Neutral Citation Number: [2008] IEHC 184

**THE HIGH COURT**

**Record Number: 2008 No. 792 SS**

**IN THE MATTER OF AN APPLICATION FOR AN INQUIRY PURSUANT TO ARTICLE 40.4.2 OF BUNREACHT NA H-EIREANN 1937**

**BETWEEN**

**JAMES BYRNE**

**APPLICANT**

**AND**

**THE GOVERNOR OF MOUNTJOY PRISON**

**RESPONDENT**

**Judgment of Mr Justice Michael Peart delivered on the 10th day of June 2008**

1. The applicant was arrested in the early hours of the 26th May 2008 by Garda Paul Oates attached to Blanchardstown Garda Station, in relation certain alleged offences, and later that morning was brought before Judge Brian Smyth sitting in District Court 44 at the Bridewell, Dublin 7. A solicitor was duly assigned to represent him and following evidence of arrest, charge and caution, he was remanded on bail to appear again before that court on the 3rd June 2008.

2. On the same occasion, Garda Oates, having become aware also that there were four unexecuted warrants in respect of the applicant, all of which had not been executed within the required time, asked Judge Smyth to re-issue these warrants, whereupon it appears the judge declined to do so since there was no certificate accompanying the application which set forth the basis on which the judge was being asked to exercise his discretion to so re-issue them. That application was made while the solicitor appointed under the Legal Aid Scheme to represent the applicant, was still present in court, and it appears that she submitted to that judge that in the absence of such a certificate the warrants could not be re-issued. The evidence of Garda Oates has been that he is inexperienced but that a sergeant in the court on that occasion advised him that the required certificate was that prescribed by Order 26, rule 11 of the District Court Rules 1997 at Form 26.4 in Schedule B thereof

3. By the 3rd June 2008, he had prepared such a certificate and had also ascertained from a colleague, Garda Petrie, that the whereabouts of the applicant had not been known for some time and that he had been moving between addresses. He has stated that the certificate so indicated as the reason for the need for re-issue of the warrants. It appears that the address for the applicant in these warrants is an address of an aunt of the applicant, and Garda Petrie had confirmed to him that her inquiries with this aunt in the past had satisfied her that the applicant as not welcome at that address.

4. The evidence before me has been that on the 3rd June 2008 the applicant's cases before Judge Smyth in Court 44 were put back for a short while, during which period, and without notification, formal or informal, to the applicant's solicitor, Garda Oates attended before Judge Mary Collins in Court 52, Richmond Courts, being the Court which had originally issued three of four the warrants sought to be re-issued, the last being a warrant issued from Edenderry District Court, and made application for the re-issue of all four warrants. Garda Oates has stated in evidence before me that he produced the required certificate in respect of each warrant, sought their re-issue, informing Judge Collins that the applicant was at that time present in Court 44. Thereupon, Judge Mary Collins granted the applications having asked him if what was contained in the certificates was correct. None of these certificates has since been located by the District Court office between that date and when this application came before me on the 6th June 2008. They appear to have become mislaid.

5. Having had these warrants re-issued by Judge Collins, Garda Oates returned to Court 44 where Judge Smyth was sitting. The applicant's cases were called, and he was remanded on bail to the 1st July 2008, Garda Oates indicating to the Court that there was no objection to bail. No indication was given either to that Court or to the applicant's solicitor that in fact these four warrants had been re-issued and that Garda Oates intended arresting the applicant outside the Court following his being further remanded on bail. Garda Oates has stated that once the applicant left the Court he spoke to the applicant and explained that he was then arresting the applicant on foot of these warrants and did so and handed copies of the warrants in question to the applicant. In cross-examination Garda Oates conformed that at the time he made the application to renew these warrants on the 3rd June 2008 he knew that the applicant was legally represented, and also that he did not inform Judge Smyth when consenting to bail on that date that there was some concern about the address at which the applicant was residing. He also accepted that he had not informed that solicitor that he was going to Court 52 in order to re-issue the warrants even though the applicant's solicitor had been present before Judge Smyth on the 16th May 2008 when he had first attempted to re-issue them. Garda Oates stated that he was not concerned about the doubts about the applicant's address when he consented to bail on the 3rd June 2008 because by that time he knew that he was going to arrest the applicant in any event on foot of the re-issued warrants.

