

THE HIGH COURT**2003 800 JR****EMAD MASSOUD****APPLICANT****AND****JUDGE ANN WATKINS AND THE DIRECTOR OF PUBLIC PROSECUTIONS****RESPONDENTS****Judgment of Mr. Justice Gilligan delivered on the 22nd day of June, 2004**

1. By order of this Honourable Court [Ó Caoimh J.] as made herein 7th day of November, 2003, the applicant was given leave to apply for orders of prohibition by way of judicial review prohibiting the first named respondent from dealing or proceeding to deal with the prosecution of the applicant on a charge of conspiracy to defraud pursuant to charge sheet 222648.

2. The grounds upon which the applicant was granted leave are as follows:-

1. The District Court has no jurisdiction to deal with the matter and no jurisdiction is disclosed in the charge sheet or otherwise.

2. The charge sheet on foot of which the charge the subject matter of the proceedings was brought and the contents of which was tendered in evidence to the District Court does not disclose any jurisdiction in that the charge sheet fails to disclose the district in which the said offence was alleged to have been committed.

3. The charge sheet on foot of which the charge the subject matter of these proceedings was brought and evidence of which contents was tendered in evidence in court on 5th day of November 2003 fail and failed to disclose any jurisdiction in the Dublin Metropolitan District in that the offence was not alleged to have occurred within the said district nor was any evidence tendered that the accused resided within the said district nor was any evidence tendered that the accused was arrested within the said district.

4. Evidence was tendered to the court by the second named respondent of the circumstances of the arrest of the applicant. This was that the applicant was arrested at his residence at Woodview Brownstown Ratoath in the County of Meath in the District Court District No. 10. The charge sheet fails to indicate in which district court district the offence is alleged to have occurred. The evidence tendered and the charge sheet fail to provide a basis on which the District Court could assume jurisdiction.

3. The applicant has sought leave to amend the grounds upon which relief is sought by the inclusion of an additional ground at 4A "that any subsequent or purported arrest as contended by Detective Sergeant Declan Daly or otherwise was not carried out in accordance with law and was therefore of no legal effect."

4. I am satisfied in the particular circumstances of this case that the amendment as requested to the grounds upon which relief is sought does not go outside the scope of the matters upon which leave was granted by Ó Caoimh J., and that the factual matters which are the subject matter of the amendments are comprehensively included in the factual matters which form the basis of the other grounds upon which relief is sought herein. I am satisfied that no prejudice is occasioned to the respondents by the granting of leave to amend the ground upon which relief is sought, and in effect the applicant does not seek judicial review upon grounds 1 to 4 inclusive, and in effect his case is dependent on the additional ground as set out at paragraph 4A as referred to herein, and in these circumstances I grant the applicant leave to amend the grounds upon which relief is sought in the terms of paragraph 4A. Thus the only issue for determination in these proceedings is an order of prohibition prohibiting the first named respondent from dealing or proceeding to deal with the matter entitled Director of Public Prosecutions at the Suit of Detective Sergeant Daly complainant/prosecutor and Emad Massoud accused/defendant pursuant to charge 222648 on the ground that any subsequent or purported arrest as contended by Detective Sergeant Declan Daly or otherwise was not carried out in accordance with law and was therefore of no legal effect.

5. The background circumstances to this application are that the applicant and his wife were both arrested at their home at Woodview, Brownstown, Ratoath, County Meath, on the morning of 4th November, 2003, and it is quite clear from the Garda Síochána custody record relating to the applicant that he was arrested for false pretences pursuant to the Larceny Act and conveyed to Swords Garda Station where both he and his wife were detained pursuant to s. 4 of the Criminal Justice Act, 1984. Their period of detention was extended by Detective Superintendent Eugene Gallagher at 2.40 p.m.

