THE HIGH COURT

IN THE MATTER OF AN INQUIRY PURSUANT TO ARTICLE 40.4.2 OF THE CONSTITUTION OF IRELAND 1937 AND IN THE MATTER OF THE HABEUS CORPUS ACT 1782

[2021] IEHC 563

[Record No. 2021/1092 SS]

BETWEEN

G. C.

APPLICANT

AND

THE GOVERNOR OF CORK PRISON

RESPONDENT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS AND THE DIRECTOR OF THE CENTRAL MENTAL HOSPITAL

NOTICE PARTIES

JUDGMENT of Mr Justice Barr delivered on the 20th day of August 2021

Introduction.

1. This is an inquiry pursuant to Article 40.4.2 of the Constitution into the lawfulness of the applicant's detention on remand in Cork Prison.

2. In essence, the applicant's case is as follows: he has a long history of mental illness in the form of paranoid schizophrenia and polysubstance drug abuse. When he was before the District Court on theft and assault charges on 29th July, 2021, an application was made to the District Court judge to make a determination on his fitness to plead to the theft charges. The DPP had consented to the charges being dealt with summarily in the District Court. It was submitted that, while the District Court judge had not explicitly stated that he would accept jurisdiction in respect of the theft charges, it was clear from what he said in court that day, that he would deal with the matter summarily.

3. However, the District Court judge upon hearing that there were no beds available in the Central Mental Hospital (hereinafter referred to as "CMH"), apparently stated that it would be futile for him to find the applicant unfit to plead and to remand him to the CMH. Accordingly, he adjourned the matter and remanded the applicant in custody to Cork Prison.

4. The applicant contends that the refusal of the District Court judge to make a formal finding that the applicant was unfit to plead, was unlawful, because in declining to make that finding, he took into consideration irrelevant matters, namely the lack of beds in the CMH.

5. It was submitted on behalf of the applicant that there was cogent uncontradicted evidence before the District Court judge that without receiving treatment in the CMH, the applicant's condition was deteriorating. The evidence before the District Court as contained in the reports furnished by Dr. Morgan, a psychiatrist attached to Cork Prison, clearly established that the longer the acute schizophrenic episode continued without appropriate treatment, the more difficult it would be to treat it and it could give rise to long-term adverse consequences. It was submitted that the only place where the

applicant could obtain the appropriate treatment, because it could be given on an involuntary basis, was in the CMH.

6. It was submitted that while the treatment being offered to the applicant in Cork Prison was entirely appropriate, the fact that he was refusing same due to a lack of insight into his condition, meant that his constitutional right to bodily integrity was being violated, because the District Court judge would not make a determination that he was unfit to plead and would not make the necessary referral to the CMH to enable the applicant to get the treatment that he urgently requires. It was submitted that in these circumstances, his continued detention on remand in Cork Prison was unlawful.

7. It was submitted that as the applicant's detention was not in accordance with law, he was seeking an order releasing him from the said unlawful detention in Cork Prison. However, he was not seeking to be released into the community, but the court could place a stay on the order to enable the authorities to take such steps as they may deem fit to ensure that the applicant's custody would become regular and lawful and where the immediate release of the applicant would be detrimental to his welfare.

8. In response, the respondent pointed out that there was no challenge to the committal warrant per se. The applicant's primary complaint was in relation to the failure of the District Court judge to make a determination that he was unfit to plead to the criminal charges against him, and consequent upon that, to make an order remanding him in custody to the CMH. It was submitted that the District Court judge did not have jurisdiction to make a determination in relation to the fitness of the applicant to plead to the theft charges, as those charges related to indictable offences, which could only be tried summarily if three pre-conditions were satisfied: the DPP consented to the matter being dealt with summarily; the District Court judge accepted jurisdiction in the matter and the accused person, having been informed of his right to trial by jury, did not object to the matter being tried summarily.

9. It was submitted that even if the District Court judge was presumed from his conduct to have been prepared to accept jurisdiction in respect of the theft charges, the third element, being that the applicant did not object to the matter being dealt with summarily, was missing, as it was clear that the applicant lacked capacity to make the necessary election. That being the case, it was submitted that the District Court judge did not have jurisdiction to determine the applicant's fitness to plead. He could only do that if the matter was going to be dealt with summarily and that was not possible because the applicant could not make the necessary election.

