Neutral Citation [2016] IEHC 680

THE HIGH COURT

JUDICIAL REVIEW

[2016 No. 478 SS]

IN THE MATTER OF AN ENQUIRY UNDER ARTICLE 40.4.2 OF THE CONSTITUTION OF IRELAND, 1937

BETWEEN

ANDREW LARKIN

APPLICANT

AND

THE GOVERNOR OF MOUNTJOY PRISON

RESPONDENT

JUDGMENT of Mr. Justice Eagar delivered on the 25th day of November, 2016

1. An application was made *ex parte* by the applicant to Noonan J. on 25th April, 2016 and the court ordered in accordance with Article 40.4.2 of the Constitution that the respondent produce the applicant before the High Court at 2 o'clock in the afternoon on Wednesday, 27th April, 2016, and to certify in writing the grounds of his detention.

2. The application was grounded on the affidavit of Aoife Corridan who is a solicitor in the office of Michael J. Staines & Company, Solicitors. In her affidavit she stated that the applicant appeared before Dublin Circuit Criminal Court on 8th April, 2014 and was sentenced in respect of one burglary count on Bill no. 41/14 to 2 years' imprisonment, and for one robbery offence in Bill 623/2013 he received a sentence of 4 years' imprisonment, consecutive to Bill 41/2014 when the final 3 years would be suspended pursuant to s. 99. The next offence which was on Bill no. 859/2013 for an attempted robbery offence and he was sentenced to three years' imprisonment, again consecutive to Bill no. 623/2013, but this sentence was fully suspended under s. 99 of the Criminal Justice Act, 2006.

3. She further stated that on 18th December, 2014 all three bills were re-entered before the original sentencing judge. An error was pointed out to the Circuit Court judge with regard to Bill no. 623/2013 which was not an offence which had been committed whilst on bail. On consent of both the applicant and the Director of Public Prosecutions this error was corrected in that the order of sentence and conviction was amended therein to reflect that the sentence imposed on Bill no. 626/2013 (being a four year sentence with the final 3 years suspended under s. 99 of the Criminal Justice Act, 2006) was concurrent to Bill no. 41/2014 and not consecutive to that bill number.

4. On 20th February, 2015 the applicant appeared in Dublin Metropolitan District Court No. 8 and pleaded guilty to the charges of trespassing which had occurred on 19th December, 2014, criminal damage which had occurred on 30th December, 2014 and s. 4 theft which occurred on 5th January, 2015 (the trigger offences). He was remanded in custody from 7th January, 2015 on these charges until 20th January, 2015 (in the District Court). He pleaded guilty to the trigger offences and was subsequently remanded in custody to Dublin Circuit Court on 27th February, 2015 under s. 99 of the Criminal Justice Act, 2006 for consideration of the reactivation of the suspended sentence imposed by the Circuit Court on 8th April, 2014 and 18th December, 2014.

5. Ms. Corridan further states that on 27th February, 2015 the s. 99 reactivation application was dealt with by Hogan J. and on that date Hogan J. reactivated all the sentences that had previously been suspended on 8th April, and corrected on 18th December, 2014. The trigger offences were remanded back to the District Court on 2nd March, 2015 where the applicant received in respect of the trigger offences, a sentence of 8 months to run from that date on all charges. The applicant did not appeal the sentence imposed in respect of the trigger offences.

6. She stated that by way of notice of appeal dated 11th March, 2015, the applicant appealed the reactivated sentences imposed on 27th February, 2015. The applicant lodged that appeal himself in prison and the appeal has not been heard by the Court of Appeal.

