THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 218

Birmingham J
Mahon J
Edwards J.

Record No : 39/16

DANNY CONNORS

Applicant/Respondent

V

GOVERNOR OF LIMERICK PRISON

Respondent/Appellant

JUDGMENT of Mr Justice Edwards delivered on the 6th of July 2017 .

Introduction
1. This is an appeal against a decision and judgment of the High Court (White J) delivered on the 18th of January 2016 declaring, in the context of an inquiry under Article 40.4.2° of the Constitution, that Danny Connors ("the applicant") was unlawfully detained. For the avoidance of confusion Mr Connors will be referred to throughout this judgment simply as "the applicant", and the Governor of Limerick Prison simply as "the respondent".

The Background to the Appeal
2. The applicant was charged, along with two co-accused, with an offence of possession of stolen property, to wit a blue twin axle trailer to the value of €750, the property of Michael Hogan, without lawful authority or excuse, knowing that the property was stolen or being reckless as to whether it was stolen, contrary to s. 18 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.

3. His trial commenced on the 10th of December 2015 in circumstances where he had pleaded not guilty. The applicant had been on bail up to the 10th of December, 2015. The trial did not conclude on that date and was adjourned part heard to the 14th of January 2016 on which date it was due to be resumed. He was remanded on continuing bail to that date. However, on the 12th of January 2016, his bail was revoked on the application of the prosecution because of breaches of the conditions of his bail. Accordingly, when the applicant came before the court again on the 14th of January 2016 for the resumption of his part heard trial he was in custody.

4. I infer from the paperwork before us, that a component of the prosecution's case against the applicant was the establishment of his presence at a relevant scene. However, I am not aware of what other evidence, if any, there may have been to link the applicant to the alleged crime.

5. When the trial resumed issues were raised concerning the law on joint enterprise / common design. As noted by White J at paragraph 3 of his ex-tempore judgment in this matter, the law on joint enterprise / common design is regarded as being well settled based on the judgment of the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v Cumberton* (unreported, Court of Criminal Appeal, Blaney J, 5th December 1994) in which that court approved of certain statements of principle in the English case of *R. v Anderson and Morris* [1966] 2 All E.R. 644.

6. However, it seems that the prosecuting member of An Garda Siochána, Superintendent Murphy, felt it important to draw the trial judge's attention to a recent decision of this Court, namely *The People (Director of Public Prosecutions) v Choung Vu* [2015] IECA 257, and in doing so sought to suggest that it had changed that aspect of the law on common design that says that mere presence at the scene of a crime will be insufficient, without more, to establish participation in a joint enterprise. As I understand it the Superintendent was of the belief that following this Court's decision in *Choung Vu* mere presence at a relevant scene in suspicious circumstances was now sufficient to establish criminal liability.

7. The solicitor for the applicant responded, correctly in our view, that the effect of our decision in *Choung Vu* is that it remains the law that mere presence alone is insufficient to allow criminal liability to be attributed on the basis of participation in a joint enterprise. However, such presence **combined with other significant circumstantial evidence** may be sufficient to establish such participation. Indeed, paragraph 51 of our judgment in *Choung Vu* makes clear that criminal liability was being attributed for the cultivation offence at issue in that case on the basis of a combination of presence at the scene of the crime (which was a cannabis grow house) and other circumstantial evidence, including the appellant's arrival at the grow house as a passenger in a vehicle that had equipment and paraphernalia used in cannabis cultivation on open display within it; the appellant's association with others who could be clearly connected to the grow house; and his evasiveness at interview and the improbability of his account.

8. At any rate, the trial judge's response to these exchanges was to indicate that he was going to require both sides to file formal legal submissions, and that he would further adjourn the hearing to facilitate this. The trial judge's disposition at this point was to adjourn the matter for four weeks, in order to allow two weeks for the prosecution's submissions to be filed, and a further two weeks thereafter for the defence's replying submissions to be filed.

9. A debate then ensued concerning the length of the proposed adjournment, the applicant's solicitor expressing concern that his client, whose bail had been revoked just two days previously, would potentially be in custody for the duration of any such adjournment. The applicant's solicitor made a fresh application for bail for his client in the circumstances, but this was refused. What happened next was that the applicant was afforded an opportunity to have a consultation with his solicitor, in the light of the refusal of the renewed bail application and the proposed further adjournment of the trial for four weeks, following which the applicant's solicitor indicated to the court that his client now wished to plead guilty.

10. However, the trial judge stated that he could not *"accept the plea today"* on the grounds that he was concerned that to do so would see the applicant convicted of the alleged offence, in circumstances where it was possible that his co-accused (who had the same level of participation in the offence) might end up being acquitted on foot of the written submissions. The applicant's solicitor then asked for a shorter adjournment on the basis that he could prepare his side's submissions within a few days. In response the trial judge then adjourned the case to the 19th of January 2016, and remanded the applicant in custody until that date.

11. It is important to note that no issue was raised with the trial judge concerning his refusal to accept the applicant's offer to plead guilty. The applicant's solicitor did not suggest to the trial judge that he was wrong in law in refusing to accept the plea; or that the trial judge was in fact obliged to do so; or that the applicant was insistent on pleading guilty at that point with a view to being sentenced in early course; or that he wished to waive the opportunity to have the legal submissions to be advanced considered for his benefit. In addition, there was no renewal of an application for bail in the new circumstances of the applicant having offered to plead guilty, and the trial judge having refused to accept that plea.