10. It was submitted that in these circumstances, the District Court judge did not have jurisdiction to make any determination in respect of the applicant's fitness to plead to the theft charges; nor did he have jurisdiction to remand the applicant to the CMH.

11. It was submitted that as the applicant was before the district court on foot of the theft charges, which were indictable offences, and in respect of the assault charge, which it

was agreed could never have been dealt with summarily, the District Court judge was entitled to remand the applicant in custody to Cork Prison.

12. In relation to the applicant's contention that his constitutional right to bodily integrity was being violated due to his incarceration in Cork Prison, it was submitted by both the respondent and the DPP, that there was no substance in that argument. This was due to the fact that there were no beds available in the CMH at the present time. The applicant had received psychiatric treatment from the in-reach team in the prison and had been assessed by them and placed on the waiting list for a bed in the CMH. He had been placed on the waiting list on 18 June 2021, at which time he had been 13th on the waiting list; by 16th August, 2021 he had moved up to number two on the waiting list.

13. It was submitted that given the level of treatment and observation that was available to him while in prison, the applicant was in fact in a better place than he would be if released into the community. It was submitted that, short of the treatment that he would receive in the CMH, he was receiving the best possible treatment that he could get outside of that setting. In these circumstances it was submitted that there was no violation of his constitutional rights, such as would render his detention in Cork Prison unlawful.

14. On behalf of the CMH, it was submitted that the applicant had a long history of serious mental illness. It was clear that he required the form of treatment that was only available in the CMH. Unfortunately there were no beds available at the present time. The applicant was on a waiting list, which was reviewed by consultant psychiatrists every Monday. As of Monday, 16th August, 2021, the applicant was number two on the waiting list for admission to the CMH. As soon as a bed should become available, the Governor of Cork Prison could make a referral to the CMH pursuant to s. 15 of the Criminal Law (Insanity) Act 2006.

15. That is a very brief outline of the issues which arise for determination before the court. The submissions of the parties will be dealt with in greater detail later in the judgment.

Background.

16. The facts giving rise to this application, are not greatly in dispute between the parties. The applicant is 30 years of age. As already noted, he has a history of suffering with paranoid schizophrenia and polysubstance drug abuse.

17. On 29th May, 2021 he was charged with two counts of theft in respect of six cans of lager to the value of €4.50, alleged to have been stolen on 28th May, 2021 and with the theft of five cans of lager and gin to the value of €22.44 on 29th May, 2021. He was granted station bail to appear before Clonakilty District Court on 1st June, 2021, when evidence of arrest, charge and caution was given. He was remanded on continuing bail to 6th July, 2021.

18. On 4th June, 2021, the applicant was alleged to have assaulted his mother with a knife. He was arrested on foot of the assault charge and evidence of arrest, charge and caution

was given at a hearing before the District Court on 6th June, 2021. He was remanded in custody.

19. At a remand hearing held on 21st June, 2021, a letter was furnished to the court from Dr. Morgan, stating that in his view the appropriate placement for the applicant was a remand to the CMH.

20. The applicant was remanded from time to time in respect of both sets of charges. When the matter came before the District Court on 19th July, 2021, the court was advised that the DPP had directed summary disposal in respect of the theft charges. The issue of the applicant being put on his election was canvassed, but given the contents of a further letter from Dr. Morgan, the applicant was not put on his election. In a letter dated 13th July, 2021, Dr. Morgan had stated that due to his mental illness, the applicant could not comprehend the evidence and was not in a position to instruct legal counsel. The doctor was of the view that the applicant was unfit to plead in accordance with the functional capacity test prescribed in the Criminal Law (Insanity) Act, 2010.

21. The applicant's legal representatives asked the judge to remand the applicant in custody to the CMH pursuant to s.4 of the 2006 Act in respect of the theft charges. It was submitted that the assault charge would likely come within the provisions of section 4 (4) of the 2006 Act and that in those circumstances the District Court judge did not have jurisdiction to make a fitness to plead determination in respect of the assault charge. The judge indicated that he was minded to make the finding of unfitness to plead in respect of the theft charges, but when informed that there was no bed available in the CMH, he remanded the applicant in custody to 29th July, 2021.

22. On 29th July, 2021, there was still no bed available in the CMH. The applicant was remanded to 11th August, 2021, at which stage he was further remanded in custody to 25th August, 2021.

