

Kennedy v Ireland

[1987] I.R. 587, [1988] I.L.R.M. 472 (12 January 1987)

THE HIGH COURT

Hamilton P.

1984 No. 5011P

**Geraldine Kennedy,
Bruce Arnold
and
Mavis Arnold**

Plaintiffs

AND

**Ireland
and
The Attorney General**

Defendants

JUDGMENT of Hamilton P. delivered on the 12th day of January 1987

1. The facts in this case are not in dispute.
2. At all relevant times both the first and second plaintiffs were distinguished and well known political correspondents with Irish national newspapers with extensive circulation within the state. The third plaintiff was and is the spouse of the second plaintiff, a free-lance journalist and an active participant in the Women's Political Association. In the course of their work and in their private capacities, each of the plaintiffs made extensive use of telephones from their respective homes. The first plaintiff's private telephone number was 280006 and the second and third plaintiffs' was 805575.
3. In para. 7 of the statement of claim delivered on behalf of the plaintiffs it was alleged that:-

"On dates unknown between the 28th July, 1982, and the 16th November, 1982, in respect of the first-named plaintiff's telephone number and between the 10th May, 1982, and the 12th July, 1982, in respect of the second-named plaintiff's then telephone number, the said telephones were illegally tapped. The said telephone tapping was carried out by one or other or either of the servants or agents of the first defendant pleaded herein. Recordings and transcripts were illegally made by the said servants or agents of the State".
4. In para. 4 of the defence delivered on behalf of the defendants, it is stated that:-

"The defendants admit the facts set out in para. 7 of the statement of claim herein but deny that by reason of any of the said facts there was any illegality or any breach of any of the plaintiffs' constitutional rights either as alleged or at all."
5. The plaintiffs had in their statement of claim alleged that the activities of which they complained and which were admitted on behalf of the State were not authorised by law, were in breach of contract and in breach of the constitution.
6. It appears from a statement made by the then Minister for Justice on the 20th January, 1983, and which was by consent of the parties to these proceedings admitted in evidence, that he confirmed that both telephones were in fact "tapped",

that the facts showed that the system of safeguards which successive Ministers for Justice had publicly declared in Dáil Éireann éireannto be an integral part of the system was either disregarded in the cases in question or, what amounts to the same thing, was operated in such a way as to be rendered meaningless and that the facts showed that there was no justification for the 'tapping' of either of the two telephones and that what occurred went beyond what could be explained as just an error of judgment.

7. Warrants authorising the communication to Assistant Commissioner T.J. Ainsworth by the Minister for Posts and Telegraphs of particulars of all communications on the said telephone numbers were issued by the then Minister for Justice on the 14th May, 1982, in respect of telephone number 805575 and 30th July, 1982, in respect of telephone number 280006.

8. It is submitted on behalf of the defendants that the right to issue such warrants is recognised by the provisions of s. 56 of the Post Office Act, 1908.

9. It is conceded by the State that such warrants are issued only in very limited circumstances such as for security purposes or for the prevention and detection of serious crime. It is further conceded by the State, as appears from the statement of the then Minister for Justice made on the 20th January, 1983, already referred to, that there was no justification for the tapping of either of the two telephones in question in this case.

10. It is submitted by Mr. Fennelly on behalf of the defendants herein, the State and the Attorney General, that while the 'tapping' of the telephones was improper, it was not illegal and did not interfere with any constitutional rights of the plaintiffs or either of them.

11. This is a submission which I cannot accept.

Constitutional Rights

12. In their statement of claim the plaintiffs, *inter alia*, claim:-

- (1) that their rights under Article 40, s. 3 of the Constitution include the personal right to privacy and to be free from unlawful and unwarranted intrusions into their private telephone conversations,

(2) that the State has failed:—

(a) to defend and vindicate their personal rights,

(b) to respect the privacy of the plaintiffs in the exercise of their profession as political journalists and in the living of their private lives by not interfering with, listening to and tapping their telephone conversations,

(c) to respect the guarantee to all citizens to express freely their convictions and opinions, including criticism of Government policy,

and

(3) that the State has:—

(a) interfered without any lawful cause or justification into the private lives and liberties of the plaintiffs,

(b) tapped the telephones of the plaintiffs and taken transcripts of conversations in a manner intended to interfere with the plaintiffs in the exercise of their guaranteed rights.

