Neutral Citation Number: [2010] IEHC 99

THE HIGH COURT

2009 688 JR

Alan Brady

Applicant

And

His Honour Judge Raymond Fulham

And

The Director of Public Prosecutions

Respondents

Judgment of O Neill J. delivered on the 26th day of March 2010.

1. Reliefs Sought

1.1 This Court (Peart J.) granted leave to the applicant to apply by way of judicial review for the following reliefs:-

1. An order of *certiorari* quashing the order of the first named respondent of the 6th May, 2009, remanding the applicant on bail to the next sessions of Wicklow Circuit Criminal Court.

2. An order of *certiorari* quashing the order of the first named respondent of the 6th May, 2009, directing that the applicant's case be listed for trial as a consequence of his order remanding the applicant on bail to the next sessions of Wicklow Circuit Criminal Court.

3. An injunction restraining the second named respondent from prosecuting the applicant as a consequence of the first named respondent's order remanding the applicant on bail to the next sessions of Wicklow Circuit Criminal Court.

4. An interim order pursuant to O.84 r.20(7) of the Rules of the Superior Courts 1986 staying any further proceedings against the applicant in respect of the offences the subject matter of the first named respondent's order dated the 6th May, 2009, pending the determination of the within judicial review.

2. The Facts

2.1 On the 5th October, 2005, the applicant was charged with various offences contrary to the Misuse of Drugs Acts 1977-1984, as amended. A book of evidence was served on the applicant on the 22nd September, 2006. On the same date, District Judge Aneas McCarthy made an order returning the applicant for trial to the next sittings of Wicklow Circuit Criminal Court. The applicant was released on bail of his own bond of €2,000, which he was required to lodge. The conditions of the recognisance entered into by the applicant pursuant to s.22 of the Criminal Procedure Act 1967 and ss. 5 and 6 of the Bail Act 1997, stipulated that the applicant was required to surrender his passport and to sign on twice weekly (on Wednesday and Friday between 9am and 9pm) at Blanchardstown Garda Station. In addition, condition no. 1 stated as follows:-

"The conditions of this recognisance are that the above named accused will:

(1) appear before the present/next sitting of the Circuit Criminal Court for Wicklow on the 5th December 2006 for the disposal of criminal business and will not depart from the said Court without leave and will attend there in person from day to day during the time the said Court shall be so held or any adjournment thereof for the purpose of his trial and also attend any other Court to which his trial may be transferred until the charge(s) set out in the charge sheet listed above shall be duly disposed of according to law."

2.2 At Wicklow Circuit Criminal Court the applicant's case was adjourned on the 5th December, 2006, on the 6th March, 2007, on the 15th May, 2007 and on the 17th July, 2007. On each of these occasions the applicant was remanded on continuing bail. When the matter was next listed, on the 4th December, 2007, Judge Michael O'Shea, following legal argument, ruled that the order returning the applicant for trial was defective by reason of the fact that no statement of charges was attached to the order, notwithstanding a recital in the order to that effect, thus constituting an error on the face of the order. The learned judge made no order in the matter.

2.3 Mr. James Boyle, State Solicitor for County Kildare, then put the applicant's solicitors, Garrett Sheehan & Partners, on notice that he would be making an application under the slip rule to District Judge McCarthy, to amend the original return for trial order. That amendment was made on the 7th December, 2007. However, it has since transpired that the amended return for trial order was lost in the post.

2.4 On the 1st April, 2008, the matter again came before Judge O'Shea at Wicklow Circuit Criminal Court. The amended return for trial was not produced. Judge O'Shea confirmed his previous ruling of "no order" and indicated that the matter should only be listed on foot of a new return for trial.

2.5 The applicant then advised his solicitors on the 6th May, 2008, that the €2,000 he had lodged in respect of bail had been returned to him by the Circuit Court office. On the 9th June, 2008, the applicant's solicitors collected the applicant's passport, which had previously been surrendered by him, from the Garda National Bureau of Criminal Investigation.

2.6 In a letter dated the 28th January, 2009, Mr. Boyle indicated to the applicant's solicitors that an application for a

duplicate of Judge's McCarthy's order of the 7th December, 2007, would be made by the prosecution on the 6th February, 2009, at District Court 44, Chancery Street, Dublin 7. On that date the matter was not called as the charge sheets were not before the District Court. The matter then came before District Judge McCarthy sitting at District Court 44, Chancery Street on the 20th February, 2009. The learned District Judge adjourned the matter to allow Mr. Boyle to swear an affidavit outlining the reasons for the delay in bringing the matter before him between December 2007 and February 2009.