23. Dr. Morgan furnished a further report in the matter by letter dated 5th August, 2021. In that report he noted that the applicant was refusing all treatment offered to him in the prison. As treating consultant, he was unable to treat the applicant against his will in a prison setting, as there was no legal mechanism for him to do so. He stated that delays in administering the necessary treatment can cause significant long-term difficulties, which would make it more difficult for the applicant to make a full recovery. He gave the following opinion:-

> *"It is also my opinion that the longer this man remains untreated for his psychotic illness, the greater the negative effect will be on his physical health. It should be noted that those with untreated psychotic illness have poorer future health outcomes and often reduced life expectancy."*

24. The applicant had been assessed by the in-reach psychiatric team in Cork prison on 6th June, 2021. Following their assessment of the applicant, they made a referral for his admission to the CMH. That referral was made on 16th June, 2021 and following

consideration of it by the authorities in the CMH, he was admitted to the waiting list as of 18th June, 2021. At that time the applicant was 13th on the waiting list. As of 16th August 2021, he is 2nd on the waiting list.

25. Admission to the CMH is done by means of a triage system, whereby the psychiatrists in the CMH review the waiting list each Monday and depending on a person's condition at that time, they are moved up and down the waiting list accordingly. The hospital always operates at full capacity. Given the nature of the illnesses presented by patients at the hospital and in particular, their propensity for violence, it is not possible to move the patients out of the hospital setting, until it is safe and appropriate to do so.

26. The CMH is the only location where the applicant can receive the necessary treatment, because he is not suitable for admission to a normal psychiatric hospital, nor for treatment in the mental health services in the community, due to his propensity for violence and the risk that that poses to medical staff and other patients. As already noted, it is not possible for the medical staff in Cork Prison to administer medication on an involuntary basis to the applicant. That can only be done in the CMH. In these circumstances, where the applicant represents a danger to others and remains non-compliant with taking medication, the only place that he can be properly and adequately treated is in the CMH.

27. The nature and extent of the psychiatric treatment which the applicant is currently receiving in Cork prison is set out in the affidavit sworn by Mr. Kelly, National Operational Nurse Manager of the Irish Prison Service, sworn on 12th August, 2021. In that affidavit, Mr. Kelly describes how the applicant has come under the care of the in-reach team in Cork Prison, which is part of the National Forensic Mental Health Service. As part of this regime, the applicant has come under the care of a consultant psychiatrist and a registrar from the local Cork Mental Health Services, supported by two forensic community psychiatric nurses from the NFMHS, who assess and oversee the care of mentally ill prisoners in Cork prison. In addition, the applicant has access to a GP in the prison. The applicant is in a single cell in the Vulnerable Persons Unit within the prison, where there is an increased ratio of staff to inmates and where he is under constant supervision.

Relevant Statutory Provisions.

28. It is appropriate at this stage to set out some of the main statutory provisions that are of relevance to this application. The first of these, are the relevant provisions in s. 4 of the Criminal Law (Insanity) Act, 2006 (as amended), which are in the following terms:-

> *"4.— (1) Where in the course of criminal proceedings against an accused person the question arises, at the instance of the defence, the prosecution or the court, as to whether or not the person is fit to be tried the following provisions shall have effect.*
>
> *(2) An accused person shall be deemed unfit to be tried if he or she is unable by reason of mental disorder to understand the nature or course of the proceedings so as to—*
>
> *(a) plead to the charge,*

(b) instruct a legal representative,

(c) in the case of an indictable offence which may be tried summarily, elect for a trial by jury,

(d) make a proper defence,

(e) in the case of a trial by jury, challenge a juror to whom he or she might wish to object, or

(f) understand the evidence.

(3)(a) Where an accused person is before the District Court (in this section referred to as "the Court") charged with a summary offence, or with an indictable offence which is being or is to be tried summarily, any question as to whether or not the accused is fit to be tried shall be determined by the Court.

[…]

(4)(a) Where an accused person is before the Court charged with an offence other than an offence to which paragraph (a) of subsection (3) applies, any question as to whether that person is fit to be tried shall be determined by the court of trial to which the person would have been sent forward if he or she were fit to be tried and the Court shall send the person forward to that court for the purpose of determining that issue."

