

THE HIGH COURT

IN THE MATTER OF AN INQUIRY PURSUANT TO ARTICLE 40.4.2 OF THE CONSTITUTION OF IRELAND

[2016] No. 5 SSP

BETWEEN

BRIAN SHAUGHNESSY

APPLICANT

AND

THE GOVERNOR OF MIDLANDS PRISON

RESPONDENT

EX TEMPORE JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 26th day of May, 2016.

1. These proceedings concern an application pursuant to Art. 40.4.2 of the Constitution for a writ of *habeas corpus* which is the great remedy available to citizens who say that they are unlawfully detained. It protects the citizen's liberty and it is one of the most important powers which the Superior Courts exercise guarding against abuse of State power. The traditional remedy was subsumed into the Constitution and is now part of the black letter law, as it were, of the State.

2. In this case the applicant made an application from prison post-sentencing some years into his period of detention. He did so without professional legal advice in what are known as "prisoner applications." He did so on paper. The court received the application and refused an inquiry in respect of many of the matters which dealt with the alleged inadequacy of his own representation at his trial, saying that these were matters for a forum other than one entertaining an application pursuant to Art. 40 of the Constitution.

3. But the court did have a concern about some of the complaints raised by the applicant regarding the validity of the sentencing which was engaged in by the trial judge, and, in particular, there was a suggestion in the papers lodged that there was sufficient ambiguity in the sentence imposed as would render the detention unlawful because there are circumstances when ambiguity in sentencing might lead to a person being able to sustain an argument that detention has become unlawful.

4. It is well established that the remedy of *habeas corpus* is available for persons who are able to show that the warrant which detained them is bad on its face, or there is some other significant unfairness relating to the continued detention of the applicant. It is also well established that complaints about length of sentence, or problems with understanding portions of a sentence, or other such matters are properly to be pursued by way of an appeal and are not susceptible to remedy in the context of an Art. 40 *habeas corpus* application.

5. In this case, the applicant has pursued an appeal against conviction in which he steadfastly maintains his innocence. That is a critical factor in this case. The applicant was convicted of one count of rape, and in sentencing him Mr. Justice Sheehan in the High Court said:-

"Taking into account the facts of the case as well as the impact these offences have had on the victim this court holds that the offence lies in the midrange and that a sentence of six years imprisonment is the correct sentence in the absence of mitigating factors. The court notes the content of the various character references submitted to it and accepts that apart from this crime the accused is a person of good character. The court accepts that the accused has actively supported his community and contributed to its development through his involvement in the GAA and business. The court accepts that he is also very much involved in the upbringing of his young family. The court also notes the extensive adverse publicity that has resulted from his conviction which will make his reintegration into society more difficult. The Court of Criminal Appeal acknowledged in *The People (DPP) v. Woods*, ex tempore judgment delivered in December 2002 that publicity attaching to a case can be punitive. Finally the court also notes that another relevant matter is the placing of the accused on the Sex Offenders Register. This is a real punishment which will impact on the accused man's life once he has served his sentence. Section 10 of the Sex Offenders Act 2001 places varying obligations on a convicted sex offender. The court holds that the accused is entitled to some benefit in light of all these factors and will suspend the final year of the sentence provided that he enters into a bond to keep the peace and be of good behaviour to the people of Ireland for a period of one year."

The sentencing judge went on as follows:-

"This court is obliged to consider the question of rehabilitation. The court notes that the accused does not accept the jury verdict. Without prejudice to the accused's right of appeal and in the event that at some point the accused may view things differently this Court will suspend a further year of the six year sentence if the accused undergoes while in prison the 'Better Lives Program for Sex Offenders.' Whether or not he participates in this program is entirely a matter for him. This court has considered whether or not it should impose a post-release supervision order purporting that the imposition of such an order in this case is appropriate and will direct that the accused person be subject to a one year post release supervision order. Finally the court also directs that the accused be placed on the Sex Offenders Register."

6. Following sentencing, there then followed an exchange between counsel and the court which was in the following terms:-

"Ms. Murphy: May it please the court, just for the purposes of clarity in relation to the second

Judge: Yes

Ms. Murphy: part of the suspension. Would you put a time limit on that because otherwise how is

Judge: Yes I follow that, I will put a time limit.

Ms. Murphy: That if he engages within a certain period.

Judge: Very well provided that is correct provided that he engages within the period of imprisonment. He has to engage in it while he is in prison.

Ms. Murphy: Yes, yes

Judge: And the availability of those prisons will depend on the prison governor so I cannot direct that he completes the program within one year of today's date [the Judge clearly meant the availability of programs]

Ms. Murphy: No, I accept that, it is just an uncertainty

Judge: Very well

Ms. Murphy: Is the court saying if for example he applies and engages with that

Judge: Yes

Ms. Murphy: That the suspension kicks in

Judge: Yes

Ms. Murphy: Even if it is not available or do you know what I mean, it is just uncertainty.

Judge: The programs are available to every sex offender.

Ms. Murphy: Yes

Judge: Very well. So I will suspend a further year of the said sentence if the accused participates in the Better Lives Program during the course of his imprisonment. Is that satisfactory?

Ms. Murphy: I think so.

Judge: Very well."

