

THE HIGH COURT

Record Number: 2012 No. 342 SS

**IN THE MATTER OF AN APPLICATION FOR AN INQUIRY PURSUANT
TO ARTICLE 40.4.2 OF THE CONSTITUTION OF IRELAND**

Between:**Florin Fitzpatrick****Applicant****And****The Governor of Castlerea Prison****Respondent****Judgment of Mr Justice Michael Peart delivered on the 30th day of March 2012:**

1. I heard this application for an inquiry into the lawfulness of the applicant's detention and for his release from custody on the 21st February 2012. Having directed an inquiry, and having heard the evidence and submissions made by the parties following the production before the Court of the applicant from Castlerea Prison, I refused the application for his release, being satisfied that his detention was in accordance with law. Having given a brief summary of my reasons I indicated to the parties that I would set forth my reasons in more detail in a written judgment.

2. The applicant is held under Committal Warrant which issued from a District Judge sitting at the District Court in Harristown (District No. 4) on the 17th February 2012. The applicant had been before the District Court that day charged with an offence, contrary to Section 9 of the Offences Against the State Act, 1939, namely of having failed without reasonable excuse to disclose as soon as practicable to a member of the Garda Síochána information which he knew or believed might be of material assistance in securing the apprehension, prosecution or conviction of any other person for a serious offence, namely the unlawful death of one John Kenny. On the 17th February 2012 the applicant was remanded in custody to the 2nd March 2012. However, the Court consented to the applicant's release upon him entering into a recognizance in his own bond of €1500 (to be lodged), with one independent surety in the same sum, of which €200 was to be lodged, and upon the applicant undertaking to reside at a stated address, to sign on at Galway Garda Station, observe a curfew, have no contact with certain witnesses, and to surrender his passport, as well as the usual conditions to be of good behaviour and not to commit any offence.

3. The grounding affidavit sworn by the applicant's solicitor reveals that the applicant is a Romanian national who has resided in this State for about ten years, has been in regular employment here, and is finding it very difficult to cope in prison. According to his solicitor's affidavit, the applicant is distressed and his physical condition has deteriorated. He has been in custody for some five months on this charge having first been charged with the offence on the 2nd October 2011. He has not been in a position to take up his bail. He has no previous convictions here, and it appears has never been the subject of any bench warrants.

4. It is stated that as far back as 25th September 2011 the applicant was questioned by Gardai in relation to the death of Mr Kenny, and remained in custody until he was charged with the offence under Section 9 of the Act of 1939 on the 2nd October 2011. Bail was refused initially, but the applicant applied to the High Court and appears to have been granted bail but on terms which he is unable to meet.

5. On the 2nd October 2011 the applicant was remanded to the same Court on the 7th October 2011, and thereafter has been continually further remanded on the basis that directions were awaited from the Director of Public Prosecutions. Ms. Rushe, the applicant's solicitor, avers that this explanation for the continued delay in moving matters forward is unsustainable, and she contends also that the Gardai have failed to provide a full, comprehensive and truthful explanation for the need for extensions of time for the service of the Book of Evidence. She states that on each occasion on which the matter has been before the District Court, the reason provided has been that directions are awaited from the DPP. It is submitted that this explanation is unsustainable as the offence with which the applicant is charged can only be tried on indictment, and that it is not therefore possible that the DPP might need time to consider whether or not the offence is one suitable for summary trial.

6. Ms. Rushe was in Court on the applicant's behalf on the 20th January 2012 and voiced her objection to a further remand in custody given the passage of time up to that date, and states that the Court presenter stated that directions were still awaited from the DPP. She has averred in her affidavit that no evidence was given to support the application for further remand, which is correct, but went on to state that the prosecution did not even have in court the Detective Sergeant in charge of the investigation. However, in relation to the latter averment, this seems to be incorrect as on the present application I heard oral testimony from the Detective Sergeant in question and he confirmed that he was in fact present on that date. She gave consideration to an application under Article 40 of the Constitution for the release of the applicant but having sought advices from Counsel decided that it would be better to make an application to have the charge struck out on the next Court date on the basis of continued delay.

7. The matter was back before the District court on the 3rd February 2012, and again an application was made for a two week remand. On that occasion the Court was informed that directions had been received from the DPP that the matter proceed on indictment. Counsel for the applicant again voiced objection to the further remand and indicated to the judge sitting on that date that the matter had been made peremptory on the last occasion, but the learned judge apparently indicated that it was peremptory against the State in relation to the obtaining of the DPP's directions. According to Ms. Rushe's affidavit the District Judge then

inquired as to the status of the Book of Evidence to which the Garda Superintendent present stated that it consisted of seven volumes and that it was intended that it be served on the next occasion that the applicant was before the District Court, and the matter was put back for a further two weeks.

