Neutral Citation Number: [2010] IEHC 199

THE HIGH COURT

2009 1803 SS

IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLE 40.4.2 OF THE CONSTITUTION OF IRELAND

Between:

MICHAEL SHANNON

Applicant

AND

THE GOVERNOR OF CLOVERHILL PRISON

Respondent

JUDGMENT of Mr Justice Michael Peart delivered on the 25th day of January 2010:

This application came before me in November 2009. At the conclusion of submissions, I gave an ex-tempore decision refusing to the relief sought namely the release of the applicant from custody, but indicated that I would prepare a written judgment containing my reasons.

Background:
On 30th October 2009 the applicant was brought before Cloverhill District Court in custody, having previously been charged with certain drugs offences. On that occasion, the applicant's solicitor informed the District Judge that he was instructed to apply for bail. In due course when the case was called, the applicant's solicitor moved his application for bail. That application was opposed by a representative of the Chief Prosecution Solicitor's Office. The prosecuting Garda in his evidence outlined his objections to bail pursuant to Section 2 of the Bail Act, 1997, giving evidence of the nature and strength of the evidence alleged against the applicant, as well as giving details of a previous conviction for a drugs offence contrary to section 15A of the Misuse of Drugs Acts, 1977 and 1984, following which the applicant had been sentenced to 8 years imprisonment on 4 October 2002. The court was also informed that while on bail awaiting trial on that charge, the applicant had committed further offences of dangerous driving under the Road Traffic Acts.

According to the applicant's solicitor's grounding affidavit sworn on 2nd November 2009, he made submissions which included that the incident of dangerous driving which had resulted in the applicant being convicted of a number of counts of dangerous driving had not resulted in the revocation of the applicant's bail at that time and that, in any event, dangerous driving was not a serious charge within the meaning of the Bail Act. He goes on to state in paragraph 11 of his said affidavit that he submitted that the court had not heard sufficient evidence to satisfy the court that the applicant was likely to commit a serious offence while on bail, and he referred to the fact also that the applicant was entitled to the presumption of innocence in relation to the offences which were the subject of the present bail application.

The exchange which took place then between the District Judge and the applicant's solicitor has formed one of the bases for the present application for the applicant's release from custody.

According to the applicant's solicitors grounding affidavit the District Judge stated that she was refusing bail and stated that the applicant "*had done it before and has done it again*". The solicitor objected to a determination of his client's application for bail predicated upon a presumption that he had committed the offence with which he was then charged, to which, according to the affidavit, the District Judge responded by saying that she did not mean what she had just said, stating that what he had meant to say was that the applicant had done it before, and that instead of saying "again" she had meant to say "before". On hearing this, according to the affidavit, the solicitor queried how the court could find that the applicant had therefore "*done it before and done it before*" on the evidence which was before the court, and suggested that such a finding was not open to the court on the evidence before it. To this, the District Judge appears to have responded by informing the solicitor that she took his representations personally and made it clear apparently that she viewed that submission as implying that the solicitor was calling her a liar. To this, the solicitor says he informed the District Judge that he was not implying that she was a liar, and he then went on to request that she recuse herself from the bail application and that she adjourn the same for consideration by a different judge, expressing concerns about the appearance of bias arising from what had occurred.

The District Judge refused to recuse herself so that the matter could be adjourned and heard by a different judge. It is submitted that the refusal to admit the applicant to bail was therefore made unlawfully and otherwise than in accordance with the constitutional guarantee of fair procedures, and that the detention of the applicant on foot of that order was therefore otherwise than in accordance with law.

A replying affidavit was filed by the prosecuting solicitor. There is no real contest as to what occurred. No issue is taken in that affidavit with anything which has been stated by the applicant is a solicitor. I should perhaps refer to the fact that in her replying affidavit the prosecuting solicitor, when referring to what the District Judge said in relation to what she had meant to say, states that the District Judge was at pains to point out that the present charge was a mere allegation and that she had meant to say that the applicant had committed this type of offence before, and it was that previous conviction she was referring to when she erroneously stated that he had done it "again".

