

## THE HIGH COURT

1982 No. 4021P

BETWEEN

OSGUR BREATHNACH

PLAINTIFF

AND

IRELAND, THE ATTORNEY GENERAL, JOSEPH EGAN,  
THOMAS FITZGERALD, JOHN MURPHY, THOMAS DUNNE,  
WILLIAM MAHER, GERALD O'CARROLL,  
JAMES BUTLER AND MICHAEL EGAN

DEFENDANTS

Judgment of Mr. Justice Blayney delivered the 14th day of  
March 1990

This is a preliminary issue in a case in which the Plaintiff claims damages against the State and certain members of the Garda Siochana for alleged assault and battery, false imprisonment, intimidation, malicious prosecution and failure to vindicate constitutional rights.

The Plaintiff was charged before the Special Criminal Court with having taken part in the train robbery which

occurred at Sallins, County Kildare on the 31st March 1976. He was convicted and sentenced to nine years' penal servitude. On Appeal to the Court of Criminal Appeal his conviction was quashed.

The circumstances out of which the Plaintiff's action arises are confined to his arrest and the period of his custody which were considered by the Special Criminal Court in the course of his trial. In their Defence the Defendants plead that the Plaintiff is estopped from relying on certain allegations made in the Statement of Claim on the ground that they were considered by the Special Criminal Court and rejected. Similarly, the Plaintiff claims that the Defendants are estopped from disputing certain pleas of the Plaintiff on the ground that the issues arising on them were considered by the Special Criminal Court and decided in favour of the Plaintiff.

The preliminary issue was settled by Johnson, J. and directed to be tried by Order of the 30th November 1989. The Plaintiff was to be Plaintiff on the issue and a Statement of Claim and Defence were to be delivered. The issue is concerned with six averments in the Statement of Claim which are as follows:-

- "1. That the Plaintiff was wrongfully and falsely imprisoned and wrongfully detained for approximately 48 hours in a Garda Station in the City of Dublin.
2. That on the 7th day of April 1976 in fear of assault the Plaintiff signed against his will a document purporting to be a confession of involvement in the

robbery of a mail train at Sallins, County Kildare on the 31st March 1976.

3. That in fear the Plaintiff repeated the said purported confession verbally to the seventh, eight and ninth named Defendants on the same date.
4. That the said confession was extracted from the Plaintiff by oppression.
5. That on the 5th or 6th day of April 1976 at the said Garda Station the Plaintiff requested a member of the Garda Siochana, a certain Garda McGauran a servant or agent of the first named Defendant to obtain for him the services of a certain Solicitor in accordance with his constitutional rights.
6. That the said request was wrongfully neglected and ignored and that the exercise of his right of reasonable access to a Solicitor was thereby frustrated and denied."

These averments may be compressed into three and were dealt with as such in the argument:-

1. Items 2, 3 and 4 - that the Plaintiff signed an alleged confession and verbally repeated it in fear of assault, and that the confession was extracted by oppression.
2. Item 1 - that the Plaintiff was falsely imprisoned and wrongfully detained for 48 hours.
3. Items 5 and 6 - that the Plaintiff requested Garda McGauran to obtain for him the services of a Solicitor and that the said request was wrongfully neglected and ignored.

While the issue as settled asks only if the Defendants are estopped from raising certain matters, it seems to me that I must necessarily consider also whether the Plaintiff is estopped from raising certain matters. It seems to me that what I have to decide is whether the Plaintiff is estopped from making the allegations contained in the first of the three paragraphs listed above, and whether the Defendants are estopped from disputing the allegations contained in paragraphs 2 and 3.

Two overlapping areas of law fall to be applied - issue estoppel and abuse of the process of the Court.

The law relating to issue estoppel was expressed as follows by Gibson L. J. in Shaw -v- Sloan and others 1982 NI 393F 398c:-

"It would seem that before estoppel of an issue can arise there must have been a final determination of the same issue in previous proceedings by a court of competent jurisdiction and the parties bound by this earlier decision must have been either the same parties as are sought in the later proceedings to be estopped or their privies."

The present case differs from the usual type of case in that the determination which is alleged to give rise to each estoppel occurred in the course of a criminal trial and not a civil action, and accordingly the question arises as to whether the parties bound by the determination of the issues in the criminal trial are the same parties as those in the civil action or their privies. A similar question arose in the case of Kelly -v- Ireland and the Attorney General 1986

ILRM 318 in which the facts were very similar to those in the present case. The Plaintiff there had been convicted by the Special Criminal Court of taking part in the same train robbery. At his trial he alleged that he had been assaulted by members of the Gardai while in custody and thereby forced to make a statement. The Special Criminal Court rejected this allegation. In an exhaustive Judgment in which he reviewed all the English authorities O'Hanlon, J. decided that the privity required to give rise to issue estoppel did exist and the Plaintiff was estopped from asserting that he had been assaulted by the Gardai. He said in his Judgment at Page 328:-

"In the rare case where a clearly identifiable issue has been raised in the course of a criminal trial and has been decided against a party to those proceedings by means of a judgment explaining how the issue has been decided, I would be prepared to hold that such decision may give rise to issue estoppel in later civil proceedings in which that party is also involved. Such estoppel would arise, not only in relation to the specific issue determined (in this case, whether the statement was made freely and voluntarily) but also to findings which were fundamental to the court's decision on such issue."