8. On the 17th February 2012, a different District Judge was presiding. The Book of Evidence was still not ready for service on the applicant and a further application for a remand was made by the prosecution. Objection to a further remand was raised by Counsel for the applicant on the basis of inexcusable delay, and according to Ms. Rushe Counsel also suggested that the continued detention of the applicant was simply a colourable device in order to keep the applicant in custody while consideration was being given to further charges being brought against him. Submissions were made also that no proper investigation as to the cause of the delay had been conducted and that there had to be good reason shown before the District court should extend time for the Book of Evidence. It is averred that at a point where Counsel wished to refer to some case-law the District Judge "cut him off", and a member of An Garda Síochána was then called to give evidence and, *inter alia*, stated that the Book of Evidence ran to seven volumes and that a good deal of Garda time had gone into the investigation. He also stated that directions had been received from the DPP on the 2nd February 2012. He was apparently cross examined in relation to the need for DPP's directions given that the charge was one triable only on indictment. Complaint is made that the District Judge intervened at that point and prevented further cross-examination which Counsel had wished to conduct in order to further test the evidence being relied upon for the further extension of time for the book of evidence. The District Judge apparently indicated that he was satisfied about the length of the book of evidence and the amount of Garda time and work involved and granted a further remand, and refused to make that remand peremptory.

9. Ms. Rushe contends that the continued detention of the applicant is unlawful and constitutes a failure to vindicate the applicant's right to liberty and to an expeditious trial. It was submitted also that the period of 42 days (subject to extension of time being granted) prescribed by Section 4B(1) of the Criminal Procedure Act, 1967, as inserted by Section 9 of the Criminal Justice Act, 1999 and as amended by Section 37(b) of the Criminal Procedure Act, 2010, has been grossly exceeded, on the basis of a belief on the part of the learned District Judge that this 42 day period commences only on the date on which the directions are received from the DPP. This latter point has not been relied upon in oral argument before me, following the delivery by this Court of its own judgment in *Farrell v. Judge Browne*, unreported, High Court, 7th February 2012. But it is still submitted that there has been no proper justification for the delay in the service of the Book of Evidence and that the District Judge acted unlawfully in further remanding the applicant in custody. It is still submitted that the continued detention of the applicant is so that matters can be further investigated, and to facilitate the possibility that further charges may be brought against the applicant. In that regard it appears also that when bail was opposed by the Gardai following the arrest of the applicant, it was considered at that time that he was a flight risk.

10. I have heard oral evidence from the Detective Sergeant leading the investigation into the unlawful killing of John Kenny. He has been in the District Court on most of the occasions on which the case has appeared in the list. He has explained the extent of this investigation. Apparently some 300 persons have been interviewed by Gardai and have made statements, including the applicant. There were a number of assailants involved in the killing. Two persons have been charged with offences arising from that death so far, namely manslaughter and withholding information. Two other suspects are believed to have already left the jurisdiction. The detective denied any suggestion that the District Judges were simply rubber-stamping applications for extensions for time. He stated that he had given evidence to the District Court on a number of occasions for the purpose of justifying further remands, and had explained the need for same on the basis of the extent of the investigation, given the number of persons who had made statements. He also confirmed that on the 2nd February 2012 the DPP had given final directions that this charge was to be prosecuted on indictment, and he also indicated that on the 17th February 2012 he had informed the District Judge that on the 2nd March 2012 he would be in a position to inform the District Judge as to the date on which the Book of Evidence would be served on the applicant. In fact during his evidence before me he was able to go further and state that in fact the Book of Evidence would be served on the applicant at Harristown District Court on the 2nd March 2012. He denied also most emphatically that the continued detention of the applicant was to facilitate the bringing of possible further charges against the applicant.

