

THE HIGH COURT

[2015] No. 13 SS P

**IN THE MATTER OF ARTICLE 40.4.2 OF THE CONSTITUTION AND THE
MATTER OF AN APPLICATION OF HABEAS CORPUS BY LIAM BRIEN
AT PRESENT IN CUSTODY IN THE MIDLANDS PRISON**

JUDGMENT of Mr. Justice MacEochaidh delivered on the 1st day of December, 2015.

1. This is an application for habeas corpus made in writing by the applicant who is in post conviction custody.
2. The applicant was convicted of sexual offences in Galway Circuit Court following trial by jury on the 26th February, 2013. He was sentenced to eight years imprisonment. On the 11th February, 2015, the Court of Appeal dismissed his appeal against conviction and reduced the sentence to five years imprisonment.
3. In May 2015 the applicant instituted plenary proceedings bearing record number 2015\3822P seeking various declarations connected with the alleged unconstitutionality of the Juries Act 1976.
4. On the 8th August, 2015, Haughton J. refused an application for *habeas corpus* which made complaint that his bail application had not been listed. The learned Judge held that:-

"The 'extraordinary procedure' of habeas corpus is not necessary or appropriate in these circumstances where the applicant is in post conviction detention and there is no suggestion that his conviction or sentences are bad on their face. Thus while the applicant may well have a legal right to have his bail application listed before the High Court his appropriate remedy does not lie in habeas corpus."

5. The applicant sought bail from the President of the High Court and was refused on the 26th August, 2015.

6. In relation to the present application for habeas corpus the applicant says:-

"While [I have] appealed to the Court of Appeal no date has been set for that appeal and it is oppressive to this Applicant to have wait [sic] indefinitely for that appeal and accordingly [I] bring this Application."

7. I have checked with the Court of Appeal. There is no record of an appeal against the order of the President refusing bail. This ground of alleged illegality contains a misleading assertion that the applicant has appealed the refusal of bail. It must fail.
8. In any event, even if the applicant could make out some unfairness or illegality connected with a delayed appeal against refusal of bail, he could not thereby be entitled to release from custody on a writ of *habeas corpus*. His remedy is to ask the Court of Appeal to hear his appeal expeditiously. In *Ryan v Governor of Midlands Prison* [2014] I.E.S.C. 54 Denham C.J. noted as follows:-

"18 Thus the general principle of law is that if an order of a Court does show an invalidity on its face, in particular if it is an order in relation to post conviction detention, then the route of the constitutional and immediate remedy of habeas corpus is not appropriate. An appropriate remedy may be an appeal, or an application for leave to seek judicial review. In certain circumstances the remedy of Article 40.4.2 arises only if there has been absence of jurisdiction, a fundamental denial of justice, or a fundamental flaw."

The applicant is in post conviction detention and the comments of the Chief Justice are applicable to his circumstances. His remedy in relation to the refusal of bail lies in the Court of Appeal.

9. The applicant also alleges that his detention is unlawful because the Juries Act 1976 is unconstitutional. He says that the jury that convicted him was drawn from a panel that was not representative of the community and, therefore, he did not have a trial in due course of law. He complains about "absence of jurisdiction".

10. It is, of course, possible for a person in custody to argue that a law which detains him or her is unconstitutional. If so found by the High Court, the matter must be referred to the Court of Appeal. Article 40.4.3. of the Constitution provides:-

"Where the body of a person alleged to be unlawfully detained is produced before the High Court in pursuance of an order in that behalf made under this section and that Court is satisfied that such person is being detained in accordance with a law but that such law is invalid having regard to the provisions of this Constitution, the High Court shall refer the question of the validity of such law to the Court of Appeal by way of case stated and may, at the time of such reference or at any time thereafter, allow the said person to be at liberty on such bail and subject to such conditions as the High Court shall fix until the Court of Appeal has determined the question so referred to it."

11. Notwithstanding the complaint made in support of this application for *habeas corpus* that the Juries Act 1976 is unconstitutional, my view is that the applicant cannot now invoke Article 40.4 of the Constitution to litigate this complaint. The applicant was required to raise the alleged want of jurisdiction arising from the invalidity of the Juries Act 1976 at an early stage of his prosecution and surely well before the jury gave its verdict. There is no evidence that he did so. His affidavit suggests that the first complaint he has made about this matter was in May 2015 when he issued a plenary summons related to this complaint.

12. In *Brennan v. Governor of Portlaoise Prison* [2008] 3 I.R. 364 it was held by the Supreme Court that, except in very exceptional circumstances, it was not open to a convicted person to challenge the legality of their detention pursuant to Article 40.4.2 of the Constitution where their case and appeal had been determined to a point of statutory finality. The Court said that a *bona fide* exercise of jurisdiction was deemed to be a good exercise if objection was not taken at the appropriate time. It was necessary that any objection relating to jurisdiction be taken as soon as was reasonably possible. This approach follows the general approach as described by Murray C.J. in *A. v. Governor of Arbour Hill Prison* [2006] I.E.S.C. 45, [2006] 4 I.R. 88 where he said as follows:-

"[125] In a criminal prosecution where the State relies in good faith on a statute in force at the time and the accused does not seek to impugn the bringing or conduct of the prosecution, on any grounds that may in law be open to him or her, including the constitutionality of the statute, before the case reaches finality, on appeal or otherwise, then the final decision in the case must be deemed to be and to remain lawful notwithstanding any subsequent ruling that the statute, or a provision of it, is unconstitutional. That is the general principle."

Thus even if the applicant could establish that the Juries Act 1976 is unconstitutional, that would not mean that he is in unlawful custody.

13. The applicant did not make complaint about the Juries Act prior to, or in the course of, his prosecution. His appeal against conviction and sentence has been determined. Thus, the point of statutory finality has been reached in his conviction and it is not open to him to re-open the legality of his conviction and consequently the legality of his detention.

14. Having conducted enquiry as required by article 40.4.2. of the Constitution, I decline to grant relief.