Neutral Citation: [2016] IEHC 292

THE HIGH COURT

[2016 No. 222 SS]

IN THE MATTER OF APPLICATION PURSUANT TO

ARTICLE 40.4.2° OF THE CONSTITUTION OF IRELAND

BETWEEN

MCDONALD

APPLICANT

AND

THE GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

THE HIGH COURT

[2016 No. 1530 P]

BETWEEN

MCDONALD

PLAINTIFF

AND

IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 27th day of April, 2016.

1. The applicant/plaintiff ('applicant') seeks habeas corpus on the basis that s. 2A of the Bail Act 1997 is unconstitutional. (The plenary element of the proceedings reflects a direction by Noonan J. on an application for an enquiry into the legality of the applicant's detention pursuant to Art. 40 of the Constitution that pleadings be delivered in relation to the alleged unconstitutionality of the Bail Act).

2. The applicant requests the court to invoke its jurisdiction under Art. 40.4.3 of the Constitution which provides a procedure to assess the constitutionality of a law detaining a person in custody. If I am satisfied that the law is unconstitutional, my duty is to refer the question of the validity of that law to the Court of Appeal (by way of case stated.)

3. The applicant was charged with murder contrary to common law. He was remanded in custody and sent forward for trial to the Central Criminal Court on the 12th November, 2015. A trial date of the 19th June, 2017, has been fixed. A bail application was made on the 9th July, 2015, which was refused. A second application for bail was made on the 17th December, 2015, which was opposed because the Gardaí believed the applicant was a flight risk and on the basis of the provisions of ss. 2 and 2A of the Bail Act 1997.

4. Section 2 of the Bail Act provides:-

> "2.—(1) Where an application for bail is made by a person charged with a serious offence, a court may refuse the application if the court is satisfied that such refusal is reasonably considered necessary to prevent the commission of a serious offence by that person.
>
> (2) In exercising its jurisdiction under subsection (1), a court shall take into account and may, where necessary, receive evidence or submissions concerning—
>
> (a) the nature and degree of seriousness of the offence with which the accused person is charged and the sentence likely to be imposed on conviction,
>
> (b) the nature and degree of seriousness of the offence apprehended and the sentence likely to be imposed on conviction,
>
> (c) the nature and strength of the evidence in support of the charge,
>
> (d) any conviction of the accused person for an offence committed while he or she was on bail,
>
> (e) any previous convictions of the accused person including any conviction the subject of an appeal (which has neither been determined nor withdrawn) to a court,
>
> (f) any other offence in respect of which the accused person is charged and is awaiting trial,

and, where it has taken account of one or more of the foregoing, it may also take into account the fact that the accused person is addicted to a controlled drug within the meaning of the Misuse of Drugs Act, 1977 .

(3) In determining whether the refusal of an application for bail is reasonably considered necessary to prevent the commission of a serious offence by a person, it shall not be necessary for a court to be satisfied that the commission of a specific offence by that person is apprehended."

5. Section 2A of the Bail Act 1997 (as amended) provides as follows:-

"2A.— (1) Where a member of the Garda Síochána not below the rank of chief superintendent, in giving evidence in proceedings under section 2, states that he or she believes that refusal of the application is reasonably necessary to prevent the commission of a serious offence by that person, the statement is admissible as evidence that refusal of the application is reasonably necessary for that purpose.

(2) Evidence given by such a member in the proceedings is not admissible in any criminal proceedings against the applicant.

(3) The court may, if it considers that publication of evidence given by such a member under subsection (1) or of any part of it may prejudice the accused person's right to a fair trial, by order direct that no information relating to the evidence or that part, or to any examination of the member, be published in a written publication or be broadcast.

(4) The court, when making an order under subsection (3), may specify the duration of the order and may at any time vary or set aside the order as it sees fit and subject to such conditions as it may impose.

(5) Subsection (2) of section 4 applies in relation to the hearing of the evidence of the member and subsections (4) to (7) of that section apply in relation to a contravention of subsection (3) of this section, in each case with the necessary modifications.

