THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 42 J.R.]

BETWEEN

CHARLES IRVINE

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Judgment of Ms. Justice Faherty delivered the 10th day of March, 2017

1. By order of Humphreys J. dated 1st February, 2016, leave was granted to the applicant to apply, by way of an application for judicial review, for:-

> (i) An order of certiorari quashing the order of His Honour Judge O'Donohue directing a retrial of the applicant's appeal entitled *The Director of Public Prosecutions (Garda Caroline Taaffe) v. Charles Irvine* made on 20th November, 2015;
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> (ii) Prohibition restraining the Circuit Court judge assigned to hear the said retrial from dealing with the matter other than by way of an Order allowing the appeal; and
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> (iii) An injunction restraining the respondent from calling evidence in support of the prosecution entitled *The Director of Public Prosecutions (Garda Caroline Taaffe) v. Charles Irvine* presently pending before the Circuit Court, Western Circuit.

2. A stay was granted in respect of the proceedings in the Circuit Court, Western Circuit until the determination of the application for judicial review.

3. The background is as follows:

The applicant was prosecuted for being drunk in charge of a car on 20th July, 2013, contrary to s.5(2)(b) and (5) of the Road Traffic Act, 2010 (as amended by s.9 of the Road Traffic (No. 2) Act, 2011). He was convicted in the District Court on 25th November, 2014.

4. The applicant appealed the conviction de novo to the Circuit Court. The appeal was heard on 17th November, 2015. The appeal focused on whether the applicant was in charge of the vehicle with intent to drive and his attempt to rebut the presumption (contained in s. 5(8) of the Road Traffic Act, 2010) that he was in charge of the vehicle with intent to drive. As made clear at para. 15 of Garda Taaffe's (the prosecuting garda) affidavit, similar evidence was given by the prosecution at the District Court appeal hearing to that given during the course of the earlier District Court trial. The prosecution evidence was to the effect that a car was seen by gardaí coming to a halt on Pearse Street, Ballina while gardaí were attending on another vehicle. The prosecuting garda testified that she and another garda turned the patrol car they were in and went towards the vehicle. This caused them to momentarily lose sight of the vehicle. On approach, they found the vehicle's engine turned off, the lights on and no keys in the ignition. A subsequent search of the vehicle located the keys in the glove box. Garda Taaffe confirms in her affidavit that she was the only prosecution witness at the District Court appeal.

5. The applicant's solicitor, in his grounding affidavit, avers that, in cross- examination, the prosecuting garda conceded that she was not in a position to state that the applicant had driven the car up to the point where she had found it. It is also the case that the applicant gave evidence in his defence. The thrust of his evidence, as described by his solicitor was as follows. The applicant had been drinking on the day in question and had been given a lift home. The vehicle had stopped and the driver had run off. The applicant then got into the front of the car. He had however no intention of driving and as far as he was concerned he was not in control of the vehicle. He was cross-examined by the State Solicitor to the effect that on the day after the incident he made a statement to the gardaí in which he said as follows:

> *"I have no memory of last night other than been [sic] outside the Pilot Bar. I woke up this morning I knew something had happened. I can't remember being arrested or anything that happened after the Pilot Bar in Enniscrone. I know now I was arrested but I have no memory or [sic] events of what happened. I was very drunk. My son, Joseph explained things to me and he remembered."*

6. The applicant's statement was not produced or put into evidence at the appeal hearing, although he accepted that he had made the statement to the gardaí.

In the course of cross examination, the applicant named the driver of the vehicle as one Alan Murphy who had given evidence in the District Court but who had left the country by the time of the District Court appeal and thus unavailable to testify.

Following the evidence, the certificate of analysis not being in dispute, submissions were made to the Circuit Court judge by each side in respect of the rebuttal of the evidential presumption contained in the Road Traffic Act, 2000 regarding an intention to drive. After hearing legal submissions, the Circuit Court judge reserved judgment and adjourned the appeal for three days to 20th November, 2015. He remanded the applicant on bail to that date. On 20th November, 2015, the Circuit Court judge refused the appeal and affirmed the District Court conviction.

7. As recounted at para. 8 of the applicant's solicitor's affidavit, the Circuit Court judge stated, *inter alia*, that on the 20th July, 2013, the gardaí had noticed the applicant in the vehicle prior to coming up to it and that the applicant had been driving. It is averred that no evidence had in fact been given to this effect by the garda witness in the course of the appeal hearing. The Circuit Court judge also found that on the evidence the applicant had been in control of the vehicle and had not displaced the burden of establishing that he did not have the intention to drive.

8. According to the applicant's solicitor, immediately following the decision, counsel for the applicant was approached by the State Solicitor who informed him that just before the Circuit Court commenced on 20th November, 2015, the gardaí had advised him that in the period between the initial hearing of the case three days earlier and the date of the decision, the Circuit Court judge had contacted the garda station in Ballina requesting copies of the statements which had been prepared for the purposes of the prosecution. They were provided to him. They had not been given in evidence before the Circuit Court on 17th November, 2015.

9. Garda Taaffe in her affidavit avers that the documents requested by the Circuit Court judge and supplied to him were the statements which had been furnished to the applicant in advance of the District Court trial. The statements were not furnished by Garda Taaffe personally to the Circuit Court judge.

The statements consisted of:-

(i) The statement of evidence of Garda Taaffe made on the 3rd September, 2013;

(ii) The cautioned statement of the applicant taken on 20th July, 2013;

(iii) The statement of evidence of Garda Thomas McManus made on 6th May, 2014; and

(iv) The statement of evidence of Garda Gerard Carney made on 21st April, 2014.

