Neutral Citation Number: [2007] IEHC 384

THE HIGH COURT

[2007 No. 1588/1587/1586/1584/1585 SS]

BETWEEN

PARTICK BRENNAN, JOHN TROY, THOMAS GILSON, SEAN O'DONNELL AND STEPHEN BIRNEY

APPLICANTS

AND

THE GOVERNOR OF PORTLAOISE PRISON AND THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

Judgment of Mr. Justice O'Neill delivered on the 9th day of November, 2007

1. In this case I directed an inquiry under Article 40 of the Constitution into the legality of the detention of all five Applicants, I also joined the Director of Public Prosecutions to the proceedings for the purposes of that inquiry.

2. The returns to the proceedings or the certificates which have been furnished by Respondents certify that all five Applicants are detained pursuant to warrants from the Special Criminal Court requiring the Respondents to detain the Applicants for the duration of the sentences imposed upon each of them, that is to say four years from the 21st February, 2005 with the last two months suspended. The same sentence was imposed in respect of all five Applicants.

3. Notwithstanding the ostensible legitimacy of those warrants and, I suppose, the ostensible legitimacy of the detention on foot of them the Applicants maintain this challenge to the legality of their detention because of the Judgment of the Supreme Court given in the case of *O'Brien v. The Special Criminal Court and The DPP*, in which judgments were delivered on the 24th October of this year and in which the Supreme Court held that the Special Criminal Court had no jurisdiction to try Mr. O'Brien. All five Applicants in this application contend that the circumstances of their arrest and detention under Section 30 of the Offences Against the State Act and their re-arrest under Section 4 of the 1997 Criminal Justice Act were identical to Mr. O'Brien's circumstances and they contend that following upon the judgments of the Supreme Court in the *O'Brien* case the detention of all of the Applicants is now unlawful.

4. The facts of this matter may be briefly summarised. All five Applicants were arrested in 2002 and they were brought before the Special Criminal Court in 2002 and they were remanded a number of times, it is not clear how many, until December 2004. At the point at which they were about to be arraigned all five Applicants challenged the jurisdiction of the Court to try them.

5. In the meantime Mr. O'Brien was arrested at a later time, he was arrested in 2004 and charged before the Special Court, but when he was charged he raised this point of jurisdiction and the Special Criminal Court fixed the trial of that issue for 13th December, 2004.

6. The Applicant's trial was due to commence on 9th December, 2004 and, when they were arraigned they too raised this jurisdiction point. With the agreement of the Court, the preliminary point, as it may be described, as to jurisdiction, both in respect of these five Applicants and Mr. O'Brien, was tried by the Special Criminal Court on 13th December, 2004 and the Court gave its judgment on that preliminary issue on the 14th December, 2004 and it rejected the submissions which had been made by all six, I suppose, Applicants at that stage.

7. Essentially, the case that was being made is that the arrest which was made under section 4 of the Criminal Law Act 1997 was unlawful, that the only possible form of arrest that was contemplated under the Offences Against the State Acts 1939-1998 for the purposes of bringing somebody lawfully before the Special Criminal Court was an arrest under the statutory scheme of The Offences Against the State Acts and hence the ordinary or general power of arrest as contained in section 4 of the Act of 1997 wasn't available and on that ground the arrest and subsequent bringing of these Applicants before the Special Court was illegal.

8. It was furthermore contended that even if that wasn't correct that Section 30(a)(3) of The Offences Against the State Act 1939, as introduced by the 1998 Act, required that upon arrest or re-arrest after a detention under Section 30 they had to be brought forthwith before the Court and charged, or forthwith charged and that was not done.

9. As to these two points, in the course of the hearing before the Special Criminal Court the State relied upon *The DPP v. Kehoe* [1986] ILRM. 69 to say that insofar as these five Applicants were concerned, as they had not raised the point on their first appearance before the Court the point was now spent and they couldn't rely upon it. The Special Criminal Court did not deal with that point but rejected the submissions made on the other two points.

10. Following upon that the trial of the Applicants proceeded before the Special Court for 25 days and in due course they were convicted on 21st February, 2005 and each of them sentenced to four years imprisonment.

11. In the meantime, Mr. O'Brien had taken judicial review proceedings, which came on for hearing before the High Court, before Mr. Justice MacMenamin, who rejected his case. He appealed to the Supreme Court and the Supreme Court on the 24th October of this year allowed his appeal and declared that the Special Court did not have jurisdiction to try Mr. O'Brien.

