Neutral Citation [2012] IEHC 497

THE HIGH COURT

Record Number: 2012 No. 1841 SS

IN THE MATTER OF AN INQUIRY UNDER ARTICLE 40.4.2 OF THE CONSTITUTION OF IRELAND

BETWEEN:

DAMIEN GALVIN

APPLICANT

AND

THE GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

JUDGMENT OF MR JUSTICE MICHAEL PEART DELIVERED ON THE 4TH DAY OF OCTOBER 2012:

I heard this application for the release of the applicant on the 4th October 2012, and at the conclusion of the hearing made an order for the release of the applicant from custody for reasons which I briefly outlined at the time, indicating that I would give fuller reasons in a written decision. I now do so.

1. The applicant seeks his release from detention at Cloverhill Prison on the grounds that it is unlawful. He is held under a warrant dated 28th September 2012 which was issued by a District Judge at Kilcock District Court.

2. He had been previously arrested on the 20th September 2012 and charged with an offence under section 3 of the Non-Fatal Offences Against the Person Act, 1997, and brought before the District Court on the following day the 21st September 2012. On that date he was remanded in custody for one week to the 28th September 2012, bail having been refused. Following that refusal the applicant issued a Notice of Motion in order to apply for bail in the High Court on the 1st October 2012, but through some mishap the application could not proceed on that date and has been adjourned.

3. Nevertheless, the applicant contends that the hearing of his bail application before the District Judge on the 21st September 2012 such as it was, and which resulted in a refusal of bail, was so lacking in fundamental fairness and constitutional justice as to render unlawful his current detention, even though he is currently no longer held in custody on foot of the warrant dated 21st September 2012, but rather on foot of that which issued a week later on the 28th September 2012. No issue or objection is taken in relation to the proceedings in the District court on the 28th September 2012. The sole basis on which this application is being brought arises from the manner in which the bail application was dealt with in the District Court on the 21st September 2012.

4. It has been submitted that even though the applicant is now in custody on foot of a warrant dated 28th September 2012, the sole reason for his custody pending trial on the offence laid against him is that he was refused bail on the 21st September 2012, since, absent some very material change in circumstances, he is precluded from renewing his application for bail in the District Court on any later remand date on the basis that his entitlement to bail is already res judicata.

5. The applicant submits that it is not sufficient to say that his remedy is to appeal the refusal of bail to the High Court as he is seeking to do, and that in circumstances where the bail hearing was so lacking in fundamental fairness he should be released from custody since the lack of fair procedures at his bail application has fatally infected the underlying basis of his detention, notwithstanding that he is no longer held on foot of the warrant which issued on the 21st September 2012.

6. Clearly it is necessary to consider what evidence there is of how the bail application on the 21st September 2012 proceeded. The applicant's solicitor, Aonghus McCarthy, who appeared on that application has sworn an affidavit setting out his recollection of what occurred. The main objection taken is that it was the prosecuting member, Inspector Dolan who simply stated to the District Judge from the body of the Court and not from the witness box under oath that he had a statement from the injured party in which he stated that he believed that he would be intimidated by the applicant if the applicant were to be released on bail. This is objected to on the basis that it is simply hearsay evidence at best, but in fact not evidence at all since it was simply something stated to the District Judge by Inspector Dolan, and that no opportunity has been given to hear the evidence of the injured party in that regard, and that no reason was either sought or provided as to whether there was any difficulty in having the injured party present in court to give evidence of his fear in this regard.

7. Garda Daly gave oral evidence before me, because he wished to take issue with just one aspect of what Mr McCarthy has averred in his grounding affidavit. Garda Daly stated that when he gave his oral evidence he informed the District Judge that he was aware from having spoken to the injured party that he was in fear of the applicant, whereas Mr McCarthy, who gave evidence before me also on this matter, stated that if that had been said he would certainly have questioned Garda Daly about it, and he had no recollection of Garda Daly giving that evidence. He did accept quite properly when cross examined that Garda McCarthy may have made a brief mention of it, but that he had made no note of it and has no recollection of it.

8. That is the only point of disagreement between Mr McCarthy and Garda Daly as to what transpired in the District Court

on the 21st September 2012. Mr McCarthy has sworn the following account of what occurred:

> *"7. I say that Inspector Dolan, representing the Notice Party in court on the day, called the prosecuting member, Garda Diarmuid Daly, who gave sworn evidence of the applicant's arrest, charge and caution and also, in response to a question from Inspector Dolan gave evidence as to the details of the charge before the court including the nature of the injuries suffered by the person allegedly assaulted by the applicant. I confirmed to the court that there was a bail application and Inspector Dolan then indicated that there would be objections to bail on the basis of the seriousness of the charge and of the likely intimidation of the injured party in the case. I say that neither the applicant nor your deponent had been made aware that an objection to bail of this nature was to be brought forward by the Notice Party.*
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> *8. I say that Inspector Dolan addressed the District Judge from the body of the court and said he had a statement from the injured party in which he stated that he believed that he would be intimidated by the applicant if the applicant were to be released on bail. I informed the District Judge that I not been on notice of this allegation and had not been provided with a copy of the any statement. I say that this document was not shown to me nor was it handed into the court. I say that I asked Inspector Dolan if this document specifically referred to the applicant and he indicated that it did*
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> *9. I say that the injured party was neither present or (sic) gave evidence as to the basis for the perceived likelihood of intimidation nor was the court given any explanation as to why he had not been brought to court to give evidence. I say that inspector Dolan's statement from the body of the court and the document he referred to, unseen by the court and the defence, was the sole basis for the court for this allegation of intimidation.*
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> *10. I say that I then made submissions to the Court. I say that I informed the court that the applicant had no intention of approaching the injured party in any way. I say that I submitted that the defence had not been given the opportunity of seeing or considering the evidentiary basis on which there was an objection to bail where neither the witness who is alleged to have been intimidated or any statement from the witness had been produced I say that I submitted that in the circumstances the applicant was entitled to be granted bail. I say that District Judge Zaidan then said that he had heard evidence from the Inspector who was objecting to bail on the 0'Callaghan grounds and that he was entitled to refuse bail on that basis and was refusing bail and was remanding the applicant in custody in Cloverhill Prison for one week until the 28th September 2912. I say that on the 28th September 2012 the applicant was remanded in custody for a further two weeks. I say that on that occasion the District Judge did refer to the seriousness of the charge although that was not the basis on which he had refused bail the previous week. "*

9. That is the extent of the evidence given on the 21st September 2012 in order to ground the refusal of bail, as given by the applicant's solicitor in his grounding affidavit, supplemented of course by the oral evidence given by Garda Daly and by Mr McCarthy before me as already described.

10. Colman Fitzgerald SC for the applicant essentially makes two points in urging that the applicant's detention is unlawful. Firstly, he submits that the obligation accord fair procedures to the applicant on the 21st September 2012 was breached by the failure of the prosecution to inform the applicant and his solicitor that there would be an objection to bail on the grounds that there was a likelihood that the applicant would intimidate the injured party if allowed bail. He has referred to the judgment of McGuinness J. in *McDonagh v. Governor of Cloverhill Prison* [2005] 1 I.R. 394. That case was decided on facts more extreme than the present case but nevertheless refers to the necessity for relevant 'evidence' to be before the District Judge in order to ground a refusal of bail, and also to the fair procedures requirement that where a Section 2 objection to bail is being raised (i.e. on the basis, as here, that the accused person is reasonably considered necessary to prevent the commission of a serious offence by that person). With regard to the latter, the learned judge stated at p.405:

> *"Counsel for the applicants argued before this Court, as, indeed, he had in the High Court, that objections under s. 2 of the Act of 1997 should be formally initiated and that, in practice, the prosecution would give notice that such an objection was to be made. There is no provision either in the Act of 1997 or in the District Court Rules that such an application should be made on notice in advance of the actual bail hearing. Nevertheless, it would seem to be essential, as a matter of natural and constitutional justice that an accused person should be made aware that an objection to bail of so serious a nature was to be brought forward by the prosecution. In the same way it is also a matter of natural and constitutional justice that the accused person should be given a proper opportunity either by means of evidence or through submissions to challenge such an objection. None of this occurred in the present case. The proceedings were in essence unfair. "*

11. Secondly, he submits that the District Judge refused bail to the applicant on the sole basis that Inspector Dolan informed him from the body of the court that there was a statement from the injured party in which he expressed this fear of intimidation, and that this at best was a form of hearsay evidence received by the District Judge, and in truth was not evidence at all. It is urged that there was no proper evidence adduced capable of being tested on cross examination, and that accordingly the District Judge did not form his own view that that there was a likelihood of intimidation, but rather accepted the view of the injured party communicated by means of what Inspector Dolan stated from the body of the court that he had a fear of intimidation at the hands of the appellant if released on bail. He has referred to the judgment of Denham J. (as she then was) in *The People (DPP) v. McLoughlin* [2010] 1I.R. 590 in which in relation to the admissibility of hearsay evidence she stated at p. 595:

> *"Hearsay evidence my not be received as a matter of course. In certain circumstances however, as an exception, hearsay evidence may be received during a bail application. The Court should be satisfied that there is a good reason why viva voce evidence may not be adduced. "*

12. In so stating she referred to what Keane J. (as he then was) stated in *The People (DPP) v. McGinley* [1998] 2 I.R. 408 at p. 414. Therein, he stated, *inter alia:*

> *"…….Where there is evidence which indicates as a matter of probability that the applicant, if granted bail, will not stand his trial or will interfere with witnesses, the right to liberty must yield to the public interest in the administration of justice. It is in that context that hearsay evidence may become admissible, where the court hearing the application is satisfied that there are sufficient grounds for not requiring the witnesses to give viva voce evidence. In such a case it would be for the court to*

consider what weight should be given to the evidence, having regard to the fact that the author of the statement had not been produced and to any other relevant circumstances which arise in the particular case. "

