



THE COURT OF APPEAL

Court of Appeal Record Number: 65/2015

**The President
McCarthy J.
Kennedy J.**

BETWEEN/

**THE PEOPLE
(AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)
RESPONDENT**

- AND -

**F.X.
APPELLANT**

JUDGMENT of the Court delivered on the 31st day of March 2022 by Ms. Justice Kennedy

1. This is an appeal from an order of the Central Criminal Court (Butler J.) following an application by the appellant for an inquiry pursuant to s. 4(8) of the Criminal Law (Insanity) Act 2006 (hereafter "The 2006 Act"). The appellant's application arose from an incident which occurred on the 11th May 2010. The appellant stabbed a patient with whom he was sharing a ward who died some 8 months later. The appellant was originally charged with s. 4 of the Non-Fatal Offences Against the Person Act, 1997 (hereafter "The 1997 Act"). Subsequently, the appellant was charged with murder and sent forward to the Central Criminal Court pursuant to s. 4(4)(a) of the 2006 Act for a determination of his fitness to be tried. Carney J. determined that he was unfit to stand trial. That determination was made on the 26th March 2012, however, thereafter, an inquiry pursuant to Article 40.4.2 of the Constitution proceeded before Hogan J. on the 3rd July who found that the committal order made by Carney J. was insufficient to detain the appellant beyond 14 days and directed that he be released on the 10th July 2012.

An application was then moved pursuant to s. 4(8) of the 2006 Act upon which Butler J. discharged the appellant in respect of the murder charge but not on the charge contrary to s. 4 of the 1997 Act. It is this order of the 17th February 2015 which is the subject of this appeal.

Background

2. This case has a somewhat complicated background. The incident which is the subject of these proceedings took place on the 11th May 2010. The appellant was a voluntary psychiatric patient at Tallaght Hospital, where he occupied one of six beds in a room on the Rowan Ward. He attacked a fellow patient, one Mr McGrane, with whom he was sharing a ward, by stabbing him in the neck with a steak knife. The appellant made admissions to the Gardaí, whilst fit to be interviewed, that he had purchased this knife from a shop earlier in the day of the attack. The attack was a single stab of the steak knife. The knife remained lodged in the victim which severed his spinal cord at the level of T2 and paralysed him below that level. Mr McGrane, who was 73 years old at the time, was not known to the appellant and was chosen at random. Mr McGrane died some 8 months later on the 11th January 2011.
3. The appellant was originally charged with s. 4 of the Non-Fatal Offences Against the Person Act, 1997 and thereafter he was charged with murder and sent forward to the Central Criminal Court for determination of his fitness to be tried pursuant to s. 4(4)(a) of the 2006 Act. On the 27th October 2011, the Prosecution entered a *nolle prosequi* in respect of the earlier charge of serious harm contrary to the 1997 Act.
4. The issue of fitness to be tried was first contended on the 10th of June 2010, where the District Court remanded the appellant to the Circuit Criminal Court for the purpose of a fitness assessment pursuant to s. 4(4) of the 2006 Act. However, following the death of the deceased, the appellant was charged with murder and he was sent forward to the Central Criminal Court on the issue of fitness, whereupon, on the 26th of March 2012, Carney J. determined on the basis of unchallenged medical evidence that the appellant was unfit to be tried and adjourned the proceedings until further order pursuant to s. 4(5)(c)(i) of the 2006 Act.
5. As stated, an inquiry pursuant to Article 40.4.2 of the Constitution was instituted wherein Hogan J. found on the 3rd July 2012 that the appellant's detention was not in accordance with law and directed that he be released on the 10th July 2012.
6. The Director of Public Prosecutions applied to the Central Criminal Court on the 9th July 2012 for an order pursuant to s. 4(6)(a) of the 2006 Act committing the appellant to the Central Mental Hospital, the matter was adjourned to the 16th July 2012, and the appellant was committed to the Central Mental Hospital subject to periodic review pursuant to the 2006 Act.
7. On the 30th July 2012, the appellant brought an application pursuant to s. 4(8) of the 2006 Act which provides:-

“Upon a determination having been made by the court that an accused person is unfit to be tried it may on application to it in that behalf allow evidence to be adduced before it as to whether or not the accused person did the act alleged and if the court is satisfied that there is a reasonable doubt as to whether the accused did the act alleged, it shall order the accused to be discharged.”

