THE SUPREME COURT

[Supreme Court Appeal No: 67/2018]

Clarke C.J.
McKechnie J.
Charleton J.
O'Malley J.
Irvine J.

BETWEEN:

The People (At the Suit of the Director of Public Prosecutions)

PROSECUTOR/APPELLANT

-AND-

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ACCUSED/RESPONDENT

JUDGMENT of Ms. Justice Iseult O'Malley delivered on the 26th day of February 2020.

1. The substantive judgment in this appeal was delivered on the 6th December 2019 by Charleton J., with whom all members of the Court agreed (see *Director of Public Prosecutions v. F.E.* [2019] IESC 85). The key finding was that the Court of Appeal had erred in its approach to the sentence imposed on the respondent, with that approach being to examine the rape offence in isolation from the surrounding circumstances. The parties have now made further submissions as to the order that should be made having regard to the judgment.

2. I agree with the order proposed by Charleton J. and his reasons therefor. I deliver this judgment principally in order to give my views on, firstly, the jurisdictional issue and, secondly, on the question of the appropriate approach of this Court where it finds an error in sentence in an individual case. The following summary of the issues raised concentrates, therefore, on the matters relevant to these aspects.

3. The respondent's principal submission is that the order of the Court of Appeal should be left in place, despite the finding of error. The first ground put forward is that the Court has no jurisdiction to interfere with the sentence in the absence of any express statutory provision. The only existing statutory framework for prosecution appeals to this Court in relation to sentence is that set out in s.29 of the Courts of Justice Act 1924, and that provides only for a "without prejudice" appeal. *The People (DPP) v. Quilligan (No.2)* [1989] I.R. 46 is relied upon in support of the proposition that the absence of statutory parameters for a "with prejudice" appeal means that the Court cannot arrogate to itself such a jurisdiction. Counsel contends that this analysis is supported by the judgments of this Court in *Director of Public Prosecutions v. J.C.* [2015] IESC 31 and *Director of Public Prosecutions v. J.C. (No.2)* [2016] IESC 50, arguing that the Court made it clear that the jurisdiction to order a re-trial in that case would not have existed absent the relevant statutory provision.

4. A query is raised as to what principles would apply in the event that the Court did propose to quash the order and re-sentence the respondent. The alternatives open, it is suggested, would be to approach the issue on the basis of the criteria for an "undue leniency" appeal, or on the basis that an error of principle was sufficient to justify variation. Counsel suggests that this is "dangerous territory" for the Court in the absence of statutory criteria.

5. The final submission made on behalf of the respondent, to be considered in the event that the Court finds that it has jurisdiction to proceed, is in support of the sentence as varied by the Court of Appeal as being appropriate in the circumstances. Evidence has been furnished as to the respondent's conduct in custody. The Court is urged to apply what appears to be described by practitioners as a "disappointment" discount – this term refers to the practice of the Court of Appeal of acknowledging that, where the Director succeeds in an "undue leniency" review of sentence, an increase in the term to be served will inevitably cause extra stress and upset to the accused.

The statutory background

6. Given the thrust of the respondent's submissions it is helpful to consider, firstly, the existing statutory framework for sentence appeals by the prosecution.

7. For many decades the only statutory provision of this nature was s.29 of the Courts of Justice Act 1924. The section has had a complex and somewhat unusual history, and was extensively amended in the current century. As it now stands, (as amended by way of substitution by s.22 of the Criminal Justice Act 2006, by s.59 of the Criminal Justice Act 2007 and by s.31 of the Criminal Procedure Act 2010) it provides, in summary, for an appeal from the determination of "any appeal" by the Court of Criminal Appeal to the Supreme Court. Clearly, therefore, it covers both conviction and sentence appeals. The right of appeal is exercisable only on foot of a certificate granted by either that court, the Attorney General or the Director of Public Prosecutions that the decision involved a point of law of exceptional public importance and that it is desirable in the public interest that there should be an appeal. The certificate can be given for the benefit of the person who was the subject of the appeal or matter determined by the Court of Criminal Appeal, but the Attorney General or the Director of Public Prosecutions can also give such a certificate for the purposes of an appeal on their own behalf. In this latter case, by virtue of s.29(3), the appeal is to be without prejudice to the decision in favour of the accused person. The accused can be heard in such an appeal if he or she wishes, with the benefit of legal aid, but in any event the Supreme Court can assign counsel to argue the case.

