[2020] IEHC 154

THE HIGH COURT

IN THE MATTER OF ARTICLE 40.4.2o OF THE CONSTITUTION

[2020 No.241 SS]

BETWEEN

JAMES FOGARTY

APPLICANT

AND

THE GOVERNOR OF PORTLAOISE PRISON

RESPONDENT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS AND THE CHIEF STATE SOLICITOR

NOTICE PARTIES

JUDGMENT of Ms. Justice Mary Rose Gearty delivered on the 27th day of March, 2020

1. Introduction

1.1 This Applicant seeks immediate release from prison having made an application for an enquiry under Article 40 of the Constitution. He is currently serving a sentence for assault causing harm. He argues that he was the victim of an offence but that the offender has never been punished and that, due to a catalogue of errors, collusion and malfeasance, the Applicant himself was convicted of an assault on the true wrongdoer and the Applicant is wrongfully imprisoned as result.

1.2 The Applicant submits that so many aspects of his detention render it unlawful, from the initial investigation and arrest, to the appointment of a legal representative who was not a qualified solicitor, to the form of the committal warrant in accordance with which he was imprisoned, that even if he fails on one or more of the arguments he makes, it is appropriate to order his immediate release nonetheless due to the manifest unfairness of the trial process, which included a period of pre-trial incarceration in addition to the sentence of 4 years and 6 months which he is currently serving.

1.3 There are three preliminary matters. Firstly, the issue of representation is addressed in circumstances where it was submitted that the Applicant was incapable of presenting his own case. Secondly, the difficulties which can arise when a litigant in person prepares and presents multiple complex arguments are outlined. Thirdly, the law in relation to the Article 40 remedy is summarised. Thereafter, each argument is dealt with in turn after a recital of the relevant facts.

2. Professional Lawyers, McKenzie Friends and Representation by a Family Member

2.1 As a preliminary issue, the Applicant requested that his son be permitted to represent him in this enquiry. While it is often essential that an initial application under Article 40 be presented by a third party, when the enquiry is ordered, the Applicant is usually represented by professional lawyers. He may also represent himself during the inquiry but may not be represented by an unqualified third party in any but the most exceptional circumstances. A McKenzie friend is a term used to describe an unqualified person who is permitted to assist a litigant in court, but such an assistant is not permitted to address the court. That is not what was proposed in this case.

2.2 It is a fundamental and important rule that those who do not choose to represent themselves must be represented by a qualified lawyer. This was confirmed by the Supreme Court in *Coffey & Ors v Birmingham & Ors,* [2013] IESC 11, where a Mr. Percy Podger sought to represent thirteen separate litigants in their proposed judicial review cases. Mr. Justice Fennelly ruled that this could not be permitted. An unqualified representative has no duty to the court, or indeed to the litigant, unlike the professional lawyer who not only owes duties to her client and to the court but may be sanctioned by the regulatory body of her profession if she is found to have breached any one of these duties. These are vital safeguards in ensuring that the courts can trust what is submitted in argument and in pleadings by professional lawyers and can administer justice more efficiently. These safeguards are, manifestly, in the public interest. One of the best illustrations of the importance of the professional lawyer and the recognition of her vital role in the administration of justice and protection of civil liberties is the fact that when a person is accused of a crime and his liberty is at stake, the State agrees to pay his lawyers if he cannot afford legal advice, so that his constitutional right to a fair trial is vindicated. Similarly, in all but the most unmeritorious applications under Article 40, the legal fees arising are paid by the State. Thus, the constitution rights of the citizen are not only acknowledged, they are given real and effective protection.

2.3 Representation was the sole issue in the case of Coffey. Mr. Justice Fennelly quoted, with approval, the comments of Sir Donaldson M.R. in *Abse & Ors v Smith*, [1986] 2 W.L.R. 322, at pages 326 to 327, where he referred to the limitation of rights of audience to qualified persons:

> *"These limitations are not introduced in the interests of the lawyers concerned, but in the public interest. The conduct of litigation in terms of presenting the contentions of the parties in a concise and logical form, deploying and testing the evidence and examining the relevant law demands professional skills of a high order. Failure to display these skills will inevitably extend the time needed to reach a decision, thereby adversely affecting other members of the public who need to have their disputes resolved by the court and adding to the cost of the litigation concerned. It may also, in an extreme case, lead to the court reaching a wrong decision."*

2.4 Fennelly J. not only endorsed these comments but added (at paragraphs 29 and 30) remarks that clarify the important role of the professional lawyer which are worth repeating even as the Court considers permitting an unqualified person to present an application under Article 40:

> *"It would be inimical to the integrity of the justice system to open to unqualified persons the same rights of audience and representation as are conferred by the law on duly qualified barristers and solicitors. Every member of each of those professions undergoes an extended and rigorous period of legal and professional training and sits demanding examinations in the law and legal practice and procedure, including ethical standards. Barristers and solicitors are respectively*

subject in their practice to and bound by extensive and detailed codes of professional conduct. Each profession has established a complete and active system of profession discipline. Members of the professions are liable to potentially severe penalties if they transgress.

There would be little point in subjecting the professions to such rules and requirements if, at the same time, completely unqualified persons had complete, parallel rights of audience in the courts. That would defeat the purpose of such controls and would tend to undermine the administration of justice and the elaborate system of controls."

2.5 Fennelly J. acknowledged that this general principle was, notwithstanding its importance, subject to rare exceptions where a particular injustice would otherwise be caused. In Coffey v. Tara Mines, [2007] IEHC 249, Mr. Justice O'Neill permitted a wife to represent her husband due to a disability which made it impossible for him to conduct the case. Finally, in the case of *Knowles v Governor of Limerick Prison*, [2016] IEHC 33, Mr Justice Humphries pointed to O.6, r. 2 of the District Court Rules of 1997, which permits representation by family members in cases of *infirmity or other unavoidable cause* as affording support for the proposition that a family member may be in a different category to those representatives who might be termed serial McKenzie friends, for want of a better description. The proposition of relying on the terms of the District Court Rules was mentioned in the context of the decision of O'Neill J., and was *obiter dicta*, as the Knowles case involved a proposed representative with no particular connexion to the litigant in question, no legal qualifications and a history of having made similar applications. The application in Knowles was refused, unsurprisingly.

2.6 In this case, the Applicant has provided medical evidence from his general practitioner (in a letter dated 31st August, 2017) which confirms an acquired brain injury arising from an accident in 1995. This led his doctor to conclude that he was a vulnerable person who should be accompanied during "official interactions". Further evidence of a more recent "stroke-type illness" was provided by the same doctor (in a letter dated 30th April, 2019), which illness affected his movement and speech "at that time". The presentation of the Applicant, on each of three occasions when the matter was listed before this Court, was also assessed in considering this issue. While the Applicant is capable of speech and capable of articulating an argument, in the limited time in which he addressed the Court himself, it appeared to this Court that his presentation would be extremely difficult to marshal; it was marked by repetition and non sequiturs. His son, Martin Fogarty, was proposed by the Applicant as one who would be capable of arguing the case on his behalf.

2.7 Despite the cogent and compelling reasons to insist on professional representation, which this Court fully endorses, it appeared from the outset that this case was one in which an injustice might have been done if the Applicant was not represented by his son. On the basis of the available medical evidence, in particular that outlining an historic brain injury, coupled with the Court's assessment of the ability of the Applicant himself at the early stages of the case, the Court ruled that this was an exceptional case in which the son of

the Applicant, Mr. Martin Fogarty, could be permitted to conduct the case on his behalf. The rule of practice applied in the District Court also provides some reassurance that to permit the child of the litigant to address the court is not without precedent, but the authorities above make it clear that the case must involve other factors pointing to a risk of injustice, such as the disabilities outlined here. The type of case should also be considered, in that some litigation is vastly more complicated than a presentation based on affidavit evidence. For the purposes of an Article 40 enquiry, and in these particular circumstances, the Applicant's son was permitted to present the case.

