THE SUPREME COURT

Appeal No. 40/2015

Denham C.J.
O'Donnell J.
McKechnie J.
MacMenamin J.
Laffoy J.
Charleton J.
O'Malley J.

Between/

The People (at the suit of the Director of Public Prosecutions)
Prosecutor/Respondent

and

Barry Doyle

Accused/Appellant

Judgment delivered on the 18th day of January, 2017 by Denham C.J.

1. Barry Doyle, the accused/appellant, referred to as "the appellant", was granted leave to appeal to this Court from the decision of the Court of Appeal of the 8th June, 2015: [2015] IESCDET 45. The Director of Public Prosecutions, the prosecutor/respondent, is referred to as "the DPP".

2. The issues upon which leave to appeal was granted were:-

> (i) Whether or not the appellant was, in the circumstances of this case, entitled to consult with a solicitor, and have a solicitor present, prior to and during the 15th interview with the Garda Síochána, during which admissions were alleged to have been made. This raises the question of whether the right to have a solicitor present during questioning is a matter of right of the detained person, or a matter of concession by the Garda Síochána.
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> I shall refer to this issue as "the presence of a solicitor" issue.
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> (ii) Whether the appellant, in all the circumstances, including that he was convicted in the Central Criminal Court on the 15th February, 2012, and the decision of the Supreme Court in *DPP v. Damache* was delivered on the 23rd February, 2012, can rely on that decision on his appeal.
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> I shall refer to this issue as "the Damache" issue.
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> (iii) Whether the matters set out in the appellant's application under the heading "Relevant facts considered not to be in dispute", or any of them, constituted threats or inducements made to the appellant and calculated to extract a confession from him. This is a matter not decided by the Court of trial or the Court of Appeal. Secondly, if they do constitute such threats or

inducements, whether their effect had "dissipated" or "worn off" by the time of the admissions relied upon by the State, as held by the trial judge; and whether or not there was any evidence on which it could have been determined that the effect of the said threats or inducements (if any) had "dissipated" or "worn off" by the time of the alleged admissions.

I shall refer to this as "the threats and inducement" issues.

Factual Background

3. The factual background was stated in the judgment of the President of the Court of Appeal, delivered on the 8th June, 2015. Commencing at paragraph 7, Ryan P. held:-

> "7. Two teams of two Gardaí each carried out the interrogation of the appellant. It was slow going at first because he was unwilling to engage with his interviewers. Their efforts were directed in the first instance at getting him to talk to them about himself and his relationships, including those with his children and with Victoria Gunnery. He was reluctant to engage with them but the Gardaí persisted. Mr. Doyle had brief consultations with a solicitor. All of the interviews were video-recorded.
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> 8. The appellant's attitude changed at interview 15, which began at 19.42 on 26th February 2009. In the previous interview that concluded at 18.35, Mr. Doyle had asked to see his solicitor Mr. O'Donnell and the Gardaí told him that he was on his way. In due course, the solicitor arrived and spoke to his client. The solicitor then approached the Gardaí with an offer. Mr. Doyle would say that he killed Shane Geoghegan if the Gardaí agreed to release Victoria Gunnery. The deal on offer was that he would answer one question only, to confirm that he had killed the deceased. The Gardaí rejected the offer. They said that they wanted Mr. Doyle to tell the truth, that answering one question would not be satisfactory in any case because it would not enable the Gardaí to find out if he was telling the truth and there could be no deal because that would be an inducement which would make any admission inadmissible in court. Mr. O'Donnell returned to his client and had a further brief consultation.
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> 9. Then interview 15 began, but it was interrupted after a few minutes by a phone call from the solicitor who wanted to speak with his client, which then happened. Thereafter, the interview recommenced. Mr. Doyle now answered the questions put to him regarding his role and confirmed that he was the person who shot Shane Geoghegan. He gave details of how he had waited for his victim, having been driven there by another person whom he did not name. He described the shooting, how it happened first on the green in front of the houses, how the gun jammed and he cleared it by ejecting the bullets, how he then resumed the pursuit by going around to the back of the house where he shot Mr. Geoghegan a number of times including once in the head from short range.
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> 10. The Gardaí asked Mr. Doyle to draw them a map of the scene and he obliged, using writing materials the Gardaí provided. He showed the points that were relevant including where the car had been parked and which way it was facing, the direction that Mr. Geoghegan had come from, where he Mr. Doyle shot Mr. Geoghegan the first time, where he ejected the bullets to clear the gun mechanism and where he had gone round to the back of the

house and finished off his victim. This information was important, as the prosecution alleged, because it included facts that the Gardaí did not know or were mistaken about.

11. At the termination of interview 15, after the tape was sealed, the Gardaí asked Mr. Doyle about his feelings for the Geoghegan family and he said he was sorry for them and in a gesture of sympathy he took off the rosary beads that he was wearing round his neck and said to give it to Shane Geoghegan's mother."

Presence of a Solicitor

4. The right of access to legal advisers is well established in our jurisprudence. In The *People (Director of Public Prosecutions) v. Madden* [1977] I.R. 336, the Court of Criminal Appeal held that a person in detention:

> "has got a right of reasonable access to his legal advisers and that a refusal of a request to give such reasonable access would render his detention illegal."

