THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 70
[2019 No. 43]

The President
McCarthy J.
Kennedy J.

BETWEEN

ANDREW O'NEILL

APPLICANT

AND

THE GOVERNOR OF CASTLEREA PRISON

RESPONDENT

JUDGMENT of the Court delivered on the 7th day of March 2019 by Birmingham P.

1. This is an appeal from a decision of the High Court (Murphy J) of 8th February 2019 refusing to direct the release of the applicant pursuant to Article 40 of the Constitution.

2. The background to the application is that the applicant had been remanded in custody at a sitting of Longford Circuit Court on 23rd January 2019. This had occurred in a situation where, on 22nd January 2019, the applicant was stopped by members of An Garda Síochana while out walking at Balgaddy, Clondalkin in Dublin. The initial approach was prompted in relation to concerns that the Gardaí had in relation to the Misuse of Drugs Act 1977. Thereafter, it appears the PULSE system identified the fact that the applicant had what was described as a 'live bench warrant'. On 23rd January 2019, in the Circuit Court, evidence was given in relation the arrest, charge and caution of the applicant and it was indicated that the Gardaí were seeking a remand in custody due to his bench warrant history. The warrant in relation to this case had issued on 4th December 2018, and it seems that there is a record of 17 bench warrants of which eight had been issued in the previous six months. The presiding Judge referred to the fact that the charges in issue were serious charges involving aggravated burglary and assault. On that basis, Judge Keenan Johnson remanded him in custody, but gave the applicant liberty to apply for bail once he had made contact with his solicitor. An Article 40 procedure was initiated on 5th February 2019 and an enquiry was directed by Noonan J., the matter was made returnable before Murphy J.

3. I have to express some concern about the extent to which matters were fully and fairly put before the leave Judge. The application for an enquiry was grounded on an affidavit sworn by the solicitor for the applicant. In ten numbered paragraphs, the solicitor recounted what he had learned from his client about what had transpired in the Circuit Court. At para. I, it is recorded that the applicant informed Judge Johnson that he had made arrangements with Garda William Whelan of Portlaoise Garda station to execute his warrants. The use of the past tense will be noted. However, the submissions which were apparently prepared having listened to the DAR records references "speaking to Warrants Officer in Portlaoise tomorrow" and the Judge responding "well, you can speak to him tomorrow". The extracts referred to in the submissions do not purport to be a verbatim extract, but the reference to "speaking tomorrow" is significant. There was the potential for the Judge to whom the application was made being misled by the extent of the information put before him in this regard. In addition, there was no reference in the affidavit to the fact which appears in the submissions that the Judge commented that he was giving liberty to apply for bail once the applicant had time to instruct his solicitor. It seems to have been in response to that possibility that the applicant said that he would be "speaking to the Warrants Officer in Portlaoise (Garda station) tomorrow". The failure to refer to the fact that the applicant was given liberty to apply for bail had the capacity to mislead the High Court Judge by omission.

4. When the matter was returned before Murphy J, senior counsel for the applicant objected to certain elements of an affidavit that had been sworn by Ms. Manthe, solicitor on behalf of respondent, protesting that it offended against the hearsay rule. Murphy J. intervened quickly and pointed out that the applicant had commenced his proceedings based on the affidavit of a solicitor. To put this controversy about hearsay and affidavits in context, it should be explained that there had been some degree of controversy as to whether the applicant had sought a solicitor while he was in custody in Lucan in Dublin, or whether Mr. O'Neill had made known that Mr. Angus McCarthy was his solicitor. There had been an expectation on the part of the applicant that the High Court would hear from Garda O'Shaughnessy who had dealings with him while he was in custody and who was the arresting member, or certainly this was a possibility, and also from a Garda Whelan as it was being suggested on the part of the applicant that he had arrangements with that Garda in relation to the execution of warrants.

5. In the course of her ruling, Murphy J. pointed out that both affidavits before the Court from the respective solicitors consisted of hearsay. She highlighted that the custody records which had been produced relating to the applicant's time in Lucan Garda station supported the view that there had been no request for a solicitor. In a situation where both affidavits were hearsay, the focus of Murphy J. was then on the remand warrant and she felt that that provided the basis for the detention. After Murphy J. had issued her ruling, relying on the warrant that had been issued by Judge Johnson on 23rd January 2019, counsel for the applicant submitted that there had been a fundamental breach of constitutional rights by depriving his client of liberty by remanding him in custody at a time he did not have legal representation. Counsel refused an invitation to call his client, saying that doing so would reverse the procedure, which he said placed the onus firmly on the detainer to justify the detention.

6. The applicant makes two principal points. He complains that the approach taken by the High Court Judge, which involved the exclusion from consideration of both affidavits and focusing exclusively on the committal warrant, meant that in reality, the enquiry that had been directed by Noonan J. never actually took place. He says that is reflected in the Notice of Appeal in that alternative reliefs are sought, namely: an order providing for the release of the applicant/appellant, but in the alternative, an order is sought remitting the enquiry for further hearing by a Judge of the High Court. Secondly, it is said that the applicant was remanded in custody at a time when he was unrepresented and that this represents a fundamental denial of justice.

