Neutral Citation Number: [2009] IEHC 584

THE HIGH COURT

JUDICIAL REVIEW

2007 1514 JR

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS

APPLICANT

AND

JUDGE MARY DEVINS

RESPONDENT

AND

M. O'M.

NOTICE PARTY

JUDGMENT delivered by Mr. Justice O'Keeffe on 2nd day of December, 2009

1. On 19th November, 2007 the High Court granted leave to the Applicant to apply by way of an application for Judicial Review for:-

> (i) An order of *certiorari* quashing the decision made by the Respondent on 19th September, 2007, to make no Order in respect of the three charge sheets against the Notice Party.
>
> (ii) An order of *mandamus* requiring the Respondent to accept the evidence of arrest, charge and caution that was given on 19th September, 2007 and to proceed to deal with the three charges in the ordinary way.
>
> (iii) A declaration that the offence of buggery contrary to Section 61 of the Offences Against the Person Act is a valid offence recognised by law if it relates to dates of alleged offences that are prior to the repeal of the said Section 61.
>
> (iv) If necessary, a declaration that the offence of indecent assault contrary to common law is a valid offence recognised by law.
>
> (v) If necessary an order of *certiorari* quashing the decision made by the Respondent on 18th July, 2007 to make no Order in the prosecution of the Notice Party.

2. The grounds upon which relief was sought are:-

> (i) The Respondent erred in law in holding that the offence of buggery contrary to Section 51 (*sic*) of the Offences Against the Person Act 1861, is not known to law or is not properly before the court in the circumstances of the present case.
>
> (ii) The Respondent wrongfully declined to exercise her jurisdiction by failing to hear and deal with the charges which were properly and lawfully before her and to send the Notice Party forward for trial.
>
> (iii)The Respondent acted without proper legal basis and in excess of jurisdiction in making "no Order".
>
> (iv)The Respondent erred in law and wrongfully refused jurisdiction in hearing evidence of arrest, charge and caution of 19th September, 2007 and then later on the same day purporting to hold that she was then not accepting evidence of arrest, charge and caution.

3. In the Statement of Grounds of Opposition it is claimed the Respondent (*sic*) has not acted promptly nor within the time limit of three months prescribed for seeking relief by way of Judicial Review by O. 84 of the Rules of Superior Courts 1986. It is contended that the form of the relief sought herein is essentially in nature that of *mandamus*. The grounds upon which relief is sought, it is claimed, first arose on 18th July, 2007 when the Respondent struck out the charges made against the Notice Party herein. The Applicant did not make an application for leave to seek Judicial Review until 19th November, 2007 and as a result the relief should be refused. Alternatively it is claimed that no extension of time for the making of this application has been sought and therefore the court has no jurisdiction to entertain the application.

4. Without prejudice to such contentions, it is further pleaded that the offences alleged against the Notice Party are alleged to have occurred between 1st September, 1970 and 31st December, 1970. It is claimed, the offence of buggery is a common law offence, the penalty for which was provided by statute (Section 61 of the Offences Against the Person Act 1861). The common law offence of buggery was repealed by Section 14 of the Criminal Law (Sexual Offences) Act 1993.

5. It is claimed that the Act of 1993 did not provide any saver for the prosecution of offences after that date which had

occurred before that date. Therefore the alleged wrongful acts on the part of the Notice Party are no longer an offence under the law. Any prosecution of the Notice Party after the abolition of the offence is a nullity, a breach of the law, due process and breach of fundamental constitutional principles.

6. It is claimed that Section 21 of the Interpretation Act 1937, and Section 27 of the Interpretation Act 2005, are not applicable to offences contrary to common law. Section 1(1) of the Interpretation (Amendment) Act 1997, applies prospectively only and is not applicable. It is claimed that the Respondent acted intra vires in making no order in respect of the invalid charge of buggery.

7. Inspector Michael Murray, swore the affidavits on behalf of the Applicant. He represented the State in the Prosecution of the Notice Party and was present in court on the relevant dates namely 20th June, 2007, 18th July, 2007 and 19th September, 2007.

8. On 20th June, 2007, the Notice Party was arrested and charged with three offences variously alleged to have occurred in the period between 1st September, 1970 and 30th June, 1971, being:-

(i) Buggery contrary to Section 61 of the Offences Against the Person Act 1861;

(ii) Indecent Assault contrary to Section 62 of the Offences Against the Person Act 1861; and

(iii)Indecent Assault contrary to Section 62 of the Offences Against the Person Act 1861

9. The offences relate to alleged sexual abuse perpetrated by the Notice Party who was a priest teaching in St. Jarlath's College, Tuam.