2.7 The next event was a letter from Mr. Boyle to the applicant's solicitors, dated the 12th March, 2009, sent by fax, advising that the matter would be listed the following day, the 13th March, 2009, before District Judge McCarthy in Limerick District Court. The applicant's solicitor instructed a Limerick based solicitor, Mr. Shaun Elder, in the matter, who informed the judge that the defence did not consent to the order amending the return for trial being made. Such an amendment to the return for trial order was made, however, by District Judge McCarthy, on a copy of the original order. The offences with which the applicant was charged were attached to the return for trial, the date of the order was changed from the 22nd September, 2006, to the 13th March, 2009, and the order purported to return the applicant to the next sittings of Wicklow Circuit Criminal Court.

2.8 Mr. Boyle wrote to the applicant's solicitors on the 3rd April, 2009, advising them that the applicant had been returned to the next sittings of Wicklow Circuit Criminal Court, which had taken place on the 18th March, 2009. He noted that there had been no appearance by the defence and that the matter had been adjourned again to the upcoming sessions commencing on the 21st April, 2009. On that date the applicant did not appear in court. He was, however, legally represented. His counsel informed Judge Fulham, the first named respondent, that there was an issue with the duplicate amended return for trial order. The learned judge listed the matter for the 24th April, 2009, for legal argument. Mr. Robert Eager, solicitor for the applicant, in paras. 22-23 of his affidavit stated that the applicant had not been cautioned to attend court on either the 18th March, 2009, or the 21st April, 2009. Detective Garda Maurice Ward, in his affidavit sworn on the 2nd December, 2009, avers that he attempted to caution the applicant prior to his case being mentioned on the 21st April, 2009, but that his attempts were unsuccessful.

2.9 In Wicklow Circuit Criminal Court, on the 24th April, 2009, the applicant's counsel submitted that the duplicate amended return for trial did not confer jurisdiction on the court as it was not a fresh return for trial order and that the sessions to which that order had returned the applicant had long since passed. It was submitted the previous "no order" made by District Judge O'Shea meant that the applicant was no longer on bail to appear before the Court. On behalf of the second named respondent, counsel argued that the duplicate amended return for trial was validly amended pursuant to the District Court slip rule and the Court had jurisdiction in the matter.

2.10 In a ruling of the 6th May, 2009, Judge Fulham held that the duplicate return for trial conferred jurisdiction on the Court. He considered the applicant to have always been on continuing bail and he noted that at no stage had any Judge set aside the bail condition. Mr. Eager described the events in Court on the 6th May, 2009, in the following terms in his affidavit sworn on the 29th June, 2009:-

> *"26. … I say that the Respondent Judge ruled inter alia that the duplicate return for trial order conferred jurisdiction on the Court and deemed the Applicant to have 'always been and has continued on bail'. The Respondent Judge stated inter alia 'that at no stage did any Judge set aside the bail condition, which was important'. … The Respondent Judge also stated 'the two orders of 'No Order' were simply deferring the issue until either the return for trial was amended or whatever; and it appears it has been amended.' …*
>
> *…*
>
> *28. … the Respondent Judge directed that the case be listed for trial. He remanded the Applicant on continuing bail to the next sessions of Wicklow Circuit Criminal Court, commencing on 30th June, 2009. I say that the Applicant's Counsel enquired on what terms the Applicant was being remanded. The Respondent Judge enquired as to the previous terms and having been informed of same directed that the Applicant be remanded on the same terms … The Applicant's Counsel argued that this was entirely artificial given that the Applicant was not present and was not entering into a fresh bail bond. I say the Respondent Judge sought the opinion of Counsel for the second named Respondent as to what followed on from re-instating the position. Counsel for the second named Respondent argued that it was the defence who were adopting an artificial position. I say that the Respondent Judge remarked that 'the consequence of his order was that Alan Brady had never not been on bail' and he affirmed his order of remand on continuing bail on the same terms and conditions with liberty to apply."*

Evidence of the Court's ruling was contained in the registrar's note of the 6th May, 2009, which reads as follows:-

> *"No Circuit Court Judge has set aside the bail conditions set down by the District Court.*
>
> *As far as this ct is concerned the 2 no orders were simply deferring the case until the return for trial was amended.*
>
> *The effect of no order does not mean the bail is revoked.*
>
> *Mr. Brady should continue on bail.*
>
> *The case should proceed to be listed for Trial.*
>
> *Adj 30/6/09 cont. Bail terms as set out in D/Ct Bail*
>
> *Mr. Brady was never not on Bail money was returned to him in error.*
>
> *Judicial intent has been consistent. Same bail conditions as before.*
>
> *Liberty to apply.*
>
> *…"*

No additional evidence of what occurred in Court on the 6th May, 2009, was put forward by the second named respondent.

