Neutral Citation: [2016] IEHC 373

THE HIGH COURT

IN THE MATTER OF AN INQUIRY UNDER ARTICLE 40.4.2

OF THE CONSTITUTION OF IRELAND 1937

[2016 No. 706 SS]

BETWEEN

ION ILIE

APPLICANT

AND

THE GOVERNOR OF CASTLEREA PRISON

RESPONDENT

JUDGMENT of Mr. Justice McDermott delivered on the 24th day of June, 2016

1. An application was made for an inquiry into the lawfulness of the applicant's detention to this Court on the 20th June, 2016. The court directed an inquiry under Article 40.4.2 of the Constitution and that the respondents certify in writing the grounds of the applicant's detention. The matter was made returnable to the 21st June, 2016. Thereafter, the matter was adjourned to the 22nd June. At the initial hearing, the court made a direction that the digital recording of the proceedings in the applicant's conviction and sentence hearing should be made available to the court and the parties.

2. The respondent certified in writing the grounds of the applicant's detention on the 21st June, 2016 relying on two committal warrants dated 9th June, 2016 issued by the Circuit Court in Galway following the applicant's conviction and sentence following his appeal in respect of two offences.

3. On the 19th March, 2016, the applicant, with an accomplice, stole €300 from the person of a Mr. Fullard contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001 in a licensed premises in Galway. The second charge arose from the fact that, having stolen Mr. Fullard's wallet, the accused then went to an ATM and removed €200, the theft of which was also laid against him pursuant to s. 4 of the 2001 Act.

4. The two culprits were stopped by a security guard on the premises and the Gardaí were called. The applicant was found to be in possession of cash and both were arrested. Although the applicant informed the Gardaí that he had taken the wallet and removed the money and had then thrown the wallet away, along with bank cards and other contents, CCTV footage showed that he had used the bank card to withdraw money from the injured party's account having obtained the PIN by watching the injured party use the card sometime earlier. Following his arrest the applicant was charged before a special sitting at Galway District Court on the 19th March, 2016 and remanded in custody until the 23rd March.

5. On the 27th April, 2016 the applicant was placed on election in respect of the charges and elected for summary disposal. He pleaded guilty to both charges.

6. The applicant was sentenced to six months imprisonment backdated to the 19th March, 2013 in respect of the charge concerning the €300 and three months imprisonment consecutive to that sentence in respect of the charge concerning the €200 which was suspended. No issue arises concerning the order made in the District Court.

7. The applicant appealed to the Circuit Court. Recognisances were fixed in the event of an appeal but an issue arose in relation to approval of an independent surety which ultimately caused an application to be made under Article 40 of the Constitution on the 23rd May, 2016 (Record No. 2016/587 SS). The inquiry was adjourned to 25th May. Oral evidence was heard. The respondent required time to arrange for members of An Garda Síochána to give evidence and an adjournment was granted for that purpose. In the meantime the applicant was admitted to bail pending the determination of the inquiry which was to resume on the 3rd June. On the 31st May, the respondent indicated to the court that he would not be proceeding any further. Final orders in that matter were not made and the applicant was remanded on bail to appear before the High Court on the 17th June when final orders in those proceedings were to be determined.

8. In the meantime, the Circuit Appeal came on for hearing on the 9th June. The applicant maintained his pleas of guilty to the two charges and a plea in mitigation was made on his behalf. It is clear from the digital recording of the proceedings that the learned Circuit judge was asked to consider the imposition of a community service order.

9. The applicant's solicitor in an affidavit of the 20th June, 2016 states at paragraph 21:-

> "I have spoken to … counsel (who appeared in the Circuit Court) who has advised me to the best of his recollection, (that) the learned Circuit Court judge did not mention community service in his ruling on the applicant's appeal and thus did not state a reason or reasons as to why community service was not appropriate in lieu of a sentence of imprisonment."

10. The full digital recording of the hearing which took place in the Circuit Court was received in evidence and played in open Court. It is clear that the solicitor's affidavit is incorrect in that the learned circuit judge, in response to the application that a community service order be considered by him, stated:-

> "No, I'm not going to consider a community service order …"

It should also be noted that this response was made following the submission that a community service order should be considered by the court in the context of a plea in mitigation in which the applicant had one previous conviction for failure to have a driving license under the Road Traffic Acts. It was immediately followed by the balance of the learned judge's ruling to the effect that he was imposing a sentence of six months imprisonment in respect of the theft of €300 and a concurrent sentence of three months imprisonment in respect of the second charge concerning the theft of €200. The suspended sentence of three months imprisonment consecutive to the six month term was varied to that extent. The applicant's counsel then **requested** suspension of the sentence in regard to the period already spent by the applicant in prison. This was refused.