10. When the matter came before Castlebar District Court on 20th June, 2007, Detective Garda Edward McLoughlin gave evidence of arrest, charge and caution. The Notice Party was represented by her solicitor, Miss Fiona McAllister. The Respondent raised the question of jurisdiction. Inspector Murray informed the court that the Director of Public Prosecutions elected for trial on indictment and he applied for an adjournment in order to prepare a Book of Evidence. He said the Respondent adjourned the matter to Castlebar District Court on Wednesday, 18th July, 2007 for service of the Book of Evidence.

11. On 18th July, 2007, at the adjourned hearing, evidence of service of the Book of Evidence was given and the court was informed that the Director of Public Prosecutions had consented to the matter being tried on indictment pursuant to Section 4(A)(2) of the Criminal Procedure Act 1967. When Inspector Murray applied to have the Notice Party returned for trial to the Central Criminal Court in Dublin, the Respondent pointed out that the matter was not properly returnable to the Central Criminal Court but to the Circuit Criminal Court.

12. He said that it was agreed that he would look further into the matter and the Respondent said she would also research the matter.

13. He said he took advice from the Director of Public Prosecutions which confirmed that the matter should be returned to the Circuit Criminal Court. He said that the Director of Public Prosecutions also brought it to his attention that in the light of the decision of the High Court in *Stephen Mitchell v. Ireland* (Unreported, 12th July, 2007) an issue could arise as to whether the indecent assault charges should have been brought contrary to common law. The Director of Public Prosecution's office, he said indicated that they were studying the judgment and might appeal and he was directed to apply to adjourn the present case so that further instructions could be obtained from the Director of Public Prosecutions. When he returned to court, he informed the Respondent, he was conceding that the matter should be returned to the Circuit Criminal Court rather than the Central Criminal Court. He informed the Respondent that there were further complications in the case and which he needed to bring to the attention of the court. He informed the court of the *Mitchell* decision and applied to have the case adjourned to September in order to take instructions from the Director of Public Prosecutions regarding issues raised in the *Mitchell* case. The solicitor on behalf of the Notice Party objected to such application, pointing out that the State had included the existing charges in the Book of Evidence and that the Notice Party should be sent forward on those charges.

14. The Respondent, he said, intervened and said that she had been researching the points raised and identified a further complication in that she noted that Section 14 of the Criminal Law (Sexual Offences) Act 1993, repealed Sections 61 and 62 of Offences Against the Persons Act 1861. She said that she wanted to put the matter back until later that day so she could research the matter further.

15. At 2.00p.m., Inspector Murray indicated to the Respondent that he had been in contact with the Director of Public Prosecution's Office and was renewing his application to have the matter adjourned to September so as he could take further instructions. The solicitor for the applicant objected to such application and the Respondent indicated that she would not exceed to this application. Inspector Murray indicated that if the Respondent was refusing his application to adjourn the case, he was asking the Respondent to return the Notice Party for trial to the next sitting in Castlebar Circuit Court. The solicitor for the Notice Party indicated that she had no objection to this application.

16. The Respondent then stated that the solicitor and the inspector were both missing the point. She made reference to the fact that Section 14 of the Criminal Law (Sexual Offences) Act 1993 had repealed Sections 61 and 62 of Offences Against the Person Act 1861. She stated that Section 8 of the Criminal Law (Sexual Offences) Act 2006 had now repealed Section 14 of the Act of 1993. She said all references to buggery had been repealed of the Statute Books save for a reference to it in the definition of indecent behaviour in the 2006 Act. He said, he told the Respondent that he had been instructed by the Director of Public Prosecution's office that Section 27 of the Interpretation Act 2005 provided that if a statutory offence had been repealed that this did not mean that the person cannot be charged with such offence. The Respondent indicated that she believed that this was wrong and said that it could not be the case. He was asked by the Respondent to comment further on the legislation. Inspector Murray indicated that he would need time to study the Acts which had been referred to by the court in order to comment on it in a constructive manner. The Respondent then said she would make no order in the case.

17. He said that on 19th September, on the directions of the Director of Public Prosecutions, the Notice Party was arrested and charged on 19th September, 2007, with:-

(i) Buggery contrary to Section 61 of the Offences Against the Person Act 1861;

(ii) Indecent Assault contrary to Common Law; and

(iii)Indecent Assault contrary to Common Law.