2.11 The applicant takes issue with this ruling. It is contended that the "no order" set the bail conditions aside and that once that order was made that the applicant was no longer bound by his bond. The position of the second named respondent is set out in para. 5 of the affidavit of Mr. Boyle sworn on the 25th November, 2009:-

> *"5. I say and believe that the Applicant entered into a recognizance on his original sending forward for trial on the 22nd September, 2006. That recognizance is signed by Alan Brady and I say and believe that he is still bound by that recognizance until the charges against him are duly disposed of in accordance with law. Although the date of the said recognizance is said to be the 22nd May, 2006, I believe that to be a typo and I say and believe this recognizance was entered into on the 22nd September, 2006, when the Applicant was first sent forward for trial. …"*

2.12 The matter was listed for trial and the applicant was remanded on continuing bail on the previous terms to the next sessions of Wicklow Circuit Criminal Court, commencing on the 30th June, 2009. Detective Garda Ward cautioned the applicant to appear in court on that date. He gave the following evidence in his affidavit:-

> *"… I say that I met with Alan Brady on the 29th May, 2009 and cautioned him to appear on that date. I informed him he was required to appear at Wicklow Circuit Criminal Court in Bray Town on the 30th June, 2009 at 10.30am. The Applicant told he* [sic.] *that he understood the caution. Further, he stated that he was aware his case was listed as his solicitor had previously informed him of same. I say that he did not appear on that date. I understand these proceedings were instituted on the 29th June, 2009."*

3. The Issues

3.1 The issue that arises for determination is whether the first named respondent was correct in concluding, in his ruling of the 6th May, 2009, that the applicant was on continuing bail. Also relevant is the question of whether the first named respondent had jurisdiction to make a new remand order, notwithstanding the terms of any previous remand order made in the case?

4. Counsels' Submissions

4.1 Mr. McDermott S.C., for the applicant, submitted that "no order" having been made by Judge O'Shea, by reason of the defective return for trial, the applicant was released from his obligation to appear before Wicklow Circuit Criminal Court and from the conditions of his recognisance. The applicant, he argued, was no longer on bail after "no order" was made on the 7th December, 2007. Mr. McDermott drew an analogy with a person remanded in custody, who, could not lawfully be detained in custody on foot of a "no order". He relied on *In Re Singer* (1963) 97 I.L.T.R. 130 and *In Re Singer (No. 2)* (1964) 98 I.L.T.R. 112 in this regard.

4.2 It was further submitted that the first named respondent did not have jurisdiction to make the order that it did once "no order" was made as the defect in the original return for trial order did not vest jurisdiction in the Circuit Criminal Court to embark upon a trial of the applicant. The effect of the "no order" was to dispose of the charges against the applicant according to law, it was argued. Mr. McDermott contended that had the State wished to bring the applicant lawfully before the Court they should have invoked a procedure on foot of the amended return for trial, but it did not do so. Such a procedure was envisaged by Ó Dálaigh C.J. in *The State (Hayden) v. Good* [1972] I.R. 351 at p. 358, he submitted.

4.3 Ms. Brennan B.L., for the second named respondent, submitted that the effect of "no order" was not to discharge the accused from the charges he faced or to release him from the terms of his bail bond. The only circumstances in which the charges against the applicant could be disposed of according to law were if the applicant was convicted or acquitted by a jury, or if the Director of Public Prosecutions entered a *nolle prosequi* or if the case was disposed of by a Circuit Court Judge pursuant to an application by the accused for a dismissal of charges under s. 4E of the Criminal Procedure Act 1967, as inserted by s. 9 of the Criminal Justice Act 1999.

4.4 The applicant was not released at any stage, she submitted, from his legal obligation to appear in court to face the charges before him. She argued that the fact that the bail monies were returned to him did not release him from this obligation. She referred to s. 5(3) of the Bail Act 1997 which provided that the only circumstances in which bail monies could be returned were when an accused was convicted or found not guilty or a *nolle prosequi* was entered. The language of ss. 22 and 23 of the Criminal Procedure Act 1967 also supported the view, she argued, that a Circuit Court Judge may make a fresh remand at a future stage in the proceedings based on the original recognisance.

4.5 The reliance by the applicant on the Singer cases was, in Ms. Brennan's submission, misplaced. The first case, she submitted, concerned a warrant document, a document authorising the detention of a person, in contrast to the instant case. She noted, however, that the second case concerned a bail bond freely entered into by an accused, which was found by the Supreme Court to be a valid return for trial.

