Neutral Citation: [2014] IEHC 349

THE HIGH COURT

[2014 No. 1120 SS]

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

BETWEEN

LEROY ROCHE AKA DUMBRELL

APPLICANT

AND

THE GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 4th day of July 2014

This is an application pursuant to Article 40.4.2 of the Constitution. The background facts, which are uncontested, are as follows.

The applicant is accused of violent disorder contrary to s. 15 of the Criminal Justice (Public Order) Act 1994. He was arrested and charged with this offence on 29th November 2013. He was refused bail in the District Court. On appeal to the High Court, Butler J., on 9th December 2013, granted bail subject to the following conditions:

(i) That he reside at 57, Emmet Road, Inchicore;

(ii) That he sign on daily between 9.00am and 6.00pm in Kilmainham garda station;

(iii) That he observe a curfew between 7.00pm and 7.00am;

(iv) That he stay out of Ballymun;

(v) The he have no contact with the co-accused;

(vi) Independent surety of €3,000, €1,000 to be lodged or €3,000 cash lodgement and his own bond of €100.

On 3rd March 2014, a bail revocation application was heard by Butler J. who found that the applicant had breached the curfew condition of his bail on at least five occasions. Bail was consequently revoked and the applicant was remanded in custody.

On 28th March 2014, the applicant was sent forward for trial. When such an event happens, there is a statutory right to apply for bail again. Such an application was made and the applicant was readmitted to bail on the same conditions as had been imposed by Butler J. in the High Court.

On 11th April 2014, the applicant's case came before the Dublin Circuit Criminal Court for mention. Again, evidence was heard that the applicant had breached the curfew condition of his bail and the applicant was remanded in custody until the 28th April 2014, when he was readmitted to bail on the same conditions as had been imposed by Butler J. An arraignment date of 23rd June 2014 was set.

On 19th June 2014, lawyers for the applicant requested that the applicant's case be listed in the *ex parte* section of Judge Ring's list in order to hear an application to vary the terms of bail. The variation was to permit the applicant to travel to Portugal on holiday and tickets were produced showing that the applicant intended to travel on 21st June 2014 and to return on 29th June 2014. The application was opposed by the prosecutor and the matter remained listed for 23rd June 2014.

On 23rd June 2014, the applicant entered a plea of not guilty and a trial date of 20th April 2015 was set. Following the trial date, a further application for a variation of bail was moved. This time Judge Ring varied the conditions of bail by relaxing curfew, signing on and place of residence conditions until the date of the applicant's proposed return from Portugal. In addition, a new condition was added, that the applicant was to return home from the airport, on Sunday 29th June 2014, via Kilmainham garda station, and there, he was to surrender his passport.

The applicant went with his girlfriend to Portugal but he came home prematurely on 25th June 2014, arriving in Dublin Airport at 10pm. There had been a row with his girlfriend and it is not denied that when he came home, he did not return to the place where he was due to reside and he did not go home via Kilmainham garda station and surrender his passport. Nor is not denied that he was in breach of the curfew, if it still applied.

The following day, at about 1.15pm, Detective Garda Ronan McMurrow made an *ex parte* application pursuant to s. 9(4) of the Bail Act 1997 for an arrest warrant arising from alleged breach of bail conditions. Evidence was given in that application of a very serious assault which had been perpetrated on the applicant's girlfriend in Portugal.

Later in the day, the applicant, apparently having heard of the application by the prosecutor, presented in Judge Ring's court and was noted to be in attendance there. Various representations were later made by his counsel that no conditions of bail had been breached. It was urged upon the court, and Judge Ring acceded to the application, that any evidence in the affidavit of Detective Garda McMurrow with respect to the alleged assault in Portugal was hearsay and inadmissible. Judge Ring agreed with that and no part of her decision, therefore, was based upon the inadmissible hearsay evidence. That evidence remains inadmissible hearsay evidence and there is no attempt by anyone to refer to it or use it in this present application.

Judge Ring was satisfied that the terms of the bail had been breached by the failure of the applicant to observe a curfew, to

surrender the passport and to reside at the given address.

The matter comes to this court following the revocation of bail by Judge Ring and the taking into custody of the applicant. This court is now asked to release the applicant from custody on the basis of legal errors attaching to the decision of Judge Ring.

It is urged upon the court that Judge Ring acted without jurisdiction in finding that conditions of bail had been breached because there was no evidence as to this. It is also urged upon the court that the facts demonstrate that no breach of the conditions actually occurred. It is further said that if the conditions of bail are ambiguous, ambiguity must be resolved in favour of the applicant.

