Neutral Citation Number: [2010] IEHC 399

THE HIGH COURT

2010 1817 SS

IN THE MATTER OF ARTICLE 40.4 OF THE CONSTITUTION AND THE HABEAS CORPUS ACT, 1782.

BETWEEN:

LADISLAV KLI

APPLICANT

V.

GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

JUDGMENT OF MR JUSTICE MICHEAL PEART DELIVERED ON THE 16TH DAY OF OCTOBER 2010:

The applicant is currently detained by the respondent on foot of a Remand warrant dated 7th October 2010 signed by Her Honour Judge Katherine Delahunt at the Circuit Criminal Court, after the applicant had been brought before her having been arrested on the 6th October 2010 on foot of a Bench Warrant which had issued from that Court on the 16th October 2009, when the applicant failed to answer his bail and appear before that Court on the said date, being the date on which, following a plea of guilty on the 20th May 2009 in relation to certain theft offences, he was due to be sentenced.

The applicant has argued that the Bench warrant which was issued on the 16th October 2009 was 'spent' by the time he was arrested on the 6th October 2010, and that his arrest was therefore unlawful, and therefore that he had been brought unlawfully before the Court on the 7th October 2010, and that the learned Circuit Court Judge had no basis in law to further remand him in custody, and that she was in error in determining on that date that the Bench warrant dated 16th October 2009 was still valid on the basis that it had not previously been lawfully executed.

The applicant has submitted on the evidence before this Court that it is the case that the Bench warrant was spent by the time the applicant was arrested on the 6th October 2010, since he had previously been arrested on foot of same on the 27th September 2010 and the warrant was fully executed when the applicant was brought before the District Court at Tallaght on the 29th September 2010, following which the District Judge indicated that he was making no order, and following which, also, the applicant was with the agreement of the Notice Party released and remained at liberty until his re-arrest on the same warrant on the 6th October 2010. The applicant is of the view that the agreement to his release on that date was because the Notice Party was also of the view that by the 6th October 2010 the bench warrant was spent, or at least that there was some doubt in that regard given the events up to that point.

I have had the benefit of a grounding affidavit sworn by the applicant's solicitor, Pádraig O'Donovan, as well as oral evidence from both Garda Francis Brennan who effected the arrest of the applicant on the 27th September 2010 and the later arrest on the 6th October 2010, and Detective Garda David Jennings, the investigating Garda in respect of the charges to which the applicant has pleaded guilty, and who gave evidence before the learned Circuit Court Judge on the 7th October 2010.

From that evidence I can arrive at the following findings of fact in relation to the events leading up to the granting of the Remand Warrant dated 7th October 2010 on foot of which the applicant is currently held, and thereafter consider the submissions which have been made by Counsel for both sides.

Having been charged with three theft offences the applicant was returned for trial at the Circuit Criminal Court on the 20th May 2001 on which date he pleaded guilty to the offences charged in Bill Number 140/2009, and thereafter he was remanded on bail to appear again on the 16th October 2009. On that date he in fact was present in Court, but that before his case was called he left Court and was not present when his case was called thereafter. This led to bench warrant being issued on that date.

That bench warrant commanded that the applicant be apprehended and directed that he be brought *"before The Presiding Judge at this present Sittings of the Circuit Court aforesaid if the same be then and there sitting, or if he cannot be taken during this present Sittings of said Court, but shall be taken during any adjournment of this present Court or future Sittings thereof that then as soon after as he shall be taken you bring or cause him to be brought before the Presiding Judge, or if he shall be taken at a time when the Circuit Court shall not be sitting that then as soon after as he shall be taken you bring or cause him* ***to be brought before a Judge of the District Court of the said County*** *to be sent to the next sittings of the Circuit Court in custody or to admit him to bail conditioned for his personal appearance at the sittings of the Circuit Court at the Law Courts, Four Courts, Dublin 7 aforesaid to answer as aforesaid and further to be dealt with according to law."* (emphasis added)

In relation to the underlined direction above, it is relevant on this application to note that the warrant is headed "Dublin Circuit -- County of the City of Dublin". In other words the direction was that he be brought before a District Court in the County of the City of Dublin.

