THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 80 JR]

BETWEEN

E. R.

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Ms. Justice Faherty delivered on the 27th day of October, 2017

1. By order of Noonan J. made on 13th February, 2017, the applicant was given leave to apply for judicial review for:

> (i) an order of *certiorari* in respect of the order of Judge Teehan of the Circuit Court made on 22nd November, 2016, denying the applicant liberty to resile from a plea of guilty entered on 12th October, 2016 and;
>
> (ii) a declaration that Judge Teehan in arriving at his decision acted unfairly, unreasonably and breached the rule of natural and constitutional justice and fundamental fairness of procedure and breached the European Convention on Human Rights.

2. Further to the written and oral submissions of the parties, the issue in this case is whether the learned Circuit Judge in refusing to allow the applicant to vacate a plea of guilty exercised his discretion in a manner that ensured the applicant's constitutional right to a fair trail was protected.

Factual background

3. The following factual background is based on the affidavit sworn on behalf of the respondent, and excerpts from the transcript of the proceedings of the Circuit Criminal Court sitting at Nenagh, County Tipperary on 11th October, 2016 and 22nd November, 2016. The relevant facts as disclosed by these documents are as follows:

4. The applicant was prosecuted at Clonmel Circuit Court along with her co accused, S.H. (her partner at the time of the alleged offence), for the offence of assault causing serious harm contrary to s. 4 of the Non-Fatal Offences Against the Persons Act, 1997 ("the 1997 Act"), assault contrary to s. 3 of the 1997 Act and for cruelty contrary to s. 246 of the Children Act 2001. The assault is alleged to have been perpetrated on the applicant's son, who was four years old at the time of the alleged assault. The child was admitted to hospital, with internal bleeding and life-threatening injuries in July 2010, at a time when he was in the care of the applicant. The applicant claimed that her son had a fall shortly before the incident.

5. The trial of the applicant commenced on 4th October, 2016. A previous trial had ended with the discharge of the jury for reasons unconnected with the present application. At the commencement of the retrial, there was an application on behalf of the applicant for a trial separate from her former partner, S.H., which application was refused by the trial judge.

6. There was a further application on behalf of both co accused for the removal of the cruelty counts from the indictment, on the basis that these counts lacked specificity. Following legal submissions, this application was also refused by the trial judge.

7. The trial began and medical evidence was adduced on behalf of the prosecution to the effect that the injuries to the child were non-accidental injuries. Mr. Peter Murchan, the chief surgeon at South Tipperary General Hospital, gave evidence that the child had been admitted in a state of hypovolaemic shock and had been resuscitated by the paediatric team. He stated that this was an injury associated with a high impact road traffic type injury and that he could not account for the child's injury from a fall unless the child had been running at a hundred miles an hour or that he had fallen from an extreme height. Consultant paediatrician Dr. Ilyas Khan gave evidence that the explanation provided by the applicant was not consistent with the injury sustained by the child. He stated that he believed that the injuries were non-accidental in nature and that they were consistent with the child being punched or kicked. Dr. John Walsh also gave evidence that there was a small healing scar on the child's left cheek.

8. An extensive *voir dire* was conducted on 6th and 7th October, 2016 regarding the admissibility of a portion of the statements of B.J. (father of the child and the ex- partner of the applicant). This *voir dire* concerned the portion of B.J.'s statement where he referred to incidents of previous complaints made by the child of being hit by the applicant's co accused, a number of weeks prior to the main assault. B.J.'s statement details an incident where the child told B.J. that he had been hit by the co accused. B.J. also stated that he heard the applicant telling the child to say that he had fallen out of bed. On Friday 7th October, 2016, the trial judge ruled that this evidence was admissible.

9. There was a subsequent *voir dire* in respect of the admissibility of the DVD evidence showing the interviews held with the child. The child specialist interviewing Gardaí were called in this regard and gave evidence in relation to the relevant protocols and clarification statements obtained from the child prior to their specialist interviews. There was no significant challenge to this evidence.

10. On 11th October, 2016, in the absence of the jury and prior to the playing of the DVD evidence, and then the subsequent cross-examination of the child, the trial judge stated as follows:

> "I think its probably only fair to say at this stage – it may well be of only academic interest – but I think it is only proper to point out that before any cross-examination of the complainant begins, and there may have to be two sets of cross examination – one before a jury and one before me –that if the accused persons were to take a certain course in relation to at least one of the counts against them on the indictment and if that were acceptable to the prosecution, assuming there are no previous convictions for a similar type of offence and assuming no significant convictions of any sort had been accumulated since 2010, I could probably see my way to deal with this matter in a non-custodial way. However, without the advantage of a plea of guilty – without the benefit, I should say, of a plea of guilty, if either or both were to

> be convicted by a jury in relation to these matters, it is difficult to see at this stage – and I stress as regards everything I say I am subject … it would be subject to anything that anybody might say in either event; I am certainly not pre-judging anything – but that it would be difficult for either to avoid a custodial sentence. I think it is only fair to point that out at this stage. It may well be of academic interest only to point – to say that now, but if the parties would like a few minutes to take instructions, I would certainly agree with that.

