Neutral Citation: [2013] IEHC 357

THE HIGH COURT

[2013 No. 5193 P]

IN THE MATTER OF SECTION 5(1) OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT, 2003

BETWEEN:

SAM MCNULTY

PLAINTIFF

AND

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS AND THE IRISH HUMAN RIGHTS COMMISSION

NOTICE PARTIES

JUDGMENT of Mr. Justice Paul Gilligan delivered on 31st day of May, 2013.

1. The plaintiff stands charged with an offence contrary to s. 41(1) and (5) of the Criminal Justice Act, 1999, namely intimidation of a witness. The charge against the accused is set out as follows:-

> "That you the said accused/defendant on 20/11/2011 at Deerpark Downs, Tallaght, Dublin 24 in said District Court area of Dublin Metropolitan District, did threaten, menace, intimidate, put in fear another person, to wit, Edward Jones who is a witness in proceedings for an offence with the intention of causing the course of justice to be obstructed or perverted or interfered with".

2. Section 41(1) of the Criminal Justice Act, 1999 provides:-

> "Without prejudice to any provision made by any other enactment or rule of law, a person –
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> (a) who harms or threatens, menaces or in any other way intimidates or puts in fear another person who is assisting in the investigation by the Garda Síochána of an offence or is a witness or potential witness or a juror or potential juror in proceedings for an offence, or a member of his or her family,
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> (b) with the intention thereby causing the investigation or the course of justice to be obstructed, perverted or interfered with,
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> shall be guilty of an offence."

3. Section 41(3) provides:-

> "In proceedings for an offence under this section, proof to the satisfaction of the court or jury, as the case may be, that the accused did an act referred to in subsection (1)(a) shall be evidence that the act was done with the intention required by subsection (1)(b)".

4. The plaintiff, Mr. McNulty, was charged that on the 17th day of October 2010, he assaulted Mr. Edward Jones, the current partner of his former wife. The charge was initially struck out on a technicality on the 6th November 2011. The charge currently against the plaintiff relates to an incident that on 20th November 2011, the applicant allegedly said to Mr. Jones "Come out here and I'll give you a proper hiding. I didn't give you enough the last time". It is submitted by the respondents that at the time of that alleged statement there was an ongoing investigation against the plaintiff relating to the assault charge. The plaintiff was subsequently re-charged, convicted of the assault and given the Probation Act. The respondents submit that the alleged incident of 20th November 2011 amounts to an interference with the course of justice and that the threat, menace and words of intimidation used are evidence of such intent.

5. The plaintiff contends that the alleged incident of 20th November 2011 was not, in any way, intended to intimidate Mr. Jones and maintains that the alleged incident related to a domestic dispute. The plaintiff seeks a declaration that s. 41 of the Criminal Justice Act, 1999 is invalid having regard to Article 38 of Bunreacht na hÉireann; in the alternative a declaration that s. 41(3) of the Criminal Justice Act, 1999 is invalid having regard to Article 38 of Bunreacht na hÉireann; a declaration pursuant to s. 5 of the European Convention on Human Rights Act, 2003 that s. 41 of the Criminal Justice Act, 1999 is incompatible with Article 6 of the European Convention on Human Rights and Fundamental Freedoms; in the alternative, a declaration pursuant to s. 5 of the European Convention on Human Rights Act, 2003 that s. 41(3) of the Criminal Justice Act, 1999 is incompatible with Article 6 of the European Convention on Human Rights and Fundamental Freedoms.

6. The plaintiff further seeks damages pursuant to common law and/or s. 3(2) of the European Convention on Human Rights Act, 2003 for loss, damage, inconvenience and expense; an interim and/or interlocutory injunction restraining the further prosecution of the charges pending the outcome of the herein proceedings; interest pursuant to the statute; such further or other order as to the court seems fit and the costs of the proceedings.

Legal Submissions on behalf of the Plaintiff

7. Ms. McDonagh for the plaintiff submits that there is no allegation to suggest any intention to pervert the course of justice by the

alleged comments. It is submitted that the likely interpretation of the allegation can be attributed to the fact that both the plaintiff and complainant were allegedly involved in a domestic altercation involving the plaintiff's former partner at a time where the plaintiff's child was being dropped off for an access visit.