7. She further states that on 19th April, 2016 Moriarty J. in the case of *Moore & Ors. v. DPP & Ors.* [2016] IEHC 244 found that the reactivation procedure under s. 99 of the Criminal Justice Act, 2006 and in particular s. 99(9) and s. 99(10) of the said Act to be unconstitutional. Ms. Corridan says that the consequence of the said finding by Moriarty J. is that the sentences reactivated by the Circuit Court on 27th February, 2015 under s. 99 of the Criminal Justice Act, 2006 were not validly imposed as the statutory provisions underpinning same are unconstitutional and accordingly no longer validly detain the applicant. She further says that, accordingly, the warrants which purport to constitute the sole authority for the detention of the applicant are by virtue of a number of features fundamentally compromised and lacking the integrity required of documentation whose purported effect is as stated, namely to deprive a person of his right to liberty, a right that can only be removed under Article 40 of the Constitution if the removal is in accordance with law.

8. Exhibited to the affidavit of Ms. Corridan were the warrants in relation to the trigger offences and the warrants in relation to the offences where the Court had imposed the active sentence and also attached was a notice of appeal signed by the applicant. This Court is surprised that no attempt had been made to obtain a copy of the orders of the District Court remanding the accused to the Circuit Court under s. 99(9). Submissions on behalf of the appellant have been lodged with the Court of Appeal.

9. Hal McGuckian is a Principal Legal Executive of the Chief Prosecution Solicitor's Office and he swore an affidavit indicating that the applicant had lodged an appeal against the activation of his suspended sentences, the subject matter of this enquiry. The Director of Public Prosecutions provided a transcript of the original sentence hearing on 8th April, 2014 and the activation hearing on 27th February, 2015 and he exhibits these. He said from a review of the transcript the terms of the suspension appear to be as follows:

a. Own bond 500 Euro;

b. To keep the peace and be of good behaviour for a period of 5 years post-release.

c. Undergo a drug treatment programme under the auspices of the Court Probation Service.

10. The applicant entered into a bond in respect of each of these offences on 12th June, 2014 and Mr. McGuckian said, having reviewed the computer system used by his office, he cannot locate any record of any appeal having been lodged in respect of the convictions for the triggering offences (the Court is satisfied that no appeal has been lodged in respect of the convictions of the triggering offences). He does confirm that the applicant has appealed Bill no. 623/2013 and Bill no. 825/2013. In the transcript of the Circuit Criminal Court on 27th February, 2015 it is clear that counsel for the Director talked about triggering offences, and at p. 7 of the transcript, Hogan J. who was the Circuit Judge, says as follows:-

> "You see, what is the purpose of suspending a sentence at all? And s. 99 would purport to perhaps give a second chance which in a way could be considered to be intrusive to the original sentence."

11. Hogan J. then activated the sentence on Bill no. 623/2013 and Bill no. 859/2013 and directed that he be given credit for the time that he spent in custody on Bill no. 41/2014.

Article 40

12. In *A. v. the Governor of Arbour Hill Prison* [2006] 4 I.R. 88 the Court found that once finality had been reached and the applicant in each case had exhausted their actual or potential remedies, they could not avail of the relief of the finding of unconstitutionality of the statute. Counsel for the applicant also suggested that the respondent would rely on the decision in *Clarke v. the Governor of Mountjoy Prison* [2016] IEHC 278 (herein "*Clarke*"). But counsel for the applicant said the decision of the Court of Appeal in the *Clarke* case that is reported at [2016] IECA 244 is, in at least one respect, significantly in the applicant's favour, and that was because the Court of Appeal confirmed the correctness of McDermott J.'s ruling in the High Court that the finality principle (set out within the Rule in *A. v. the Governor of Arbor Hill*) did not operate to preclude Mr. Clarke from bringing his *habeus corpus* challenge. However the issue for this Court to determine is whether or not the applicant in this case can succeed, where *Clarke* failed.

