AN CHÚIRT UACHTARACH
THE SUPREME COURT

Clarke CJ
McKechnie J
Dunne J
Charleton J
O'Malley J

Supreme Court appeal number: S:AP:IE:2019:000004
[2019] IESC 000
Court of Appeal record number 2018/30
[2018] IECA 53
High Court record number 2017/80JR
[2017] IEHC 803
Circuit Criminal Court bill number: TYDP 17/2012

Re. s 3 Non-Fatal Offences Against the Person Act 1997, assault causing harm

BETWEEN

ER

APPLICANT/APPELLANT

- AND -

THE DIRECTOR OF PUBLIC PROSECUTIONS

PROSECUTOR/RESPONDENT

Judgment of Mr Justice Peter Charleton delivered on Friday, December 6th 2019

1. At issue on this appeal is the effect of a trial judge intervening during a criminal trial to give an indication of a suspended, or other lenient, sentence should an accused person plead guilty to counts on the indictment. Any such intervention is claimed by ER, the appellant, to profoundly undermine the due course of a trial as guaranteed by Article 38.1 of the Constitution. Where a plea of guilty is entered in the aftermath of such an indication, this is contended by ER to be void and that such a plea ought to be vacated at the option of the accused. It is claimed that to fail to vacate that plea is a further serious breach of fair trial rights. Whether that intervention and subsequent decisions by the trial judge are, or are not, wrong in law, the Director of Public Prosecutions contends that the appropriate remedy for errors during a trial is exclusively an appeal and not a judicial review. That point, however, was not pleaded in the notice of opposition filed as against the accused's statement grounding the judicial review application, but was only first argued, successfully, on appeal from the judgment of the High Court to the Court of Appeal. Thus, there is an issue as to whether this Court should consider that point.

Background

2. On 26 July 2010, a young boy of four was admitted to the paediatric section of a Munster hospital. He was already known to the treating physicians and nurses, since he had been admitted to the paediatric ward for burn injuries previously. On this occasion, he presented with severe bruising and, because of internal injuries, had to be resuscitated.

Surgery followed by intensive care was required to stem and treat internal bleeding. Social workers were called because of the history of previous injuries and the gardaí were notified. Ultimately, the child's mother and her domestic partner were charged with two offences: assaulting the boy "causing him harm", contrary to s 3 of the Non-Fatal Offences Against the Person Act 1997; and "being a person having custody of a child" that they "did wilfully assault, ill-treat, cause or allow the said child to be assaulted/ill-treated in a manner likely to cause unnecessary injury to the child's health or seriously to affect his well being", contrary to section 246 of the Childrens Act 2001.

3. A trial took place before Judge Teehan and a jury but the verdict was one of disagreement. The accused were retried in October 2016 and the course of the hearing was one of objection to evidence, trials within the trial, and the judge ruling that evidence objected to should be admitted in evidence. What then occurred was that the interview taken with the child victim was played to the jury by way of a video recording of what he had told the investigating authorities. He then had to be available for cross-examination by counsel for the two accused. At that point, and in the absence of the jury, Judge Teehan intervened and said in open court:

> I think it's probably only fair to say at this stage – it may well be of only academic interest – but I think it is only proper to point out that before any cross-examination of the complainant begins and there may have to be two sets of cross-examination – one before a jury and one before me - that if the accused persons were to take a certain course in relation to at least one of the counts against them on the indictment and if that were acceptable to the prosecution, assuming there are no previous convictions for a similar type of offence and assuming no significant convictions of any sort had been accumulated since 2010, I could probably see my way to deal with the matter in a non-custodial way. However, without the advantage of a plea of guilty – without the benefit, I should say, of a plea of guilty, if either or both were to be convicted by a jury in relation to these matters, it is difficult to see at this stage- and I stress as regards everything I say I am subject … to anything anybody might say in either event; I am certainly not pre-judging anything – but that it would be difficult for either to avoid a custodial sentence. I think it is only fair to point that out at this stage. It may well be of academic interest only to point – to say that now, but if the parties would like a few minutes to take instructions, I would certainly agree with that.

4. This happened sometime in the morning of 11 October 2016. Counsel for both accused asked for time. Returning the next day in the afternoon, both individually pleaded guilty to assault causing harm. Before that happened, counsel for the Director of Public Prosecutions told the court that the intervention did not mean that an appeal on sentence would not be open to the prosecution. Counsel for ER told the court that he had so advised his client. The male accused was sentenced later, in 2017, to 10 years with 7 years suspended. This was not, it should be noted, a sentence which accords with the precedents set out in *The People (DPP) v FitzGibbon* [2014] 2 ILRM 116. Mention of that sentence in this judgment is not any form of approval. The accused mother was similarly

sentenced in 2017, this time to 8 years suspended imprisonment and the mention of that is not approval. Neither sentence was appealed by the Director of Public Prosecutions under s 2 of the Criminal Justice Act 1993 as unduly lenient, notwithstanding the sentences being outside any prior identified range. What matters in this context is that a criminal trial begins when the accused is indicted and ends when the accused is sentenced. This judicial review was commenced by seeking and obtaining leave to initiate judicial review proceedings prior to the conclusion of the criminal trial.

