that process. Prior to the coming into force of the 1922 Constitution, it was possible to seek leave to argue a fresh ground of appeal in the Court of Appeal but only on strict conditions. See Wylie, The Judicature Acts (Ireland): and rules of the Supreme Court (Ireland) 1905, copiously annotated, (Dublin; 1906), p.781. Nothing in the 1922 or 1937 Constitutions suggests any different understanding of the concept of an appeal from the High Court in performance of the administration of justice. There is a spectrum of cases in which a new issue is sought to be argued on appeal. At one extreme lie cases such as those where argument of the point would necessarily involve new evidence, and with a consequent effect on the evidence already given (as in K.D. for example); or where a party seeks to make an argument which was actually abandoned in the High Court (as in Movie News); or, for example where a party sought to make an argument which was diametrically opposed to that which had been advanced in the High Court and on the basis of which the High Court case had been argued, and perhaps evidence adduced. In such cases leave would not be granted to argue a new point of appeal. At the other end of the continuum lie cases where a new formulation of argument was made in relation to a point advanced in the High Court, or where new materials were submitted, or perhaps where a new legal argument was sought to be advanced which was closely related to arguments already made in the High Court, or a refinement of them, and which was not in any way dependent upon the evidence adduced. In such cases, while a court might impose terms as to costs, the Court nevertheless retained the power in appropriate cases to permit the argument to be made."

35. It is not however in fact correct that the issue of a more appropriate remedy was not raised in the High Court. At para. 55 of her judgment the learned High Court judge refers to the submissions of counsel for the DPP on the very issue and notes that she was referred by her to the case of *Freeman v. DPP* [2014] IEHC 68. In that judicial review application, the same issue arose as herein; that issue is whether it was open to the court of judicial review to intervene in relation to a decision refusing to vacate a guilty plea, made by the trial judge in a criminal case that had not yet concluded. In that judgment, Kearns P. stated at para. 22 as follows:

"22. A threshold question arises as to whether an issue of this sort is more properly an issue to be left to the Court of Criminal Appeal rather than to intervention by the High Court by way of judicial review.

23. In Director of Public Prosecutions v. Special Criminal Court [1999] 1 IR 60, the Supreme Court made clear that it was undesirable to seek judicial review during the currency of a criminal trial, subject to the jurisdiction of the court to grant cases stated on occasion, or where a legal point of such importance arose such that there should be a definite ruling on the matter (which in that case related to informer privilege). Neither consideration arises in the instant case.

24. The rationale for such an approach is obvious. If every ruling or decision given by a trial judge during the course of a criminal trial could be challenged by way of judicial review, the resultant outcome would be chaos and the criminal justice system would become totally incapable of operating effectively. At the very least the process could be open to abuse at every turn.

25. In this context the following dictum of Ó Dálaigh C.J. in The People (Attorney General) v. McGlynn [1967] 1 I.R. 232 at p. 239 is apt and often cited:-

> *"The nature of a criminal trial by jury is that, once it starts, it continues right through until discharge or verdict. It has the continuity of a play".*

26. As further emphasised by Hedigan J. in the recent case of Berry v. Judge Hickson & Ors [2012] IEHC 320 at para. 5.5:-

> *"As this court has repeatedly stated, save for the most exceptional cases, criminal proceedings belong in the criminal courts. Where an accused who is convicted of an offence believes that he has not had a fair trial he can appeal to the Court of Criminal Appeal who will have a transcript of all the evidence and can judge the case for fairness in the light of all the evidence given. The court of judicial review does not have access to all the evidence given and is thus in a weak position to judge the fairness of a trial overall. It is vital for the efficient conduct of criminal matters that criminal trials proceed through the criminal courts and are not dispersed between the court of trial and other courts. In Corporation of Dublin v. Flynn [1980] I.R. 357 at 365, Henchy J. stated:-*

> *'It is the essence of a criminal trial that it be unitary and self-contained, to the extent that proof of the ingredients of the offence may not be established as a result of a dispersal of the issues between the Court of trial and another tribunal.'"*

36. Kearns P. continued later on as follows:-

> *"29. It follows a fortiori that the further the trial process has proceeded, the less desirable it becomes for any such interruption. The plea of guilty in this case was tendered only after three voir dire hearings had been resolved against the applicant and the trial was entering its final phases. The trial process has not concluded because there has been no sentence yet imposed by the trial judge."*

37. Whilst this issue was not pleaded in the notice of opposition in the High Court judicial review proceedings nor in the grounds of appeal herein, it was clearly raised on the part of the DPP in the High Court. It is true that the learned High Court judge did not refer to the immediately preceding paragraphs of Kearns P.'s judgment which were very trenchant on the issue. It is however clear that at the very least this is one of those cases at the other end of the continuum to which O'Donnell J. referred in *Lough Swilly*. The argument sought to be raised may be considered to be a new formulation of a point advanced in the High Court or one closely related to or a refined version of argument already raised in the High Court and in fact considered by the learned High Court judge.