12. I should say, to complete the history, that after their conviction by the Special Criminal Court these Applicants appealed to the Court of Criminal Appeal and I am satisfied that as part of their appeal they did rely upon the jurisdictional point and, again, the question of whether their right to do so was spent did arise but was not decided by the Court of Criminal Appeal. But it is quite clear from Judgment of the Court of Criminal Appeal that their contention in relation to the legality of their re-arrest was rejected in that Court.

13. Now, the issues which arise on this application are essentially two. First of all, there is a jurisdictional issue. For the State, Mr. Collins contends that these proceedings are misconceived, that the complaint that the Applicants make in relation to their detention are not the proper subject matter of an Article 40 inquiry, that other avenues of procedure ought to be availed of, such as judicial review or, indeed, a return to the Court of Criminal Appeal to seek a Section 29 certificate in order to bring an appeal to the Supreme Court. Needless to say, these contentions by the State, the DPP, are vehemently resisted by all five Applicants, who assert that, relying upon the line of authority stemming from the case of *Sheehan v. DPP, District Justice O'Reilly* [1993] 2.IR 81 that they are entitled to make this application in the manner in which they have so done.

14. The issue, therefore, which arises is: What is the appropriate choice of procedure in circumstances such as have arisen here, where, as it were, late in the day there is a judgment of the Supreme Court, to the effect that the Special Court did not have jurisdiction to try Mr. O'Brien?

15. Having read the affidavits, I am satisfied that insofar as the jurisdiction of the Special Court is concerned there is no difference between the circumstances of Mr. O'Brien's case and of these five Applicants and in all material respects their circumstances were identical and I don't think there is really any dispute about that.

16. In general, whether or not one should proceed by Article 40 inquiry in these circumstances is a topic which has been, I suppose, subject to considerable academic and indeed forensic debate over a number of years. But it would seem to me that there are a number of things that need to be stressed and the reason they need to be stressed is because of nature of the Article 40.4 relief and, indeed, of the right which is sought to be protected, namely the right to liberty. There is no doubt in my mind that where the question of the legality of someone's detention arises and where on an ex parte application sufficient material is put before this Court to cause this Court to have a concern as to the legality of the detention there must thereafter proceed an urgent inquiry to establish that the detention is either legal or not legal. I have no doubt, and indeed some stress has been given to this in the authorities, in particular in the Sheehan case, that this is an inquiry that requires urgency first of all. The procedure which is envisaged by Article 40 has been described as an informal one, that is to say no particular procedure has been laid down, and it is a matter for the Court to adapt such procedure, on an inquisitorial basis it would seem, to satisfy itself as to the legality or otherwise of the detention.

17. The problem with going the road of judicial review, or indeed the road suggested here of applying for a Section 29 certificate, is that there would undoubtedly be considerable delay in so doing and it would seem to me, that if at the end of the day illegality is established a great deal of time will undoubtedly have been lost in reaching that point.

18. In my view, such an approach or such a manner of proceeding does not give due respect, first of all, to the right which is sought to be projected, the right to liberty, and, secondly, it does not give due adherence to the prescribed procedure in the Constitution, namely Article 40.4.

19. I think the matter is well stated by Finlay CJ in the case of S*heehan v. District Justice O'Reilly* where he says at page 89:

> "Such an application in its urgency and importance must necessarily transcend any procedural forms of application for judicial review or otherwise. Applications which clearly in fact raise an issue as to the legality of the detention of a person must be treated as an application under Article 40 no matter how they were described."

20. The Respondents have placed some reliance on, I suppose, the other aspect of authority bearing down on this situation, that is to say the case of *McSorley v. The Governor of Mountjoy Prison,* [1996] 2. ILRM, 31 in particular the judgment of the High Court. In the Supreme Court, in the *McSorley* case Sheehan was distinguished on the basis that the legal defect was apparent on the face of the order, and the Court held that the absence of representation, by parties whose actions, were challenged indicated that proceedings by way of judicial review was required instead of an Article 40.4 Inquiry.

21. It would seem to me that in this case the reverse, perhaps, should take place. The DPP is represented here so it seems to me there is a legitimus contradictor. Indeed, there are no disputes as to fact but insofar as issues of natural justice arise they are amply catered for. Thus, in my view, it seems to me that the *McSorley* case is now to be properly distinguished insofar as this application is concerned.