5. Before being sentenced, the accused mother ER had returned to court on 22 November 2016 and had asked Judge Teehan for leave to vacate her plea of guilty. It should be clearly noted that since the advice given by an accused's lawyers is central to any decision as to whether a plea of guilty was voluntarily made, those representing an accused should discharge themselves, thereby giving him or her the opportunity to waive legal professional privilege. In that way, the context in which the plea was made can be properly explored. Regrettably, that did not happen in this case. Bare evidence was given by ER that she was influenced by the statement of Judge Teehan in pleading guilty. She said: "I did that because I didn't want to go to prison and that was the option I was given as I'd been stuck between a rock and a hard place and that was the decision I made on that day." Having heard submissions, the judge did not permit ER to vacate her plea of guilty.

High Court and Court of Appeal

6. On behalf of ER, judicial review was sought in the High Court seeking an order quashing the decision of Judge Teehan of 22 November 2016 that she should not be permitted to change her plea. Having tried that matter, Faherty J granted certiorari, in a judgment dated 27 October 2017, as against that decision, stating at paragraph 39:

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

7. In consequence of her view that Judge Teehan overstepped the bounds of what was possible in terms of giving any indication as to potential sentence, Faherty J quashed the order of the Circuit Court upholding the plea of guilty; [2017] IEHC 802. At paragraph 69 she said:

> To my mind, given the unsolicited intervention which he made on 11th October, 2016, the frailty which arises in this case is that, in ruling as he did on the application to retract the guilty plea, the trial judge did not pay due regard to the

undoubted certainty that his words, however well intentioned, were understood by the applicant as giving her the choice either to plead guilty and receive an almost certain non-custodial sentence or plead not guilty and receive an almost certain custodial sentence.

8. It is clear from the written submissions lodged before the High Court that Faherty J was never given the opportunity to consider whether judicial review was appropriate where what was sought to be quashed was a ruling made during the currency of a criminal trial. On the matter being appealed to the Court of Appeal, however, that point was raised for the first time. It was determinative in the judgement of Hedigan J, Edwards and McCarthy JJ concurring, [2018] IECA 302. Citing *Freeman v DPP* [2014] IEHC 68, the Court of Appeal ruled out judicial review in the circumstances of cases such as this, stating at paragraph 39, that even if error had been established in a ruling in a court of trial, this did not suffice for any intervention into the conduct of the trial by way of judicial review in the High Court:

> Regrettably, this is not the correct test in judicial review of this type of case. In the first place, as the *Freeman* judicial review case, cited above, demonstrates, the court of judicial review should almost never intervene in a criminal case that is not concluded. The bar is set at the highest level. Save only where the interests of justice and the right to a fair trial demand it, for clear and compelling reasons, the criminal trial should never be interrupted but should proceed to its proper conclusion. After that conclusion, which means after sentence is passed, then the convicted person may consider whether to appeal to this Court. The second part of the test applied by the learned High Court judge is regrettably also incorrect. In judicial review, it is not the correctness of the decision that is considered. The court of judicial review does not sit as a court of appeal. It is well established that the true test is not whether the decision impugned is an error, but whether it is lawful. See *Bailey v Flood* (unreported, 6 March 2000, Morris P.) and *Kenny v Judge Coughlan* [2008] IEHC 28 (O' Neill J.). No fault was found by the High Court in the procedure that was followed nor could there have been. It was a manifestly fair process that afforded the respondent [ER] every opportunity to make her case. Thus the only ground remaining upon which the court in judicial review could intervene would be on irrationality grounds. In the circumstances of the case. I do not believe any argument of this kind could be sustained nor indeed was irrationality pleaded by the respondent.

9. It was against this judgment, [2018] IECA 53. that ER appealed. The Court granted leave on issues of general public importance which were stated in the determination of O'Donnell, McKechnie and Charleton JJ:

(1) Whether the Court of Appeal was correct to permit the DPP to argue that the case was inappropriate for judicial review;

(2) In any event, whether the Court of Appeal was correct to dismiss the case on the ground that it was inappropriate for judicial review;

(3) Further and in any event, whether the trial judge's intervention on 11 October 2016 was such that the plea of guilty should be vacated.

