Neutral Citation Number: [2011] IEHC 445

THE HIGH COURT

2010 1290 JR

BETWEEN

B. G.

APPLICANT

AND

DISTRICT JUDGE CATHERINE MURPHY, DIRECTOR OF PUBLIC PROSECUTIONS AND THE JUDGES OF THE DUBLIN CIRCUIT COURT (No.2)

RESPONDENTS

AND

IRELAND AND THE ATTORNEY GENERAL

NOTICE PARTIES

AND

IRISH HUMAN RIGHTS COMMISSION

AMICUS CURIAE

JUDGMENT of Mr. Justice Hogan delivered on the 8th day of December, 2011

1. The issues considered in this judgment arise as a sequel to my earlier judgment in *BG v. Judge Murphy (No.1)* [2011] IEHC 359 ("BG No.1"). While the salient facts were set out in that judgment, one may briefly recapitulate by saying that the applicant is a 49 year old man whose mental capacity - in view of the relevant psychiatric evidence presented to the court - may fairly be regarded as being in some doubt. He now stands charged with the sexual assault of a female, contrary to s. 2 of the Criminal Law (Rape) (Amendment) Act 1990 (as amended) ("the 1990 Act").

2. When the applicant originally came before the District Court in January 2010 it was indicated to the court that the Director of Public Prosecutions would consent to summary disposal of this indictable offence, but only if he were to plead guilty. In *BG (No.1)* I summarised thus the subsequent sequence of relevant events:-

> "There then followed a series of adjournments which were variously designed to facilitate the making of appropriate disclosure by the prosecution and to obtain appropriate professional legal and psychiatric evidence. Matters came to a head in July 2010 when the Director outlined his position in writing:-
>
> > 'The DPP directed that the charge before the court proceed on indictment pursuant to s. 13 of the Criminal Procedure Act 1967. There is consent to the matter being disposed of if all the conditions of that section are met.
> >
> > Since a fitness to plead issue has arisen, the accused is not in a position to enter a plea, therefore s. 13 of the Criminal Procedure Act cannot be utilised. The fitness to plead issue therefore has to be determined by the Circuit Court.
> >
> > We will be making the application for the accused to be returned for trial for the fitness to be tried issue to be determined.'
>
> Following a full hearing on 23rd July, 2010, on the issue, District Judge Murphy concluded that she had no jurisdiction in the matter, save in the event that the applicant pleaded guilty. The prosecution solicitor, Ms. Farrell, confirmed that the Director wanted the issue of the applicant's fitness to plead to be sent forward for hearing to the Circuit Court. District Judge Murphy acceded to this submission and then sent the applicant forward on bail to the next sittings of the Dublin Circuit Court so that his fitness to plead could be determined by a judge of that Court."

3. The critical issue in that judgment concerned the proper interpretation of the provisions of s. 4(3)(a) and s. 4(4)(a) of the Criminal Law (Insanity) Act 2006 ("the 2006 Act"). At a superficial level, the question was simply whether the question of the accused's fitness to plead should be determined by the District Court or by the Circuit Court. As it apparent from the judgment in *BG (No.1),* I held that District Judge Murphy was correct to rule that this question must be determined by the Circuit Court in light of the relevant provisions of s. 4(3)(a) and s. 4(4)(a) of the 2006 Act. But the ultimate issue presented by this litigation is, in truth, a more subtle and difficult one.

4. In the ordinary way an accused person who wished to plead guilty to the charge and thereby obtain the benefit of the summary disposal of this indictable offence could simply do so by pleading to the charge in the District Court. The District Court could then impose a maximum sentence of 12 months. If the accused wished to appeal that sentence, he could do so without constraint to the Circuit Court, where the appeal would be heard *de novo.* If, on the other hand, it were considered that the sentence was too lenient, it would *de facto* be quite impossible for the Director of Public Prosecutions to appeal any such sentence. It is true that any sentence imposed by the District Judge might in theory be appealed by the prosecution to this Court on a point of law by virtue of s. 2 of the Summary Jurisdiction Act 1857 (as amended by s. 51 of the Courts (Supplemental Provisions) Act 1961). In practice, however, it would not appear that any such appeal against a sentence imposed by the District Court has ever been taken, even though this Court enjoys a jurisdiction to overturn an acquittal on a point of law: see, *e.g.,* the remarks of Finlay P. in *Director of Public Prosecutions v. Nangle* [1984] I.L.R.M. 171, 172.

5. As we presently shall see, however, this option of pleading guilty is not open to an accused in the position of the applicant in view of the doubts which attach to his mental capacity. The crux of the problem is that the relevant legislation would permit him to consent to such summary disposal only where the District Court was satisfied that he understood the nature of the charge. Since this was to beg the very question which (as I have found) the 2006 Act required first to be determined by the Circuit Court - namely, his capacity to plead - the end result was that the accused was sent forward to the Circuit Court to enable the fitness to plead issue to be determined. As a consequence, in the event that the applicant is ultimately found to be fit to plead, the terms of the legislation would seem to suggest that the applicant faces the full rigours of trial on indictment before the Circuit Court. If this is correct, then the applicant faces a maximum sentence of 14 years.

