

THE HIGH COURT

[2023] IEHC 538

Record No. 2022 114 JR

BETWEEN

ALAN HARTE

PLAINTIFF

AND

**THE SPECIAL CRIMINAL COURT, THE DIRECTOR OF PUBLIC PROSECUTION,
IRELAND AND THE ATTORNEY GENERAL**

DEFENDANTS

JUDGMENT of Ms. Justice Bolger delivered on the 2nd day of October 2023

1. This is the judicial review of the applicant's prosecution before the Special Criminal Court. He seeks a declaration that provisions of Section 40 of the Offences Against the State Act 1939 are in breach of Articles 34.1, 38 and 40.1 of the Constitution because (i) a verdict delivered by the Special Criminal Court permits a two thirds majority verdict and (ii) the accused person is not informed whether the court's verdict is a unanimous or a majority decision. The applicant contends that his treatment was, therefore, unfair and unlawful and his conviction and sentence should be set aside. For the reasons set out below, I am refusing this application.

Background

2. The applicant was charged on 26 November 2019 with one count of false imprisonment and one count of causing serious harm contrary to ss. 4 and 15 of the Non-Fatal Offences Against the Person Act 1997. On 26th March 2020, the Director of Public Prosecutions in accordance with the powers vested in her pursuant to s.48(a) of the Offences Against the Person Act 1939, certified that in her opinion, the ordinary courts were inadequate to secure the effective administration of justice and the preservation of public peace and order in this case and that the prosecution should therefore proceed before the Special Criminal Court. There is no challenge to that certification in these proceedings.

3. The trial of the Applicant and three other accused persons commenced before the Special Criminal Court on 31 May 2020 pursuant to Part V of the Offences Against the Person Act 1939. The Court found the applicant guilty on 8 November 2021 and a sentence of thirty years imprisonment was imposed on 20 December 2021 backdated to 26 November 2019 being the date on which the Applicant had entered custody. The Applicant is currently serving that sentence in Portlaoise Prison.

4. The Applicant was granted leave to apply for the following reliefs by way of judicial review:

- i. A declaration that the provisions of Section 40 of the Offences Against the State Act 1939 are in breach of Articles 38 and 40.1 of the Constitution having regard to the fact that a verdict delivered by the Special Criminal Court permits a two thirds majority verdict.*
- ii. A declaration that the provisions of Section 40 of the Offences Against the State are repugnant to Articles 34.1, 38 and 40.1 of the Constitution*

having regard to the fact that an accused person shall not be informed of whether a verdict delivered by the Special Criminal Court is by unanimous or majority decision.

- iii. *A declaration that the trial of the Applicant before the Special Criminal Court was unfair and not in accordance with law having regard to the provisions of Sections 25(1) and (2) of the Criminal Justice Act 1984 and Articles 34, 38 and 40.1 of the Constitution.*
- iv. *An Order setting aside the conviction and sentence of the Applicant imposed by the Special Criminal Court.*
- v. *If necessary, an extension of time to bring proceedings on the basis that it is appropriate and in the interest of justice to do so.*
- vi. *Such further or other Order as to this Honourable Court say appear to be just and meet the case.*
- vii. *A recommendation pursuant to the Legal Aid (Custody Issues) Scheme.*

Legislative and Constitutional Provisions

- 5.** Article 34.1 of the Constitution provides for the administration of justice in public;

"Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public."

- 6.** Article 38.3.1^o of the Constitution allows the use of non-jury courts in specified circumstances;

"Special courts may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order."

Part V of the Offences Against the State Act 1939 places Article 38.3.1 on a legislative footing.

- 7.** Section 40 of the Offences Against the State Act 1939 provides for a majority verdict of the Special Criminal Court:

"40.—(1) The determination of every question before a Special Criminal Court shall be according to the opinion of the majority of the members of such Special Criminal Court present at and taking part in such determination, but no member or officer of such Court shall disclose whether any such determination was or was not unanimous or, where such determination was not unanimous, the opinion of any individual member of such Court.

(2) Every decision of a Special Criminal Court shall be pronounced by such one member of the Court as the Court shall determine, and no other member of the Court shall pronounce or indicate his concurrence in or dissent from such decision."

- 8.** Section 25 of the Criminal Justice Act 1984 permits a majority verdict in jury trials in limited and specific circumstances;

"25.—(1) The verdict of a jury in criminal proceedings need not be unanimous in a case where there are not fewer than eleven jurors if ten of them agree on the verdict.

(2) The court shall not accept a verdict of guilty unless the foreman of the jury has stated in open court whether the verdict is unanimous or is by a majority in accordance with subsection (1) and, in the latter event, the number of jurors who agreed to the verdict.

(3) The court shall not accept a verdict by virtue of subsection (1) unless it appears to the court that the jury have had such period of time for deliberation as the court thinks reasonable having regard to the nature and complexity of the case; and the court shall not in any event accept such a verdict unless it appears to the court that the jury have had at least two hours for deliberation.

(4) The court shall cause the verdict of the jury to be taken in such a way that, where the verdict is one of not guilty, it shall not be indicated whether the verdict was unanimous or by a majority.