13. McDermott J. in his judgment set out the facts of the case and also set out the effect of the decision of Moriarty J. in *Moore & Ors. v. DPP & Ors*. [2016] IEHC 244 and he viewed the authorities in relation to the question of appeals as set out in *McCabe v. Ireland & Attorney General* [2014] IEHC 435. At para. 30 McDermott J. stated:

> *"The court is satisfied that the real issue in this case is whether the applicant is entitled to the benefit of the declaration of invalidity in the circumstances of his case and not whether his return to court on foot of an illegality may be deemed inconsequential to the court's jurisdiction. If the declaration has retrospective effect in this case, the court is not satisfied that it may be categorised as a mere procedural defect. However, for the reasons which follow, the Court is not satisfied that the applicant is entitled to the retrospective application of the Moore decision."*

14. Having cited the judgments of Murray C.J. and Hardiman J. in *A. v. the Governor of Arbour Hill Prison* [2006] 4 I.R. 88, McDermott J. held:

> *"The applicant lays particular emphasis on the fact that the criminal proceedings in his case have not been finalised or concluded in the Court of Appeal since his appeal against sentence under s. 99(12) is still pending. I am satisfied that this is so and that the applicant is not precluded from raising a point concerning the invalidity of the statute under which he was returned to the Circuit Court under s. 99(9) and (10)."*

The applicant in this case is in exactly the same position as was in Clarke.

15. McDermott J. analysed the jurisprudence in relation to declarations of unconstitutionality in a number of spheres:

> *"The consequences for prior criminal trials of the Supreme Court's declaration that elements of the Juries Act 1927 were inconsistent with the provisions of the constitution in [deBurca v. The Attorney General [1976] I.R.] were considered in The State (Byrne) v. Frawley [1978] I.R 326. In Byrne's case the prosecutor had been tried by a jury selected under the provisions of the Juries Act 1927 and was convicted and sentenced to seven years penal servitude. The conviction occurred in December 1975 and the decision in deBurca was delivered during the course of his trial. No point was taken in respect of this decision and the prosecutor proceeded with the jury which had been empanelled even though counsel for Byrne also acted in deBurca…*
>
> *Henchy J. (delivering the judgment of the court), stated that the applicant made an informed and deliberate decision to turn down the opportunity to challenge the composition of the jury during the course of his trial."*

He also reviewed the judgments emanating from the Superior Courts as a result of the decision of the Supreme Court in *Damache v. The Director of Public Prosecutions* [2012] 2 I.R. 266 (herein "*Damache*") to the effect that the evidence procured on foot of the impugned search warrant was unconstitutionally obtained and therefore inadmissible in law. He cited the case of *The Director of Public Prosecutions v. Cunningham* [2013] 2 I.R. 631 (herein "*Cunningham*"). The applicant had been convicted before Cork Circuit Criminal Court on 27th March, 2009. The Court of Criminal Appeal held that where a right of appeal was provided by law the proceedings could not be regarded as finalised and concluded in respect of the decision that was sought to be appealed until the appeal had been concluded or no appeal had been taken within the time limit for so doing. The Court of Criminal Appeal held that the appeal in *Cunningham's* case had not been finalised or concluded and the applicant was entitled to rely upon the declaration of *Damache* as a ground of appeal.

16. McDermott J. cited the decision of *Director of Public Prosecutions v. O'Connor* [2014] IECCA 4. It was one of the cases which followed on from the *Damache* case and the *Cunningham* case. The appellant was sentenced to 10 years' imprisonment following his conviction for a robbery. No issue was taken with the validity of the warrant in the course of the trial. Subsequently at the Court of Criminal Appeal, McKechnie J. said:-

> *""In addition however, there is also a question of conduct in this case: whether such should be characterised as acquiescence, waiver or acceptance, probably does not matter at the end of the day. Whichever way it is considered, and whether it amounts to a concession or otherwise, there is no doubt but that during the course of trial, defence Counsel made the statement which is referred to at para. 8 above [being that as above quoted]. It must immediately be emphasised that Counsel cannot in any way be criticised for making this statement and in that context the Court is not unmindful of the case law on s. 29 of the 1939 Act which preceded Damache. Notwithstanding, it is obvious that this Court cannot know precisely what prompted such a concession: it may well have been for a tactical or strategic reason, or indeed, it may have been in an effort to save time and to facilitate the smooth running of the trial. Whichever, it must be presumed to have been designed to further the defence approach, and to strengthen the appellant's position before the jury. That being so, he cannot now be permitted to raise an argument which runs diametrically contrary to*

the position which he previously adopted, for to do so would be inconsistent with the principles of law above mentioned."

