THE COURT OF APPEAL

209CPA/14

Birmingham J.
Sheehan J.
Mahon J.

In the matter Section 2 of the Criminal Procedure Act 1993

The People at the Suit of the Director of Public Prosecutions

Respondent

v

Anthony Buck

Appellant

Judgment of the Court (ex tempore) delivered on the 11th day of December 2015 by Mr. Justice Birmingham

1. The Court is in a position to indicate that it has reached a decision and to state now what that decision is.

2. The appellant, Mr. Anthony Buck was convicted in the Central Criminal Court following a lengthy trial presided over by Quirke J. on the 20th February, 1998. He was convicted of the murder of David Nugent between the evening of the 8th and the morning of the 9th July, 1996 at Clonmel, Co. Tipperary. The mandatory life sentence was imposed and he was also convicted on the same occasion of robbery and sentenced to twelve years imprisonment.

3. He appealed that conviction to the Court of Criminal Appeal and that Court dismissed the appeal. It did however issue a certificate pursuant to s. 29 of the Courts of Justice Act, 1924 permitting the matter to be brought to the Supreme Court. The matter came before the Supreme Court and in what is now a reported case, the case of *DPP v. Buck* [2002] 2 I.R. 268, that Court dismissed the appeal in a judgment delivered by Keane C.J. and answered the questions posed to it in the negative.

4. To put the matters in issue today in context, it is necessary to explain that the prosecution case at trial relied to a significant extent on incriminating statements that were made by the accused over the course of three interviews which were conducted with him following his arrest at Cahir garda station on the 14th July, 1996.

5. Mr. Buck has now invoked the provisions at s. 2 of the Criminal Procedure Act, 1993 and has contended that there has been a miscarriage of justice and that his conviction should be quashed by this Court. More specifically he contends that the judgment of the Supreme Court in the case of *DPP v Gormley and White* [2014] IESC 17 constitutes a newly discovered fact within the meaning of s. 2 of the Criminal Procedure Act 1993. He also contends, and it is fair to say it is very much a subordinate point, that a new or newly discovered fact has arisen to the effect that Garda O'Connell, the member in charge of the station at the time of his arrest and detention, knew or must have known at the time that he first attempted to contact, on the appellant's behalf, his solicitor Mr. Peter Reilly, that Mr. Reilly was conflicted and would not have been in a position to act for or advise the applicant.

6. The Director of Public Prosecutions has responded to the invocation of s. 2 by bringing a notice of motion which seeks to dismiss the application, contending that the Supreme Court decision in *Gormley and White* cannot and does not constitute a new or newly discovered fact and therefore this is an application which is bound to fail and to that extent constitutes an abuse of process.

7. First of all, it must be said that the Court undoubtedly has a jurisdiction to dismiss summarily applications brought under section 2. So much is clear from the decision of the Court of Criminal Appeal in *McKevitt v DPP* [2014] IECCA 19 and the decision of this Court in *Joseph O'Reilly v DPP* [2015] IECA 111. What is clear from the *McKevitt* case and also from the case of *DPP v. Brian Meehan* [2014] IECCA 10 is that it is a jurisdiction to be exercised sparingly.

8. In any event, the question of when it is appropriate to dismiss summarily is of limited relevance in the context of what is now before the Court, because before the Court today was the DPP's motion, but also Mr. Buck's application. In fact, the procedure followed today was that Mr. Buck's application was opened in the ordinary way and responded to by the DPP.

9. By way of background, it should be explained that Mr. Buck was arrested at his home in Clonmel at 2.54 pm on Sunday the 14th July, 1996 and he was brought to Cahir garda station in the custody of An Garda Síochána and on arrival he was detained under s. 4 of the Criminal Justice Act 1994.

10. It is of some significance that the 14th July in question, was the day of the Munster hurling final. Following Mr. Buck's arrival at the garda station, he was processed in the ordinary way by a member of the gardaí, Garda Donal O'Connell who was acting as member in charge. Soon after his arrival he was brought to an interview room and the first of what was to be a number of interviews commenced. At approximately 3.40 pm, the appellant requested the gardaí to contact Mr. Peter Reilly, solicitor with a view to having him attend at Cahir garda station on his behalf.

11. It is in this context that the fact that this was Munster final day becomes relevant because the efforts of the gardaí to make contact with a solicitor on Mr. Buck's behalf were unsuccessful. The evidence at trial was that efforts had been made in Clonmel, in Cahir, in Cashel, in Tipperary and Carrick-on-Suir. On the evening of the 14th, the appellant was visited by his mother and the question of a solicitor was raised once more. Relatively soon after her departure, a solicitor called to the station, Mr. Ciaran Cleary, who was not the solicitor that the appellant had first requested and he spent approximately half an hour, maybe fractionally less, with Mr. Buck. It appears, and we have been told, that he was called as a witness at the trial by the defence, that he was released from his obligations of confidentiality and his evidence at trial was that he had informed Mr. Buck that he was not obliged to make a statement. Up until the point of his arrival, Mr. Buck had not made any admissions, but in his three interviews subsequent to the visit

of the solicitor he did make admissions.

