Neutral Citation Number: [2007] IEHC 280

THE HIGH COURT

RECORD NO. 2003/6559 P

BETWEEN

S.M.

PLAINTIFF

AND

IRELAND, THE ATTORNEY GENERAL AND THE DIRECTOR OF PUBLIC PROSECUTIONS

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on 12th July, 2007.

Factual and procedural background

1. The plaintiff stands charged with 33 offences, 31 of which relate to indecent assault on a male. The offences are alleged to have occurred over a ten-year span between 1966 and 1976. There are eight complainants, each of whom was under seventeen years of age at the time of the alleged offences against him. If the plaintiff is convicted of any of the alleged offences of indecent assault on a male, having regard to the time frame within which the offences are alleged to have been committed, the relevant sentencing provision is s. 62 of the Offences Against the Person Act, 1861 (the Act of 1861), which, insofar as is relevant to such offence, provides as follows:

> "Whosoever … shall be guilty of … any indecent assault upon a male person, shall be guilty of a misdemeanour, and being convicted thereof shall be liable … to be kept in penal servitude for any term not exceeding ten years …"

2. The charges against the plaintiff have a long history. On 1st October, 1997 he was charged with 23 offences of indecent assault, in respect of which he was served with a book of evidence in November 1997. In relation to those charges, on 16th February, 1998 he obtained leave to apply for judicial review against the third defendant (the Director) seeking to prohibit the further prosecution of the offences on the ground of delay. That application was refused by this Court (McGuinness J.) on 20th December, 1999. While the judicial review proceedings were being prosecuted, the plaintiff was charged with a further eight offences of indecent assault. On 28th February, 2000 the plaintiff was returned for trial, the two sets of charges being consolidated. On foot of an application by the plaintiff the matter was transferred from the Galway Circuit Criminal Court to the Dublin Circuit Criminal Court, where the matter stands adjourned pending the outcome of these proceedings.

3. These proceedings were initiated by plenary summons which issued on 30th May, 2003. The primary relief which the plaintiff seeks is a declaration that s. 62 of the Act of 1861 is unconstitutional and is null and void. Following the coming into operation of the European Convention on Human Rights Act, 2003 (the Act of 2003) the plaintiff was given leave to amend his statement of claim to seek a declaration pursuant to s. 5(1) of that Act that s. 62 is incompatible with the State's obligations under the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention). Subsequently, after the matter had been listed for hearing, the defendants brought a motion seeking to dismiss these proceedings on the basis that they were an abuse of process. That motion was successful at first instance. However, an appeal by the plaintiff against that decision was successful. The judgment of the Supreme Court was delivered by Kearns J. on 28th March, 2007. That cleared the way for the substantive proceedings to be heard in this Court.

The plaintiff's argument in outline

4. It is the plaintiff's contention that s. 62 of the Act of 1861, as amended and operational at the time of the offences he is alleged to have committed, is in breach of Article 40.1 of the Constitution, amounting to an unjustifiable inequality before the law, as it imposes a maximum sentence of ten years imprisonment for indecent assault on a male person, that being five times greater than the maximum sentence for a first conviction of indecent assault on a female, as provided by s. 6 of the Criminal Law Amendment Act, 1935 (the Act of 1935). While the plaintiff also contends that s. 62 breaches his rights under article 6 of the Convention to fair procedures in determination of criminal charges free from discrimination on the grounds of sex as provided for by article 14 of the Convention, in reality, the focus of the submissions made on his behalf was on the guarantee of equality contained in Article 40.1. Therefore, the focus of this judgment will be on whether, as was argued on behalf of the plaintiff, s. 62 is contrary to Article 40.1 and was never carried over into law by Article 50.1 of the Constitution.

5. In addressing that issue, it is necessary to consider first the legislative history of punishment of the offence of indecent assault and the nature of that offence.

The legislative history of punishment for indecent assault

6. Sections 61 and 62 of the Act of 1861 were enacted under the heading "Unnatural Offences". Section 61, as amended by the Statute Law Revision Act, 1892, provided as follows:

> "Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable to be kept in penal servitude for life."

7. Section 62, as similarly amended, which I have already quoted in part, provided for a maximum penalty of ten years penal servitude, not only in the case of a conviction of any indecent assault upon a male person but for "attempt to commit the said abominable crime", that is to say, buggery, or conviction "of any assault with intent to commit the same".

8. Section 52 of the Act of 1861, which was enacted under the heading "Rape, Abduction and Defilement of Women", provided for a maximum penalty of two years imprisonment on conviction "of any indecent assault upon any female". That section was repealed by the Act of 1935, which enacted, in s. 6, in lieu thereof, a provision that –

> "… whosoever shall be convicted of any indecent assault upon any female shall be liable, in the case of a first conviction of any such offence, to imprisonment for any term not exceeding two years, and in the case of a second or any subsequent conviction of any such offence, to penal servitude for any term not exceeding five years nor less than three years or imprisonment for any term not exceeding two years."

9. Until s. 6 of the Act of 1935 was repealed in 1981, a person, whether male or female, convicted of an indecent assault of a male person was liable to a maximum penalty of ten years, whereas a person, whether male or female, who was convicted of indecent assault on a female was liable to a maximum sentence of two years for a first conviction. That remains the position in relation to a

conviction for an offence of indecent assault which occurred before 1981.

10. Section 10 of the Criminal Law (Rape) Act, 1981 (the Act of 1981) repealed s. 6 of the Act of 1935 and raised the maximum penalty on conviction of any indecent assault upon a female to ten years imprisonment. Thereafter, the penalty for indecent assault was victim gender neutral, a state of affairs which has persisted down to the present time, notwithstanding intervening legislative changes. First, s. 2 of the Criminal Law (Rape) (Amendment) Act, 1990 (the Act of 1990), having provided that the offence of indecent assault upon any male person and the offence of indecent assault upon any female person shall be known as sexual assault, further provided that a person guilty of sexual assault shall be liable on conviction on indictment to imprisonment for a term not exceeding five years. Secondly, s. 37 of the Sex Offenders Act, 2001 (the Act of 2001) amended the Act of 1990 by providing a maximum penalty of fourteen years for sexual assault on a child, meaning a person under seventeen years of age, and a maximum sentence of ten years for any other sexual assault.

The nature of the crime of indecent assault

11. The nature of the crime of indecent assault was considered by the Supreme Court in *Director of Public Prosecutions v. E.F.* (Supreme Court, 24th February, 1994, Unreported). In his judgment, with which the other four judges agreed, Egan J. stated that the offence of indecent assault was never created by any statute, although punishments for the offence have been from time to time laid down by various statutes. He then went on to consider, in the context of an indecent assault upon a female, *inter alia*, s. 6 of the Act of 1935, s. 10 of the Act of 1981 and s. 2 of the Act of 1990, which came into operation on 21st January, 1991, and he stated:

> "It is clear from the foregoing that the offence of indecent assault remains but as and from 21st January, 1991 it became known as sexual assault. It still remains a common law offence for which punishment is provided by statute."

12. Egan J. went on to state that an indictment should refer to the offence as "indecent assault contrary to common law", and that, while there is no necessity to include the words "and as provided for" by the statutory provision imposing the punishment relevant to the time the offence is alleged to have been committed, it might be helpful as pointing out where the punishment is to be found. I mention that because the charge sheets which have been put before the court in this case indicate that the plaintiff is charged with indecent assault "contrary to" s. 62 of the Act of 1861. However, that is for another day and another forum.