11. Following the comments, defence counsel were then given a period of time to take instructions and the case was let stand until the following day, 12th October, 2016, until after 2 p.m. On 12th October, 2016, the applicant and her co-accused entered a plea of guilty to the s. 4 assault charge. The trial judge was told that the applicant had no previous convictions. He was also told that the applicant and her co- accused had been advised that even if the trial judge saw fit to impose a suspended sentence, there was a possibility that the respondent could take a further step in the matter. Counsel for the applicant applied to have the matter adjourned to the next sessions in order to consider what, if any, reports were required prior to sentencing. The trial judge then remanded both accused on continuing bail to 14th March, 2017.

12. On 22nd November, 2016, the applicant sought leave from the trial judge to change the plea previously entered to one of not guilty on the basis that the aforesaid intervention of the trial judge had placed her in an unfair, invidious position and gave rise to circumstances where the plea of guilty was not a free, independent, voluntary act.

13. Prior to the applicant being called in evidence, her counsel indicated to the trial judge that the trial judge's comments had an "inherent unfairness that perhaps was unintended by the Court as to how that item of jeopardy operated on [the applicant's] mind at that particular point in time" and that it was "an unusual situation to have occurred for an accused person to know upon the election of a plea of guilty [she was] guaranteed to walk out of the courtroom free and unfettered …as opposed to electing to maintain innocence [she would, if convicted], have a greater likelihood of facing a much more unenviable outcome."

14. In her oral evidence on 22nd November, 2016, the applicant outlined that she had maintained her plea of not guilty for twelve months up to the trial and that she had maintained her not guilty plea after her retrial commenced in October, 2016 and that she had only changed her plea on the sixth day of the trial (12th October, 2016). She stated that following the trial judge's intervention on 11th October, 2016, she understood that a plea of guilty would result in a non-custodial sentence and that she had entered a plea because she did not want to go to prison.

15. The applicant testified as follows: "The way I took that choice was put in the plea to avoid the custodial sentence or run the possibility of being wrongly convicted and the possible wrong prison sentence." She stated that it had been made clear to her by her legal team on 11th and 12th October, 2016, that the only pleas acceptable to the DPP was a plea to the more serious offence under s. 4 of the 1997 Act. Accordingly, she had entered such a plea on 12th October, 2016. She went on to state:

> "I did that because I didn't want to go to prison and that was the option I was given as I'd been stuck between a rock and a hard place and that was the decision I made on that day".

16. She testified that that decision did not sit great with her "because I'm innocent and I feel like I've had to make a decision out of the lesser of two evils." She confirmed that she wished to retract her plea of guilty.

17. Under cross examination, the applicant acknowledged that following the trial judge's intervention on 11th October, 2016, she had had a number of consultations with her legal team (solicitor, junior counsel and senior counsel) until her guilty plea was entered on 12th October, 2016. She acknowledged having sought advice from her legal team and stated that she had been advised that it was ultimately her decision to make. It was put to her that she was a competent person in the normal ways of the world in that she had been capable of making a decision to move to the UK and that she was capable of holding down a job. She agreed that her position and her options had been discussed with her by her legal team over a 24-30 hour period between 11th and 12th October, 2016, but stated that "it was a very hard decision to make".

18. She went on to state: "I made the decision at that time as obviously I didn't want a long custodial sentence. That was the decision that was given, putting the plea for a suspended sentence or the possibility if convicted a long term sentence." "I only changed my plea to guilty on the basis of the decision that I was asked to make." When put to her that there had been nothing rushed about the decision, she agreed that it had been discussed with her legal team.

19. In re-examination she stated that had the trial judge not intervened in the manner he did she would have proceeded with the trial.

20. In his submissions to the trial judge, the applicant's counsel argued that the evidence suggested in no uncertain terms that the trial judge's intervention had weighed on the applicant's mind. He submitted that justice was better served by enabling the applicant to contest her innocence rather than insist on the plea of guilty being maintained "in particular in the unusual circumstances that… arose."

21. Counsel for the prosecution submitted to the trial judge that the applicant's decision was one taken when she had full legal representation, that it was something which was not done on the spur of the moment and that it was done by an adult of 29 years of age with the aid of her legal team, all of which are factors which should lead to the application to vacate the guilty plea being refused. Counsel for the prosecution went on to cite a number of legal authorities to the trial judge.

22. In his response, the applicant's counsel submitted that the applicant's situation was markedly different from the authorities relied on by the prosecution in that in her case there had been a clear indication from the bench as to the likely outcome for the applicant in two different scenarios. It was argued that the applicant was entitled to take the trial judge's indication at face value and that the trial judge would have to make a determination as to whether her will was influenced in the context of the comments the trial judge himself had made. Counsel stated that "it would beggar belief" that the applicant had not been influenced by the trial judge's comments.

23. The trial judge's ruling on the application to vacate the guilty plea was in the following terms:

> "[The] trial duly came on before me in Clonmel on the 4th October of this year and following days… [T]here were four days of hearings, largely consisting of voir dires and on the morning of the fifth day I gave an indication that if there was to be a plea of guilty by either or both of the accused to one count on the indictment acceptable to the prosecution then the probability was that I could deal with the matter in a non custodial way. If, on the other hand, there were to be a conviction by the jury, then having regard to the gravity of the offences alleged here and indeed even the least serious

of them, then it would be difficult for the – for either of the accused to avoid a custodial sentence.

