Neutral Citation [2013] IEHC 88

THE HIGH COURT

[Record No. 2012 2143 SS]

IN THE MATTER OF AN APPLICATION FOR AN INQUIRY PURSUANT TO ARTICLE 40.4.2 OF BUNREACHT NA HEIREANN 1937

BETWEEN

A.B.

APPLICANT

AND

THE COMMISSIONER OF AN GARDA SIOCHANA

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

AND

THE CLINICAL DIRECTOR OF THE CENTRAL MENTAL HOSPITAL

AND

DISTRICT JUDGE MURPHY

AND

THE IRISH PRISON SERVICE

RESPONDENTS

JUDGMENT of Mr. Justice Colm Mac Eochaidh delivered on the 8th day of February 2013

1. On the 13th November, 2012, complaint was made pursuant to Article 40.4.2 of the Constitution that the applicant A. B. was unlawfully detained by An Garda Siochana. I ordered an inquiry and on the evening of the same day I directed the release of A. B. saying I would give my reasons later. The Title of these proceedings was devised on behalf of the applicant though in reality the allegation of unlawful detention was directed at the Gardai.

2. The detention of the applicant, A. B., arose in the following circumstances. A.B. was charged with assaulting T.C. at an opticians' premises in Dublin on the 28th February, 2012, contrary to s. 2 of the Non-Fatal Offences Against the Person Act, 1997, and also with damaging the plate glass display window of the same opticians' premises on the 28th March, 2012, contrary to s. 2(1) of the Criminal Damage Act, 1991. A.B. first appeared in the District Court on the 5th April, 2012. He was remanded on bail to May 31st. His (former) solicitors instructed Dr. Paul O'Connell, a consultant forensic psychiatrist, to assess A.B.'s fitness to be tried.

3. Dr. O'Connell interviewed A.B. on the 28th June, 2012, and his report was compiled within 24 hours. The report records that A.B. has had a troubled life, beset with mental illness. It describes A.B.'s account of encountering T.C. at the city centre opticians' premises. It is apparent that the encounter was delusional.

4. Dr. O'Connell records significant *animus* expressed by A.B. towards T.C. as well as a history of violent encounters and heavy drinking. Dr. O'Connell concludes his report in the following terms:

> "7.1 In my opinion, Mr. B., in all probability, suffers from paranoid schizophrenia. It is likely that he has been mentally ill for several years. The account he gives me strongly suggests that his behaviour in relation to his interactions with Mr. C was driven by delusions. It is possible that defence of insanity may be appropriate. However, further information is required, ideally in the form of the book of evidence.
>
> 7.2 Given the nature of his delusions, there is a substantial risk of recidivism.
>
> 7.3 It would be helpful to obtain a copy of the records of his GP, St. James's Hospital and the Richmond Road Day Hospital.
>
> 7.4 My opinion is that Mr. B. is unfit to be tried.
>
> 7.5 That is because his mental illness (which is mental disorder as defined in section 4 of the Criminal Law Insanity Act) prevents him from being able to instruct his defence. His attitude to his defence appears to be grounded in psychotic paranoid suspicion.
>
> 7.6 He lacks insight and judgment and is unable to give proper weight to the evidence and is consequently unable to form a reasonable judgment when deciding about his plea options.
>
> .....
>
> 7.11 In the event that this matter is adjourned, I recommend that Mr. B. is assessed for involuntary admission to his catchment area hospital. A copy of this report should be sent to his GP, Dr. Lathan, to facilitate this."

5. By the 29th June, 2012, A.B.'s former solicitors (who had ceased representation by the time of the habeas corpus application) were aware that their client was unfit to be tried, and was suffering from a serious mental illness. Dr O Connell's report advised that A. B. be assessed for involuntary admission to psychiatric treatment in the event that his case be adjourned and that a copy of his psychiatric report be sent to A.B.'s doctor (who was identified) to facilitate this. Despite the multiple adjournments, it would appear that the advice of Dr. O Connell was not heeded in that A. B. was not assessed for involuntary admission. His former solicitors have helpfully sworn an affidavit describing their representation and I shall refer to that account later. They say that numerous attempts were made to contact Dr Latham and when he eventually made contact it was to say that A.B was no longer his a patient.

6. Dr O'' Connell's report was sent by the applicant's former solicitors to the Chief Prosecution Solicitor and to the prosecuting Garda on July 4th 2012.