8. It is submitted on the plaintiff's behalf that s. 41(3) of the 1999 Act provides that proof of a threat made against a witness shall be evidence that it was done with the intention to pervert the course of justice. It is submitted that there is no provision for the rebuttal of such evidence. It is further contended that the impugned provision, particularly subsection (3), discharges the prosecution of their duty to prove its case beyond reasonable doubt, relieving them of the requirement to provide actual evidence of an intention to pervert the course of justice, meaning they only have to prove a threat was made to a person who is a witness. Therefore, it is argued, the subsection essentially provides that proof of the *actus reus* of the threat is evidence of the specific *mens rea* and, without more, is capable of amounting to sufficient evidence for a conviction.

9. Ms. McDonagh submits that the prosecution must prove every element of the alleged offence beyond reasonable doubt. She refers to *McGowan v. Carville* [1960] I.R. 330 where Murnaghan J. held:-

> "…there is no onus on a person charged with an offence to prove his innocence, the onus at all times being on the State to prove his guilt".

10. It is also contended that the presumption of innocence requires that the prosecution must prove some actual evidence in respect of all necessary ingredients of the offence in order to satisfy the onus upon them.

11. Referring to *C.C. v. Ireland* [2006] 4 I.R. 1, counsel notes that the accused was charged with unlawful carnal knowledge of a minor contrary to section 1(1) of the Criminal Law (Amendment) Act, 1935. The Supreme Court considered whether such an offence was compatible with the Constitution. Hardiman J. at 44 held:-

> "It appears to us that to criminalise in a serious way a person who is mentally innocent is indeed "to inflict a grave injury on that person's dignity and sense of worth"…
>
> ….
>
> It appears to us that this, in turn, constitutes a failure by the State in its laws to respect, defend and vindicate the rights to liberty and to good name of the person so treated, contrary to the State's obligations under Article 40 of the Constitution…"

12. Counsel for the plaintiff submit that by comparing the legislative provisions in this action to those in C.C., s. 41 of the Criminal Justice Act, 1999 creates, on its face, a serious criminal offence in respect of which a person who is mentally innocent could be convicted. It is submitted that any provision which obviates the requirement to prove a guilty mind in a criminal trial is unconstitutional and contrary to Article 38 of Bunreacht na hÉireann.

13. The plaintiff also relies on in *Re Employment Equality Bill*, 1996 [1997] 2 I.R. 321 where Hamilton C.J. at p. 373 held:-

> "However what is sought to be done by this provision is that an employer, devoid of any guilty intent, is liable to be found guilty on indictment of an offence carrying a fine of £15,000 or a prison sentence of two years, or both such fine and imprisonment…".

14. A further authority referred to is that of *R. v. Vaillancourt* [1987] 2 S.C.R. 636 where the accused took part in an armed robbery of a pool hall in the belief that his co-accused was armed with only a knife. During the course of the robbery the co-accused produced a gun and shot a person who later died. Section 213(d) of the Canadian Criminal Code provided that culpable homicide is where a person dies in the course of a robbery as a result of the weapon used. The question before the court was whether the section, which effectively removed the requirement to prove intention to kill or cause serious harm in order to sustain a murder conviction, was constitutional. Lamar J. quoted Dickson C.J. in *R. v. Oakes* [1986] 1 S.C.R. 103 at pp. 132 – 133 where he stated:-

> "…a provision which requires the accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence in s. 11(d). If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt. This would arise if the accused adduced sufficient evidence to raise a reasonable doubt as to his or her innocence but did not convince the jury on a balance of probabilities that the presumed fact was untrue". [Emphasis added.]

15. Ms. McDonagh thus submits that the issue in this case is not a "mere evidential burden" being placed on the plaintiff, rather it is the omission of the requirement to prove an essential element of the offence, in this instance, the *mens rea* of intending to pervert the course of justice. It is submitted that the impugned section goes far beyond a mere evidential presumption that can be rebutted and actually discharges the onus to prove half of the offence.