(6) Nothing in this section is to be construed as prejudicing the admission in proceedings under section 2 of other evidence of belief, or of evidence of opinion, whether tendered by any member of the Garda Síochána or other person.

(7) Nothing in this section limits the jurisdiction of a court to grant bail."

6. The Gardaí opposed bail. Detective Sergeant Tallon gave evidence. He said that on the 12 June, 2015, a Mr. Keith Walker arrived at a certain location and exited a black Toyota vehicle, normally driven by another man identified as "A." A male, believed by the Gardaí to be the applicant in this case, dressed as a female, killed Mr. Walker by discharging eighteen shots from a sub-machine gun into his body. C.C.T.V. footage of the shooting of Mr. Walker was available. Evidence was given that the killing of Mr. Walker was likely to have been a case of mistaken identity. Later that day the Gardaí obtained a warrant to search a particular premises. Four people were present in the house, including the applicant who was found in a bedroom wearing women's leggings. It appeared to the Detective Sergeant that the applicant was wearing make up and had a cut over his eye. The Gardaí had evidence that a witness who had seen the gunman in the aftermath of the shooting had noticed a cut over the gunman's eye. The applicant was then arrested. C.C.T.V. footage of the surrounding area was viewed by the Gardaí, and the Sergeant was satisfied that the applicant could be identified from footage taken nearby where the gunman is seen without his wig.

7. The wig and gun were found some days later in a lane, together with a handbag and a disposable glove. The applicant's D.N.A. was found on the wig and glove, and firearm residue was also found on the wig.

8. A Chief Superintendent also gave evidence opposing bail. [redacted text].

The Chief Superintendent gave evidence and was cross examined. [redacted text].

9. The judge's ruling was in the following terms:-

"Mr. McDonald is charged with murder in particular circumstances where a male was dressed up in women's clothing concealing a lethal submachine gun and 18 shots were fired at the victim, 18 times. There is -- of course he has a presumption of innocence, but there is quite a body of evidence against him. The fact that there's no forensic evidence in relation to the makeup is fairly weak when there's actually eyewitness evidence in relation to the makeup, but he has a presumption of innocence that the evidence is strong.

There's an obligation both under O'Callaghan and section 2, including section 2 as amended by section 2A. By way of background, he is 64 previous convictions, 36 of them whilst he was on bail. A number of those were in the Circuit Criminal Court; the convictions included nine unlawful takings, three handling of stolen property, attempted robbery, a firearms matter and an escape: all significant in terms of the O'Callaghan objection. However, it's not impossible that the O'Callaghan objection could be met by conditions and by a sum. I don't think the sum in question would be sufficient and it would have to be an independent surety, so I'm not going to refuse on O'Callaghan.

There's a section 2 simpliciter and, in that respect, Sergeant John O'Donovan gave evidence in relation to this conviction whilst on bail and I've always felt it isn't quite sufficient to show that he has committed offences whilst on bail. There should be evidence in relation to why he might commit further serious offences and, through no fault of Sergeant O'Donovan, he's not in a position to give this, save by looking at the history. However, then we have Chief Superintendent Clavin. He has given detailed evidence. First of all, he gave --not first of all, but in the course of his evidence, he made the objection under section 2A and expressed an opinion that the refusal of bail was necessary but it wasn't a bald opinion by any means [emphasis added]. He's a person who's been 34 years in the Gardaí. He's been a Chief Superintendent since 2013 and he gave evidence of his experience and the use of intelligence and he made it quite clear that he has a source, or sources, in this matter, in respect of whom he claimed privilege and no questions were asked in relation to that, quite properly, because the privilege would have been upheld in those particular circumstances, but he finds the Gardaí, as is often the case, trying to prevent citizens from slaughtering each other and other people perhaps getting injured in the interim, [redacted text]. I have to balance his undoubted right to liberty with this chance of harm to people and the evidence, I believe, is very high in that regard and I feel I must refuse under section 2, including as amended -- as added by section 2A, but it's an ordinary section 2 refusal as well because I'm quite satisfied, on his evidence, that there is a probability of further serious offences. I do agree that it's very focused and it doesn't relate to

the previous offending in particular. So, section 2 to refusal."

