APPROVED **[2020] IEHC 631**

THE HIGH COURT
JUDICIAL REVIEW

2019 No. 562 J.R.

BETWEEN

ANDREW LONG

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 8 December 2020

INTRODUCTION

1. These judicial review proceedings seek to challenge a decision of the Circuit Criminal Court to refuse to permit the applicant to withdraw his plea in criminal proceedings. The applicant (hereinafter "***the accused***") had initially pleaded not guilty to a number of offences of assault under the Non-Fatal Offences against the Person Act 1997. The accused subsequently changed his plea, and entered a plea of guilty to two counts. The accused later applied to the trial judge for permission to withdraw his plea of guilty. This application was refused by a ruling dated 14 January 2019. Following a sentencing hearing in April 2019, a custodial sentence was imposed. The accused has since served out his custodial sentence.

2. The principal issue for determination in this judgment is whether any challenge to the ruling refusing to permit the withdrawal of the guilty plea should be

determined in the context of the accused's pending appeal before the Court of Appeal, rather than by way of judicial review before the High Court. The resolution of this issue turns largely on whether the pending appeal represents an adequate alternative remedy.

CHRONOLOGY OF EVENTS

3. The chronology of events is set out in tabular form below. A more detailed narrative of the events post-sentence is then provided under the next heading.

6 March 2018	Trial of offences commences before judge and jury
8 March 2018	Trial judge refuses an application for a directed acquittal
9 March 2018	Accused pleads guilty to two offences (assault and assault causing harm, respectively)
3 July 2018	Trial judge informed that accused wishes to withdraw guilty plea. The original legal team permitted to come off record.
26 November 2018	Application to be permitted to withdraw guilty plea is heard
14 January 2019	Trial judge refuses permission to withdraw plea ("***the impugned ruling***")
30 April 2019	Sentence of imprisonment imposed
8 May 2019	Notice of appeal filed with Court of Appeal
30 July 2019	Judicial review proceedings instituted
19 November 2019	Amended notice of appeal filed
28 February 2020	Leave to apply for judicial review granted following *inter partes* hearing
26 November 2020	Substantive application for judicial review heard

PROCEDURAL HISTORY

4. The accused filed an appeal against conviction and sentence with the Court of Appeal on 8 May 2019. The notice of appeal had been prepared by the accused

personally, i.e. as a litigant in person. An amended notice of appeal was subsequently filed with the benefit of legal representation on 19 November 2019.

5. In parallel, these judicial review proceedings were instituted on behalf of the accused on 30 July 2019. An *ex parte* application for leave to apply for judicial review had been moved on that date before the High Court (MacGrath J.). The court directed that the application for leave to apply for judicial review be made on notice to the Director of Public Prosecutions. The accused subsequently issued a notice of motion in October 2019, and the leave application ultimately came on for hearing before the High Court (O'Moore J.). By order dated 28 February 2020, leave to apply for judicial review was granted limited to the following two grounds.

   (i). The Respondent Circuit Court Judge failed, refused or neglected to take cognisance of the fact that [the accused] sought to change his plea in a timely fashion.

   (ii). The Respondent Circuit Court Judge failed, refused or neglected to address whether the application to vacate a guilty plea should be assessed on the criminal standard or the civil standard.

6. The substantive application for judicial review came on for hearing before me on 26 November 2020. It should be noted that, by that time, the accused had already completed his sentence of imprisonment and had been released from custody.

THE IMPUGNED RULING

7. The transcript of the operative part of the trial judge's ruling reads as follows.

> "In this case, Mr. Long, you were at all times legally represented and advised by an experienced solicitor and counsel, both senior and junior. The standard required by you is to satisfy this Court that there are good and substantial reasons why your plea of guilty should be set aside. The authorities on this issue is that the discretion in these type of cases should be used sparingly where an accused person has understood the nature of the charge or charges against him and entered a clear and informed plea of guilty. You had a familiarity with criminal cases, having been acquitted by two juries in circumstances where you opted not to give evidence and had the benefit of experienced lawyers. In this case, you are also represented and advised by experienced lawyers throughout the trial.
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> [The trial judge then referred to the judgments in *Byrne v. Judge McDonnell* [1997] 1 I.R. 392; *Dunne v. McMahon* [2006] IEHC 72; [2007] 4 I.R. 471; and *Director of Public Prosecutions v. Redmond* [2006] IESC 25, [2006] 3 I.R. 188]
>
> I also have considered the impact on the two victims in this case, the two victims were put through their evidence and cross-examined. One of the victims turned up in court on the sentencing day in July 2018, both had prepared impact statements, or reports for the Court. The delay in informing the Court [of] your intention to change your plea is also a factor which has to be considered when deciding this type of issue.
>
> Therefore, the conclusion I come to is as follows: in this case, I am fully satisfied that your guilty plea was an acknowledgment of guilt having been fully advised by your solicitor and by senior and junior counsel. I believe it was carefully thought, it was a carefully thought out decision made by you, when at the time you were fully capable of making such a decision. It was an informed decision and a true admission of guilt. I do not accept that undue pressure was put to bear on you to plead guilty, or that emotional reason used to entice a guilty plea. You were given every opportunity to defend yourself and that your right to fair procedures were not infringed, or your constitutional rights to a fair trial. You have failed to show good and substantial reasons why this Court should now allow you to change your plea from guilty to not guilty. I must therefore refuse your

> application to change such plea of guilty to not guilty. That concludes my judgment."