4.6 The Court had an inherent discretion, in her submission, even where someone was not on bail to issue a remand and she cited *Kiely v. Judge Ní Chondúin* [2008] I.E.H.C. 370 (Unreported, High Court, Sheehan J., 27th November, 2008) in support of this proposition, where the inherent jurisdiction of the District Court to issue a warrant for the arrest of an accused person was recognised.

5. Decision

5.1 In this case there is no challenge to the validity of the return for trial. Here, the order sought to be quashed is the remand of the applicant on bail. It is clear from the evidence given that the first named respondent regarded the applicant as having been on continuing bail. This is notwithstanding the return of the bail monies to the applicant personally and the return of his passport to his solicitors. The obligation the applicant undertook when he entered in to the recognisance is *inter alia*, as stated on the face of the recognisance as follows:-

"(1) …. will attend there in person from day to day during the time the said Court shall be so held or any adjournment thereof for the purpose of his trial and also attend any other Court to which his trial may be transferred until ***the charge(s) set out in the charge sheet listed above shall be duly disposed of according to law.****"* [Emphasis added]

5.2 Obviously a practical problem arose in this case because the original return for trial was defective because the charges were not included on it.. As it is the return for trial that grounds the jurisdiction of the Court to which an accused is sent for trial on specified charges, His Honour Judge O'Shea predictably made no order when the case first came before him, no doubt on the basis that he had no jurisdiction in the absence of a valid return for trial to make any order concerning the prosecution of the charges laid against the applicant.

5.3 This eventuality created an obvious practical problem. As the Circuit Court could not make any order and hence could not adjourn the prosecution to a later date in the Circuit Court, how was the applicant to comply with his obligations under the recognisance to attend Court as required? The applicant has construed this difficulty as a termination of the obligation in question, a view which he feels has been confirmed by the return of his €2000 cash lodgment and his passport. In my opinion he was wrong in this conclusion. Certainly, whilst the prosecution was in hiatus, pending the amendment of the return for trial under the slip rule in the District Court, he was relieved of the obligation to attend the Circuit Court in person, for the obvious reason that no proceedings were taking place in that Court, in the prosecution. However, once the District Court made the amending order, thereby invoking correctly the jurisdiction of the Circuit Court the applicant's obligation under the recognisance revived and having been cautioned of when to attend the Circuit Court, he was, under the terms of the recognisance obliged to comply. Thus, in my opinion, the first named respondent was correct in concluding, when the matter came before him on the 6th May 2009, that the applicant had remained bound under the conditions of his original bail terms as set in September 2006. The return of the cash lodgment and the passport was an error, as the charges against the applicant had not been disposed of according to law.

5.4 Even if I and the first named respondent are wrong in this view, the question arises as to whether the remand order he made on the 6th May, 2009, can be said to be invalid? On that date, a valid return for trial existed in respect of the applicant. I am satisfied that the corrected Return for Trial, gave jurisdiction to the Circuit Criminal Court to try the applicant and, for that purpose, it was within the jurisdiction of the Circuit Court to remand the applicant from time to time as is usual until prosecution and defence were ready for trial.

5.5 The order made was a simple order of remand obliging the applicant to turn up in Court at its next sitting. The applicant was cautioned in this regard. Thus, even if the applicant was discharged from his obligations under the recognisance entered into in September 2006, the Circuit Court had ample jurisdiction to make a remand order on the 6th May, 2009, because it had jurisdiction to try the applicant on the charges set out in the corrected Return for Trial. As part of that jurisdiction the Circuit Court had to consider whether there was to be a remand in custody or on bail.

5.6 In the event, having been informed of the terms of the original bail, the first named respondent fixed the same terms in remanding the applicant on bail to the sitting of the Circuit Court on the 30th June, 2009. The fact that the applicant did not agree to these terms or any terms is immaterial. The Court determines the conditions on which bail will be granted with or without the assent of an accused person. Needless to say, these must be tailored to enable an accused person to take up bail, but an accused does not have a right of veto over the grant or refusal of bail. The applicant could, of course, chose not to enter into the required bond and thereby forfeit bail. Having selected the same terms, under which the applicant had enjoyed bail for in excess of two and a half years it could hardly be said that the conditions imposed impaired the right of the applicant to bail. Even if the applicant was dissatisfied with the conditions of bail imposed, it was always open to him apply to this Court in the weekly bail list for relief in that regard.

6. Conclusion

6.1 For the reasons set out above, I have come to the conclusion that I must refuse the relief sought in these proceedings.