29. The Criminal Justice (Theft and Fraud Offences) Act, 2001 (as amended) provides for the summary trial of indictable offences. Section 53 is in the following terms:-

"53.—(1) The District Court may try summarily a person charged with an indictable offence under this Act if—

(a) the Court is of opinion that the facts proved or alleged constitute a minor offence fit to be tried summarily,

(b) the accused, on being informed by the Court of his or her right to be tried with a jury, does not object to being tried summarily, and

(c) the Director of Public Prosecutions consents to the accused being tried summarily for the offence."

Submissions on behalf of the Applicant.

30. It is not necessary to repeat the skeleton submissions that have been set out in the earlier section of this judgment. Ms. Fawsitt SC submitted that in this case, there was uncontradicted evidence from Dr Morgan, that the applicant was suffering from a serious mental illness. It was also uncontroverted that he was having an acute episode of schizophrenia since in or about 4th June, 2021.

31. Counsel submitted that the medical records, which had been exhibited in the pleadings, clearly demonstrated that the applicant's condition was deteriorating significantly since his initial admission to Cork Prison. It was noted that when first seen by a psychiatrist in the prison, he was noted to be well kempt and in reasonable condition. However, the later notes demonstrated that he was suffering from an acute episode of delusion, where he thought that he had been assaulted and sexually assaulted by members of the prison staff. It was also clear that, while he had been compliant in taking antipsychotic medication from 6th June, 2021, that had ceased in or about 14th June, 2021.

32. It was further submitted that having regard to the reports furnished by Dr. Morgan, there was clear evidence that he required treatment, which could only be given in the CMH. The doctor was of the opinion that if the applicant did not receive this treatment, the acute episode would be more difficult to treat and there was a risk that he would suffer adverse consequences in the longer term.

33. It was submitted that the District Court judge had acted unlawfully on 29th July, 2021 when he had refused to make a determination in relation to the applicant's fitness to plead. It was submitted that in refusing to deal with that issue, due to the fact that there were no beds available in the CMH, the judge had acted in breach of the terms of s. 4 of the 2006 Act. It was submitted that the terms of s. 4 (3) (a) were clear. That section provided that where the person was before the court charged with a summary offence, or with an indictable offence, which was being, or was going to be tried summarily, any question as to whether or not the accused is fit to be tried "*shall be determined by the court".*

34. It was submitted that this placed a clear statutory obligation on the judge to determine the issue once it was properly raised before the court. That issue had been raised in this case. The District Court judge had stated that it was his intention to make the necessary finding of unfitness to plead and to make a referral to the CMH. It was submitted that in those circumstances, the judge had acted unlawfully in failing to make that finding and in failing to make the necessary referral to the CMH. Accordingly, his remand in custody to Cork Prison, was unlawful.

35. It was further submitted that where there was clear evidence that the applicant's current mental condition could not be treated adequately within the prison setting and that it could only be treated in an appropriate manner in the CMH, there was a breach of the applicant's constitutional right to bodily integrity by failing to remove him to the CMH, when all were agreed that that was the appropriate and necessary place for him to receive treatment.

36. In relation to the lack of jurisdiction point that had been raised on behalf of the respondent and the DPP, counsel stated that there were two answers to that argument.

37. Firstly, s. 53 (1) which dealt with the trial of indictable offences in a summary manner, provided that the accused, on being informed by the court of his or her right to be tried with a jury, *"does not object to being tried summarily".* It was submitted that this did not

mean that he had to be put to his election, but rather that he must not object to the matter being dealt with in a summary manner. It was submitted that, given the minor nature of the theft charges, it was inconceivable that the applicant would not have opted for trial of those charges in a summary manner. It was submitted that in these circumstances, there was little substance to the argument made on behalf of the respondent and the DPP in relation to lack of jurisdiction.

38. Furthermore, it was submitted that the DPP had not objected to the District Court judge making a determination on the applicant's fitness to plead when the matter was before him in July 2021. The only reason that the necessary determination and the referral to the CMH, was not made on that occasion, was due to the fact that there were no beds available and the judge stated that it would be futile for him to make a referral to that hospital in such circumstances.

39. It was submitted that where the prosecution had not objected to jurisdiction when the matter was canvassed before the District Court, it was not open to them now to raise an objection to jurisdiction. In effect, they were estopped by their conduct from challenging jurisdiction at this remove.