12. The argument advanced, and the argument between the parties, turns in large measure on the question of whether the decision in *Gormley and White* can be regarded as a newly discovered fact. The jurisdiction to embark on an inquiry as to whether a conviction represented a miscarriage of justice was created by the Criminal Procedure Act 1993. Section 2 of that Act so far as is relevant provides as follows:-

> "(1) A person
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> (a) who has been convicted of an offence either -
> (i) on indictment...
> (b) who alleges that a new or newly discovered fact shows that there has been a miscarriage of justice in relation to the conviction or that the sentence imposed was excessive, (that is not relevant here)
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> may, if no further proceedings are pending in relation to the appeal, apply to the Court for an order quashing the conviction or reviewing the sentence.
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> (2) An application under subsection (1) shall be treated for all purposes as an appeal to the Court against the conviction or sentence.
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> (3) In subsection (1)(b) the reference to a new fact is to a fact known to the convicted person at the time of the trial or appeal proceedings the significance of which was appreciated by him, where he alleges that there is a reasonable explanation for his failure to adduce evidence of that fact.
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> (4) The reference in subsection (1)(b) to a newly-discovered fact is to a fact discovered by or coming to the notice of the convicted person after the relevant appeal proceedings have been finally determined or a fact the significance of which was not appreciated by the convicted person or his advisers during the trial or appeal proceedings."

13. In this case, the appellant is contending that the decision in *Gormley and White* constitutes a newly discovered fact and as we have seen he also has the subsidiary point in relation to what was known or must have been known by the member in charge.

14. So far as the main issue in the case is concerned, what is contended to be a newly discovered fact is a judgment given by the Supreme Court many years after this case was finally concluded. This is a judgment that was given many years after this case was finally concluded, a judgment delivered many years after the trial, many years after the rejection of the application for leave to appeal by the Court of Criminal Appeal and many years after the final outcome in the Supreme Court. It was the view of the Court that it would be to do violence to language to suggest that a much later decision of the Supreme Court could under any circumstances be regarded as newly discovered fact. The Court draws comfort and support in that regard from the decision of the Court of Criminal Appeal in *McKevitt* where judgment was delivered by MacMenamin J. In the Court's view, there is quite simply no newly discovered fact to be found in the judgment in *White and Gormley.* That would be sufficient to dispose of this appeal.

15. However, the court will add just some brief observations. Both in oral argument and on a number of occasions in the written submissions, the point has been made that the effect of *Gormley and White* is to "overrule" the earlier decision of the Supreme Court in Buck. This Court is not at all convinced that that is so and draws attention to the fact that the judgment of Clarke J., which is the lead judgment of the Supreme Court, refers to and quotes with apparent approval from the judgment of Keane C.J. in the earlier *Buck* case. At para. 5.3 of his judgment, Clarke J. comments:-

> "This Court returned to the issue of reasonable access to a lawyer in *People (Director of Public Prosecutions) v Buck* [2002] 2 I.R. 268, where it was necessary to consider the position of an accused who was arrested on a Sunday. Difficulties were encountered in procuring a legal advisor for the accused. He was questioned for a number of hours before a solicitor arrived. However, no statement was taken until after the accused had consulted with a solicitor. It was in this post-access statement that the accused made inculpatory admissions. He sought to challenge the admission of this statement in evidence on the ground that he was subjected to pre-consultation interrogation, amounting to a breach of his constitutional rights. In response to this submission, Keane C.J., on behalf of the Court, noted Walsh J.'s dissent in *People (Director of Public Prosecution) v Conroy* [1986] I.R. 460 to the effect that pre-access interrogation was a constitutionally forbidden procedure, yet stated:
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> > 'It would also seem to me that, where a person being detained under a statutory provision asks for a solicitor to be present and the gardaí make bona fide attempts to comply with that request, the admissibility of any incriminating statement made by the person concerned before the arrival of the solicitor should be decided by the trial judge as a matter of discretion in the light of the common law principles to which I have referred, based on considerations of fairness to the accused and public policy. Such an approach would seem preferable to a rigid exclusionary rule that would treat such statements as inadmissible without any regard to the circumstances prevailing in the particular case.'"

