THE HIGH COURT

[2015 9975 P]

[2024] IEHC 334

BETWEEN:

CONOLLY

PLAINTIFF

AND

THE COMMISSIONER OF AN GARDA SÍOCHÁNA & ORS

DEFENDANTS

Ex Tempore Judgment of Ms. Justice M. Gearty delivered on the 5th of June 2024

1. The Plaintiff seeks damages on the basis that he was prosecuted under a provision that was later found to be unconstitutional. The claim arises from an incident on 11th December 2008 when the Plaintiff was arrested at the Garda Boat Club premises at Islandbridge, where he had been in a car with a woman. His interaction with gardaí led to various charges. He was charged with using threatening, abusive, or insulting behaviour in a public place contrary to s.6 of the Criminal Justice (Public Order) Act, 1994 ("the Public Order Act"). He was later charged with two further offences arising out of the same incident, (i) Obstructing a peace officer contrary to s.19(3) and (4) of the Public Order Act; and (ii) Offending modesty contrary to s.18 of the Criminal Law (Amendment) Act, 1935 ("the 1935 Act"), as amended by the Criminal Law (Rape) (Amendment) Act, 1990.
2. The Plaintiff was convicted of all three offences ("the Boat Club offences"), on 14th July 2010 in the District Court, and the convictions were affirmed on appeal to the Circuit Court on 15th November 2011. The Plaintiff also launched two separate sets of judicial review proceedings. One is irrelevant to this case save that it might

explain what happened next. His proceedings challenging his conviction of the Boat Club offences were unsuccessful in the High Court and no appeal was allowed by the Supreme Court. His judicial review proceedings in respect of separate offences, also under the Public Order Act and also in Islandbridge, but unrelated to the Boat Club offences, were successful, and he obtained prohibition of these charges on 11th November 2013.

3. The Plaintiff then re-entered the Boat Club offences before the Circuit Court although his appeal in that case had been unsuccessful and the case concluded. I cannot conceive of any legal basis for the re-listing of these cases for re-hearing. Despite this, it is an agreed fact that his appeals proceeded, again, in respect of the Boat Club convictions and were allowed on consent. In other words, on 19th February 2014, the Boat Club case was listed (again) and the convictions were overturned this time, by consent and without the need to hear evidence.
4. The Plaintiff had always maintained his innocence in respect of these offences and had challenged the garda evidence in respect of the facts in the District Court and the Circuit Court on appeal. At no point did he challenge the legislation under which he had been convicted, either the 1935 Act or the 1994 Public Order Act.
5. The relevant section of the 1935 Act, s.18, was challenged in two unrelated sets of proceedings by third parties. The first was *Douglas v. DPP* [2013] IEHC 343 in which parts of s.18 were found to be unconstitutional, but that case left the operative part of s.18 in place insofar as it applied to this Plaintiff. The more relevant challenge, in considering this case, was in *McInerney v. DPP* [2014] IEHC 181. There, the sub-section under which the Applicant was convicted was challenged and struck down, by Hogan J. as being unconstitutional.
6. Hogan J., in his judgment in *McInerney*, dated 9th April 2014, held as follows:

> *"…[T]he offence of "offending" modesty is hopelessly vague and subjective in character and it intrinsically invites arbitrary and inconsistent application. No clear standard of the conduct which is prohibited by law is articulated thereby and the surviving part of s. 18 does not contain any clear principles and policies. In this respect these relevant*

provisions of s. 18 are manifestly unconstitutional and are inconsistent with Article 15.2.1, Article 15.5.1, Article 38.1, Article 40.1 and Article 40.4.1 of the Constitution.

7. The Plaintiff seeks damages on the basis that he was convicted in 2008 and 2011 of an offence which was unconstitutional. He argues that as s.18 has been found to be inconsistent with the Constitution and was therefore void *ab initio*, the offence was unconstitutional even in 2008, when he was first charged. As will be noted immediately, this argument does not apply to either of the two public order offences, as the legislation in that regard remains the law. Obstruction of a peace officer, under s.19(3) and s.6 breach of the peace remain criminal offences. The penalty imposed on the Plaintiff was in relation to the offence under s.6 only, with the other matters taken into account.

