Neutral Citation Number: [2009] IEHC 109

THE HIGH COURT

2009 233 SS

IN THE MATTER OF AN INQUIRY PURSUANT TO ARTICLE 40.4.2 OF THE CONSTITUTION OF IRELAND

BETWEEN

ZORAN ANDJELKOVIC

APPLICANT

AND

THE GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

Judgment of Mr. Justice Hedigan, delivered on the 4th day of March, 2009

1. The applicant is a Dutch national who is currently remanded in custody before Dublin District Court having been charged with an offence contrary to section 15A of the Misuse of Drugs Act 1977 ('the 1977 Act').

2. The respondent is the official responsible for the applicant's detention for the purposes of the present proceedings.

3. The applicant seeks to challenge the lawfulness of his detention, under the procedure laid down in Article 40.4.2º of the Constitution. He does so on the basis of what he alleges to be unlawful procedures adopted by the District Court, sitting at Cloverhill Courthouse, on the 10th of February 2009.

I. Factual and Procedural Background

4. On the 13th of December 2008, the applicant was sitting in his vehicle at Airside Retail Park, Swords in the County of Dublin when he was approached by a number of members of An Garda Síochána. A search of the vehicle was then carried our pursuant to section 23 of the 1977 Act. The applicant was arrested on suspicion of having committed an offence under the 1977 Act and was conveyed to Ballymun Garda Station where he was detained for questioning pursuant to section 2 of the Criminal Justice (Drug Trafficking) Act 1996. During his detention at the station, it was put to the applicant that two kilograms of cocaine had been concealed within his vehicle, the value of which was approximately €150,000. On the 14th of December 2008, the applicant was released from custody and charged with offences contrary to sections 3 and 15 of the 1977 Act, which cover simple possession of a controlled drug and possession for the purposes of sale or supply respectively.

5. On the 15th of December 2008, the applicant was brought before Dublin District Court to answer the charges. The prosecuting Garda gave evidence of arrest, charge and caution in the usual manner and also indicated to District Judge Dunne that the estimated value of the drugs seized was €150,000. The applicant was then remanded in custody to Cloverhill Prison to appear before the District Court sitting at Cloverhill Courthouse on the 19th of December 2008.

6. The applicant appeared before the District Court at Cloverhill Courthouse on the 19th of December 2008, the 6th of January 2009 and the 3rd of February 2009 while directions from the Director of Public Prosecutions were awaited. On each occasion, the applicant consented to being continuously remanded in custody as he was of limited means and not in a position to nominate a place of residence within the State for the purposes of a bail application. On the application of the Chief Prosecution Solicitor, an extension of time was also granted by District Judge Coughlan for the service of the book of evidence under section 4B(3) of the Criminal Procedure Act 1967 (as inserted by section 9 of the Criminal Justice Act 1999).

7. On the 10th of February 2009, the applicant appeared once again before the District Court at Cloverhill Courthouse. Before the commencement of court business, the applicant was preferred with an additional charge sheet. This charge sheet detailed an offence contrary to section 15A of the 1977 Act, which is identical in its terms to section 15 of the 1977 Act save for the addendum that, at the time of the possession, the market value of the drugs was €13,000 or more.

8. When the case was called on, the investigating Garda gave evidence of arrest, charge and caution in relation to the section 15A offence detailed on the new charge sheet. He stated on inquiry that the approximate value of the drugs involved was €120,000 and sought a remand of one week in relation to the new charge. The Chief Prosecution Solicitor informed the Court that the Director of Public Prosecutions had directed that the prosecution on foot of the two original charge sheets should proceed by way of trial on indictment. He then made an application for a further extension of one week for service of the book of evidence.

9. The applicant did not consent to an extension of time for service of the book of evidence in respect of the original charges, nor did he consent to a remand on foot of the new charge sheet. At this stage, 57 days had passed since he first appeared before the District Court. Section 4B(1) of the Criminal Procedure Act 1967 (as inserted by section 9 of the Criminal Justice Act 1999) provides that the book of evidence must be served on an accused person within 42 days of his first appearance before the District Court.

10. During the course of the hearing, the investigating Garda gave evidence of the manner in which the investigation had progressed. He stated that the substance seized had been delivered to the Forensic Science Laboratory at Garda Headquarters for analysis on the 13th of December 2008, immediately following the initial arrest, and a certificate of analysis was returned on the 3rd of February 2009. He further asserted that he could not have been sure of the value of the drug seized until it was scientifically certified, although he did state that the Garda Síochána National Drugs Unit generally placed an estimated value on cocaine of €70,000 per kilogram.