40. In relation to the issue as to whether there was a breach of the applicant's right to bodily integrity by virtue of the fact that he could not obtain the appropriate and necessary psychiatric treatment while detained in Cork Prison, it was submitted that it was established that where there may be a lawful remand to prison, that remand could be rendered unlawful by virtue of the unlawful conditions in which the prisoner was detained. In this case, the evidence was uncontradicted that the continued detention of the applicant in Cork Prison was resulting in circumstances whereby his acute psychotic episode was not being adequately treated and, according to Dr Morgan, the delay in treating this episode, would render its treatment more difficult over time and could give rise to serious long-term consequences for the applicant. It was submitted that these circumstances were sufficient to render his detention in the prison unlawful.

41. It was submitted that insofar as the respondent and the DPP had relied on the decision of the Court of Appeal in *SM v. Governor of Cloverhill Prison & Anor.* [2021] IECA 102, that had ignored a crucial difference between that case and the present case, because in the SM case, the judge at first instance had made a specific finding that there was no evidence that the detention of the applicant in Cloverhill Prison was making his mental state worse than when he had entered the prison, or that any deterioration was irreversible, or would make his condition more difficult to treat when he should be admitted to the CMH. Those considerations did not apply in the present case.

42. Finally, it was submitted that the applicant was not seeking an order for his immediate release, but rather that if the court should find that his detention in Cork Prison was unlawful, the court could, where there were special circumstances, place a stay on the order, so that the relevant authorities could mend their hand and ensure that his detention was on a lawful basis. This would mean that he would have to be admitted to the CMH. In support of the assertion that the court had the power to grant a stay on its

order in special circumstances, counsel referred to *FX v Clinical Director of the Central Mental Hospital* [2014] 1 I.R. 269 and *N v The Health Service Executive* [2006] I.R. 374.

Submissions on behalf of the Respondent and the DPP.

43. It is appropriate to take the submissions that were made by Mr. Barron SC on behalf of the respondent and by Ms. O'Neill BL on behalf of the DPP together, as there was a considerable overlap between their submissions. Firstly, it was submitted that, irrespective of what the District Court judge had intimated he was prepared to do at the hearing on 29th July 2019, the fact of the matter was that he did not have jurisdiction to make a determination on the applicant's fitness to plead and consequent upon such determination to make a referral to the CMH.

44. It was submitted that it was accepted that the theft charges were indictable offences. The DPP had consented to those charges being dealt with summarily. However, there were two other necessary pre-– conditions which had to be in place before the District Court could assume jurisdiction in the matter. The judge in the District Court had to be satisfied that it was appropriate to deal with the charges in a summary manner. In this case, the judge had not made a specific determination to that effect. Even if the court were to hold that by his comments, the judge had implicitly accepted jurisdiction in respect of the theft charges, there remained the outstanding matter of the election by the accused to have the charges against him dealt with summarily.

45. In this case, the clear and controverted evidence of Dr Morgan was that the applicant was not in a position to give any instructions to his legal representatives at that time. Therefore, he could not make the necessary election as required by s. 53 (1) (b) of the 2001 Act. That being the case, it was submitted that the district court judge did not have jurisdiction to deal with the matter and therefore he did not have jurisdiction to make a determination in relation to the applicant's fitness to plead. It was submitted that the provisions of s. 4 (3) (a) of the 2006 Act only applied where an indictable offence was being tried summarily, or was going to be tried summarily in the District Court. In this regard counsel relied on the decision *in BG v. District Judge Murphy & Ors.* (No. 1) [2011] IEHC 359 and *O'Malley v. District Judge Paul Kelly & Anor*. [2015] IECA 67.

46. In relation to the allegation that the applicant's right to bodily integrity was being violated by his incarceration in Cork Prison, it was submitted that the court was entitled to have regard to the fact that the applicant was receiving the best possible treatment that would be available outside of the CMH. It was submitted that given the applicant's lack of insight into his condition and his failure to comply with the medication prescribed for him, it was highly unlikely that he would avail of treatment if he was released into the community. It was submitted that within the prison regime, he was receiving the best possible care as outlined in the affidavits sworn by Mr Kelly and Prof Mohan, Acting Clinical Director of the CMH. That the court can take into account the treatment options that may be available to an applicant in the community, as compared to those being furnished to him in a prison, was established in the SM case.

