Neutral Citation: [2015] IEHC 780

THE HIGH COURT

RECORD NO. 2015/2011

IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLE 40 OF THE CONSTITUTION
MR A

APPLICANT

and
GOVERNOR OF THE MIDLANDS PRISON
and
DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

and
JUDGE SEÁN O'DONNABHAIN

NOTICE PARTY

JUDGMENT of Mr Justice Max Barrett delivered on 10th December, 2015.

Part 1: Background facts.
1. Mr A has been convicted of sexual offences involving his young granddaughter. He was found guilty by a jury after a four-day trial which ended a couple of weeks ago. Mr A was on bail throughout his trial. After the jury was released, counsel for the prosecution informed the court that there was no objection to continuing bail pending sentence. To this, the learned trial judge responded: *"There will be no bail in this case."* Counsel for Mr A then interjected to inform the court that there was no objection to continuing bail from the granddaughter either; he then started making submissions regarding bail. However, he was interrupted by the learned trial judge who stated: *"There will be no bail."* The judge was as good as his word: the case was adjourned to 8th February next, and Mr A was remanded in custody until that date.

Part 2: Kernel of present application.
2. The kernel of this Art.40 application is not that bail was refused but that Mr A was not allowed to make his case fully as to whether or not bail should continue to be extended to him pending sentence. All parties at the within application shared the view that there was a breach by the learned trial judge of the fundamental principle known as *'audi alteram partem'* whereby no decision is reached in court proceedings without a fair hearing beforehand in which each party is heard. They differed as to the consequences of that breach. Counsel for Mr A contends that it was so egregious and represented such a fundamental denial of fair procedures as to render his continuing detention unlawful. The State contends that to the extent that there was a breach this is more properly a matter for appeal.

3. As mentioned, counsel for Mr A maintains that the breach of *'audi alteram partem'* renders unlawful Mr A's continuing detention. Though indicating that it would be unusual for the High Court to intervene during a period of remand, he referred the court to the judgment of the Supreme Court in *The People (DPP) v. Goulding* [1999] I.R. 398, in which Barrington J. stated, at 400, that:

> *"[I]t would be unusual, though not impossible, for the High Court to intervene in the period between conviction and imposition of sentence when the trial judge had remanded the accused in custody."* [Emphasis added].

4. In effect, counsel for Mr A contended that on the facts of this case, the court may do what, to borrow from the judgment of Barrington J., might be styled the "unusual", and so intervene at this time. But in an Art.40 application it does not matter whether or not the court's intervention is *"unusual".* The court has no discretion as to how to act where it is not satisfied that a person is being unlawfully detained. Having commenced upon an Art.40 enquiry, if the court is not satisfied that a person is being lawfully detained, it must, pursuant to Art.40.4.2°, *"order the release of such person from such detention",* whether such order comes at an unusual time or not. So although Goulding (a bail appeal) has the effect that the period between conviction and imposition of sentence is a 'space' into which the High Court ought not lightly to tread, that is in the context of bail. When an Art.40 application has been commenced, the High Court, armed with the Constitution, may freely enter that 'space' and must order a detainee's release from detention if it is not satisfied that her or his detention is lawful.

Part 3: The decision in Ryan.
5. The court is mindful, when it comes to Art.40 applications, of the distillation of principle undertaken by Denham C.J. in the Supreme Court's decision last year in *Ryan v. Governor of the Midlands Prison* [2014] IESC 54. In that case, the Chief Justice, following a survey of applicable case-law, including the decision of the Supreme Court in *McDonagh v. Governor of Cloverhill Prison* [2005] I.R. 394 to which this Court was referred in the course of the within application, observed as follows:

> *"18…[T]he general principle of law is that if an order of a Court does not show an invalidity on its face, in particular if it is an order in relation to post conviction detention, then the route of the 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 such circumstances the remedy of Article 40.4.2 arises only if there has been an absence of jurisdiction, a fundamental denial of justice, or a fundamental flaw."*

6. Here, the learned trial judge was acting within jurisdiction: the decision as to whether or not to order continuing bail in respect of Mr A was his to make. This is not a case where, as for example, in *Cirpaci v. Governor of Mountjoy Prison* [2014] IEHC 76, there was an absence of jurisdiction.