8. On the 30th July 2012, Carney J. gave directions in relation to the hearing and directed that the issue be tried by a judge alone pursuant to the 2006 Act and directed that the prosecution prepare a statement of charges and book of evidence stating as follows: -

“[I] am surprised the statute doesn’t tell us one way or another, but, that being so, I think I would come down on the side of trial by judge alone. So I give that direction and note that a book of evidence and statement of charges is to be served, and that the matter will progress through list to fix dates in the ordinary way.”

9. Following this, an indictment was lodged with two counts; murder and assault causing serious harm. It appears from the submissions filed on behalf of the Director that the hearing was to take place on the 21st October 2013, but was adjourned, prior to that date, an indictment was lodged as above.

Jurisdiction of this Court

10. This Court raised the issue regarding the jurisdiction of the Court to hear this matter and following the consideration of supplemental written submissions, we are satisfied on this issue and proceed accordingly.

The Hearing before Butler J.

11. On the 2nd December 2014, the inquiry commenced. It was submitted at the hearing on behalf of the Director that if the court were to discharge the appellant on the murder count, s. 9(2) of the Criminal Law Act 1997 as amended by s. 29 of the 1997 Act applied.
12. Furthermore, the Director submitted that even if s. 4 had not been preferred on the indictment, s. 4 would have been an alternative verdict pursuant to s. 9(2) of the 1997 Act, as amended.
13. Counsel on behalf of the appellant argued that there was no lawful charge pursuant to s. 4 of the Non-Fatal Offences Against the Person Act 1997 before the Central Criminal Court and therefore the possibility of the appellant being discharged on such charge did not arise. It was also submitted that there was no basis in the 2006 Act requiring or permitting an indictment to be lodged where a person had been returned for a determination as to fitness to be tried. Moreover, that there was no lawful basis for the addition of counts to an indictment. Counsel on behalf of the appellant argued that if the Court had a reasonable doubt as to the alleged act of murder, it should discharge the appellant on that charge and make no further order.
14. Evidence was adduced and judgment was delivered by Butler J. on the 17th February 2015. The judge found that there was a reasonable doubt on the murder charge but he was satisfied that a jury would have found the appellant guilty on the s. 4 charge. An Order was made discharging the appellant on the murder count. Butler J. provided a written judgment, portions of which he recites for the transcript on the said date. At paras. 11 and 12 of the judgment he said as follows:-

"Having considered the evidence adduced on behalf of the prosecution and that of Dr Gilsean, a Pathologist called on behalf of the defence, I am satisfied that there must be reasonable doubt as to whether the act complained of caused, or contributed to –or contributed in more than a minimal was (sic) to, the death of the deceased.

There follows a question of what must be done as a result of that finding. The Act provides that the court "shall order the accused to be discharged". The defence, in effect, argues that he should be completely discharged. The evidence tendered in this case related to both to Counts 1 (Murder) and Counts 2 (Assault Causing Serious Harm), on the Indictment. Should this matter have gone to trial before a jury on the basis of the evidence which I heard, I am satisfied that it would have to have found the accused not guilty by direction on Count 1 but guilty on Count 2. It would make no sense were the legislation to be interpreted on the facts of this case to allow a complete discharge of the accused. I am, therefore, discharging him in respect of the count of murder."

Application before Noonan J.

15. The appellant then applied to the High Court pursuant to Article 40.4.2 for an inquiry into the lawfulness of his detention. This application was heard by Noonan J. in *FX v The Director of the Central Mental Hospital* [2015] 2 IR 435 on the 19th and 20th of March 2015. Judgment was delivered on the 25th March 2015. Noonan J. held that the appellant was in lawful custody and refused to grant his release.

