Neutral Citation Number: [2009] IEHC 42

THE HIGH COURT

Record Number 2008 1792 SS

IN THE MATTER OF AN APPLICATION FOR AN ENQUIRY PURSUANT TO ARTICLE 40 OF THE CONSTITUTION OF IRELAND

BETWEEN:

JAMES MACHARIA

APPLICANT

AND

THE GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

Judgment of Mr. Justice Michael Peart delivered on the 30th day of January 2009:

While the issue of the lawfulness of the applicant's detention on foot of a warrant purporting to have issued from the Dublin Metropolitan District Court on the 17th November 2008 is no longer a live issue since the applicant had been released on bail by the time this substantive application was heard by me, the issue which gave rise to the application for an enquiry under Article 40 should be the subject of a determination firstly because the applicant seeks the costs of the application, and secondly in my view because the issue is an important one, and my decision may be of assistance generally in the future.

The issue raised is a very net one indeed. The said warrant under which the respondent held the applicant on the relevant date has been signed not by any District Judge who ordered that the applicant be lodged in Cloverhill Prison during a relevant period of adjournment, but by a District Court Clerk. In so doing, the said District Court Clerk has availed of the same form of warrant which would in the past have been signed by the District Judge, and has simply changed in ink the words "Judge of the District Court" where they appear below the signature line, and replaced that wording with "District Court Clerk".

John Finlay SC for the respondent submits that following the amendment of the Courts Act, 1971 ("the 1971 Act") by the substitution of sections 13A and s. 14 (as inserted) thereof by the inclusion of a new section 14 (by section 23 of the Civil Law (Miscellaneous Provisions) Act, 2008), the warrant, signed as it is by the District Court Clerk, is a valid warrant on foot of which the respondent was entitled to hold the applicant, and that his detention there under was therefore at all times lawful.

Section 14, sub-section (3) of the 1971 Act now provides:

> "14.— *(1)* ……
>
> *(2)* ……
>
> *(3) Subject to subparagraph (2) of paragraph 4 of the Sixth Schedule to the Courts (Supplemental Provisions) Act,1961, a warrant issued on or after the commencement of this section by a judge of the District Court shall, when signed by –*
>
> > *(a) any judge of the District Court assigned to the District Court district in which the warrant issued, or*
> >
> > *(b) subject to subsection (4), any district court clerk assigned to the District Court area in which the warrant was issued,*
> >
> > *be evidence in any legal proceedings of the matters to which the warrant relates until the contrary is shown.*
>
> *(4) ……"*

Other submissions are made by Mr. Finlay, without prejudice to that primary submission, and I will address those in due course.

Feichín McDonough SC for the applicant takes a different view of what this section permits. He submits that while the section, in respect of a warrant, enables a district court clerk to sign a warrant that has been issued by a judge of the District Court, the warrant in the present case makes no reference whatsoever to the judge having issued a warrant, and that what the warrant on its face is simply a command by the district court clerk to lodge and detain the applicant at Cloverhill Prison, without any reference to the judge having so ordered, and that this lacuna is fatal to its validity, as on its face it is a warrant made without jurisdiction by the district court clerk.

Mr. McDonough has referred to the judgment of Keane C.J. in *Simple Imports Ltd v. Revenue Commissioners* [2000] 2 I.R.243. In that case certain search warrants had been issued by District Judges pursuant to the provisions of s. 205 of the Customs Laws consolidation Act, 1876 and s. 5 (1) of the Customs and Excise (Miscellaneous Provisions) Act, 1988. Before such warrants may issue it was necessary firstly that a customs officer must have reasonable grounds for his suspicion that certain goods are on a premises sought to be searched, and secondly that the judge be satisfied from the information given on oath by the customs official, that the officer had a reasonable suspicion. The warrants which issued from the District Court recited merely that the customs officer had "cause to suspect …" etc, and did not go on to recite that the judge was satisfied that from the information given on oath that the officer had a reasonable suspicion, as required by the legislation. The warrants which issued did so in a standard form which had been in existence for some time. During the course of his judgment, Keane C.J. stated that he did not accept the respondents' submission that the invalidity of the warrant can be cured by evidence that there was in fact before the district judge evidence which entitled him to issue the warrant within the terms of the statute. He stated at p. 255 that such a submission was *"contrary to principle and unsupported by authority"*, and further:

> *"Given the necessarily draconian nature of the powers conferred by the statute, a warrant cannot be regarded as valid which carries on its face a statement that it has been issued on the basis which is not authorised by the statute. It follows that the warrants were invalid and must be quashed."*

Mr. McDonough has submitted that if such be the case in respect of a search warrant, then it applies with even more vigour to a warrant to remove a person's liberty.