JUDICIAL REVIEW AND CRIMINAL PROCEEDINGS

8. The principal issue for determination in this judgment is whether the High Court should decline to entertain the challenge to the trial judge's ruling on the basis that any challenge should, instead, be pursued in the context of the appeal pending before the Court of Appeal.

9. As it happens, the Supreme Court has addressed the question of the appropriateness of judicial review in detail in its recent judgment in *E.R. v. Director of Public Prosecutions* [2019] IESC 86 ("***E.R.***"). This judgment was delivered on 6 December 2019, that is, a number of months *after* the institution of the within judicial review proceedings.

10. The Supreme Court endorsed the well-established principle that the taking of judicial review proceedings in the course of a criminal trial will only be appropriate in exceptional circumstances, citing *Director of Public Prosecutions v. Special Criminal Court* [1999] 1 I.R. 60, and *Freeman v. Director of Public Prosecutions* [2014] IEHC 68.

11. The case law indicates that there are two strands underlying the principle. The first is that the taking of judicial review proceedings prior to the conclusion of a criminal trial has the effect of disrupting the unitary nature of the trial. It also has the capacity to create chaos in the criminal justice system and is open to abuse. One obvious example of potential abuse is where a person charged with a criminal offence submits to a criminal trial to test the waters as to whether a confession will be admitted into evidence, with a view to challenging the ruling on the *voir dire* if it goes against them. Even if such an application for judicial

review were ultimately to be heard on its merits and determined against an applicant, the original trial will have had to be abandoned. In this hypothetical scenario, the person charged will have a second trial in front of a different jury and possibly a different trial judge.

12. The second strand underlying the principle against the taking of judicial review proceedings in respect of rulings made in a criminal trial concerns the limitations of the High Court's judicial review jurisdiction. Judicial review is concerned principally with the legality of the decision-making process, and not with the underlying merits of the ruling under challenge (save in cases of irrationality). Put otherwise, the function which the High Court exercises in determining judicial review proceedings is far more limited than that which the Court of Appeal would exercise in determining an appeal against conviction and sentence.

13. The inherent limitations on the High Court's judicial review jurisdiction have been described, in more eloquent terms, by the Supreme Court in *E.R.* as follows (at paragraph 17).

> "[…] 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."

14. The Supreme Court judgment goes on, in the next paragraph, to emphasise that an applicant for judicial review in criminal proceedings has the "substantial burden" of showing the deprivation of a right. It is not enough to ground a successful application for judicial review that the trial judge might have made an error of fact, nor even an incorrect decision of law.

15. In summary, the general principle is that the High Court will, normally, in the exercise of its discretion decline to entertain judicial review proceedings taken against rulings made in the course of a criminal trial. The logic underlying this principle extends, in part at least, to judicial review proceedings taken *subsequent* to conviction and sentence. This is because an appeal to the Court of Appeal almost always represents an adequate alternative remedy. Indeed, an appeal is almost always the *preferable* remedy from an accused's perspective because of the inherent limitations on the judicial review jurisdiction.

16. The case law indicates, however, that judicial review will be appropriate in exceptional circumstances. Thus, for example, in *Director of Public Prosecutions v. Special Criminal Court* [1999] 1 I.R. 60, the Supreme Court held that the High Court had been correct to entertain an application for judicial review in the "exceptional circumstances" of that case, and having regard to the importance that there should be a definitive ruling on the question of "informer privilege". The Supreme Court noted that whereas the trial before the Special Criminal Court had been formally "opened", the ruling of the Special Criminal Court impugned in the judicial review proceedings was, essentially, a ruling which had been sought and given by way of *preliminary ruling* before the trial proper was embarked upon.

DETAILED DISCUSSION

17. The primary issue for determination in this judgment is the threshold issue of whether the challenge to the ruling refusing to permit the withdrawal of the guilty plea should be determined in the context of the appeal pending before the Court of Appeal, rather than by way of judicial review before the High Court. If this issue is resolved against the accused, then relief by way of judicial review should be refused as a matter of discretion.