7. A.B. next appeared in court on the 26th July, 2012, when the District Court accepted jurisdiction and an issue of fitness to be tried was ventilated. The former solicitor's received a letter from Cahir O Higgins Solicitors on the same day indicating that they had been authorised to come on record. The former solicitors informed the new solicitors of the contents of the medical report on that day. It was on this occasion that A.B. first appeared in relation to the alleged property damage. Further remand on bail was ordered until the 5th October, 2012 which was to be the trial date for the issue of fitness to be tried. The District Court was informed that there was a psychiatric report available but it was not seen by the judge. I doubt if he would have adjourned the matter had he been given the report. Thus, the contents of the medical report were known to the original solicitors by the end of June, were known to the prosecution solicitors by the beginning of July and by the new solicitors by the end of July.

8. On the return date of October 5th 2012 the former solicitors applied and were permitted to come off record and AB's current solicitors took over. The report was not shown to the District Court on that day.

9. The applicant's next appearance m the District Court was on the 8th November, 2012, when a successful application was made to revoke bail on the basis of contact occurring between A.B. and T.C.. Counsel for A.B. consented to the custodial remand.

10. It was not until the matter came before Judge Catherine Murphy on the 12th November, 2012, that Dr. O Connell's psychiatric report was given to the District Court for the first time, some five months after its compilation. Judge Murphy decided that A. B. was unfit to be tried as soon as she read the report. On the 13th November, 2012, a Committal Warrant was issued. It records (in manuscript) that a finding of "unfitness to plead" in respect of A.B. was made the day before, on the 12th November, 2012. The warrant ordered the detention of AB in the Central Mental Hospital for a period of 14 days, *inter alia*.

11. Section 4 of The Criminal Law (Insanity) Act 2006, (as amended by the Criminal Law (Insanity) Act 2010) deals with an accused person's fitness to be tried. New provisions were added to s. 4(3) by the 2010 Act. New section 4(3)(aa) deals with the powers of the court both before it formally concludes that an accused person is unfit to be tried and thereafter. When the question of whether a person is unfit to be tried arises, the court may request that evidence of an approved medical officer be adduced for the purposes of (i) determining whether to adjourn the proceedings until further order to facilitate the accused person in accessing any care or treatment necessary; (ii) making a determination as to whether or not the accused person is fit to be tried, or (iii) exercising a power referred to in sub-section (6)(a). This sub-section gives the court power to request evidence to determine fitness to be tried or, following such a determination, to direct in-patient or out-patient care in the Central Mental Hospital ('the designated centre' under the Act). The District Court cannot direct inpatient care unless it has received a report of an approved medical officer (obtained in accordance with s. 4(6)(a)). Thus, on the evidence of an approved medical officer, the court may commit the accused person to a designated centre for a period of not more than 14 days (see s.(4)(6)(a)(i) of the 2006 Act). An approved medical officer is required to report to the District Court on whether or not the accused person is suffering from a mental disorder and is in need of inpatient care or in need of outpatient care.

12. One way or the other, where the court has made a determination that an accused person is unfit to be tried, the court is directed by s. 4(3)(b) to adjourn the proceedings "until further order".

13. From these provisions it can be seen that the District Court is now empowered, once it decides that an accused is unfit to be tried by reason of mental illness, to direct that persons suffering from mental illness obtain inpatient or outpatient treatment. The legislative provisions I have described represent a bridge between criminal process and civil powers to be deployed for the protection of persons who are unwell. In the words of Hogan J. in *B.G. v. District Judge Catherine Murphy* [2011] IEHC 359 at para. 1, the 2006 Act "may be said to represent a modern enlightened and humane response . . . to the plight of those afflicted by mental illness."

What led to these proceedings?

14. The Committal Warrant described above was addressed to "the person in charge" of the Central Mental Hospital. The warrant commanded its addressee "to lodge [to] the accused ... at Central Mental Hospital, Dundrum, Dublin 14, there to be detained by the Clinical Director thereof until the above time of adjournment pursuant to section 4(6)(a)(i)(a)(ii) of the Criminal Law (Insanity) Act 2006".

15. In addition, the Committal Warrant directed that "the approved medial officer concerned shall report to the court on whether, in his/her opinion, the accused person committed under s. 6(a) is suffering from a mental disorder (within the meaning of the Mental Health Act 2001) and is need of inpatient care or treatment or is in need of outpatient care or treatment".

16. The District Court thereby ordered the Central Mental Hospital to take A.B. into its care on an inpatient basis for a period of 14 days to assess what his mental health needs and treatment might be. A.B. was conveyed by An Garda Siochana to the Central Mental Hospital on the 13th November, 2012.

