Neutral Citation No. [2016] IEHC 402

THE HIGH COURT

[2016 No. 14 SS P]

IN THE MATTER OF AN APPLICATION

PURSUANT TO ARTICLE 40.4.2 OF BUNREACHT NA hÉIREANN

BETWEEN

ANTHONY BUCK

APPLICANT

AND

THE GOVERNOR OF PORTLAOISE PRISON

RESPONDENT

JUDGMENT of Mr. Justice McDermott delivered on the 13th day of July, 2016

1. This is an application by Anthony Buck who was convicted of murder and robbery following a three week trial before the Central Criminal Court (Quirke J.) on 20th February, 1998. The application is made in the form of a letter with an accompanying statement of facts and submissions. There is no sworn affidavit grounding the application and the court is not furnished with copies of any orders or warrants issued, the transcript of the trial, any papers in relation to the appeal or the grounds of appeal or orders and judgment made on appeal. It has long been the case that a complaint may be made in an informal way by letter to the High Court alleging that a person is being unlawfully detained. Once the complaint is made the court is obliged to consider and rule upon it in open court (*The State (Cremin) v. Cork Circuit Judge* (unreported Supreme Court 8th February, 1965 per Ó Dálaigh C.).

2. Following his conviction the applicant was sentenced to imprisonment for life in respect of the murder conviction and twelve years imprisonment in respect of the robbery charge. He subsequently appealed to the Court of Criminal Appeal. That appeal was dismissed but a point of law of exceptional public importance was certified for the consideration of the Supreme Court pursuant to s. 29 of the Courts of Justice Act 1924 on the 10th December, 1999. The certified question was as follows:

> "In circumstances where a member of An Garda Síochána arrests a person suspected of a serious crime (in the instant case murder) at a time and in circumstances where it is likely that there will be difficulties in getting a solicitor for the arrested person should such be requested; and
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> where the arrested person is detained in a garda station pursuant to the provisions of s. 4 of the Criminal Justice Act 1984 and does in fact request access to a solicitor and is questioned for substantial periods of time by relays of gardai in relation to the offence for which he was arrested before he has access to a solicitor;
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> whether the conduct of the gardai in so questioning the arrested person before he has access to a solicitor but after he has sought access constitutes a conscious and deliberate violation of the arrested persons constitutional right of access to a solicitor (not being a violation which has extraordinary excusing circumstances) rendering inadmissible in evidence any statement, omissions or confessions which may thereafter be made by the arrested persons;
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> notwithstanding that the arrested person may after the said questioning have a visit from a solicitor (while still in s. 4 detention) and make the statement, admissions or confessions after such visit from the solicitor."

3. The facts of the case are set out in the judgment of the Supreme Court (*The People (DPP) –v- Buck* [2002] 2 I.R. 268). Following his arrest at 3:15pm on a Sunday, the applicant was detained under s. 4 of the Criminal Justice Act 1984 and continuously questioned by teams of gardai with some interruption until the arrival of his solicitor at 8:33pm. During the course of these interviews he was questioned about the murder of the late David Nugent and denied any involvement in the attack which led to his death. At approximately 5:29pm one of the interviewing gardai when leaving the interview room informed another on his way in that the applicant wanted a solicitor and that he did not want to answer any questions until he had spoken to a solicitor. A number of attempts were made to contact a solicitor unsuccessfully until the services of a solicitor were procured for the applicant at 8:33pm.

4. The solicitor who attended and had a consultation with the applicant gave evidence in the course of his trial which is quoted in the judgment of Keane C.J. He stated that in the course of the consultation the applicant confirmed that he had not made a statement and that he was familiar with garda stations having had a number of previous convictions. He told his solicitor "I know all about making statements". He also stated that he was not involved in the matters alleged; he was pleading not guilty and would not be making a statement. When told that he did not have to make a statement he is said to have replied "I know all about that". The applicant gave a different account of this interview stating that the solicitor informed him that there were already witnesses against him and that the best thing to do was to make a statement. The trial judge in his ruling on the issue stated that he accepted the evidence of the solicitor as to the interview.

5. At 9:30pm the applicant indicated that he would make a statement and having been cautioned a statement was committed to writing and finished approximately one hour and a half later.