10. In his affidavit, the applicant's solicitor avers that having been approached by the State Solicitor and apprised of the events between the hearing of the District Court appeal and the decision of the Circuit Court judge, counsel for the applicant had indicated to the State Solicitor that in the circumstances the conviction could not stand and that the appeal should be allowed. The applicant had by this stage left the courthouse. It is not in dispute that the matter was then mentioned by the State Solicitor to the Circuit Court judge and the State Solicitor applied to have the order of conviction vacated. According to the applicant's solicitor, the Circuit Court judge inquired as to the reason and the State Solicitor gave a brief explanation. At that stage, the matter was put back to the end of the list.

11. When the matter was called again, the State Solicitor outlined to the Circuit Court judge the information that had come to his attention and the concerns of the office of the Director of Public Prosecutions (D.P.P.) in relation to the conviction and again requested that the order of conviction be vacated. The Circuit Court judge immediately granted this request.

12. According to the applicant's solicitor, the Circuit Court judge went on to state that it had been a misunderstanding on his part as to whether or not the statements were in fact part of the evidence given. He then went on to state that he would not allow the appeal because it was his understanding that the statements were being put in as part of the evidence. The Circuit Court judge then vacated the order and put the matter back into the list for hearing before another Circuit Court judge.

13. In the course of his affidavit, the applicant's solicitor avers:-

> "I say and believe and am advised by counsel that had the conviction stood, it is clear same would have been quashed by Order of the High Court once the irregularities underlying the conviction had been brought to the High Court's attention. I say and believe and am advised further that the Applicant was on hazard of being lawfully convicted during the course of the appeal hearing …but that [by] virtue of [the Circuit Court judge] having acted contrary to fair procedures the conviction could not stand.
>
> In these circumstances I am advised that an Order of Certiorari quashing such a conviction would be in circumstances where the Applicant for such Order would be entitled to plead *autrefois acquit* in respect of any subsequent attempt to re-enter the District Court Appeal for rehearing. On the basis of authority I am advised that, in these circumstances, the fact that [the Circuit Court judge] has himself set aside the conviction does not affect the legal consequences which flow from the fact that the Applicant herein was in jeopardy of a proper and lawful conviction and accordingly and upon the grounds set out in the Statement of Grounds filed herewith I pray this Honourable Court for the relief sought herein."

14. The specific grounds upon which relief is sought are as follows:-

(i) The trial judge stepped outside his jurisdiction and acted contrary to fair procedures seeking material from the prosecution which had not been given in evidence and in considering same;

(ii) The trial judge stepped outside his jurisdiction and acted contrary to fair procedures in seeking material from the prosecution which had been given in evidence and relying on same as part of the rationale for his decision to convict;

(iii) The hearing commenced within jurisdiction and the applicant was on hazard of a lawful decision to convict. The actions of [the Circuit Court judge] were in purported exercise of his jurisdiction but vitiated same in circumstances where the conviction imposed was liable to be quashed by an Order of Certiorari, with the applicant thereafter being able to plead *autrefois acquit*;

(iv) In the event the applicant has been denied a trial in due course of law in circumstances where he was on hazard of a lawful conviction; and

(v) An objective observer, apprised of the relevant circumstances, would be of the view that justice was not being done or being seen to be done.

15. The principal grounds of opposition are as follows:-

•There is no conceivable prejudice to the applicant as a result of the order made. The defence strategy deployed by the applicant in the appeal was the same as that adopted in the District Court, albeit with less evidence. There is therefore no advantage gained by the D.P.P. in the matter being retried, nor any prejudice suffered by the applicant. At the rehearing the applicant is open to conduct the appeal in any way he sees fit.

• Complaint is made by the applicant that the Circuit Court judge displayed bias and exceeded fair procedures and had regard to the statements which had not been tendered in evidence at the trial. The decision made by the Circuit Court judge to refuse the applicant's appeal has now been set aside. There is therefore no prejudice to the applicant as a result

of the alleged want of fair procedures as the order was set aside and the appeal remains pending before the Circuit Court.

• The applicant is not in a position to plead autrefois acquit at any subsequent trial. There was no final determination acquitting him of the charge. He has not been acquitted of the charge and his appeal has not been allowed.

• The applicant is entitled to and will receive a full and fair hearing of his appeal in due course. There is no evidential basis for the suggestion that the applicant cannot fairly prosecute his appeal.

The applicant's submissions

16. Principally, it is submitted on behalf of the applicant that he should not have to face a retrial. When the appeal commenced before the Circuit Court judge on 17th November, 2015, he had jurisdiction to entertain the appeal which was by way of a full rehearing. The Circuit Court judge heard contested evidence on the essential issue as to whether the accused before him had been in charge of a mechanically propelled vehicle with intent to drive contrary to the terms of the relevant legislation at a time when he had an excessive quantity of alcohol in his blood. Accordingly, the applicant was on hazard of being lawfully convicted following the trial. It is submitted that in the course of his conduct of the appeal the Circuit Court judge acted contrary to the rules of constitutional justice and fair procedures and, in effect, failed to afford the accused before him a trial in due course of law, as provided for in Article 38 of the Constitution.

