Neutral Citation Number: [2011] IEHC 199

THE HIGH COURT

2011 868 SS

IN THE MATTER OF AN INQUIRY UNDER ARTICLE 40.4 OF THE CONSTITUTION OF IRELAND

BETWEEN

MARK CLARKE

APPLICANT

AND

GOVERNOR OF CLOVERHILL PRISON

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on 12th May, 2011

1. In these proceedings the applicant moves the Court for an order of release pursuant to Article 40.4.2 of the Constitution. In essence, the principal question is whether the District Court was acting within jurisdiction in admitting certain hearsay evidence in the course of an application to revoke bail. The applicant additionally maintains that in the course of revoking bail previously granted the District Court judge hearing the application failed to exercise an independent judgment.

2. This application arises in the following way. The applicant is presently charged with the possession for the purposes of sale or supply of significant quantities of the controlled drug diamorphine, contrary to the provisions of the Misuse of Drugs Act 1977, and the regulations made thereunder. The applicant was originally charged with these offences when he appeared before District Judge Clyne on 27th April, 2011, having been arrested by Garda Bracken of Carberry Station. He was admitted to bail on his own bond of €10,000 with no lodgement required. There was, however, a stipulation that the applicant reside at his own address and that he sign on twice daily with Leixlip Garda Station. Following a further appearance in the District Court, the applicant was remanded on continuing bail to 1st June, 2011.

3. In late April or early May 2011 Garda Lee of Mountjoy Garda Station was approached by a confidential source who is well known to her as a reliable informant. This source informed her that the applicant was to be given a passport and money to enable him to leave the State. Garda Lee gave evidence to the effect that the applicant's circumstances were not previously known to her and she simply passed on this information to her Garda superiors.

4. This information was duly passed on to Garda Bracken who then applied *ex parte* on foot of a sworn information to the local District Court on 4th May, 2011, for a warrant. The applicant was then arrested pursuant to the warrant and appeared before District Judge Zaidan on 6th May, 2011. Both Garda Bracken and Garda Lee gave evidence before Judge Zaidan to the effect that the circumstances had now changed in the light of this new information and that there was now a risk that the applicant would leave the jurisdiction.

5. The applicant also gave evidence whereby he rejected the suggestion that he would breach his recognisance. He pointed out that he was wholly reliant on disability allowance and had no other source of income. Furthermore, he stated that he suffered from a medical condition which militated against him fleeing with ease. In addition, his passport was with the Gardaí and all his family ties were with this State. It is not in dispute but that the applicant complied fully with the terms of his bail conditions.

6. At the close of the hearing which lasted over an hour District Judge Zaidan retired to his chambers for some ten to fifteen minutes. At that point, he returned to deliver his decision whereby he revoked the applicant's bail, having overruled certain jurisdictional objections. He stated that he "would refuse bail on the basis of the evidence", adding that:-

> "….clearly the allegation is serious [and that] it was evident that at first the State did not object to bail [but] it was now objecting to bail on the basis of a trustworthy and reliable informant and there was now a concern that he would leave the jurisdiction. Bearing in mind these concerns and the alleged seriousness and nature of the offence, I will refuse bail."

7. During the hearing before me it was contended that after the delivery of the ruling the judge had engaged in an exchange with the prosecuting Garda, Inspector Dolan, whereby he queried whether it would have been possible to reach an accommodation between the parties whereby the applicant remained on bail, albeit subject to more onerous conditions. When this was put to the two Garda witnesses in cross-examination, they accepted that an exchange of that sort might have taken place, but they either did not hear or could not recall what was said, since they were probably focussing on the question of the taking of the applicant back into custody.

8. Garda Lee also gave evidence - which I fully accept - that when waiting for arrangements to be made for the applicant to be conveyed to Cloverhill Prison the applicant spontaneously admitted that he had been offered the facility of a passport and money, but that he had rejected the offer. However, at the hearing before District Judge Zaidan the applicant had been asked in evidence whether he "was being" offered such facilities, but he had denied this. At the hearing before me it was suggested that the applicant's statement to Garda Lee was not necessarily inconsistent with his evidence, since there was a difference of tense – "had been offered" as distinct from "was being offered" - between the two statements. While a grammarian would doubtless assent to this proposition, the difference is nonetheless somewhat nuanced. At all events, I do not propose to rely on this informal conversation, since it was not before Judge Zaidan. This exchange nevertheless tends to bear out the accuracy of Garda Lee's source.

The jurisdiction of the District Court

9. Section 6(5) of the Bail Act 1997 ("the 1997 Act") provides that:-

> "Where a person charged with an offence is admitted to bail by a court on his or her entering into a recognisance with or without a surety or sureties, the court may, on the application to it in that behalf by a surety or sureties of the accused person or of a member of the Garda Síochána and upon information being made in writing and on oath by or on behalf of such surety or member that the accused is about to contravene any of the conditions of the recognisance, issue a warrant for the arrest of the accused person."

10. Section 6(6) allows a Garda to effect an arrest in such circumstances. Section 6(8) then provides:-

> "A person arrested pursuant to subsection (6), shall, as soon as practicable, be brought before the court that made the order directing that the recognisance be entered into."

