THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 365 J.R.]

BETWEEN

DEAN O'MAHONY

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice White delivered on the 13th of October, 2017

1. The Applicant was granted leave to bring judicial review proceedings

> (i) seeking an Order of *Certiorari* quashing the order of Clonmel District Court made on 17th November, 2015, pursuant to s. 99(9) of the Criminal Justice Act 2006, remanding the Applicant in custody to appear before Clonmel Circuit Court on 18th November, 2015; and
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> (ii) an Order of *Certiorari* quashing the order of Clonmel Circuit Court made on 3rd December, 2015, pursuant to s. 99(10) of the Criminal Justice Act 2006, whereby the suspension of six years imprisonment backdated to 22nd July, 2014, and imposed upon the Applicant on 18th November, 2014, was revoked and he was ordered to serve four years of the suspended sentence.

Factual Background.

2. On 25th July, 2014, the Applicant pleaded guilty to various offences on indictment before Clonmel Circuit Criminal Court.

3. On Bill No. TY39/2011, he pleaded guilty to count 1 in the indictment, possession of a controlled drug, cannabis resin on 3rd October, 2009, at 47 Wilderness Grove, Clonmel for the purposes of supply contrary to the provisions of ss. 15 and 27 of the Misuse of Drugs Act 1977, as amended. The street value of the drugs was €2,205.

4. On Bill No. TY40/2011, he pleaded guilty to count 1, possession of Diamorphine for the purposes of supply contrary to the provisions of the Act on 3rd February, 2011, at 47 Wilderness Grove, Clonmel. The street value of the drugs was €2,591. On count 3, he pleaded guilty to simple possession of cannabis herb with a street value of €26 at 47 Wilderness Grove, Clonmel.

5. On Bill No. TY25/2012, he pleaded guilty to count 1 of unlawful possession for the purposes of sale and supply of cannabis herb on 5th June, 2010, , with a street value of €2,279, at 47 Wilderness Grove, Clonmel.

6. On Bill No. TY26/2012, he pleaded guilty to count 1 possession of cannabis resin, value €48 for the purposes of sale and supply and count 3 possession of Diamorphine, at 47 Wilderness Grove, Clonmel on 29th June, 2011.

7. On Bill No. 27/2012, he pleaded guilty to count 1 possession of cannabis pollen for sale or supply on 8th November, 2010, with a street value of €584.70 at 7 Church View, Lisonagh, Clonmel and on count 3 unlawful possession of Diamorphine, street value €5 contrary to s. 3 of the Misuse of Drugs Act.

8. The court ordered a Probation and Welfare report and a Governor's report. The Applicant was remanded in custody for sentence.

9. A further Bill No. TY61/2004 was before Clonmel Circuit Criminal Court on 28th October, 2014. The Applicant pleaded guilty to Count 1 and 2, allegations of handling stolen property on 21st September 2011 at 47 Wilderness Grove Clonmel. contrary to s. 17 of the Theft and Fraud Offences Act, the property being a Sony laptop valued at €550 and an Xbox, valued at €249.

10. The sentence hearing proceeded on 13th and 18th November, 2014. The court was informed that the Applicant had three previous convictions

> • 20th October, 2009, Clonmel Circuit Criminal Court, assault causing harm sentenced to four years imprisonment, suspended on conditions from 20th October, 2009 for a period of four years.
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> • Two public order offence convictions at Clonmel District Court on 9th September, 2008, when a fine was imposed.

11. The Court was informed that bench warrants had been issued for the Applicant on 24th February, 2012, and 9th March, 2012, on certain Bill numbers and a warrant had been issued in Clonmel District Court on 29th February, 2012. The warrants were executed on 22nd July, 2014, when he returned from Australia. He had a dependency on morphine and heroin.

12. The learned Circuit Court Judge imposed the following sentences.

> • On Bill TY39/2011, he imposed a sentence of four years imprisonment;
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> • on Bill No. TY40/2011, on count 1 he imposed a sentence of four years imprisonment; and on count 3 a sentence of six months imprisonment.
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> • On Bill TY25/2012, on count 1 he imposed a sentence of four years imprisonment. Those separate periods of imprisonment were operated concurrently.

