

THE HIGH COURT

[2016] No. 12 SSP

IN THE MATTER OF ARTICLE 40.4.2 OF THE CONSTITUTION AND IN

THE MATTER OF AN

APPLICATION FOR HABEAS CORPUS BY

EDWARD O'SULLIVAN

AT PRESENT IN CUSTODY IN CORK 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 the 15th October, 2009, the applicant took possession of or used a mechanically propelled vehicle without the consent of its owner. This was a violation of s112 of the Road Traffic Act 1961, as amended. On 7th May, 2010, the applicant was brought before His Honour Judge Carroll Moran (as he then was) at the Circuit Criminal Court sitting at Limerick, who handed down a sentence of four years imprisonment. The final year of this sentence was suspended for a further four years under s99 of the Criminal Justice Act 2006, on the proviso that he keep the peace and be of good behaviour during that time. On 26th July, 2013, the applicant was found to have breached those terms by committing a robbery offence contrary to s14 of the Criminal Justice (Fraud and Offences) Act 2001, as amended. His suspended sentence was therefore reactivated by Moran J., per s99 (9) and (10) of the 2006 Act, on 24th October, 2013. He is currently in custody in Cork Prison, where he is serving a four year sentence for robbery, with the final two years suspended for five years, consecutive to the service of his reactivated sentence.
3. The applicant refers to Moriarty J.'s judgment in *Moore v. DPP* [2016] IEHC 244, where s99 (9) and (10) of the 2006 Act were deemed unconstitutional. These provisions served as the basis for the reactivation of his suspended sentence and he argues that he is therefore entitled to habeas corpus relief within the meaning of Article 40.4.2 of the Irish Constitution 1937.
4. McDermott J.'s reasoning in *Clarke v. Governor of Mountjoy Prison* [2016] IEHC 278 is helpful in analysing the legal effect of Moriarty J.'s judgment in *Moore*, as well as the law applicable to habeas corpus cases in general. 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. The applicant in this case submits that the declaration of unconstitutionality of s99 (9) and (10) gives rise to such a departure.
5. This applicant's argument as to uniform retroactive unconstitutionality has been soundly rejected by the Courts in a number of cases, most notably *A v. Governor of Arbour Hill Prison* [2006] 4 I.R. 88. In order to benefit from a finding of unconstitutionality subsequent to trial of action, an applicant must highlight certain conduct and circumstances that give rise to some unfairness or injustice. Moriarty J. was cognisant of this requirement when he gave his judgment in *Moore*, which was reached "in the context of the facts reviewed and the arguments made".
6. The applicant's behaviour at trial is particularly useful in assessing the situation.. 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 he is debarred from claiming the benefit of the ruling (See Hardiman J.'s judgment in *The People (Director of Public Prosecutions) v. Cunningham* [2012] IECCA 65). This reasoning is similar to that of the Supreme Court in *The State (Byrne) v. Frawley* [1978] I.R. 326, where the findings of unconstitutionality in the Juries Act 1927 (See *De Burca v. Attorney General* [1976] I.R. 3) did not benefit the applicant because he had not challenged the validity of the jury at trial. McDermott J. employs similar reasoning in *Clarke* with regard to the applicant's guilty plea and failure to challenge s99 when at trial for his second offence, two facts that did not exist in *Moore*. The crux of the *Moore* decision was that the realities of the operation of s99 impeded the applicants' ability to appeal their second sentence before their suspended sentence was re-activated and they were detained.
7. Turning back to the facts at hand, and keeping in mind McDermott J.'s judgment in *Clarke*, this Court cannot extend the benefit of the declaration of unconstitutionality of s99 (9) and (10) to this applicant. He does not disclose the nature of his plea in the trial for robbery, nor does he disclose any attempt on his part to appeal the findings of that trial. The sum total of the applicant's argument revolves around the finding of unconstitutionality in *Moore* and no effort has been made to engage with the facts of the case itself. For these reasons, the Court will refuse to direct an inquiry pursuant to Article 40.4.2 of Bunreacht na hÉireann.