THE COURT OF APPEAL

Birmingham J.
Mahon J.
Edwards J.

617/15

623/15

618/15

624/15

Brian Doolan

Appellant

V

Ireland and the Attorney General

Governor of Midlands Prison

Respondents

And

Liam Brien

Appellant

V

Ireland and the Attorney General

Governor of Midlands Prison

Respondents

Judgment of Mr. Justice Birmingham delivered on the 5th day of April 2016

1. In these cases the appellants, Mr. Doolan and Mr. Brien, seek to appeal the judgment and order of the High Court of the 26th August, 2015, (Kearns P.) refusing their applications for bail. Technically what is before the Court are applications for an extension of time to appeal the order of the High Court but in fact the proceedings before the Court have focused on the substance of the issue: whether it is appropriate that the appellants should be admitted to bail.

2. This application arises in a situation where it is accepted that valid appeals were not lodged within the time prescribed. However, it is entirely clear that the appellants formed an intention to appeal immediately. It is also clear that the failure to lodge effective appeals within the time prescribed was as a result of procedural errors. At one stage, the respondents were minded to argue that the errors were not of the nature contemplated in the leading case on extending time *Eire Continental Trading Company Limited v. Clonmel Foods Limited* [1955] 1 I.R. 170. However, very sensibly in my view, this argument was not pressed. For my part, I am quite satisfied that subject to the appellants establishing arguable grounds for appeal that this would obviously be an appropriate case in which to extend time.

3. However, the respondents say that it is very clear that the appellants are not in fact in a position to establish an arguable case. It is this which has led to a telescoping of the extension of time and appeal against the refusal of bail applications. Therefore, the real issue before the court is whether the High Court was correct to refuse bail or whether the High Court was incorrect and the appellants should as a result now be admitted to bail.

4. The background to the application for bail and to this appeal is that both appellants are at present prisoners in the Midlands Prison serving substantial prison sentences following convictions on indictment. In the case of Mr. Doolan, he was convicted in the Central Criminal Court on the 5th March, 2013, of offences of rape, sexual assault and indecent assault. On the 23rd April, 2013, he was sentenced to a term of twelve years imprisonment with two years suspended. In the case of Mr. Brien, he was convicted in the Circuit Criminal Court in Galway on the 26th February, 2013, of offences of sexual assault and was sentenced to eight years imprisonment. On the 11th February, 2015, this Court dismissed an appeal against conviction but reduced the term of imprisonment from eight years to six years with one suspended. Both appellants instituted habeas corpus proceedings –Article 40 proceedings – seeking their release on the basis that their detention was illegal. In essence the complaint made was that they had stood trial before an improperly constituted jury. The appellants challenge various provisions of the Juries Act 1976, which they say are repugnant to the Constitution. They also say that the Act is incompatible with European Union law and that it is also incompatible with the European Convention on Human Rights. Detailed arguments have not been addressed to this last contention which at present is an assertion only.

5. On the 8th of August, 2015, the habeas corpus/Article 40 applications were refused by the High Court (Haughton J.)

6. On the 20th August, 2015, the appellants sought to be admitted to bail by way of a notice of motion of that date. A bail application came on before Kearns P. on the 26th August, 2015, who refused to admit the appellants to bail.

7. In this case we do no have a note of the judgment of Kearns P. However, we have been told that in refusing the application for bail he referred to the decision in *DPP v. Corbally* [2001] 1 I.R. 180, and also spoke of the wider disquieting implications which may arise if other convicted persons were entitled to bail while they sought to prosecute potentially lengthy legal proceedings.

8. *Corbally* it will be recalled was a case where an applicant had sought bail pending the determination of his appeal following a conviction for firearms offences, wounding and related offences. Bail was refused by the Court of Criminal Appeal but a s. 29 Courts of Justice Act 1924 certificate was granted. The Supreme Court dismissed the appeal, holding that bail should be granted where notwithstanding that the applicant came before the court as a convicted person, the interests of justice required it, either because of the apparent strength of the appellant's grounds of appeal or the impending expiry of the sentence or some other special circumstances. The Court added: "It must always be borne in mind that the applicant for bail in this situation is a convicted person and the Court of Criminal Appeal should therefore exercise its discretion to grant bail sparingly".