2.8 Mr. Martin Fogarty had sworn the affidavit which was presented to the Court but the Applicant, in open court, confirmed that he had read the document and was satisfied that its contents were true. The justice of the case appeared to require such measures as it appeared that the Applicant was otherwise incapable of presenting his case in a coherent manner.

3 Protection for the Litigant in Person

3.1 The litigant in person is at an obvious disadvantage in legal proceedings. Because he lacks the advice of a qualified lawyer he usually has at least two serious problems, both of which beset the Applicant and his son during these proceedings.

3.2 The first is that he is not familiar enough (or at all, in some cases) with the law and with legal processes such that he struggles to correctly identify the best remedy for his case or to concisely and cogently argue his case so as to ensure that he achieves the most appropriate relief from the court. This situation is ameliorated by the duty of the court to ensure that the litigant's rights are vindicated. He may also have the advantage that his opponent is represented by independent counsel. Unlike the litigant in person, the lawyer has duties beyond her duty to her client. The duties of every officer of the court, solicitor or barrister, are not only important in upholding the public interest by ensuring that the court is not misled and that proceedings are conducted efficiently, they are vital in assisting litigants in person who, not being familiar with the relevant law and procedural rules, often waste a large amount of court time. The lawyer's professional duties extend to assisting her opponent if that opponent is not represented by a lawyer.

3.3 The second problem the unrepresented litigant faces is just as serious and permeates most such cases: he is concerned with the outcome of the case as it affects him personally. This produces a very natural bias in his own favour. This bias, usually deeply felt and all the more distorting for that reason, can also lead to misleading accounts being offered to the court and even to unfair allegations being made about those who are not in court to defend themselves. The personal investment of the litigant in the outcome of the case is in stark contrast with the position of the professional lawyer, and in particular the independent referral barrister, who has no financial or personal interest in the outcome of the case. The practical implications of her role include duties of independence and absolute good faith. The self-employed barrister is singled out, not because solicitors are not independent, generally speaking, but because the barrister is not beholden to any other person: she has no duties to partners and is not in receipt of a salary, she has no ongoing relationship with the client and she is as independent as it is possible to be. This

is the reasoning behind the professional model adopted by the referral Bar. The independent lawyer is in the best position to see the facts clearly, assess them clinically, and is concerned only to argue her side of each issue to the best of her ability. Just as importantly, she will assess what is not in issue and focus on the true crux of the case. It is rare for a litigant in person to agree facts or issues with his opponent. It can be difficult for a court to rely upon the litigant, as the emotional impact of the events in issue often produce an extreme reaction, amounting in some cases to paranoia, such that their opponent parties, and even their own representatives, are seen as being motivated by malice at every turn. All of these comments apply to this Applicant and with equal force to the Applicant's son, Mr. Martin Fogarty. Not only was he presenting a case for a close family member, but it became clear as the case unfolded that he had taken an active part in his father's defence since his father had dispensed with his third legal team, in circumstances which are set out below.

3.4 In each such case, therefore, a court must be vigilant to test such facts and beliefs as may be asserted, to assess them independently and to weigh the evidential support for the assertions very carefully. It is vital to recall that the assertion of malice is so serious an allegation that it requires evidential support. Chief Justice Denham, in *H v. DPP*, [1994] 2 I.R. 589 found that no *prima facie* case of *mala fides* had been made out against the Respondent. She went on to comment, at page 606, that the "*unsubstantiated statement of belief by the appellant, not denied by the [respondent] does not of itself give rise to an adverse inference"*. This Court is bound by and agrees with that general view. In cases such as this one, belief in malfeasance is stated with great regularity and each such assertion must be assessed by reference to the support for that belief, if any. The absence of a denial may simply reflect the fact that the respondent is a stranger to the facts said to ground the belief.

3.5 Finally, in every case, the most important value remains the importance of upholding and vindicating the constitutional rights of the citizen. If, even in a case riddled with irrelevant arguments, assertions of collusion and legal errors, including even the choice of remedy, if there remains a risk that a serious injustice has been done, then the Court must examine the facts in order to decide whether to grant relief. The vindication of the rights of citizens by the courts is so important that it demands the analysis of the most wide-ranging claims of injustice, even if such claims, as here, initially seem far-fetched and appear unlikely to be well founded. Lord Denning referred to the prospect of police officers lying as an appalling vista, in a case in which they were subsequently shown to have done exactly that. Agents of the State may deliberately mislead and have done so in the past. The far more appalling vista is that other organs of the State might not acknowledge and guard against this.

4 Facts: The Offence

4.1 The Applicant was convicted in January 2020 of committing an assault on the 8th of August 2015, which caused harm to his neighbour, hereafter "the complainant". The complainant had asked the Applicant to move his car and, having opened a gate at the Applicant's own premises, he was struck forcibly on the head from behind and fell. He

looked up to see the Applicant standing over him holding a stick. The Applicant was shouting at him to the effect that he was trespassing. The prosecuting guard, who attended some time later that day, stated that the Applicant had identified the stick or piece of timber he used and had given the stick to her. The Applicant explained that he struck the man, not having recognised him as his neighbour. He signed a note in her notebook to that effect. In later interviews while detained, the Applicant denied striking anyone and said that he had thrown a stick at the man and, later still, it was said that he had not been at his home that day. This is a summary of the evidence that was given at trial, though hotly contested in each particular by the Applicant, who represented himself at the trial.

4.2 The Applicant also contended before this Court that there was a history to these events and in his grounding affidavit many such matters are set out. These include an alleged dispute (going back to 2012) with the same neighbour, a further dispute in 2018 with a man who had arranged to cut wood from a tree on the complainant's land (which led to civil proceedings) and allegations of the complainant having had mental health difficulties. The Applicant maintained throughout the trial that he had been the victim of a trespass by the complainant.

4.3 In respect of this history, the complainant not only gave evidence before the jury that he had been a neighbour of the Fogarty family for many years and had never had a problem with them before, he also made it clear at trial that the incident in 2018 had involved another man to whom he had sublet the land and not himself and, finally, he accepted in evidence that he had occasionally suffered from mental health issues for which he had sought appropriate medical help.

5 Facts: The Procedural History

5.1 The Applicant in these proceedings, and in two pre-trial applications to the High Court which were exhibited by him in the grounding affidavit for this action, describes a lengthy procedural history including numerous allegations of unfair procedures and injustices alleged to have occurred in the District Court and the Circuit Court. These can be conveniently grouped as follows: the legal aid history, the warrant history, the pre-trial remand in custody, the dismissal application and the trial and sentence.

5.2 During his pre-trial remand in custody, the Applicant brought Article 40 proceedings which were initiated by Mr. Martin Fogarty and dismissed by Mr. Justice Barrett on the grounds that the matters raised were all matters for the trial judge.

5.3 The trial itself led to a number of new allegations of unfairness. There was a disclosure application on the 8th of October 2019, an adjournment on the 22nd of October 2019, a second adjournment on 14th January 2020 and a trial which commenced on the 21st of January 2020. The trial culminated in a jury verdict that the Applicant was guilty. A prison sentence of 4 years and 6 months was imposed. A committal warrant issued and it is argued, in addition to the deficiencies of the trial process, that this warrant is bad on its face.