11. The word "court" is defined by s.1 of the 1997 Act as meaning "any court exercising criminal jurisdiction but does not include court martial".

12. Counsel for the applicant, Mr. Greene SC, contended that the effect of this provision was that the applicant must be returned to the judge who made the order admitting the applicant to bail. This contention would, if accepted, mean that Judge Clyne rather than Judge Zaidan had exclusive jurisdiction in the matter. It is, however, perhaps significant that the word used is "court" rather than "judge." It seems to me that that the Oireachtas plainly intended that where the accused was arrested pursuant to this provision that he or she be brought back before the *court* which made the order, as distinct from the individual *judge* who made the order. Any other conclusion would lead to manifest convenience and even absurdity.

13. This very point was forcefully made by Kelly J. in *Adams v. Director of Public Prosecutions* [2001] 2 ILRM 401 in the context of an argument that only the judge who granted leave to apply for judicial review could sit to hear an application to have that leave set aside on the basis that it was improvidently granted:-

> "A moment's consideration of this proposition would demonstrate the absurd results that could flow from it. What if the judge who made the order was engaged in other business of the Court which could not be interrupted, *e.g.*, presiding over criminal business in the Central Criminal Court; what if the judge was on circuit?; what if the judge had retired?; what if the judge had died?: In the latter two circumstances the order, on [counsel's] thesis, could never be set aside. In the former two it could be done (in an urgent case) only by interrupting a criminal trial or following the judge to the country venue at which he might be presiding."

14. The same argument applies by analogy in the present case. In these circumstances it is unnecessary for me to examine the terms of s. 6A of the 1997 Act (as inserted by s. 10 of the Criminal Justice Act 2007) on which Mr. Kelly, junior counsel for the respondent, also relied.

15. It follows, therefore, that the District Court plainly had jurisdiction to entertain the application to revoke bail and that this jurisdiction was not confined to any individual judge thereof. For these reasons, I would reject the argument that Judge Zaidan had no jurisdiction in the matter or that the arrest warrant somehow failed to show jurisdiction on its face.

The hearing before Judge Zaidan

16. Before dealing with the issue of hearsay evidence, it may be convenient here to deal with the other objection raised by the applicant. It is said that the evidence shows that the judge failed to exercise his judicial functions in an independent fashion and simply yielded to the Garda objections without personally satisfied of the adequacy of the objections. Of course, as Walsh J. noted in *The People v. O'Callaghan* [1966] I.R. 501, 517:-

> "It is not sufficient for the opposing authority or witness to have a belief nor can the court simply act upon the belief of someone else. It must itself be satisfied that the objection is sufficient to enable the court to arrive at the necessary conclusion of probability."

17. Yet, so far as the present case is concerned, I confess that I can find little evidence which might support such a submission.

18. The hearing lasted over an hour and the judge rose to consider his decision. Everything points to the fact that the judge gave the matter considerable thought and that he reflected before announcing his decision. For the applicant Mr. Greene SC urged that I should have regard to the fact that Judge Zaidan used the words "these concerns", implying that the judge simply deferred to the wishes of the Gardaí. For my part, I rather think that this is an over interpretation of these words. Rather, the judge concluded on the evidence that important new information had come to light - admittedly through an informant not before the court - which suggested that the applicant presented as a flight risk. Leaving over the moment the question of the admission of hearsay evidence, it is hard to see how it could be argued that this was a decision to which the District Judge was not entitled to take.

19. Mr. Greene SC also argued forcefully that the exchange between Judge Zaidan and Inspector Dolan showed that the judge was otherwise prepared to allow the applicant remain on bail, but that he felt compelled or - perhaps it would be more correct to say - coerced by the nature of the Garda objections to hold otherwise. But even assuming that these exchanges took place in the manner contended for, I personally fail to see how any inference can be drawn from this other than that the judge conscientiously examined as to whether any alternative option short of revoking bail was possibly open, even though he had just pronounced that the Garda objections were well founded.

The admission of hearsay evidence in a bail application

20. We may now turn to the principal issue, namely the admission of hearsay evidence by the District Judge. It is clear from the Supreme Court's decision in *Director of Public Prosecutions v. McLoughlin* [2009] IESC 65, [2010] 1 I.L.R.M. 1 that such evidence can be admitted in the course of a bail application only sparingly and even then only when, in the words of Hardiman J., "a specific, recognised, ground for its admission has been properly established by ordinary evidence." The legal system's general lack of enthusiasm for hearsay evidence does not arise by reason of an embedded historical prejudice for which there is no modern rationale or because of the habitual and unthinking application of familiar technical rules. It is rather because as Hardiman J. pointed out in *McLoughlin*, the reception of such evidence tends to frustrate the right of effective cross-examination. This latter right is absolutely central to the truth-eliciting process, without which right no accused could effectively challenge his or her accusers: see, *e.g.,* the comments of Ó Dálaigh C.J. in *Re Haughey* [1971] I.R. 217 at 264 and those of Hardiman J. in *Maguire v. Ardagh* [2002] 1 I.R. 385.