6. This is by no means the only consequence. In the event that the Circuit Court were to impose a custodial sentence then it would require quite exceptional circumstances before the applicant could secure an effective stay on that sentence of imprisonment pending an appeal to the Court of Criminal Appeal. This is in contrast to the position in the District Court, where the accused will inevitably remain at liberty pending an appeal to the Circuit Court. Nor is the appeal to the Court of Criminal Appeal an untrammelled one. Leaving aside the purely theoretical restriction that leave to appeal is formally required, of far more significance is the fact that the Court of Criminal Appeal will not interfere with any such sentence unless some error of principle has been identified. By virtue, moreover, of s. 2 of the Criminal Justice Act 1993 (as amended) it would be open to the Director of Public Prosecutions to appeal any sentence imposed by the Circuit Court on grounds of leniency, albeit that in practice that Court will interfere with the sentence originally imposed only in special cases.

7. This is the general background to the present constitutional challenge. The essence of the applicant's case is that he has been effectively deprived of the right to plead guilty in such circumstances in that District Court and that the 2006 Act was worked an unconstitutional discrimination against him. In this regard, I also had the benefit of very helpful submissions from Mr. McDermott for the Director of Public Prosecutions, Mr. Callinan SC for the Attorney General and Mr. Fitzgerald SC for the Irish Human Rights Commission, the latter appearing as *amicus curiae*. Before, however, we can swim out, so to speak, to these rather deep constitutional waters, it is first necessary now to set out the somewhat complex statutory background to this case.

The statutory background

8. Section 2 of the 1990 Act (as amended) provides:-

> "The offence of indecent assault upon any male person and the offence of indecent assault upon any female person shall be known as sexual assault.
>
> (2) A person guilty of sexual assault shall be liable on conviction on indictment to imprisonment for a term not exceeding 5 years."

9. Section 13 of the Criminal Law Procedure Act 1967 ("the 1967 Act") allows a District Judge to accept a guilty plea in respect of such an offence provided that "the court is satisfied that [the accused] understands the nature of the offence and the facts alleged." To repeat what I said on this point in *BG (No.1)*:-

> "Section 13(2)(a) [of the 1967 Act] requires the consent of the prosecutor (i.e., the Director) for such summary disposal. Nevertheless, where there is such summary disposal, the maximum range of penalties is confined by that sub-section to that appropriate to a minor offence. Since, however, the District Court cannot ascertain whether the applicant understands the nature of the offence, the sub-section cannot presently be invoked, quite independently of the fact that there has been no indication by the applicant that he might wish to plead guilty."

10. Section 4(3)(a) of the 2006 Act provides:-

> "Where an accused person is before the District Court (in this section referred to as "the Court") charged with a summary offence, or with an indictable offence which is being or is to be tried summarily, any question as to whether or not the accused is fit to be tried shall be determined by the Court."

11. Here again I might conveniently repeat my analysis of this point contained in *BG (No.1)*:-

> "The applicant has not, of course, been charged with a summary offence. He was rather charged with an indictable offence which could only be tried summarily provided he pleaded guilty and provided also that the District Judge was satisfied that he understood the nature of the offence and the facts alleged. But these essential statutory pre-conditions to the exercise of that jurisdiction are not - as yet, at least - in place in the present case. It cannot therefore be said that the offence in question "is being or is to be tried summarily", since without these pre-conditions being satisfied, the offence will never be tried summarily.
>
> In the present case, the effect of the Director's direction was that the applicant was to be tried on indictment if, for whatever reason, he did not plead guilty. Here the applicant did not plead guilty and the District Judge could not have been satisfied that he understood the nature of the offence. It follows, therefore, that in these circumstances s. 4(3)(a) cannot apply to the present case and the District Court had no jurisdiction to try the offence summarily having regard to the facts of the case as presented."

Does the Circuit Court have jurisdiction in this case?

12. Having concluded that s. 4(3)(a) does not apply to the present case, I then proceeded to hold that s. 4(4)(a) must apply. It provides as follows:-

> "(a) Where an accused person is before the Court charged with an offence other than an offence to which paragraph (a) of subsection (3) applies, any question as to whether that person is fit to be tried shall be determined by the court of trial to which the person would have been sent forward if he or she were fit to be tried and the Court shall send the person forward to that court for the purpose of determining that issue."

13. As the applicant is a person charged with an offence "other than an offence to which [s. 4(3)(a)] applies", it follows that the mandatory provisions of s. 4(4)(a) govern the case. This effect of this that the District Court was obliged to return this applicant to the Circuit Court and it is that latter Court alone which has jurisdiction to hear and determine the fitness to plead issue. The applicant's case is accordingly that this construction of the 2006 Act gives rise to an unconstitutional lacuna in that he has no real means of availing of the opportunity - should this prove advantageous to do so after the determination of the fitness to plead issue -

of pleading guilty before the District Court and thereby securing the benefit of a lower range of maximum sentences which might be imposed on him. As I put it in *BG (No.1)*:

> "The applicant thus contends that this lacuna amounts to a form of unconstitutional discrimination contrary to Article 40.1 as between those persons whose mental capacity is not in doubt on the one hand and those other persons (such as himself) whose respective fitness to plead requires to be judicially determined on the other."

Is the constitutional challenge premature?

14. This is, accordingly, the background of the present claim whereby the plaintiff urges that the legislation is unconstitutional. Before considering this question, however, it is necessary to consider the first argument advanced by both Mr. McDermott for the Director of Public Prosecutions and by Mr. Callanan SC for the Attorney General, namely, that this constitutional claim is premature and that I should not accordingly pronounce upon this issue.

