Neutral Citation Number: [2006] IEHC 126

**THE HIGH COURT**

**[2005 No. 838 JR]**

**BETWEEN**

**FRANK DALY**

**APPLICANT**

**AND**
**JUDGE JOHN COUGHLAN**

**RESPONDENT**

**AND**
**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**NOTICE PARTY**

**Judgment of Mr. Justice John MacMenamin dated the 10th day of March, 2006.**

**Factual Background**

1. The applicant herein was charged with the offences of having no insurance and no driving licence on 28th April, 2000. On 19th June, 2001, he was convicted of those offences and sentenced to a six month period of detention in relation to each sentence, which sentences were to run consecutively. He appealed this decision to the Circuit Court and took up bail pending the appeal.

2. On the 19th November, 2003, the appeal was struck out in the Circuit Court and the District Court order was affirmed. The applicant was not present in the Circuit Court on that date for the purposes of prosecuting his appeal. The committal warrants were then returned to the District Court for reissuing. They were reissued in the District Court on 17th December, 2003. On the 18th May, 2005, some seventeen months later, an order was made by the first named respondent purporting to reissue the said warrants for a period stated thereon to be "within six months" of the date of issuing. This arose for the following reason.

3. On the 6th March, 2005, the applicant has been arrested and charged by Garda Eoin Maher for an unrelated charge. He was admitted to bail on 8th March, in relation to that charge. On 23rd May, 2005, the applicant attended Dun Laoghaire District Court in compliance with the terms of that bail bond. On that date the charge was struck out on the application of the prosecution. On the same date the applicant was arrested on foot of the warrants, the subject matter of the prosecution. He was lodged in Mountjoy prison on foot of the said warrants and subsequently transferred to the Midlands prison.

4. On 25th July, 2005, an application was made pursuant to Article 40.4.2 of the Constitution of Ireland for an inquiry into the validity of the detention of the applicant. This application was brought in proceedings entitled *Frank Daly v. The Governor of the Midlands Prison*. This application was made returnable for the following day. On that date, leave was granted to apply for judicial review in the instant proceedings by Quirke J. This was made returnable to the 28th July, 2005. The applicant was admitted to bail by the High Court (Peart J.) on 10th August, 2005.

5. The actual relief now sought by the applicant is for an order of *certiorari* by way of an application for judicial review to quash the first named respondents order of 18th May, 2005, reissuing the warrants originally issued by then President of the District Court His Honour Judge Peter Smithwick on 17th July, 2003.

6. The circumstances so far as concern the respondents are dealt with to a degree in two affidavits sworn herein In the first of these, Detective Garda Francis Hoban disputes a contention made by the applicants on the course of his affidavit that he was not made aware of the date upon which his appeal against conviction and sentence before the Circuit Criminal Court was scheduled for hearing. He states that the appeal was scheduled for hearing on 12th November, 2003. He recollects being in court on that date and recalls that the applicant was personally present in court and was represented by way of solicitor. The Detective Garda states that he gave evidence that the applicant had driven while he was disqualified, that various submissions were made in mitigation relating to those occasions and that the judge indicated that he would adjourn the matter for one week when he would give his judgment on 19th November, 2003. The matter was mentioned on that date. The applicant did not himself appear in court, however his solicitors were present. On that date the District Court order was affirmed.

7. There is also filed a second affidavit by Sergeant John O'Donovan of An Garda Siochána, Finglas Garda Station. He testifies of efforts which were made to serve warrants on the applicant.

8. More directly relevant however he states firstly that on the 27th December, 2004, he was on duty at Finglas Garda Station when he was contacted by Cabra Garda Station by telephone. He was told that the applicant had called in person to the station to inquire if there were any warrants in existence for him. He indicated that there were such warrants in Finglas Garda Station. The applicant indicated that he would call to that station to be served with the warrants and to serve the relevant sentences. The sergeant states that he spoke personally to the applicant, and he asked him where he was living. He indicated he was living in Cabra but declined to say exactly where despite being requested to do so. The applicant did not call to Finglas Garda Station on 28th December, as indicated, and continued at liberty.