12. However, on the following day, the 15th of January 2016, an application was made to the High Court on behalf of the applicant for an enquiry under article 40.4.2° of the Constitution into the lawfulness of his detention. The basis of that application was that the District Judge had been wrong in law to refuse to accept the applicant's offer to plead guilty; that this error meant that there was a flaw or defect in the proceedings before the District Court that was so fundamental as to render the proceedings thereafter unfair and a negation of the applicant's right to be tried and sentenced "in due course of law"; and that it further meant that the order purporting to remand him in custody from the 14th of January 2016 to the 19th of January 2016 for the purpose of ensuring his attendance to face continuing trial was bad, and that accordingly he was deprived of his liberty other than "in accordance with law". It was further contended that the article 40 procedure was the appropriate one in which to seek relief, rather than judicial review, given the short period of the detention order and the impracticability of obtaining relief by way of judicial review before it would have expired.

13. The respondent, in certifying the basis of the applicant's detention, relied upon the remand order of the District Judge. The application was substantively opposed on the basis that not every defect or illegality attaching to a detention will invalidate that detention; that in this case the error, if any, was one made within jurisdiction; that the applicant had no merits and was likely to have been remanded in custody in any event to await sentencing even if his plea had been accepted, in circumstances where the trial in respect of the co-accused was ongoing and the trial judge would almost certainly wish to defer sentencing until their trial had concluded.

14. The High Court (White J) held in an *ex tempore* judgment delivered on the 18th of January 2016 that the applicant was in unlawful detention. In consequence of this the applicant was released. The respondent now appeals against the finding that the applicant was in unlawful detention.

15. As it transpired, the case against the applicant's two co-accused was not finalised until the 28th of April 2016, some fourteen weeks after the applicant's offer to enter a guilty plea. Both were convicted and sentenced to six months imprisonment, suspended for two years.

16. The case against the applicant has not yet been concluded. The matter was back before the District Court on the 19th of January 2016. It is unclear to this Court whether the applicant had turned up in person, but the applicant's legal submissions make clear that he was certainly represented by his solicitor. The District Judge declined to make any order in respect of the applicant in circumstances where, at that point, he was neither before the court as a person remanded on bail nor as a person remanded in custody. Since that date the prosecution of the applicant has effectively been in limbo. The case remains part heard and not yet concluded. He has not been discharged, but neither has a resumption date been fixed for the case. The case effectively stands adjourned generally of the District Court's own motion in the light of the High Court's order. The applicant is at liberty and is not presently the subject of any remand order, either on bail or otherwise.

The High Court's judgment

17. In his *ex tempore* judgment, White J reviewed the facts of the case and various authorities that had been opened to him concerning the jurisdiction of a court to refuse to accept or to set aside the plea of an accused person. These included *The People (Director of Public Prosecutions) v Redmond* [2006] 3. I.R. 188, a decision of the Supreme Court, relied upon by the applicant; Olafusi v The Governor of Cloverhill Prison & Anor [2009] IEHC 558, also relied upon by the applicant, which was a decision in which the High Court considered itself bound by, and was disposed to follow, the Supreme Court's decision in Redmond; and *The State (McCann) v Wine* [1981] I.R. 134, a decision of the Supreme Court relied upon by the respondent.

18. White J quoted from the judgment of Kearns J who was a member of the five judge bench of the Supreme Court (Geoghegan, Fennelly, Kearns and Macken JJ; Denham J dissenting) that heard the *Redmond* case. Briefly the facts in *Redmond* were that it involved a consultative case stated to the Supreme Court from the late Haugh J, then the presiding judge at Castlebar Circuit Criminal Court, as to whether he had jurisdiction to refuse to accept a plea of guilty by an accused and to substitute a plea of "not guilty" on his behalf, in order to allow the issue of the accused's sanity to be considered by a jury in circumstances where he (the trial judge) had doubts about the accused's sanity. The Supreme Court answered the question submitted in the negative. At paragraph 100 of his judgment Kearns J said:

> *"It must be borne in mind that an intervention to set aside the plea of an accused person has a number of very significant consequences. Firstly, such an intervention runs counter to an accused person's right in the ordinary way to select his preferred line of defence. This seems to me to be an integral part of the right to a fair trial which is guaranteed by Article 38 of the Constitution. In this context I should say that I see nothing wrong or objectionable in a course of action whereby an accused person, adopting a pragmatic approach to an upcoming trial in consultation with his legal and medical advisers and on their advice, would weigh up the advantages of getting a reduced but finite sentence by pleading guilty instead of opting for a fully contested trial where the prosecution or the court might introduce an issue of insanity with its concomitant risk of indefinite confinement in a prison for the "criminally insane" in the wake of any jury finding of insanity. This "balancing approach" in most instances will be a practical, common sense course which in my opinion has much to commend it under the current legal regime and is an approach with which practitioners in this area of law will be familiar."*