In the present case the respondent has filed an affidavit sworn by the district court clerk who signed the committal warrant. In that affidavit she states that she was the clerk in court on the 17th November 2008, being the date on which this warrant issued. She states that the District Judge made an order on that date remanding the applicant in custody, with consent to bail, to appear again in Cloverhill District Court on the 21st November 2008, and that she, as district court clerk, pursuant to the provisions of s. 23 of the Civil Law (Miscellaneous Provisions) Act, 2008, amending s. 14 (3) of the Courts Act, 1971, "*did sign the warrant which was issued by the said judge of the District Court committing the applicant to Cloverhill Prison with consent to bail…".*

She has exhibited the orders in respect of each charge, and these are dated 11th December 2008, and have been signed by the District Judge, and recite, inter alia, that:

> *"It was adjudged that the said accused be remanded in custody to Cloverhill Prison with consent to bail…"*

Curiously these orders have been signed by the judge himself, whereas it would appear that these orders could have been signed by the district court clerk under the provision of s. 14 (1) (as substituted) being *"an order made … recording a decision of a judge of the District Court"*, that subsection having made the same provision in respect of court orders, as subsection (3) set out above made in respect of warrants. However nothing turns on that.

Mr. McDonough has referred to a judgment of mine in *JOG v. Governor of Cork Prison* [2007] 2 I.R. 203. In that case, the warrant issued from the Circuit Court which did not on its face record precisely what was ordered by the Circuit Court Judge in a couple of respects. I concluded that there was no prescribed form for the particular warrant being issued in that case contained in the Consolidated Circuit Court Rules, and that it was necessary for another form to be adapted to the particular circumstances of that case, and that this had been carelessly done. I concluded also at page 213 that *"this warrant lacks the integrity worthy of a document whose effect is to authorise the deprivation of a person's liberty. On this ground alone I am not prepared to regard this warrant as a sufficient authority for his detention."* Mr. McDonough urges that the warrant in the present case, being one which appears on its face to be one made without jurisdiction being shown, suffers from an equal frailty, being a form which has not been suitably adapted from the form used prior to the amendment to s. 14(3) of the 1971 Act referred to above.

Mr. Finlay has submitted on behalf of the respondent that the new section states that the warrant signed by the district court clerk "is evidence in any legal proceedings of the matters to which the warrant relates until the contrary is shown". He submits accordingly that the applicant has failed to show that District Judge did not issue a warrant, and refers in that regard to the copy orders signed by the District Judge wherein he ordered the remand of the applicant in custody, and which have been exhibited by Ms. McQuaid in her affidavit, and says that it is therefore clear that the judge issued the warrants, and that in accordance with the provisions of s. 14(3) of the 1971 Act, the said warrants have been signed by the district court clerk.

As a fall-back position, Mr. Finlay urges that even if there is some frailty in the manner in which the warrants were prepared and signed by the district court clerk, such defect is not sufficient to breach any fundamental right of the applicant that his release is required pursuant to the provisions of Article 40 of the Constitution, since it is clear that the judge did in fact order his remand in custody, and that he had jurisdiction to do so, and in that regard refers to the judgment of O'Higgins C.J. in *The State (McDonough) v. Frawley* [1978] I.R. 131 at p.136. He submits that at best the complaint of the applicant is a purely technical one and one which should not resulting the release of the applicant as sought.

Mr. McDonough agrees that the new s. 14 of the 1971 Act provides that the warrant is evidence of the matters to which it relates until the contrary is shown, but submits that what that means is simply in this case that the document is evidence that the District court Clerk and not the judge commands the detention of the applicant, and that the document is completely lacking as far as showing any jurisdiction for that. He reiterates that the new section does not confer power on a district court clerk to issue a warrant, but simply to record that a warrant was issued by a District Court Judge, without it being necessary for the judge himself/herself to have signed the warrant.

Conclusions

The facts are not in dispute in any way on this application. There is no doubt but that on the 17th November 2008 the applicant was before the District Court on a number of charges, and that on that date the District Judge remanded him in custody to the 21st November 2008 (with bail terms set); and further that the applicant was brought to Cloverhill Prison on the 17th November 2008; and further that the respondent thereafter detained the applicant there on foot of a document headed 'Committal Warrant' which was signed by the district court clerk.

