



THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 3

[2017 No. 543]

**The President
Edwards J.
McCarthy J.**

IN THE MATTER OF AN INQUIRY PURSUANT TO ARTICLE 40.4.2 OF THE CONSTITUTION OF IRELAND 1937

BETWEEN

MERVYN WHITE

APPLICANT

AND

THE GOVERNOR OF MOUNTJOY PRISON

RESPONDENT

JUDGMENT of Birmingham P. delivered on the 16th day of January 2019

1. This is an appeal from a decision of the High Court (Noonan J.) delivered on 6th November 2017 which refused an application for an order pursuant to Article 40 of the Constitution directing the immediate release of the applicant.

2. In summary, the challenge was grounded on the contention that the applicant was being detained on foot of a committal warrant which had been reissued by a judge of the District Court shortly before its execution. Central to the applicant's case is his claim that the judge of the District Court did not have any jurisdiction to reissue the warrant. The applicant had an alternative or a subsidiary argument which was that the warrant did not show jurisdiction on its face because it failed to record that the Judge, having heard the matter, conducted the necessary judicial inquiry before deciding to reissue the warrant. The High Court concluded that the applicant had not demonstrated any fundamental error in the warrant of a type or nature that could warrant the intervention of the Court on foot of an Article 40 inquiry. The High Court was of the view that the general issue of jurisdiction raised by the applicant was not one that he was entitled to raise by way of an Article 40 application. Rather, the appropriate means of ventilating the issues was by way of an application for judicial review. In the aftermath of the High Court judgment, the applicant commenced judicial review proceedings. The applicant was granted bail in the context of those proceedings.

3. It is necessary to say something more about the background facts which, it has to be said, reflect little credit on the applicant. The applicant was prosecuted in the District Court in respect of a number of road traffic matters, including drunk driving, dangerous driving, and driving without insurance. He entered pleas of guilty in District Court No. 8 in the Criminal Courts of Justice on 1st October 2014. The case was subsequently adjourned to 29th October 2014 for a sentencing hearing. The applicant failed to appear on that date and the matter was adjourned in his absence on two further occasions, first, to 12th November 2014, and then to 10th December 2014. When the applicant once more failed to appear on 10th December 2014, Judge of the District Court, Anne Watkins, proceeded to sentence the applicant in his absence, imposing a two-month prison sentence in respect of the charge of driving while under the influence of an intoxicant contrary s. 4(1) of the Road Traffic Act 2010. A committal warrant, which is now central to the present proceedings, was issued in the applicant's absence on 10th December 2014.

4. On 19th January 2015, the applicant commenced judicial review proceedings, seeking orders of certiorari quashing the orders made by Judge Watkins including the committal warrant. It was contended that Judge Watkins had exceeded her jurisdiction and had fallen into error in sentencing the applicant in his absence. It is said that she should instead have issued a bench warrant to compel his attendance. The judicial review proceedings came on in the High Court before Barrett J. who, in a judgment delivered on 26th May 2016, rejected a challenge. The applicant's response was to lodge an appeal to the Court of Appeal. On 14th June 2017, the Court of Appeal dismissed the appeal and affirmed the judgment of the High Court.

5. When the applicant initiated his judicial review proceedings, the proceedings of 10th December 2014 were stayed on foot of an order of White J. Confirmation of this is to be found in the fact that the solicitors for the applicant wrote to An Garda Síochána on 17th February 2015, enclosing a copy of the High Court order and drew specific attention to the "stay" and sought confirmation that the applicant "will not be approached by members of An Garda Síochána in relation to this committal warrant until such time as the High Court has finalised the judicial review proceedings".

6. The solicitors for the applicant were in correspondence with An Garda Síochána by letter dated 28th November 2016 when the appeal was pending in the Court of Appeal. In the course of that letter, it was stated "the stay previously in place is continued".

7. As indicated, the Court of Appeal, having reserved judgment, delivered judgment on 15th June 2017. Although the appeal was dismissed, the Court was invited, and indeed persuaded by the applicant to continue the stay on the execution of the committal warrant until 31st July 2017.

8. On 5th July 2017, Garda Niall O'Connor of Henry Street Garda Station in Limerick made his way to the CCJ where he was directed by court officials to the Court where Judge of the District Court, Anthony Halpin, was presiding. When the case was called, Garda O'Connor handed in the warrant and the application pack. He has averred that, included among the documents therein, were the committal warrant, a copy of the High Court order of 19th January 2015 granting the applicant leave to seek judicial review and ordering the "stay", the two letters from the applicant's solicitor, to which reference has been made, the judgment of the Court of Appeal, a covering document in the name of Inspector O'Connor and an unsigned form setting out the background in some detail.

