Neutral Citation: [2016] IEHC 504

THE HIGH COURT

[2016 No. 887 SS]

IN THE MATTER OF AN APPLICATION FOR AN INQUIRY PURSUANT TO ARTICLE 40 OF THE CONSTITUTION OF IRELAND 1937

BETWEEN

R. A.

APPLICANT

AND

THE GOVERNOR OF CORK PRISON

RESPONDENT

JUDGMENT of Ms. Justice Costello delivered on 18th day of August, 2016

1. The applicant is currently detained in Cork Prison pursuant to an order of District Judge Ní Chondúin of 5th August, 2016, whereby the learned judge refused the applicant bail.

2. The applicant appeared before the District Court on 13th March, 2016, in respect of a charge of theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001, in relation to the alleged theft of a video camera valued at €1,500.00. On that occasion, he was granted bail and required to return before the District Court on 23rd March, 2016. He did not attend. A warrant issued in respect of the applicant's failure to attend Cork District Court on that date.

3. The applicant was apprehended in Dublin on 14th July, 2016, and on 15th July, 2016, he was brought to Blanchardstown District Court on foot of the extant warrant. No application for bail was made on that occasion. He was remanded in custody to appear before Cork District Court on 20th July, 2016. In addition, the applicant was charged with a further charge of failing to appear on 23rd March, 2016, pursuant to s. 13(1) of the Criminal Justice Act 1984, as amended.

4. On 20th July, 2016, the applicant was not produced in court by the Irish Prison Services and the court was informed that he was unable to come to court due to psychiatric illness. The case was remanded to Cork District Court to 28th July, 2016.

5. On 28th July, 2016, the applicant was produced in court. A medical report of Dr. Toal, Consultant Forensic Psychiatrist at the Central Mental Hospital, dated 26th July, 2016, was presented to the Court. Paragraph 10.4 of the report reads as follows:-

> "*[The applicant] is currently acutely psychotic and in need of psychiatric admission to facilitate appropriate treatment to prevent further deterioration in his presentation. [The applicant] has been placed on the waiting list for admission to the Central Mental Hospital under section 15 of the Criminal Law (Insanity) Act 2006.*
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> *I am advised there is no admission bed currently available at the Central Mental Hospital. In the interim he will continue to be reviewed on a regular basis by the prison in reach psychiatric team at the receiving prison. He is currently placed on D2 wing, a wing for vulnerable prisoners. He has not been compliant with his prescribed antipsychotic medication over the past week.…*
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> *[The applicant] is currently acutely psychotic and in need of psychiatric admission to facilitate appropriate treatment to prevent further deterioration in his presentation. In the event that [the applicant] were to be granted bail or other non-custodial disposal, he has been referred for admission to Connolly Hospital Blanchardstown, Dublin 15.*
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> *His treating team in Connolly Hospital Blanchardstown Hospital have advised (26th July 2016.) that they are prepared to admit him as soon as an admission bed is available for him.*
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> *It would be helpful from a psychiatric perspective were any conditions attached to bail or other non-custodial disposal to include that he:*
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> 1. *Agree to be transported from Cloverhill Prison to the Department of Psychiatry Connolly Hospital Blanchardstown, by Irish Prison Service staff and members of the Court Liaison Service or the HSE assisted admission team* **at such time as an admission bed becomes available.**
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> 2. *Remain there until medically discharged (i.e. not abscond from hospital).*"

6. The applicant's solicitor, Mr. Edmund Burke, swore the affidavit grounding the application pursuant to Article 40 on behalf of the applicant. He did not give any details of the application for bail made on behalf of the applicant on 28th July, 2016. At para. 12 of his affidavit, he stated that:-

> "*…the judge indicated that he was not willing to grant bail to the Applicant as it was a matter for the prison as to whether or not they wished to send the Applicant to hospital or not*."