16. Acknowledgement is made for the fact that an accused person could potentially give evidence to overcome s. 41(3). However, it is respectfully submitted that an accused person has the right to remain silent and, if the prosecution cannot prove their case beyond reasonable doubt, the accused is entitled to an acquittal. Therefore it is not a solution to say the accused can give evidence to rebut the subsection. Counsel submits that the 'crucial test' is whether the onus on the prosecution to adduce some evidence of the intention to pervert the course of justice is discharged. They compare s. 41(3) to other types of evidential sections and note that there is no provision for the rebuttal of evidence, either by cross examination or otherwise. It is submitted that the offence has created two parts and the prosecution need only prove one part to sustain a conviction.

17. Ms. McDonagh refers to the decisions in *O'Leary v. Attorney General* [1993] 1 I.R. 102 (High Court) and [1995] 1 I.R. 254 (Supreme Court) and *Hardy v. Ireland* [1994] 2 I.R. 550, which, she argues, can be distinguished from the current case. In O'Leary it is submitted that the relevant section of the legislation did nothing more than create an evidential presumption of the *actus reus* on the basis of a piece of physical evidence whereas in the current case, the proof of the *actus reus* amounts to evidence of the *mens rea*. It is contended that in effect, s. 41 of the Criminal Justice Act, 1999 means that no evidence of the *mens rea* need be called. Counsel submit that this violates the presumption of innocence and the principle *actus non facit reum nisi mens sit rea*.

18. Costello J. held in *O'Leary* at pp. 108-109:-

> "It is obvious that the difference in the manner in which the statute shifts the onus of proof may produce different legal consequences and so any statute which does so must be carefully considered to appreciate exactly the effect it may have on an accused's constitutional rights. But there is one feature in common which a number of these statutes possess. By providing that once a fact is established (the possession of the housebreaking implement under the Larceny Act, 1916, the possession of a controlled drug under the Misuse of Drugs Act, 1977, the possession of a document which is an incriminating document under the Act of 1939), the court is then required to draw an inference which is specified in the section. It is the nature and effect of the inference or conclusion that requires careful analysis."

19. It is submitted that *Hardy* has different circumstances to the current case and effectively affirms that the prosecution must prove all ingredients of the offence and, if in so doing a statutory provision permits a reasonable inference to be drawn, that is not unconstitutional. Counsel argues that where a person is found in possession of physical evidence, such as an explosive substance, such a fact could be used to rebut any inference drawn by the court. However, where the presumption relates to evidence of *mens rea*, it is much harder, short of the accused giving evidence, to displace. It is submitted that in the present scenario, even if the judge were to accept that the oral evidence demonstrates the perceived threat was a response to a domestic dispute and not a case of witness intimidation, it would be incorrect to give a direction of no case to answer in circumstances where the law means that the fact of the threat is *prima facie* evidence as to the intention of the accused.

20. Counsel for the plaintiff further submits that as an alternative to the declaration that the impugned section contravenes Article 38 of Bunreacht na hÉireann, the plaintiff also seeks declarations, pursuant to s. 5 of the European Convention on Human Rights Act, 2003, that the impugned sections are incompatible with Article 6 of the European Convention.

21. Ms. McDonagh submits that the issue in contention falls to be considered under the principle of proportionality, in line with the authority of *Meadows v. Minister for Justice* [2010] 2 I.R. 701. It is contended that the effect of s. 41(3) of the 1999 Act is wholly disproportionate to the end which is sought to be achieved. It is argued that whereas cases of genuine witness intimidation can be inferred from the circumstances, in cases such as the present case, the presumption arising from the fact of a threat being made to a witness in the absence of any circumstances which suggest an intention to pervert the course of justice, is illogical, arbitrary, speculative and disproportionate.