8. In *A v. Governor of Arbour Hill Prison* [2006] 4 IR 88 Murray CJ. (with whom McGuiness, Hardiman and Geoghegan JJ. agreed) held as follows:

> "*Judicial decisions which set a precedent in law do have retrospective effect. First of all the case which decides the point applies it retrospectively in the case being decided because obviously the wrong being remedied occurred before the case was brought. A decision in principle applies retrospectively to all persons who, prior to the decision, suffered the same or similar wrong, whether as a result of the application of an invalid statute or otherwise, provided of course they are entitled to bring proceedings seeking the remedy in accordance with the ordinary rules of law such as a statute of limitations. It will also apply to cases pending before the courts. That is to say that a judicial decision may be relied upon in matters or cases not yet finally determined. But the retrospective effect of a judicial decision is excluded from cases already finally determined. This is the common law position.*"

9. Murray CJ. then held:

> "*… I am of the view that concluded proceedings whether they be criminal or civil based on an enactment subsequently found to be unconstitutional cannot normally be reopened. As I have already indicated, I am prepared to accept that there may possibly be exceptions. But in general it cannot be done. Nor as the Chief Justice and Hardiman*

J. have pointed out is there any precedent for a collateral challenge of this kind. I am also firmly of the opinion that if the law were otherwise there would be a grave danger that judges considering the constitutionality or otherwise of enactments would be consciously or unconsciously affected by the consequences, something which in the view of Walsh J. and endorsed by O'Higgins C.J. should not happen.

10. The Plaintiff acknowledges that the general position is as set out here by the Supreme Court: *"concluded proceedings whether they be criminal or civil based on an enactment subsequently found to be unconstitutional cannot normally be reopened"*. Nevertheless, he seeks to persuade me that his case is an exception. In *A v. Governor of Arbor Hill Prison* Mr. A was convicted of having unlawful carnal knowledge of a girl under the age of consent, contrary to s.1(1) of the 1935 Act. He pleaded guilty. On 23rd May 2006 the Supreme Court in *C.C. v. Ireland & Ors* [2006] 2 ILRM 161 declared that s.1(1) of the 1935 Act was inconsistent with the Constitution. A few days later, Mr. A sought an Order pursuant to Article 40.4.1 directing his release from prison on the basis that his detention was unlawful, as s.1(1) had been declared inconsistent with the Constitution.
11. The sequence of events is similar to that in this case: the Plaintiff here was charged and convicted, and his case finally disposed of in February of 2014, two months before the orders of the High Court striking down s.18 of the 1935 Act.
12. The distinctions relied upon by this Plaintiff are that Mr. A pleaded guilty and acknowledged having committed an offence. Mr. A was also described as a singularly inappropriate candidate for relief and the Plaintiff argues that his case is entirely different: this Plaintiff did not plead guilty, never acknowledged his guilt and his convictions were overturned. Further, he claims that there was no victim of his alleged behaviour, unlike the victims in the *A* and *C.C.* cases.
13. In *A*, Hardiman J. quotes from Henchy J. in *Murphy v. Attorney General* [1982] IR 241 where he refers to a finding of unconstitutionality as a judicial death certificate. Henchy J. also commented that such a finding meant that the offence did not exist when it was purported to charge that applicant with it. As Hardiman J. pointed

out, however, at paragraph 49 in *A*, Henchy J. went on to find that "what was done on foot of the condemned statutory provision may not *necessarily* be relied on as a ground for a claim for nullification or for other redress." The Plaintiff emphasises the word *"necessarily"* - saying that this must mean what was done may be relied upon for redress in some circumstances.

14. The Plaintiff also relies on the comment, by Henchy J. again, and again as quoted by Hardiman J. in *A*, that the Court in *Murphy* expressly avoided general consideration of the broad question as to when and to what extent acts done on foot of an unconstitutional law may be immune from suit in the Courts. This means, as the Plaintiff correctly points out, that I must consider each case on its merits, step by step, and there is no general answer to the question: are these acts, namely the prosecution of the plaintiff in this case, immune from later civil suit?
15. The Plaintiff's claim in these proceedings is this: he was wrongfully convicted, as described above, in circumstances where subsequent legal developments resulted in s.18 of the 1935 Act being found to be unconstitutional by the High Court. That being the case, he says he is entitled to damages and he points to loss of his employment which arose, he submits, as a result of his wrongful convictions.