6 The Extent of the Article 40 Remedy and the Habeas Corpus Application

6.1 Article 40.4.2o of the Constitution requires that the High Court must release a person who complains he is unlawfully detained unless satisfied that he is being detained "in accordance with the law". Chief Justice Denham described the extent of the courts' jurisdiction in Article 40 applications at paragraphs 23 and 24 of her judgment in *Ryan v Governor of Midlands Prison*, [2014] IESC 54:-

> *"The traditional remedy of Habeas Corpus, now subsumed in Article 40 of the Constitution, is the great protection of the citizens' liberty. It protects our citizens from arbitrary detention and imprisonment without legal warrant, not to mention "disappearances" which, historically and now, are all too common in dictatorial regimes. The Courts must always enquire immediately into the grounds of any person's detention, when called upon to do so.But the fact that every person detained has a right to have the legality of his detention examined by the Superior Courts does not mean that such a person has a right to have every complaint he may have examined under the same extraordinary procedure."*

6.2 Denham C.J. summarised the position at paragraph 18:

> *"Thus the general principle of law is that if an order of a Court does not show an invalidity on its face, in particular if it is an order in relation to post conviction detention, then the route of the constitutional and immediate remedy of habeas corpus is not appropriate. An appropriate remedy may be an appeal, or an application for leave to seek judicial review. In such circumstances the remedy of Article 40.4.2 arises only if there has been an absence of jurisdiction, a fundamental denial of justice, or a fundamental flaw."*

6.3 Notwithstanding these ostensibly narrow rules governing the extent of the Article 40 remedy, it remains the case that, in the words of Finlay C.J. in *State (McDonagh) v Frawley* [1978] I.R. 131 if there is a *fundamental breach of justice* or in the words of Denham C.J. *a fundamental denial of justice* then, even if the alleged breach involves looking beyond the face of the warrant, the Article 40 procedure is appropriate.

6.4 This interpretation of the position is confirmed by the unusual case of *The Child and Family Agency v McG and JC*, [2017] IESC 9, [2017] 1 IR 1. Here, the applicant body appealed an order of Ms. Justice Baker which had directed the phased release of a child who had been taken into the care of the agency but where the parents of the child, although entitled to legal representation, had not been represented at the hearing. The Supreme Court found that the custody hearing had been lacking in the fundamental requirements of justice and also held that to take the child into care in such circumstances amounted to a detention which could attract the constitutional protection of the Article 40 procedure.

6.5 This robust adoption of the remedy is also found in *McDonagh v Governor of Cloverhill Prison* [2005] IESC 4, [2005] 1 IR 394 where the Supreme Court held that a bail hearing

in the District Court had been so fundamentally unfair that both applicants were entitled to be released from custody.

6.6 The Court in McDonagh quoted extensively from the Henchy J. in *the State (Charles Wilson) v The Governor of Portlaoise Prison*, [1969] 7 JIC 2902, where he held:

> On a habeas corpus application by a person detained by order of a court, whether under sentence following conviction or otherwise, matters dealing with the weight of the evidence or irregularities of procedure which do not go to the jurisdictional basis of the trial or other court proceedings are not relevant unless the irregularities or the procedural deficiencies complained of are shown to be such as would invalidate any essential step in the proceedings leading ultimately to his detention.

6.7 Henchy J. described the provision as follows:

> *The mandatory provision in article 40 s.4 sub-s. 2 of the Constitution that the High Court must release a person complaining of unlawful detention unless satisfied that he is being detained "in accordance with the law" is but a version of the rule of habeas corpus which is to be found in many Constitutions. The expression "in accordance with the law" in this context has an ancestry in the common law going back through the Petition of Right to Magna Carta. The purpose of the test is to ensure that the detainee must be released if—but only if—the detention is wanting in the fundamental legal attributes which under the Constitution should attach to the detention.*
>
> The expression is a contentious one and is designed to cover these basic legal principles and procedures which are so essential for the preservation of personal liberty under our Constitution that departure from them renders the detention unjustifiable in the eyes of the law. To enumerate them in advance would not be feasible and, in any case, an attempt to do so would only tend to diminish the constitutional guarantee. The effect of that guarantee is that unless the High Court (or, on appeal, the Supreme Court) is satisfied that the detention in question is in accordance with the law, the detained person is entitled to an unqualified release from that detention. It is the circumstances of the particular case that will usually determine whether or not a detention is in accordance with the law.

6.8 In McDonagh, the Supreme Court found that the applicants were entitled to the presumption of innocence and that it was highly improper to find, in the absence of relevant evidence, that either of them would "go out and assault someone again with a gun" or "go out and shoot someone". These comments "*should not have been made in the context of a bail hearing or indeed in any context"* and went far beyond being merely "unusual in phraseology", as they were characterised in the High Court. The Supreme Court observed that many factors might justify the refusal of bail but there was no indication in in this case that any of these matters had been taken into account by the judge hearing the bail application.

6.9 The facts of McDonagh are set out so as to contrast the case with that of Ryan, who argued that he was being unfairly prevented from taking up temporary release while imprisoned as a convicted person. These distinctions help explain the Supreme Court position on this issue, which might otherwise seem dissonant. Perhaps, to put the matter most plainly, one should conclude by emphasising the comment of Denham C.J. in Ryan that *the remedy of Article 40.4.2 arises only if there has been an absence of jurisdiction, a fundamental denial of justice, or a fundamental flaw*. There was no such fundamental flaw in Ryan, but an argument that the Minister had failed to exercise his discretion correctly in respect of the right to temporary release. This might be termed classic judicial review territory as it would appear that the decision was one which should remain that of the Minister and immediate release is unlikely to be the required remedy. The alleged wrong was not as stark as the injustices described in McDonagh, or in comparable cases. In *Cirpaci v Judge O'Neill*, [2017] IEHC 263 Hogan J. found that there was a failure to advise of the right of election, a condition precedent to the court having jurisdiction. In *Sheehan v District Justice Reilly* [1993] 2 IR 81 the applicant had been sentenced to a term in excess of what was permitted by law and in *Bailey v the Governor of Mountjoy*, [2012] 2 I.R. 391, neither the applicant nor his solicitor was given notice of his appeal hearing. This brief outline of the facts of each these superior court cases may explain why each applicant's release was ordered in the latter cases and why Mr. Ryan's was not.

6.10 The Applicant's argument here is that the acts alleged against the various State actors in his trial, including the pre-trial process, amount to a series of fundamental breaches of his rights, such that the only appropriate response is an order that the Applicant be released from custody forthwith. That omnibus argument is addressed in the final section of this judgment.

6.11 The committal warrant issues are most obviously the proper subject matter of an Article 40 hearing. These are addressed first, followed by a brief consideration of the earlier application under Article 40, as the Respondent submitted that this would render many of the Applicant's arguments *res judicata*.

7 The Committal Warrant

7.1 The main argument in this respect centred on the fact that the original warrant did not bear the seal of the Circuit Court. There was a further submission that the warrant was signed by a person who had no authority to sign the warrant.

