Neutral Citation Number: [2011] IEHC 492

THE HIGH COURT

2011 1824 SS

IN THE MATTER OF THE APPLICATION OF AN INQUIRY PURSUANT TO ARTICLE 40.4 OF THE CONSTITUTION OF IRELAND

BETWEEN

DH

APPLICANT

AND

GOVERNOR OF WHEATFIELD PRISON AND IH

RESPONDENTS

JUDGMENT of Mr. Justice Hogan delivered on the 23rd day of December, 2011

1. These Article 40 proceedings raise important issues concerning the jurisdiction of the District Court to sentence a defaulting maintenance debtor to prison for contempt of court. These proceedings commenced before Feeney J. on 9th September, 2011. On the same day Feeney J. directed an inquiry in the legality of the applicant's detention ("the husband") and admitted him to bail pending the determination of this inquiry. On 16th December, 2011, I held that the detention of the husband was unlawful and I directed his release pursuant to Article 40.4.2 of the Constitution. I am now giving the reasons for that decision in open court.

2. This application arose in rather unusual circumstances. The husband and the second respondent ("the wife") have been married since 1993. Unfortunately, relations between the parties broke down sometime in 2008. On 4th February, 2009, the District Court made an order requiring the husband to pay the wife maintenance in the sum of €1,000 per month. This was subsequently varied downwards to the sum of €600 per month by order of the District Court dated 22nd October, 2010. It would appear that the applicant paid maintenance until February, 2011.

3. The husband subsequently maintained that his business had suffered as a result of the very difficult economic conditions prevailing in the State and that he wished to have his maintenance payments further reduced. A further summons was issued by the husband returnable for the Bray District Court on 5th January, 2011, whereby he sought to have the monthly sum of €600 varied further. That summons was adjourned on a number of occasions and was ultimately dealt with – or so it is contended – by Judge Coughlan on 1st June, 2011.

4. In the meantime, the husband had issued a civil bill in the Circuit Court on 23rd March, 2011, seeking judicial separation and maintenance in other related financial matters. Those proceedings were served on the wife on 24th April, 2011.

5. There is indeed confusion as to what exactly Judge Coughlan decided on 1st June, 2011. There was a busy list on the court that date and the matter was dealt with quickly. The husband's legal representatives were probably justified in believing that Judge Coughlan had decided to yield jurisdiction in favour of the Circuit Court given the fact that the new proceedings were now extant, but it is another matter as to whether he had intended thereby to rule that the District Court henceforth lack jurisdiction at all in maintenance matters involving the parties during the pendency of the Circuit Court proceedings. In the event, it is unnecessary for me to express any concluded view on this question.

6. What is not in doubt is that on 7th July, 2011, the wife caused a fresh District Court summons to be issued returnable for hearing on 7th September, 2011. In that summons the wife contended that the husband had failed to pay the sum of €3,600, which sum represented the arrears of maintenance. Although the summons was headed as being in the matter of the Enforcement of Court Orders Act 1940, s. 8 (as amended by the Enforcement of Court Orders (Amendment) Act 2009, s.2), it gave no warning to the husband that he might be held liable in contempt or otherwise imprisoned if he failed to pay the sums in question. Nor did the summons contain any penal endorsement in the manner required by O. 46B, r. 6(2) of the District Court Rules 1997 (as amended).

7. The summons came before Judge Connellan on 7th September, 2011. It would seem that he was informed of the view taken by Judge Coughlan on 1st June, 2011, but Judge Connellan nevertheless elected to take jurisdiction in the matter. The wife maintains that the applicant was given every opportunity by Judge Connellan to agree to pay the outstanding maintenance sums to her, but that he declined or, at all events, failed to do so. What is not in dispute is that as a result of that hearing, Judge Connellan convicted and sentenced the applicant to seven days imprisonment for contempt of court for non-payment of maintenance to the wife. It is accepted that Judge Connellan did not warn the husband that he was liable to be found to be contempt of court. It is equally clear that the judge did not give the husband any real opportunity to discharge the sums in question before finding him to be in contempt.