17. The Supreme Court noted on appeal on a certification:-

> *"It would, in this Court's view, be entirely inconsistent with the [appellant's] previous stance to permit him now in effect to reverse his position in such a diametric way and to argue that his arrest and detention were unlawful. The situation as it had been moved irreversibly by the end of the trial and even thought an extant appeal remains, the consequences therefrom cannot be undone."*

Mr. O'Connor then sought a release under Article 40.4.2 and in a judgment given by Hogan J. on 5th February, 2014 he noted that the applicant was bound by his conscious choice of trial, as set out in the judgment of the Court of Criminal Appeal. Hogan J. also relied upon the decision of the Supreme Court in *F.X. v. The Clinical Director of the Central Mental Hospital* [2014] IESC 1 in which Denham C.J. stated at para. 65:-

> *"In general, if there is an order of any court, which does not show an invalidity on its face, then the correct approach is to seek the remedy of appeal and, if necessary, apply for priority. Or, if it is a court of local jurisdiction, then an application for judicial review may be the appropriate route to take. In such circumstances, where an order of the court does not show any invalidity on its face, the route of the constitutional and immediate remedy of habeas corpus is not the appropriate approach."*

18. One of the issues then to be considered in this case is in relation to the warrants. The warrants are exhibited by the affidavit of Assistant Governor Anthony Harris of Mountjoy Prison.

19. The warrants do not refer to s. 99(9) nor s. 99(10) but mention s. 99(10A). Section 99(10A) states:-

> "The court referred to in subsection (10) shall remand the person concerned in custody or on bail to the next sitting of the court referred to in subsection (9) for the purpose of that court imposing sentence on that person for the offence referred to in that subsection."

The mention in the warrants of s. 99(10A) does imply that the procedure under which Mr. Larkin was produced in the Central Criminal Court was under the impugned provisions of s. 99(9) and s. 99(10).

20. McDermott J. in Clarke analysed Mr. Clarke's conduct and circumstances and he noted:-

> *"The applicant had been convicted and sentenced following a trial in due course of law and in accordance the fundamental attributes of a fair trial. No appeal was taken at that stage and the criminal trial was concluded once the time limit for appeal had expired. The applicant solemnly undertook to abide by the conditions of the suspended sentence. He was happy to do so.*
>
> *…*
>
> *When he appeared in the District Court in respect of the new offences in 2014, he pleaded guilty. His case was then sent back to the Circuit Court. The applicant has never evinced an intention to appeal his conviction in the District Court on these matters. Unlike the applicants in the Moore case he is not a person convicted after a trial in the District Court who wished to appeal that conviction but was unable to do so before the case was referred back to the court which had imposed the suspended sentence. He did not experience the prejudicial or suggested discriminatory effects of the impugned sub-sections found to apply to the Moore applicants. He was guilty and accepted his guilt. He had no basis upon which to issue judicial review proceedings challenging the process, as the applicants in Moore had done."*

This is the circumstance of the applicant.

21. McDermott J. mentioned that no attempt was made by Clarke to challenge the constitutionality of s. 99(9) and (10) and further:-

> *"I am satisfied that such a challenge could not have succeeded because he could not demonstrate any prejudice or discrimination that he had suffered upon which to base it."*

The applicant in this case is in exactly the same position as Clarke.