7.2 An argument had been raised initially that the date of birth and the name of the Applicant, (Jimmy as opposed to James) were both incorrect and that this rendered the warrant invalid. Neither argument was pressed in oral submissions as it was accepted that the Applicant knew that he was the subject of the warrant and no confusion was caused by these errors. The case of *P.O.I. v the Governor of Cloverhill Prison*, [2017] 3 I.R. 602, therefore, disposes of these issues. There, the Supreme Court ruled on the validity of a warrant that issued on foot of a deportation order and held that, to be valid, it is necessary that a warrant contain on its face all information necessary to show the basis of the jurisdiction relied upon. Trivial mistakes, which could not cause unfairness or confusion as to the basis for the detention could be rectified. Here, neither mistake

caused any unfairness or confusion and therefore neither could be the basis for an order that the Applicant was wrongfully detained.

7.3 In respect of the seal, the Respondent points to the rules of the Circuit Court and specifically, Order 4, rule 1. That rule reads:

1(1). The Court shall have for use in each County an embossing Seal … specifying the name of the Circuit in connection with which it is to be used. Such Seal shall be placed and retained in the custody of the County Registrar. It shall not be necessary that any Decree, Order, Warrant or other document shall be signed by the Judge.

(2) Every document requiring under any provision of statute or statutory instrument, rule of law or any other Order of these Rules to be issued under Seal of the Court shall be authenticated by the Seal of the Court impressed thereon and the signature of a person mentioned in sub-rule (4).

(3) Every document requiring authentication other than one referred to in sub-rule (2), and every Decree, Order and Warrant, shall be authenticated by the signature of a person mentioned in sub-rule (4).

(4) The persons who may authenticate the impression of the Seal of the Court on a document mentioned in sub-rule (2) or a document mentioned in sub-rule (3) are:

(a) the County Registrar, or

(b) such person, or one of such persons, as may, for such period as may be specified, be nominated for that purpose by the County Registrar, or

(c) where any business of the office of the Court in a county is specified in accordance with section 14 of the Courts and Court Officers Act 2009 as business that shall be transacted in a combined court office …

(i) the combined court office manager appointed under section 19 of that Act for that combined court office, or (ii) a member of the staff of the Courts Service employed in that combined court office under section 21 of the Courts and Court Officers Act 2009 as may, for such period as may be specified, be nominated for that purpose by the combined court office manager concerned, on behalf of the County Registrar. [emphasis added]

7.4 As is clear from rule 1(2), if required by law, a document must have a seal. The Applicant cannot point to any rule which requires a committal warrant to bear a seal. There are a significant number of documents which do require the seal, a committal warrant does not appear to be one of these documents.

7.5 The wording of O.4 rule 1 names the warrant as a type of document which requires only an authenticating signature. Thus, the rule itself suggests that a warrant does not require

a seal. Finally, while the wording of the document itself is unfortunate, referring as it does to it bearing a seal, this cannot change the law which does not provide that a committal warrant requires a seal in order to be effective.

7.6 As regards the signature, sub-rule (4), and the affidavit of Mr. Gerard Connolly, the relevant combined office manager, make it clear that the signatory had the authority to sign the relevant warrant. He was the nominated signatory under Order 4, rule 1(4)(c)(ii) of the Circuit Court Rules as amended by SI number 19 of 2019). A copy of the nomination of the signatory, duly signed by the relevant office manager, was exhibited.

7.7 The committal warrant is, therefore, good on its face. Insofar as the Supreme Court in Ryan suggests that the duty of the High Court in an article 40 hearing is limited to this inquiry, the application fails.

7.8 It seems to this Court that to limit the enquiry to the face of the warrant is too restrictive a view and there is ample authority, from Ryan itself and the other decisions of the Supreme Court set out above that even those facts which might attract a judicial review remedy or an appeal may nonetheless attract a remedy under Article 40 if the breaches of fundamental rights are sufficiently egregious. The allegations here, if borne out, amount to such egregious conduct that it is appropriate to examine them rather than baldly advising the Applicant to go to the Court of Appeal without further enquiry.

8 The First Article 40 Enquiry

8.1 In earlier proceedings, heard by Barrett J. on the 27th of September, Mr. Martin Fogarty sought an enquiry into the Applicant's detention on various grounds. Mr. Fogarty described unacceptable conditions of detention and argued that the Applicant should be released due to these conditions. He also raised arguments to the effect that the Applicant had not been served with any arrest warrants, that his son (Gerry) had been assaulted in Limerick Prison and that his papers were taken from him at the prison by prison officers. He raised the issue that disclosure, which he said was necessary for the Applicant's pending trial, had not been made at that time.

8.2 Mr. Justice Barrett ruled that these were matters for the Trial Judge and found that the relevant remand warrant, under which the Applicant was then detained, was good on its face. The application had the effect however, that consent to bail on the part of the Director of Public Prosecutions was forthcoming, and the Applicant subsequently appeared at his trial having been remanded thereafter on bail.

8.3 Given the ruling of Barrett J. that these were matters for the Trial Judge, and given that the subsequent trial has resulted in a number of fresh complaints, this Court is not estopped from considering this application.

8.4 As explained by O'Dalaigh C.J. in *State (Wilson) v Governor Portlaoise Prison*, [1969] 7 JIC 2902, even if a previous application has been made, it is important that arguments raised have been addressed. In Wilson, the then President of the High Court had not replied to a request for an enquiry under Article 40, as it was the second such enquiry.

The application in Wilson was refused by the Supreme Court on the basis that all of the matters raised were properly matters for the Court of Appeal but it was held that the refusal to address the issues raised by the second application had been an error.

8.5 Those facts can be contrasted with the present position, where the issues were fully canvassed and addressed by Barrett J. but where they were held to be matters for a trial judge, in circumstances where the trial was then listed to proceed within a fortnight of that application. This new application is one that must be addressed given the intervening trial, rather than due to any deficiency in an earlier application. It is now alleged that the Trial Judge failed to address any of the matters raised in these proceedings.

9 The Circuit Court Trial

9.1 The Applicant was present on his trial date on the 14th of January 2020 when he was afforded an adjournment to obtain legal representation. On the 21st of January, he indicated that he wanted another adjournment as he had not yet obtained a lawyer. He had been afforded the previous week within which to do so and had discharged the third of three solicitors who were assigned in this case the previous September (the first solicitor was unable to act, he also discharged the second solicitor). In these circumstances, the Trial Judge was entitled to proceed with the case. That decision having been made clear to the Applicant, he requested that his son represent him. This was refused by the Trial Judge. On the basis of the law outlined on this question above, this was clearly a decision that was not only open to the Circuit Court Judge, but was undoubtedly correct.

9.2 The essence of the Applicant's case is that he was not afforded a fair trial. So much so, he argues, that he should be released from prison, without further trial. He points to the original 999 call, which the Applicant himself made, and in which he told the gardaí that his neighbour was trespassing on his property. He lists the various defects from legal representation, to warrants which were never served on him, to disclosure which was not given to him, but his most fundamental argument is that he should not have been convicted because the complainant was an unreliable witness but the State actors colluded together to defeat justice. At the invitation of the Applicant, this Court has listened to the DAR of the Circuit Court proceedings and has heard some of the evidence which was presented to the jury.

9.3 In submissions to this Court, there were repeated characterisations of the evidence against the Applicant in respect of the assault allegation as being very weak. It was asserted, specifically, that there was no evidence that the Applicant struck the complainant at all and that this allegation was fabricated by Garda Coonan. This is simply not true. The facts as set out in the Book of Evidence, and repeated at trial under oath, reveal clear, cogent and compelling evidence of a serious and unprovoked attack on the complainant by this Applicant. His averment that there was no evidence that he hit his neighbour is so far removed from the truth as to call into question every averment made by the Applicant. The word "unprovoked" is used advisedly, as the essence of the original defence mounted was that the complainant was trespassing. This too is a gross

exaggeration. The victim's evidence was that he was trying to get the Applicant to move his car and had opened a gate on the Applicant's land having already spoken to him minutes beforehand and having been a visitor on the land many times before.

