Neutral Citation Number: [2006] IEHC 366

THE HIGH COURT

Record Number: 2006 No. 1583 SS

BETWEEN

DANIEL HAMILL

APPLICANT

JUDGE DONAGH MCDONAGH
AND
THE GOVERNOR OF CLOVERHILL PRISON

RESPONDENTS

Judgment of Mr Justice Michael Peart delivered on the 22nd day of November 2006

1. The applicant seeks an order for his release under Article 40.4.2 of the constitution on the ground that his detention has been unlawful since the 20th October 2006 arising from the fact that he was not himself present in Court Number 8 in the Four Courts on that date when he was further remanded to appear before the Circuit Court on tomorrow the 24th November 2006. His solicitor and Counsel were, however, present when his case was called and the matter was remanded.

2. The fact of the matter is that the applicant, having been arrested and charged with the offences in question was remanded in custody from time to time in the District Court, and that bail had been refused, in the District Court, the High Court, and later on appeal by the Supreme Court.

3. His solicitor's grounding affidavit states that on the 18th August 2006 the applicant appeared in Cloverhill District Court when he was served with the Book of Evidence, and that he was remanded to appear in the Circuit Court on the 20th October 2006. She further avers that he received a letter from the Courts Service dated 28th August 2006 which stated, inter alia, that he and his legal representatives must attend at Court 8, Four Courts, Dublin 7. As he was in custody in Cloverhill Prison during this time, he was brought to the Four Courts building on that morning along with a large number of other persons whose cases were before that Court. It is important to note that the applicant's case was listed for purely procedural reasons. No trial was to take place.

4. In any event, the applicant was brought upon arrival at the Four Courts to a part of the building referred to as the Cloverhill Prison holding area or some such description. It is, the Court is told, an area below the ground floor on which Court 8 exists, and is in the nature of a secure holding area where prisoners are kept on arrival.

5. It appears that on that morning there were a total of 78 cases in the first respondent's court list, made up of 49 new cases for mention, 20 older cases all for mention, as well as 3 arraignments and 6 cases for sentence. The first named respondent announced to the prison officers present at the commencement of his list that that persons who were in custody on a new mention basis were not to be brought up to the Courtroom from the holding area in ease of the list.

6. When the applicant's case was called he was represented by solicitior and Counsel and the case was put back until the 23rd November 2006, he being remanded in custody to appear again on that date, i.e. tomorrow.

7. Complaint is now made yesterday that the action of the first named respondent in directing that the applicant be kept in the holding area and the matter proceeding in his absence has breached his constitutional rights to fair procedures and his right to access to his lawyers when his case is being dealt with by the Court. It is submitted that the right to be legally advised involves also a requirement that he be present in court on the occasion of the remand in question so that he can give relevant instructions to his legal team. It is relevant to his submissions that a co-accused of the applicant was before the Court also on that date but he was on bail at the time. In such circumstances, it is said that his co-accused was able to speak with his lawyers and arrange that a certain application was made which apparently related to the availability of CCTV footage and other similar type evidence. The applicant says that his absence from the Court when that occurred placed him at a disadvantage since he was unable to so instruct his own legal team. Brendan Kilty SC submits that in such a situation it cannot be said that justice is seen to be done in the absence of the accused.

8. The applicant's solicitor has not averred either that the applicant sought access to his legal team and was refused, or that the legal team sought access to their client and were refused. Neither has the applicant or his solicitor suggested any particular prejudice which either did result or may have resulted from their client's absence from the courtroom.

9. The applicant had been in custody for about seven weeks prior to the 20th October 2006. There has been no suggestion that during that time the applicant was unable to access his solicitor or the she was unable for any reason to consult with him prior to what inevitably was going to be a mention of the case on the 20th October 2006. Clearly neither the applicant nor the legal team saw any reason for a consultation on the morning of the 20th October 2006, otherwise I have no doubt that requests would have been made in that regard and arrangements made.

10. The applicant has learned somehow that his co-accused who is on bail was physically present in court on that date when his case, which, by the way, or so the Court is told, was not in the new case category, was mentioned. It appears that in relation to disclosure being made some application was moved, and the applicant feels disadvantaged by not having been in a position to instruct his team to move similarly. But his Counsel and solicitor were present, and it is only by chance that the applicant's case and his case were in the same list. In fact the Court has not been informed if his case was dealt with before or after that of the co-accused. If the former, then the fact that the co-accused may have subsequently made some application which the applicant would have liked to make, would not be of much relevance. The Court does not know. But one way or another, he was represented at the time the case was called, and there is no evidence or suggestion that the application which the applicant now wishes had been made is one that would have had the capacity to alter his custodial status.

