[2020] IEHC 512

THE HIGH COURT

IN THE MATTER OF AN INQUIRY PURSUANT TO ARTICLE 40.4.2° OF THE CONSTITUTION

[2020 No. 1290 SS]

BETWEEN

C.I.

APPLICANT

AND

THE MEMBER IN CHARGE OF DÚN LAOGHAIRE GARDA STATION

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on Tuesday the 20th day of October, 2020

1. Where the custodian of a detained person complies with a request, as opposed to an order, of a judge to bring that person before a court, does the detention thereby become unlawful? While from a legal point of view that is a surprisingly open question, about which reasonable people may well disagree, the common-sense answer is No, and I think that is the appropriate legal answer as well.

Facts

2. The applicant was born in 1974 and is now 46 years of age. On 4th April, 2020 it is alleged that he committed a number of offences, in particular, assaulting his 90-year-old father, and taking and damaging his father's phone. Certain aspects of those matters have already been proved to the civil standard in the sense that a barring order has been made in relation to the applicant, but the allegations await proof to the criminal standard.

3. The injured party's complaint was made available to the court. While that complaint is not proof of its contents, it does at least outline the nature of the allegation, which was that the applicant came to the father's house looking for money, took the father's phone out of his hand preventing him from phoning the Gardaí, got the father in a headlock and hit him "*black and blue*". The applicant then left, but came back again looking for money. The father's grandson was hit on the back of the head. Gardaí were eventually called, but the applicant had left by that stage.

4. As the domestic violence proceedings were heard otherwise than in public under s. 23 of the Domestic Violence Act 2018, it seems appropriate to redact the applicant's name for the purposes of the present judgment.

5. The applicant was first arrested and questioned on 8th May, 2020 and a file was submitted to the DPP. Around two weeks before the re-arrest, the DPP gave directions regarding the charging of the applicant. As matters by this stage had moved into August, one need hardly point out that the courts system operated in a less full-throttled way compared to term-time or even compared to other vacation periods.

6. The applicant was at this point on bail and was signing on on a daily basis. On 25th August, 2020 he presented at Dún Laoghaire Garda Station to sign the station bail book. When doing so, he was informed by a member of An Garda Síochána that he was supposed to be in the Family Court in Dolphin House. He stated that he didn't need to

attend as it was for a barring order. The father had previously been brought by Gardaí to the Family Law Court as part of the COVID Community Engagement Scheme, which was being run to deal with domestic violence matters during the COVID-19 emergency.

7. At 10:55 a.m., Garda Rachel Carway arrested the applicant at Dún Laoghaire Garda Station under s. 10(2) of the Criminal Justice Act 1984 which allows for re-arrest for the purpose of charging. After the applicant was arrested, Garda J.P. Durkan, who had been one of the Gardaí involved in the COVID Community Engagement Scheme, contacted the station to ask if any Garda present knew whether the applicant would attend the family law proceedings. He was told that the applicant had just been arrested. The learned District Court judge, Judge Furlong, was informed of this and requested that the applicant be presented to his court in Dolphin House so that he could finalise the barring order application. The applicant was searched and placed in a cell. He requested a solicitor and that was facilitated by the Gardaí. Clearly those procedures took a certain amount of time.

8. Various communications with the applicant's solicitor were put to Garda Carway in evidence, but she had no particular knowledge of those and no oral evidence was called on behalf of the applicant. Following the issues of searching, placing in a cell and dealing with legal advisers, the remainder of the time was taken up with preparing and printing the charge sheets. Garda Carway herself prepared the charge sheets and at 11:47 a.m., the applicant was charged by Sgt. Killian Donohoe with three offences under s. 15 of the Criminal Justice (Theft and Fraud Offences) Act 2001, s. 3 of the Non-Fatal Offences against the Person Act 1997 and s. 2 of the Criminal Damage Act 1991.

9. Garda Carway intended to bring the applicant to the District Court on the criminal matters forthwith, but the judge's request to finalise the barring order was acceded to first. She had a discussion with Sgt. Donohoe at that point about availing of the evening court. The applicant was taken from Dún Laoghaire Garda Station at 12:15 p.m. to Dolphin House. The party arrived at 12:50 p.m. and the barring order matter was taken straight away. A barring order was made for a two-year period. That application finished after about 30 minutes at 1:20 p.m. The Gardaí rechecked the availability of the Criminal Court in the CCJ at that point, but were told that the relevant court had finished business and that they would have to wait until 4:30 p.m. for the evening court. The applicant was then brought back to Dún Laoghaire Garda Station, arriving at 2:00 p.m. A doctor was contacted to provide methadone for the applicant. He was then conveyed to the evening court, arriving at the CCJ at 4:29 p.m.

10. While being processed, he stated that he was awaiting a COVID test. He provided information recorded on a COVID screening/algorithm form timed at 4:40 p.m. that he had a cough and other symptoms. Based on the information provided, the attending nurse attached to the Irish Prison Service refused him access to the custody area complex in the CCJ, stating that a doctor's letter would be required. Garda Carway's evidence was that she had been made aware that she should bring prisoners to court through the custody area and not simply by walking through the front door of the CCJ. The applicant

was then conveyed back to Dún Laoghaire Garda Station and was examined by Dr. Moloney, following which a letter was furnished saying that no symptoms of COVID were displayed. However, it was now too late to bring the applicant back to the evening sitting of the CCJ. In Dún Laoghaire Garda Station, the applicant stated in front of a number of members of an Garda Síochána, "*[s]ure I don't have Corona-virus, I was only messing, I thought I would get out*."