13. The personal right to privacy is not one of the rights actually acknowledged by Article 40 of the Constitution but as stated by Mr. Justice Kenny in *Ryan v. The Attorney General* [1965] I.R. 294 at p. 313:-

"[T]here are many personal rights of the citizen which follow from the Christian and democratic nature of the State which are not mentioned in Article 40 at all."

14. The personal right to privacy is one of such rights. In the course of his judgment in *Norris v. The Attorney General* [1984] I.R. 36 at pp. 100 and 101 of the report, Mr. Justice McCarthy stated:-

"The Constitution does not guarantee or, in any way, expressly refer to a right of privacy — no more, indeed than does the United States Constitution, with which our Constitution bears so many apparent similarities. In the United States Constitution the right to privacy in one form or another has been founded upon the First Amendment (*Stanley v. Georgia* (1969) 394 U.S. 557); the Fourth and Fifth Amendments (*Terry v. Ohio* (1968) 392 U.S. 1); in the penumbras of the Bill of Rights (*Griswold v. Connecticut* (1965) 381 U.S. 479)

— the contraceptives case; in the Ninth Amendment (*Griswold v. Connecticut*); and in the concept of liberty guaranteed by the first section of the Fourteenth Amendment (*Meyer v. Nebraska* (1923) 262 U.S. 390).

In our Constitution a right of privacy is not spelt out. As stated by Mr. Justice Henchy in his judgment, there is a guarantee of privacy in voting under Article 16, s. 1, sub-s. 4 — the secret ballot; a limited right of privacy given to certain litigants under laws made under Article 34; the limited freedom from arrest and detention under Article 40, s. 4; the inviolability of the dwelling of every citizen under Article 40, s. 5; the rights of the citizens to express freely their convictions and opinions, to assemble peaceably and without arms, and to form associations and unions—all conferred by Article 40, s. 6, sub-s. 1; the rights of the family under Article 41; the rights of the family with regard to education under Article 42; the right of private property under Article 43; freedom of conscience and the free profession and practise of religion under Article 44. All these may properly be described as different facets of the right of privacy, but they are general in nature (as necessarily they must be in a Constitution) and do not set bounds to the enumeration of the details of such a right of privacy when the occasion arises. In our jurisdiction this is best exemplified in the *McGee Case* [1974] I.R. 284 where, whilst Mr. Justice Walsh rested his judgment upon the provisions of Article 41, Mr. Justice Budd, Mr. Justice Henchy and Mr. Justice Walsh relied upon the guarantees of Article 40, section 3. I would respectfully share the latter view of the true foundation for what the *McGee Case* upheld — the right of privacy in marriage.

Whilst the Constitution of the Irish Free State (Saorstát Éireann éireann) 1922, did not, as it were, isolate the fundamental rights of citizens in a manner in which the present Constitution of 1937 has done, articles 6, 7, 8, 9 and 10 of that Constitution indicate the manner in which certain rights were spelt out but, to a degree, highlight the absence of such guarantees as are contained in Article 40, s. 3, and Article 41 of the Constitution. There may well be historical reasons for these differences — a greater awareness of the need for the annunciation of fundamental rights was present during the 1930s than at the time of the negotiations for the Treaty

that led to the enactment of the Constitution of the Irish Free State. At all events, since 1937, the concept of judicial dynamism in constitutional law has grown, thereby identifying more readily the role of the Courts, and in particular, this Court as the judicial organ of government, not merely by way of a supervisory jurisdiction on the actions of the legislative and executive branches of government but by way of legal interpretation — thus playing its part in "seeking to promote the common good, with due observance of prudence, justice and charity, so that the dignity and freedom of the individual may be assured . . ." as most strikingly evidenced by the decision in the *McGee Case*.