A number of authorities were opened to the court in support of the arguments made by counsel. The well-known case of *Inspector of Taxes v. Kiernan* [1981] I.R. 117, is advanced in favour of the proposition that rules which impose liability ambiguosly must be strictly construed. At p. 122 Henchy J. says:

> "Secondly, if a word or expression is used in a statute creating a penal or taxation liability, and there is looseness or ambiguity attaching to it, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language."

Though I am not certain that the *dicta* in *Kiernan*, which dealt with the interpretation of statutes, apply in a similar way to court orders, I am of the view that the proposition that ambiguity should be resolved in favour of the addressee where a court order restricts freedom is correct. Thus the question which the court must ask is whether such ambiguity attaches to the relaxation of th1bail conditions, as granted by Judge Ring.

Counsel has argued that the new conditions were ambiguous. He hypothesises as to what the conditions might mean if the trip to Portugal had been postponed or delayed because of bad weather. Before going on to deal with counsel's arguments, I should refer to two other authorities which have been opened to me by counsel for the applicant.

The first of these is a decision of Hogan J. in *Cirpaci v. The Governor of Mountjoy Prison* [2014] IEHC 76, where, having reviewed the jurisprudence on the *habeas corpus* rules in the Constitution, he concludes at para. 26 as follows:

> "It follows, therefore, from a consideration of this case-law that the Article 40.4.2 jurisdiction remains a broad and flexible one. It is, however, not as confined as the respondents suggest. It is rather the case that Article 40.4.2 shines as a beacon of liberty which will never deny refuge to an applicant who can show a fundamental breach of constitutional rights or the existence of some other significant defect attaching to the warrant or order providing for his or her detention."

The other decision which was opened to the court is *Hegarty & Ors. v. The DPP* (Unreported, Kelly J. 29th November 1996), where Kelly J. reviewed some of the fundamental principles attaching to bail. On p. 3 of his judgment, he said:

> "I will therefore approach each bail application in the most advantageous way from the point of view of the applicants. I will assume, though without deciding, that the jurisdiction being exercised by me was precisely the same as that which I would exercise on any ordinary bail application where bail is sought pending trial. Such an approach involves the application of the principles set forth in *O'Callaghan's* case as to the facts of each individual case ... the right to bail can only be displaced in circumstances where there is evidence sufficient to satisfy me that there is a reasonable probability that either (a) the applicant will interfere with witnesses pending the full hearing or (b) the applicant will not turn up for the hearing."

To those two original criteria for a decision on bail must now be added the third criteria from s. 2 of the Bail Act 1997, which is a consideration as to whether the prevention of the commission of a serious offence is a factor which might influence the grant or withholding of bail. But the proposition advanced by counsel for the applicant based upon that case, and it not gainsaid by counsel for the respondent, is that there is a presumption in favour of bail and that there is a constitutional right to bail for accused persons. I am cognisant of the presumption in favour of bail and the general right to bail for accused persons.

The effect of the submissions made by counsel for the applicant as to what happened when Judge Ring revoked bail is to suggest that Judge Ring actually clarified her order relaxing bail on the occasion of the application for the revocation of bail by adding or indicating that there was an implicit clause in the relaxation conditions which meant that the relaxation was only effective if the trip to Portugal was undertaken and undertaken in full.

On this application, the question for the court is not whether I would have reached a different conclusion to Judge Ring. I emphasise that in exercising jurisdiction under Article 40.4.2 of the Constitution, I am not acting in a simple appellate capacity. My task is to enquire, to borrow the words of Hogan J., in *Cirpaci*, whether the decision of Judge Ring reveals a fundamental breach of constitutional rights and the existence of a significant defect in the order. If Judge Ring has erred within jurisdiction, such would not attract, in my view, a remedy under Article 40 of the Constitution. The proper course, if there is genuine disagreement with Judge Ring's order, is to pursue an appeal to the High Court. I am told that this could be heard imminently.

My view is that Judge Ring did nothing surprising by holding that the bail conditions had been breached. I do not find that her order relaxing bail was ambigous. Objectively speaking, it seems clear to me that the relaxation of the conditions of bail was for the purpose of facilitating a trip to Portugal of a duration set and chosen by the applicant. That was the sole purpose of the relaxation. Any abandonment or interruption of that trip would trigger the *status quo ante*. To answer the hypothesis identified by counsel for the applicant, if the trip had not been undertaken, in my view, there could be no question but that the relaxation would not apply. The bail conditions set originally by the High Court were only relaxed for a particular purpose, and if that purpose was interrupted or abandoned, then so too was the relaxation of the bail conditions.