47. It was submitted that while the treatment being afforded to the applicant in Cork Prison was not of the standard that he would receive in the CMH, because the medical staff in the prison could not administer medication on an involuntary basis, the court was entitled to have regard to the fact that this treatment was of a very high standard and was certainly the best that the applicant could obtain outside of the CMH. It was submitted that in these circumstances, there was no violation of his right to bodily integrity due to his continued detention in Cork Prison. It was submitted that the court had to have regard to the fact that the courts could not direct that a person should be admitted into the CMH. They could make the necessary referral, but admission to the hospital was entirely a matter for the hospital authorities and the operation of their triage system.

48. Finally, in relation to the issue of making an order and placing a stay upon it, that was not something which could be done for an indefinite period, until such time as a bed should become available in the CMH. It was a facility that was designed to be used in very special circumstances, where the illegality of the detention could be cured within a relatively short period of time by taking the appropriate steps.

49. It was submitted that it was not appropriate for the court, if it were minded to make the order sought by the applicant, to place a stay on its order for an indefinite period: see dicta of Hyland J. in the *SM* case at first instance, which issue had not arisen for determination before the Court of Appeal; [2020] IEHC 639.

50. Having regard to all of these matters, it was submitted that the court should refuse the application made on behalf of the applicant.

Submissions on behalf of the CMH.

51. Mr McGuinness BL on behalf of the CMH referred to the affidavit sworn by Prof Mohan on behalf of of the hospital authorities. This set out the operation of the system for admission to the hospital, which was based on a triage system, whereby those persons who are on the waiting list, who are deemed the most in need of urgent psychiatric treatment within the hospital, were given a priority listing on the waiting list. The waiting list was reviewed each Monday and the condition of each of those on the list was reassessed on a weekly basis and their position on the list adjusted according to their needs. In relation to the applicant, he had moved from being 13th on the waiting list, to being second on the waiting list as of 16th August, 2021.

52. Counsel highlighted the following matters: firstly, the applicant was not suitable for treatment in any of the ordinary psychiatric units in hospitals in the country. This was due to the fact that he represented a danger to medical personnel and other patients. As such, the only place where he could receive the appropriate treatment was in the CMH.

53. Secondly, counsel pointed out that the CMH always operates at full capacity. That capacity had been reduced due to the covid-19 pandemic, because it had been necessary to set aside a number of isolation beds for use in the event that some of the patients should become infected, because it was not possible to move any of these patients to isolation units in other facilities, due to their violent propensity.

54. Thirdly, counsel referred to the various referral routes into the CMH which had been described at paragraph 25 of the affidavit. In this case, a referral had been made by the psychiatric team in Cork Prison on 16th June 2021 and the applicant had been admitted onto the waiting list on 18th June 2021. He had moved up the waiting list in accordance with the level of his need. In addition, the prison governor could make a referral under s. 15 of the 2006 Act, as soon as a bed should become available. Thus, the applicant was in the best possible position to obtain a bed in the hospital once one became available.

55. Fourthly, counsel referred to the averment at paragraph 17 of the affidavit, wherein Prof Mohan had stated that he was not in a position to admit the applicant to the CMH as of the date of the swearing of his affidavit, as to do so would require him to either discharge someone currently in the hospital in need of treatment, or to exclude someone who has been triaged ahead of the applicant as having greater need to be in the CMH.

56. Finally, there had been reference in the affidavit to the fact that a new hospital in Portrane, Co Dublin, would come on stream in the near future. In that regard, while it had been hoped that additional beds would become available in the new facility in September 2021, having taken up to date instructions in the matter, counsel stated that it was now hoped that those beds would become functional and available at some time in late October, or early November 2021.

Conclusions.

57. This Art 40 application was heard over two days on 17th and 18th August 2021. The court has considered the very helpful submissions, both written and oral, made by counsel on behalf of the parties and on behalf of the notice parties. This is a sad case in many respects. The applicant is a young man, who has had a long history of mental illness. What began as relatively minor theft offences in May 2021, escalated into a serious offence of assault on his mother alleged to have been perpetrated on 4th June 2021.

