Neutral Citation Number: [2009] IEHC 522

THE HIGH COURT

2009 1860 SS

IN THE MATTER OF AN APPLICATION FOR AN ENQUIRY PURSUANT TO ARTICLE 40.4.2 OF THE CONSTITUTION OF IRELAND

BETWEEN:

BRIAN MOONEY

APPLICANT

AND

GOVERNOR OF ST. PATRICK'S INSTITUTION

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 13th day of November 2009:

On the 14th September 2009 at Tallaght District Court the applicant pleaded guilty to a charge of *"having with you an article to wit which had a blade or which was sharply pointed",* contrary to Section 9 (1) of the Firearms and Offensive Weapons Act, 1990. The article in question was a screwdriver. It appears that he was before the Court on that date on a number of charges, but his plea related to this particular charge. The remainder were adjourned.

The applicant is 16 years of age, and has no previous convictions.

On the evening of the 10th November 2009 he was given a sentence of 30 days' detention in respect of this offence, and this application for an enquiry into the lawfulness of his detention was made to this Court on the following day. I have heard the evidence and submissions, and have allowed the applicant bail pending the delivery of this judgment.

No replying affidavit has been filed in response to the affidavit of the applicant's solicitor, Peter Connolly, and accordingly the factual background to this application can be gleaned from same.

Mr Connolly avers that on the 14th September 2009 the applicant pleaded guilty to the said charge at the District Court, whereupon the District Judge directed a probation officer's report, and remanded the applicant to the 27th October 2009 on bail. It is averred that on the 27th October 2009 the applicant did not attend court as he was in hospital. On this date, a probation officer's report was produced to the court, and which states only the following:

> *"I phoned Brian's mother on the 6th October to arrange an appointment for herself and Brian. She was unavailable to meet me until the 12th October due to work commitments. On the 12th October she phoned me and advised me that Brian had the flu and would not be able to meet me that week. I arranged to meet herself and Brian on the 19th October. They failed to attend.*
>
> *As a result I am unable to offer any further information to the court."*

The applicant was further remanded until the 10th November 2009 on bail. No bench warrant was issued, which, it has been submitted, indicates that the explanation for the non-attendance of the applicant was accepted by the District Judge. It appears that on the 10th November 2009 the applicant and his mother were in court, and that the District Judge enquired of the applicant's Counsel as to why the second appointment had been missed with the probation and welfare officer, whereupon an instruction was taken from the applicant's mother who could not recall exactly what that reason was, but thought it was because the applicant was with his father or was in hospital. The District Judge was informed of this and was told also that the applicant's mother wished that a further opportunity be afforded to work with the Probation and Welfare Services.

It is averred that at this point the District Judge stated that he was not satisfied and stated that the applicant could either be remanded in custody for a further week so that the applicant's mother could find out why the second appointment had been missed or the judge could immediately proceed to sentencing that day. Counsel asked the District Judge to remand the applicant on bail until the 1st December 2009 as this was a date to which the other charges had been adjourned, so that inquiries could be made as to the reason for missing the second appointment, but this was declined.

The choice of a remand for a week in custody or proceeding to sentence was repeated by the District Judge, at which point the matter was put back to `third call' so that an instruction could be taken. At third call the Court was informed that the applicant's mother believed that the reason why the applicant missed the second appointment was that he was still suffering from flu. Clearly no medical certificate was produced since none is averred to or exhibited. This explanation was deemed insufficient by the District Judge, and when the two choices were again offered to the applicant, Counsel stated that the applicant wished to proceed to sentencing. It appears that an instruction was obtained in that regard from the applicant and his mother.

Having heard evidence from the prosecuting Garda, including that the applicant had no previous convictions, and having heard evidence and submissions as to mitigating factors, the District Judge imposed a sentence of 30 days' detention.

It is submitted on the present application that this sentence is unlawful in as much as the District Judge did not have a Probation and Welfare Report in order to assist him, and as provided for in s. 99 (1)(b) of the Childrens Act, 2001 ("the Act").