21. The evidence of Garda Lee regarding the information tendered by the unknown informant was hearsay inasmuch as it implied the truth of assertions made by an unknown person whose credibility and general integrity as a witness could not be tested by cross-examination. Undoubtedly, the admission of such evidence places the cross-examiner in an unenviable position.

22. The general leaning of the courts against the admission of hearsay in bail applications can be seen in cases such as *McGinley* and *McLoughlin*. In the former case the applicant had been arrested and charged with unlawful carnal knowledge of a very young girl. Garda evidence was given to the effect that the family of the complainant had been intimidated. The Supreme Court held that that the applicant's objections to the receipt of such hearsay evidence were well founded, since no reason had been established in evidence as to why the complainant's family could not give viva voce evidence.

23. The decision in *McLoughlin* is in a similar vein. Here the accused had been charged with assault and the objection to bail was that the witnesses had been intimidated. Hearsay evidence was given in respect of this, a factor which the Supreme Court found to be unsatisfactory given that, in the words of Hardiman J.:-

> "I would also say that the evidence relied upon to ground the admission of hearsay must establish something more than that it is convenient to the prosecution, or to the witnesses, to have the evidence given in that form. It must also establish that all reasonable steps have been taken to procure evidence in the usual form. In the present case it was blandly said that certain witnesses were unwilling to come to court but no attempt to compel their attendance seems to have been made, which I would normally regard as a necessary proof.
>
> It must be borne in mind that, in a case like the present, it will not be possible to conduct the ultimate prosecution of the accused without the witnesses so that, if they are indeed unavailable as alleged, a case against the appellant must collapse. But if they are available, there is much less force in the objection to bail."

24. But as Hardiman J. himself acknowledged, these comments were necessarily obiter, because the Supreme Court took the view that this Court had fallen into error by refusing bail simply on the basis that the Gardaí feared for the safety of prosecution witnesses, as distinct from the Court *itself* being satisfied of existence of the intimidation threat.

25. The question nevertheless remains as to whether there was, in Hardiman J.'s words in *McLoughlin*, "a specific, recognised, ground for its admission [which] has been properly established by ordinary evidence?" In my view, there was.

26. The present case would seem to be indistinguishable in principle from the decision of the Supreme Court in *McKeon v. Director of Public Prosecutions* (Unreported, Supreme Court, 12th October, 1995). Here a Garda gave evidence that she was in receipt of confidential information indicating that the applicant had received a false passport and money from an illegal organisation with a view to assisting him to leave the country. Costello P. held that in view of the established principle of informer privilege, such hearsay evidence was admissible in principle. The judge duly assessed that evidence in the light of other evidence and factors and concluded that bail should be revoked. That decision was upheld by the Supreme Court.

27. As Keane J. noted in *McGinley* ([1998] 2 I.R. 408, 415), there was thus present in *McKeon* a "specific reason for not producing the author of the statement, *i.e.*, the fact that the information had been communicated in confidence to the Gardaí." As Keane J. further observed:-

> "The courts both here and in England have for long recognised that the public interest may require that the anonymity of police informers should be preserved in particular cases: see *Marks v. Beyfus* (1890) 25 Q.B.D. 494 and *Director of Consumer Affairs v. Sugar Distributors Ltd*. [1991] 1 I.R. 225. The trial judge was satisfied that the anonymity of the informer should be preserved and that, having regard to all the other circumstances before him, the application for bail should be refused."

28. These words apply equally to the present case. There is thus present here a factor which was missing in *McGinley*, namely, a recognised evidential basis for the receipt of hearsay evidence, in this case information supplied to a member of the Gardaí by an informer. In these circumstances, I am bound to conclude that the District Judge Zaidan acted lawfully in receiving and admitting this hearsay evidence.

29. For good measure, one might add that in *Director of Public Prosecutions v. Vickers* [2009] IESC 58 that the Supreme Court also upheld the admission of hearsay evidence in the course of a bail application where the accused had been charged with murdering his spouse. Here the evidence was given by a close friend of the deceased and bore on the concerns she had expressed to that friend for her safety and that of her children immediately prior to her death. In his judgment for the Court, Kearns J. upheld the reception of that evidence on the basis that the person who could have given the evidence was herself deceased and that the Court "would not extend the admissibility of the hearsay evidence beyond that which was strictly necessary."

30. Plainly, therefore, judged by the principles adumbrated in *Vickers* the evidence tendered in the present case was also admissible on the basis that such hearsay as was admitted was strictly necessary given that - if only to state the obvious - one could not realistically have expected that Garda Lee's source would have been identified and obliged to take the witness stand.

Conclusions

31. Since I am of the view that District Judge formed an independent view on the question of flight risk and that the judge furthermore acted lawfully in receiving hearsay evidence, it follows that he was lawfully entitled to revoke the applicant's bail. In these circumstances, it must follow that the applicant remains in lawful custody. Given that the applicant remains in lawful custody, it follows in turn that the present application for an order under Article 40.4.2 must fail.