8. The prosecution authorities were given a right to take "with prejudice" appeals against sentence, in cases tried on indictment, with the introduction of a right to apply for a review of sentence on grounds of "undue leniency" by s.2 of the Criminal Justice Act 1993. The initial appeal was from the court of trial to the Court of Criminal Appeal. Section 3 of the Act provided for an appeal to the Supreme Court on foot of a certificate from the Court of Criminal Appeal, the Attorney General or the Director that the decision involved a point of law of exceptional public importance and that it was desirable in the

public interest that an appeal should be taken. Section 3 was repealed by the Court of Appeal Act 2014, with effect from the 28th October 2014.

9. Section 29 of the Act of 1924 has been legislatively earmarked for repeal on two occasions. The first was the Courts and Courts Officers Act 1995, which contemplated the transfer of the functions of the Court of Criminal Appeal to the Supreme Court. However, the relevant provisions were never brought into operation.

10. The section is also scheduled for repeal in the Court of Appeal Act 2014. The establishment of the Court of Appeal, as a result of the 33rd Amendment of the Constitution, required the amendment or repeal of various items of legislation pertaining to, *inter alia*, the Court of Criminal Appeal. Section 73 of the Act of 2014 repealed a number of such measures, as listed in the First Schedule to the Act. This repeal provision has been brought into force in part only, in that some of the scheduled items have been repealed but others have not. Section 29 of the Act of 1924 was one of six measures intended to be repealed by virtue of S.I. 259/2018, which appointed the 31st August 2018 as the date on which the provisions of the Act of 2014 relating to the abolition of the Court of Criminal Appeal should come into operation. Section 3 of the Courts (Establishment and Constitution) Act 1961 (which established the Court of Criminal Appeal for the second time) was also to be repealed. However, the Minister revoked the order some weeks before the specified date, in S.I. 313/2018.

11. The case made by the respondent is that s.29 remains in force and is the only statutory provision dealing with the jurisdiction of this Court in determining a sentence appeal. It is argued that the Court has no inherent power to alter a sentence to the detriment of the accused. On that basis, it is submitted, on the authority of *Quilligan (No.2),* that this Court lacks jurisdiction to interfere with the order made by the Court of Appeal, despite finding that that Court erred in its reasoning.

DPP v Quilligan (No.2)

12. To put this decision in context it is necessary to give a brief history of the prior relevant case-law. In *The State (Burke) v. Lennon* [1940] I.R. 136 the then Supreme Court held that under the terms of Article 34 as it then stood there could be no appeal against the granting of an absolute order of habeas corpus. In so holding, the Court followed the reasoning of the House of Lords in *Cox v. Hakes* [1890] 15 A.C. 506, which had held that the deeply-rooted common law rule against an appeal in such cases could not be destroyed by the general words, used in the Judicature Act of 1873, conferring power to "hear and determine appeals from any judgment or order". In essence, the majority of the Supreme Court applied the same principle of interpretation to the reference in Article 34 to "all decisions of the High Court". (For the sake of historical accuracy, it should perhaps be noted that it was pointed out in *Sullivan v. Robinson* [1954] I.R. 161 that Article 34 did not in fact apply pending the establishment of the courts provided for under the Constitution of 1937 – this did not occur until 1961.)

