Neutral Citation: [2014] IEHC 222

THE HIGH COURT

[2014 No. 658 S.S.]

IN THE MATTER OF AN APPLICATION FOR AN INQUIRY PURSUANT TO ARTICLE 40.4 OF THE CONSTITUTION OF IRELAND

BETWEEN/

M. C.

APPLICANT

AND

THE DIRECTOR OF OBERSTOWN DETENTION SCHOOL

RESPONDENT

JUDGMENT of Mr. Justice Mc Dermott delivered on the 18th April, 2014

1. The applicant is a minor born on the 23rd November, 2000. He is presently detained in Oberstown Detention School in the custody of the Respondent pursuant to a warrant of the District Court made on the 14th April, 2014, following his remand in custody on two charges until Tuesday 22nd April at 10.30.a.m. An order was made directing an inquiry into the lawfulness of the Applicant's detention by Keane J., on the 16th April returnable to the 17th April requiring the production of the applicant before the court and also requiring the respondent to certify in writing the grounds of his detention.

2. The applicant was charged with two offences set out on charge sheets numbered 14676467 and 14676483 alleging that on the 14th April at Elm Grove Tallaght, Dublin 24 he robbed Bilal Farooq, a pizza delivery man, of his car keys and wallet containing various cards and €50 contrary to section 14 of the Criminal Justice (Theft and Fraud Offences) Act 2001 and assaulted Mr. Farooq at the same time causing him harm contrary to section 3 of the Non-Fatal Offences Against the Person Act, 1997.

3. Garda David Jennings arrested the applicant at 11.40 p.m. on the evening of the alleged offences at a local shop near the location of the attack. He was conveyed to Tallaght Garda Station where he was detained under section 4 of the Criminal Justice Act 1984 which was suspended between 1.50 a.m. and 8.00 a.m. on the 15th April. He was released from section 4 detention at 11.45 a.m. and re-arrested and charged with the offences. He made no reply in respect of the robbery charge but replied "sorry" to the assault charge.

4. He was then conveyed to the Children's District Court. Garda Jennings objected to bail on the grounds that the accused would not turn up to his trial and that the refusal of bail was reasonably necessary to prevent the commission of a serious offence by the applicant under section 2 of the Bail Act 1997.The learned District Judge was not satisfied that the applicant would not turn up to his trial or any other occasion to which the charges might be remanded. However, he was satisfied that Bail should be refused under section 2.

5. The applicant had no previous convictions. The evidence adduced in the course of the Bail hearing included material contained in a memorandum furnished to the applicant's counsel at the time and outlining the basis of the s. 2 objection. It also contained a statement of the Garda's belief that he would, if granted bail commit further serious crime similar to that with which he was currently charged. It stated that the boy "appears to be off the rails at the moment" by which he meant that the applicant had been arrested four times in the previous four months. A file had been submitted to the Director of Public Prosecutions but no charges had been directed. The memorandum indicated that he had come to the attention of the Garda authorities 68 times since May, 2012 for a number of matters including robbery, burglary, theft, handling stolen property and road traffic offences (including dangerous driving), criminal damage and possession of knives. It was also indicated that a charge of robbery had been initiated against the applicant by way of summons. It later emerged in the grounding affidavit that the charge was laid by way of charge sheet and that he had been released on station bail.

6. The facts of the alleged offences were outlined to the court. Mr. Farooq had been attacked and robbed while delivering pizzas. As he emerged from a driveway he was accosted by two youths one of whom punched him in the head and upper body. Two other youths joined the attack and the four culprits dragged the injured party down a cul-de-sac where he was further assaulted and robbed. The applicant is alleged to have approached the injured party initially and demanded his money, assaulted him while he was on the ground and taken his car keys from his hand while he was being assaulted. It is said that there are a number of witness statements identifying the applicant as one of the culprits. This is denied by the applicant. It is also claimed that during the course of interviews he made "certain admissions" the extent of which remained unspecified.