It is a striking feature of the matter that the applicant has elected not to give any evidence, either to Judge Ring or to this court as to his understanding of the bail conditions. It may well be that he was confused about the conditions. Or it may be that he has a full appreciation, which accords with Judge Ring's understanding, of the relaxation conditions and that he deliberately breached them. We simply do not know because neither Judge Ring nor this court has been told what the applicant's own understanding of his bail conditions was. Whatever the explanation for his decision not to give evidence, in its absence, Judge Ring was entitled to decide whether the conditions had been breached based upon her knowledge of the circumstances surrounding the relaxation of bail, *inter alia*.

A further argument is addressed suggesting that on a revocation application, a judge must ask two broad questions, the first being whether conditions have been breached, and if so, is it appropriate to revoke bail, which question is to be answered by reference to

the original criteria for the grant or refusal of bail, bearing in mind that there is a constitutional presumption in favour of or that there is a right to bail for accused persons.

No authority has been opened to me in support of this proposition and I disagree with it. My view is that the right to bail is fully addressed when the court fixes the conditions of bail. That decision balances the rights of the accused with the other interests which are to be protected. That process does not have to be repeated, save where fundamental circumstances change and where the court is urged to rebalance those particular interests. No argument has been advanced to me that fundamental circumstances regarding the balancing between the rights of the accused in this case, and the rights of the other public interests which are to be protected needs to be or ought to be recalibrated. Therefore, I reject the proposition that the approach to be taken by a judge on an application for revocation must involve both steps.

The question before the court on a revocation application is 'what are the consequences which flow from a breach of condition of bail if found?' In a case such as this, where the accused elects not to tell the court about the circumstances in which bail was breached, the court must react to the breach, if found, and in the absence of any evidence from the accused, is entitled to assume that the breach is not irrelevant or *de minimus* or accidental. Revocation is a proper result in such circumstances. Evidence from the accused, where the breach was unintended, accidental or arising from a genuine misunderstanding, might, and probably would result in a benign reaction from the Bench to an alleged breach. But this was not the case and the court was not offered the assistance of the accused as to the circumstances in which bail was said to have been breached. I therefore reject these two arguments advanced in favour of the applicant by counsel.

The second challenge to custody argues that the applicant was before the court on a warrant issued pursuant to s. 9(4) of the Bail Act 1997. Consequently, it is said, the power of the Circuit Criminal Court was limited to estreatment or forfeiture. The court, it was submitted, was not entitled to revoke bail. To appreciate this argument s. 9 of the Bail Act 1997 (as amended) must be set out in full:

> "9.-(1) 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.
>
> (2) Where a receiver-
>
> (a) appointed under subsection (1) takes any action under this section in relation to property, and
>
> (b) believes, and has reasonable grounds for believing, that he or she is entitled to take that action in relation to the property, he or she shall not be liable to any person in respect of any loss or damage resulting from the action, except in so far as the loss or damage: is caused by his or her negligence.
>
> (3) Money recovered by the receiver may, to the extent necessary, be applied to meet expenses incurred in the performance of his or her functions and the remuneration of any person employed in that connection.
>
> (4) The court may, on the application of a member of the Garda Síochána and on information being made in writing and on oath by or on behalf of the member that the person has contravened a condition of the recognisance (other than the condition referred to in subsection (1) that he or she appear before a specified court on a specified date at a specified place), issue a warrant for the arrest of the person.
>
> (5) A member of the Garda Síochána may arrest the person pursuant to a warrant issued under subsection (4) notwithstanding that the member does not have the warrant concerned in his or her possession at the time of the arrest.
>
> (6) Where subsection (5) applies, the member shall serve the warrant on the arrested person as soon as practicable.
>
> (7) The arrested person shall be brought as soon as practicable before the court.
>
> (8) Where a warrant has been issued under subsection (4), the person and any surety remain bound by their recognisances, and any money paid into court in connection therewith shall not be released before the conclusion of any proceedings under this section.
>
> (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.

(11) The prosecutor shall be given notice of, and be entitled to be heard in, any application under subsection (10).

(12) Subject to subsection (13), 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).

(13) Where the person referred to in subsection (12) is a child within the meaning of section 110 of the Children Act 2001, non-compliance with an order under subparagraph (i) of subsection (1) or with any variation of it under subsection (10) shall be treated as a default in payment of a fine, costs or compensation under the said section 110 and the provisions of that section shall apply accordingly."

