

Finlay C.J.
Walsh J.
Griffin J.
Hederman J.
McCarthy J.

000240

THE SUPREME COURT

304/89

JAMES PIUS CLARKE

Plaintiff/
Appellant

and

JOHN PAUL McMAHON

Defendant/
Respondent

AND IN THE MATTER OF ARTICLE 40 OF THE CONSTITUTION

JAMES PIUS CLARKE

Applicant/
Appellant

and

THE GOVERNOR OF PORTLAOISE PRISON

Respondent

JUDGMENT delivered on the 13th day of March 1990 by
FINLAY C.J.

This is an appeal brought by the Appellant, who is a citizen of Ireland, against the Order made in the High Court on the 28th July 1989 by Costello J. refusing both

a claim for release pursuant to Section 50 of the Extradition Act 1965 and also a claim for release pursuant to Article 40 of the Constitution.

The Appellant appealed on a number of grounds against the entire of that Order made in the two separate proceedings which had been heard together.

Upon the hearing before this Court of the appeal, however, Counsel for the Appellant expressly abandoned his appeal against the dismissal of his claim under Section 50 of the Act of 1965. This had been a claim that the offence for which the Appellant had been convicted and in respect of the balance of the sentence arising from which his return to Northern Ireland was requested was a political offence and that the other offences which surrounded his escape from the Maze Prison were offences connected with that political offence. No reason was given for abandoning that appeal, though it may have been associated with the facts surrounding the offence which seemed to indicate that an attack was made on a house in which a member of the UDR resided, and that it involved indiscriminate shooting into the house and into a car which arrived at the house as a result of which serious injuries to a number of men,

women and children, who were members of the family, were caused.

With regard to the appeal against the decision of Costello J. on the application pursuant to Article 40 of the Constitution, two grounds of appeal were argued.

They are:

1. That evidence now produced leads to the conclusion that the conviction of the Appellant resulted from a statement signed by him which was untrue and which was obtained by assault and intimidation whilst he was in the custody of the RUC. It was then urged that accordingly to deliver him into Northern Ireland to serve the balance of the sentence imposed on him would be a failure to defend or protect his constitutional rights.
2. That the evidence of the conduct of the prison staff towards prisoners in the Maze Prison, in the aftermath of the mass escape from the Maze Prison on the 23rd September 1983, in which the Appellant took part, together with the evidence of their later conduct and testimony in claims brought by prisoners for damages for assault, allied to the absence of any attempt by their superior authorities to discharge or discipline any member of the prison staff, led to a conclusion that to deliver the

Appellant to serve the balance of his sentence in the Maze Prison would be a failure to protect his constitutional rights.

Challenge to conviction of Appellant

The Appellant was arrested on the 26th March 1978, in Northern Ireland, and was charged with attempted murder and a number of other offences arising out of an armed raid carried out by a number of men on the home of a family called Harper in Castlederg, in Co. Tyrone, on the 2nd February 1977.

Whilst in the custody of the RUC on the 27th March 1978, he made a statement, which he signed, admitting his participation in the raid, and identifying the type of weapon which he used and the part in the raid which he took, which consisted of firing at a car that arrived into the farmyard during the raid. Some of the details contained in this statement were at his subsequent trial corroborated in part by forensic evidence, though such evidence did not afford proof of the Appellant's participation in the raid.

He was tried before His Honour Judge Russell at the Crown Court in Belfast, sitting without a jury, and he was represented at the trial by a Solicitor and by Junior

and Queen's Counsel. From the judgment of Russell J. which was exhibited in the High Court, it is clear that no challenge was made to the admissibility of this Appellant's statement, or to the method by which it had been obtained. The Appellant did not give any evidence nor tender any evidence on his behalf. He was convicted of a number of offences and sentenced on the 1st June 1979 to a number of different concurrent terms of imprisonment, the longest of which was eighteen years.

