Neutral Citation: [2014] IEHC 176

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 491 S.S.]

BETWEEN

GARY MILLER

APPLICANT

AND

THE GOVERNOR OF THE MIDLANDS PRISON

RESPONDENT

JUDGMENT of Ms. Justice Baker delivered the 26th day of March, 2014

1. The applicant applied on Tuesday, 25th March, 2014, for an order for release under Article 40.4.2 of the Constitution. A conditional order was granted by me at 1pm. The matter was made returnable at 4pm on that day when the court entered upon a long hearing of the matter. The respondent and the appropriate State authorities were on notice of the application and counsel appeared for the applicant and respondent.

Facts

2. The application was grounded on the affidavit of John Quinn, solicitor. The applicant was convicted of five separate driving offences under the Road Traffic Act 1961 and the Finance Act 1976, as amended. Convictions and sentences were made by the judge of the District Court, Naas on 4th April, 2013, and were appealed by the applicant to the Circuit Court which, on the hearing of the appeal on 18th March, 2014, affirmed each of the five convictions and the sentences imposed by the District Court.

3. Two of the convictions of the District Court, as so affirmed by the Circuit Court, are relevant to this application: the offence under s. 38 of the Road Traffic Act 1961 and that under s. 56(1) and (3) of the Road Traffic Act 1961, as amended. In each, the District Court Judge had imposed a term of imprisonment of five months, commencing on 4th April, 2013, and to run concurrently. The terms of imprisonment and the concurrent nature of these terms were affirmed without variation by the Circuit Court order on 18th March, 2014.

4. The applicant was detained in the Midlands Prison on foot of a committal warrant, the subject matter of this application. It is asserted, *inter alia*, that the warrant was defective and that the detention of the applicant at the Midlands Prison is as a result unlawful.

The short form warrant

5. The committal warrant had the record number of the circuit appeal and identified the appeal as having been heard in the Circuit Court. The date of birth of the applicant was identified in the heading.

6. The body of the warrant provided as follows:-

> *To the Governor of Midlands Prison, Portlaoise, Co. Laois*
>
> *Her Honour Judge Stewart, Judge of the Circuit Court assigned to said Circuit on the 18th day of March 2014 has this day heard and determined the Appeal of the above named Defendant taken from the District Court in the above mentioned Criminal Case and pursuant to her Order on such Appeal has directed that the above named Defendant be imprisoned for a period totalling 10 months. Such sentence is comprised of;*
>
> • *5 months- case no. 2012/220465/1;*
>
> • *5 months - on case no. 2012/220465/4 to be served after the legal expiration of the 5 months imposed in case no. 2012/220465/1;*
>
> *You are hereby authorised and empowered to receive the body of the said Gary Miller and him to imprison and keep at Midlands Prison, Portlaoise, Co. Laois pending the issue in due course of a formal Warrant of Execution.*

7. This warrant was dated at Naas on 18th March, 2014, and was signed by a nominated signatory on behalf of the County Registrar.

8. In the course of the hearing before me and for present purposes I described this document as the "short form warrant".

Basis of detention

9. Following on the making of the conditional order by me, the Governor was required pursuant to the provisions of Article 40 to state the reasons for the detention and for that purpose the Assistant Governor, Teresa McCormack, certified in writing that the applicant was held in custody pursuant to the warrant of 18th March, 2014, and the short form warrant was exhibited.

10. Counsel for the applicant relied in particular on the judgment of Hogan J. in *Joyce v. Governor of the Dachas Centre* [2012] IEHC 326, [2012] 2 I.R. 666, and says that the warrant held in that case not to form a sufficient basis for the lawful detention of the applicant was in substantially the same form as the short form warrant offered as justification for detention by the respondent in this case. Counsel for the respondent pointed to one particular element in the short form warrant which he says is sufficient to enable this court to distinguish the judgment of Hogan J. in *Joyce v. Governor of the Dochas Centre*. In particular, he asked the court to note that the short form warrant contained two unique signifiers, and in regard to each of the two detention periods the case number was

expressly set out. The warrant which was held to be insufficient to ground detention in *Joyce v. Governor of the Dochas Centre* did not contain any signifier or reference to the offence to which the applicant was convicted and did not record in any way that offence, but simply referred to, at para. 29, "the above mentioned criminal case". As was noted by Hogan J. in that case, there was no separate conviction order from the Circuit Court before him when he determined the application for the inquiry.

