Neutral Citation [2014] IEHC 387

THE HIGH COURT

2014 No 1108 S.S

IN THE MATTER OF AN INQUIRY UNDER ARTICLE 40.4.2 OF THE CONSTITUTION OF IRELAND, 1937

BETWEEN:

JOSH TURNER

APPLICANT

AND

GOVERNOR OF MOUNTJOY PRISON

RESPONDENT

JUDGMENT OF MR JUSTICE MICHAEL PEART DELIVERED ON THE 29th DAY OF JULY 2014:

1. On the 21st May 2014 the applicant was before the District Court at Navan on a number of charges. In respect of all but one thereof he had previously pleaded guilty, and was before the Court for sentence only. The particular offences were offences under the Road Traffic Acts. The one remaining charge in respect of which he had previously pleaded not guilty was, according to the charge sheet, an offence contrary to section 15(1) and (5) of the Criminal Justice (Theft and Fraud Offences) Act, 2001. That section creates an offence where a person is, when not at his or her place of residence, in possession of any article with the intention that it be used in the course of, or in connection with, inter alia, a burglary. The charge against the applicant was that he was in possession of *"an article to wit a screwdriver, a claw hammer, a torch, a pair of plyers and a rod with the intention that it be used in the course of burglary".*

2. I can overlook the grammatical infelicities of that sentence in that he was accused of being in possession of more than one article, yet "article" and "is" are used rather then their plurals, as, in fairness to the applicant, he has not indulged in such pettifoggery on this application.

3. The section 15 offence is one which may be dealt with summarily or on indictment. The applicant had previously been put on his election and he opted for summary disposal. The DPP consented to that, and the District Judge considered also that it could be dealt with summarily. Hence his appearance before the District Court for trial on that offence on the 21st May 2014.

4. Having heard the evidence in the case including the evidence of the applicant in his defence, the District Judge convicted the applicant, and sentenced him to a period of 8 months imprisonment back-dated to 4th February 2014. According to the affidavit sworn by the applicant's solicitor on this application, Counsel for the applicant had submitted to the Court that even if he was to be considered to have been in possession of the articles in question, there was no evidence that that the applicant was in possession of them with the intention that they be used in the course of a burglary, and that it was not a situation where an inference could be drawn in that regard. I should ad that according to that affidavit, the applicant had given evidence and was cross-examined, and during the course of it he had given explanations for why each of the items were in his possession, which, if believed, would be consistent with innocence. For example, he stated that he had found the plyers and used it to tighten a not holding a wire onto the battery of the car. These explanations are contained in paragraphs 8 and 9 of the grounding affidavit.

5. It appears that when the evidence had concluded and submissions had been made, the District Judge rose and considered her notes and then came back and expressed herself satisfied that the applicant was guilty of the offence charged. When giving her reasons for convicting, the District Judge appears to have stated that there had been no evidence submitted by the defendant of any intention to commit burglary, but that she was entitled to take into account the circumstances of the offence including the fact that at a time close to midnight on the occasion the applicant, who was the driver of the car, upon seeing the Gardai, drove off at speed, following which a chase ensued. She did not accept his explanation that he drove off like that because he lacked documents. I take that to mean that he had no insurance, driver's licence and so on. She went on to state that she was entitled to take into account all the circumstances of the case, and draw a reasonable inference that he was in possession of the articles for the purpose of burglary.

6. It appears that evidence was given that the applicant has 178 previous convictions, including for theft and robbery, possession of articles, and various road traffic offences. These and other factors were taken into account when passing the 8 month sentence imposed.

7. When this application for his release under Article 40.4.2 of the Constitution was first moved, the only basis put forward for his release was that contained in paragraph 24 of the grounding affidavit, namely *"… the evidence presented in support of the section 15 charge was not such that any inference could reasonably or properly be drawn that the applicant was in possession of the items in question for the purpose of burglary"*. I will come to the submissions made on that issue.

8. I directed an inquiry under Article 40.4.2 of the Constitution, and the applicant was duly produced to the Court for that purpose. The Governor of Mountjoy Prison certified the basis of the applicant's detention as being a warrant dated 21st May 2014 signed by the District Judge. This was the first occasion on which Counsel and solicitor for the applicant had seen the warrant on foot of which the applicant was detained. Upon examination of the warrant a number of potential infirmities in the warrant were identified, and submissions were heard from both sides as to any significance which should be attached to same. Obviously, Counsel for the applicant, Michael P. O'Higgins SC took a less benign view of them than did Counsel for the Governor, Grained O'Neill BL.

