Nuetral Citation Number [2015] IEHC 190

THE HIGH COURT

[2015 No. 398 SS]

IN THE MATTER OF AN INQUIRY PURSUANT TO ARTICLE 40.4.2 OF THE CONSTITUTION OF IRELAND, 1937

BETWEEN:

F. X.

APPLICANT

AND

THE CLINICAL DIRECTOR OF THE CENTRAL MENTAL HOSPITAL

RESPONDENT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

JUDGMENT of Mr. Justice Noonan delivered the 25th day of March, 2015

Preliminary
1. At the outset of these proceedings before me, on the 19th of March, 2015, I made an order pursuant to s. 27 of the Civil Law (Miscellaneous Provisions) Act 2008 prohibiting the publication or broadcast of any matter relating to the proceedings which would, or would be likely to, identify the applicant.

Introduction
2. This matter comes before the court on foot of the order of O'Malley J. made herein on the 13th of March, 2015, whereby she directed an inquiry pursuant to Article 40.4.2 of the Constitution into the lawfulness of the applicant's detention at the Central Mental Hospital.

Background facts
3. On the 11th of May, 2010, the applicant was a patient at Tallaght Hospital when he attacked another patient, Mr. James McGrane by stabbing him in the neck with a steak knife thereby severing his spinal cord at the level of T2 and paralysing him below that level. Mr. McGrane was not known to the applicant and was chosen at random.

4. The applicant was arrested and brought before Tallaght District Court on the 14th of May, 2010, where he was charged pursuant to s. 4 of the Non Fatal Offences Against the Person Act 1997 with intentionally or recklessly causing serious harm to Mr. McGrane. Whilst he was initially remanded by the District Court to Cloverhill Prison, the prison doctor certified that the respondent was suffering from a mental disorder for which he could not get appropriate care in that prison and accordingly the Governor transferred him to the Central Mental Hospital pursuant to s. 15 of the Criminal Law (Insanity) Act 2006 ("the 2006 Act").

5. On the 10th of June, 2010, the District Court remanded the applicant to the Circuit Criminal Court for the purpose of a fitness assessment pursuant to s. 4 (4) of the 2006 Act.

6. Mr. McGrane died on the 11th of January, 2011 and on the 14th of October, 2011, the applicant was charged with murder and sent forward to the Central Criminal Court. On the 27th of October, 2011, the prosecution entered a *nolle prosequi* in respect of the s. 4 charge in the Circuit Criminal Court. On the 4th of November, 2011, the Mental Health (Criminal) Review Board ("the Review Board") reviewed the applicant's detention in the Central Mental Hospital and decided that his detention was appropriate.

7. On the 26th of March, 2012, the matter came before the Central Criminal Court (Carney J.) who determined that the applicant was unfit to be tried and made an order pursuant to s. 4 (5) (c) of the 2006 Act adjourning the proceedings until further order. There was no dispute but that the applicant was unfit to be tried and the medical evidence in that regard was uncontroverted.

8. On the 30th of April, 2012, the Director of Public Prosecutions ("the DPP") served the Book of Evidence on the applicant and notified him in writing that the indictment once lodged by the prosecution would contain two counts, the offence of murder and a separate offence contrary to s. 4 of the Non Fatal Offences Against the Person Act 1997.

9. On the 21st of June, 2012, the applicant applied to the High Court (Hogan J.) for an inquiry under Article 40.4.2 of the Constitution. The basis for this application arose out of an earlier judgment delivered by Hogan J. on the 5th of April, 2012, in *EC v. The Clinical Director of the Central Mental Hospital* [2012] IEHC 152. Hogan J. delivered judgment on the 3rd of July, 2012, holding that the applicant's detention was not in accordance with law and ultimately directing that he be released on the 10th of July, 2012. The purpose of the delay was to enable the relevant authorities to regularise the applicant's detention in the meantime.

10. Accordingly, the DPP applied to the Central Criminal Court (Sheehan J.) on the 9th of July, 2012, for an order pursuant to s. 4 (6) (a) of the 2006 Act committing the applicant to the Central Mental Hospital. That order was made and the matter adjourned to the 16th of July, 2012, when it again came before the Central Criminal Court (Carney J.).