• On Bill TY26/2012, on count 1, he imposed a sentence of one year consecutive on the four year concurrent sentences and on count 3, a six month sentence on simple possession which ran concurrent with the sentence imposed on count 1 on Bill TY26/2002.

• On Bill TY27/2012, he imposed a sentence on count 1 of one year's imprisonment and count 3, six months imprisonment and those were concurrent with Bill 26/2002 but consecutive to the sentences of four years.

• On Bill No. 61/2014, he imposed a sentence of one year on each count concurrently but consecutive on both other sentences.

The effective sentence imposed on the Applicant was six years from 22nd July, 2014 suspended from 18th November, 2014, on strict conditions. The Applicant was bound to keep the peace for five years, and attend addiction services. He was placed under the supervision of the Probation Service for two years. He gave two sworn undertakings to the court to pay €1,000 a year to Aiseiri Cahir, a drug treatment centre, and to train young persons in the sport of kickboxing.

13. The sentences were not appealed. Subsequently, the Applicant was charged with an offence of theft of a sports jersey from Lifestyle Sports in Clonmel on 10th June, 2015, valued €74. The Applicant appeared before Clonmel District Court on 4th August, 2015. The matter was remanded on bail to 15th September, 2015. It was further adjourned to 20th October, 2015, when he indicated he was pleading guilty to the offence. On 3rd November, 2015, facts were given before the court about the offence and the matter was then adjourned to 17th November, 2015, in order for the applicant to refund the cost of the sports jersey.

14. On 17th November, 2015, when it came to the attention of the learned District Court Judge that there had been a previous suspended sentence imposed by Clonmel Circuit Criminal Court and that the suspension period was still current, the Applicant was remanded to appear before Clonmel Circuit Criminal Court on 18th November, 2015. When the matter came before the court on 18th November, 2015, the Applicant applied for an adjournment and sought the preparation of a Probation Service report. The matter was adjourned to 1st December, for the purpose of that report and then further adjourned to 3rd December, 2015. An application was made on behalf of the Director of Public Prosecutions to revoke the original suspended sentence. Evidence was tendered by Garda John Downey of the offence on 10th June, 2015.

15. The learned presiding judge noted that the Applicant had not complied fully with the requirements of the Probation Service as noted from the probation report. The Applicant's undertaking to pay the sum of €1,000 to Aiseiri Cahir by 18th November, 2015, had not been complied with.

16. When sentencing the Applicant, the learned judge stated:-

> "He has shown a disregard for his obligation to engage with the Probation Service. He has saved not a penny despite his ability to go drinking on the occasion when he says this offence occurred… Even if such an offence had not been committed, if the matter had been re-entered by the Probation Service, then the Court would be left with little option but to impose a custodial sentence. But the commission of this crime on top of all those other matters leave the court with no alternative but to impose a custodial sentence here today."

He substituted a sentence of four years in custody suspending the final two years of the original six year sentence on conditions. The Applicant lodged an appeal to the Court of Appeal against the decision to revoke the suspended sentence on 23rd December, 2015.