In saying that, I was saying what would have been relatively obvious as regards the latter part, relatively obvious to even a lay person who never had legal advice, but in any event [the applicant] was somebody who did have legal advice throughout the entire process. Now, Mr. Sheehan argues that legal advice is not some sort of forensic decontaminant but – perhaps its not, but the Courts in a number of decisions on this issue have stressed the importance of having legal advice and the reasons why the Courts have ruled, the higher Courts [have] ruled on occasion in this and other jurisdictions that the discretion ought …to have been exercised to allow a guilty plea to be changed to a plea of not guilty was the absence of legal advice.

But I gave this indication at a particular stage of the trial. It was at a stage just before the child complainant was about to give evidence. He may have had to give evidence and be cross-examined by two senior counsel twice during the trial and before that came about in relation to events …that were the basis of what was in the book of evidence and …what transpired during the *voir dires* that I heard, obviously deeply upsetting and certainly on the basis of the medical evidence by a significant, I considered it appropriate to state what was…probably obvious, as I said, even to a lay observer. I did give an indication in relation to the probability of a non custodial sentence and in doing that I was mindful of the fact of two things that the Court has to be particularly mindful of in recent times, …victims in criminal cases and children and the complainant here, of course, was a child as well as being a victim and he certainly was a victim of the plea of guilty entered by [the applicant's co-accused] [in respect of which] there has been no attempt to retract. And it certainly would have been in ease– I was indicating that this would be a powerfully mitigating factor and it was something that the parties should recognise. I did indicate that what I said might well be of academic importance and that the matter could proceed almost immediately if it were to be – if what was said was to be considered and put to one side.

…

Now, [the applicant] then did have well over 24 hours to consider this matter, to consider it in consultation with her legal advisors and, as she said herself…there was, in effect, back and forth between them to discuss various aspects of it. I heard [the applicant] give evidence. She is a person who understood all of the considerations here. She's somebody who is a mother herself…who has had …what seemed like a good work history, who's capable of making decisions. She seems to have at least average intelligence. I may be doing her a distinct disservice by stating it in those terms but certainly I am not overstating and it was something considered over not just half an hour or an hour. It wasn't a situation where there was extreme pressure or indeed any real pressure of time to come to a decision.

There was no – importantly, there's no evidence that the will of [the applicant] was over borne. Mr. Justice Hardiman has stressed the importance of finality. Finality is often been refereed to in terms of civil litigation, but no less it is important in criminal matters also and the effect of this guilty plea was that there would be no further need for trial before a jury and there would be no further need for this young victim to give evidence."

Considerations

24. As put by O'Malley on Sentencing Law and Practice (3rd Ed., Roundhall, 2016), "Every person charged with a criminal offence has a constitutional right to trial in due course of law and to the entire panoply of rights and presumptions associated with that concept."

25. The issues which arise in this application must be assessed against the backdrop of the above principle.

26. In the course of her submissions to this Court, counsel for the respondent argued that the trial judge's intervention must be assessed in the context in which it were made, namely against a backdrop of a number of rulings adverse to the applicant, including the ruling on the admission of a DVD of the child giving evidence and where very strong medical evidence had been tendered proximate to the time the plea was entered. The submission of the applicant was that the relevance put by the respondent to the applicant's plea being proximate to adverse rulings on *voir dires* has no merit since the trial judge did not (nor could he have) commented on the weight of evidence in the case.

27. Counsel for the applicant emphasised the fact that the applicant had maintained a plea of not guilty throughout her first aborted trial in October, 2015, and throughout the first five days of the retrial that commenced in October, 2016, until the intervention of the trial judge on 11th October, 2016, and following which she entered a plea of guilty on the afternoon of 12th October, 2016. Accordingly, it was argued that her change of plea was not a tactical response to the adverse rulings on the *voir dires*, given that she had up to 11th October, 2016, maintained her innocence of the charges preferred against her.

28. Overall, I accept the point made on behalf of the applicant that the Court should not place undue weight on the relative proximity of the plea of guilty to the adverse *voir dires* in circumstances where it is indisputable on the face of the record that the guilty plea followed upon the trial judge's intervention.

29. It seems to me that the first question which arises for determination in this case is how the trial judge's intervention is to be categorised, and whether his intervention is permitted as a matter of Irish law.

30. The case made on behalf of the applicant is that the trial judge's intervention was a unilateral act and that it did not emanate from anything said or intimated on behalf of the applicant. Rather, it was an outcome or choice specified by the trial judge and was thus tantamount to a plea bargain offered by the trial judge. It is submitted that this amounted to an extraordinary circumstance which was, in effect, an intervention by the trial judge into a decision which, at its heart, should be free of any interference. In support of his arguments, counsel for the applicant cites *R. v. Turner* [1970] 2 QB 321and *R v. Goodyear* [2005] EWCA Crim 888.

