[UNAPPROVED] **[NO REDACTION NEEDED]**

THE COURT OF APPEAL

CIVIL

[2020 No.118]

The President

Neutral Citation Number [2021] IECA 352

McCarthy J.

Kennedy J.

IN THE MATTER OF ARTICLE 40.4.2 OF THE CONSTITUTION

BETWEEN

JAMES FOGARTY

APPLICANT

AND

THE GOVERNOR OF PORTLAOISE PRISON

RESPONDENT

JUDGMENT of the President delivered on the 21st day of December 2021 by Birmingham P.

1. This is an appeal against a decision of the High Court (Gearty J.) of 27th March 2020 refusing to direct the release of the applicant pursuant to Article 40.4.2° of the Constitution. The matter has been listed on numerous occasions in this Court's management list, and it was first listed for hearing on 15th April 2021. The issues that have been central to the listings in this Court relate to the question of representation on the appeal.

The Representation Issue

2. When the matter did not proceed to a conclusion when previously listed, this was because, at that stage, it appeared that the applicant was open to the question of seeking legal advice and representation. The focus on this question of representation mirrors an issue that had arisen in the High Court. The circumstances in which it arose there are set out in the judgment of Gearty J. between paragraphs 2.2 and 3.5.

3. At that section of the judgment, Gearty J. made clear why it is generally regarded as desirable that an applicant be represented by professional lawyers. However, in a situation where the applicant provided medical evidence in support of his application that a son of his should be permitted to represent him – evidence which referred to the fact that Mr. James Fogarty had experienced an acquired brain injury arising from an accident in 1995, as well as a more recent "stroke-type" illness, which, it was said, affected his movement and speech "at that time" – the High Court was satisfied that the case before it was one where injustice might be done if the applicant was not represented by his son. It was viewed as an exceptional case in which the son of the applicant could be permitted to conduct the case on his father's behalf.

4. While the decision of the High Court to regard the case as an exceptional one was understandable, it must be said that the outcome was not a happy one. At paragraph 9.3 of her judgment, Gearty J. observed:

> "In submissions to this Court, there were repeated characterisations of the evidence against the Applicant in respect of the assault allegation as being very weak. It was asserted, specifically, that there was no evidence that the Applicant struck the complainant at all and that this allegation was fabricated by Garda Coonan. This is simply not true. The facts as set out in the Book of Evidence, and repeated at trial under oath, reveal clear, cogent and compelling evidence of a serious and unprovoked attack on the complainant by this Applicant. His averment that there was no evidence

that he hit his neighbour is so far removed from the truth as to call into question every averment made by the Applicant. The word “unprovoked” is used advisedly, as the essence of the original defence mounted was that the complainant was trespassing. This too is a gross exaggeration. The victim's evidence was that he was trying to get the Applicant to move his car and had opened a gate on the Applicant's land having already spoken to him minutes beforehand and having been a visitor on the land many times before.”

At paragraph 9.8, the High Court judge commented:

> “The result of the Applicant either representing himself or being represented by a close family member in this case has been a presentation seen almost entirely from the point of view of the Applicant and with little or no attempt to view the case from any other angle. Thus, no information was given to the Court by the Applicant as to the material facts set out above, which shed a very different light on what the Applicant has submitted. The evidence at trial illustrates the bias that has permeated the presentation of this case to the Court and affects the weight to be attached to any averments in the Applicant's affidavits.”

5. When this matter first appeared in this Court’s management list, it was made clear to the applicant that he should not assume that the procedure that was permitted in the High Court would be repeated in the Court of Appeal, and that he would be well advised to retain the assistance of a professional legal team if he did not wish to represent himself. At numerous other management listings, every effort was made to facilitate the applicant in obtaining legal advice, to the extent of identifying a number of solicitors and law firms of particular renown, practising in the area of criminal law and with experience of Article 40 applications.

6. Taking the view that the applicant should represent himself if he is unwilling to engage the services of professional lawyers, this Court was influenced by the fact that on the numerous occasions that he appeared in the management list, the applicant was fluent and articulate, and had an impressive command of the *minutiae* of this long-running saga. There was nothing to indicate that he had any difficulty in presenting his case or marshalling the facts; the difficulty was with the substance of the case that he sought to present.

7. This Court is also influenced by the fact that there is nothing to suggest, given how matters progressed in the High Court, that the applicant's position would be improved by having the case presented on his behalf by his son, nor is there anything at all to suggest that having his son present the case would advantage the Court. In that regard, it might be noted that the written submissions, signed "Martin Fogarty" (the son) on behalf of the applicant, are, in certain respects, intemperate. By way of example, at paragraph 4.1, it is stated:

> "Judge Patrick Meghan lied to and deliberately misled the jury about warrants being served including arrest warrants that the Gardaí do not even have while ignoring the applicant James Fogarty on the exact same matter."