15. The prematurity doctrine may be regarded as a sub-set of a wider field of prudential rules whereby the courts seek to conserve the exercise of judicial power in such a manner as to ensure that the powers of judicial review of legislation are confined to those cases where the exercise of that power is imperatively required. The exercise of judicial power is confined by Article 34.1 of the Constitution to the administration of justice and it would not be proper or decorous for the courts to exercise such powers in a manner which was not integral to the administration of justice in a particular case itself. In this regard, I might venture to repeat what I said on the somewhat cognate topic of mootness in *Salaja v. Minister for Justice, Equality and Law Reform* [2011] IEHC 51:

> "The mootness doctrine is a rule of judicial practice which is designed to ensure the proper and efficient administration of justice. It thus shares a close affinity with other judicially created rules of practice, such as the rules relating to *locus standi*, the rule of avoidance and the doctrine of justicability. These doctrines and rules of practice may all said to be constitutionally inspired - in particular, by the doctrine of separation of powers reflected in Articles 6, 15, 28 and 34 of the Constitution - even if they are not actually constitutionally mandated in express terms. As Article 34.1 of the Constitution provides that the administration of justice is committed to the courts, the courts must endeavour to fulfil that mandate by confining themselves to the resolution of actual legal controversies. If they were to do otherwise, then the courts would stray beyond that proper constitutional role of administering justice as between parties to a legal dispute, inasmuch as such decisions would amount to purely "advisory opinions on abstract propositions of law": see *Hall v. Beals* 396 U.S. 45 (1969)(*per curiam*). Outside of the special confines of Article 26 (which, in any event, provides for a binding decision - and not merely an advisory opinion - by the Supreme Court on the constitutionality of a Bill following a reference by the President), the provision by judges of such advisory opinions would not, at least generally speaking, serve the proper functioning of the administration of justice, since if unchecked or not kept within clearly defined limits, it would involve the judicial branch giving gratuitous advice on legal issues to the Oireachtas and the Government, a function which was never conferred on it by the Constitution.
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> The mootness doctrine further serves the interests of the proper administration of justice by conserving scarce judicial resources. As Hardiman J. observed in *G. v. Collins* [2005] 1 I.L.R.M. 1, 13: "proceedings may be said to be moot where there is no longer any legal dispute between the parties." In this respect, the doctrine of mootness may be said to constitute a sub-set of the broader *locus standi* rules, since if a legal dispute has been resolved and the issue thereby becomes moot, the litigants no longer have any proper interest in seeking to have the issue judicially resolved, even if they had such an interest at some point in the proceedings. In such instances, the public interest generally requires that the judicial branch of government refrain from deciding such questions. As Henchy J. remarked in the context of the general *locus standi* rules in *Cahill v. Sutton* [1980] I.R. 269, 283:-
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> > 'To allow one litigant to present and argue what is essentially another person's case would not be conducive to the administration of justice as a general rule. Without concrete personal circumstances pointing to a wrong suffered or threatened, a case tends to lack the force and urgency of reality. There is also the risk that the person whose case has been put forward unsuccessfully by another may be left with the grievance that his claim was wrongly or inadequately presented.'"

16. It is true, of course, that, viewed from a temporal perspective, prematurity and mootness stand at opposite ends of this spectrum of prudential rules of practice. They both nevertheless firmly belong to this wider field of prudential rules of practice which seek to conserve judicial power and to protect the proper administration of justice in the manner envisaged by Henchy J. in *Cahill v. Sutton*. Both are rules of practice which serve to ensure that the courts do not pronounce unnecessarily on constitutional issues. The rules as to mootness ensure that the court does not deal with this question when the constitutional element of the case is essentially over and the rules as to prematurity see to it that the court does not do this when the constitutional element of the case has not yet properly begun.

17. The debate concerning prematurity in this case focussed on three decisions of this Court, *Curtis v. Attorney General* [1985] I.R. 458, *Kennedy v. Attorney General* [2007] IEHC 3 and *SM v. Ireland (No.2)* [2007] IEHC 280, [2007] 4 I.R. 369 and two decisions of the Supreme Court, *CC v. Ireland* [2005] IESC 48, [2006] 4 I.R. 1 and *Osmanovic v. Director of Public Prosecutions* [2006] IESC 50, [2006] 3 I.R. 504. Since it is common case that there were special factors in play so far as *CC* is concerned, we may consider that first.

18. In *CC* the applicants, who were facing trial for statutory rape and (in some instances) sexual assault in the Circuit Court, sought declarations by way of judicial review regarding the proper construction of s. 1 of the Criminal Law (Amendment) Act 1935 and, if necessary, a declaration that the legislation was unconstitutional. The High Court dismissed the applications on their merits, having construed the relevant legislation. It was this factor - *i.e.*, the fact that Smyth J. had sought to construe the legislation in question in a particular way - which ultimately persuaded the Supreme Court to hold that it should grant the appropriate declarations by way of judicial review, since otherwise, for example, the Circuit Court might have regarded itself as bound by that decision.