6. Garda Oates stated that he was of the view that he was under no obligation to inform the applicant's solicitor that he was going before Judge Collins to re-issue the warrants, but accepted when it was put to him, that by making that application in the absence of the applicant and his solicitor the applicant was deprived of any opportunity to contradict the statement in the certificate that there was doubt about where the applicant was residing and that he "was moving between addresses", or that his aunt had stated that he was not welcome at her address. He stated also that the only reason he did not go back to Judge Smyth to re-issue the warrants having initially applied to that judge was that the Garda Sergeant in Court 44 had told him that the appropriate judge to make that application to was the judge sitting in the Court which had issued the warrants in the first place. He denied any subterfuge in that regard, or that his consenting to bail was simply a 'ruse' to enable him to execute the re-issued warrants as soon as the applicant left Court 52 having been remanded on bail.

7. Conor Devally SC for the applicant submits that the manner in which Garda Oates conducted himself in the matter of re-issuing these warrants without notice to the applicant's solicitor and the fact that he consented to bail in Court 44 on the 3rd June 2008 knowing that there was doubt about the applicant's address and that he was going to arrest the applicant on foot of these warrants amounts to an abuse of process and that this goes to the heart of the lawfulness of the applicant's detention on foot of these re-issued warrants. He submits that Garda Oates's behaviour in this manner was "a contrivance" which denied the applicant his fundamental right to fair procedures. Without going as far as characterising the actions of Garda Oates as amounting to '*mala fides*' Mr Devally nevertheless submits that his motive was to, by a subterfuge, to achieve the imprisonment of the applicant at all costs. In all these circumstances it is submitted that the detention of the applicant is unlawful.

8. Micheál P. O'Higgins BL for the respondent has submitted that nothing that has occurred can be seen as rendering the detention of the applicant unlawful. He has asked the Court to look at the overall context in which these events occurred. In that regard he refers to the fact that the re-issued warrants are valid post-conviction warrants, and that there has been no attempt to challenge those warrants, and that the applicant has not averred that he was unaware of these outstanding warrants. Mr O'Higgins submits that there is a very high onus on the applicant when asserting in such circumstances that his fundamental rights have been infringed to

the extent that his detention is thereby rendered unlawful. In that regard he has referred to the fact that the applicant himself has sworn no affidavit on this application, and that the only evidence on his behalf is the grounding affidavit sworn by his solicitor on his behalf. He refers to the fact that the applicant did not give any oral evidence on this application, for example in relation to where he resides, in contrast to Garda Oates who gave evidence both directly and under cross-examination. Mr O'Higgins submits that the manner in which Garda Oates applied for the re-issue of these warrants was in accordance with the prescribed procedures for such applications under the District Court Rules. He submits that such an application is by way of ex parte application and refers to Order 26, rule 11 in that regard which provides that where it has not been possible to find a person who is subject to a warrant or discover where that person is, "*such person having the execution of the warrant shall return the warrant to the court which issued the same ….. with a certificate (Form 26.4, Sch. B) endorsed thereon stating the reason why it has not been executed, and the court may re-issue the said warrant, after examining on oath if the court thinks fit so to do concerning the non-execution of the warrant, or may issue any other warrant for the same purpose from time to time as shall seem expedient.*"

9. Mr O'Higgins submits that there is good reason why such an application is made ex parte, as putting the person whose arrest is contemplated on notice of such an application could in some cases serve to frustrate the objective of apprehending the person on foot of the warrant. He submits also that there was no requirement in law on Garda Oates to return to Judge Smyth having prepared the necessary certificates for these warrants since the requirement under the rule is that the application for re-issue is to return to the Court which issued the warrants, i.e. in this case Court 52 in the case of three of the warrants in question. I should just refer to the fact that the fourth warrant in this case is one which emanated from the District Court in Edenderry and not Court 52. If Mr O'Higgins is correct in this submission, it would suggest that the judge sitting in Court 52 was not the appropriate judge to re-issue the Edenderry warrant. However, Mr Devally ahs not sought to rely on this point and has not argued that point. I do not propose to make any determination in relation thereto, since three of the warrants were issued form Court 52 in the first place.

10. Mr O'Higgins submits that where Judge Collins was provided with the unexecuted warrants and certificates as to the reason for non-execution, and where she enquired of Garda Oates whether what was stated in the certificates was correct, she acted within jurisdiction when she re-issued the warrants on the 3rd June 2008, and that therefore Garda Oates was entitled to act as he did on foot of same by arresting the applicant when he did so. He submits that the fact that he had not put the applicant's solicitor on notice of that application does not invalidate the procedure, and that his consenting to bail even though he knew at the time that he was simply going to re-arrest the applicant when he left court after he consented to bail is again something which he was entitled to do.