6. The learned chief justice considered the decision of *The People (DPP) v. Conroy* [1986] I.R. 460 and noted that Walsh J. (dissenting) stated at p. 479 that if a solicitor is sent for in response to a request by a detained person, but the members of An Garda Síochána decided to press ahead with the interrogation before the arrival of the solicitor, that procedure should be regarded as constitutionally forbidden. However, the learned chief justice was satisfied that the question as to whether inculpatory statements made by a person in custody who is subjected to questioning by a garda after he has requested the presence of a solicitor but before

the solicitor arrives are admissible had not been authoritatively resolved.

7. The court considered the earlier Supreme Court decision in *The People (DPP) v. Healy* [1990] 2 I.R. 73. In that case a solicitor who had been retained by a detainee's family arrived at a garda station and sought an interview with them. He was informed that the defendant was being interviewed and despite his protests was told that he would have to wait. He was eventually permitted to see the defendant by which stage the taking of an inculpatory statement had been completed. The trial judge ruled the statement inadmissible because the defendant had been denied a right of instant access to his solicitor without any excuse and the court could not be satisfied that the incriminating admissions contained in the statement were made prior to the denial of that right of access. The court concluded that the failure by the gardai to permit the solicitor to see the defendant as soon as he arrived at the station was a deliberate and conscious violation of his constitutional right of access to a solicitor and a complete failure to observe reasonable standards of fairness in the course of his interrogation. Keane C.J. noted that if the trial judge in that case had been satisfied that the incriminating statement had been made prior to the arrival of the solicitor, it would have been admissible in evidence, since, at that point there would have been no deliberate and conscious violation of the applicant's constitutional right of access to a solicitor or such a failure to observe reasonable standards of fairness as to require the exclusion of the statement. The crucial issue, noted by Keane C.J., was that in *Healy* there was a causative link between the breach of the right of access to a solicitor by the gardai and the obtaining of the admission. Keane C.J. summarised the conclusion of the court:

> "Since the trial judge was, on the evidence, entitled to conclude that there had been no conscious and deliberate violation of the appellant's right of access to a solicitor, it follows that he was at no time in unlawful custody and that accordingly, the inculpatory statements made by him were properly not treated as inadmissible on the ground that he was in unlawful custody when they were made. Even if the continuation of questioning by the gardai between the time that he asked for a solicitor and the arrival of Mr. Cleary at 8:33pm could be regarded as a conscious and deliberate violation of his constitutional rights, there was no causative link between the breach in question and the making of the incriminating statements. The appellant had not made any incriminating statements prior to the arrival of Mr. Cleary, and on the trial judge's findings, had been advised by Mr. Cleary as to his right not to make any statement. The trial judge also accepted Mr. Cleary's evidence that, at that point, the appellant was relaxed and not showing any signs of stress. It follows inevitably that there was, on the evidence, no causative link between any breach of the applicant's constitutional rights arising from the questioning before the solicitor arrived and the making of the incriminating statements."

The appeal was unanimously dismissed. This decision was delivered twelve years before the decision of the Supreme Court in *The People (DPP) –v- Gormley and White* [2014] IESC 17 in which it was held that a detainee had a right of access to a solicitor before interview and not to be interrogated prior to gaining such access. The applicant claims to be entitled to the retrospective benefit of that decision and that his pre-trial detention and trial were conducted in breach of the standard of fairness required under Article 38 of the Constitution as a result of which he is entitled to release under Article 40.

8. There is no challenge to the warrant under which the applicant is detained. The application is a collateral attack upon the lawfulness of his conviction.

9. In 2015 the applicant invoked the provisions of s. 2 of the Criminal Procedure Act 1993 and contended before the Court of Appeal that there had been a miscarriage of justice and that his conviction should be quashed by reason of the decision of the Supreme Court in *Gormley and White*. He contended that the decision constituted a newly discovered fact within the meaning of s. 2 of the 1993 Act. In the judgment of the Court of Appeal [2015] IECA 344 Birmingham J. noted that the facts of this case and that those of *Gormley* were strikingly different. The learned judge emphasised the necessity for a causative link to be established between any breach of constitutional rights and any period spent in unconstitutional custody and the evidence sought to be excluded. The exclusion of unlawfully obtained evidence is conditioned by a causation requirement (citing *Evidence in Criminal Trials* (Heffernan and Ní Raifertaigh p. 389). He also stated:

> "20. The matter has been revisited more recently by the Court of Criminal Appeal presided over by Murray C.J. in the case of *DPP v. Bryan Ryan* [2011] IECCA 6 . In the court's view, the fact that no admissions were made during the time that the Gardaí were seeking to secure the attendance of a solicitor and that all the admissions were made after there had been a consultation with a solicitor represents from Mr. Buck's perspective an insuperable obstacle."

