Neutral Citation: [2013] IEHC 499

THE HIGH COURT

[2013 No. 876SS]

IN THE MATTER OF SECTION 52(1) OF THE COURTS (SUPPLEMENTAL PROVISONS) ACT 1961

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF GARDA BARRY JOSEPH RYAN)

PROSECUTOR

AND

ANDRIUS BURLEGA

ACCUSED

JUDGMENT of Kearns P. delivered on the 14th November, 2013.

This is a case stated by Judge Catherine Murphy of the District Court pursuant to s. 52 of the Courts (Supplemental Provisions) Act 1961 in which four questions are asked of this Court concerning the interpretation of certain procedural matters that arise in relation to cases under s.4 of the Criminal Law (Insanity) Act 2006. The accused had been charged under s.2(1) of the Criminal Damage Act 1991 and s.2 of the Non-Fatal Offences Against the Person Act 1997. An issue was raised by the defence as to the fitness of the accused to be tried.

THE CASE STATED

The charge before the District Court is that the accused:-

> "*On the 28th March 2012 at Berlin Opticians 157 Capel Street, Dublin 7, did without lawful excuse damage property to wit, front plate glass display window and door belonging to Mr. Tim Cashman*" contrary to s.2(1) of the Criminal Damage Act 1991. The accused was granted legal aid and bail in respect of the charge which he took up; and
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> "*On the 28th February 2012 at Berlin Opticians 157 Capel Street, Dublin 7 he assaulted Mr. Tim Cashman*" contrary to s.2 of the Non Fatal Offences Against the Person Act 1997. Bail was extended to this charge.

An issue was raised on the 26th July, 2012, when the charges came before the District Court as to the fitness of the accused man to be tried and the matter was adjourned to the 5th October, 2012, to hear the issue of fitness to be tried.

A report from Dr. Paul O'Connell of the Central Mental Hospital of the 29th June, 2012, found that in the opinion of the author the accused was unfit to stand trial by virtue of a mental disorder.

On the 13th November, 2012, it was ordered by the District Court that the accused should be assessed under s.4(6) of the Criminal Law (Insanity) Act 2006. The accused was committed to the Central Mental Hospital for that purpose. When the accused was presented by the gardaí on foot of the committal warrant the Clinical Director Dr. Harry Kennedy stated that the accused could not be committed due to lack of available space. The accused was brought back to the District Court and the court was advised of the lack of space at the Central Mental Hospital. However, the court was of the view that the allocation of resources was not a matter for the District Court and the order had been made under the Act of 2006.

The accused was then brought to the garda station which prompted an Inquiry under Article 40.4.2 of the Constitution. The detention was deemed unlawful and an order to release the accused there from forthwith was issued. See the decision of MacEochaigh J. in *A.B. v. The Commissioner of an Garda Síochána, the Director of Public Prosecutions, the Clinical Director of the Central Mental Hospital et all* [2013] I.E.H.C. 88 (Unreported, High Court, MacEochaigh J., 8th February, 2013).

Immediately following his release the accused was arrested under s.12 of the Mental Health Act 2001 and brought to St. Vincent's Hospital, Fairview in Dublin where he remains as a patient.

The learned District Court Judge seeks the opinion of the High Court on the following questions:

> (a) With respect to the substantive criminal proceedings must I adjourn the matter generally with liberty to re-enter, the case to be re-entered if and when it is contended that the accused is now fit to be tried?
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> (b) In the circumstances where my original order of 13 November 2012 was not given effect to by the accused being committed to the Central Mental Hospital for assessment may I now give effect to that order by reissuing a warrant, committing the accused for a period of up to 14 days so as to facilitate further assessment?
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> (c) If neither of the above are permitted, may I revisit the issue afresh and make a new order under 4(6)(a)(i)(I) of the Criminal Law (Insanity) Act 2006 to ensure that the accused is examined by a consultant psychiatrist attached to the Central Mental Hospital and for a report to be prepared for me by such psychiatrist under section 4(6)(b)?
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> (d) If neither these courses of action is open to me, must I now strike the charges out in circumstances where there is no evidence before me to suggest that the accused has recovered his fitness to plead?

REPLIES

(a) Yes – the Director of Public Prosecutions and counsel for the accused agree that the proceedings may be adjourned until the accused is deemed fit to be tried.

(b) Contentious – see discussion below.

(c) No - unless there is an application to reverse the finding of fitness to be tried.

(d) No - as where the court finds an accused unfit to be tried the only consequence is that the District Court must adjourn the matter, with liberty to re-enter should the accused become fit to be tried.

MAIN ISSUE IN CONTENTION

The main issue that arises on the basis of this consultative case stated is the issue of whether the District Court, in circumstances where the original order to commit an accused to the Central Mental Hospital for assessment was not fulfilled, i.e. it was frustrated due to unforeseen and extraneous circumstances, can the District Court reissue the warrant committing him for assessment for a period of up to 14 days so as to facilitate further assessment.

