Neutral Citation Number: [2009] IEHC 380

THE HIGH COURT

Record Number: 2009 477 SS

IN THE MATTER OF AN ENQUIRY UNDER ARTICLE 40.4.2 OF THE CONSTITUTION

BETWEEN:

Bridget Devoy

Applicant

And

The Governor of the Dochas Centre, Mountjoy Prison

Respondent

Judgment of Mr Justice Michael Peart delivered on the 31st day of March 2009:

I heard submissions in relation to this application for the applicant's release from custody on the 27th March 2009. She was released on bail while I considered those submissions, and on the 31st March 2009 I ordered her release since I had concluded that her detention was not in accordance with law. I indicated my reasons in broad outline and informed the parties that in due course I would give my reasons in the form of a written judgment. This judgment contains those reasons.

There is no real dispute about the background to this application. It can be easily gleaned from the affidavit of John Neville, solicitor for the applicant and who has represented her in relation to certain summonses for offences under the Road Traffic Acts currently before the District Court in Dún Laoghaire, Co. Dublin, and from the affidavit of Sgt. Mary Diskin, who has been the presenting sergeant at that Court in relation to those summonses.

On the 13th January 2009 the applicant was before the Court in relation to offences of drunken driving, dangerous driving, driving without insurance cover, and having no driving licence. On that date she was remanded on bail to the 24th March 2009 so that a pre-sentence Probation report could be obtained. On the 24th March 2009, and the District Judge was given the facts of the case and details of some fourteen previous convictions against the applicant. It appears that having read this Report the District Judge formed the view that she was unhappy with the efforts made by the applicant to attend the services which were recommended by the Probation Officer. Mr Neville at that point apparently informed the judge that the applicant had instructed him that she had attended at one of these services, namely WOVE (Women Overcoming Violent Emotions). It appears that the judge put the case back to a second calling and requested a probation officer who was in the court at the time (not the author of the report) to make further enquiries of the author of the report about a particular paragraph in the report which states:

> *"… Whilst she has not attended any service recommended to her during this adjournment period, she informed me of her intention to attend a meeting with WOVE … organisation on Friday 13th March. I am unable to verify whether she has honoured this commitment".*

Mr Neville states in his affidavit that he had offered to put his client in the witness box in order to assist in any clarification which the judge was seeking, and informed her that the applicant had attended at WOVE on the 13th March 2009 as asked by the author of the report. That offer was not taken up.

At second call, according to Mr Neville's affidavit, the probation officer who had been asked to make contact with the author of the report informed the judge that she could only reiterate what was in the report and could not confirm whether the applicant had attended WOVE. Sgt. Diskin makes no averment as to any recollection she has about what was said at that stage.

However, everybody is agreed that the District Judge then remanded the applicant in custody to the 7th April 2009 for an "up to date" pre-sentence report, stating that she was unhappy with the contents of the report. Mr Neville states he requested the judge to remand his client on bail, but to no avail, and further that at no time did the judge indicate what the purpose of that up to date report was, or why she was remanding the applicant in custody, she having been on bail up to that point.

Submissions:
Colman Fitzgerald SC for the applicant has drawn attention to the concluding paragraphs of the Report which was before the Court on the 24th March 2009 which state as follows:

> *"According to the risk assessment tool applied, Miss Devoy presents in the moderate risk range of re-offending in the next twelve months. The defendant is aware of the pertinent factors highlighted."*
>
> *In relation to the disposal of these matters, Miss Devoy presents as a suitable candidate for Probation supervision at this time. Should the Court concur with this assessment I respectfully suggest the imposition of a twelve month Probation Order, with a condition attached that the defendant engage in appropriate counselling intervention as recommended by the supervising Probation Officer.*

He suggests therefore that this is not a case where the judge, when remanding the applicant in custody, could have already formed a concluded view that whatever may be contained in any further report requested she was going to impose a prison sentence in respect of these offences, in spite of the existence of so many previous convictions. He submits that there was no basis existing or suggested, on normal bail criteria, why bail should be revoked, such as a risk of absconding or even committing further offences. In such circumstances it is submitted that the remand in custody amounts to an impermissible de facto imprisonment. He also highlights the fact that it was not stated by the judge why a further report was thought necessary, and submits that it must be the case, especially in the light of the recommendation of the Probation Officer that the applicant could be dealt with non-custodially, that the judge could not have rationally reached a view on the 24th March 2009 that a sentence of imprisonment was to be imposed,

whatever may be contained in the further report requested.