13. In *The State (Browne) v Feran* [1967] I.R. 147 the Court came to the opposite conclusion to that in *State (Burke) v Lennon* and held that it did indeed have jurisdiction to hear an appeal against the making of an absolute order of *habeas corpus*. All members of the Court agreed with Walsh J. that the canons of construction applicable to a statute were not equally applicable to the construction of a written Constitution.

> *"In the construction of a Constitution words, which in their ordinary meaning import inclusion or exclusion, cannot be given a meaning other than their ordinary literal meaning save where the authority for so doing can be found within the Constitution itself."*

14. In *Attorney General v. Conmey* [1975] I.R. 341 a person convicted in the Central Criminal Court had unsuccessfully appealed to the Court of Criminal Appeal. Having failed to obtain a certificate for the purposes of a further appeal to the Supreme Court, he then applied for an extension of time within which to lodge an appeal against the conviction in the Supreme Court. O'Higgins C.J. (with the agreement of Walsh J.) expressed the view that there could in some cases be a direct right of appeal from the Central Criminal Court (that being the title of the High Court when exercising its criminal jurisdiction) to the Supreme Court. However, on the facts of the case the Court held that the appellant had exhausted his remedies in appealing to the Court of Criminal Appeal.

15. In *The People v. O'Shea* [1982] I.R. 384 a majority of the Court held (in ruling on a preliminary issue) that the Court had jurisdiction to hear a prosecution appeal against a directed verdict of acquittal in the Central Criminal Court. Any pre-existing common law rule to the contrary was considered to be inconsistent with the scope of the appellate jurisdiction conferred on the Supreme Court by Article 34. The majority judgments were delivered by O'Higgins C.J. and Walsh J. Hederman J. agreed with them insofar as the preliminary issue of jurisdiction was concerned, but expressly reserved his position on the "important matters of substance and procedure" that could only be decided after hearing the substantive appeal. (As it happened, all members of the Court subsequently agreed that the trial judge had acted correctly, and no further issue arose.)

16. Finlay P. dissented on the jurisdictional issue, taking the view that the immunity of a verdict of "Not Guilty" was one of the essential ingredients of the right to a jury trial guaranteed by Article 38.5 and that this took precedence over the general right of appeal from the High Court to the Supreme Court. Henchy J. also dissented. He did not accept that it was appropriate to adopt a literal interpretation of Article 34.4.3º, given that many of the decisions routinely made in the High Court were generally acknowledged as not being subject to appeal, or indeed as intrinsically unappealable. The overall principle was seen by Henchy J. as being that appeals would not be entertained in certain circumstances because they would be inconsistent with the due administration of justice.

17. It is noteworthy, for present purposes, that at p. 428 of the report Henchy J. said:

> *"It is, in my understanding, a fundamental of our jurisprudence that a right of appeal to a particular court requires, at the least, that there be vested in that court,*

by the Constitution or by statute, a right to vary in whole or in part the decision of the lower court at the instance of an appellant who is, in the legal sense, aggrieved by that decision."

18. The point, as he developed it, was that to permit an appeal to be entertained was to concede that it could be successful. However, if a successful appeal would entail breach of a particular constitutional right, then permitting the appeal to be brought would be a departure from the principle of harmonious interpretation of the Constitution. Henchy J. made it clear that, like Finlay P., he saw the immunity of a jury verdict of acquittal as being constitutionally guaranteed.

19. The decision of the majority in *O'Shea* established that there was a jurisdiction to hear a prosecution appeal against an acquittal in the Central Criminal Court, and that issue was not reopened when the Court came to deal with *The People (DPP) v. Quilligan* [1986] I.R. 495. In that case the Court heard and unanimously allowed an appeal by the Director against a directed acquittal. The verdict was ordered to be set aside. However, the next question, which was the subject of a separate hearing, was whether a retrial should be ordered. The prosecution contended that the power to do so could be found either in O.87 the Rules of the Superior Courts 1986 (which specifically provided for an order for a new trial after an appeal to the Supreme Court from the Central Criminal Court), or in the inherent jurisdiction of the Court to make such orders as were necessary after exercising its appellate jurisdiction by setting aside an erroneous decision. This issue was the subject of the judgments reported in *Quilligan (No.2)*.

