Neutral Citation Number: [2006] IEHC 169

**THE HIGH COURT**

**2006 NO. 694 SS**

**IN THE MATTER OF ARTICLE 40, SECTION 4, SUB-SECTION (2)
OF BUNREACHT NA hÉIREANN**

**A.**

**APPLICANT**

**AND**

**THE GOVERNOR OF ARBOUR HILL PRISON**

**RESPONDENT**

**Judgment of Miss Justice Laffoy delivered on 30th May, 2006.**

1. Sub-section 1 of Article 40, s. 4 of the Constitution provides that no citizen shall be deprived of his personal liberty save in accordance with law. Sub-section 2 mandates a judge of the High Court to whom a complaint is made that a person is being unlawfully detained to forthwith enquire into the complaint. The judge is empowered to order the production of the person detained before the court and that the person in whose custody he is detained certify in writing the grounds of detention. On production of the person, the court is mandated to –

> "… after giving the person in whose custody he is detained an opportunity of justifying the detention, order the release of such person from such detention unless satisfied that he is being detained in accordance with the law."

2. On 26th May, 2006, on the application of the applicant, I ordered that in accordance with sub-s. 2 of Article 40.4 the applicant be produced before the court yesterday, 29th May, 2006, and that the respondent certify in writing the grounds of his detention. The respondent complied with that order and certified that he held the applicant in custody in Arbour Hill Prison pursuant to a warrant dated 24th November, 2004, a copy of which he exhibited.

3. The warrant discloses that the applicant was convicted in the Circuit (Criminal) Court on 15th June, 2004 on a plea of guilty of unlawful carnal knowledge contrary to s. 1(1) of the Criminal Law (Amendment) Act, 1935 and that, subsequently, on 24th November, 2004 he was sentenced to be imprisoned for a period of three years, the sentence to date from 8th November, 2004. It is common case that the indictment on foot of which the applicant was charged was a one-count indictment.

4. The basis on which the applicant contends that his detention is unlawful is that on 23rd May, 2006 the Supreme Court declared that s. 1(1) of the Act of 1935 is inconsistent with the provisions of the Constitution in *C.C. v. Ireland, The Attorney General and The Director of Public Prosecutions*. It is of significance that in that case the Supreme Court declared s. 1(1) to be inconsistent with the Constitution in toto, rejecting an argument made on behalf of the State parties that a declaration of inconsistency should be couched in terms that s. 1(1) "cease to have force and effect *to the extent that* it precluded an accused from advancing a defence of reasonable mistake …" ( *per* Hardiman J. at p. 38).

5. What I have to decide on this application, having heard submissions on behalf of the applicant and the respondent yesterday, is whether I am satisfied that the applicant is being detained in Arbour Hill Prison in accordance with the law, having regard to the circumstances which now prevail, that s. 1(1) has been declared by the Supreme Court to be inconsistent with the Constitution. If I am not so satisfied I must order the release of the applicant.

6. The first question I have to consider, in determining whether the applicant is being detained in accordance with the law, is what is the effect of the inconsistency of s. 1(1) with the Constitution. It is well settled that in the case of a post-Constitution statute a declaration of invalidity means that the statute was invalid *ab initio*. Apparently, there is no decided case on the effect of a declaration that a pre-Constitution statute is inconsistent with the Constitution. That issue was considered by the Supreme Court in *Murphy v. The Attorney General* [1982] I.R. 241 by Henchy J., but his comments were clearly *obiter*, because at issue there was the constitutionality of a post-1937 statute, the Income Tax Act, 1967. Nonetheless, I respectfully adopt the following passage from the judgment of Henchy J. at p. 306 as a correct statement of the law:

> "If it is a pre-Constitution enactment, Article 50, s. 1, provides in effect that the statutory provision in question shall, subject to the Constitution and to the extent that it is not inconsistent therewith, continue in full force and effect until it is repealed or amended by enactment of the Oireachtas, i.e. the Parliament established by the Constitution. The issue to be determined in such a case is whether, when the impugned provision is set beside the Constitution, or some particular part of it, there is disclosed an inconsistency. If the impugned provision is shown to suffer from such inconsistency, it may still be deemed to have survived in part the coming into operation of the Constitution, provided the part found not inconsistent can be said to have had, at the time of that event, a separate and self-contained existence as a legislative enactment. Otherwise, the impugned provision in its entirety will be declared to have ceased to have a legislative existence upon the coming into operation of the Constitution in 1937.
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> Such a declaration under Article 50, s. 1, amounts to a judicial death certificate, with the date of death stated as the date when the Constitution came into operation."

7. Applying the foregoing principles, the Supreme Court having struck down s. 1(1) in its entirety, that section ceased to have legislative existence in 1937. Thereafter, there was no statutory offence of unlawful carnal knowledge of a girl under the age of fifteen years to which there attached the punishment prescribed by the Act of 1935. To put it another way, the offence with which the applicant was charged did not exist in law when it was purported to charge him with it, nor at the respective dates of his purported conviction and sentencing.

