Neutral Citation Number: [2014] IEHC 46

THE HIGH COURT

IN THE MATTER OF ARTICLE 40.4.2 OF THE CONSTITUTION OF IRELAND

[2014 No. 1 SSP]

BETWEEN

PAUL O'CONNOR

APPLICANT

AND

THE GOVERNOR OF MIDLANDS PRISON

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on the 5th day of February , 2014

1. This is an application by the applicant, Paul O'Connor, for an inquiry into the legality of his detention pursuant to Article 40.4.2 of the Constitution. This application was made by the applicant himself in writing in a very careful and considered fashion. This application was then referred to me for consideration as to whether I should direct an inquiry into the legality of that detention.

2. Mr. O'Connor was convicted of the single count of robbery contrary to s. 14 of the Criminal Justice (Theft and Fraud) Act 2001, on the ground that in June, 2009 he participated in the robbery of a sum of over €10,000 from a bookmaker's premises. For that offence he received a ten year prison sentence. There is no doubt but that principal issue raised by the applicant is whether he is entitled to rely on the finding by the Supreme Court in February, 2012 in *Damache v. Director of Public Prosecutions* [2012] 2 I.R. 266 that s. 29 of the Offences Against the State Act 1939, was unconstitutional. It is equally clear that evidence obtained on foot of that s. 29 search warrant was used in the course of the criminal prosecution against the applicant at his criminal trial in July 2011.

3. In the light of the decision in *Damache*, the applicant sought to add this new ground in his appeal to the Court of Criminal Appeal. In a decision delivered in February, 2013 that Court pointed out that in the light of recent post-*Damache* authority, it was clear that the applicant could not be permitted to do thus unless he had raised issues concerning the constitutionality of s. 29 at some stage (or, at least, the validity of the evidence obtained thereto) in the course of that criminal trial. This is clear from a trilogy of post-*Damache* decisions of the Court of Criminal Appeal in The People v. Cunningham [2012] 2 ILRM 406, The *People v. Kavanagh* [2012] IECCA 65 and *The People v. O'Brien* [2012] IECCA 68.

4. The Court then went on to consider what the situation was with regard to the applicant. It noted that at his trial the applicant had expressly conceded through counsel that the application for the search warrant was in accordance with law and that the search warrant was duly issued in accordance with law. Accordingly, no issue was taken at all in relation to the admissibility of the evidence obtained pursuant to the s. 29 warrant and as McKechnie J. was to note in a later application brought by Mr. O'Connor (*Director of Public Prosecutions v. O'Connor* [2014] IECCA 4):-

> "The relevant witnesses were stood down and no issue was ever taken as to the validity of the warrant."

5. The applicant is bound by this conscious choice of trial strategy. Just as in *The State (Byrne) v. Frawley* [1978] I.R. 326 – where a conscious decision was made to proceed with an unconstitutionally empanelled jury – the applicant cannot be heard to complain that in the light of subsequent events which he did not foresee (i.e., the decision of the Supreme Court several months later in *Damache* finding s. 29 of the 1939 Act to be unconstitutional) he wished he had made a different choice.

6. It was in these circumstances and for all of these reasons that the Court of Criminal Appeal refused to apply the principle and consequences of *Damache* to the circumstances of the case, and further refused the applicant to appeal on this ground. By a further decision of the Court of Criminal Appeal (*Director of Public Prosecutions v. O'Connor* [2014] IECCA 4) the Court of Criminal Appeal (in a judgment published subsequent to this Article 40 application on 23rd January, 2014), refused the applicant leave to appeal his conviction to the Supreme Court.

7. In my view, these decisions are binding on me. The inter relationship between the High Court's jurisdiction under Article 40.4.2 of the Constitution and the statutory right of appeal to the Court of Criminal Appeal from a conviction on indictment has also, as it happens, been clarified by a decision of the Supreme Court delivered within the last few weeks: see *F.X. v. Clinical Director of the Central Mental Hospital* [2014] IESC 1.

8. In her judgment for the Court Denham C.J. said (at para. 65):-

> "In general, if there is any order of any court, which does not show an invalidity on its face, then the court 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."

9. In the present case the warrant of 15th July, 2011 issued by the Circuit Court, is good and valid on its face. The applicant had had the benefit of a full appeal to the Court of Criminal Appeal and the matter has been considered again by that Court in the context of an application for leave to appeal to the Supreme Court under s. 29 of the Courts of Justice Act 1924. In both instances, the Court of Criminal Appeal has affirmed the conviction and refused the applicant further leave to appeal.

10. In the light of FX it is clear that the Article 40.4.2 jurisdiction could be invoked in such circumstances only where the order displayed a jurisdictional error or it was clear that there was some fundamental denial of the applicant's constitutional rights, whether

by reason either of the circumstances of the conviction itself or perhaps, as in *Kinsella v. Governor of Mountjoy Prison* [2011] IEHC 235, [2012] 1 I.R. 457, the circumstances of detention. Here the only issue is the extent to which the applicant can retrospectively invoke the decision in *Damache*. It is clear from a long series of decisions (including all the recent decisions of the Court of Criminal Appeal dealing with post-*Damache* issues) that such declarations of unconstitutionality cannot generally be invoked to upset earlier convictions, save where the issue itself has been raised at the court of trial. This is another example of where, in the words of Henchy J. in *The State (Byrne) v. Frawley [*1978] I.R. 326, 350:

> "What has been lost in the process of events is not the right guaranteed by the Constitution but the [applicant's] competence to lay claim to in the circumstances of this case."

11. In these circumstances since it is manifest that the applicant is being detained in accordance with law, I cannot see that there is any further matter which requires an inquiry by this Court.

12. In these circumstances I feel compelled to refuse the application for an inquiry into the legality of the applicant's detention.