Neutral Citation Number: [2011] IEHC 257

THE HIGH COURT

2010 2236 SS

IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLE 40.4.3 OF THE CONSTITUTION

BETWEEN

GLEN DEMPSEY

APPLICANT

AND

THE MEMBER IN CHARGE OF TALLAGHT GARDA STATION

RESPONDENT

AND

IRELAND, THE ATTORNEY GENERAL AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTIES

JUDGMENT of Mr. Justice Herbert delivered the 1st day of June, 2011

The applicant was arrested by a member of the Garda Síochána at 13.37 hours on the 6th December 2010, pursuant to the provisions of s. 30(1) of the Offences Against the State Act 1939 (as amended). This section provides that a member of the Garda Síochána may arrest without warrant any person whom he suspects of having committed or being about to commit or being or having been concerned in the commission *inter alia* of a scheduled offence for the purpose of Part V of the Act or whom he suspects of carrying a document relating to the commission or intended commission of any such offence or being in possession of information relating to the commission or intended commission of any such offence as aforesaid. It was common case between the parties at the hearing of this application that the relevant scheduled offence in this instance was the unlawful discharge of a firearm at 44 Brookfield, on the 17th November, 2010. Following his arrest the applicant was brought to Tallaght garda station arriving there at 13.51 hours. It was averred by Det. Insp. John Walsh, attached to Tallaght garda station and, who was in charge of the investigation of the scheduled offence, in a replying affidavit sworn for the purpose of this application on the 16th December, 2010, that at 13.15 hours Sgt. Brian Flynn, the member in charge at Tallaght garda station explained to the applicant the reason for his arrest and entered the requisite details in the Custody Record. He further avers that at 14.00 hours, Sgt. Flynn went off duty and was replaced as member in charge by Sgt. Ciaran McLoughlin.

In her affidavit grounding this application, sworn on the 6th December, 2010, Lorraine Stephens, solicitor of Lorraine Stephens & Co. Solicitors, for the applicant, states that in or around 15.48 hours, the applicant's mother contacted her and informed her that the applicant had been arrested. She immediately telephoned Tallaght garda station where she spoke to the member in charge Sgt. McLoughlin. It was common case during the hearing of this application that in answer to a query from her, she was informed by Sgt. McLoughlin that the Custody Record stated that the applicant had been arrested and was being detained under the provisions of s. 30(1) of the Offences Against the State Act, suspected of being in possession of information relating to the commission of a scheduled offence under that Act. Again, it was common case that Lorraine Stephens spoke with the applicant on the telephone at 15.48 hours in her recollection and, between 16.04 and 16.07 hours according to Det. Insp. Walsh.

It was stated by Det. Insp. Walsh in his said affidavit that the applicant was then taken to an interview room at 16.27 hours. This first interview ended at 18.11 hours. At 18.37 hours, the applicant's solicitor again spoke to the member in charge, Sgt. McLoughlin, and asked whether the applicant was being held for withholding information. The purpose of this inquiry appears to have been to ascertain whether or not the applicant had been arrested pursuant to s. 30(1) of the Act of 1939 on a reasonable suspicion that he had committed a scheduled offence under s. 9 of the Offences Against the State (Amendment) Act 1998, - failing, without reasonable excuse, to disclose as soon as practicable information which he knows or believes might be of material assistance to the Garda Síochána. The member in charge stated that he was not being so held.

In her grounding affidavit the applicant's solicitor states that she advised the member in charge that, "there may be an issue in relation to the constitutionality of s. 30(1) of the Act of 1939". She asked if the applicant was a suspect in relation to the commission of the scheduled offence. The member in charge was unable to answer her question and her telephone call was transferred to Det. Sgt. Tom McManus who was directly involved in the investigation. The applicant's solicitor repeated her question and her statement regarding the possible issue with regard to s. 30(1) of the Act of 1939. In her ground affidavit the applicant's solicitor states that Det. Sgt. McManus replied that he understood what she was asking but declined to divulge the information sought and suggested that she might ask her client whether he was involved in the commission of the scheduled offence.