17. The relevant provisions of s. 99 of the Act are

> 99(9) Where a person to whom an order under subsection (1) applies is, during the period of suspension of the sentence concerned, convicted of an offence, the court before which proceedings for the offence were brought shall, after imposing sentence for that offence, remand the person in custody or on bail to the next sitting of the court that made the said order.
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> (10) A court to which a person has been remanded under subsection (9) shall revoke the order under subsection (1) unless it considers that the revocation of that order would be unjust in all the circumstances of the case, and where the court revokes that order, the person shall be required to serve the entire of the sentence of imprisonment originally imposed by the court, or such part of the sentence as the court considers just having regard to all of the circumstances of the case, less any period of that sentence already served in prison and any period spent in custody (other than a period during which the person was serving a sentence of imprisonment in respect of an offence referred to in subsection (9) pending the revocation of the said order.
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> (12) Where an order under subsection (1) is revoked in accordance with this section, the person to whom the order applied may appeal against the revocation to such court as would have jurisdiction to hear an appeal against any conviction of, or sentence imposed on, a person for an offence by the court that revoked that order.
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> (13) Where a member of the Garda Síochána or, as the case may be, the governor of the prison to which a person was committed has reasonable grounds for believing that a person to whom an order under this section applies has contravened the condition referred to in subsection (2) he or she may apply to the court to fix a date for the hearing of an application for an order revoking the order under subsection (1).(14) A probation and welfare officer may, if he or she has reasonable grounds for believing that a person to whom an order under subsection (1) applies has contravened a condition imposed under subsection (3) or (4), apply to the court to fix a date for the hearing of an application for an order revoking the order under subsection (1).
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> (15) Where the court fixes a date for the hearing of an application referred to in subsection (13) or (14), it shall, by notice in writing, so inform the person in respect of whom the application will be made, or where that person is in prison, the governor of the prison, and such notice shall require the person to appear before it, or require the said governor to produce the person before it, on the date so fixed and at such time as is specified in the notice.
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> (16) If a person who is not in prison fails to appear before the court in accordance with a requirement contained in a notice under subsection (15), the court may issue a warrant for the arrest of the person.
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> (17) A court shall, where it is satisfied that a person to whom an order under subsection (1) applies has contravened a condition of the order, revoke the order unless it considers that in all of the circumstances of the case it would be unjust

> to so do, and where the court revokes that order, the person shall be required to serve the entire of the sentence originally imposed by the court, or such part of the sentence as the court considers just having regard to all of the circumstances of the case, less any period of that sentence already served in prison and any period spent in custody pending the revocation of the said order.

18. On 19th April, 2016, Moriarty J. delivered judgment in *Moore v. Ireland* [2016] IEHC 244. By final order of 11th May, 2016, ss. 99(9) and (10) of the Act were struck down as being unconstitutional. On 25th April, 2016, the Applicant made an application to the High Court pursuant to Article 40 of the Constitution arguing that his continued detention on foot of the original committal warrant of 3rd December, 2015, was invalid.

19. When the Respondent in the Article 40, the Governor of Portlaoise certified his detention, it transpired that the Applicant was also serving a three month sentence imposed by Clonmel District Court imposed on 5th April, 2016. The Applicant then applied for leave to apply for judicial review proceedings which is the matter before this Court.

20. There was already pending before the courts, an Article 40 challenge on similar grounds *Clarke v. Governor of Mountjoy Prison* [2016] IEHC 278. McDermott J. delivered judgment on 27th May, 2016. That was appealed to the Court of Appeal who delivered judgment on 28th July, 2016: [2016] IECA 244, and ultimately the Supreme Court on 10th October, 2016, refused a certificate: [2016] IESC 122. The Applicant seeks to differentiate the law applicable in the present challenge from the decision in *Clarke*.

21. The Applicant's argument is that Clonmel District Court on 18th November, 2015, and Clonmel Circuit Criminal Court on 3rd December, 2015, did not have jurisdiction to either remand the accused in custody or to impose sentence. The Applicant relies on two judgments that of *Murphy v. Attorney General* [1982] I.R. 401, where Henchy J. stated at p. 313:-

> "Once it has been judicially established that a statutory provision enacted by the Oireachtas is repugnant to the Constitution, and that it therefore incurred invalidity from the date of its enactment, the condemned provision will normally provide no legal justification for any acts done or left undone, or for transactions undertaken in pursuance of it; and the person damnified by the operation of the invalid provision will normally be accorded by the Courts all permitted and necessary redress."

and the Supreme Court decision of *A. v. Governor of Arbour Hill Prison* [2006] 4 I.R. where the Applicant relies on the judgment of Murray C.J. at para. 125, p. 143, as follows:-

> 125 "In a criminal prosecution where the State relies in good faith on a statute in force at the time and the accused does not seek to impugn the bringing or conduct of the prosecution, on any grounds that may in law be open to him or her, including the constitutionality of the statute, before the case reaches finality, on appeal or otherwise, then the final decision in the case must be deemed to be and to remain lawful notwithstanding any subsequent ruling that the statute, or a provision of it, is unconstitutional. That is the general principle."