Apart from the fact that the judgment of the Supreme Court in *Gormley* was not as a matter of law a newly discovered fact for the purposes of s. 2, the Court of Appeal also considered the merits of the applicant's submissions and concluded that any purported unconstitutionality did not give rise to the statement made which was adduced in evidence at his trial. There was no causative link and therefore no fundamental unfairness in the trial

10. The issue of access to a solicitor prior to interview had, of course, been further considered by the Supreme Court in *Gormley and White*. Clarke J. in that case summarised the current state of jurisprudence in Ireland as follows:

> "5.7 It is clear that the current state of the jurisprudence in Ireland recognises that the right to have access to a lawyer while in custody is a constitutionally recognised right. A failure to provide reasonable access after a request from a suspect in custody can, on that basis, render the custody unconstitutional and thus lead to any evidence obtained on foot of such unconstitutional custody becoming inadmissible. To date the jurisprudence has not gone so far, however, as to require that advice from a requested solicitor actually be made available to the relevant suspect prior to questioning or the taking of samples. However, that is the question which falls squarely for decision in these cases."

The court considered the jurisprudence of the European Court of Human Rights and other common-law countries which had similar constitutional provisions on this issue.

11. Clarke J. (delivering the principal judgment) stated that the consistent international position was that any entitlement to have access to a lawyer at an early stage after arrest carried with it an entitlement not to be interrogated after such access is requested and before access to such a lawyer is obtained. He stated:

> "9.2 There would be little point in giving constitutional recognition to a right of access to a lawyer while in custody if one of the principal purposes of that custody in many cases, being the questioning of the relevant suspect, could continue prior to legal advice being obtained. At a minimum any such right would be significantly diluted if questioning could continue prior to the arrival of the relevant lawyer. In those circumstances, it seems to me that the need for basic fairness, which is inherent in the requirement of trial in due process of law under Article 38.1 of the Constitution, carries with it, at least in general terms and potentially subject to exceptions, an entitlement not to be interrogated after a request for a lawyer has been made and before that lawyer has become available to tender the requested advice. As

pointed out earlier, there are many issues of detail which surround the precise extent of such a right. Not all of those issues of detail arise in the context of Mr. Gormley's case which is, of course, the only case before this Court concerning interrogation."

12. In Mr. Gormley's case the interrogation occurred entirely after he requested a solicitor. He made statements which were relied upon to a significant extent at his trial before he had an opportunity to obtain the requested advice. The Supreme Court held that the conviction of a person wholly or significantly on the basis of evidence obtained contrary to those constitutional elements amounted to a conviction following an unfair trial process. The court concluded that Mr. Gormley did not have a trial in due course of law because a material part of the evidence on foot of which he was convicted was obtained during questioning which occurred "after he had requested legal advice and before that legal advice had been obtained".

13. It is clear from the documentation submitted by the applicant that the evidence upon which reliance was placed at his trial was obtained after he had received clear advice from his solicitor and indicated that he fully understood his right not to make any statement whatsoever in relation to the events under investigation. The court of trial found this to be the case beyond a reasonable doubt. The applicant's case therefore is entirely distinguishable from the facts in *Gormley*. Furthermore, there is simply no causative link between any alleged breach of his rights of access to a solicitor and the obtaining of the evidence upon which he was convicted. (See *People (DPP) v. A.D.* [2012] 2 I.R. 332 and *Healy* supra).

14. I am therefore satisfied on this application that the principles developed in *Gormley and White* would not have been of any assistance to the applicant at his trial. He made a statement notwithstanding the fact that he was advised by a solicitor of his right not to do so and his clear indication to his solicitor that he understood that right fully.