13. The decision in *The Director of Public Prosecutions v. E.F.* was followed more recently by the Supreme Court in *S.O'C. v. Governor of Curragh Prison* [2001] 1 I.R. 66, where Hardiman J. reiterated that s. 2 of the Act of 1990 had merely effected a change of the name of the offence and that the nature of its constituent elements remained unaltered.

14. The constituent elements of the common law offence of indecent assault are set out in Charleton, McDermott & Bolger on Criminal Law (1999 Edition, Butterworths) at p. 647 as follows:

> "(1) That the accused intentionally assaulted the victim.
>
> (2) That the assault, or the assault and the circumstances accompanying it, are proved to be indecent according to the contemporary standards of right-minded people.
>
> (3) That the accused intended to commit such an assault as referred to in (2) above."

15. As counsel for the plaintiff pointed out, the elements of the common law offence of indecent assault, and the offence itself, are gender neutral as regards both the accused and the victim. It is the sentencing legislative provisions, s. 62 of the Act of 1861 and s. 6 of the Act of 1935, which introduce difference of treatment of the convicted accused by reference to the gender of the victim.

16. It seems to me that that analysis highlights a fundamental fallacy in the defendants' defence of the plaintiff's claim. There was a thread running through the defendants' submissions that two different offences exist, indecent assault on a male and indecent assault on a female, and that, even though they are of moral equivalence, that does not mean that they have to carry the same maximum penalty. That submission is based on a false premise. There is a single common law offence of indecent assault, which may be committed by a man or a woman and may be committed on a man or a woman. There being one offence, the plaintiff has not advanced, and has not needed to advance, a moral equivalence basis in support of his contention of unconstitutional unequal treatment.

17. It is convenient at this juncture to address a point made on behalf of the defendants which, in my view, is irrelevant to the issue which the court has to decide. It was submitted that, taken together, ss. 61 and 62 of the Act of 1861 provide for a scheme of sentencing relating to a range of offences of varying gravity, ranging from buggery to indecent assault upon a male person. As regards s. 62, it was submitted that, when applying its provisions following conviction, a sentencing court would have regard to the fact that the offence of indecent assault upon a male person is at the lower end of the range of offences which, by virtue of that section, carry a maximum penalty of ten years. Leaving aside whether a sentencing court would be entitled to take that view of s. 62, the fact is that s. 62 provides for a maximum sentence of ten years for indecent assault upon a male. While the declaration of inconsistency with the Constitution which the plaintiff seeks is framed as encompassing the entirety of s. 62, the reality is that this case concerns only the maximum penalty provided in s. 62 for indecent assault upon a male person, and not the maximum penalty for attempted buggery or assault with intent to commit buggery. Therefore, I proceed on the basis that at most the plaintiff is entitled to a declaration of inconsistency in relation to so much of s. 62 as provides the maximum penalty for indecent assault on a male person.

Pre-emptive defences

18. Before considering the substance of the plaintiff's case that s. 62 of the Act of 1861 contravenes Article 40.1, I propose considering a number of defences advanced on behalf of the defendants, which I consider were intended to be of a pre-emptive nature. These are the defendants' contentions that –

> (a) the plaintiff does not have standing to challenge the constitutionality of s. 62;
>
> (b) the issue of the constitutionality of s. 62 is *res judicata*;
>
> (c) the doctrine of separation of powers precludes the court from granting the relief sought;
>
> (d) the issue raised by the plaintiff is non-justiciable; and
>
> (e) "equalising upwards" would confer no benefit on the plaintiff.

Locus standi
19. The basis on which the defendants contended that the plaintiff lacks standing was that, given that he limits his complaint to the sentencing provisions of s. 62, he is not "a person aggrieved" until such time as he is convicted of an offence for which he is liable to punishment under the section. It was submitted that his challenge was premature and inconsistent with the presumption of innocence.

20. Counsel for the defendants, in advancing that argument, properly acknowledged that the decision of the Supreme Court in *Osmanovic v. The Director of Public Prosecutions & Ors.* [2006] I.E.S.C. 50, in which judgment was delivered on 25th July, 2006 and is now reported at [2006] 3 I.R. 504, does not support it. The *Osmanovic* judgment concerned three separate appeals in which the constitutionality of s. 89(b) of the Finance Act, 1997, which amended s. 186 of the Customs Consolidation Act, 1876 and provided a new penalty for customs offences, was challenged. The judgment of the Supreme Court rejecting that challenge was delivered by Murray C.J. Geoghegan J. delivered a separate judgment on the contentions made by the State parties in all three cases, which had commenced by way of applications for judicial review, that the judicial review was moot in that the applicants had not been tried or convicted, so that the question of constitutionality of what penalty would be imposed had not arisen. Two of the applicants had pleaded not guilty and had been returned for trial, but had not been tried. The third applicant had been charged and had appeared in the District Court, but no further step had been taken. Having referred to the authorities which had been cited on behalf of the applicants as supporting the proposition that a person facing criminal charges has sufficient standing to challenge the constitutionality of the substantive provisions at issue, Geoghegan J. stated that he considered the decision of Carroll J. *in Curtis v. Attorney General* [1985] I.R. 458 as being the most relevant. He continued (at p.511):

> "In that case, there was a prosecution under s. 186 of the Customs Consolidation Act, 1876, as amended, and by reason of the provision for the determination of value of the goods the plaintiff wanted to challenge the constitutionality of the relevant provision ahead of the trial. Carroll J. took the view that the plaintiff had *locus standi* to challenge the constitutionality of the provisions in question 'as he was in imminent danger of a determination affecting his rights, and this need not necessarily be a decision which would adversely affect his rights'. In my opinion, Carroll J. applied the law correctly. Applying the same principles to this case, I consider that none of the proceedings, the subject matter of this appeal, are premature."

21. Applying the same principles to this case, it is clear that the plaintiff has sufficient *locus standi* to challenge the constitutionality of s. 62 at this juncture. He has been returned for trial and he is in imminent danger of a determination which would affect his rights.

Res judicata
22. While the defendants pleaded *res judicata* in their defence and their counsel submitted that the issue before the court is *res judicata*, he fairly acknowledged that there was merit in the plaintiff's contention that the point at issue here has not been determined before.

23. The basis of the defendants' contention that the issue is res judicata was that *in Norris v. The Attorney General* [1984] I.R. 36 the Supreme Court held that ss. 61 and 62 of the Act of 1861 did not amount to invidious discrimination contrary to Article 40.1 of the Constitution or contravene other personal constitutional rights, was consistent with the Constitution and was carried over by Article 50. However, counsel for the plaintiff argued that what was challenged in the *Norris* case was the sentencing provision in relation to buggery contained in s. 61 and the sentencing provision in relation to attempted buggery provided for in s. 62, and not the other discrete element contained in s. 61, the punishment for indecent assault on a male.

24. In the *Norris* case the challenge to s. 61 and s. 62 was treated as relating to the punishment prescribed for buggery and related offences. It was not treated as extending to the punishment for indecent assault on a male person prescribed in s. 62. The challenge was founded on alleged violations of Article 40.1 and Article 40.3. The basis of the challenge having regard to Article 40.1, which also impugned s. 11 of the Criminal Law Amendment Act, 1885 (the Act of 1885), as summarised in the judgment of McWilliam J. in the High Court (at p. 43), was that the provisions in issue created invidious or arbitrary discrimination between male homosexual citizens and female homosexual citizens and between homosexual and heterosexual citizens, thus offending against the provision that all citizens shall, as all human persons, be equal before the law. Delivering the majority judgment in the Supreme Court, O'Higgins C.J. stated (at p. 59) that his understanding was that the plaintiff's complaint that the impugned legislation was inconsistent with Article 40.1 was confined to the Act of 1885. However, if he was incorrect in that view, as the act which constituted buggery could only be committed by a male, and was a crime whether committed with a male or a female, the prohibition in the Act of 1861 applied whether the act was committed by a homosexual or a heterosexual male, so that no discrimination could be involved.