19. In *Curtis v. Attorney General* [1985] I.R. 458 the plaintiff faced charges that he had fraudulently evaded customs duties which were levied on certain goods. Section 34 of the Finance Act 1963 provided for a procedure whereby the Revenue Commissioners could estimate the value of the goods in question. In the event that this estimate was challenged, the value of the goods was to be determined conclusively by the District Court and there was to be no appeal against that decision. In the event that the value of the goods exceeded IR£500, then the legislation provided that the case to be tried on indictment, but, curiously, the value as determined by the District Court was to bind the jury. Carroll J. held that the plaintiff had the necessary *locus standi* to challenge the constitutionality of the legislation for the following reasons ([1985] I.R. 458 at 462):

> "While the determination by the District Court in accordance with s. 34(4) [of the 1963 Act] might be in his favour, he is nevertheless in imminent danger of a determination affecting his rights. It is not necessary that that a determination adversely affecting rights must first be made before a constitutional challenge can be started. It is sufficient if there is a reasonable apprehension of such a determination: see *Cahill v. Sutton* [1980] I.R. 269, 286."

20. This decision was expressly approved by the Supreme Court is *Osmanovic*. Here the applicants sought to challenge the constitutionality of fixed penalty provisions in respect of the illegal importation of goods. While this Court (Ó Caoimh J.) had dismissed the challenge as premature, the Supreme Court took a different view. In the words of Geoghegan J. ([2006] 3 I.R. 504 at 511):-

> "Is each of these appellants acting prematurely in seeking to challenge the constitutionality of section 89(b)? The learned trial judge thought so but I do not agree. In the case of the *Osmanovics*, the judge took the view that these applicants might well be acquitted on the merits and that they should wait until they were convicted before mounting any challenge to the constitutionality of the provision. In relation to the [companion] Sweeney case the respondents lay emphasis on the very early stage of that case and that it is not known yet what options are open to that appellant at the District Court stage. In other words, the Criminal Procedure Act, 1967 has not really yet come into play. The trial judge seems to have been of the same view. I do not accept that *locus standi* is such a narrow concept or that the views of the learned trial judge conformed with the principles of this court set out in *Cahill v. Sutton* [1980] I.R. 269. I appreciate that prematurity and *locus standi* are not quite the same thing. In each of these three cases, however, I am of the opinion that if the appellants' complaints based on the Constitution could be arguably justified, they are perfectly entitled to air them at this stage. In each case, prosecutions have at least been instituted.
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> ….. In expressing the views which I have done, I would prefer to rely on general principle supported by the case which seems to me to be most relevant that of *Curtis v. Attorney General*, a decision of Carroll J. in the High Court. ….In that case, there was a prosecution under section 186 of the Customs Consolidation Act, 1876 as amended and by reason of the provision for the determination of value of the goods the plaintiff wanted to challenge the constitutionality of the relevant provision ahead of the trial. Carroll J. took the view that the plaintiff had *locus standi* to challenge the constitutionality of the provisions in question "as he was in imminent danger of a determination affecting his rights, and this need not necessarily be a decision which would adversely affect his rights." In my opinion, Carroll J. applied the law correctly. Applying the same principles to this case, I consider that none of the proceedings, the subject matter of this appeal, are premature."

21. In *SM v. Ireland (No.2)* [2007] IEHC 280, [2007] 4 I.R. 369 the plaintiff had been returned for trial in respect of indecent assault offences allegedly committed under s. 62 of the Offences against the Person Act 1861. That section provided for radically different penalties, depending on whether the victim was male or female. Applying *Osmanovic*, Laffoy J. held that the plaintiff had the requisite standing to challenge the constitutionality of these sentencing provisions, even though, of course, he had merely been *charged* with an offence under that section.

22. The decision of MacMenamin J. in *Kennedy v. Director of Public Prosecutions* [2007] IEHC 3 is, however, heavily relied on by both Mr. McDermott and Mr.Callinan SC as authority for the proposition that the constitutional issue in the present case is premature. In *Kennedy,* the applicant, a civil servant, was charged with accepting a corrupt payment. It was said that he had improperly accepted gifts from persons seeking immigration status. At this point the applicant sought to challenge the constitutionality of an evidential presumption contained in s. 4 of the Prevention of Corruption (Amendment) Act 2001 which, he contended, had the effect of creating unfair evidential presumptions in favour of the prosecution.

23. MacMenamin J. held that this challenge was premature for the following reasons:

> "The tenor of each decision of the Supreme Court in *C.C…* express the real concern as to whether it was appropriate for the court at that point to entertain the application. For exceptional reasons only the Supreme Court considered it appropriate to proceed to deal with the substantive issue. Prima facie, and absent exceptional circumstances, these are issues for the trial judge.
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> In the instant case it has not been suggested (and certainly not put in evidence) that there are a number of other cases pending whose outcome will depend on that in the instant case. The section impugned is not that under which the applicant is charged.
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> In the instant case this court accepts the submissions made on behalf of the Attorney General that what is in question here is a hypothesis which has not occurred and may never occur. As matters stand, no presumption has been invoked against the applicant. This court is unaware, and can only speculate as to how the evidence will evolve at trial. It may be, hypothetically, that the prosecution may call witnesses to say that they paid money to the applicant as a reward for granting them favours. As matters stand the applicant has not put in issue any of the statements contained within the book of evidence. The applicant has not engaged with the evidence in any way nor identified the nature of his defence or which facts may be in issue. In the event that witness statements go unchallenged it may not be necessary for the prosecution to invoke the provisions contained within s. 4 of the Prevention of Corruption (Amendment) Act, 2001 at all.
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> One must look too, to the role of the trial judge. As matters stand such judge has not been asked to give any ruling on the meaning of the term "*deemed"* or the expression "*unless the contrary is proved*" in the impugned section. The applicant's core complaint in these proceedings is based on the contention that "unless the contrary is proved" means "unless the contrary is proved on the balance of probabilities". Whether that contention has any force or application remains to be determined at trial.
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> Furthermore the section in question provides that the presumption will only arise where the prosecution has proved that:
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> (a) the gift consideration to advantage has been given or received by the applicant and
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> (b) the person who gave the gift had an interest in the discharge by the applicant of a statutory function.
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> The trial judge has yet to rule on the meaning of the term "it is proved that" in subs. (1) of s. (4). The applicant assumes (and his case requires one to accept in advance) that the prosecution will establish that both elements