It is stated by Det. Insp. Walsh in his said replying affidavit that the applicant was interviewed again, this interview commencing at 19.08 hours and ending at 19.30 hours. In a supplemental affidavit sworn by Lorraine Stephens, solicitor for the applicant on the 14th January, 2011, she states that at 19.16 hours immediately after this Court had directed an inquiry under Article 40.4.2 of the Constitution of Ireland into the detention of the applicant and directed that the applicant be produced before the court at 20.30 hours, she had telephoned Tallaght garda station and had informed a member of the Garda Síochána of the making of this order.

In his said replying affidavit Det. Insp. Walsh avers as follows:-

> "13. I say and believe that the Applicant was detained and was subject to the provisions of the detention at the time of the bringing of the Application before the Court, but that in fact the questions which required to be put to the Applicant were reaching an end at the time of the bringing of this Application and therefore the further detention of the Applicant is

no longer required.

14. Arising from all of the above the Applicant is, and remains, a person of interest to An Garda Síochána in relation to the serious matters under investigation. A number of significant admissions were made by the applicant with regard to certain matters put to him."

The body of the applicant was produced before the court in accordance with its Order. The court was informed that it was not proposed to detain the applicant in custody any further. The application was then adjourned by consent to the 17th December, 2010 and the applicant was released on nominal bail to appear on that date. On that date the applicant was released from his bail and it was agreed that the application be struck out, but reserving the issue of costs to be determined by this Court.

At the hearing of the application relating to costs it was submitted on behalf of the applicant that it was necessary to bring this application to achieve the unconditional release of the applicant from his detention. Senior Counsel for the applicant referred to the provisions of O. 99, r. (1) of the Rules of the Superior Courts which provides that the costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those courts respectively. He further referred to the provisions of O.99, r. (1)(4) as amended and substituted by S.I. No. 12/2008, Rules of the Superior Courts (Costs) 2008, which provides that the costs of every issue of fact or of law raised upon a claim or counterclaim shall, unless otherwise ordered, follow the event. The event, said Counsel in the instant case, was the unconditional release of the applicant from detention. The applicant he said was entitled to challenge his detention because it was founded merely upon the fact that he was a "person of interest" to the Garda Síochána rather than a suspect in the commission of the scheduled offence.

Senior Counsel for the applicant stated that in three similar applications which he identified and which was not disputed by the respondent or the notice parties, where the same legal point had been raised and the applicants had been released from detention, the applicants in two of those cases had been awarded the costs of the conditional order by consent and in the other case by this Court after argument. As no note of the arguments addressed to the court or of the judgment of the court was discoverable, this Court can place no reliance on these matters in deciding the issue of costs in the present application.

Senior counsel for the applicant submitted that the only reasonable inference to be drawn from the facts in the habeas corpus applications referred to at para. 10 (O'Neill, August, 2009), para. 11 (O'Brien, November, 2009) and para. 12 (Doonan, November, 2009) of the grounding affidavit of Lorraine Stephens is that a tactical decision was made in order to avoid a case stated going to the Supreme Court that the detention of those applicants was no longer necessary so that the application pursuant to Article 40.4.2 thereby became a moot.

Senior Counsel for the applicant recalled that Det. Sgt. McManus had declined to inform the applicant's solicitor whether the applicant was a suspect in the commission of the schedule offence under investigation by him. Sgt. McLoughlin had confirmed, by reference to the Custody Record that the applicant was not arrested and detained for withholding evidence. Sgt. McLoughlin by reference to the Custody Record informed the applicant's solicitor that he had been arrested and was being detained pursuant to the provisions of s. 30(1) of the Offences Against the State Act 1939 (as amended) suspected of being in possession of information relating to the commission of a scheduled offence.

Senior Counsel for the applicant adopted the opinion of the Committee to Review the Offences Against the State Acts 1939 – 1980 and related matters, (the Hederman Committee) which in its Report published in 2002 warned that this very wide power of arrest and detention appeared to give rise to constitutional issues and, that there was a serious doubt about the compatibility of this aspect of s. 30(1) of the Act of 1939 with Article 5 of the European Convention on Human Rights. The Committee also considered that the power to arrest persons in possession of information under s. 30(1) of the Act of 1939 were no longer necessary to enable the Garda Síochána to counteract the activities of both paramilitary organisations and organised crime because of the availability of the powers conferred by s. 9(1) of the Offences Against the State (Amendment) Act 1998. This section provides that:-

"A person shall be guilty of an offence if he or she has information which he or she knows or believes might be of material assistance in –

(a) preventing the commission by any other person of a serious offence, or

(b) securing the apprehension, prosecution or conviction of any other person for a serious offence

and fails without reasonable excuse to disclose that information as soon as it is practicable to a member of the Garda Síochána."