11. On the latter occasion, the court made an order pursuant to s. 4 (5) (c) (i) of the 2006 Act committing the applicant to the Central Mental Hospital subject to periodic review by the Review Board pursuant to the Act. Again, the order was made on foot of uncontroverted medical evidence. The order of Carney J. stated as follows:

> "THE MATTER coming on for trial of the issue of fitness to be tried pursuant to s. 4 (5) of the Criminal Law (Insanity) Act

2006 (as amended by s. 4 of the Criminal Law Insanity Act, 2010)

AND having heard the evidence adduced and the submissions made on behalf of the respective parties and having heard the evidence of an approved medical officer namely Dr. Damien Mohan

THE COURT DOTH FIND, pursuant to s. 4 (5) (c) (i) of the Criminal Law Insanity Act, 2006 that the accused herein is unfit to be tried and is suffering from a mental disorder (within the meaning of the Mental Health Act 2001) and

THE COURT DOTH FIND, having heard the evidence of an approved medical officer, that the accused FX is in need of inpatient care or treatment in a designated centre and

THE COURT DOTH ORDER, pursuant to s. 4 (5) (c) (i) of the Criminal Law Insanity Act 2006 (as amended by s. 4 of the Criminal Law Insanity Act 2010) that the proceedings herein be and the same are hereby adjourned until further order and that the accused FX be and is hereby committed to the Central Mental Hospital, being a designated centre pursuant to the said Criminal Law (Insanity) Act, 2006 until an order is made under s. 13 of the said Criminal Law (Insanity) Act, 2006 (as amended by s. 7 of the Criminal Law Insanity Act, 2010)."

11. On the 30th of July, 2012, an application was made on behalf of the applicant to the Central Criminal Court for a hearing pursuant to s. 4 (8) of the 2006 Act. The court determined that the 2006 Act required that the issue be tried by a judge alone and directed the prosecution to prepare a statement of charges and a book of evidence for service on the applicant.

12. On the 14th of October, 2013, the prosecution lodged the indictment containing the two counts above referred to.

11. During the course of his detention in the Central Mental Hospital, the applicant was subject to regular review by the Review Board. The last such review took place on the 21st of November, 2014. For that purpose, a psychiatric report dated the 12th of November, 2014 was prepared by Dr. Damien Mohan, a consultant forensic psychiatrist, following assessment of the applicant. Dr. Mohan found that the applicant's diagnosis is that of treatment resistant paranoid schizophrenia, a mental disorder within the terms of both the 2006 Act and the Mental Health Act 2001. Dr. Mohan considered that the renewal of the applicant's detention under the 2006 Act was appropriate in order to facilitate his continued care, treatment and rehabilitation. He felt that the applicant's mental illness is of a nature and degree which made it appropriate for him to continue to receive medical treatment in a hospital with conditions of medium security such as pertain at the Central Mental Hospital for the protection of other persons from serious harm and for the applicant's own health and safety.

12. He concluded that the applicant continues to lack insight into his condition and further that he lacks the capacity to instruct his legal advisers, make a proper defence or understand the evidence. Accordingly, Dr. Mohan did not recommend that the applicant's case be returned to trial.

13. The Review Board considered the matter on the 21st of November, 2014 and concluded that it was clear that the applicant remains unfit to plead. The Board accordingly concluded:

> "The Board is satisfied that [the applicant] continues to suffer from a very serious and chronic mental disorder which renders him unfit to plead and is in need of inpatient treatment in the Central Mental Hospital, and that he is properly detained there and should remain so detained pending further review."

14. The s. 4 (8) hearing took place in the Central Criminal Court before Butler J. over four days from the 2nd to the 5th of December, 2013. At the conclusion of the hearing, the court directed that written submissions be delivered by the parties.

