Neutral Citation [2015] IEHC 620

THE HIGH COURT

JUDICIAL REVIEW

IN THE MATTER OF ARTICLE 40.4.2 OF THE CONSTITUTION

[2015 No. 1230 SS]

BETWEEN

PAUL O'SHEA

APPLICANT

AND

THE GOVERNOR OF SHELTON ABBEY

RESPONDENT

JUDGMENT of Mr. Justice Bernard J. Barton delivered the 13th day of August 2015

1. These proceedings come before the court by way of an application under Article 40.4.2 of the Constitution and are concerned with an order of committal dated the 17th of July 2015.

Background

2. The applicant was the first named defendant in High Court proceedings entitled between George Maloney, plaintiff v. Paul O'Shea and Canon Agri Limited, defendants.

3. On the 22nd of December 2014 Noonan J. made an order in those proceedings granting the plaintiff certain injunctive reliefs which included an order that the first named defendant (herein after the applicant) surrender vacant possession of certain lands described in a schedule to the plenary summons. An order prohibiting the applicant from impeding or obstructing the plaintiff in his efforts to secure the lands in question was also made at that time.

4. There had been an issue in those proceedings which concerned the identification of the scheduled lands as a result of which the plaintiff sought and was granted an order amending the schedule by incorporating an amended map of the property in question which was edged by a red line. That map was also annexed to the court Order of the 22nd of December 2014.

5. The applicant failed to comply with those Orders, whereupon, by motion dated the 18th of May 2015, the plaintiff sought an order for his attachment and committal. That motion was heard by Gilligan J. on the 19th of May 2015. At the hearing the applicant gave a sworn undertaking to surrender vacant possession, within 21 days, of the property described in the amended schedule and map. He also undertook not to impede or obstruct the plaintiff in his efforts to take possession of the property, the court noting that the receiver intended to enter the property through fields via a driveway to obtain possession of farm buildings described in court as "the sheds".

6. Having been given these undertakings, the court adjourned the motions to the 16th of June 2015. It transpired at the hearing of the adjourned motions that the applicant had again failed to comply with his sworn undertakings. On the 18th of June Gilligan J. made an order which found that the applicant was in contempt both of the order of the 22nd of December 2014 and his undertakings. Liberty was given to the plaintiff to issue an order for the attachment of the applicant returnable for the 24th of June to show cause as to why he should not be committed to prison for such contempt.

7. At the hearing of the matter on the 24th of June, the applicant gave a further undertaking to abide by the order of the 22nd of December 2014 whereupon the motion was further adjourned to the 8th of July, the warrant for attachment being stayed for two weeks.

8. On the 8th of July at the hearing of the adjourned motion, the applicant having once again failed to comply with the order and his undertakings , Gilligan J. found the applicant guilty of a flagrant and serious contempt by continuing to disobey both the order and the undertakings. Accordingly, the court ordered that the contempt be considered punitive in nature, and as consequence of which the applicant was not to be afforded any opportunity to purge his contempt.

8. As to that the court ordered that the applicant be committed to Mountjoy Prison to be detained there for a hundred days in respect of his contempt and that the plaintiff be at liberty to issue an order of committal directed to the Commissioner and members of an Garda Siochana to arrest the applicant and detain him in that prison.

9. Thereafter the plaintiff issued an order of committal which made specific reference to the orders of 22nd of December 2014 and the 8th of July 2015 and the undertakings of the 19th of May, the breaches thereof in respect of which the applicant had been found to be in contempt, and commanded the arrest of the applicant that he be lodged in Mountjoy for a hundred days without opportunity to purge his contempt. The order was dated the 17th of July and on its face was purportedly made by the Chief Justice.

10. Following the making of the conditional order, the governor ,as required pursuant to provisions of Article 40 , on the 11th of August certified in writing that the applicant was held in custody pursuant to the order of committal and which was exhibited.

11. In addition to the certificate, the assistant governor, Pat Corcoran, in the absence of the governor who was on leave, swore a replying affidavit in which he exhibited the order of the 8th of July, the order of the 22nd of December 2014, the plenary summons and the affidavit of George Maloney sworn the 22nd of December 2014 exhibiting the amended schedule referred to in the order of the 22nd of December 2014, such documentation being exhibited for the assistance of the court in the course of its enquiry.