identified are in place so as to give rise to the presumption of corruption. The evidential basis upon which the applicant seeks relief by way of judicial review has not yet been established. The court is invited to deliver a judgment upon a hypothesis or a moot."

24. This passage invites the following observations. First, MacMenamin J. stressed that the applicant was not challenging the constitutionality of a section with which he was charged. While that is also formally true in the present case as well, the impugned section nevertheless relates to a vital element of that charge, namely, the maximum penalty which the applicant faces. In that respect, the present case is much closer to cases such as *SM (No. 2)* and *Osmanovic.* Second, unlike *Kennedy*, there has been here a judicial ruling on the meaning of s. 4(4), so that this case does not involve the element of pure hypothesis which was present in that case. Third, it is clear from *Curtis, Osmanovic* and *SM (No.2)* that an applicant accused of a criminal charge has the necessary standing to challenge the constitutionality of elements of the sentencing regime, even though, of course, the accused might never be convicted of any offence. One common theme of these three decisions would seem to be that any accused is entitled to know with certainty the penalty provisions of the offence with which he or she is charged and, accordingly, enjoys the requisite standing to challenge these provisions.

25. For all of these reasons, it must accordingly be concluded that the present constitutional challenge is not premature so far as the range of possible sentence is concerned. By analogy, however, with the views of MacMenamin J. in *Kennedy,* I take the view that any challenge based on the alleged inequality arising from the appeal provisions (such as, e.g., the right of the Director of Public Prosecution to appeal any severity imposed by the Circuit Court on grounds of leniency) is presently too remote to merit immediate adjudication.

The constitutional construction of s. 4(3) and s. 4(4)

26. In the light of the conclusion that the case is not premature so far as sentence is, we may now turn to examine the constitutional question on its merits. The real question here is whether the Circuit Court would be bound as a matter of law in the case at hand by the sentencing constraints to which the District Court would have been subject. For the Director, Mr. McDermott stressed how improbable such a scenario would be, since it would be inconceivable - or so the argument ran - that the Circuit Court would ever seek to impose a higher sentence than the District Court maximum in circumstances where the accused elected to plead guilty having been found to plead by the Circuit Court. That may well be true, but it is, with respect, fundamentally irrelevant to the issue at hand. An accused in the position of the applicant is entitled to know as a matter of right the applicable statutory maxima prior to making a decision as to whether to plead guilty. This very point was, in any event, emphasised by the Supreme Court in *CC v. Ireland*.

27. Approaching the matter in this way, the true test is rather to ask whether the Circuit Court could ever *lawfully* impose a sentence greater than the District Court maximum of twelve months in a case such as the present. That question effectively answers itself, since it is plain from the structure of the Act that in the event that the accused is found to be fit to be tried, the matter is to proceed as if he had been returned for trial on an indictable offence in the Circuit Court in the usual fashion. In this respect the provisions of s. 4(4)(c) of the 2006 Act could scarcely be clearer:-

> "If the determination under *paragraph* (b) is that the accused person is fit to be tried, the provisions of the Criminal Procedure Act 1967, shall apply as if an order returning the person for trial had been made by the Court under section 4A of that Act (inserted by section 9 of the Criminal Justice Act 1999) on the date the determination was made but, in any case where section 13 of that Act applies, the person shall be returned for trial."

28. It is thus plain that the Circuit Court is not bound by the jurisdictional limits which apply in the case of the District Court. Mr. Callinan SC urged me to apply *East Donegal* principles *(East Donegal Co-Operative Ltd. v Attorney General* [1970] I.R. 317) so that these jurisdictional limitations might thereby be implied. A court cannot, however, imply a limitation into the words of a statute when this would be at odds with the structure of the statutory language itself. It is clear *East Donegal* does not empower a court to interpret a statute in the name of the double construction rule which is effectively *contra legem* the statute itself. As Walsh J. himself recognised ([1970] I.R. 317, 341) that the double construction rule:-

> "cannot be pushed to the point where the interpretation would result in the substitution of the legislative provision by another provision with a different context, as that would be to usurp the functions of the Oireachtas."

29. While *East Donegal* gives the courts considerable freedom to interpret statutory language so as to make it conform with standard constitutional norms - fair procedures representing a classic case in point - with which the Oireachtas may be assumed to wish to comply, they cannot do actual violence to the statutory language under the guise of an interpretation designed to conform with the Constitution.

Does the 2006 Act contain an unconstitutional lacuna?