11. Section 3(1)(a) of the Criminal Justice (Community Service) Act 1983 as substituted by s. 3 of the Criminal Justice (Community Service) (Amendment) Act 2011 provides:

> "(1)(a) Where a court, by or before which an offender stands convicted, is of opinion that the appropriate sentence in respect of the offence of which the offender is convicted would, but for this Act, be one of imprisonment for a period of twelve months or less, the court shall, as an alternative to that sentence, consider whether to make an order (in this Act referred to as a 'community service order') in respect of the offender and the court may, if satisfied, in relation to the offender, that the provisions of section 4 have been complied with, make a community service order in accordance with this section."

12. Section 3(1)(b) vests the court with a discretion if it forms the opinion that a sentence of more than 12 months imprisonment is appropriate to make a community service order in respect of the offender.

13. Section 4 of the 1983 Act is amended by the substitution of s. 4 of the 2011 Act which provides that a court should not make a community service order unless a number of conditions have been complied with. The court must be satisfied, having considered the offender's circumstances and an assessment report prepared by a probation officer following a request by the court, and if necessary, having heard from that officer, that the offender is a suitable person to perform work under a community service order and that arrangements can be made for him or her to perform that work. The offender must also have consented to the making of such an order. In this case the applicant's consent was indicated by his counsel during the course of the hearing.

14. Counsel on behalf of the applicant submits that it is mandatory under s. 3(1)(a) for a court, having determined that it would be appropriate to sentence an offender to a period of imprisonment of less than twelve months in respect of the offence to which he has pleaded guilty to "consider whether to make" a community service order and that the words used by the learned judge clearly indicated that he refused to do so. It is submitted that the learned judge clearly considered the case to be one in respect of which sentences of six months and three months imprisonment were appropriate. Therefore, it is submitted that he was obliged as a matter of law to consider whether the applicant was a person in respect of whom it may be appropriate to make a community service order as an alternative to the sentence of imprisonment deemed to be appropriate.

15. Counsel for the respondent submits that, in the context of the submissions made to the learned circuit judge during the sentencing hearing, it would be inappropriate to extrapolate from that hearing the single sentence now relied upon by the applicant as indicating a failure on the part of the learned circuit judge to consider whether a community service order was appropriate as an alternative to the sentence of imprisonment contemplated. It was submitted that it is clear from the recording that the learned judge considered the submission that a community service order was appropriate but had rejected the submission in imposing the sentence. The Court is invited to interpret the words of the learned judge as in fact meaning that he had considered whether such an order was appropriate but had rejected the submission.

16. I am not satisfied that I can interpret the clear words used to the effect that the judge "was not going to consider a community service order" as meaning the opposite and as compliant with s. 3 in the circumstances. It seems to me that the Court must first determine the appropriate sentence and then must as a matter of law consider whether a community service order may be appropriate in the circumstances of the case. The dominating relevant circumstance is that the Court intended to impose a custodial sentence of less than twelve months imprisonment. The purpose and intention of the statute is to ensure that a noncustodial alternative is available for a wide range of offences that might otherwise require a short custodial term of imprisonment. The applicant's case was clearly one to which the section is applicable. The alternative is particularly appropriate for those who are first time offenders or those whose previous conviction might be regarded as very minor It is mandatory that it be properly and fully considered. The importance of this consideration is evidenced by the removal of the discretion in the 1983 Act to consider a community service order in those circumstances: the Oireachtas has now made it mandatory that this option be considered, if a sentence of twelve months or less imprisonment is thought to be otherwise appropriate.

17. I am satisfied that there has been a failure to consider a community service order as an alternative to the sentence imposed. I am therefore satisfied that the case falls to be considered under the principles stated in the *State (McDonagh) v. Frawley* [1978] I.R. 131 in which O'Higgins C.J. in delivering the judgment of the Supreme Court stated:-

> *"Where a person such as the prosecutor is detained for execution of sentence after conviction on indictment, he is prima facie detained in accordance with law and … it would require "most exceptional circumstances for this Court to grant even a conditional order of habeas corpus to a prisoner so convicted." ... In a case such as the present, the production of the warrant by the governor of the prison will normally be a sufficient justification of the detention.*
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> *The stipulation of Article 40, s. 4, sub-s. 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 merits 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 purposes 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. For example, if the judge at a murder trial in which the accused was convicted were to impose a sentence of imprisonment for life instead of penal servitude for life as required by the statute, the resulting detention would be imposed technically without jurisdiction. But the prisoner would not be released under Article 40, s. 4, for it could not be said that the detention was not "in accordance with the law" in the sense indicated. In such a case the court would leave the matter of sentence to be rectified by the Court of Criminal Appeal; or it could remit the case to the court of trial for the imposition of the correct sentence … 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 rearrest …"*

