

**THE HIGH COURT**

**2011 1246 SS**

**IN THE MATTER OF A COMPLAINT FOR AN INQUIRY PURSUANT TO ARTICLE 40.4.2 OF THE CONSTITUTION OF IRELAND 1937,  
AND**

**IN THE MATTER OF ARTICLE 40.4.1 OF THE CONSTITUTION AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003**

**BETWEEN**

**EDWARD BRADY**

**APPLICANT**

**AND**

**GOVERNOR OF THE MIDLANDS PRISON**

**RESPONDENT**

**PRESIDENT OF HIGH COURT (KEARNS J.),**

**DIRECTOR OF COURTS SERVICE, E. GRIFFIN (REGISTRAR OF THE HIGH COURT), DIRECTOR OF PUBLIC PROSECUTIONS AND  
CIRCUIT CRIMINAL COURT (JUDGE PATRICIA RYAN)**

**NOTICE PARTIES**

**JUDGMENT of Ms. Justice Irvine delivered on the 18th day of July, 2011**

1. The applicant is currently detained in the Midlands Prison. From the documentation before the court it appears that the applicant was convicted on 15th January, 2010, on seven counts of indecent assault contrary to common law. On 11th March, 2010 he was sentenced by Her Honour Judge Patricia Ryan at the Circuit (Criminal) Court to two years imprisonment on each count in accordance with s. 6 of the Criminal Law (Amendment) Act 1935 ("the 1935 Act"), with the sentences to run concurrently. The conviction Order also notes that the trial judge directed that the applicant's name be placed on the Sex Offenders Register for a period of ten years commencing 11th March, 2010. She also refused the applicant leave to appeal against conviction and sentence.

2. The applicant seeks an inquiry pursuant to Article 40.2 of the Constitution into the lawfulness of his present detention in the Midlands Prison. He also seeks certain declaratory relief. To this end, he lodged the present application with the High Court on 23rd of June 2011 and the twelve pages of paperwork grounding his application were put before me on 27th June, 2011. In his unsworn statement dated 10th June, 2011, the applicant seeks a number of declaratory relief's, namely

(i) A declaration that his present detention is unlawful because the High Court failed to deal with an application for *habeas corpus* which he claims he made on 25th March, 2011 ("the first application"). This failure is stated to be in breach of his constitutional rights and his rights under the European Convention on Human Rights Act 2003. The applicant maintains that his family were told by the court registrar that she had received his affidavit and the warrant exhibited therein; that the application would be put before a judge in early course and that she would be in touch with him regarding the result. He enclosed with the present application, a copy of the papers allegedly lodged by him in support of the first application.

(ii) He seeks a declaration that the committal order and warrant of conviction is invalid as its contents and recitals are fraudulent, vague and void for uncertainty and do not represent the words spoken by the sentencing judge.

(iii) He seeks a declaration that his detention in the Midlands Prison is unlawful as the warrant of conviction only permits him to be detained in Mountjoy Prison.

3. As to the facts relied upon in support of the present application, the applicant states that he was never before the court on Bill of Indictment No. DU01069/2004 (seven counts of indecent assault), that being the bill of indictment referred to in the conviction order. He further maintains that the Circuit Judge did not make an order that he be placed on a Sex Offenders Register and he states that he wants his solicitor and counsel to give evidence in this regard.

4. As exhibit B to his unsworn statement, the applicant encloses a copy of the affidavit and exhibits he maintains he submitted to the High Court on 25th March last. Therein the applicant sought a number of relief's which may be summarised as follows:-

(i) a declaration that he "could not and should not have been prosecuted under s. 6 of the Criminal Law (Amendment) Act 1935, having regard to the provisions to s. 10(2) of the Criminal Law (Rape) Act 1981;

(ii) a declaration that the Circuit Criminal Court had no power or jurisdiction to try, convict or sentence him to two years imprisonment under s. 6 of the Criminal Law (Amendment) Act 1935 having regard to s. 10(2) of the Criminal Law (Rape) Act 1981;

(iii) a declaration that his legal advisers had acted in a "deplorable and constitutionally unacceptable manner" and that his trial was not conducted in accordance with the principles laid down by the Supreme Court in *McDonough v. Frawley* [1978] I.R.; and

(iv) an injunction to prevent his removal from the Midlands Prison to any other prison pending the determination of those proceedings.

5. Having received the aforementioned documents on 27th June, 2011, the applicant was notified by letter dated 29th June, 2011 that the court was making inquiries regarding a number of the matters referred to by him in his affidavit. In this regard the court sought a copy of his indictment from the office of the chief prosecutor and further made an inquiry of the chief registrar and head of the Supreme and High Court operations as to any correspondence or documentation it had received from the applicant in respect of the first application. The court was advised on 29th June, 2011, that no documentation or correspondence in relation to the applicant's first application could be located and it received the applicant's indictment from the Chief Prosecutor's office on 7th July, 2011.