25. The element of s. 62 at issue in the *Norris* case, unlike the provision at issue here, did not stipulate a maximum sentence based solely on the gender of the victim of the offence. The issue which the plaintiff raises in this case, which is whether a law which creates a distinction as to the maximum punishment which may be imposed on a person convicted of an offence solely on the basis of the gender of the victim is consistent with Article 40.1, did not arise in the *Norris* case. Accordingly, I am satisfied that the issue as to the validity of the portion of s. 62 at issue in this case by reference to Article 40.1 was not decided in the *Norris* case. As has been held in this Court by Geoghegan J. in *Laurentiu v. Minister for Justice* [1999] 4 I.R. 26, the upholding of the constitutionality of an enactment against a particular ground of attack does not preclude the court from reconsidering the matter in another case in the light of a quite different form of attack.

26. Therefore, I conclude that the issue in this case is not *res judicata*. That being the case, it is unnecessary to express any view on the alternative proposition advanced by counsel for the plaintiff that, having regard to the decision of the European Court of Human Rights in *Norris v. Ireland* (1991) 13 E.H.R.R. 186, which found ss. 61 and 62 of the Act of 1861 to be in breach of the Convention, given that this Court is, by virtue of s. 2 of the Act of 2003 bound, insofar as possible, to interpret and apply statutory provisions in a manner compatible with the Convention, the court would be obliged to disapply s. 62. However, I record, for completeness, the submission of counsel for the defendants that the decision of the European Court of Human Rights was founded on a breach of the privacy guarantee contained in article 8 of the Convention, not on discrimination grounds.

Separation of powers
27. Underlying the invocation of the doctrine of separation of powers by the defendants is the assumption that the plaintiff is inviting the court to form a judgment on the appropriateness of the maximum penalty for indecent assault on a male person. Counsel for the defendant submitted that the question of the appropriateness of a penalty is an area warranting strong judicial restraint, citing the following passage from the judgment of the Supreme Court in *Re Article 26 of the Constitution and the Regulation of Information (Services Outside the State for Termination of Pregnancy) Bill, 1995* [1995] 1 I.R. 1 (at p. 53):

> "The question of the determination of the appropriate penalty for the commission of an offence created by statute is a matter purely for the Oireachtas and the adequacy or otherwise of any such penalty cannot be regarded by this Court as a ground for holding that the provision in regard to creation of the offence and providing the penalty therefor is repugnant having regard to the provisions of the Constitution."

28. As I understand the plaintiff's case, it is not predicated on a necessity for the court to form a judgment as to the appropriateness of either the penalty provided in s. 62 of the Act of 1861 for indecent assault on a male or the penalty provided in s. 6 of the Act of 1935 for indecent assault on a female. I see nothing in the plaintiff's case which is an explicit invitation to the court to stray into an area which the Constitution has reserved to either the Oireachtas or the Executive. However, two arguments advanced on behalf of the plaintiff, the application of the proportionality test and the duty of a judge to act on his own motion, seemed to me to veer in a direction which could lead to the court crossing the boundary of the judicial function. I will address those arguments later.

29. In the context of their submission that the appropriateness of punishments and the denunciation of particular offences are areas where the doctrine of separation of powers is strictly interpreted, the defendants asserted that the Oireachtas is perfectly entitled to regulate punishment in such a way as to deter sexual misconduct as against males and females in different ways, notwithstanding the moral equivalence of such behaviour. As I have already found, the correct analysis here is that the single offence carries a different maximum penalty depending solely on the gender of the victim. The kernel of the plaintiff's case is whether that is permissible having regard to the guarantee of equality contained in Article 40.1. I will return to that issue later.

Non-justiciability

30. The defendants' argument on non-justiciability is merely a continuance of their argument on the applicability of the doctrine of separation of powers, in that they argue that the appropriateness of a particular maximum statutory penalty is a non-justiciable matter, save only in an exceptional case where it is suggested that the penalty would amount to a cruel and unusual punishment. However, as I have stated, the appropriateness or otherwise of the maximum penalty provided in s. 62 is not part of the plaintiff's case. It is not the plaintiff's case that the penalty itself is unconstitutional; it is that the discrimination based on the gender of the victim is unjustified and contrary to Article 40.1.

31. Counsel for the plaintiff identified the decisions of the High Court and the Supreme Court in *Cox v. Ireland* [1992] 2 I.R. 503 as authority for the proposition that it is open to the court to find that a sentencing regime is unconstitutional having regard to the rights guaranteed by Article 40. In that case, the plaintiff challenged the constitutionality of the provisions of s. 34 of the Offences Against the State Act, 1939, which provided that a person who was convicted by the Special Criminal Court of a scheduled offence and who at the time of the conviction was the holder of an office or employment remunerated out of public sources would upon conviction forfeit the office or employment and be disqualified from holding any like office for a period of seven years subsequent to the date of the conviction and would also be disqualified from receiving a publicly funded pension, subject to the proviso that the Government might, in its absolute discretion, remit in whole or in part any such forfeiture or disqualification.

32. In the High Court, Barr J. held that the nature and purpose of s. 34 was to impose penalties on certain categories of persons convicted by the Special Criminal Court of a scheduled offence. He found that the penalties imposed by s. 34 on those within its compass were patently unfair and capricious in nature and that they amounted to unreasonable and unjustified interference with the personal rights which are guaranteed by Article 40.3 as unspecified personal rights. He also dealt with the challenge under Article 40.1 as follows (at p. 513):

> "The provisions of the section also amount to unfair discrimination under Article 40, section 1, which guarantees equality before the law. See judgment of the Supreme Court in *The People (Director of Public Prosecutions) v. Quilligan (No. 2)* [1989] I.R. 446 (Henchy J. at final paragraph of p. 56)."

33. Therefore, he found that s. 34 in its entirety was unconstitutional and void.

34. An appeal against that judgment was dismissed. When setting out the decision of the Supreme Court, Finlay C.J., who delivered the judgment of the Court, did not explicitly refer to either Article 40.1 or Article 40.3. Having stated that the court was satisfied that the State is entitled, for the protection of public peace and order, and for the maintenance and stability of its own authority, by its laws to provide onerous and far-reaching penalties and forfeitures imposed as a major deterrent to the commission of crimes threatening such peace and order and State authority, and is also entitled to ensure as far as practicable that amongst those involved in the carrying out of the functions of the State there is not included persons who commit such crimes, the court noted that scheduled offences involved offences of widely varying seriousness, giving examples of the diversity. It was pointed out that a person convicted in the Special Criminal Court of one of the less serious offences was subject to the mandatory imposition of the forfeiture provisions contained in s. 34, even though he might be in a position to establish that his motive or intention in committing the offence, or the circumstances under which he committed it, bore no relation at all to any question of the maintenance of public peace and order or the authority or stability of the State. The court held that, notwithstanding the fundamental interests of the State which s. 34 sought to protect, the provision failed as far as practicable to protect the constitutional rights of the citizen and was "impermissibly wide and indiscriminate". It is clear from the earlier part of the decision that the constitutional rights to which the court was referring were "the unenumerated constitutional right … to earn a living" and "certain property rights protected by the Constitution".