22. There are particular difficulties arising in this case in going the route suggested by Mr. Collins, namely judicial review or a Section 29 application. Firstly, insofar as judicial review is concerned it is now a considerable period of time since these events took place and without doubt an application for judicial review, would undoubtedly be met by a defence of delay and it would have to be anticipated that there is, at the very least, considerable doubt whether it could be successful.

23. Returning to the Court of Criminal Appeal to apply for a certificate under Section 29 of the Act of 1924 is likewise fraught with difficulty. The main point which would be sought to be litigated has already been decided by the Supreme Court and, again, there is a question of delay in that respect, too. It would seem to me that where there is a real concern, as indeed there is, over the legality of the detention of these Applicants, that is not an appropriate course which should be enjoined upon the Applicants in order to have tested the question of the legality of their detention and, if they are illegally detained, to secure their immediate release.

24. I am satisfied, therefore, that so far as the Art. 40.4 jurisdictional point is concerned, the procedure which has been adopted by the Applicants is the correct manner of proceeding in order to litigate the complaints which they now make.

25. Moving from there to the question of the legality or otherwise of their detention. The starting point, I suppose, in an analysis of the events that have occurred in this case, is the judgment of the Supreme Court in *The State, [McDonagh] v. Frawley* [1978] IR, 131, the Applicants in this case come to the Court as persons who are convicted of offences and, therefore, to all outward appearances their detention has the appearance of legitimacy, being supported by warrants which on their face are valid. And, indeed, there is no dispute at all as to the validity of the warrants on their face. No submission has been made as to any defect on the face of these warrants.

26. In the case of *State [McDonagh] v. Frawley* the Court in that case was faced with a complaint concerning legality, of detention, which arose out of a concern that the Applicant had in about the manner in which it was being cared for in prison. The learned Chief Justice, O'Higgins CJ, had this to say as part of his judgment:

> "The position of a person duly convicted and properly sentenced is quite different. Where a person such as the prosecutor is detained for execution of sentence after conviction on indictment he is *prima facie* detained in accordance with law and as was held in the High Court by McGuire P. at page 435 of the report of the *State, Cannon v. Kavanagh* it would require:
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> > "...most exceptional circumstances for this Court to grant even a conditional order of habeas corpus to a prisoner so convicted".

27. It goes on then to say further on:

> "The stipulation in Article 40.1.1 of the Constitution that a citizen may not be deprived of his liberty save "in accordance with law" does not mean that a convicted person must be released on habeas corpus merely because some defect or illegality attaches to his detention. The phrase means that there must be such a default of fundamental requirements that the detention may be said to be wanting in due process of law."

28. What is clearly ruled out there are any complaints -- this is for a convicted person -- which fall short of the sort of fundamental

defects as so described by the learned Chief Justice in that case.

29. In the case of *The State, [Royal] v. Kelly*, which was at [1974], IR 295, Walsh J. in his judgment at p. 267 said the following in relation to this:

> "The mandatory provision in Article 40.4.2 of the Constitution that the High Court must release a person complaining of unlawful detention unless satisfied that he has been detained in accordance with law is but a version of the rule of habeas corpus which is to be found in many Constitutions. The expression "in accordance with law" in this context has an ancestry in the common law going back to the Petition of Rights and to Magna Carta.
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> The purpose of the text is to ensure that the detainee must be released if, but only if, the detention is wanting in the fundamental legal attributes which under the Constitution should attach to the detention. The expression is a compendious one and is designed to cover these basic legal principles and procedures which are so essential for the preservation of personal liberty under our Constitution that departure from them renders the detention unjustifiable in the eyes of the law.
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> To enumerate them in advance would not be feasible and in any case an attempt do so would only attempt to diminish the Constitutional guarantee. The effect of that guarantee is that unless the High Court, or on appeal the Supreme Court, is satisfied that the detention in question is in accordance with law the detainee is entitled to an unqualified release from that detention. It is the circumstances of the particular case that will usually determine whether or not a detention is in accordance with law."

30. In this case the complaint is that the Special Criminal Court lacked a jurisdiction to try and, ergo, convict the Applicants. It is hard to imagine any complaint which could in a sense could be more fundamental to the legality ultimately of a conviction. To be able to say that the Court that convicted you had no jurisdiction to try you is a complaint, in my view, which goes to the very root of the right to liberty and is of a most fundamental nature and seems to me to be the kind of complaint which was envisaged both by the learned Chief Justice in *The State, Frawley v. McDonagh* and, indeed, was of the kind also envisaged in The *State, [Royal]* case, as being one which ought properly to be the subject matter of an Article 40 inquiry in the first place and if established to lead to an order for the release of the detainee.