22. It is further submitted that *Telfner v. Austria* (App. 33501/96) is relevant to the proceedings. In *Telfner* the European Court of Human Rights ("ECtHR") held that evidential presumptions or inferences from silence do not offend Article 6(2) of the ECHR in principle, on the condition that the underlying evidence is so strong that the inference drawn is the only common sense inference that can be drawn. It was held by the court that the inference must not be so great as to require an explanation without first having established a *prima facie* case. By requiring the applicant to do so in *Telfner*, Austria was found to be in violation of Article 6(2) ECHR.

23. Counsel for the plaintiff further submits that *Salabiaku v. France* (App. 10519/83) endorses the principle that the ECHR has imposed limits on what can be presumed or inferred by statutory provision.

Legal Submissions on behalf of the Respondents

24. Mr. Callanan for the respondents submits that there is no legal basis to the argument as advanced on the plaintiff's behalf, that the impugned provisions are unconstitutional and / or incompatible with Article 6 of the ECHR. It is denied that the provisions contained in s. 41 of the Criminal Justice Act, 1999 relieve the prosecution of the requirement to prove its case beyond a reasonable doubt.

25. It is argued on the respondents' behalf that s. 41 of the Criminal Justice Act, 1999 enjoys the presumption of constitutionality and is to be interpreted and applied in a manner consistent with the plaintiff's rights under the Constitution. The introduction to s. 41(1) of the 1999 Act states that the creation of the offence under that sub-section is "without prejudice to any provision made by any other enactment or rule of law".

26. Mr. Callanan submits that s. 41 of the Criminal Justice Act, 1999 is not intended to undermine or infringe any rights which the plaintiff may have under other statutory enhancements or rules of law. They argue that the plaintiff's argument is contrived and misconceived. The respondents submit that there is nothing in s. 41(3) of the 1999 Act which would prevent a court from interpreting and applying the provision in a manner consistent with the plaintiff's constitutional rights. The onus of proof remains on the prosecution and they still have to prove, beyond reasonable doubt, that the accused is guilty of the charge preferred against him.

27. It is further submitted that s. 41(3) allows a particular inference to be drawn but only on the basis of established proven facts. It does not create a presumption of guilt, it does not shift the onus of proving guilt onto the defendant and it does not seek to alter the standard of proof which is required for a successful prosecution.

28. Counsel for the respondents note that the shifting of an evidential burden was found to be permissible in *O'Leary v. the Attorney General* [1993] 1 I.R. 102, where it was submitted unsuccessfully that s. 3(2) of the Offences Against the State (Amendment) Act, 1972 and s. 24 of the Offences Against the State Act, 1939 were unconstitutional as they had the effect of shifting the burden of proving innocence to the accused, thus depriving him of the protection of the presumption of innocence.

29. Costello J. noted a number of statutory provisions which had the effect of shifting the onus of proof in certain circumstances. Referring to the difference between the legal burden of proof and the evidential burden of proof he stated at 109:-

> "…the shifting of the evidential burden does not discharge the legal burden of proof which at all times rests of the prosecution. The accused may elect not to call any evidence and will be entitled to an acquittal if the evidence adduced does not establish his or her guilt beyond a reasonable doubt. Therefore if a statute is to be construed as merely shifting the evidential burden no infringement occurs."

30. Mr. Callanan submits that this decision is applicable to the current case as neither of the statutory provisions concerned was found to be unconstitutional. In the appeal to the Supreme Court, O'Flaherty J. stated at 265:-

> "The important thing to note about the section is that there is no mention of the burden of proof changing, much less that the presumption of innocence is to be set to one side at any stage".

31. Counsel for the respondents also refer to *Rock v. Ireland* [1997] 3 I.R. 484 as authority for their argument. In that case, the Supreme Court considered a challenge to the constitutionality of sections 18 and 19 of the Criminal Justice Act, 1984 which allowed certain inferences to be drawn from an accused person's failure to explain the presence of certain items on or about his person. The

applicant argued that such provisions infringed his constitutional rights to silence and the presumption of innocence.