35. I think it is open to question whether, as was argued by counsel for the plaintiff, the Supreme Court was endorsing the finding of Barr J. that the provisions of s. 34 amounted to unfair discrimination under Article 40.1. The decision of the Supreme Court in the *Cox* case, however, is authority for the proposition that the manner and effect of the imposition of a statutory penalty is subject to judicial review by reference to the rights guaranteed by the Constitution and liable to be declared unconstitutional if found to constitute a disproportionate inroad on those rights.

No benefit

36. The defendants' submission that the courts will not intervene to put right an alleged invidious discrimination where the alleged discrimination can be remedied in such a way that does not benefit the person alleging the discrimination is based on a passage from the judgment of O'Higgins C.J. in the *Norris* case, which related to the challenge in that case to the constitutionality of s. 11 the Act of 1885. Section 11 provided as follows:

> "Any male person who, in public or private, commits, or is party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour."

37. The basis of the challenge to s. 11 was outlined by McWilliam J. in the High Court (at p. 49). Unlike the two sections of the Act of 1861 under challenge, s. 11 did differentiate between men and women. Neither s. 11 nor any other section of the Act of 1885 made it an offence for women to commit an act of gross indecency. Therefore it was argued on behalf of the plaintiff that s. 11 offended against Article 40.1 in that it constituted an arbitrary and invidious discrimination between the male and female citizens, and particularly between male and female homosexuals. McWilliam J. rejected that argument. One of the reasons he advanced for so doing was that the plaintiff was saying, in effect, that there would be no complaint if the law were amended by making it an offence for women to commit acts of gross indecency. However, he pointed out that, if this were done, the plaintiff would not get any benefit and, by analogy to the decision in *Cahill v. Sutton* [1980] I.R. 269, it was not an argument on which he was entitled to rely.

38. The majority in the Supreme Court took a similar view. The passage from the judgment relied on by the defendants is to be found at p. 59 and comprises the last two sentences of the next quotation. Dealing with the plaintiff's argument that s. 11 was inconsistent with Article 40.1, in that it discriminated against male citizens who were homosexuals, O'Higgins C.J. stated:

> "As to gross indecency, however, the prohibition only applies to such conduct between males. Does the fact that it does not apply to gross indecency between females involve a discrimination which would be prohibited by Article 40, section 1? I do not think so. The legislature would be perfectly entitled to have regard to the difference between the sexes and to treat sexual conduct or gross indecency between males as requiring prohibition because of the social problem which it creates, while at the same time looking at sexual conduct between females as being not only different but as posing no social problem. Furthermore, in alleging discrimination because the prohibition on the conduct in which he claims he is entitled to engage is not extended to similar conduct by females, the plaintiff is complaining of a situation which, if it did not exist or were remedied, would confer on him no benefit or vindicate no right of his which he claims to be breached. I do not think that such an argument should be entertained by the court."

39. The response of counsel for the plaintiff to that submission was that that aspect of the decision in the Norris case is out of line with subsequent decisions of the Supreme Court, referring to three decisions in which Article 40.1 was successfully invoked.

40. The first was *McKinley v. Minister for Defence* [1992] 2 I.R. 333. In that case, the Supreme Court held that, in principle, where a common law right offends against the principle of equality, the court must redress the inequality by a positive declaration that the right vests in the party discriminated against. Applying that principle, the court held that the common law right of a husband to sue for loss of *consortium* and *servitium* was by virtue of, inter alia, the application of the principle of equality enshrined in Article 40, extended to a wife.

41. The second was the decision of the Supreme Court in *W. v. W.* [1993] 2 I.R. 476. In that case, the Supreme Court held that the common law rule of dependent domicile of a married woman ceased to be part of Irish law by virtue of Article 50 of the Constitution, being inconsistent with Article 40.1. As a consequence, the common law rule in relation to the recognition of foreign divorces prior to the coming into operation of the Domicile and Recognition of the Foreign Divorces Act, 1986 (the Act of 1986) was unconstitutional. The Supreme Court found that it was in a position to deal with the resulting lacuna on the basis that common law rules are judge-made law and may be modified depending on the current policy of the court. It was held that in modifying the rule regarding the recognition of foreign divorces the court should consider the rule then applicable in relation to divorces after 2nd October, 1986 as contained in the Act of 1986. On that basis, the common rule to be applied to a divorce prior to 2nd October, 1986 was that the divorce would be recognised if granted by the court of a country in which either of the parties to the marriage was domiciled at the time of the proceedings for divorce.

42. It is important to emphasise that both of those examples of the Supreme Court "equalising up", in the sense of conferring a benefit on the class of persons against whom the law had discriminated, involved substitution of a new common law rule for an invalid common law rule.

43. The third example suggested by counsel for the plaintiff was the decision of the Supreme Court in *An Blascaod Mór Teo. v. Commissioners for Public Works (No. 3)* 1 I.R. 6. In that case the Supreme Court struck down in its entirety An Blascaod Mór National Park Act, 1989 which provided for the compulsory acquisition by the Commissioners for Public Works of land on the Great Blasket Island but excluding land owned by a class of persons comprising, broadly speaking, owners or occupiers who were ordinarily resident on the island on 17th November, 1953 and the lineal descendents of such persons. The Supreme Court held that the plaintiffs, who were owners and occupiers who were not within the excluded class, were being treated unfairly as compared to persons within the excluded class and held that the Act in its entirety was invalid having regard to the provisions o the Constitution. I assume that in referring to this decision, counsel for the plaintiff is suggesting that the Supreme Court, following the dictum in the *Norris* case, could have taken the view that, if the unfair exclusion were removed, that would confer no benefit on the plaintiffs because their lands would still be subject to compulsory acquisition.

44. The observations of O'Higgins J. in the *Norris* case, that, if the alleged discrimination did not exist or were remedied, that would confer no benefit on the plaintiff, were made in the context of the finding that there was no discrimination and that there was a justification for the difference of treatment of the sexes, as the passage from his judgment which I have quoted illustrates. As counsel for the plaintiff pointed out, in a context where there is a finding of discrimination contrary to Article 40.1, the approach adopted in the Norris case does not address the mischief. Accordingly, it seems to me that the proper course for the court to adopt is to consider whether the plaintiff has made out his substantive case.

45. It is true, as counsel for the defendant pointed out, that a person convicted of the offences with which the plaintiff is charged committed since the coming into operation of the Act of 2001 would face a maximum penalty of fourteen years imprisonment. It is reasonable to infer that the increase in the penalty reflects the increased seriousness with which the commission of sexual offences against children is viewed generally. However, that is not an answer to the plaintiff's assertion that s. 62 is invidiously discriminatory and unconstitutional.

The substantive issue: breach of Article 40.1

46. Article 40.1 of the Constitution provides as follows:

> "All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."