7. Garda Jennings accepted that no weapon was used in the attack, that the applicant had no previous convictions and had not been the subject of warrants on prior occasions. He stated that eight witnesses had identified the applicant as one of the culprits.

8. The applicant's mother gave evidence. She lived in Tallaght with her husband and six children and resided there for nine years. Her main source of income was social welfare and she was in a position to offer €300 by way of cash lodgment in court. She accepted that the applicant's behaviour caused difficulties. She believed it arose from the fact that she was imprisoned for a period of fourteen months and released in July, 2013. She believed that her presence would have operated as an influence in keeping him out of trouble. However, she attempted to impose a curfew on the applicant from 8.00 p.m. each night going to the extent of hiding his shoes but he ignored it. On the evening of the offence he left the house defying her curfew. She accepted that this was not the first time that he had come to Garda attention. She also informed the court that the child suffered from asthma.

9. An application was made that the applicant be admitted to bail with strict conditions. It was emphasized that he had no previous history of bench warrants or previous convictions, that his mother would be involved in his supervision and that he was very young.

10. The ruling of the court was set out at paragraph 18 of the grounding affidavit which is accepted by the respondent as an

accurate summary. The learned judge stated:

> "There is a presumption in favour of granting bail. There is good reason for that –it is an important tenet of democracy. Judges have to be conscious not to interfere with an individual's freedom without justification. It's unusual to remand people in custody because it effectively involves a denial of liberty to innocent people in the sense that that they have not been formally convicted, so the presumption of innocence applies. The law does allow for remanding people in custody in certain circumstances. The Garda Siochana rarely object to bail, even in cases where judges themselves think that this is a strange position to adopt. However, we cannot interfere with matters that are none of our business. The position is more acute where children are involved.
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> The concept of remanding in custody a child is one to which huge difficulties attach. The Garda Siochana object to bail even more rarely in cases involving minors. My experience of such objections is very limited. Detective Garda Jennings does not object to the grant of bail to M. lightly, it is only made after great consideration. My function is to strike a balance. There is a public interest, which today is represented by the DPP via Garda Jennings who has outlined to the court the extremely high number of occasions M. has come to Garda attention. From this I conclude M is not in control of his parents and, that if released on bail, will engage in further criminal behaviour.
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> Last night, M. was supposed to be at home and two horrendously serious –one of the most serious allegations you can make about someone- charges are being brought against him, in that an attack was made on a person lawfully going about their business. I believe the evidence of Detective Garda Jennings is very strong. Eight witness statements tie M. to the herein offence. If released, M. is in huge risk of further criminal offences, which is the very essence of section 2.
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> I accept that he is not at risk of flight nor, as no bench warrants have issued in respect of him, is there a likelihood of him failing to turn up in court. Therefore, reluctantly I am refusing bail purely because of the s. 2 objections raised very clearly by Detective Garda Jennings. These are exceptional circumstances."

11. The applicant was then remanded in custody for one week so that the directions of the Director of Public Prosecutions might be obtained and made known to the court.

12. It is submitted that the applicant's detention is unlawful on a number of grounds related to section 2 of the Bail Act 1997 the relevant elements of which provide:-

> "(1) Where an application for bail is made by a person charged with a serious offence, a court may refuse the application if the court is satisfied that such refusal is reasonably considered necessary to prevent the commission of a serious offence by that person.
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> (2) In exercising its jurisdiction under subsection (1) a court shall take into account and may, where necessary, receive evidence or submissions concerning-
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> (a) the nature and degree of seriousness of the offence with which the accused person is charged and the sentence likely to be imposed on conviction,
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> (b) the nature and degree of seriousness of the offence apprehended and the sentence likely to be imposed on conviction…
>
> (f) any other offence in respect of which the accused is charged and is awaiting trial…..
>
> (3) In determining whether the refusal of an application for bail is reasonably considered necessary to prevent the commission of a serious offence by a person, it shall not be necessary for a court to be satisfied that the commission of a specific offence by that person is apprehended."

