Neutral Citation: [2016] IEHC 323

THE HIGH COURT

[2016 No. 638 S.S.]

IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLE 40 OF THE CONSTITUTION

BETWEEN

DAVID WALSH

APPLICANT

AND

THE MINISTER FOR JUSTICE AND EQUALITY, THE DIRECTOR OF PUBLIC PROSECUTIONS, THE COURTS SERVICE, JUDGE ALICE DOYLE AND THE GOVERNOR OF CORK PRISON

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 13th day of June, 2016

1. This application under Article 40.4 of the Constitution arises out of repossession proceedings before Waterford Circuit Court on 21st May, 2016 between Bank of Ireland Mortgage Bank, plaintiff and Feana Walsh, defendant, record number 2014/00438.

2. On that date Her Honour Judge Alice Doyle heard an application on behalf of the bank for possession of a property of Ms. Feana Walsh, a sister of the applicant.

3. Ms. Walsh did not in fact appear in court on that occasion, but the applicant did, and sought to address the court on her behalf. In that regard he relied on an instrument under the Powers of Attorney Act, 1996. Judge Doyle rejected his entitlement to address the court, whether by virtue of the power of attorney or otherwise, and in that regard she was absolutely right to do so. Save in exceptional circumstances, there is no provision in law for "lay advocacy", for solid reasons of public policy which are discussed in case law to which I will refer later. The execution of a power of attorney does not in any way confer a right of audience before a court where none otherwise exists.

4. Unfortunately, the applicant declined to accept the undoubtedly correct ruling of Judge Doyle in this regard and continued to seek to address her, thereby disrupting the business of the court. He was warned by the learned judge "*that a continuation of your interruption of this court will result in you being found in contempt*" (p. 12 of transcript). He disregarded this warning and was then found in contempt. The learned judge then said "*you are to be arrested and taken out of the court*" (p. 13 of transcript).

5. Prior to sentence, he was advised that he might avail of legal advice and that a solicitor would be appointed under the legal aid scheme. He stated that he did not wish to have a solicitor. Furthermore he was given the opportunity to apologise to the court, which he failed to do. He was then sentenced to two weeks' imprisonment.

6. He was then brought back to the court and given "*a final opportunity*" to apologise to the court, to which he replied "*but I haven't done anything wrong*". The sentence therefore stood.

7. On 2nd June 2016, Mr. Jerry Beades applied for an order for an inquiry under Article 40.4, on behalf of the applicant. Barrett J. made that order, which was to be returnable for 3rd June, 2016.

8. On the latter date the matter came before Noonan J., who directed that the digital audio recording be made available, and the substantive hearing of the matter was then transferred to me that afternoon.

9. At the hearing, Mr. Seán Gillane S.C. (with Ms. Gráinne O'Neill B.L.) appeared for the third and fifth respondents. The applicant appeared in person. Mr. Beades attempted to address the court on his behalf, a matter I will deal with further below.

The detainer is the appropriate respondent in an Article 40 application

10. As I previously ruled in *Knowles v. Governor of Limerick Prison* [2015] IEHC 33 (Unreported, High Court, 25th January, 2016), the person detaining an applicant is the appropriate respondent to an Article 40 application. Thus I struck out the first to fourth named respondents, leaving the Governor of Cork Prison as the sole respondent to the application.

Save in exceptional circumstances, a lay person does not have a right of audience on behalf of an applicant at the hearing of an Article 40 application

11. As discussed in my decision in *Knowles* (paras. 11 to 26), the Supreme Court has laid down on multiple occasions that in the absence of exceptional circumstances (or statutory provision to the contrary), the only capacity in which a person can appear to represent another in court proceedings is that of a professional advocate: see *The State (Burke) v. Lennon* [1940] I.R. 136 (Sullivan C.J.); In re application of Woods [1970] I.R. 154 (Walsh J.); *Battle v. Irish Art Promotions Ltd* [1968] I.R. 252 (Ó Dálaigh C.J.); and In re Coffey [2013] IESC 11 (Unreported, Supreme Court, Fennelly J., 26th February, 2011) at para. 37.