9.4 At trial, the complainant gave evidence that he fell, having received a blow to the head which left him on the ground. He said he felt like he had been *hit by a ton of bricks* and could see the Applicant standing over him, with a stick in his hand. His evidence was that Applicant asked him, could he not read signs? He received 12 stiches in his head as a result of the blow. The prosecuting guard gave evidence that she had been handed a stick by the Applicant and that he confirmed he had used it to hit the man, not recognising his neighbour. He later changed this story to one in which he threw the stick. This Court was told that none of this had occurred as described and that there were witnesses who could have proved his innocence. In that respect, it should be noted that at his sentence hearing, after his conviction, the Applicant told the Court: "*the stick that I threw at him didn't even hit him*".

9.5 It is asserted that the prosecuting guard hid forensic evidence. This is a reference to the stick with which the Applicant hit the complainant. His affidavit suggests that there was forensic evidence in this regard which was deliberately concealed. In submissions, it emerged that this allegation followed from the agreed fact that there was no blood observed on the stick. At trial, what emerged in this regard was that the stick was only taken because the Applicant told the guard that it was the stick he had used to hit his victim. The guard confirmed that the stick was examined by scenes of crime examiners but that there was no laboratory report because there was no forensic material to be examined; no blood was observed. It is misleading to suggest that this was an attempt to hide evidence. The prosecution position was that there was no forensic evidence, and this was very clear from the evidence at trial.

9.6 The Applicant refers to the evidence of an assault as a "*fiction created by Garda Andrea Coonan and supported by no witness statements and no forensic evidence whatsoever*". Not only was there a damning witness statement from the complainant, the lack of forensic evidence is easily explained and has been explained under oath by the prosecuting guard. Again, the submission made in the affidavit is so far from being true as to bring the reliability of the Applicant into question in respect of all other issues raised by him.

9.7 The Applicant repeatedly asserted that the complainant was unreliable due to mental health issues. This fact was admitted by the complainant. His composed evidence was in sharp contrast to the Applicant's own demeanour at trial. The Applicant repeatedly and heatedly insisted to the complainant that he, the complainant, had been stalking the Applicant's wife and putting fear into his mother-in-law using a pitchfork and, on another occasion, a sweeping brush. These accusations the complainant refused, in bemused tones, to accept. He repeatedly answered to the effect that he did not know what the Applicant was talking about.

9.8 The result of the Applicant either representing himself or being represented by a close family member in this case has been a presentation seen almost entirely from the point of view of the Applicant and with little or no attempt to view the case from any other angle. Thus, no information was given to the Court by the Applicant as to the material facts set out above, which shed a very different light on what the Applicant has submitted. The evidence at trial illustrates the bias that has permeated the presentation of this case to the Court and affects the weight to be attached to any averments in the Applicant's affidavits.

9.9 Assessing credibility is an exercise in which the courts engage every day. It can be difficult to define what factors are important in ascribing weight to certain testimony, including evidence given on affidavit. But it is uncontroversial to remark that when a deponent has ignored facts that do not suit his case, to the extent that material in his affidavit is positively misleading, the weight to be attached to the remaining averments is correspondingly lowered. The more misleading the averments and submissions of the Applicant, the less likely it is that any assertions made by him will be credible.

9.10 This contrast between matters of fact and the assertions of the Applicant, combined with the outlandish nature of the remaining issues make it difficult for the Court to accept the Applicant's remaining assertions namely; that evidence was taken in the middle of the trial and destroyed; that two of his family were dragged out of court for no reason; that the Applicant was prevented from calling witnesses in his case; that an order was made to destroy the evidence which had been taken by the State. The Court has, however, listened to portions of the DAR which have shed some light on these asserted beliefs.

9.11 When this Court queried what, if anything, had been destroyed, the description given was of phone evidence consisting of recordings that would rebut the State's case. Pressed further, the suggestion was that the recordings showed that the complainant was "crazy and off his head".

9.12 The alleged events, if true, amount to an outrageous affront to justice carried out by a range of state actors in a public courtroom in mid-trial and before a jury. Before assessing the veracity of the claims, it may be worth noting as regards the alleged recordings, that they could show no more than the complainant himself had already admitted before the jury. Under cross-examination by the Applicant, this man had agreed that he had suffered from mental health issues. He agreed that he had been a patient in an appropriate facility. Significantly, it was never suggested to him that he had been suffering from any particular such difficulty on the day of the assault or that he had made up his account as a result of mental health problems. There is nothing that a recording of this complainant on any other occasion could have added to this picture such that the jury might have changed their verdict in this case.

9.13 The Applicant alleges that his wife and his son, Stephen, were physically removed and his son charged with "a made-up assault" to cover the taking of the court materials and as a form of intimidation of witnesses. The charge sheet in this regard is exhibited. Finally,

he alleges that witnesses and the Applicant's assistants were kept out of the Circuit Court and intimidated.

9.14 There is no doubt that there was a fracas in the court on that date. From what can be discerned on the DAR, there were references to parties recording events, but it is far from clear as none was speaking into a microphone during this incident. This Court did not hear any ruling of the Court preventing a witness from being called although the entirety of the trial was not examined. What is clear from the Trial Judge's later order, however, is that the reason parties were removed was to prevent them from recording events at the trial itself. To this extent, the Court is confirmed in its view that the recording of the trial on a mobile phone was what concerned the Trial Judge and this was not gratuitous removal of defence witnesses.

9.15 The Trial Judge did not order that evidence be destroyed and this is yet another misleading assertion by the Applicant. He directed that the phones that had been seized during the trial be handed over to gardaí so that recordings made in court could be deleted. This contradicts what was submitted to me on behalf of the Applicant. The Applicant's son was asked if the disturbance in court, during which two family members were removed, had anything to do with their recording of court proceedings. He insisted that this was not the reason for the fracas. The Judge's order suggests that far from evidence being destroyed, not only was there an attempt to record the court proceedings but that the only order made was that these recording be deleted. There was no other order in relation to evidence and nothing that justifies the allegation that the Trial Judge ordered the destruction of evidence.

10 Legal Representation

10.1 The Applicant claims that he was never afforded adequate legal representation in this case. The right to legal representation is set out in the *State (Healy) v Donoghue*, [1976] IR 325 and has been confirmed many times subsequently. Most pertinently to this case, it is clear from the Supreme Court decisions in *State (Sharkey) v. Mcardle*, [1981] 6 JIC 0402, and *State (Royle) v Kelly*, [1974] IR 259, that the right to legal representation is vitally important but is not an "absolute right", to use the words of the Applicant in submissions to this Court. In other words, there must be reasonable and meaningful access to a lawyer, but it is a right which cannot be vindicated unless there is a minimal level of cooperation by the person being represented. In Royle, for instance, the applicant insisted that he be entitled to retain a particular lawyer and, when this solicitor was not assigned by the Court, he represented himself. The Court confirmed that the right to a lawyer is not a right to a particular lawyer. It is also a right that must be vindicated in a reasonable and proportionate way.

10.2 Here, a District Court Judge had assigned a specific solicitor, who very quickly notified the Applicant that he could not act in the case and another solicitor was appointed. The Applicant discharged this solicitor. A new solicitor was then assigned. This solicitor was based in Dublin and the person employed by that office, who handled the Applicant's case, was a former member of An Garda Síochána. By September of 2019, that third

solicitor had been discharged. The barristers engaged by that solicitor had written certain advices which the Applicant exhibited in this application.