20. The Court divided on the question. Walsh and McCarthy J.J. would have ordered a retrial. Henchy J. (with whom Griffin J. agreed) considered that the Court had no jurisdiction to make such an order. It is therefore necessary to consider the reasoning of the judgments in some detail, but I intend focussing only on those aspects relevant to the instant case.

21. In summary, Henchy J. concluded as follows.

    (i) Order 87 of the 1986 Rules of the Superior Courts could not avail the prosecution because if it were to be properly construed as permitting an order for a retrial after an acquittal, it would go beyond matters of pleading, practice and procedure and would be *ultra vires*. In any event the 1986 rules could not apply as they had come into force after the acquittal of the accused, and the previous version (dating from 1962) had not dealt with appeals taken directly from the Central Criminal Court to the Supreme Court.

    (ii) Whether the jurisdiction to hear an appeal against an acquittal derived from the Constitution or not, it did not necessarily follow that there was an ancillary jurisdiction to order a retrial. The Court of Criminal Appeal, established in 1924, did not have that power until 1928 when it was specifically conferred by statute. Even then, the Supreme Court had held (in *The People (Attorney General) v. Griffin* [1974] I.R. 416) that it could be exercised only in certain circumstances. Henchy J. concluded that it followed that the jurisdiction to hear an appeal did not necessarily

carry with it an ancillary jurisdiction to order a retrial, and that such a jurisdiction would have to be conferred by statute.

(iii) If legislation were to provide for such a jurisdiction, its constitutionality would be questionable on grounds of equality (if it applied only to cases tried in the Central Criminal Court), or on grounds of incompatibility with fundamental fairness or the constitutional guarantee of a trial by jury. It would have the effect of unconstitutionally discriminating between different persons acquitted by direction in the Central Criminal Court, and between those acquitted in that Court and those acquitted in the Circuit Criminal Court or the Special Criminal Court.

(iv) The legislature had expressed its will on the issue by providing, in s.34 of the Criminal Procedure Act 1967, for a "without prejudice" appeal on a point of law following an acquittal. This provision would be negatived for practical purposes if the jurisdiction now claimed to exist could be utilised instead. The Court would therefore be unconstitutionally subverting the legislature by exercising it.

(v) The most "compelling and practical" reason for refusing the order was perceived as being the possibility that, if the accused were put on trial again, they could successfully raise a plea of *autrefois acquit*, on the basis that they had been tried and acquitted by a court of competent jurisdiction. The jury had acted within jurisdiction in entering the verdict on the trial judge's direction, and the judge, while erring in law, had not acted without jurisdiction.

(vi) The Supreme Court should not construe its appellate jurisdiction in such a way as to either enlarge or diminish the powers or functions of another court. The High Court was not an inferior court subject to corrective orders such as mandamus, but the order now sought would in effect be such an order.

22. Walsh and McCarthy J.J. reached the opposite conclusion. Taking the above points in turn, their combined views were, in summary, that:

(i) The Court was not creating a new jurisdiction, but exercising one that had been recognised since *Conmey* and *O'Shea*. The Oireachtas had not sought to exercise its power under Article 34 to limit the right the right of appeal, or the consequential results, after those decisions. The 1986 Rules had been made some years after *O'Shea* and made it clear that, as a procedural matter, the Court could order a new trial where it thought it proper.