18. Though the authorities indicate that alternative remedies, if available, should be pursued, in this case the court is mindful that the

warrants under which the applicant is held issued from the Circuit Court following the conclusion of an appeal. In the circumstances I am satisfied that an application under Article 40.4.2 is appropriate and I am satisfied that the evidence set out above demonstrates that there has been a fundamental default of requirements, in essence an error of law, whereby the learned judge failed to apply the mandatory provisions of s. 3 when imposing sentence.

19. This case turns on its facts and the court is mindful of the very heavy workload of the Circuit and District Courts in relation to offenders in respect of whom s. 3 may be an appropriate consideration but this case is not about taking the words spoken out of context. The plain meaning of the ruling made is contrary to what is required under the section.

20. I have considered the recent decision in *O'Brien v. District Judge Coughlan* [2015] IECA 245. In that case the appellant pleaded guilty to two road traffic offences. He was sentenced to four months imprisonment and disqualified from driving. The appellant complained that the respondent failed to consider whether to make a community service order as an alternative to the custodial sentence and was therefore in breach of s. 3 of the 2011 Act. It was submitted that the respondent failed to address the applicant's suitability for a community service order which was a mandatory obligation since he contemplated and imposed a sentence of four months imprisonment. In the High Court Kearns P. held that the learned judge "was not required to expressly state reasons for not imposing community service where the same was not sought or consented to". Kearns P. noted that judges of the District Court were often required to consider the imposition of short custodial sentences and it must be presumed that they were aware of their obligation to consider community service as an alternative. The learned judge did not consider that there was a need to state openly and detail the reasons why community service was not suitable in every individual case. He concluded that it was an obvious inference in the *O'Brien* case from the undisputed facts that the judge felt that a custodial sentence was necessary and added that "this is particularly the case when the issue of community service is never raised or consented to by a defendant's legal representative". He noted also that the applicant in that case had an appeal to the Circuit Court where a community service order might be sought.

21. Ryan P. in delivering the judgment of the Court of Appeal stated as follows:-

> "12. A Court is under an obligation not simply to give its decision, but to give the reasons why it reached the decision. That is, however, a quite different obligation from what is proposed in this case. The judge was required to take into account the option of community service when deciding on sentence. That does not mean that he had to spell out expressly that he had performed his statutory duty in this regard. Obviously he had to take it into account but he did not have to state that he had done so. It may well be desirable in general circumstances for him to do so, if only to reassure anybody who might be in doubt about the matter, but it is not an obligatory requirement in the sense that failure to do so inevitably results in the invalidation of the judgment that he gives.
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> 13. It is also true that a judge's reasoning does not have to be set out in any specific or particular form. It is clear that the judge thought that this case was a serious one, a view which he was perfectly entitled to reach, having regard to the circumstances. The particularly serious features were the repeated criminal offending in the same fashion. It would indeed have been a very lenient view if the judge thought that this was a suitable case for community service. Whatever about that, the point is that the failure to specify that he had taken into account the question of community service does not furnish a sufficient or any basis for invalidating the judgment.
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> 14. Any such omission does not infringe the precept that a court is expected and required to give reasons for its decision. Kearns P. was correct in saying that it would be absurd to expect every judge to recite everything that he or she had taken into account in arriving at the decision. That would impose an obligation to specify a long list of legal and factual matters in every case and would be wholly unrealistic.
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> 15. If the judge mentions that he has taken section 3 into consideration that avoids any uncertainty or speculation but the Act does not mandate such statement and it must be presumed that the judge complied with the statutory obligation; there is no basis for a reviewing court to infer failure to do so from the single fact without anything more (than) omission to mention the section when imposing sentence. There would have to be some basis in fact for the inference, over and above the mere omission."

22. Counsel for the applicant submits that there is something more in this case, which is the specific statement by the learned judge that he was not going to consider a community service order. There are other distinguishing features. In *O'Brien* the previous convictions and the surrounding circumstances of the commission of the offences enabled the inference to be drawn objectively that the learned judge in that case had considered the provisions of s. 3 in that there was nothing to rebut the presumption that he acted with knowledge of and in accordance with the section and had taken it into consideration. I am not satisfied to interpret the words of the learned judge in this as meaning that he had in fact considered a community service order as an alternative to the sentence contemplated, particularly where, as in this case, the words carry entirely the opposite meaning following a submission made on behalf of the applicant on this issue which was not made in O'Brien.