15. Butler J. delivered his judgment on the 17th of February, 2015, ruling that the applicant be discharged on the murder count but not on the s. 4 count. He made the following order:

> "The Court having heard evidence adduced before it pursuant to s. 4 (8) of the Criminal Law Insanity Act 2006 (as amended by s. 4 of the Criminal Law Insanity Act, 2010) on the 2nd, 3rd, 4th and 5th days of December 2014.
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> The Court then having received and considered the written submissions of the respective parties
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> On the 17th day of February 2015 the court doth determine pursuant to s. 4 (8) of the Criminal Law Insanity Act 2006 as amended by the Criminal Law Insanity Act, 2010, the accused person being unfit to be tried:
>
> There being a reasonable doubt as to whether the accused person did the act alleged in respect of Count 1 on the indictment, the Court accordingly orders that the accused person be discharged in respect of the Murder offence as set out under Count 1 on the Indictment.
>
> There being no reasonable doubt that the accused person did the act alleged in respect of Count No 2 on the Indictment the Court accordingly does not discharge the accused person in respect of the Assault Causing Serious Harm offence as set out under Count 2 on the Indictment."

16. In the course of delivering his judgment, Butler J. said:

> "11. Having considered the evidence adduced on behalf of the prosecution and that of Dr. Gilson, a pathologist called on behalf of the defence, I am satisfied that there must be reasonable doubt as to whether the act complained of caused, or contributed in more than a minimal way to, the death of the deceased.
>
> 12. There follows a question of what must be done as a result of that finding. The Act provides that the court *"shall order the accused to be discharged"*. The defence, in effect, argues that he should be completely discharged. The evidence tendered in this case relates to both two counts 1 (murder) and count 2 (assault causing serious harm), on the indictment. Should this matter have gone to trial before a jury on the basis of the evidence which I heard, I am satisfied that it would have to have found the accused not guilty by direction on count 1 but guilty on count 2. It would make no sense were the legislation to be interpreted on the facts of this case to allow a complete discharge of the accused. I am, therefore, discharging him in respect of the count of murder."

The Criminal Law (Insanity) Act 2006
17. The provisions of the 2006 Act as amended by the Criminal Law (Insanity) Act 2010, insofar as relevant to this inquiry, are as follows:

> "4.— (1) Where in the course of criminal proceedings against an accused person the question arises, at the instance of the defence, the prosecution or the court, as to whether or not the person is fit to be tried the following provisions shall have effect.
>
> (2) An accused person shall be deemed unfit to be tried if he or she is unable by reason of mental disorder to understand the nature or course of the proceedings so as to—
>
> (a) plead to the charge,
>
> (b) instruct a legal representative,
>
> (c) in the case of an indictable offence which may be tried summarily, elect for a trial by jury,
>
> (d) make a proper defence,
>
> (e) in the case of a trial by jury, challenge a juror to whom he or she might wish to object, or
>
> (f) understand the evidence."