22. The essence of the Applicant's arguments is set out at para. 61 of his written submissions which stated:-

> "It is abundantly clear that the criminal proceedings against the present Applicant have not yet concluded. A point of finality has not yet been reached because the Applicant's appeal remains outstanding. He appealed the activation decision on 23rd December, 2015. It was while awaiting the hearing of that appeal that Moriarty J. on 19th April, 2016, in the *Moore* case, found that the activation procedures pursuant to subs. (9) and (10) of s. 99 of the Criminal Justice Act 2006 were unconstitutional. Therefore, since the process which resulted in the activation of the Applicant's sentences was not a valid process, and since he was not validly before the Circuit Court at all, the sentences which currently hold the Applicant in custody were not validly imposed and accordingly he is no longer validly detained. Moreover, this unlawful detention occurs in circumstances where the Applicant's prosecution has not yet been finalised. A further fundamentsl problem for the detainer is that the Applicant's appeal is pending before a Court that has no jurisdiction to entertain it."

23. The Applicant submitted that he is entitled to relief in this case *ex debito justitiae* that is to say as a matter of right.

24. The Respondent has submitted that the Applicant has delayed in bringing these proceedings and has not laid any evidential basis to extend time. Further that the decisions in *Clarke* in the High Court and Court of Appeal and the decision in *Larkin v. Governor of Mountjoy Prison* [2016] IEHC 680, a decision of Eagar J. of 25th November, 2016, preclude the Applicant from seeking relief on the basis of a benefit of unconstitutionality in another case, as he is not entitled as of right to the benefit. That in addition the *Clarke* authority upheld the sentencing Court's jurisdicition as. 99(17) was not rendered unconstitutional by the Moore decision.

25. The Respondent further argued that the Applicant was not entitled to relief because of his conduct. He at no stage questioned the validity of the section, he freely entered into a bond to keep the peace and be of good behaviour and fully engage with the sentencing process and failed to abide by the terms of the bond. He also enjoyed the benefit of the discretion given by the section when the revocation of the sentence was imposed. The Respondent further argued that the proceedings did proceed to finality absent the Applicant breaching the terms of the bond that he entered into.

26. The Respondent also relies on the decision in *A. v. Governor of Arbour Hill Prison*, and argues that the Applicant cannot rely on the Moore decision as he did not initiate a challenge to s. 99(9) and (10) though he could have and because of his guilty plea, he was not covered by the frailties identified in the sections by the judgment of Moriarty J.

Decision.

27. In the particular circumstances of this case, and the chronology, the Court is prepared to extend time to facilitate the application for *certiorari* and to deal with it on the merits.

28. The Applicant's situation mirrors exactly the position in the *Clarke* judgment at para. 63 which states:-

> 63. "I am satisfied that each case of this kind must be examined on its own merits and that the authorities do not establish that a declaration of invalidity of the two sub-sections has a blanket retrospective effect. The Applicant is not to be excluded from seeking the benefit of the declaration because his appeal under s.99(12) is still pending and the proceedings under s.99 have not been concluded. However, I am satisfied that he is not entitled to its benefit for the following reasons. Firstly, he engaged fully in the original sentencing process whereby following his plea for leniency he undertook to abide by the several conditions set down in the order for the purpose of securing his early release from

custody. In response, the State intended to devote significant resources to secure his rehabilitation during the course of the suspension. As a result he obtained his release from custody. These decisions were made following advice and involved the making of an irreversible commitment by the Applicant and the State. Secondly, absent a breach of those conditions the trial was at an end. Thirdly, he failed to challenge the s.99 procedure at any stage. These procedures were relied upon and applied by the State in good faith and were the relevant law in force at the time. Furthermore, he cannot identify any substantive injustice or breach of his right to fair procedures or any unfair prejudice or discrimination suffered by him in the course of the hearings leading to the revocation. He seeks the technical benefit of the declaration which has no relevance to the merits of his case. To permit the applicant's release on that basis would tend to place a premium on a formal and rigid application of the declaration of invalidity which is not justified or mandated by the decisions of the Supreme Court and Court of Criminal Appeal set out above: nor is it justified on the facts of this case."