31. I am satisfied that given that it is not in dispute but that the Special Criminal Court did not have a jurisdiction to have tried Mr. O'Brien and as the circumstances of Mr. O'Brien's case are identical to those of these Applicants I am satisfied that the Special Criminal Court did not have a jurisdiction to have tried them. I think that is, as I have said, a deficiency of the most fundamental sort which robs everything that was subsequently done of legitimacy.

32. The real issue, however, in this case, is not whether or not the Special Court had jurisdiction. The real issue in this case is whether or not the Applicants can now complain about that matter.

33. It is now, I think, well established in our jurisprudence that the right to complain or the opportunity to complain about a defect, be it a Constitutional defect or legal defect, can be lost by the non-exercise of that right and the passage of time. I think the principle was probably first stated by Henchy J. in the case of *The State, [Byrne] v. Frawley*, [1978] IR, page 326. At page 350 the following was said by Henchy J:

> "Because the prisoner freely and knowingly elected at his trial to accept the impanelled jury as competent to try him I consider that he is now precluded from by that election by claiming that the jury lacked constitutionality (See the decision in this Court in *Corrigan v. The Irish Land Commission*)
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> The prisoner's abrogation of the jury was affirmed by his failure to question its validity when he formulated grounds of appeal against his conviction and sentence and when his application for leave to appeal was argued in the Court of Criminal Appeal. It was not until some five months after his trial that he first put forward the complaint that the jury had been formed unconstitutionally. Such a volte-face is impermissible. having by his conduct led the Courts, the prosecution, who were acting for the public at large, and the prison authorities to proceed on the footing that he accepted without question the validity of the jury the prisoner is not now entitled to assert the contrary. The Constitutional right to a jury drawn from a representative pool existed for his benefit, having knowingly elected not to claim that right it would be contrary to the due administration of justice under the Constitution if he were to be allowed to raise that claim in the present proceedings when, by deliberate choice, it was left unasserted at the trial and subsequently in the Court of Criminal Appeal.
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> What has been lost in the process of events is not the right guaranteed by the Constitution but the prisoner's competence to lay claim to it in the circumstances of this case."

34. That is the end of that quotation. It is that last sentence which is of critical importance. The right in question, as here the right not be tried by a Court which lacks jurisdiction, that is not in question. What is in question here is the competence of a particular applicant to lay claim to that right in the circumstances of the case.

35. That principle was discussed by Kearns J. in the case of A*nthony Gorman v. Judge Mary Martin* and *His Honour Judge Anthony Kennedy v. The Director of Public Prosecutions* in which the judgments of the Supreme Court were delivered on 29th July, 2005. That was a case in which the Applicant in that case had sought to have his conviction overturned, having pleaded guilty, long after the events. In that case Kearns J applied the principles annunciated by Henchy J in *The State, [Byrne] v. Frawley* case.

36. The matter was further considered by the Supreme Court in the case of *A v. The Governor of Arbourhill Prison*. In that case the learned Chief Justice at page 143 of the report stated the following as a general principle.

37. He says the following:

> "In a criminal prosecution where the State relies in good faith on a statute enforced at the time and the accused does not seek to impugn the bringing or conduct of the prosecution on any grounds that may in law be open to him, including the constitutionality of the statute, before the case reaches finality, on appeal or otherwise, then the final decision in the case must be deemed to be and to remain lawful, notwithstanding any subsequent ruling that the statute or a provision of it is unconstitutional. That is the general principle."

38. Ms. Murphy, indeed all of the Applicants, rely heavily on that passage as amply encompassing the situation of these Applicants. In that particular passage of the learned Chief Justice what he implied is that, up until the finality of the proceedings, that if the point is taken it can be subsequently relied upon. In this case the point was taken initially just before trial began, at the arraignment stage.

39. There are, however, two cases which I must now deal with and these are the case of The *DPP v. Kehoe* [1986] ILRM, p. 69 a judgment of the Court of Criminal Appeal reported 1986 ILRM, page 69, and also the case of the *DPP v. Gilligan*, another judgment of the Court of Criminal Appeal in which judgment was given on 8th August, 2003.