11. Micheál P. O'Higgins SC for the applicant submitted that the delay in the service of the Book of Evidence and the resulting continued detention of the applicant while he awaits his trial is inexcusable and inordinate and such that the applicant's right to liberty and right to an expeditious trial have been infringed and that accordingly his continued detention is unlawful. Referring to the judgment of this Court in *Farrell v. Judge Browne* (supra), Mr O'Higgins has submitted that even if Section 4B of the Act of 1967, as amended is no longer considered to apply to offences triable on indictment only, nevertheless the period of 42 days should continue to be a useful guide to what period of time is reasonable for a person to be kept in custody awaiting the service of the Book of Evidence. He points to the fact that in the present case the applicant has been in custody so far for a period of over five months, and that there can be no justification for that. He submits that there is little evidence of any serious inquiry or concern for the delay in the case on the part of the District Judges who have been remanding the applicant on an ongoing basis, and that no consideration appears to have been given to a further relaxing of bail conditions to enable the applicant to take up his bail. It is submitted that an application under Article 40.4.1 of the Constitution is the appropriate remedy to seek, in circumstances where the applicant's right to liberty is being infringed.

12. Paul Anthony McDermott BL for the respondent has submitted that if the applicant has any grounds for arguing for any reliefs in this case those reliefs should be sought by way of judicial review, or possibly by some bail application in which the applicant could seek a further easing of bail conditions to enable him to take up his bail. But that the facts of the case do not warrant the bringing of an application for the release of the applicant under Article 40.4.2 of the Constitution in circumstances where the orders made by the district Court are clearly orders made within jurisdiction, even if the applicant has raised objection to them through his lawyers on a number of occasions.

13. Mr McDermott has submitted that the 42 day time limit for the service of the Book of Evidence does not apply to indictable only offences; but in any event, even if it did, the District Judge has a discretion to extend that time, not just once, if he or she is satisfied that there are grounds for so doing. In the present case it appears from the evidence that the District Judge on the 23rd February 2012 heard evidence as to the length of the investigation and the size of the Book of Evidence and was satisfied that a further remand was justified, rather than that the charge should simply be struck out. In so far as the applicant makes a proportionality argument in relation to the continued detention, Mr McDermott suggests that such an argument is an argument well capable of being made upon a judicial review application.

14. It is submitted that given the number of witnesses whom the Gardai have had to interview and take statements from in this case since the investigation commenced, and the amount of time involved in that process of investigation, the length of time that it has taken thus far for the Book of Evidence to be prepared is not necessarily unreasonable, and that the District Judge was entitled to accept the evidence of the investigating Detective Sergeant in that regard, and that if the applicant was dissatisfied with the decision he could consider moving by way of judicial review if he considered that the manner in which the District Judge exercised his

discretion was irrational or unreasonable, or gave other grounds for arguing by way of judicial review. It is submitted also that there is no evidence whatsoever from which the applicant can ask this Court to conclude that the continued detention of the applicant is a colourable device with which to ensure the applicant's continued detention in order to facilitate the bringing of further charges against the applicant. It is submitted that it is crystal clear from the evidence which has been given that the reason given to the District Judge for further remands was that directions were awaited from the DPP, and that this was true. It was also true that those directions had now been given on the 2nd February 2012. It is submitted that the evidence given by the Detective Sergeant on the 17th February 2012 that on the 2nd March 2012 he would be in a position to give a definite indication of the date for service of the Book of Evidence was also true, as he has in this Court stated that in fact it will be served on that date. In these circumstances, it is submitted that there is no basis for impugning the bona fides and integrity of members of An Garda Síochána in the manner sought, by suggesting that they have some ulterior motive in keeping the applicant in detention.

15. Mr McDermott makes the point also that upon the return for trial in due course to the Circuit Criminal Court the applicant may again apply for bail and seek terms which he can meet, and he suggests that that there is no proportionality in a decision that would lead to the unconditional release of the applicant on the present application.

16. On these facts and in the light of the submissions made by each side, I am completely satisfied that there are no grounds for suggesting that the applicant was in unlawful detention following the remand order made on the 17th February 2012. The District Judge heard evidence from the investigating Garda Sergeant. He was clearly aware that there had been previous remands and was aware of the length of time that the applicant has been in custody. Having heard the reasons why further time was required either for directions from the DPP or for the service of the Book of Evidence it was open to him to exercise his discretion in the manner he did. He heard evidence in relation to the scale of the investigation and the number of witnesses from whom statements had been taken, and it was open to him to consider that this justified a further remand. Clearly if he heard no evidence or received no information or submissions from the Court presenter on which to reach a rational decision to grant a further remand, matters may be capable of better argument that there was no lawful basis for the applicant's detention. But that is not the situation here. The District Judge acted within his jurisdiction, and had evidence before him from which he could conclude that a further remand was justified. I could see no possible basis for the contention on this application that the detention of the applicant was not in accordance with law, and I refused the application for his release.