Grounds of Appeal

16. The appellant now seeks to appeal the order of Butler J., discharging the appellant on the charge of murder, but refusing to discharge the appellant on the offence of assault causing serious harm. The appellant submits, in essence, that as the appellant was sent forward from the District Court on the charge of murder only for a determination of his fitness to be tried, that was the sole matter before the court and there is no provision under the 2006 Act to prefer additional charges. Moreover, that the procedure pursuant to the 2006 Act is *sui generis* and the provisions of the Criminal Procedure Act 1967 do not apply.

17. The appellant now seeks the following Orders: -

- (i) *An Order that there is no charge lawfully laid against the appellant pursuant to the provisions of s. 4 of the Non-Fatal Offences Against the Person Act 1997, as amended.*
- (ii) *Further, or in the alternative, an Order declaring that there is no charge lawfully laid against the appellant pursuant to the provisions of s. 4 of the Non-Fatal Offences Against the Person Act 1997, as amended.*
- (iii) *Further, or in the alternative, an Order discharging the appellant in respect of the charge laid against him pursuant to s. 4 of the Non-Fatal Offences Against the Person Act 1997, as amended.*

Submissions of the Appellant

18. The appellant submits that where a person has been sent forward on the issue of fitness to stand trial, there is no provision in the 2006 Act for the addition of charges. It is argued on behalf of the appellant that there was no charge against the appellant of serious harm pursuant to s. 4 of the 1997 Act from the date when the appellant was first sent forward by the District Court up to the 30th July 2012, when the Central Criminal Court directed a "trial on the facts". For this reason, it is said that the issue of the appellant being discharged or otherwise in respect of this charge never properly arose. It is submitted that the appellant had only been sent forward for a fitness hearing to the Central Criminal Court on the charge of murder and that therefore, when he was discharged on the murder charge, he no longer stood charged with any criminal offence.
19. It is argued that on a finding of unfitness, s. 4(8) would allow for the strength of the evidence in such a case to be tested. It is submitted that s. 4(8) allowed the accused to be discharged where there was a reasonable doubt as to whether the appellant did the act alleged. The appellant argues that it was "common case" that such a discharge was the equivalent of an acquittal.
20. The appellant cites the case of *State (Williams) v Kelly* [1970] IR 271, in which an accused person had been sent forward by the District Court to the Circuit Court on signed pleas of guilty pursuant to s. 13 of the Criminal Procedure Act 1967. An indictment was preferred against the accused and he was arraigned, pleaded guilty and was sentenced. In *habeas corpus* proceedings, it was contended that the sentence had been imposed without jurisdiction as there had been no return for trial to found an indictment. It was held that an indictment cannot be preferred where an individual is sent forward on a signed plea. The appellant submits that based on the reasoning in *State (Williams) v Kelly*, a *fortiori* an indictment cannot be preferred against a person who has been sent forward for a fitness hearing under the 2006 Act.
21. It is submitted that the appellant was charged with murder alone when he was returned to the Central Criminal Court for his fitness to be determined. However, no such procedure was open in respect of the act of assault and as such it was not open to the court to consider his fitness on this charge. The appellant argues that the effect of the 2006 Act is that a court's finding of unfitness does not occur in a vacuum.
22. The appellant further submits that there is no provision in the 2006 Act to add further counts after an accused is returned for his fitness to be determined, and no power to add counts after a determination of unfitness and before a s. 4(8) trial on the facts. In essence, it is argued that the prosecution had no valid power to add the s. 4 count to the matters to be considered in the procedure and therefore the court had no jurisdiction to deal with that count and unless the alternative counts can in some way be imported from the 1997 Act to the 2006 Act, there is no basis for finding that that would be permitted. Section 9 on its face deals with an entirely different situation whether it is to be an indictment for a specific offence etc.

