THE COURT OF APPEAL

Birmingham P.
Edwards J.
McCarthy J.

Neutral Citation Number: [2019] IECA 321

[535/2017]

BETWEEN

KENNETH FORDE

APPELLANT

AND

DISTRICT JUDGE ROSEMARY HORGAN & ORS

RESPONDENT

[536/2017]

BETWEEN

SEAN MOYNIHAN

APPELLANT

AND

DISTRICT JUDGE ROSEMARY HORGAN & ORS

RESPONDENT

JUDGMENT of Mr. Justice Edwards delivered on the 19th of December 2019

1. I have had the opportunity of reading the judgement of my colleague Mr Justice McCarthy and I am in general agreement with it but wish to make the following additional observations.

2. The problem that has arisen in both of these cases is essentially the same. In both cases the appellants were bailed to attend court on a particular day. On being granted bail they had each entered into a recognizance conditioned for their appearance before the court in question on the specified date at the specified time. In both cases they failed to answer their bail. The State sought to estreat their respective recognizances. In doing so, that opened up the possibility that if there was then a failure to comply with the relevant estreatment order a warrant of committal for a determinate term of imprisonment would at that point be issued by the court against the defaulter. That possibility came to pass in both cases. When the first named appellant, Mr Moynihan failed to pay the sum of €250 that had been estreated from him within the period in which he was required to do so, the first named respondent issued a warrant of committal committing him to prison for seven days. Similarly, When the second named appellant, Mr Ford (or Forde) failed to pay the sum of €500 that had been estreated from him within the period in which he was required to do so, the first named respondent issued a warrant of committal committing him to prison for five days.

3. Both appellants sought and obtained leave from the High Court to seek orders of *certiorari* by way of judicial review in order to quash their respective committal warrants on the various grounds, but primarily on the grounds that the notices informing them of the order of estreatment in their respective cases did not contain what is colloquially known as a penal endorsement advising them that if they failed to pay the estreated sum within the period specified a warrant for their committal to prison in default of payment would be issued without further notice to them.

4. It was contended on behalf of both that Order 27, Rule 8 of the District Court Rules, as amended, now provides:

> "Where the Court makes an order under section 9(1) of the Bail Act 1997, notice of the order in the Form 27.9 Schedule B shall be served on the accused and on any surety or sureties by prepaid ordinary post."

Form 27.9 in Schedule B of the District Court Rules specifies the form of the notice to be served on a person who has failed to comply with the conditions of his recognisance and against whom estreatment has been ordered, and the appellants contend that what I have referred to as a penal endorsement is an integral part of the said Form 27. 9. The case is made that in circumstances where failure to comply with the notice could lead to loss of liberty the specified form of notice must be strictly adhered to.

5. Both appellants were ultimately unsuccessful in obtaining relief by way of judicial review from the High Court, and they now appeal to this Court.

6. Section 9 (1) of the Bail Act 1997 (the Act of 1997) as amended by s. 48 of the Criminal Justice (Miscellaneous Provisions) Act 2009 (the Act of 2009) makes provision for the eventuality that a person fails to answer their bail. It provides, inter-alia, for the possibility of estreatment and forfeiture of a recognizance in appropriate circumstances.

The relevant legislation

7. Section 9(1) of the Act of 1997 is in the following terms:

> "Where an accused person or a person who is appealing against a sentence of imprisonment imposed by the District Court (in either case referred to in this section as ' the person ') is admitted to bail on entering into a recognisance conditioned for his or her appearance before a specified court on a specified date at a specified time and place, and the person—
>
> (a) fails to appear in accordance with the recognisance, or
> (b) is brought before the court in accordance with subsection (7) and the court is satisfied that the person has contravened a condition of the recognisance,
>
> the court may order—
>
> (i) that any moneys conditioned to be paid under the recognisance by the person or any surety be estreated in such amount and within such period as the court thinks fit,

(ii) that any sums paid into court by the person or any surety be forfeited in such amount or amounts as the court thinks fit,

(iii) where a bank, building society, credit union or an An Post deposit book has been accepted as security for the amount of the recognisance, that the entity concerned pay into court that amount, or such lesser amount as the court thinks fit, from the moneys held by the person or any surety on deposit therein, and

(iv) where necessary for estreatment, that a receiver be appointed to take possession or control of the property of the person or any surety and to manage or otherwise deal with it in accordance with the directions of the court."

8. If any of the orders provided for in s. 9 (1) of the Act of 1997 as amended are made the person concerned may appeal this in the ordinary way.