18. When the matter came before the court on 19th September, 2007, evidence was given by Detective Garda Edward McLoughlin of arrest, charge and caution to the court. He said that before he got as far as indicating the Director of Public Prosecution's consent to return for trial, the Respondent asked if these charges were correctly founded in law. He reminded the Respondent that similar charges had come before the court on an earlier occasion and that she had raised questions regarding the authenticity of offences outlined in the charges and having regard to the fact that the laws in question had been repealed in their entirety. He submitted that the charges in question were valid and that they came about as a result of the Director of Public Prosecutions considering the matter and issuing new instructions. He pointed out that the charges then before the court on 19th September, 2007 were brought as a result of the Director of Public Prosecutions most recent instructions and he handed a copy of Section 27 of the Interpretation Act 2005, to the Respondent and the Notice Party's solicitor. In response to a question from the Respondent, the solicitor for the Notice Party said that the Director of Public Prosecutions had already brought charges as a result of which was that the Respondent had made no order and the Director of Public Prosecutions was now coming again with new charges despite the judge's previous decision in the matter.

19. The Respondent asked how was she to know whether the charges were correct in law or not. When Inspector Murray referred to the Interpretation Act 2005, she asked why the Interpretation Act 2005, had not been cited at the end of the charge. She then said she would put the case back until 3.00p.m. and asked Inspector Murray to hand up to her whatever submissions he had. He handed the judge two decisions – *Goulding v. Judge McVigh* and a copy of a document entitled *Director of Public Prosecutions v. M. O'M. – Submissions*.

20. At a subsequent point during that day the solicitor for the Notice Party asked the Respondent as to directions on whether or not the Notice Party was in custody to which the Respondent replied in the affirmative as he had been arrested.

21. When the court resumed hearing, the Respondent stated it was her decision to make no Order in the case. She said she was not satisfied the charges before her were good or grounded on good law. She said no argument had been opened to suggest the charges were good. She said that the submissions that had been tendered by Inspector Murray were inadequate; they were not signed by any person and did not bear the stamp of the Director of Public Prosecution's office. She said the *Goulding* case was a relevant case and she had no issue with the points decided by it. She went on to say that she was not then accepting evidence of arrest, charge and caution. Inspector Murray replied to say that she had already heard evidence of arrest, charge and caution earlier in the day. The Respondent said she was not then accepting it. When asked why not by the Inspector, she said she believed the charges were bad and she had heard no argument to the contrary. She said she was not acknowledging evidence of arrest, charge and caution on the charge sheets. Inspector Murray said that it has not been possible to take any copy of the District Court orders and there was no way to progress the matter other than by way of Judicial Review.

22. The Notice Party in an affidavit does not dispute the evidence of Inspector Murray that evidence of arrest, charge and caution was given to the court on 19th September, 2007. He acknowledged that he was in custody in the garda station on that day. He asserted that the reasons given for the new charges on 19th September, 2007, were no different in nature to those of 18th July, 2007 and the reasons that were advanced on behalf of the Director of Public Prosecutions and the order made on 19th September, 2007 were no different in nature to the order and the reasons given by the Respondent on 18th July, 2007. He contended that the grounds for relief now sought first arose on 18th July, 2007 and that the application for Judicial Review was not made promptly pursuant to O. 84, r. 21 of the Rules of the Superior Courts.

23. Inspector Murray stated that he had received instructions from the Director of Public Prosecutions in early September to reinitiate proceedings as soon as possible so that there would be no question of undue delay on the part of the Applicant. He also had regard to the state of health of the Notice Party who had been ill in putting the matter back until 19th September, 2007 and he wanted to avoid undue delay being raised as an issue. In that context, he had agreed to defer in initiating the proceedings until 19th September, 2007.

24. Inspector Murray further stated that at no time when the matter was before the District Court did the Notice Party's solicitor raise any question in respect of the validity of the charges. This assertion has not been contradicted by or on behalf of the Notice Party.

