

THE HIGH COURT

IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLE 40.4.2 OF THE
CONSTITUTION OF IRELAND 1937

[2023] IEHC 177

Record No. 2023 / 522 SS

BETWEEN:-

SIMEON BURKE

APPLICANT

AND

THE GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

JUDGMENT of Mr. Justice Barr delivered *extempore* on 12th April, 2023.

1. This is an application brought on behalf of the applicant for an inquiry into the legality of his detention in Cloverhill prison. The application was moved before the court by the applicant's sister Ms. Ammi Burke. It was grounded upon an *ex parte* docket which was undated and unsigned and on an unsworn affidavit, which was purportedly the account that the applicant wished to put before the court.

2. The background to the applicant's complaints in relation to the legality of his detention in Cloverhill prison, arises out of the events which took place in the Four Courts, Dublin 7, on 7th March, 2023. At 14:00 hours that day, the applicant and other members of his family had

attended in the Court of Appeal to hear its judgment in a case that concerned the applicant's brother.

3. The applicant states that he was present in the courtroom taking notes. He stated that during the delivery of the judgment of the Court of Appeal, after several objections had been raised by members of his family during the delivery of the judgment, the court rose to deliver its judgment electronically. Thereafter, the applicant alleges that he was seized by members of An Garda Síochána, who grabbed him forcibly around the neck and other parts of his anatomy. He states that he was dragged out of the courtroom and out of the Court of Appeal building. He states that he was dragged across the interior yard of the Four Courts and was then put out onto the public footpath. He states that his clothing was torn and he was injured, was bleeding and was in shock.

4. The applicant alleges that he was then bundled into a Garda vehicle and was removed to the Bridewell Garda station. He alleges that in breach of the Garda Custody Regulations, he was not informed of the offence or matter for which he had been arrested. He stated that he did not know why he was being detained. He states that he was put into a cell in the police station.

5. The applicant states that approximately one hour later, at 16.20 hours he was taken out of the cell and was charged by Sgt David O'Leary with an offence contrary to s. 6 of the Public Order Act 1994 (as amended). He alleges that he was not given a copy of the charge sheet, which was contrary to regulation 15(1) of the Garda Custody Regulations.

6. The applicant states that he was conveyed to the Criminal Courts of Justice at Parkgate Street, Dublin 7. He stated that when he entered the courtroom, Garda Conor O'Dwyer was already seated in the witness box. The applicant states that he could not hear much of what the Garda was saying to the judge. He alleges that, despite the fact that Garda O'Dwyer had not

arrested him, he was presenting himself as the arresting and prosecuting Garda and was giving evidence in that capacity.

7. The applicant stated that when the Garda had finished giving his evidence on that occasion, he challenged the lawfulness of his arrest and detention. He stated that he explained the matters that he had set out in his affidavit to the learned District Court judge. He explained that in his opinion he had been unlawfully arrested. He asked the judge to halt the process on that basis. He stated that the judge simply replied "I hear you, Mr. Burke". He states that the judge did not otherwise comment on, or consider, his application, or make any decision on it. No reasons were given by the judge for the failure to consider his application. The applicant submits that the failure of the District Court judge to properly consider his application, was wholly contrary to natural justice and fair procedures. He submits that the District Court has no jurisdiction to do anything with the matter, in the absence of evidence of proper and lawful arrest.

8. The applicant stated that he was remanded with consent to bail, on his own bond of €200 and on condition that he stay away from the Four Courts. He stated that he did not consent to those bail terms. Accordingly, he was remanded in custody. The applicant stated that he could not consent, as the process had no validity, as it was in his opinion, manifestly and egregiously contrary to law and to justice from the outset.

9. The applicant stated that at subsequent hearings before the District Court on 7th, 14th, 28th and 29th March, 2023, he attempted to raise these objections that he had to the fact of his arrest; the manner of his arrest; and the fact that he had not been told of the basis on which he had been purportedly arrested, when he was initially detained by the Gardaí in the Four Courts, or when he was first brought to the Garda station.