9. Subsections (9) and (10) of s. 9 of the Act of 1997 contained specific statutory protections for a person against whom a s.9(1) order is made. They provide, respectively:

"(9) Where the court makes an order under subsection (1), notice shall be given to the person and any surety stating that an application to vary or discharge the order may be made to the court within 21 days from the date of the issue of the notice.

(10) On such an application, the court may vary or discharge the order if satisfied that compliance with it would cause undue hardship to the person or any surety."

10. These provisions of the Act require to be implemented with due regard to the rules of court specific to the court making the estreatment order. In this instance that was the District Court and so the relevant rules are the District Court Rules.

11. Order 27, Rule 8 of the District Court Rules 1997, as amended, now provides:

"8. Where the Court makes an order under section 9(1) of the Bail Act 1997, notice of the order in the Form 27.9 Schedule B shall be served on the accused and on any surety or sureties by prepaid ordinary post.."

12. Finally, s.9 (12) of the Act of 1997 provides (to the extent relevant):

"…, if an order under subparagraph (i) of subsection (1) or any variation of it under subsection (10) is not complied with, a warrant of committal of the person or any surety for such non-compliance shall be issued by the court and, for the purpose of determining the term of imprisonment to be served by the person or surety, the warrant shall be treated as if it were a warrant for imprisonment for the non-payment of a fine equivalent to the amount estreated under the said subparagraph (i) of subsection (1)."

Form 27.9

13. Form 27.9 is required to be in the following form:

“Schedule B O.27, r. 8

BAIL ACT 1997 Section 9(9) (inserted by Criminal Justice (Miscellaneous Provisions) Act 2009, Section 48)

ORDER OF ESTREATMENT / FORFEITURE OF BAIL MONEYS

District Court Area of District No.

Accused .....
of .....
*Surety .....
of .....
*Case No: .....
*Fine No: .....
*Charge Sheet/Summons: .....
At a sitting of the District Court at.....on the ..... day of.....20..... the Court, in accordance with section 9(1) of the Bail Act 1997 (inserted by section 48 of the Criminal Justice (Miscellaneous Provisions) Act 2009) ordered that the recognisance entered into by you as *accused/†surety on the ..... day of ..... 20..... be estreated as *you/†the accused failed to comply with the conditions of the said recognisance.

The effect of this order is that:

*(i) an estreatment order has been made against

*you the accused in the sum of €..... to be paid within a period of.....

*you the surety .....in the sum of €..... to be paid within a period of.....

Payment by you on foot of this order of estreatment should be made to the District Court Clerk at the address below. Cheques, postal orders, or money orders should be crossed and made payable to the said Clerk.

IF YOU FAIL TO PAY THE SAID SUM WITHIN THE PERIOD SPECIFIED A WARRANT FOR YOUR COMMITTAL TO PRISON IN DEFAULT OF PAYMENT WILL BE ISSUED WITHOUT FURTHER NOTICE TO YOU

*(ii) the sum of €..... paid into court by

*you the accused be forfeited in the amount of €.....

*you the surety be forfeited in the amount of €.....

*(iii) a *bank *building society *credit union *An Post deposit book having been accepted as security for the amount of the recognisance, the said *bank *building society *credit union *An Post is required to pay into court the amount of €.....from the moneys held by you on deposit therein.

*(iv) ..... of .....is appointed receiver to take possession or control of your property and to manage or otherwise deal with it in accordance with the directions of the court.

An application to vary or discharge this Order may be made to the court within 21 days from the date of issue of this notice.

Dated this..... day of..... 20....

Signed.....

District Court Clerk

District Court Office at.....

To....., *Accused/†Surety

of.....

*delete where inapplicable

*applies only to a surety."

The Notices actually served on the appellants

14. Neither of the notices actually served on the appellants was in the prescribed form. However, in both cases they informed the defaulter that there had been an estreatment of his recognizance by the District Court for failure to appear, and of the date and place when that occurred and the amount estreated. They also in both cases informed the defaulter that the estreated sum was then due and should be paid, but that he had 21 days from the making of the order within which to apply to the court for a variation or discharge of the order. In neither case, however, was the defaulter warned that in default of payment of the outstanding sum a warrant for his imprisonment would issue without further notice.

15. In particular the form of wording that appears in capital letters and bold type on the form specified in Form 27.9 of Schedule B to the District Court Rules, stating **IF YOU FAIL TO PAY THE SAID SUM WITHIN THE PERIOD SPECIFIED A WARRANT FOR YOUR COMMITTAL TO PRISON IN DEFAULT OF PAYMENT WILL BE ISSUED WITHOUT FURTHER NOTICE TO YOU**, was not included. Nor was anything approximating it.