40. In the first of these case, that is the case of *DPP v. Kehoe*, a jurisdictional point was taken in relation to jurisdiction of the Special Criminal Court and McCarthy J, giving the judgment of the Court, had this to say relative to it:

> "It is sufficient to say that the jurisdiction of the Special Criminal Court is conferred by section 43 of the Act of 1939 and that that jurisdiction does not depend upon the technical validity or the manner in which an individual may be physically present before the Court which has by section 43.1(c) jurisdiction to order the detention of and to detain in civil or military custody or to admit to bail in such amount and with or without sureties as the Court shall direct pending trial by that Court and during and after such trial until conviction or acquittal any person sent forward after such trial, transferred or otherwise brought for trial by that Court.
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> That is not to say that there are not circumstances constituting unfair procedures or breach of constitutional rights that would not invalidate a trial. Ordinarily, however, as was pointed out during the course of the arguments in the Special Criminal Court by counsel for the Director of Public Prosecutions, the time to take such a point is when first brought before that Court. If that point is not taken then it is spent."

41. Mr. Justice McCarthy goes on to say:

> "Having regard to this conclusion, it is unnecessary to come to any concluding view upon the argument that underlay the Applicant's substantial submission."

42. A number of things arise out of that. Mr. Collins for the DPP places very heavy reliance upon that statement from the Court of Criminal Appeal as being authority for the proposition that where a jurisdictional point is to be taken in relation to the jurisdiction of the Special Criminal Court, as was sought to be done by the Applicants in this case, that it must be taken at the first step, the first stage that they were brought before the Court. And if it is not done then, that's the end of that, the point is spent. He submits that because that wasn't done then it was not open to the Applicants at any point thereafter, and certainly not open to them on this application, to raise that jurisdictional point as a means of attacking the legality of their detention.

43. For the Applicants it is submitted that if a Court has no jurisdiction that point can be relied upon at any stage in the course of the proceedings pending before that Court. Reliance is placed upon the A case and, indeed, *The State, Byrne v. Frawley* as permitting a jurisdictional point such as this to be taken at any stage before finality in the proceedings.

44. In The second case, that is to say the *DPP v. Gilligan*, a similar point also came up. That Court, in which McCracken J was the presiding judge, had this to say:

> "In passing this Court should perhaps also comment on the case of *DPP v. Keogh*, 1985 IR 44, in which McCarthy J said at page 447..."

45. Then he quotes the passage which I have just quoted and goes on to say:

> "The Applicant takes issue with this approach, particularly in the light of the facts of the present case in which he in fact appeared unrepresented before the Special Criminal Court for several months. This Court feels that is it probably an overstatement of the position to say that if the point is not taken at the first possible opportunity then it is spent. However, it is clearly desirable that the point should be taken at the earliest possible opportunity and if this is not done it is for the accused to satisfy the Court that there is a reasonable explanation why the point was not taken."

46. Ms. Murphy submitted that the statement by McCarthy J. in the *Kehoe* case was made obiter. I don't think that's correct. It seems quite clear to me from the reading of the judgment that his statement in that regard was indeed the *ratio decidendi* of the Judgment. That being so, in my view it is binding on this Court. The Court of Criminal Appeal is an Appeal Court from this Court and it seems to me that I am bound by that statement. To the extent that, as was, I think, said by Mr. Collins, to have been softened by what was said in The *DPP v. Gilligan* it seems to me what was said in The *DPP v. Gilligan* was undoubtedly said obiter. But even taking what was said in *Gilligan* as being a correct statement of the law, it does not seem to me to avail the Applicants in this case because without doubt they did not take the point at the earliest opportunity and they have not explained why they did not do so.

47. As I have said, I am bound by the authority of the case of *The DPP v. Kehoe* and it seems to me that the Applicants in this case, not having raised the jurisdictional point when they were brought before the Special Court the first time, they were not in a position to raise the point later and, certainly, not now able to rely upon it in these proceedings.

48. It might be said that there is some inconsistency between the decision of the Court of Criminal Appeal in *The DPP v. Kehoe* and the line of authority culminating in the statement of general principle by the learned Chief Justice in the A case. That does not seem to me to be necessarily so. It seems to me that the statement of McCarthy J in the *Keogh* case is, so far as jurisdictional points are concerned, a particularly, I suppose, strict statement of the general principle that is set out in the statement of general principle in the A case and following on from The *State, Byrne v. Frawley*. There isn't a necessary inconsistency. It seems to me that the Kehoe case has to be regarded as a particularly strict view of how the general principle is to operate when points are taken in relation to the jurisdiction of the Court.

49. So, for those reasons it seems to me that whilst there is, no doubt at this stage but that the Special Court did not have jurisdiction to try the Applicants, they cannot now at this stage rely upon that point in order to attack the legality of their detention and hence I must conclude that their detention is lawful.