The applicant's case
12. The applicant's complaint is directed not towards jurisdiction or substance of the orders of the 22nd of December 2014 and 8th of July but rather the process of subsequent execution. This is particularly understandable having regard to the comity which exists between courts exercising the same jurisdiction the general rule being that it is only in exceptional circumstances that an Article 40 application will lie in relation to post conviction detention. See *The State (McDonagh) v. Frawley* [1978] I.R. 131 and *Byrne v. the Governor of Wheatfield Prison* [2015] IEHC 166.

13. The grounds for this application are set out in the affidavit of the applicant's solicitor, Jacqueline McManus sworn the 10th of August 2015.

14. The first of these is that the lands referred to in the schedule to the plenary summons as amended, annexed to the order of the 22nd of December 2014 and referred to in the committal order, included lands which were not the applicant's property but which belonged to neighbours and relatives. The applicant could not be legally required to deliver up that which he did not possess. Secondly, it is said that the order of the 22nd of December 2014 was not served personally and that this was a prerequisite to the lawfulness of an order containing, as it did, a penal endorsement.

15. Thirdly it is said that the description of the lands on the face of the committal order which, apart from including property which the applicant did not and could not have been required to surrender, was vague and lacking in specifics and detail to the point of uncertainty and therefore prejudicial to the applicant.

16. Finally, it was submitted that the applicant had been detained on foot of a committal order issued in the name of the Chief Justice whereas it ought to have been issued in the name of Gilligan J., the fact that it did not do so was apparent on its face and was fatal to the validity of the order.

17. It was also submitted that the failure to serve the order of the 22nd of December personally together with the defects and errors which were apparent on the face of the committal order could not be rectified on an application under Article 40.4.2 nor were they minor or technical errors but, rather, were fundamental to the validity of the order rendering the detention of the applicant unlawful.

Decision
18. During the course of the hearing of this inquiry the assertion on behalf of the applicant that he had not been personally served with the order of the 22nd of December 2014 was challenged. There was evidence that he was on notice of the terms of this Order and, indeed, subsequent orders through correspondence and emails, however, it was contended on behalf of the applicant that this was insufficient since the order of the 22nd of December 2014 contained a penal endorsement.

19. Whether or not that is so is, in my view, questionable in circumstances where the applicant was fully aware of the terms of the order and had given sworn undertakings in court to comply with its terms. It is unnecessary, however, in the circumstances of this case to make such a determination since I am satisfied on the evidence before the court that the applicant was served personally.

20. No doubt the applicant's solicitor swore her affidavit on the instructions of the applicant and did so in good faith, however, during the course of the hearing an affidavit sworn by Michael Walsh, solicitor for the plaintiff in the proceedings to which reference has already made, was produced and in which Mr. Walsh deposed that he had served the applicant personally on the 23rd of April 2015. It was submitted on behalf of the applicant that it was not actually clear from his affidavit that the order had been served physically on the applicant rather than on another person with whom the applicant was present. As to that suggestion, Mr. Walsh attended the hearing of the application and confirmed that he had, indeed, served the applicant personally. Accepting as I do the evidence of Mr. Walsh, I reject this ground as a basis for impugning the lawfulness of the applicant's detention.

21. With regard to the lack of detail and specifics as to the description of the property referred to in the committal order, I have had an opportunity during the course of the hearing to examine the certified copy of the map produced in court and comprised in the amended schedule to the summons. This shows and describes clearly the lands which were the subject matter of the order of the 22nd of December 2014 and in respect of which the applicant also gave sworn undertakings to the court on the 19th of May. It follows that there cannot have been any question of uncertainty or doubt in the mind of the applicant, or anyone else with knowledge of the amended schedule and map, as to the identity of the lands which were the subject matter of the proceedings, the order of the 22nd of December 2014, and the undertakings of the 19th of May.