29. There is one distinction The committal warrant in the *Clarke* case did not mention the provisions of s. 99(9) and (10) while the committal warrant in this application refers to the judge imposing a sentence pursuant to s. 99(10) of the Act. To that extent, this application does differ from the *Clarke* case.

30. The court concurs with the submissions of both the Applicant and Respondent that the seminal decision is that of *A. v. Governor of Arbour Hill Prison* [2006] 4 I.R., and in particular the judgment of Murray C.J. at page 111.

31. In order to get a sense of the judgment and to ensure the consequences of the judgment are clear, it is necessary to quote a number of passages. Under the heading of general observations at paras. 16 – 21, Murray C.J. stated:-

> 16 "On the 2nd June, 2006, this court handed down its decision in this case allowing the appeal of the respondent and setting aside the order of the High Court.
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> 17 The reasons why I agreed with that decision are set out in this judgment. I do not accept that it is a principle of our constitutional law that cases which have been finally decided and determined before our courts on foot of a statute which is later found to be unconstitutional must invariably be set aside as null and of no affect.
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> 18 When this court, in *de Burca v. Attorney General* [1976] I.R. 38 struck down as unconstitutional the provisions of a statute governing the selection of juries in criminal cases it did not mean that the tens of thousands of jury decisions previously decided by juries that were selected under a law that was unconstitutional should be set aside. When this court found in *McMahon v. Attorney General* [1972] I.R. 69 that certain provisions of the Electoral Acts were unconstitutional it did not mean that all elections which took place on foot of the impugned statute were void and of no effect, that there was no valid Oireachtas in being and none which could validly remedy the situation.
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> 19 The Constitution like others, is holistic and provides a full and complete framework for the functioning of a democratic State and an ordered society in accordance with the rule of law, the due administration of justice and the interests of the common good. In providing for the common good and seeking "…social true order", in the words of the Preamble to the Constitution, the application of the Constitution cannot be distorted by focusing on one principle or tenet to the exclusion of all others.
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> 20 For reasons which I will go on to explain, the abstract notion of absolute retroactivity of the effects of a judicial decision invalidating a statute is incompatible with the administration of justice which the Constitution envisages, as many of the *dicta* of this court indicate in cases which it has already decided.
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> 21 It is also a notion which other legal and constitutional systems have, in comparable circumstances, found incompatible with a due and ordered administration of justice."

Murray C.J. went on to state from paras. 85 – 88, the following:-

> 85 "Absolute retroactivity based solely on the notion of an Act being void *ab initio* so as to render any previous final judicial decisions null would lead the Constitution to have dysfunctional effects in the administration of justice. In the area of civil law it would cause injustice to those who had accepted and acted upon the finality of judicial decisions. Rights which had become vested in third parties as a consequence of such decisions would be put in jeopardy. The application of a principle of absolute retroactivity consequent upon a declaration of unconstitutionality of an Act in the field of criminal law would render null and of no effect final verdicts or decisions affected by an Act which at the time had been presumed or acknowledged to be constitutional and otherwise had been fairly tried. Such unqualified retroactivity would be a denial of justice to the victims of crime and offend against fundamental and just interests of society.
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> 86 In addition to causing injustice it would undermine one of the fundamental objectives of the administration of justice, namely finality and certainty in justiciable disputes. As Hamilton C.J. observed in *Greendale Developments Ltd. (No. 3)* [2000] 2 I.R. 514 at p. 527: "The finality of proceedings both at the level of trial and, possibly more particularly, at the level of ultimate appeal is of fundamental importance to the certainty of the administration of law and should not lightly be breached".
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> 87 In my view when an Act is declared unconstitutional a distinction must be made between the making of such a declaration and its retrospective effects on cases which have already been determined by the courts. This is necessary in the interests of legal certainty, the avoidance of injustice and the overriding interests of the common good in an ordered society.
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> 88 Such a distinction is consistent in my view with the basic norms of constitutional adjudication and is supported by judgments and judicial *dicta* in the caselaw of this court, to which I will now turn."