11. The Court has been referred to the judgment of Geoghegan J. in *Brennan v. Windle* [2003] 2 ILRM 520, and to that of McMenamin J. in *Daly v. Coughlan*, unreported, High Court, 10th March 2006. In particular, Mr Devally has referred to a passage in the judgment of McMenamin where the learned judge at paragraph 26 of the unreported judgment refers to the fact that in that case the application for re-issue was made in the absence of the applicant and that "*there is nothing to suggest that the applicant could not have been put on notice of the application to reissue and that the application could have been made in his presence*". But that comment

12. Each of these cases was by way of judicial review and not under Article 40.4 of the Constitution, albeit that the application in the latter case commenced as an application under Article 40 but on the return date for the inquiry, the applicant was instead granted leave to seek relief by way of judicial review. That is the first distinction to be drawn. Secondly, however, each case was one where the absence of certification or evidence as to the reason for non-execution was at the heart of the applications for certiorari. In the present case there was a certificate, albeit that they are now mislaid and not available. But, importantly there has been evidence before this court by Garda Oates as to what he stated to Judge Collins on his application for re-issue of the warrants and to the effect that such certificates were attached to the application.

13. I do not find these two judgments to be of assistance in resolving the question of the lawfulness of the applicant's detention. The issue on this application is not whether Judge Collins acted *intra vires* when she exercised her discretion to order re-issue or whether there was sufficient evidence contained in the certificates before her which accompanied the warrants when the application was made. Such matters would have to be the subject to claim by way of judicial review. The question to be determined is whether the manner in which Garda Oates applied for re-issue of the expired warrants without further notice to the applicant's solicitor, and consented his remand on bail on the 3rd June 2008 in the knowledge that he could be immediately re-arrested on foot of these warrants, breached fair procedures to the extent that the fundamental rights of the applicant were breached.

14. Relevant to the question of whether any fundamental right of the applicant has been breached is the existence of post-conviction warrants which are enforceable, subject to re-issue in the case that they have expired. Of course, the authorities must not delay unreasonably in the execution of warrants which are orders to them from the Court to commit persons to prison. The execution of such warrants is not a matter of discretion on the part of the Gardaí. But this Court is entitled on this application to regard these warrants as having been properly re-issued by a competent Court, leaving aside the issue not raised on this application regarding the power of the judge sitting in Court 52 to re-issue the Edenderry warrant to which I have already referred. In this regard I refer to a passage of the judgment of O'Higgins CJ in *State (McDonagh) v. Frawley* [1978] I.R. 131 at p.136 as follows:

> *" The stipulation in Article 40, section 4, subsection 1 of the Constitution that a citizen may not be deprived of his liberty save 'in accordance with law' does not mean that a convicted person must be released on habeas corpus merely because some defect or illegality attaches to his detention. The phrase seems to mean that there must be such a default of fundamental requirements that the detention may be said to be wanting in due process of law. For habeas corpus, therefore, it is insufficient for the prisoner to show that there has been a legal error or impropriety, or even that jurisdiction has been inadvertently exceeded."*

15. At best in the present case, the applicant can be said to have been taken by surprise by the fact that when Garda Oates had prepared the certificates necessary to accompany his application to renew the warrants, he ought to have put his solicitor on notice of his application being made to Judge Collins, and that he was deprived of the opportunity of addressing the question which arose on the certificates, namely the difficulty which was said to have existed in apprehending the applicant because he was believed to be "moving between addresses". There is however no evidence from the applicant, other than the affidavit of his solicitor, which is silent on the question of what evidence or contrary information might have been given to Judge Collins in relation to where the applicant resides or could be located, or in relation to the statement by his aunt that he was not welcome at her address.

16. I can well understand that in some circumstances and cases a Garda intending to make an application to re-issue a warrant might choose to inform that person's solicitor of the intended application as a matter of courtesy where he/she knew that a solicitor was acting for that person. But the discharge of a matter of courtesy in that way should not be confused with an obligation to do so, where the procedure laid down in the District Court rules provides for an ex parte application. It also does not go against any fundamental right of the applicant that Garda Oates did not inform Judge Collins either that he had already made the initial application

to another judge on the 26th May 2008 and who had refused to deal with the application in the absence of the certificates required under those rules, or that when he consented to bail on the 3rd June 2008 for the reason stated by him, he did so with an ulterior motive, namely that he knew that he would re-arrest the applicant outside the Court. If there is any room for criticism of the manner in which Garda Oates conducted himself in relation to the applicant's solicitor or the judge sitting in Court 52, and I am making no final determination in that regard since it is unnecessary to do so, it does not follow that any fundamental right which the applicant is entitled to have protected was breached such that his release must be ordered from detention on foot of lawfully re-issued warrants.

17. I am satisfied accordingly that the detention of the applicant is in accordance with law, and I refuse the relief sought on this application.