17. It is submitted that *certiorari* of the Circuit Court judge's conviction would have been a remedy open to the applicant had the State Solicitor simply apprised the applicant of what transpired following the hearing of his District Court appeal rather than making an application to the Circuit Court judge to vacate the order of conviction. Counsel submits that no advantage should accrue to the respondent by virtue of an inappropriate application having been made to the Circuit Court judge to set aside his conviction. Had the Circuit Court judge not vacated the conviction, any ensuing conviction would have been quashed by an order of *certiorari* of the High Court. On the grant of an order of *certiorari*, a retrial would not be possible as the applicant could on any such retrial plead *autrefois acquit.* In this regard, counsel for the applicant relies on the *dictum* of Walsh J. in the *State (Tynan) v. Keane* [1968] I.R. 348.

18. Counsel submits that it is clear that the applicant's case falls into the type of situation described by Walsh J. in the *State (Tynan) v. Keane* in that what is at issue in the present case is the conduct of the Circuit Court judge albeit such conduct is referable to what occurred between the hearing of the applicant's appeal and the verdict.

19. Reliance is placed on the *dictum* of Henchy J. in the *State (Holland) v. Kennedy* [1977] I.R. 193 and counsel cites the *State (Keeney) v. O'Malley* [1986] ILRM 31 and *Sweeney v. Brophy* [1993] 2 IR 202 in aid of his submissions.

20. Counsel also relies on the principle of nemo debet bis vexari which, as described by Palles CB in *R (Hastings) v. Justices of Galway* [1906] 2 I.R. 499 has been "*acted upon as far back as our records extend*".

21. It is argued that the matter can be looked at from both a procedural point and from a substantive point of view. The result is the same in each instance. From a procedural point of view it is clear that the applicant was convicted and left the Court a convicted person on the morning of 20th November, 2015. Subsequently that conviction was set aside. The applicant is in the same position as an individual whose conviction has been set aside by the High Court, given the reason for the setting aside of the conviction.

22. From a substantive point of view, the matter is even clearer. The courts have set their face against requiring an accused, save in the most limited of circumstances, to face his trial a second time. Although no personal criticism is directed towards the State Solicitor, it remains the fact that whoever in Ballina garda station supplied the material to the Circuit Court judge, this should never have occurred and there is no real explanation for how that possibly could have occurred, or indeed if it had occurred in other cases. It is submitted that although he had not in fact given evidence in the District Court appeal, the Circuit Court judge may have relied upon Garda McManus's statement to find that the applicant was the driver of the vehicle in question. It is further contended on behalf of the applicant that although no evidence was given to the Circuit Court in this regard, there was material in the statements of Garda McManus and Garda Carney that, respectively, the applicant had been "very abusive" and that he had "acted and spoke in an insulting and threatening manner towards Gardaí". Counsel submits that there is also an apprehension that the Circuit court judge may have received the applicant's previous convictions.

23. It is submitted that it is not so much the provision of the material to the Circuit Court judge but the very fact that he requested it that constitutes the most damning indictment of the procedure followed on the occasion in question. It amounted, counsel submits, to an egregious breach of the straightforward, well-recognised and firmly established principles of fair procedures. Counsel submits that the respondent does not address the egregious unfair procedures which occurred in relation to the applicant's District Court appeal. It is not a question of the Circuit Court judge making an order, setting it aside and then trying to cure it. What preceded the vacating of the order is of relevance. The Circuit Court judge asked the gardaí for statements which had not been put into evidence. Even when he must have realised that he had statements which were not put in evidence he did not resile. He delivered a judgment. When he discovered what he had done, after it was brought to his attention by the State solicitor, he delivered a retrial.

24. It is submitted that contrary to the respondent's assertions, the applicant has suffered prejudice. He has been put on his trial. He has given evidence. He has disclosed his defence and has been cross-examined. The prosecuting garda has been cross-examined. The applicant was on hazard of being lawfully convicted. The trial concluded and the applicant was convicted. That conviction was set aside on the basis that the conviction was arrived at in violation of the applicant's right to a trial in due course of law. If, as occurred here, the Circuit Court judge breaches the principles of constitutional justice and then convicts and thereafter the conviction is quashed there is a clear blue line, the accused cannot be retried. This principle is clearly recognised by McKechnie J. in *Stephens v. Connellan* [2002] 4 I.R. 321.

The respondent's submissions

25. On behalf of the respondent, it is submitted that there is no basis for the applicant's contention that the Circuit Court judge received a list of the applicant's convictions. It is clear from Garda Taaffe's affidavit that the Circuit Court judge sought and received only statements. Similarly, the question of whether it was the Circuit Court judge's practice to ask for statements is not a matter for this court.

26. Furthermore, contrary to the applicant's counsel's suggestion in these proceedings, it was open to the Circuit Court judge, based on the evidence given by Garda Taaffe at the hearing of the District Court appeal to the effect that she observed the applicant in the driver's seat of the car, to draw inference that the applicant was driving the car. Thus, there was evidence other than Garda McManus' statement from which the Circuit Court judge could make this finding.

27. It is submitted that what is noteworthy from the pleadings is that no challenge has been made to the Circuit Court judge having vacated his order of conviction. Rather, the applicant takes issue with the order adjourning the matter for a new trial before a different Circuit Court judge.