9. Firstly, the warrant refers to the charge in respect of which the applicant was convicted by attaching a copy of the charge sheet rather than setting out the offence in the warrant per se. The point made in that regard is that on the attached charge sheet the offence is described as an offence contrary to section 15(1) and (5) of the Criminal Justice (Theft and Fraud Offences) Act, 2001, whereas according to Mr O'Higgins that section has been amended, and in fact substituted, and therefore the offence should have

been described as being one contrary to the section as amended, and as substituted, as the applicant is entitled to know precisely offence for which he has been sentenced. That issue arises because by section 47 of the Criminal Justice Act, 2007 section 15 of the Act of 2001 was amended in two ways: (I) that paragraph (aa) was added to subsection (1) in order to include the offence of robbery, and (b) that section 2 be substituted by a new subsection (2) to provide a defence to an offence under section 15(1) if he/she can *"prove that at the time of the alleged offence the article concerned was not in his or her possession for a purpose specified in that subsection"*. Other amendments to section 15 were effected by section 49 of the Criminal Justice (Miscellaneous Provisions) Act, 2009 which are not immediately relevant to the present application.

10. In relation to this first issue in relation to the face of the warrant, it is important to remember that the applicant was charged and convicted of an offence under section 15(1) of the Act of 2001, and that none of the amendments to that section which were made subsequently as set forth above relate to that particular offence. It is also noteworthy that, as pointed out by Ms. O'Neill, that section 14 (2) of the Interpretation Act, 2005 provides:

> *"(2) a citation of or a reference to an enactment shall be read as a citation of or a reference to the enactment as amended (including as amended by way of extension, application, adaptation or other modification of the enactment), whether the amendment is made before, on or after the date on which the provision containing the citation or reference came into operation."*

11. This point of objection must fail. There is no error on the charge sheet in this regard, particularly given the provisions of section 14(2) of the Interpretation Act, 2005. But even without that provision, the fact that the section creating the offence for which the applicant was convicted was not altered, amended or substituted in any way by any later amendment of the Act of 2001 means that there was no prejudice of any real substance derived from the fact that the charge sheet, and therefore the warrant detaining the applicant, did not contain the words "as amended" after the Act of 2001 was stated. It is certainly not something so fundamental as would, taken on its own, invalidate the warrant.

12. The second issue identified from an examination of the face of the warrant was that on the prescribed form of warrant used in this case there are four paragraphs, not all of which are relevant to the applicant's particular case and should have been deleted as inapplicable by the person preparing the warrant. Had that been done, two paragraphs would have been crossed out, leaving the two remaining which were applicable. The two to be deleted as inapplicable were that *"the accused having pleaded guilty"* and *"The accused having pleaded guilty and the DPP having consented to having the offence dealt with summarily".* They are clearly not applicable in circumstances where it is not in dispute that in relation to the section 15 charge the applicant pleaded not guilty and went through his trial on the offence. Possibly the first of the paragraphs should have been simply amended so as to reflect the fact that the accused person had pleaded 'not guilty' instead of 'guilty'.

13. In my view, this error on the face of the warrant is not so fundamental as to render detention unlawful. I agree of course that a warrant on foot of which a person is detained is a very important document being one which authorises a deprivation of liberty. I agree also that great care must be taken by those whose task it is to prepare a warrant for signature by the District Judge to ensure that the warrant is correctly prepared. I agree also that there can be situations where the errors are so numerous, or indeed that a single error can be so significant and fundamental, that the signed warrant ought not to be considered worthy of a document which deprives a person of such an important right as that to liberty. But in the present case, I do not consider that the failure to have deleted the two sentences to which I have referred, or not to have at least amended the first paragraph to 'not guilty' as being in that category of error. They are basic clerical errors, but I do not believe that they constitute errors such as, in some other cases, where a warrant does not indicate that a person has been put on his election prior to being disposed of summarily, which undermine the integrity of the warrant. In such a case the warrant fails to disclose on the face of the warrant the jurisdiction of the District Judge to deal with the case at all. That is an error of a different character in my view. These errors do not go to jurisdiction. Either way, the District Judge had jurisdiction to dispose of the case summarily.