Piggybacking

16. The case of *A* is authority for the proposition that the argument this Plaintiff seeks to raise can only be raised by those who have challenged the impugned provision before the proceedings in question have finally concluded. However, this is to limit its scope, as this Plaintiff argued. Both Murray CJ. and Hardiman J. emphasised the importance of assessing the facts of the case and identifying whether rights had been breached. While Hardiman J. noted that no case cited before them had been successful in what he called "piggybacking" on an earlier finding of unconstitutionality, neither Judge ruled out the possibility.
17. The general reasoning followed similar arguments in *de Burca v. Attorney General* [1976] IR 37 where provisions in the statute governing the selection of juries were

struck down and in *McMahon v. Attorney General* [1972] IR 69 where provisions of the Electoral Acts were also struck down. As set out in both judgments and endorsed in the *A* case, the thousands of jury verdicts and the elections which took place before the impugned statutes were considered by the courts were not, thereby, rendered void and of no effect. The ramifications of such a result were considered to be too damaging to public order. The value of certainty in the law required that cases which had been finalised should not be affected by later decisions, even if the relevant provisions, under which a verdict was recorded, an election was held or an act was criminalised, are struck down.

18. While the Defendants correctly identify that one issue for this Court is to consider the public order and the common good there is another significant factor, which is to assess the position of the affected party and the justice of the case. The Supreme Court in *A.* concluded that the consequences of striking down legislation could only crystallise in respect of the litigation which gave rise to the declaration of invalidity, but generally speaking, it does not affect other, finally concluded cases. It would, according to the Supreme Court, be contrary to good order if convictions and sentences, deemed lawful at the time they were decided and imposed, had to be reopened. The Court did, however, note that there might be exceptional reasons in a particular case, such that the verdict should not be allowed to stand, though Hardiman J. stated that Mr. A *"could not possibly qualify as an exception"* (para. 191).
19. I note, in particular, paragraphs 57 to 62 of the judgment of Hardiman J. in which he confirms that the conduct of the person who applies may be a factor in considering the effect of a provision that is now void. He refers at paragraph 66 to the factors which might militate against granting relief to an applicant in respect of acts done under an unconstitutional statute. His list includes estoppel, preclusion, delay, acquiescence, "*impracticability and the impermissibility of a volte face by the litigant, all of which … might also be described as abuse of process*."
20. The most appropriate features of this case are impracticability and acquiescence, insofar as the Plaintiff acquiesced in the legality of the 1935 Act, never seeking to

challenge it. The more significant feature here is that there were two other offences which were not affected by the decision in *McInerney*. This makes it impracticable and (to add to the list of Hardiman J., above) ineffective to allow this Plaintiff to succeed. He cannot succeed in respect of the other offences and cannot separate them one from the other so as to mount a claim based on the s.18 conviction alone.

21. While the Plaintiff's alleged behaviour was not comparable that in question in A's case, this Plaintiff was convicted of two public order offences. The Plaintiff says that the unconstitutionality of the s.18 offence was sufficient to contaminate the whole proceedings. There was no evidence before me, nor was it ever submitted (though it was initially pleaded), that there was a malicious prosecution. It is now an accepted fact that as far as the gardaí were concerned, s.18 of the 1935 Act represented the law at the time and they were acting in good faith in that regard in instigating the prosecution in the first place. This being the case, an unconstitutionality, which was later identified in a separate case, could not contaminate or affect the findings of guilt of public order offences in the first two trials involving this Plaintiff in respect of the Boat Club offences.
22. The Plaintiff argued that there was no victim in his case. While there was no victim to compare to the vulnerable women in the *A* case and the *C.C.* case, one of the remaining offences (before it was mysteriously overturned in 2014) was that of obstructing a police officer and the other was breach of the peace, essentially. These are not entirely victimless crimes but, as set out above, there is no direct comparison between these allegations and the facts in the *A* case. However, the reasoning in the *A* case was not dictated by the heinousness of the offence but by the consequences of reopening a case which had been finalised on the rights of the accused, balanced against the public interest in finality in litigation.
23. The Plaintiff is not serving a sentence imposed as a direct result of the impugned legislation. Even in those circumstances, it is not clear if he could later claim the benefit of the ruling in *McInerney's* case but I am satisfied that, as a man who has exhausted the appeal process (beyond what would usually be permitted and to his

benefit, as it happens) and who was convicted of two other offences, the Plaintiff has not shown that his case is an exceptional one in which I should permit him to rely on a ruling which arose after his case concluded such as to now challenge one of the three provisions under which he was found guilty. It is also relevant to note that he was later successful in his appeals and that he has no criminal record in respect of these three convictions.