12. This does not take away from the entitlement of a lay person to apply for an inquiry on behalf of a detained person at the *ex parte* stage. But once the inquiry has been ordered and the detained person is himself or herself before the court, no lay person has a right to act as an advocate for that person, save in extraordinary circumstances. To hold otherwise would be to set the scene for courtroom anarchy. It would be to allow persons who know little or nothing of law or of obligation to the court, and still less of codes of discipline or professional standards, to hold themselves out as advocates, to the destruction of the rights of the citizen. Indeed Mr. Beades' attempt at "advocacy" in this case provided abundant exemplification of why such a procedure is unacceptable.

13. Mr. Beades appeared to be in possession of some form of power of attorney from the applicant. Such a document is irrelevant to

a right of audience and could not conceivably have any effect of conferring such a right. To allow a power of attorney to confer a right of audience would simply be to drive a coach and four through the public policy rationale for requiring advocacy to be conducted on a professional basis, as discussed by the Supreme Court in *In re Coffey.*

14. Secondly, Mr. Beades claimed incorrectly that he was the applicant in the matter. Again this was a proposition which I have considered and previously rejected in *Knowles.* While a lay third party may apply on behalf of a detained person at the *ex parte* stage, that application must be made in the name of, and with the actual or presumed consent of, the detained person, who is and at all times remains the applicant. Mr. Beades is not the applicant.

15. Mr. Beades appeared to have quite some difficulty initially in accepting my ruling that he was not entitled to a right of audience at the substantive stage, and he went to some lengths to express the posture of rejection he adopted in that regard. It is perhaps true at one level that a certain amount of irreverence towards officeholders serves an important public policy function, as the ancient and venerable institution of the Court Jester or Fool illustrates. However, what prevents the irreverence of the Fool from descending into intolerable insolence is that it is mitigated by wit, moderation, subtlety, intelligence and at least superficial courtesy. These are qualities that did not unduly trouble Mr. Beades in this case. The approach adopted did little to assist the applicant or indeed the court.

A previous decision on a point of law adverse to an applicant does not constitute bias

16. In the course of his application for a right of audience, Mr. Beades asked me to recuse myself because I had previously rejected the concept of a right of audience for a "lay advocate" in *Knowles*. This application was without merit. Merely having made a decision on a point of law adverse to the position that a particular applicant is seeking to make does not constitute bias. *"It must be clearly understood that one adverse ruling, or even a series of adverse rulings, by a court is not, without significantly more, to be regarded as grounds for claiming either subjective or objective bias": Tracey v. Burton* [2016] IESC 16 (Unreported, Supreme Court, 25th April, 2016) per MacMenamin J. (Denham C.J. and Charleton J. concurring) at para. 45 (for some of the limitations of the doctrine of bias see also the judgment of Irvine J. (Ryan P. and Hogan J. concurring) in *O'Driscoll (a minor) v. Hurley and H.S.E.* [2015] IECA 158 (Unreported, Court of Appeal, 8th July, 2015) at paras. 73 to 86; and *Garda Commissioner v. Penfield Enterprises Ltd.* [2016] IECA 141 (Unreported, Court of Appeal, Irvine J., 11th May, 2016).

17. I will now proceed to deal with the two most significant points which arose in this case. It is not necessary in view of my findings below to address any of the other issues which arose in argument.

Was the detention proportionate?

18. Mr. Gillane, in a very able submission, did not hotly take issue with the proposition that a term of imprisonment for contempt must be proportionate, having regard to the right to personal liberty under Article 40.4 of the Constitution and art. 5 of the ECHR. Rather he submits that the decision was proportionate because the learned judge gave the applicant the opportunity to apologise, and in any event the decision was within the range of options legitimately open to her.