New argument on appeal

10. No general analysis is necessary as to the circumstances in which an appellate court will hear an argument which was not proposed to the court of trial. The fundamental principle as stated by Henchy J in *Movie News Ltd v Galway County Council* (Unreported, Supreme Court, 25 July 1977) has since been developed. In that authority, the Supreme Court set its face, apart from in exceptional cases, against the introduction of points which were not canvassed and decided at first instance. To permit the raising of fresh grounds not argued in the High Court would be for the court to which an appeal was taken to "enter on the trial of a matter as of first instance and thereby deprive the party aggrieved with its decision of the constitutional right of appeal which he would have if that matter had been decided in the High Court." See also *D (Otherwise C) v MC* [1985] IR 697 and *DK v Crowley* [2011] 1 ILRM. That authority remains the point of departure for the admission of fresh issues, and a caution against upsetting the ordinary and reliable constitutional structure of hearing followed by appeal. Because of the responsibility to strive for justice, and in the interests of finality, however, points closely related to, or a development of, issues argued at first instance may be permitted at the discretion of the appellate court, but only provided no injustice thereby results. In the decision of *Lough Swilly Shellfish Growers v Bradley* [2013] 1 IR 227, O'Donnell J mentioned, at paragraph 8, a spectrum at one end of which there are:

> cases such as those where argument of the point would necessarily involve new evidence, and with a consequent effect on the evidence already given (as *in K.D. (Otherwise C.) v. M.C.* [19 85] I.R. 697 for example); or where a party seeks to make an argument which was actually abandoned in the High Court (as in *Movie News Ltd. v. Galway County Council* (Unreported, Supreme Court, 25th July, 1977)); or, for example where a party sought to make an argument which was diametrically opposed to that which had been advanced in the High Court and on the basis of which the High Court case had been argued, and perhaps evidence adduced.

11. These would not be cases where leave would be granted to raise new issues. But at the other end of the spectrum, as he put it:

> lie cases where a new formulation of argument was made in relation to a point advanced in the High Court, or where new materials were submitted, or perhaps where a new legal argument was sought to be advanced which was closely related to arguments already made in the High Court, or a refinement of them, and which was not in any way dependent upon the evidence adduced. In such cases, while a court might impose terms as to costs, the court nevertheless retains the power in appropriate cases to permit the argument to be made.

12. Thus in *Koger Inc. & Anor v James O'Donnell & Ors* [2013] IESC 28, this Court held that the discretion to enable a new issue would not be exercised in favour of a party where the

new point sought to be raised was completely opposed to the points raised during the trial in the High Court. Another example was *Ambrose v Shevlin*. [2015] IESC 10 where new evidence and a new issue relating to a flooding incident was not allowed. On the other side of the balance was *Cussens & Ors v Brosnan (Inspector of Taxes)* [2015] IESC 48 where the proposed new point was so closely related to the arguments advanced in the High Court as to be properly regarded as arising from the questions posed in the case stated in the Circuit Court.

13. The issue of when new points ought to be entertained on appeal was addressed by the Supreme Court in *ACC Bank plc v Lynn* [2015] IESC 100 in the context of the interests of justice. This concerned a new argument about sale in lieu of partition. In considering whether to allow the new point, the Supreme Court noted that any discretion to allow a new point to be argued on appeal "is to be exercised in order to pursue the aim of fundamental fairness within the limitations of the constitutional structure." In that regard, "there is a continuum between lack of merit in bringing in fresh points on appeal simply because they have occurred to the parties and their lawyers late in the day and cases where the discretion should favour the appellant. In exercising that discretion, the fundamental question is whether the balance of fairness lies." See the judgment of Charleton J at paragraph 9.

14. In the present case, it is to be noted that in the first paragraph of the notice seeking judicial review, of 27 January 2017, it is pleaded on behalf of ER that the Director of Public Prosecutions had "failed to vindicate the applicant's constitutional rights to a fair trial in exercising improper pressure on [ER] during the course of the trial prior to the entry of the plea of guilty" and, furthermore, had "contravened the applicant's fair trial rights under Article 6 of the European Convention on Human Rights" and, had "acted in breach of fair procedures and constitutional justice in refusing" her "request to vacate her plea of guilty". It was asserted, "justice and fair procedures require the orders sought" to be vacated; thus referring to the claim of certiorari against Judge Teehan's refusal to allow the plea of guilty to be changed. The trial judge, in turn, was claimed to have "acted unreasonably and breached the rules of natural and constitutional justice and fundamental fairness of procedure and breached the European Convention on Human Rights." The statement of opposition, of 30 March 2017, denies that there has been any failure to vindicate constitutional rights and also claims no breach of the Constitution or of fair procedures. By way of a factual assertion, the document asserts that since ER "had over 24 hours to consider whether she wished to enter that plea", her formal admission of guilt before the Circuit Court was a voluntary action by her.