Mr Fitzgerald has also submitted that the detention is unlawful because an unfairness has occurred since if the District Judge had imposed a sentence on the applicant on the 24th March 2009 the applicant would have been entitled to file a Notice of Appeal against that sentence and to have entered into a recognizance, and that having done so, the applicant would not have been required to serve the sentence until such time as it was affirmed on appeal. Whereas in the present circumstances, even if the applicant is sentenced in due course and appeals, and if that appeal was successful, the applicant would have served a period of time in custody until the 7th April 2009. He has submitted that the right of the District Justice to remand the applicant in custody is not to be equated to the right of a trial judge in the Central Criminal Court or the Circuit Criminal Court to remand a convicted person in custody following conviction and before sentence is passed, since in the District Court an appeal and recognizance operates automatically as a stay on the execution of the sentence pending the determination of the appeal. In this regard Mr Fitzgerald has referred to the judgment of Charleton J. in *Burke v. DPP* [2007] 2 ILRM. 371.

Mr Fitzgerald has referred to the judgment of Denham J. in *Howard v. District Judge Early and DPP*, unreported, Supreme Court, 4th July 2000. That was a case where the applicant had been remanded in custody for a period when prosecuted in respect of an offence for which the maximum penalty for that offence was a fine. Among the reliefs sought was an order prohibiting the further prosecution of the case on the basis that the applicant had already suffered a penalty worse that the penalty provided for by statute. While that relief was not granted and the matter was remitted back to the District Court, on the basis that the applicant was in custody also on foot of other court orders, Denham J. stated at paras. 12-13:

> *"… Whilst the District Court has powers of remand in custody they should not be used for de facto sentencing.*
>
> *Where there are probation and other reports before the court so that adequate information is available and the maximum sentence is a fine and not custody, it is for the court to exercise its power to remand with constitutional due process. This might include a remand in custody but would require due consideration. On the face of it in circumstances where a maximum penalty is a fine and adequate probation reports are in court it would be the exceptional case where an order of remand in custody would be in accordance with constitutional justice."*

Mr Fitzgerald submits that while the facts of that case are of course different to the present one, nevertheless the applicant has been the victim of what amounts to a de facto sentence and in circumstances where the District Judge may not, particularly in the face of the Probation Officer's recommendation, in the end following any clarification provided in the further report requested, impose any sentence at all, or perhaps a suspended sentence with conditions to attend certain services. He submits that to do so is not in accordance with constitutional justice, and that this is not an exceptional case as referred to by Denham J. such as would justify a remand in custody in the circumstances of this case.

Mr Fitzgerald has submitted that a remand in custody must be ordered for a lawful purpose, and that no such purpose is evident from the facts of this case.

Insofar as the remand in custody amounts to a revocation of bail in circumstances where there was not before the District Judge any application to revoke bail or any facts before the Court to suggest that by reason of normal bail criteria such a revocation was necessary or justified, Mr Fitzgerald has referred to the judgment of O'Neill J. in *Rice v. Mangan*, High Court, unreported, 30th July 2004. In that case the applicant had submitted, inter alia, that the respondent judge had no jurisdiction to interfere with his bail without an application being made by either the prosecution or the applicant. The learned judge did not agree with that submission but stated:

> *"… There is nothing in my view either in sections 22 or 23 of the Criminal Procedure Act, 1967 or in the Rules of the District Court which either expressly or by necessary implication prevent a District Judge from altering bail conditions or indeed revoking bail on his own motion. I would be of the opinion that circumstances can occur in the course of proceedings which would justify a District Judge altering bail conditions or revoking bail in circumstances where no application for that was theretofore made. A conclusion therefore that a District Judge did not have jurisdiction would be wrong.*
>
> *Whilst in rare circumstances a person's bail conditions might be altered or indeed the bail itself revoked without prior notice being to the person concerned, it can safely be said that no such circumstances existed in the applicant's case. I am quite satisfied that in this case the applicant should not have been faced with what was intended by the respondent to be an alteration of his bail conditions but which turned out to be a revocation of his bail without proper notice so as to have enabled him to be prepared and to have legal representation present. In proceeding to deal with the applicant's bail as is set out in the applicant's affidavit I am quite satisfied that the respondent breached the applicant's right to fair procedures."*

Tony McGillycuddy BL for the respondent has placed some emphasis on the fact that the applicant had pleaded guilty to these offence and that she therefore had ceased to enjoy the presumption of innocence, and to the fact that the District Judge was aware that there were previous convictions, had considered the Probation Report, and had seen that there had been some doubt about the applicant's level of cooperation with the Probation Services. Mr McGillycuddy therefore submits that the judge was dealing with the applicant at a post-conviction stage, and that given the facts and circumstances of the case there must be a distinct possibility hat the judge would impose a custodial sentence, albeit that she decided to direct a further probation report in relation to the attendance by the applicant with WOVE. He submits that this is not a case such as some of those referred to by Mr Fitzgerald where there was any lack of fair procedures, since the applicant was legally represented and her solicitor was given an opportunity to make whatever submissions which he wished to make. In circumstances where a custodial sentence was a distinct possibility as a penalty for these offences, Mr McGillycuddy submits that a remand in custody for two weeks was within the jurisdiction of the District Judge, and that this should not be equated with pre-empting a sentence.