(5) This section shall not affect the trial of any offence for which the court is required, upon the conviction of the accused, to sentence him to death or any trial commenced before the commencement of this section."

9. Section 8 of the Criminal Justice (Amendment) Act 2009 creates a presumption that certain organised crime offences are to be tried in the Special Criminal Court.

"(1) It is hereby declared that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to an offence under each of the following provisions of Part 7 of the Act of 2006, namely, sections 71A, 72, 73 and 76."

10. Article 40.1 of the Constitution provides a guarantee of equality for all citizens;

"All citizens shall, as human persons, be held equal before the law.

This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."

Decision

Article 38

11. The applicant says that the law entitles him to the same trial in a non-jury court as is afforded to an accused person before a jury court. This proposition does not sit comfortably with the provisions of Article 38.3 which allows special courts to be established by law in certain circumstances. There is nothing in Article 38 providing for how a majority verdict should be delivered and there is no requirement for the court established by that constitutional provision to be made up of a specified number of members. Article 38.3 permits a court established thereunder to be made up of a single judge or decision maker, if that was the wish or intention of the Oireachtas.

12. Qualified majority verdicts are acceptable features of the constitutional order and consistent with the jurisprudence of the ECHR; *Twomey and Cameron v. United Kingdom* (App. Nos. 67318/09, 22226/12). International practice confirms that there is nothing exceptional about them. No accused person has a constitutional right to a majority verdict of a particular proportion, i.e. five-sixths rather than two-thirds and there is no constitutional prohibition on a qualified majority verdict.

- 13.** Article 38 is permissive, and allows the non-jury Special Criminal Court, if established, to conduct a different trial process than takes places at a jury trial before the ordinary courts. The requirement of Article 38.1 that all persons be tried "*in due course of law*" does not mean that an accused person before the Special Criminal Court has the right to the same treatment as that afforded to a person before the ordinary courts. Any other analysis would render the existence of Article 38.3 pointless. It must be assumed that the architects of the Constitution intended that Article, as with any Article of the Constitution, it to have meaning and relevance.
- 14.** The Special Criminal Court is currently established by law, as is permitted by Article 38.3 It exists as a creature both of statute and of the Constitution. It is a matter for the Oireachtas to determine whether such a court should be established and for the Government to determine by Proclamation whether it should continue to exist or should cease – the legality of which upheld by Barrington J. in *Kavanagh v. Ireland* [1996] I.R. 321. The process whereby the DPP can certify that a prosecution should proceed before the Special Criminal Courts can only occur at a time when the necessary Government Proclamation is enforced. Where that occurs, there is a lawful basis for a person prosecuted before that court in relation to whom the DPP has exercised the powers vested in her by that Government Proclamation, to be subjected to a different trial process, as long as they are tried "*in due course of law*" in accordance with Article 38.1. The person prosecuted before the Special Criminal Court is, quite simply, in a different legal position to a person prosecuted before a jury court by virtue of the existence of the Government Proclamation and the exercise by the DPP of the powers vested in her by it. There is nothing unlawful about that, given that the exception to a jury trial that has been put in place by the Oireachtas and the Government "*is itself constitutional*" (as per O'Donnell J. (as he was then) *Murphy v. Ireland* [2014] IESC 19, [2014] 1 I.R. 198 at para. 16):-

"It is not necessary to take issue with the description of summary trial in the District Court, or trial before the Special Criminal Court, as exceptions to a constitutional norm of trial by jury. But if so, it is important to identify the nature of the exception, and the manner in which it is provided for. It is an exception which is itself constitutional in its nature. Article 38.5 is not phrased, as many other provisions in the Constitution are, in terms where a provision is stated but then qualified by the possibility of legislation. The Article does not for example provide: "save in such cases as may be provided for by law no person shall be tried on a criminal charge without a jury". If it were so, then the analysis of any law providing for trial other than by jury would be straightforward. A law providing for any such exception would be narrowly construed to ensure minimal impairment of the constitutional right."

- 15.** The fact that recommendations have been made, including by the Hederman Report of the Committee to Review the Offences Against the State Acts 1930-1998 on which the applicant relies, to change the procedures of the Special Criminal Court does not mean the current procedures are unlawful. The report sets out what its authors consider to be a better way of dealing with non-jury trials, but ultimately it is a matter for the Oireachtas to legislate on any changes and for Government to choose whether to continue with the Proclamation currently in force. It is not for this court to dictate such policy issues to the Government or to the Oireachtas.

Article 40.1

- 16.** The applicant condemns the different treatment of him before the Special Criminal Court and of another accused before an ordinary jury court as invidious discrimination, a breach of his constitutional right to equality and as irrational and

disproportionate. The scope of Article 40.1 was well summarised by O'Donnell J. in *Murphy* at para. 33;

"Article 40.1 is a guarantee of equality before the law. It is a fundamental right guaranteed by the Constitution and unlike many of the other provisions in the 1937 Constitution, has no counterpart in the 1922 Constitution. It is perhaps not insignificant that it is placed at the outset of the fundamental rights section of the Constitution. It set an egalitarian and essentially republican tone which is perhaps reinforced by the specific provisions of Article 40.2 prohibiting titles of nobility and honour. It is therefore a vital and essential component of the constitutional order."