9. The documents that Garda O'Connor brought with him to the CCJ merit further description. There was, first of all, the application addressed to the District Court Clerk in the CCJ dated 17th June 2017 on notepaper headed the Superintendent's Office of An Garda Síochána in Henry Street, Limerick. The body of the document provided as follows:

"Re: Warrants forwarded for Re-Issue

I wish to apply, in accordance with Order 26, Rule 11 of the 1997 District Court Rules to have the Warrants listed hereunder reissued:

List of Warrants

PULSE ID No. 1187667

Name of Defendant: Mervyn White

Case No. 2014/87958

Date of Issue of Warrant: 10th December 2014 – Request Reissue

Reissue

Declaration

A copy of this application, the Warrants, Form 26.4 and all supporting material have been forwarded to Bridewell Garda station, Dublin

The original Warrants and Form 26.4 are attached forwarded for your attention please.

Dermot O'Connor

Inspector for Superintendent"

"Form 26.4

Schedule B, Order 26, Rule 11

Certificate as to Non-Execution of Warrant

Case No. 2014/87958

Warrant Number 1187667

Case Details:

Director of Public Prosecutions (Prosecutor)

Mervyn White (Defendant)

(Surety) (In case of his treatment Warrant)

I certify that after diligent search and for the following reasons, namely:

Committal Warrant issued on 10th December 2014, KOD/Lyons Solicitors initiated Judicial Review proceedings challenging the decision of District Judge Anne Watkins to sentence their client, Mervyn White, in his absence. Leave was granted by the High Court on 19th January 2015, in granting leave, Mr. Justice White ordered a stay on the proceedings dated 10th December 2014. The matter was back before the High Court on the following dates:

3rd March, 2015, 9th December 2016, 6th April 2017.

Judgment in relation to this case was delivered on 15th June 2017 by Mr. Justice Hedigan. It stated that the Judge was entitled to proceed with the hearing in the absence of the Appellant. The appeal was dismissed.

Therefore, my application is to have the Warrant reissued in order to execute same.

Attached documentation:

Copy of Committal Warrant No. 1187667 – Mervyn White

Copy of High Court Judicial Review before Mr. Justice White on 19th January 2015 attached.

Copy of documentation from KOD/Lyons Solicitors dated 17th February 2015.

Copy of documentation from KOD/Lyons Solicitors dated 28th November 2016.

Copy of Judgment of Court of Appeal delivered on 15th June 2017 by Mr. Justice Hedigan.

*(The person) *(sufficient goods of the person) against whom the within Warrant was issued cannot be found.

Dated this the 16th June 2017

Signed: _____

To whom this Warrant was *(addressed)*(endorsed)

*(delete where inapplicable)"

10. It appears that Garda O'Connor entered the witness box and that the judge of District Court considered the application. Having done so, he stamped and signed the warrant and the Court Clerk returned the documents to the Garda. The reissued warrant is exhibited in the course of an affidavit sworn by the applicant's solicitor. The document is not easy to read, but it is dated 5th July 2017, appears to be signed by Judge Halpin and appears to say "I hereby reissue this Warrant for a period of six months from this date". The words "for a period of" are not clearly legible.

11. Following the expiry of the stay granted by the Court of Appeal, the reissued warrant was executed by agreement on 8th August 2017 at which point the applicant was lodged in Mountjoy Prison. On 10th August 2017, the applicant sought an inquiry into the lawfulness of his detention. On the following day, he was granted bail.

12. The basic case for the applicant before the High Court and now before this Court is that the warrant on foot of which he was lodged in Mountjoy Prison does not constitute a lawful basis for his detention. A number of grounds are advanced, but most fundamentally, he says that the District Court had no jurisdiction to reissue the warrant in this case because the sole basis for reissuing a warrant is to be found in s. 33 of the Petty Sessions (Ireland) Act 1851 which provides:

"[w]herever the person to whom any Warrant shall be so addressed, transmitted or endorsed for execution, shall be unable to find the person against whom such Warrant shall have been issued, or his goods, as the case may be, or to discover where such person or his goods are to be found, he shall return such Warrant to the justices by whom the same shall have been issued within such time as shall have been fixed by such Warrant (or within a reasonable time when no time shall have been so fixed), and together with it a Certificate of the reasons why the same shall not have been executed: and it should be lawful for such justice to examine such person on oath touching the non-execution of such Warrant, and to reissue the said Warrant again, or to issue any other Warrant for the same purpose, from time to time as shall seem expedient."

In summary, the applicant says that the only justification for the District Court reissuing the warrant would have been if his whereabouts were unknown and there was difficulty in locating him.

13. The applicant makes two subsidiary points. First, he says that the warrant failed to show jurisdiction on its face. He says that it is essential that the warrant show on its face that the judge of the District Court carried out the statutory inquiry necessary for reissuing, and when that has not happened, it follows that the warrant is bad or defective. Finally, he says that the statutory certificate that is required was deficient in that it was unsigned and it did not identify the author.