15. It would have been easy for the notice of opposition to simply state: judicial review does not lie against the impugned decision or, barring exceptional circumstances, any ruling made in the course of the trial, an appeal is the only available remedy in this instance. That was not done until the Director of Public Prosecutions appealed the High Court decision in favour of ER. In paragraph 19 of submissions lodged on 31 May 2018, it is explicitly stated that judicial review does not lie for rulings made during a criminal trial.

16. In terms of the balance of the discretion to allow this point to be argued on appeal, that clearly weighs in favour of the Director of Public Prosecutions. It may be that an obvious point was overlooked in the context of the emphasis placed by the applicant ER on the factual circumstances and it may be, too, that the paucity of evidence due to the non-withdrawal of the lawyers acting for her on the application to revoke her plea of guilty placed too much focus on her personal state of mind.

17. As will emerge from the section which follows, an accused in a criminal trial who is advised to forego an appeal and instead pursue a judicial review, faces a burden different to an argument as to right and wrong. Judicial review is not about the correctness of decision-making, nor is it the substitution by one court of a legal analysis or factual decision for that of the court under scrutiny. On judicial review, where successful, the High Court returns the administrative or judicial decision to the original source and, implicitly in the judgment overturning the impugned decision, requires that it be redone in accordance with jurisdiction or that fundamentally fair procedures be followed. If the decision-maker has no jurisdiction, that may be the end of the matter but the High Court never acts as if a Circuit Court case were being reconsidered through a rehearing, which is a circumstance where a court will be entitled to substitute its own decision. Judicial review is about process, jurisdiction and adherence to a basic level of sound procedures. It is not a reanalysis.

18. Thus, as the pleadings in this case make clear, and as discussed in the next section of this judgment, incumbent on the applicant ER is the substantial burden of showing not an error of fact or a decision of law made in the course of the hearing that might be incorrect, but the deprivation of a right. For the Director of Public Prosecutions to introduce into that existing equation required to be met by an applicant for this relief in the High Court, that judicial review does not lie in the context of decisions validly made by the trial judge in the course of a criminal trial is essentially a development of the burden which ER already undertook in pursuing judicial review as a remedy.

Judicial review of a criminal trial ruling

19. As mentioned earlier, a trial in the Circuit Criminal Court commences with the accused pleading to the indictment and ends when the accused is either acquitted or is sentenced on foot of a finding of guilty. This judicial review was commenced before Judge Teehan sentenced ER. Hence, it is an attempt to seek that the High Court quash a ruling made in the course of a criminal trial. It may be argued that what is sought to be invoked on behalf of ER only involves the ample power of the High Court, invested as that court is by virtue of Article 34.3.1º "with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal." That the High Court has such power is beyond question. Equally certain is that the High Court does not exercise that many functions, such as analysing a tax return or granting planning permission. These are not within the scope of questions of law or fact tried in court but the jurisdiction and basic fairness of the way such decisions are arrived at are within the scope of judicial review. As regards any devolution of that wide jurisdiction, to the Circuit Court in this instance, the High Court exists within the context of the structure of the Constitution to

ensure the proper application of law and the respect for the dignity of the individual imported into criminal procedure by Article 38.1. The apparent contradiction between the amplitude of the High Court's jurisdiction and its ceding to other courts is resolved by the supervisory authority of the High Court over all other judicial tribunals. As Henchy J explained in *Tormey v Ireland* [1985] IR 289 at 296:

> If there has not been a statutory devolution of jurisdiction on a local and limited basis to a court such as the District Court or the Circuit Court, the High Court will hear and determine the matter question, without any qualitative or quantitative limitation of jurisdiction. On the other hand, if there has been such a devolution on an exclusive basis, the High Court will not hear and determine the matter or question, but it's full jurisdiction is there to be invoked – in proceedings such as *habeas corpus, certiorari, prohibition, mandamus, quo warranto*, injunction or declaratory action – so as to ensure that the hearing and determination will be in accordance with law. Save to the extent required by the terms of the Constitution itself, no justiciable matter or question may be excluded from the range of the original jurisdiction of the High Court.