31. It is well established from the decision in *People (DPP) v. Heeney* [2001] 1 I.R. 736 that plea bargaining has no place in Irish law. In Heeney, the trial judge had indicated, at a pre-trial meeting with counsel for the prosecution and defence, the level of sentence he would impose on a guilty plea. Subsequently, the accused pleaded guilty to unlawful carnal knowledge of young girls and received sentences of six years and three years respectively. On appeal, the Court of Criminal Appeal increased the sentence to ten years and stated that it could not be fettered by a meeting in the trial judge's chambers or any indication given by the trial judge as to likely sentence. The matter went to the Supreme Court on a point of law of exceptional public importance as to whether the Court of Criminal Appeal should have had regard to the fact that a meeting had taken place between the trial judge and counsel where indication as to sentence had been given. The Supreme Court declared that plea bargaining in the sense of a private arrangement whereby a particular level of sentence will be imposed in return for a plea of guilty has no place in Irish law and that any such

arrangement would be unconstitutional. The Supreme Court also stated that the procedure in issue in the case could not properly be described as a plea bargain. It also went on to state that a trial judge would not be precluded from giving an indication of the level of sentence that can be secured by a guilty plea subject to the proviso that, as set out by Keane C.J., at p. 741:

> *"…any indication that a trial judge might give as to what sentence he might impose in the event of a plea of guilty would have to be subject to the proviso, express or implied, that he or she might reach a different view depending on the evidence which he or she subsequently heard in open court. As for counsel for the prosecution, while his or her presence is obviously essential if any discussions are going to take place with the judge before the trial, it would not be part of his or her function to enter into any form of 'bargain' with counsel for the defence as to the appropriate sentence. It must also be emphasised that, while discussions in chambers between judge and counsel are occasionally desirable in the interests of justice, in general, under Article 34.1 of the Constitution, justice must be administered in public."*

32. *Heeney* was subsequently considered in *Attorney General v. Murphy* [2010] 1 I.R. 445, an extradition case. There, the respondent sought to prevent his extradition to the US on the basis that albeit he had entered a plea of guilty following a plea bargain made by him with the US prosecutor. It was argued that the plea bargaining regime in the US was not one which would be constitutionally permissible in Ireland. In addressing the question, Peart J. stated:

> *"[23] It is true that plea bargaining is a recognised feature of criminal procedure in some other jurisdictions, including the United States of America. It is true also that such a common place procedure has its critics, and that it has been discouraged here not least in the comments of Keane C.J. in The People (Director of Public Prosecutions) v. Heeney [2001] 1 I.R. 736. On the other hand, while there is no plea bargaining regime formally in place or engaged upon here, it is well known and accepted that where an accused person enters a guilty plea at an early stage, a lesser sentence will be achieved than would be the case where sentence is imposed on conviction following a trial. Indeed, if no reduction in sentence was apparent in the sentence passed following the entry of such a guilty plea, it would, in all probability, be corrected upon appeal to the Court of Criminal Appeal.*
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> *[24] Several different interests are served well here, as no doubt they are in the United States of America or other jurisdictions in which a plea bargaining regime is recognised and accepted, where an accused person is aware that an incentive exists to plead guilty, namely, that a reduced sentence will, in all probability, be imposed - save of course where a mandatory life sentence is the only sentence which can be imposed. Those interests include in some cases the fact that the victim will not be required to go through the experience of having to give evidence and be cross-examined upon that evidence. Another interest that is well served in this respect is the administration of justice by the saving in court time, and the time of the jurors who would otherwise be required to hear all the evidence and reach a verdict.*
>
> *[25] I mention these matters in order to at least dilute to some extent the emphasis placed by the respondent upon the nature of the plea bargaining regime upon which he engaged in the United States of America. One difference of course between what exists in the United States of America and the situation in this jurisdiction is that here there is no direct involvement between counsel for the prosecution and defence and the court itself in arriving at an agreement as to what sentence will be imposed on a guilty plea. Everything which happens here will happen in open court and in public. I am not, however, satisfied that by ordering the extradition of the respondent to the United States of America so that he can attend the sentencing court, the court is doing something which will result in a breach of any fundamental right to which the respondent is entitled to protection from this court by refusing to extradite him."*

33. Albeit that the trial judge's intervention in the present case was in open court, counsel for the applicant submits that what was posited by the trial judge to the applicant were two stark choices, which do not accord with established legal principles. Alternative sentencing scenarios were openly put before the applicant, who had not solicited any such indication. It is submitted that the specific mischief initially addressed in *R. v. Turner* and nuanced in *R. v. Goodyear* arises in the applicant's case.

34. *R. v. Turner* concerned an accused who claimed the mistaken belief, midway through his trial, that his counsel, in giving advice on the issue of a plea, possessed an inside track upon the likelihood of the judge imposing a fine rather than a custodial sentence. This belief arose on account of a prior meeting between counsel and the judge in chambers. A plea of guilty was entered and the defendant sought subsequently to resile from that plea. The application to vacate the guilty plea was refused by the trial judge. The appeal against the refusal was allowed. In the Court of Appeal, Porter C. J. stated, at p.326:

> *"[The defendant] was warned that the choice was his, but once he felt that this was an intimation emanating from the judge, it is really idle in the opinion of this court to think that he really had a free choice in the matter."*

35. The UK Court of Appeal went on to set out a number of principles, which are relied on by the applicant in this case. In summary, these are as follows:

> 1. Counsel for the defence must be completely free to give the accused the best advice, and if needs be advice in strong terms;
>
> 2. The accused, having considered counsel's advice, must have complete freedom of choice whether to plead guilty or not guilty;
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> 3. There must be freedom of access between counsel and judge. Any discussion as may take place must be between the judge and both counsel for defence and prosecution;
>
> 4. The judge should, subject to one exception, never indicate the sentence which he is minded to impose. A statement that on a plea of guilty he would impose one sentence but that on a conviction following a plea he would impose a severer sentence is one which should never be made. The only exception to this rule is that it should be permissible for a judge to say, if it be the case, that whatever happens, whether the accused pleads guilty or not guilty, the sentence will or will not take a particular form, e.g., a probation order or a fine or a custodial sentence.