Order 84 of the Rules of the Superior Courts

25. The Applicant is required in seeking relief by way of Judicial Review to act promptly and within the time limit of three months where the relief sought is other than by way of *certiorari*. Having reviewed the affidavits that have been sworn in this application, I am satisfied that the grounds for which relief in respect of this application first arose was on 19th September, 2007 when the Notice Party was charged again and when there was evidence of arrest, charge and caution given to the court. Furthermore, during the course of the hearing, the respondent acknowledged that the Notice Party had already been arrested (earlier on 19th September) and was in custody. Furthermore, the statement by Inspector Murray that at no stage when the matter was before the District Court did the Notice Party's solicitor raise any issue in respect of the validity of the charges has not been challenged. Furthermore, it appears to me from the account given by Inspector Murray namely that he was given time to study the legal issues raised by the court on 18th July, 2007, is indicative that he could make further submissions. On this basis, the grounds for applying for Judicial Review did not arise on 18th July, 2007 and first arose on 19th September, 2007.

26. In relation to this issue of acting promptly, I am satisfied that the applicant has acted promptly.

27. Furthermore, I am satisfied that it was not until 19th September, 2007, that the Notice Party was charged with indecent assault contrary to common law.

Issue – Is buggery a statutory or a common law offence?
28. Counsel on behalf of the Applicant (Mr. Donal O'Donnell, S.C. and Mr. Paul Anthony McDermott, B.L.) stated that the Notice Party faces a charge of buggery contrary to Section 61 of the Offences Against the Person Act 1861. That section provides:-

> *"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."*

The section appears under the general heading "*Unnatural Offences*" and bears the side title "*sodomy and bestiality*".

29. They stated, Section 61 was repealed by Section 14 of the Criminal Law (Sexual Offences) Act 1993, which provided that:-

> *"The enactments specified in column (2) of the Schedule to this Act are hereby repealed to the extent specified in column (3) of that Schedule."*

The operative part of the Schedule states "*Section 61 and 62 (save insofar as they apply to buggery or attempted buggery with animals)*".

30. Section 2 of the 1993 Act provides that:-

> *"Subject to sections 3 and 5 of this Act, any rule of law by virtue of which buggery between persons is an offence is hereby abolished."*

31. Section 3 provides for an offence of buggery of persons under 17 years of age and Section 5 is an offence to commit an act of buggery with a person who is mentally impaired.

32. Section 8 of the Criminal Law (Sexual Offences) Act 2006, provides that the offences of buggery and gross indecency with males under 17 years of age were repealed. In their place, two new offences of (i) defilement of a child under 15 years of age and (ii) defilement of a child under 17 years of age were created. The offence of defilement in this context means a sexual act and a sexual act is defined in Section 1 of the Act, so as to include "*buggery*".

33. Counsel on behalf of the Applicant submitted that as a result of the foregoing statutes there has never been a time when conduct such as is alleged against the Notice Party in the present case (i.e. buggery of a child) would not have amounted to a serious criminal offence.

34. In respect of the issue as to whether buggery was a common law offence or a statutory one, the Applicant submitted that the correct and definitive analysis of the law is given in *Halsburys Law*, 4th Ed. (reissue); 1990, para. 505 which states that:-

> *"A common law it is an indeitable offence for a person to commit buggery with an animal or with another person. It is also a statutory offence for a person to commit buggery with another person or with an animal…"*

In respect of this latter statement, Section 12(1) of Sexual Offences Act 1956, is given as authority.

35. Counsel for the Applicants submitted that the offence of buggery had maintained a dual existence over the past century and existed both as a statutory offence and as a common law offence. They stated that the tradition in this jurisdiction had always been to prosecute it in its statutory incarnation, and thus it had not intended to be prosecuted as a common law offence (in this regard it differed from assault which was clearly always recognised as a common law offence for which the penalty was provided by statute). They submitted that the mere fact that there may have been a subsisting common law offence of buggery did not mean that Section 61 was not a parallel statutory offence of buggery.

36. They referred to the decision of McWilliams J. in the High Court in *Norris v. the Attorney General* [1984] I.R. 36 at 40 – 41:-