7. In the event, District Judge Malone remanded the applicant in custody to 10th August, 2016.

8. At a date not identified by Mr. Burke, he spoke with Dr. O'Neill, Consultant Forensic Psychiatrist at the Central Mental Hospital, concerning the applicant. Mr. Burke stated that he was informed that there was now a bed available for the applicant in James Connolly Memorial Hospital in Blanchardstown, Dublin and that Dr. O'Neill recommended that the applicant take up this bed in order to receive treatment. Dr. O'Neill wrote a letter dated 4th August, 2016 to Mr. Burke stating:-

> "*Further to my recent psychiatric report prepared for Cork District Court, I am writing at your request to confirm that [the applicant] remains unwell and in need of psychiatric admission. If bailed, I have contacted the Department of Psychiatry in James Connolly Hospital, Blanchardstown, who advise that they will reserve an admission bed for [the applicant] should he be granted bail on 5th August, 2016. The admission would be under the Mental Health Act 2001*.

In the event that the bed reserved were not to be available until later in the day, it would be helpful were conditions attached to bail or other non-custodial disposal to include that [the applicant] agree to be transported by prison staff or Gardaí to the Department of Psychiatry in James Connolly Hospital, Blanchardstown, **at such a time as a bed becomes available**."

9. Mr. Burke sought to have the matter relisted before the District Court and it was relisted on 3rd August, 2016. He said that he outlined the background to District Judge Ní Chondúin and informed the Court that he wished to make a bail application on behalf of the applicant. District Judge Ní Chondúin relisted the matter and adjourned the case to 5th August, 2016, and indicated that the application could be dealt with by video link.

10. The Digital Audio Recording of the hearing on 5th August, 2016, was made available to this Court together with a transcript of the proceedings. Mr. Burke made an application for bail on the basis of Dr. O'Neill's letter and submitted that the conditions suggested should be conditions of bail if granted. It is clear that bail was sought in order that the applicant might receive treatment in a psychiatric hospital.

11. Inspector Feargal Foley, on behalf of the State, accepted that the applicant was in need of psychiatric help. He stated that his view was that once the applicant was remanded in custody lawfully that it is then a matter for the Prison Governor to resolve his medical issues and that he can be transferred to any medical facility when he is in custody.

12. The following exchange then occurred:-

"Judge: *and that's the way I'm going to go*.

Mr. Burke: *For the record, you are leaving it for the prison authorities…*

Judge: *Murmurs assent*,

Mr. Burke: *Just formally Judge, for*

Judge: *I refuse bail*.

Mr. Burke: *Thank you*.

Judge: *You can take it to the High Court*".

13. The matter was let stand for a short time while Mr. Burke took instructions from his client. When the matter resumed, District Judge Ní Chondúin confirmed that she was refusing bail and she would direct urgent medical attention be provided to the applicant.

14. The following points emerge from this exchange:-

(i) The application was an application for bail in respect of an accused person who had been remanded in custody.

(ii) In respect of the original charge, he had been granted bail but had failed to attend on 23rd March, 2016.

(iii) A bench warrant had issued on that date and the applicant had been taken into custody pursuant to that warrant on 14th July, 2016.

(iv) He has been in custody since 15th July, 2016.

(v) An application for bail was refused on 28th July, 2016. The court had the report of Dr. Toal of 26th July, 2016.

(vi) The letter from Dr. O'Neill of 4th August, 2016, was handed into the Court on 5th August, 2016. It is not clear whether the report of Dr. Toal was provided to District Judge Ní Chondúin.

(v) No evidence was given by the State in opposition to the application for bail.

(vi) The objection of the State to bail was not on the basis of s. 2 of the Bail Act 1997, or that refusal of bail was necessary to ensure attendance of the accused at trial or on the basis that refusal of bail was necessary to prevent interference with witnesses, evidence or jurors (the last two grounds being those recognised by the Supreme Court in *The People (Attorney General) v. O'Callaghan* [1966] I.R. 501).

(vii) District Judge Ní Chondúin did not give any reason for refusing to admit the applicant to bail and did not state any grounds for her refusal other than to state, following the submission of Inspector Foley, "*and that's the way I'm going to go*."

15. The applicant was detained in Cork Prison pursuant to the committal warrant dated 5th August, 2016. No issue is taken with the validity of the warrant in these proceedings.

16. The applicant seeks relief pursuant to Article 40 on two grounds. The first is that the proceedings before the District Court on 5th August, 2016, were so fundamentally flawed that the detention pursuant to the resulting order is unlawful. The second is that the continued lack of treatment of the applicant is so egregious as to render his continued detention unlawful.