22. It had also been submitted that the applicant could not have been lawfully required or compelled to surrender lands the subject matter of the proceedings but it was contended by the applicant were in the possession of the second defendant on foot of a lease made between it and the applicant. However, it transpired during the course of the hearing before me that by order of Laffoy J. in separate proceedings the lease in question had been declared void as against the receiver.

23. Having due regard to these findings, I reject the submission that the schedule to the plenary summons, as amended, annexed to the order of the 22nd of December 2014, and referred to in the committal order, was vague or lacked specifics to the point that it rendered the execution of a High Court order so prejudicial to the applicant that it resulted in his being deprived of his liberty. There could not, and in my view, there was never any question of the applicant having to deliver up vacant possession of lands he did not own and possess. The order of the 22nd of December 2014 clearly refers to and is concerned with the lands described and edged in red on the amended map scheduled to the summons, moreover, these were the same lands which were the subject matter of the sworn undertakings given by the plaintiff himself but with which he had failed to comply.

24. Turning to the case made concerning the form of the committal order, it was accepted by counsel for the applicant that had it recited that the applicant was being committed to prison on the order of Gilligan J. then there could not have been any complaint on that ground, however, the applicant contended that on its face the form of the order purported to show that it had been made by the Chief Justice in circumstances where she had neither heard the application nor made the order committing the applicant to prison. It was necessary, in his submission, that the Governor and, indeed, his client, should have been able to identify from the order the judge and court by which the applicant was being committed to prison. In this case it did not do so and the decision of the President in *Byrne v. the Governor of Wheatfield Prison infra* was cited as authority in support of the submission.

25. It is clear from a reading of that judgment, however, that there were a number of significant differences between the circumstances in the case of *Byrne* and those pertaining to this case. In the first place the form and terms of the committal order in *Byrne* were quite different and lacked the requisite specificity and detail.

26. It is clear on the face of the order under consideration in this case that it is a solely punitive order whereas that was not the situation in *Byrne*. In addition the order made here makes specific reference to the identity of the judges who made the orders of the

22nd of December 2014 and 8th of July, to the applicant's undertakings, to the breaches of the orders and undertakings, to the term of imprisonment to be served, and the identity of the prison in which the applicant was to be imprisoned.

27. It was submitted on behalf of the respondent that these features constituted a valid committal order and that there were no defects on its face nor was the process of execution otherwise defective. The applicant had failed to establish, as he was required to do in accordance with the law, that the order was bad on its face and even if there was some material matter which was not apparent , the record could be referred to if so required for the purposes of assisting the court to ascertain or interpret the grounds upon which the applicant was being detained and in respect of which the respondent cited the decision of this court in *Miller v. the Governor of the Midlands Prison* [2014] IEHC 176. However, it was contended that as all of the material information necessary to constitute a valid order was apparent on the face of the order made in this case there was no requirement or necessity to go further..

28. Turning to the controversy between the parties as to the purpose and meaning of the wording on the committal order which purported to show that it had been made by the Chief Justice, that question had also been raised in the case of Byrne, infra, and in the related case of *Moore v. the Governor of Wheatfield Prison* [2015] IEHC 147.

29. As to that, the President had observed in his judgment that no explanation had been offered to the court to explain how the naming of the Chief Justice on the committal order might dispense with the necessity to name the court or judge who had imposed the sentences in those cases but which was not apparent from the warrant under consideration.

30. In *GE v. the Governor of Cloverhill Prison* [2001] IESC 41 the Chief Justice explained the rational for clarity in documents such as a detention order and in this regard she observed that it:

> *"should contain clear information on its face as to the basis of its jurisdiction. This information is required so that it be available to for example (a) the person in custody, such as the appellant; (b) the Governor of the Prison, or any other, who is holding a person in custody; and (c) the Court which is requested to inquire into the custody pursuant to Article 40 of the Constitution."*

31. The appearance on the face of the order that it had been made by the Chief Justice was not explained by reference to any particular rule of court nor does it appear that the matter was argued before him although the President appears to have considered that the inclusion might be found by a reference to Order 84 Rule 1 of the Rules of the Superior Courts.