20. Articles 34-38 of The Constitution provide for both the institution of courts, the manner of their administration, the appointment of judges, the standards to which they must abide by way of solemn oath and the structure of appeals. While Article 40.4 guarantees that no citizen would be deprived of "personal liberty save in accordance with law" and sets up a remedy whereby the High Court may supervise and make orders over any form of imprisonment to ensure that it is lawful, nonetheless that remedy is not available to bypass the avenue of appeal. The appropriate remedy is the structure of statutory and constitutional appeals where it is sought to be argued that an error of law has led to a court order; *Roche (Dumbrell) v Governor of Cloverhill Prison* [2014] IESC 53. Thus in *FX v The Clinical Director of the Central Mental Hospital* [2014] IESC 1, at issue was a two part hearing on a finding of unfitness to plead being made by the Central Criminal Court. At paragraphs 66 Denham CJ stated, that any "order of the High Court which is good on its face should not be subject to an inquiry under Article 40.4.2 unless there has been some fundamental denial of justice." As a matter of principle:

> > the appropriate remedy is an appeal to an appellate court, with, if necessary, an application for priority. Thus, the remedy under Article 40.4.2 may arise where there is a fundamental denial of justice, or a fundamental flaw, such as arose in *The State (O.) v. O'Brien* [1973] 1 I.R. 50, where a juvenile was sentenced to a term of imprisonment which was not open to the Central Criminal Court.

21. The architecture of criminal trials and appeals in this jurisdiction is such that, under the current statutory system, convictions in the District Court are subject to rehearing in the Circuit Court by way of the fresh presentation of the evidence. Hence, the accused may enter into recognisance pending the outcome of the appeal should he or she be convicted in the District Court. In the Circuit Court on appeal, the full evidence is heard again and the conviction is either affirmed or is overturned. Cases commenced on indictment before the Central Criminal Court or Circuit Criminal Court become subject to a final order of

such courts on the accused being sentenced followed by an appeal to the Court of Appeal. Here, the rehearing is based on the transcripts and original exhibits of the trial. If convicted in either of these courts, the accused will be remanded in custody or on bail pending an appeal but subject to an application for bail to the appellate court. Of its nature, a criminal trial is complex with, as this case demonstrates, evidence heard in the absence of the jury and rulings by the trial judge as to: the applicability of legislation designed to assist child witnesses and witnesses with special needs; legal argument; argument and speeches by counsel; a direction by the trial judge to the jury; and ultimately, the verdict. This is not to be diverted into the supervisory jurisdiction of the High Court to ensure adherence to the Constitution and to law being properly invoked. It was not so invoked here.

22. The only case which upheld resort to judicial review during the currency of any criminal trial is that of *Director of Public Prosecutions v Special Criminal Court* [1999] 1 IR 60. The circumstances of that case demonstrably required a resort to the jurisdiction of the High Court in order to ensure adherence to established law. The Director of Public Prosecutions successfully asked the High Court to overturn a radical departure by the Special Criminal Court. This was of such a nature that a ruling of that court in the course of trial was quashed on judicial review. The underlying criminal prosecution for murder concerned the death of a journalist who was shot several times in June 1996 while driving her car on the public highway from Naas to Dublin. Police forces in the democratic world are open to confidential communications when seeking to solve crime. Some such communications were received by the investigating team into this murder. This was, in the ordinary way, disclosed by the prosecution to the defence. Argument took place before the Special Criminal Court as to the proper approach to that confidential material. The prosecution stated that it was subject to informer privilege, which was not that of the State, but that of the individual or individuals involved. Were these confidences to be breached, the prosecution would be obliged to offer no evidence since the State had no entitlement to waive privilege, but was instead obliged to uphold it and to vindicate the right to life. The threat to life from the criminal gang was apparent from their actions in the murder and knowledge of any disclosure of their activities put the confidential communicants in danger. The defence argument was that they should see the material, but that the accused, Paul Ward, should not. This unprecedented submission was accepted by the Special Criminal Court, ordering that the material should be handed over for scrutiny by the accused's barristers and solicitor and then be the subject of further argument. Despite this being a ruling in the course of a criminal trial, the Director of Public Prosecutions immediately applied to the High Court. Carney J, giving judgement at first instance, specifically noted how rare it was that any such application should be made and touched on the circumstances whereby, nonetheless, it might be justified. At page 69-70 of the report he stated:

> It is unique in my experience that relief of this nature is being sought during the currency of a trial which remains at hearing. It cannot be emphasised strongly enough that an expedition to the judicial review court is not to be regarded as an option where an adverse ruling is encountered in the course of a criminal trial. I am

> undertaking this application for judicial review during the currency of the trial because a need has presented itself to urgently balance the hierarchy of constitutional rights including, in particular, the right to life. In the overwhelming majority of cases it would be appropriate that any question of judicial review be left over until after the conclusion of the trial. In the instant case, such an approach would have led the Director of Public Prosecutions to abort the trial and the people of Ireland would have been deprived of their right to have a particularly heinous crime prosecuted to a verdict of either conviction or acquittal.