16. It is also worth drawing attention to the fact that the facts of this case and the facts of *Gormley* were very significantly different. The position in *Gormley* is that he was alleged to have committed the offence which was an attempted rape in the early hours of the 24th April, 2005, a Sunday. He was arrested at 1.47 pm on the same day and he arrived at the garda station at 2.00 pm. He was informed of his rights and he was given the names of solicitors at 2.15 pm. Efforts were then made by the gardaí to locate either one of the solicitors and when contact was made, one of the solicitors responded to a message that had been left for him, at 3.06 pm, and he confirmed to the gardaí that he would attend at the station shortly after 4.00 pm or as soon as possible after 4.00 pm. The situation therefore was that the gardaí had every reason to expect that at 4.00 pm or very shortly thereafter, the solicitor who had been requested to attend would be at the station to consult with the detainee. Notwithstanding that Mr. Gormley was first interviewed at 3.10 pm and made a number of inculpatory admissions. The requested solicitor eventually arrived at 4.48 pm and met with Mr. Gormley for a period of about 45 minutes. There was then further interviews and for the moment nothing turns on those.

17. In the view of the Court, the facts are strikingly different. There is a further point that the Court draws attention to and that is for the necessity for a causative link to be established between any breach of constitutional rights, any period spent in unconstitutional custody and the evidence sought to be excluded. That issue is dealt with by Dr. Heffernan and Ms. Ní Raffertaigh in their text Evidence in Criminal Trials at p. 389 and the section of the text is headed "*Causitive Link."* The authors say the exclusion of the unlawfully obtained evidence is conditioned by a causation requirement. The evidence must be obtained as a result (their emphasis) of the unlawful action. Thus, even where it is established that the gardaí have breached an accused's constitutional rights,

the remedy of exclusion will be applied only where the trial judge is satisfied that the evidence was obtained in consequence of that breach. The authors then refer to the case of *People v. Healy* [1990] 2 I.R. 73 and then at para. 8.37 they go on to say:-

> "The causative requirement was revisited in *People v. Buck* where the Supreme Court held that where a detained person asks to see a solicitor and the gardaí make *bona fide* attempts to facilitate access the admissibility of any statement made prior to the arrival of the solicitor is a matter within the trial judge's discretion. Even if the continuation of questioning after a request has been made and before a solicitor arrives could be regarded as a conscious and deliberate breach of the suspect's rights, the exclusionary rule will not be applied in the absence of a causative link between the breach and the making of the incriminating statements."

18. The authors then go on to set out in the following paragraph the facts of *Buck* as already recited in the course of this judgment.

19. The authors then at para. 8.39 go on to say that that reasoning was applied in the case of *DPP v O'Brien* [2005] 2 I.R. 204, a decision where the judgment was delivered by McCracken J. In the course of that judgment, McCracken J. observed that the ultimate access to the solicitor, when there had been no access up until then, put an end to the unconstitutional situation.

20. The matter has been revisited more recently by the Court of Criminal Appeal presided over by Murray C.J. in the case of *DPP v. Bryan Ryan* [2011] IECCA 6. In the Court's view, the fact that no admissions were made during the time that the gardaí were seeking to secure the attendance of a solicitor and that all the admissions were made after there had been a consultation with a solicitor represents from Mr. Buck's perspective an insuperable obstacle.

21. In relation to the point about the member in charge and his knowledge, this arises in a situation where the solicitor first nominated, Mr. Reilly had it seems been consulted by the family of the murdered man and in those circumstances would obviously have been in difficulties in acting.

22. It arises in circumstances where Mr. Buck was not the only person arrested in relation to this murder. Mr. Lee Ahearn was arrested and it appears that he too requested that contact be made with Mr. Peter Reilly and the custody records record that that was complied with at 8.08 am by Garda Kelly and the appellant seeks to suggest that this could constitute a newly discovered fact, because they say, well if the request was complied with that must have led to a situation where the gardaí would have been told, "no I'm sorry, I can't act".

23. There is a further point in that the evidence at trial had been that the gardaí learned of the situation in relation to Mr. O'Reilly during the course of their efforts to secure the attendance of a solicitor. The evidence at trial was that the member in charge, Garda O'Connell, was making these efforts and as part of those efforts, he made contact with Clonmel garda station to see if they might have a mobile number or other contact numbers for the solicitor. In response to that, the evidence at trial was that he was informed by the member in charge in Clonmel that there was an entry in their occurrence book that Mr. O'Reilly would not be acting for any prisoners in the Nugent case because he was acting for the family of the murder victim and would have a conflict of interest. The point being made is that the member in charge in Clonmel was performing that role on the following day while a still further suspect was arrested and it appears in response to a request from that suspect made contact with Mr. O'Reilly. The argument is "well why would that member in charge (Garda Cashin) be doing that if it was the situation as early as the previous day".

24. The Court's view is that all of these issues were canvassed very elaborately and very thoroughly at the trial; the question of the admissibility of the statements, the question of access to the solicitor were centre stage at trial, centre stage at the appeal to the Court of Criminal Appeal and centre stage in the appeal that was ultimately brought to the Supreme Court. These matters could not possibly constitute a new or newly discovered fact such as to lead to a conclusion that the conviction was unsafe and ought to be set aside.

25. The Court is satisfied that this is an application without substance and without merit and the Court dismisses the application.