36. Counsel for the applicant submits that the *Turner* principles have clear application in this jurisdiction in light of the constitutional protection afforded the trial process by virtue of Article 38 of the Constitution.

37. It is also contended that is that it is clear from the trial judge's ruling on the application to vacate the guilty plea that the motivation for the trial judge's offer was to save the child victim from the perils of one or perhaps two cross-examinations. I do not believe that the issue of the trial judge's reference to the child victim, in his ruling on the application to retract the guilty plea, has

any particular bearing on the issue which falls to be addressed by this Court, which is whether the trial judge sufficiently vindicated the applicant's right to a fair trial in accordance with the Constitution.

38. Counsel for the respondent submits that there has been no judicial statement in this jurisdiction that a trial judge cannot give an indication of sentence, which is all the trial judge did in the instant case. Accordingly, counsel contends that what occurred in the present case accords with what the Supreme Court, in *Heene*y, has stated is permissible. Moreover, counsel points to the fact that the trial judge's intervention occurred in open court and his comments were clearly subject to the provisos which *Heeney* says must attach to any such indication. Accordingly, the respondent's position is that it cannot be suggested that any bargain was made or offered by the trial judge. The respondent also argues that as discussions in private between the trial judge and counsel regarding sentence are now firmly discouraged (see *Heeney*), the principles set out in *R v. Turner* and *R v. Goodyear*, upon which the applicant relies, have little relevance in this jurisdiction, as noted in O'Malley on Sentencing Law and Practice (3rd Ed., Roundhall, 2016). It is thus contended by the respondent that the essence of trial judge's statement was that it was merely pointed out to the applicant there was significant mitigation for a plea of guilty, which in Irish law is a factor to be considered in sentencing. A trial judge by virtue of s. 29 (1) of the Criminal Justice Act 1999 is statutorily obliged to take account of the stage at which a plea of guilty was entered. Counsel for the respondent also submits that it is important to note the terms in which the trial judge's intervention was couched, in particular his emphasis on the fact that what he said may be of "academic" interest only and that he was not prejudging anything. It is submitted that the care the trial judge took was evident in the language in which his comments were couched.

39. While I would not categorise the trial judge's intervention as akin to a plea bargain, I am persuaded by the argument that what was understood by the applicant as conveyed by the trial judge, albeit couched with the proviso that what was being said might be only of "academic interest", was, in effect, that if the applicant were to plead guilty, she would probably receive an non-custodial sentence, whereas her maintaining her not guilty plea would, if she was convicted, probably result in a custodial sentence. To my mind, the scenario which then presented to the applicant was more than a mere indication of sentence (in the sense permitted by *Heeney*), rather it was the stark choice, as counsel for the applicant has categorised it in these proceedings.

40. It is common case that the applicant entered a plea of guilty on 12th October, 2016 and that in a letter to the respondent in early November, 2016, she had intimated her wish to retract that plea. The question which arises for consideration therefore is whether the trial judge in ruling on the said application to retract on 22nd November, 2016, and exercising his discretion not to allow the applicant to retract her guilty plea, had due regard for her constitutional right to a fair trial.

41. Before addressing this, some words on the consequences of a plea of guilty and the retracting of such a plea.

42. The essence of a guilty plea was outlined in *S (an infant) v. Recorder of Manchester* [1971] AC 481 in the following terms, at p.501:

> *"All that is denoted by such an 'acceptance' is that a court is proceeding to consider what is the appropriate course to take in regard to a person who, as the court thinks, with full appreciation of what he is doing and with adequate understanding of what is involved in and what are the ingredients of a charge preferred against him , has fully and freely acknowledged and confessed to the court that he is guilty of the charge."*

43. The effect of a plea of guilty was described by Hardiman J. in *DPP v. Hughes* [2013] 2 I.R. 619, as follows, at p. 624:

> *"Indeed, the effect of the plea of guilty goes somewhat further. It is an acknowledgment by the accused, fully advised by solicitor and counsel, of his factual and legal guilt of certain of the offences with which he is charged."*

44. The importance of a plea of guilty was underscored by the dictum of Denham C.J. in the *People (Director of Public Prosecutions) v. Kavanagh* [2012] IECCA 65, where the learned judge states, at para.58:

> *"Some decisions by an accused during a trial have an important consequence for an appeal. For example, if an accused enters a plea of guilty at a trial that is a relevant factor. Such a plea is a choice by an accused. Once the plea is made and the conviction order follows, that is the foundation of fact for any consideration on any appeal."*

45. It is well recognised that a person may change a guilty plea before the conclusion of the trial. In *Byrne v. Judge McDonnell* [1997] 1 I.R. 392 Keane J. (at p. 402), citing *S. (an infant) v. Recorder of Manchester*, acknowledged that *"…in any trial, whether summary or on indictment, the trial judge can permit a person who has pleaded guilty to change that plea at any time before the case is finally disposed of by sentence or otherwise".*

46. Whether an accused will be permitted to retract a guilty plea is a matter for the trial judge. A trial judge's discretion as to whether to permit an accused person to change a plea of guilty must be exercised in accordance with the right to a fair trial.