14. Having heard submissions on the issues relating to the face of the warrant, the matter was adjourned so that the Court could reach a decision on these issues. There was no objection to the applicant being allowed to be on bail during the period of adjournment. Obviously in the event that the applicant was to succeed on those grounds, it would not be necessary to embark upon a consideration of the ground originally being relied upon, namely the question of whether the detention is unlawful on account of the inference drawn by the District Judge as to the applicant's intention to commit a burglary offence. The matter was listed again before me on for decision on those issues, but on that date I felt that it would be better to deal with the matter in its entirety rather than piecemeal, and the matter was put back again briefly, with the applicant again being permitted to be on bail.

15. The matter came back before me on the 11th July 2014 so that I could hear additional submissions on the inference point. On that date I was informed that there had been a development in so far as in the interim the District Judge had amended the warrant under 'the slip rule', namely Order 12, rule 17 DCR which provides that:

> *"17. Clerical mistakes in decrees, orders or warrants, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court".*

The applicant's solicitor has stated that the application to amend was not made on notice to him. The respondent Governor swore an affidavit stating simply that he is informed by a solicitor in the Chief State Solicitor's office that on the 8th July 2014 the District Judge amended the warrant to reflect what had actually happened in court, and that he was now in possession of the amended warrant, and he produced same to the court.

16. The applicant has submitted that the 'slip rule' application ought to have been made on notice to the applicant, and that since it was made *ex parte* the amendment ought not to be considered to have been lawfully made. Mr O'Higgins has referred to the ex tempore judgment of O'Neill J. in *Murphy v. Director of Public Prosecutions* [2008] IESC 360. That was a case where a return for trial to the Special Criminal Court was found by the DPP to contain three clerical errors, which were corrected by means of a 'slip rule' application made, in the absence of the solicitor or counsel for the accused although unsuccessful attempts to give adequate notice had been made. O'Neill J. considered that the interests of justice being seen to be done mandated in that case that the amended return for trial be quashed even though he did not consider that if the accused had been present there would have been any reality to opposing the application to correct the errors.

17. Slip rule applications may be made *ex parte*, but may also be on notice to the other side. In that regard I refer to Order 12, rule 17 DCR set forth above, and also to Order 12, rule 13 DCR which provides: *"where no provision is made in any statute of Rules of Court governing practice and procedure in a particular proceeding the Court may adopt such procedure as it shall consider appropriate"*. The question of what is "appropriate" will involve a consideration of what is fair, and therefore whether or not it is necessary that the other side be put on notice of a particular application. Each case will depend on its own facts and circumstances.

In my view it very much depends on the nature of the amendment sought, and consequently whether any substantive rights of the other party stand to be affected. In the Murphy case it is clear that without a proper and lawful return for trial the Special Criminal Court would have no jurisdiction to try the accused person. The return for trial is a fundamental step in the criminal process, and I can appreciate completely that in such circumstances O'Neill J. considered that the accused was entitled to be given adequate notice of the application to amend. As he stated *"it is not for others to anticipate what submission might be made on behalf of an accused person. I am satisfied that the accused person is entitled to be present and to be legally represented, to ensure that his interests in this essential step in the process are protected".*

18. I have already concluded that the errors in the warrant on foot of which the applicant was detained were not of such a fundamental nature as to invalidate the warrant. One could say that in such circumstances no slip rule application was necessary, unlike in the Murphy case referred. Nevertheless, out of an abundance of caution the application was made to correct these mere clerical errors so that the warrant as amended would become a model of perfection. There must be a distinction drawn between the amendment of a return for trial, which after all is a document recording a step taken in the criminal process so that the trial of a person can proceed, and a post-conviction warrant whose purpose is to enable the convicted person to serve a lawfully imposed sentence of imprisonment, and which in relation to all substantive matters was correct. It authorised the Governor to detain the applicant for the correct period, and recited the offence in respect of which the sentence was given. At worst there was simply a failure to delete or amend two lines in the warrant which did not apply, and which importantly the applicant would have known did not apply in his case because he will have known that he pleaded not guilty and his trial proceeded on that basis in his presence. That is an entirely different situation to where there were acknowledged defects of a fundamental nature in a return for trial as in the Murphy case.