How then, to identify the nature of the personal right of privacy? The right to privacy has been called by Brandeis J. of the United States Federal Supreme Court "the right to be let alone" — a quotation cited by the Chief Justice in this case and by Mr. Justice Walsh in his dissenting judgment as a member of the Court of Human Rights in *Dudgeon v. United Kingdom* (1981) 4 E.H.R.R. 149. By way of definition it has brevity and clarity and I would respectfully adopt it as accurate and adequate for my purpose but, to a degree, the very definition begs the question. The right to privacy is not in issue, the issue is the extent of that right or the extent of the right to be let alone."

15. Though not specifically guaranteed by the Constitution, the right of privacy is one of the fundamental personal rights of the citizen which flow from the Christian and democratic nature of the State. It is not an unqualified right. Its exercise may be restricted by the constitutional rights of others, by the requirements of the common good and is subject to the requirements of public order and morality.

16. There are many aspects to the right to privacy, some of which have been dealt with in the cases referred to by Mr. Justice McCarthy in the passage which I have just quoted from his judgment in *Norris's Case* [1984] I.R. 36 and the remaining aspects remain to be dealt with when suitable cases come before the courts for determination. The question to be determined in this case is whether the right to privacy includes the right to privacy in respect of telephonic conversations and the right to hold such conversations without deliberate, conscious and unjustified interference therewith and intrusion thereon by servants of the State, who listen to

such conversation, record them, transcribe them and make the transcriptions thereof available to other persons.

17. I have no doubt but that it does.

18. As stated by Mr. Justice Henchy in his judgment in *Norris v. The Attorney General* [1984] I.R. 36 at p. 71:-

"Having regard to the purposive Christian ethos of the Constitution, particularly as set out in the preamble ("to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations"), to the denomination of the State as "sovereign, independent, democratic" in Article 5, and to the recognition, expressly or by necessary implication, of particular personal rights, such recognition being frequently hedged in by overriding requirements such as "public order and morality" or "the authority of the State" or "the exigencies of the common good", there is necessarily given to the citizen, within the required social, political and moral framework, such a range of personal freedoms or immunities as are necessary to ensure his dignity and freedom as an individual in the type of society envisaged. The essence of those rights is that they inhere in the individual personality of the citizen in his capacity as a vital human component of the social, political and moral order posited by the Constitution.

Amongst those basic personal rights is a complex of rights which vary in nature, purpose and range (each necessarily being a facet of the citizen's core of individuality within the constitutional order) and which may be compendiously referred to as the right of privacy."

19. The nature of the right to privacy must be such as to ensure the dignity and freedom of an individual in the type of society envisaged by the Constitution, namely, a sovereign, independent and democratic society. The dignity and freedom of an individual in a democratic society cannot be ensured if his communications of a private nature, be they written or telephonic, are deliberately, consciously and unjustifiably intruded upon and interfered with. I emphasise the words "deliberately, consciously and unjustifiably" because an individual must accept the risk of

accidental interference with his communications and the fact that in certain circumstances the exigencies of the common good may require and justify such intrusion and interference. No such circumstances exist in this case.

20. There has been, as is admitted on behalf of the defendants, a deliberate, conscious and unjustifiable interference by the State through its executive organ with the telephonic communications of the plaintiffs and such interference constitutes an infringement of the constitutional rights to privacy of the three plaintiffs. Though the second plaintiff is not a citizen of this state, he is entitled to the same personal rights as if he were. Such interference constituted an infringement of the plaintiff's constitutional right to privacy and, in the words of Mr. Justice Walsh spoken during the course of his judgment in *Meskeil v. Córas Iompair Éireann* [1973] I.R. 121 at p. 134, such interference was "unlawful as constituting a violation of the fundamental law of the State."

