Neutral Citation Number: [2010] IEHC 451

THE HIGH COURT

2009 409 JR

BETWEEN

JOHN BURKE

APPLICANT

AND

GARDA KEVIN BOURKE, MICHAEL MURRAY, STATE SOLICITOR, JUDGE TERRANCE FINN AND DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Ms. Justice Irvine delivered on the 23rd day of November, 2010

1. The applicant in these proceedings is a farmer who resides at Duncummin House, Emly, Co. Tipperary.

2. By order of the High Court dated 27th April, 2009, the applicant was granted leave to apply for an order of *certiorari* challenging the validity of orders of the District Court made on 19th and 24th March, 2009, respectively whereby bench warrants were issued for his arrest.

3. The grounds upon which the applicant obtained leave to apply for judicial review are set forth in his statement grounding his application for judicial review and these grounds are ultimately replicated in the notice of motion returnable before this Court on 27th May, 2009.

Factual Background

4. Apart from the two affidavits sworn by the applicant on 10th June, 2009, the Court has had the benefit of affidavits from Darina Hannan, solicitor attached to the office of the State Solicitor for Limerick City, Michael Murray, State Solicitor, Garda Martin Taggart, Cashel Garda Station and Garda Kevin Bourke of Henry St. Garda Station, Limerick. From these affidavits, the factual background to the proceedings can be gleaned.

5. The applicant faces a number of different prosecutions. One such prosecution relates to an alleged use by the applicant of marked oil in a fuel tank contrary to a number of revenue regulations and financial statutory provisions. The summons in respect of this alleged offence was issued on 11th November, 2008.

6. On 24th November, 2008, some ten summonses were issued against the applicant in respect of road traffic offences all of which were returnable before the Court on 27th February, 2009.

7. A bench warrant issued for the arrest of the applicant in respect of his failure to appear before the District Court in Limerick City on 19th March, 2009, in respect of the prosecution referable to his alleged use of marked fuel. A bench warrant was also issued for the applicant's arrest in relation to certain road traffic charges when he failed to appear in the District Court on 24th March, 2009. Both warrants were executed at the same time by Garda Taggart on 27th March, 2009, following which, on the same date, the applicant was brought before the District Court at 5.30pm, when the third respondent, Judge Finn ("the District Judge") remanded him on bail to reappear before the District Court on 31st March, 2009.

8. By order of the High Court made by O'Neill J. on 27th May, 2009, the applicant obtained a stay on the prosecution of both of the aforementioned sets of proceedings pending the outcome of the within judicial review application.

The Applicant's Submissions

9. The applicant submits that the warrant dated 19th March, 2009, should not have being issued. He maintains that he sent a fax from a hotel in Clonmel informing the chief clerk of Limerick District Court that he could not attend due to his commitments in another court hearing. He also maintains that he left a letter with the Circuit Court office in Clonmel to the same effect, expecting that the Clonmel Circuit Court would direct the information contained in that letter to Limerick District Court. It is submitted that it was unlawful, in circumstances where he had notified the Court that he was not in a position to attend, for the presiding district judge to issue a warrant for his arrest.

10. In respect of the warrant issued on 24th March, the applicant maintains that he received no notice of the hearing which was to take place before the Court on that date. He denies receiving a letter notifying him of the adjourned date for the hearing of the summonses, namely 24th March, 2009. He accepts that a letter was posted to him at his known address, namely Duncummin House, Emly, which letter is exhibited in the affidavit of Garda Kevin Bourke, the first respondent herein, sworn on 21st November, 2009. He does not know how the letter posted to him at that address was returned to the sender marked "unknown at this address". However, the applicant maintains that since this letter was before the District Court on 24th March, 2009, that the District Judge had no jurisdiction to issue a warrant for his arrest as he could not have been satisfied that the applicant knew that the proceedings were before the Court on that day.

11. In addition to the aforementioned matters, the applicant maintains that the District Judge, who remanded him on bail late in the afternoon of 27th March, 2009, should not have taken seisen of his case due to the fact that he had shown bias towards him in other proceedings. There was therefore a risk that he might be biased when dealing with the applicant and on that basis he seeks to challenge the District Judge's decision to grant him bail.

12. Finally, the applicant submits that the bench warrants were fraudulently obtained by Mr. Michael Murray, State Solicitor, the second respondent herein, and as a result seeks to impugn their validity.

Summary of Respondents' Submissions

13. The statement of opposition filed by the Director of Public Prosecutions, the fourth respondent herein, on 2nd December, 2009, contends that both bench warrants were issued in accordance with the jurisdiction held by the relevant District Court judge. It was further submitted that the second respondent, contrary to what is alleged by the applicant, did not apply for the issue of either bench warrant and was not in court on either occasion. Insofar as the judicial review proceedings did not commence until 27th April, 2009, the bench warrants which were executed on 27th March, 2009, were spent at the time the applicant moved for relief. Accordingly, any challenge to the issue or execution of those warrants has been rendered moot.

14. As regards the applicant's submission that the District Judge before whom he was brought on the evening of his arrest should not have dealt with these warrants due to a possible bias, the fourth respondent submits that no issue of bias can arise in circumstances where the judge's involvement was limited to granting the applicant bail. He did not remand the applicant in custody and in such circumstances the assertion made is devoid of any substance.