18. Counsel on behalf of the accused relies on the following arguments in support of the contention that judicial review is the more appropriate remedy. First, much is made of the fact that the judicial review proceedings were not instituted until *after* the accused had been convicted and sentenced by the Circuit Criminal Court. It is submitted that the criminal proceedings had thus concluded. It is sought to distinguish the judgment in *E.R. v. Director of Public Prosecutions* [2019] IESC 86 on this basis.

19. With respect, this submission overlooks that a significant part of the rationale underlying the Supreme Court's judgment is concerned with the inherent limitations upon the High Court's judicial review jurisdiction as compared to an appeal before the Court of Appeal. As emphasised in the passage from *E.R.* cited at paragraph 13 above, judicial review is about process, jurisdiction and adherence to fair procedures. It does not entail a reanalysis of the findings of the Circuit Criminal Court. This distinction between judicial review and an appeal is of crucial importance in the present case because, as discussed shortly, the two grounds upon which the ruling is challenged are both ones which the Court of Appeal is better placed to hear and determine.

20. The gist of the second argument advanced for pursuing an application for judicial review in preference to the appeal pending before the Court of Appeal is that judicial review proceedings are more expeditious. It is suggested that an application for judicial review will generally be heard and determined in a shorter timeframe than an appeal. This is said to be important in the present case in that the accused had already been sentenced and had been detained in prison at the time the proceedings were first instituted. (The accused has since completed his custodial sentence). The implication of the argument being that a successful outcome in the judicial review proceedings might have resulted in the accused being released earlier than a successful outcome in the appeal.

21. This argument is incorrect both in principle and in practice. At the level of principle, a litigant is not entitled to divert from the procedural architecture prescribed for criminal proceedings under legislation in the hope that judicial review might be more expeditious. As a matter of practice, it is incorrect to suggest that judicial review proceedings before the High Court will inevitably be more expeditious that an appeal to the Court of Appeal. Once all papers, including written legal submissions, have been filed with the Court of Appeal, an appeal in a criminal matter will be allocated a hearing date in short course.

22. Indeed, the chronology of these judicial review proceedings indicates that the appeal route would have been swifter. The progress of the within proceedings had been delayed as a result of shortcomings in the initial papers filed in July 2019. This necessitated the filing of a supplemental affidavit in December 2019. This resulted in a delay in the hearing of the application for leave to apply for judicial review, and a knock-on delay in the hearing of the substantive application.

23. By contrast, had the appeal, which had been lodged before the Court of Appeal in May 2019, been progressed, it is likely that an earlier hearing date could have been secured for the appeal. (For reasons which have not been satisfactorily explained on affidavit, the appeal had not been progressed by the filing of written submissions).

24. Further, and in any event, leaving aside the question of an earlier hearing date, the procedures governing an appeal to the Court of Appeal allow for the grant of bail pending the hearing and determination of an appeal. This is sufficient safeguard for the rights of an accused.

25. The third argument advanced on behalf of the accused in support of pursuing judicial review proceedings involves an allegation that the trial judge acted in contravention of the accused's constitutional rights by denying him his right to a fair trial in due course of law, as guaranteed under Article 38.1 of the Constitution of Ireland (§§43 and 44 of the written legal submissions).

26. Were such an allegation to be made out, then judicial review proceedings might well be appropriate. In principle, a court, such as the Circuit Criminal Court in this instance, which commences a hearing within jurisdiction may subsequently exceed jurisdiction, by falling into unconstitutionality, and thereby make its decisions liable to be quashed on *certiorari*. (*State (Holland) v. Kennedy* [1977] I.R. 193 at 201). It is necessary, therefore, to consider the two grounds upon which leave to apply for judicial review had been granted on 28 February 2020 to assess whether they entail such an allegation.

27. The essence of the first ground in respect of which leave has been granted appears to be that the trial judge erred in finding that there had been delay on the part of the accused in making application to withdraw his guilty plea. Attention

is drawn to two points in the trial judge's ruling where reference is made to a three-week delay. This is then identified by the trial judge as a factor to be considered in deciding the application. Counsel on behalf of the accused submits that the finding of delay is incorrect in circumstances where the accused had given oral evidence at the hearing on 26 November 2018 to the effect that he had sought to contact a (new) solicitor within days of the guilty plea having been entered.

28. With respect, if and insofar as the trial judge may have erred in making a finding of delay—and this court is not saying that he did—this would represent an error of fact not of law. The appropriate forum before which to challenge such an alleged error of fact is the Court of Appeal. The making of an error of fact is an error within jurisdiction, and, as such, is not amenable to correction by judicial review before the High Court. By contrast, the Court of Appeal, in exercising its appellate jurisdiction, is well placed to correct any error which may have been made.