11. The respondent then produced to the court the relevant orders of the District Court upon each of which was certified, by the nominated signatory on behalf of the County Registrar, the fact that the Circuit Court Judge had on the hearing of the appeal on 18th March, 2014, affirmed the District Court order. The certificate was made on the 25th March, 2014, and in each case identified the specific charges in respect of which the convictions were made. It is not disputed that these documents were generated for the purposes of the hearing before me and after the conditional order for the inquiry was made.

12. Counsel for the respondent also produced fax copies of two documents called committal warrant after appeal" which showed they were faxed at 4:39pm on 25th March, 2014, and which contain the full statement of the District Court order and a full recital of the findings of the Circuit Court Judge on appeal. Again, it is not contested that this document was generated for the purposes of the hearing before me. This document in the course of the hearing was referred to as the "long form warrant".

What is the nature of the inquiry pursuant to Article 40.4.2?
13. The focus of this part of the application before me is the question of whether the short form warrant was sufficient to warrant the detention of the applicant at the Midlands Prison. Article 40.4.2 of the Constitution is clear as to the procedure which requires to be followed: Upon the production of the body of the applicant before the High Court and, after giving the person in whose custody he is detained an opportunity of justifying the detention, the High Court enters upon an inquiry as to the basis of the detention and as to whether such detention is in accordance with law. Article 40.4.2 provides:-

> *Upon complaint being made by or on behalf of any person to the High Court or any judge thereof alleging that such person is being unlawfully detained, the High Court and any and every judge thereof to whom such complaint is made shall forthwith enquire into the said complaint and may order the person in whose custody such person is detained to produce the body of such person before the High Court on a named day and to certify in writing the grounds of his detention, and the High Court shall, upon the body of such person being produced before that Court and after giving the person in whose custody he is detained an opportunity of justifying the detention, order the release of such person from such detention unless satisfied that he is being detained in accordance with the law.*

The article is framed in the present continuous and requires the court, in regard to the applicant, to be "satisfied that he is being detained in accordance with the law" (emphasis added). If the court is not so satisfied it must order the release of the person from "such detention". The focus of the inquiry is whether the detention complained of is lawful and the procedures set out in the Article itself envisage a two stage process: A High Court Judge enters upon a full hearing of the basis of the detention following on the giving of notice to the respondent and other State authorities of the making of the conditional order.

14. Accordingly, in my view, the inquiry this court makes on the full hearing of the application is a hearing into the lawfulness of the current detention of the applicant and on the evidence adduced at that hearing.

Is the short form warrant defective on its face?
15. The short form warrant is in substantially the same form as that found to be insufficient to justify detention by Hogan J. in *Joyce v Governor of the Dochas Centre*. It contains one difference, namely it identifies the individual record numbers of the charges of which the applicant was convicted. It does not, in any sense, however, on its face identify the nature of the matters which the applicant was convicted.

16. In *G.E. v. The Governor of Cloverhill Prison* [2011] IESC 41, the Supreme Court heard an appeal from the decision of the High Court that the detention of the applicant was lawful. Denham C.J. explained the purpose of the detention order as follows, at para. 31:-

> *A document, such as in issue here, should contain clear information on its face as to the basis of its jurisdiction. This information is required so that it be available to, for example, (a) the person in custody, such as the appellant; (b) the Governor of the Prison, or any other, who is holding a person in custody; and (c) the Court which is requested to inquire into the custody pursuant to Article 40 of the Constitution.*

17. The court held that there was insufficient detail on the face of the document to show jurisdiction in that it did not state on its face the reason for the arrest and detention of the applicant. That judgment was followed and applied by Hogan J. in *Joyce v. Governor for the Dochas Centre*, where he interpreted the passage as requiring that a warrant of detention must contain such requisite information as would satisfy an examination as to jurisdiction on the face of the warrant. Denham C.J. approved, at para. 26 of her judgment, the passage from Parke B. in *Gossett v. Howard* (1845) 10 Q.B. 411, at p. 431, that "the cause must be contained in the warrant" and Hogan J. referred also to this quote and applied the test as explained by the Supreme Court to the facts before him stating, at para. 36:-

> *Where, however, as here, the only document forming the basis of the detention is a committal warrant of the kind we have just described, this must be adjudged to be defective and as not forming a sound basis in law for the applicant's detention.*

18. While I accept that the warrant at issue in the instant case does contain some signifiers, indeed unique signifiers, which were not contained in the warrant before Hogan J. in *Joyce v. Governor of the Dochas Centre*, those signifiers of themselves do not provide any, not to mention any sufficient, information to the Governor of the Midlands Prison, in which the applicant is detained, to enable him to know the basis for detention. The Governor did not have and did not exhibit in his certificate the orders showing the offences of which the accused was convicted and in respect of which he was sentenced as certified by the nominee of the County Registrar.