And on the specific privity point, having reviewed the relevant statutory provisions O'Hanlon, J. expressed his conclusions as follows:-

"In criminal proceedings, on indictment, the Director of Public Prosecutions acts in a representative

capacity on behalf of the People of Ireland and in defending a civil claim against the State the Attorney General also acts in a representative capacity on behalf of the People of Ireland. Accordingly, no problem arises, in my opinion, as to the question of privity of parties in the two sets of proceedings."

I agree with the reasoning of O'Hanlon. J and I adopt and follow the conclusion he reached.

There is, however, one distinguishing feature between the present case and Kelly's case. In the latter the Defendants were solely Ireland and the Attorney General, but in the present case a number of members of the Gardai are also Defendants. Can it be said that they were parties or privies to the criminal trial so that they and the Plaintiff would be bound inter se by any issue decided during the trial? I think it is unlikely that they would be held to have been parties or privies but in my opinion it is not necessary to answer the question as the second principle of law which is applicable, abuse of the process of the Court, applies irrespective of the question of privity. Where an issue has been finally determined by a Court of competent jurisdiction it is an abuse of the process of the Court to seek to have it relitigated in a new proceeding. The principle was applied by the House of Lords in Hunter -v- Chief Constable of West Midlands and another 1981 3 All ER 727 in which it was held (on facts very similar to those in the present case) that a claim for damages for assault brought against police officers should be struck out on the ground that the issue of assault had been determined against the Plaintiff in his criminal trial and accordingly to allow the matter to be relitigated

would be an abuse of the process of the Court. O'Hanlon, J. followed this decision in the Kelly case. He dismissed the Plaintiff's claim not only on the ground of issue estoppel but also on the ground that to permit it would be an abuse of the process of the Court. I am satisfied that the same principle falls to be applied in this case also.

I now go on to consider in respect of each of the three allegations whether it was the subject matter of an issue determined finally by the Special Criminal Court in the course of the Plaintiff's trial.

1. The allegation that the Plaintiff signed an alleged confession and verbally repeated it in fear of assault and that the confession was extracted by oppression.

In the course of his trial before the Special Criminal Court the Plaintiff alleged that he had been assaulted by the Gardai and that he had been coerced by such assaults, and by the fear of further assaults, into making statements admitting his involvement in the robbery. This allegation was fully considered by the Court. In the Judgment of the Court, delivered by the President of the High Court, all the evidence was reviewed and the decision of the Court is expressed as follows at Page 24 of the Judgment:-

"The Court has carefully assessed all the evidence, and has regard to the demeanour of the witnesses, the manner in which they have given their evidence, and is satisfied that the Gardai witnesses are truthful and have given a truthful account of what transpired during the different interviews with the accused Mr. Breathnach in the Bridewell Garda Station during the period of his detention there. The Court is satisfied

beyond all reasonable doubt that the statements alleged to have been made by the accused were not made as a result of any assaults, ill-treatment or improper matters employed by members of the Garda Siochana or any of them, and that the injuries of which the accused subsequently complained were not inflicted or caused by any member of the Garda Siochana."

In my opinion this was a final determination against the Plaintiff of the issue relating to the statements. It was a determination of that issue by a Court of competent jurisdiction and it would be an abuse of the process of the Court to permit the Plaintiff to raise it again. And Counsel for the Plaintiff did not seek to argue the contrary. While he referred to the decision of the Court of Criminal Appeal that there was a want of basic fairness in the manner in which the statements were taken, he did not submit that the Plaintiff was entitled to reopen the allegations contained in Items 2, 3 and 4. So I hold that the Plaintiff may not raise these allegations in his action.

2. The allegation that the Plaintiff was falsely imprisoned and wrongfully detained for 48 hours.

The Plaintiff was arrested twice under Section 30 of the Offences Against the State Act 1939. His first arrest was on the 31st March 1986, the day of the robbery, and the second was on the 5th April 1986. It is in regard to the latter that the allegation was made. The determination of the Special Criminal Court in regard to this arrest was as follows (Page 25 of the Judgment of the Court):-

"The Court is satisfied that the arrest of Mr. Breathnach on the 5th day of April 1976, being an

arrest on suspicion of the commission of the same crime in respect of which he was previously arrested on the 31st day of March 1976, was not in accordance with law, and constituted an infringement of his constitutional right to liberty."

And at Page 27 of the Judgment the Court said:-

"The detention of the accused in the Bridewell Station between the 5th and 7th day of April 1976 was undoubtedly unlawful."