9. It is further deposed that in March, 2005, the Sergeant became aware that the applicant had been charged in Dun Laoghaire Garda Station. The sergeant was informed that the applicant was due before Dun Laoghaire District Court on 23rd May, 2005, to answer to certain charges. In the light of the circumstances outlined he states that he felt justified in making an application for the reissue of the two committal warrants which had been exhibited by the applicant. He made an application on the aforesaid basis to the respondent on the 18th May, 2005 and the respondent herein reissued the two committal warrants on that date. On 23rd May, 2005, he went to Dun Laoghaire District Court with a Garda Tarrant where he arrested the applicant on foot of the two committal warrants reissued on the 18th May, 2005.

10. In the course of the affidavit sworn on behalf of the respondent, no detail is provided as to what transpired at the renewed hearing before the first named respondent herein at all. No detail is available as to the evidence adduced before the first named respondent when considering the application to reissue the warrant. Nor is there any evidence as to the first named respondent being himself satisfied, or so pronouncing that he was satisfied, with any explanation tendered regarding the delay in reissuing the warrants and the basis upon which he sought to do so. No evidence is adduced that he had made such an inquiry. Finally the reissued warrant contains the following strange endorsement in the name of the first named respondent; "I hereby reissue this warrant within six months." The signature of the respondent appears underneath. This is cast into particularly sharp relief in the circumstances where this judicial act of renewal took place some seventeen months after the original issuing of the warrants from the District Court.

**The Requirement to return warrants for reissue.**
11. Section 33 of the Petty Sessions (Ireland) Act 1851 provides:

> "Whenever the person to whom any warrant shall be so addressed, transmitted or endorsed for execution, shall be unable to find the person against whom such warrant shall have been issued, or his goods, as the case may be, or to discover where such person or his goods are to be found, he should return such warrant to the justices by whom the same shall have been issued within such time as shall have been fixed by such warrant (or within a reasonable time where no time shall have been so fixed), that together with it the certificate of the reasons why the same shall not have been executed; and it shall be lawful for such justice to examine such person on oath touching the non-execution of such warrant, and to re-issue the said warrant again, or to issue any other warrant for the same purpose from such time to time as shall seem expedient."

12. It will be seen therefore that where no time is fixed by warrant, a reasonable time shall be implied; where the warrant has not been executed there should be before the District Judge dealing with the issue of renewal, a certificate for the reasons why it has not been executed and thereafter it shall be lawful for a judge to examine such person on oath touching the non-execution of such warrant and to reissue it or any other warrant for the same purpose from time to time as may seem expedient.

13. Under O. 26 r. 11 of the District Court Rules 1997 it is provided;

> "11. Where a warrant other than:
>
> - a warrant for the arrest of a person charged with an indictable offence,
>
> - a warrant for the arrest of a person who has failed to do appear in answer to a summons in respect of an offence,
>
> - a bench warrant for the arrest of a person who has failed to appear in compliance with the terms of recognisance, or
>
> - a search warrant 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 had 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 reissue 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."

14. Thus both the Petty Sessions (Ireland) Act and the District Court Rules provide that a warrant should be returned for reissue "within a reasonable time" with a certificate giving the reasons for the non-execution. There is also vested in the District Court Judge a discretion as to whether the applicant for the reissuing should be examined on oath concerning the non-execution of the warrant.

15. Where the rules and Act differ is in the time permitted for such an application. The rules provide that it must be done within six months. The Act provides that it be done within a reasonable time, where no time is fixed by the warrant.

16. But both the District Court rules and s. 33 of the Act of 1851 place an obligation on applicants for the reissuing of a warrant to do so with a certificate and/*or* evidence on oath. Thus as Hardiman J. put it in *Brennan v. Windle* [2003] 3 I.R. at 494:

> "A person who holds a warrant which has expired is not entitled, as of right, to have it reissued, but only on proof of particular matters." (At p. 503).

And as Geoghegan J. said in the same case:

> "If the certificate, contrary to what is asserted, never existed, then the reissue of the warrant was invalid and the order should clearly be quashed. There is a clear requirement under the rules that there be a certificate before the judge, to whom the application for reissue is made, certifying the reasons. I have already referred to the wording in the printed form. (At p. 511).

17. In *Brennan* there was evidence that a certificate had been produced in the District Court but that it had subsequently been lost.

18. Here the evidence of what took place in the District Court on 18th May, 2005, is a single sentence in paragraph 7 of the affidavit of Sergeant O'Donovan where he states:

> "I made an application on the aforesaid basis (i.e. the account set out at paragraphs 8 and 9 of this judgment) on 18th May, 2005 and the respondent reissued the two warrants on that date."