Submissions of the Respondent

23. It is submitted that the literal interpretation for which the appellant contends is misconceived and that the appellant contends for an overly strict and nonsensical interpretation of the section. If this approach were to be adopted, then if a person is found unfit on a single count and then discharged on that count, such would nullify the entire proceedings. This, it is argued cannot have been the intention of the Oireachtas.
24. Reliance is placed on *Boyne v Dublin Bus* [2006] IEHC 209 where Gilligan J. quoted with approval from the judgment of Arden J. in *Garbutt & Anor v Edwards* [2006] 1 All ER 553 the following (at p. 564 of *Garbutt* judgment): -

“Indeed, in a question of statutory interpretation the court is bound to have in mind the purpose of a statutory rule or the mischief at which it is directed, so far as such purpose or mischief can be ascertained. That is not to say, of course, that the court can simply give effect to that purpose, but where the court has to make a judgment about the proper meaning of a statute it is likely to want to consider whether it can by the process of interpretation give its effect to its purpose or the mischief to which the statute is directed.”
25. The Director notes that the concept of a non-literal interpretation of statutes in the criminal sphere has also been considered in *DPP v Carter* [2015] IESC 20. In this Supreme Court judgment, O’Donnell J. commented that even in a criminal provision where a strict construction applied, a literal construction did not.
26. Reliance is placed on s. 9(2) of the 1997 Act as amended whereby an accused may be found guilty of an alternative offence should the evidence not warrant a conviction for murder. The Director contends that when an accused is sent forward for his/her fitness for trial to be assessed, the prosecutor is not precluded by law from preferring any further charges.
27. The Director refers to the orders sought by the appellant and contends that the appellant is not in fact seeking to appeal the order made by Butler J. discharging him on the murder charge, but asks this Court to find and/or for a declaration that the charge under s. 4 of the 1997 Act was not lawfully preferred against the appellant. In this regard, she says that the Central Criminal Court has jurisdiction to provide for its own procedures and did so by directing that a statement of charges and book of evidence be served. The indictment then followed and the inquiry pursuant to s. 4(8) ensued. It is argued that in such an application, a court may have regard to the possibility of alternative verdicts, moreover, that the prosecutor is not precluded from preferring additional charges when a person is sent forward for a determination as to fitness to be tried.
28. In addressing the third order sought by the appellant; that is to discharge the appellant from the s. 4 charge, the Director contends this does not arise on the facts of the case, and that only a jury has the capacity by way of a non-guilty verdict to so find.

29. Finally, it is contended that the delay in prosecuting this appeal must be considered by the Court. The respondent submits that given the amount of litigation engaged in in relation to this case, the appeal should be refused. The respondent also points to the absence in the appellant's submissions of mention of the parallel litigation taken by the appellant in the FX case. It is submitted that this must be considered by this Court when deciding whether any relief should be granted to the appellant.

The Issues

30. Firstly, the question arises as to whether the Director was entitled to lodge an indictment on the appellant being sent forward pursuant to s. 4(4)(a) of the 2006 Act and, if so, was she permitted to add counts to that indictment?
31. Secondly, whether, when a court is considering an application pursuant to s. 4(8) of the 2006 Act, that court may have regard to the provisions of s. 9(2) of the 1997 Act.

The Statutory Provisions

32. We now set out the relevant provisions of 2006 Act as amended by the Criminal Law (Insanity) Act 2010 insofar as this appeal is concerned commencing with s. 4 of the Act which governs the issue of an individual's fitness to be tried: -

"4-(1) Where in the course of criminal proceedings against an accused person the question arises [...] as to whether or not the person is fit to be tried the following provisions shall have effect.

(2) [...]

(3) [...]

(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.

(b) Where an accused person is sent forward to the court of trial under paragraph (a), the question of whether the person is fit to be tried shall be determined by the judge concerned sitting alone.

(c) If the determination under paragraph (b) is that the accused person is fit to be tried, the provisions of the Criminal Procedure Act 1967, shall apply as if an order returning the person for trial had been made by the Court under section 4A of that Act (inserted by section 9 of the Criminal Justice Act 1999) on the date the determination was made but, in any case where section 13 of that Act applies, the person shall be returned for trial.

(d) If the determination under paragraph (b) is that the person is unfit to be tried the provisions of subsection (5) shall apply.

(e) Where the court subsequently determines that the person is fit to be tried the provisions of the Criminal Procedure Act 1967, shall apply as if an order returning the person for trial had been made by the Court on the date the determination was made."