19. In the circumstances, my view is that the short form warrant taken alone does not form a basis in law for the detention of the applicant and it does not taken alone provide sufficient information as to the reason for the applicant's detention.

The power of the court on the inquiry
20. In *Gallagher v. Director of the Central Mental Hospital (No. 2)* [1996] 3 I.R. 1, the High Court stated, at p. 6, that an Article 40.4.2 inquiry envisages "the widest possible powers to be conferred on the judge or court conducting the enquiry". In that context, I was prepared to entertain the argument made by counsel for the respondent that the combination of the short form warrant and the formal orders of the Circuit Court as certified on 25th March, 2014, by the nominated signatory of the County Registrar were sufficient

when taken together to justify the detention of the applicant. In Kevin Costello's text, *The Law of Habeas Corpus in Ireland* (Four Courts Press, 2006), the author states a general proposition as follows, at p. 72:-

> *A well-established remedial technique on habeas corpus is to permit the retroactive validation of the defectively performed procedural step at the habeas corpus hearing itself. The earliest application of this principle is the ancient common law rule under which a defective warrant may, in the course of habeas corpus proceedings, be replaced by a corrected warranted*

21. What was urged by counsel for the respondent before me was not so much that the court would replace the short form warrant with the long form warrant, but would consider the question of whether the short form warrant was defective at all. He argued that a joinder of documents was permitted as a matter of law and he offered the orders as certified on behalf of the County Registrar as evidence, which he argued when taken together with the short form warrant showed that the detention was lawful.

22. Given the view that I take that the court had wide powers at the hearing of the application, and given the constitutional imperative that gives the detainer an opportunity to justify the detention, I turn now to ask whether the short form warrant may as a matter of law be joined to other documents to create a chain of documents which taken together can justify the detention.

Can the short form warrant be joined to other documents or evidence?
23. In *Carroll v. Governor of Mountjoy Prison* [2005] IEHC 2, [2005] 3 I.R. 296, Peart J., *inter alia*, considered the question of whether the sentences imposed for various offences for which the applicant was sentenced were to run concurrently or consecutively. Peart J. accepted that it was the practice of the courts to specify how the sentence was to run, and considered that the warrants on their face certainly lacked clarity. He went on, however, to state at p. 302:-

> *The court record can in some cases assist in clearing up any ambiguity arising since the Circuit Criminal Court is a court of record.*

24. In that case, the court held that the record did not assist in determining what was in the mind of the trial judge and, in the circumstances, there existed an uncertainty as to the length of the period of imprisonment. Peart J. held, at p. 306, that there was a

> *genuine ambiguity or uncertainty which cannot be cleared up by reference to the warrants themselves, or any other documents. The court record itself does not clarify the date from which sentence should commence.*

25. The Supreme Court, in *In re Tynan* [1969] 1 I.R. 273, considered the question of whether the warrant was bad on its face, in that it did not state the particulars of the offence in respect of which it was stated the applicant had been convicted. Walsh J., albeit he held in that case that the warrant was sufficient on its face, stated the following, at p. 281:-

> *The records of the Circuit Court would testify to the acts and proceedings there if the occasion called for an inquiry as to the same, but there is nothing on the face of the warrant which calls for such inquiry.*

26. In *The State (Brien) v. Edmond J. Kelly & Ors*. [1970] 1 I.R. 69, the Supreme Court was prepared to resolve any ambiguity in the Circuit Court sentences by reference to the Circuit Court records of the spoken decision on sentence.

27. These judgments clearly point to the court having a jurisdiction to hear evidence which can explain the facts in the warrant and are authority for that proposition. The jurisdiction of the court, however, is discretionary and in *McMahon v. Leahy* [1984] 1 I.R. 525, McCarthy J., at p. 547, was not prepared to "overlook the careless approach and lack of attention to detail" which he found in what was, in that case, an extradition warrant. The court indicated that one might overlook "patent errors in a printed document" but that there were circumstances when this would not be exercised in favour of the respondent. I am not satisfied that there exists any unusual or special circumstances that might require me to exercise my discretion in this case not to admit the additional evidence, especially as I can do so without any oral or extrinsic evidence or any explanation which cannot be gleaned from the face of the documents offered by the respondent.