38. In this case the respondent sought, as in *Freeman*, to withdraw her plea of guilty. As found by the High Court judge at para. 61, the hearing afforded to her by the trial judge was a fair one. It was in fact quite an elaborate hearing involving the respondent herself giving evidence and submissions being made to the judge. He gave a careful and considered decision on the application. At para. 54 the learned High Court judge set out the proposition upon which she proposed to decide the application for certiorari of this decision. She stated;

> *"It is well established that significant deference is given to a trial judge who oversees a criminal trial. There is no doubt that the trial judge is the person best placed to assess whether or not an accused person's will was overborne by whatever factor is said to have caused his or her will to be overborne. Accordingly, I accept the general proposition that in cases such as the present, the court should be slow to intervene, unless it finds that the trial judge erred in finding the applicant's will was not overborne."*

39. Regrettably, this is not the correct test in judicial review of this type of case. In the first place, as the *Freeman* judicial review case cited above demonstrates, the court of judicial review should almost never intervene in a criminal case that has not concluded. The bar is set at the highest level. Save only where the interest of justice and the right to a fair trial demand it, for clear and compelling reasons, the criminal trial should never be interrupted but should proceed to its proper conclusion. After that conclusion, which means after sentence is passed, then the convicted person may consider whether to appeal to this court. The second part of the test applied by the learned High Court judge is regrettably also incorrect. In judicial review it is not the correctness of the decision that is considered. The court of judicial review does not sit as a court of appeal. It is well established that the true test is not whether the decision impugned is in error but whether it is lawful. See *Bailey v. Flood* (unreported, 6 March 2000, Morris P.) and *Kenny v. Judge Coughlan* [2008] IEHC 28 (O'Neill J.). No fault was found by the High Court in the procedure that was followed nor could there have been. It was a manifestly fair process that afforded the respondent every opportunity to make her case. Thus the only ground remaining upon which the court in judicial review could intervene would be on irrationality grounds. In all the circumstances of the case I do not believe any argument of this kind could be sustained nor indeed was irrationality pleaded by the respondent.

40. The course that should have been taken in this case, following the refusal of the application to resile, was to proceed to sentence. Once that part of the criminal process had ended, the respondent should then have considered her option to appeal. Even at that stage, a pursuit of judicial review would be premature. In any event, judicial review in such circumstances is of less benefit to a person in the respondent's position. It is a procedure that is very limited in its consideration of a case and most importantly for the respondent, one that cannot question the correctness of a decision, only its lawfulness. On the other hand, an appeal to this court against conviction and sentence permits of a far wider examination of the case. Although the Court of Appeal will allow a trial judge a wide margin of discretion in decisions such as is herein challenged, it will not be limited to intervention only upon grounds of illegality. The Court of Appeal may examine the case from every angle, may examine all the evidence given and ultimately apply a test of whether or not an accused person was given a fair trial. A court of appeal in the circumstances herein is not only the appropriate remedy, it is also the one most beneficial to a person such as the respondent.

41. Finally, in a case such as this, where a very young child is centrally involved as a victim and as a witness, it is to be deplored that it should have been delayed as it has been by taking the wrong form of action as herein. Following her plea of guilty made on the 12th October 2016, the respondent delayed some three weeks before notifying a desire to resile from her plea on the 1st November 2016. Having failed in that application made on the 22nd November 2016 she then waited two and a half months before seeking leave for judicial review. It is incumbent on everyone involved in cases of this nature to proceed as expeditiously as justice allows. I could consider allowing the appeal on the basis that the respondent failed to apply promptly for judicial review. However the main ground upon which the appeal will be allowed and the order of certiorari will be quashed is the one that I find central. The respondent acted prematurely in seeking judicial review of a decision made in the course of a criminal trial that had not concluded. In doing so she failed to avail of the appropriate alternative remedy. I would allow the appeal on this ground alone. It is unnecessary to consider the other grounds raised.