33. We pause there to say that reference to the "court" is to the District Court and subsection (5) of the Act relates to the hearing of a fitness application and the options open to the court of trial. Section 4(8) of the 2006 Act states: -

"Upon a determination having been made by the court that an accused person is unfit to be tried it may on application to it in that behalf allow evidence to be adduced before it as to whether or not the accused person did the act alleged and if the court is satisfied that there is a reasonable doubt as to whether the accused did the act alleged, it shall order the accused to be discharged."

Section 1 of the Act defines for the purposes of the Act that: -

"court means any court exercising criminal jurisdiction and includes court martial."

34. The 2006 Act provides for the establishment of the Mental Health (Criminal Law) Review Board regarding *inter alia* the obligations to persons detained under the provisions of the 2006 Act. Section 13(2)(a) provides: -

"Where the clinical director of a designated centre forms the opinion in relation to a patient detained pursuant to section 4 that the patient is no longer unfit to be tried for an offence he or she shall forthwith notify the court that committed the patient to the designated centre of this opinion and the court shall order that the patient be brought before it, as soon as may be, to be dealt with as the court thinks proper."

35. We now move to the terms of s. 9(2) of the Criminal Law Act 1997 as amended by s. 29 of the Non-Fatal Offences Against the Person Act 1997 which provides: -

"If, on an indictment for murder, the evidence does not warrant a conviction for murder but warrants a conviction for any of the following offences-

(a) Manslaughter, or causing serious harm with intent to do so, or

[...]

the accused may be found guilty of such offence but may not on that indictment be found guilty of any offence not specified in any of the foregoing paragraphs."

36. That concludes the relevant statutory provisions.

The Order of Carney J.

37. We have helpfully been furnished with the transcript of the hearing before Carney J. on the 30th July 2012 when the issue of a hearing pursuant to s. 4(8) was first canvassed. The matter came before the court on that date, following the determination that the

appellant was unfit to be tried in order to seek directions as to the mode of trial. The issue arising and the proposed procedure were very clearly stated by the then counsel for the Director and it is worthwhile to set out what was said: -

"This is a defence application for a trial of the issue of whether the accused has in fact committed the act alleged against him, which is the stabbing of an elderly patient with a kitchen knife, and the issue before the Court today is how that should be tried. The submission of the Director is that the protection afforded by the relevant section is analogous to the protection afforded by section 4(e) of the Criminal Justice Act 1999 and that accordingly the matter should be tried by a judge sitting alone. And it seems to me that if the trial is to proceed in an orderly fashion, the Director should undertake to furnish a book of evidence, which I do undertake to furnish, and the Director should also furnish a statement of charges so that the Court will know what the issue to be tried is. I so undertake again."

38. It is to be observed that the only issue taken on behalf of the appellant at the directions hearing related to whether the matter should be heard by a judge sitting alone or by a jury. There was no opposition to the procedure suggested by counsel for the Director other than relating to that issue. Indeed, Mr Fitzgerald SC on behalf of the appellant said: -

"I think the only issue in which there is any dispute is in regard to whether it should be tried by judge alone or by judge and jury."

Carney J. ruled as follows: -

"[I] am surprised the statute doesn't tell us one way or another, but, that being so, I think I would come down on the side of trial by judge alone. So I give that direction and note that a book of evidence and statement of charges is to be served, and the matter will progress through list to fix dates in the ordinary way."

39. It is undoubtedly correct to say that it was eminently sensible and indeed absolutely necessary that the material contained in the book of evidence and any additional disclosure be furnished prior to the hearing of the application. The book of evidence incorporates, in the ordinary course of events, the statement of charges and it appears that it is to this that counsel for the Director and the judge referred. The purpose of such disclosure is abundantly clear; so that the parties would be on notice of the charges and the potential evidence to be adduced at the s. 4(8) hearing.