22. McDermott J. then continued:-

> *"I am satisfied that the procedures under s.99(9) and (10) were relied upon by the State in good faith in that they were regarded as having the force of law at the time. These procedures were not and could not have been successfully impugned by the applicant because he could not have demonstrated any prejudice or fundamental injustice or inequality of treatment in the manner in which they were applied to his case. I am satisfied that where no demonstrable injustice of a fundamental nature has occurred in the applicant's case he should not be regarded as a person in respect of whom release must be ordered. I do not consider that there are any circumstances, exceptional or otherwise, in this case which require that the declaration made in the Moore case should have a retrospective effect, much less the blanket effect suggested."*

23. The Court notes the decision of the Court of Appeal given by Birmingham J. in *Clarke v. Governor of Mountjoy Prison* [2016] IECA 244, which focused on the circumstances of the Clarke case. Birmingham J. referred to the Circuit Court proceedings, and stated that the Circuit Court proceeded under s. 99(17) and quoted:-

> "A court shall, where it is satisfied that a person to whom an order under subsection (1) applies has contravened a condition of the order, revoke the order unless it considers that in all of the circumstances of the case it would be unjust to so do, and where the court revokes that order, the person shall be required to serve the entire of the sentence originally imposed by the court, or such part of the sentence as the court considers just having regard to all of the circumstances of the case, less any period of that sentence already served n prison and any period spent in custody pending the revocation of the said order."

24. Birmingham J. said:-

> *"The High Court addressed the question of whether the declaration of invalidity in relation to the two subsections gave rise to a mere procedural defect in procuring the attendance of Mr. Clarke before the Circuit Court which was cured by his appearance or whether the declarations operated to vitiate the jurisdiction of the Court to make the orders in question. In the High Court the respondent had sought rely on a line of authorities such as State (Attorney General) v. Fawsitt [1955] I.R. 39, DPP (Ivers) v. Murphy [1999] 1 IR 98 and Killeen v. Director of Public Prosecutions [1997] 3 I.R. 218. However, the High Court felt that the return of the case to the sentencing court under s. 99(9) was coupled with a specific power which was exercisable because of the convictions in the District Court under s. 99(10) which had also been declared invalid. So, the High Court approached the case on the basis that the real issue was whether the appellant/applicant was entitled to the benefit of the declaration of invalidity in the circumstances of the case and that the issue was not whether his return to the court of trial on foot of an illegality may be deemed inconsequential to the Court's exercise of its activation jurisdiction."*

25. Birmingham J. reviewed the transcript of the sentence hearing of Mr. Clarke and stated:-

> *"It seems to me that consideration of this issue by the Circuit Court expanded beyond the confines of subs. (10) and that the Court was having regard to all of the information that was emerging on foot of inquiries that it set in motion* [this Court's emphasis*]. I acknowledge that the Court did not indicate whether in doing so it was exercising its wider function under subs. (17) but it seems to me that the reading of the two transcripts would suggest that is what was happening. In forming that view I do not lose sight of the fact that the reference in subs. (10) to "unjust in all the circumstances of the case" makes clear that the Court when dealing with a matter under subs. (10) is not confined to a consideration of the facts of the triggering offence."*

He said at para. 32:-

> *"If I am wrong about that I would in any event follow the reasoning of McDermott J. in the High Court. I accept, as he did, that a notice of appeal was lodged, which means that Mr. Clarke's position is to be distinguished from that of A. v. Governor of Arbour Hill Prison. However, like McDermott J., I do not believe that the fact that because an appeal was lodged and accordingly that matters had not been finalised before judgment in Moore that it follows automatically that Mr. Clarke is entitled to be released."*

26. Counsel for the applicant referred to the decision of *O'Farrell & Ors. v The Governor of Port Laoise Prison* [2016] IESC 37. This related to persons who had transferred their sentences from the United Kingdom to Ireland. In that case McMenamin J. quoted from the judgment of the Chief Justice in *Caffrey v. The Governor of Port Laoise Prison* [2012] 1 I.R. 637 where she quoted the following statement of law by Charleton J. (then in the High Court) as follows:-

