

IN THE MATTER OF ARTICLE 40.4.2 OF THE CONSTITUTION OF IRELAND

HASSAN SELIM

APPLICANT

JUDGMENT of Mr. Justice Eagar delivered on the 9th day of May, 2017

1. This is a judgment on an application by the applicant Hassan Selim for an inquiry into his detention at the Midlands Prison.
2. On the 21st of February, 2006 he was convicted at the Central Criminal Court of offences of rape contrary to s. 48 of the Offences against the Person Act 1861, and s. 2 of the Criminal Law (Rape) Act 1981 as amended by s. 21 of the Criminal Law (Rape) (Amendment) Act 1990. He was also convicted of other offences namely aggravated sexual assault, false imprisonment and assault which were committed arising out of the same set of events. The applicant at that time was known as Francis Condra.
3. The applicant was sentenced to be in prison for sixteen years to date from the 22nd of February, 2006 and the applicant has now served over eleven years of this sentence and with one quarter remission he is due for release in about nine months or so. The applicant was sentenced to other lesser periods of imprisonment which were to run concurrently with that sentence. These sentences relate to the same event and these sentences have all expired. The sentences were as follows:-

aggravated sexual assault 8 years' imprisonment,

false imprisonment 3 years' imprisonment, and

assault, 3 years' imprisonment.
4. The applicant neither appealed the conviction or the severity of the sentence, at the time of sentencing. He makes his complaint now that the sentencing judge did not impose a correct sentence permitted by law. He argues that there is no penalty laid down for the offence of rape in either the Criminal Law (Rape) Act 1981 or the Criminal Law (Rape) (amendment) Act 1990. The trial judge therefore relied on the provisions of s. 48 of the Offences against the Person Act 1861 which provides:-

"Whosoever shall be convicted of the crime of rape shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years or to be imprisoned for any time not exceeding two years with or without hard labour."
5. The applicant cites section 11 of the Criminal Law Act 1997, entitled "abolition of penal servitude, hard labour and prison divisions".

"(1) No person shall be sentenced by a court to penal servitude.

(2) Every enactment conferring a power on a court to pass a sentence of penal servitude in any case shall be treated as an enactment empowering that court to pass a sentence of imprisonment for a term not exceeding the maximum term of penal servitude for which a sentence could have been passed in that case immediately before the commencement of this Act, and accordingly, in the case of any enactment in force on the 5th of August, 1891, being the date on which s. 1 (repealed by this Act) of the Penal Servitude Act, 1891, came into operation, whereby a court had, immediately before the commencement of this Act, power to pass a sentence of penal servitude, the maximum term of imprisonment shall not exceed five years or any greater term authorised by the enactment.

(3) No person shall be sentenced by a court to imprisonment with hard labour; and every enactment conferring a power on a court to pass a sentence of imprisonment with hard labour in any case shall operate so as to empower that court to pass a sentence of imprisonment for a term not exceeding the term for which a sentence of imprisonment with hard labour could have been passed in that case immediately before the commencement of this Act; and so far as any enactment in force immediately before the commencement of this Act requires or permits prisoners to be kept to hard labour it shall cease to have effect; and accordingly the expressions "with or without hard labour", "with hard labour", "without hard labour" and corresponding expressions, wherever occurring in any enactment prescribing the punishment for an offence, are hereby repealed.

(4) So far as any enactment provides that a person sentenced to imprisonment or committed to prison is or may be directed to be treated as an offender of a particular division, or to be placed in a separate division, it shall cease to have effect.

(5) Any person who, immediately before the commencement of this Act, was undergoing or liable to undergo a term of penal servitude shall, if that person is or ought to be in custody at such commencement, be treated thereafter as if he or she were undergoing or liable to undergo imprisonment and not penal servitude for that term.

(6) Any person who has been sentenced to imprisonment with hard labour for a term which has not expired at the commencement of this Act shall, for the remainder of that term, be treated as though he or she had been sentenced to imprisonment without hard labour."
6. The applicant cites the provisions of s. 11(2) above. He emphasises the last two lines, which state that the maximum term of imprisonment shall not exceed five years, or any greater term authorised by the enactment. He states the sentencing judge acted *ultra vires* and also exceeded his jurisdiction, insofar as he purported to impose a sentence of sixteen years' imprisonment for the offence of rape contrary to s. 48 of the Offences Against the Persons Act 1861, and s. 2 of the Criminal Law (Rape) Act 1981, as amended by s. 21 of the Criminal Law (Rape) (Amendment) Act 1990. He argues that the legislation prohibits the imposition of a sentence of imprisonment greater than five years.

7. He states that the remedy of judicial review is not open to him, in that he does not want to challenge his conviction. Remedy by way of an order of certiorari will compel him to seek to have his conviction and sentence quashed.

8. Further, he states that never appealed his sentence because he assumed until recently that the sentence imposed was a valid and lawful one. Since he now has a mere ten months to serve in his remaining sentence, he would not have sufficient time (having regard to the long vacation) to apply for an extension of time to appeal and execute that appeal, even with due diligence before the expiration of his sentence.

9. All serious offences and a great many minor offences are punishable with imprisonment. Until the Criminal Law Act 1997 came into force, penal servitude existed as a distinct custodial sentence. In recent decades, the courts interpreted sentences once imposed for "penal servitude" as being for all practicable purposes identical with imprisonment. Section 11 of the Act of 1997 provides:-

"(a) No person shall be sentenced to penal servitude;

(b) Any enactment empowering a court to impose penal servitude shall be treated as authorising imprisonment up to the same maximum period; and

(c) Any person who immediately before the commencement of the Act, was subject to a sentence of penal servitude shall be treated as if undergoing a sentence of imprisonment.

10. Before s. 1 of the Penal Servitude Act came into force on the 5th of August, 1891, some statutes provided for penal servitude without indicting a maximum term. The section provided that in all cases, the maximum term of penal servitude was to be five years. The maximum term for those offences is now five years' imprisonment unless the relevant enactment allows for a longer period (this Court's emphasis). Section 11 of the Act of 1997 provides that where a person is convicted on indictment of a statutory offence punishable with imprisonment but for which no particular maximum term is specified, the maximum prison sentence to which such person is liable is two years.

11. Section 48 of the Offences Against the Person Act 1861 provides for penal servitude for life. Section 11 abolishes penal servitude and s. 11(2) empowers the court to pass a sentence of imprisonment for a term not exceeding the maximum term stipulated for penal servitude. The effect of s. 11 in the Criminal Law Act 1997 is in effect to substitute the word "imprisonment" for "penal servitude" in s. 48 of the Offences Against the Person Act 1861. In those circumstances, by virtue of s. 11 of the Criminal Law Act 1997, the maximum term of imprisonment for a conviction of the crime of rape is life imprisonment.

12. In these circumstances, the Court refuses an inquiry into the legality of the applicant's detention in the Midlands Prison.