The Law

17. As was stated by Dunne J. in *Director of Public Prosecutions v. Mulvey* [2014] IESC 18:-

"*Bail is not the automatic right of an individual awaiting trial but it is an important aspect of the individual's constitutional right to liberty, a right which can only be restricted on limited grounds supported by cogent evidence*."

It is well established that there are three circumstances in which the prosecution may validly object to bail on behalf of an accused person:-

(i) on the basis of s. 2 of the Bail Act 1997;

(ii) that refusal of bail is necessary to ensure attendance of the accused at trial (*The People (Attorney General) v. O'Callaghan*); or

(iii) on the basis that refusal of bail is necessary to prevent interference with witnesses, evidence or jurors (*The People (Attorney General) v. O'Callaghan*).

18. The objections made must be supported by sufficient evidence to enable the court to form its own independent decision that bail should be refused. There must be evidence supporting the objection which has "*the degree of cogency which satisfies the court itself that the objection has been made out as a probability*." See: *The People (Director of Public Prosecutions) v. McLoughlin* [2010] 1 I.R. 590. See also: *The People (Attorney General) v. O'Callaghan; Galvin v. The Governor of Cloverhill Prison* [2012] IEHC 497; and *Grant v. Governor of Cloverhill Prison* [2015] IEHC 768.

19. In *Mulvey*, the Supreme Court heard an appeal by the applicant from an order of the High Court refusing to admit him to bail. In the absence of evidence to demonstrate that the applicant was involved in or connected to any intimidation (the basis of the decision to refuse bail), the Supreme Court allowed the appeal and set aside the judgment of the High Court and remitted the matter back to the High Court.

20. In *Roche v. The Governor of Cloverhill Prison* [2014] IESC 53, the Supreme Court considered whether relief pursuant to Article 40 of the Constitution should be granted where the Court held that the Circuit Court had acted in error in revoking the bail of the applicant. Charleton J. delivered the judgment of the court. He cited the well known passage from *The State (McDonagh) v. Frawley* [1978] I.R. 131 at p.136:-

> "*The stipulation in Article 40, s.4, sub-s. 1, of the Constitution that a citizen may not be deprived of 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 means 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*."

21. He also referred to the passage from Henchy J. in *The State (Royle) v. Kelly* [1974] I.R. 259, where he held at p. 269:-

> "*The purpose of the test is to ensure that the detainee must be released if – but only if – the detention is wanting in the fundamental legal attributes which under the Constitution should attach to the detention*."

22. The judgment also cited with approval from the decision of Denham C.J. in *F.X. v. Clinical Director of the Central Mental Hospital* [2014] 1 I.R. 280 at p. 301:-

> "*An order of the High Court which is good on its face should not be subject to an inquiry under Article 40.4.2° unless there has been some fundamental denial of justice. In principle the appropriate remedy is an appeal to an appellate court, with, if necessary, an application for priority. Thus, the remedy under Article 40.4.2° may arise where there is a fundamental denial of justice, or a fundamental flaw, such as arose in The State (O.) v. O'Brien [1973] 1 I.R. 50, where a juvenile was sentenced to a term of imprisonment which was not open to the Central Criminal Court*."

23. Charleton J. noted that the error of the Circuit Judge in that case was as to the construction of the order of the Court which had been made in ease of the appellant. This was an error made within jurisdiction and she had jurisdiction to make the order made. He then stated in para. 25:-

> "*That being so: this appellant then had an appropriate remedy. An immediate right to invoke the full and original jurisdiction of the High Court was open to him should it be considered that some possible advantage would be available to him on putting his circumstances afresh before that Court. Given the wide breadth of powers in respect of bail available to any judge of the court before which an accused is to be tried, and bearing in mind the ready availability of review in respect of any such order, it is difficult to conceive of circumstances when resort to Article 40 is either appropriate or necessary. The Circuit Criminal Court had jurisdiction to revoke bail. The order committing the applicant to prison is regular on its face and does not recite or refer to the order of the 19 June and does not require interpretation of that order to be effective. The instant case is not a matter for the remedy under Article 40.4.2° but appropriately is a matter for recourse to the bail list in the High Court*."

