Neutral Citation Number [2012] IEHC 366

THE HIGH COURT

[2012 No. 1468 S.S.]

IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLE 40.4.2 OF THE CONSTITUTION

BETWEEN

GARY BAILEY

APPLICANT

AND

GOVERNOR OF MOUNTJOY PRISON

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on the 31st day of July, 2012

1. In this application pursuant to Article 40.4.2 of the Constitution the respondent has raised an important issue regarding the scope of this provision and its inter-action with the remedy of judicial review. The applicant maintains that he did not receive due notice of a Circuit Court hearing in May, 2012 as a result of which an earlier District Court conviction (of which he admittedly had notice) was affirmed. He contends that his arrest and detention pursuant to a committal warrant then issued by the Circuit Court is accordingly unlawful. The respondent contends, however, that this issue should more properly be determined by means of an application for judicial review of the warrant, rather than by means of an application under Article 40.4.2.

2. In this judgment I am now called upon to resolve this question as a preliminary jurisdictional issue. The issue arises in the following fashion.

3. The applicant is currently serving a sentence of four months imprisonment in respect of a series of road traffic offences, including non-display of motor tax, driving without insurance and driving without a driving licence. The summonses first came before the District Court on the 9th May, 2011, whereupon the applicant was assigned legal aid. The Legal Aid (District Court) Certificate was sent to the applicant's solicitor at his business address and a copy was also sent to the applicant at 29 Finnstown Hall, Lucan, Co. Dublin.

4. The applicant was subsequently convicted of these offences in the District Court on the 11th January, 2012, whereupon he received a sentence of four months imprisonment. The applicant appealed the conviction to the Circuit Court by filing and serving a notice of appeal and, upon entering into the appropriate recognisance in Mountjoy Prison, he was released pending that appeal. The applicant's solicitor, Simon Fleming, has sworn an affidavit saying that neither he nor the applicant received any notification of an appeal date, although it appears to be the usual practice that such notification is sent to both the appellant and his or her solicitor.

5. Matters came to a head on the 15th July, 2012, when a relative of the applicant attended Ronanstown Garda Station where he was informed that there was a warrant in existence for the present applicant. The relative was asked to inform Mr. Bailey that he should attend at that station in order to have the warrant executed. The applicant duly attended Ronanstown Garda Station later that day, whereupon he was arrested on foot of the committal warrant. The committal warrant recites the particular of the conviction in the District Court and goes on then to provide:-

> "Whereas the hearing on appeal by the said accused against the said order, the Circuit Court judge for the County and City of Dublin on the 13th June, 2012, ordered as follows: no appearance, strikeout appeal, affirmed conviction and order of the District Court and ordered that the accused be imprisoned for a period of four months."

6. Critically, however, that warrant was addressed to the applicant at 17 Shancastle Drive, Clondalkin, Dublin 22. This is, apparently, a former address of the applicant but he has not resided there for some time. Mr. Bailey is currently residing with his mother at 34 Gurteen Avenue, Ballyfermot, Dublin 10. The essence, therefore, of the present complaint is that the applicant's detention in Mountjoy Prison is unlawful by reason of the fact that neither he, nor his assigned solicitor, received any notification of the appeal date, with the result that he did not appear for his appeal.

7. This initial application for an inquiry was moved on Thursday, 19th July, 2002. made an order pursuant to Article 40.4.2 requiring the respondent to certify the grounds in writing and to produce the applicant before me on the following day. On Friday, 20th July, counsel for the respondent, Mr. McGillicuddy, indicated to the court that further time was necessary in order to ascertain the precise sequence of events with regard to the issue of the notification of the appeal date.

8. It was agreed that Mr. Bailey should be admitted to bail (on admittedly stringent terms to the following Monday, 27th July). On that occasion Mr. McGillicuddy indicated that yet further time was necessary, although he hoped to have affidavit evidence on behalf of the respondent filed within a matter of days. On Thursday 26th July, Mr. McGillicuddy indicated that there was still difficulties in preparing the affidavit and that it now appeared that affidavits from several different deponents would now be necessary.

9. At that juncture, however, Mr. McGillicuddy indicated that he wished to raise a preliminary jurisdictional issue, namely, that the applicant's complaints in relation to the notification of the appeal and the validity of the committal warrant ought properly to have been raised by way of judicial review rather than by way of an application under Article 40.4.2. Counsel for the applicant, Mr. O'Higgins S.C., issued that he was consenting to have this matter dealt with as, in essence, a preliminary jurisdictional issue. This judgment, therefore, addresses this net issue.