(ii) The jurisdiction to set aside an erroneous decision in law must necessarily carry with it the necessary competence to ensure that the mistakenly interrupted trial proceedings were brought to a conclusion in accordance with law. It would be inconsistent with the administration of justice enjoined by Article 34 that a court of final appeal, hearing appeals from a court with full original jurisdiction, would not have an ample armoury to ensure that justice was done. In the case of the Court of Criminal Appeal, it had been necessary to provide the power to order a retrial by a

specific statutory provision – that court was a creature of statute and had no jurisdiction save that conferred by statute. The Oireachtas had not chosen to give it a power to quash acquittals. This Court, by contrast, was a creature of the Constitution, with a jurisdiction derived solely from the Constitution, and had the right to entertain appeals from all decisions of the High Court save in the case of such decisions as were excepted by law.

(iii) The right of appeal from the High Court was provided for in the Constitution. An argument based on constitutional equality could not be raised against a provision of the Constitution.

(iv) Section 34 of the Criminal Procedure Act 1967 was a special provision for a case stated procedure, as distinct from an appeal. The argument on this point was seen as similar to one rejected in *Conmey* and *O'Shea*, to the effect that the establishment of the Court of Criminal Appeal deprived the Supreme Court of jurisdiction to hear an appeal against conviction. It had been clearly laid down that any statutory provision purporting to limit or abolish the right of appeal to this Court must be clear and unambiguous. The 1967 Act did not establish such a limit but in fact conferred an extra jurisdiction in addition to the Court's appellate jurisdiction.

(v) The respondents could not claim to have been tried "in accordance with law", since the trial had been stopped by reason of an erroneous interpretation of the law by the trial judge. It had never proceeded to a verdict considered and chosen by the jury.

23. In a very brief judgment, Hederman J. referred to his judgment in *O'Shea* and again stated that he reserved his position on the issue. He agreed with Henchy and Griffin J.J. that a retrial should not be ordered. However, he gave no indication of his reasons for that conclusion, whether by way of agreement with the reasoning of Henchy J. or disagreement with anything said by Walsh J. or McCarthy J. In those circumstances, the *ratio* of the case is difficult to discern.

24. This line of authority comes to an end with *Quilligan (No.2)*. Section 11 of the Criminal Procedure Act 1993 abolished the right of appeal from the Central Criminal Court to the Supreme Court. However that section was, in turn, repealed by the Court of Appeal Act 2014.

Jurisdiction under the Constitution

25. Prior to the 33rd Amendment, Article 34.4.3º of the Constitution provided for the jurisdiction of the Supreme Court in the following terms:

> *The Supreme Court shall, with such exceptions and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court, and shall also have appellate jurisdiction from such decisions of other courts as may be prescribed by law.*

26. It is important to stress here that in accordance with this provision the Oireachtas was clearly entitled to exclude (as well as to regulate) categories of cases from the Court's jurisdiction. The provision for the conferral by law of an appellate jurisdiction is also relevant in this case, with the jurisdiction in respect of appeals from the Court of Criminal Appeal being a clear example. The Court of Criminal Appeal was itself established by statute (originally by s.8 of the Act of 1924, and subsequently under s.3 of the Courts (Establishment and Constitution) Act 1961), rather than by the Constitution, and the appeal jurisdiction and machinery was, similarly, created by law.

27. The 33rd Amendment provided for the establishment of the Court of Appeal. Article 34.4.1º sets out the appellate jurisdiction of that Court in the following terms:

> *4.1º The Court of Appeal shall –*
>
> *i save as otherwise provided by this Article, and*
>
> *ii with such exceptions and subject to such regulations as may be prescribed by law,*
>
> *have appellate jurisdiction from all decisions of the High Court, and shall also have appellate jurisdiction from such other courts as may be prescribed by law.*

28. The reference to the possibility of exceptions and regulations, as prescribed by law, mirrors the previous position relating to the Supreme Court. There is a clear example of the legislative conferral of a further appellate jurisdiction in s.8(3) of the Court of Appeal Act 2014, which provides for the vesting in the Court of Appeal of all jurisdiction which was, immediately before the establishment day, vested in or capable of being exercised by the Court of Criminal Appeal. This was subject only to a transitional provision (s.78) which stipulated that the Court of Criminal Appeal should continue to have jurisdiction in respect of any proceedings that had been initiated and heard, in part or in full, before the establishment day. Thus, although s.3 of the Courts (Establishment and Constitution) Act 1961 has not been repealed, the Court of Criminal Appeal could have no jurisdiction in respect of any matter not coming within this exception. It seems to me that in those circumstances the continued existence of s.29 of the Act of 1924 may be explicable by reference to the possibility that some case dealt with and determined by the Court of Criminal Appeal may yet give rise to an application for a certificate for an appeal to this Court.

