NEUTRAL CITATION NUMBER [2012] IEHC 325

THE HIGH COURT

[2012, 1071 SS]

IN THE MATTER OF THE INQUIRY UNDER ARTICLE 40.4.2 OF THE CONSTITUTION

BETWEEN

MICHAEL O'CALLAGHAN

APPLICANT

AND

THE GOVERNOR OF CORK PRISON

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on the 20th July, 2012

1. This applicant for an inquiry pursuant to Article 40.4.2 of the Constitution is currently serving a sentence of imprisonment on counts of possession of a firearm with intent to commit robbery and one count of robbery. The applicant, Mr. O'Callaghan, having been duly found guilty by a jury in the Circuit Court in Cork on these offences on the 5th February, 2001, subsequently received a sentence of 10 years imprisonment in respect of these offences.

2. The offences in question arise from an incident at Blackpool Post Office on the 26th March, 2009, where two masked and armed raiders entered the post office on that afternoon in the course of which they seized a significant quantity of cash. The Gardaí retrieved a balaclava hat from the bank of a canal which a witness had seen one of the robbers discard following the robbery. On the following day the applicant's dwelling was searched on foot of a warrant issued pursuant to s. 29(1) of the Offences Against the State Act 1939 (as substituted by s. 5 of the Criminal Law Act 1976). On foot of this search, a cigarette butt that had been smoked by the applicant was retrieved by the Gardaí. The cigarette butt was then subjected to DNA analysis and it was found to match the DNA from the balaclava.

3. Following the confirmation of this match, a senior investigating Gardaí, Detective Sergeant O'Sullivan, went to the applicant's mother's home and arrested him pursuant to s. 30 of the Act of 1939. Following that arrest, the applicant made a cautioned statement while in custody giving an account of his movements on the day of the robbery. That statement was then relied on by the prosecution and was the subject of adverse comment by them during the course of his trial.

4. Approximately one year after his conviction on these offences on 23rd February 2012 the Supreme Court held that s. 29 of the Act of 1939 was unconstitutional: see *Damache v. Director of Public Prosecutions* [2012] IESC 12. The extent to which persons whose convictions rested in whole or in part on evidence obtained in the aftermath of such a search conducted under s.29 can rely on that finding of unconstitutionality has already been subject to a series of decisions of the Court of Criminal Appeal: see *The People v. Cunningham* [2012] IECCA 64, *The People v. Kavanagh* [2012] IECCA 65, *The People v. Hughes* [2012] IECCA 69 and *The People v. O'Brien* [2012] IECCA 68.

5. The present application would, however, appear to be the first in which a convicted person has contended that his conviction (and, hence, his detention) has been rendered *unlawful* (as distinct from being merely incorrect or erroneous in law) by reason of *Damache*, such that he would be entitled to an order for release under Article 40.4.2. Here it must be observed that the applicant's appeal to the Court of Criminal Appeal is currently outstanding, albeit that the original notice of appeal makes no reference to any issue touching on the validity of the search of his dwelling. I was informed by counsel for the applicant, Mr. O'Hanlon S.C., that it is intended to apply to the Court of Criminal Appeal for permission to extend the grounds of appeal to include this particular point.

6. I should pause at this juncture to say that I express no view whatever on the merits of any appeal to the Court of Criminal Appeal or whether the grounds of appeal should be so extended or whether Mr. O'Callaghan will be entitled to avail of the ruling in *Damache*. These matters will be entirely a matter for that Court. My task, however, in the context of this Article 40.4.2 application is a different one: can it be said that the applicant's detention by reason of his conviction is so plainly a deprivation of due process that he ought to be entitled to immediate release?

7. The consideration of this question has not been without difficulty, but it has been agreed that I should proceed on the assumption - albeit simply for the purposes of argument- that Mr. O'Callaghan would be able to show that the original search of the premises was unconstitutional, *i.e.*, that he could properly avail of the *Damache* point, even though this issue was not taken at his trial. On that assumption, therefore, can it be said that, to adopt the words of O'Higgins C.J. in *The State (McDonagh) v. Frawley* [1978] I.R. 131, 136, that there has been "such a default of fundamental requirements" that the applicant's conviction "may be said to be wanting in due process of law", or, to adopt the language of Henchy J. in *The State (Royle) v. Kelly* [1974] I.R. 259, 269, if the detention "is wanting in the fundamental legal attributes which under the Constitution should attach to the detention".