19. And at paragraph 103 Kearns J had gone on to say:

> *"Against this backdrop 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. As noted by Geoghegan J. in his judgment herein an accused person may justifiably be extremely indignant that his decision to plead in a particular way is being superseded by an inquiry as to his sanity. In my opinion therefore, a judge should not intervene to set aside a guilty plea unless there are quite exceptional circumstances arising in the particular case."*

20. The trial judge considered that the law applicable to the circumstances of the present case was that stated in *The People (Director of Public Prosecutions) v Redmond* and that the case of *The State (McCann) v Wine* was distinguishable as to its

circumstances but that how it was resolved was in no way inconsistent with the *Redmond* approach in as much as there were quite clearly exceptional circumstances in that case which justified the intervention. He said:

> *"I am of the view that this case can be distinguished quite clearly from the Redmond case. It was a premature application to enter a plea, but from the Court's perspective that certainly would come within the definition in Redmond of very exceptional circumstances, where a person who was trying to use the system effectively to get out of a much more serious allegation from the same set of offences. That would comc within the dicta by Kearns J. as very exceptional circumstances, where a judge would be quite entitled to refuse to accept that plea."*

21. White J had also been referred by the respondent to a judgment of the High Court in a case of *Brehuta v District Judge John Coughlan & Anor* [2012] IEHC 498 in support of the respondent's case. He held that:

> *"I do not consider the case opened by the Respondent in the matter of Monalisa Brehuta v Judge John Coughlan in any way relevant to the issues that I have to decide today. That is about equality of treatment in a sentencing hearing in relation to a co-accused that simply in my view does not arise as an issue that this court has to determine - which is the issue as to the change of a plea and the onus on a District Judge, or any judge, to accept or reject."*

22. White J commented in relation to the present case that *"clearly the Court would have some concerns if in fact the position was that the learned judge had taken the view that he was remanding him for a very short period of time and that because of the short period of time he wanted to finalise the case against the other two accused and then deal with the issue of the plea of the third accused. But it is clear in the order that it was his intention, in fact, was to remand for four weeks and it was only until the solicitor intervened that he agreed to a shorter remand."*

23. He concluded:

> *"19. So, looking at it from that perspective the Court could not take the view that the application by the accused person before this Court today is an inappropriate application pursuant to Article 40 of the constitution. Because clearly the reason advanced by the learned district judge to refuse the plea does not come in within the ambit of very exceptional circumstances. Regularly, where people are the co-accused in matters it is open to one of the accused to plead guilty. A judge has a discretion to postpone sentence until he deals with the contested accused persons. He is completely within his rights to do that. So, 1 was confused firstly by Mr. O'Higgins submission that there may have been a situation where there was an obligation on him to deal with the plea there and then, but Mr. O'Higgins resiled from that issue, or maybe 1 took him up wrong on the matter. But what he said was that he was entitled to give himself the chance of making the argument to the district judge, once he had entered a plea of guilty, that the sentence would either be dealt with on that day,which would give him a chance to have recognisance fixed and to be on bail to appeal, or that the district judge would, after a plea of guilty, reconsider his remand in custody, which on the face of it would be unlikely.*
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> *20. So, clearly the reasons advanced by District Judge Finn did not come within the jurisprudence as laid down in the Redmond or Olafusi cases, and Olafusi gives the Court the indication that it is illegal detention rather than any other remedy such as judicial review and the Court finds that pursuant to Article 40 enquiry that Mr. Connors at this point in time is in illegal detention … ."*

The grounds of appeal

24. The respondent appeals against the decision on a number of grounds. They are set out below as listed in the notice of appeal.

> (i) The High Court Judge erred in law in holding that that the District Court Judge did not have discretion to postpone entry of a guilty plea in circumstances where he had a genuine concern that the applicant might find himself convicted of the alleged offence where his two co-accused could end up being acquitted.
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> (ii) The High Court Judge failed to consider the fact that when the District judge indicated his concern that he might be put in a position of convicting the applicant and then later acquitting the two co-accused, the applicant asked for a shorter remand period only, and did not indicate he wished to still enter the plea. In those circumstances, the applicant acquiesced in the course proposed by the trial judge and indicated he wished to avail of the opportunity of having the legal submissions considered by the trial judge and being acquitted.
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> (iii) In the circumstances, there was no fundamental defect in fair procedures such that the hearing before the trial judge led to an invalid detention.
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> (iv) The High Court Judge erred in finding that there were not exceptional circumstances such that the trial judge was correct to exercise his discretion to postpone entry of a guilty plea. In this regard, the High Court Judge did not correctly apply the principles set out in *DPP v Redmond* [2006] 3 I.R. 188 and *Olafusi v Governor of Cloverhill Prison* [2009] IEHC 558 and failed to recognise the distinguishing features of the facts of the present case.
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> (v) The High Court Judge erred in concluding that the release of the applicant was an appropriate remedy in circumstances where there was a valid remand warrant holding the applicant in prison.
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> (vi) In particular, the High Court Judge erred in law by accepting the submission on behalf of the applicant that he had lost the opportunity of having his plea entered, the sentence heard and determined and the opportunity then of entering an appeal against said sentence, having recognisances set, and then being released, all in the course of the same day.
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> (vii) The High Court Judge erred in law in failing to have regard to the fact that even if the guilty plea offered on behalf of the applicant had been accepted by the trial judge in the District Court, the trial judge would have been entitled to postpone the taking of any evidence in respect of penalty, and the imposition of any sentence, until the trial had finally concluded.
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> (viii) Further, the High Court Judge failed to give any weight to the fact that the applicant was in custody, not as a result of the decision to postpone the guilty plea, but because his bail had been revoked two days previously because of his failure to comply with the conditions of bail.