The Significance of the Indictment

40. That then brings us to a consideration of an indictment. Insofar as a fitness issue is concerned, the nature of the charge directs which court determines the issue. The Constitution requires that an accused person is entitled to know the charges preferred against him/her on which he/she is being put on trial and so the indictment sets out the statement of offence and the particulars of offence. *The People (AG) v Boggan* [1958] IR

67 to which the appellant refers, sets out the basis of the jurisdiction to try a criminal charge, being that of a valid return for trial order.

41. The Criminal Justice Act 1999, substantially amended the Criminal Procedure Act 1967. The relevant portion of s. 4A reads:-

“(1) Where an accused person is before the District Court charged with an indictable offence, the Court shall send the accused person forward for trial to the court before which he is to stand trial (the trial court) unless-

(a) the case is being tried summarily; or

(b) the case is being dealt with under section 13.”

42. Although preliminary examinations have been abolished, there remains a requirement that an accused be *sent forward for trial*. The return for trial order must be for the relevant court for trial. Those charged with indictable offences are sent forward to the relevant Circuit Criminal Court unless there is a requirement that the offence charged be tried before the Central Criminal Court, such as in the present case.

43. The appellant refers to *Boggan* as authority that the jurisdiction to try an offence on indictment is founded in the return for trial. Donnelly J. more recently in *Wyatt v Director of Public Prosecutions* observed: -

“The return for trial forms the basis of the jurisdiction to try a person on indictment.”

44. It is said therefore that as the appellant was not sent forward for trial pursuant to the Criminal Procedure Act 1967, the provisions of that Act do not have application, specifically s. 4M which provides:-

“Where the accused has been sent forward for trial in accordance with this Part, the indictment against the accused may include, either in substitution for or in addition to counts charging the offence for which he has been sent forward, any counts that-

(a) are founded on any of the documents served on the accused under section 4B or 4C, and

(b) may lawfully be joined in the same indictment.”

45. Consequently, it is contended on behalf of the appellant that no additional charges could be added in circumstances where the 1967 Act has no application and where there is no provision within the 2006 Act for the addition of charges where a person is sent forward for a determination of fitness to stand trial under that Act.

Conclusion on this issue

46. The return for trial forms the basis of the jurisdiction to try a person on indictment. The appellant was not sent forward for trial, he was sent forward to the court of trial for the

purpose of determining his fitness to be tried. Section 4(4)(a) of the 2006 Act provides the statutory basis to send an accused forward to the appropriate court for that specific purpose. Therefore, in the present case, the appellant was lawfully before the Central Criminal Court, and, once the issue of his fitness was determined, and he was found unfit, it was then for that court to address the matter pursuant to the provisions of s. 4(5). From the point of the return under s. 4, the proceedings were properly before the Central Criminal Court.

47. A s. 4(8) application; a so called "trial on the facts" fell for determination by that court once application was made on behalf of the appellant. Carney J. directed that the statement of charges and the book of evidence be served, to which procedure there was no objection. The point is made that the only offence on which the appellant was sent forward under s. 4 was that of murder, therefore, the question arises whether the respondent was entitled at that point to prefer an indictment and to invoke the provisions of the 1967 Act by adding an additional count.
48. In our opinion, it is clear from the 2006 Act that where a person is sent forward to the court of trial for the specific purpose under s. 4 of the 2006 Act, the provisions of the 1967 Act do not apply unless the accused is found fit to stand trial. Section 4(4)(c) of the 2006 Act provides that where a person is found fit to stand trial, the provisions of the Criminal Procedure Act 1967 shall apply as if an order returning the person for trial had been made by the District Court under s. 4A of that Act. It follows that s. 4A does not apply on a finding that the person is unfit and therefore there was no order before the Central Criminal Court returning the appellant for trial, consequently, it was not possible to prefer a valid indictment. *A fortiori*, there was no statutory power to add counts pursuant to s. 4E of the 1967 Act. Section 4(4)(e) of the 2006 Act addresses the situation where the court subsequently determines a person is fit to stand trial and in that event, the provisions of the 1967 Act will apply. So, again, only on a finding of fitness will the Criminal Procedure Act have application.
49. Indeed, when setting out the nature of the application before Carney J. at the directions hearing, counsel referred specifically to the statement of charges as did Carney J. Whilst that reference may have been thought to include an indictment, we do not think this to be correct. An indictment could not be preferred unless and until the appellant was returned for trial. Therefore, the indictment lodged cannot be said to be a valid indictment as there was no order returning the appellant for trial to the Central Criminal Court.
50. However, the real issue, in our opinion, concerns the addition of the charge of assault causing serious harm. Prior to considering this issue we will make some observations on the issue of fitness to be tried and s. 4(8) of the 2006 Act.