6. Notwithstanding the fact that the court has not been in a position to locate the papers which the applicant maintains he lodged by letter dated 25th March last, prior to his being entitled to any declaratory relief of the nature sought on the present application, I would have to be satisfied that he had put forward, in the course of his first application, good grounds to argue that his detention was unlawful. Having considered a copy of the papers which the applicant maintains were lodged with the High Court on 25th March last and which are exhibited at exhibit B to his unsworn statement grounding the present application, I am not satisfied that he has established any legal basis for his complaint in the first application.

7. At the heart of the first application was an assertion that by reason of the provisions of the Criminal Law (Rape) Act 1981 ("the 1981 Act") that the applicant could not validly have been indicted or convicted for the offence of indecent assault contrary to common law. Section 10 of that Act provides as follows:-

"(1) If a person is convicted on indictment of any indecent assault upon a female he shall be liable to imprisonment for a term not exceeding 10 years.

(2) Section 6 of the Criminal Law Amendment Act, 1935, is hereby repealed."

8. The effect of the aforementioned section is that the maximum sentence for indecent assault upon a female was raised to ten years from the maximum sentence of two years previously provided for by s. 6 of the 1935 Act. However, notwithstanding the provisions of Section 10, the offender remains liable only to the imposition of the maximum sentence that applied at the time when the offence was committed. In particular it is provided at s. 13(4) of the 1981 Act as follows:-

"Section 10 and, in so far as it relates to an offence under section 10, section 12 shall not have effect in relation to an offence committed before the commencement of this Act."

The offences in the present case were committed between 8th August, 1974 and 7th August, 1976. In such circumstances, the court, at the time the applicant was indicted and sentenced was constrained by the maximum tariff provided for in s. 6 of the 1935 Act.

9. The effect of s. 10 of the 1981 Act does no more than provide for an alteration in the maximum sentence to be applied in respect of any offence of indecent assault contrary to common law committed after the commencement of that Act. The section has no bearing on the validity of the applicant's prosecution and/or his conviction on the seven charges of indecent assault contrary to common law relating to offences which were committed prior to 8th August, 1974 and the 7th August, 1976. Neither has the Statute any bearing upon the validity of the sentence imposed by the learned Circuit Court judge, confined as she was at the time of sentencing to the maximum period provided for in s. 6 of the 1935 Act.

10. For the aforementioned reasons, it is clear to me that even had the applicant's first application been validly submitted to the court, he did not have any good grounds to argue that his detention at that time was unlawful or to seek an Order of the Court directing an Inquiry into the lawfulness of his detention. Accordingly, this Court has no need to engage further upon the applicant's right to the declaratory relief sought on his present application which right is stated to be based upon an assertion that his constitutional rights and/or his rights under the European Convention on Human Rights Act 2003, were breached by the High Court in its alleged failure to deal promptly with the application which he states he made on 25th March last.

11. As to the applicant's complaint in the present proceedings that he was never before Her Honour Judge Ryan in respect of the charges contained in Bill of Indictment No. 1069/04, that contention is contrary to the documentary evidence available to the court. Regarding his assertion that the committal order and warrant of conviction is invalid as its contents and recitals are fraudulent, vague and void for uncertainty, the applicant does not state the basis for any such allegations. Indeed, in his sworn affidavit in support of his first application, the applicant made no complaint that the committal order or warrant of conviction was vague or void for uncertainty and in that application confined his complaint as to the effect of s. 10(2) of the 1981 Act on the validity of his prosecution, conviction and sentence.

12. The applicant further complains in the present proceedings that as the warrant for his detention is directed to the Governor of Mountjoy Prison that he has grounds to argue that his detention is unlawful because he is presently held in the Midlands Prison. In this regard I am satisfied that these facts do not give the applicant any legal basis to support his present application for an inquiry into the lawfulness of his detention. The transfer of prisoners from one prison to another is a matter for the executive and not for the courts. Any such transfer may be exercised by the Minister for Justice, Equality and Law Reform pursuant to s. 17 of the Criminal Justice Administration Act 1914, and in such circumstances the Governor of the prison to which the transfer is made becomes his new custodian. There is no evidence before this Court that a transfer order was not made in accordance with the said provision.

13. In addition to the foregoing grounds of complaint the applicant contends that the trial Judge did not, at the time he was sentenced, order that his name be placed on the sex offenders register for a period of ten years as appears on the warrant of conviction. In this regard the court notes firstly that this complaint, even if it were true and established by means of evidence, does not go to the lawfulness of the applicant's detention and therefore can give him no grounds for the relief he seeks under Article 40.4 of the Constitution. Secondly, I note that no such complaint was made by the applicant in his first application. Finally, if the applicant was truly of the belief that the court order in respect of his conviction and sentence was not in accordance with what was directed by the sentencing judge that is a matter that should have been revisited with that judge and is not a matter that can be dealt with on the present application.

14. For all of the aforementioned reasons I will refuse the present application.