58. It is not necessary to set out the history of the matter since his initial arrest on the theft charges and his subsequent arrest on the assault charge. The key issue which the court has to determine on this application is whether the applicant's detention in Cork Prison at the present time is lawful.

59. Having considered the submissions of counsel and having read the relevant case law, the court is satisfied that the District Court judge did not have jurisdiction to make a determination on the issue of the applicant’s fitness to plead when the matter was before him in July and August 2021. The reason why the District Court judge did not have jurisdiction to make that determination was due to the fact that he did not have jurisdiction to deal with the theft charges in a summary manner. That was due to the fact that the applicant was not in a position to make an election to enable the charges against him in relation to the theft matters to be dealt with summarily.

60. Section 53 of the 2001 Act is clear in his terms. It provides that the District Court may try summarily a person charged with an indictable offence under the Act if three conditions are met. For the purposes of this application, the court is prepared to find that two of

those conditions were met; namely, that the DPP had consented to the matter being dealt with summarily and the court is prepared to find that while an express determination had not been made by the judge in relation to acceptance of jurisdiction, it was clear from his general demeanour and comments at the time, that he was prepared to accept jurisdiction in respect of the theft charges.

61. However, there was one major piece missing. Section 53 (1) (b) provides that it is a precondition to acceptance of jurisdiction in the District Court that the accused, on being informed by the court of his or her right to be tried with a jury, does not object to being tried summarily. The clear evidence before the District Court, as furnished by Dr Morgan, was that the applicant was not in a position to understand what was going on, or to instruct his legal advisers. In those circumstances, it was not possible for the accused to make the necessary election, or at the very least, to indicate that he did not have an objection to the matter being tried summarily, as required by s. 53 (1) (b). Accordingly, the District Court could not assume jurisdiction to deal with the theft charges.

62. That being the case, it is clear that the District Court judge could not make the necessary determination pursuant to the jurisdiction conferred by s. 4 (3) (a) of the 2006 Act. It is clear from a reading of that subsection that the jurisdiction to make the necessary determination only arises where the matter is either proceeding before the District Court because it is a summary matter, or where it is an indictable offence, where that matter is being tried before the District Court, or is going to be tried before it. In this case, due to the lack of capacity on the part of the applicant to make the necessary election, the District Court was never going to have jurisdiction to deal with the matter concerning the theft charges. As such, the District Court judge did not have jurisdiction to make any determination, even if he had wanted to, in relation to the applicant's fitness to plead.

63. In these circumstances, it appears to the court that the relevant subsection is s. 4 (4) (a) of the 2006 Act. That provides that the court which must determine the issue of the accused person's fitness to plead, is the court of trial to which the person would have been sent forward if he or she were fit to be tried. The subsection provides that the District Court shall send the person forward to that court for the purpose of determining that issue.

64. Thus, it would appear that the only option available to the District Court in the circumstances of this case, is to send the theft charges forward to the Circuit Criminal Court and for that court to decide the issue of the accused's fitness to plead and to make whatever remand may be appropriate consequent upon its finding on that issue.

65. The court is satisfied that its findings on the jurisdiction issue herein are in accordance with the authorities on the matter. In particular, it would appear that this case is governed by the authority of *BG v. District Judge Murphy & Ors*. (No. 1) where Hogan J stated as follows at paras 12 and 13:-

> *"[12.] The applicant has not, of course, been charged with a summary offence. He was rather charged with an indictable offence which could only be tried summarily*

provided he pleaded guilty and provided also that the District Judge was satisfied that he understood the nature of the offence and the facts alleged. But these essential statutory pre-conditions to the exercise of that jurisdiction are not - as yet, at least - in place in the present case. It cannot therefore be said that the offence in question "is being or is to be tried summarily", since without these pre-conditions being satisfied, the offence will never be tried summarily.

[13.] In the present case, the effect of the Director's direction was that the applicant was to be tried on indictment if, for whatever reason, he did not plead guilty. Here the applicant did not plead guilty and the District Judge could not have been satisfied that he understood the nature of the offence. It follows, therefore, that in these circumstances s. 4(3)(a) cannot apply to the present case and the District Court had no jurisdiction to try the offence summarily having regard to the facts of the case as presented."

66. The decision in *O'Malley v. District Judge Paul Kelly & Anor.* also supports this proposition; see in particular para. 28 of the judgment. See also *Cirpaci v. Governor of Mountjoy Prison* [2014] 2 I.R. 471.