Under s.4(6) of the Act of 2006 the court has to determine two salient issues. Firstly, is the person fit to be tried, and secondly if not, then as *per O'Callaghan v. The Director of Public Prosecutions* [2011] I.E.S.C. 30; [2011] 3 I.R. 356 the court must adjourn the matter. In *O'Callaghan, a nolle prosequi* was entered and then the accused was re-arrested. A majority in the Supreme Court held that the proceedings under the second arrest were not allowed. Once the court decides that an accused is unfit to be tried then there is no other option but to adjourn. In the cases of *E.C. v. Clinical Director of the Central Mental Hospital* [2012] I.E.H.C. 152 (Unreported, High Court, Hogan J. 5th April, 2012) and *F.X. v. Clinical Director of the Central Mental Hospital and the Director of Public Prosecutions* [2012] I.E.H.C. 271 (Unreported, High Court, Hogan J., 3rd July, 2012), the court stated at paras. 7-8:-

> "…it will be seen that where the District Court has determined that the accused is unfit, it is obliged to adjourn the proceedings. Section 4(3)(b) then continues by providing that the Court may:-
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> > '(i) if it is satisfied, having considered the evidence of an approved medical officer adduced pursuant to subsection (6) and any other evidence that may be adduced before it that the accused person is suffering from a mental disorder (within the meaning of the Act of 2001) and is in need of in-patient care or treatment in a designated centre, commit him or her to a specified designated centre until an order is made under section 13, or
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> > (ii) if it is satisfied, having considered the evidence of an approved medical officer adduced pursuant to subsection (6) and any other evidence that may be adduced before it that the accused person is suffering from a mental disorder or from a mental disorder (within the meaning of the Act of 2001) and is in need of out-patient care or treatment in a designated centre, make such order as it thinks proper in relation to the accused person for out-patient treatment in a designated centre.'
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> 8. It will be seen that in addition to its obligation to adjourn the proceedings, the Court may also order - and it is a permissive power- that the accused person receive either in-patient (s. 4(3)(b)(i)) or out-patient care (s. 4(3)(b)(ii)) at a specified designated centre. The Central Mental Hospital is the designated centre for this purpose: see s. 3(1) of the Act of 2006. So far as the present case is concerned, it is only necessary to examine the in-patient care option."

The District Court's Order of the 13th November, 2012, committing the accused for further assessment to the Central Mental Hospital cannot be held to be a nullity. It is a valid order of the District Court. The detention in conveying the accused to the Central Mental Hospital was lawful, and there appears to be no dispute about this. Article 40 proceedings were taken when the accused was taken into garda custody when the accused was turned away from the Central Mental Hospital. The High Court in those proceedings held that the accused was in unlawful detention when detained by the gardaí after being turned away from the Central Mental Hospital, see *A.B. v. The Commissioner of an Garda Síochána, the Director of Public Prosecutions, the Clinical Director of the Central Mental Hospital et all* [2013] I.E.H.C. 88 (Unreported, High Court, MacEochaigh J., 8th February, 2013).

The District Court is a court of local and limited jurisdiction. Therefore it cannot go beyond its statutory remit once a valid order has been issued. No power to re-issue a warrant is expressed in s.4 of the Act of 2006 and the court is of the opinion that a paternalistic view of the Act of 2006 whereby this power might be implied cannot be taken in the given circumstances, even if ordinary common sense would so suggest.

Order 26 Rule 11 of the District Court Rules specifically sets out the jurisdiction for the re-issuing of warrants:

"[Return of unexecuted warrants —Court may reissue]

> 11. Where a warrant, other than
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> —a warrant for the arrest of a person charged with an indictable offence,
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> —a warrant for the arrest of a person who has failed to appear in answer to a summons in respect of an offence,
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> —a bench warrant for the arrest of a person who has failed to appear in compliance with the terms of a recognisance, or
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> —a search warrant,
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> is addressed, transmitted or endorsed for execution, to any person and he or she is unable to find the person against whom the warrant has been issued or to discover where that person is or where he or she has goods, such person having the execution of the warrant shall return the warrant to the Court which issued the same (within such time as is fixed by the warrant or within a reasonable time, not exceeding six months where no time is so fixed) with a certificate (Form 26.4, Schedule B) endorsed thereon stating the reason why it has not been executed, and the Court may re-issue the said warrant, after examining any person on oath if the Court thinks fit so to do concerning the non-execution of the warrant, or may issue any other warrant for the same purpose from time to time as shall seem expedient."

Nothing in these rules could apply to the within case. The jurisdiction of the District Court is clearly confined under this Order in its ability to re-issue warrants. The mere fact that the committal warrant was "frustrated" does not automatically mean that the warrant can re-issue.

The problem that would arise if it was deemed that such an order for committal could be re-issued is the uncertainty that surrounds that proposition. The facts relating to the accused's state of mental health were assessed over a year ago and it is unclear what his present position is. A completely *de novo* fact-finding process would require to be undertaken but the Act of 2006 makes no provision in this regard. The decision in *Ejerenwa v. The Governor of Cloverhill Prison* [2011] I.E.H.C. 351, (Unreported, High Court, Hogan J., 5th September, 2011) notes that any instrument depriving an accused of their liberty must be clear on its face. It cannot be said that an option to re-issue a committal warrant without any certainty or statutory basis would not impact on the rights of the accused.

It appears in the circumstances of the within case that the only option available to the District Court is to adjourn the matter with liberty to re-enter. A new warrant cannot issue nor can a warrant re-issue. The court can, if the accused is deemed fit to be tried, continue the case in hand as *per O'Callaghan*.

The structure is a statutory structure wherein there are two options, if the accused is unfit then the proceedings are adjourned, if the accused is no longer unfit then the case can be re-entered.

Insofar as the questions posed by the learned District Court Judge are concerned I would answer them in the following manner:-

> (a) The substantive criminal proceedings must be adjourned generally with liberty to re-enter, the case to be re-entered if and when the accused is fit to be tried.
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> (b) The warrant for committal for assessment in the Central Mental Hospital cannot be re-issued. This would be to go beyond the jurisdiction of the District Court and impinge on the rights of the accused.
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> (c) A new order under s.4(6)(a)(i)(I) of the Act of 2006 cannot be made unless an application is made on behalf of the accused to reverse the finding of unfitness to be tried.
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> (d) The only available option for the District Court within its jurisdiction is to adjourn the matter unless and until the accused is deemed fit to be tried.