28. The question of whether there was jurisdiction to vacate the order of conviction does not arise for this Court. In any event, counsel relies on the *State (Kiernan) v. District Justice de Burca* [1963] I.R. 248), *Callaghan v. Cork J.J.* [1895] 2 I.R. 350 and *Richards v. O'Donohue* [2016] IESC 74 as authority for the proposition that a court has jurisdiction to revisit an earlier order. Thus, the Circuit Court judge in the present case enjoyed a jurisdiction to revisit his earlier order in the presence of both legal teams. It is also clear that counsel for the applicant enjoined in the State's application to have the conviction set aside, as he applied for the applicant's appeal to be allowed. He did not make the case in the Circuit Court that the Circuit Court judge could not revisit his earlier order. Accordingly, there is no merit in the applicant's argument that what should have happened in the Circuit Court is that the State Solicitor should simply have advised the applicant's counsel of what had transpired between the hearing of the District Court appeal and the decision and then left the applicant to pursue the matter thereafter by way of application for leave for judicial review.

29. The only matter under challenge is the fixing of a new trial date before a different Circuit Court judge. Thus, the question for determination is whether the order that was duly made, namely adjourning the matter and the fixing of a new trial date before a different judge, was in observance of the applicant's right to fair procedures as protected by Article 38 of the Constitution. It is submitted on behalf of the respondent that this question must be answered in the affirmative. It is further submitted that given that the earlier order for conviction has been vacated, there is no conviction or acquittal such as would give rise to a plea in bar of *autrefois acquit*.

30. Counsel contends that the applicant's case is not dissimilar to a situation where on a trial for indictment a jury disagrees and a new trial is directed. In such circumstance double jeopardy does not arise. In this regard counsel cites the *dictum* of Denham J. in *DS v. Cork J.J.* [2008] 4 I.R. 379.

31. Similarly, where there has been a conviction of an indictable offence and it is quashed on appeal by the Court of Appeal, a retrial may be ordered. While this will not normally be done where there was some want of proof at the trial, it will be done where there has been some fault with the trial such as the direction to the jury. (*People (Attorney General) v. Griffin* [1974] I.R. 416 refers) Counsel submits that the applicant's case is closer to this analogy than the authorities upon which his counsel relies.

32. Counsel also submits that a closer analogy to the applicant's circumstances can be drawn with the lesser used procedure of arresting judgment between the conviction by jury and the imposition of sentence. Where this is done, although a conviction has been announced, it will not act as a bar to the defendant being tried for the same offence. (*Vaux's Case* 4 Co Rep 44a)

33. Counsel submits that another analogy can be drawn where a conviction is quashed by way of judicial review on the grounds of unfairness but where there is discretion to remit if fairness permits it. Here, the conviction was set aside on grounds of unfairness, albeit by the trial judge himself. Where there is a want of fair procedures leading to an order being quashed by *certiorari*, this will not normally prevent a remittal occurring. It is submitted that it is a question of degree as to whether the fixing of a new trial date constitutes unfairness for the applicant. In aid of his arguments, counsel cites *Gilmartin v. Murphy* [2001] 2 I.L.R.M. 442 and *Grennan v. Kirby* [1994] 2 I.L.R.M. 199.

34. It is submitted that insofar as the applicant places reliance on the *State (Keeney) v. O'Malley*, that case concerns the admission by the trial judge of evidence which should not have been let in, which was not a factor in the applicant's case. All in all, the applicant has not, it is submitted, shown how a further trial would be unfair. It is submitted that in considering whether fairness allows for the trial of the applicant to now proceed, the following facts are relevant:-

1. The applicant has not served any time in custody in relation to the offences;

2. The applicant has not served any period of disqualification from driving as a result of the offence;

3. A central issue in the trial (in both the District Court and on appeal) appears to have been the credibility of the applicant's account of events. The Judge was entitled to hold it was unbelievable in the circumstances;

4. The case concerns an appeal. There is therefore no prejudice to the applicant by "showing his hand" in giving evidence. He had already disclosed this in running a similar defence in the court below. This information was available to the prosecution before the hearing of the appeal and this has not changed;

5. The offence of drunk in charge will usually be regarded as a serious offence in the context of remittal;

6. No suggestion that any witnesses who may be unavailable in the future were available for the hearing of the appeal before the Circuit Court judge;

7. The offence is of some antiquity, but the applicant was tried expeditiously in the District Court. There is no suggestion that the passage of time would in any way unfairly prejudice the applicant.

35. It is submitted that the prosecution is no stronger position in any future trial, nor is the applicant in any weaker position than before.

36. In summary, while counsel for the respondent acknowledges that there is no authority on the question which has to be decided in the within proceedings, namely that the court who has set aside its own order then seeks to fix a retrial, there is however sufficient analogy with the factors relied on by the respondent to warrant the remittal of the matter to the Circuit Court.

The applicant's submissions in response

37. Insofar as the respondent refers to the applicant's counsel having acquiesced to the conviction being set aside by the Circuit Court judge, such a plea is not made in the grounds of opposition. The grounds of opposition merely state that no prejudice accrues to the applicant in a retrial; that there was no bias on the part of the Circuit Court judge; that the plea of autrefois acquit is not available to the applicant; and that he will get a full and fair appeal. Thus it is not open to the respondent to now rely on something which is not pleaded. In this regard counsel relies on the *dictum* of Finlay Geoghegan J. in *Balchand v. Minister for Justice* [2016] IECA 383.

Considerations

38. In the course of his submissions counsel for the applicant argued that the applicant should not be deprived of the entitlement to plead *autrefois acquit* by reason of steps taken by the D.P.P. to have the Circuit Court judge set aside his order. Counsel's argument is that if, following the conviction, the State Solicitor had simply apprised the applicant's legal representative of what had occurred and left the applicant to his remedy, the applicant would have succeeded in the High Court in quashing the conviction with no possibility of a retrial. He submits that the happenstance of the matter having been brought to the attention of the applicant's legal representative on the morning of 20th November, 2015, with the ensuing application made on behalf of the D.P.P. to rescind the order of conviction and adjourn the matter for a retrial before another judge, cannot affect the substance of what had occurred. Albeit that the conviction which had been obtained otherwise than in accordance with justice and the precepts of fair procedures was "vacated" by the Circuit Court judge, it is submitted that this cannot entitle the D.P.P. to put the applicant on trial for a second time.