The Appellant has now deposed on affidavit that this statement was untrue and that it was obtained from him by a mixture of physical assault and intimidation, and he has tendered two affidavits, from his mother and from a friend, both of whom visited him whilst he was in the custody of the RUC, seeking to support his complaints of ill-treatment.

Although the Appellant now denies guilt for the offences of which he was convicted, the only explanation given by him for his failure to give evidence either with regard to the admissibility of the statement or to the main issue of guilt or innocence, is that he did not think he would be believed.

It was established by the Respondent in the High Court that in Northern Ireland law the most ample rights of appeal exist from the findings of a Crown Court in which an accused is tried on a criminal charge by a judge sitting without a jury.

They include a right of appeal without any leave to the Court of Appeal on any question of law and a right of appeal, with the leave of the court, on questions of fact or on mixed questions of fact and law. The Court of Appeal has in any appeal before it wide-ranging powers in the interests of justice, at its discretion, to admit fresh evidence.

The Appellant before this Court did not seek to appeal his conviction.

Costello J. rejected this portion of the Appellant's claim upon a number of grounds, viz.

- (1) That the Court cannot properly undertake an investigation into the validity of a conviction where extradition to serve an imposed sentence arising from such a conviction is sought.
- (2) That the fact that the courts of the requesting State were never asked to adjudicate on the Appellant's present claim that his statement was inadmissible, means that for the courts of this State to do so would be

contrary to the extradition arrangements which are contained and reflected in the Act of 1965.

(3) That what the Court in this instant case is asked to do is to investigate a complaint that criminal assaults took place eleven years ago in another jurisdiction, and that the attempt to do so would be an unconstitutional exercise of the Court's judicial powers.

I agree with the decision of Costello J. and with the reasons for which he reached it.

In the course of his judgment he acknowledges that the Court has, in addition to its powers under Section 50 of the Act of 1965, inherent powers for the protection of constitutional rights.

The statement that the Court cannot in an extradition case properly undertake an investigation into the validity of a conviction recorded in a requesting State must be understood as being subject to this inherent power. The facts of this case, in my view, go nowhere near establishing a situation in which this inherent power might be invoked and it is, therefore, not necessary for me to speculate on what might constitute, in any other case, such a situation.

I would, accordingly, be satisfied that the appeal of the Appellant on this ground must fail.

Mass escape from the Maze Prison

In my judgment, recently delivered, in Finnucane v. The Governor of Portlaoise Prison, I have set out in very brief form some of the legal principles which apply to a claim that delivery on foot of an order made pursuant to the Extradition Act 1965 would constitute an invasion of or failure to protect constitutional rights, by reason of the fear of assault or ill-treatment.

I see no reason to repeat them here, and I apply them to the consideration of this ground of appeal.

I have also set out in that judgment a summary of the facts surrounding the mass escape from the Maze Prison on the 23rd September 1983; the assaults and ill-treatment of prisoners which took place in its aftermath and the conspiracy on the part of the prison staff to cover up and deny these assaults.

These facts have again been proved in this case.

The issue of the conduct of the prison staff in the Maze Prison towards prisoners immediately after the mass escape in September 1983 first arose before this Court in the case of Russell v. Fanning, the appeal in which was heard in March 1987.

At that time it was established that actions for damages had been instituted by a number of prisoners for assault by prison officers. They were pending and none had yet come to trial. No evidence was tendered to the Court of knowledge from independent sources on the part of the supervisors of the prison staff, of the probable truth of those allegations.

The case was made by the Respondents that even if assaults had occurred in September 1983, which they still denied, a repetition of them at a time when these actions by the prisoners were pending was highly unlikely. It was also contended that the existence of pending judicial proceedings afforded at least, an explanation as to why disciplinary proceedings had not been instituted against any member of the prison staff. For this and other reasons, O'Hanlon J. was satisfied in the High Court that there was not any real probability of the Applicant being assaulted if he were returned to the Maze Prison, and that conclusion was affirmed by a majority of the members of this Court.

That situation has now drastically altered. The truth of these allegations concerning assault and ill-treatment is now clearly established and accepted by the authorities responsible in so far as they are treating

the remaining proceedings as assessments of damage.