The Hederman Committee pointed out that this section does not criminalise the mere possession of relevant information but addresses the real mischief by making it an offence to fail without reasonable excuse to give information to the Garda Síochána.

Senior Counsel for the applicant submitted that this part of s. 30(1) of the Act of 1939 (as amended) constitutes an unnecessary infringement of the personal right to liberty guaranteed by Article 40.4.1 of the Constitution, particularly in the context of the availability to the Garda Síochána of the provisions of s. 9(1) of the Offences of Against the State (Amendment) Act 1998.

It was submitted by Senior Counsel for the respondent and the notice parties that the application was misconceived and should not have been brought. Counsel submitted that the applicant lacked *locus standi* to advance a claim that the particular section under which he was detained was unconstitutional, because it permits of the arrest and detention of completely innocent persons unconnected with suspicion of criminal activity who, innocently and inadvertently had become aware of information relating to certain types of offences. For the reasons set out by Det. Insp. Walsh in his affidavit sworn on the 16th December, 2010, Counsel submitted that the applicant could not have brought himself within the category of an "innocent bystander" referred to in the Hederman Committee Report. Det. Insp. Walsh averred as follows:-

"3. I say and believe that as part of the ongoing investigation I became aware that the Applicant in this matter, Mr. Dempsey was allegedly involved in an incident on the 4th day of November, 2010, wherein it is alleged that the Applicant went to the house at 44 Brookfield. The incident on the 4th day of November involved a man with the nickname "Marley" (who was subsequently identified as being Mr. Dempsey) along with two other people intimidating and threatening the resident of the house, Ms. Mary Burke, about a debt which was owing as a result of drugs going missing, and it was put to Ms. Burke that her nephew was the person who now owed this money and that this money would have be re-paid.

> 4. I say and believe that following this, on the 10th day of November, 2010 that an aggravated burglary took place at the house at No. 44 Brookfield, wherein three masked men entered with a firearm and further threats were issued in relation to money which it was suggested was owed by the nephew of Ms. Burke.
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> 5. I further say and believe that on the 17th day of November, there was an incident when a firearm was discharged and a shot was fired into the house at 44 Brookfield, while Ms. Burke and a number of other people were present in the house, and that as a result of this that Ms. Burke left the house and moved to a different address.
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> 6. I say and believe that following this on the 3rd day of December, 2010, that the Applicant met Ms. Burke walking along Maplewood Road, and the threats were made as to the money which was owing and the potential consequences for Ms. Burke and her nephew should the money not be re-paid.
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> 7. I say and believe that arising of the investigation of the offences on the 17th day of November and the incidents which took place both before and after that date there were a number of matters which required to be put to the Applicant as a result of information which it is believed was in the possession of the Applicant. I further say and believe that the Applicant as a result of these matters was at the time of his arrest a person of interest in the investigation.
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> 8. Therefore, I say and believe that the Applicant was arrested on the 6th day of December, 2010, at 1.37 pm under s. 30(1) of the Offences Against the State Act 1939, as amended for possession of information relating to a scheduled offence, involving the unlawful discharge of a firearm at 44 Brookfield, on the 17th day of December, 2010 and that the Applicant was then brought to Tallaght Garda Station."

The applicant, Senior Counsel submitted, was endeavouring to seek a review of the constitutionality to this part of s. 30(1) of the Act of 1939, (as amended) based on a *jus tertii*. He was, "seeking to be allowed to conjure up, invoke and champion the putative constitutional rights of a hypothetical third party . . ." (Henchy J.). Senior Counsel for the respondent and notice parties submitted that no attempt was made to engage with the actual facts of the case as the applicant saw them to be. The applicant's solicitor was at all times free to speak to the applicant both in person and on the telephone. The applicant's legal advisers had elected to pursue the Article 40 application before the Court without first establishing whether the point sought to be advanced had any application in the actual circumstances of the case.