18. Subsection (3) (a) is concerned with summary trials and subs. (4) continues:

> (4) (a) Where an accused person is before the [District Court] charged with an offence other than an offence to which *paragraph (a)* of *subsection (3)* applies, any question as to whether that person is fit to be tried shall be determined by the court of trial to which the person would have been sent forward if he or she were fit to be tried and the [District Court] shall send the person forward to that court for the purpose of determining that issue.
>
> (b) Where an accused person is sent forward to the court of trial under *paragraph (a)*, the question of whether the person is fit to be tried shall be determined by the judge concerned sitting alone.
>
> (c) If the determination under *paragraph (b)* is that the accused person is fit to be tried, the provisions of the Criminal Procedure Act 1967, shall apply as if an order returning the person for trial had been made by the [District Court] under section 4A of that Act (inserted by section 9 of the Criminal Justice Act 1999) on the date the determination was made but, in any case where section 13 of that Act applies, the person shall be returned for trial.
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> (d) If the determination under *paragraph (b)* is that the person is unfit to be tried the provisions of *subsection (5)* shall apply.
>
> (e) Where the court subsequently determines that the person is fit to be tried the provisions of the Criminal Procedure Act 1967 , shall apply as if an order returning the person for trial had been made by the [District Court] on the date the determination was made.
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> (5) (a) Where an accused person is before a court other than the [District Court] charged with an offence and the question arises as to whether that person is fit to be tried the provisions of this subsection shall apply.
>
> (b) The question of whether the accused person is fit to be tried shall be determined by the judge concerned sitting alone…
>
> (c) Subject to *subsections (7)* and *(8),* if the judge determines that the accused person is unfit to be tried, he or she shall adjourn the proceedings until further order, and may—
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> (i) if he or she is satisfied, having considered the evidence of an approved medical officer adduced pursuant to subsection (6)(b) and any other evidence that may be adduced before him or her that the accused person is suffering from a mental disorder (within the meaning of the [Mental Health Act 2001]) and is in need of in-patient care or treatment in a designated centre, commit him or her to a specified designated centre until an order is made under section 13 , or 13A, or
>
> (ii) if he or she is satisfied, having considered the evidence of an approved medical officer adduced pursuant to subsection (6)(b) and any other evidence that may be adduced before him or her that the accused person is suffering from a mental disorder or from a mental disorder (within the meaning of the Act of 2001) and is in need of out-patient care or treatment in a designated centre, make such order as he or she thinks proper in relation to the accused person for out-patient treatment in a designated centre.
>
> (d) Where the court determines that the accused person is fit to be tried the proceedings shall continue.
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> (6) (a) For the purposes of determining whether or not to exercise a power under *subsection (3)(b)(i)* or *(ii)* or in subsection (5) (c) (i) or (ii), the court, having considered the evidence of an approved medical officer adduced before it in respect of the accused person —
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> (i) may for that purpose –
>
> (i) commit the accused person to a designated centre for a period of not more than 14 days, or
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> (ii) by order direct that the accused person attend a designated centre as an outpatient on such day or

days as the court may direct within a period of 14 days for the date of the making of the order,

and

(ii) Shall direct that the accused person concerned by examined by an approved medical officer at the designated centre.

(b) Within the period authorised by the court under this subsection, the approved medical officer who examined the accused person pursuant to sub paragraph (ii) of paragraph (a) shall report to the court on whether or not in his or her opinion the accused person is –

(i) suffering from a mental disorder (within the meaning of the Act of 2001) and is in need of in-patient care or treatment in a designated centre, or

(ii) suffering from a mental disorder or a mental disorder (within the meaning of the Act of 2001) and is in need of out-patient care or treatment in a designated centre.

(7) Where on the trial of an accused person the question arises as to whether or not the person is fit to be tried and the court considers that it is expedient and in the interests of the accused so to do, it may defer consideration of the question until any time before the opening of the case for the defence and if, before the question falls to be determined, the jury by the direction of the court or the court, as the case may be, return a verdict in favour of the accused or find the accused person not guilty, as the case may be, on the count or each of the counts on which the accused is being tried the question shall not be determined and the person shall be acquitted.

(8) Upon a determination having been made by the court that an accused person is unfit to be tried it may on application to it in that behalf allow evidence to be adduced before it as to whether or not the accused person did the act alleged and if the court is satisfied that there is a reasonable doubt as to whether the accused did the act alleged, it shall order the accused to be discharged."

19. The 2006 Act goes on to provide for the establishment of the Mental Health (Criminal Law) Review Board and gives it certain powers and duties in relation to, *inter alia*, persons detained pursuant to the provisions of the 2006 Act. The remit of the Board, which is currently chaired by a former member of the Superior Courts, is expressed in s. 11 (2) as including the following:

"The Review Board shall be independent in the exercise of its functions under this Act and shall have regard to the welfare and safety of the person whose detention or conditions of discharge it reviews or whose application for unconditional discharge it determines under this Act and to the public interest."

20. Section 13 of the Act insofar as material provides:

"13 – (1) The Review Board shall ensure that the detention of a patient is reviewed at intervals of such length not being more than 6 months as it considers appropriate and the clinical director of the designated centre where the patient is detained shall comply with any request by the Review Board in connection with the review.

(2) (a) Where the clinical director of a designated centre forms the opinion in relation to a patient detained pursuant to *section 4* that the patient is no longer unfit to be tried for an offence he or she shall forthwith notify the court that committed the patient to the designated centre of this opinion and the court shall order that the patient be brought before it, as soon as may be, to be dealt with as the court thinks proper…

(3) Where the clinical director of a designated centre forms the opinion in relation to a patient detained pursuant to *section 4* or to section 202 of the Defence Act 1954, that the patient, although still unfit to be tried, is no longer in need of impatient care or treatment at a designated centre he or she shall forthwith notify the Review Board of this opinion.