It is also submitted that the said sentence is without jurisdiction given the provisions of s. 96 of the Act which provides that a period of detention should be imposed only as a measure of last resort in the case of a child.

Submissions:
Paul Greene SC for the applicant has referred first of all to the provisions of s. 96 of the Act, which provide as follows:

> *96.-(1) Any court when dealing with children charged with offences shall have regard to*
>
> *(a) the principle that children have rights and freedom before the law equal to those enjoyed by adults and, in particular, a right to be heard and to participate in any proceedings of the court that can affect them, and*
>
> *(b) the principle that criminal proceedings shall not be used solely to provide any assistance or service needed to care for or protect a child.*
>
> *(2) Because it is desirable wherever possible*
>
> *(a) to allow the education, training or employment of children to proceed without interruption,*
>
> *(b) to preserve and strengthen the relationship between children and their parents and other family members,*
>
> *(c) to foster the ability of families to develop their own means of dealing with offending by their children, and*
>
> *(d) to allow children reside in their own homes,*
>
> *any penalty imposed on a child for an offence should cause as little interference as possible with the child's legitimate activities and pursuits, should take the form most likely to maintain and promote the development of the child and should take the least restrictive form that is appropriate in the circumstances; in particular, a period of detention should be imposed only as a measure of last resort.*
>
> *(3) A court may take into consideration as mitigating factors a child's age and level of maturity in determining the nature of any penalty imposed, unless the penalty is fixed by law.*
>
> *(4) The penalty imposed on a child for an offence should be no greater than that which would be appropriate in the case of an adult who commits an offence of the same kind and may be less, where so provided for in this Part.*
>
> *(5) Any measures for dealing with offending by children shall have due regard to the interests of any victims of their offending." (my emphasis)*

Mr Greene has submitted first of all that in the instant case the choice offered to the applicant, namely to accept a period of one week in custody so that further information could be obtained by the applicant's mother as to the reason why the second appointment with the Probation Services could be provided, or that he proceed to sentence, is in breach of the principle appearing above that measures taken in respect of the child should be the least restrictive that is appropriate in the circumstances, and that a period in detention should be imposed only as a last resort. He suggests that on the 10th November 2009 a position of last resort had not been reached, and that a further period, if one was to be allowed, should have one on bail.

The same submission is made in relation to the 30 day sentence imposed especially in circumstances where it was a first offence and one to which a plea of guilty had been made. The point is also made that when offering this choice, the District Judge gave no indication that he intended to impose a period of detention if he were to proceed to sentence, and that it was unfair and unreasonable to expect a child to make a choice of this kind in the circumstances of this case.

It is additionally submitted that the District Judge erred in law by sentencing the applicant in the absence of a Probation and Welfare Report which satisfies the requirements for such a Report as mandated by s. 99 of the Act.

Section 99 provides:

> *99.-(1) Subject to subsections (2) and (3), where a court is satisfied of the guilt of a child, it*
>
> *(a) may in any case, and*
>
> *(b) shall, where it is of opinion that the appropriate decision would be to impose a community sanction, detention (whether or not deferred under section 144) or detention and supervision*
>
> *adjourn the proceedings remand the child and request a probation and welfare officer to prepare a report in writing (a "probation officer's report ") which*
>
> *(i) would assist the court in determining a suitable community sanction (if any) or another way of dealing with the child and*
>
> *(ii) would contain information on such matters as may be prescribed including any information specifically requested by the court.*
>
> *(2) The probation officer's report shall at the request of the court indicate whether, and if so how, in his or her opinion any lack o care or control by the parents or guardian of the child concerned contributed to the behaviour which resulted in the child being found guilty of an offence.*
>
> *(3) The court may, in addition, request that a victim impact report be furnished to it in respect of any victim of the child where it considers that such a report would assist it in dealing with the case.*
>
> *(4) The court may decide not to request a probation officer's report where*
>
> *(a) the penalty for the offence of which the child is guilty is fixed by law,*

or

(b) (i) the child was the subject of a probation officer's report prepared not more than 2 years previously,

(ii) the attitude of the child to, and the circumstances of, the offence or offences to which that report relates are similar to his or her attitude to, and the circumstances of, the offence of which the child has been found guilty, and

(iii) the previous report is available to the court and the court is satisfied that the material in it is sufficient to enable it to deal with the case.

