

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 718 J.R.]

BETWEEN

JAMES FITZGERALD

APPLICANT

AND

DISTRICT JUDGE DERMOT DEMPSEY

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Mr. Justice Eagar delivered on the 17th day of June, 2016

1. These proceedings for judicial review seek an order quashing the order of the first named respondent made on 26th November, 2014 in Swords District Court, in which he issued a bench warrant for the arrest of the applicant in respect of two charges.

2. The facts appear as follows:

The applicant was arrested by Garda Stephen Harte on 22nd November, 2014 in respect of offences alleged to have been committed of s. 4 and s. 6 of the Criminal Justice (Public Order) Act 1994. He was brought to Swords Garda Station and charged with these offences. He was granted station bail on the morning of 23rd November, 2014. He was bailed to appear at Swords District Court on 26th November, 2014. It is important to remember that when a person is released from a Garda station to appear on a certain date, the decision on what date he should appear is normally that of the prosecutor but the experience of this Court is that, if there is a matter which requires a person to be elsewhere on the particular selected date or dates, the prosecuting garda will normally fix a different date.

3. In fact, the applicant had brought High Court proceedings in respect of a constitutional challenge of various provisions of the Sex Offenders Act 2001 which had been listed for the 25th November, 2014. The case was called on for 3 days.

4. The case did not begin on Tuesday 25th November, 2014 and was adjourned to the morning of Wednesday 26th November, 2014. In fact, on that date no judges were available to hear the case and it was adjourned to a later date when it was heard by Binchy J.

5. On 26th November, 2014 the applicant did not appear to answer his bail in respect of the charges in Swords District Court.

6. The affidavit of Eleanor Leane of Messrs. KOD Lyons Solicitors indicates that she instructed counsel to appear on behalf of the applicant in Swords District Court to explain the applicant's absence, as he was due to appear before the High Court as the sole plaintiff in plenary proceedings, and to seek a later date in the applicant's absence. She also stated that she left a message by telephone at Swords Garda Station on the evening of 25th November, 2014 for the prosecuting Garda, Garda Stephen Raymond Harte, to give him advanced warning of the applicant's absence the following day.

7. She also swears that counsel spoke to the presenting sergeant on the morning of 26th November, 2014 and explained that the applicant would be absent, and informed the presenting sergeant of the reason for his absence. The presenting sergeant stated he would be applying for a bench warrant in the absence of any documentation which corroborated the reasons for the applicant's absence.

8. When the applicant's case was called by the court registrar, the presenting sergeant applied for a bench warrant in the applicant's absence, and despite the first named respondent being told by counsel the reason for the applicant's absence, the first named respondent issued a bench warrant for the applicant's arrest. Ms. Leane also states that the first named respondent stated, following a request by her attending counsel, that the bench warrant should be executed "with discretion". The experience of this Court is that such a direction from a judge implies that the Gardaí should come to some arrangement with the applicant for his surrender to the bench warrant.

9. Ms. Leane also states that it was physically impossible for the applicant to simultaneously attend both courts, and she claims that the first named respondent acted in excess of jurisdiction and contrary to the principles of natural and constitutional justice in issuing a bench warrant for the arrest of the applicant.

10. The supplemental affidavit of Eleanor Leane states that counsel advised that the applicant would be required to give evidence in relation to a number of matters including his personal circumstances and other matters which only he could give evidence of at the constitutional action before the High Court. She stated that it was common practice for matters to be adjourned in the District Court because of the unavailability of the accused person required in other courts. She stated that, in all the circumstances, it was disproportionate and unreasonable for the first named respondent to have issued a bench warrant for the arrest of the applicant.

11. The affidavit of Bob Kavanagh, the presenting sergeant in Swords District Court, indicated that he prosecuted a number of cases, including the case of the applicant. He says that he was approached by counsel for the applicant and was told that the applicant would not be in attendance as he had other proceedings before the High Court. He said that counsel had no documents to support this, but had been told of the situation by the applicant's solicitor's office. Sergeant Kavanagh indicated that in the absence of any documentation to corroborate this assertion, he would apply for a bench warrant and he stressed the particular context of the applicant's history of bench warrants. When the case was called, counsel for the applicant told the court that the applicant was not

present as he had another case in the Four Courts, and Sergeant Kavanagh indicated that there was no documentation to support this, and the applicant had a long history of bench warrants having been the subject of 31 bench warrants in the past. The first named respondent then issued a bench warrant. Sergeant Kavanagh also states that he was aware the applicant had proceedings before the High Court but indicated that the applicant was under no compulsion to attend there. If the applicant was to give evidence, this would have been done in the High Court at a time when he was not required in Swords Court. He states that the applicant could have given evidence and then attended Swords if his case was put to second call, but that also in the alternative he could have attended Swords at first call, and travelled to the Four Courts to give evidence thereafter. He also states that the warrant can be executed by arrangement with the applicant and that the court would take into account his excuse for non-attendance of the court when considering to re-admit him to bail.