6. The nature of the investigation surrounding the applicant and his wife's arrest is that it is alleged that a fraudulent claim was made by the applicant and his wife against Scottish Provident Ireland Limited (now known as the Abbey National Group Limited). It is alleged that a surgical operation had been carried out on the applicant's wife Mrs. Gehan Massoud at the Nobel Clinic, 79 Eccles Street, Dublin 1, and that as a result of that operation a sum of €685,658.56 was obtained on foot of a claim which was paid by Scottish Provident Ireland Limited into an account held in the name of the applicant and his wife at the Permanent TSB, Carysfort Avenue, Blackrock, Co. Dublin. During their period of arrest both the applicant and his wife were interviewed extensively by members of the Garda Bureau of Fraud Investigation at Swords Garda Station and at approximately 9 p.m. on 4th November, 2003, Detective Sergeant Daly, having reviewed the evidence against both, applicants spoke by telephone to Detective Superintendent Eugene Gallagher and outlined the evidence available and his concern that the applicant and his wife would leave the jurisdiction if released without charge. He recommended to Detective Superintendent Gallagher that charges of obtaining by false pretences be preferred, and following this conversation and in the light of the evidence available he made the decision to charge both the applicant, and his wife with the offence of obtaining by false pretences. At 9.08 p.m. the applicant who was in the interview room, was notified by Sergeant Patrick Byrne, who was the Sergeant in charge, that he was being released from the provisions of s. 4 of the Criminal Justice Act, 1984. Detective Sergeant Daly then proceeded to bring the applicant from the interview room to the door of Swords Garda Station which exits into the public area of the station. He had already advised both the applicant and his wife that following their release they were going to be re-arrested for the purpose of charge and he accepts that he had made a decision to charge both the applicant and his wife with false pretences and that it was his intention to arrest both the applicant and his wife for the purpose of charging them immediately following their release from their detention under s. 4 of the Criminal Justice Act 1984. He says that the re-arrest of the applicant took place to effect his charging with the offence of false pretences as per the provisions of s. 10 of the Criminal Justice Act 1984. He says that when he arrived at the door of the Garda Station which exits into the public area of the station there was a drunken man causing a disturbance in the public office and he proceeded no further and arrested the applicant for the offence of obtaining by false pretences and he explained to him at the time that the arrest related to obtaining by false pretences of cash from Scottish Provident Ireland Limited in the period between September 2001 and March 2002, and he gave the applicant the

legal caution to which he made no reply. Detective Sergeant Daly then says that the applicant was taken to the station gaoler for processing and that the time of his arrest was 9.08 p.m.

7. In much the same circumstances the applicant's wife Mrs. Gehan Massoud was arrested for the offence of obtaining by false pretences.

8. Following his arrest the applicant was placed in a cell until 11.35 p.m. Detective Sergeant Daly says that the time delay was due to a problem with the pulse charging system which at the time was not operating correctly and as a result the old system of charging had to be utilised. The applicant was then charged with the offence of conspiracy to defraud, as this was the charge directed by the office of the Director of Public Prosecutions. The applicant was kept in Garda custody overnight as there was a concern with his release on bail, and he was then taken on 5th November 2003 to the Dublin District Court No. 46 at 10.30 a.m. in order to appear before the first named respondent and was remanded to appear again on the 12th day of November, 2003.

9. The applicant advances two grounds for the basis that his subsequent or purported arrest as contended for by Detective Sergeant Daly was not carried out in accordance with law and was therefore of no legal effect, and I am satisfied in this regard that it follows that the applicant contends that his detention was unlawful from 9.08 p.m. onwards at Swords Garda Station on 4th November 2003.

10. The first ground is that the applicant was never a free agent in reality and was at all times held in custody never having been released from his earlier arrest at 9.10 a.m. on 4th November 2003 at his home and that accordingly he was effectively held in custody for a period in excess of twelve hours and re-arrested while in custody.

11. The second ground advanced is on the basis that the purported arrest at 9.08 p.m. for false pretences when linked into the actual charging of the applicant at 11.35 p.m. with conspiracy to defraud pursuant to charge sheet 222648 was unlawful and contrary to s. 10 and in particular s. 10(2) of the Criminal Justice Act 1984 in circumstances where the applicant was initially arrested at 9.10 a.m. on 4th November 2003 in respect of false pretences, allegedly released and arrested for a second time at 9.08 p.m. for false pretences but not charged for a further two hours and twenty seven minutes, being held in a Garda cell in the intervening period and when charged at 11.35 p.m. was charged with conspiracy to defraud.

12. Section 10 of the Criminal Justice Act 1984 provides that:

"(1) Where a person arrested on suspicion of having committed an offence is detained pursuant to section 4 and is released without any charge having been made against him, he shall not-

(a) be arrested again for the same offence, or

(b) be arrested for any other offence of which, at the time of the first arrest, the member of the Garda Síochána by whom he was arrested suspected him or ought reasonably to have suspected him, except on the authority of a justice of the District Court who is satisfied on information supplied on oath by a member of the Garda Síochána not below the rank of superintendent that further information has come to the knowledge of the Garda Síochána since the person's release as to his suspected participation in the offence for which his arrest is sought. A person arrested under that authority shall be dealt with pursuant to section 4.

(2) Notwithstanding anything in subsection (1), a person to whom that subsection relates may be arrested for any offence for the purpose of charging him with that offence forthwith.

