THE HIGH COURT

[2017 No. 10 S.S.P.]

IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLE 40.4 OF THE CONSTITUTION

BETWEEN

STEPHEN MANNING

APPLICANT

AND

THE GOVERNOR OF CASTLEREA PRISON

RESPONDENT

(No. 3)

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 27th day of June, 2017

1. Dr. Manning was convicted on 23rd January, 2017 in Castlebar District Court of an offence under s. 6 of the Criminal Justice (Public Order) Act, 1994. He then appealed that conviction to the Circuit Court where once again he was convicted. He was sentenced to two months' imprisonment.

2. In the course of his trial in the District Court he brought three judicial review applications, each of which I refused [*Manning v. McCarthy (No. 1) and Manning v. D.P.P.* (*ex tempore*, 21st November, 2016) and *Manning v. McCarthy (No. 2)* (*ex tempore*, 11th January, 2017)]. The latter decision is currently the subject of an application for leave to appeal to the Supreme Court [Record No. 2017/59].

3. In relation to his detention in Castlerea prison there have been four *habeas corpus* applications and I am now dealing with the fourth. The first application was a matter brought by Mr. Ben Gilroy on his behalf and dismissed by Noonan J. [*Gilroy v. Governor of Castlerea Prison* [2017] No. 507 S.S.]. The second was an application brought on his behalf by Ms. Marguerite Corbett and Mrs. Manning which I rejected on the 17th May, 2017 [*Manning v. Governor of Castlerea Prison* [2017] IEHC 348]. The third was an application brought by way of a *habeas corpus* prisoner application and dismissed by Binchy J. on the 18th May, 2017 [*Manning v. Governor of Castlerea Prison* [(No.2)] [2017] IEHC 343]. He now brings a fourth application by way of the standard form for prisoner applications, which he completed on the 1st June, 2017, but submitted to the Courts Service under cover of a letter dated the 5th June, 2017, by which stage he had been released on temporary release and was no longer a prisoner.

4. On 7th June, 2017 I dismissed the application, and I now take the opportunity to set out more formal reasons for having done so. There are three key issues at this stage; the first is whether the applicant can make an application of this kind while on temporary release; the second issue is whether a simple repetition of grounds already rejected by another judge constitutes grounds warranting an enquiry; and finally there is the question of whether in any event Article 40 is an appropriate mechanism to deal with alleged shortcomings in a summary trial.

Can a prisoner on temporary release apply for *habeas corpus*?

5. On the first issue there is something of a dearth of authority. R.J. Sharpe says in *The Law of Habeas Corpus*, 2nd Ed., (Oxford, 1989) p. 169 that "*there has been virtually no consideration of the appropriateness of habeas corpus to challenge the legality of parole, probation or suspended sentence controls. An individual who is subject to such controls may be restricted as to his employment, place of residence, associates, and general daily habits*."

6. The learned author says that most controls of this nature would ordinarily be seen as a significant curtailment of personal freedom if only because any breach of conditions of release usually carries a sanction of immediate incarceration suggestive of the proposition that jurisdiction to apply for relief by way of *habeas corpus* can exist in such situations.

7. There is a certain analogy with the law in relation to bail. David Clark and Gerard McCoy, *Habeas Corpus: Australia, New Zealand and The South Pacific* (Sydney, 2000) at pp. 63-64 note that it has been "*accepted that a person on bail does not enjoy the same liberty as a person not on bail; one judge in a habeas corpus case called it conditional liberty* [*Kelleher v. Governor Goulburn Training Centre* (1987) 61 ALJR 278 at 279 (HCA) *per* Brennan J.]. *On the other hand, there are bail cases which make it clear that to be released on bail means to be out of actual custody* [*R v. Hawkins* [1988] VR 256 at 258 (SC)]. *It is clear that a person on bail is not as free as a person not subject to bail and it is also clear that they are not as confined as a person in actual custody*".

8. The Ontario High Court in *Ex parte Hinks* [1972] O.R. 182 (H.C.) held that *habeas corpus* does not lie in relation to parole, stating that because he is not confined, the applicant is not entitled to the remedy of *habeas corpus*, and citing *Masella v. Langlais* [1955] S.C.R. 263. Such an approach seems to me to undervalue the impact on an applicant's liberty of the conditions attaching to the status of parole or analogous positions.

9. In terms of the Irish position, Dr. Kevin Costello in the *Law of Habeas Corpus in Ireland*, (Dublin, 2006), comments at p. 120 that "*[t]he constitutional right is restricted to a complaint made in respect of an allegation that a person is being unlawfully 'detained', and, patently, excludes from the operation of the procedure cases where the applicant is at liberty when the initial application is submitted*". The point made by Costello is crucial – one must be in detention (within the sense of the constitutional provision) for Article 40 to apply at all. Persons at liberty are simply excluded. Of course it depends what one means by "at liberty" for the purposes of Article 40.