17. The Clinical Director of the Hospital declined to comply with the order of the District Court and refused to take A.B. into custody. A.B. was returned to the Courts of Criminal Justice at Parkgate Street and Judge Murphy was informed of what had taken place. Counsel for the Clinical Director of the Hospital appeared as did Dr. O'Connell and Dr. Kennedy, the Clinical Director, in person. Judge Murphy was asked to reconsider her Committal Warrant but she declined. The District Judge was clearly of the view that A.B. was in immediate need of inpatient care for mental illness. The judge was aware that bail had been revoked on the 9th November, 2012, because A.B. had contacted T.C., in a manner which caused concern to An Garda Siochana. The criminal proceedings stood adjourned and it was not legally possible to place A.B. back in the custody of the Irish Prison Service.

18. An Garda Siochana, acting responsibly, took A.B. into their care at the Bridewell Garda station pending the outcome of the standoff between the District Court and the Central Mental Hospital. It was the Garda custody of AB which was sought to be questioned in these proceedings.

19. I ordered an inquiry into the legality of the detention of A.B. by An Garda Siochana and when the matter was returned for hearing on the 13th November, 2012, the justification advanced by counsel on behalf of An Garda Siochana in support of the legality of the detention of A.B. was that such custody and detention was necessary to execute the Committal Warrant of the District Court and consequently was lawful.

20. Immediately preceding the decision of the District Court that A.B. was unfit to be tried, A.B. was in the lawful custody of the Irish Prison Service, bail having been revoked some days beforehand. Once it was determined that A.B. was unfit to be tried, custody was transferred to the Central Mental Hospital. An Garda Siochana acted lawfully by keeping A.B. in their custody to execute that warrant. It was agreed by counsel on all sides that there was no express statutory authority empowering the Gardai to take AB into custody to convey him to the Central Mental Hospital, but it was also agreed that such power must be implied in section 4 (6) of the 2006 Act. However, once the Central Mental Hospital declined to obey the order of the District Court, the legality of the detention of the accused by An Garda Siochana fell under a shadow.

21. Counsel for An Garda Siochana argued that the custody by An Garda Siochana of A.B. was lawful so long as they were attempting to execute the committal warrant. That submission can only be regarded as correct if there is a reasonable possibility that the warrant can be executed. For example, if the Central Mental Hospital indicated that they could not admit a person immediately but could do so within 24 hours, the intervening custody would surely be lawful. However, the Director of the Central Mental Hospital, Dr. Kennedy, gave clear evidence that he was unable to admit A.B., and that 18 persons were urgently waiting to be admitted to the Central Mental Hospital.

22. An Garda Siochana are not entitled, much less obliged, to detain a person in the position of A.B. indefinitely in the hope that a bed becomes available in the Central Mental Hospital as this would involve the indefinite detention of a potentially very unwell person in the unsuitable surrounds of a Garda station.

23. In view of the impossibility of executing the warrant I decided that the custody of A.B. in the hands of An Garda Siochana was without lawful authority.

24. I was troubled by the prospect of an immediate and unsupervised release of a person who was mentally ill. In my view the District Court correctly concluded that AB required immediate in-patient treatment. I was mindful of what Dr O Connell had said about recidivism and of the fact that bail had been revoked because of contact between AB and Mr C and that AB's attitude to Mr C not benign and was delusional.

25. I was aware of cases where the High Court had declared detention to be unlawful but had placed a stay on release, there being exceptions to the otherwise clear language of Article 40.4.2 of the Constitution requiring the High Court to order the immediate release of a person unlawfully detained. (See *D.G. v. Eastern Health Board* [1997] 3 I.R. 511 and *N v. Health Service Executive* [2006] 4 I.R. 374). However, I could not identify circumstances or an event which would cause a stay to expire and thus the effect of a stay would be to place A.B. in indefinite police detention in circumstances where he needed inpatient assessment and possibly inpatient treatment. In this connection I should refer to the decision in *The State (At the Prosecution of Thomas McDonagh) v. John Frawley* [1978] IR 131, where O'Higgins C. J. said at p. 137, "But in cases where it has not been shown to the satisfaction of the court that the detention is "in accordance with the law" in the sense indicated, the release of the detained person must be ordered and, notwithstanding judicial dicta to the contrary, the order of release may not be coupled with an order of re-arrest. The protection of personal liberty, which Article 40, s. 4, is intended to ensure, would be hollow and ineffectual if the order of release was not unqualified and unconditional."

26. Thus, the High Court, no matter what its concerns, could not release AB and order his re-arrest.

27. Dr. O'Connell gave evidence as to the circumstances surrounding the compiling of his medical report and as to the opinions he formed of A.B.'s mental health. This evidence was heard by members of An Garda Siochana who were present in court throughout.