> *"What I do not believe can ever happen is that a prisoner, by his consent incidental to the process whereby he is imprisoned, or by failing to take a point as to jurisdiction at the appropriate time, or by apparently acquiescing in the form of his detention, can render what is not in law a valid form of imprisonment into a lawful detention. If a prisoner cannot be detained by a court in accordance with law, then incidental aspects of consent, acquiescence, or delay cannot make lawful what is unlawful. Nor would I believe that the court has any discretion akin to that exercised in judicial review proceedings to refuse to make an order in habeas corpus proceedings. There is only one issue in this kind of inquiry: is the prisoner lawfully detained or not? That admits of only one answer where there is no legal foundation to a sentence of imprisonment."*

27. This judgment reaffirms what is clear about the nature of an Article 40, and that is that it is unlike judicial review, in that the High Court judge cannot exercise discretion.

28. The final decision in *O'Farrell & Ors. v The Governor of Port Laoise Prison* [2016] IESC 37 is noteworthy in that McMenamin J. said:-

> *"This is a troubling case. The arrangements in question concern the profoundly important question of mutual trust and reciprocity between two friendly neighbouring states. The respondents pleaded guilty to most serious offences. The respondents asked to be repatriated, and agreed to be bound by the Irish parole and remission terms. Many would say, that having committed these very serious crimes, the respondents should be made face the consequence of their actions for the full period of the sentence imposed. But courts are to interpret and apply the law. I would hold that the process whereby the respondents were placed in detention in Ireland was fundamentally defective. The warrants were void ab initio. In this highly unusual case, and for the reasons set out, the Article 40.4 procedure was the correct one. The circumstances are distinct from those in the State (McDonagh) v. Frawley [1978] I.R. 131 , where it was held the courts should be very slow to grant relief by habeas corpus to prisoners serving sentences imposed by a court. I do not think the terms "adapt" or "vary" can be interpreted broadly in that context. I would hold that neither s.9 of the Act, nor the inherent jurisdiction of the Court, can be invoked to cure the jurisdictional deficiencies which are fundamental in these cases."*

29. However the issues in question in *O'Farrell & Ors. v The Governor of Port Laoise Prison* [2016] IESC 37 related to the very nature of the warrant holding the applicant in custody.

30. Of more relevance to the applicant's case is the decision of *Karl Killeen v. The Director of Public Prosecutions & Ors.* [1997] 3 I.R. 218. The head note of the Supreme Court in that case at para. 2 says:-

> *"That, as a general rule with some exceptions, the jurisdiction of the District Court to embark on any criminal proceeding, including the holding of a preliminary examination, was unaffected by the fact that the accused person had been brought before the court by an illegal process."*

The Court also approved the decision of *The State (Attorney General) v. Fawsitt* [1955] I.R 39.

31. The main complaint of the applicant in this case is in relation to the legal basis on which he was remanded to the Circuit Court for the purpose of bringing to that Court's attention his breach of the bond in relation to the suspension of the sentence and the purpose of being dealt with by that Court. This Court is quite clear that the Circuit Court had jurisdiction to deal with the suspension of the sentence. Having regard to the decision of the Supreme Court in *Karl Killeen v. The Director of Public Prosecutions & Ors.* [1997] 3 I.R. 218 and a decision of the Supreme Court in *F.X. v. The Clinical Director of the Central Mental Hospital* [2014] IESC 1 the authorities do not establish that a declaration of invalidity of the two subsections have a blanket retrospective effect. The applicant

is not to be excluded from seeking the benefit of the declaration because his appeal under s. 99(12) is still pending. In accordance with the decision of McDermott J. given in *Clarke:-*

> *"He engaged fully in the original sentencing process … he cannot identify any substantive injustice or breach of his right to fair procedures or any unfair prejudice or discrimination suffered by him in the course of the hearings leading to the revocation. He seeks the technical benefit of the declaration which has no relevance to the merits of his case."*

32. For these reasons I am satisfied that the applicant is detained in accordance with law and the application is refused.