The Inference drawn:
19. As I have said, the ground first relied upon by the applicant before the commencement of this inquiry was that there was no evidential basis for the drawing of an adverse inference that he possessed the articles found in his vehicle after this car chase *"with the intention that [they] be used in the course of burglary"*.

20. Mr O'Higgins submits firstly that none of the circumstances in this case are themselves suggestive of a burglary being intended on the occasion on which the applicant was stopped. He refers to the nature of the articles found, namely a small torch, a plyers, a claw-hammer and a rod, the latter being of a heavy plastic/rubber type which together with other such rods are screwed together in order to form one longer length of piping in order to clear an outside drain. These objects were produced in Court for inspection by me. The point was made also that there were tins of paint found in the boot of this car, and it was said that the old paint on the end of the rod found was explained by it being used to stir paint. Similarly there was paint on the claw hammer, consistent with it being used to open a tin of paint. So, it is submitted that these objects themselves are not suggestive of an intended burglary, since they do not necessarily lend themselves to use for gaining entry to a house. It was suggested by Ms. O'Neill for the respondent that she had been instructed by a member of An Garda Siochana that the rod could be used through a letter box in order to get hold of keys that may be within reach with the use of the rod. However, there was no evidence given in this regard, and I must say that it seems improbable to me that a single rod of this length (3 feet approx) would assist in that purpose. It would need several screwed together I would have thought, depending on the type of house involved. The applicant explained the torch in the car by saying that this was a torch which he used "when checking on horses he owned at night". He said also that the torch was on his key ring, whereas the Garda evidence had been that it was found under the driver's seat beside the claw hammer. In relation to the plyers he explained that he had found the plyers in the car when he bought it and had used them to tighten a loose not connecting a wire to the battery. His evidence was also to the effect that he had just bought the car for €800 a few days previously and that these objects found in the car had been left there by the previous owner.

21. In any event, Mr O'Higgins has submitted that those circumstances are not suggestive of or consistent with an intention to commit a burglary, and are capable of an inference consistent with innocence, and therefore that the judge was obliged to give the applicant the benefit of the doubt and draw the inference that was consistent with innocence rather than guilt. He points out also that the first occasion on which it was ever put to the applicant that he had the intention to commit burglary was in cross-examination in the District Court. He had never been interviewed at which this suggestion was put to him. When it was put to him in cross-examination he explained the fact of these articles being in his car as appears in his affidavit. His solicitor's grounding affidavit explains that the evidence in the District Court was to the effect that the Gardai had seen this vehicle being driven by the applicant and with a co-accused in the front passenger seat, and three other males in the back. Immediately after that sighting a car chase ensued in which the applicant drove off at high speed, including through a red light, on the wrong side of the road, including down the wrong lane of a dual carriageway. When the vehicle was eventually stopped (I understand from Counsel that this was achieved with the involvement of three Garda vehicles) some of the occupants fled the scene, although the applicant appears not to have fled and was arrested at the scene.

22. It was apparently put to him in cross-examination that he had these articles in his possession with the intention to commit a burglary offence. The applicant denied this was his intention, and gave the explanations which I have referred to and which are more expansively set forth in his solicitor's affidavit. Mr O'Higgins accepts that it was always open to the trial judge to reject the defendant's evidence as to his lack of intention to commit a burglary offence. However, if she chose to reject his denials and his explanations for these articles found in his car, she would have to be able to rely on some other evidence as the basis for finding that he had the intention required by the section, since there is no presumption of an intention contained in the section which an accused must rebut. Mr O'Higgins asks perhaps rhetorically what other evidence of intention was there in the case besides the nature of the articles themselves which are also consistent with innocence.