23. Giving the unanimous judgement of the Supreme Court, on the unsuccessful appeal by the accused, O'Flaherty J endorsed "everything that Carney J said about the undesirability of people repairing to the High Court for judicial review in relation to criminal trials at any stage (and certainly not during the currency)" but accepted the utterly exceptional nature of the circumstances leading to that particular application. The State had a duty to vindicate the right to life of any confidential informant and, further, the privilege invoked was not that of the State but was instead that of any person communicating on a confidential basis in an attempt to assist the solving of a crime. The extraordinary ruling of the Special Criminal Court to share documents with an accused's advisors but not the accused undermined the confidence that was required to exist between an accused person and his or her legal representatives, leaving a situation where the accused was no longer instructing them since they were in possession of information which they could not discuss. At page 88-89, O'Flaherty J stated:

> Counsel for the notice party submitted that judicial review did not lie in this case. The notice party had been arraigned and it was submitted that the trial had started and reliance is placed on the dictum of Ó Dálaigh C.J. in *The People (Attorney General) v McGlynn* [1967] I.R. 232 at p. 239:-
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> > "The nature of a criminal trial by jury is such that, once it starts, it continues right through until discharge or verdict. It has the unity and continuity of a play. It is something unknown to the criminal law for a jury to be recessed in the middle of a trial for months on end, and it would require clear words to authorise such an unusual alteration in the course of a criminal trial by jury."

While this statement applies to criminal trials with a jury, it should be regarded as a precept that should, as far as practicable, be followed in respect of all criminal trials subject to the jurisdiction of courts to grant cases stated on occasion … but, in the exceptional circumstances of this case, and having regard to the importance that there should be a definitive ruling on this matter of informer privilege, it was right that Carney J. should have entertained the application at first instance and for us to hear at on appeal.

24. Those principles have not been modified in any subsequent case. For ER it is argued on this appeal that the circumstances here fit within the category of cases where judicial review should be available. Invoked is the statement by Henchy J in *State (Holland) v Kennedy* [1977] IR 193 at 201 that for "any one of the number of reasons" a court may

exceed jurisdiction "and thereby make its decision liable to be quashed" including that the court might "fall into unconstitutionality, or it may breach the requirements of natural justice, or it may fail to stay within the bounds of the jurisdiction conferred on it by statute." That is not, however, as this case demonstrates, to be taken in isolation from the constitutional architecture which is its backdrop. That principle is exemplified by the decision of Kearns P in *Freeman v Director of Public Prosecutions* [2014] IEHC 68 which emphasised the continuity of a criminal trial. That case is authority also to the idea that what is involved in a decision to accept or to reject a change of plea by an accused is a matter for the discretion of the trial judge. In reality, nothing in this case comes close to the exceptional circumstances exempted from the general prohibition on taking judicial review in the course of a criminal trial exemplified by the *Special Criminal Court* case. Therefore, judicial review is not appropriate. That remedy having been chosen, and in deference to the judgments of the High Court and the arguments presented on appeal, it is, nonetheless, necessary to comment on the other points put forward.

Plea intervention

25. On behalf of ER it is asserted that both the intervention by the trial judge and his subsequent refusal to allow her to revert her plea to one of not guilty were legally wrong.

26. In the neighbouring jurisdiction, it is made clear that judges in the course of a trial should not intervene to spontaneously give an indication of sentence. Any such indication, however, may be made where a request for such an indication is made by counsel for the accused. In the earliest of the significant cases on plea bargaining, *R v Turner* [1970] 2 All ER 281, the Court of Appeal approved of the practice whereby counsel for the defence privately spoke to the trial judge in chambers in order to get an indication as to sentence. According to Lord Parker CJ: "There must be freedom of access between counsel and judge." As to any safeguard to that, he simply indicated: "Any discussion, however, which takes place must be between the judge and both counsel for the defence and counsel for the prosecution." He instanced a circumstance where such secret communication might justifiably take place as including one where the accused has cancer and has little time left, thus revealing a strong mitigating factor in sentencing. Another instance would be, he said, discussions on the propriety of accepting a plea to a lesser count or lesser included offence of a count in the indictment. Even still, "justice must be administered in open court." An article not cited in submissions for ER was that by Charleton and McDermott, Constitutional Implications of Plea Bargaining [2000] The Bar Review 476, and the cases cited therein, where the *Turner* guidelines are dismissed as inconsistent with the requirement in Article 34.1 that justice should be "save in such special and limited cases as may be prescribed by law … administered in public." Among the objections listed of counsel repairing to a judge's chambers, away from the public scrutiny of open court, with the media acting as the watchdog for the general public, were the danger of inadequate information being given the judge, inhibition on the judge imposing a more severe sentence, the "incorrect atmosphere" of chambers in contrast to that in open court, misunderstanding among the parties, and possible pressure on the accused.