(ix) The High Court Judge failed to give due weight to the provisions of Order 23 of the District Court rules and to the Supreme Court judgment in *State (McCann) v Hubert Wine* [1981] I.R. 134 and to the fact that the rules envisage a District Judge having discretion to reject a plea of guilty if he sees sufficient reason to do so.

(x) The High Court Judge failed to give any weight to the decision in *Brehuta v Judge Coughlan* [2012] IEHC 498 and the principle of law that justice must be even-handed and that persons who are similarly situated do not receive different treatment because of some happenstance irrelevant to guilt or innocence.

The Respondent's Submissions

25. In relation to alleged acquiescence, the respondent emphasises that when the District Judge indicated he wished to postpone the guilty plea, the applicant simply applied for a shorter remand period. Neither the applicant nor his solicitor communicated to the District Judge that he still wished to enter a guilty plea. Thus, the respondent argues, the applicant tacitly indicated that he wished to avail of the opportunity of deferring his guilty plea until the submissions could be considered so long as those submissions could be considered in a relatively short period. It was in these circumstances that the District Judge shortened the original remand period from four weeks to five days. No issue was taken in the District Court with the validity of the Judge's remand order. The respondent has further submitted that the High Court Judge made an error of fact, in holding that the District Judge had intended to remand the matter for four weeks for legal submissions and therefore could not have had it in mind to deal quickly with the legal issues so that the plea could then be disposed of. In fact, the appellant argues, the District Judge, appreciating the significance of the applicant's offer to plead guilty, readily acceded to a shorter remand period to allow the matter of the outstanding legal issue, which might possibly be resolved to the advantage of the applicant, to be promptly disposed of.

26. The respondent submits that on the facts of the case, there was no refusal to accept a plea. Taken at its height there was simply a suggestion by the Judge that the accused might want to defer his plea until the Judge had determined whether the accused would be acquitted on the basis of the legal submissions, a course which the respondent argues was acceded to by the applicant.

27. The respondent has further submitted that the High Court Judge relied too heavily on the decisions of *The People (Director of Public Prosecutions) v Redmond* [2006] 3 IR 188 and *Olafusi v Governor of Cloverhill Prison* (High Court, Unreported Dec. 11, 2009, O'Neill J). The respondent relies instead on Order 23 Rule 3 of the District Court Rules which states that *"Where the accused, personally or by solicitor or counsel appears and admits the truth of the complaint made against him or her, the Court may if it sees no sufficient reason to the contrary, convict or make an order against him or her accordingly …"*, and asserts that a rule that is described as being *"in the same terms"* was interpreted previously in The *State (McCann) v Wine* [1981] IR 134.

28. In *The State (McCann) v Wine*, the Supreme Court held that a District Judge had discretion to decline to accept an accused's plea of guilty if he or she sees sufficient reason. In that case, the accused pleaded guilty to a lesser charge to preclude the prosecution from proceeding with a more serious offence arising out of the same circumstances. However, in delivering the unanimous judgment of the Supreme Court, Griffin J stated:

> *"Even if the purported plea of guilty were not premature in this case, in my view the provisions of 64(1) of the Rules of 1948 could not be construed in the manner suggested by the respondent which is to interpret the words "the Justice may, if he sees no sufficient reason to the contrary, convict" in a mandatory sense by treating the word "may" as meaning "shall." In my opinion, to construe the sub-rule – language which uses the word "shall" both before and after the portion of the sub-rule in which the word "may" is found. The use of the word "may" clearly confers a discretion on the District Justice, and in my view the existence of a complaint charging a serious indictable offence under s. 53 of the Act of 1961 constitutes a "sufficient reason to the contrary" to enable a District Justice to exercise his discretion to refrain from convicting a defendant of the trivial offence of careless driving and thus precluding the prosecution from proceeding with a serious indictable offence."*

29. Therefore, the respondent argues, an issue relating to the proper and fair administration of justice was held in the McCann case to amount to *"a sufficient reason to the contrary"*. This decision was not cited in the later case of *The People (Director of Public Prosecutions) v Redmond*. The respondent speculates this was because that case had commenced in the Circuit Court, obviating any need to interpret the relevant provision of the District Court rules. Further, the issue in *Redmond* case was not a refusal to allow an accused to enter a guilty plea but whether a Judge could substitute a plea of not guilty for a plea of guilty that had already been entered, so that the sanity of the accused could be determined by a jury. A majority of the Supreme Court held that the Judge did not have jurisdiction to substitute a plea of "not guilty".

30. The respondent has argued that the judgment in the *Redmond* case was specific to its own facts, and that the majority were careful to emphasise that they did not intend to lay down a general rule. In that regard the respondent points out (at paragraph 23 of his written submissions) that Geoghegan J made it clear he would not answer the question in a general fashion as a judge might have different powers in a different case. Fennelly J was equally circumspect. Of significance in that case was that if the accused had been determined criminally insane, he could have served an indeterminate sentence in a mental institution, and Kearns J alluded specifically to this.