Application of the law to the facts: the question of the joinder of documents
28. In the case of the short form warrant, I am of the view that it is possible without hearing any extrinsic evidence or making any extrapolation of fact to directly link the short form warrant, which contained express individual signifiers, to the Circuit Court orders themselves as certified by the County Registrar, and these orders contain the same records numbers as appear on the face of the short form warrant.

29. In the circumstances, and having regard to clear authority on the subject that the court may seek and find clarification and assistance in the records of the court to assist in interpreting the grounds for detention, my view is that the short form warrant when taken together with and joined to the Circuit Court orders form a sufficient basis for the detention of the applicant. I say this expressly because it is possible to join these documents without having to engage with any extrinsic evidence and because the short form warrant contains, on its face, sufficient and unique signifiers which enable the link to be made.

The long form warrant
30. A long form warrant was produced and had been faxed at 4:39pm on 25th March, 2014, in the course of the hearing before me. It seemed that the practice in the District Court area of Naas was similar to that in the rural circuit of Co. Louth, the subject matter of the hearing in *Joyce v. Governor of the Dochas Centre*, in that a short form committal warrant was drawn up immediately following conviction which would in due course be followed by a fuller warrant containing the appropriate data. The short form warrant which was available to this court identified that it was issued "pending the issue in due course of formal Warrant of Execution".

31. That formal warrant has now been drawn up and a number of procedural matters have been raised as to its form. The warrant is headed up as a District Court warrant and it contains at the top of the warrant, the date of birth of the applicant and the case signifiers or record numbers. It identifies the issuing authority as being the District Court area of Naas, District No. 25 and is described as a "committal warrant after appeal". It is signed by a judge of the District Court and contains a recital of the District Court order and a later recital that on the hearing of the appeal, the Circuit Court judge for Naas, Co. Kildare on 18th March, 2014, ordered that the conviction and order of the District Court be affirmed and that the accused be imprisoned for the successive periods of five months as described above. The committal warrant then commands the Governor of the Midlands Prison to lodge the accused in the prison to be detained for the period of the aforesaid sentence.

32. Section 23 of the Courts of Justice (District Court) Act 1946 ("Act of 1946"), provides:-

> *Where an appeal .from the District Court in any matter is determined (whether before or after the passing of this Act) by the Circuit Court, then, unless the Circuit Court has issued the instrument necessary to enforce its decision, the District Court shall issue the said instrument.*

33. The District Court did issue the instrument necessary to enforce its decision, being in this case a committal warrant after appeal and this was done pursuant to the statutory power in s. 23 of the Act of 1946.

34. In *State (Caddie) v. McCarthy & Ors*. [1957] 1 I.R. 359, at p. 381, the expression "the instrument necessary to enforce its decision" was held not to include a direction to detain custody pursuant to O. 43, r. 6 of the Circuit Court Rules of 1950 pending the issue of a formal warrant.

35. An informal warrant, the short form warrant identified above, had issued out of the Circuit Court in this case on 18th March, 2014. This issued under O. 41, r. 6 of the Circuit Court Rules of 2001 which provides as follows:-

> *Where the Order of the Judge of the District Court, as confirmed or varied on appeal, directs the imprisonment of any person the Judge may, upon confirming or varying the said Order, or at any time before the issue of a warrant by a Judge of the District Court, or by the County Registrar, for the execution of such Order so varied or confirmed, direct that such person be taken into custody forthwith, or detained in custody, and imprisoned pending the issue of such warrant.*

36. This rule provides the statutory basis on foot of which the short form warrant was issued, and it issued before the District Court warrant on 25th March, 2014, and was an order which confirmed or varied on appeal the order of the District Court.

37. In the circumstances, I am satisfied that the long form warrant is correct in its form and it complies with the statutory requirements of s. 23 of the Act of 1946. Accordingly, any detention of the applicant on foot of the long form warrant would have been lawful. The respondent has urged upon me however that I should consider the question of the validity of the detention under the short form warrant and I have set out my decision and reasons above.

Postscript

38. I am mindful of the postscript to the judgment of Hogan J. in *Joyce v. Governor of the Dochas Centre,* where immediately before he was to deliver his judgment, counsel for the respondent informed him that a full version of the committal warrant had been prepared overnight and that it was available to the court, although it was not in fact available at that precise time. Hogan J. took the view that he was obliged to decide the application based solely on the information in evidence before him at the hearing. I accept that reasoning and approach. Regrettably unexpected circumstances have led to the inclusion of a postscript in this judgment also.