At the commencement of this application before me, the respondent, as required, certified in writing the grounds for the detention of the applicant. The certificate signed by him and produced to the court has annexed to it a copy of the committal warrant which was signed by the District Judge on 30th October 2009. That warrant indicates that on that date, she had adjourned the charges to 13th November 2009, and the warrant requires the respondent "*to lodge the said accused in Cloverhill Prison there to be detained by the governor thereof until the time of adjournment (<u>being a period not exceeding eight days from the date hereof</u>) when you shall have said accused at the said decision to be further dealt with according to law*. " (My emphasis)

The underlined phrase contained in the parentheses above has given rise to a second submission on behalf of the applicant. The wording within the brackets is something which in the present case ought to have been deleted from the warrant when it was being signed. The reason for this is obvious since the warrant was being signed on the 30th October 2009, and the date of the adjournment is clearly beyond the period of eight days referred to.

The wording within the brackets is clearly applicable only in the case of a first remand since on that occasion a District Judge may not remand the accused in custody for a period longer than eight days. However in the present case, and on 30th October 2009, it was not the first remand and therefore the District Judge could remand beyond that period, as indeed she did. However, it is submitted on behalf of the applicant that the fact that this wording is retained within the warrant creates such uncertainty as to the period of time for which the applicant was to be held in custody pursuant to that Committal Warrant that it is void for uncertainty and unlawful.

Taking this last submission first, I am satisfied that the Committal Warrant is not confusing or vague and is certainly sufficiently clear to anyone who would read it, in spite of the fact that the phrase in question has not been removed. It is quite clear from the warrant that on 30th October 2009, the case was adjourned until the 13th November 2009 and that the applicant was to be held in custody until that date and then produced to the court. I would regard the failure to have deleted the words in question as being a minor and technical defect in the warrant and insufficient to invalidate it.

In relation to the ground based on what happened on the bail application itself, it is worth noting at the outset that the objections to bail which have been outlined in the grounding affidavit appear, on their face, to be perfectly valid and sustainable objections under section 2 of the Bail Act 1997. One can ignore the reference to the previous conviction for dangerous driving committed on bail, if necessary. The evidence of a previous conviction under section 15A of the Misuse of Drugs Acts, 1977 and 1984 is not contradicted, and that is something that the prosecuting garda was perfectly entitled to refer to, and bring to the attention of the District Judge.

I refer to that simply because it is worth noting that there was an objective and rational basis for refusing bail in this case. Absent such a basis, it might have been possible to put forward a better argument that, following the unfortunate exchange between the District Judge and the applicant's solicitor, that her mind was influenced against the applicant unreasonably.

However objective bias is a different matter. It is not the same as actual bias. It is a question of considering, not whether the judge was actually biased, but rather whether a reasonable and well-informed objective bystander, having been present in court, would consider that what had occurred could reasonably have influenced the District Judge against the applicant and the application for bail. If so, it might be said that there was a reasonable apprehension that the judge was biased.

But I believe that it is clear both from the applicant's solicitor's affidavit and from the affidavit filed in response by the prosecuting solicitor who was present, that when it was drawn to her attention that she appeared to be reaching a decision on the basis that the applicant was guilty of the offence which was presently before the court, she, on repeated occasions, made it clear that she had mis-spoken, and made it clear what she had intended to say.

When assessing the question of objective bias, it is important to bear in mind that the so-called objective observer must be regarded as a reasonable and fair-minded observer possessed of all relevant facts, and in this case, that would include the fact that on several occasions, according to the replying affidavit at least, the district judge made clear of what she had in fact meant to say and made it clear also that of course the applicant enjoyed the presumption of innocence in relation to the charges before her.

It must be borne in mind also that in any busy court there will be occasions on which things may be said which ought not to be said, or things may be said simply through error. These matters can be corrected at the time, as happened in this case, so as to remove any lingering doubt that some injustice had been done in the manner in which the case had been conducted or heard and a decision reached. In the present case, I am satisfied that the District Judge was justified in refusing to recuse herself and refusing to adjourn the case so that it could be dealt with by a different judge. I am not satisfied that there is evidence of objective bias having occurred in the unfortunate circumstances of this case.

For these reasons I am satisfied that the detention of the applicant was lawful on the date on which I heard this application for his release and these are the reasons why I refused the present application.