Neutral Citation: [2014] IEHC 461

THE HIGH COURT

[2014 No. 1271 SS]

IN THE MATTER OF AN APPLICATION

PURSUANT TO ARTICLE 40.4.2 OF THE CONSTITUTION

BETWEEN

KARL O'BRIEN

APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS,

DISTRICT JUDGE DAVID KENNEDY,

GOVERNOR OF MOUNTJOY PRISON

RESPONDENTS

JUDGMENT of Mr. Justice Hogan delivered on 22nd October, 2014

1. This application for an inquiry into the legality of the applicant's detention pursuant to Article 40.4.2 arises from the circumstances in which the District Court imposed a six months' sentence upon the applicant, Mr. O'Brien. The sentence itself followed a plea of guilty to the attempted robbery of a schoolboy. The fundamental contention of the applicant is that the sentence was imposed in a manner which was not consistent with fair procedures.

2. While there is some dispute between the parties regarding what actually took place at the sentence hearing, I have had the benefit of listening to the digital audio recording of the sentencing hearing which took place before Bray District Court on 24th July 2014. The hearing itself lasted about five to six minutes. The prosecuting Garda, Garda Dowling, gave evidence of the circumstances of the attempted robbery which occurred when the applicant (who was apparently under the influence of alcohol at the time of the offence) confronted a 17 year-old school student on his way back from school and endeavoured to rob him of his belongings. Garda Dowling outlined the applicant's past history of offending which included 77 previous convictions, including a litany of offences committed within the last few years.

3. Pausing at this point, it would have to be said that in view of the applicant's offending history and the nature of the offence at issue (not least the unpleasant circumstances in which it was committed), some form of custodial sentence was more or less inevitable. Counsel for the applicant nevertheless asked for the sentence to be put back and he endeavoured in a highly professional manner to summarise the type of evidence which he would like to call in aid of that mitigation argument. He indicated that he would to adduce evidence that the applicant had engaged in a full time training programme run by FÁS; that he had also completed a 6 week course run by the Health Service Executive; that he had received assistance from Alcoholics Anonymous and that he was in stable relationship with twin daughters.

4. Having listened to the digital audio recording, I cannot accept the submission that the District Judge unfairly impeded defence counsel from making appropriate submissions. It seems to me that the substance of the applicant's case was adequately conveyed by counsel. It is true that the District Judge indicated that he was not disposed to grant an adjournment and that he further indicated that he had made up his mind. While it may be that the sentence hearing was not perhaps absolutely perfect or ideal, allowance must naturally be made for the exigencies of a busy District Court list. It seems to me that such imperfections in that sentence hearing (such as there were) should have been addressed by means of an appeal to the Circuit Court.

5. One thing is clear: whatever be the precise ambit of the scope of the Article 40.4.2 jurisdiction following the recent judgments of the Supreme Court in *Roche v. Governor of Mountjoy Prison* [2014] IESC 53 and *Ryan v. Governor of Limerick Prison* [2014] IEHC 54, an order providing for the release of an applicant who has been convicted of an offence can only be made where either the warrant is seriously defective (as in *Joyce v. Governor of the Dóchas Centre* [2012] IEHC 326, [2012] 2 I.R. 326) or the order displays a lack of jurisdiction on its face (as in *FX v. Governor of the Central Mental Hospital* [2014] IESC 1) or the convicting court lacked jurisdiction to impose a conviction in the first place (as in *Cirpaci v. Governor of Mountjoy Prison* [2014] IEHC 76) or there has been a material breach of the applicant's constitutional rights. Here I may venture to repeat what I said on the topic in *Cirpaci*:

> "...Article 40.4.2 shines as a beacon of liberty which will never deny refuge to an applicant who can show a fundamental breach of constitutional rights or the existence of some other significant defect attaching to the warrant or order providing for his or her detention."

6. Measured by this test, it is clear that the applicant cannot bring himself within the proper scope of the Article 40.4.2 jurisdiction. No fundamental breach of his constitutional rights has been identified or established and the order of conviction is perfectly good on its face.

7. In these circumstances, the applicant's proper remedy is to appeal the sentence decision to the Circuit Court. In explaining why the applicant elected to pursue the Article 40 route rather than to lodge an appeal, counsel for the applicant, Mr. O'Loughlin SC, emphasised that the recognisances had been fixed in the event of an appeal at €800, with a cash lodgement of €400. He maintained that, given his client's difficult financial plight, a lodgement of that kind made the right of appeal illusory.

8. While I am finding against the applicant so far as the Article 40 issue is concerned, the amount of the cash lodgement required in

the case of an impecunious and unemployed defendant such as the applicant with two young children and who is presumably entirely dependent on social security payments is, I confess, somewhat troubling. As I explained in my judgment in *McCabe v. Ireland* [2014] IEHC 345, whilst the right of appeal against the imposition of sentence by a court of local and limited jurisdiction is subject to regulation by law in the light of the express provisions of Article 34.3.4 of the Constitution, it must nonetheless be regarded in the light of this self-same provision as a fundamental constitutional value. Furthermore, that right of appeal must be capable of being exercised in a realistic and effective manner.

9. The applicant has, however, also a remedy to address this issue, namely, to lodge an appeal to this Court against the amount of the cash lodgement. Whether this Court would be prepared at this stage to hear an appeal against the amount of the recognisance and, if so, what the outcome of any such appeal might be, would be a matter for the judge of this Court who is assigned to hear the appeal.

10. Subject to these observations, I am nonetheless coerced to conclude that the applicant is in lawful custody and that the present application under Article 40.4.2 of the Constitution must stand refused.