11. There is no doubt that the applicant enjoys a constitutional right of access to legal representation. That does not mean that at every moment of every day whenever he wishes to speak to his solicitor, that solicitor must be available or made available to him. His solicitor was available to him for seven weeks prior to this mention date and he had that opportunity to seek advice on all aspects of his forthcoming mention date in Court 8 and instruct his solicitor and Counsel accordingly. It was never the case that there was even a possibility that his case would be heard in any substantive way which could affect his substantive rights. As far as fair procedures are concerned, nothing in particular is submitted by way of evidence or otherwise as to the manner in which a perceived lack of fair procedure impacted adversely upon him, except that he fears that he could have made some as yet unspecified application to the Court following upon some application made by his co-accused regarding some CCTV and other film evidence. In my view there would have been nothing to prevent the applicant's lawyers from mentioning the applicant's case again to the Court if they had considered

that such an application ought to be considered in his case also.

12. Fair procedures include the right to be present in Court when justice is being administered, and in particular at the trial. It is by no means clear to me that the right to be present exists in some absolute way whenever the case is being mentioned only, perhaps for a remand so that disclosure can be made or so that a date can be fixed for hearing. The fact that a letter from the Court's service was received telling him that he must be there, does not create a right as such to be in the Court when the case is mentioned. If a specific prejudice has resulted and which can be linked back to the applicant's absence from the physical courtroom, then the extent of the right could be looked at in that particular context. But there is no such suggestion here apart from what I have referred to, and any potential hazard in that regard was amply protected by the presence of both solicitor and Counsel on his behalf. The circumstances of this case are far from the sort of complaint, striking at the very heart of the legality of detention, made by the applicants in *McDonagh v. The Governor of Cloverhill Prison*, unreported, Supreme Court, 28th January 2005. It is unnecessary to set out the details of that case in any detail.

13. Another issue is relevant in my view but not determinative necessarily. It is the fact that the breach of the applicant's right, if it happened at all, happened seven weeks ago. It is only on the day prior to the date to which his case was remanded that he has decided to seek a release pursuant to Article 40.4.2 of the Constitution. The purpose of applying under that article is to enable a person whose detention is thought to be unlawful to seek a remedy in that regard as a matter of urgency. For that reason it is in the nature of such applications that affidavits grounding the application are frequently sworn by a solicitor or indeed anybody in a position to do so on the applicant's behalf. Much latitude is allowed in the area of hearsay evidence and so forth. Where that sort of urgency is not thought to exist, there are many cases where judicial review procedures should be adopted if it is felt that the judge in the court below has erred in some manner. Indeed even in cases of urgency judicial review procedures can be adopted with suitable time limits being put in place for the filing of Statement of Opposition and affidavits. But as in this case to wait for seven weeks before exercising a right to apply for release by way of Article 40.4.2 of the Constitution is inappropriate, except where some exceptional circumstance has been shown to exist to prevent sooner action. No such explanation is present in this case. Nonetheless, even that delay should not prevent the Court making an order, albeit late in the day, if indeed even so late the applicant is in detention which the Court considers unlawful. But there is a hurdle of credibility to overcome, I suggest, where, so late, an applicant claims that his fundamental rights have been infringed in so serious a manner as to invalidate his detention while he awaits his trial.

14. It is important that the unusual and important remedy by way of Habeas Corpus does not result in the release of persons from detention where the alleged want of fair procedure or other irregularity does not strike at the heart of the legality of detention. Life is imperfect in many ways, not least in relation to criminal procedures, but that is not to assume that every imperfection fatally contaminates the legality of detention. Only where there is such a fundamental flaw in the applicant's detention such as to render it unlawful should an applicant be released from what would otherwise be lawful custody. The following oft-quoted passage from the judgment of O'Higgins C.J. in *The State (McDonagh) v. Frawley* [1978] I.R. 131 at p.136 is as relevant today as it was twenty eight years ago, and is as follows:

> *" The stipulation in Article 40, section 4, subsection 1 of the Constitution that a citizen may not be deprived of his 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 seems to mean 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, 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."*

15. I appreciate of course that this case referred to a "convicted person" and that the present applicant is someone who is entitled to enjoy the presumption of innocence, but that distinction in my view does not alter the thrust of what the learned Chief Justice was stating. It is equally applicable to any person in custody such as the applicant who is in custody awaiting his trial.

16. I am satisfied that the applicant is detained in accordance with law, and refuse the relief sought.