47. I propose adopting the expression "the proviso" as shorthand for the second sentence.

Submissions on behalf of the plaintiff

48. In developing the argument that, insofar as section 62 contravenes Article 40.1 because it provides for a maximum penalty on

conviction of indecent assault on a male person which is five times as severe as the penalty for a first conviction for the same offence on a female, counsel for the plaintiff drew on a number of analogies which, in the abstract, are apt and even compelling, if only hypothetical: a statutory provision which provides for a maximum sentence of life imprisonment for the murder of a man in contrast to a maximum sentence of two years for the murder of a woman; a statutory provision which provides for a maximum penalty of ten years for an assault on a member of one religion, say, the Roman Catholic Church, in contrast to a maximum penalty of two years for an assault on a member of another church, say, the Presbyterian Church; and a statutory provision which creates different maximum penalties for an assault or an indecent assault depending on the racial or ethnic origin of the victim. Those analogies were deployed by counsel for the plaintiff to illustrate the application of the principles by reference to which, he submitted, the court should evaluate s. 62 against the obligation imposed on the State in Article 40.1, which I propose to consider in some detail.

49. It was submitted that the court should adopt a strict scrutiny approach for a number of reasons, one being that the Constitution presupposes gender equality throughout its text, Articles 9, 16 and 45 being cited as examples. Another reason suggested was that it was the approach which Barr J. had adopted in the Cox case, in that he subjected the impugned provision, which was characterised as a sentencing provision, to a strict analysis before reaching the conclusions which I have quoted earlier. The principal reason advanced was that a strict scrutiny approach is to be derived from the following passage from the judgment of Hamilton C.J. in *Re Article 26 and the Employment Equality Bill, 1997* [1997] 2 I.R. 321 (at p. 347):

> "The forms of discrimination which are, presumptively, at least, prescribed by Article 40.1 are not particularised: manifestly, they would extend to classifications based on sex, race, language, religious or political opinions."

50. As I understand the submission made on behalf of the plaintiff, it was that, if a classification is presumptively unconstitutional, for example, classification on gender grounds, not only does this call for a more searching judicial analysis to see if the differentiation can be justified but also the burden of proof of justification shifts to the State parties. In this case, it was suggested that it was incumbent on the defendants to demonstrate that the distinction which is embodied in s. 62, which focuses on the gender of the victim as opposed to the inherent gravity of the offence, was enacted with "due regard" to the factors outlined in the proviso to Article 40.1 – differences of capacity, physical and moral, and of social function.

51. The position in this case is that neither side adduced any oral evidence. The factual background outlined earlier is based on agreed facts. Therefore, the court is confined to adopting the approach suggested by Costello P. in the following passage in *Molyneux v. Ireland* [1997] 2 I.L.R.M. 241 (at p. 244), which was approved of by the Supreme Court in *Re Article 26 and The Illegal Immigrants Bill, 1999* [2000] 2 I.R. 360 (at p. 392):

> "It is not necessary for the court to search the parliamentary debates to ascertain the arguments used to justify the enactment of the measure – it will usually be possible for the court to make reasonable inferences from the provisions of the statute itself and the facts of the case."

52. The imposition of radically different maximum penalties for indecent assault depending solely on the gender of the victim, it was submitted, is prima facie discrimination based on gender and it is the type of discrimination which is forbidden by Article 40.1, in that it is discrimination which is invidious or arbitrary (per Walsh J. in *de Burca v. Attorney General* [1976] I.R. 38 at p. 68.)

53. Counsel for the plaintiff recognised that Article 40.1 does not prevent differentiation in sentences based on the attributes of the victim. An obvious example of such differentiation cited was s. 37 of the Act of 2001, which imposes a more severe maximum penalty for sexual assault on a child than for sexual assault on an adult, and, which, he acknowledged, can reasonably be justified on the basis of physical and moral capacity and also on the basis of social function, where the perpetrator is in a position of trust or authority in relation to the child. However, it was submitted, there is no justification for differentiation in sentencing based solely on the victim's gender,no more than there is justification for differentiation in sentencing based solely on the victim's religion or the victim's racial or ethnic background.

54. To illustrate the distinction between a difference based on gender per se and a distinction based on social function, counsel for the plaintiff referred to the judgment of Walsh J. in the *de Burca* case, in which the validity of the Juries Act, 1927 was challenged, one of the bases of the challenge being that the conditional exclusion of women, who were exempted from serving as jurors but, if otherwise qualified, were allowed to apply to be inserted on the list of jurors, was inconsistent with the provisions of the Constitution. Dealing with the challenge which was grounded on inconsistency with Article 40.1, Walsh J. pointed out (at p. 71) that there could be little doubt that the Oireachtas could validly enact statutory provisions which could have due regard within the provisions of Article 40 to differences of capacity, both physical and moral and of social function insofar as jury service is concerned, giving examples of exemptions for which provision might be made: for all mothers with young children, all widowers and deserted husbands in charge of young children and certain occupations. He continued:

> "However, the provision made in the Act of 1927, is undisguisedly discriminatory on the ground of sex only. It would not be competent for the Oireachtas to legislate on the basis that women, by reason of their sex, are physically or morally incapable of serving and acting as jurors. The statutory provision does not seek to make any distinction between the different functions that women may fulfil and it does not seek to justify the discrimination on the basis of any social function. It simply lumps together half of the members of the adult population, most of whom have only one thing in common, namely, their sex. In my view, it is not open to the State to discriminate in its enactments between persons who are subject to its laws solely upon the ground of the sex of those persons. If a reference is to be made to the sex of a person, then the purpose of the law that makes such discrimination should be to deal with some physical or moral capacity or social function that is related exclusively or very largely to that sex only."

55. Having identified one category of exemption from jury service in the impugned Act as having the single word description "Women", Walsh J. stated (at p. 72):

> "To be of either sex, without more, is not per se to have a social function within the meaning of Article 40 of the Constitution. To be an architect or a doctor, for example, is to have a social function, but the function does not depend upon the sex of the person exercising the profession. Clearly some social functions must necessarily depend upon sex, such as motherhood or fatherhood. In the proper context, due recognition may also be given by the law to the fact that social functions are more usually performed by one sex rather than by the other. The essential test in each such case is the function and not the sex of the functionary."

56. Counsel for the plaintiff submitted that the distinction at issue here, imposing a radically more severe maximum penalty for sexual assault on a man than for sexual assault on a woman, could never be justified on the basis of either social function or moral capacity. He recognised, however, that such a difference might be rationally justified if based on a real difference in physical capacity giving

rise to an objectively identifiable aggravating factor, for example, the risk of an unwanted pregnancy resulting from the rape of a woman. He also seemed to recognise permissible and non-permissible gradations of difference in severity, in that he advocated that the test which the court should apply in determining whether a provision which is *prima facie* discriminatory can be saved from inconsistency by reference to the proviso to Article 40.1 is whether or not it meets the test of proportionality. It was submitted that in the light of the decision in the *Cox* case, sentencing legislation which fails a proportionality test is itself unconstitutional.

57. The formulation of the proportionality test which counsel for the plaintiff commended to the court was that of Costello P. in *Heaney v. Ireland* [1994] 3 I.R. 593, which is in the following terms:

> "The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally-protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:
>
> (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
>
> (b) impair the right as little as possible; and
>
> (c) be such that their effects on rights are proportional to the objective."