No form of disciplinary proceedings against prison staff could now possibly prejudice the claims still unresolved. No such disciplinary proceedings, however, have been initiated nor, on the evidence, is there any probability that they will be initiated.

The documentary evidence adduced in this case tends to establish that the authorities with responsibility for the discipline of the prison staff had for many years very strong grounds for believing that a major breach of discipline had occurred in September 1983.

The fact that the Plaintiff took part in this mass escape, even in the absence of any evidence especially identifying him with the injuries to Prison Officer Ferris, in my view, having regard to considerations above set out, makes it necessary for the Court, in order to protect his constitutional rights, to intervene by declining to permit his delivery to Northern Ireland on foot of the warrants.

I would, therefore, allow the appeal on this ground.

approved
V. a. Finlay

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THE SUPREME COURT

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304/89)

JAMES PIUS CLARKE

PLAINTIFF/APPELLANT

AND

JOHN PAUL McMAHON

DEFENDANT/RESPONDENT

Judgment of McCarthy J., delivered the 13th day of March 1990.

1. The Section 50 Claim

The affidavit of the Plaintiff stated his belief that both the offences of which he was convicted and the offences alleged against him in pursuance of the escape were political offences or offences connected with political offences. In his Judgment in the High Court, Costello J., said:-

"In the section 50 proceedings it is not now contested that the extradition should be refused on the grounds that (a) the original offence of the 2nd February 1977 or (b) the

offences relating to his escape from the Maze Prison were political offences and, indeed, it is accepted that I cannot make an order for his release under the section on any of the evidence adduced in those proceedings."

The first ground of appeal set out in the Notice of Appeal challenged this finding as to political offences, but, at the start of the hearing of this appeal, this challenge as well as the claim itself under section 50 was expressly abandoned.

2. The Article 40 Claim

This claim is in two parts:-

- (a) That the conviction was tainted by evidence (his own admissions) obtained by acts which were contrary to the guarantee under the Irish Constitution and standards applicable in any civilized community. In a further affidavit he stated that on the 2nd February 1977 he was present at a party at the Central Bar, Main Street, Letterkenny; further, there were affidavits by Brendan O'Donnell and Denis J. Doherty to the effect that each had seen the plaintiff in the Central Bar at approximately 8.30 p.m., on the 2nd February 1977. The proceedings were heard by Costello J., on the 25th July 1989 but the Order made by him does not record that these

affidavits were adduced in evidence, nor does his Judgment refer to them. They are not mentioned in the Notice of Appeal. At the commencement of the hearing of this appeal, Mr. Clarke S.C., expressly stated that he was "not standing over" the affidavit of Brendan O'Donnell. The "alibi" claim was not pursued in any form, and must be presumed to have been abandoned.

As to the challenge to the conviction I agree with the conclusion of the Chief Justice that, subject to the inherent power of the Court to act for the protection of constitutional rights, the Court cannot in an extradition case properly undertake an investigation into the validity of a conviction recorded in a requesting State. The making of an extradition arrangement is a political, not a judicial, act; if a political arrangement such as that created by Part III of the Extradition Act 1965 together with the reciprocal legislation of the United Kingdom Parliament in the Backing of Warrants (Ireland) Act 1965 contemplates a warrant for the arrest of a person convicted of an offence in, amongst other places, Northern Ireland, then, subject to the constitutional proviso I have mentioned, the Court cannot inquire into the validity of the conviction.

(b) The danger of ill-treatment.

In my Judgment in Finucane's case I have already expressed my view as to the standard of proof required in circumstances such as those surrounding the proposed extradition of one of those who escaped in the mass escape from the Maze Prison on 23rd September 1983.

In my conclusion that the applicant in Finucane's case was entitled to an Order under Article 40, I did not depend my view upon any fact that identified his case as being different from that of the present plaintiff.

It follows that a like order should be made in this case.

I would allow the appeal accordingly.

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