> "…while a court may draw such inferences from an accused's failure or refusal to account for the presence of an object, substance or mark in the circumstances provided for in the section, it is not obliged to draw any inferences from such failure or refusal.
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> It is, however, entitled to draw such inferences as appear proper. It is purely a matter for the court, or subject to the judge's directions, the jury, to decide whether any inferences should be drawn or what inferences may be properly drawn from the failure or refusal of the accused person to account for the presence of such substances.
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> In deciding what inferences may properly be drawn from the accused's failure or refusal, the court is obliged to act in accordance with the principles of constitutional justice and having regard to an accused person's entitlement to a fair trial must be regarded as being under a constitutional obligation to ensure that no improper or unfair inferences are drawn or permitted to be drawn from such failure or refusal.
>
> If inferences are properly drawn, such inferences amount to evidence only, they are not to be taken as proof. A person may not be convicted on an offence solely on the basis of inferences that may properly be drawn from his failure to account such inferences may only be used as corroboration of any other evidence in relation to which the failure or refusal is material".

32. Mr. Callanan argues that the current situation in this case regarding the provisions in the Criminal Justice Act, 1999 are similar to the arguments put forward in *O'Leary* and *Rock*. He submits that s. 41(3) merely provides that the doing of the act of harming, threatening, menacing or putting in fear "shall be evidence" that the act was done with the intention required. They argue that there is nothing in the provision to suggest that such evidence is conclusive proof, nor is it binding on a court to accept that evidence. The provision does not explicitly mention the burden of proof changing or that the presumption of innocence is to be set aside.

33. Counsel for the respondents refer to the plaintiff's reliance on *C.C. v. Ireland* and argue that there is no comparison between the current case and the circumstances in the former. It is submitted that *C.C.* was upheld because the plaintiff was effectively deprived of a defence but no such deprivation exists in the current case as the plaintiff has not asserted he wishes to advance any defence nor is he being deprived of doing so. Moreover s. 41(3) does not criminalise a person who is "mentally innocent" as the prosecution must prove beyond reasonable doubt the accused had the requisite intention.

34. Further Mr. Callanan rejects the argument put forward by the plaintiff regarding Article 6 of the ECHR. He disputes the plaintiff's use of the decisions in *Meadows* and *Telfner*. *Meadows*, he argues, concerned an administrative decision of the Minister for Justice, Equality and Law Reform and is unclear how it could be authority for the proposition that s. 41(3) must be "proportionate and reasonable". It is submitted that there is nothing in s. 41(3) which renders it disproportionate and/or unreasonable.

Decision of the Court

35. This case concerns a statutory offence of intimidation of witnesses in the course of criminal proceedings. Section 41 of the Criminal Justice Act, 1999, as outlined previously, provides the law governing this offence. The issue for the plaintiff is s. 41(3):-

> "In proceedings for an offence under this section, proof to the satisfaction of the court or jury, as the case may be, that the accused did an act referred to in subsection (1)(a) shall be evidence that the act was done with the intention required by subsection (1)(b)".

36. Counsel for the plaintiff argues that essentially this provision can be interpreted as meaning that proof of a threat made against a witness shall be evidence that it was done with the intention to pervert the course of justice. It is argued that the meaning of the section is plain – where a threat is made to a witness, this in itself amounts to evidence of an intention to pervert the course of justice without further evidence. Moreover it is argued that s. 41(3) allows no provision for the rebuttal of any such evidence. They argue that proof of the *actus reus* of the threat is enough to hold there is sufficient *mens rea* and, without any further evidence, is sufficient for a conviction.

37. It is a well established principle of Irish law that legislation enjoys the presumption of constitutionality. Walsh J. in *East Donegal Co-operative Livestock Marts Limited v. The Attorney General* [1970] I.R. 317 at p. 340 held:-

> "In testing the validity of the Acts of the Oireachtas which were passed since the coming into force of the Constitution, the approach is that laid down by this Court in *McDonald v. Bord na gCon* [1965] I.R. 217. It was pointed out in that case that there was a presumption of constitutionality operating in favour of all such statutes….It is only when there is no construction reasonably open which is not repugnant to the Constitution that the provision should be held to be repugnant.
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> Therefore an Act of the Oireachtas, or any provision thereof, will not be declared invalid where it is possible to construe it in accordance with the Constitution; and it is not only a question of preferring a constitutional construction to one which would be unconstitutional where they both may appear to be open but it also means that an interpretation favouring the validity of an Act should be given in cases of doubt".