16. In the High Court, counsel for the respondents relied in each case inter alia upon Order 23 Rule 12 of the District Court Rules which provides:

> "No departure from any of the forms in the said schedules, or omission of any of the particulars required thereby, or use of any other words than those indicated in such forms, shall vitiate or make void the proceedings or matter to which such forms relate, if the form or the words used be otherwise sufficient in substance and effect."

The High Court's Judgment

17. In an ex tempore judgement delivered in the case of Sean Moynihan at the conclusion of the hearing into these matters on 27 October 2018, Coffey J ruled as follows:

> "It is common case that when the court makes an order for estreatment pursuant to section 9 subsection 1 of the Criminal Justice Miscellaneous Provisions Act 2009, and notice must be given to a person affected pursuant to section 9 (9) of the Act stating that an application to vary or change the order may be made to the court within 21 days from the date of the issuing of the notice. It is further common case that a notice was sent in the post to the applicant, which contained the information specified in the relevant subsection. It is further not in dispute that the warrant issued on 18 December 2014 recited that notice was given pursuant to section 9 subsection 9 to the applicant. At issue at this juncture, because I'm told there are further issues in the case, is whether the warrant so issued in the said circumstances is bad because it failed also to conform -- sorry to comply with the form prescribed by the District Court Rules which contains a provision for a -- contains a precedent, rather, for a form which contains a penal endorsement. It is clear applying ordinary techniques of interpretation of the relevant legislation that the only requirement under the Act is to give notice of the information specified in the relevant provision of the Act, which is subsection 9 of section 9. It follows that a failure to give notice in the form prescribed by the District Court Rules does not constitute a breach of the provisions of the Act and therefore does not vitiate the validity of the warrant so issued.
>
> In making this ruling, I note also that the applicant was legally represented when the estreatment order was made and that the applicant has not engaged with the evidence to say that he was aware from communicating with his lawyer or otherwise as to what actually transpired on the day that he failed to turn up for his trial. I also note that the applicant says that he does not recall receiving the form and does not go so far as to say that he received the form but was misled by it."

18. It is understood that a further ruling was made in the case of Mr Ford (Forde) which was to all intents and purposes to the same effect.

Discussion and Decision

19. While the Rules of the District Court represent secondary legislation they are nonetheless law, and they should be complied with. This is especially so where they are concerned with the operation of a provision of primary legislation which could lead to the deprivation

of a person's liberty. The High Court judge was of course correct in stating that s.9(9) of the Act of 1997 as substituted does not in terms require the giving of a warning that failure to pay the estreated sum could result in a warrant of imprisonment being issued against the subject person without notice. However, Order 27 rule 8 of the District Court Rules does require that "notice of the order in the Form 27.9 Schedule B shall be served on the accused and on any surety or sureties by prepaid ordinary post." It therefore requires the giving of notice in a specified form as a matter of law. The form specified contains a prominent penal endorsement in bold type and in capital letters. This was not something to be disregarded or treated as some form of soft law or even not law at all. It was a statutory requirement.

20. I am reinforced in my view by by the observations of Clark J in *Shell E & P Ireland Ltd v McGrath and others* [2013] IESC 1, concerning the importance of rules of court. He stated:

> *"7.20 The rules of court are, of course, a form of secondary legislation. They are made with the authority of the Oireachtas in the form of the enabling provisions of the Courts of Justice Acts 1924-36 and the Courts (Supplemental Provisions) Act 1961 ("the Courts Acts"). That does not, of course, give the rules-making authority carte blanche. It is possible that an argument might be made that measures adopted in the rules go beyond the legitimate delegated powers of rules-making authorities. It might also be, as the trial judge correctly pointed out, that limitations, whether to be found in legislation or in the rules, which affect the ability of a party to maintain or defend proceedings in a reasonable way, might amount to a breach of the rights of such party either to access to the court or to the fair conduct of proceedings (as to the distinction between which see Farrell v. Bank of Ireland [2012] IESC 42).*
>
> *7.21 However, the Oireachtas has conferred on the rule-making authority power to make rules of court. Those rules have, unless declared invalid, the force of law. If it is suggested that a time limit for bringing judicial review proceedings which is to be found only in rules of court is of a different status to a time limit to be found in legislation then such an argument really could only have validity if it were to bring into question the power of the rule-making authorities to introduce those time limits in the first place. If the introduction of time limits for bringing judicial review is intra vires the rule-making authority then it is a legitimate exercise of secondary legislation and amounts to a legal barrier to the bringing of such proceedings outside such time limits subject, of course, to the power contained in the rules themselves to extend time. The fact that such a legal power is to be found in secondary as opposed to primary legislation does not seem to me to affect its status. If it is said that the rule-making authorities do not have the power to impose such time limits then it is hard to see how that point would not apply to all judicial review cases save those where there is an express time limit to be found in primary legislation. There was, of course, no challenge to the validity of the rules of court, which provide for time limits in respect of judicial review proceedings, before this court. The court must proceed therefore, on the basis that the rules in relation*