24. It is clear, therefore, that an error within jurisdiction in relation to the refusal to grant bail does not entitle an applicant to relief pursuant to Article 40. The appropriate remedy is to bring an originating bail application to the High Court rather than *habeas corpus*. The crucial issue is whether the error complained of is sufficiently fundamental such as to warrant relief under Article 40.

25. Humphreys J. considered this issue in *Grant v. Governor of Cloverhill Prison*. At para. 100 he noted that:-

> "*Where the detention arises under a court order, the grounds for seeking Article 40 relief are limited to a flaw appearing on the face of the record, an absence of jurisdiction (in the strong sense that the court could not in any circumstances have made the order complained of), or a fundamental denial of justice or fundamental flaw, especially having regard to the availability of alternative, more appropriate, remedies such as judicial review (Ryan v. Governor of Midlands Prison [2014] IESC 54 at para. 18, FX v. Clinical Director of the Central Mental Hospital [2014] IESC 01)…*
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> *…. Likewise, in the context of refusal of bail, the hearing must be exceptionally flawed, or the refusal of bail must be such that a court could not properly have made that order, before relief under Article 40 can be granted, having regard to the more proper alternative remedy available (see Roche)*."

26. It is clear that the applicant is not advancing the case that there is an error on the face of the record or that the order of the District Court was made without jurisdiction. This leaves the question of fundamental flaw or denial of justice.

27. District Judge Ní Chondúin's failure to give reason for her decision to refuse bail is an error within jurisdiction, in my opinion. It does not amount to a fundamental denial of justice such that relief pursuant to Article 40 is required to vindicate the applicant's rights as opposed to an application for bail before the High Court.

28. The most concerning aspect of the hearing of 5th August, 2016, was the absence of any sworn testimony. There must be cogent evidence before the court so that the court can satisfy itself that the objection advanced by the prosecution has been made out as a matter of probability. This was recently restated by the Supreme Court in *Mulvey*. In that case, the Supreme Court granted the appeal and remitted the matter back to the High Court. The Supreme Court did not admit the applicant to bail, notwithstanding the absence of evidence to support the grounds for objecting to bail. In other words, it underscored that the appropriate procedure was to ensure that there was a properly conducted application for bail before the High Court with appropriate evidence. It was not appropriate to vindicate the applicant's rights by admitting him to bail on his appeal notwithstanding the fact that he had been deprived of his liberty in the absence of any cogent relevant evidence upon which the Court could properly have refused bail.

29. The decision in *Roche* was delivered five months later by the Supreme Court. It in no way detracted from long established principles in relation to the granting of bail. On the contrary, it emphasised that the appellant had an appropriate remedy, being the immediate right to apply to the High Court for bail.

30. Having regard to both decisions of the Supreme Court, as I must do, I have reached the conclusion that, while the District Judge erred in her conduct of the bail application in deciding to refuse to admit the applicant to bail in the absence of any sworn testimony, the hearing was not exceptionally flawed within the meaning of the authorities under discussion. Bearing in mind the fact that in *Mulvey*, in the absence of relevant cogent evidence, the Supreme Court did not admit the successful appellant to bail, but rather referred the matter back to the High Court, it is difficult to say that a similar error – an absence of evidence – should have a different result – release, albeit pursuant to Article 40. This conclusion is reinforced by the clear statement of the Supreme Court in Roche that "*it is difficult to conceive of circumstances when resort to Article 40 [rather than an application for bail to the High Court] is either appropriate or necessary*".

31. Furthermore, unlike *Mulvey's case*, while there was no sworn evidence before the District Court, there was relevant material before the learned judge to which she was entitled to have regard. The applicant was charged with a failure to appear before the District Court in Cork on 23rd March, 2016, in accordance with the terms of his bail in breach of s. 13(1) of the Criminal Justice Act 1984. Thus, the District Judge had material before her of the fact that the applicant originally had been granted bail, he had failed to appear on the return date of 23rd March, 2016, a warrant had issued for his arrest in Blanchardstown and he was subsequently charged under s. 13 of the Act of 1984.

32. I accept the submission of counsel for the applicant, Mr. Fitzgerald S.C., that the simple fact of the issuing of a bench warrant or charging the applicant pursuant to s. 13 in and of itself does not automatically mean that an application for bail will be refused. However, he accepted that, of course, this was a matter which could be taken into account by the Court. On that basis, it appears to me that there was material before District Judge Ní Chondúin upon which she could have reached a decision to refuse bail.