31. Likewise, the respondent argues that the factual background in *Olafusi*, in which O'Neill J held it was not permissible to refuse a plea on the grounds that the court was not satisfied as to the accused's identity, distinguishes it from the present case.

32. These authorities, the respondent argues, deal with narrow factual scenarios, and do not cover the myriad of situations in which an accused might offer to plead guilty.

33. In relation to grounds (iii) and (v), the respondent argues that Article 40 proceedings were not an appropriate remedy in circumstances where there was a valid remand warrant. The respondent argues that the applicant was not being illegally detained. *Redmond*, it was submitted, is not authority to suggest that a rejection of a guilty plea automatically results in an illegal detention. In *Ryan v Governor of Midlands Prison* [2014] IESC 54, the Supreme Court reiterated the principle that *habeas corpus* is an extraordinary remedy and not available unless there is a fundamental denial of justice or a fundamental flaw. In the present case, the respondent contends that there was no such fundamental flaw. If the height of the applicant's case is that there was a refusal to accept his plea, there should have been no ambiguity on the part of the applicant and he should have made it clear to the trial judge on the date in question that he was insisting on entering his plea and that he wished to waive his right to have the legal submissions advanced considered for his benefit. He did not do so.

The Applicant's Submissions

34. The applicant contends, firstly, and with respect to the acquiescence argument advanced by the respondent, that this issue was not raised with the High Court Judge and that for that reason it was not dealt with in his judgment. The applicant submits that it cannot therefore be relied upon in this Court. Secondly, and notwithstanding that, the applicant contends that no indication was given that the applicant was resiling from his offer, and expressed desire, to plead guilty and the request for a shorter remand period was simply to ensure that the applicant's detention would be for the shortest possible time prior to any potential sentence being imposed. The applicant argues that acquiescence on his part cannot therefore be inferred.

35. The applicant relies upon Kearns J's statement in *The People (Director of Public Prosecutions) v Redmond* that the right to enter a plea is a fundamental element of an accused's constitutional right to a fair trial. Therefore, the applicant submits that the breach of such a right cannot be condoned through acquiescence which, in any event, is denied as having occurred on the particular facts. The applicant further refers to the *dictum* of Denham J in *Caffrey v Governor of Portlaoise Prison* [2012] IESC 4 where she noted that *"the appellant could not be lawfully detained on the basis of his consent or acquiescence."* Furthermore, we were reminded that in *O'Malley v Kelly* [2015] IECA 67, this Court held that the accused was entitled to the relief granted by the High Court (certiorari in that case) despite significant acquiescence.

36. With respect to the respondent's allegation of an error in fact on the part of the High Court Judge in relation to the length of the remand period, the applicant notes that the relevant quotations came from a paragraph of the judgment where the High Court judge was considering whether the application was an abuse of the Article 40 process, and the quotations do not therefore form part of the *ratio* of the judgment. Further, the applicant asserts that it is clear from the transcript that the High Court judge was fully aware of the chronology of events and at what stage the plea was entered and the remand period reduced. Furthermore, the four week remand period still remained after the guilty plea was refused and had the applicant's solicitor not applied to reduce the remand period, the applicant would have been remanded for a period of four weeks. The applicant also notes that the District Judge did not actually give his ruling until some fourteen weeks after the guilty plea was entered. Further, in refutation of the respondent's submission that the length of the remand period was key to the finding of an illegal detention, the applicant says that the reasoning behind the High Court Judge's finding lay in the fact that the District Judge's reason for refusing a plea did not fall within the ambit of the exceptional circumstances set out in *Redmond* and *Olafusi*. The applicant therefore submits that the High Court Judge's ruling was correct.

37. In relation to the District Judge's jurisdiction to refuse to accept the change of plea, the applicant submits that it is clear from the judgment of Kearns J in Redmond that the right of a defendant to choose whether to plea guilty or not guilty comes within the ambit of the constitutionally protected right to a fair trial. As Denham J (as she then was) stated in *Adebayo v Minister for Justice* [2006] 2 IR 298 at 304 *"constitutional and statutory rights, if they exist, may not be nullified by procedural rules."* Thus, the applicant says, rules of the District Court cannot trump the applicant's constitutionally guaranteed right to choose his plea and to be allowed to change his plea.

38. Regarding the *McCann* case, the applicant maintains that, contrary to the respondent's assertion that the District Court rule in question in that case was in similar terms to the one in the present case, the rule in that case contained a mandatory requirement to state the substance of the complaint against the defendant *"and that, if he thereupon admits the truth of the complaint, the District Justice 'may, if he sees no sufficient reason to the contrary, convict or make an order against the defendant accordingly . . .'"*, unlike the rules in the present case. This was the primary basis on which Griffin J allowed the appeal in that case. McCann, the applicant argues, can further be distinguished from the present case because that case dealt with an attempted premature guilty plea to a summary offence to avoid prosecution for a more serious indictable offence. The applicant argues that the factual scenario in *McCann* meant it did, therefore, fall within the exceptional circumstances contemplated in *Redmond.*

39. Turning to the arguments advanced by the respondent in relation to Redmond, the applicant argues that Geoghegan J's comments, limiting the generality of his ruling, related specifically to the powers a court has to deal with a guilty plea in circumstances where there is an issue of fitness to plead and not to the question as to whether a judge has the power to refuse to accept a guilty plea in other circumstances.