30. It seems plain that, by reason of what would appear to be a mere accidental oversight in the course of statutory drafting, the Oireachtas has inadvertently failed to have proper regard to the rights and interests of those who are either mentally ill or whose mental capacity in is doubt. Specifically, it can be said that the Oireachtas has through this inadvertence failed to provide a mechanism whereby persons charged with indictable offences whose fitness to plead is later established can obtain the benefit of a guilty plea before the District Court. This is, as we have seen, stands in stark contrast to the position of an accused person whose mental capacity is not in doubt and who is thereby not impeded from availing of this option.

31. There is accordingly a plain inequality of treatment with potentially far-reaching consequences between two categories of accused for which, objectively speaking, there is no possible constitutional justification. No reason has really been suggested as to why accused persons whose fitness to plead is in doubt find themselves in that situation. This is very far removed from cases where, for example, a "diversity of arrangements" in the sphere of extradition was held not to infringe Article 40.1: see *The State (Hartley) v. Governor of Mountjoy Prison,* Supreme Court, 21st December, 1967, per Ó Dálaigh C.J. Nor can it be compared with those cases where different jurisdictional allocation rules for criminal trials or for powers of arrest which did not in themselves affect either the mode of trial or the scale of penalties were held not to be unconstitutional: see, *e.g., Molyneux v. Ireland* [1997] 2 I.L.R.M. 241 at 244-245, per Costello P. The legislation at issue here is rather much closer to cases such as *Cox v. Ireland* [1992] 2 I.R. 503 where a statutory provision which triggered a much higher penalty (specifically, the loss of a public service pension) was found to infringe Article 40.1 precisely because of the *nature of the court* which imposed the original sentence (i.e., the Special Criminal Court as distinct from the ordinary courts) and *in respect of which court venue the accused had no control*.

32. This, of course, is not for a moment to suggest that the Oireachtas cannot provide for higher penalties for those accused persons convicted on indictment as distinct from those cases where an accused pleads guilty to such offences and is dealt with summarily before the District Court. It is, however, to say that in making rules which permit accused persons to avail of the option of summary disposal before the District Court, the Oireachtas cannot place certain categories of accused persons (such as those whose mental

capacity is in doubt) at a real disadvantage as compared with other similarly situated accused persons without objective justification.

33. This, however, is precisely what has happened here by reason of essentially unforeseen consequences of the drafting of s. 4(3)(a) and s. 4(4)(a) of the 2006 Act. The legislation has thus unintentionally yielded an anomaly which it is impossible to justify. It follows, accordingly, that by reason of this failure, the Oireachtas has violated the constitutional command of equality before the law as required by Article 40.1. In the light of this conclusion, it is unnecessary for me to address the arguments based on Article 14 ECHR.

What is the remedy for an unconstitutional lacuna?

34. In the light of the conclusion that the 2006 Act contains an unconstitutional omission of the kind we have just described, the question then arises as to what is the appropriate remedy in this type of case. The classic remedy in respect of an unconstitutionality is, of course, that prescribed by Article 34.3.2, namely, the invalidation of the relevant portion of the statute in question. Experience has shown - both in this jurisdiction and elsewhere - that the invalidation of the statute is not, however, the only possible remedy and this is perhaps especially true where the problem in question is the result of omission rather than commission.

35. Indeed, one of the peculiarities of unconstitutional legislative omissions is that the remedy of invalidation often would really serve no purpose at all, other than a Samson-like collapsing of the legislative pillars which gave rise to the unconstitutionality in the first instance. This was, for example, the case in *Somjee v. Minister for Justice* [1981] I.L.R.M. 324. Here a foreign male national married to an Irish female complained of the gender-based discrimination which was then contained in s. 8 of the Irish Nationality and Citizenship Act 1956. Keane J. pointed out that the invalidation of the Act would simply result in a situation where the facility of granting citizenship upon marriage to any foreign national (male or female) simply collapsed and would confer no practical benefit on the plaintiff. Keane J. went on to hold ([1981] I.L.R.M. 324 at 327):-

> "There is, in my opinion another and fatal obstacle to the claim of both plaintiffs. It was conceded on their behalf that, if s. 8 of the Act of 1956 was declared to be invalid having regard to the provisions of the Constitution, the section in its entirety would fall. Mr. O'Flaherty [counsel for the plaintiffs] submitted that, in such circumstances, the court would be entitled to declare that the plaintiff's rights had not been vindicated by the Oireachtas in the expectation that the Oireachtas would take whatever steps were necessary to ensure that their rights were in fact protected. No authority was cited in support of this proposition and I am satisfied that it is not well-founded. The jurisdiction of this Court in a case where the validity of an Act of the Oireachtas is questioned because of its alleged invalidity having regard to the provisions of the Constitution is limited to declaring the Act in question to be invalid, if that indeed be the case. This Court has no jurisdiction to substitute for the impugned form of enactment which it considers desirable or to indicate to the Oireachtas the appropriate form of enactment which should be substituted for the impugned enactment.
>
> The results of the plaintiff's argument, if well founded, would be to invalidate s. 8 in its entirety…that would confer no benefit wherever on the plaintiff's: it would not address any injustice to which either of them was subjected or in any sense known to the law, vindicate their personal rights."