33. In those circumstances, I am satisfied that the error was an error within jurisdiction and that the hearing was not so sufficiently flawed as to require that the rights of the applicant be vindicated by the granting of relief pursuant to Article 40. The applicant's rights may be vindicated by an application for bail in the High Court, in the usual way.

34. Insofar as it was suggested in argument that the applicant himself may not be in a position to swear the affidavit required to ground such an application, there are procedures available under the rules of court to deal with such circumstances. Accordingly, I have concluded that the applicant is not entitled to relief pursuant to Article 40 on this ground.

35. The second, separate ground upon which the applicant sought relief pursuant to Article 40 related to the conditions of his detention and, in particular, the failure to afford him treatment in a hospital setting. It was argued that the failure was of such a magnitude as to render his continued detention unlawful and to justify his immediate release from custody under Article 40.

36. Reliance was placed upon *The State (Richardson) v. Governor of Mountjoy Prison* [1980] I.L.R.M. 82. Barrington J. held at pp. 91-92 that:-

> "*Exceptionally, however, the conditions under which a prisoner is detained may be such as to make his detention unlawful, notwithstanding the existence of a valid warrant. In such case, habeas corpus will lie*.
>
> *Lesser legitimate complaints of prisoners fall to be investigated in other forms of legal proceedings*."

37. Following the decision in *The State (C.) v. Frawley* [1976] I.R. 365, Barrington J. accepted that the State must take appropriate steps to protect the health of persons held in custody as well as is reasonably possible in all the circumstances of the case. He held that in order to justify the making of a final order of *habeas corpus*, the threat to an applicant's health must be so grave or immediate as to make the applicant's detention illegal.

38. The issue was explored further by Hogan J. in *Kinsella v. Governor of Mountjoy Prison* [2012] 1 I.R. 467. He concluded that the manner in which a prisoner was detained would not, of itself, be sufficient to render unlawful, an otherwise lawful period of detention unless there was a complete failure to provide appropriate conditions or treatment. Hogan J. held that the conditions, under which the applicant had been detained, constituted a violation of his constitutional right to the protection of the person and held that the State had failed to vindicate that right in the manner required by Article 40.3.2° of the Constitution.

39. The question he then posed himself was whether the breach, while undoubtedly serious in itself, was such as would entitle the applicant to immediate and unconditional release in the course of an Article 40.4.2° application. He followed the dictum of Clarke J. in *J.H. v. Russell (Mental Health)* [2007] 4 I.R. 242, where Clarke J. said that:-

> "*…it does not seem to me that anything other than a complete failure to provide appropriate conditions or appropriate treatment could render what would otherwise be a lawful detention, unlawful*."

40. Hogan J. concluded on the facts in *Kinsella* that it could not be said that *presently* the breach of the applicant's constitutional rights was so serious that it immediately vitiated the lawfulness of his detention and on that basis he refused to grant the order pursuant to Article 40.4.2°.

41. I, therefore, accept that there exists a legal basis for releasing an applicant otherwise lawfully detained where the conditions of his or her detention are such as to render the continued detention unlawful. However, it is clear that the courts will not immediately make such an order but will afford the detainer an opportunity to remedy the matters complained of prior to making an order under Article 40. In addition, the onus is on the applicant to establish that something in the order of a complete failure to provide appropriate treatment is and continues to exist.

42. The facts in this case, in my opinion, do not meet this threshold. It is true that the medical report of 26th July, 2016, states that the applicant is currently acutely psychotic and in need of psychiatric admission to facilitate appropriate treatment to prevent further deterioration in his presentation and that he continues to reside in Cork Prison. However, it would appear that he has had some in-patient treatment and I have no information as to how he has progressed since the letter of 4th August, 2016. The report of 26th July, 2016, indicated that he had not complied with his medication for approximately one week but I have no further indication as to whether this continues to remain the situation.

43. While, undoubtedly, he is unwell and requires treatment, I cannot *presently* say that the circumstances of his treatment are such as to render his detention unlawful so that he would be entitled to release pursuant to Article 40.

44. Therefore, I refuse his application based on this ground also.