19. The applicants submit that there being no evidence that such a certificate was before the District Court, the reissuing of the warrant was thereby invalid. They rely on the statement of Geoghegan J. in *Brennan*:-

> "If … the certificate did exist but neither the original nor any copy either in the custody of the gardaí or on the District Court file or elsewhere can be found and produced, then it was incumbent on the third respondent to produce affidavit evidence to this effect and secondary evidence by such affidavit or another affidavit as to what was in fact originally contained in the certificate. None of that has been done. (At p. 511).

20. In Brennan there was a failure to give evidence of the contents of such a certificate. But in the instant case there has been no evidence adduced of a certificate existing at all. Instead having recited the history of events set out earlier in this judgment the deponent says only:

> "I made an application on the aforesaid basis to the respondent on the 18th May, 2005…".

21. But no evidence is adduced as to what precisely was stated to the District Court judge. This is of particular importance in the absence of a certificate. Nor is there any evidence of the reasoning of the District Court judge of the basis of the evidence adduced

before him. And this absence of evidence arises in the context of an order which is *prima facie* bad on its face in that it recites that it was renewed within six months when it plainly was not.

22. As a matter of law there is no reason why the obligation on the learned district judge in carrying out this procedure should not mirror that adopted when applying for a search warrant. As stated by Hamilton P. (as he then was) in *Byrne v. Grey* [1988] 1 I.R. 31 at page 38:-

> "…the District Justice or Peace Commissioner should *himself be satisfied by information on oath* that facts existed which constitute reasonable grounds for suspecting that an offence has been or is being committed."

Here there is no evidence that any such inquiry took place at all in a context where the warrants had remained unexecuted for such a period of time from which it might be inferred that the issue would or should have exercised the mind of the first named respondent. Had he conducted the inquiry he may have been satisfied with the explanation tendered and reissued the warrant. He was not entitled however, to reissued the warrant without making that inquiry. The onus is not on the applicant to contradict the evidence on Sergeant O'Donovan or Detective Garda Hoban. In fact the contrary is the case. Having regard to the authority of *Brennan* I consider that the burden shifted in the instant case to the respondent to show the lawfulness of the impugned acts of the respondent. Given that the application to reissue the warrant was made *ex parte* it is a matter within the peculiar knowledge of the respondents.

23. The peculiar knowledge principle, was affirmed by the Supreme Court in the case of *Hanrahan v. Merck Sharp and Dohne* where Henchy J. remarked

> "The rationale behind the shifting of the onus of poof to the defendant in such cases would appear to lie in the fact that it would by palpably unfair to require plaintiff to prove something which is beyond his reach and which is peculiarly within the range of the defendants capacity of proof." (At p. 635).

24. This principle was recently approved by the Supreme Court in *Brennan v. Windle* where the applicant had been convicted and sentenced to a custodial sentence in his absence. Subsequently an *ex parte* application was made to reissue the committal warrant before District Judge Windle.

25. In *Brennan* the issue arose as to whether the applicant had been validly served with a summons and whether a committal warrant had been validly reissued. It was argued by the respondent that the applicant had failed to discharge the burden of proof in that regard. Hardiman J. expressed "distaste" at that submission. In approving the approach adopted in Hanrahan he held:

> "In my view, this approach applies with no less force in a case where the moving party has established a *prima facie* case and where the liberty of a citizen is at issue. I would add that, even if there were no authority along the lines cited, I would have come to the same conclusion." (At p. 501).

Therefore in these circumstances it devolved upon the State to demonstrate that the summons was served properly and further that the application to reissue was lawful.

26. In the instant case the application to reissue was made in the absence of the applicant. In the affidavit of Sergeant O'Donovan he says he became aware that the applicant had been charged in March, 2005 and bailed to appear on 23rd May, of that year. He therefore applied to have the warrant reissued. There is nothing to suggest that the applicant could not have been put on notice of the application to reissue and that the application could have been made in his presence. It is not clear why for example notice could not have been served on the applicant on the 23rd May, of an intention to pursue such a course of action. While the six months time limit is not binding, it is as was pointed out by O'Dhalaigh C.J. in *The State (McCarthy) v. Governor of Mountjoy Prison* Unreported, Supreme Court 20th October, 1967, (which dealt with r. 78 of the old District Court rules identical in all material respects to O. 26 r. 11 of the 1997 rules) directory in nature and the power of the District Court is in no way curtailed by the rule. No evidence was adduced as to what, if anything, transpired between December, 2004 and May, 2005, with regard to the execution of the warrant.