17. More recently O'Malley J. scoped out the principles underpinning the interpretation of Article 40.1 as follows in *Donnelly & Anor v. Minister for Social Protection & Ors* [2022] IESC 31, [2022] 2 I.L.R.M. 185 at para. 188:-

- "(i) Article 40.1^o provides protection against discrimination that is based on arbitrary, capricious or irrational considerations.*
- (ii) The burden of proof rests upon the party challenging the constitutionality of a law by reference to Article 40.1^o.*
- (iii) In assessing whether or not a plaintiff has discharged that burden, the court will have regard to the presumption of constitutionality.*
- (iv) The court will also have regard to the constitutional separation of powers, and will in particular accord deference to the Oireachtas in relation to legislation dealing with matters of social, fiscal and moral policy.*
- (v) Where the discrimination is based upon matters that can be said to be intrinsic to the human sense of self, or where it particularly affects members of a group that is vulnerable to prejudice and stereotyping, the court will assess the legislation with particularly close scrutiny. Conversely, where there is no such impact, a lesser level of examination is required.*
- (vi) The objectives of a legislative measure, and its rationality (or irrationality) and justification (or lack of justification) may in some cases be apparent on its face. Conversely, in other cases it may be necessary to adduce evidence in support of a party's case."*

18. The manner in which a person is tried in the prosecution of a criminal charge against them is not intrinsic to the person and so, in accordance with paragraph (v) of O'Malley's judgement in *Donnelly* set out above, a lesser standard of scrutiny is required in assessing an accused's situation by reference to his Article 40.1 right to equality before the law. The Constitution must be "*pedigree blind just as it should be colour blind or gender blind except when those interests are relevant to a legitimate legislative purpose*" (*An Blascaod Mór Teo v. Commissioner for Public Works* (No. 3) [1999] IESC 4, [2000] 1 I.R. 6, at p. 19). However, the courts cannot, and are not required to, be blind to a difference in treatment that is mandated by the Constitution.

19. Because of Article 38, the legislation introduced thereunder by the Oireachtas, and the Proclamation issued by the Government the applicant is not in the same or a comparable position to a person tried by a jury. There is no breach of his constitutional right to equality before the law where he is subjected to a different law in the manner of his trial, a difference that originated in and is mandated by the Constitution itself. It is, as described by O'Donnell J. in *Murphy*, a difference that is "*made in accordance with the dictates of the Constitution could not offend*

Article 40.1." (at para. 35). Article 40.1 does not entitle the applicant to a mirror image of how a jury trial is conducted, in his trial before the non jury Special Criminal Court.

Does the accused have a right to know if a verdict was unanimous or by majority.

- 20.** The applicant contended that there is no rational basis for concealing whether the verdict of the Special Criminal Court is unanimous or by majority. Article 34.1 of the Constitution requires justice to be administered in public and therefore the applicant asserts that there would need to be some basis for depriving him of those constitutional rights. He says this concealment infringes his ability to appeal a decision effectively as well his right to be provided with reasons for the decision. However, Article 38.6 provides that "*The provisions of Articles 34 and 35 of this Constitution shall not apply to any court or tribunal set up under section 3 or section 4 of this Article.*". There is no constitutional requirement for trials before the Special Criminal Court to take place in public, although as they must take place in due course of the law, established principles of natural and constitutional justice apply. The practice of the Special Criminal Court not disclosing whether its verdicts were unanimous or by majority, and not publishing any dissenting opinions that may exist, do not contravene the applicant's rights to be tried in in due course of law. Majority decisions are no less binding than unanimous decisions and hold no lower weight to appeal courts. Any rights the applicant has to appeal or their ability to challenge a decision of the Special Criminal Court is not infringed by this practice. In this case, the applicant was provided with a comprehensive, written and reasoned decision of the Special Criminal Court, thereby vindicating his right to a reasoned decision and to a fair trial without the need to disclose any dissenting decision that may have existed.
- 21.** There is authority for the non-disclosure of dissenting judgments including in an Article 26 reference to the Supreme Court and the decisions of the CJEU. In both scenarios confidence in the system and the legitimacy of the majority judgment must be protected from being undermined by the publication of a dissenting decision. The same rationale applies to the verdicts of the Special Criminal Court for which the DPP has certified her opinion that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order.

Conclusions

- 22.** The applicant is not in a similar or comparable position to a person who is tried before the jury courts because he is subjected to a process that is provided for by Article 38.3 of the Constitution. The fact that the applicant is subjected to a different and Constitutionally permitted process does not breach his Constitutional rights to equality or to a trial in accordance with the law. The applicant does not enjoy a right, constitutional or otherwise, to a mirror image of the trial process before a jury court or a right to a similar five sixths majority verdict or a right to know of the existence of any dissenting decision. Therefore, I refuse the applicant's application for relief.

Counsel for the applicant: Michael Liam O'Higgins SC, Michael D Hourigan BL

Counsel for the respondent: Remy Farrell SC, Colmcille Raymond Kitson BL, James Rooney BL