11. The investigating Garda explained that a preliminary file had been remitted to the Chief Prosecution Solicitor's Office on the 30th of January 2009 and that a number of statements and pieces of forensic evidence relating to fingerprints remained outstanding. No evidence was offered to explain the ensuing delay in preparing the book of evidence and the applicant's solicitor sought to have all

charges against his client struck out. Reliance was placed on a number of decisions of the High Court including the two decisions in *Dunne v. Governor of Cloverhill Prison* (High Court, unreported, 15th and 25th January 2008) and in particular *Zaharia v. Governor of Cloverhill Prison* (High Court, unreported, 24th November 2008). No copy of the approved judgment in the latter case was available and instead the applicant's solicitor sought to rely on counsel's note of the decision.

> 12. District Judge Brady ultimately reached the following conclusions:
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> (i) there had been no explanation for the delay since the 30th of December 2008;
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> (ii) the 42 day period in respect of the section 15A charge sheet started on the day the charge was preferred i.e. the 10th of February 2009;
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> (iii) it is not proper for the Director of Public Prosecutions to prefer a charge under section 15A of the 1977 Act until the necessary evidence has been received, including the forensic science certificate;
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> (iv) the new charge under section 15A of the 1977 Act was of a substantially different basis in fact to the original charges under sections 3 and 15 of the 1977 Act;
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> (v) it was for the Director of Public Prosecutions to decide how and when to prefer criminal charges, within the mandatory terms of section 4B(1) of the Criminal Procedure Act 1967, as inserted by section 9 of the Criminal Justice Act 1999; and
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> (vi) the note of the judgment in *Zaharia* was nothing more than hearsay.

13. On the basis of these findings, the District Judge decided to refuse an extension of time for the service of the book of evidence. He therefore struck out the original charges under sections 3 and 15 of the 1977 Act. He further held that in the circumstances, an extension of time for the charge under section 15A of the 1977 Act was not necessary. The applicant was remanded in custody for one week.

14. On the 12th of February 2009, the applicant was granted a conditional order of *habeas corpus* by this Court and now seeks to challenge his continued detention by the respondent.

II. The Decision of the Court

15. The essence of the applicant's case is that a charge under section 15A of the 1977 Act is in reality the same as a charge under section 15 of that Act for the purposes of the present proceedings. On this basis, the applicant submits that a section 15A charge could have been preferred at any time by the Director of Public Prosecutions and should not be allowed to inhibit the effect of the time limit for service of the book of evidence provided for by section 4B(1) of the Criminal Procedure Act 1967, as inserted by section 9 of the Criminal Justice Act 1999. To allow the Director to extend time by preferring fresh but nearly identical charges would be, in the applicant's submission, to allow the total subversion of the statutory obligations contained within section 4B(1) of the 1967 Act.

16. In support of his arguments, the applicant relies on both of the decisions in the *Dunne* case as well as that in *Zaharia*, all of which were presented before the District Court. However, it seems to me that each of those decisions is readily distinguishable from the circumstances of the present case. In *Dunne*, the central issue was whether a District Court judge was entitled to extend time for service of the book of evidence in respect of a single charge, pursuant to section 4B(3) of the Criminal Procedure Act 1967, in the absence of evidence justifying the delay. Counsel for the Director of Public Prosecutions in that case had failed to advance any evidence explaining why time ought to be extended but the District Judge had nonetheless granted the extension and remanded the applicant in custody. In his decision, Edwards J. stated:

> "It seems to me that there are, of necessity, three components to an application for an extension of time pursuant to s. 4B (3). To be successful an applicant must satisfactorily address all three. The first component involves establishing the factual matrix underpinning the application, because such applications do not take place in a vacuum. The second component involves persuading the District Judge that on the basis of the facts as established there is "good reason" for extending time. The third component involves also persuading the District Judge that on the basis of the facts as established it would be in the interests of justice to extend the time. Applications by the DPP for extensions of time pursuant to s. 4B (3) occur routinely in the District Court. In many, perhaps even most, of these cases the facts put forward as giving rise to the need to seek the extension are not disputed. In such instances, the application is dealt with on the basis of asserted facts, without evidence being received in support of those assertions, and the judge determines the matter on the basis of submissions by the parties directed only towards the second, and/or the third, of the components that I have mentioned. There is no necessity for evidence in such circumstances because the accused is, by his conduct in not calling for the adduction of evidence, deemed to accept the facts as asserted, and to have waived his right to insist on proof of them. However, in any particular case, an accused is entitled if he wishes to put the DPP on proof of the factual matrix underpinning his application. If he does so, the circumstances alleged to exist must then be established in evidence. Further, the accused must be afforded an opportunity of testing the evidence put forward in the crucible of cross-examination, and to call evidence in rebuttal if he wishes. If evidence is called for, and is not produced, the District Judge will thereafter be incompetent to adjudicate further on the application, as consideration of second and/or third component issues can only take place in the context of established (or accepted) facts. As I have said neither "good reasons" nor "the interests of justice" can exist in a vacuum."

17. I cannot accept that the situation which arose in *Dunne* is comparable to the present case. It is clear that on the 10th of February 2009, the District Judge struck out the original charges against the applicant on the basis that no adequate explanation had been presented to him for the delay in service of the book of evidence in respect of those particular offences. I do not think the fact that Judge Brady went on to permit the preferment of a new and distinct charge against the applicant has any bearing on the issue. In my opinion, the procedural deficiencies in the prosecution of separate, albeit factually related, charges cannot have such an inhibitory effect on the preferment of fresh charges against an accused, where appropriate. It seems to me that only in cases where the objective of the prosecutor is to circumvent the statutory time limit, or where a similar kind of serious injustice may arise, should such a practice be prohibited. I can not accept that any such ulterior motive or injustice existed in respect of the applicant in this case.

18. In respect of *Zaharia***,** again it seems to me that the decision of the High Court in that case is not entirely apposite to the present proceedings, although some similarities undoubtedly exist. In *Zaharia*, the Director of Public Prosecutions had sought to prefer, following the expiry of the 42-day period for an offence contrary to section 29(2) of the Criminal Justice (Theft and Fraud Offences) Act 2001, new charges against the applicant which had a similar factual nexus and the same essential elements. Counsel for the

applicant in that case submitted that the conduct of the Director amounted to a "colourable device" which had the sole function of avoiding the time limits for service of the book of evidence. No evidence whatsoever was advanced to explain the delay in prosecution of the original charge, or indeed as to why the preferment of the new charges should be permitted. However, it is clear that in the present case, some justification was in fact advanced by the Director of Public Prosecutions for the preferment of the charge under section 15A of the 1977 Act. It therefore falls for the Court to consider the adequacy of that justification in the circumstances of the case as a whole.

19. There are a number of important matters which the Court must consider in assessing the conduct of the prosecuting authorities. Firstly, I note that the Director of Public Prosecutions only received the forensic science report on the 3rd of January 2009. It seems to me that following the receipt of this, the Director's office moved promptly, directing that the proceedings in respect of the charges already preferred should proceed by way of indictment and further directing that a new charge should be preferred under section 15A of the 1977 Act. I also note the evidence of the investigating Garda given on the 10th of February 2009 to the effect that the market value of the drug, a required proof under section 15A, could not have been known until the forensic science report had been returned.

20. It seems to me that the intentions of the prosecuting authorities in the present case were entirely *bona fide* in bringing a charge under section 15A of the 1977 Act. No intention to subvert the provisions of section 4B(1) of the Criminal Procedure Act 1967 was evident from the manner in which things unfolded. Indeed, this is something which was largely accepted by the applicant who concedes that no "colourable device" was being used as might have occurred in other cases.

III. Conclusion

21. There does not appear to me to be any rule of law which prohibits the preferment of new charges against a person already accused of other offences, provided that such is done in good faith and that no serious injustice arises. In this case, I must confess to some concern at the similarity of the charges under sections 15 and 15A of the 1977 Act. Nonetheless, the Oireachtas have quite plainly thought the difference between the two offences to be sufficient to merit two distinct legislative provisions. It seems to me that when circumstances such as those of the present case do arise, it will be incumbent on the District Court to exercise a particularly stringent oversight in relation to any further requests for an extension of time. In light of the foregoing, I am satisfied that the applicant is being detained by the respondent in accordance with law and will accordingly refuse this application.