47. In *Dunne v. McMahon* [2007] 4 I.R. 471, Laffoy J., citing *Byrne* and *The People (DPP) v. B* [2002] 2 I.R. 246, put it thus:

> *"I am satisfied that a trial judge has a discretion to allow an accused to change his plea from guilty to not guilty before the case is disposed of by sentence or otherwise and the paramount consideration in the exercise of that discretion is to ensure that the constitutional right of the accused to a fair trial is protected." (at p. 477)*

48. As stated in *R. v. Dodd* [1981] 74 Cr App R 50, the discretion to allow an accused to change a guilty plea to one of not guilty *"must be exercised judicially"* and where the accused alleges the guilty plea was made under pressure, *"the judge must hear evidence and determine that issue before ruling on the application to change the plea."*

49. It is asserted on the applicant's behalf that, in arriving at the decision that the applicant's will was not overborne, the trial judge failed to have regard to the nature of his intervention on 11th October, 2016 and failed to properly analyse the evidence tendered by the applicant as to the effect of that intervention on her.

50. Counsel for the applicant also contends that it cannot be reasonably maintained that the alternative scenarios put forward by the trial judge did not influence and induce the applicant's decision to plead guilty. It is the applicant's case that the fact that the improper pressure achieved the intended result is evidenced by the fact that there was never any hint of the applicant entering a plea of guilty prior to the trial judge's intervention. In short, counsel submits that the applicant's right to a fair trial, and maintaining her innocence, was improperly subordinated, as would appear from the trial judge's ruling, in favour of the child complainant being spared cross-examination.

51. It is also argued that the trial judge did not set out how he arrived at the conclusion that the applicant's will was not overborne. Counsel submits that the trial judge's conclusion was in any event incorrect as the applicant clearly stated in evidence that her plea of guilty had not been freely made for the reasons given by her.

52. Counsel for the respondent urges on the Court that at the time of the trial judge's comments, there was no application on the applicant's behalf that the comments were improper, or that the applicant's will was being overborne. Nor was such an application made on 12th October, 2016, when the applicant changed her plea to a guilty plea. While I accept this latter argument, I am not persuaded that it is the salient factor for consideration in this application, for the reasons set out later in this judgment.

53. The respondent also argues that an important factor in this case is that more than 30 hours passed between the trial judge's intervention on 11th October, 2016, and the entering of applicant's guilty plea on 12th October. In that time, the applicant had access to and took advice from her legal team, as is clear from her evidence. Moreover, the applicant acknowledged in cross-examination that the decision to enter a guilty plea was hers and that she was competent to make that decision. Accordingly, the respondent contends that the evidence shows that the applicant exercised her free will with the benefit of legal advice and that there was nothing rushed about the decision. Counsel submits that the trial judge, in his ruling, carefully analysed the applicant's evidence, as is evident from the transcript. Counsel for the respondent further submits that the applicant herself has not adduced sworn evidence in this application; the only affidavit is that of her solicitor who avers only that "the applicant contends that she was denied her constitutional rights and her right to fair procedures by the actions of the respondent".

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

55. In aid of her submission that the Court should be sparing in its intervention in cases such as the present, counsel for the respondent relies on the decision of Kearns P. in *Freeman v. DPP* [2014] IEHC 68. In that case, the accused sought to have his conviction quashed on the grounds that he had entered a plea of guilty because of improper inducements and contact with senior members of the Gardaí during the course of the trial. The trial judge heard an application to vacate the plea of guilty and refused the application. Relief was refused by the High Court in judicial review proceedings. In the course of his judgment, Kearns P. stated:

> *"32.While there may be exceptional circumstances which would warrant this Court in interfering with a criminal trial, the well settled jurisprudence, for obvious reasons, leans strongly against any such intervention.*
>
> *33.Overall I am satisfied that the learned trial judge took into account in this case all relevant factors when exercising his discretion not to allow the applicant to change his plea. Rather surprisingly, no application was made to him (or indeed to this Court) for leave to cross-examine the respondents' witnesses on the facts to which they have deposed in their affidavits. The onus of establishing the factual basis upon which an application of this sort is based rests on the applicant.*
>
> *34. In so far as this Court in turn also exercises its discretion, it must have regard to the fact that a very considerable delay occurred before this judicial review was brought – indeed it was only brought on the occasion of the hearing before the third named respondent. I therefore refuse relief on the basis that the learned trial judge at all times acted intra vires, judicially, and with due regard to the applicants constitutional right to a fair trial when he refused to allow him to change his plea.*
>
> *35. Once sentence has been imposed in this matter, it will remain open to the applicant to raise each and every point canvassed in this judicial review application in the context of an appeal brought to the Court of Criminal Appeal. In view of the unusual nature of this case, it may be possible to apply to the presiding judge of the Court of Criminal Appeal for an early hearing if the applicant decides to further pursue this matter by means of an appeal."*