19. I have already said that the learned judge's decision rejecting a right of audience for the applicant was entirely correct, as was her decision rejecting the power of attorney in particular as a basis for any such alleged right. Furthermore, it is to be noted that she commendably informed the applicant of his right to legal aid and legal representation, and gave him two opportunities to apologise.

20. However one of his difficulties here is that it is accepted that the transcript is a somewhat imperfect record in this particular case, as there was a great deal of noise and interference with the sound recording. Furthermore, no affidavit was put in on either side from anyone who was present on the day, nor did either side seek to call witnesses.

21. It is clear from the transcript, such as it is, that there was some disruption going on, and it may well be that the learned judge did explain clearly why a formal conviction for contempt and an arrest and sentence were necessary, but unfortunately this does not appear on the transcript which I was given.

22. It is clear that disruption of court proceedings does constitute contempt in the face of the court, which in principle can be dealt with there and then by the judge concerned: see *Morris v. Crown Office* [1970] All E.R. 1079; Law Reform Commission, *Consultation Paper on Contempt of Court* (July, 1991) pp. 6 and 24; and *In re Rea* 2 L.R. Ir. 429 (Q.B. Div. 1878) (a case of a solicitor who was committed for contempt, having "*shouted at the court in a most violent and unseemly manner*" (at p. 430)).

23. However disruption of court proceedings comes in many forms. The applicants in the *Morris* case were engaged in a calculated and coordinated campaign of disruption. The applicant in the present case rather appears to be someone who came to court under a fundamental misapprehension as to whether he had a legal entitlement to address the court, and had a consequent difficulty in accepting the court's correct ruling in that regard.

24. As distinct, say, from a person who uses language which is an affront to the administration of justice, who engages in disruption by way of protest, or physical aggression in a court room, or who by words or gestures threatens any person within or in the precincts of the court, the sort of behaviour for which the present applicant stands condemned, namely speaking out of turn, constitutes what could be regarded as common or garden contempt.

25. In such a case, it is not always necessary for a judge faced with such a contemnor to go the formal route of a finding of contempt followed by arrest, detention and sentence. In many instances it will be sufficient, and therefore more proportionate, simply to direct a person to leave the courtroom, or if he or she fails to do so, to direct the relevant Superintendent and members of the Garda Síochána to compel the contemnor to leave, using reasonable force if necessary.

26. It is not necessary to arrest an individual in order to require him or her to leave a courtroom, or indeed any premises. While it is something of a truism to submit, as Mr. Gillane did, that "*there was no half way house between detention and liberty*" (see *Dunne v. Clinton* [1930] I.R. 366 per Hanna J. at 372 as cited in similar formulations in numerous cases including *McGlynn v. Garda Commissioner* (Unreported, High Court, Kinlen J., 12th June, 1998) at p. 17), that expression cannot be read with an unbending literalness. To remove a person from a place they have no entitlement to be in, if necessary by force, is not an arrest or any other form of wrong. Had Mr. Walsh been simply escorted from the courtroom, he would have been entirely at liberty to go anywhere he was entitled to go. This would not include an entitlement to go back into the courtroom because his disorderly conduct there provided an ample basis for him to be excluded. He would not be under arrest, but nor would he be free to go anywhere he wished. Whether to call that a "*half-way house"* between detention and liberty is probably a matter of semantics and taste rather than indisputable logic, but if it is a half-way house, it is an entirely lawful and legitimate one that is permissible not only under the Constitution but under any ordered system involving private and public rights to control real property.