(3) Where a person has been arrested under section 30 of the Act of 1939 in connection with an offence is released without any charge having been made against him, he shall not be detained pursuant to section 4-

(a) in connection with the first-mentioned offence, or

(b) in connection with any other offence of which, at the time of his arrest for the first-mentioned offence, the member of the Garda Síochána by whom he was arrested suspected him or ought reasonably to have suspected him."

13. As regards the first ground advanced by the applicant, that in effect he was never a free agent or released from custody, I am satisfied that the correct procedure was followed and that while initially the applicant may have been in the custody of the arresting officer being Detective Sergeant Daly on arrival at Swords Garda Station at 9.53 a.m., the applicant was placed in the custody of the member in charge and it was the member in charge who advised him at 9.08 p.m. that he was being released from the provisions of s. 4 of the Criminal Justice Act, 1984, and he was aware that he was going to be arrested again for the purpose of being charged with the offence of false pretences. I do not consider that there is any reality to the submission that the applicant should have been brought out on to the public street outside Swords Garda Station and ought to have been advised that he was in effect free to go prior to being re-arrested against the background where he had already been advised that he was going to be re-arrested for the purpose of being charged with the offence of false pretences.

14. As Barron J. in *Quinlivan v. Governor of Portlaoise Prison* [1998] 1 I.R. 456 at p. 462, at p. 462-463:

"It is significant that the challenge against this procedure is that there was no release because the applicant was not brought to the public street before he was re-arrested. The law would surely be an ass if it denied the right of the Gardaí to arrest a person on private property where the person arrested had no chance of escaping arrest in favour of permitting his arrest on the public street where he would have had the same lack of chance of escaping. But the submissions on behalf of the applicant do not stop there. It is accepted that such irregularity would have been permissible if it was necessary to ensure the arrest of the applicant but because the irregularity could have been avoided by bringing him to the public street in the circumstances indicated the arrest was unlawful. I cannot accede to a submission based upon such a premise."

15. Counsel for the applicant has made extensive submissions as regards the timing of the applicant's initial arrest, his alleged release from custody, and his subsequent arrest, but in this regard I am satisfied to accept the evidence of Detective Sergeant Daly and I do not consider that there is any merit in these submissions.

16. Accordingly I am satisfied that the first ground in its own right fails.

17. However, the first ground necessarily runs into the second ground because in effect Detective Sergeant Daly was entitled to arrest the applicant pursuant to s. 10 of the Criminal Justice Act, 1984, for a second time for any offence for the purpose of charging him but was obliged to charge him with that offence forthwith. What has happened in this case is that following the intervention of the second named respondent the applicant was not charged with the offence for which he was arrested a second time at 9.08 p.m. but was charged at 11.35 p.m. with the charge as set out on charge sheet 222648 which was that

"You the said accused on an unknown date between 25th September 2001 and 28th March 2002 at a place unknown within the state did conspire with Gehan Massoud your wife to defraud the Abbey National Group Limited (formerly known as Scottish Provident Ireland Limited) contrary to common law."

18. The passage of time of two hours and twenty seven minutes between the applicant's arrest at 9.08 p.m. and his eventual charge at 11.35 p.m. is explained as being due to a problem with the pulse charging system which at the time was not operating correctly and that as a result the old system of charging had to be utilised. The applicant was charged with the offence of conspiracy to defraud as this was the charge directed by the Office of the Director of Public Prosecutions.

19. The net issue that arises here is that the applicant was arrested for false pretences and Detective Sergeant Daly accepts that the second arrest took place to effect his being charged with the offence of false pretences as per the provisions of s. 10 of the Criminal Justice Act 1984. I take the view that I am entitled to come to the conclusion that at some time between 9.08 p.m. and 11.35 p.m. on 4th November 2003 in Swords Garda Station there was a change of direction when a decision was taken to charge the applicant with conspiracy to defraud. Accordingly the issue to be determined is the legal effect of the fact that the applicant was arrested for the second time for the purpose of being charged with the offence of false pretences but was never as such charged with that offence and was charged with a different offence being that of conspiracy to defraud contrary to common law.

20. Section 10 of the Criminal Justice Act, 1984 is quite clear in setting out that where a person has already been arrested and detained pursuant to s. 4 and is released without any charge having been made against him he shall not be arrested again for the same offence or be arrested for any other offence which at the time of the first arrest the member of the Garda Síochána by whom he was arrested suspected him or ought reasonably to have suspected him.