(4) Where the Review Board receives a notification under *subsection (3)*, it shall order that the patient be brought before it as soon as may be, and shall, having heard evidence relating to the mental condition of the patient given by the consultant psychiatrist responsible for his or her care or treatment, determine the question whether or not the treatment referred to in *subsection (3)* is still required in the same manner as if that question were being determined pursuant to the relevant provision of this Act or the Defence Act 1954 , as may be appropriate, and shall make such order as it thinks proper in relation to the patient, whether for further detention, care or treatment in a designated centre, for his or her conditional discharge under section 13A or for his or her unconditional discharge."

The Arguments

21. Counsel for the applicant, Mr. Fitzgerald SC, submits that the applicant's detention in the Central Mental Hospital was authorised by the order of the Central Criminal Court of the 16th of July, 2012. At the time that order was made, the applicant was facing a charge of murder only and thus the order was predicated on that charge and no other.

22. He contends that when the applicant was discharged on the count of murder by the Central Criminal Court on the 17th of February, 2015, the original order authorising his detention thereby became spent so that the applicant's continued detention thereafter is unlawful. He says that a determination of unfitness to be tried is offence specific under s. 4. One of the criteria for the determination of fitness is the accused's ability to understand the evidence. Thus he may not be able to understand the complex medical evidence regarding cause of death for the purposes of a murder charge and thus be unfit but in relation to an alternative charge based on simpler evidence he may be able to understand that and therefore be fit. This must mean, it is said, that a determination of unfitness for the purposes of the murder charge cannot be regarded as a determination of unfitness in relation to the s. 4 charge. That charge was never before the Central Criminal Court when the unfitness determination was made. Therefore, Carney J. did not decide to commit the applicant on the s. 4 charge. The court cannot have intended to detain the applicant on the basis of a charge of which it knew nothing.

23. Counsel instances the example of the addition of a theft charge to the murder charge and says that once the murder charge falls away, the applicant's detention could not possibly be justified on the basis of a continuing subsequent theft charge. Whilst the order of the 16th of July, 2012 refers to the adjournment of "proceedings", those proceedings and the murder charge are in effect one and the same thing, there being no other charge at that time.

24. He argues further that the subsequent orders of the Review Board cannot justify the applicant's detention which must derive from the order of the court.

25. Counsel for the respondent, Mr. Finlay SC, submits that s. 4 (5) (c) (i) of the 2006 Act mandates the court to adjourn "the proceedings" and may thereafter commit the accused to the appropriate institution when the other parameters of the section have been satisfied. Thus, it is the "proceedings" and not the charge which forms the basis for the applicant's detention. In the course of such criminal proceedings, further charges may be added or subtracted as necessary and this commonly occurs. The fact that one charge falls away, as here, does not mean that the "proceedings" come to an end or that the lawfulness of the committal expires. Even if that there were not so, the respondent contends that it is in fact the decisions of the Review Board following the initial committal order that become the basis for the applicants continued detention in the Central Mental Hospital and he points to the provisions of s. 13 in that regard. Therefore, any change to the status of the criminal proceedings short of a complete discharge of those proceedings is of no consequence.

26. Mr. Coffey SC on behalf of the DPP, the notice party, adopted a similar argument although suggested that the original committal order of the court endures until such time as the Review Board decides that the applicant is fit to be tried. He points to the fact that the order of the 16th of July, 2012 adjourned the proceedings "until further order" and no such order, in relation to the committal at any rate, has been made. Both the murder charge and the s. 4 charge were before Butler J. and no objection was taken by the defence to the latter charge.

27. He further submits that in a trial for murder, it is open to the jury to acquit the accused on that charge but find him guilty on a range of alternative charges as provided by s. 9 of the Criminal Law Act 1997. Such alternative verdicts include a verdict under s. 4 of the Non-Fatal Offences Against the Person Act 1997. This is so irrespective of whether the accused is charged with such an offence and accordingly his committal arising from the murder charge must be regarded as embracing the range of alternative verdicts that are open. He accepts however that the position may be otherwise where the added charge, e.g. theft, is unrelated to the murder charge.