> *"On reading the sections which are challenged, it appears to me that there is a distinction between s. 61 of the Act of 1861 and the other two sections, in that s. 61 provides a punishment for the crime of buggery as though it were an existing offence whereas the other two sections create offences by declaring that certain acts shall be misdemeanours.*
>
> *I have tried to find out the origin of the offence for which s. 61 provides the punishment. I am not sure that I have succeeded. It is probable that the first statute relating to the offence in Ireland is the statute of the Irish Parliament, 10 Chas. I, sess. 2, c. 20, which is entitled 'An Act for the punishment of the vice of buggery.' The relevant part is as follows:— 'Forasmuch as there is not yet sufficient and condigne punishment appointed and limited by the due course of the laws of this realme, for the detestable and abominable vice of buggery committed with mankind or beast; it may therefore please the King's Highnesse, with the consent of his lords spirituall and temporall, and the commons of this present Parliament assembled, that it may be enacted, and be it enacted by the authority of the same, that the same offence be from henceforth adjudged felonie, and such order and forme of processe therein to be used against the offendors, as in cases of felony at the common law: and that the offendors being hereof convicted by verdict, confession, or outlawry, shall suffer such paines of death, and losses, and penalties of their goods, chattels, debts, lands, tenements and hereditaments, as felons be accustomed to*

doe, according to the order of the common lawes of this realme . . .' Whether there was such an offence at common law in Ireland prior to the enactment of 10 Chas. I, sess. 2, c. 20, or not I do not know. The opening passage of the statute with the reference to 'the vice' suggests that there was not, whereas the absence of any indication of the acts required to constitute the offence suggests that there was. If there was such an offence at common law, it was clearly not a felony. Possibly it was an offence cognisable only in the Ecclesiastical Courts.

The statute 10 Chas. I, sess. 2, c. 20, was repealed by s. 1 of 10 Geo. IV, c. 34 but s. 18 of the latter statute provided:— 'And be it enacted, that every person convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall suffer death as a felon.' It seems to me that the expression 'shall suffer death as a felon' can only be interpreted as meaning that the offence was continued as a felony. My attention has not been directed to any repeal of this statute. If it has not been repealed, the statute creating the offence is 10 Geo. IV, c. 34 and s. 61 of the Act of 1861 merely reduced the penalty from death to penal servitude for a minimum period of ten years. Although I have thought it proper to investigate this aspect of the matter, it is largely irrelevant if my conclusion that the offence is a statutory one is correct."

37. Having quoted this extensive portion from the decision of McWilliam J., counsel for the Applicant submitted this Court should hold that the offence is a statutory one rather than a common law. They submitted that the Supreme Court judgments did not directly address this issue but O'Higgins C.J. noted at p. 61:-

"In England, buggery was first treated as a crime by the statute 25 Hen. VIII c. 6, having been previously dealt with only in the ecclesiastical courts. In Ireland, it first received statutory condemnation in the statute of the Irish Parliament 10 Chas. I, sess. 2, c. 20. Subject to statutory changes as to punishment, it continued to be prohibited and punished as a crime in accordance with the provisions of the Act of 1861 which were complemented by the later provisions of the Act of 1885. While those statutory provisions have now been repealed in the entire of the United Kingdom, the question in this case is whether they ceased to operate in Ireland at the time of the enactment of the Constitution in 1937."

38. They referred to the dissenting judgment of McCarthy J. who stated at p. 80 – 81:-

"One does not have to be a homosexual to commit an offence under any of the three sections; it is the act or deed itself that constitutes the offence. In the case of a male homosexual, it is more likely that he, rather than a male heterosexual, will commit such an act or deed; clearly, also, the act proscribed by s. 61 may be committed by a male upon a female, who may be his wife, a feature to which I shall return. Such an act was an offence in the common-law courts by the statute 10 Chas. I, sess. 2, c. 20, and in the older form of indictment it was described as 'against the order of nature, that detestable and abominable crime of buggery (not to be named among Christians)' — see 1 East P.C. 480; 12 Co. Rep. 37."

They accepted that the judgments indicated that the Judges believed that they were concerned solely with whether Section 61 continued in force after 1937 and were not addressing the continued existence of a common law offence.

39. They referred to the preamble to the 1861 Act which begins with the words:- "*WHEREAS it is expedient to consolidate and amend the Statute Law of England and Ireland relating to Offences Against the Person.*" It indicated, they submitted, that the drafter of the Act believed he was amending statute law. This was to be contrasted with the drafting of the Non-Fatal Offences Against the Person Act 1887 which provided in its title that it is "*an Act to revise the law relating to the main Non-Fatal Offences Against the Person and to provide for connected matters*". It was noted that Section 28 of the 1997 Act expressly abolished certain common law offences. No such provision was to be found in the Criminal Law (Sexual Offences) Act 1993.