8. The next question I have to consider is what are the consequences of the demise of s. 1(1) long before the applicant was charged with the offence of which he was convicted and in respect of which he is now detained. Within the narrow confines of an enquiry under Article 40, as a matter of law, I have only to consider whether one specific consequence now prevails, whether as of today his detention is not "in accordance with the law". The test as to whether detention is "in accordance with the law" was explained in the following passage from the judgment of Henchy J. in *The State (Royle) v. Kelly* [1974] I.R. 259 (at p. 269):

> "The mandatory provision in Article 40, section 4, sub-section (2) of the Constitution that the High Court must release a person complaining of unlawful detention unless satisfied that he is being detained 'in accordance with the law' is but a version of the rule of *habeas corpus* which is to be found in many Constitutions. The expression 'in accordance with the law' in this context has an ancestry in the common law going back through the Petition of Right to Magna Carta. The purpose of the test is to ensure that the detainee must be released if – but only if – the detention is wanting in the fundamental legal attributes which under the Constitution should attach to the detention.

> The expression is a compendious one and is designed to cover these basic legal principles and procedures which are so essential for the preservation of personal liberty under the Constitution that departure from them renders a detention unjustifiable in the eyes of the law. To enumerate them in advance would not be feasible and, in any case, an attempt to do so would tend to diminish the constitutional guarantee. The effect of that guarantee is that unless the High Court (or, on appeal, the Supreme Court) is satisfied that the detention in question is in accordance with the law, the detained person is entitled to an unqualified release from that detention. It is the circumstances of the particular case that will usually determine whether or not a detention is in accordance with the law."

9. That passage was quoted recently by the Supreme Court in an application pursuant to Article 40.4.2, *McDonagh v. The Governor of Cloverhill Prison*, in which the judgment of the court was delivered by McGuinness J. on 28th January, 2005. The paragraph of the judgment of Henchy J. which follows the passage which I have just quoted, in my view, is of particular relevance to this case and is in the following terms:

> "Where, as in the present case, the prisoner has been convicted and sentenced by a court established by law under the Constitution, and the jurisdiction of that court to try the offence and impose the sentence has not been challenged, it would be necessary to show that the procedure has been so flawed by basic defect as to make the conviction a nullity before it could be held that the detention was not in accordance with law."

11. In that passage Henchy J. was recognising that even in the case of a person convicted and sentenced by a court of competent jurisdiction the process could have been so procedurally flawed as to render the conviction a nullity and the detention unlawful.

12. In this case, the applicant is detained on foot of a conviction for an action which was accepted by the applicant and by the People through the relevant State authorities, including the Director of Public Prosecutions, to be an offence on 15th June, 2004 but which we now know, by reason of the declaration made by the Supreme Court last week, was not an offence either when the action occurred or when the applicant was convicted or sentenced. The defect here could not be more basic. It is that the purported conviction relates to something which is not an offence in criminal law. In my view, the conviction is a nullity, as is the sentence. Adopting the terminology used by O'Higgins C.J. in *The State (McDonagh) v. Frawley* [1978] I.R. 131 (at p. 136), there is "such a default of fundamental requirements that the detention may be said to be wanting in due process of law" and, accordingly, is not in accordance with law.

13. As I have said, the only consequence of the declaration of the inconsistency of s. 1(1) with the Constitution with which I am concerned on this application is whether it has rendered the detention of the applicant unlawful as of now. It is undoubtedly the case that the consequences of a declaration under Article 50, s. 1 may be determined by a variety of factors, for example, the conduct of the person relying on the declaration or the fact that an irreversible course of events has taken place, so that what was done on foot of the condemned statutory provision may not necessarily be relied on as a ground for a claim for nullification or other legal redress, as Henchy J. noted in *Murphy v. The Attorney General*, citing the decision of the Supreme Court in *The State (Byrne) v. Frawley* [1978] I.R. 326. However, on this application I am not concerned with whether the applicant may be in a position to maintain a civil action for wrongful imprisonment in the future. I am not concerned whether there are other persons in custody having been convicted on a plea of guilty of an offence under s. 1(1), in circumstances where the Director of Public Prosecution entered a *nolle prosequi* in relation to other charges. I am not concerned whether the aggregate effect of the declaration of unconstitutionality may reveal an "appalling vista" nor whether that possibility is mitigated by the authorities relied on by the respondent. None of those considerations are relevant to the determination I have to make.

14. It was submitted on behalf of the respondent that this application is misconceived in that it was asserted that the applicant's conviction remains valid, unless in its discretion, a court were to quash the conviction in appropriate judicial review proceedings. The contention is that the conviction remains valid on its face. In my view, that submission is not correct. In the light of the declaration by the Supreme Court of the inconsistency of s. 1(1), the only offence of which the applicant was convicted, the conviction is a nullity, and the warrant is bad on its face. I would see no sense whatsoever in the applicant pursuing a remedy in judicial review proceedings to quash a conviction, a sentence and a warrant which are patently bad.

15. For the purposes of this application the following facts were agreed:

> · that the date of the alleged offence was 18th May, 2003,
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> · that the applicant's date of birth is 24th April, 1965, so that he was 38 years of age at the date of the alleged offence,
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> · that the complainant's date of birth is 21st August, 1990, so that she was 12 years of age at the date of the alleged offence, and
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> · that at the date of the alleged offence the applicant knew that the complainant was under the age of 15 years.

16. On the basis of the foregoing facts it was conceded on behalf of the applicant that the applicant would not have had *locus standi* to challenge the constitutionality of s. 1(1) before the Supreme Court made the declaration of inconsistency last week. The fact that that declaration rendered the applicant's detention unlawful may have the appearance of a "windfall bonus" for the applicant. Be that as it may, in my view, his detention was rendered unlawful by the declaration and cannot continue.

17. Not being satisfied that the applicant is being detained in accordance with the law, I direct his release from detention in Arbour Hill Prison.