8. For my part, I cannot agree that the conviction fails to meet this test. It is true that, on this hypothesis (*i.e.,* that the applicant can avail of *Damache*), the search of the dwelling was unconstitutional and unawlawful. But even on the applicant's own case, taken at its highest, all that this would mean is that the DNA evidence thereby obtained in relation to the cigarette butt would have to be excluded, assuming, of course, that the exclusionary rule in relation to unconstitutionally obtained evidence articulated by the Supreme Court in *The People (Director of Public Prosecutions) v. Kenny* [1990] 2 I.R. 110 so required this.

9. While it is true that the underlying principle of *Kenny* is that the applicant must be restored to the *status quo ante* to the greatest degree possible in the aftermath of a breach of a constitutional right- so that evidence obtained as a result will usually be excluded - in the present case the doctrine cannot be operated with such remorseless logic so as to invalidate the subsequent arrest, not least where, as here, no objection to that arrest was taken during the trial. Even then, the statement which the applicant made in custody following the s. 30 arrest appears not to have played a central role in the trial.

10. It follows, therefore, that, even taking the applicant's case at its height, the impact of the unconstitutional search so far as the conviction was concerned was somewhat exiguous and remote. It cannot accordingly be said that the suggested unconstitutionality was so absolutely central and integral to the conviction, such that it could be fairly said that, in the words of Henchy J. in *Royle*, it was "wanting in the fundamental legal attributes" presupposed by Article 38 and Article 40 of the Constitution.

11. It may be- and I here again stress that I am expressing no view on this issue - that Mr. O'Callaghan will be able to show on appeal that the conviction was tainted by legal error, such that the Court of Criminal Appeal might set aside that conviction. That, however, is an argument which goes to the *merits* of the conviction and not its fundamental legality.

The consent of the Director of Public Prosecutions

12. The second issue which arose was that it was contended on behalf of the applicant there was no proof before the District Judge to the effect that the Director of Public Prosecutions had given the requisite consent to the trial of the applicant on the firearms offence in the Circuit Court. A firearms offence is a scheduled offence for the purposes of the Act of 1939 and the direction by the Director of the trial in a venue other than the Special Criminal Court is thus a necessary prerequisite to jurisdiction: sees. 45(2) of the Act of 1939 (as amended by s. 11 of the Criminal Justice Act 1999).

13. In the present case, it is clear that the return for trial contained no endorsement or writing to the effect that the Director had so directed. Yet here it must be recalled that s. 4(3) of the Prosecution of Offences Act 1974 provides that:-

> "The fact that a function of a law officer has been performed by him (whether it has been so performed personally or by virtue of subsection (1) of this section) may be established, without further proof, in any proceedings by a statement of that fact made-
>
> (a) in writing and signed by the law officer, or
>
> (b) orally to the court concerned by a person appearing on behalf of or prosecuting in the name of the law officer."

14. Section 4(4) further provides that the term "law officer" means the Attorney General, the Director of Public Prosecutions or the Acting Director. It follows, therefore, from the express words of that sub-section that the fact that the Director has given a direction may be established through the oral statement of solicitor or counsel for the Director. This point is, in any event, confirmed by the judgment of McCracken J. for the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v. Gilligan*, August 8, 2003.

15. In the present case it is clear from the transcript of the evidence of the hearing of 11th February, 2011 (which was the 3rd day of the trial) that prosecuting counsel informed the Circuit Court judge that evidence was given to the District Court of the fact that the Director had consented to the trial before the ordinary courts. The trial judge indicated to prosecuting counsel that it was not necessary for such evidence to be tendered to him again, although counsel had offered to do so. This sequence of events was not challenged before the Circuit Court by counsel for the applicant, although the prosecution were properly put on proof of the fact of consent.

16. The only inference which can be drawn here is that the Circuit Court judge was satisfied that the requisite consent had been tendered before the District Court. Counsel for the prosecution was entitled so to give that consent by means of s. 4(3) of the Act of 1974 and it was quite clear that he did so. For all of those reasons, I am satisfied that this second issue is not well founded.

Conclusions

17. In the event, therefore, since I am satisfied that the applicant is detained in accordance with law, I must therefore reject his application for release under Article 40.4.2 of the Constitution.