Senior Counsel for the respondent and the notice parties submitted that the general rule that costs followed the event did not apply in the instant case as there had been no determination of the application by the court. Counsel submitted that in considering the issue of costs the appropriate test for the court to apply was to consider whether the applicant would have succeeded had the matter proceeded to a hearing.

Senior Counsel for the respondent and the notice parties submitted that the Garda Síochána had acted reasonably and properly in not releasing the applicant from detention when advised by the solicitor for the applicant that it was intended to apply to this Court for an inquiry pursuant to the provisions of Article 40 of the Constitution. The Garda Síochána, he submitted, remained under a continuing obligation to discharge their duties as investigators of a serious crime and, could not release a person prior to the conclusion of lawful questioning unless so ordered by a court of competent jurisdiction or, in exceptional circumstances as where the person became ill and required immediate medical treatment.

The respondent and the notice parties submit that the applicant could not have successfully obtained an order directing his release on foot of this application as it was not open to him to invoke the "totally innocent person" constitutional issue identified by the Hederman Committee Report. He was not such a person as he was, "of interest to the Garda in the affair".

The applicant submits that anyone arrested and deprived of their liberty under a possibly unconstitutional statutory power has sufficient *locus standi* to challenge that arrest and detention. If the particular legislative power is unconstitutional then a right of theirs is "broken, endangered or threatened" (See *O'Mahony v. Melia* [1989] I.R. 353 per Keane C.J.). Senior Counsel for the applicant in the present case submitted that the decisions of this Court in*, Maloney v. the Member in Charge of Tallaght Garda Station* (Unreported, High Court, 22nd January, 2008, O'Neill J.) and, *Maloney v. Ireland and Others* (Unreported, High Court, 25th June, 2009, Laffoy J.) upon which the respondent and the notice parties relied in support of their *locus standi* argument, were distinguishable on their facts from the instant case. In those cases, counsel submitted, there was sufficient evidence to support the contention that the applicant was "clearly implicated" in the offence under investigation and, was not a person arrested and detained solely on suspicion of being in possession of information relating to the commission of a scheduled offence. In the instant case the applicant is alleged to have been involved in issuing oral threats to Ms. Burke at her residence on the 4th November, 2010, prior to the date of the scheduled offence and on the public roadway on the 3rd of December, 2010, after the commission of the scheduled offence on the 17th November, 2010. Det. Sgt. McManus has refused to say whether or not the applicant was suspected of involvement in the scheduled offence.

It was the applicant's contention that the general rule of practice that a party would not be permitted to seek relief from the Court on facts which did not arise in his case, if this rule applied to the applicant, should be overlooked because, "there is a transcendent need to assert against the statute, the constitutional provision that has been invoked", (*Cahill v. Sutton* [1980] 1 I.R. 269 at 285 per. Henchy J.). Senior Counsel for the applicant identified what he claimed was this need by reference to the following matters:-

> "(a) . . . the extreme powers of detention which may be exercised in respect of individuals and substantial sections of the population . . ..
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> (b) It may not be possible for individuals in respect of whom there is no suspicion of having committed an offence or of concealing information to challenge the constitutionality of the section adequately or in time, before the matter is claimed to be moot.
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> (c) It may be difficult between persons in respect of whom there is no such suspicion and persons in respect of whom there is a reasonable suspicion and therefore it may be difficult to identify any suitable individual litigant."

Senior Counsel for the applicant advised the court that these matters had also been relied upon in the case of *Maloney v. Ireland and Others* (above cited).