28. It was indicated to me by counsel that members of An Garda Siochana (having heard the evidence of Dr. O Connell) had reasonable grounds for believing that A.B. was suffering from a mental disorder and had formed the view that there was a serious likelihood of A.B. causing immediate and serious harm to himself or to other persons. They were therefore willing to exercise a power under s. 12 of the Mental Health Act 2001 to take A.B. into custody if he were to be released. Such custody, it is to be noted, is for the purposes of applying to a registered medical practitioner for a recommendation which, if forthcoming, permits a person to be removed to an approved centre for treatment.

29. It appears to me that support for this approach may be found in *Oladapo v. Governor of Cloverhill Prison* [2009] IESC 42 where the Supreme Court said:

> "It is well established in the Court's case-law that a person released from unlawful custody, including a person unconditionally released pursuant to an order under Article 40 of the Constitution, is not thereafter exempt from the due process of law (see for example *The People (Director of Public Prosecutions) v. Pringle* [1981] (2 Frewen). The release of an unlawfully arrested person from unlawful custody in circumstances such as the present case is not a mere formality even if such a release were to be immediately followed by a lawful arrest or re-arrest. The release marks in a substantive manner the termination of that which has been unlawful in a fundamental way from its inception. It is then for a garda member effecting a subsequent arrest, if any, to justify that deprivation of liberty in accordance with law."

I should also refer to the decision of Clark J. in *JH v. Russell* [2007] 4 I.R. 242 where he adopted a similar approach to the course I followed save that the circumstances of that case permitted him to place a stay on the release order so that arrangements could be made to arrange the involuntary treatment of the person concerned.

30. The final complication in this matter was that section 12 of the Mental Health Act 2001 is expressed in terms which suggest that the powers (of civil detention) may not be exercised in respect of a person already in custody. If this is correct, (and it may not be) it would not be lawful to stay a release order so that the Gardai could exercise section 12 powers.

31. The solution which the court, with the cooperation of counsel for the applicant, counsel for An Garda Siochana and other parties present, devised was to order A.B.'s immediate release, but with the comfort that An Garda Siochana would, shortly after his release, take him into civil custody under s. 12 of the Mental Health Act 2001 for the purposes of securing medical attention for him and I am informed that this is what happened.

32. It seems to me that the District Court, the Central Mental Hospital and An Garda Siochana all attempted to act in the best

interests of A.B. and in the public interest. Though not required by law, best practice may be that when a psychiatric report is requested by an accused person's lawyers relative to 'fitness to be tried', an opinion might be also sought as to whether treatment - inpatient or outpatient- is required. If inpatient care is recommended, the lawyers could make contact with the Central Mental Hospital to see if they could accommodate the accused in the event of a committal warrant issuing and if not, lawyers might then consider what alternatives might be arranged to safeguard their client, including advising the Gardai of a possible section 12 Mental Health Act 2001 detention. It seems to me that there would be nothing wrong if the District Court were to make the same inquiry of the Central Mental Hospital prior to issuing a committal warrant, given that at present it is only in that institution that in patient assessment may occur (For the avoidance of any doubt, where a person is found not fit to be tried, a Court is not bound to direct treatment of the accused. The mere finding of unfitness does not trigger a need to be treated for mental illness.) Counsel for the State made written submissions urging me not to issue guidelines or directions as to how these matters might be handled and of course I fully agree that it is not my function to do any such thing. Where weakness in a legislative scheme is observed I see nothing improper in judicial suggestion on how problems in future might be avoided.

33. Finally, I was concerned by the lapse of time between the date of Dr. O'Connell's report and the date its contents were revealed to the District Court. It seems to me that when defence lawyers commission a psychiatric report which advises that an accused is not only unfit to be tried but also a possible danger to himself or to a member of the public, it is incumbent on the accused's lawyers to make the appropriate application to Court as soon as is practicable. This is particularly so where a mentally ill accused person might endanger himself or herself or the public. Where such danger is in prospect, the lawyers' public duties as officers of the court are superior to the obligations owed to their client. In this regard I received written submissions from the applicant's lawyers urging me not to make any such remark and seeking to persuade me that the contents of such a psychiatric report are confidential and covered by privilege and that no duty requires the contents to be revealed. I disagree. In any event, in this case a decision was taken to seek a trial of the fitness issue not later than 26th July 2012. The medical report had been revealed to the prosecution and the gardai on July 5th 2012. My view is that a trial of fitness to be tried should have been sought in early July 2012 and I can find no good reason why this matter was only tried in early November 2012. It is a cause of concern that Dr O Connell's warning about recidivism came to pass and that AB made contact with TC, something which, in all probability, would not have happened had an early application been made to the District Court.