Part 4: Application of Ryan.
7. Applying the above-quoted principles in Ryan to the facts underpinning the within proceedings, the following conclusions arise: (1) the order remanding Mr A in custody does not show any invalidity on its face; (2) as it is an order in relation to post-conviction detention then, all else being equal, one might have expected Mr A to appeal the decision concerning bail or to seek leave for judicial review; (3)what ostensibly makes this Art.40 application appropriate is that there has been a breach of the principle of *audi alteram partem.*

8. The court has been careful to use the word 'ostensibly' in the preceding paragraph because (i) the court is not satisfied that there has been a complete breach of the principle of *audi alteram partem*, and, (ii) to the extent that there has been a breach, the court is not satisfied that any fundamental denial of justice or fundamental flaw in proceedings arises there from.

9. As regards (i), the learned trial judge heard from prosecuting counsel, indicated what he was minded to do, heard briefly from defending counsel and then appears to have 'cut across' the latter to indicate what he was going to do. Could the learned trial judge have given a more fulsome hearing to defending counsel? The answer to this question is 'yes'. However, it does not seem to this

Court, from the description to it of what happened in the trial court, that the learned trial judge hopelessly crossed the line from the efficient despatch of proceedings into the worst of breaches of the *'audi alteram partem'* principle. To borrow a phrase of Eamon de Valera, the learned trial judge appears simply to have decided at some stage, albeit it would seem an early stage, that 'We have heard enough'.

10. As regards (ii), to the extent that the learned trial judge did act in breach of *'audi alteram partem'*, it does not seem in all the circumstances to have been so egregious a breach as would yield a denial of justice or flaw in the proceedings sufficient to render Mr A's resultant detention unlawful. One has to credit the learned trial judge with the learning and common-sense of which he is undoubtedly possessed: having sat and listened to the trial of Mr A for four days, the court has no doubt but that the learned trial judge brought his experience as a judge and the measure he had taken of Mr A in that time in arriving at the decision to determine the issue of continuing bail in a curtailed manner. Moreover, given Mr A's conviction, this was not a case in which any presumptive right to bail might have been contended to arise. There is too the point that –if the court might borrow from the language of Justice Frankfurter in *Indianapolis v. Chase Nat'l Bank* 314 U.S. 63 (1941), 69 – a criminal trial, like all court proceedings, *"is the pursuit of practical ends, not a game of chess".* One mistaken move by a judge need not ruin all that follows. If it did, our court-administered system of justice would quickly prove unworkable in practice.

Part 5: The decision in Gill.
11. Passing reference was made by counsel for Mr A to the decision in *Gill v. District Justice Connellan* [1988] I.L.R.M. 448. That was a case in which a solicitor was repeatedly frustrated by the respondent District Justice in cross-examining an arresting Garda and making certain submissions. The District Justice complained that the cross-examination was not relevant. He told the solicitor that: *"It does not matter what you say, the Act was complied with"; "You are wasting time"; "You can go on and on for all the good it will do you. I am not interested"; "What is the point? – the sample was properly taken";* and *"I do not care: I am not interested: do you want to call any witnesses".* All in all, there seems to have been an interesting day in the Longford District Court back in 1987. But what arose in this case, at the end of what thus far appears to be an otherwise un-impugned four-day trial, seems to this Court, for the reasons stated in Part 4, to be qualitatively and substantively different. The court therefore considers that *Gill* can be distinguished on its facts for the very extreme case that it was, as opposed to the within case where any error that arose appears to rather pale in comparison to what occurred in *Gill*, and need not and does not, to this Court's mind, yield the conclusion that Mr A's continuing detention is unlawful.

Part 6: Conclusion.
12. For the reasons stated above, the court does not consider that Mr A's continuing detention is unlawful and thus declines to grant any of the reliefs that Mr A seeks pursuant to the within application.

13. The court notes in passing that it is not clear from the papers before it that any order has been made prohibiting the identification of Mr A. However, given the nature of his offences, and that they involved a minor, the court has elected to anonymise his identity in this judgment.