58. The primary focus of the submission of counsel for the plaintiff was not so much on the three-step analysis provided for in that formulation but whether the discrimination on the grounds of gender inherent in s. 62 meets the preliminary test that it relates "to concerns pressing and substantial in a free and democratic society", which counsel for the plaintiff equated with the test whether the provision can be said to have a legitimate and rational purpose. That phraseology is resonant of the test posited by Barrington J. in *Brennan and Ors. v. The Attorney General* [1983] I.L.R.M. 449, which was approved of by the Supreme Court in *The Employment Equality Bill, 1996* reference. There, in the course of an analysis of Article 40.1 it was stated by the Supreme Court (at p. 346):

> "The wide-ranging nature of the qualification which follows the general guarantee of equality before the law puts beyond doubt the legitimacy of measures which place individuals in different categories for the purposes of the relevant legislation. In particular, classifications based on age cannot be regarded as, of themselves, constitutionally invalid. They must, however, be capable of justification on the grounds set out by Barrington J. … as follows:
>
> 'the classification must be for a legitimate legislative purpose … it must be relevant to that purpose, and that each class must be treated fairly.'"

59. In this case, counsel for the plaintiff, adopting the approach suggested in the *Molyneux* case referred to earlier, submitted that the purpose of differentiating between indecent assault on a male and indecent assault on a female for the purposes of sentencing, as manifested in ss. 61, 62 and 52 of the Act of 1861, is fundamentally irrational and is not a legitimate legislative purpose. Counsel went further and submitted that, even if the provision related to a legitimate purpose, it would not meet the requirements of the proportionality test, there being a disproportionate difference between the maximum penalty for an assault on a man and the maximum penalty for an assault on a woman. In relation to that point, it seems to me that to apply the proportionality test in that manner must involve, to some extent, forming a view on the appropriate maximum sentences for indecent assault on a man and indecent assault on a woman, which I do not believe is the function of the court. How else could it be determined that twice as severe passes the test, but five times does not?

60. Counsel for the plaintiff also suggested two alternative standards of review: whether there is actual justification for the provision, in the sense that the provision exists "to deal with some physical or moral capacity or social function that is related exclusively or very largely to that sex [male persons] only" per Walsh J. in the *de Burca* case; or the more deferential standard, which is classified as hypothetical justification in Doyle on Constitutional Equality Law (2004 Edition), which is posited on whether there could be any reasonable justification for the distinction. It is not possible to find any reasonable justification for the distinction between s. 62 of the 1861 Act and s. 6 of the 1935 Act, it was submitted.

61. A separate argument advanced on behalf of the plaintiff was directed to the constitutional obligations of the judicial arm and was put forward as a duty of a judge to act on his or her own motion. A judge who has made a declaration to uphold the Constitution cannot apply a sentencing provision which offends Article 40.1 and should, on his or her own motion, disapply the offending provision, it was submitted. I suspect that this argument was primarily advanced as an antidote against *locus standi* or *res judicata* difficulties.

62. The authority cited for the proposition is the decision of the Supreme Court in *The State (D.P.P.) v. Walsh* [1981] I.R. 412. That case had an unusual procedural history in the Supreme Court. The substantive appeal in the Supreme Court concerned whether the respondents, Mr. Walsh and Mrs. Conneely, were entitled to a trial with a jury on charges of contempt of court, a conditional order for attachment having been made against them in the High Court. The Supreme Court held that, as they were charged with the commission of major criminal offences, their trial was governed, prima facie, by the requirements of Article 38.5 of the Constitution. However, they were not entitled to a trial with a jury since there were no disputed issues of fact requiring the services of a jury for their determination. After the substantive hearing, as a special concession, Mr. Walsh and Mrs. Conneely were permitted by the Supreme Court to file affidavits showing cause. Mrs. Conneely averred in her affidavit that the critical offensive passage in the statement sent to the press, which was the subject of the contempt proceedings, had been inserted by her at her husband's suggestion and that he had been present while she was transmitting by telephone the contents of the statement to the newspaper for publication. In the course of dealing with submissions made that that affidavit and an affidavit filed by Mr. Walsh established the existence of unresolved issues of fact which required to be determined by a jury, Henchy J. dealt with what he described as "the strange submission" put forward by Mrs. Conneely, that because of coercion on her husband's part, it was he, and not she, who could be found guilty of contempt. Henchy J. dismissed that argument on the basis that the mere presence of the husband in the room could neither provide a defence for her nor form the basis of his conviction. However, he went on to hold, on his own motion, that the presumption relied on, the common law defence of marital coercion, was inconsistent with the Constitution and was not carried over by Article 50 because it was repugnant to the concept of equality before the law guaranteed by Article 40.1 and could not, under the second sentence of that Article, be justified as discrimination based on any difference of capacity or social function as between husband and wife.

63. I see formidable difficulties in translating the approach adopted by the Supreme Court in the *Walsh* case in relation to a common law rule of evidence to a statutory sentencing provision. Clearly, it could not apply in relation to a provision created by a post-1937 statute, which carries a presumption of constitutionality. It is difficult to see how it could be applied unless the appropriate *legitimus contradictor*, Ireland through the Attorney General, was given an opportunity to be heard. More significantly, there would be inherent in it the risk of trespassing outside the judicial sphere. Aside from that, even if such an obligation exists, it is the obligation of the

sentencing judge. It has not been necessary to use this argument to combat the defences of lack of *locus standi and res judicata* raised by the defendants. I do not propose to attach any weight to it in dealing with the substantive issue.

64. Finally, counsel for the plaintiff suggested that the decision of the Supreme Court of the State of Kansas in *Kansas v. Limon* is instructive as to how the court should approach the determination of the substantive issue. I propose considering that decision in detail later.

Submissions on behalf of the defendant
65. I have already addressed some of the arguments advanced on behalf of the defendants in relation to the substantive issue in dealing with the nature of the offence of indecent assault and the pre-emptive defences. I do not propose to go over that ground again.

66. The defendants, as I understand the submissions made on their behalf, did recognise two bases of discrimination, in the sense of difference of treatment, in the imposition of maximum penalties for indecent assault in s. 62 of the Act of 1861 and s. 6 of the Act of 1935. One is the different measure of protection given to female victims, because of the maximum penalty provided for in s. 6, against the greater measure of protection given to male victims, because of the greater maximum penalty provided for in s. 62. It was suggested that the only person who could even hypothetically assert being discriminated against on gender grounds arising out of that difference would be a female victim of indecent assault to whom the sentencing regime contained in s. 6 would apply (i.e. a female victim assaulted prior to 1981). It was submitted that the plaintiff is essentially seeking to be subrogated to the position of the hypothetical female victim, so as to get a windfall on foot of that hypothetical injustice. That, in my view, is not a proper characterisation of the plaintiff's claim. Another basis, that a person sentenced under s. 62 is exposed to a higher maximum penalty than a person being sentenced under s. 6 solely on account of the gender of the victim, is, in fact, the basis on which the plaintiff makes his claim.

67. The defendants submitted that a difference of treatment as regards sentencing of persons convicted of sexual assault on male persons and persons convicted of sexual assault on female persons is not invidious, arbitrary or capricious. It is not invidious discrimination to distinguish between girls and boys in the sexual offences code, it was submitted. It is proper to have regard to the fact that a sexual offence on a girl may result in an unwanted pregnancy. As I have already indicated, that point was recognised by counsel for the plaintiff. However, rationally one would expect that distinction to be marked by a more severe penalty for an offence against a female person than an offence against a male person. Aside from that, it is a consideration which does not apply to the offence at issue here, indecent assault, the components of which have been outlined. Accepting the argument made on behalf of the defendants, that it is for the Oireachtas to regulate by law the appropriate punishment for an offence, as a matter of principle, the appropriateness of the penalty must be related to the particular offence. An argument advanced on behalf of the defendants, that the Oireachtas is entitled to have regard to the fact that every intercourse-based offence will also involve an indecent or sexual assault, cannot be correct and it cannot constitute justification which comes within the proviso in Article 40.1.