56. In *DPP v. Freeman* [2015] IECA 145, the same accused sought to have his conviction quashed on the ground that he had entered a plea of guilty because of improper inducements and contact with the Gardaí. In refusing to quash the conviction, Birmingham J. stated:

> *"25. There is no doubt that the contact between the Detective Superintendent and the then accused was unusual. Indeed, it would have been better if the contact had not occurred. In a situation where this Court has not had access to all of the material which was before the trial court and on which the trial judge relied, it is not appropriate to put matters in stronger terms. The trial judge referred to comments made by Kearns J., as he then was, in the Supreme Court in the case of People DPP v. Redmond [2006] 3 I.R. 217, where he had commented:-*
>
> > *"A judge would, in my view, require to be satisfied that very exceptional circumstances are demonstrated and a very high threshold met before he actively intervenes to second guess the accused, and his legal and/or medical advisers who opt to plead or conduct a defence in a particular way. A judge should not intervene to set aside a guilty plea unless there are quite exceptional circumstances arising in the particular case."*
>
> *26. Applying that test to the case, he found that there were not exceptional circumstances present and refused the application. In a situation where he had found as a fact that the contact between the accused and the Detective Superintendent was in relation to matters unconnected with the trial, he was entitled to so conclude. Mr. Freeman entered his plea with his eyes open. He was aware that his legal team were not advising a plea because they, in part at least, saw the arguments in relation to Damache as having substance. Any confidence there might once have been in that point must be significantly undermined by reason of the decision of the Supreme Court in the J.C. case. Insofar as there was contact, both by telephone and face to face between the Detective Superintendent and the appellant it is clear that Mr. Freeman was willing to engage in that contact.*
>
> *27. He entered his plea at a time when he had assistance from senior and junior counsel and there can be no reason whatsoever to believe that his will was overborne. The decision whether to vacate the plea on foot of the application or not was a matter for the trial judge. Having conducted three voir dires, he was uniquely well positioned to assess where the merits lay. The decision that he arrived at was one that was very clearly open to him and accordingly, this ground of appeal fails. That disposes of the appeal against conviction and the court will now turn to the question of sentence."*

57. Counsel for the applicant submits that the respondent's reliance on the decision of the Court of Appeal in *DPP v. Freeman* is

misplaced. In that case the trial judge had found no evidence of the plea bargain alleged by the accused. Accordingly, there could be no finding that the accused's will was overborne.

58. From the factual matrix in *DPP v. Freeman*, I am satisfied that there are sufficient points of difference in that case to distinguish it from the present case, not least that the events in *DPP v. Freeman*, which were said to give rise to the accused's will being overborne, were found not to be connected with the trial process at all. Furthermore, I note that in refusing relief in the High Court, Kearns J. relied*, inter alia*, on the fact that the accused had delayed in seeking to judicially review the decision not to let him retract his guilty plea, a factor which does not arise in the present case.

59. Counsel for the respondent also relies on the decision of Laffoy J. in *Dunne v. McMahon*. In that case, the accused pleaded guilty during the course of a trial but, having dismissed his legal team, he then sought, at the sentencing stage, to change his plea on the basis that he had not understood or had been misled on the offences to which he had pleaded guilty. After a full hearing, the trial judge concluded the accused understood what he was doing when he pleaded guilty and refused to allow a change of plea. In the High Court, Laffoy J. refused to quash that decision on a judicial review. She concluded that the accused's constitutional right to a fair trial had been fully observed and there was no basis for the High Court to interfere with the trial judge's exercise of discretion in the matter. She stated, at para. 9:

> *"The question which arises in this case is whether, in exercising his discretion, the respondent had due regard for the applicant's constitutional right to a fair trial. In my view, he had. He took measures to ensure that, if it was the applicant's case that either his lawyers misled him or did not represent him competently, that he could make that case in a manner which would withstand challenge from the lawyers who were to be afforded an opportunity to be heard. Further, notwithstanding that the applicant earlier had chosen to waive his right to legal aid, he granted the applicant legal aid for the substantive hearing of the application to change his plea and certified for senior counsel to argue his case. He heard the evidence of the applicant and he heard submissions on his behalf. In a comprehensive, reasoned ruling he explained why he was not allowing the applicant to change his plea. He found as a fact that the applicant understood what he was doing when he changed his plea, with the benefit of legal advice. That finding was open to him and it would be wholly inappropriate for this court to interfere with it. I am satisfied that the respondent acted within jurisdiction, judicially and with due regard to the applicant's constitutional right to a fair trial in refusing to allow him to change his plea."*

60. Accordingly, counsel for the respondent submits that, as set out in *Dunne v. McMahon*, the trial judge is the person best placed to assess whether the applicant's will was overborne. It is submitted that the transcript shows that the trial judge did all that was required of him; he heard the applicant's evidence, and duly considered whether the plea was freely given.

61. It is common case that when an accused alleges in the course of the trial his or her plea of guilty was made under pressure, the trial judge must hear evidence and then rule on the application to change the plea. Undoubtedly, in this case, the trial judge fairly afforded due process in hearing the applicant and the submissions put forward on her behalf.