24. *DPP v. Cunningham* [2013] 2 IR 631 is also an apposite comparator. That case followed the case of *Damache v. DPP* [2012] 2 IR 266. There, a provision which permitted the issuing of a search warrant by a superintendent who was based in the same garda station as the investigating team, was struck down. In *Cunningham*, Mr. Cunningham was convicted of money laundering and crucial evidence was found in his house. The superintendent in his case issued the warrant and it was, therefore, a *Damache* warrant. In other words, it was a search warrant issued under a provision later found to be unconstitutional. Mr. Cunningham had appealed his convictions and one of the grounds was that use of this provision to obtain a warrant was invalid, he called it a device to avoid going to a judge, essentially. That appeal was pending when *Damache* was decided in the Supreme Court where the warrant process was found to be unconstitutional. Mr. Cunningham sought to rely on *Damache* and to argue before the Court of Appeal that the warrant in his own case was unconstitutional.
25. The Court in *Cunningham* found that his appeal remained extant and there was no basis on which one could say that the case was finalised. Mr. Cunningham was entitled to rely on *Damache*. The Court also decided that he had not debarred himself from relying on the point raised by *Damache* and he had not, directly or indirectly, acknowledged that the law applied to him. Because the warrant was critical in his case, as the bulk of the evidence was collected on that warrant which was now invalid, Mr. Cunningham's conviction could not stand.
26. This Plaintiff argued that his case had not concluded. This is incorrect. There was an appeal in 2011 which, in normal circumstances would have been the end of the

matter. While it was re-entered, that appeal, however irregular, was concluded by 19th February 2014, at the very latest. There was no further appeal and no sentence was imposed, by definition, as the last appeal was successful.

27. This Plaintiff, unlike Mr. Cunningham, had not challenged s.18 at any stage of the proceedings against him. This Plaintiff indirectly acknowledged that the 1935 Act was validly in force in 2008 in that he fought the case on the basis of the facts only, and not on the basis of any alleged infirmity in the legislation.
28. I am further persuaded that this is a fair outcome in circumstances where, as already noted, s.18 was not the only charge faced by this Plaintiff. While the charges against him were not as serious as those against Mr. A, or indeed Mr. Cunningham, that is not the test by which a court can measure whether or not the effects of a void statute should remain. If there is oppression or injustice in the case, a court should consider allowing an applicant to rely on the unconstitutionality of the provision but there is no evidence of such oppression or injustice here.
29. The effects of allowing this challenge would be to allow, in theory, any number of challenges to criminal convictions on the basis of provisions which have been struck down subsequently. Noting again the judgments in the *A* case, by which I am bound and with which I agree, the floodgates argument is an unattractive one, or as Hardiman J expressed it, it is distasteful. While the Plaintiff claims that to award damages to him would have very little effect, it may be that many convictions would be affected. The effect, whether many or few would be affected, is not the point: the scope of the retrospective effect of s.18 is in issue and must be determined not by the numbers who might be affected but by the effect the provision has had on the Plaintiff. Here, given the other public order convictions and thanks to the Plaintiff's prosecution of a subsequent appeal, the effect has been minimal.
30. The Plaintiff suggested that *Damache* and *Cunningham* were not relevant to his case but the principles, insofar as they concern retrospectivity of a finding of unconstitutionality, apply and are directly relevant.

31. At no point had this Plaintiff sought to challenge s.18 of the 1935 Act. Further, unlike Mr. Cunningham (or indeed, Mr. A), he had also been convicted of two separate offences which were not connected to the 1935 Act. While the Plaintiff submitted that the s.18 conviction contaminated the other two offences, there is no basis for this submission. While the witnesses were the same, the basis of his challenge is the *McInerney* case, not any infirmity of evidence or mistake as to fact. This whole case is predicated on one argument: that Hogan J. struck this section down as being vague and inconsistent with the Constitution, which leads to an argument that the Plaintiff was wrongly convicted. This can only apply to the conviction under s.18 and not to the other two convictions.
32. Moreover, this case began after the decision in *McInerney* had been handed down and after the Boat Club case had finished. Final orders were made, allowing the appeal in full. This is wholly different from Mr. Cunningham's case: he had an extant appeal in which the relevant provision had already been challenged. In those circumstances, he obtained the benefit of the *Damache* case. Here, there were no proceedings in being when Mr. McInerney was successful in his claim.
33. While s.18 of the 1935 Act was void *ab initio,* it is clear from the Supreme Court judgments in *A*, that the position, i.e. the unconstitutionality of the section, crystallised only at the time when Hogan J. pronounced that the section was void. That judgment applied to the applicants in that case, Mr. McInerney and Mr. Curtis, and to those already involved in proceedings challenging the section. Otherwise, it is prospective. Looking at the facts of *Cunningham*, it was clear that the applicant there had not only extant proceedings but had in fact challenged the same provision as to warrants as was successfully challenged in *Damache*.
34. The Plaintiff argues that he was fined €500 and didn't pay that fine, thus leaving him open to a 3-day period of imprisonment in default of payment. As a matter of fact, it was accepted that he did not pay and that he did not serve the period in default. This, he submits, means that the case was never brought to finality.