21. In the same case, Walsh J. further stated at pp. 132 and 133:-

"[A] right guaranteed by the Constitution or granted by the Constitution can be protected by action or enforced by action even though such action may not fit into any of the ordinary forms of action in either common law or equity and that the constitutional right carries within it its own right to a remedy or for the enforcement of it."

22. In this case the plaintiffs and each of them claim damages for breach of constitutional rights, abuse of power and breach of contract. In the events which have happened, the only remedy which the plaintiffs can obtain in this court, which, as one of the organs of the State is obliged to respect, defend and vindicate the personal rights of the citizens, lies in damages. Damages may be compensatory, aggravated, exemplary or punitive.

23. In the course of argument in this case I stated that, in my opinion, the plaintiffs were not entitled to punitive damages in this case. I still adhere to that view because of the action of the then Minister for Justice, in the course of the statement made by him on the 20th January, 1983, already referred to, in openly acknowledging that both the telephones referred to in this case were in fact "tapped", that the system of safeguards which successive Ministers of Justice have publicly declared in Dáil Éireann éireann to be an integral part of the system was either disregarded or, what

amounted to the same thing, was operated in such a way as to be rendered meaningless and that the facts showed that there was no justification for the tapping of either of the two telephones and that what occurred went beyond what could be explained as just an error of judgment. In doing so he, though belatedly, vindicated the good names of the plaintiffs herein, in particular the first and second plaintiffs.

24. It is quite clear from a consideration of the Civil Liability Act, 1961, and in particular s. 7, sub-s. 2 and s. 14, sub-s. 4 thereof that Irish law recognises a distinction as between "punitive damages" and "exemplary damages". In determining the damages to which the plaintiffs are entitled, I must have regard not only to the distress which was suffered by the plaintiffs as a result of the infringement of their constitutional right to privacy, the implication thereof and the publicity consequent thereto but also to the fact that the infringement was carried out deliberately, consciously and without justification by the executive organ of the State which is under a constitutional obligation to respect, vindicate and defend that right.

25. In the course of his speech to the House of Lords in *Rookes v. Barnard* [1964] A.C. 1129, at p. 1226, Lord Devlin distinguished between aggravated and exemplary damages and stated that exemplary damages may be awarded where there has been "oppressive, arbitrary or unconstitutional action by the servants or the government".

26. The action of the executive in this case in "tapping" the telephones of the plaintiffs without any lawful justification and in interfering with and intruding upon the privacy of the plaintiffs constituted an attack on their dignity and freedom as individuals and as journalists and cannot be tolerated in a democratic society such as ours is and our Constitution requires it to be and the injury done to the plaintiffs has been aggravated by the fact that it has been done by an organ of state which is under a constitutional obligation to respect, vindicate and defend their rights. The plaintiffs are in my opinion entitled to substantial damages and it is, in the circumstances of this case, irrelevant whether they be described as "aggravated" or "exemplary" damages.

27. I have carefully considered the evidence of the plaintiffs which I accept as honest and truthful with regard to the effect that the knowledge that their telephones had been "tapped" had on them and the distress that they suffered, which distress

was accentuated by the realisation that the only justification for such tapping lay in security reasons or in connection with the investigation of serious crime. I am satisfied that the plaintiffs have not suffered any loss and am not satisfied that the change in the second plaintiff's career as a journalist is attributable to the actions of the executive. I am also satisfied, particularly having regard to the statement of the Minister for Justice already referred to, that the reputations of the plaintiffs and each of them, have been vindicated. That being said however, the injury done to the plaintiffs' right to privacy was serious, the distress suffered by them as a result thereof significant and in the case of the first and second plaintiffs was done consciously, deliberately and without justification. In the case of the third plaintiff, who is the spouse of the second plaintiff, the injury was not done consciously or deliberately but incidentally.

28. In all the circumstances of this case, I will award to the first plaintiff the sum of £20,000 damages, to the second plaintiff the sum of £20,000 damages and to the third plaintiff the sum of £10,000 damages.