32. Having considered that question which was argued before me it is my view that the explanation is to be found in Order 42 rules 8 and 13 and Order 5 Rule 8 of the rules. In the course of the hearing it had been contended on behalf of the applicant that a committal order went far beyond and was in nature something more than an execution order; it was something which extended beyond and was not truly part of the process of execution.

33. This begs the question as to what constitutes an order of execution within the meaning of the rules. In this regard Order 42 Rule 8 of the Rules of the Superior Courts provides:

> *"In these Rules the term "execution order" shall include orders of fieri facias, sequestration and attachment and all subsequent orders that may issue for giving effect thereto. The term "issuing execution against any party" shall mean the issuing of any such process against his person or property as under the preceding rules of this Order shall be applicable to the case."*

Giving these words their ordinary and natural meaning it seems me from a reading of this rule that all "*subsequent orders*" for giving effect to the orders mentioned must necessarily include an order of committal.

34. This does not, however, provide the complete answer to the question raised: The determination of that makes it necessary to refer to other rules and in this regard the provisions of Order 42 rule 13 are apposite. It provides:

> *"13. Every execution order shall bear the date of the day on which it is issued, and shall be authenticated in the same manner as an originating summons. The forms in Appendix F, Part II, shall be used."*

It follows from these rules that all orders of execution, including a committal order, must authenticated in the same manner as an originating summons which begs the further question as how that is to be done. The answer to that is to be found in Order 5 rule 8 which provides:

> *"8. Every originating summons shall bear the date of the day of issue and shall be authenticated in the name of the Chief Justice, or if the office of Chief Justice be vacant, in the name of the President of the High Court and shall be sealed with the seal of the High Court."*

35. The essence of the submission made on behalf of the respondent in relation to this question was that the reference to the Chief Justice on the order of committal was for the purpose of authentification of the order. It did not mean that the Chief Justice had heard the matter and had made the order. On the contrary, it was apparent from the face of the committal order that it had been made on foot of the order of the 8th of July ; which was a material ingredient that was absent on the face of the orders which were impugned in the cases of *Moore* and *Byrne*.

36. Finally, the decision of the Supreme Court in *the State (McDonagh) v. Frawley infra* was distinguished in the *Moore* and *Byrne* cases on the grounds that the order was coercive in nature and that as such the failure on the face of the warrant to provide any indication that the contempt could be purged by means of the procedures contained in Order 44 Rule 5 rendered it invalid, however, it was submitted on behalf of the respondent that that issue did not arise in this case as the order was solely punitive in nature.

37. The court is concerned on this application with an inquiry into one fundamental question; namely whether or not the detention of the applicant in prison is lawful.

38. I adopt the views of the President set out in the post script to his judgment in the *Byrne* and *Moore* cases as to the approach which the court should adopt when hearing an enquiry under Article 40 including, if necessary, the rectification of the record by permitting the filing of a long form warrant with all appropriate information.

39. In *Joyce v. The Governor of the Dochas Centre* [2012] I.R. 678 Hogan J. addressing the question as to what is necessary in order

to constitute a valid warrant observed that :

> *"A warrant of arrest or detention must contain such requisite information as would satisfy an examination as to jurisdiction on the face of the warrant by, for example, a judge of this Court exercising the Article 40.4.2 jurisdiction."*

Conclusion.

40. Careful consideration of the order of committal issued in this case discloses clear information on its face as to the basis of its jurisdiction. It details the court and the judge by whom the applicant was adjudged to be in default, the date of that order, the breach of the order of the 22nd of December 2014, the undertakings given by the applicant, the nature of the undertakings, the date given and the breaches thereof, the finding that as a result of those breaches that the applicant was in contempt and that he be committal for it, the command to the Commissioner and An Garda Siochana to arrest the applicant and detain him in Mountjoy Prison, the period for which he is to be detained, the date on which such detention is to commence and that such detention is to be without the opportunity for the applicant to purge his contempt. In the circumstances I find that rectification of the record by reference, for example, to the content of the orders of the 22nd of December 2014 and the 8th of July, is unnecessary. Accordingly, the court is satisfied that the detention of the applicant is lawful ; the application is refused and the court will so order.