8. The hearing before Judge Connellan was, of course, heard in camera and was prompted by a purely private law dispute between husband and wife. At the hearing before me, Ms. Dempsey appeared for the Governor of Wheatfield Prison. In most Article 40 proceedings the technical respondent is the Governor of a prison or a detention centre. In reality, however, counsel for the Governor will be representing wider State interests, typically the Director of Public Prosecutions, the Attorney General or An Garda Síochána. Equally, where the Article 40 arises out of a conviction in the District Court this will be at the behest of the prosecution brought either by the Director of Prosecutions of by individual members of An Garda Síochána. That, however, is not the position here and Ms. Dempsey's position is really quite limited. All that counsel can do on behalf of the Governor is to point to the existence of the warrant from the District Court committing the applicant to prison but as no issue arises in relation to that warrant, her role is a fairly limited one.

9. In fairness to the Governor I should point out that the Governor has been seeking to discharge from these proceedings for some time with a view – very understandably – to save costs. Indeed, it was agreed at the hearing before me on the 2nd December, that the Governor need not attend the resumed hearing and will only be present for such further hearing as takes place in relation to any

costs applications.

10. That leaves us then in the very unusual situation whereby effective legitimus contradictor is the wife. She is a foreign national who speaks excellent English, but she is not legally qualified and she would not claim to be familiar with court procedure. She sought to obtain the assistance of the Legal Aid Board, but the Board found itself unable to assist her.

The validity of the District Court order of 7th September, 2011

11. Turning now to the validity of the District Court order, it should first be noted that the summons is headed s. 8 of the Enforcement of Court Orders Act 1940 (as amended by s. 2 of the Enforcement of Court Orders (Amendment) Act 2009)("the 1940 Act"). Section 8(1) of the 1940 Act was the traditional procedure whereby a maintenance creditor could apply to the District Court for enforcement of that order and the District Judge was empowered to impose a maximum penalty of three months' imprisonment for wilful default of payment.

12. The original procedures contained in the 1940 Act were, however, found to be unconstitutional by Laffoy J. in her judgment in *McCann v. Monaghan District Judge* [2009] IEHC 276, [2009] 4 I.R. 200 since, in essence, the 1940 Act was found to contain insufficient procedural safeguards. The amendments effected by the 2009 Act were designed to ameliorate this state of affairs. Specifically, important new safeguards in terms of both notice and legal aid were introduced by the 2009 Act.

13. Accordingly, s. 8 as thus amended now requires the District Court to put in train the notice requirement of s. 6 of the 1940 Act. In other words, where a maintenance creditor makes an application for enforcement under s. 8 and the District Judge considers that imprisonment is a possible option, he or she may treat the application as an application for a summons under the (new) s. 6, in which case the application is governed by the requirements of s.6(2).

14. Section 6(2) now requires that the summons shall:-

> "(a) be issued by the District Court clerk concerned,
>
> (b) contain details of the consequences, under this section, of a failure to comply with an instalment order and in particular the possibility of imprisonment,
>
> (c) provide information in ordinary language of the options available to the judge of the District Court under subsection (7) at the hearing of the summons,
>
> (d) state that the debtor may be arrested if he or she fails to appear before the District Court as directed, and
>
> (e) be served on the debtor by personal service, unless the judge of the District Court directs otherwise."

15. These statutory requirements may be regarded as having been enacted by the Oireachtas in order to cure the procedural deficiencies with the original 1940 Act so graphically identified by Laffoy J. in *McCann*. Compliance with these procedural requirements is accordingly of particular importance and any non-compliance with such requirements could only be excused where it was essentially *de minimis* or fell into some category of harmless error: see, *e.g.,* by analogy the judgment of Henchy J. in *Monaghan UDC v. Alf-A-Promotions Ltd.* [1980] I.L.R.M. 64. The husband was given no notice whatever that the failure to comply might lead to his imprisonment, yet s. 6(2)(b) of the 1940 Act particularly requires that the summons contain such a notice.