39. It is accepted by all concerned that the order of the Circuit Court judge vacating the conviction is not under challenge in the within proceedings. Accordingly, there being no challenge to the vacating of the order of conviction, I find that the applicant cannot now say that the Circuit Court judge acted improperly in so doing or that the action of the respondent in seeking to have the order vacated was improper. I note however that at no point was it suggested on behalf of the applicant that there was any mal intention on the part of the respondent on 20th November, 2015 in seeking to have the order of conviction vacated. The applicant's contention is that it was procedurally inappropriate to do so.

40. In the course of submissions to this court, there was some debate as to whether counsel who represented the applicant in his appeal had acquiesced in the State Solicitor's application to have the order refusing the appeal vacated. Counsel for the respondent contends that the applicant's counsel enjoined in the application to vacate the Circuit Judge's Order. The respondent acknowledges that acquiescence is not pleaded. I note that the applicant's solicitor avers that upon being apprised by the State Solicitor as to what had transpired between the date of hearing of the appeal and the Circuit Court judge's decision, counsel's immediate response was that the order of conviction could not stand and that the appeal should be allowed. In similar vein, Garda Taaffe avers that following the State Solicitor's application that the conviction be vacated and the matter adjourned for a new hearing before another judge, the applicant's counsel submitted in reply that the appeal should be allowed simpliciter in the circumstances. Purely by way of observation, it is not clear to the court that the applicant's counsel enjoined in the State Solicitor's application to the extent canvassed by the respondent. The application to vacate the conviction was made by the State solicitor, as is clear from Garda Taaffe's affidavit. Clearly, the focus of the applicant's counsel's submission to the Circuit Judge was that the appeal should be allowed.

41. Before turning to the substance of the present challenge, the court will address a discrete submission advanced on behalf of the applicant. On the issue of whether the Circuit Court judge may have received a list of the applicant's convictions, as far as this court is concerned, there is no evidence before it to suggest that the Circuit Court judge received such a document; Garda Taaffe's affidavit refers solely to "statements" having been requested and supplied. Nor is it the court's function to speculate on whether requests for statements had been made in other cases, as speculated upon by the applicant's counsel.

42. As I have already indicated, the vacating of the order of conviction by the Circuit Court judge is not the issue which falls for determination in the within proceedings. It is what transpired upon the vacating of the conviction that is the focus of the present challenge.

43. The question for the court is whether the applicant should face a re-hearing of his appeal in the Circuit Court, Western Circuit and whether the applicant would be entitled to plead *autrefois acquit* in any subsequent hearing.

44. In the course of the proceedings the court was referred to a considerable body of jurisprudence pertaining to when, consequent on an order of *certiorari,* it is appropriate or permissible to remit a matter for retrial. Of course, the present case is unusual in that the question which must be addressed does not fall to be answered consequent upon *certiorari* of the order of conviction; rather the issue arises in circumstances where it was the Circuit Court judge himself who vacated the order of conviction. There is no need to again rehearse the reason as to why this course was adopted as the events which led to the Circuit Court judge agreeing to vacate the conviction, after being requested to do so by the respondent, are set out elsewhere in this judgment.

45. Counsel for the applicant has stressed that but for the State Solicitor's intervention on 20th November, 2015, which was at the behest of the respondent, the applicant would have succeeded in having his conviction quashed in the High Court. As regards this argument, the respondent did not demur but it is the respondent's position that there are no grounds to bar a retrial of the applicant's appeal.

46. Whether or not the special pleas of *autrefois acquit* and *autrefois convict* will be available "depends upon the technicalities of judicial review and whether or not the order is held to have been made within or without jurisdiction" (McDermott "Res Judicata and Double Jeopardy" (Butterworths 1999)).

47. In the *State (Tynan) v. Keane*, Walsh J. outlined the circumstances in which such pleas will be established. He stated at p. 355:

> *"It is also well established that a plea of autrefois convict or autrefois acquit cannot be established if it be based upon an adjudication which was in excess of jurisdiction or without jurisdiction, because such an adjudication is no adjudication at all.*
>
> *That, however, is something essentially different from the quashing by certiorari of an improper conviction by a tribunal of competent jurisdiction. Such a quashing would amount to an acquittal. Similarly, an improper acquittal by a court of competent jurisdiction would not be subject to being quashed on certiorari. In both these latter instances the accused person would have been in peril in that he was before a tribunal which might have subjected him to lawful imprisonment, or other lawful penalty. The impropriety which would ground such an order of certiorari would be one referable to the conduct of the hearing of the tribunal, and not one referable to a matter vitiating the jurisdiction of the tribunal."*

48. In the *State (Holland) v. Kennedy*, Henchy J. observed at p.201:-

> *"The real question in this case, as it seems to me, is whether the order of the District Court is reviewable on certiorari. Counsel for the respondent has submitted that as the order is good on its face and as the error, if any, made by the respondent was an error made within jurisdiction, the procedure to remedy it should be held to be by appeal and not by certiorari.*
>
> *Having considered the authorities, I am satisfied that the error was not made within jurisdiction. The respondent District Justice undoubtedly had jurisdiction to enter on the hearing of this prosecution. But it does not necessarily follow that a*

court or a tribunal, vested with powers of a judicial nature, which commences a hearing within jurisdiction will be treated as continuing to act within jurisdiction. For any one of a number of reasons it may exceed jurisdiction and thereby make its decisions liable to be quashed on certiorari. For instance, it may fall into unconstitutionality, or it may breach the requirements of natural justice, or it may fail to stay within the bounds of the jurisdiction conferred on it by statute. It is an error of the latter kind that prevents the impugned order in this case from being held to have been made within jurisdiction."