40. Reference was made to *Sexual Offences* by O'Malley, p. 136 – 137.

41. They acknowledged that there was the distinct offence of indecent assault which was regarded as a common law offence. This authority, it was submitted, did not detract from the fact that the 1861 Act was dealing with the statutory offence of buggery. They referred to *In People (Director of Public Prosecutions) v. F.* (Unreported, Supreme Court, 24th February, 1994), *S. O'C. v. Governor of Curragh Prison* [2002] 1 I.R. 66 at p. 69. *Mitchell v. Ireland* (Unreported, High Court, 12th July, 2007) was a case where Laffoy J. held the proper way to charge the offence of indecent assault was by stating it to be contrary to common law.

42. The Applicant's counsel submitted that it was difficult to extract the ratio from the cases which have held that certain offences such as indecent assault are common law offences only. There appears to be no decisive indicia. For example, there is no such thing as a self contained statutory offence where one finds all the ingredients of the offence in the words of the statute.

43. It was submitted on behalf of the Applicant, that even if there was a subsisting offence of common law buggery, that by 1861 there was also a distinct statutory offence of buggery contrary to Section 61 and that the statutory offence can still be prosecuted after the enactment of the 1993 Act. They relied on Section 27 of the Interpretation Act 2005, which provides that:-

"(1) Where an enactment is repealed, the repeal does not –

…

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment,

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence against or contravention of the enactment which was committed before the repeal or…

(2) Where an enactment is repealed, any legal proceedings (civil or criminal) in respect of a right, privilege, obligation or liability acquired, accrued or incurred under, or an offence against or contravention of, the enactment

may be instituted, continued or enforced, and any penalty, forfeiture or punishment in respect of such offence or contravention may be imposed and carried out, as if the enactment had not been repealed."

This wording was almost identical to that which was found in Section 21 of the Interpretation Act 1937.

44. It was submitted that the purpose of this provision was to insure that a person who commits an offence under an Act can still be prosecuted and convicted of that offence even if his conduct only comes to light after the Act had been repealed. Thus, if the offence of buggery contrary to Section 61 is a statutory offence then it is still permissible to prosecute in respect of it. They submitted this section made it unnecessary for the Oireachtas to provide for a saver in the case of a statute which repealed a previous statute or part thereof.

45. They referred to Section 1 of the Interpretation (Amendment) Act 1997, which applied to an offence which was an offence at common law abolished, abrogated or otherwise repealed before or after the passing of the Act. They referred to *Grelish v. Director of Public Prosecutions* [2001] 3 I.R. 144, where it was held by the Supreme Court that the Interpretation (Amendment) Act 1997, must be interpreted as having prospective effect in order for it not to offend against the constitutional prohibition on retroactive penal legislation. It was held that the Act did not apply to prosecutions for repealed common law offences initiated before it came into force. They referred to the fact that the judgment of Hardiman J. expressly left open the question as to whether the Interpretation (Amendment) Act 1997, would operate to allow a prosecution of a common law offence committed prior to its repeal in which the prosecution is initiated after the Interpretation (Amendment) Act 1997, came into force.

46. Counsel on behalf of the Notice Party (Mr. Feichín McDonagh, S.C. and Ms. Caroline Cummings, B.L.) submitted that it was implicit in the submissions of the Applicant that the Act of 1993, set about to abolish two separate offences namely the offence of buggery at common law for which no penalty has ever been provided and also the statutory offence contrary to Section 61 of the 1861 Act.

47. It was submitted by the Notice Party that it must be assumed that the Oireachtas believed in 1993 that there was in existence the common law offence of buggery in respect of which there had been no statutory intervention over the previous 500 years so as to provide for penalty. It was submitted that the 1993 Act was drafted in such a way so as to insure that the offence was abolished by Section 2 and that as a consequential amendment, the penalty provision provided for in Section 61 was repealed.

48. They referred to Section 2 of the 1993 Act which provided:-

> *"any rule of law by virtue of which buggery between persons is an offence is hereby abolished."*

They submitted this wording of the phrase "*rule of law*" is the draftsman's mechanism to refer to an aspect of the common law.

