

THE HIGH COURT

[2016] No. 11 SSP

IN THE MATTER OF ARTICLE 40.4.2 OF THE CONSTITUTION AND IN

THE MATTER OF AN

APPLICATION FOR HABEAS CORPUS BY

GHEORGE PASARE

AT PRESENT IN CUSTODY IN CASTLEREA PRISON

JUDGMENT of Ms. Justice Stewart delivered on the 9th day of June 2016.

1. This is an application for a conditional order of *habeas corpus* made in writing by the applicant, who is in post-conviction custody and seeking an inquiry into the lawfulness of his detention.

2. On 8th November, 2012, the applicant was convicted on three counts under s3 of the Non-Fatal Offences Against the Person Act 1997 at the Circuit Court sitting in Galway. He was sentenced to five years imprisonment, to commence from 13th December, 2011, with the final two and a half years suspended on certain conditions. Eighteen months of this suspended sentence were reactivated on the 9th July, 2015, following a breach of these conditions. The applicant was convicted in the District Court sitting in Galway for an offence contrary to s15 (1) and (5) of the Criminal Justice (Theft and Fraud Offences) Act 2001. A sentence of six months was handed down on the 13th July, 2015, for the s15 offence, which was reduced to three months following an appeal to the Circuit Court sitting in Galway. This sentence and the re-activated section of his previous sentence are to be served consecutively. The applicant is currently in custody in Castlereagh Prison serving said sentences.

3. The applicant refers to Moriarty J.'s judgment in *Moore v. DPP* [2016] IEHC 244, where s99 subs. (9) and (10) of the Criminal Justice Act 2006 were deemed unconstitutional. He submits that his circumstances are similar to, if not the same as, those of two of the applicants in that case, (Edward Moore and Stephen Butler). His sentence was re-activated on foot of these subsections four days prior to the conclusion of District Court proceedings for his second offence and prior to his partially successful appeal thereof. He argues that these circumstances give rise to a breach of his Constitutional rights and he is entitled to habeas corpus relief.

4. As outlined in *The State (McDonagh) v. Frawley* [1978] I.R. 131, *habeas corpus* is not triggered by mere technicalities. In finding that deprivation of the applicant's liberty is not in accordance with law, the court must be convinced that there has been a departure from the fundamental rules of natural justice. When reaching his conclusions in *Moore*, Moriarty J. stated that he did so "in the context of the facts reviewed and the arguments made". In *Clarke v. Governor of Mountjoy Prison* [2016] IEHC 278, McDermott J. drew on all of this legal reasoning and came to the conclusion that substantive elements of the applicant's case should be similar to those in *Moore* if said applicant is going to benefit from Moriarty J.'s judgment therein. But each case must also be examined on its own merits.

5. Based on a comparison of *Clarke and Moore*, one can conclude that the strength of these similarities would have to be significant. In *Clarke*, the applicant's appeal was still active but this was not enough to attract the benefit of the *Moore* decision. He was not able to point to a substantive injustice in his case and sought a declaration on a technicality alone. His conduct during trial was also quite different. In *Moore*, the applicants had pleaded not guilty and had challenged s99 from the outset. These facts were not present in *Clarke*. In the case before the Court today, there are some similarities to the facts in *Moore*. But the fact remains that *Moore* was decided on the basis that the applicants' ability to appeal was impeded, which exposed them to detention without due process. In this case, due process has concluded and the applicant's conviction for a second offence was affirmed. His application is based on a technicality, as opposed to a substantive infringement of his Constitutional rights.

6. One of the key issues in determining the scope of retroactivity for a finding of unconstitutionality is whether or not the accused has conducted himself in such a manner that debars him from claiming the benefit of the ruling (See Hardiman J.'s judgment in *The People (Director of Public Prosecutions) v. Cunningham* [2012] IECCA 65). The applicant has failed to provide the necessary information to allow the Court to form an opinion in this regard. For example, the Court has not been informed about the plea entered by the applicant when brought to trial for his second offence, the grounds of appeal before the Circuit Court or a substantive effort to engage with section 99. If the applicant wishes to meet the requirements outlined in *Clarke*, more detailed submissions are required about the applicant's circumstances in general.

7. For all of the above reasons, the Court will refuse to direct an inquiry pursuant to Article 40.4.2 of Bunreacht na hEireann.