The Supreme Court decisions in Sheehan, McSorley and McDonagh

10. So far as the jurisdictional issue was concerned, Mr. McGillicuddy relied heavily on the Supreme Court's decision in *McSorley v. Governor of Mountjoy Prison* [1997] 2 I.R. 258. In this case the applicants pleaded guilty before the District Court to the offence of being in the unlawful possession of a motor vehicle and were sentenced to periods of imprisonment. The essence of their complaint

was that the District Judge had failed to inform them of their right to legal aid. This factual contention was accepted by the respondent (who was the Governor of Mountjoy Prison), inquiries having been made with the prosecuting Gardai. The Supreme Court held, however, that in those circumstances where the conduct of the District Judge had been called into question, the application should have proceeded by means of judicial review, as this would have given both the judge and the Director of Public Prosecutions an opportunity to have been heard.

11. Mr. McGillicuddy conceded that the earlier decision of the Supreme Court in *Sheehan v. Reilly* [1993] 2 I.R. 81 appeared to point in the opposite direction. Here the applicant had been sentenced by a District Judge to a period of imprisonment in excess of the statutory maximum. In that case this Court directed that the applicant proceed by way of an application for judicial review rather than under Article 40.4.2. On appeal, however, the Supreme Court held that it was "quite inappropriate to convert this application under Article 40 into a judicial review proceeding": see [1993] 2 I.R. 81, 92, *per* Finlay C.J. This was especially so where, as here, this process could add to the delay, not least where it transpired that, as Finlay C.J. was to point out, the applicant remained in unlawful custody for a period after the initial application for an inquiry was converted into a judicial review application: see [1993] 2 I.R. 81, 92. In *McSorley*, O'Flaherty J. (who was himself a member of the five judge Court in *Sheehan*) distinguished *Sheehan* on the basis that "it was clear by reference to the record in that case that the applicant was in unlawful custody": see [1997] 2 I.R. 258, 262.

12. In *McDonagh v. Governor of Cloverhill Prison* [2005] IESC 4, [2005] 1 I.R. 394 the Supreme Court granted an order under Article 40.4.2 in circumstances where a District Judge had refused bail on grounds not advanced by the prosecution and which were not supported by the evidence and of which the applicants had no notice. The judge also appears to have made inappropriate comments about the fact that the applicants were members of the travelling community. McGuinness J. concluded her judgment thus ([2005] 1 I.R.394, 405):-

> "It appears to this court that the procedural and other deficiencies of the hearing before the District Judge in this case were indeed such as would invalidate essential steps in the proceedings leading ultimately to the applicant's detention, or, to use the words ofHenchy J. in *The State (Royle) v. Kelly* [1974] I.R. 259, the detention of the applicants was wanting in the fundamental legal attributes which under the Constitution should attach to it. The court, therefore, on the date of the hearing of this matter, allowed the appeal and ordered the immediate release of the applicants."

13. I confess that I have not found it at all easy to reconcile *Sheehan and McDonagh* on the one hand and *McSorley* on the other, not least given that all three cases involved, to one degree or another, imputations on the conduct of the District Judge in question. This is, perhaps, especially true of the facts in both *McSorley* and *McDonagh*. As it happens, *McSorley* was not referred to in *McDonagh*.

14. I have nevertheless come to the conclusion that *McSorley* must be regarded as being a singular and exceptional case which effectively is confined to those special cases where the conduct of the judge who made the order detaining the applicant has been specifically impugned, such as then to require the matter to proceed by way of judicial review in order to ensure that the judge in question was served with the proceedings so as to enable him or her "to make their observations": [1997] 21.R. 258, 263, *per* O'Flaherty J. Insofar as *McSorley* established any wider rule- such as, for example, that Article 40.4.2 is available only where the unlawful custody was obvious - such a rule has not been applied by the Supreme Court either before or after that decision. Given that - to put matters no lower - the preponderance of other Supreme Court authority leans heavily against such a rule, in these circumstances, I do not consider that such a rule is binding on me.

15. In any event, such a rule would dramatically reduce the scope, power and effect of Article 40.4.2°, even though the availability of this remedy is central to the workings of a free society. Any one who doubts such a proposition really need look no further than the famous opening lines of Kafka's great novel, *The Trial* ("Someone must have been telling lies about Josef K., for, without having done anything wrong, he was arrested one fine morning") or, indeed, for that matter, its closing, despairing lines ("Where was the judge he had never seen? Where was the High Court he had never reached?"). Given these considerations, it seems unlikely that the Supreme Court in *McSorley* intended to prescribe such an interpretation of Article 40.4.2° with potentially far-reaching consequences.