62. However, what was undoubtedly a rather unusual circumstance in this case is that the trial judge was tasked with determining whether the applicant was pressurised by the trial judge himself *via* the unsolicited intervention made by him midway through the trial. Counsel for the applicant submits that, in those circumstances, the discretion to be exercised by the trial judge in deciding whether to permit the applicant to retract her guilty plea must be loaded in favour of the applicant, given that the pressure alleged by the applicant emanated from the trial judge himself.

63. It is further submitted that it is indisputable that the applicant, once the intervention occurred, would have effectively acknowledge the trial judge's comments and have acted upon them in order to be free from the likelihood of a custodial sentence if she were to be convicted, and in the knowledge that if she did put in a guilty she would most probably not face a custodial sentence.

64. In essence, the argument which the applicant puts before this Court is that the unilateral raising by the trial judge of a possibility of a guilty plea, and thereby incentivising such a plea, carried with it the obligation on the trial judge to exercise a high degree of care when the applicant wished to resile from her plea of guilty. Given the very particular circumstances of this case, I agree with this submission. I am of the view that it was not sufficient for the trial judge to state that there was no evidence of the applicant's will having been overborne, or that she had access to her lawyers in the 30 hours or so that elapsed from the time of the intervention to the time the guilty plea was entered. I find that that was too high a standard by which to judge whether the applicant's will was overborne, given the circumstances in which the plea of guilty came to pass. I find this to be so even where the applicant had the benefit of experienced legal representatives.

65. In the course of her submissions, counsel for the respondent emphasised that the trial judge was careful to qualify his comments on the basis that they might be of "academic" interest only to the applicant. While I note the language used, I accept the applicant's counsel's submission that the trial judge did not demur when, on 22 November, 2016, it was suggested to him that his comments were understood by the applicant as intended to be acted upon by her.

66. It is, I believe, an important factor in this case that, unlike the position that pertained in *R. v. Dodd, Dunne v. McMahon* and *Freeman*, the applicant's plea of guilty did not arise on the basis of any mistaken belief on her part arising from her interaction with any third party. Nor was it a situation whereby the applicant's plea was proffered unsolicited to the trial judge. Rather, it came about as a result of a concrete indication by the trial judge, which was indisputably relied on by the applicant. Although the trial judge's comments were couched with some conditions attached, nevertheless, when pared back, the substance of the comments was clear; if there was no plea it would be difficult for the applicant to avoid a custodial sentence, if convicted. The fact that the trial judge's comments were made in the absence of the jury is irrelevant, as the trial judge would ultimately be the decision-maker on sentence, if the applicant were to be convicted.

67. It seems to me that, in the words of the Court of Appeal in *R. v. Turner*, it would be "*idle*" to suggest that the applicant really had any free choice in the matter. I also note the observation of Lord Woolf in *R. v. Goodyear*, at para. 30:

> *"The defendant is personally and exclusively responsible for his plea. When he enters it, it must be entered voluntarily, without improper pressure. There is to be no bargaining with or by the judge."*

68. In coming to my decision in this case, I am more than mindful that the applicant had the benefit of that legal advice from senior and junior counsel and from her solicitor in the period of 11th to 12th October, 2016, and that she availed of this advice. This is an important factor for this Court to take account of in deciding whether the trial judge's discretion not to allow the applicant to vacate her guilty plea was fairly exercised. I note the words of the learned Laffoy J. in *Dunne v. McMahon*, that where an accused has the

benefit of legal advice when he or she changes a plea to one of guilty, it would be "*wholly inappropriate*" for a court to interfere in a ruling of a trial judge made within jurisdiction. However, counsel for the applicant submitted to the Court that whatever way one approaches the issue, the stark choice faced by the applicant, following the intervention, was not going to be assisted by legal advice, as the trial judge had intimated by virtue of his intervention on 11th October, 2016, that on a plea of guilty the applicant would most probably not face a custodial sentence, whereas if there was no plea of guilt, she would most probably face a prison sentence. Thus, it is counsel's contention that the choice the applicant had to make was less of a legal decision and more a case of expediency, or a life decision, on her part. He contends that, as was submitted to the trial judge on her behalf, the fact of legal advice having been availed of by her was not a kind of "forensic decontaminant" that, simply because it was present and availed of, meant that it rendered any less stark the choice faced by the applicant, at the invitation of the trial judge. I am persuaded by counsel's argument in this regard.

69. To my mind, given the unsolicited intervention which he made on 11th October, 2016, the frailty which arises in this case is that, in ruling as he did on the application to retract the guilty plea, the trial judge did not pay due regard to the undoubted certainty that his words, however well intentioned, were understood by the applicant as giving her the choice either to plead guilty and receive an almost certain non-custodial sentence or plead not guilty and receive an almost certain custodial sentence.

70. In all the circumstances of this case, notwithstanding the broad discretion which a trial judge has in the conduct of a criminal trial, and acknowledging that the High Court should be slow to intervene in the conduct of a criminal trial, I am constrained to find that ruling of the trial judge of 22nd November, 2016, imbued as it was with the events of 11th October, 2016, cannot be said to accord with the applicant's right to a fair trial, as guaranteed by Article 38 of the Constitution.

71. I am satisfied therefore that an order of *certiorari* of the order of 22nd November, 2016, is warranted.