Neutral Citation Number: [2011] IEHC 294

THE HIGH COURT

2011 1068 SS

IN THE MATTER OF AN APPLICATION

PURSUANT TO ARTICLE 40.4.2

OF THE CONSTITUTION OF IRELAND

BETWEEN

RICHARD McCANN

APPLICANT

AND

GOVERNOR OF CASTLEREA PRISON

RESPONDENT

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

1. In this application under Article 40.4.2 of the Constitution, the applicant moves the Court for an order of release from his current detention following the revocation of bail by the District Court on 1st July, 2011. The application was made to me shortly after 11am on the morning of 11th July, 2011. I then directed an inquiry into the legality of the detention and that inquiry commenced at 4.30pm later that afternoon. Mr. McCann stands charged with two offences which are said to have been committed on 4th June 2011, one under s. 6 of the Criminal Justice (Public Order) Act 1994 (as amended) in relation to abusive language and the other under s. 9(1) of the Firearms and Offensive Weapons Act 1990 (as amended) in relation to the possession of a blade.

2. On the following day, 5th June, 2011, Mr. McCann was brought to Cavan District Court where he was granted bail, subject to the conditions that he stay away from a particular family called the McDonaghs; that he sign on at Cavan Garda Station every Monday and Thursday and that he observe a curfew from 11pm until 8am each night. The applicant has since been remanded on continuing bail to 22nd September, 2011.

3. On the evening of 27th June, 2011, the Gardaí noticed that the windows of the applicant's mother's house had been broken. Following inquiry, it then emerged that she had been attending the applicant's wedding in Tullamore earlier that day. Further inquiries then disclosed that the applicant had not signed on at Cavan Garda Station on the 20th, 23rd and 27th June, 2011.

4. Evidence on this point was given by the relevant member of An Garda Síochána, Garda Joanne Gethins. It is only proper to record that Garda Gethins travelled at very short notice from Cavan to Dublin to assist the Court by giving evidence. I found her to be a most impressive witness who gave evidence in a commendably balanced and fair minded fashion.

5. While Garda Gethins acknowledged that the applicant subsequently explained that he neglected to sign on because of his wedding preparations, she also observed that the Gardaí had received no advance warning of this. Nor had the applicant ever sought to have his bail conditions varied.

6. A further development was that a member of the rival family, Edward McDonagh, had complained of an incident on 20th June when it is alleged that the applicant had sought to ram his car with another motor vehicle. A statement was subsequently taken from another individual, Michael Duke, who was said to have confirmed that he was travelling with Mr. McCann when the car ramming incident occurred. At that point, the Gardaí sought to have Mr. McCann's bail revoked. Following an application on sworn information to revoke bail, an arrest warrant was issued by the District Court. Mr. McCann was duly arrested and brought before the District Court on 1st July, 2011.

7. There is a broad measure of agreement as to what subsequently transpired at the revocation hearing. Garda Gethins gave evidence in relation to the failure to sign on and in respect of the car ramming incident. It was put to her in cross-examination that the applicant would deny any contact with the McDonaghs or any involvement in the car ramming incident. It was further suggested that the evidence was hearsay, given that the McDonaghs were not present in court.

8. At that point, District Judge McBride asked Garda Gethins if she were satisfied that the applicant was involved in ongoing serious criminal activity. Garda Gethins stated that she was so satisfied. District Judge McBride than stated that there was an exception to the hearsay rule in circumstances where the Gardaí give evidence of this nature. It may be inferred from this that the judge proceeded to accept and act on this hearsay evidence, because it is not disputed that this was among the reasons given by the judge for refusing bail. It is also accepted that the judge further remarked at some point in the proceedings that the applicant was one of the worst criminals to pay appear before him in his twelve years on the bench.

9. The District Judge then decided to revoke bail for the following reasons:-

(i) the applicant had failed to sign on at Cavan Garda Station on 20th, 23rd and 27th June.

(ii) he had been charged with the most serious of offences to the well being of fellow human beings.

(iii) he was a dangerous criminal involved in a criminal feud between two criminal gangs in Cavan town.

10. When the judge indicated that he was refusing bail, the applicant then shouted and insulted him in very unpleasant and

disagreeable language. A full account of what transpired is contained in *The Star* newspaper for 6th July, 2011, a copy of which was supplied to me during the course of the hearing. The judge directed the arrest of the applicant and, following a brief adjournment, asked him whether he wished to apologise. The applicant regrettably continued his tirade of abuse. The judge then sentenced him to one week's imprisonment for contempt.

The jurisdiction of this Court in Article 40 proceedings

11. Counsel for the Governor, Mr. McDermott, urged strongly that I should regard this particular Article 40 application as abusive. He noted that it was possible for the applicant to wait until 11th July before applying to this Court without notice to the respondent and then seeking an unconditional release from this Court. He also pointed out that it would have been open to the applicant to commence judicial review proceedings and that in the event that either the Director did not oppose the application or the Court was minded to quash the decision of the District Court revoking bail, the Court could nonetheless have imposed conditions so as to ensure that the applicant was not unconditionally released in the sense that he would still have to abide by the pre-existing bail conditions.