29. The 33rd Amendment also altered both the scope of the Supreme Court's jurisdiction and the machinery for its exercise. Article 34.5. deals with appeals to this Court from decisions of the Court of Appeal and the High Court as follows:

> *5.3º The Supreme Court shall, subject to such regulations as may be prescribed by law, have appellate jurisdiction from a decision of the Court of Appeal if the Supreme Court is satisfied that –*
>
> *i the decision involves a matter of general public importance, or*

ii in the interests of justice it is necessary that there be an appeal to the Supreme Court.

5.4º Notwithstanding section 4.1º hereof [i.e. the jurisdiction of the Court of Appeal], the Supreme Court shall, subject to such regulations as may be prescribed by law, have appellate jurisdiction from a decision of the High Court if the Supreme Court is satisfied that there are exceptional circumstances warranting a direct appeal to it, and a precondition for the Supreme Court being so satisfied is the presence of either or both of the following factors:

i the decision involves a matter of general public importance;

ii the interests of justice.

30. There is no longer any reference to the possibility of the creation by the legislature of exceptions to the Court's jurisdiction, or to the possibility that any further jurisdiction could be conferred by law on the Supreme Court, as opposed to the Court of Appeal. Whether, in the circumstances, a certification procedure such as that operated in the past in respect of appeals from the Court of Criminal Appeal should be considered as an exclusion, as regulation, or as the conferral of an additional appellate jurisdiction from the decisions of a court that is not the High Court or the Court of Appeal may be open to question. The right of appeal set out in Article 34 relates only to decisions of those courts, and furthermore is now based on a requirement that this Court be satisfied that certain constitutional criteria are met. However, while these issues may fall to be resolved in the future, they do not require to be addressed in this case.

31. What is certainly clear is that there is no category of decisions, of either the High Court or the Court of Appeal, that may not be appealed to this Court. The key question in every case will be the criteria set out in the Act. Thus, the Court has granted leave to appeal against decisions of the High Court made under statutes that provided that such a decision was to be final and unappealable, or appealable only with a certificate from the court below (see *Pepper Finance v. Cannon* [2020] IESC 2 and *Grace v. An Bórd Pleanála* [2017] IESC 10 for examples dealing with, respectively, Circuit Court appeals and the Planning and Development Act 2000). That situation arises because the Constitution no longer permits the exclusion of any category of case from the appellate jurisdiction of this Court (in contrast to that of the Court of Appeal). Given the terms in which the Constitution has conferred the Court's jurisdiction, legislative intervention has not been necessary to enable such appeals.

Discussion

32. Given the foregoing description of the Court's jurisdiction, I cannot see that the Constitution envisages any category of case in which the Court would have jurisdiction to hear an appeal, and to express a view, but would not have jurisdiction to make an order to put its decision into effect. In my view *Quilligan (No.2)* is not of assistance here. Assuming, for the purposes of the discussion, that Hederman J. favoured the analysis of Henchy J. over that of Walsh and McCarthy J.J. (although not to the point of expressing

agreement with it), nonetheless I do not consider that the analysis can determine the outcome in this case, given the constitutional arrangements now in place.