39. The hearing of this application concluded before me at 7:30pm on 25th March, 2014, and I reserved my judgment to the following morning, it being recognised that at that point in time the other and quite distinct issues raised in the habeas corpus application before me had not been addressed by either counsel.

40. At 11am on 26th March, 2014, when the matter came on, I was informed that a supplemental affidavit of the solicitor for the applicant was available which exhibited a reply from the respondent which confirmed that the warrant under which the applicant was then held was the same warrant as previously exhibited. I expressed my disquiet that the respondent did not appear to have on the day following the hearing of the case the supplemental documentation which I had held, as a matter of law, could be joined with the short form warrant to form a basis for detention. The matter was adjourned until 2pm and I was invited to deliver a ruling on the questions argued before me as to the validity of the short form warrant. I did so in the terms stated above, but expressed continued disquiet as to the current documentation that was in the possession of the respondent.

41. At 4pm when the matter resumed counsel for the respondent informed the court that at 3:40pm the long form warrant, which contains full details of both the District Court and Circuit Court convictions, had been given to the Governor.

42. It appeared that this long form warrant together with the orders which were produced to the court at the hearing on 25th March, 2014, were given to prison officers in Naas in the afternoon of 25th March, 2014, for delivery by them to the respondent but that an incident had occurred at the prison gates which resulted in these original documents no longer being available. It seems that no email or fax was sent to the Governor of the Midlands Prison at any time during the hearing of the application before me on 25th March, 2014, or on the morning of 26th March, 2014, and that there was hand delivered to him the original long form warrant at 3:40pm on 26th March, 2014.

43. Counsel for both the applicant and respondent had invited me to deliver my judgment on the question argued before me on 25th March, 2014, and I gave my judgment prefaced with a comment that the judgment prepared and the arguments considered by me were based on an assumption that the Governor had or would have by the end of the hearing sufficient information either in the form of the long form warrant or the documentation proposed to be joined with the short form warrant to collectively make up and show on their face the reasons for the detention.

44. In the events, it now transpires that the Governor did not have, and was not furnished with, sufficient documentation to enable him to know the basis of the applicant until 3:40pm on 26th March, 2014. This was almost a full day after the substantive hearing before me commenced and some twenty hours after the hearing before me concluded. The hearing of this application ended at 7:30pm on 25th March, 2014, and as I accept and adopt the approach of Hogan J., as outlined above, I am constrained to decide the matter on the basis of the documents and evidence available during that hearing.

45. I accept that counsel for the respondent was not aware that steps had not been taken at the time of the hearing to ensure that the Governor had the documentation on foot of which the arguments were made to this court. The court was equally unaware and I gave my ruling on an assumption or hypothesis which was wholly incorrect. The arguments that I heard and the considerations that I gave to the argument advanced before me were based on a hypothesis which was not true in fact, namely that the Governor had, or was about to be given, sufficient documentation which it was argued could be joined to enable him to understand the nature and reasons for the detention of the applicant. That documentation could either have been the long form warrant, or the short form warrant and the orders of the Circuit Court as certified by the nominee of the County Registrar. In fact, he had neither class of document and for a period up to 3:40pm on 26th March, 2014, he had no documentation other than that which I have held was not of itself sufficient to form a legal basis for detention.

46. In the circumstances, having regard to the hypothesis on foot of which I delivered my considered opinion and having regard to the view that I take that the short form warrant taken alone does not form a legal basis for detention, especially in light of the

requirement as identified by Denham C.J. in *G.E. v. The Governor of Cloverhill Prison* that the person holding an applicant be aware of the reasons for the detention, I am of the view that the detention of the applicant is not lawful and I say this notwithstanding my view that, as a matter of law, a joinder of the short form warrant with other documents was considered by this court and that joinder of documents did result in a chain of documentation which was sufficient to justify the lawful detention of the applicant.

47. The documentation sought to be joined by the respondent as a matter of fact was not and did not come into the possession of the Governor until late in the day following the hearing. At the time the court concluded its inquiry into the legal basis for the detention of the applicant, the Governor did not have adequate information to know with sufficient precision and in sufficient detail the offence on which the applicant was detained.

48. In the circumstances, I direct the release of the applicant pursuant to Article 40.4.2 of the Constitution as I am not satisfied that he is detained in accordance with law.