8. The applicant has raised multiple issues in relation to different phases of the case, from the initial investigation and arrest, to issues about the appointment of legal representatives, to an application to dismiss the charges pursuant to s. 4(e) of the Criminal Procedure Act 1967 (as amended), to multiple issues relating to the trial, and finally to an issue in relation to the form of the committal warrant.

9. There was also what might be described as an "omnibus" argument, a contention that even if any one of the complaints might not result in the release of the applicant, the combination of the issues raised should have this effect.

10. At s. 14 of the High Court judgment, Gearty J. referred to the case of *State (Wilson) v. Governor of Portlaoise Prison* (Unreported, Supreme Court, Ó Dálaigh CJ, Walsh J, Budd J,

29th July 1969). The High Court judge recalled that this was a case where the applicant had been convicted of murder and had sought to review his trial. She observed that, much as this applicant had done, he alleged that his was a "fixed trial" involving a conspiracy between his counsel, prosecuting counsel, and the judge. The applicant pointed to an extradition argument, to alleged perjury on the part of one of the witnesses, to the inadmissibility of other evidence, and to the alleged violation of his human rights. Detailed further grounds were added with the permission of the Court, and were summarised as alleged failures of the judge and counsel in the running of the trial, including in directing the jury. Gearty J. quoted Walsh J. as saying in response to the new grounds:

> "*Habeas Corpus* is not a mode of reviewing alleged procedural deficiencies unless they go to the jurisdictional basis of the trial or invalidate some essential step in the proceedings leading ultimately to the conviction."

Gearty J. then observed that the same comment was appropriate in this case "in considering the various allegations made about deficiencies leading up to and during the [a]pplicant's trial." She added that just as relevant were the comments made at page 4 of the *Wilson* judgment, where the Court referred to grounds already rejected by the High Court in a previous application, but went on to say:

> "What remains are a pot pourri of grounds which, if substantiated, would be proper to be advanced in the Court of Criminal Appeal, but none of which go to the jurisdictional basis of the trial or invalidate any essential step in the trial leading ultimately to the applicant's conviction.

Gearty J. then, at paragraph 14.3, comments:

> "That is exactly what has been presented here: a *pot pourri* of grounds, only one of which truly addresses the concerns of the Article 40 application. That is the committal warrant ground, which has been rejected. The remaining grounds do not contain

prima facie evidence of any breaches of constitutional rights such as would deprive the Circuit Court of jurisdiction. The weight of the evidence at trial appears to have been strongly in favour of the prosecution."

11. I would invite the reader of this judgment to refer to the judgment of Gearty J. of 27th March 2020, with which I find myself in complete agreement. Despite the multiplicity of issues raised, in my view, the proceedings are without substance, and certainly without merit. The unfortunate fact is that the applicant had an alternative remedy available to him in terms of an appeal against conviction and/or sentence. He has stated that he did in fact appeal at an early stage, but no appeal has emerged. However, it has been indicated on behalf of the authorities that if there is an application to extend time to allow an appeal out of time against conviction or sentence, there would be no objection. The applicant has been asked repeatedly whether he wishes to avail of this option, but he has chosen to prevaricate.

12. I have limited information available to me about what transpired at trial and at the sentence hearing, but I would simply observe that the sentence of four and a half years, even with the prospect of one year of that sentence being suspended, seemed to fall at the higher end of sentences generally imposed in respect of assaults under s. 3 of the Non-Fatal Offences Against the Person Act 1997. On the basis of the very limited information available, it certainly could not be said that any appeal against severity of sentence would have little prospect of success.

13. When this matter was listed for a resumed hearing on 9th November 2021, the applicant sought repeatedly to raise his desire to be represented by his son. When it was made abundantly clear to him that this was not going to happen, and that it had been long made clear to him that his choices were to be professionally represented by solicitor and counsel with legal aid assigned, or to represent himself, he sought to interrogate the Court. When told that he should proceed to make his submissions seeking his release, he did not do so. It was

then made clear to him that if the Court was not going to hear submissions, either from the applicant in person, or from lawyers on his behalf in support of the appeal, then the Court would have to decide the case on the papers. In fairness to the applicant, it may be said that he did refer to the committal warrant issue, albeit generally by way of asking questions, whether of a rhetorical nature or otherwise.

The Article 40 Issues

14. The majority of the issues sought to be raised, in what might charitably be described as a scatter gun approach, could never have been expected to result in the release of the applicant pursuant to Article 40. The long and short of this case is as follows: the applicant was returned for trial, a jury was empanelled, and jurors took an oath to well and truly decide the case, and to give a true verdict according to the evidence. The jury convicted and the Circuit Court judge proceeded to sentence.