23. Mr O'Higgins seeks to rely on the judgment of Hogan J. in *Cirpaci v. Governor of Mountjoy Prison*, unreported, High Court, 25th February 2014, and submits that the question raised as to the correctness of drawing the adverse inference in this case goes to jurisdiction, since the prosecution had to prove the intention element of the offence beyond a reasonable doubt if the applicant was to be convicted of the offence, and in his submission failed to do so. In *Cirpaci,* it transpired post-conviction and sentence, that the accused had never been put on his election, yet the warrant stated that he had. That procedural defect was held to go to jurisdiction in view of the precise terns of section 53(1) (b) of the Act of 2001, and accordingly that the District Judge lacked any jurisdiction to hear and determine the charge against the accused person and dispose of the matter summarily. It was considered in such circumstances that judicial review was not the appropriate remedy, and that since it was clear that the applicant's detention was not in accordance with law, an order should be made under Article 40.4.2 of the Constitution.

24. Ms. O'Neill for the respondent distinguishes the facts of *Cirpaci* from the present case, and says that even if the District Judge fell into error in rejecting the applicant's evidence and thereafter drawing the inference of intention from all the evidence which she had heard, she did so within jurisdiction. This, she submits, is to be distinguished from a situation in *Cirpaci* where the failure to put the accused on his election at all meant that the judge simply had no jurisdiction to try the case, and therefore the detention of the accused following such an unlawful process could not be regarded as being in accordance with law.

25. In Ms. O'Neill's submission, the complaint which the applicant makes is one that ought to more properly have been the subject of an appeal rather than an application for release. In that regard she had referred to the judgment of Walsh J. in *The State (Royle) v. Kelly* [1974] IR 259. It amounts in her submission to an appeal on the merits, just as does an appeal by an accused person to the Court of Criminal Appeal where perhaps a jury has been misdirected as to the law or the circumstances in which the jury might draw an adverse inference from the facts given in evidence, or where perhaps, having been properly directed, the jury draws an inference which was not open on the evidence given. In *State (Royle) v. Kelly*, Walsh J. held that even if it was the case that the trial had proceeded in a manner that was unsatisfactory, the matters complained of were not such as to invalidate any essential step in the proceedings leading to the sentence imposed, and that if at all they constituted grounds of appeal. In so concluding, Walsh J. stated at page 267:

> *"In The State (Charles Wilson) v. The Governor of Portlaoise Prison (Supreme Court – 11th July 1968) I stated as follows:- 'On a habeas corpus application by a person detained by order of a court, whether under sentence following conviction or otherwise, matters dealing with the weight of the evidence or irregularities of procedure which do not go to the jurisdictional basis of the trial or other court proceedings are not relevant unless the irregularities or the procedural deficiencies complained of are shown to be such as would invalidate any essential step in the proceedings leading ultimately to his detention. See the judgment of this Court in The State (McKeever) v. The Governor of Mountjoy Prison'. That view was assented to again in a later application by the same Charles Wilson in The State (Charles Wilson) v. The Governor of Portlaoise Prison (Supreme Court – 29th July 1969) when O'Dálaigh C.J., giving the judgment to which the other members of the Court assented, stated with reference to the particular grounds raised in that case:-- 'What remains is a pot-pourri of grounds which, if substantiated, would be proper to be advanced in the Court of Criminal Appeal, but none of which go to the jurisdictional basis of the trial or invalidate any essential step in the trial leading ultimately to the applicant's conviction …… ."*

26. For some reason, although, as is required to be done, the District Judge fixed recognizances in the event of an appeal, the applicant lodged no appeal against his conviction and sentence. Instead he seeks his release some five weeks into his sentence on the basis that his detention is not in accordance with law. The distinction between this case and one such as Cirpaci is clear. The drawing of an inference is something done by the trial judge in this case within jurisdiction. She may or may not have been correct to draw the inference which she did from the facts at her disposal following hearing all the evidence, but be that as it may, it is a matter to be addressed by way of an appeal on the merits, and not by way of application for release under Article 40.4.2 of the Constitution. The issue does not go to jurisdiction. It is quintessentially an appeal point, and one which the applicant for whatever reason chose not to raise by way of appeal.

27. I am satisfied therefore that any detention on foot of the warrant the subject of this application is in accordance with law. In so far as the warrant holding the applicant until he was released on bail by this Court has now been amended under the slip rule – a step which is not invalidated by lack of it being made on notice to the applicant for reasons which I have dealt with herein – any detention on foot of that warrant as amended in the future will be in accordance with law also, subject of course to any new ground of unlawfulness that may arise for argument.

28. For these reasons I refuse the application for release.