Neutral Citation: [2015] IEHC 754

THE HIGH COURT

[2015] No. 12 SS P

IN THE MATTER OF ARTICLE 40.4.2 OF THE CONSTITUTION AND IN

THE MATTER OF AN

APPLICATION FOR HABEAS CORPUS BY

BRIAN DOOLAN

AT PRESENT IN CUSTODY IN MIDLANDS PRISON

JUDGMENT of Mr. Justice Mac Eochaidh delivered on the 1st day of December 2015.

1. This is an application for habeas corpus made in writing by the applicant who is in post conviction custody.

2. The applicant was convicted on the 5th March, 2013, at the Central Criminal Court of various sexual offences and was sentenced to twelve years imprisonment with two years suspended backdated to the 27th January, 2012.

3. The applicant appealed to the Court of Appeal against conviction and sentence. One of the grounds of appeal was that the Juries Act 1976 was unconstitutional. As I understand it, this was the first time this point had been raised by the applicant. The notice of appeal was served out of time and according to the applicant, on 20th November, 2014, the Court of Appeal declined to extend time. Further to enquiries made of the Court of Appeal, I am informed no issue remains to be determined in respect of the applicant's appeal in that Court.

4. On the 15th May, 2015, the applicant issued proceedings bearing record no. 2015/3823P against Ireland and the Attorney General, by plenary summons which challenged the constitutionality of the Juries Act 1976.

5. The applicant sought bail in the first half of July 2015 pending determination of the plenary proceedings.

6. By application dated the 29th July, 2015, the applicant sought an order of habeas corpus on the basis that his application for bail (sent by post on Monday 13th July, 2015) had not been listed for hearing and no reason or explanation had been offered.

7. By decision of the 8th August, 2015, Haughton J. refusing the application, said:-

> *"The applicant's only complaint is that his bail application has not been listed. The applicant avers that there has been a refusal to list his application, but nothing in writing is exhibited and no detail is given to back this up this bare assertion. It would be open to him to seek judicial review of the failure or refusal to list it after making appropriate demand. The 'extraordinary procedure' of habeas corpus is not necessary or appropriate in these circumstances where the applicant is in post conviction detention and there is no suggestion that his conviction or sentences are bad on their face. Thus while the applicant may well have a legal right to have his bail application listed before the High Court his appropriate remedy does not lie in habeas corpus.*

8. Haughton J. also mentioned the decision in *Arra v Governor of Cloverhill Prison and Others* [2004] I.E.H.C. 393. Haughton J. noted the comments of Clarke J. at p. 382 of that decision who said:-

> *"…it is well established that persons convicted upon trial by indictment are not, in the ordinary way, entitled to release pending an appeal. While there are, of course, cases were persons have been admitted to bail pending appeal it would, I think, be fair to characterise same as being the exception rather than the norm"*

9. Following the refusal of habeas corpus based upon the alleged failure of the State to list the applicant's application for bail, the applicant moved an application for bail, in person, before the President of the High Court on the 26th August, 2015. Bail was refused by the President.

10. The first ground advanced in favour of the present application for *habeas corpus*, as expressed by the applicant, is as follows:-

> *"This Applicant was refused bail by the High Court on the 26 August 2015 and while he has appealed to the Court of Appeal no date has been set for that appeal and it is oppressive to this Applicant to have [to] wait indefinitely for that appeal and accordingly he brings this Application."*

11. I have checked with the Court of Appeal. There is no record of an appeal against the order of the President refusing bail. This ground of alleged illegality contains a misleading assertion that the applicant has appealed the refusal of bail. It must fail.

12. In any event, even if the applicant could make out some unfairness or illegality connected with a delayed appeal against refusal of bail, he could not thereby be entitled to release from custody on a writ of habeas corpus. His remedy is to ask the Court of Appeal to hear his appeal expeditiously. In *Ryan v Governor of Midlands Prison* [2014] I.E.S.C. 54 Denham C.J. noted as follows:-

> *"18 Thus the general principle of law is that if an order of a Court does show invalidity on its face, in particular if it is an order in relation to post conviction detention, then the route of constitutional and immediate remedy of habeas corpus is not appropriate. An appropriate remedy may be an appeal, or an application for leave to seek judicial review. In certain circumstances the remedy of Article 40.4.2 arises only if there has been absence of jurisdiction, a fundamental denial of justice, or a fundamental flaw."*

The applicant is in post conviction detention and the comments of the Chief Justice are applicable to his circumstances. His remedy in relation to the refusal of bail lies in the Court of Appeal.

13. The applicant also alleges that his detention is unlawful because the Juries Act 1976 is unconstitutional. He says that the jury

that convicted him was drawn from a panel that was not representative of the community and, therefore, he did not have a trial in due course of law. He complains about "absence of jurisdiction".

14. It is, of course, possible for a person in custody to argue that a law which detains him or her is unconstitutional. If so found by the High Court, the matter must be referred to the Court of Appeal. Article 40.4.3. of the Constitution provides:-

> *"Where the body of a person alleged to be unlawfully detained is produced before the High Court in pursuance of an order in that behalf made under this section and that Court is satisfied that such person is being detained in accordance with a law but that such law is invalid having regard to the provisions of this Constitution, the High Court shall refer the question of the validity of such law to the Court of Appeal by way of case stated and may, at the time of such reference or at any time thereafter, allow the said person to be at liberty on such bail and subject to such conditions as the High Court shall fix until the Court of Appeal has determined the question so referred to it."*

15. Notwithstanding the complaint made in support of this application for *habeas corpus* that the Juries Act 1976 is unconstitutional, my view is that the applicant cannot now invoke Article 40.4 of the Constitution to litigate this complaint. The applicant was required to raise the alleged want of jurisdiction arising from the invalidity of the Juries Act 1976 at an early stage of his prosecution and surely well before the jury gave its verdict. Failure to do so is fatal to this application.

16. In *Brennan v. Governor of Portlaoise Prison* [2008] 3 I.R. 364 it was held by the Supreme Court that, except in very exceptional circumstances, it was not open to a convicted person to challenge the legality of their detention pursuant to Article 40.4.2 of the Constitution where their case and appeal had been determined to a point of statutory finality. The Court said that a bona fide exercise of jurisdiction was deemed to be a good exercise if objection was not taken at the appropriate time. It was necessary that any objection relating to jurisdiction be taken as soon as was reasonably possible. This approach follows the general approach as described by Murray C.J. in *A. v. Governor of Arbour Hill Prison* [2006] I.E.S.C. 45, [2006] 4 I.R. 88 where he said as follows:-

> *"[125] In a criminal prosecution where the State relies in good faith on a statute in force at the time and the accused does not seek to impugn the bringing or conduct of the prosecution, on any grounds that may in law be open to him or her, including the constitutionality of the statute, before the case reaches finality, on appeal or otherwise, then the final decision in the case must be deemed to be and to remain lawful notwithstanding any subsequent ruling that the statute, or a provision of it, is unconstitutional. That is the general principle."*

Thus even if the applicant could establish that the Juries Act 1976 is unconstitutional, that would not mean that he is in unlawful custody.

17. The applicant did not make complaint about the Juries Act prior to, or in the course of, his prosecution. He did not pursue the point in a timely appeal. Thus, the point of statutory finality has been reached in his conviction and it is not open to him to re-open the legality of his conviction and consequently the legality of his detention.

18. Having conducted enquiry as required by article 40.4.2. of the Constituion I decline to grant relief.