21. Accordingly in my view it is quite clear that the purpose of s.10 is to provide a general bar on persons being re-arrested after they have already been detained for a period up to 12 hours on an immediate prior arrest pursuant to s. 4. Against this general proviso s.10 provides for two exceptions and the first, which is not relevant to this case, refers to the exception on the authority of a justice of the District Court who is satisfied on certain specified criterion, and the second which is particularly relevant is contained in s.10 (2) which states that:

"Notwithstanding anything in sub-section (1), a person to whom that subsection relates may be arrested for any offence for the purpose of charging him with that offence forthwith".

22. In the circumstances of this case the crucial words are "for the purpose of charging him with that offence forthwith".

23. I am satisfied that this specific statutory exception has to be construed strictly and be allowed to operate only so far as is necessary to serve its statutory purpose against a background where Article 40.4.1 of the Constitution enshrines the right to personal liberty and any provision whereby a person is held without charge in police custody obviously represents an inroad into this right. Accordingly it follows that insofar as s. 10 provides for a lawful inroad into the right to personal liberty, its terms have to be construed strictly.

24. O'Higgins CJ in *In the matter of Article 26 of the Constitution and in the matter of the Emergency Powers Bill, 1976* [1977] I.R. 159, pp. 172-173, specifically referred to the issue of strict construction when an inroad is being made in respect of the liberty of an individual when he stated as follows:

"The extent to which the bill, if signed by the President and given Constitutional validity as law by Article 28, s. 3, sub-s. 3, would encroach on personal rights which would otherwise be constitutionally guaranteed was canvassed in argument. In this context it is important to point out that when a law is saved from invalidity by Article 28, s.3, sub-s. 3, the prohibition against invoking the Constitution in reference to it is only if the invocation is for the purpose of invalidating it. For every other purpose the Constitution may be invoked. Thus, a person detained under s. 2 of the bill may not only question the legality of his detention if there has been non-compliance with the express requirements of s. 2, but may also rely on provisions of the Constitution for the purpose of construing that section and of testing the legality of what has been done in purported operation of it. A statutory provision of this nature which makes such inroads upon the liberty of the person must be strictly construed. Any arrest sought to be justified by the section must be in strict conformity with it. No such arrest may be justified by importing into the section incidents or characteristics of an arrest which are not expressly or by necessary implication authorised by the section".

25. Gannon J. in *O'Flynn v. District Justice Clifford* [1988] I.R. 740, at p. 745, refers specifically to the unlawful detention of a person without charge to facilitate the investigation and formulation of intended charges wherein he states:

"But if it should appear to a court that an accused person was unlawfully detained without charge to facilitate the investigation and formulation of intended charges his immediate release would be ordered"

26. The holding of a person in detention for investigation of an alleged offence or for the purpose of being charged was specifically referred to by McGuinness J. in the course of her judgment in *DPP v. Early* [1998] 3 I.R. 158, at pp. 167-169, wherein in dealing with the question of the interpretation of certain provisions of the Criminal Justice (Drug Trafficking) Act, 1996 she stated:

"In the Criminal Justice Act, 1984, there are parallel provisions to this which have been used over quite a lengthy period of time. These provisions also permit the holding of persons for investigation of an offence. It should be remembered of course that prior to the Criminal Justice Act, 1984 (leaving aside the provisions of the Offences Against the State Act, 1939, which might be regarded as a special case of emergency legislation), there was no provision for arresting persons and holding them for investigation and questioning as opposed to arresting them, charging them and bringing them immediately before the court. Thus, in 1984, it was an entirely new departure to provide for this type of arrest and detention in the ordinary criminal law. Section 4 of the Criminal Justice Act, 1984, applies to any offence for which a person of full age and capacity and not previously convicted may, under or by virtue of any enactment, be punished by

imprisonment for a term of five years or by a more severe penalty and to an attempt to commit any such offence.

Section 4(2) provides that:-

'Where a member of the Garda Síochána arrests without warrant a person whom he, with reasonable cause, suspects of having committed an offence to which this section applies, that person may be taken to and detained in a Garda Síochána station for such period as is authorised by this section if the member of the Garda Síochána in charge of the station to which he is taken on arrest has at the time of that person's arrival at the station reasonable grounds for believing that his detention is necessary for the proper investigation of the offence.'

