

THE HIGH COURT

[Record No. 2017/7 SSP]

IN THE MATTER OF ARTICLE 40.4.2 OF THE CONSTITUTION OF IRELAND

WALTER MORRISSEY

APPLICANT

JUDGMENT of Mr. Justice Eagar delivered on the 9th day of May, 2017

1. The applicant says that he is serving a sentence of thirteen years' imprisonment which was imposed from the 9th of January, 2012 in respect of an aggravated sexual assault and an assault causing serious harm. He was convicted and sentenced in the Central Criminal Court and is serving the sentence in the Midlands Prison.

2. He is making an application for an order of *habeas corpus* as follows:-

(1) He said he did not get a fair trial and that under the Constitution of the Irish State, he had a right to a fair trial.

3. He said the trial judge in his case should have not allowed the prosecution's senior counsel to summarise the evidence presented to the jury by the prosecution. He had no defence legal team, and he was not representing himself as he had no documents or mobile telephone data.

4. He said he did not summarise the evidence to the jury. He did not make an argument speech to the jury.

5. He said he made a plea to the jury because the trial judge refused to discharge the ten jurors and allow him a retrial. He refers to the court transcript of which the Court will set out further. The one thing he states that he did say to the jury was: "members of the jury all I ask is not to convict (me) of anything. There is only ten of you, just one of you. Please, please, please, please hold out, do not convict and I will get a retrial that is all I ask you to do, thank you very much."

6. He said he was anxious to discuss several aspects of the evidence, as his senior counsel was not able to cross-examine the prosecution witnesses in full, as the defence team did not have full disclosure and telephone data. He states that this was deliberately kept from the defence by the DPP/Garda to sabotage his defence. He said he was left with no choice but to dismiss his legal team, as they had inadequately conducted his defence. He further states that the prosecution should have the right to a closing speech in all cases, except where the accused is not represented by counsel or a solicitor and does not call any witnesses.

7. The Court of Criminal Appeal would have been the appropriate method of dealing with the issues which he has raised in his application. At present, he is serving a lawful sentence of imprisonment and therefore the relief under Article 40 does not arise.

8. However, I will seek to deal with some of the issues which have been raised by Mr. Morrissey, the applicant.

9. On the 8th of July, 2013 (on day 8 of the trial) counsel on behalf of the applicant indicated that his solicitor had been discharged by the applicant, and that in those circumstances counsel he could no longer appear on behalf of the applicant. The trial judge indicated to the applicant that it was his decision to discharge his solicitor and counsel, but indicated that the case would proceed and that the applicant would simply end up having to defend himself.

The following transpired:

"Applicant: I am not capable of doing that sir.

Judge: you are not capable of doing it?

Accused: No.

Judge: well then I think you should reconsider your decision.

Accused: No, I need another legal team, sir.

Judge: No, I am afraid you are not getting another legal team. So the case proceeds now in the absence of senior counsel and [...] and you defend yourself.

Accused: Well we have only got 10 jurors.

Judge: That is so.

Accused: I did not agree to allow 10 jurors.

Judge: The position is that counsel and solicitors were instructed and have allowed the case to come to this [...] The case proceeds with ten jurors. If Mr. O'Carroll and his team on your instructions continue to represent you, then that is fine. If on the other hand you have discharged them then you represent yourself.

Applicant: Yes, the discharge – because it should have gone for a retrial it should not have ...

Judge: I see, alright thank you Mr. Morrissey, I don't need to know why you have taken the decision. Mr. O'Carroll thank you very much and you jury for your attendance.

In the presence of the jury:

Judge: There has been a development insofar as the applicant, as he is entitled to, has discharged his legal team and apparently on that basis the trial will now be proceeding with Mr. Morrissey defending himself. So Mr. Morrissey, I should explain the situation, where you have chosen to be no longer represented, the options that are available to you. On Friday last the prosecution case closed and the position now is that there are a number of options available to you. You can if you wish, give evidence on your own behalf. That would involve going into the witness box, taking the oath and if you do that you will be subjected to cross-examination by Mr. McCarthy, counsel on behalf of the DPP. Alternatively, you are not obliged to say anything and you may simply indicate that you do not wish to go into evidence. It is always the entitlement of a party whether represented or unrepresented to remain silent and not go into evidence. In either event, whether you give evidence and/or [...] cross-examined or whether you chose not to, you will have in due course an opportunity to make a speech and make submissions to the jury and you will have the last word in that regard, speaking only before me. I will be the one who will come after you. So Mr. Morrissey what do you want to do? Do you want to give evidence or do you want to exercise your right not to give evidence?

Applicant: I need a legal team your honour.

Judge: No Mr. Morrissey, the State has provided you with a legal team at considerable public expense, it might be said and it is not acceptable that on, whatever this is now day 7 or 8 of the trial, that you discharge your legal team. It is too late for new legal teams, your existing legal team were here up to a few moments ago and were in a position to represent you. If you don't want them, the only choice available to you is to represent yourself. You are now representing yourself and I am asking you what you want to do? Do you want to give evidence on your own behalf or not?

Applicant: I want a retrial. I can't give evidence on my own so I'm not going to ...

Judge: There is – this trial is going to continue to a conclusion, the only question is what procedure is going to be followed between now and the end of the trial by you. So the question is, do you want to get into the witness box and give evidence to the ladies and gentlemen of the jury, or do you not want to give evidence?

Applicant: I did want to give evidence but I have no legal team.

Judge: So well, does that mean you don't want to give evidence?

Applicant: I can't give evidence.

