Neutral Citation Number: [2012] IEHC 33

THE HIGH COURT

2011 1425 SS

Between:

VIOREL ROSTAS

APPLICANT

AND

THE GOVERNOR OF MOUNTJOY PRISON

RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 2nd day of February 2012:

1. On the 8th July 2011 the applicant pleaded guilty to an offence contrary to Section 56 of the Road Traffic Act, 1961. He was sentenced to four months imprisonment, and for the purpose of enabling the applicant to appeal that sentence recognizances were fixed in his own bond in the sum of €750, with one independent surety in the same sum. On the same date an application was made to the High Court for his production from Mountjoy Prison to Cloverhill District Court on the 11th July 2011 at l lam for his application to the High Court for a reduction in the amount of these recognizances. The applicant was not produced as ordered.

2. On the 11th July 2011, the High Court made a further order for his production to the High Court at Cloverhill District Court on the 18th July 2011 at Ham, and again, the applicant was not produced, and the Court made a further order for his production before that Court at 2pm that day.

3. At 2pm on the 18th July 2011, the applicant was once again not produced, the explanation given to the applicant's solicitor being lack of resources.

4. Later that afternoon, not surprisingly, the applicant's solicitor and Counsel attended before this Court and applied for an order for an inquiry into the lawfulness of his detention under Article 40 of the Constitution, making the point that the failure by the respondent on three occasions to comply with an order of this Court for his production for the purpose of his bail application had frustrated his right to bring such an application thereby rendering his continued detention unlawful. An order for such an inquiry was made returnable for the following day, the 19th July 2011 at 10.30, which suggests that the ex parte application was made late in the afternoon on the 18th July 2011.

5. On the 19th July 2011, when the matter was called, the respondent was represented as was the applicant, and the Court was informed that no inquiry into the lawfulness of detention was required in circumstances where the applicant at some stage during the 18th July 2011 had applied to the Governor for temporary release, and that in the evening of the 18th July 2011 he was so released and was therefore no longer in custody. The question of costs of the application was left over, and I heard submissions in relation thereto on the 27th' January 2012.

6. Colman Fitzgerald SC for the applicant seeks an order for costs of the ex parte application, such costs to be taxed in default of agreement in the usual way. That application is resisted, firstly because of certain reasons which are put forward as to why the applicant was not produced on the above dates for his application to reduce recognizances, but principally because unknown to his legal team the applicant had applied for temporary release and was released on foot of that application. It is submitted that had the applicant kept his lawyers informed of that situation they would have advised him to await the outcome of that application and they would not have made the ex parte application for an inquiry until the outcome of the application for temporary release was known.

7. The reason why the applicant was not produced on the 11th July 2011 is explained by Ms. Balfe of the DPP's office by reason of the fact that the list of persons whose bail application was listed for hearing that day and whose production was required, and which is sent to the relevant prison, did not include the name of the applicant. On the 18th July 2011 when Ms. Balfe became aware that the applicant had not been produced she and Counsel for the applicant spoke to a prison officer and were informed that some clarification was sought as to the applicant's date of birth as there were two people in Mountjoy in the name of the applicant, and they were told apparently that due to lack of resources he would not be produced that day but would be produced at the bail list on the following Thursday.

8. An affidavit sworn by the Deputy Governor of Mountjoy Prison, Joseph Joyce discloses that sometime between 9.30am and 11 am on the 18th July 2011 the applicant spoke to an officer at Mountjoy Prison and applied for temporary release. That application was forwarded to the Irish Prison Service at 12.58pm by email, and approval was received back by the Governor's office at 3.36pm by email. Mr Joyce avers that the applicant was informed of this approval at 5pm, and he was released at 7.40pm.

9. The record of telephone calls made by the applicant that day show no call to or visit by his solicitor during the 18th July 2011. It would appear that they were completely unaware that he had made an application for temporary release. Whether the applicant was aware that his solicitor and Counsel were going to the High Court on the afternoon of the 18th July 2011 1 do not know. It is not averred to. The affidavit grounding the application for an inquiry was sworn, not by the applicant, but by his solicitor. But if they told him that they were so applying, it is unlikely that he would not have told his solicitor that he had applied for temporary release. In the absence of that information it was reasonable that his lawyers should have considered that the situation whereby three orders for the applicant's production had filed to produce the applicant for his application was unsatisfactory to say the least, whatever the reasons for that satisfaction, and that there was a case for arguing that his continued detention was unlawful. As a matter of undisputed fact the applicant was not actually released until after the order for an inquiry had been made by this Court.

10. I bear in mind that any person may apply for an inquiry into a person's detention if there appear to be grounds for so contending.

I think it was reasonable that the applicant's solicitor should have considered that in this case there were arguable grounds, considering that their efforts to have the applicant produced in court for his application to have recognizances reduced had failed despite three orders being made. I agree of course that it is unfortunate that the applicant did not inform them that he had applied for temporary release, but he did not become aware that his application in that regard was successful until after his legal team had applied for his release under Article 40 of the Constitution.

11. I have been referred to a judgment of Herbert J. in *Dempsey v. The Member in Charge of Tallaght Garda Station*, unreported, High Court, 1St June 2011 where the learned judge was required to consider how to exercise his discretion in relation to costs in a similar situation where the actual inquiry ordered was not required to be completed, albeit for reasons totally different to the present case. In concluding that he would make an order for costs of the ex paste application for an inquiry in that case he stated:

> "Costs in such applications are at the discretion of the court, to be exercised judicially. In my judgment an applicant should be entitled to the costs of a conditional order in an application pursuant to the provisions of Article 40 of the Constitution if it was reasonable in the circumstances of the case to have made the application. In assessing this question the Court must have regard to a number of matters which include, whether the making of the application was appropriate, for example, that it was not based on a mere technicality or that no reasonable preliminary steps had been taken to secure the applicant's release, whether the facts and the circumstances of the case so far as possible had been carefully ascertained and fully presented, whether a sufficient doubt was shown that the applicant's detention might not be lawful or whether there was uncertainty as to the constitutionality of the legislation on foot of which the applicant was detained. I do not intend this list to be exhaustive and other issues as to the reasonableness may arise on the facts of individual cases ... ... ".

12. I respectfully agree that the above represents a reasonable approach to the exercise of the Court's discretion on the question of costs in these circumstances. The central question will be whether it was reasonable that the applicant's lawyers should consider that an application for an inquiry should be commenced, on the basis of what they knew or ought to have known prior to the making of the application. In the present case there is no doubt that they were unaware that the applicant had made an application for temporary release earlier on the 18th July 2011. In an ideal world the applicant ought to have so informed them so that a judgment could be made as to whether or not an application for release under Article 40 of the Constitution should be made. I suspect that if they had known this they would have awaited the result of that application. But the applicant is clearly not an Irish national. Some allowance must be made for that fact in considering that he did not inform his solicitor of his application for temporary release.

13. I think on balance the applicant's solicitors were justified in considering that reasonable grounds existed for commencing the application for his release, and that they ought not to be refused their costs because the applicant did not inform them that he had applied for temporary release. They clearly on the basis of what they knew made a bona fide application for an inquiry into the lawfulness of his detention, since he had not been produced on three occasions. Whatever may be the explanations given for that happening, there were certainly prima facie grounds for arguing that his continued detention was unlawful.

14. 1 will make an order that the applicant's costs be taxed in default of agreement.