40. The applicant notes that all five Judges of the Supreme Court, including Denham J (as she then was) in her dissent, recognised that it would require very exceptional circumstances for a Court to substitute a not guilty plea for a defendant's guilty plea.

41. Though Denham J was of the view that such exceptional circumstances did arise in *Redmond*, the applicant submits that his circumstances would be unlikely to fall within Denham J's definition of exceptional circumstances had her judgment been the majority view. In any event, the majority in *Redmond* held that a very high threshold would need to be met to justify a trial judge in dislodging a defendant's plea.

42. In *Olafusi*, the aforementioned judgment of Denham J in Redmond, was considered by O'Neill J. O'Neill J found that the grounds on which Denham J envisaged the refusal of a guilty plea *were "related to due process and, in particular, the fairness of the criminal justice process."* O'Neill J found that such circumstances did not arise in *Olafusi* as the accused was *"legally represented and [did] not suffer from a mental impairment."*

43. Taken together, the applicant submits that the following principles may be taken from the authorities:

> i. The right to enter a plea is constitutional in origin and arises from an accused's right to a fair trial guaranteed by Article 38 of the Constitution;
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> ii. Procedural rules cannot oust constitutional rights;
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> iii. A plea is enhanced if the accused has the benefit of legal advice;
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> iv. Very exceptional circumstances and a high threshold are required to be met before a plea of guilty can be rejected;
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> v. This principle outlined at iv is reinforced where the charges relate to summary or minor matters;
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> vi. Exceptional circumstances may arise where there is a breach of due process, such as not having legal advice or an abuse of the criminal justice process;
>
> vii. Ordinarily, a Court should not second guess an accused's reasons for entering a plea nor his motives for doing so. It is for the legal advisors to advise and for the sentencing Judge to sentence.

The applicant argues that his case falls squarely within Redmond.

44. Further, the applicant submits that Article 40 proceedings were the appropriate remedy. The applicant notes that the respondent had failed to refer to *Olafusi* , an application for an enquiry pursuant to Article 40 on the same basis as that of the applicant in the present case, on this point. The applicant further points to the remarks of Denham CJ in *Ryan v Governor of Midlands Prison* [2014] IESC 54 where she stated that *"[in] certain circumstances the remedy of Article 40.4.2 arises only if there has been absence of jurisdiction, a fundamental denial of justice, or a fundamental flaw."* The applicant submits that where it is established that the right to enter a plea is a constitutional right, a breach of such right exceeds jurisdiction, is a fundamental denial of justice and a fundamental flaw.

45. In *Brennan v Governor of Portlaoise Prison* [2008] 3 IR 364 at 369 O'Neill J held that where material is put before the court to cause the court to have concern as to the legality of the detention *"there must thereafter proceed an urgent inquiry to establish that the detention is either legal or not legal."*

46. In *Bailey v Governor of Mountjoy Prison* [2012] 2 IR 391 at 397 Hogan J held that the jurisdiction of the Court under Article 40.4.2° was not confined solely to cases where the illegal nature of the detention was obvious. Hogan J again held in *Cirpaci v Governor of Mountjoy Prison* [2014] 2 IR 471 that the power of the High Court in an enquiry under Article 40 was not narrow, but rather it was *"broad and flexible."* Finally, in *Grant v Governor of Cloverhill Prison* [2015] IEHC 768 Humphreys J held that an alternative remedy could not be an absolute bar to *habeas corpus*.

47. In conclusion on the substantive issues, the applicant maintains that the decision of the High Court Judge to grant Article 40 relief and release the applicant was soundly based, was supported by well established legal precedent and was reached following a careful and detailed examination of relevant authorities.

Mootness
48. Although, strictly speaking, it was not pleaded expressly as a ground of opposition to the appeal by the applicant, the applicant has nevertheless raised the further issue of mootness in his written legal submissions. He contends that the issue raised in this appeal, namely the correctness of the finding by the High Court that the applicant's detention following upon his, was unlawful, is moot because the order at issue, namely the order remanding him in custody on the 14th of January 2016 to the 19th of January 2016 pending the intended resumption of the adjourned trial on that date, in circumstances where the trial judge had refused to allow him to change his plea, is now spent and therefore the appeal ought not be entertained as the case does not come within any of the recognized exceptions to the mootness doctrine.

49. The respondent subsequently filed detailed further written submissions specifically addressing the mootness objection raised by the applicant.

50. The respondent, unsurprisingly, contends that the issue raised on the appeal is not moot and in that regard says that the issue is one that is *"capable of repetition yet evading review"*; which, if that be the case, would bring it within an exception to the mootness doctrine first recognised as existing in the United States of America in *Southern Pacific Terminal Co. v Interstate Commerce Co.* (1911) 219 U.S. 498 and endorsed as also applying in this jurisdiction in cases such as *Condon v Minister for Labour* [1981] I.R. 62 and P.*V. (a minor) v The Courts Service* [2009] 4 I.R. 264. Alternatively, the respondent says, even if it is moot this Court should, as a matter of discretion, proceed in any event to determine the appeal, notwithstanding that the issue raised on the appeal is moot, because to do so would be in the interests of the proper administration of justice.