I find on the facts of the instant application that the only relief which the applicant could have obtained or could reasonably have expected to obtain was a reference by way of Case Stated to the Supreme Court pursuant to the provisions of Article 40.4.3 of the Constitution as to the constitutional validity of this aspect of s. 30(1) of the Offences Against the State Act 1939 (as amended) and,

his release on bail pending the determination of the question by the Supreme Court. I find on the facts that after the application had been made to this Court pursuant to the provisions of Article 40 claiming that the applicant was being unlawfully detained at Tallaght garda station, after this Court had inquired into this complaint, after this Court had ordered that the applicant be produced before the court later on the same evening at 20.30 hours and, after this Court had directed the respondent to certify in writing the grounds upon which the applicant was being detained, the application was rendered a moot after the body of the applicant had been produced before the Court by the Court being informed that the Garda Síochána had completed their questioning of the applicant and had no objection to his being released on nominal bail. In such circumstances the applicant claims that he is entitled to the costs of the conditional order to include the costs of this application for costs. The respondent and the notice parties submit that as the applicant lacked *locus standi* to maintain the application at all it was in effect an abuse of the process and that they should be awarded the costs of the application. Alternatively they submit that the costs should lie where they fall and the Court should make no order as to costs.

I am not satisfied to hold on the facts of the instant case that had the application proceeded to a hearing the applicant would inevitably have been found to lack *locus standi*. I would not even go so far as to hold that this was a strong probability. When the solicitor for the applicant advised Sgt. McManus that she considered that there might be an issue as to the constitutionality of s. 30(1) of the Act of 1939 (as amended), and, after Garda Aine McCarville or Sgt. McLoughlin were informed by the Solicitor for the applicant that an Article 40 application was to be made to this Court seeking the release of the applicant, he was not immediately released nor was his solicitor informed that his release was imminent or assured that immediate arrangements would be made for his release. In those circumstances, if they were to secure the release of the applicant, his lawyers had no option but to press ahead with an application for habeas corpus. In the events which occurred it was not necessary for this Court to determine whether the applicant was or was not being detained in accordance with law which would have necessitated the stating of a case for the opinion of the Supreme Court.

On the body of the applicant being produced before this Court, it was informed that it was no longer necessary to detain the applicant in custody as the members of the Garda Síochána investigating the commission of the scheduled offence had obtained sufficient information from the applicant. In my judgment while this fortuitous concurrence of circumstances may have saved the time and expense of further proceedings in the matter, it does not assist in resolving the question of whether the applicant should be awarded the costs of the conditional order.

Costs in such applications are at the discretion of the court, to be exercised judicially. In my judgment an applicant should be entitled to the costs of a conditional order in an application pursuant to the provisions of Article 40 of the Constitution if it was reasonable in the circumstances of the case to have made the application. In assessing this question the Court must have regard to a number of matters which include, whether the making of the application was appropriate, for example, that it was not based on a mere technicality or that no reasonable preliminary steps had been taken to secure the applicant's release, whether the facts and the circumstances of the case so far as possible had been carefully ascertained and fully presented, whether a sufficient doubt was shown that the applicant's detention might not be lawful or whether there was uncertainty as to the constitutionality of the legislation on foot of which the applicant was detained. I do not intend this list to be exhaustive and other issues as to reasonableness may arise on the facts of individual cases. I am, however, satisfied that in the instant case the application meets all of these criteria and I am satisfied that the application for the conditional order was reasonably and properly made.

In *R. (O'Sullivan) v. Military Governor of Hare Park* [1924] 58 I.L.T.R. 62, the applicant was imprisoned by reason of mistaken identity and was released a day after a notice of motion for a conditional order of habeas corpus. No order was made on the application but Maloney L.C.J. held that under the circumstances the applicant was justified in coming to the court and ought to be paid his costs. In *State (Carney) v The Governor of Portlaoighise Prison* [1957] I.R. 25, Teevan J. (affirmed by the Supreme Court on appeal), discharged a conditional order of habeas corpus made by Haugh J. but held that:-

> "In view of the doubts existing as to which sentence the prisoner was detained on at the time the conditional order was applied for, I allow him his costs of the conditional order. Each party will abide his own costs of the present application, [allowing cause shown and discharging the conditional order]."

I am satisfied that in each of these cases the Court awarded the applicant the costs of the conditional order because it considered that regardless of the outcome it was reasonable for the applicant to have made the application for habeas corpus.

The court will therefore order that the applicant be entitled to the costs of the application for the conditional order to include the costs of this issue as to costs and directs the same to be taxed and ascertained before a Taxing Master of the High Court in default of agreement between the parties.