13. The court noted at the outset of this application that if the applicant was dissatisfied with the ruling of the learned District Judge an application might have been made to the High Court for an order admitting the applicant to Bail. However, counsel submitted that the Article 40 jurisdiction was appropriately invoked if procedural or other deficiencies of the hearing before the District Court were such as to invalidate any essential step in the proceedings leading ultimately to the applicant's detention. This principle which dates back to the decision in *The State (Royle) v. Kelly* [1974] I.R. 259 and further, was applied in a challenge to the lawfulness of the detention of an applicant who had been refused bail in the District Court in *Mc Donagh v. The Governor of Cloverhill Prison* [2005] IESC 4. In Mc Donagh the Supreme Court ordered the release of the applicant who had been refused bail because of an apprehension that he might commit further offences, on the basis that there was no evidence to suggest that any of the matters set out in section 2(2) of the Bail Act 1997, had been considered by the District Judge. The court accepted that it was "essential as a matter of natural and constitutional justice that an accused person should be given a proper opportunity either by means of evidence or through submissions to challenge such objections. None of this occurred in the present case. The proceedings were in essence unfair".

14. In this case it is submitted that the District Judge failed to take account of the matters which he was obliged to consider under s. 2(2) and in particular, the matters referred to in s. 2(2)(a),(b) and (f). It is clear that he took into account the seriousness of the charge and the nature and strength of the evidence against the applicant. He was aware that the applicant had been charged with another robbery offence and that he had been arrested for four robberies in the previous four months. He was also informed of the extensive history of the applicant with the Gardaí over a two year period involving other offences. He did not specifically address the issue of the sentence likely to be imposed. It would have been difficult to anticipate the likely sentence other than by reference to the strong case which he considered had been presented by Detective Garda Jennings who outlined the evidence against the applicant. It must however, be recalled that the directions of the Director of Public Prosecution have yet to be obtained which may have an influence on the sentence to be imposed if the matter is sent forward to the Circuit Court. In those circumstances, the District Judge was limited in the scope of his assessment of the sentence issue. He was also well aware of the principles underpinning the sentencing of minors and that a custodial sentence is not the preferred option under the Children Act 2001.The learned judge was an experienced judge in the Children's court. I am not satisfied that it has been established that the issue of possible sentence was not considered. The learned judge demonstrated a great reluctance to refuse bail and considered the acute difficulties created by committing a child to custody but regarded the circumstances with which he was confronted as "exceptional". There is no doubt that the court was aware of its sentencing options should the applicant be convicted in the District Court. It was clear that he had no prior convictions and that there were considerable difficulties in exercising parental control. However, the learned judge described the

offences as "horrendous". As a matter of law the judge is required to obtain a probation report before imposing a custodial sentence. It is clear from the ruling that these were factors of which the District Judge was aware. He cannot be regarded as detached from this reality and its possible implications for the future sentencing of the applicant should it arise. Indeed, the child's mother agreed fully with the assessment that she had little or no authority over him. In those circumstances, I do not consider that the failure to utter the words that he was taking account of the likely sentence that may be imposed establishes such a default of requirements as to render his decision fundamentally flawed.

15. It was also submitted that the learned judge acted without jurisdiction in remanding the applicant for the purpose of preventing "further criminal behaviour" or "criminal offences". At issue here is the failure of the judge to use the word "serious" to qualify the two phrases in his ruling and thereby comply with the provisions of section 2 which is intended to be used only as a basis to refuse bail if it is reasonably considered necessary to prevent the commission of a "serious offence" by the applicant : it is said that the court must consider the nature and degree of seriousness of the offence which is apprehended.