10. The evidence available to Mr. Justice Butler on the application for bail demonstrated the basis for the Garda belief of the applicant's involvement in the killing of Mr. Walker. By virtue of s.2A of the Bail Act otherwise inadmissible evidence as to the opinion of the Chief Superintendent that refusal of bail was reasonably necessary to prevent the commission of a serious offence was available. [redacted text]. It is certain that the s.2A evidence was by no means the only evidence offered to support the contention that bail should be refused because of the prospect of the commision of a murder by the applicant if released.

11. Counsel for the respondent/defendants have outlined case law which leans against permitting Art. 40 to be used to overturn the refusal of bail by the High Court. Reference was made to Roche (*also known as Dumbrell) v. The Governor of Cloverhill Prison* [2014] I.E.S.C. 53 and *Ryan v. The Governor of Midlands Prison* [2014] I.E.S.C. 54.

12. I accept that in normal circumstances bail refusal is addressed by appeal and not by an application for *habeas corpus* or judicial review.

13. However, Art. 40 of the Constitution, as indicated above, contains special provision to accommodate the type of argument that the applicant seeks to make in this case. The applicant's argument is that the refusal of bail was based on the opinion evidence of the Chief Superintendent which was rendered admissible by s.2A of the Bail Act 1997 and as that provision is unconstituional, the applicant is unlawfully detained. If that is correct, a court could readily find that the applicant is in unlawful custody. Given that the argument as to the validity of the law was not raised at the bail hearing, it could not feature in an ordinary appeal from the decision to refuse bail. Thus, these proceedings are properly before me.

14. Counsel for the applicant has referred to judicial analysis of s.3(2) of the Offences Against the State (Amendment) Act 1972 which is analagous to s.2A of the Bail Act. That section renders admissible the belief of a Chief Superintendent that a person accused of membership of the Irish Republican Army is in fact a member of that organisation. In *Redmond v. Ireland* [2015] I.E.S.C. 98, a decision delivered on the 17th December, 2015, Hardiman J. said as follows:-

> "I have no doubt that the provisions of s.3(2) represent a very serious diminution of the protections ordinarily afforded to an accused person by the law of evidence. On the face of it, it merely makes the opinion of the Chief Superintendent admissible in evidence. In reality, however, its effect is far greater. That effect cannot be better stated than it was by Fennelly J. in DPP v. Kelly [2006] 3 IR 115. Fennelly J. said, at p.135:
>
> 'The real problem is that, where privilege is claimed, as it inevitably is, the defendant does not know the basis of that belief. He does not know the names of the informants or the substance of the allegations of membership. Without any knowledge of these matters, *the accused is necessarily powerless to challenge them*. Informants may be mistaken, misinformed, inaccurate or, in the worse case, malicious. *None of this* can be tested.'" (emphasis in original)

15. Hardiman J. proceeds to outline the disadvantages faced by an accused person in dealing with the statutorily admissible opinion evidence of a Chief Superintendent as to the alleged fact that the accused is a member of the I.R.A.. He then says:-

> "24. I do not consider that s. 3(2) would be consistent with the Constitution if it permitted the conviction of a person solely on the basis of the opinion evidence. This is even more obviously the case if privilege is successfully asserted over the material which lead to the formation of the opinion. This is because these matters in combination tend to exclude any 'examinable reality' from the case and thereby undermine any potential avenue to effectively challenge the opinion evidence. The effect of this is wholly to subvert the prospects of useful cross-examination and to exclude even the theoretical possibility of undermining the opinion by cross-examination. This creates scope for the possibility of a conviction on opinion evidence only, which evidence is effectively unchallengeable.
>
> 25. But I do not consider that s.3(2) is capable **solely** of a construction which permits the result mentioned above. This would prevent a trial so conducted from being a trial 'in due course of law'.
>
> To hold a section to be unconstitutional for that reason would be a far reaching finding and one not lightly to come to in relation to a statute designed to combat an undoubted subversive threat which is well capable of intimidating witnesses. Indeed, even apart from that particular context, a court should in any event adopt any constitutional construction of an impugned section which may be open, in preference to declaring the Act to be unconstitutional.
>
> …
>
> In the present case the effect of the Act on the face of it is simply to render the opinion of the Chief Superintendent admissible in evidence, whereas it would otherwise be inadmissible. But the Section does not attempt to require a court to place any particular weight upon the evidence or to interpret it in any particular way. It is, no doubt, for that reason that counsel for the State was able to agree, on the hearing of this appeal, that the Court would be empowered to elevate to a rule of law the current practice whereby the trial court will not convict on belief evidence alone. As s.3(2) is currently construed, and was construed by the learned High Court judge in this case, it remains quite possible to convict on unsupported belief evidence whose grounds are concealed from the defendant." (emphasis in original)