As can be seen, sub-section (4) contains the power of the court to issue a warrant for the arrest of a person in respect of whom a member of the gardaí swears that he has contravened a bail condition. Sub-section (7) provides that the arrested person shall be brought before the court. Sub-section (1)(b) provides that where that person is brought before the court and the court is satisfied that the person has contravened a condition of the recognisance, the court may order any of the matters set out in (i) to (iv). As can be seen from the text of the provision set out above, the matters at (i) to (iv) deal exclusively with estreatment and forfeiture. Counsel for the applicant urges an interpretation of s. 9 which would have the effect, if adopted, of restricting the remedy for breach of bail conditions following arrest under s. 9(4) to estreatment or forfeiture.

Counsel for the respondent accepts that if this interpretation is correct, the Circuit Criminal Court was not entitled to revoke bail for a person brought before it pursuant to a warrant issued under s. 9 (4) of the Bail Act 1997.

In *Maguire v. DPP* [2004] IESC 53, it was argued that s. 2 of the Bail Act 1997, contained an exhaustive list of the matters to which reference might be made in considering the grant or withholding of bail. The High Court had held that s. 2 confined the court to the factors enumerated ins. 2(2). In the Supreme Court, Hardiman J. said as follows:

> "Nor do I consider that the opening words of s. 2(2) of the Act of 1997, introducing a list of six factors which a court 'shall take into account' on such application operates to exclude any other matter which a court is entitled or obliged to consider. If it had been the desire of the legislature so to confine the Court's consideration, that result could have been achieved by the use of a form of words such as 'shall consider only ... ', in place of the phrase actually used."

It is suggested by counsel for the respondent that I should adopt a similar approach to the interpretation of s. 9(1)(b) and not interpret the provision as confining the jurisdiction of the court when dealing with a person brought before the court on a s. 9(4) warrant .

On my reading of s. 9, the power of the court to make orders under s.9(1)(b) (i) to (iv) is not conditional upon application in that respect being made by the prosecutor. It appears that the court has the power to make those orders of its own motion once it is satisfied that bail conditions have been contravened This statutory power to react to an established breach of bail condition mirrors the common law position, as described by O'Neill J. in *Rice v. Judge Mangan* [2009] 3 I.R. 1. In that case, an accused person was before a District Court judge who sought to impose a bail condition that the accused stay out of County Clare. When challenged by the accused as to the reason for or the propriety of this, the District Court judge revoked bail and remanded the accused in custody. In the High Court, the applicant argued that the District Court had no jurisdiction to interfere with bail without an application from either the prosecutor or the accused. O'Neill J. said as follows:

> "[21] I would not agree with this submission of the applicant. There is nothing in my view either in ss. 22 or 23 of the Criminal Procedure Act 1967 or in the Rules of the District Court which either expressly or by necessary implication prevent a District Judge from altering bail conditions or indeed revoking bail on his own motion. I would be of opinion that circumstances can occur in the course of proceedings which would justify a District Judge altering bail conditions or revoking bail in circumstances where no application for that was theretofore made. A conclusion therefore that a District Judge did not have this jurisdiction would be wrong."

The view expressed by O'Neill J. in that passage reflects the agreed position of counsel that courts enjoy a common law power to revoke bail. It seems to be the position that no statutory basis for this power exists. Further, counsel also agreed that there was no common law power of arrest for the sole purpose of revocation of bail based on breach of bail conditions. If that is correct, then the only power of arrest for breach of bail conditions is contained ins. 9 (4). The applicant's argument if accepted would mean that an accused person who has breached a bail condition may be arrested but the only remedy for the breach is estreatment or forfeiture.

I reject the arguments of the applicant. In order for the applicant to succeed, I would be required to interpret s. 9 (1) of the Bail Act 1997, as confining the jurisdiction of the court where a person is brought before it on breach of bail to estreatment or forfeiture. There is nothing in the section which suggests that the legislature intended to confine the court's reaction to breach of bail to estreatment or forfeiture only. Nothing in the section suggests that the legislature intended to remove the common law power of revocation from the courts, for this would be the effect of the interpretation advanced by counsel for the applicant. I find support from the *dicta* of O'Neill J., as set out above, for the proposition that the court may, at any time, on its own motion, or if requested by the prosecution, revoke bail. This power exists regardless of whether the accused person is brought before the court on foot of an arrest warrant under s. 9(4), or whether the accused is present in court on any one of the numerous occasions when an accused person is being processed by the court. Indeed, the *dicta* of O'Neill J. suggests that there may be circumstances when bail could be revoked or bail conditions altered in the absence of the accused. But these, surely, would be rare and exceptional circumstances.

For these reasons, I refuse to make the orders sought by the applicant.