35. I do not have to consider whether it is arguable that an outstanding penalty might allow an Plaintiff to reinstate proceedings because, here, the Plaintiff himself re-entered the Boat Club case in the Circuit Court in February 2014 and successfully appealed all three charges. There is no sense in which the case is still hanging over him. It is over. Neither he, nor the prosecutor, appealed that order so the case finished on 19th February 2014, even if it had not been finalised in 2011.

The European Convention on Human Rights

36. The Plaintiff also seeks to rely on Article 7 of the European Convention on Human Rights which confirms that no one shall be held guilty of a criminal offence which did not constitute a criminal offence at the time it was committed.
37. Article 7, as the Defendants point out, refers to a situation in which a penalty is imposed in relation to conduct which was not an offence at the time. In other words, what the Convention prohibits is a law which penalises conduct, which conduct is defined retrospectively. In such a case, a citizen might not know what conduct would, in the future, constitute an offence. This offends against the principle of certainty in criminal law. In this case, the conduct was a criminal offence at the time of commission and was understood to be a criminal offence, but the law changed and, while the ruling made s.18 invalid *ab initio*, this is not the sense in which Article 7 is generally understood. In other words, the invalidity crystallised *after* the alleged conduct the subject matter of an impugned law.
38. If the Convention is to be relied upon to argue that decisions according to the domestic law are disproportionate or unfair, the Court requires more detailed argument and relevant case law on which to make such a finding. The Plaintiff bears the burden of proof in this case and has not raised any case or specific argument which persuades me that his case raises an argument that Article 7 applies or that it has been breached by the Defendants.

The Right to Damages

39. The quotations, above, from *A v. the Governor of Arbour Hill* make it clear that a finding by Hogan J. that a provision was unconstitutional does not mean that the agents of the state were acting unlawfully in applying the law as they understood it to be, in 2008 and throughout the prosecution of the Boat Club case. As it happens, the Plaintiff had the benefit of an extra appeal in 2014 in which he was entirely successful: there are no longer any relevant convictions on his record.
40. If a Plaintiff is to achieve damages in respect of a criminal conviction, there is an existing remedy: the tort of malicious prosecution. He may also seek a declaration that there has been a miscarriage of justice. I note that this Plaintiff made an application for such a declaration in 2015 and was refused. In the tort of malicious prosecution, an applicant must prove, amongst other things, that the State instigated a case maliciously with no reasonable or probable cause to do so. There is no evidence that this occurred here and that argument was not pursued.
41. As the Plaintiff has not persuaded me, on the basis of *McInerney*, *A v. the Governor of Arbour Hill* and *Cunningham*, that he is entitled to re-open this case and as this was the sole remaining basis of the claim, the issue of damages does not arise.

Conclusion

42. I must refuse this application for damages. The issue of damages does not arise as the Plaintiff is not entitled to rely on the unconstitutionality of s.18 of the 1935 for the reasons outlined. This was the sole basis for his application.

Costs

43. The usual rule is that costs follow the event, suggesting that the Plaintiff should bear the Defendants' costs in the proceedings. I have heard the parties in this regard today. The Plaintiff draws my attention to the provisions of s.169 of the Legal Services Regulation Act, 2015 and he points to the way in which this case was run. The Plaintiff argues that it was reasonable for him to raise one of the issues in the proceedings. He draws my attention to the High Court decision in the

A case (*A v. Governor of Arbour Hill Prison* [2006] IEHC 169), which was overturned, as an example of lack of clarity in the law in that the Supreme Court had to decide the issue, which was not then clearcut.

44. There were important legal issues to be teased out in this case and, significantly, the Plaintiff agreed to confine the case to one discrete issue. Nonetheless, the case as initially pleaded was much wider and included claims of malicious prosecution. The case was only netted to one significant point in recent months.
45. The cases of *A v. the Governor of Arbour Hill* and *Cunningham* did not completely answer the issue, as each such case turns on its own facts, but they did establish a general rule, in particular in respect of cases which had concluded.
46. This Plaintiff's case had clearly concluded and he could not bring himself within the exceptions mentioned in the *A* case. On balance, and because the Defendants have succeeded in respect of every argument and also because of the very widely drafted case they had to meet, initially, I must award the costs of the action to the Defendants. There is insufficient reason to depart from the general rule.
47. Costs to be adjudicated in default of agreement.