49. In *Sweeney v. Brophy* [1993] 2 I.R. 202, the first named respondent had unilaterally invited the prosecution to treat its own witness as hostile, had threatened to jail the witness for contempt for giving evidence inconsistent with his statement to the gardaí and had ruled evidence called by the applicant to be inadmissible without justification. In that case, quashing of the conviction had not been opposed by the D.P.P. but the D.P.P. sought the remittal of the mater to the District Court. The High Court quashed the conviction but refused to remit the matter to the District Court, an approach upheld on appeal to the Supreme Court. In the course of his judgment in *Sweeney*, Hederman J. described the *dictum* of Walsh J. in the *State (Tynan) v. Keane* as setting out "*the demarcation between a situation where a quashing on certiorari gives rise to an entitlement to bring fresh charges and those where it does not*".

He went on to state at p.211:-

"In my judgment certiorari is an appropriate remedy to quash not only a conviction bad on its face or where a court or tribunal acts without or in excess of jurisdiction but also where it acts apparently within jurisdiction but where the proceedings are so fundamentally flawed as to deprive an accused of a trial in due course of law. I take this opportunity of emphasising that certiorari is not appropriate to a routine mishap which may befall any trial; the correct remedy in that circumstance is by way of appeal. However, if there be a breach of the fundamental tenets of constitutional justice in the hearing or a failure to hear the evidence in the case the trial can properly be categorised as one that has not been held in due course of law and any conviction arising therefore should be quashed so as to entitle the defendant to plead autrefois acquit"

50. The court was also referred to *The State (Keeney) v. O'Malley*. In that case, Lynch J. considered what flowed from the fact that the applicant had successfully (in the Supreme Court) quashed a conviction in a Road Traffic Act matter imposed in a District Court appeal. The D.P.P. had sought to relist the matter before a different Circuit Court judge for rehearing. Prohibition was sought. In considering whether the effect of the orders of the Supreme Court amounted to an autrefois acquit, Lynch J. stated, inter alia:

"There appear to be two types of cases in which Certiorari will be granted by the Superior Courts, and it is not easy in many of the cases to see where the dividing line is to be drawn. The first is where the Circuit Court or the District Court acts either without any jurisdiction at all or clearly in excess of such jurisdiction as it had. The second type of case is where the Circuit Court or the District Court clearly had jurisdiction to entertain the matter before it but went wrong in the exercise of its jurisdiction in some way, which the Superior Courts regard as sufficiently fundamental to justify an order of certiorari being made. This distinction appears to be clearly made by Mr. Justice Walsh in his judgment in the Supreme Court in the case of the State (Tynan) v. Keane."

51. Lynch J. went on to state:

"The District Court order in this case was never challenged. Therefore there was clearly a valid appeal to the Circuit Court and the Learned Circuit Court judge had jurisdiction to enter on and entertain and hear it. The only defect in his trial of the appeal from the District Court was the wrongful admission by him of evidence and it seems to me that the Superior Court orders have held that that wrongful admission of evidence which was not admissible was of a sufficiently fundamental nature to warrant Certiorari notwithstanding that the learned Circuit Court judge had jurisdiction to try the appeal. I think therefore that at the present time this case falls within the latter part of the passage which I have quoted from Mr. Justice Walsh's judgment in Tynan's case, rather that within the earlier part of that passage are within the terms of the passage which I have quoted from the judgment of Mr. Justice Henchy in Holland's case…

[B]eing in the position where I have to choose as to whether the learned Circuit Court judge was acting within jurisdiction but making an error in the exercise of his jurisdiction sufficiently fundamental to warrant certiorari on the one hand, or was acting in excess of, or without any jurisdiction on the other hand, it seems to me this case falls within the first of these alternatives and, accordingly, that the effect of the previous orders of the High Court and the Supreme Court amount to an acquittal.

I have come to the conclusion therefore that in the special and rather unusual circumstances of this case the Prosecutor is entitled to rely on the plea of autrefois acquit and accordingly I make an order disallowing the Cause Shown in relation to paragraph (c) of the grounds of my Conditional order and I make absolute the Conditional order of Prohibition on the grounds set out in paragraph 8(c) of the affidavit sworn by the Prosecutor's Solicitor in this matter. The effect of this order is to prohibit the learned Circuit Court judge from entering on or entertaining the appeal save only to relist the matter for the purpose of making an Order reversing the conviction of the District Court and dismissing the summons."