It was not until Monday 27th September 2010 at about 5pm that the applicant was arrested at his home in Ennis, Co. Clare by Garda Brennan, following which he was brought to Ennis Garda Station where he was processed as an arrested person. Garda Brennan made enquiries from the Courts Service as to which District Court he could bring the applicant before and according to his evidence he was informed that he could bring the applicant to any District Court. The District Court at Ennis was not then sitting and having held the

applicant overnight at Ennis Garda Station, he brought the applicant to Gort District Court on the following day, the 28th September 2010 at 10.30am, for the purposes of executing the warrant. At that stage he endorsed the warrant as follows: "Executed in (sic) warrant by arresting the defendant and bringing him before Gort District Court on the 29/9/10". He handed the warrant to the District Court Clerk. The matter was not called during the morning and at about 2.30pm. that day the District Judge called Garda Brennan towards the Bench and handed him back the warrant and informed him that he would not deal with it and that it would have to be dealt with in Dublin.

Garda Brennan again contacted the Courts Service and the advice given to him then was that he should go before a Dublin District Court the following day, the 29th September 2010 and retain the applicant overnight for that purpose, as he would not reach Dublin in time to appear that day in Dublin given the distance to be travelled.

On the 29th September 2010, Garda Brennan brought the applicant in custody to Tallaght District Court where he arrived at about 9.30am. He made an alteration to the endorsement on the warrant in order to remove the reference to Gort District Court and replaced it with a reference to Tallaght District Court. Having given the bench warrant to the District Court Clerk the case was called and Garda Brennan gave evidence of arrest. The applicant was legally represented at that stage. He was cross-examined on his evidence and certain submissions were made to the effect that the applicant was not in lawful custody given that there was no satisfactory explanation for the applicant not being brought before a District Court in Dublin on the 27th September 2010 even if that would have required a special sitting of the Court, and the applicant's solicitor sought to have the applicant released from custody.

In the light of these submissions the District Judge put the matter to second call. While awaiting second call, it appears that the representative of the Chief Prosecution Solicitor's office made contact with the DPP's office in order to obtain a view on the issue raised as to the lawfulness of the applicant's detention. At second call the District Judge stated that he was going to make no order in the matter. In addition, more time was needed by the DPP's office to consider the issues which had been raised, but in the circumstances then subsisting, the Chief Prosecution Solicitor's representative offered the applicant two options in the light of the judge's refusal to make any order. The first option was that the matter would be adjourned for one week to the Circuit Court during which period the applicant could be allowed to be on bail. The second option was that the applicant would simply be released. The applicant opted for release and this occurred, whereupon the applicant returned to his home in Ennis.

Garda Brennan stated in his direct evidence that it was the District Judge who directed the applicant's release when he indicated that he was making no order. However, I feel it is more likely that it was simply agreed between all concerned that the applicant be released without the necessity for any order as such in that regard. There is certainly no order of the District Judge before me ordering the release, and all parties are agreed that the District Judge stated that he was making no order.

Sometime between the 29th September 2010 and 1st October 2010, Garda Brennan received instructions from Detective Garda Jennings, the investigating officer, to contact the applicant and caution him to attend before the Dublin Circuit Court on the 5th October 2010. On Friday 1st October 2010 at about 8.35pm he did so at the applicant's house, and the applicant informed Garda Brennan that he probably would not appear in court on the 5th October 2010.

On the 5th October 2010, D/Garda Jennings attended at the Circuit Criminal Court and outlined this sequence of events to Her Honour Judge Delahunt. The applicant did not appear as cautioned. According to the affidavit of the applicant's solicitor, an application was made for the issue of a new bench warrant on the 5th October 2010. It is agreed by all parties that Judge Delahunt took the view that the bench warrant already issued was still live and valid, and that she indicated that the applicant should be arrested on foot of same and brought before the Circuit Criminal Court as soon as possible. In so far as the applicant's solicitor has deposed in his grounding affidavit that on the 5th October 2010 *"it may be that the Judge was not made a party to the full history and prior double execution of the warrant",* I am satisfied, having heard the oral evidence of Detective Garda Jennings who was in court at that time, that he gave a full history of the relevant events to Judge Delahunt on that occasion.