67. In relation to the submission on behalf of the applicant that it was not necessary for him to make a positive election in order to confer jurisdiction on the District Court, I am not satisfied that the wording of s. 53 (1) (b) of the 2001 Act, relieves the applicant of the necessity to indicate that he elects to have the matter proceed before the District Court. While the subsection merely provides that he must not object to the matter being tried summarily, it is clear that that lack of objection must be based on his being informed of his right to have the charges tried before a jury. This implies that he must be told of the right; he must understand what he has been told and based on that understanding, he does not object to the matter proceeding in the District Court. In the circumstances of this case, the applicant was not in a position to comply with that subsection. The evidence of Dr. Morgan in this regard is compelling.

68. In relation to the submission on behalf of the applicant that the respondent and more particularly the DPP, are estopped from raising the issue of jurisdiction, due to the fact that the prosecution had not raised any such objection when the matter was first canvassed before the District Court judge; I do not think that this submission is well-founded. The jurisdiction of the District Court to deal with indictable offences in a summary manner, is governed by statute. The parties cannot confer a jurisdiction on the District Court without satisfying the conditions for the exercise of that jurisdiction, as required by statute. This is very clear from the O'Malley decision.

69. There are certain occasions where the parties can by agreement confer jurisdiction on a lower court to deal with the matter. That is provided for in section 53 of the 2001 Act. However in order to do so it is necessary for the relevant preconditions to be satisfied. It is not possible to bypass or ignore some, or all, of the preconditions by reference to the fact that the prosecution may not have objected to the assumption of jurisdiction at the time that the matter was first canvassed before the District Court. Accordingly, the court

finds that the respondent and the DPP are not prevented from raising the jurisdiction issue on this application.

70. The findings of the court in relation to the jurisdiction issue effectively determine this application. However, in deference to the very able argument made on behalf of the applicant in relation to the remaining issues, the court will deal with these as well. In relation to the issue of whether the applicant's right to bodily integrity has been interfered with, or violated, to such an extent that his detention in Cork Prison has been rendered unlawful, the court is of the view that such contention has not been made out.

71. The court accepts the evidence given by Dr Morgan in his reports, that the applicant urgently needs treatment in the CMH. That is not challenged by any of the evidence called on behalf of the respondent, or the notice parties. Indeed, all are agreed that the applicant requires admission as soon as possible to the CMH, so that the appropriate treatment can be given to him, if necessary on an involuntary basis.

72. The court is satisfied on the basis of the SM decision that it is entitled to have regard to the level of care that the applicant is currently receiving and is entitled to compare that to the treatment which he may receive in the event that he was released from Cork Prison, when deciding whether there has in fact been a violation of his right to bodily integrity.

73. The court is satisfied having regard to the medical records that have been exhibited in relation to his treatment in Cork Prison and having regard to the matters averred to by Mr Kelly and Prof Mohan, that the applicant is receiving a high level of treatment at the present time. It is not the desired treatment, because the medical staff in the prison do not have the power to administer antipsychotic medication to the applicant on an involuntary basis. However, the court is satisfied that if he were released into the community, not only would he represent a great danger to members of the community, he would in all probability become homeless, as referred to in the medical records, and, given his lack of insight into his medical condition, and his refusal to take antipsychotic medication, his condition would likely deteriorate more rapidly.

74. In other words, while his detention in Cork Prison is not ideal from a treatment perspective, it is the best treatment and the most optimal placement for the applicant, outside of an admission to the CMH. In these circumstances the court is not satisfied that there is a violation of his right to bodily integrity, such as would render his detention in Cork Prison unlawful.

75. Finally, while the issue of a stay does not arise having regard to the findings already made by the court, this court would respectfully agree with the dicta of Hyland J when giving the judgment at first instance in the SM case in relation to the circumstances in which it may be appropriate for a court on an application such as this to place a stay on its order; in particular, the court respectfully agrees with the observations of the trial judge at paras. 48 and 49 of her judgment. Even had this court been prepared to make the order sought by the applicant herein, it would not have held that it was appropriate to place an open-ended stay on that order pending a bed becoming available in the CMH.

76. For the reasons set out herein, the court refuses to make a declaration that the applicant's detention in Cork Prison at the present time, is unlawful.