15. I am also satisfied that even if that were incorrect, the applicant is not entitled to the retrospective application of the principles developed and declared in *Gormley and White* having regard to the principles set out in the decision of the Supreme Court in *A. v. Governor of Arbour Hill Prison* [2006] 4 I.R. 88. In that case the applicant sought his release because the statutory offence of which he had been convicted was declared invalid by reason of its unconstitutionality. Murray C.J. stated:-

> "114. It follows from the principles and considerations set out in the cases, which I have cited, that final decisions in judicial proceedings, civil or criminal, which have been decided on foot of an Act of the Oireachtas which has been relied upon by parties because of its status as a law considered or presumed to be constitutional, should not be set aside by reason *solely* of a subsequent decision declaring the Act constitutionally invalid.
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> 115. The parties have been before the courts. They have in accordance with due process, had their opportunity to rely on the law and the Constitution and the matter has been decided. Once finality has been reached and the parties have in the context of each case exhausted their actual or potential remedies the judicial decision must be deemed valid and lawful.
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> 116. Save in exceptional circumstances, any other approach would render the Constitution dysfunctional and ignore that it contains a complete set of rules and principles designed to ensure "an ordered society under the rule of law" in the words of O'Flaherty J.
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> 117. I am quite satisfied that the Constitution never intended to visit on that ordered society the potential unravelling of judicial decisions over many decades when a particular Act is found unconstitutional solely on the consideration of the *ab initio* principle to the exclusion of all others."

See also Geoghegan J. at para. 279; Hardiman J. at para. 264 and McGuinness J. at paras. 190-191).

16. In this case the criminal proceedings have long since concluded following appeals to the Court of Criminal Appeal and the Supreme Court and a further application under s.2 of the 1993 Act. The fairness of the trial process was demonstrably not affected by reliance upon any material obtained during the period prior to the applicant's consultation with his solicitor. There is no evidence that these events gave rise to any fundamental injustice or substantial error or oversight (see *the People (DPP) v. Bolger* [2013] IECCA 86; *the People (DPP) v. Huges* [2013] 2 I.R. 619; *Director of Public Prosecutions v. O'Connor* (unreported Court of Criminal Appeal 4th February, 2013) and *The People (DPP) v. Cronin (No. 2)* [2006] 4 I.R. 329). Furthermore, the retrospective effect of a judicial decision is excluded from cases already finally determined at common law. As stated by Murray C.J. in the *A* case at para. 37:

> "No one has ever suggested that every time there is a judicial adjudication clarifying or interpreting the law in a particular manner which could have some bearing on previous and finally decided cases, civil or criminal, that such cases be reopened or the decisions set aside. It has not been suggested because no legal system comprehends such an absolute or complete retroactive effect of judicial decisions. To do so would render a legal system uncertain, incoherent and dysfunctional…"

The learned Chief Justice also found that a similar approach was adopted in other common law jurisdictions and by the European Court of Human Rights (paras: 38 to 63).

17. The applicant is a convicted person and therefore this application must be considered within the principles set out in *The State (McDonagh) v. Frawley* [1978] I.R. 113 in which O'Higgins C.J. stated (at p. 136) in delivering the judgment to the Supreme Court:-

> "… Where a person such as the prosecutor is detained for execution of sentence after conviction on indictment, he is *prima facie* detained in accordance with law and, as was held in the High Court by Maguire P. at p. 435 of the report of *the State (Cannon) v. Kavanagh*, it would require "most exceptional circumstances for this Court to grant even a conditional order of *habeas corpus* to a prisoner so convicted." … In a case such as the present, the production of the warrant by the governor of the prison will normally be a sufficient justification of the detention.

The stipulation in Article 40, s. 4, sub-s. 1, of the Constitution, that a citizen may not be deprived of his liberty save "in accordance with law" does not mean that a convicted person must be released on *habeas corpus* merely because some defect or illegality attaches to his detention. The phrase means that there must be such a default of fundamental requirements that the detention may be said to be wanting in due process of law. …"

18. In *The State (Aherne) v. Cotter* [1982] I.R. 188 at p. 203 Henchy J. stated:-

> "Before a convicted person who is serving his sentence may be released under our constitutional provisions relating to

> *habeas corpus*, it has to be shown not that the detention resulted from an illegality or a mere lapse from jurisdictional propriety but that it derives from a departure from the fundamental rules of natural justice, according as those rules require to be recognised under the Constitution in the fullness of their evolution at the given time and in relation to the particular circumstances of the case. Deviations from legality short of that are outside the range of *habeas corpus*."

19. I am not satisfied that the applicant has established an arguable case that his trial was in any way unfair or set out facts from which the court could conclude that his conviction was based on any evidence procured during the course of his detention at a time when he did not have access to a solicitor. This is simply not the case.

20. I am not satisfied that there is any basis for a complaint based on the provisions of the European Convention on Human Rights or the European Convention on Human Rights Act 2003.

21. The application is refused.