The Court's Assessment
15. Order 22, rule 1 and Order 23, rule 2 of the District Court Rules 1997 give a district judge power to issue a warrant for the arrest of a person against whom a summons has been issued in a wide variety of circumstances.

16. Order 22, r. 1 of the District Court Rules provides:-

> "Where a summons is issued requiring the appearance before the Court of a person against whom a complaint has been made or an offence has been alleged and such person fails to appear at the required time and place or at any adjourned hearing of the matter, and it is proved to the Judge there present that such person has been served with the summons, or where at any time either before or after the date on which such person is required by the summons to appear an information, in the Form 22.1, Schedule B, is made that he or she is evading service or is about to abscond or has absconded, the Judge may issue a warrant, in the Form 22.2, Schedule B, for the arrest of such person."

17. Order 23, r. 2 provides:-

> "Subject to the provisions of O.22, r. 3, where the accused is not present and is not represented to answer the complaint and, in the case of a summons it appears to the Court that the summons was duly served, the Court may proceed to deal with the complaint or may issue a warrant for the arrest of the accused."

18. Having considered the affidavits of the parties, it is not clear whether the District Judge, when dealing with the summons listed for hearing before him on 19th March, had received any communication from the applicant indicating that he could not attend due to a commitment to another court hearing. However, even if he had received such communication, he was entirely within jurisdiction to issue a warrant for his arrest once satisfied that the applicant was on notice of the hearing or once satisfied from the history of the proceedings that the applicant should have been in attendance. Likewise, in relation to the warrant issued on 24th March, 2009, it was open to the District Judge, having heard the evidence of the first respondent, who produced the letter which he had sent to the applicant's address which had been returned to him marked "unknown at this address", once satisfied that he had been served with the summons, to deal with the complaint in his absence or to issue a warrant if satisfied, as he clearly must have been from the history of the proceedings, that the applicant was evading service.

19. Even if I am in error in relation to my findings in the last preceding paragraph, I in any event accept the second respondent's submission that it would be futile in circumstances where the warrants have been executed to grant any relief to the applicant. In the case of *The State v. McPolin* [1976] I.R. 93 at p.100, Finlay P. stated that:-

> "I would be prepared to accept the general principle that the Court should in its discretion refuse to make an order of *certiorari* in a case where it is clear that the applicant can derive no benefit from it."

20. I further accept that the decision of O'Neill J. in *Hofman v. Judge John Coughlin & Director of Public Prosecutions* [2005] IEHC 60, (Unreported, High Court, O'Neill J., 4th March, 2005) is further authority for the proposition that this Court should not embark upon making an order or declaration which cannot in any practical way alter the rights of the applicant at this juncture. In *Hofman*, a decision which was not appealed to the Supreme Court, the applicant was refused bail by the first respondent on 5th May, 2004. He later obtained bail from O'Donovan J. on 24th May, 2004, and thereafter instituted proceedings by way of judicial review seeking an order of *certiorari* quashing the order of the first respondent refusing him bail on 5th May, 2004. The second respondent argued that in the light of the fact that O'Donovan J. had admitted the applicant to bail on 24th May, 2004, that the proceedings before the court were moot and that the order of *certiorari* sought should not be granted.

21. O'Neill J. accepted that submission made on behalf of the respondent stating as follows (at p.7):-

> "Mr. O'Malley for the second named respondent submits that because the applicant was admitted to bail by O'Donovan J. on 24th May, 2004, the relief which is sought in these proceedings cannot now affect the applicant's rights and therefore these proceedings are moot and no relief should be granted.
>
> I am satisfied that Mr. O'Malley's submission is well founded and I accept it.
>
> It is quite clear that no order or declaration that I can now make will in any kind of practical way alter the rights of the applicant, his right to liberty having been vindicated by O'Donovan J. on 24th May, 2004.
>
> Accordingly I must exercise my discretion to refuse the reliefs sought in these proceedings."

22. In the present case, the two bench warrants were executed on 27th March, 2009. Later the same evening, the applicant was granted bail by the relevant District Judge in Clonmel on the day of his arrest. The warrants were accordingly extinguished and spent at the time the proceedings were instituted. In these circumstances, I am satisfied that, having regard to the decisions above referred to, the Court should not exercise its discretion to make any orders which cannot alter the applicant's rights at this juncture.

23. In relation to the applicant's submission that the District Judge should have refrained from dealing with the warrants when the applicant was brought to Clonmel District Court due to the possibility that he might be biased because of his past dealings with the applicant, it is the Court's assessment that the claim is clearly without foundation having regard to the fact that the learned District Court judge granted the applicant bail when the matter was brought before him. In such circumstances, the applicant has not established the existence of bias or the validity of any suspicion of bias.

24. Finally, insofar as it is alleged that the second respondent procured the bench warrants in each case by means of a fraud perpetrated on the court, the Court notes the affidavit of the second respondent denying his presence in court on either date and also his denial that he applied for the issue of either warrant. It was established in the case of *The King (Martin) v. Mahony* [1910] 2 I.R. 695, that *certiorari* lies where an order has been obtained by fraud. However, the onus of proving bad faith lies on the applicant. Having regard to the uncontroverted evidence of the second respondent that he had no involvement in the procurement of either bench warrant, the applicant has failed to adduce the requisite proof of bad faith. It follows from this determination that there is no basis to strike out the underlying prosecutions.

25. For all of the aforementioned reasons, the applicant's claim will be dismissed.