33. Taking in turn the issues that are relevant in the instant case, the first point is that O.58 of the Rules of the Superior Courts (S.I. 583/2018) is, obviously, directly concerned with the operation of the new jurisdiction post the 33rd Amendment. The questions in *Quilligan (No.2)* as to the applicability of the Rules do not, therefore, arise. Order 58 r. 29 provides that, subject to the provisions of the Constitution and of statute, the Supreme Court has on appeal, and may exercise or perform, all the powers and duties of the court below, and may give any judgment and make any order which ought to have been made, and may make any further or other order as the case requires. It seems to me that, rather than being *ultra vires* as suggested by Henchy J., this provision is entirely consistent with his analysis in O'Shea, quoted above, as to the fundamental characteristics of an appellate jurisdiction in our jurisprudence. The essential point is that the 33rd Amendment did not create an advisory jurisdiction, and the basic task of this Court is to play its part in the administration of justice by determining cases. As O'Donnell J. observed in *McDonagh v. Sunday Newspapers* [2017] IESC 59 (at paragraph 15):

> *"It is important to recall that the purpose of any appeal is not in itself just to decide points of law: it is to decide cases. The reason why a party appeals is to seek an order different from that made by the court below, not merely a different determination as to law, however interesting that might be."*

34. If the Court has jurisdiction to hear an appeal, I think that it follows that it must, as Henchy J. said in *O'Shea*, be able to vary the decision of the lower court at the instance of the party legally aggrieved by it. There is nothing in the terms of the 33rd Amendment to suggest the possibility that the Court might, in some instances, lack that power.

35. Henchy J. felt that, at the very least, legislation would be required to give jurisdiction to order a retrial. I do not believe that the example relied upon by him, in relation to the jurisdiction of the Court of Criminal Appeal to order a retrial, is apposite in the context of the current constitutional regime. The Court of Criminal Appeal, a creature of statute, had been expressly conferred with power to uphold or to quash a conviction. Either result would represent the finding of the Court on the issues presented to it. It was in no sense a necessary consequence of those powers that it should be able to order a retrial where the conviction was quashed. The legislature having made such provision, this Court interpreted it (in *Griffin*) as not being intended to be used as an instrument of harassment, or to allow the prosecution to mend its hand after failing to adduce an essential proof. While couched in terms of statutory interpretation, the ruling could just as well have been expressed in terms of fundamental fairness, or the need to exercise statutory powers in a manner consistent with constitutional rights.

36. The respondent has also cited the judgments in *J.C.*, without pointing to any particular part of any particular judgment. It is submitted that the judgments make it clear that there would have been no jurisdiction to order a retrial without the statutory provisions under consideration. However, that goes almost without saying. The trial under

consideration had taken place in the Circuit Court. Section 23 of the Criminal Procedure Act 2010 permitted the Director to appeal on a point of law to the Supreme Court and the Court could, in certain circumstances, direct a retrial. Without that provision there could not have been an appeal to the Supreme Court in the first place. Its constitutionality was not in issue in the case. It is noteworthy that s.23 has been amended by s.71 of the Court of Appeal Act 2014, and that such a case would now go from the Circuit Court to the Court of Appeal. In addition, the section now acknowledges the constitutional jurisdiction of this Court by providing that there may be an appeal from the Central Criminal Court to the Supreme Court subject to the terms of Article 34.5.4, and an appeal from the Court of Appeal subject to the terms of Article 34.5.3.

37. I think it also worth stressing that in this case the Court is not concerned with a jury verdict, and the special considerations attending a verdict of acquittal (especially where that verdict is on the merits rather than by direction). This appeal relates only to sentence, which is a matter reserved to the trial judge and the appellate courts. In principle, judicial errors are subject to correction by an appellate court exercising lawful jurisdiction.

38. The respondent in the instant case seeks to rely upon the provision of a "without prejudice" appeal in s.29 of the Courts of Justice Act 1924 as exemplifying the legislative will that the Court should not have jurisdiction to increase a sentence in the absence of express legislation to that effect, in the same way that Henchy J. found that the "without prejudice" provision in s.34 of the Criminal Procedure Act 1967 ruled out the possibility that the Constitution conferred a power to order a retrial. To be clear, the application for, and grant of, leave to appeal to this Court was made by the Director in accordance with the constitutional criteria. It was not presented or argued as being governed by s.29. The only potential relevance of the provision lies in the proposition that it exemplifies a constitutional principle that there can be no "with prejudice" sentence appeal in the absence of specific legislative provision.