29. The second ground upon which the trial judge's ruling is challenged entails an allegation that the trial judge failed to address the standard of proof to be applied. In order to make sense of this ground, it is necessary to refer briefly to the transcript of the hearing before the Circuit Criminal Court on the application to withdraw the guilty plea. It is apparent from the transcript that both sides were in agreement that, in accordance with the judgment of the Court of Appeal in *Director of Public Prosecutions v. Judge* [2018] IECA 242, a person who wishes to withdraw a guilty plea must show "good and substantial" reason why their plea should be set aside. The trial judge himself then raised with counsel the question of whether the standard of proof applicable is the civil or criminal one.

Counsel for the Director of Public Prosecutions ("***the Director***") accepted that whereas the onus of proof lay with the person seeking to withdraw their plea, that onus only had to be met on the civil standard, i.e. on the balance of probabilities. Counsel expressly stated that the accused did not have to meet the criminal standard by proving beyond a reasonable doubt that he had entered the guilty plea under duress. Counsel for the Director expressly submitted to the trial judge that if the judge were to prefer the evidence of the accused to that of his former legal team, *applying the civil standard*, then this would have established good and substantial reason for the withdrawal of the plea.

30. Given this exchange at the Circuit Criminal Court, it is very difficult to understand the criticism now being made of the trial judge's ruling. It had been expressly conceded on behalf of the Director that the lower standard of the balance of probabilities applied. This had been in ease of the accused. It meant that the accused simply had to satisfy the trial judge that, on the balance of probabilities, his version of events was to be preferred. As it happens, the trial judge was not so satisfied for the reasons set out in detail in his ruling.

31. The argument now made on behalf of the accused in these judicial review proceedings seems to be to the effect that because a decision on whether to allow a person to withdraw a guilty plea occurs in the context of criminal proceedings, then the criminal standard of proof must apply. With respect, this argument fails to distinguish between the *onus* of proof and the *standard* of proof. The case law indicates that a person who seeks to withdraw a guilty plea bears the onus of showing "good and substantial" reason for being allowed to do so (*Director of Public Prosecutions v. Judge* [2018] IECA 242). An application to withdraw a guilty plea thus represents one of those few instances in criminal proceedings

where the onus of proof resides with an accused person. The Director of Public Prosecutions had properly acknowledged, through her counsel, that an accused person only has to discharge this onus to the civil standard. It would be perverse for an accused person to insist that he should instead be held to the *higher* standard applicable to the prosecution, namely beyond all reasonable doubt.

32. For the reasons summarised above, the criticism now made of the trial judge's ruling is untenable. More fundamentally, however, even if the trial judge had applied the incorrect standard of proof, such an error of law would be one within jurisdiction. The appropriate forum for the correction of such an alleged error of law is before the Court of Appeal.

33. It follows that neither of the two grounds upon which leave to apply for judicial review has been granted discloses an error outside jurisdiction, still less a breach of the accused's constitutional right to be tried in due course of law.

34. Finally, the reliance placed by the accused on *Byrne v. Judge McDonnell* [1997] 1 I.R. 392 is misplaced. On the facts of that case, an accused had pleaded guilty to an offence before the District Court at a time when he did not have the benefit of legal representation. The possibility of a *custodial sentence* being imposed only arose subsequent to the accused having entered a plea of guilty, when the District Court judge was made aware of the circumstances surrounding the commission of the offence. The High Court (Keane J.) granted relief by way of judicial review on the basis that the accused should have been permitted to change his plea to one of not guilty so as to ensure that he was properly represented from the beginning of his trial, and not merely when it came to the question of sentence. By contrast, the accused in the present case had the benefit of legal representation both at the time he entered a guilty plea and for the

purposes of his subsequent application to withdraw that plea. (The accused was represented by a new legal team on the latter occasion).

CONCLUSION AND FORM OF ORDER

35. The application for judicial review is dismissed on the basis that there is an adequate alternative remedy available to the accused, namely his appeal against conviction and sentence which is currently pending before the Court of Appeal. None of the factors relied upon by the accused disclose exceptional circumstances such as to justify the invocation of the High Court's supervisory jurisdiction. (*E.R. v. Director of Public Prosecutions* [2019] IESC 86 applied).

36. The attention of the parties is drawn to the statement issued on 24 March 2020 in respect of the delivery of judgments electronically, as follows.

> "The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."

37. The parties are requested to correspond with each other on the question of the appropriate costs order. In default of agreement between the parties on the issue, short written submissions should be filed in the Central Office by 11 January 2021. The order granting leave notes that the accused intends to apply for a recommendation under the Legal Aid – Custody Issues Scheme. If this is to be

pursued, this should also be addressed in written submissions by reference to the principles in the judgment in *O'Shea v. Legal Aid Board* [2020] IESC 51.

Appearances
Desmond Hayes for the applicant instructed by Tim Kennelly Solicitors
Conor McKenna for the respondent instructed by the Chief Prosecution Solicitor