51. I have considered the submissions on mootness and am satisfied that the substantive issue that has been raised is indeed one that is *"capable of repetition yet evading review"* and that accordingly I should proceed to determine the substantive questions raised on the appeal.

Analysis and Decision
52. I am satisfied that the High Court judge was correct in identifying the case of *The People (Director of Public Prosecutions) v Redmond* as being the most relevant and apposite authority in the circumstances of this case, and further that he was correct in his assessment of the significance of the earlier decision in *The State (McCann) v Wine* [1981] IR 134. The *McCann* case was clearly distinguishable on its facts, but notwithstanding that there were in any event exceptional circumstances that were capable of justifying the trial judge's intervention in that case had the *Redmond* approach been adopted.

53. I also consider that the point made by the applicant, that the provision in the District Court Rules under consideration in the *McCann* case (rule 64(1) of the District Court Rules 1948) was not in fact in exactly similar terms to the provision in the current District Court Rules (Order 23 Rule 3 of the District Court Rules 1997 as amended) relied upon by the respondent, is a point well made. That having been said, the *McCann* decision does provide support for an interpretation of the existing rules that recognises that the use of the word "may" confers a discretion on the District Judge. However, that is hardly controversial. There may well be discretion but it must be exercised judicially. The judicial exercise of that discretion involves having due regard to any strictures imposed internally by the rule, (in this instance that there should, in the court's view, be "no sufficient reason to the contrary"); as well as to the notion of trial in due course of law under Article 38 of the Constitution as interpreted by the Superior Courts. Moreover, where there is a tension or potential conflict between these considerations the requirements of constitutional due process must be prioritised.

54. The *Redmond* case makes clear that an accused person's right of self determination in terms of selecting his preferred defence to, or how he wishes to plead to, a criminal charge is an integral part of the right to a fair trial guaranteed by Article 38 of the Constitution, and that a trial judge should not intervene to set aside a guilty plea or, it follows, refuse to allow an accused to change his plea from one of not guilty to one of guilty, unless there are quite exceptional circumstances arising in the particular case.

55. I have no hesitation in concluding that the High Court judge was right in his determination that the necessary exceptional circumstances did not exist in this case and that the District Judge, notwithstanding his well intentioned motivation, was wrong to not to accept the applicant's change of plea when it was offered on the 14th of January 2016.

56. There was, from that point on, a serious flaw in the proceedings that required to be corrected. However, in circumstances where the applicant had indicated his willingness to plead guilty it was not so fundamental a flaw as to *per se* require the immediate abandonment of the proceedings and for the applicant to be discharged. If the proceedings continued and he happened in due course to be acquitted that would be to his undoubted, if undeserved, benefit. If the proceedings continued and he was convicted, he would be able to make the case as part of a plea in mitigation that he had offered to plead guilty at an earlier stage and the judge would be obliged to take that into account. However, the trial judge's decision to remand him in continuing custody from the 14th to the 19th

of January 2016, in circumstances where he had offered to plead guilty, and that plea should have been accepted, is problematic.

57. There was no certainty, and in light of the trial judge's insistence on receiving written legal submissions it was perhaps unlikely, that the case would have been finalised on the 19th of January 2016 even if the plea had been accepted. As it happened the case against the applicant's co-accused did not conclude until the 28th of April 2016. However, the applicant could, if his plea had been accepted, have applied to the trial judge to sentence him immediately or, if the judge was not disposed to do so, to grant him bail in the new circumstances that then obtained. In accordance with *The People (Attorney General) v O'Callaghan* [1966] I.R. 501 the trial judge would have been obliged to take account, amongst other things and in addition to considerations previously taken into account, the specific new circumstances that there had been plea of guilty, and the likely duration of the period the applicant might have to spend on remand if sentencing were to be deferred until the case against his co-accused had been concluded. In circumstances where the judge refused to accept the plea, the applicant never got the chance to seek either relief. On the contrary, he was remanded in custody in the flawed circumstance of being treated as continuing to be contesting his guilt, which did not represent the reality, and on the basis that his trial would in fact continue on an uncertain date in the future once written submissions had been exchanged.

58. I do not accept that there was acquiescence in this case. Neither am I persuaded that there was any error of fact on the part of the trial judge. It would certainly have been better if the applicant's solicitor had submitted to the trial judge that he was wrong in law in refusing to accept the plea; and that he was in fact obliged to do so. However, the circumstances were very unusual and the solicitor was required to respond instantly to the District Judge's stance, and clearly had very little time, if any, to reflect on the constitutional implications of what the District Judge was proposing to do, and to give a considered response. It is noteworthy that having reflected overnight on what had occurred the solicitor arranged on the following day for the initiation of these Article 40 proceedings. This suggests an early intuition on the part of the solicitor that the District Judge's order could not be right even if the basis for his intuition may not have been immediately clear to him, nor articulated, at the time. However, it appears to have crystalised overnight, possibly following legal research and/or consultation with counsel, and a plan of action was formed involving the initiation of these proceedings. I do not consider that it would be fair in these circumstances to deem the applicant to have acquiesced in the District Judge's wrongful refusal to accept the plea that had been intimated, and his remand of the applicant in custody to the 19th of January 2017 to face continuing trial.