16. Hardiman J. expressly endorsed the views of Charleton J. in the same case who believed that safeguards were available, such that belief evidence would not stand alone, and that the charge of membership would be supported by other evidence which supports the accusation of membership of the I.R.A.. Though the applicant relies heavily on the decision of the Supreme Court in *Redmond* in support of the contention that s.2A is unconstitutional, it seems to me that the provision is perfectly capable of a constitutional construction similar to that achieved with respect to s.3(2) of the Offences Against the Person Act 1972. No part of s.2A of the Bail Act 1997 (as amended) permits, much less requires, a judge on a bail application to conclude that bail must be refused merely because a Chief Superintendent has expressed an opinion that bail must be refused to prevent the commission of a serious offence. Indeed, as pointed out by the respondent, s.2A(7) provides that the section does not limit the jurisdiction of the court to grant bail.

17. It seems to me that the argument as to the unconstitutionality of the section in this case is purely theoretical and does not reflect the facts. The Chief Superintendent expressed an opinion as permitted by s.2A of the Bail Act. A review of his evidence indicates that the Chief Superintendent was at all times fully aware of the nature and extent of the direct evidence of the involvement of the applicant in the killing of Mr. Walker. He was aware of the evidence that Mr. Walker was an unintended, innocent victim. He was aware that Mr. Walker was innocently connected with a man known as "A" [redacted text]. He was aware of the physical evidence which connected the applicant with the unlawful killing of Mr. Walker. He was aware of evidence which suggested a

connection between the applicant and a firearm that was used in the killing. The only information based on a confidential source, and in respect of which privilege was asserted, was information available to [redacted text] that [redacted text].

18. Nothing in s. 2A of the Bail Act 1997 prevents an applicant for bail from cross-examining a Chief Superintendent as to the basis of his or her opinion that bail should be refused in order to prevent the commission of a serious offence. Clearly any such prohibition would be unconstitutional. Nothing in the subsection requires a court to accept the opinion evidence of a Chief Superintendent. In line with the principles outlined by the Supreme Court in *Redmond*, the section would be unconstitutional if it permitted a court to refuse bail based exclusively on s.2A opinion, which in turn was based on privileged confidential information in respect of which no cross-examination was possible.

19. It is of some significance in this case that the broad basis of the Chief Superintendent's belief that bail should be refused in order to prevent the commission of a murder was not the basis of any cross-examination, save of the barest kind. The Chief Superintendent relied on a wealth of evidence, including certain confidential privileged information to conclude that bail should be refused in order to prevent the commission of a serious offence and his evidence was essentially unchallenged.

20. The impugned section is well capable of a construction which requires opinion evidence rendered admissible by the section to be based on matters other than privileged material. That is precisely what happened in this case and it is clear that the judge had detailed evidence from a Chief Superintendent and other Garda witnesses as to the involvement of the applicant in a particular killing, and as to the risk of a future killing by the applicant.

21. The applicant makes a further argument as to the unconstitutionality of s.2A of the Bail Act. It is said that the section permits a bail court to take account of the nature and strength of the evidence in support of the charge against the applicant and to take account of any other offence in respect of which the accused person is charged and is awaiting trial, which, it is submitted, is not reconcilable with the presumption of innocence. My view is that it is not open to the applicant to make that argument in this case because no such determination was made by the trial judge.