68. The defendants have pointed to no other difference of physical capacity, moral capacity or social function between a male person and a female person which justifies imposing a more severe maximum penalty on a perpetrator of either gender for indecent assault on a male than for indecent assault of a female.

Kansas v. Limon
69. This was a decision of the Supreme Court of the State of Kansas, applying federal law, delivered on 21st October, 2005.

70. At issue in the *Limon* case was a Kansas statute, commonly referred to as the Romeo and Juliet statute, which, broadly speaking, regulated sexual activity between teenagers and provided for a penalty where certain conditions applied, including that the victim and the offender were members of the opposite sex. Mr. Limon complied with the conditions except that limiting application to acts between members of the opposite sex. In consequence, Mr. Limon was exposed to a much more severe penalty under Kansas sentencing guidelines.

71. The *Limon* case had quite an extensive history when it came before the Kansas Supreme Court in 2005. A petition brought by Mr. Limon for a writ of *certiorari* was pending before the United States Supreme Court when that court gave judgment in *Lawrence v. Texas* 539 U.S. 558 on 26th June, 2003. On the following day the Supreme Court granted Limon's petition and remanded the case to the Kansas Court of Appeals, for further consideration in light of *Lawrence v. Texas*. In *Lawrence v. Texas*, the majority of the Supreme Court had held that a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violated the due process clause of the Fourteenth Amendment. O'Connor J., who concurred in the finding of unconstitutionality, based her conclusion that the Texas statute was unconstitutional, not on the substantive component of the due process clause of the Fourteenth Amendment, but on the equal protection clause. The decision of the Kansas Court of Appeals on the remand affirmed Limon's conviction and sentence. On the appeal to the Kansas Supreme Court the argument advanced on behalf of Limon was that to punish criminal voluntary sexual conduct between teenagers of the same sex more harshly that criminal voluntary sexual conduct between teenagers of the opposite sex was a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

72. In its judgment, as a first step, the court concluded that the Romeo and Juliet statute created a discriminatory classification based on sexual orientation. The next step was that the level of scrutiny to be applied in determining whether the Romeo and Juliet statute was unconstitutional because of its exclusion of homosexual conduct was the rational basis test, which is the most deferential level of scrutiny in the hierarchical standard of review structure applied in US constitutional jurisprudence. Having identified the discriminatory classification and the appropriate level of scrutiny, the court summarised its task as to "search for a rational basis for the harshly disparate sentencing treatment of those 18 years old and younger who engage in voluntary sex with an underage teenager of the same sex". The court started that search by looking at the legislative history, but did not find anything in it regarding the legislative purpose for adding the opposite sex requirement in the Romeo and Juliet Bill. The court then went on to consider various possible State interests which had been canvassed, namely:

> (1) the protection and preservation of the traditional sexual mores of society;
>
> (2) the preservation of the historical notions of appropriate sexual development of children;
>
> (3) the protection of teenagers against coercive relationships;
>
> (4) protection of teenagers from increased health risks that accompany sexual activity;
>
> (5) promotion of parental responsibility and procreation; and

(6) protection of those in group homes (the contact between Mr. Limon and the other male having occurred at a school for developmentally disabled children where Mr. Limon and the other male were residents).

73. The conclusion of the court was that the Romeo and Juliet statute did not pass rational basis scrutiny under the equal protection clause, stating as follows:

> "… adding the phrase 'and are members of the opposite sex' created a broad, overreaching, and undifferentiated status-based classification which bears no rational relationship to legitimate State interests. Paraphrasing the United States Supreme Court's decision in *Romer [v. Evans* 517 US 620], the statute inflicts immediate, continuing and real injuries that outrun and belie any legitimate justification that may be claimed for it. Furthermore, the State's interests fail under the holding in *Lawrence* that moral disapproval of a group cannot be a legitimate governmental interest. …"

74. Having considered what the appropriate remedy was, the court struck from the statute the words "and are members of the opposite sex".

75. Because the court had determined the statute violated constitutional equal protection guarantees based upon a rational basis analysis, it did not consider it necessary to consider Mr. Limon's other arguments, that strict scrutiny should be applied and that the statute discriminated on the basis of sex.

76. Counsel for the plaintiff submitted that, by analogy, the manner in which the plaintiff is discriminated against in this case, being exposed to a maximum penalty under s. 62 five times greater than a person facing sentencing under s. 6, bears no rational relationship to a legitimate State interest.

77. Counsel for the defendants emphasised that the court in *Limon* did not nullify the whole statute, but merely severed the offending words. Indeed, a similar approach was adopted in this jurisdiction in *TO'G v. Attorney General* [1985] I.L.R.M. 241, where, having found a proviso to s. 5(1) of the Adoption Act, 1974 to be repugnant to Article 40.1 of the Constitution because it discriminated against a widower whose wife died while a child was in the couple's care but before the adoption order was made by imposing conditions on the widower which would not be required where the adopter was a woman, the High Court (McMahon J.) excised the offending proviso.

Conclusions on substantive issue

78. Section 62 of the Act of 1861, in mandating a maximum penalty for the offence of indecent assault when committed against a male person which is substantially different from the maximum penalty mandated by law when the same offence is committed against a female, is prima facie discriminatory on the ground of gender in contravention of Article 40.1. It is inconsistent with the Constitution unless the differentiation it creates is legitimated by reason of being founded on difference of capacity, whether physical or moral, or difference of social function of men and women in a manner which is not invidious, arbitrary or capricious.

79. The core question is whether the classification of persons convicted of indecent assault on male persons for different treatment in sentencing is for a legitimate legislative purpose and is relevant to that purpose. In endeavouring to identify the purpose which the classification serves, there is really nothing to go on other than what may be gleaned from the context of the impugned provision within the legislative scheme of the Act of 1861. The impugned provision is an integral part of provisions (ss. 61 and 62) which manifest a societal repugnance to homosexual activity in the terminology used, for instance, the references to "unnatural" offences and the "abominable" crime of buggery. The same degree of societal disapproval is not apparent in the terminology used in the Act of 1861 dealing with sexual offences against women.

80. In the *Norris* case, in the context of the challenge to the provisions impugned there based on inconsistency with Article 40.1 the Supreme Court recognised the outlawing of male homosexual conduct as a legitimate legislative purpose. In the majority judgment, delivered by O'Higgins C.J., in a passage which I have quoted earlier, the Supreme Court recognised a legitimate legislative purpose in treating sexual conduct or gross indecency between males as requiring prohibition, because of the social problem which it creates, while leaving sexual conduct between females outside the scope of the criminal law because of the perception that it posed "no such social problem". Henchy J., who concurred with the majority in rejecting the Article 40.1 challenge expressed a similar view stating (at p. 70):

> "What the sections have done is to make certain conduct between males criminal, while leaving unaffected by the criminal law comparable conduct when not committed exclusively by males. Therein lies the reason why in my view unconstitutional discrimination under Article 40, section 1, has not been shown. The sexual acts left unaffected are for physiological, social and other reasons capable of being differentiated as to their nature, their context, the range of their possible consequences and the desirability of seeking to enforce their proscription as crimes. While individual opinions on the matter may differ, it was and is a matter of legislative policy to decide whether a compulsion of the common good is capable of justifying the distinction drawn. I would hold that the proviso contained in the second sentence of Article 40, section 1, makes constitutionally acceptable under that Article the line of demarcation between the acts made criminal by the impugned sections and those which the plaintiff complains are left unproscribed by the criminal law."