59. Moreover, and in any case, the applicant raises the valid objection that acquiescence was not raised in the court below. In addition we have been referred to jurisprudence in support of the proposition that an unlawful detention cannot be rendered lawful by the acquiescence of the person detained.

60. The case of *Caffrey v The Governor of Portlaoise Prison* [2010] IEHC 213 concerned an Article 40.4.2° application by a prisoner who had been sentenced to a life sentence in England for murder, but subject to a punitive tariff of twelve years. After a number of years he had secured his transfer to an Irish prison under the Transfer of Sentenced Persons Acts 1995 to 1997, in order to serve the remaining balance of his sentence closer to his family who reside in this jurisdiction. While he was in Portlaoise prison that portion of his sentence which comprised the punitive tariff of twelve years elapsed. The applicant Caffrey then brought his application under Article 40.4.20 of the Constitution claiming an entitlement to immediate release. He argued that the legal nature of the sentence that he was given in England comprised a punitive element of twelve years imprisonment followed by preventive detention for the rest of his life. His case was that since preventive detention is a concept unknown to Irish law, he should be immediately released. Charleton J found his detention to be lawful and this was upheld on appeal by the Supreme Court in a 3:2 decision.

61. The relevance of *Caffrey* to the present case is that in the course of his judgment in the High Court Charleton J stated (*obiter dictum*):

> *"What I do not believe can ever happen is that a prisoner, by his consent incidental to the process whereby he is imprisoned, or by failing to take a point as to jurisdiction at the appropriate time, or by apparently acquiescing in the form of his detention, can render what is not in law a valid form of imprisonment into a lawful detention. If a prisoner cannot be detained by a court in accordance with law, then incidental aspects of consent, acquiescence, or delay cannot make lawful what is unlawful. Nor would I believe that the Court has any discretion akin to that exercised in judicial review proceedings to refuse to make an order in habeas corpus proceedings. There is only one issue in this kind of enquiry: is the prisoner lawfully detained or not? That admits of only one answer where there is no legal foundation to … imprisonment".*

62. These remarks were cited with approval by Denham CJ who gave judgment on behalf of the majority in the Supreme Court (Hardiman J and Macken J concurring). The Chief Justice added:

> *"I would affirm this approach by the learned High Court judge. The issue for the Court was whether the appellant was lawfully detained or not. The appellant could not be lawfully detained on the basis of his consent or acquiescence; it is a question of law."*

63. In the circumstances I am satisfied that the trial judge was correct in finding the detention of the applicant on foot of the District Judge's order remanding him in custody from the 14th of January 2016 until the 19th of January 2016 to face a resumed trial, in which he was to be treated as continuing to contest his guilt when that was not the reality, to have been unlawful.

64. I would dismiss the appeal in those circumstances.

65. Finally, as previously observed, this case went into limbo following the judgment of the High Court. It seems that this was due to uncertainty by the District Court Judge as to his jurisdiction to make any order further remanding the applicant, either on bail or in custody, in the light of the High Court's judgment. It may therefore be of assistance to indicate how I envisage that the matter might progress from here.

66. As I have already stated I consider that the District Court case must be deemed to have been adjourned generally of the District Court judge's own motion in circumstances where he retained seizen of the part heard case on the 19th of January 2016 but, by virtue of having doubts as to his jurisdiction to make any order further remanding the applicant, either on bail or in custody, in the light of the High Court's judgment on the previous day, made no remand order and did not immediately resume the case against the applicant.

67. What ought to have happened is that the matter should have been immediately resumed and progressed on the basis that the applicant's desire to change his plea (assuming he had not changed his mind) would belatedly be facilitated, and the matter continued from there. This still needs to happen. However, to date there has been no application by either side, on notice to the other side or

otherwise, to re-enter the matter with a view to its finalisation.

68. I wish to make clear my view that, in the event of an application even at this late stage to re-enter the matter with a view to its finalisation, the District Court judge would, I believe, have jurisdiction to fix a date for the resumption of the case. Assuming a re-entry at the behest of the prosecution, he would have jurisdiction to require the prosecution to formally notify the applicant of the date on which the trial is to be resumed. I am satisfied that if there were then to be no appearance by the applicant on the scheduled date for resumption of the matter, the District Judge, in circumstances where he still retains seizen of a part heard trial, would have jurisdiction to issue a bench warrant for applicant's arrest and to further adjourn the case pending the execution of that warrant. I consider that the fact that the applicant is not presently the subject of any remand order, either on a regime of bail or otherwise, would not serve to emasculate the District Judge's ability to resume and conclude the matter, or to deprive him of jurisdiction to take such steps as are necessary to administer justice in accordance with the Constitution in the case still before him. However, the administration of justice in accordance with the Constitution requires that on any resumption date the applicant should be permitted to enter the plea of guilty that he has indicated he wishes to enter (assuming that remains his wish) and the matter should proceed from there in the normal way.