15. The High Court judge indicated that she felt that the only issue which was appropriate for an Article 40 was the issue in relation to the committal warrant. It is the case that there were certain errors on the warrant relating to the form of the forename and date of birth, and the applicant also sought to raise issues about the form of the warrant, in particular, the absence of a seal of court. I should expressly say that I agree with the High Court judge that the warrant is not a document that requires the fixing of a seal of court, rather, it is a document that should be authenticated by the signature of a person nominated for that purpose by the County Registrar.

16. In response to the application, Mr. Gerard Connolly, a Combined Office Manager of the Courts Service, swore an affidavit, averring that he is the Combined Court Manager in relation to the Combined Court Office in Clonmel, which conducts the court business concerning Nenagh Circuit Court, one of the "constituent courts of that office". He explains

that in Clonmel Circuit Court, committal warrants (or "Rules of Court") are not signed by the judge who made the order in question. In fact, they are signed by the Combined Office Manager, or else by a "nominated signatory" on behalf of the Combined Office Manager or County Registrar. In this case, he avers and exhibits the relevant documentation establishing that the relevant Rule of Court was signed by a Mr. Roger Quirke, a "nominated signatory" – a nomination that had not been revoked.

17. I should add that even if I was persuaded, which I have not been, that there was any defect of form in the manner of the execution of the warrant, then this would not in any event be of such significance as to require the applicant's immediate release. It is beyond doubt that the applicant stood trial, was convicted and sentenced, and if there was any defect in the form of the documentation, the appropriate course of action would be to have that defect rectified.

18. While the High Court was of the view that only the issue in relation to the committal warrant was an appropriate one for consideration in the context of an Article 40 inquiry, there are one or two matters to which I want to make brief reference.

19. The issue of legal representation for the trial has been raised. The right of an accused person charged with a serious offence, carrying with it a risk of imprisonment for a significant term, to be legally represented is of fundamental importance. If there were any question of the applicant being denied legal representation, that would be a matter of the gravest concern. However, it is clear that, despite being offered every possible opportunity to obtain legal advice, and therefore to be represented at trial by legal professionals, the applicant chose not to do so. In fact, the applicant has displayed a consistent preference for representing himself, or for being represented by a family member, across the jurisdictions.

20. So far as the s. 4(e) of the Criminal Procedure Act 1967 (as amended) application is concerned, I have not had sight of the transcript of that application, but it appears from the judgment of the High Court that what occurred was something of a hybrid application,

involving, in large measure, an application for disclosure, but couched in terms of a section 4(e). One way or another, issues relating to disclosure, and issues relating to a refusal to dismiss the case following an application under s. 4(e), are the staple diet of the Court of Appeal's criminal division when hearing appeals against conviction. These are not matters that are appropriate for an Article 40 inquiry.

21. Similar to the High Court judge, I also see similarities with the case of *Kelleher v. Governor of Portlaoise Prison* (Unreported, Supreme Court, Hamilton C.J., O'Flaherty J., Murphy J., 30th October 1997), an *ex tempore* decision delivered by Hamilton C.J. in 1997. This was in relation to the celebrated Ballyconneely beach drugs case. The applicant had tried to raise issues relating to his detention in custody during the investigation of the offence for which he was eventually tried, convicted, and imprisoned. Hamilton C.J. observed that none of the issues relating to arrest and charge were properly the subject of an Article 40 inquiry. He commented:

> "These are questions that occur regularly in the course of proceedings in the Criminal Courts and before the Court of Criminal Appeal and in my opinion there is nothing exceptional about the circumstances of this case which would justify this Court…in ordering the High Court to hold a full enquiry into the lawfulness of the detention."

As the High Court pointed out, O'Flaherty J., in a two-line judgment, added that the whole proceeding was "totally misconceived and should never have been brought."

22. In my view, the remarks of O'Flaherty J. are much in point and I would repeat them without equivocation in the context of this case.

23. I am firmly of the view that the appeal against the decision of the High Court must be dismissed. I have referred to the fact that there has always been an alternative remedy available to the applicant in terms of an appeal against conviction and/or sentence to the

Court of Appeal. It is unfortunate that the applicant's misguided focus on an Article 40 application means that the appeal against conviction and/or sentence has not been brought in a timely fashion. Had the applicant done so, an appeal against conviction and/or sentence could have been heard by now.

24. While at one level, the view might be taken that the applicant has nobody to blame but himself (and perhaps those in whom he reposes confidence), I would not regard it as appropriate for the applicant to be shut off from an appeal as a result of his own foolishness.

25. Accordingly, if the applicant seeks to enlarge the time within which to bring an appeal (and if successful) the resultant appeal against conviction and/or sentence will be given priority within the Court of Appeal's management list with a view to assigning the earliest possible date for hearing.

26. It is almost unnecessary to add that if the applicant does decide to pursue an appeal against conviction and/or sentence, he would be very wise to seek legal representation.

McCarthy J:

I agree with the judgment of Birmingham P.

Kennedy J:

I have read the judgment of Birmingham P. and I agree with the contents thereof.