- 10.** The applicant stated that during the hearing before the District Court on 14th March, 2023, the District Court judge stated "That is a matter for the trial".
- 11.** The applicant also complains that at the hearing before the District Court on 29th March, 2023, the solicitor acting for the DPP stated to the court that the prosecution was not relying on any CCTV footage from the Four Courts on the day that the judgment of the Court of Appeal was delivered. The applicant alleges that the solicitor further indicated that there was no such CCTV footage available. The applicant states that subsequent enquiries by him have revealed that there were no less than eight CCTV cameras showing the relevant areas within the precincts of the Four Courts.
- 12.** At the hearing of this application on 12th April, 2023, the applicant's sister stated to the court that prior to a further hearing in the District Court that morning, a Garda had handed an envelope to her brother, stating that it contained CCTV footage from the Four Courts on 7th March, 2023. She submitted that that was a very significant matter in relation to the fairness of the proceedings in general, in particular, having regard to the representations that had been made by the solicitor acting for the DPP on 29th March, 2023.
- 13.** The first question which this court must determine, is whether the applicant's sister is entitled to move the application that the court should direct an inquiry pursuant to Article 40.4.2 of the Constitution, on behalf of her brother. The right to liberty is such an important right, that it has been protected at law for many centuries. The present remedy that is provided for under Article 40 of the Constitution, is but a recent iteration of a remedy that has existed for many centuries at common law. The remedy of seeking an inquiry into the legality of a person's detention, is one of the most wide-ranging remedies known to the law. I am satisfied that in appropriate circumstances, it is permissible for third parties to make an application seeking the

direction of an inquiry into the legality of a person's detention. Indeed, the wording of Article 40.4.2 of the Constitution makes that clear when it provides that such an application may be made “by or on behalf of” a detained person. Accordingly, I find that Ms. Ammi Burke has *locus standi* to make this application on behalf of her brother, who is currently detained in Cloverhill prison.

14. In the course of moving the application, Ms. Burke invited the court to find that two other High Court judges, whom she said had declined to entertain her application on behalf of her brother, had acted contrary to law. This court declines to make any such finding. Each application that is made to the court for an inquiry under Article 40 of the Constitution, must rest on its own facts.

15. The fact that the applicant was offered bail when first brought before the District Court, on condition that he provide his own bond of €200 and on condition that he should stay away from the Four Courts, until the trial, which is due to be heard on 17th April, 2023; does not prevent the applicant seeking an inquiry into the legality of his current detention in Cloverhill prison. The fact that he could bring that detention to an end by agreeing to the conditions on which bail was offered to him, does not deprive him of the right to challenge the legality of his continued detention: see *McMahon v. Leahy* [1984] IR 525.

16. The court is satisfied that, given the importance of the right to liberty, the threshold for seeking an inquiry into the legality of a person's detention pursuant to Article 40.4.2 of the Constitution, should be a low bar. In other words, the court should err on the side of caution when considering the application and, if in any doubt as to the possible legality of a person's detention, the court should direct that an inquiry be held.

17. While the court is conscious that on the hearing of this application, it has only been

provided with one side of the events that took place in the Four Courts on 7th March, 2023. In fairness to the applicant, he did exhibit to his affidavit a précis of evidence furnished by Garda Conor O'Dwyer. In that précis of evidence, Garda O'Dwyer stated that when he and other gardaí entered the Court of Appeal, they asked members of the Burke family, including the applicant, to leave; but they did not do so. He stated that the applicant held onto the bench in the courtroom and refused to leave. He went on in that précis of evidence to describe how the applicant had behaved in an aggressive fashion on that occasion. He stated that outside the gates of the Four Courts, being a public place, the applicant was extremely aggressive; he was insulting and abusive towards Gardaí and with several members of the public present, it was feared that he may have provoked a breach of the peace. I set out these details, merely to show that there are clearly two sides to the account of what may have transpired in the Four Courts on 7th March, 2023.

18. It seems to me that the kernel of this particular application relates to his continued detention in Cloverhill prison. That detention is based upon the remand committal warrant issued by the District Court on 7th March, 2023 and continued thereafter from time to time. However, it is clear that that detention is based on the legality of the original arrest in respect of the alleged offence contrary to s. 6 of the Criminal Justice (Public Order) Act 1994 (as amended). It seems to me that having regard to the matters that are averred to in the unsworn affidavit produced in the name of the applicant, he has raised matters on which the court should inquire into the legality of his continued detention in Cloverhill prison.

19. Accordingly, the court will direct that an inquiry be held into the legality of the applicant's continued detention by the respondent. The court directs that that inquiry will be held at 11.00 hours on 13th April, 2023, or at such time thereafter as may be directed by the vacation

judge dealing with the list.

20. The court will make an order directing that the respondent produce the applicant before the High Court in the Four Courts on 13th April, 2023 at 11:00 hours.

21. The court directs that notice of the making of this order be furnished to the Chief State Solicitor and to the respondent by email, together with a copy of the *ex parte* docket and the unsworn affidavit of the applicant by 19:00 hours this evening. A copy of the court order directing the holding of an inquiry is to be furnished to the respondent and to the Chief State Solicitor by email, as soon the order has been drawn up by the registrar.