27. The section goes on to provide for two six hour periods of detention, an initial six hour period and a further six hour period where necessary and where so directed by an officer of the Garda Síochána not below the rank of superintendent. As can be seen, this is a much shorter period of detention than that provided for under s. 2 of the Criminal Justice (Drug Trafficking) Act, 1996, but it is nevertheless parallel in type and purpose to that detention. Section 10 of the Act of 1984, which is comparable to s. 4 of the Act of 1996 provides:-

'10. (1) where a person arrested on suspicion of having committed an offence is detained pursuant to section 4 and is released without any charge having been made against him, he shall not -

(a) be arrested again for the same offence, or

(b) be arrested for any other offence of which, at the time of the first arrest, the member of the Garda Síochána by whom he was arrested suspected him or ought reasonably to have suspected him, except on the authority of a justice of the District Court who is satisfied on information supplied on oath by a member of the Garda Síochána not below the rank of Superintendent that further information has come to the knowledge of the Garda Síochána since the person's release as to his suspected participation in the offence for which his arrest is sought. A person arrested under that authority shall be dealt with pursuant to section 4.'

Section 10(2) provides:-

'Notwithstanding anything in subsection (1), a person to whom that subsection relates may be arrested for any offence for the purpose of charging him with that offence forthwith.' As can be seen, these provisions are very similar to the provisions in s. 4 of the Act of 1996 and are parallel to them. In both cases, the holding of someone in detention for investigation for an offence, which is an infringement of the right to liberty of a citizen, can only be carried out in serious circumstances. In addition to the safeguards that I have mentioned, there are quite a number of other safeguards against abuse of the power of detention provided for in both statutes. The main safeguard, which is contained both in s. 10 of the Act of 1984 and s. 4 of the Act of 1996, is a safeguard against repeated detention by the gardaí on the same offence without any new information having come to light. However, this is different from the situation which can arise where a person has been released from detention under s. 4 of the Act of 1984 or s. 2 of the Act of 1996 and at a later stage a decision is made by the director of Public Prosecutions or by the gardaí to charge that person with an actual offence. Section 10(2) of the Act of 1984 and s. 4(5) of the Act of 1996 permit a further arrest for this purpose and for this purpose only. It is essential to distinguish carefully and clearly between arrest for the purposes of detention for investigation and arrest for the purposes of charging the alleged offender, of bringing him or her before the court and of initiating the procedures under the Criminal Procedure Act, 1967, which eventually will lead to his or her trial."

28. McGuinness J. is strong in her view that the provisions of s. 10 are a safeguard in respect of the constitutional right to liberty of the citizen.

29. I take the view that s. 10(2) is clear in its intent to the effect that a person can be arrested after having been detained for up to twelve hours pursuant to s. 4 for any offence and by this I interpret the statute to include a different offence to that in respect of which the person was detained pursuant to s. 4, for the purpose of charging that person with the offence in respect of which they were arrested forthwith.

30. I am satisfied that any interpretation of s.10 which allows the Garda authorities to do anything after a person has been re-arrested pursuant to s.10(2) that is not directed at charging that person with the offence for which he has been re-arrested should be rejected because it goes beyond the purpose of the exception. As O'Flaherty J. stated in *Cork County Council v. Whillock* [1993] I.R. 231, at p. 237:

"Turning then to an analysis of s.14 it is clear to me that the first rule of construction requires that a literal construction must be applied. If there is nothing to modify, alter or qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences: Maxwell on "Interpretation of Statutes" (12th ed.) at page 28. Further, a construction which would leave without effect any part of the language of a statute will normally be rejected; Ibid at p. 36".

31. Egan J., at p.239 of his judgment, deals with the presumption in somewhat greater detail when he states:

"There is abundant authority for the presumption that words are not used in a statute without a meaning and are not tautologous or superfluous, and so effect must be given if possible to all the words used, for the legislature must be deemed not to waste its words or say anything in vain".

32. I take the view that in the particular circumstances of this case, once the applicant had been re-arrested pursuant to s. 10(2) in respect of the offence of false pretences, it was incumbent on the member to charge the applicant with false pretences and proceed from that point on with the normal logical consequences. The applicant was not in custody for the purpose of the relevant member obtaining instructions from the Director of Public Prosecutions having regard to the fact that he had already been in custody for 12 hours pursuant to s. 4 and then released. The applicant was in custody having been re-arrested effectively immediately in respect of a particular offence for the purpose of being charged with that offence forthwith and once the decision was taken not to charge him with that offence and to charge him only with the offence of conspiracy to defraud in my view his original arrest became unlawful

because its very purpose in accordance with the provisions of s. 10(2) was not going to be fulfilled and he was in unlawful custody and was being held in breach of his constitutional right to liberty pursuant to Article 40.4.1 of the Constitution.

33. In these circumstances I will hear the submissions of counsel as to the appropriate order that should be made.