(5) Where a court requests a report under this section, it may at any time summon as a witness any person whose evidence in its opinion would assist it in dealing with the case." (my emphasis)

In the light of the mandatory requirement that when a detention of the child is being considered by the District Judge a Report shall be obtained, it is submitted that the only Report available to the Court, namely one which simply stated that due to non-attendance no information could be offered to the Court, is not capable of fulfilling the function and objective of s. 99 of the Act, and in such circumstances it is submitted that the imposition of a sentence is without jurisdiction and unlawful. Mr Greene submits that it was incumbent upon the District Judge, given the scheme of the Act, not simply to give a 'Hobson's Choice' to the applicant, and that he reasonably ought to have adjourned the matter again, remanding the applicant on bail, so that firstly an explanation could be available for the non-attendance of the applicant with the Probation Service, and so that another effort could be made to obtain an appropriate Report could be afforded in order to put the District Judge in a position to determine what sentence or other penalty was appropriate having regard to the provisions of s. 96 of the Act.

He points to the fact also that in the Report which was before the District Judge there is nothing which suggests a wilful lack of cooperation by the applicant such that the Probation officer could never envisage being in a position to prepare a full report, or at least one which could assist the District Judge in performing his function in relation to an appropriate penalty.

A further submission is made for the applicant that in sentencing the applicant in the way he did, the District Judge failed to have regard to the provisions of s. 143 of the Act which provides:

"143.--(1) The court shall not make an order imposing a period of detention on a child unless it is satisfied that detention is the only suitable way of dealing with the child and, in the case of a child under 16 years of age, that a place in a children detention school is available for him or her.

(2) Where an order is made under subsection (1), the court making the order shall give its reasons for doing so in open court."

Mr Greene submits that there is no evidence that the District Judge gave any reasons in open court as to why a detention of 30 days was required. He has in addition referred to the variety of possible measures which were open to the District Judge when deciding on how to deal with the applicant when imposing penalty, given the provisions of s. 98 of the Act which provide as follows:

""98.- Where a court is satisfied of the guilt of a child charged with an offence it may, without prejudice to its general powers and in accordance with this Part, reprimand the child or deal with the case by making one or more than one of the following orders.

(a) a conditional discharge order,

(b) an order that the child pay a fine or costs,

(c) an order that the parent or guardian be bound over,

(d) a compensation order,

(e) a parental supervision order,

(f) an order that the parent or guardian pay compensation,

(g) an order imposing a community sanction,

(h) an order (the making of which may be deferred pursuant to section 144) that the child be detained in a children detention school or children detention centre, including an order under section 155 (1),

(i) a detention and supervision order."

In all the circumstances it is submitted that the District Judge fell into error and that the detention of the applicant is unlawful.

For the respondent, Ronan Kennedy BL submits that the District Judge has acted within his powers, albeit in a way which the applicant considers harsh, and he submits at the outset that the appropriate remedy for the applicant to pursue is to appeal the severity of the sentence to the Circuit Court. In that regard, the District Judge has fixed recognizances for the purpose of an appeal.

Before addressing the submissions of Mr Greene, Mr Kennedy has made the point that in so far as the applicant seeks to rely upon the provisions of s. 143 of the Act, there is no evidence one way or the other in the affidavit grounding this application that the District Judge gave no reasons for his decision as required by that provision. He states that if there had been evidence given in that regard, the respondent could have sought information from the prosecuting Garda in that regard and could have filed an affidavit in reply if required. He submits therefore that this ground is not one which this Court should have regard to on this application.