16. In view of the manifest non-compliance with the notice requirements of s. 6(2)(b) of the 1940 Act in the present case, an essential prerequisite to the valid exercise by the District Judge of his statutory contempt powers was thus missing. By reason of such non-compliance with this jurisdictional prerequisite, the District Judge accordingly had no jurisdiction whatever to impose a custodial sentence in the present case: see, e.g., the judgment of Henchy J. in *The State (Holland) v. Kennedy* [1977] I.R. 193.

17. Such a conclusion also accords by analogy with the practice of this Court in contempt matters. Order 41, r.8 RSC requires that the relevant court order must contain a penal endorsement (*i.e.*, a specific warning that the defendant is liable for potential imprisonment) where it sought to invoke the coercive contempt jurisdiction of this Court. While the court has a discretion to dispense with this requirement in cases where the defendant is required by court order to refrain from committing a specific act, in the ordinary course, compliance with Ord. 41. r. 8 is mandatory: see generally *Hampden v. Wallace* (1884) 26 Ch.D. 746 and *Ulster Bank Ltd. v. Whitaker* [2009] IEHC 16. Thus, in the latter case, Clarke J. refused to take any coercive step such as sequestration of assets in the absence of the relevant penal endorsement. Whitaker is a powerful reminder of the imperative necessity of adhering to all procedural pre-requisites to the exercise of the contempt jurisdiction.

18. In any event, Ord. 46B, r. 6(2) of the District Court Rules 1997 (as amended) is in similar terms. Rule 6(2) envisages that the order served on the person "required to obey the said order" shall be endorsed as follows:-

"If you do not obey this order by the time stated, you may be imprisoned or fined in order to compel you to obey the order."

19. No such endorsement was contained in the summons of 7th July, 2011. As if to re-inforce all of this, similar provisions are contained in the new statutory contempt powers given to District Judges to deal with defaulting maintenance debtors which are contained in s. 9A of Family Law (Maintenance of Spouses and Children) Act 1976, as inserted by s. 31 of the Civil Law (Miscellaneous Provisions) Act 2011. As these provisions were not among those specified by s. 1(10) of the 2011 Act came into force on 2nd August, 2011, as being subject to a ministerial commencement order, they came into force on the date signed by the President in accordance with Article 25.4.1 of the Constitution*, i.e.,* in this case, 2nd August, 2011.

20. While the entry into force of these provisions post-dated the issue of the summons, the provisions of the new s. 9A underscored the necessity for advance notice to a potentially defaulting maintenance debtor of the consequences of a potential default, including the possibility of a prison sentence. The new s. 9A also incorporates the new procedural safeguards which were clearly necessary after the judgment in *McCann*.

21. While it is unnecessary for the purposes of this judgment to consider the distinctions between civil and criminal contempt, it suffices to say that, as O'Hanlon J. noted in *Ross Co. Ltd. v. Swan* [1981] I.L.R.M. 416, 417, the imposition of a custodial sentence via the contempt jurisdiction should generally be the option of last resort for any court, save where the behaviour of the offender is so contumelious and outrageous as to call for immediate sanctions. While I appreciate that, at least from the perspective of the wife, the husband here had been given many opportunities to discharge his obligations to her, she nonetheless fairly acknowledged that the District Judge in the present case gave the husband no such advance warning so far as the sentence of imprisonment is concerned.

22. This was clearly a manifest error on the part of the learned District Judge in the exercise of his statutory contempt jurisdiction under the 1940 Act (as amended). Nor were the requirements of O. 46B, r. 6(2) of the District Court Rules regarding the necessity for a penal endorsement complied with. In a case such as this, it was clearly incumbent on the District Judge to warn the husband of the potential consequences of his failure to comply with the order and, just as importantly, to give him a fair opportunity of doing so. The judge was also obliged to consider whether the financial circumstances of the husband also called for a variation of the maintenance order.

Conclusions

23. It follows, therefore, that for the reasons just stated, the District Judge erred in law in imposing a seven day sentence of imprisonment. Since I was plainly not satisfied that the applicant husband was being detained in accordance with law, it was for those reasons that I directed his release pursuant to Article 40.4.2 of the Constitution.