16. A rule of this nature would also seem contra-indicated by the actual wording of Article 40.4.2° itself which requires this Court forthwith to inquire into the complaint. If, however, the jurisdiction of this Court under Article 40.4.2° was confined to those cases where the illegal nature of the detention was obvious, why, then, it might be asked, should this Court have the role and function of conducting such an inquiry and, indeed, why should this elaborate role be spelt out by the Constitution in such meticulous detail?

17. The distinction between legal errors which are patent and those which are not is not one, moreover, which is drawn by the language of Article 40.4.2 itself. Article 40.4.2 is rather solely concerned with the *legality* of the detention, irrespective of the nature of the legal error which infects the detention. Thus, the detention may be wholly illegal, even though the order grounding the detention may be perfectly valid on its face. The Supreme Court's judgment in *McDonagh* itself provides a good illustration ofthis.

18. Here it may be recalled that fair procedures and the giving of due notice is fundamental to the judicial mandate, namely, the administration of justice as required by Article 34.1. The centrality of fair procedures and the necessity for timely notice in administrative and judicial decision-making has been stressed in scores of major decisions of the Supreme Court, of which cases such as *Re Haughey* [1971] I.R. 217, *DK v. Crowley* [2002] 2 I.R. 744 and *Dellway Investment Ltd v. NAMA* [2011] IESC 14 are only among the most notable and important.

19. Besides, as Davitt P. observed in *The State (Quinn) v. Ryan* [1965] I.R. 70, 89, the guarantees in Article 40.4.2° must be construed in the light ofthe State's obligations to protect the person in Article 40.3.2° and the liberty of the person in Article 40.4.1°. Unless, as Davitt P. put it, these guarantees are to be regarded as "mere platitudes", it follows that Article 40.4.2° must accordingly be interpreted in a manner which makes it effective. Yet the very effectiveness of that remedy might well be compromised if issues of the adequacy of notice of criminal proceedings could not be raised via Article 40.4.2°, not least where the applicant might be obliged in practice to spend a longer period in unlawful custody than would otherwise have been the case. This point is illustrated by the following example.

20. Suppose that by reason of confusion and error in relation to name, identity or address a completely innocent person has been arrested on foot of a committal warrant and detained in custody in respect of a criminal charge of which he knows nothing. Is it to be said that such an applicant should be obliged to forfeit the protections of Article 40.4.2° - which does not require prior leave to commence the proceedings, which enables the applicant to apply for an inquiry to any judge of this Court of his or her choosing, which requires this Court forthwith to inquire into the complaint, which permits the Court to require the production of the applicant and the certification of the grounds of the detention and which is not a discretionary remedy - in favour of the remedy of judicial review which is not as expeditious, which does not contain these safeguards, which requires prior leave and is itself a discretionary remedy?

21. On putting this example in oral argument to Mr. McGillicuddy, he suggested in reply that much would depend on how straightforward the case in question might prove to be. He conceded, for instance, that issues of notice which might easily be resolved by means of a routine inquiry to the Gardai or the office of the Director of Public Prosecutions could readily be dealt with by means of the Article 40.4.2° procedure. Other more complex cases- of which he insisted this was one- could more properly be dealt with by means of judicial review. The difficulty with this approach, of course, is that the judge to whom the initial complaint under Article 40.4.2° is made is unlikely to be able to determine on an ex ante basis whether this is one of the more straightforward or more complex cases and to accommodate the proceedings accordingly.

22. At all events, whether the factual issues are complex or otherwise, the fundamental point remains that issues of notice are central to the fair administration of justice and the legality of any ensuing detention. Where an applicant can show that he has been convicted in circumstances where he did not receive adequate prior notice, then his ensuing detention has been flawed by a "basic defect as to make his conviction a nullity [so] that the detention was not in accordance with law": *The State (Royle) v. Kelly* [1974] I.R. 249, 254, *per* Henchy J. There can be no doubt at all- unless the words of the Constitution are to be reduced to purely platitudinous statements of benign goodwill that an inquiry into these matters falls squarely within the provenance of Article 40.4. 2°.

Conclusions
23. In conclusion, therefore, it follows that, for the reasons I have endeavoured to advance, I would reject the jurisdictional arguments advanced by the respondent that the issues bearing on the adequacy of notice in criminal proceedings cannot be raised by means of an application under Article 40.4.2° or that these issues should more properly dealt with by means of an application for judicial review.

24. In the light of this ruling, I propose now to continue with the balance of the inquiry into the legality of the applicant's detention pursuant to Article 40.4.2°.