27. It seems to me preferable and more proportionate that common or garden disruption of this type should be dealt with by exclusion from court, rather than by arrest and detention. For such an arrest to survive scrutiny on an Article 40 inquiry, the court whose order is under review must at a minimum find or state that exclusion would be insufficient to deal with the affront to justice; or alternately such a conclusion must be obvious from the circumstances, as would be the case where offensive, insulting or outrageous language, allegations or utterances were deployed, threatening words or gestures or any form physical aggression was offered by the contemnor, or where the disruption was in the nature of a planned protest rather than spontaneous obstinacy. In a case where the circumstances of the disruption were more serious than the norm, such as an abuse of the forum of the court contemptuously to offer gratuitous and outrageous allegations, no reasons need be articulated because the circumstances would speak for themselves and simple exclusion would properly be inherently considered inadequate in such a case. There is a significant difference between a person who commits contempt in the face of the court by making wild allegations against the court itself, for example, and a person who commits contempt merely by speaking out of turn, but the content of whose utterances is itself not inherently scandalous. Both are contemnors, but the latter can proportionately be dealt with simply by exclusion. Exclusion would be inadequate to deal with the former.

28. As I hope I have made clear in referring to the difficulty with the transcript, it may well be that the learned judge stated that exclusion of the applicant would not be adequate to address the affront to the administration of justice in this case, but unfortunately no evidence to that effect was put before me. The onus being at all times on the detainer, I must therefore uphold the present application on this ground, on the basis that it has not been demonstrated that the detention was proportionate.

29. Should similar disruption arise in another case of a nature that simply constitutes speaking out of turn, in my view the appropriate course is simply to exclude the contemnor from court without directing their arrest (but by authorising Gardaí to use reasonable force if necessary). Such a procedure avoids the need for detention and therefore for any consequent Article 40 inquiry. If arrest is required, it would be appropriate (to ensure that the proportionality of that action is clear to any reviewing court) that the judge taking that course would state expressly that merely excluding the person would be inadequate to address the affront to the administration of justice committed in the case (unless the nature of the disruption is such that it is obvious that mere exclusion would be an insufficient response). A court has an inherent power to exclude a disrupter, with or without a formal finding of contempt. It can certainly do so without such a finding. But it can also legitimately hold the common or garden disrupter to be in contempt and then exclude them. It is not necessary, following a finding of contempt, to take any specific further action thereafter. Arrest, detention and sentence are not automatically required following a finding of contempt, and it may be that a finding on its own, combined as appropriate with exclusion from the court, may be a sufficient salutary reminder to a contemnor of their obligations. Certainly in the present case, while there is an issue with the detention for the reasons I have mentioned, no error has been established in the finding of the learned judge that the applicant was in contempt of court, and to that extent was very much the author of his own misfortune. Furthermore, the learned Circuit Court judge had jurisdiction to commit the applicant for contempt, so it is not a consequence of my finding in this application that there was any breach of art. 5 of the ECHR: see *Hammerton v. United Kingdom* (Application no. 6287/10, European Court of Human Rights, 17th March, 2016) paras. 107 to 121. Therefore s. 3A of the European Convention on Human Rights Act 2003 is not triggered (see sub-s. (3)(a)).