14. The High Court took the view that even if the applicant was correct that the District Court could not reissue a warrant where the whereabouts of the individual concerned are known, that would not provide a basis for directing the applicant's release pursuant to Article 40 of the Constitution. The arguments advanced were described by the High Court as "nuanced arguments" falling well outside the ambit of what a court is required to consider in an Article 40 application.

15. For my part, it seems to me that to categorise the arguments as "nuanced arguments" is to understate the fundamental nature of what is being contended. In essence, it is being contended that the applicant found himself in custody because a Judge of the District Court made an order which he had absolutely no jurisdiction to make. I differ from the High Court in that I believe if the point is a good one, it is a point that is appropriate to an Article 40 inquiry.

16. In my view, the effect of the stay orders of the High Court and the Court of Appeal was to stop the clock: the clock restarted with the expiry of the Court of Appeal stay on 31st July 2017.

17. The clock having been stopped, and then having restarted, the judge in the District Court was not only entitled to reissue the committal warrant, but had an obligation to do so.

18. The view that I take about the obligation on the District Court to reissue the warrant disposes of the complaint that the Judge failed to carry out a statutory enquiry necessary for reissuing of the warrant and about the absence of a duly completed statutory certificate. While the Garda, in preparing the documentation, had unfortunately, though understandably, followed the O. 26 template, it is abundantly clear that the Judge in the District Court was informed of the reality of the situation, that it was not a case of someone whose whereabouts could not be ascertained, but someone who had commenced judicial review proceedings, had obtained orders from the High Court and then the Court of Appeal staying the operation of the committal warrant and those stays had expired. In those circumstances, the High Court Judge was, in my view, entitled to refuse the Article 40 application and there can be no question of the High Court having been obliged to order the appellant's release.

19. In considering the issues raised, I should say that I believe that some of the issues sought to be canvassed were ones that were appropriate to raise in the context of an Article 40 inquiry, to that extent, I would diverge from the approach adopted in the High Court. However, I would agree with the High Court that Mr. White was not in unlawful custody. In my view, when the High Court and the Court of Appeal stayed the District Court warrant and when that stay expired, the warrant was then revived. I am satisfied that in the circumstances, the District Court was entitled to reissue the warrant. It might be that an argument could be advanced that the effect of the order of the High Court and the Court of Appeal was to stop the clock, and that with the expiry of the stay, the clock restarted so that no further application to the District Court was necessary, but, be that as it may, such an application having been made, the District Court was entitled to reissue.

20. The fact that the High Court and the Court of Appeal stayed the proceedings of 10th December 2014, in my view, sets this case apart from other cases where stale warrants have been considered. Nonetheless, I draw some comfort from cases such as *R(Shields) v. Justices of Tyrone* [1914] 2 IR 89, a decision of Pallas CB, which is authority for the proposition that the jurisdiction given by s. 33

of the Petty Sessions Act to reissue a warrant, or to issue a fresh warrant, is not limited to the cases mentioned in the section of the person to whom the warrant was being addressed not being found.

21. Further support for that approach is to be found in the Supreme Court decision of *Healy v. The Governor of Cork Prison* [1998] 2 IR 98 (O'Flaherty J.). The case concerned an applicant who, in January 1996, was convicted of an offence in the District Court and was sentenced to six months imprisonment. On 23rd January 1996, a Warrant of Execution was issued by the District Judge. Said warrant was not purportedly executed until 23rd December 1996 when the applicant was arrested and taken to Cork prison. At that point, the Governor of the prison refused to accept the applicant on the grounds that the warrant was stale as the time limit specified in r. 78 of the District Court Rules, the precursor of O. 26, r. 11, had elapsed. Then, on 15th January 1997, the warrant was reissued by the District Judge, which took the form of writing 'Reissued, 15th January 1997' on the warrant with the signature of the District Judge underneath. On foot of that warrant, the applicant was arrested and lodged in Cork prison. In the course of his judgment, O'Flaherty J. commented:

"[t]he question is: can such a warrant which is spent be reissued? Or is the power to reissue confined to a reissue within the six months specified in the rule? Counsel for the applicant has freely conceded that, as far as the circumstances of the case are concerned, there could have been issued a new warrant and that would have been perfectly effective. Is there any difference between a new warrant and a stale warrant that has been reissued? The answer has been provided in the clearest terms, in my judgment, in the decision in *The State (McCarthy) v. The Governor of Mountjoy*.