to judicial review time limits are a valid exercise of the power delegated to the rule-making authorities by the Oireachtas.

7.22 On that basis the rules have the force of law and have the same status as time limits to be found in primary legislation except, of course, that the rule-making authorities do not have the power to depart from those time limits which are specified in primary legislation. It is, of course, the case that the type of legislation which has been adopted in recent times in the planning and immigration fields, for example, not only imposes a statutory time limit for the commencement of proceedings but also prevents any question as to the validity of relevant measures being raised save by judicial review. There is no similar provision in respect of challenges outside those fields which have been the subject of specific legislation. No such restriction applies to a challenge in respect of measures such as the CAOs and the consent which are at the heart of these proceedings. However, it remains the case that a judicial review challenge to those measures would be required, as a matter of law, to be taken within the time limits specified in the rules of court or in such extended time as the court might provide. It seems to me to necessarily follow that permitting such a challenge to be brought in a manner which would entirely circumvent those rules would amount to permitting rules which have the force of law as secondary legislation to be circumvented in an inappropriate way. It seems to me to follow that a valid exercise by the rule-making authority of its power to impose, by rule of court, time limits for the bringing of judicial review applications necessarily implies, by analogy, that those rules are applicable to such challenges in whatever way, as a matter of procedure, the challenge concerned may be brought."

21. It is true that under Order 12, Rule 23 a failure to comply strictly with the specified form can be forgiven as a matter of judicial discretion *"if the form or the words used be otherwise sufficient in substance and effect"*. In this case there was a complete absence of any penal endorsement. This was notwithstanding that the form provided for one. The purpose of a penal endorsement is to focus the mind of the person at risk of having their liberty deprived on the potential consequences of their actions. Nothing in the form of notice actually used would have done that. It is impossible therefore in my view to suggest that the form or the words used in this case was *"otherwise sufficient in substance and effect."* The liberty of the individual was in peril. There was a statutory protection in place in terms of a requirement that such an individual should have it specifically drawn to their attention by means of a clear warning that a failure to pay the estreated sum would attract the consequence of the issuance of a warrant of imprisonment without further notice. The failure to afford that protection was a matter that requires to be taken seriously.

22. I draw further support from my views from the approach of Charleton J in *DPP v Mulligan* [2008] IEHC 334. This was a case in which the High Court was asked to adjudicate on the existence, or otherwise, of an obligation to warn in the context of a failure to provide one's name when demanded by a member of An Garda Siochána pursuant to s.24(2) of

the Criminal Justice (Public Order) Act 1994. Charleton J found that any such power should be accompanied by a warning to the accused, and in doing so applied the reasoning in two earlier relevant decisions, namely that of Laffoy J in *DPP v Gilligan* (Unreported, High Court, Laffoy J, 2nd November 1995) and that of O'Caoimh J in *Bates v Brady* [2003] 4 IR 111. In the *Mulligan* case, Charleton J approved of a series of propositions offered by Viscount Simon in the case of *Christie v. Leachinsky* [1947] 573 at 587-588, concerning the law on arrest, one of which was in terms that a citizen, whose liberty was at risk of being deprived, was entitled to be told the legal basis on foot of which that might occur. It was suggested that this:

> *"turns on the elementary proposition that in this country a person is, prima facie, entitled to his freedom and is only required to submit to restraints on his freedom if he knows in substance the reason why it is claimed that this restraint should be imposed."*

23. In conclusion, I consider that these appeals should be allowed on the basis that the warrants in these cases issued in circumstances where the appellants had not received notice in the required form concerning the consequences of a failure to pay the sums estreated from them within the specified time, and in particular that they might be deprived of their liberty without further notice in that event. The failure to comply with the statutory requirement created an unfairness impinging directly on a citizen's constitutional right to liberty. In the circumstances I would grant orders of certiorari quashing the warrant in both cases.