38. Section 41(3) of the 1999 Act does not provide, as submitted by the plaintiff, that the evidence is conclusive; all it does is provide that the act of harming, threatening, menacing or putting in fear "shall be evidence" that the act was done with the intention required. There is no onus on any court to accept that evidence. There is no reference in the section to the burden of proof altering or the presumption of innocence being set aside. There is nothing in the section that provides for a conclusive situation or that it is incumbent on the judge or jury to accept the evidence.

39. Further s. 41(3) does not *oblige* the court to draw any inferences but the court has discretion to do so. As the section stands, it provides for the court to evaluate and assess the significance of the evidence before it. It does not infringe on the accused's right to the presumption of innocence.

40. Similarly the Supreme Court in *Hardy* in dismissing the appeal held:-

> "…in the course of a trial for an offence under s. 4, sub-s. 1 of the Explosive Substances Act, 1883, the prosecution remained under an obligation to prove all the elements of the offence beyond a reasonable doubt; the principle that an accused must be tried in due course of law was not infringed by a statutory provision which permitted the drawing of

inferences from facts proved beyond a reasonable doubt by the prosecution".

41. I accept the submission of Mr. Callanan that the burden of proving, beyond reasonable doubt, remains on the prosecution throughout any action taken under the legislation and s. 41(3) of the 1999 Act merely provides that an accused may have an evidentiary burden to displace where *prima facie* there is evidence pointing to his guilt.

42. Section 41(3) of the Criminal Justice Act, 1999 does not discharge the prosecution of the onus to prove the act alleged beyond reasonable doubt. Further, nothing in the section invalidates the right to a trial in due course of law. Hederman J. in *Hardy* stated:-

> "…this analysis complies with our well-established criminal law jurisprudence in regard to having trials in due course of law. That constitutional requirement applies whether the offence is made an offence under a pre or post constitutional enactment. It protects the presumption of innocence; it requires that the prosecution should prove its case beyond all reasonable doubt; but it does not prohibit that, in the course of the case, once certain facts are established, inferences may not be drawn from those facts and I include in that the entitlement to do this by way of documentary evidence. What is kept in place, however, is the essential requirement that at the end of the trial and before a verdict can be entered the prosecution must show that it has proved its case beyond all reasonable doubt."

43. It is clear from the decision in *Rock* that the provisions under s. 41(3) of the Criminal Justice Act, 1999 do not oblige a court to draw inferences – the court retains discretion to do so. The court has an obligation to ensure that no improper or unfair inferences are drawn. I am of the view that there is nothing contained in s. 41(3) of the 1999 Act that would limit this obligation.

44. Further the court has an inherent obligation to conduct a trial in a manner consistent with the plaintiff's constitutional rights, which would include allowing him to rebut any evidence offered against him.

45. On the basis of the contentions submitted on the plaintiffs behalf, I am not satisfied that s. 41 of the Criminal Justice Act 1999 is incompatible with Article 38 of the Constitution.

46. Further, the plaintiff does not satisfy this Court that the provision is incompatible with Article 6 of the ECHR. Having considered the argument in *Meadows*, I am satisfied that the argument put forward by counsel for the plaintiff in relation to proportionality is not relevant to these proceedings. There is nothing contained in s. 41(3) which renders it disproportionate and/or unreasonable. As stated above, s. 41(3) does not create a presumption. It merely allows the court to make certain inferences, on the basis of proven facts and such inferences cannot be disproportionate, illogical or speculative.

47. With regard to the submissions made in respect of *Telfner*, I am satisfied that that case concerned the legitimacy of a court drawing inferences from an applicant's silence. No such concern in raised in the present case. Section 41(3) of the Criminal Justice Act, 1999 does not provide that a court can draw inferences from silence. As I stated previously, the only inferences a court may make under s. 41(3) are those pertaining to certain facts which are proved beyond a reasonable doubt to the court.

48. Accordingly, I refuse to grant the reliefs as sought.