39. In my view, the omission from the current version of Article 34 of any reference to a possibility that the Oireachtas could legislate to exclude (as opposed to regulate) any class of case from the appellate jurisdiction of the Court means that such exclusion cannot be brought about by implication or inference, any more than it could by express legislative provision. Again, if the Court has jurisdiction to hear an appeal it seems to me to follow that it must have jurisdiction to make such order, subject to the Constitution and any relevant legislation, as is appropriate in the interests of justice.

40. The issue of *autrefois acquit* does not arise in the circumstances, and nor does any question of treating the High Court as an inferior court.

The approach of the Court in a sentence appeal

41. In this case the accused exercised his right to appeal the sentence imposed in the Central Criminal Court, on the basis of an argument that the trial judge had erred in principle. The Court of Appeal having given judgment on that issue, the Director has exercised the

right, available to any litigant in that Court, of seeking leave to appeal to this Court in relation to that judgment.

42. No constitutional principle applicable to sentencing has been identified that could prevent this Court from making an appropriate order if it finds an error in the judgment of the Court of Appeal. However, in seeking to identify the appropriate order it seems to me that the Court should bear in mind certain factors. The first is that the correct approach to the outcome will be largely dictated by the nature or categorisation of the appeal. The second is that this Court does not have, and is not likely to accrue, the day-to-day experience of sentencing that is undoubtedly possessed by the trial judges and the Court of Appeal. It is therefore undesirable in principle that the Court should take on the role of a sentencing court where it is not necessary. It seems to me that, as a general principle, it is only if the Court concludes that both of the lower Courts erred in principle that it should embark on the sentencing process itself. However, I would not wish to be taken as excluding the possibility that it might be appropriate in other, exceptional circumstances.

43. In this case, those factors lead me to conclude that, in the first place, the Court cannot apply the criteria that it might in an "undue leniency" appeal. This was not a prosecution appeal, and the Court of Appeal did not, accordingly approach it as such. As it was the respondent's appeal, the task was to determine whether the trial judge had erred in principle. This Court has found that the Court of Appeal erred in carrying out that task. The consequence of that finding is, in my view, that the sentence imposed by the trial judge should stand unless the Court considers that, for a reason other than that identified by the Court of Appeal, it represents an error in principle. In this particular case, I agree with Charleton J. that the trial judge approached the matter correctly and did not err.

44. I do not find any exceptional circumstances in the case that might justify the Court in substituting its own sentence. The evidence adduced on his behalf shows that the respondent has made reasonably good use of his time in custody. However, there is nothing exceptional about his good conduct, especially given that the trial judge had built in an incentive for rehabilitation in suspending part of the sentence.

45. I acknowledge that the respondent has been put through some extra stress as a result of the Director's appeal. However, it does not seem to me that the situation is the same as that arising in an "undue leniency" appeal. In such cases, the accused person has, from the date on which the trial judges passes sentence, an expectation of being released on a specified date and is likely to focus intently on that date. A successful prosecution appeal will almost certainly mean extra stress, particularly where the original sentence was relatively short. In this case, it was the respondent who took the initiative in appealing, and thus opened up the possibility that the sentence would actually be increased in his own appeal. In the circumstances, the Director's appeal to this Court has served simply to deal with the error of the Court of Appeal and to bring about the restoration of the original sentence.

46. In this case, since the Court considers that the trial judge assessed sentence correctly and did not err in principle, I would not consider it appropriate to interfere with her order.

47. I would therefore set aside the order of the Court of Appeal and affirm the order of the Central Criminal Court.