27. In *R v Goodyear* [2005] 2 Cr App R 20 the diffuse indication in *Turner* was solidified into a set of precepts which is now the subject of guidance by the Judicial College of England and Wales. Briefly: counsel should not repair to chambers for an indication of sentence; judges should only give an indication of sentence as of that stage of the trial when it is requested and on the basis of the judge's then knowledge of the evidence, and in open court; judges should not take the initiative but should only respond to an invitation by counsel; this should not happen where facts are uncertain; and an uninvited indication by the judge must be assessed as whether it created inappropriate additional pressure which improperly narrowed the freedom of choice of the accused; *R v Nightingale* [2013] 2 Cr App R 7 and see Archbold, Criminal Pleading, Evidence and Practice (2020 edition) 5A 111-128. Other jurisdictions take the view that asking the trial judge in open court for any indication of sentence is wrong; *R v Marshall* [1981] VR 725, *R v Dubien* (1982) 32 CCC (2d) 97.

28. Commenting on any supposed agreement on sentence through the prosecution having the power to limit sentence or by resort to the judge in chambers, Charleton and McDermott stated:

> It would be wrong … to move from a system where the judge after an open hearing has that responsibility, and from a system where it is the job of lawyers to estimate what the sentence will be, to a situation where the prosecution and defence can sit down together and knock out a bargain whereby the maximum sentence will be limited to a particular number of years, or to a particular tariff on a basis which is again private and which lacks the fundamental safeguard of transparency. … Plea bargaining has no constitutionally permissible place in our system of law.

29. In *The People (DPP) v Heeney* [2001] 1 IR 736 the dangers of private discussions in chambers with a judge with a view to an indication of sentence were exemplified. Counsel for the defence had asked for, and had regrettably been granted, a private interview with a judge of the Circuit Criminal Court with a view to discerning the sentence that would later be imposed in open court. The case involved sexual violence against six victims who were then young girls. Keane CJ, having referred to the Constitution at 741, quoted with approval the statement of Lord Scarman, which pre-dated *Turner*, in *Attorney General's Reference No. 40 of 1997, Leslie Atkinson* (1978) 67 Cr App R 200 at 202, that "in this sensitive area, the appearance of justice is part of the substance of justice and it will not do if a prisoner or the general public derive the impression that it is possible, either openly in a pre-trial review … or by private discussion between counsel and judge, to achieve a bargain with the court."

30. At issue in that appeal from the Court of Criminal Appeal was whether counsel for the prosecution ought to intervene while the judge and defence counsel were having a private discussion as to the likely sentence and state that any such agreement was subject to the Director of Public Prosecutions appealing any unduly lenient sentence under s 2 of the Criminal Justice Act 1993. Statutory power of appeal could not be fettered by the intrusion of any such procedural requirement. What Keane CJ made clear in that

unanimous decision of the Supreme Court was that there could be "no question … of any form of bargain being entered into in private which would determine in advance the sentence to be imposed by the court." Discussions in private as to sentence were "undesirable" and the practice had "properly been discontinued by the Director of Public Prosecutions."

31. What occurred during the trial of ER was, on all of the submissions before this Court, unprompted by any advance discussion with Judge Teehan. Instead, what seems likely is that considerations of humanity as to the strain on the very young victim of extreme violence led him to make a spontaneous intervention. That intervention was undesirable. It was instead for the trial judge to exercise control over the tone and length of cross-examination to ensure that while the accused exercised their entitlement to test the child's evidence, this would be done with dignity and within an appropriate, and if necessary, limited time frame.

32. This was not a case, however, where Judge Teehan was the decider of fact. Hence, his intervention would not have set up any feeling in the mind of the accused that the judge had already formed a view that he or she was guilty. Rather, it was an error for him to have mentioned the matter at all. Whether in open court, or worse still, in the secrecy of chambers, discussions with the court as to sentence have no place in the constitutional order of a trial in due course of law under Article 38.1 of the Constitution.

Plea of guilty

33. This does not mean that the plea of guilty entered by the accused was wrong. An inducement from the trial judge was not what was involved here. Rather, it was the provision of information. That indication of sentence, furthermore, clashed markedly with the clearly available precedents as to the appropriate sentence in such serious assault cases *The People (DPP) v FitzGibbon* [2014] 2 ILRM 116. Even if the intervention by Judge Teehan is to be considered in any way as an influence on the accused, the prosecution, perhaps influenced by the decision in *DPP v Heeney*, was very quick to disavow any impression that no right of appeal against an unduly lenient sentence would not be exercised. ER was clearly aware that no matter what the trial judge said, he did not have the last say but rather that the Court of Appeal had the power to review and to increase any sentence. Thus, despite any intervention by the trial judge, ER, as the accused would have been well aware that the trial judge did not any ultimate authority on what the sentence would be. Further, as is well known to those with legal advice, as ER had, indications which are incorrect are subject to being corrected. Here the transcript discloses that the defence clearly stated that the accused, ER, had been advised of the entitlement of the prosecution to appeal the sentence. The effect of a statement is subject to the advice following from it. In *The People (DPP) v Buckley* [1990] 1 IR 14 Finlay CJ stated the rule as to inducements leading to confessions in custody in terms of a warning to the trial judge that he or she should have regard to the possibility that a past illegal inducement might still be operating on the mind of the accused at a later stage.