Fitness to be Tried and s. 4(8)

51. Fitness to plead is a fundamental prerequisite of a criminal trial. An accused person must be capable of understanding the nature of the trial and charge against him/her. In order to ensure a fair trial, the person charged must be capable of taking part in that trial. It is basic fair procedure. Ultimately, the 2006 Act seeks to balance the rights of individuals

who fall within it, that is those with a mental disorder in terms of the Act, and to ensure that justice is done.

52. It is apparent that a determination as to fitness is to be carried out by the appropriate court, either by the District Judge, if the offence is summary or being tried summarily, or the appropriate court of trial. Where the person is sent forward to the court of trial, then, in accordance with s. 4(5)(b), the fitness issue is determined by the judge sitting alone. As s. 1 defines a court as "any court exercising criminal jurisdiction.", quite obviously, this includes the High Court exercising its criminal jurisdiction.
53. Should the person be found fit, then, in the court of trial, the terms of s. 4(4)(c) apply; that is the provisions of the Criminal Procedure Act 1967, as amended, come into play as if the person had been sent forward by the District Court under s. 4A of that Act. Where a person signed pleas of guilty, the person is deemed to be returned for trial. Where the person is found unfit, then the provisions of s. 4(5) of the 2006 Act apply and the proceedings are adjourned until further order and may include in patient or out-patient care or treatment in a designated centre.
54. It is trite to say that it is only where a person is charged with an offence that a determination as to his/her fitness may arise. The nature of the offence determines the court which will determine the fitness issue.
55. Secondly, where there is a determination that the person is fit, then the proceedings continue. That clearly means that the criminal proceedings proceed in the usual way. In this regard, the Act makes specific reference to the date of the determination on fitness as being the date of the return for trial to the relevant court.
56. Section 4(8) introduced for the first time, the concept of a "trial on the facts" and the provision comes to the aid of persons who are detained in a designated centre, having been found to be unfit to stand trial, and where an issue arises regarding the commission of the "act alleged" by the accused. Clearly the intent was to ensure that persons found not to have committed the act, should not be detained. As stated by O'Malley in *The Criminal Process* at para. 14-34 when referring to the 2006 Act and *inter alia* s. 4 (8):-

"These provisions, it must be said, are quite enlightened because a common problem with the former insanity law was that it tended to deny any meaningful opportunity to accused persons to vindicate their innocence once a question arose about their mental state."
57. Thus, the section permits an application to the "court", clearly the court of trial, where there has been a finding of unfitness, for evidence to be adduced as to whether the accused person did the "act alleged".
58. This procedure is not the same as a criminal trial, as the only matter being considered by the court is the *actus reus*. If the *actus reus* cannot be proven beyond reasonable doubt, then the accused shall be discharged. In effect, this means an acquittal. The Act does not

elaborate on the word "discharged", but it would appear that the section envisages that the accused person will be discharged from the offence charged.

Section 9(2) of the 1997 Act

59. As stated above, the argument is made on behalf of the appellant, that where a person has been sent forward by the District Court to the Central Criminal Court for a determination of their fitness to be tried, there is no provision in the 2006 Act for the addition of charges to that with which he was charged when sent forward, whereas the respondent argues that, as per s. 9(2) of the 1997 Act, even if there were no power to lodge an indictment bearing the original count and an additional count, s. 9(2) enables a court to recognise the residual wrongdoing and refuse to discharge the appellant under s. 4(8) of the 2006 Act.
60. It does not seem to this Court that the respondent was entitled to lodge an indictment as the appellant had not been sent forward *for trial* and so absent a finding of fitness, s. 4 of the 1967 Act did not apply. However, we observe that the appellant was entitled to have the alleged offence set out in some format, whether that was by way of the statement of charges in the book of evidence or in some other manner. In reality, the fact that this was done by way of the indictment would not present a difficulty for the appellant except that the indictment included an additional count to that of murder.
61. Section 9(2) of the Criminal Law Act 1997 is set out earlier in this judgment but for ease of reading provides as follows:-