In my opinion this was a clear determination against the people of Ireland, represented by the Director of Public Prosecutions, and operates as an issue estoppel against the people of Ireland as represented by the State and the Attorney General. It would also in my opinion be an abuse of the process of the Court to permit the Defendants to relitigate the issue.

Counsel for the Defendants submitted that a distinction should be made between issues decided against the Plaintiff at his trial, and issues decided in his favour, and that it was only in respect of the former that issue estoppel arose. In my opinion this is not entirely correct. It is certainly the case that in regard to any issue decided against him the Plaintiff may not try to have it relitigated. But where some matter is decided in favour of an accused in a criminal trial, it is necessarily decided against the Director of Public Prosecutions, acting on behalf of the people of Ireland, and accordingly the people of Ireland, acting through the Attorney General in civil proceedings, may be estopped from putting the same matter in issue again depending on the nature of the determination made

by the Court. It seems to me that the nature of the determination here, a clear decision on the legality of the Plaintiff's arrest, is such as to give rise to an estoppel. The Attorney General is precluded from disputing that the arrest was unlawful because the issue was the subject of a final determination against the Director of Public Prosecutions by the Special Criminal Court. All the Defendants are precluded from disputing it because it would be an abuse of the process of the Court for them to do so.

3. The allegation that the Plaintiff requested Garda McGauran to obtain for him the services of a Solicitor and that the said request was wrongfully neglected and ignored.

In my opinion the Defendants should not be precluded from disputing these allegations as there was no final determination in regard to them by the Special Criminal Court. The matter was dealt with as follows in a ruling of the Special Criminal Court on the 8th day of December 1978, the 40th day of the trial:-

"The Court has carefully considered the evidence of Guard McGauran and has, indeed, directed the Court Stenographer to transcribe his notes of the evidence, so that the Court would have in addition to the members' notes of the evidence, a detailed and accurate note of same. It appears from this evidence that Mr. Breathnach indicated to Guard McGauran that he wished to see a Solicitor and that he asked him to get a Solicitor. Guard McGauran cannot say whether the conversation in which such indication was given and request made, was on the 31st March 1976, or

during the period of the first detention or on the 5th April 1976. The evidence clearly established that on the occasion of his detention beginning on the 31st March 1976 that the accused Mr. Breathnach had requested a Solicitor and the Court has dealt with this in the course of his previous ruling. While the evidence of Guard McGauran does not establish that a request was made to him during the period of Mr. Breathnach's second detention, his evidence does establish the possibility that the request was made at that time and the accused Mr. Breathnach is entitled to the benefit of the doubt in that regard. Consequently, the Court must deal with this application on the basis that such a request was made in the period of the second detention. Guard McGauran does not remember taking any action upon receipt of that request but stated that it was his usual practice in such circumstances to inform the Station Sergeant but he does not remember doing so on this occasion. The Court has heard the evidence of Sergeant Purtill, Sergeant Carey and Sergeant Fennessy and is satisfied that no request was made to them. The Court is satisfied that a person in detention has a constitutional right to legal assistance if he requests it and the failure to take reasonable steps to obtain such assistance upon request is a failure by the Garda Siochana to vindicate such constitutional right. Taking the construction of Guard McGauran's evidence most favourable to the accused, it would appear that a request was made to him and that he

failed to take any steps on foot thereof and thus such failure was failure to vindicate the accused's constitutional rights."

In making this ruling the Special Criminal Court acted on the principle that an accused is entitled to the benefit of the doubt in criminal proceedings, and that where two constructions of a witness' evidence are equally open, the one most favourable to the accused must be taken. The Court did not purport to make a positive finding of fact holding the scales evenly between the prosecution and the accused. Because of this I consider that there was not any final determination of the issue by the Special Criminal Court and accordingly the Defendants should not be precluded from raising it again in these proceedings.

In the light of these findings, I determine the preliminary issue as follows:-

1. The Defendants are estopped from pleading the matters contained in Paragraph 8 of the Defence of the first and second Defendants, Paragraph 2 of the Defence of the third Defendant, and Paragraph 2 of the Defence of the tenth Defendant, that is to say, from pleading a denial that the Plaintiff was wrongfully arrested and wrongfully detained for 48 hours.
2. The Defendants are not estopped from pleading the matters contained in Paragraph 5 of the Defence of the first and second Defendants, that is to say, from pleading a denial that any request by the Plaintiff for the obtaining of the services of a Solicitor was wrongfully neglected or ignored or that any rights of reasonable access to a Solicitor were frustrated or denied.

3. The Plaintiff is estopped from alleging the matters pleaded in Paragraphs 7 and 8 of the Statement of Claim delivered on the 5th January 1983, that is to say, he is estopped from alleging that he signed a document purporting to be a confession out of fear of being assaulted; that he repeated the purported confession verbally out of fear of further assaults, and that the said confession was extracted from him by oppression and violence.

*John Gray*

14. 03. 1990