9. There are significant differences between CORBALLY and the present case. In *Corbally* the application for bail pending the determination of an appeal against conviction was made within the context of the trial/appeal process. In the present case, the application is outside the ordinary trial/appeal process and is for bail pending the final determination of plenary proceedings. I am satisfied that the threshold for granting bail in a case such as this is certainly no lower than *Corbally*. In the absence of full argument addressed to this issue, I would reserve to another occasion the question of whether a threshold higher than *Corbally* is appropriate and would determine this appeal by reference to the *Corbally* principles.

10. The appellants say that they have good grounds for contending that certain provisions of the Juries Act 1976 are repugnant to the Constitution, are inconsistent with EU law and incompatible with the provisions of the European Convention on Human Rights.

11. The appellants point in particular to s. 6 of the Juries Act 1976, which confines jury service to citizens. In that context, the appellants refer to the fact that the most recent census of 2011, indicates that 12% of the population of the State are non citizens, the majority of these coming from other Member States of the EU. They say that the exclusion of non citizens means that juries are not representative of Irish society as a whole. They say that the exclusion of citizens of other Member States of the EU falls foul of the non discrimination on the ground of the nationality provisions of the EU Treaties. The appellants are also critical of s. 9 of the 1976 Act. Section 9(1), they point out, provides for the excusal as of right from jury service of otherwise qualified and eligible citizens solely on the basis of their office, trade, profession or calling. They refer to the list of occupations set out in the schedules and say that whatever may have been the position in 1976, that in 2016 there is no rational basis for excluding many of the occupations listed, instancing airline pilots, pointing out that while in 1976 there was only one national airline with a very small pool of pilots, the situation is very different today. Section 9(2) which authorises County Registrars to excuse persons summoned for "good reason" is also criticised. They point out that there is no definition of the phrase "good reason". They also argue that the County Registrar is not an appropriate person to perform such a role and say that the way the system operates in practice serves to restrict the size of the jury panel and to make juries less representative of Irish society as a whole.

12. The appellants contend that the points that they have identified are points of substance such as to bring them over the Corbally threshold. In addition, each appellant says that there are other factors present which militate in favour of bail. Mr. Doolan says that the fact that he is incarcerated impinges on his capacity to prepare for the hearing, given that as a prisoner he has limited access to legal authorities, text books and other materials. By way of example he points out that the issue identified in relation to the European Convention on Human Rights has not been fleshed out in argument and says that this is because of the difficulties he experiences in accessing ECHR authorities. Mr. Brien says that the plenary proceedings are likely to be protracted and it may well be that he will have served his sentence before they are finally concluded.

13. The respondents argue that there is a heavy onus on the appellants to establish that the interests of justice require that bail be granted to them pending the determination of the plenary proceedings. They say that the appellants would have to establish a strong chance of success in the substantive case for bail to be considered. Furthermore, the respondents say that both men lost the right to challenge the constitutionality of their trials due to acquiescence referring to the *State (Byrne) v. Frawley* [1978] 1 I.R. 326.

14. I accept that the points raised by the appellants in relation to the Juries Act 1976 are interesting ones. However, the appellants face formidable obstacles if they are to succeed in their challenge and certainly if they are to establish that their convictions are nullity. The Juries Act 1976, like every other post 1937 statute, enjoys a presumption of constitutionality. They will also face powerful arguments to the effect that the time for challenging the composition of the jury panel was before the jury was sworn to try them and that having failed to make the points before trial, they cannot now invoke the point long after the trial and conviction.

15. In my view the appellants have not even come anywhere close to meeting the *Corbally* test. Far from the interests of justice requiring that they be admitted to bail, the interests of justice in fact require that they, having stood trial facing very serious charges and having been convicted, should remain in custody until their sentences have been served.

16. I find myself in complete agreement with the remarks attributed to Kearns P. about the disquieting implications which would arise if convicted persons were entitled to bail while seeking to prosecute potentially lengthy legal proceedings. If the appellants were entitled to bail, then every single individual in the prison system serving a sentence following upon a conviction after a jury trial could create a similar entitlement merely by issuing a plenary summons. Such a prospect is inconceivable in a society based on constitutional principles and the rule of law. I would dismiss the appeal.