It is the wording of that document which is central to the present application, and whether, although the judge had made orders for the remand of the applicant in custody, the document is sufficient to constitute a valid and lawful warrant for the lawful detention of the applicant. What has occurred clearly is that the form which has been used is precisely the same form of Committal warrant which is prescribed for use prior to the amendment of s. 14 of the 1971 Act, and that same was not adapted in any way to take account of the signing thereof by the district court clerk following the amendment of that section as described.

As held by the Supreme Court in Simple Imports Ltd v. Revenue Commissioners [supra] "a warrant could not be regarded as valid which carried on its face a statement that it had been issued on a basis which was not authorised by statute". The facts of that case are of course very different to the present case. In that case the warrant contained a statement as to the basis on which the warrant were issued, and that basis was not what was authorised by statute, even though there was evidence before the District Judge which was given and which would have justified the issue of the warrant, The error was that this lawful basis was not stated in the warrant. In the present case, the error, if it be such, is that the warrant signed by the district court clerk is simply signed by the district court clerk, and makes no mention whatsoever on its face that the District Judge made an order for the issue of the warrant. The warrant simply states that the hearing of the charges was adjourned, and commands the detention of the applicant. Though the facts are different, the principle must be the same in my view, namely that the warrant detaining the applicant must on its face show that the warrant was lawfully issued by a person empowered to so issue the warrant, and that is the District Judge alone, and not the district court clerk. In my view that lacuna cannot be simply be filled at some later stage by it being shown, as in this case, that the judge in fact made such an order. Neither is the situation met by the fact, not disputed in this case, that the applicant was himself present in court when the remand in custody was ordered by the judge. In the case of JOG v. Governor of Cork Prison [supra]

there was equally little doubt that that applicant was aware of what was required of him in order to comply with the order of the Circuit Court Judge, but that was insufficient to render valid a warrant which had been carelessly prepared and which failed to reflect what was actually ordered by the learned judge.

The warrant in the present case is on its face a command by the district court clerk to detain the applicant in Cloverhill Prison. That cannot be appropriate and lawful. Such an important document – an authorisation for the deprivation of the liberty of the applicant – must be properly and carefully prepared. Great care must be taken not only to enable the detainor to be aware of the authority under which he is to detain the person, but so that the detainee can by inspecting the document be aware of precisely the lawful authority under which he is held.

I of course impute absolutely no *mala fides* to the district court clerk. But when the Oireachtas passes legislation which confers a power on the district court clerk to sign a committal warrant, consideration must be given to what if any changes must be made to prescribed forms previously in use when signed by the judge himself/herself. The form used in the present case is that prescribed by the Rules of the District Court, 1997, Form 19.1. It is a form intended to be signed by the judge, and contains two recitals, namely, firstly, that the person was before the court charged with the offences attached thereto, and secondly, that the charge(s) has/have been adjourned. It then simply commands the person to whom it is addressed to lodge the accused person in the prison there to be detained until the time of the adjournment. What ought to have happened in the present case, given that the warrant was being signed pursuant to s. 14 of the 1971 Act by the district court clerk, is that an additional recital should have been added namely to the effect that an order was made/issued that day by the Court/ District Judge that the accused by remanded in custody (with consent to bail) until the adjourned date. A form of warrant containing that additional recital could then be appropriately signed by the district court clerk pursuant to the power given in that regard by new s. 14 of the 1971 Act. That document would then under the said provision be evidence of the matters to which it relates, namely that the applicant was before the court on the date in question, that the charges were adjourned and that the applicant was remanded in custody by the judge until that adjourned date.

The present 'warrant' signed as it is by the district court clerk is evidence of the matters to which the warrant relates, but that in the present case is simply, by reference to the words in the 'warrant', that the applicant was before the court, and that the charges were adjourned to 21st November 2008. There is no reference to the fact that the judge remanded him in custody to that date, and the command that he be so detained is given by the district court clerk. That in my view is insufficient, and fails to show any jurisdiction on the face of the warrant for the lawful detention of the applicant.

In those circumstances the detention of the applicant on foot of same was unlawful.

The applicant was released on bail before this application came on for hearing, but since I have reached this conclusion, the applicant in my view is entitled to the costs of the application, since before being entitled to such an order, the merits of the applicant's application had to be determined.