7. That is the sentencing which took place in the Central Criminal Court. Counsel for the respondent has emphasised that in the appeal which has been pursued against conviction, no complaint whatsoever was made about any aspect of that sentencing. There is no extant appeal against it and that means that the only chance of success the applicant has in the Court of Appeal is to have his conviction overturned. He cannot pursue any of the complaints about the sentencing which he is seeking to pursue in this case in that forum. He has shut off his options comprehensively in that regard.

8. Counsel for the respondent has pointed out that in accordance with long established case law, of course, persons who appeal against sentence are at risk in the sense that the Court of Appeal may decide to increase the sentence rather than decrease it. Even if the applicant in this case wished to bring an appeal saying that the section of the sentencing offering him the chance to participate in particular programs was somehow unlawful, the danger would be of course that the Court of Appeal might unpick the whole of his sentencing and increase his sentence. In any event, the applicant has chosen not to pursue that option in anyway and now he is confined to an appeal against conviction only. That appeal has been delayed and the reasons for that are irrelevant to this particular application.

9. The essence of the complaint made on this application is that uncertainty attaches to the sentencing and that, therefore, uncertainty somehow has infected the warrant which detains him, and the warrant is accordingly unlawful. Another way of interpreting these grounds advanced is that because the duration of sentence is unclear, custody is unlawful or the warrant is unlawful, and the applicant, in the pleadings he has submitted, says that:-

"Certainty in the duration of his sentence is essential to the validity of a committal warrant and there is a lack of certainty in the duration of the sentence in this applicants committal warrant in that the sentence on the one hand with full remission could have terminated on the 22nd March, or on the other hand he could have full remission terminated on the 22nd December, 2016".

10. Counsel for the respondent has pointed out that that misstates the law and that it is not unlawful for a sentence or for a committal warrant not to indicate precisely the dates of the release of a person. I agree that it is not unlawful for a sentencing judge to give a sentence which is contingent on certain factors. If the factors were unattainable, impossible, or illegal, the sentence might well be unlawful and custody could therefore be unlawful, and a person could be released on that basis.

11. The condition attached to the sentence which would affect the length of the sentence in this case was not unlawful. It offered the applicant the chance to participate in a programme related to rehabilitation and a reduction in the period of custody if the offer were accepted and carried through. The difficulty for the applicant is that the programme requires him to admit his guilt and as he declines so to do so he cannot participate in the scheme and he cannot therefore avail of the reduction of time in prison. I find that he has fully understood those circumstances although he has attempted to say in court that he does not really understand the sentencing. It is perfectly clear from the interaction between the court and the applicant, and from reviewing the correspondence that he has sent, received and has understood, that at all times it was a precondition to participation in the programme that the applicant accepts that he is guilty of the crime of which he has been found guilty by a jury of his peers. There is nothing uncertain in the sentence imposed by the court. That its duration is contingent upon participation in a rehabilitation scheme does not render it uncertain.

12. In the context of this matter, this court has raised, and the applicant has pursued it somewhat himself, the question as to whether there is any illegality or difficulty attaching to a sentence which, on the one hand, acknowledges that a person has a constitutional right of appeal against conviction, and on the other hand, a sentence which offers an applicant a reduced sentence provided he participates in a programme which requires an admission of guilt. The argument here is that the contingency is unlawful

and thus the sentence is unlawful.

13. The tension or the difficulty which potentially arises is that a person interested in securing a reduced sentence by participating in a programme would be required to admit guilt which could have a negative effect on the constitutional right of appeal in which guilt may be contested.

14. This court is not required to resolve that question though my instinct is that admission of guilt for the purpose of participation in a rehabilitative program would not debar an appeal against conviction. But that is not a matter for this court; that is a matter for another court and another day. In this court that matter is entirely moot because the applicant was repeatedly and carefully asked by this court whether if, hypothetically, the court could give him a guarantee that his admission of guilt for the purposes of participating in the program would not have any impact on his appeal against conviction, would he then participate in the programme and he carefully said that he would never participate in that programme because he is morally certain of his own innocence and, therefore, he cannot bring himself to participate in the programme which requires him to admit his guilt. So that question of the illegality of offering such a programme because of its impact on his right to appeal is a moot in this case because the applicant, as is his absolute entitlement, declines to participate in the programme even if it had no effect on his right of appeal.

15. The matters addressed at para. F of his pleadings repeat the case he has sought to make in para. 43 and simply stated in various different ways that there is ambiguity in the sentencing and that makes it illegal. And as I have said there is no ambiguity in the sentencing whatsoever and the fact that the length of time he has to spend in prison is not certain at its commencement, that it is dependent on outside factors, or factors other than those which were certain at the time of sentencing does not make it unlawful. That form of sentencing is lawful and it has recently been so held in the decision of *Kovacs v. the Governor of Mountjoy Womens Prison* [2015] I.E.H.C. 418.

16. In those circumstances, it seems to me that even if it were open to the applicant to pursue the sort of complaints he has sought to make in the context of an Art. 40 application I would hold against him. It does seem to me that in any event the complaint he has sought to make about the matters which he says make the sentencing unlawful or unfair are matters which ought to have properly been pursued by way of an appeal and not by way of application for Art. 40 *habeas corpus* relief.

17. I cannot find any flaw in the warrant which detains him nor in the sentence which underlay the warrant which detains him. There is no merit in the application whatsoever and I have no hesitation in saying that the applicant is in lawful custody and I refuse the application under Art. 40.