Detective Garda Jennings stated that he had informed the learned Circuit Judge that the original warrant was still in the District Court Office, and that she informed him that it should be returned to him. He retrieved the original bench warrant from the District Court Office and gave it to Garda Jennings, who has stated that at that stage he understood that it was still valid.

On the 6th October 2010 Garda Brennan made contact with the applicant and informed him that he should attend at Ennis Garda Station for the purpose of arrest, as he was anxious that the arrest would occur at a time which would permit the applicant to be brought to the Dublin Circuit Court on the 7th October 2010. It appears that the applicant agreed to attend by appointment at 9pm.In fact he did not turn up at that time, and Garda Brennan had to send two text messages to the applicant before eventually the applicant attended at about 9.30pm, whereupon he was arrested by Garda Brennan on foot of the bench warrant and was held in custody overnight at Ennis Garda Station and in the morning was brought to the Dublin Circuit Criminal Court. Judge Delahunt heard submissions to the effect that the bench warrant was spent by the time the applicant was re-arrested on foot of same the previous evening and was not therefore lawfully before the Court. However, these submissions were rejected and the learned judge remanded him in custody to the 2nd November 2010 for sentence. No application for bail was made.

Submissions:
Tony McGillicuddy BL for the respondent has first of all submitted that on the facts of the present case the bench warrant was not spent and was still valid by the time the applicant was arrested on foot of same on the 6th October 2010, since no order had been made by the District Judge sitting at Tallaght District Court on the 29th September 2010. In that sense it is submitted that the execution of the warrant was incomplete on that date, in spite of the fact Garda Brennan had, prior to handing in the warrant to the Court, endorsed it to the effect that it was executed, as he had done at Ennis District Court on the previous day.

Without prejudice to that submission he has relied upon authorities for the proposition also, even if the warrant is to be found to have been spent by that date, the law is clear that once the accused person is actually before the Court, it matters not whether the accused person has been brought before the Court by some illegal process, and that the learned Circuit Court Judge had jurisdiction to deal with the matter by remanding the applicant in custody to a date for sentencing, as she did.

The first authority for this proposition which is relied upon is *Killeen v. The Director of Public Prosecutions and others* [1997] I.R. 218. In that case, the applicant was arrested on foot of warrants issued in reliance upon sworn informations. However, the charges had been incorrectly stated on the warrants, and it was contended therefore that the warrant for the applicant's arrest was invalid. It was held unanimously by the Supreme Court per Keane J., as he then was, (Denham J. and Lynch J. concurring) that as a general rule, albeit with some exceptions, the jurisdiction of the District Court to embark on any criminal proceeding, including the holding of a preliminary examination, was unaffected by the fact that the accused person had been brought before the court by an illegal process. In the course of his judgment the learned judge stated as follows:

> *"The error of law alleged to have been committed by the District Judge in the present case must next be considered. It can in general be said that the jurisdiction of the District Court to embark on any criminal proceeding, including the holding of a preliminary examination, is unaffected by the fact, if it be the fact, that the accused person has been brought before the court by an illegal process. This was so held by Davitt JP. In The State (Attorney General) v. Fawsitt [1955] I.R. 39, at p. 43 where he said:*
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> > *'The usual methods of securing the attendance of an accused person before the District Court, so tat it may investigate a charge of an indictable offence made against him, is by way of arrest or by way of formal summons, but neither of these methods is essential. He could, of course, attend, voluntarily, if he so wished; so far as the exercise of the Court's substantive jurisdiction is concerned it is perfectly immaterial in what way his attendance is secured, so long as he is present before the district Justice in Court at the material time. Even if he is brought by an illegal process, the Court's jurisdiction is nonetheless effective.'*
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> *Some qualifications to that general principle may be noted in passing. First, evidence obtained from the accused person during the course of a detention which proves to be unlawful, whether because of a defective warrant or for some other reason, may subsequently be excluded as inadmissible by the court of trial. Secondly, where the process by which the person is brought before the court involves a deliberate and conscious violation of his constitutional rights, of which the most graphic example is The State (Trimbole) v. The Governor of Mountjoy Prison [1985] I.R. 550, the court may be justified in refusing to embark upon the hearing. There may also be cases in which a question is raised as to the validity of the detention in garda custody of a person brought before the District Court, in which case the appropriate course is to remand the person concerned, enabling him, if he wishes so to do to apply to the High Court for an order of habeas corpus ……. None of these considerations arise in the present case."*