34. Both legally and ethically, counsel for an accused are not entitled to indicate a plea of guilty unless that plea is, as Hardiman J stated in *The People (DPP) v Hughes* [2012]

IECCA 69, a statement that the accused committed the offence; see para 27. Pleading guilty means just that: the accused admits the offence. In our system that occurs both in the context of legal advice and within a matrix of facts as alleged by the prosecution in the book of evidence served well prior to trial. By pleading guilty the accused accepts responsibility for the facts and mental element relevant to the count on the indictment which he or she admits.

Withdrawal of lawyers for the accused

35. Where an accused wishes to withdraw from a plea of guilty, the trial judge has a discretion as to whether to accept that the plea should revert to not guilty. While Kearns J in *The People (DPP) v Redmond* [2006] 3 IR 188 at 217 stated that a judge "should not intervene to set aside a guilty plea unless there are quite exceptional circumstances arising in the particular case", once a plea of guilty is entered, before it may be changed the accused bears the burden of demonstrating undue pressure. Given the discretionary nature of the trial judge's jurisdiction in allowing an accused to resile from a plea of guilty, overturning such a decision requires clear evidence that an impermissible degree of pressure was exerted over the accused; *Dunne v McMahon* [2007] 4 IR 471 at 479-80.

36. Furthermore, what is required on an application to change a plea is complete evidence as to the circumstances allegedly bearing on an accused. The entry of a plea of guilty is not to be taken lightly. To enter a plea and then, as in this case, seek to change it a month later, completely disrupts the course of a criminal trial and undermines its unitary nature. Witnesses will be sent away, the victim may have some sense of closure, and the scarce time of the court which could have been used on completing the trial will be otherwise used up. A plea of guilty is a very serious matter. Changing a plea is at the discretion of the court and should involve hearing all the relevant evidence. Therefore, any solicitor or barrister representing and advising the accused should immediately withdraw once the accused seeks to go back on his or her formal admission of guilt. That leaves their evidence available to the accused who is not obliged to waive legal professional privilege but who thereby is given that option. The trial court will then have a proper view of the circumstances. That did not happen in this case and it should have.

37. Hence, it is clear that an application of such moment, necessarily involving the accused claiming pressure or wrong advice, as opposed to pleading guilty in pursuit of a strategy of disruption which is itself contrary to good order and Article 38.1 of the Constitution, should involve at least the entitlement of an accused to waive legal professional privilege in favour of the presentation of the advice which the accused received. Counsel and solicitors faced with a request by their client to go back on their guilty plea should thus immediately withdraw and make their evidence available to the accused and the accused's fresh advisors. In that regard the separate concurring judgment of O'Malley J clearly states the importance of that approach.

38. Furthermore, the evidence on the application made the subject of this judicial review, as the trial judge assessed it, was unconvincing in these circumstances. Even were Judge Teehan not entitled to come to the view which he took that the plea of guilty had been voluntarily entered, which he was, what was presented to him in the context of such a

serious application was an incomplete aspect of a decision that a judge has every entitlement to fully enquire into.

Result

39. While the intervention by the trial judge should not have been made, the plea of guilty was made on reflection, with the benefit of legal advice, and in the context of a prosecution warning that any sentence was subject to appeal by the Director of Public Prosecutions and review by the Court of Appeal.

40. Plea bargaining has no place in our constitutional architecture, but this indication did not amount to any seeking of a bargain from a court as to sentence. The indication was made incorrectly but within jurisdiction. The decision to disallow the accused ER to change her plea was one open to the trial judge, and cannot be disturbed. Since only circumstances of fundamental denial of the entitlement of the accused and the prosecution to have a criminal trial in due course of law justify resort to judicial review, the prosecution were entitled to argue the availability of that remedy on this appeal, despite that not having been raised in the High Court. Whether then argued or not, as applicant for judicial review, ER took on the burden of showing a deprivation of the constitutional structure of her trial. This has failed.

41. In disallowing a change of plea, the trial judge was faced with limited evidence, her lawyers not having withdrawn. There is nothing to suggest that Judge Teehan approached that application incorrectly, much less that his approach was a fundamental denial of justice as guaranteed by the Constitution.