36. But with deep respect to the views of that very great judge, if that were indeed the law, then the capacity of the courts to provide an effective remedy in those cases where the Oireachtas had breached Article 40.1 by unjustly conferring a privilege or benefit on one select group of society might have been compromised. While it is, of course, true that the court cannot indicate to the Oireachtas how or in what manner a particular enactment might be repealed or altered, for reasons which I will now endeavour to set out, it is clear from the subsequent post *Somjee* case-law that it can declare that the law in question fails to meet constitutional norms by reason of an unconstitutional omission, even if the court refrains from actually declaring that law to be unconstitutional.

37. Here we are at the heart of the objective of this constitutional provision, since the equal treatment of similarly situated persons is of the essence of the just application of law: cf. here by analogy the classic comments of Jackson J. in *Railway Express v. New York* 336 U.S. 106 (1946):

> "This equality is not merely abstract justice. The framers of the Constitution knew and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally."

38. Indeed, by requiring that the problems created by unconstitutional omissions are either judicially resolved or (where necessary) legislatively addressed, the courts may be said to contribute to the proper and effective functioning of the political process in the manner envisaged by the Constitution. There are all too many examples where the majority are prepared to accept the application of a potentially unfair law, provided, of course, it is applied to a minority and not to them. The history of humanity is sadly replete with such examples. If, by reason of judicial decision, such laws were henceforth to be applied generally - instead of being artificially confined to an unconstitutionally selected class - it might be expected that in time any unfairness or injustice which was thereby created or perceived by the application of such laws to the general population would thereby be speedily remedied by the Oireachtas itself in response to political pressure from that very majority.

39. By granting this form of declaration in the unusual cases where this relief seems appropriate, the courts may be further said to advance the dialogue between the three branches of government which is a healthy feature of the separation of powers. Questions of policy naturally remain the exclusive prerogative of the Oireachtas and the Government. The process of judicial review of legislation may, however, contribute to effective law-making in that – just as in the present case – it may throw up examples of anomalies or other instances of unconstitutional differentiation which any fair society would seek immediately to redress once these examples came to light.

40. Returning to the question of remedies, in some instances, therefore, the courts can cure the unconstitutionality caused by a legislative omission by (possibly) extending the scope of the legislation by ensuring that it operates equally or (certainly) by granting a declaration regarding its scope of application. The existence of such a jurisdiction in the former category of cases is perhaps uncertain and, insofar as it can be exercised at all, it is confined to admittedly rare and special cases. The prime (and perhaps only) example here is supplied by the Supreme Court's decision in *McKinley v. Minister for Defence* [1992] 2 I.R. 333, a case where the plaintiff wife sued for loss of consortium in respect of her husband. This was not, however, possible at common law, since the cause of action itself had evolved in circumstances where the wife was regarded as a form of quasi-chattel of her husband. While the Court was unanimously of the view that the common law in its original form violated Article 40.1, a majority of the Court considered that the rule could be made gender neutral by extending it so that plaintiffs in the position of Ms. McKinley could sue in respect of injuries to their spouse. Of course, it might be said that the rule in question was simply a common law rule which was inherently susceptible to modification by judicial decision, so that the *McKinley* principle could not be applied to *legislative* omissions where the relevant

legislation is under-inclusive in its scope of application. Whether this is in fact so must await resolution in an appropriate case.

41. Whatever about the true scope of *McKinley*, it is plain from subsequent decisions such as *McMenamin v. Ireland* [1996] 3 I.R. 1, *SM v. Ireland (No.2)* and *Carmody v. Minister for Justice, Equality and Law Reform* [2009] IESC 71, that the courts can grant a declaration to remedy a legislative omission. In *McMenamin*, the Supreme Court clearly indicated – even if it did not formally so declare - that the existing pension arrangements for District Judges violated Article 35.5. Thus, Hamilton C.J., O'Flaherty and Blayney JJ. all indicated that this was so and equally stated that they expected that this omission would now be addressed by the Oireachtas, as indeed it subsequently was.

42. This principle also emerges from the judgment of Murray C.J. in *Carmody* where he said ([2010] 1 I.R. 635 at 667-668):-

> "….the substance of the appellant's claim is that he has no right to apply for criminal legal aid in a District Court trial which would provide him with representation by counsel as well as a solicitor and therefore no right to be granted such legal aid where the essential interests of justice so require. On this basis he has claimed that s. 2(1) of the [Criminal Justice (Legal Aid) Act 1962] is repugnant to the Constitution.
>
> The Court has already determined that the denial of an opportunity to apply for and be granted, where appropriate, such legal aid is a denial of a constitutional right. He is entitled to have that constitutional right vindicated. Article 40.3 of the Constitution imposes on the organs of State the duty to defend and vindicate the personal rights of the citizen.
>
> As this Court has frequently pointed out, and as Henchy J., did in *[The State (Healy) v. Donoghue* [1976] I.R. 326] this Court is one of the organs of government, the judicial organ. In exercising its judicial functions it must seek to vindicate such rights.
>
> In doing so the Court is not confined to the specific form of remedy sought by a claimant who has established that his or her fundamental rights under the Constitution are being denied. Where that is established this Court has jurisdiction pursuant to the provisions of the Constitution and in particular Article 40.3 to grant such remedy as it considers necessary to vindicate the right concerned. As Barrington J., pointed out in *McDonnell v. Ireland* [1998] 1 I.R. 134 at 148 "… when the Legislature has failed in its constitutional duty to defend or vindicate a particular constitutional right pursuant to the provisions of Article 40.3 of the Constitution … this Court, as the Court of last resort, will feel obliged to fashion its own remedies."
>
> The Court is satisfied that it would be unjust and contrary to the appellant's right to a trial "in due course of law" as required by Article 38.1 of the Constitution if the prosecution of the charges brought against him were allowed to proceed while he is denied the right to apply for legal aid to include solicitor and counsel and have that application determined on its merits. To allow a trial to proceed without any possibility of determining whether it was essential to a fair hearing that the defendant be represented by solicitor and counsel would be, in the words of O'Higgins J., in the *Healy* case, "to tolerate injustice".
>
> A consequence of this conclusion is that the appellant in this case cannot be tried unless and until he is afforded an opportunity to apply for legal aid to include solicitor and counsel and have that application determined on its merits having regard to the considerations referred to in this judgment. The State has in place more than one scheme for legal aid generally by which the rights of citizens to such legal aid are secured through either statutory or administrative measures. The obligation which rests on the State is to secure for defendants, either by administrative or statutory means, the right to apply for appropriate legal aid for those charged with criminal offences. It is for the State to determine the Court or other body which should have responsibility for deciding on the merits of such an application."