Mr McGillicuddy submits that in the present case it is clear that no such egregious circumstances exist such that the above qualifications to the general rule apply, since it is clear from the evidence that at all times the Gardai in question acted in a bona fide and responsible manner in their attempts to have the bench warrant executed, and in particular where the Circuit Court Judge had expressed the view that the bench warrant was still valid and directed that the applicant be brought before the Court on foot of same, and in circumstances where the District Judge at Tallaght District Court had explicitly stated that he was making "no order" on the 29th September 2010. It is submitted that the presence of the applicant before the Circuit Court on the 7th October 2010 was sufficient for the Circuit Court Judge to remand the applicant for sentencing, regardless of the method by which his attendance had been achieved.

The second case relied upon by the respondent is *Director of Public Prosecutions (Garda John Ivers) v. Murphy* [1999] 1 I.R. 98. In this case, the accused person had been arrested otherwise that on a warrant, and it was submitted on her behalf that the certificates relied upon as evidence of such arrest were insufficient to establish an arrest otherwise than on foot of a warrant and that the District Judge was obliged to satisfy himself that the accused had been so arrested. Keane J., as he then was, stated at p. 113 that *"there was nothing in the case stated to suggest that proof that the accused had been arrested was an essential proof in the prosecution"* and he referred again to the general rule to which he had referred in *Killeen v. Director of Public Prosecutions* [supra] and to which I have already referred. In the same case, Denham J. in her judgment at p. 107 stated:

> *"The accused was present in the District Court when the charge sheet was laid before the District Judge. There is well established jurisprudence that her presence cures any defect in the procedure."*

Mr McGillicuddy has referred also to the judgment of McGuinness J. in *Director of Public Prosecutions (McTiernan) v. Bradley* [2000] 1 I.R. 420. In that case, the accused had been arrested otherwise than on a warrant in connection with a charge of assault contrary to section 2 (1) (b) of the Non-Fatal Offences Against The Person Act, 1997. It had been submitted on his behalf that there was no power to arrest other than on a warrant for such an offence. Again, it was decided that in cases where proof of a valid arrest was not an essential ingredient to ground a charge, the jurisdiction of the District Court to embark upon any criminal proceeding was not affected by the fact that an accused person has been brought before the court by an illegal process, and the court should consider whether there has been a deliberate and conscious violation of the accused's rights prior to embarking on the hearing.