13. In the *McLoughlin* case no direct viva voce evidence was given by witnesses as to the likelihood of intimidation because the relevant witnesses were unwilling to come to court, but the gardai involved gave relevant evidence that they had been in contact with the persons concerned and had been told that they would not attend. In those circumstances, Denham J.(as she then was) stated that in those circumstances it was reasonable for the trial judge to admit that hearsay evidence. In the present case, however, no such evidence was given, save for Garda Daly's evidence that the injured party was in fear of the accused. In addition there was just the statement by Inspector Dolan from the well of the court that there was a statement from the injured party, but no evidence was given in that regard. No basis was given for that fear, and he did not state that he had asked the injured party to attend and that the injured party had refused to attend court, and neither did Garda Daly.

14. In McLoughlin, Hardiman J., referring to the general rule against hearsay evidence in such cases as described by Keane J. in McGinley (supra), stated at p. 603:

"…..There is no question of there being a general exception allowing hearsay in bail applications as such. Insofar as any analogy is drawn with interlocutory proceedings in civil cases, I would reject it for the reasons offered by Keane J and quoted above.

The result of this is that hearsay evidence may be admissible in a bail application, but quite exceptionally, and when a specific, recognised ground for its admission has been properly established by ordinary evidence. "

15. While it is true that the warrant detaining the applicant by the time this application was brought is one dated 28th September 2012 and that no complaint is made in relation to the hearing on the 28th September 2012, the fact remains that the refusal of bail was made following the hearing on the 21st September 2012, and that it is the latter hearing which is relevant to whether or not the applicant is in lawful detention. On the 28th September 2012 he was simply further remanded in custody, bail having been refused on the 21st September 2012 as outlined above. In so far as it is contended by the respondent that by not having made complaint between the 21st September 2012 and the 28th September 2012 he has in some way acquiesced, Mr Fitzgerald has referred to the judgment of Denham C.J. in *Caffrey v. The Governor of Portlaoise Prison* [2012] IESC 4, where at para. 33, affirming the approach of Charleton J. in the High Court, stated:

"The issue for the Court is whether the appellant was lawfully detained or not. The appellant could not be lawfully detained on the basis of his consent or acquiescence; it is a question of law."

16. Accordingly, I am satisfied that the failure of the applicant to raise issues earlier in relation to the hearing on the 21st September 2012 is not relevant. He cannot be taken by any acquiescence, to be implied or otherwise, to have rendered lawful a detention which by law is unlawful. That question is a matter of law.

17. As to the issue of no notice of the objection to bail being notified in advance by the prosecution, it seems clear from the judgment of McGuinness J. in *McDonagh v. Governor of Cloverhill Prison* (supra) that fair procedures require that such notice be given, so that the accused person is afforded a reasonably sufficient opportunity to consider and meet it in consultation with his legal team. That requirement of fair procedures seems all the more essential where at issue is the liberty of the accused. No person should be deprived of his liberty based on an objection of which he was given no notice. In that regard it seems to me that the applicant's right to fair procedures was breached in this case.

18. The final question is whether there was any evidential basis on which the District Judge could himself have concluded that there was a probability that the applicant was likely to intimidate the injured party. Garda Daly has stated that in his oral evidence he stated that he was aware from having spoken to the injured party that he was in fear of the applicant. That is the only evidence as such that was before the district Judge in relation to the question of intimidation. In addition to that evidence there was just what Inspector Dolan told the District Judge from the body of the Court, as recounted by Mr McCarthy in his grounding affidavit to the effect that he had a statement from the injured party in which he stated that he believed that he would be intimidated by the applicant if the applicant were to be released on bail. Mr McCarthy's averment in this respect was not contradicted by Garda Daly, and Inspector Dolan did not give evidence before me. He was not in court on this application. That statement by Inspector Dolan cannot constitute evidence - even hearsay evidence - in relation to the objection raised on the 21st September 2012. Neither was the injured party's statement to Inspector Dolan produced to the District Judge. This seems to me to be a situation where the District Judge could not have had any evidential basis on which to conclude his own view that there was a probability that the applicant would if released intimidate the injured party. The inevitable inference is that bail was refused because of the belief on the part of Inspector Dolan and Garda Daly that based on their conversations with the injured party they each believed that the applicant was likely to intimidate him. In my view that is sufficient to render the detention of the applicant unlawful, since it is clear from the cases to which I have been referred that it is of the utmost importance that the District Judge should form his own view in that regard, and it goes without saying that he can do so only on the basis of evidence given. It may in exceptional circumstances be the case that hearsay evidence in that regard can be admitted, but as is made clear in the passages quoted above, there must be some evidence provided as to why the person alleging intimidation is not able to be present in court to give relevant evidence on which he might be crossexamined.

19. For these reasons I am satisfied that the detention of the applicant on foot of the Committal Warrant dated 28th September 2012 was unlawful, and accordingly I have ordered that he be released.