12. The affidavit of Stephen Harte, the arresting member, states that the applicant was bailed to appear in Swords District Court three days after his arrest and the applicant did not indicate that there was any difficulty with his attending Swords Court on 25th November, 2014 or the 26th November, 2014. He made no mention of any impending High Court proceedings. He says that if the member in charge had been told this he would have no difficulty with nominating another date which was convenient to the applicant. He also states that, in relation to Ms. Leane's leaving a telephone message with him on the evening of 25th November, 2014 to give him advance warning of the applicant's absence the following day, he did receive this message but not until the evening of 26th November, 2014 after the bench warrant had issued.

13. The affidavit of Donough McGuinness, a solicitor in the Office of the Chief State Solicitor, confirmed that the High Court case was originally scheduled for a three day hearing in the High Court due to begin on 25th November, 2014. Due to unavailability of judges, the case did not commence on that date and it was adjourned to 26th November, 2014.

14. Mr. McGuinness makes the point that the applicant was under no compulsion to attend the High Court proceedings. In the event that he was required to give evidence, this could have been slotted in during the hearing at a time other than the time that he was required to be present in Swords District Court. He did give evidence, but this Court is quite certain that the case would have been opened before Binchy J. by an opening address by counsel on behalf of the applicant, and I have no doubt that it was possible for the applicant to attend Swords District Court at 10:30. The High Court would usually sit at 11 o'clock or after.

Legislation

15. Part 3 of the Criminal Procedure Act 1967, as amended, gives district judges the power to remand and deals with forms of recognizance and periods of remand. In s. 24(5)(b) it states:-

"If the Court is satisfied that a person who has been remanded on bail is unable by reason of illness or accident to be brought before the Court at the expiration of the period of remand, the Court may, in that person's absence, remand the person for such further period, which may exceed fifteen days, as the Court considers reasonable."

Subsection 6(b) states:-

"Where a person has been remanded on bail and there has been no sitting of the Court on the date to which he has been remanded, that person shall stand so remanded to the sitting of the Court next in the same District Court area."

16. Under the legislation there appears to be no provision for a district judge to adjourn or remand a person who is released on bail in their absence for the purposes of attending another court or otherwise.

17. As well as the affidavits of Sergeant Bob Kavanagh, Garda Stephen Harte and Mr. McGuinness there is the statement of opposition of the respondents. A number of points commend themselves to this Court. The statement of opposition states that the applicant suggested that there was "uncontroverted evidence before the court of the impossibility of the applicant attending." On the contrary, there was no evidence whatsoever, only the submission of the applicant's counsel. The court was clearly told of the applicant's warrant history and that there was a bail bond before the court which had been signed by the applicant three days previously.

18. There was no evidence that it would have been impossible for the applicant to attend to answer his bail as he was not required to attend at the High Court and could have attended Swords District Court and returned to the city centre, to the Four Courts, in ample time to give evidence at the High Court proceedings.

Decision

19. The issue before this Court is whether the first named respondent's order issuing a warrant for the arrest of the applicant was in excess of jurisdiction and in breach of principles of natural and constitutional justice. The first named respondent, in issuing the warrant, was told by counsel of the belief of Mr. Fitzgerald that the applicant was required to attend at the High Court as opposed to the District Court. He was also apprised of the warrant history of the accused which, with 31 warrants for his arrest, is clear evidence of his propensity not to comply with court orders. He was not bailed to appear in the High Court but was bailed to appear in Swords District Court. It appears to this Court that the legislation contained in Part III of the Criminal Procedure Act, 1967, as amended, does not allow a district judge to remand a person who has been granted bail in their absence for the requirement that they appear in another court. Obviously if a person is bailed to two different courts on the same day, that does present an issue of bi-location, but almost all district judges would be prepared to put the matter back on the basis that an accused person is travelling between two courts to which they had been ordered to attend.

20. A number of cases were opened to the Court, including *Kiely v. Judge Angela Ní Chondúin and the Director of Public Prosecutions* [2008] IEHC 370 in which Sheehan J. noted:-

"[A]nd particularly where the applicant had failed to attend court on the occasion when her case was first listed for trial, that the issuing of the warrant for the arrest of the applicant was the appropriate step for the District Judge to take."

Also opened was the case of *Burke v. Bourke & Ors.* [2010] IEHC 451, a decision of Irvine J. At para. 18, she states:-

"18. Having considered the affidavits of the parties, it is not clear whether the District Judge, when dealing with the summons listed for hearing before him on 19th March, had received any communication from the applicant indicating that he could not attend due to a commitment to another court hearing. However, even if he had received such communication, he was entirely within jurisdiction to issue a warrant for his arrest once satisfied that the applicant was on notice of the hearing or once satisfied from the history of the proceedings that the applicant should have been in attendance."

21. Also cited was the agreed note of the *ex tempore* judgment of Feeney J. dated 31st July, 2013 in the case of *Cavlan v. Judges of the Northern Circuit & Ors.* Feeney J., in that case, said:-

"I am satisfied that the issuing of the warrant in this case is not unfair, unreasonable or disproportionate. It was not contrary to public interest. In fact it was the opposite. It was seeking to uphold the integrity and to ensure the necessary prosecution of a criminal offence within this jurisdiction and this did not breach the applicant's rights and insofar as it might be said to interfere with his rights I am satisfied that such interference was limited to the extent which was necessary and could be said to be proportionate."

22. All of the authorities open suggest that the first named respondent in this case acted lawfully within jurisdiction proportionately, and I so find.