49. They submitted that it was clear from the statute of Hen. VIII that as of the date of the statute there was not yet sufficient punishment appointed for the detestable and abdominal vice of buggery. It was inherent in the legislation that the abominable vice buggery was an offence in respect of which insufficient penalty was available. They referred to Coke and William Hawkins in *A Treatise and the pleas of the Crown* (1716) who pointed out that the crime was:-

> *"Felony by the ancient common law and punished according to some authors with burning but according to others with burying alive but by the statute of Hen. VIII is punished in the same manner as other felonies."*

He stated that Edward Hyde in his Pleas of the Crown (1803) point out that the statute of Hen. VIII provided the penalty. Reliance was also made on the Criminal Law of Ireland (1977) by P.A. O'Siochain where the author noted that it was a felony at common law with the penalty provided by Section 61 of the 1861 Act. They referred to Mr. Justice Charleton's book "*Offences Against the Person*" which states that buggery is a felony at common law, the penalty for which is fixed by Section 61 of the 1861 Act.

50. They submitted that the Act of 1841 and/or the Act of 1861 merely substituted a new penalty for the penalty provided for in Section 18 of 10 Geo. 4 c. 34. The latter provision did not create a statutory offence, but merely provided the penalty, as possibly did the Act of 1842 as did the Act of 1861. They referred to the 4th Ed. of Halsbury to which I have already referred.

51. They submitted that the fact that in the past buggery may have been charged as an offence contrary to Section 61 of the 1861 Act is entirely irrelevant to the issue to be decided. They instanced that the indecent assault charges were initially charged as statutory offences in July 2007 and by September, 2007 were charged by the applicant as contrary to the common law.

52. It was submitted that from historical prospective and a drafting perspective as from the perspective of the amendments brought forward in 1993, that buggery was at all times an offence of common law in respect of which from time to time, both in England and in Ireland, a penalty was provided for by statute.

53. They submitted that the decision of McWilliam J. in the *Norris* case was not authority for the proposition that buggery was a statutory offence.

Conclusions

54. It is to be noted that in the 1st Ed. of *Halsburys* (1909) Vol. 9 para. 1091, it is stated:-

> *"It is a felony by statute to commit the abdominal crime of buggery either with mankind or with an animal the punishment for this offence is penal servitude for life or for not less than three years, or imprisonment with or without hard labour and for not more than two years."*

For the first proposition, the authors rely on Section 61 of Offences Against the Person Act 1861. For the second proposition, the author's state:-

> *"This offence was probably first made punishable by the Common Law Courts by statute (1533 – 4, 25 Hen. VIII, c. 6(2) Stephen, History of the Criminal Law, 429). (See however 1 Hawk. P.C., c. 4). The punishment by 25 Hen. VII c. 6, and so it remained until the Offences Against the Person Act 1861, Section 61."*

55. This statement in itself is not conclusive evidence but its content is to be contrasted with that which appeared in the more recent edition.

56. In my opinion, the wording of Section 2 of the 1993 Act which refers to "*any rule of law by virtue of which buggery between persons is an offence is hereby abolished*" is not conclusive that the offence is one at common law.

57. I have been referred to the decision of the Supreme Court in *Director of Public Prosecutions v. E.F.* (24th February, 1994) and *M. v. Ireland & Ors* (Unreported, High Court, Laffoy J. 12th July, 2007). In the *E.F.* case, the court decided that the offence of indecent assault had never been created by any statute, although punishment for the offence had been provided in different statutory provisions from time to time. In the *M.* case, Laffoy J. held that the proper way to charge indecent assault is contrary to common law. These decisions do not determine the issue the court has to decide in this case.

58. I have considered all the statutory and historical references submitted to the court. Whilst I accept that the *Norris* case, McWilliam J. was not considering the issue in this case, nevertheless his analysis and conclusion in relation to the historical origin of the offence should not be disturbed save on the basis of more reliable and persuasive conclusions. I have been referred to many sources of historical value which it is contended, support the conclusion, buggery was a common law offence. I am of the opinion that I have been referred to no superior authority than that of McWilliam J. in the *Norris* case where he states his conclusion is that the offence of buggery is a statutory one. I conclude, therefore, that Section 61 of the 1861 Act provides for the statutory offence of buggery.

59. I am not satisfied that the offence of buggery has been established as a common law offence. Having reached this conclusion, it is unnecessary to consider the scope of the Interpretation (Amendment) Act 1997, which applied to common law offences which had been abolished by the Act of 1997.

60. Section 27 of the Interpretation Act 2005, provides that where a statutory offence has been repealed, a person who commits an offence under the Act can still be prosecuted with that offence even if such person's conduct only comes to light after the Act has been repealed. In my opinion, the offence of buggery contrary to Section 61 is a statutory offence and it is permissible to prosecute in respect of an alleged breach.

61. I will hear the parties on the appropriate order to make.