81. As I have held in dealing with the *res judicata* defence, the Supreme Court in the *Norris* case was not concerned with the issue of the constitutionality of the maximum penalty for indecent assault on a male person imposed in s. 62. The legitimate legislative purpose which the Supreme Court recognised in the *Norris* case as justifying criminalising sexual conduct between males, in my view, cannot justify the existence of the provision under attack here. That is because the offence of indecent assault can be committed by a man or a woman. While this Court is bound by the decision of the Supreme Court in the *Norris* case, the basis on which the Supreme Court found that there was a legitimate legislative purpose for the discrimination which was under attack on the ground of inconsistency with Article 40.1 there, can have no application to the offence of indecent assault because of the nature of the offence.

82. What else can be extrapolated from the submissions as supporting a legitimate legislative purpose? There are two possibilities implicit in the defendants' submissions. One is that male and female victims require different degrees of protection against sexual offences necessitating different levels denunciation as reflected in sentencing. The other is that the gravity of the sexual offence against a woman is inherently greater than that against a man because of the risk of an unwanted pregnancy. The imposition of a substantially more severe maximum penalty for indecent assault of a male person most certainly would not address the second possibility, nor would it address the first possibility if, as I think it is reasonable to assume for present purposes, women are more vulnerable to sexual assault than men.

83. I can find nothing in the Act of 1861 or in an objective consideration of the differences of physical capacity, moral capacity and social function of men and women which points to a legitimate legislative purpose for imposing a more severe maximum penalty for

indecent assault on a male person than for the same offence against a female person. Therefore, I have come to the conclusion that the relevant provision is inconsistent with Article 40.1.

84. I have come to that conclusion on the basis of the case as presented without having to reach any conclusion on whether the burden of establishing justification lies with the defendants or with the plaintiff. It is also unnecessary to express any view on whether gender-based discrimination warrants a strict scrutiny approach. In my view, no rational justification for the different maximum penalties which statute law prescribes where the offence of indecent assault is committed, whether by a man or a woman, against a male and a female can be divined even on the basis of the most deferential form of scrutiny. That discrimination is the legacy of Victorian mores and social attitudes. It is an anomaly which just over a quarter of a century ago the Oireachtas eliminated prospectively.

Form of order

85. The plaintiff's challenge and this decision relate only to the portion of s. 62 which prescribes a maximum penalty for the offence of indecent assault. Accordingly, the order of the court will declare that so much of s. 62 of the Act of 1861 as provides that whosoever shall be guilty of any indecent assault upon a male person shall be guilty of a misdemeanour, and being convicted thereof, shall be liable to be kept in penal servitude for any term not exceeding ten years, is inconsistent with the Constitution and is not continued by Article 50 of the Constitution. That formulation follows the order of the Supreme Court in the *de Burca* case (cf. p. 84). Counsel for the defendants suggested that, if a declaration were to be made, it should provide that s. 62 "has ceased to have force and effect only to the extent that its sentencing provisions are different from those provided for by s. 6 of the [Act of 1935]". At the hearing, counsel for the defendants suggested that the court might wish to hear further submissions on the form of the declaration, if the court was minded to make a declaration. I am satisfied that the declaration which I propose embodying in the order of the court is the only form of declaration which the court can properly make. To excise the words "upon a male person" from s. 62 would be to purport to extend the maximum penalty provided for in s. 62 to every person convicted of indecent assault, which the court cannot do. To purport to equalise the maximum sentence down to the level provided for in s. 6 of the Act of 1935 would be to purport to reform or amend the law, which the court cannot do. All the court can do is to declare that the statutory maximum penalty provided for in s. 62 on conviction of a common law offence is inoperative. The common law offence is not affected, nor is the punishment appropriate to the common law offence at common law.

Consequences

86. In addition to seeking a declaration of invalidity, the plaintiff has sought various reliefs aimed at preventing the continuation of the prosecution against him on the charges of indecent assault, including declaratory and injunctive relief.

87. The basis on which the plaintiff contends that his prosecution for indecent assault cannot continue is that the offence and the sentence for the offence are so inextricably entwined that if one falls so must the other. Counsel for the plaintiff cited two authorities in support of that proposition.

88. The first is a decision of the Supreme Court in T*he State (de Burca) v. O'hUadhaigh* [1976] I.R. 85. What happened in that case was that Ms. de Burca had been convicted in the District Court on two charges and sentenced to two concurrent sentences of two months imprisonment, but, by mistake, the District Justice entered the sentence on each charge sheet as "three months imprisonment". The entry in each charge sheet relating to sentence was quashed on *certiorari*. The complainant then went back to the District Court seeking to have the correct sentence entered on each charge sheet. The Supreme Court, in proceedings brought by Ms. de Burca, held that the order of *certiorari*, although expressly limited to quashing the entries relating to the sentences, had the effect in law of quashing the convictions as well as the sentences. In the passage of his judgment, with which the other judges agreed, relied on by counsel for the plaintiff, Henchy J. stated as follows (at p. 92):

> "The main ground put forward in support of the submission that both convictions and sentences stand quashed is that, since it is common case that the sentences have been quashed on *certiorari*, it follows, as a matter of law that the convictions have fallen with them. For my part, I am satisfied that this is the correct interpretation of the law. We have been referred to a long line of judicial authorities, running back over 200 years, which show that an invalid sentence cannot be severed from a conviction so as to validate the conviction on its own. This Court accepted that to be the law in *The State (Kiernan) v. de Burca*. Counsel for the respondents have been unable to direct our attention to any authority to the contrary. In fact, in those cases where the argument for either total or partial validation of the order has been raised, it has failed: see *R. v. Slade*. Since a conviction and sentence must stand or fall together, I conclude that the quashing of the sentences in this case also struck down the convictions."

89. A similar approach was adopted by Gannon J. in *The State (O'Reilly) v. Delap* (The High Court, 20th December, 1985, Unreported). There, in an order of the District Court drawn up after conviction the statement of jurisdiction was inaccurate and incomplete and, consequently, the order was bad on its face. Gannon J. ascribed the error on the order to some want of care in drawing up the order, rather than in the pronouncement in court. Nonetheless, as the conviction and sentence were matters of record, he made absolute a conditional order of *certiorari* quashing the conviction and order.

90. I do not see the relevance of those decisions to the plaintiff's position following the declaration of invalidity of the impugned portion of s. 62. The plaintiff stands charged with the common law offence of indecent assault. The effect of the declaration of invalidity is that there is no statutory penalty for conviction on that offence. The absence of a statutory penalty has consequences as to the penalty which may lawfully be imposed on the plaintiff in the event of his conviction. It may also have ramifications in relation to the mode of trial and the venue. However, all of these matters are matters for the Director, in the first instance, and the court of trial thereafter, but with proper regard for the plaintiff's right to a trial in due course of law, which is guaranteed by Article 38.1 of the Constitution.

91. I consider it important to emphasise that the plaintiff has not been convicted. Indeed, he is entitled to the presumption of innocence. The considerations which counsel for the defendants have urged on the court by reference to the judgment of Hardiman J. *in A. v. The Governor of Arbour Hill Prison* [2006] 2 I.L.R.M. 161 (the constitutional rights of others, the interests of victims of crime and considerations of justice and the common good generally) have no place in the determination in these proceedings of whether the prosecution against the plaintiff should continue. I have attached no weight to them.