10.3 One of the complaints made is that the Applicant insists that the third solicitor was chosen by the Circuit Court Judge and not by himself. Whether this is so or not is immaterial, as long as the solicitor was one on the legal aid panel. This solicitor was discharged some time before the trial. The Applicant demanded his file back from that office. He maintains that he still has not received that file in full.

10.4 As this factual history makes clear, the Applicant was capable, throughout, of discharging solicitors when he was unhappy with the representation afforded him. It is important to note the Applicant's specific averments in this regard. He avers that solicitors and barristers assigned to represent him "refused to take basic instructions from him" and have "gone so far as to undermine his defence". The Applicant goes on to state that these lawyers were inadequate and ineffectual. Nonetheless, he concludes this section of the affidavit by stating that efforts continued to obtain legal representation. None of these efforts is outlined in the affidavit.

10.5 Contrary to what the Applicant argued in oral submissions, far from being obliged to accept the assertions about his legal teams because they were not refuted, this Court must assess their weight. The Respondents and Notice Parties in this case cannot refute these allegations as they are strangers to what occurred between the Applicant and his legal teams.

10.6 The Court has seen some of the advices sent to this Applicant, which include helpful summaries of the then factual position. In many particulars, these shed light on other claims of the Applicant. For instance, in a letter from his then barrister in December of 2018, he is advised to present himself to gardaí in order to execute a warrant as there is no objection to his remaining on bail. Considering the Applicant's assertions as to the issuing of multiple warrants in the case, this is a disturbing shaft of light into the murky allegation that he was never advised as to any court dates and no warrants were served on him. It is of course a difficulty for an accused if there is any confusion as to dates, but these attendances and the evidence put before Mr. Justice Barrett tend to suggest that, just as he has done in relation to events at the trial itself, the Applicant is unreliable as to events which led to warrants for his arrest being issued by the Court.

10.7 The Respondent, in an affidavit sworn by the prosecuting guard, confirms that there were several solicitors assigned and, most significantly, avers that the Applicant was afforded an adjournment as late as the 14th of January of 2020 in order to ensure that he was represented at his trial.

10.8 The Applicant avers that there were many adjournments in order to "create billables" to use his words. From the evidence presented to this Court, the case was adjourned for reasons that frequently arise in criminal proceedings. The legal aid system does not permit a payment to any lawyer for cases which are listed for mention only and which are adjourned. The one reason, therefore, that the Applicant suggests as explaining the

adjournments of his case, is not only a damaging allegation of unprofessional conduct, it is demonstrably incorrect.

10.9 The claims of the Applicant in respect of the lawyers' failure to take instructions, when compared to the letters exhibited in his own affidavit, suggest that his assertions in this respect are not reliable. The only conclusion that this Court can reach on the available evidence is that his right to legal representation was vindicated and he did not avail of the many opportunities afforded to him in that respect.

10.10 None of those criticised in this way have had any opportunity to reply to these claims. There is a further aspect to this part of the Applicant's case. The representative who corresponded with the Applicant when the third and final solicitor was assigned to his case only qualified as a solicitor in January of 2020. The Applicant has persisted in referring to him throughout his case as "the Fake Solicitor". The fact is that, despite all of the exhibits shown to the Court in this respect, there is no specific claim in any of these exhibits, by him or on his behalf, that this man is a qualified solicitor. In the letters he signed, it is clear that there is only one qualified solicitor named thereon, and it is not the signatory. This is the solicitor who was named in the Legal Aid assignment, and not the representative from his office. It should also be noted that qualified and competent counsel was briefed and retained at all times in this case while there was a solicitor on record.

10.11 Unfortunately, from the point of view of the Applicant, the representative employed by his third solicitor was a former member of An Garda Síochána. This fact appears to have led to the averment that the representative conspired with his former colleagues in An Garda Síochána against the Applicant, at a time when he was this man's client. There is no evidence to support the averment. The Court has no hesitation in rejecting this suggestion. It is commonplace for members of An Garda Síochána to requalify as solicitors or barristers. Their professional lives would be short indeed if they acted to the detriment of their clients in this way and the suspicion of the Applicant is ill-founded and misguided as a general proposition.

10.12 Looking at the particular facts of this case, the Applicant exhibits a number of courteous letters from the impugned apprentice solicitor, none of which supports the allegation that he was actively working against the Applicant. A further exhibit shows that this representative was actively trying to contact the Applicant on a date when he claims he was advised to attend at court but that nobody else appeared. Once again, the evidence points to explanations which are not alluded to in the Applicant's narrative of events and it is difficult to accept any version he presents as being reliable.

10.13 The Applicant has argued that the fact that he was not represented at his jury trial was one of the most significant injustices which led to his wrongful conviction. What led to this lack of representation, as outlined above, explains why it occurred and why, at his trial, he eventually applied to the Trial Judge to have his son, Martin, represent him. When the trial judge refused to allow this, he chose to represent himself. For all the reasons outlined above in considering the representation of the Applicant for the purposes

of this application, the Trial Judge was right in that respect. The conduct of a criminal trial is a very different thing to the presentation of an Article 40 application. A trial involves much careful preparation, appropriate and focused witness handling and enormous resources including the participation of willing citizens as members of the jury. The Article 40 procedure is one that involves submissions alone and it is, by its nature, urgent. The exceptional permission to a family member to represent an Applicant who is under some disability could not extend to a trial by jury.

10.14 The Applicant was afforded many opportunities and ample time to obtain a new lawyer; even up to a week before the trial an adjournment was granted for this specific purpose. There is no attempt to explain why one of the many highly qualified and experienced lawyers who practice criminal law could not represent this Applicant even at that late stage. He did not in fact pursue that avenue and his refusal to engage a fourth solicitor can only be attributed to the Applicant's deliberate but misguided decision not to engage another lawyer.

10.15 In assessing the Applicant's complaints about his own lawyers, it is important to note also an argument made in respect of a barrister who acted for the prosecution in October of 2019.

10.16 It is averred that the original prosecuting barrister had a conflict of interest but remained in the case in order to ensure that appropriate disclosure was not made to the Applicant. These are very serious allegations. The Applicant was offered the opportunity to reconsider this argument in circumstances where the barrister withdrew long before the trial. Instead, he insisted that this was proof of the various agents of the State acting together against his interests and that the barrister in question had retained a case management role at the behest of the Trial Judge until he was replaced by another barrister who had no connection with the case.

10.17 The original barrister, who had properly handed over the case, had only recognised the potential conflict when the Applicant described the circumstances of an earlier altercation with a man called O'Reilly. This man had sublet the complainant's land and both men, the complainant and O'Reilly, had been sued by the Applicant. The original prosecuting barrister acted for O'Reilly in those proceedings and had not recognised the parties until the Applicant's disclosure application in October 2019. While that civil case had settled, he acknowledged that the perception might be that he would have knowledge of the previous dispute or that he might be seen to be somehow less than independent having acted for a co-defendant of the complainant and against the Applicant (who had been the plaintiff). That was the history of his involvement. He continued to deal with some disclosure matters but the entire file was handed over before the trial date to a second barrister, who conducted the case thereafter.