43. If, as seems clear from *Carmody*, that the courts can grant a declaratory remedy in order to rectify a legislative omission of this sort, what, then, is the appropriate step to be taken in the present case? It is implicit in *Carmody* that the court rejected the option of invalidation, simply because this would not have given any practical assistance to the applicant in that case. He sought, after all, the *extension* of the legal aid scheme, not its invalidation or nullification.

44. In passing, it may also be observed that, as already alluded to, courts in other jurisdictions have had to confront problems of this kind with under-inclusive legislative categorisations. The German Constitutional Court has, from its earliest days, pioneered the technique of the "admonitory decision" ("Appellentschiedung") whereby the Court provides a temporary solution of this nature designed to permit a transient cure in respect of otherwise unconstitutional legislation pending a thorough legislative review of the offending statutory provisions: see, e.g., Rupp v. Brünneck, "*The Admonitory Functions of Constitutional Courts (Germany)*" (1972) 20 *American Journal of Comparative Law 387*. As a distinguished judge of the German Constitutional Court during the 1960s and 1970s, Justice Rupp v. Brünneck herself participated in many of the leading admonitory decisions of this nature delivered by that Court in areas such as the different treatment of children born outside of marriage for inheritance purposes and sex discrimination in pension legislation. The *Carmody*-style declaration would be clearly recognised by the comparative constitutional lawyer as being similar to an admonitory decision of this type. Indeed, in passing, it might be said that such a comparativist would probably categorize the declaration of incompatibility provided for in s. 5(2) of the European Convention of Human Rights Act 2003 as a species of admonitory decision as well, in that it is essentially an invitation to the Oireachtas to redress a defect identified in the legislation by the court in the light of the State's ECHR obligations.

45. The solution in question envisaged by a *Carmody*-style declaration seems appropriate for the present case as well. The invalidation of key parts of the 2006 Act would confer no practical benefit on the applicant and would seriously deplete a range of safeguards designed to protect the best interests of the mentally ill in the course of the criminal justice system pending the enactment of new legislation. If, on the other hand, this Court grants a *Carmody*-style declaration, it can thereby take effective steps to safeguard the applicant's rights by extending the scope of s. 4(4) to cater for a case of this kind. If one may be permitted to use a dental analogy, this is in the nature of a temporary filling - rather than a full extraction - pending the appropriate repair and overhaul of the legislative scheme at some stage in the future by the Oireachtas.

46. To my mind, therefore, the most appropriate remedy is to grant a declaration along the lines of that granted by Laffoy J. in *SM (No.2).* In that case Laffoy J. held that s. 62 of the 1861 Act was inoperative by reason of the fact that it provided for different penalties depending on whether the victim of an indecent assault was a male or a female. Laffoy J. declared ([2007] 4 I.R. 369 at 401):-

> "..that if the plaintiff were to be convicted and sentenced for the common law offence of indecent assault in respect of a male person, for the sentencing judge to apply a maximum sentence of more than the equivalent sentence that would have been available at the time of the offence for an indecent assault upon a female would be to breach the plaintiff's constitutional right to equality."

47. I propose therefore to grant a declaration along the same lines which seeks to redress the most obvious inequality - namely, the range of sentence open to the Circuit Court - identified by Mr. O'Higgins SC for the applicant. I appreciate that some potential inequalities and anomalies may still remain - particularly in the relation to possible prosecution appeals against sentence - but the question of whether any remedy might be available in such circumstances would seem to be best addressed if and when the Director of Public Prosecutions sought to lodge any appeal against sentence imposed following a plea of guilty in the Circuit Court.

Conclusions

48. I will accordingly declare that in the event that the applicant is found to be plead by the Circuit Court and subsequently pleads guilty to the sexual assault of a female, contrary to s. 2 of the Criminal Law (Rape)(Amendment) Act 1990 (as amended), for the sentencing judge to apply a maximum sentence of more than the equivalent sentence that would have been available to the District Court had the applicant's fitness to plead already been established and he had so pleaded guilty before the District Court would be to breach the plaintiff's constitutional right to equality under Article 40.1.