52. In *Stephens v. Connellan*, McKechnie J. had occasion to consider the circumstances where an applicant who succeeded in quashing a conviction would be entitled to the special plea *autrefois acquit*. He stated at p.344:-

"Reverting to the consequences which flow from the relief granted above, could I commence by stating that in criminal law the general proposition that no person can be prosecuted twice for the same offence is correct only if on the previous or first occasion the person in question was either lawfully convicted or lawfully acquitted and as a result has available to him the special pleas of either autrefois acquit or autrefois convict. The underlying basis of this doctrine and the requirement or scope of establishing either plea, are matters not directly relevant to this case and neither is any consideration of issue estoppel. For a most helpful analysis of these topics see pp. 197, 213 and 257 et seq. of McDermott on Res Judicata and Double Jeopardy .For the purposes of the aforesaid general proposition the following can be stated:-

> *(a) a person whose conviction by a court or tribunal having competent jurisdiction is subsequently set aside by way of certiorari on the grounds of some impropriety, has available to him the special plea of autrefois acquit as the quashing of such conviction, in law, amounts to an acquittal;*

(b) a person, who has obtained an improper acquittal by a similar court or tribunal, will not have that acquittal set aside by the superior courts and accordingly, will likewise have available a special plea, in that case one of the autrefois acquit;

(c) such a plea however is not available if the order pronouncing the conviction or acquittal was made by a court or tribunal acting in excess of or without jurisdiction with the result that even a subsequent order of certiorari will not act as a bar to a fresh prosecution of the same person on the same offence(s);

(d) the type of impropriety which would ground an order of certiorari where the court or tribunal has jurisdiction would be one 'referable to the conduct of the hearing … and not one referable to a matter vitiating the jurisdiction' of such court or tribunal; and finally;

(e) the rationale for the distinction appears to be that in the former situation an accused person is viewed by law as having been in peril in that he might have been subjected to lawful sanction, whereas in the latter instance, because of the absence of jurisdiction, the adjudication is said to be 'no adjudication at all' with the order and conviction being void ab initio and therefore being a nullity, see The State (Tynan) v. Keane [1968] I.R. 348 and in particular the judgment of Walsh J. of the Supreme Court at p. 355).”

53. It is submitted on behalf of the applicant that his circumstances fall into the scenario envisaged by McKechnie J. at (d) and the first part of (e) above, that is where the setting aside of the applicant's conviction was referable to the conduct of the Circuit Court Judge and where the applicant was in the course of the District Court appeal "*in peril*".

54. Counsel for the respondent relied on a number of scenarios to which, he argued, the applicant's case was analogous and which, it is argued, supports the respondent's contention that a rehearing of the matter was the proper course. In the first instance, I am not persuaded that the present case is analogous to a situation where a jury disagrees and a retrial is ordered. Here, the applicant was in fact convicted, albeit that the order refusing the appeal was later vacated by the Circuit Court judge. I will return shortly to the issue of the order having been vacated by the Circuit Judge himself. Nor, to my mind, can the present case be said to be simply analogous to a situation where the Court of Appeal orders a retrial where there has been a conviction through a judicial process which is simply defective in some respect such as a misdirection or wrongful admission of evidence.

55. In further opposition to the applicant's challenge, the respondent relies on the approach adopted by Kearns J. in *Gilmartin v. Murphy* [2001] 2 I.L.R.M. 442. There, a conviction for drunk driving was quashed in the absence of the accused being afforded legal representation. The sole issue was whether the case should be remitted for retrial. Having referred, *inter alia*, to Sweeney *v. Brophy, State (Holland) v. Kennedy*, and *State (Tynan) v. Keane*, Kearns P., observed as follows at pp.449-451:

"This case is slightly unusual in that there are two elements present in the equation. The first is want of jurisdiction to impose the sentences, which renders the convictions null and void ab initio. There is a clear line of authority suggesting that remittal is appropriate in such circumstances ... Given that the accused could never have been required to serve any part of his sentence, there can be no basis for pleading autrefois convict or acquit. Unless there is some clear element of unfairness to an accused person in such circumstances, the line of authority … suggests that the High Court should exercise its discretion to remit the case back to the District Court for further consideration."

Kearns P. went on to state:-

"The Applicant has not himself suggested that there would have been a hearing on liability had he had legal representation. He had a number of previous convictions for having no insurance extending over the previous three years. There is no suggestion that in the hearing which did take place the Respondent, apart from making the error as to jurisdiction, behaved unfairly or conducted the hearing in any sort of improper way, in marked contrast to some of the cases cited where there was a full contest on liability and the accused's rights were severely trenched upon during and in the manner of the actual hearing itself.

These seem to me to be the relevant criteria to determine whether or not there has been genuine unfairness and prejudice to an accused person. It is considered unfair to subject an accused person, who has already undergone the ordeal of a trial, perhaps accompanied following conviction, by a period of detention, to endure all that again. However, the void nature of the sentences imposed in this case permit the court to hold that the accused was never in peril of serving any part of either sentence. … the Applicant has not established any prejudice that would outweigh the public interest in seeing that the prosecution against the Applicant should now proceed in due course of law."

56. Kearns P. also had regard to what was described as the seriousness of the offences and remitted the case to the District Court holding that the public interest in prosecution outweighed any perceived prejudice to the applicant.

57. It seems to me that a primary focus in *Gilmartin* was the finding of the want of jurisdiction in the District Court in imposing the sentences it imposed. *Gilmartin* falls more readily into the first scenario described by Walsh J. in the State (Tynan) v. Keane, i.e. an example of a case where there was no jurisdiction to enter into the matter of the case. This does not bar a retrial for the reasons set out by Walsh J. This, to my mind, is not comparable to the applicant's situation which in more in keeping with the second limb of the *State (Tynan) v. Keane*, namely "*conduct of the hearing of the tribunal*".

Additionally, I note that in *Gilmartin*, Kearns P. had found that there was no suggestion that the applicant in that case sought or required legal assistance before deciding to plead guilty. Kearns P. therefore had regard to the fact that the applicant was "*not being asked to undergo a second trial in any meaningful sense of the word*". However, the applicant in the present case is being asked to undergo a second trial in its full sense.