12. While there may be circumstances in which the Article 40 procedure can be abused (see, *e.g.,* the comments of Henchy J. in *Re McDonagh*, High Court, 24th November, 1969, Kenny, *Informality in Modern Irish Habeas Corpus* (1974) 9 *Irish Jurist* 67 and more generally Costello, The *Law of Habeas Corpus in Ireland* (Dublin, 2006) at 102), I cannot agree that this is one such case. It is true that applications of this kind can be disruptive, not least given that persons such as prison officers and Gardaí can be seriously discommoded, as indeed happened in the present case. Their personal and professional lives can be inconvenienced by reason of the urgent necessity to respond at very notice to an Article 40 inquiry of which they have had no prior notice. It is also true that the relief available under Article 40 - unconditional release - is dramatic and immediate. While the applicant may have had other avenues of redress open to him - specifically, an application for judicial review to quash the decision of the District Court - this cannot be regarded as debarring the applicant from availing of the very remedy which the Constitution expressly affords him.

13. If the Article 40.4.2 procedure comes with these disadvantages (if they can be properly so called) then such are simply the price of living a free and democratic society governed by the rule of law. The drafters of the Constitution were clearly alive to the necessity to safeguard carefully the protection of personal liberty. Specifically, the judges of this Court were enjoined by Article 40.4.2 "forthwith" to inquire into any complaint that a person was unlawfully detained. While this obligation may - and, as we have just seen, does - discommode public servants such as court registrars, state solicitors, gardaí and prison officers by requiring expedited hearings in circumstances of great urgency, this simply reflects the high value placed by the Constitution on personal liberty.

14. Short of something approaching acquiescence or laches, therefore, I cannot see that delay on the part of a person otherwise illegally detained can debar that person from seeking relief by way of an Article 40.4.2 application. Here the delay was, in any event relatively short, and it must be acknowledged that up to 8th July the applicant was in lawful detention by virtue of his imprisonment for contempt of court.

15. In any event, were the present applicant to succeed by way of an Article 40 application, the practical effect of the decision would be to annul the decision of the District Court, even though in strict theory such relief is simply concerned with the detention. Put another way, while the applicant would be entitled in that event to be released from his present detention, the status quo ante would nonetheless revive, namely, so that his liberty would be conditioned by the pre-existing bail conditions.

The admission of hearsay evidence by the District Court

16. We may now turn to consider the essence of the applicant's complaint in the present case. The gist of the objection is that, by overruling the objection of the applicant's legal advisers, the District Judge received and acted upon hearsay evidence in deciding to revoke bail, namely, the allegations in relation to the car ramming incident and, more generally, the views which were expressed as to whether the applicant was engaged in serious crime.

17. The question of the reception hearsay evidence at bail hearings was considered by me in *Clarke v. Governor of Cloverhill Prison* [2011] IEHC 199. In that case I upheld the decision of the District Court to act on and receive hearsay evidence where informer privilege was at stake. In Clarke, I nonetheless stressed that the reception of hearsay evidence in bail applications was very much the exception rather than the rule and that the hearsay evidence at issue in that case was admissible by virtue of what Hardiman J. described in *Director of Public Prosecutions v. McLoughlin* [2009] IESC 65, [2010] 1 I.L.R.M. 1 as "a specific, recognised, ground for its admission [which] has been properly established by ordinary evidence."

18. In the present case, informer privilege was not at stake and it cannot be said that there is any recognised legal basis for the reception of hearsay evidence in the circumstances I have just described. I infer from the evidence of Garda Gethins that the authorities took the view that the (very) bad relations between the feuding families should not be exacerbated unnecessarily by the production of the members of the McDonagh family to give evidence at the bail hearing. There was the further practical difficulty that Mr. Duke was in custody at the relevant date and thus could not conveniently be produced to give evidence in person before the District Court.

19. While these are perfectly understandable practical concerns, there was nonetheless no basis in law for the reception of such evidence. As Hardiman J. observed in *McLoughlin*:-

> "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."

20. Nor can it be said that the evidence on which the learned District Judge acted was hearsay only in some purely technical sense, so that the reception of such evidence amounted to a form of harmless error. Rather, the effect of the decision in the circumstances was entirely to frustrate the right of the applicant to seek to elicit by cross-examination the truth or otherwise of these allegations. If I may venture to repeat what I said in *Clarke*:-

> "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. In these circumstances, the admission of the hearsay evidence must be regarded as a fundamental error on the part of the learned District Judge, such that that vitiates the legality of the current detention. This is accordingly a case where, to adapt the graphic language of Henchy J. in *The State (Royle) v. Kelly* [1974] I.R. 259, 269, the detention of the applicant "is wanting in the fundamental legal attributes which under the Constitution should attach to the detention."

22. In reaching this conclusion, I do not overlook the fact that the District Judge would have been entitled - albeit not obliged - to revoke the bail in circumstances where on three separate occasions the applicant had taken it upon himself not to sign on at Cavan Garda Station, even if this omission was in the days leading up to his wedding. While this factor was mentioned by the judge, it would nevertheless be unrealistic not to accept that the alleged car ramming incident and the opinion evidence in relation to ongoing criminality weighed far more heavily in the decision to revoke bail. But since these latter conclusions were fatally undermined by the admission of the hearsay evidence, the detention of the applicant cannot therefore be allowed to stand.

Conclusions

23. For the reasons just stated, therefore, I will accordingly direct pursuant to Article 40.4.2 that the applicant be released from the custody ordered by the District Court when it revoked bail. For completeness, I should observe that while the applicant's release from *that custody* is immediate and unconditional, the effect of this order is that the previous bail conditions imposed by the District Court on 5th June, 2011, now revive and apply to the applicant.