10.18 From January, this second barrister was responsible for all disclosure and trial matters. It is simply not sustainable to argue that the connection, revealed by the first barrister himself, was improper or was such as to render the trial unfair. This argument is even more ludicrous when one considers that the barrister stepped back from the case

voluntarily and a separate barrister was retained who could not be said to have had any prior involvement with any of the parties. It was of course correct that the first barrister should withdraw. The Applicant is right to suggest that he could not remain in the case as one of the most important features of the referral barrister is that she is independent. However, this barrister did withdraw and there can be no complaint thereafter as the prosecution case was taken over by a second barrister.

10.19 As so often occurs in a case presented by a litigant in person or, as here, a close family member, the arguments presented bear no relation to the true position. Stepping back from the individual arguments of injustice and collusion for a moment, one can see that here is a well-substantiated allegation of assault made by one neighbour against another. On any view of these events, there is only one suspect and only one victim. It is worth recalling the salient features of the evidence. Any question of technical trespass pales into insignificance when seen against the testimony of a man having been struck over the head with a piece of timber, leaving him dazed on the ground with his assailant, still holding the stick, shouting at him about the signs which warn trespassers off the land.

10.20 This damning version of events, denying only his knowledge of the identity of the man he hit, was confirmed by this Applicant to the prosecuting guard when she arrived at the scene, the Applicant pointed out the stick he had used, and his comments were written into her notebook. The Applicant signed this note. While his version of events changed completely in various later interviews, these admissions and acts constitute compelling and admissible evidence against him.

10.21 In *DPP v Gormley and Others* [2014] IESC 17, [2014] 2 IR 591, upon which the Applicant attempts to rely, the Supreme Court held that a suspect has an important right of access to a solicitor while detained in a garda station. The case is not authority for the proposition that a solicitor must be obtained while a garda is still at the scene of an alleged crime and before or during her initial enquiries.

10.22 The main evidence in the case is summarised again here in order to make the following observation: unlike his various family members, the prosecution actors in this case (the gardaí, solicitors, and counsel), his own lawyers, and the Trial Judge had no unprofessional interest in this case. They had no motive to act together or separately to defeat the Applicant's defence. There is no evidence of them knowing or being influenced by any of the witnesses, there is no evidence of them having acted inappropriately and there is no foundation for any of the Applicant's assertions in this regard. The core of his application is based on a narrative that is unfounded, deeply damaging to third parties (most of whom are not before the Court), and which, insofar as this Court can judge on the evidence before it, has been either deliberately fabricated or based on paranoia, or both.

11. Warrant History

11.1 The Applicant did not appear to answer his bail on a number of court dates in circumstances which were the subject of a factual dispute at the Circuit Court and in subsequent High Court proceedings. It is not in dispute that he was hospitalised at one

point and at least one bench warrant issued at a time when he was in a nursing home. He was remanded in custody due to the existence of these bench warrants.

11.2 The Applicant relied principally on the decision of Mr. Justice Hogan in the case of *Bailey v. the Governor of Mountjoy*, [2012] IEHC 366, [2012] 2 IR 391 in this regard. There, an enquiry was ordered due to the uncontested evidence from both the applicant and his solicitor that he had no notice of a hearing at which his appeal was dismissed, and a conviction and sentence of imprisonment affirmed. Hogan J. ruled that in circumstances where the application had been adjourned from time to time to allow the respondent to prepare a response, the Article 40 procedure was appropriate. That applicant was released on bail pending the enquiry, which was struck out when he was imprisoned in relation to a separate offence.

11.3 As must be immediately apparent from that short description, unlike the position in Bailey, this Applicant has no support for his assertion that he did not know about the court dates and that his solicitors did not tell him. The exhibits in the Applicant's own affidavit, tend rather to suggest that his solicitor and barrister were trying to help him avoid attracting further warrants and to ensure that he remained on bail.

11.4 There is some further evidence on these issues, but it arose in the earlier Article 40 enquiry. The initial application took place on the 27th of September and included arguments about the validity of the arrest warrants. As noted, relief was refused on that occasion, but the High Court heard evidence from the sergeant supervising the prosecution of the case. His evidence was that the warrants issued in circumstances where counsel engaged by the Applicant had confirmed to the Circuit Court that the Applicant was aware of the relevant dates. The Applicant disputes this awareness and these instructions, and he has discharged all counsel who had previously been engaged.

11.5 Having reviewed the evidence given to the High Court on the 27th of September and taking into account the comments, above, in respect of the Applicant's unfounded accusations against all of his legal teams, without exception, this Court does not accept that the Applicant found himself unwittingly the subject of repeated bench warrants.

11.6 There is a final point which must be addressed. At the height of the Applicant's case, and recalling the evidence as regards his brain injury, it may be that some special attention ought to have been paid by his representatives or even by the Court to the extent that he could not have been expected to know about his court dates or to follow up with the Court or any of his lawyers in this regard. It may even be that there was unfortunate confusion as to dates which led to warrants issuing which should not have issued. He himself makes it clear that he was grateful to His Honour Judge Teehan for acknowledging during a hearing in respect of these warrants the Applicant was clearly in need of medical attention. However, whatever injustice is now alleged, he was on bail by the end of September, he was afforded the opportunity to engage lawyers on more than one occasion thereafter and failed to do so. These last facts are not in issue and are dispositive of the issue as to whether or not he was deprived of legal representation at trial. He was not. His various complaints about his legal teams prior to the trial have not

been substantiated but in any event could not, in the circumstances outlined, be seen as breaches so fundamental that his subsequent trial was rendered unfair and that require his immediate release.

11.7 This Court relies on the case of Kelleher, an ex tempore ruling delivered by Hamilton C.J. on the 30th of October 1997. There, the Applicant tried to raise issues relating to his detention in custody during the investigation of the offence for which he was eventually tried, convicted and imprisoned. The Chief Justice concluded that none of the issues relating to arrest and charge are properly the subject of an Article 40 hearing. As he put it:

> *"These are questions which occur regularly in the course of proceedings in the criminal courts and before the Court of Criminal Appeal and in my opinion there is nothing exceptional about the circumstances of this case which would justify this Court … in ordering the High Court to hold a full enquiry into the lawfulness of the detention."*

Mr. Justice O'Flaherty added, in a two-line judgment, that the whole proceeding was *"totally misconceived and should never have been brought*."

11.8 With the benefit of the information gleaned from the Respondent's affidavit, from some of the exhibits to the Applicant's own affidavit, from the DAR of the previous Article 40 application and the DAR of the evidence of the trial (limited to the application on the 8th of October, the complainant's evidence, the prosecuting guard's evidence in respect of the forensic evidence available and the sentence hearing) this action appears to be similarly unjustified and totally misconceived.

12. Pre-Trial Detention

12.1 As regards the alleged breaches of the rights of the Applicant while he was in custody before his trial, such matters include an allegation of assault against one of his family members and an allegation of theft of his papers by prison staff. Even if proven, and they remain assertions at present, such matters could not render his current sentence of imprisonment unlawful at this stage. Mr. Justice Hogan addressed similar issues in *Kinsella v Governor of Mountjoy Prison*, [2011] IEHC 235, [2012] 1 IR 467, and following Mr. Justice Clarke's dictum in J. H. v Clinical Director of Cavan General Hospital [2007] IEHC 7, [2007] 4 IR 242, held that nothing other than *a complete failure to provide appropriate conditions or appropriate treatment could render what would otherwise be a lawful detention, unlawful*. There, Hogan J. concluded, the applicant was not at that time being treated in such a way as to immediately vitiate the lawfulness of his detention. The same comment applies here, without making any finding as to the previous conditions in which the Applicant was detained.