O'Flaherty J. continued:

"... this is what the Chief Justice had to say in words which govern precisely the situation that pertains here:-

'I accept that r. 78 lays a duty upon the bailiff. I think it should also be construed as meaning that a warrant which has not been executed within the times specified (i.e. the time fixed for return by the warrant, or, where no time is fixed, a reasonable time, or, in the latter case, in any event a time not exceeding 6 months) is a stale warrant and cannot be lawfully executed. Before this can be done it must be re-issued; and the re-issued warrant in its turn is also subject to the time limitation stated in rule 78. There is of course the alternative of issuing a new warrant. Is there any good reason for reading the power to re-issue a stale warrant as being limited to the circumstances in which (to use the old terminology) the bailiff has defaulted in making a return in due time and with a proper endorsement? The re-issued warrant comes with the same authority as the original warrant. Clearly a district justice may re-issue an original warrant which has been returned with endorsement within the time specified. Why not also outside such time and independent of whether or not the bailiff has been in default? The purpose of the warrant is to execute the court's order; the bailiff's default is a matter between the court and the bailiff, and ultimately between the bailiff and the bailiff's superiors. But the court's duty and power to see its orders are executed can be in no way dependent upon the default of a third party. The party against whom execution has not yet been made suffers no hurt: rather has he enjoyed what can be described as an unwarranted respite. A new warrant will be appropriate where the original warrant has been destroyed or lost and also, although not necessarily so, where a new bailiff is chosen. But in all other cases reason and principle, economy and dispatch, indicate that the original warrant should be re-issued. The re-issued warrant with the date of re-issue endorsed thereon is given a new life as from that date of the duration specified in rule 78.'

O'Flaherty J. went on to comment that *The State (McCarthy) v. The Governor of Mountjoy* authority was a very helpful one and expressed the hope that if the present judgment was reported, that the judgment in *McCarthy* should form an appendix to it and that has subsequently occurred.

22. These and other cases were considered by the Supreme Court in the case of *Buckley v. Hamill* [2017] 248 1 IR. There, the decision is of O'Malley J. with whom MacMenamin J. and Laffoy J. agreed. Both sides draw some comfort from the decision. At para. 78 and subsequent paragraphs, O'Malley J. discusses the state of the authorities. The appellant draws attention to the fact that the case of *R(Shields) v. Justices of Tyrone* was distinguished and confined to its facts. However, in that context attention must also be drawn to the observation, at para. 80 of O'Malley J's judgment in *Hamill*, that "[c]ommittal warrants, however, must under statute be addressed to the Gardaí and it is not unreasonable to expect that the order of the court to arrest the person concerned will be obeyed". It has been pointed out with some force that in this (i.e. the present) case, there was no question of the orders of the Court not being obeyed; rather, the order of the District Court was stayed by orders of the High Court and the Court of Appeal. At paras. 86 and 87 of her judgment, O'Malley J says as follows:

"86. Apart from a case where an appeal has been lodged there is no statutory discretion to postpone execution where the whereabouts of the person are known, at the request of that person or otherwise (save perhaps for a limited period in exceptional circumstances). This does not, of course, mean that such warrants may not be executed by appropriate arrangement between the garda and the person concerned.

87. It is, therefore, a prerequisite to the renewal of a warrant that it has not been executed because the person cannot be found. If the court is not satisfied of that fact it should refuse to renew the warrants. Since that criterion was manifestly not satisfied in this case, it follows that the renewals were invalid."

23. In this case, it is not the situation that an appeal was lodged, but it is the case that proceedings were commenced in the High Court and that Court, and then the Court of Appeal, stayed the order of the District Court on the applicant's application. In those circumstances, it seems to me impossible to categorise the warrant as a stale warrant. In this case, there was no culpable delay or dragging of heels on the part of the authorities. On 5th July 2017, in anticipation of the expiry of the stay, Garda O'Connor of Henry Street in Limerick made his way to the CCJ and the reissued warrant was executed by agreement on 8th August 2017. The fact that the warrant was executed by agreement is not without significance given the observation of O'Malley J. at para. 86:

"[t]his does not, of course, mean that such warrants may not be executed by appropriate arrangement between the garda and the person concerned."

Because of the stays, the warrant could not have been lawfully executed any earlier.

24. The complaint about the warrant lacking jurisdiction on its face is, in my view, misconceived. The procedures followed in the District Court, if procedures were necessary, were appropriate in all the circumstances.

25. The simple fact here is that the applicant was aware of the issue of the committal warrants. Those warrants could not have been enforced before 1st August 2017. Until then, because of the orders of the High Court and the Court of Appeal, the Gardaí were not

entitled to execute the warrants. It was the actions of the appellant in seeking and obtaining a stay that made it impossible to execute the warrants before 1st August 2017. Thereafter, he cooperated in arrangements for the execution of the warrant. In those circumstances, it seems to me that there was no question of the High Court being obliged to order the appellant's release and it seems to me that the High Court was fully entitled to dismiss the application under Article 40 for his release.

26. In those circumstances, I would dismiss the appeal.