He distinguishes the case of Howard referred to by Mr Fitzgerald, pointing out, as is the case of course, that the offence in Howard was one which attracted only a monetary penalty, whereas in the present case up to six months imprisonment is possible. He refers also to the power vested in the District Judge by s. 24 of the Criminal Procedure Act, 1967, as amended, to remand in custody without consent for up to fourteen days on the second or subsequent occasions upon which a person is before the court. Where, therefore, as in this case the applicant is remanded in custody for two weeks, this is within jurisdiction.

He also refers to the fact that in the present case the solicitor for the applicant made no application to the District Judge to proceed immediately to sentence the applicant. He submits that this could have been done, and in that situation the applicant would have been able to file a Notice of Appeal and enter into a recognizance so that the penalty would be suspended until the determination of

the appeal. He submits therefore that the judgment of Charleton J. in *Burke v. DPP* to which Mr Fitzgerald has referred is to be distinguished since no application was made to the District Judge to proceed immediately to sentence the applicant.

Conclusions:
There is no doubt that pursuant to the provisions of s. 24 of the Criminal Procedure Act, 1967 as amended, there is a power to remand a person in custody for up to fourteen days without consent where the person is before the court other than for the first time. However that is not an answer to the question of the lawfulness of the applicant's detention.

In the present case the applicant was on bail when she was before the court on the 24th March 2009. Clearly she had previously been considered to meet the criteria for bail. In my view what occurred on the 24th March 2009 amounts to a revocation of bail, in circumstances where there was no application for revocation of bail by the prosecuting Garda Sergeant on any of the usual bail grounds, such as absconding, interfering with witnesses or even committing further offences. If the District Judge considered that there were grounds for revoking bail and was considering doing so, as in theory she is entitled to do of her own motion, it seems to me that fair procedures require that those grounds must be notified in some reasonable way to the accused person or her representative in order to provide a reasonable opportunity to address them either by way of evidence or by way of submissions. That did not occur. I respectfully agree with the statement of O'Neill J. in *Rice v. Mangan* to which Mr Fitzgerald referred and as set forth above.

The District Judge had sight of a Probation report which recommended that the matter be dealt with non-custodially, albeit that there was some doubt expressed about whether or not the applicant had attended WOVE as agreed. Of course, the District Judge is under no obligation to follow the recommendation. But in the present case the District Judge wanted to obtain some clarification about what the author of the report said about the applicant's cooperation with the Probation services. Presumably that was in order to decide on what penalty was appropriate in respect of the offences. I think that it is reasonable to presume that the District Judge did not feel that it was appropriate to impose a penalty until such time as that matter was clarified. That seems to me to have been the purpose of seeking the further report. No other purpose was identified by the District Judge on the evidence before me. If the District Judge did not feel that she was in a position to decide on an appropriate sentence or other penalty until she had received that further report, the revocation of bail and remand in custody must be seen as a de facto sentence and in circumstances where there was no capacity to file an appeal and recognizance in order to appeal against same. It is a *de facto* sentence in circumstances where it is at least possible that having received the further report clarifying the situation with regard to the applicant's engagement with the probation services, she will decide that a custodial sentence is not appropriate or that a suspended sentence may be appropriate, as recommended by the Probation officer. Even if a suspended sentence or no sentence is imposed, the applicant would have spent two weeks in custody in circumstances where she had been on bail and where there would not appear to have been any identified reason why a revocation of bail was appropriate or required or justified by any conduct of the applicant.

Such a de facto sentence offends against constitutional justice, and while the facts of *Howard v. District Judge Early and DPP* are entirely different, I see no reason not to respectfully adopt the remarks of Denham J. for the purpose of the present case.

In my view there has not been identified any lawful basis for a revocation of bail as such. There has not been identified any purpose of a further probation report other than to clarify matters in relation to the applicant's attendance at WOVE or other services. If that was the purpose of the further report, then that matter was something which the District Judge must have considered important or at least relevant to the question of whether or not a custodial sentence was appropriate, in spite of the recommendation to the contrary contained in the report which was before the Court. Where the question of sentence had yet to be decided upon, and where the matter may be dealt with non-custodially, the remand in custody of the applicant amounts to a de facto sentence against which no appeal exists, as it would if it were actually imposed as a sentence. It is not sufficient for the respondent, through Mr McGillycuddy, to argue that the applicant's solicitor could well have asked the judge to sentence his client and thereby made the appeal mechanism for release available. Firstly, it seems clear that the District Judge did not feel in a position to decide upon an appropriate sentence – otherwise why did she seek a further probation report. Secondly, it would be invidious in the face of a request for a further report for a solicitor to ask that his/her client be sentenced immediately in circumstances where no sentence might be ordered at all.

In my view the detention of the applicant on foot of the order dated 24th February 2009 was unlawful, and for these reasons I ordered her release.