27. A distinction must be drawn between the certificate which arises in the instant case as compared to that which arose in *The State (Holland) v. Kennedy* [1977] I.R. 193. That case turned on an appraisal of the evidence and an interpretation of s. 102(3) of the Children Act, 1908. A young person was not to be sentenced to imprisonment for an offence "unless the court certifies" that the young person is of so unruly a character that he cannot be detained in a place of detention. The "certificate" accordingly is part of the order of the Court. It is entirely to be distinguished therefore from the form of certificate envisaged in the instant case which is a matter of necessary evidence emanating from the applicant as opposed to a conferral of jurisdiction. But this distinction does not resolve the issue from the point of view of the respondent as, I consider, that there has been in any case a failure of evidence on the part of the first named respondent to demonstrate, that he exercised his jurisdiction lawfully having regard to the procedural requirements which devolved upon the gardaí in making the application to reissue and upon the first named respondent in exercising his judicial function within jurisdiction in carrying out that procedure. Such a step is to be seen in the context of being a judicial proceeding and is not a mere "rubber stamp" particularly having regard to the fact that the issue of the liberty of a citizen is in question. I do not accept that facts of the instant case are to be distinguished from *Brennan* on the basis of the evidence as it has in fact has been adduced here. I reach this conclusion not on the basis of what was *said* by Sergeant O'Donovan and Detective Garda Hoban in their affidavits but on the *absence* of information as to what precisely transpired in the District Court and the absence of evidence as to the reasoning of the first named respondent.

28. Furthermore, while *Brennan* was based on principles of fair procedures and the rule of *audi alteram partem* that the determinations of fundamental principle which arises therein are of equal application when the question arises as to whether there *is evidence before the court* which *prima facie* place upon the respondents the duty to establish that the first named respondent did in fact act within jurisdiction. Failing that it seems to me that a position analogous to that in *The State (Holland) v. Kennedy* [1977] I.R. 193 would arise as to jurisdiction.

29. Finally and relating to the same issue of the jurisdiction of the first named respondent, there is the question of what is stated on the face of the warrant. As a general principle the warrant should exhibit on its face that the requisite inquiry into the application for reissue has been carried out. As stated in O'Connor, the Irish Justice of the Peace [1915] Vol. 1 page 189:-

> "All the facts necessary to show jurisdiction should appear on the face of the warrant."

30. The strictness that should be applied in examining such warrants is described by Huddlestone B. in *ex parte Teraz* [1878] (4 Ex) Div. 638 at p. 668;

> "Warrants in execution are the nature of convictions, and it has always been held that warrants of that class require considerable strictness for the reason that when the party is brought up on habeas corpus, and is held under a warrant of execution, the court can only judge by what appears in the warrant whether a crime has been committed and whether the alleged criminal is properly held in custody."

31. The importance of this principle was illustrated in the context of a search warrant and is no less applicable here. In *Simple Imports v. The Revenue Commissioners* [2000] 2 I.R. 243 a search warrant recited that the judge "hath caused to suspect and thus suspect" rather than the required reasonable grounds to suspect. On that ground, the warrant was quashed as it failed to show jurisdiction on its face. Keane J. (as he then was) held:-

> "Given the necessarily draconian nature of the powers conferred by the statute, a warrant cannot not be regarded as valid which carried on its face a statement that it had been issued on the basis that is not authorised by statute. It follows that the warrants were invalid and must be quashed." (At p. 255).

32. In the instant case there is no endorsement touching upon any inquiry. Rather the warrants are stamped.

> "I hereby reissue this warrant within six months."

This was simply not so. The act of reissuing took place seventeen months after their issue from the District Court. Therefore I consider that the warrant not only fails to refer to any inquiry into the basis for the application for reissuing, but also, in the absence of any evidence here of the nature of the application, the fact than the respondent endorsed the warrant as being issued within six months when it actually was not, gives an indication as to the meagre nature and extent of the inquiry carried out which the respondent has not rebutted having regard to the burden of proof.

33. In all the circumstances I consider the applicant is entitled to an order for judicial review on the grounds outlined.