12.2 These were matters which were raised before Mr. Justice Barrett last September at which time he ruled that the matters raised were for the trial judge. It bears repeating that none of the assertions of the Applicant in any other particular has been supported by the surrounding evidence to which the Court has access. The current Respondent is not in a

position to refute any claims made by the Applicant in this regard and the Court is not required to make any finding of fact on this issue in circumstances where he has long left that place of detention.

12.3 The Applicant was released in September of 2019, he was offered legal assistance by the Circuit Court Judge in October and again in January and refused to take up the opportunities he then had to obtain legal representation. He has had a jury trial which led to his current sentence of imprisonment. At the request of this Court, he has received material from one of his former solicitors though he claims that this has been redacted or censored in some way in that the name of the former representative no longer appears in the papers. Crucially, nowhere does he point to a specific breach which prejudiced his trial in regard to his pre-trial detention. While there are complaints about his solicitors and barristers, and about his papers having been taken, it was never argued that he did not have a copy of the evidence which was to be called at trial. The argument about disclosure materials is separate and was the subject of numerous complaints. This is addressed below.

13. The Dismissal Application

13.1 In 1999, the preliminary examination procedure in the District Court, whereby a district judge examined the book of evidence before sending it forward to the court of trial, was replaced by section 4 of the 1967 Criminal Procedure Act, as amended in 1999. This provides, at section 4E, for a procedure whereby an accused can apply, at any stage in advance of a trial, for an order that the case against him be dismissed by the court of trial on the basis that there is not a sufficient case to put the accused on trial. The Court of Criminal Appeal decision *DPP v Lawel,* [2014] IECCA 33 addresses the extent of the jurisdiction of any court hearing an application under section 4E. It is clear that this is a jurisdiction that can only be exercised in the clearest of cases and, following the Supreme Court decision in *Cruise v O'Donnell*, [2007] IESC 67, [2008] 3 IR 230, MacMenamin J. in Lawel held that it was not appropriate to make rulings on the admissibility of evidence or the lawfulness of detention as part of such an application.

13.2 The 4E procedure is one that should be used when the proposed evidence is deficient in a demonstrable way which can be determined without hearing extensive evidence on the issue. The example given, at paragraph 16 of the judgment in Lawel, was where the only evidence against an accused consisted of inadmissible hearsay. As set out by Clarke J. in *DPP v Jagutis*, [2013] IECCA 4, [2013] 2 IR 250, for a successful application to dismiss under section 4E, there are two conditions: first, the case against the accused must depend on the admissibility of certain evidence, such that there would be insufficient evidence to convict on the relevant charge without that evidence and second, the issues arising must be plain, not involving the resolution of contested issues of fact and capable of being dealt with by examination of the proposed evidence in the Book of Evidence supplemented only by explanatory oral evidence, if necessary.

13.3 This Court has listened to the DAR of the dismissal application on the 8th of October, which was treated as a disclosure hearing (which in substance, it was) and the same application on the 21st of January, immediately preceding the trial. Before his trial

proceeded, the Applicant applied to the Trial Judge for 155 different items in a disclosure application. The application was made in writing 14 days before the trial was first listed to commence, and the written document was headed "Dismissal Application". Some of the items set out were matters properly the subject of an application for disclosure but many were not. In particular, a series of potentially relevant items were sought which related to the civil proceedings between the Applicant and the complainant, the medical history of the complainant and many questions were asked. What is more important in considering this submission, is that none of the matters outlined were properly the subject of an application under section 4E.

13.4 The Applicant has argued that, even if the application was doomed to fail, it should nonetheless have been considered and reasons given for the refusal. On the DAR in this respect it appears that the learned Trial Judge ruled on the 21st of January that the dismissal application was one which ought to be made at the close of the prosecution case. In this, he was in error as the relevant law clearly envisages a pre-trial application.

13.5 Referring back to the purpose of this exercise, the test which must now be applied is to ask if this was so fundamental a breach of the Applicant's rights as to require his immediate release? As noted, the list of matters said to comprise the section 4E application could not have led to a dismissal of the charges under that section as each one of the 155 issues raised was either a matter for pre-trial disclosure or for argument. It is also clear that the manner in which the case was argued obscured many of the issues and made the tasks of the Trial Judge and of opposing counsel very difficult. Each item on the list had been considered by the Trial Judge on the 8th of October and various orders were made in that regard. When the list was raised again on the 21st of January at the beginning of the trial, the Trial Judge knew the contents of the list. In all of those circumstances, and in particular, bearing in mind that the document, despite being labelled a Dismissal Application, was in fact a disclosure request, the failure to address the argument as a formal application under section 4E was not such an injustice as could have deprived the Court of jurisdiction.

14. The Omnibus Argument

14.1 The Applicant argues that, while one of the complaints made above might not result in his being released, the combination should have this effect. In *State (Wilson) v Governor Portlaoise Prison,* [1969] 7 JIC 2902, a judgment was delivered on the 29th July 1969 by O'Dálaigh C.J. This applicant had been convicted of murder and sought to review his trial. Much as this Applicant has done, he alleged that his was a "fixed" trial, involving a conspiracy between his counsel, the prosecuting counsel and the judge. He pointed to an extradition argument, the alleged perjury of one of the witnesses, the inadmissibility of other evidence and an alleged violation of his human rights. Detailed further grounds were added, by the permission of the court, which can be summarised as alleged failures of the judge and counsel in the running of the trial, including in directing the jury. In response to the new grounds, Mr. Justice Walsh held (at page 7) that "*Habeas Corpus is not a mode of reviewing*

alleged procedural deficiencies unless they go to the jurisdictional basis of the trial or invalidate some essential step in the proceedings leading ultimately to the conviction." The same comment is appropriate in this case in considering the various allegations made about deficiencies leading up to and during the Applicant's trial.

14.2 Just as relevant are the comments made at page 4 of the same judgment. Here, the Court refers to grounds already rejected by the High Court in a previous application but goes on to say:

> *"What remains are a pot pourri of grounds which, if substantiated, would be proper to be advance in the Court of Criminal Appeal, but none of which go to the jurisdictional basis of the trial or invalidate any essential step in the trial leading ultimately to the applicant's conviction."*

14.3 That is exactly what has been presented here: a pot pourri of grounds, only one of which truly addresses the concerns of the Article 40 application. That is the committal warrant ground, which has been rejected. The remaining grounds do not contain prima facie evidence of any breaches of constitutional rights such as would deprive the Circuit Court of jurisdiction. The weight of the evidence at trial appears to have been strongly in favour of the prosecution.

15. Conclusion and Alternative Remedies

15.1 Should the Applicant disagree with the actions or findings of the trial judge, his proper course is an appeal to the Court of Appeal. His repeated attempts to litigate these issues suggest that it is unlikely there will be an argument against extending the time for such an appeal, and the Notice Parties confirmed that such an issue would not be raised, although the Court of Appeal may take its own view of the merits of permitting an extension of time in this case. That Court, should an extension be permitted, would have the benefit of transcripts of the trial to assist in assessing the various arguments which have been made here, none of which require the urgent or dramatic remedy of the Article 40 procedure.

15.2 It is perhaps clear from the comments made throughout this judgement that the Applicant would be well advised to retain the services of a lawyer for any such appeal. While his son was given permission to present this application, it is by no means clear that the Court of Appeal would grant the same leeway, particularly if they have transcripts from the trial before them which may show the Applicant's ability in quite a different light to that initially presented in this Court, notwithstanding the medical evidence. Not having read the transcripts, nor having listened to more than the limited DAR excerpts described above, it is impossible for this Court to comment further in that regard.

15.3 The application is refused.