22. The applicant has also sought to argue that the section is unconstitutional because it is a disproportionate interference with the rights of an applicant for bail. The applicant argues that s.2A goes further than the provisions of s.2(1) which merely requires the bail judge to take into account the belief of the Chief Superintendent. It is argued that the section elevates the mere opinion of the Chief Superintendent into evidence that refusal of bail is necessary.

23. It is abundantly clear from the transcript of the bail application that the Chief Superintendent did not attempt to make a bare statement of his opinion that refusal of bail was necessary. It is also apparent from the transcript that the trial judge did not simply accept any such bare assertion of opinion by a Chief Superintendent. Had events transpired in such a fashion the applicant's arguments might carry some weight.

24. The People of Ireland amended the Constitution to allow preventative detention of persons not yet convicted of offences pending trial. Sections 2 and 2A of the Bail Act 1997 lay down principles governing related decision making for judges. Section 2A does not require the court to accept the opinion evidence of a Chief Superintendent. Section 2A does not mandate refusal of bail, based on a mere expression of opinion by a Chief Superintendent. Elaborate explanation of the opinion of the Chief Superintendent was provided and was not subject to any real scrutiny under cross-examination by the applicant.

25. In the Supreme Court decision in *Redmond*, reference was made to the practice of the Special Criminal Court to rely upon corroborating evidence in addition to the opinion evidence of a Garda as to the fact of membership of the I.R.A.. In this case, Sarah Behan, who is a legal executive in the Appeals Section of the Office of the Director of Public Prosecutions, swore on affidavit as to the number of bail applications involving s.2A of the Bail Act. Figures were given that in 2015, only seventeen bail applications involved opinion evidence given in accordance with s.2A of the Act. Of those seventeen, eleven applicants for bail were granted bail notwithstanding the belief evidence offered by a Chief Superintendent. These figures indicate that judges hearing opinion evidence offered in accordance with s.2A of the Act do not employ an interpretation of that section which results in the judge feeling bound by the opinion of the Chief Superintendent as to the possibility of the commission of a serious offence by the bail applicant.

26. It was contended by the applicant that the Chief Superintendent was entitled by s.2A to give opinion evidence based on a confidential source in respect of which privilege was raised. Section 2A does not seem to me to expressly permit the use of privileged and hearsay evidence. It is a fact that this is what happened in this case. The applicant did not challenge the hearsay element of the evidence. Nor did the applicant challenge the reliance on privilege by the Chief Superintendent. I accept that the trial judge in his ruling indicated that it was proper for the applicant not to challenge the privilege asserted by the Chief Superintendent. Notwithstanding the view expressed by the trial judge, it appears to me that this is not an appropriate case in which to litigate an alleged flaw in s.2A, i.e. that it mandates or permits the use of a privileged source as the basis for otherwise inadmissible opinion evidence as to the likelihood of the commission of a future serious offence. I am of the view that to litigate such a point in an action such as this, it would have been necessary for an applicant's lawyers to have challenged hearsay and/or privilege at the bail hearing.

27. All of the complaints made by the applicant in this case are theoretical. The mischief put at the door of s.2A did not occur in the bail application under review. The trial judge did not rely on the simple expression of opinion by the Chief Superintendent to refuse bail. A wealth of corroborating evidence as to the likelihood of the commission of a serious offence by the applicant was available to the trial judge. The Chief Superintendent was not cross-examined on any of these matters though that facility was available to the applicant's counsel. The Chief Superintendent was not cross-examined as to the basis of his opinion that a future serious offence would be committed. The use of privilege by the Chief Superintendent was not, in fact, challenged by counsel for the applicant. The trial judge did not directly or indirectly express a view that he was compelled to conclude that a serious offence might be committed because of the s.2A evidence offered by the Chief Superintendent.

28. For the most part, I regard the complaints advanced in this case as to the unconstitutionality of s.2A to constitute a *jus tertii.*

29. In all the circumstances, I have not formed a view that s.2A of the Bail Act is unconstitutional and I therefore refuse to refer questions to the Court of Appeal in relation to this matter. I am also compelled by this conclusion to declare that the applicant is in lawful custody.