Pádraig Dwyer SC for the applicant has submitted that the bench warrant is as a matter of law and fact executed once the person who has been arrested has been brought before the court thereafter, and that execution is not dependent upon the judge in question taking any particular step thereafter. Accordingly it is submitted that once the applicant herein was brought before the District Court at Tallaght on the 29th September 2010, the bench warrant was executed. He relies also on the fact that Garda Brennan actually endorsed the warrant to the effect that he had executed same, and that this is unaffected by the fact, if it be a fact, that the District Judge decided to make no order. Mr Dwyer has sought support for this submission from a judgment of Ms. Justice Finlay Geoghegan in *Minister for Justice, Equality and Law Reform v. O'Fallúin,* unreported, High Court, 14th October 2005. That was a case where the surrender of the respondent was being sought on foot of a European arrest warrant, and an issue arose as to whether the underlying domestic warrant on foot of which the European arrest warrant was issued was still extant at the time the European arrest warrant was issued in view of the fact that the respondent had been arrested in this jurisdiction on foot of the domestic warrant, which had been 'backed' for the purposes of Part III of the Extradition Act, 1965. On foot of that arrest the respondent had been brought before the High Court here, as required, and had not been brought before the Bow Street Magistrates' Court which was the Court to which the domestic warrant directed that the respondent be brought following his arrest. Evidence of English law was adduced on the application for surrender. Part of that evidence was to the effect that under English law a warrant is executed when the person named therein is arrested in accordance with the command in the warrant, and brought before the court referred to in the warrant i.e. Bow Street Magistrates Court. The learned judge concluded that the domestic warrant was not executed despite the arrest of the respondent, since he was not thereupon brought before the court referred to in the warrant and that the domestic warrant was therefore extant at the time the European arrest warrant was issued. Mr Dwyer contrasts that situation with the present case since not only was the applicant arrested on foot of the bench warrant but was also brought before the Court referred to in the bench warrant i.e. "a Judge of the District Court of the said County" (namely Dublin).

Mr Dwyer has submitted also that the authorities relied upon by the respondent herein, namely *Director of Public Prosecutions (Garda John Ivers) v. Murphy* [supra] and *Killeen v. The Director of Public Prosecutions and others* [supra] cannot be authority for disregarding a person's constitutional rights in the matter of the execution of bench warrants or otherwise. He submits also that the present case ought to be distinguished from Ivers and Killeen on the basis that the defects identified in both were procedural defects only and not such that constitutional rights were violated by a re-arrest on foot of a spent warrant. He submits also that the fact that Garda Brennan acted in a bona fide manner does not detract from the illegality of what occurred by the applicant being arrested again on foot of what is contended to be a spent warrant. In that regard, Mr Dwyer has relied upon the judgment of Finlay CJ in The People (DPP) v. Kenny [1990] 2 IR. 110 which held, inter alia, that in deciding whether the violation of constitutional rights was carried out consciously and deliberately the test was whether the act complained of was conscious or deliberate and it was immaterial

whether or not the actor knew that what he was doing was in breach of the constitutional rights of the accused.

Conclusions:
I am satisfied, first of all, that the bench warrant which issued on the 16th October 2009 was not as a matter of law executed either at Gort District Court on the 28th September 2010, or even at Tallaght District Court as on neither occasion did the District Judge fully deal with the matter. In Gort District Court the judge sitting there quite correctly indicated that this Court was not the appropriate court to which the warrant directed that the applicant be brought following arrest. At Tallaght District Court the fact is that while the applicant was physically brought before the Court, the judge sitting there decided that he would make no order in the circumstances which were outlined to him. The absence of any step being taken by that District Judge resulted in my view in a situation where, while the applicant was brought to the court, execution remained incomplete in the absence of any order being made. Instead of having the matter dealt with, some agreement was reached between the Chief Prosecution Solicitor and the applicant which resulted in the applicant leaving court at liberty. But that did not happen as a result of an order made by the District Judge.

In my view therefore the warrant remained unexecuted and was not thereafter 'spent'. Whether or not the District Judge ought to have dealt with the matter finally on the 29th September 2010 is not a question to be decided on the present application.

It follows in my view therefore that the Circuit Court Judge was entitled to take the view, which she did on the 5th October 2010, that the bench warrant was still extant and unexecuted, and that the applicant should be arrested again on foot of same. She was correct also in dealing with the matter on the 7th October 2010 in the manner in which she did, by remanding the applicant in custody for sentencing at a later date.

Even if I am incorrect in so concluding that the warrant was not spent, I am satisfied also that the presence of the applicant before the Circuit Court on the 7th October 2010 was sufficient for the learned Circuit Judge to deal with the matter in the way she did, and I agree that the situation which presented itself is permitted by reference to the authorities to which Mr McGillicuddy has referred and which I have set forth above.

For these reasons, I am satisfied that the applicant is in lawful custody, and I refuse this application for his release.