Discussion

28. The nature of a detained person's detention pursuant to the provisions of the 2006 Act has been the subject of several somewhat inconsistent judgments of this court. In *JB v. The (Criminal Law) Mental Health Review Board* [2008] IEHC 303, Hanna J. stated:

> "Section 13 (a) of the Act of 2006 is silent as to any regime for the supervision of a person provisionally discharged from a designated centre. As already observed, one of three orders can be made – the further detention of the patient, the unconditional discharge of the patient or his or her discharge subject to conditions for outpatient treatment or supervision or both. In describing what is in sequence the first option open to the Board, the form of words employed, namely for further detention, is interesting. Section 5 (2) cited above, governs the circumstances facing the applicant. The order of Carney J. committing the applicant to the Central Mental Hospital has an expressed currency: "...until an order is made under s. 13." On one interpretation, it could be argued that once the Board ordered the further detention of the applicant the original order of Carney J. became spent. Even if the Act did not express the nature of the detention order to be made by the Board in the terms it did, an order refusing to discharge a patient still amounts to an order under s. 13. What, consequently, was the status, indeed relevance, of the s. 5 criteria?
>
> In any event, this line of argument was not pressed by any party and I decline to make any finding upon it. The answer to any question raised thereby does not get us any further in determining this matter. I am content to hold that the order of Carney J. is still *in situ*."

28. Peart J. reached a somewhat different conclusion in *L v. Kennedy (Clinical Director of the Central Mental Hospital) and the (Criminal Law) Mental Health Review Board* [2011] 2 I.R. 124, where he said (at p. 139):

> "In the present case, I am of a different view in relation to the original committal order surviving beyond the making of an order under s. 13 of the 2006 Act, and consider that an order made under s. 5 following a special verdict can survive only until an order is made by the Board on the first review by the Review Board under s. 13 of the Act, since that is what the section states. It seems to me that the order made under s. 5 (2) is simply a mechanism for bringing the person into the Central Mental Hospital, so that an opportunity can be provided for the professionals there to decide whether the person is suffering from a mental disorder (under 2001 Act) and is in need of inpatient treatment. A special verdict is a not guilty verdict. The committal order made thereafter is not therefore one to be seen in any penal or punishment context. There is no reason why that category of committal order should endure beyond a point where the medical professionals reach conclusions for the purposes of s. 13 of the Act. What is of concern at the time of the special verdict is handed down is whether or not the person is ill, as defined, and in need of inpatient care or treatment. Once that question is determined under s. 13, there is no reason why the trial judge's committal order would continue to endure, and wording of s. 13 of the Act is inconsistent with that."

29. Hogan J. added his voice to the debate in EC where he said (at para. 37):

> "While I respectfully agree with Peart J. that there may be no reason 'why that category of committal order endure beyond a point where the medical professionals reach conclusions the purposes of s. 13 of the Act', yet I cannot personally identify a provision contained in s. 13 which would enable one to conclude that the mere fact that the patient has been referred to the Review Board in and of itself supersedes the earlier court order."

The same judge in the earlier proceedings involving this applicant reiterated that view in *FX v. Central Mental Hospital (No. 1)* [2012] IEHC 272, where he again held that despite the Review Board simply reviewing the applicant's case, the basis for his detention remained the order of the Central Criminal Court.

30. I respectfully agree with the views expressed by Hanna and Hogan JJ. It seems to me that the legal basis for the applicant's detention in the Central Mental Hospital must be the order of the Central Criminal Court and not any subsequent order of the Review Board. Were it otherwise, it would mean that in this case, if the murder charge of which the applicant was acquitted was the only charge against him, his acquittal and discharge would not result in his release from the Central Mental Hospital. Clearly that cannot

have been the result intended by the legislature and it must follow in my view that the applicant's detention is rendered lawful by the order of the court rather than the Board. It is of course true to say that the Board is entitled to order the release of the detainee should it consider that appropriate following a review. It does not however follow as a corollary that the Board can authorise his detention in the absence of a court order.