5. The right of access to a solicitor, when requested by or on behalf of a person in detention, was recognised as being a constitutional right by Finlay C.J. in *The People (Director of Public Prosecutions) v. Healy* [1990] 2 I.R. 73, where he stated:-

> "The undoubted right of reasonable access to a solicitor enjoyed by a person who is in detention must be interpreted as being directed towards the vital function of ensuring that such person is aware of his rights and has the independent advice which would be appropriate in order to permit him to reach a truly free decision as to his attitude to interrogation or to the making of any statement, be it exculpatory or inculpatory. The availability of advice from a lawyer must, in my view, be seen as a contribution, at least, towards some measure of equality in the position of the detained person and his interrogators.
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> Viewed in that light, I am driven to the conclusion that such an important and fundamental standard of fairness in the administration of justice as the right of access to a lawyer must be deemed to be constitutional in its origin, and to classify it as merely legal would be to undermine its importance and the completeness of the protection of it which the courts are obliged to give."

6. Thus, it was recognised over twenty years ago that there is a constitutional right of reasonable access to a solicitor.

7. The constitutional right is grounded in Article 38.1 of the Constitution, which provides that:

> "No person shall be tried on any criminal charge save in due course of law."

8. The protection of a trial in due course of law is not confined to the trial in court but applies also to pre-trial detention and questioning. However, not all rights which are guaranteed for the courtroom apply to pre-trial detention and questioning. For example, the solicitor of an accused is not permitted to have regular updates and

running accounts of the progress of an investigation: *Lavery v. Member in Charge, Carrickmacross Garda Station* [1999] 2 I.R. 390.

9. The concept of basic fairness of process applies from the time of arrest. In *DPP v Gormley and DPP v White* [2014] IESC 17, [2014] 2 I.R. 591, Clarke J. described this as:

> "…[T]he requirement that persons only be tried in due course of law therefore requires that the basic fairness of process identified as an essential ingredient of that concept by this Court in *State (Healy) v Donoghue* applies from the time of arrest of a suspect. The precise consequences of such a requirement do, of course, require careful and detailed analysis. … it seems to me that the fundamental requirement of basic fairness does apply from the time of arrest such that any breach of that requirement can lead to an absence of a trial in due course of law. In that regard it seems to me that the Irish position is the same as that acknowledged by the ECtHR and by the Supreme Court of the United States."

10. *DPP v Gormley and DPP v White*confirmed an entitlement to have reasonable access to legal advice prior to the conduct of any interrogation.

11. Further, in *DPP v Gormley and DPP v White*, opinions were given as to possible future development of the law. Thus, Hardiman J. stated (in a judgment concurring with Clarke J.):-

> "[12] In my view, the most salient and practically important feature of Mr. Justice Clarke's judgment is the citation from the judgment of the Supreme Court of the United Kingdom in *Cadder v. Her Majesty's Advocates*[2010] UKSC 43. There, at para. 48, Lord Hope, having summarised the principal features of the European Convention on Human Rights jurisprudence concluded that:
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> > "the contracting States are under a duty to organise their systems in such a way as to ensure that, unless in the particular circumstances of the case there are compelling reasons for restricting the right, a person who is detained has access to a lawyer before he is subjected to police questioning."
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> [13] I believe that the law in Ireland is identical, as to the need to organise [our system] to take account of detained persons' rights.
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> [17] It is, at least *prima facie*, a matter for the legislature and the State to provide for the time and manner of a person's arrest and the circumstances of his or her detention. But it is now essential that these matters should be regulated, and if necessary the mode of regulation altered, in order to vindicate the right to legal advice."

12. In other words, while the right of access to a solicitor before questioning was once again affirmed, Hardiman J. pointed out that there needed to be regulation by the Legislature and the State in the area.

13. In *Gormley* the issue as to whether a detained person is entitled to a general right to have a lawyer present during an interrogation did not arise. Consequently, any statements on such issue are *obiter dicta*.

14. In this case the appellant had access to his lawyer just before the key interview. Also, at the solicitor's request, the interview was interrupted to enable access by the solicitor to the appellant.

15. Consequently, it is clear that the appellant requested access to a solicitor and obtained access to a solicitor. He had access to legal advice. He had access to the solicitor before the important Interview 15, and he had access, at the solicitor's request, during that interview, when the solicitor phoned in and sought to speak to the appellant as Interview 15 was underway. The interview was interrupted to enable the appellant to speak to his solicitor. There was no request to have the legal adviser present during the interview.

16. I am satisfied that the constitutional right of access to legal advice was met by the attendance of the appellant with his solicitor prior to Interview 15, and indeed by the telephone call from his solicitor which interrupted Interview 15.

17. The constitutional right is a right of access to a lawyer. The right is one of access to a lawyer, not of the presence of a lawyer during an interview.

18. I am satisfied that the appellant's constitutional rights were met in the circumstances of this case.

European Convention on Human Rights

19. As to Convention rights, I am satisfied that they also were met. *Salduz v. Turkey* (2009) 49 E.H.R.R. 19 and *Dayanan v. Turkey* (App. No. 7377/03) were opened to the Court. I have already quoted Hardiman J. in *DPP v Gormley and DPP v White*.

Presence of a Solicitor issue

20. As to the first issue, the presence of a solicitor: the appellant consulted with his solicitor prior to the 15th interview. He also received a telephone call from his solicitor during the 15th interview. Thus, his constitutional right of access to legal advice was met. The appellant, in the circumstances of this case, was not entitled to have a solicitor present during the interview.

21. It is an important factor that since the decision in *Gormley*, the State has introduced a Code of Practice on Access to a Solicitor by Persons in Garda Custody, which permits the presence of a solicitor during interview, if necessary. Also, of importance is the fact that interviews are video-taped.

The Damache issue

22. As to the second issue, the Damache issue, I agree with the judgment of Charleton J.

The threats and inducement issues

23. As to the third issue, the threats and inducement issues, I agree with the judgment of Charleton J.

24. Consequently, I would dismiss the appeal.