58. In *Grennan v. Kirby*, also relied on by the respondent, the applicant was on trial in the District Court. Before the trial, his solicitor applied to the District Court judge for an adjournment of the proceedings on the grounds that he was seeking to retain the services of a particular barrister. The prosecuting garda consented to the adjournment but it was refused by the first named respondent who proceeded with the hearing that led to the applicant's conviction. The applicant applied to the High Court to have his conviction quashed. The DPP agreed that certiorari should issue against the conviction. The only matter which had to be decided was whether the proceedings should be remitted to the District Court. Murphy J. was satisfied to quash the conviction holding at p.203:-

"In my view the action of the judge of the District Court in the present case refusing to adjourn the trial with the consent of the prosecution was to enable the solicitor on behalf of the applicant to instruct counsel – while made for the

best motives – was of such a nature as to deprive him of jurisdiction enter upon the hearing of the matter with the result that an order of certiorari should issue on the basis that the order and conviction was a nullity."

Murphy J. was satisfied to remit the matter to the District Court. He stated:

"Being a nullity it seems to me it presents no barrier to the matter now proceeding in the District Court. Justice for the applicant requires that he should have his costs of these proceedings which were necessary to correct the error made by the judge of the District Court. Justice for the community requires that the prosecution against the applicant should now proceed in due course of law."

59. Insofar as the respondent relies on *Grennan v. Kirby* in support of his argument for remittal, I note that the *ratio* of that case was to the effect that the circumstances of that case were such as to deprive the District Court judge of jurisdiction to embark upon a trial. In those circumstances there was no bar to a remittal. I find that *Grennan v. Kirby* is entirely distinguishable from the present case, essentially, because in *Grennan v. Kirby* there was no adjudication at all, to paraphrase Walsh J. in the *State (Tynan) v. Keane.* As far as the present case is concerned, the Circuit Court judge clearly had jurisdiction at the outset to embark on the appeal. The vacating of the conviction arose solely because of actions referable to the Circuit Court judge.

60. I note however the very helpful test formulated by Murphy J. in *Grennan v. Kirby*, following upon his review of *State (Keeney) v. O'Malley, State (Holland) v. Kennedy* and *Sweeney v. Brophy*. At p. 202 he states:

"It appears, therefore, that impropriety or misconduct by a court or tribunal which does possess nominal or formal power to determine a particular issue may have different consequences and be remedied by different means as follows:

(1) Where the misconduct or error may be described as 'a routine mishap' the correct remedy is an appeal and certiorari is not available.

(2) Where the misconduct or error constitutes a breach of the fundamental tenets of constitutional justice, the decision should be quashed by an order of certiorari but in some cases at least on the basis that the defendant would be entitled to plead autrefois acquit. That such a plea would be available suggests that the conduct was not such as to deprive the court or tribunal of its jurisdiction.

(3) Errors or conduct-not greatly dissimilar to those described in category (2)- which would be so fundamental that they would provide reason for not treating the court or tribunal as continuing to act within jurisdiction with the result that such order as the tribunal or court might make would be held not to have been made within jurisdiction."

61. Given the circumstances of the present case, it appears to me that the applicant's situation falls more readily into principle (2) of the test formulated by Murphy J. in *Grennan v. Kirby*, effectively that category of cases such as *State (Keeney) v. O'Malley* and *Sweeney v. Brophy*. In *Sweeney v. Brophy* "*a breach of the fundamental tenets of constitutional justice*" was found to transport a case into one "*that has not been held in due course of law*". Any resulting conviction merits quashing "*as to entitle the defendant to plead autrefois acquit*". As put by McKechnie J. in *Stephens v. Connellan*,"*a person whose conviction by a court or tribunal having competent jurisdiction is subsequently set aside by way of certiorari on the grounds of some impropriety, has available to him the special plea of autrefois acquit as the quashing of such conviction, in law, amounts to an acquittal*".

62. I see no reason to depart from the principles cited above solely because *this* court was not called upon to quash the conviction. There was, to my mind, there was a breach of the fundamental tenets of constitutional justice in the present case, as clearly acknowledged by the swift action taken by the State Solicitor in seeking to have the refusal of the appeal vacated, after taking advice from the respondent who had "concerns". Notwithstanding that there is no order of *certiorari* quashing the conviction such as would, in a case such as the present, entitle the applicant to plead *autrefois acquit* in any subsequent hearing, I am satisfied that the court has a residual discretion for cases where, notwithstanding that the special plea of *autrefois acquit* may not available on a strict application of the rules, it nevertheless appears unjust that the second prosecution should proceed. This case is such a case, particularly so where I am satisfied that the applicant, in the course of his District Court appeal, was "*in peril*" of being convicted.

63. Accordingly, having regard to the established principles which will give rise to a plea of *autrefois acquit*, coupled with the particular circumstances of this case, I am satisfied that the applicant's challenge to the retrial of his appeal has been made out.

The question which now falls for determination is the type of order this court should make.

64. Counsel for the applicant submits that the relief fashioned by Lynch J. in the *State (Keeney) v. Judge O'Malley* is appropriate to the applicant's circumstances. I am in agreement therewith. Accordingly, I will grant an order of prohibition pursuant to relief (ii) of the Notice of Motion restraining the Circuit Court judge assigned to rehear the applicant's appeal from dealing with the matter other than by way of an order allowing the appeal.