31. That being so, the issue then becomes whether the order of the Carney J. of the 16th of July, 2012 is now spent as a result of the acquittal of the applicant on the murder charge. There is no question of there being any invalidity in that order and the applicant does not make that case. Rather he says simply that it has run its course.

32. In my view, when the court considered the applicant's fitness to be tried on the murder count, it must have been alive to the range of possible alternative verdicts that might be brought in by a jury on this count. Clearly one such alternative was a verdict of guilty of the s. 4 offence. I therefore cannot accept the somewhat artificial proposition that the court may have considered the applicant to be unfit to be tried for murder but might well have come to a different conclusion in relation to manslaughter, attempted murder, s. 4 and so forth.

33. To look at it another way, if the court had in fact concluded that the applicant was fit to be tried on the murder charge and the jury went on to convict the applicant of the s. 4 offence, would that conviction then be bad because no determination in relation to the applicant's fitness to be tried for that offence had been made? I cannot accept that it was the intention of the legislature in enacting the 2006 Act that where the fitness of an accused person to be tried for an offence is in issue, the court has to embark upon a separate inquiry in relation to each possible alternative verdict that might be arrived at in order to determine the accused's fitness to be tried for each such alternative offence. It further seems to me that as the original murder charge against the applicant always had the potential to result in his conviction in respect of a range of alternative offences, the original "proceedings" within the meaning of s. 4 (5) (c) must be read as including such alternatives and the proceedings on foot of which the applicant is detained continue in being as long as the s. 4 charge is extant.

34. The applicant also criticises the certificate of the respondent in relation to the applicant's detention on the basis that it states that the applicant "is presently detained on foot of an order of the Central Criminal Court made on the 16th day of July 2012 and the subsequent decision of the Mental Health (Criminal Law) Review Board on foot of its independent statutory review hearing of the 21st day of November 2014 pursuant to the Criminal Law (Insanity) Act 2006 as amended." (Emphasis supplied).

35. Although I have held that the applicant is detained on foot of the order of the 16th of July, 2012 and not any subsequent order of the Review Board, that does not in my view invalidate the certificate. I do not think that the respondent is to be criticised for referring to both orders in justifying the applicant's detention in circumstances where there are recent conflicting judgments, referred to above, as to which order is the relevant one. The "belt and braces" approach is understandable in that context and it seems that the worst that can be said of the certificate is that it gives too much rather that too little information.

The Practical Effect of this Inquiry and the Applicant's Best Interests

36. There are a number of features of this matter that are common case. That the applicant attacked the unfortunate Mr. McGrane in the manner alleged is not disputed. Indeed, this has already been determined by the judgment of Butler J. He concluded that a jury would have to have found the applicant guilty of assault causing serious harm contrary to s. 4. It is also not in dispute that the applicant suffers from chronic paranoid schizophrenia which is resistant to treatment and that, in the words of Hogan J. in *FX (No. 1)*, "the overwhelming evidence is that the applicant is seriously disturbed and that he presents a very serious threat to himself, identifiable individuals and to the general public were he to be released from custody."

37. The parties also seem to agree that the applicant is receiving the best possible therapeutic treatment in his current environment and any interruption in that regime would not be in his interests. It is clear in the light of the undisputed psychiatric evidence that the applicant lacks capacity to give instructions to his legal team. He has no insight into his condition or into the criminal legal process. For example, he appears to believe that the function of jurors at his trial would be to act as witnesses.

38. Against this background, I raised with counsel for the applicant the basis upon which he claimed to be entitled to move the application in this matter, a concern apparently also raised by the Supreme Court in *FX (No. 1).* In response, counsel quite rightly pointed out that those representing a person suffering from a mental disability that deprived him of capacity to give instructions must be entitled to move the court under Article 40 since otherwise such a person could never have an inquiry into the lawfulness of his detention.

39. I accept that this submission must be correct and further that if an applicant's detention is unlawful, the court could not come to the conclusion that the applicant's release should be refused because it would not be in his best interests.