In relation to the applicant's other submissions, Mr Kennedy submits firstly that while a 30 day detention may at first sight seem severe, one must bear in mind that the maximum penalty provided for the offence in question is 12 months' imprisonment, and that the penalty imposed is therefore at the lower end of a possible range of sentence, if a sentence was being considered appropriate.

It is submitted also that the District Judge was entitled to be very concerned at the fact that the applicant had failed to attend the

Probation Service on two occasions, and that it was within jurisdiction to consider that he had received a Report, albeit one that provided no assistance, and that he was entitled to take a view that the requirements of the Act as far as directing a Report is concerned, had been complied with.

Mr Kennedy submits that a District Judge cannot be expected in every case to keep adjourning a case where appointments are not kept, and that it would be an appalling vista if, in a case such as the present one, a judge was to proceed to sentence and that sentence could then be in effect set aside by the release of the person, because the judge had not continued to adjourn in the hope that the person would cooperate with the Probation Service.

He also submits that in the present case, the offer of a remand for one week in custody was a reasonable one given that he had no satisfactory explanation for non-attendance, as this would have facilitated the preparation and production of a further report by the Probation Service. It is suggested that since the applicant opted to proceed to sentence the applicant cannot now complain that he received a sentence that he was not expecting, or which he considers excessive, and that in the latter circumstance, the remedy is to appeal the sentence, rather than to achieve his release on the grounds of unlawfulness. He draws attention to the fact that the District Judge was appraised of the fact that the applicant had no previous convictions and had pleaded guilty, and that clearly these factors must have been taken into account when imposing sentence.

Conclusions:
One issue for determination in this case is whether the probation officer's report which was before the District Judge is a Report which fulfils the requirements of s. 99 of the Act.

The requirement in s. 99 is that where the District Judge is of the opinion that the appropriate decision would be to impose a community sanction, detention order or a detention and supervision order, he must adjourn the proceedings and remand the child and request a probation and welfare officer to prepare a "probation officer's report". That is the obligation set forth in the section. It is an obligation to adjourn and remand, although the section then goes on to provide in broad terms what such a report would contain i.e. *"information on such matters as may be prescribed, including any information specifically requested by the court".* It is described in s. 99 (1)(i) as a report *"which would assist the court in determining a suitable community sanction (if any) or another way of dealing with the child...".* But the obligation on the judge is to adjourn for such a report.

The section is silent as to what consequence should flow from a failure of a child to cooperate in the preparation of such a report. It nowhere states that further opportunities should be provided for the child's cooperation if there has been a failure to cooperate in the preparation of such report, although clearly a judge has a discretion to adjourn the matter further.

In the present case there was a failure to cooperate for reasons which were insufficient to satisfy the District Judge. The evidence seems to have been confined to a belief that on the second occasion that the applicant was still suffering from flu or was in hospital. The explanation of flu given on the first occasion when the matter was put back seems to have been accepted by the judge and he adjourned the matter and remanded the applicant on bail. Clearly the question of whether or not to adjourn the matter again when it was before him on the 10th November 2009 was a matter for the exercise of a discretion. On that occasion the District Judge was not satisfied with the explanation, such as it was, in respect of the second missed appointment. This was a view that he was entitled to have, particularly, in my view, since the applicant was in court with his mother, and presumably knows beyond a mere belief, exactly what the reason, if any, was.

The district Judge could have adjourned the matter further if he was satisfied to do so. Instead he took the view that if there was to be such a further opportunity for the applicant's cooperation, or for a full and proper explanation to be provided, the applicant should be remanded in custody. That was a matter for his discretion, and is not something which is prohibited by any provision of the Act. One could well imagine that he may have been of the view that a week in detention would ensure that the probation and welfare officer who was to prepare the report would be in a position to interview the applicant.