16. I am satisfied that the nature and degree of the seriousness of the offences which it was considered might be committed by the applicant were clear from the ruling of the learned judge. Serious offences are those which attract a penalty of five years imprisonment or more. The applicant was charged with two such offences. He had recently been arrested for four other robberies and was charged with another. He had a history of engagement with the Gardaí in respect of other matters which were also defined as serious offences under the statute. There was ample evidence to support the proposition that refusal of bail was "reasonably considered necessary to prevent the commission of a serious offence". The applicant was clearly not susceptible to parental control or supervision and the stream of delinquent behaviour had continued over a two year period unabated. These were factors which clearly influenced the judge in reaching the conclusion that the refusal would likely prevent the commission of serious criminal offences by the applicant. This was not an unreasonable conclusion.

17. It is not the case that the section is confined to adult recidivists or so-called professional criminals. It is not prohibited by law or under the provisions of the constitution to deny bail to minors who are accused of serious criminal offences under the statute. The refusal was properly regarded in this case as an exceptional measure not to be taken lightly. Refusal of bail to a minor is contemplated under the provisions of the Children Act 2001. Minors accused of serious offences may be properly refused bail under s. 2 if the test is met and the relevant matters are appropriately considered. The ethos of the Children Act is that even following conviction "a period of detention should be imposed only as a measure of last resort" (s. 96). Refusal of bail to minors is not the norm, but in this case the nature and extent of the applicant's history of delinquency and the complete absence of effective domestic supervision and control contributed to the reluctant refusal of bail under section 2.

18. The Warrant is also challenged. It is on its face said to be a "COMMITTAL TO REMAND CENTRE ON REMAND" under s. 88(1)(c) of the Children Act 2001. The incorrect sub-section of the Act is relied upon. The original s. 88 was substituted by a new s. 88 under s. 135 of the Criminal Justice Act 2006, concerning the requirements applicable to the remand in custody of a child. The wording of the substituted s. 88(1)(a) is identical to that of the former section 88(1)(a). The remainder of the substituted section contains a number of changes to the provisions applicable to a child who is remanded in custody. It is claimed that the words "as substituted by" should appear on the face of the Warrant. I am satisfied that this is not necessary. It is also submitted that there is a more fundamental defect in that s. 88(1)(c) was relied upon in the heading of the Warrant rather than the correct section 88(1)(a). Section 88(1)(c) refers to a situation when the court decides to remand a child in custody "in respect of whom the court has postponed a decision". This is clearly not such a case. The citation of the subsection is inappropriate- but is it fatal to the warrant? I do not consider that it is. A want of form, ambiguity or error may be corrected or resolved by reference to other documentation or to what actually transpired at a hearing (see *The State (Brien) v. Kelly* [1970] I.R. 69 and In *re Tynan* [1969] I.R 273).For that reason the slip rule exists and an error such as that which occurred in this case might be easily corrected by application under the District Court Rules in that regard. There is in fact no ambiguity or uncertainty as to the order which the learned District Judge intended to make. It is abundantly clear on the face of the order. The applicant was being remanded in custody to Oberstown School, Lusk, County Dublin to appear before Court No. 2, Criminal Courts of Justice, Dublin 7 at 10.30 a.m. on the 22nd April to be further dealt with in accordance with law in respect of the two charges attached.

19. Of some importance also is s. 8(10) of the Children Act as substituted which states that the court shall not remand a child in custody if the only reason for doing so is that the child is in need of care or protection or the court wishes to obtain the assistance of the Health Service Executive under s. 76B of the Act in dealing with the case. It is clear in this case that the applicant was not remanded in custody for these reasons.

20. For the reasons given I am satisfied that the applicant is detained in accordance with law and I refuse the application. In doing so this court does not in any sense act as a court of appeal. The High Court was available to exercise its bail jurisdiction which the applicant has pointedly failed to invoke. The court was informed during the course of the hearing that the child's mother was attempting to make arrangements to move him from his home area to relatives in Athy where he might be away from the influence of other youths or influences which contributed to his delinquency. This matter was never put before the District Court during the hearing at which she gave evidence. It may be that some consideration may be given to bringing a further bail application. The case, of course, remains remanded until next Tuesday 22nd April.