30. I should finally emphasise that the present case is concerned only with contempt by a person other than a party to the proceedings. Mr. Walsh had no right or title to address the Circuit Court and no legitimate involvement in the proceedings. The position may be more complicated where the contemnor is actually a party. Excluding an unrepresented party from the courtroom during the hearing is an option but would have the consequence of a rather one-sided hearing. It may be in such cases that a court might prefer to consider the option of deferring punishment for the contempt (if deferral is appropriate, which it may not be) until after the hearing concludes (at which point, a custodial sanction might well find favour); or alternatively perhaps a briefer spell in custody such as for the court day or overnight, to allow a hot-headed party time to simmer down. That is not to exclude in principle the option of simply expelling the party from the courtroom and proceeding with the hearing if that is a proportionate response. In such a case, the party will have brought the difficulty on themselves by their own voluntary conduct and is not really in a different position from someone who for example cannot be heard because they have failed to file their application in time or at all. The culpable absence of a respondent to an application is not a reason for not hearing it, even a contempt application: *Sanchez v. Oboz* [2015] EWHC 611 Fam *per* Cobb J. at para. 2. In some cases, it may be possible to combine that option with the possibility of a more limited order; thus if an interlocutory injunction is sought, and a party misbehaves and is expelled from the courtroom, the court may consider granting a more time-limited injunction in his or her absence and revisiting the matter at the following sessions to consider a full interlocutory order when the misbehaving party will have had time to reflect on their conduct. It may also be that the option of transferring the contempt matter to another judge could be considered, in the interests of the nemo iudex principle, where the particular form of contempt is in the form of a personal affront to an individual judge "*aimed at the judg[e] personally*": *Kyprianou v. Cyprus* (Application no. 73797/01, European Court of Human Rights, 15th December, 2005) para. 127. That was not in issue in this case: the applicant's wrong was in failing to sit down in silence, a course of conduct that was not in any way personal to the particular court before which he found himself. Alternatively, a court may on occasion take the pragmatic approach of simply failing to hear the insolence of a contemnor. While this is not a strategy that can be adopted in all such cases, there is something in Seneca's aphorism: "It does not serve one's interest to see everything, or to hear everything" (*De Ira* book III; "*Non expedit omnia videre, omnia audire":* Moral Essays Vol I (Loeb, Cambridge Mass., 1928), p. 280; *Dialogues and Essays* (tr. John Davie, Oxford, 2007) p. 27).

Is the order incorrectly addressed to the Governor?

31. As a matter of first principles, an order is addressed to the parties or their solicitors. It exists in "original" form only electronically, and the copies of the perfected order taken up by both sides are equally authentic. By contrast, a warrant for the detention of a prisoner exists ordinarily in a single original, which is issued on foot of an order of the court and is addressed to the relevant Superintendent of the Garda Síochána (see my judgment in *Grant v. Governor of Cloverhill Prison* [2015] IEHC 768 (Unreported, High Court, 27th November, 2015)) or, in Dublin, to the Governor of the Prison (see s. 25 of the Prisons Act 2015). That original is then endorsed on behalf of the Superintendent upon lodging the prisoner in a specific gaol.

32. Order 37 of the Rules of Circuit Court deals primarily with civil contempt but r. 3 is capable of also applying to contempt in the face of the court. It states that "*[e]very order of attachment or committal for contempt of Court shall be directed to the Superintendent of the Garda Síochána for the district in which the party to be attached or committed resides, or may be found, or to such other member of the Garda Síochána as the Court may direct*". This appears to envisage that it is an order, rather than a warrant, which is to be the basis for detention. On a first principles basis, one might wonder whether this is in fact the most appropriate procedure. It may be that there would be merit in the Circuit Court Rules Committee reviewing this provision and indeed making clear what parts of O. 37 are intended to apply to both criminal and civil contempt and what parts to civil contempt only.

33. In any event r. 3 states that the order is to be addressed to the relevant Superintendent or member. In the present case the order is addressed to both the Superintendent and the Governor of Cork Prison, although the order was endorsed on behalf of the Superintendent by lodging the applicant in Cork prison.

34. To my mind the addressing of the order to the Governor as well as the superintendent is an error on the face of the record having regard to O. 37, r. 3. Whether it is an error that would warrant on its own the release of the applicant, having regard to the fact that I previously drew attention to a similar problem in Grant, is not a matter that I have to decide in this case given the other findings that I am making. However there may come a point when even minor errors may warrant release if no action is taken to prevent recurrence despite multiple warnings in that regard.

Order

35. For those reasons, the order I made on 3rd June 2016 was as follows:

> (i) that the first to fourth named respondents be struck out;
>
> (ii) that the application by Mr. Jerry Beades to address the court, and his application that the court recuse itself, be refused; and
>
> (iii) that the applicant be released pursuant to Article 40.4 of the Constitution.