40. However, it seems to me that the court must have regard to the practical realities of the case and ought not be invited to embark upon an academic exercise for the sake of it. The time, effort and not least costs involved in such an exercise are hardly warranted in circumstances where no concrete benefit is likely to accrue to the applicant irrespective of the outcome. Considerable expense has already been incurred in pursuing *FX (No. 1)* in both the High and Supreme Courts and despite success, in the High Court at any rate, this has resulted in no change to the applicant's status.

41. In the present case, as before, even if the applicant were to succeed, it is a virtual certainty that he will remain in his current place of detention by virtue of the further applications that will thereby be necessitated.

42. I can only echo the apposite words of Kearns J. (as he then was) in delivering the unanimous judgment of the Supreme Court in *EH v. Clinical Director of St. Vincent's Hospital and Others* [2009] 3 I.R. 774 (at p. 792):

> "[***49***] The applicant is a person suffering from a mental disorder. It is not contested that she is a person whose mental disorder requires that she be detained for treatment in hospital. It is not contested, even by her own medical expert, that the clinical and nursing staff of St. Vincent's University Hospital: St. Michael's Hospital, Dun Laoghaire; and the Health Service Executives Community Care team have at all times acted in the best interests of the applicant within the meaning of s. 4 of the Mental Health Act 2001. Finally, it is not contested that any procedural irregularity has attended the various orders detaining the applicant from the 22nd of December, 2008.
>
> [***50***] These proceedings were initiated and maintained on purely technical and unmeritorious grounds. It is difficult to see in what way they advanced the interests of the applicant who patently is in need of psychiatric care. The fact that s. 17 (1) (b) of the Act of 2001 provides for the assignment by the Commission of a legal representative for a patient following the making of an admission order or a renewal order should not give rise to an assumption that a legal challenge to that

patient's detention is warranted unless the best interests of the patient so demand. Mere technical defects, without more, in a patient's detention should not give rise to a rush to court, notably where any such defect can be, or has been, cured – as in the present case. Only in cases where there has been a gross abuse of power or default of fundamental requirements would a defect in an earlier period of detention justify release from a later one. As O'Higgins C.J. observed in The *State (McDonagh) v. Frawley* [1978] I.R. 131 at p. 136: -

> "The stipulation in Article 40, s. 4, sub-s.1, of the Constitution that a citizen may not be deprived of his liberty save 'in accordance with law' does not mean that a convicted person must be released on *habeas corpus* merely because some defect or illegality attaches to his detention. The phrase means that there must be such a default of fundamental requirements that the detention may be said to be wanting in due process of law. For *habeas corpus* purposes, therefore, it is insufficient for the prisoner to show that there has been a legal error or impropriety, or even that jurisdiction has been inadvertently exceeded."

[***51***] I would refuse the various reliefs sought for all the reasons set out above and dismiss the appeal."

43. It seems to me that these remarks apply with even greater force to the present case. As I have said, there is no dispute about the fact that the applicant requires and is currently receiving the best available care for his illness. The healthcare professionals charged with caring for the applicant are ethically obliged to act with his best interests in mind. The Review Board is explicitly required by the statute to have regard to the applicant's welfare and safety as well as the public interest in considering his case. There is not even a colourable attempt in the grounding affidavit herein to identify any benefit that will accrue to the applicant from the making of this application. No medical or psychiatric evidence has been adduced on behalf of the applicant in this matter. The suggestion that if the application is successful some vague benefit might theoretically accrue by virtue of the applicant being the subject of an application under the Mental Health Act 2001 is entirely unexplained and ignores the reality that the inevitable consequence of a successful challenge to the applicant's detention herein is a further application under the 2006 Act.

44. In the light of the comments of the Supreme Court above referred to, it seems to me that there is an onus on those representing a party suffering from a mental disability who is incapable of giving legal instructions to satisfy themselves that the applicant's best interests are served before seeking to move the court on his or her behalf under Article 40. Having regard to these matters, I fail to see therefore how this challenge to the applicant's detention was warranted.

Conclusion

45. For the reasons already given, I am satisfied that the applicant's detention in this case is in accordance with law and I will therefore dismiss this application.