It is clear from the fact that the District Judge had adjourned the case for such a report that he was, on the 14th September 2009, at least considering a detention order or a community sanction. Otherwise he would not have been required to seek a report.

In my view he complied with s. 99 by adjourning the matter and remanding the applicant on bail for such a report. On the 27th October 2009 he had a report, albeit one which indicated that because the applicant had been unable to attend on the 12th October 2009 due to flu, and that he again failed to attend on the 19th October 2009.

When the matter came before the court on the 27th October 2009 the applicant was not in court as he was, according to what is stated in the grounding affidavit, in hospital, and the matter was put back to the 10th November 2009, again on bail. I am of the view that the District Judge was entitled to exercise his discretion on that date by stating that the matter could be put back once more but only if the applicant was detained in custody. But since he had a report before him, he was also in my view entitled under the Act to decide that he could proceed to sentence, and without offering the choice of a further remand in custody.

The report which he had in his possession on the 27th October 2009 and again on the 10th November 2009 was one which he had requested pursuant to the provisions of s. 99 of the Act. While that section goes on to provide for the purpose and content of such a report, there will always be situations where by reason of a lack of cooperation by the child or parent(s) the probation officer cannot complete a full report such as would have been contemplated by the District Judge and the Act. It is a matter for any particular judge in such circumstances to exercise a discretion as to whether it is reasonable to adjourn the case further. The exercise of that discretion by acceding to an application for a further adjournment is not dependent upon the probation officer stating in the report available that there is no chance of ever being in a position to assist the court, though clearly such a statement would be relevant.

In my view the report was one which the Judge was entitled to regard as one completed in accordance with his request under s. 99 even though there is nothing in the report which addresses the matters referred to in s. 99. The fact that it did not contain that material was not explained to the satisfaction of the District Judge, and again that it is a matter within the discretion of the judge.

The fact that the judge proceeded to sentence, after it was indicated that the judge should proceed to sentencing, an instruction having been taken in that regard from the applicant and his mother who was in court, is something which he was entitled to do, and this ground provides no basis for a finding by this Court that the sentence passed is unlawful.

Another issue is whether when making his decision as to penalty, the District Judge complied with the provisions of s. 96 (1) of the Act which sets out two matters which the court shall have regard to, and also s. 96 (2) of the Act which provides that any penalty

should, inter alia, be the least restrictive appropriate in the circumstances, and that any period of detention should be imposed only as a last resort.

These provisions set out broad principles which must guide a judge when dealing with an offending child. There is nothing to suggest that the District Judge in this case failed to have regard to these provisions. The fact that he may be considered by the applicant to have dealt with him harshly cannot of itself be sufficient to indicate that the District Judge failed to observe the requirement that the appropriate penalty to be imposed, or any further remand in custody, should take the least restrictive form that is appropriate, and that a period of detention should be imposed only as a last resort.

Such a requirement allows a measure of discretion to the judge, and it does not preclude a decision such as the one arrived at in this case, where clearly the judge considered the matter of cooperation, and also the nature of the offence and that he had no previous convictions. The fact that the applicant may consider the sentence to be unreasonable or severe does not mean that it is unlawful. As Mr Kennedy has submitted, the sentence passed is at the lower end of any possible sentence for that offence, if a sentence was to be imposed. While a sentence is not mandated, and other non-custodial penalties are provided for, these are matters for the exercise of a wide discretion by a District Judge. The applicant's remedy is to appeal the sentence imposed if he considers it to be excessive, and not to achieve his release on the basis that it was imposed unlawfully and without jurisdiction.

The final issue is that arising from the provisions of s. 143 of the Act which prohibits the imposition of a detention order unless the court is satisfied that detention is the only suitable way of dealing with a child, and whether or not reasons were given by the District Judge as required by s. 143 (2) of the Act. There has been no evidence offered in this regard on this application, and it is not therefore a ground which this Court is in a position to consider.

For these reasons, I do not consider that the applicant is unlawfully detained and I refuse the relief sought.