7. In my view, the High Court Judge was entitled to take the view that she was presented with two affidavits, each containing hearsay, and indeed consisting of hearsay, and that accordingly, she would not act on either. In raising the question of hearsay, counsel on behalf of the applicant seems to have proceeded on the basis that the Court could and should act on foot of the hearsay material that he had put before the Court and that the Court should ignore hearsay put before the Court on behalf of the authorities. In my view, such a proposition was untenable. It is of course the case that no particular formality is required at the stage of seeking an enquiry. By way of example, the Court deals on an almost daily basis with prisoner applications which generally take the form of a letter or informal document. However, once an enquiry has been directed and once it emerges that there are disputes as to fact, if that be the situation, then a Court is entitled to expect that evidence will be put before it in proper form. In this case, there could have been no difficulty whatsoever in doing so. The matter was before the Circuit Court on 23rd January 2019. Only on 5th February 2019 was the application for an enquiry initiated. As we have seen, that was made returnable at 2pm on 6th February 2019. At that stage, the matter was put back to 8th February 2019 because the State authorities were not in a position to deal with the matter on 6th February 2019 with the applicant admitted to bail in the meantime. At that stage, it must have been obvious to all concerned that the matter was proceeding towards a contested hearing with at least the possibility, if not the probability or certainty, of facts being in issue. It is hard to see why, at that stage, steps were not taken to have Mr. O'Neill put his version of events before the Court in proper form by way of affidavit. The difficulties that have now emerged about the version of events put before the Court at the initiation of enquiry stage show how prescient the High Court Judge was in refusing to act on foot of the affidavit comprising hearsay which the applicant and his advisers were relying on.

8. For my part, I do not believe there is any basis for suggesting that what occurred on 23rd January 2019 in the Circuit Court amounted to a fundamental denial of justice. It is clear beyond dispute that the applicant, facing very serious charges, including aggravated burglary, an offence which carries a maximum sentence of life imprisonment, failed to appear for a Court listing and a warrant issued. The said warrant issued on 4th December 2018, but it was only on 22nd January 2019 that the applicant was stopped, walking in Clondalkin. He was, therefore, stopped some seven weeks after he had failed to appear and a warrant had been issued. Therefore, this was not a case of confusion about the dates, mixing up the second and third Fridays or something of that nature. In fact, when the applicant was given an opportunity to explain why he failed to appear, he simply said that he forgot the date. It seems to me that in those circumstances, the Judge was entitled to take the view that the applicant had failed to comply with the terms of his bail conditions, and that as a result, there would be a remand in custody. However, very properly, the Circuit Court Judge did not leave it at that, but indicated that a bail application could be moved. Three weeks after the hearing in the High Court and more than five weeks after the Circuit Court indicated that a bail application could be moved, no such application has been made to date. I regard that as surprising and indeed disappointing. In a situation where an individual fails to comply with the terms of their bail conditions and as a result is remanded in custody, one would expect that the next step would be an application for bail.

9. In the case of State Roche (Dumbrell) v. Governor of Cloverhill Prison [2014] IESC 53, the Supreme Court was dealing with a situation where bail had been revoked by a Circuit Court Judge even though the terms of the bail order, properly construed, had not been breached. The issue arose in circumstances where the bail conditions which had been operative had been relaxed for a stated period to allow the applicant attend a holiday in Portugal. The difficulty arose when they returned earlier than scheduled and did not resume compliance with the bail conditions. Charleton J. was of the view that what had occurred was an error within jurisdiction, which did not give rise to release under Article 40, and that to suggest otherwise was "untenable". Commenting in relation to bail applications, Charleton J. commented:

"[a]n immediate right to invoke the full and original jurisdiction of the High Court was open to [the applicant] should it be considered that some possible advantage would be available to him on putting his circumstances afresh before that Court

. . . .

It is difficult to conceive of circumstances where resort to Article 40 is either appropriate or necessary."

Later in the judgment, he commented:

"[a]s the law stands, an applicant for habeas corpus who has been through a lawful process whereby there is detention in accordance with legal form must show the following in order to obtain immediate release: that the warrant is fundamentally flawed . . . ambiguity or error in [the warrant] . . . or that the Court did not have jurisdiction to make the order impugned, or that there was such a fundamental and egregious denial of procedural rights as entirely stripped the Court of its jurisdiction. The Constitution requires that the remedy in Article 40.4 is not to be used to usurp the structures which it had set up or to operate as a parallel jurisdiction out of context with the functioning of the courts in the making of orders and the appeal of those orders."

10. In this case, a bail hearing had been offered by the Circuit Court Judge, and of course there was also available the option of invoking the High Court's bail jurisdiction. The applicant and his advisers did neither. It is hard to see that the applicant's best interests were served by the decision not to make an application for bail. In making that point, I do not ignore the fact that there was a history of bench warrants issuing and that a bail application may not have been entirely straightforward as a result.

11. Be that as it may, I am quite satisfied that the procedure adopted by the Circuit Court Judge giving rise to the remand of the applicant in custody, in a situation where he had not observed and honoured his bail conditions does not provide a basis for ordering his release pursuant to Article 40.4. To use the language of Charleton J, "to suggest otherwise is untenable".

12. Accordingly, I would dismiss the appeal.