At the conclusion of the judgment from paras. 122 – 127, he stated:-

> 122 " In the light of the considerations outlined above, the judgments and *dicta* of this court to which I have referred, I am satisfied that the Constitution permits, if not requires, a distinction to be made between a declaration of invalidity of an Act and the retrospective effects of such a declaration on previous and finally decided cases.
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> 123 There are transcendent constitutional reasons why a declaration of constitutional invalidity as regards a statute should not in principle have retrospective effect so as necessarily to render void cases previously and finally decided and

> determined by the courts, which reasons include the interests of the common good in an ordered society, legal certainty and the need to avoid the incoherence and injustice which would be brought to the system of justice envisaged by the Constitution if the approach argued for were adopted.
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> 124 I am reinforced in that view by the fact that such a principled approach is consonant with the general principles of constitutional adjudication and interpretation in other legal systems generally but particularly in those where a judicial declaration of invalidity of a law also applies *ab initio* .
>
> *The general principle*
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> 125 In a criminal prosecution where the State relies in good faith on a statute in force at the time and the accused does not seek to impugn the bringing or conduct of the prosecution, on any grounds that may in law be open to him or her, including the constitutionality of the statute, before the case reaches finality, on appeal or otherwise, then the final decision in the case must be deemed to be and to remain lawful notwithstanding any subsequent ruling that the statute, or a provision of it, is unconstitutional. That is the general principle.
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> 126 I do not exclude, by way of exception to the foregoing general principle, that the grounds upon which a court declares a statute to be unconstitutional, or some extreme feature of an individual case, might require, for wholly exceptional reasons related to some fundamental unfairness amounting to a denial of justice, that verdicts in particular cases or a particular class of cases be not allowed to stand.
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> 127 I do not consider that there are any grounds for considering this case to be an exception to the general principle. The applicant, like all persons who pleaded guilty to or were convicted of an offence contrary to s. 1(1) of the Act of 1935 had available a full range of remedies under the law. They could have sought to prohibit the prosecution on several grounds including that the section was inconsistent with the Constitution. Not having done so they were tried and either convicted or acquitted under due process of law. Once finality is reached in those circumstances the general principle should apply."

32. The first sentence of para. 63 of McDermott J's decision is important. He stated:-

> "I am satisfied that each case of this kind must be examined on its own merits and that the authorities do not establish that a declaration of invalidity of the two sub-sections has a blanket retrospective effect."

33. The interpretation of the clause in the *A*. judgment "before the case reaches finality on appeal or otherwise" is relevant.

34. I am satisfied that the Applicant would not have come within the terms of the challenge in the *Moore* decision as he pleaded guilty to what is called the trigger offence that is the allegation of a theft of the jersey and had not appealed that decision, so the injustices set out in the *Moore* judgment did not apply to the Applicant.

35. It is a matter for the Court of Appeal to decide its own jurisdiction and it is not up to the High Court to dictate it. The nature of the appeal of the Applicant is on the decision to revoke and the severity of the sentence applied by the judge on revocation. The trial judge did not impose the full six year suspended sentence but imposed a sentence of four years. On appeal, the Court of Appeal can consider the merits of that decision but cannot overturn the Applicant's original conviction.

36. This Court on the basis of the Clarke judgment is entitled to treat this application on its own merits and to interpret the decision in A. as to finality. Finality emerged in this case when the original sentence was imposed on 18th November, 2014,

37. McDermott J. decided in *Clarke* that apart from the breach of conditions, the trial was at an end with imposition of the original sentence, without appeal. Finality was established in this Applicant's case when he pleaded guilty to a substantial number of criminal offences on six different indictments in the Circuit Criminal Court. Sentence was imposed after a plea of guilty when the accused openly acknowledged his guilt. The Applicant's own conduct led to the breach of conditions.

38. The Court has discretion in judicial review proceedings where an order of *certiorari* is sought. If there was an issue of unconstitutionality and if the Applicant had come within the ambit of the *Moore* judgment, the court would exercise that discretion in favour of the Applicant. However, the court considers the application unmeritorious and the relief sought is refused.