Judge: I see, well then we are into the question of closing speeches. Mr. McCarthy do you propose to exercise your right in the circumstances to make a closing speech or do you want to consider your position in that regard?

Mr. McCarthy: I think I will be very brief my lord. But I think I should exercise it.

Judge: Well I would like an opportunity just to consider what the legal situation is. Ladies and gentlemen, I just want to take a few moments to consider what has happened. So I will be back to you in a few moments.

In the absence of the jury:

Judge: Where are Mr. Morrissey and Mr. McCarthy. I don't have the section in front of me and I can't offhand quote the section but my recollection is that when a party is not legally represented during a trial the prosecution doesn't have an entitlement to make a closing speech. Now the situation is different in a situation where for part of the trial including the very critical stage of the trial when the complainant was cross-examined, the accused is represented. But I will rise for a few moments to consider what the significance of that section is and if you can find the section, I will be glad to have your thoughts in particular.

Mr. McCarthy: Can I – I just can't recall which Act it is, my lord.

Judge: Alright well we can see if we can find it.

Mr. McCarthy: I will find it.

Judge: I'll rise for a few moments.

Then the case resumes:

Mr. McCarthy: May it please you my lord.

Judge: Yes.

Mr. McCarthy: I have been able to find an Act in Mr. O'Malley's book.

Judge: Likewise

Mr. McCarthy: and a judgment in Byrne [1988] 2 I.R.

Judge: Yes.

Mr. McCarthy: 1998 which I think deals with the issue.

Judge: Yes.

Mr. McCarthy: For the record perhaps I should read it out.

Judge: Yes.

Mr. McCarthy: On the record for Mr. Morrissey and it is under the Criminal Justice Act 1984, section 24:

"Order of closing speeches

(1) Notwithstanding any rule of law or practice, and notwithstanding anything contained in section 2 of the Criminal Procedure Act, 1865, the procedure at a trial on indictment as to the closing speeches for the prosecution and for the defence shall be as follows:

(a) the prosecution shall have the right to a closing speech in all cases except where the accused is not represented by counsel or a solicitor and does not call any witness (other than a witness to character only), and the defence shall have the right to a closing speech in all cases, and

(b) the closing speech for the defence shall be made after that for the prosecution.

(2) Section 3 of the Criminal Justice (Evidence) Act, is hereby repealed."

Mr. McCarthy: I have checked and there is no amendment to that statute I can find my lord. Mr. O'Malley's book at p. 325, the Criminal Process, in dealing with this quote the Criminal Procedure Act 1865 Denman's Act first conferred the right upon the defence to sum up his evidence of the close of the trial. Present Irish law is contained in s. 24(1) of the Criminal Justice Act 1864.

"In order to achieve some degree of balance, the prosecution is allowed a closing speech where the accused is represented by lawyers who will have the opportunity to expose possible weaknesses in the prosecution case to subvert that the balance might be tilted unfairly against the accused as the prosecution retained that right even when the accused was unrepresented and failed to call any witnesses in respect of the offences charged. However, an accused person cannot deprive the prosecution of its right to its closing speech simply by discharging his or her legal team. At least if they had the opportunity before discharge to test or challenge the prosecution case."

And then [...] refers to the *DPP v. Byrne* [1998] 2 I.R. 417, the judgment of Keane J.

Mr. McCarthy: and for the record I perhaps should put what the judgment discloses. In the *Byrne* case, in this case:

"The first applicant was the first applicant was represented by senior and junior counsel from the beginning of the trial: they were discharged only after the trial judge ruled on the application for a direction. Accordingly, literally construed, the exception in subs. 1(a) does not apply to this case since the applicant was represented by counsel, save at the closing stage of the trial. However, even if one were to adopt a purposive rather than a literal construction of the section, it is clear that it cannot have been the intention of the Oireachtas to deprive the prosecution of their right to a closing speech in circumstances such as arose in this case. The object of the section is to give the prosecution a right to a closing speech in circumstances where the accused has been represented by counsel or a solicitor who, as professional advocates, may have exposed what appear to be weaknesses or lacunae in the prosecution's case and which the prosecution may wish to deal with before the jury consider their verdict. It was clearly the view of the legislature that it would tilt the balance unfairly in favour of the prosecution if they were to have a similar facility where the accused was not so legally represented and did not call any evidence. It would tilt the balance unfairly in the other direction if an accused person, by discharging his counsel or solicitor after they had tested the strength or otherwise of the prosecution case in full, could deprive the prosecution of the opportunity to make a closing speech."

It seems to me that meets the situation in this case.

Judge: Are you seeking to make a closing speech?

Mr. McCarthy: I am going to make a brief [...]

Judge: Alright well then let me ask Mr. Morrissey, Mr. Morrissey you have heard what counsel had said, he said that in the circumstances the prosecution is entitled to make a closing speech and they intend to make a closing speech after which it will be your entitlement to make a speech. Do you want to say anything about the discussion we were just having as to whether the prosecution can make a speech or not?

Applicant: No.

Judge: Alright then we will have jury back and I will invite you to make your closing speech Mr. McCarthy.

Mr. McCarthy: I think when the jury are back I think you should reiterate to Mr. Morrissey that he is entitled to – what his choices are."

10. It seems clear to this Court that the issues Mr. Morrissey has brought before this Court are matters which he should have brought before the Court of Criminal Appeal. It is quite clear however, that the prosecution is entitled to make a closing speech in circumstances when the accused was represented. The witnesses for the prosecution were cross-examined by counsel.

11. In these circumstances, I refuse to direct any inquiry into the legality of the applicant's detention.