Other Grounds

23. It is not necessary therefore to determine the other grounds advanced on behalf of the applicant. It was submitted that the learned judge was obliged to give reasons as to why community service was not appropriate in lieu of a sentence of imprisonment. In O'Brien, the applicant relied on a number of authorities concerning the obligation to give reasons. Kearns P. considered a number of these authorities including *Kenny v Coughlan* [2014] IESC 15 and in respect of furnishing reasons stated:-

"Judges of the District Court deal with a large number of cases on a daily basis and are often required to consider the imposition of a short custodial sentence and so s.3(1) is of particular relevance to their work. It must be presumed that District Judges are aware of their obligation to consider community service as an alternative without the need to openly and in detail articulate the reasons why community service is not suitable in every individual case…the reasons for a District Judge's decision can be clearly implied in some cases without being expressly stated in any particular form"

24. There was no requirement to openly articulate a particular reason for not imposing a community service order in that case because the reason was obvious from the prior history of the accused and the serious nature of the offence. In addition the matter was never raised in the course of the hearing. The learned judge noted that imposing requirements to give detailed reasons would make the work of the District Court more cumbersome and prompt a flood of judicial review applications where reasons offered were deemed to be inadequate."

25. The Court of Appeal upheld the judgment of Kearns P. at paragraphs 12 to 15 quoted above. The court was satisfied that the judge's reasoning did not have to be set out in any particular form and may be clear from the evidence adduced in the case. I am

bound by the Court of Appeal's judgment in this respect and I am satisfied that the applicant's submission, based on a failure by the judge to provide any or any adequate reasons for the refusal to make the order under the section, could not have succeeded.

26. I have, in reaching that conclusion, considered the decision of the Supreme Court in *Kenny –v- Coughlan* [2014] IESC 15 which concerned the extent of the reasons required of a trial judge in a summary trial. In that case, as here, a submission was made that a duty to give reasons arose under Article 6 of the European Convention of Human Rights. The judgment of the European Court of Human Rights in *Ruiz Torija v Spain* (1995) 19 EHRR 553 was relied upon. In that case the Court stated that courts or tribunals should adequately state the reasons on which decisions are based. The Supreme Court noted the effect of this decision and that of *Vrabec & Ors v Slovakia* (Application no. 31312/08) (Unreported, European Court of Human Rights, 26th March, 2013) in that the degree and extent to which a decision of the District Court must be explained by giving reasons will depend on the nature and circumstances of the case. In the prosecution in issue, a speeding offence, involving a summary trial routinely dealt with daily in the District Court, the Court was satisfied that the issues had been clearly presented by the parties and the evidence of the prosecution was accepted over that of the defence. It was sufficient for the District Court Judge to state that fact as the reason for convicting the accused and no elaboration was required. The decision in *O'Brien* is, of course, entirely in accordance with this decision. I am therefore satisfied that it would have been unnecessary for the Circuit Court Judge in this case to give any detailed reasons for a decision refusing a community service order.

27. The final matter raised concerned the absence, from the face of the warrant, of any reference to the court's consideration of the 2011 Act. I am not satisfied that it is necessary that such a reference should appear or that the decision of the Supreme Court in *Ejerenwa v The Governor of Cloverhill Prison* [2011] IESC 41 requires that it should. The essential elements of a valid warrant have been considered in a number of cases and most recently in *Freeman v Governor of Wheatfield Prison* [2016] IECA 177 in which Mahon J. delivering the judgment of the Court stated;-

"It is long accepted that a warrant if it is to be deemed valid, must show on its face sufficient information to establish the jurisdiction of the court from which it emanates. The purpose of this rule is to enable the detainer to satisfy himself that the person named in the warrant is lawfully being placed in detention under his custody for a stated period of time, and to enable the detained person to satisfy himself of, and understand the lawfulness of his detention…."

28. The court rejected the submission that a warrant which failed to disclose on its face that the case had been tried summarily with the consent of the Director of Public Prosecutions or that the Court was satisfied to deal with the case summarily because it was a minor offence was invalid. The Court was satisfied that these were matters that could reasonably be assumed on the face of the warrant by reference to the information contained which described that the accused had been convicted and sentenced to a period of imprisonment within the sentencing limits relevant to convictions in the District Court. I am therefore satisfied that the validity of the warrants in this case is not dependent upon a recital concerning the application or consideration of s. 3 of the 2011 Act. I would have refused the application on this ground.

Conclusion

29. For the reasons set out above I am satisfied that the applicant is not detained in accordance with law and will direct his immediate release.