10. O'Higgins J. in *Bolger v. Garda Commissioner* [1998] 12 JIC 1502 (Unreported, High Court, 15th December, 1998) took the view that "*it seems to me to be reasonable that an inquiry under Article 40 of the Constitution should be normally refused in circumstances where the time of the application the applicant is on bail though it is possible to envisage exceptional circumstances where this might not apply*". The decision on appeal (*Bolger v. Garda Commissioner*, Supreme Court *ex tempore*, 8th July, 1999 [1999] 7 JIC 0803) does not seem to specifically address this issue. Even heavily discounting for my having been an unsuccessful professional protagonist in that case, it very respectfully seems to me that the approach taken in *Bolger* is, for the reason alluded to by Costello, perhaps not altogether satisfactory theoretically because for the purposes of an Article 40 application, a person must be either in detention or not in detention. If not in detention they simply cannot apply under Article 40.4 and the court has no jurisdiction to address any such purported application. If they are in detention then they can so apply. The question really is whether conditional liberty such as bail, parole or temporary release in this case amounts to detention. It seems to me that taking a purposive

and expansive view of the right to personal liberty, having regard to the arguments for such a wider approach alluded to by Sharpe and Clark & McCoy, bearing in mind that an Article 40 application can proceed despite the grant of bail in the course of the proceedings, acknowledging that forms of conditional freedom do involve a curtailment of the right to personal liberty, and further recognising that such forms of conditional freedom also are generally liable to be revoked in certain circumstances, that such a form of conditional liberty is legitimately to be regarded as detention for the purposes of an Article 40.4 so I would resolve the threshold jurisdictional question at this stage in favour of Dr. Manning.

Can an Article 40 application simply re-hash grounds already refused by another judge, without new material or argument?
11. The second issue is the fact that the grounds of the present applications significantly overlap with what was refused by Binchy J., and essentially what has been presented to me in this application is a reworded version of the grounds that were rejected at the inquiry stage by him. On some of the points there has been very little rewording but it seems very clear that the general thrust of the complaint is the same and essentially centres on alleged defects in the trial of the applicant in the Circuit Court.

12. Hogan J. in *Joyce v. Governor of the Dóchas Centre* [2012] IEHC 326 specifically held that there was a constitutional right to make a successive application to a different judge for an inquiry but as he says at para. 21 that "*some measure of realism must nonetheless be brought to the process*" and that ordinarily such a reapplication on the same grounds would have to involve some additional elements such as, as he puts it at para. 24, "*some new authority or perhaps even new facts coming to light*". It seems to me those elements are very much missing here and indeed given that the applicant is not actually in Prison, there was nothing stopping him from personally presenting himself to pursue the application. In the absence of anything new that was not before Binchy J., I would not be hugely disposed to order an inquiry.

13. I would note that when the applicant corresponded with the Courts Service after Binchy J.'s ruling he was informed that "*Judge Binchy has already considered your application for Habeas Corpus dated 11th May, 2017, and he has given his ruling on this matter on Thursday 18th day of May 2017. If you do not agree with the decision of Judge Binchy given on this date, you are within your rights to appeal the decision to the Court of Appeal*". That would be the conventional route for the applicant to challenge the decision of Binchy J. rather than make a fresh application on essentially identical grounds, and in the circumstances I would propose to refuse the application for an inquiry.

Are defects in a summary trial properly matters for habeas corpus?
14. In his ruling, Binchy J. felt that complaints such as an alleged want of fair procedures in the summary trial were matters more appropriately pursued by way of judicial review (citing *Ryan v. Governor of Midlands Prison* [2014] IESC 54). It seems to me that that principle holds because the criminal process itself provides a generally self-contained mechanism for dealing with the legality of detention for the purposes of an accusation of criminal guilt (see *Stack v. Boyle* 342 U.S. 1 (1951), *R. v. Richmond Justices* ex parte *Moles* [1981] Crim. L.R. 170, *Grant v. Governor of Cloverhill Prison* [2015] IEHC 768 para. 94). That mechanism is, at least in the case of summary prosecution, subject to judicial review, an option that was not availed of in relation to the conviction. Correspondingly, and bearing in mind the essentially self-contained nature of the criminal process, alleged defects in a trial on indictment (not in issue here) are generally more appropriately pursued in appellate courts by way of criminal appeal rather than in the High Court under Article 40.

15. Given that Binchy J.'s view that judicial review is (generally) more appropriate in relation to alleged shortcomings in a summary trial seems to me to be persuasive and correct, this does not seem to be an appropriate case in which I should order an inquiry in any event, even overlooking the absence of anything of substance having been added to the application refused by him and re-hashed before me. I should however emphasise that the self-contained nature of the criminal process is a general proposition and one can envisage exceptions where Article 40 would be appropriate to address a clear affront to legality that arose in a detention on foot of a summary conviction, for example where the sentence was in excess of that permitted by law, or other circumstances amounting to error on the face of the record, absence of jurisdiction, fundamental denial of justice or fundamental flaw as outlined by the Supreme Court in *Ryan*.

Order
16. The applicant's summary trial has now been the subject of 7 High Court applications (all unsuccessful) which essentially have been doomed by an understandable failure by the applicant, as a lay litigant, to appreciate correct legal procedures. Such a multiplication of proceedings takes the concept of "serial litigation" to a new level. I understand that these outcomes must be frustrating for him but on the other hand the conventional pathways to an effective remedy in relation to summary trials are well-established. More fundamentally, an effective remedy does not equate to a right to win one's case.

17. For those reasons I will decline to order an inquiry.