"(2) If, on an indictment for murder, the evidence does not warrant a conviction for murder but warrants a conviction for any of the following offences-

(a) manslaughter, or causing serious harm with intent to do so, or

(b) any offence of which the accused may be found guilty by virtue of an enactment specifically so providing (including section 7(3)), or

(c) an attempt to commit murder, or an attempt to commit any other offence under this section of which the accused might be found guilty, or

(d) an offence under the Criminal Law (Suicide) Act, 1993,

the accused may be found guilty of such offence but may not on that indictment be found guilty of any offence not specified in any of the foregoing paragraphs."

62. The first point that occurs is that serious harm is a constituent element of the offence of murder – every murder incorporates serious harm. Secondly, any person facing a charge of murder will also face a trial in relation to the alternate offences on which a jury can return a verdict. The question is whether, in the absence of a valid indictment and the addition of a count pursuant to the Criminal Procedure Act 1967, and simply on the basis of the options open to a jury at trial, was the judge entitled to consider those alternate options when determining the application pursuant to s. 4(8) of the 2006 Act?

63. The court in a s. 4(8) application is considering whether, in terms of the statute, the accused did the "act alleged". In the present case that act included the act of stabbing the deceased and whilst the judge was not satisfied beyond reasonable doubt on the issue of causation, thus leading to the discharge of the appellant on the murder charge, this did not remove a consideration of the necessary alternative offence of assault causing serious harm.
64. It appears to be undisputed that the appellant stabbed the deceased on the 11th May 2010. Therefore, it can be said that there is no doubt but that he committed the act which would constitute an assault pursuant to s. 4 if the respondent proved that the act was carried out with the necessary *mens rea*.
65. In circumstances where the court was considering whether the appellant "did the act alleged", which is a consideration of the *actus reus* in respect of the offence of murder, it is an artificial and narrow interpretation of s. 4(8) to suggest that if the court were not satisfied beyond reasonable doubt that he did the act alleged, that he be discharged entirely from the proceedings.
66. The "act alleged" must incorporate a consideration of the alternative and necessary offences which may fall for consideration by a jury in due course (in the event that the appellant is found fit).
67. Whilst the 1997 Act refers to "on an indictment for murder", we do not believe that this in and of itself precludes a judge when considering the *actus reus* of the offence of murder on an application under s. 4(8) of the 2006 Act from considering alternative offences which are constituent elements of the offence of murder and which may lead to a conviction for an alternative offence at trial.
68. Ignoring for a moment the fact that the indictment preferred two counts, one of which was that of assault causing serious harm, the judge in our view was entitled to assess the evidence to include the necessary alternative verdicts which could arise at trial. To do otherwise would require an artificial reading of the provision under the 2006 Act.
69. When a charge of murder is preferred against an accused person, that charge may, in certain circumstances, present a jury with a range of alternative verdicts. It is for this reason that in many instances, the indictment at trial will simply refer to the single count of murder, in the knowledge that a range of alternative verdicts may be open to a jury depending on the evidence. Therefore, when considering an application under s. 4(8), it would cause an injustice to fail to consider the alternative range of verdicts on a charge of murder. The alternative verdicts apply regardless of whether such counts are preferred on the indictment as the murder charge in and of itself incorporates the range of alternative verdicts open to a jury. Thus, it was open to Butler J. when determining the application under s. 4(8) of the 2006 Act, to consider the potential alternative offences, irrespective of whether the appellant was charged with any one of those offences.

70. The appellant has filed a notice of motion seeking certain orders as set out earlier in this judgment. For the reasons given, we dismiss the appeal and refuse the reliefs sought.