11. Later that evening, the applicant sought an inquiry under Article 40.4 of the Constitution. The court has a discretion to entertain urgent applications in such manner consistent with justice as it sees fit, whether by physical hearing, on reading the papers, by remote hearing or simply on the phone. In this case, I accepted the application for an inquiry on the basis of a telephone hearing on application of the applicant's counsel, and I made an order for an inquiry under Article 40.4 of the Constitution, but dispensing with the production of the applicant until further order, given the possible COVID issue (which had not been totally clarified at that point).

12. On the return date, 26th August, 2020 at 11 a.m., the respondent produced a certificate under Article 40.4. The applicant was in the CCJ at that point, but in a custody area and wasn't in fact brought before a criminal court in deference to the Article 40 procedure. Given that it was accepted that the applicant didn't have COVID symptoms, I made a production order to allow consultation to take place in the Four Courts where the Article 40 hearing was to be held and adjourned the matter to allow instructions to be taken.

13. When the sitting resumed, I received an affidavit of Garda Carway and also received oral evidence from Garda Carway who was cross-examined. Having seen and heard her, I accept her evidence in full as consistent and coherent. I have received helpful submissions from Ms. Eilis Brennan S.C. (with Mr. Kevin Roche B.L.) for the applicant and from Mr. Tony McGillicuddy B.L. for the respondent, who of course bears the burden of proof. On 26th August, 2020 having heard the matter, I informed the parties of the order being made and indicated that reasons would be given later.

Issues

14. While the issues were phrased in different ways in the course of the hearing, I think it is possible to summarise them under essentially four headings:

    (i). whether the arrest was other than for the purposes of being charged;

    (ii). whether there was unlawful delay in charging the applicant;

    (iii). whether taking the applicant to Dolphin House rendered the detention unlawful;

    (iv). whether the requirement to bring the applicant to a criminal court "*as soon as practicable*" was breached overall.

Allegation that arrest was not for the purposes of being charged

15. It is clear from the evidence that the arrest was for the purpose of charging the applicant. I am satisfied that on the evidence the fact that an issue also arose regarding domestic

violence proceedings was not the purpose of the arrest. Ms. Brennan also argues that the purpose of the detention changed subsequently, but that is best dealt with under the heading of the conveyance of the applicant to Dolphin House which is addressed below.

Alleged delay in charging the applicant

16. Section 10(2) of the Criminal Justice Act 1984 requires an applicant to be charged "*forthwith*". It is in similar terms to s. 30A(3) of the Offences Against the State Act 1939, inserted by s. 11 of the Offences Against the State (Amendment) Act 1998, which was interpreted in *O'Brien v. Special Criminal Court* [2007] IESC 45, [2008] 4 I.R. 514 at 535, to mean that the charging should be immediate or at once and that there should be no delay. The applicant here was arrested at 10:55 a.m. and charged at 11:47 a.m. Clearly, certain procedures had to be gone through. He was searched, placed in a cell and made a request for a solicitor. Contact was made with a solicitor. His charge sheets were prepared and then were printed. Printing them wouldn't take that long, but preparing charge sheets for three offences under three different enactments could take a little time.

17. Going through the normal custody procedures and preparing and printing charge sheets doesn't amount to the kind of "*delay*" envisaged by Fennelly J. in *O'Brien*. A period of an hour, give or take, in a case with no special features, could not reasonably be regarded as involving unlawful delay.

18. Much reliance was placed by the applicant on *Whelton v. District Judge O'Leary & DPP* [2010] IESC 63, [2011] 4 I.R. 544, but the facts were crucially different – the applicant in that case presented for arrest by arrangement. As McKechnie J. points out at 573, the applicant attended by appointment "*at a given location, at a particular time and for a particular purpose*." There was one single charge sheet which could have been ready to go. In the present case, the applicant was signing on and so selected the time of his appearance himself, albeit within given parameters. What members of An Garda Síochána were available to deal with him at the time so selected was dependent on when, or indeed whether, he chose to appear. Almost by definition, the arrest of someone other than by appointment is going to involve some level of delay in charging that is materially greater than that involved where the person is arrested by appointment at a specific time.

19. Complaint was made in *Whelton* about the routine practice of putting a person in a cell awaiting charge. But those complaints must be read in the context of the facts in that case, specifically the fact that it was a case of presentation by appointment. A person who honours their appointment to attend a station at a given time to be arrested may well be safely accommodated in a public area, without being taken to a cell. But where a person is arrested otherwise than by appointment, for example simply when they show up on bail to sign the station book, it is not necessarily obvious that he or she can simply be left sitting in a public area of the station. Prudence would normally suggest that conveyance of such a person to a secure area would have obvious attractions. I am satisfied that the Garda Síochána placing this particular applicant in a cell was reasonable in the circumstances.

The complaint regarding the "*detour*" to facilitate the request by Judge Furlong

20. Ms. Brennan submits that there was no jurisdiction to bring the applicant to Dolphin House and that doing so for half an hour rendered the detention otherwise than for the purposes of being brought to a criminal court. She also submits that the delay was such that he was not brought to a criminal court as soon as practicable.

21. First of all, the purpose of detention has to be judged by reference to the dominant purpose. On the evidence, I am satisfied that bringing the applicant to a criminal court was the dominant purpose at all times. The fact that there might be subsidiary or incidental purposes during a period of detention doesn't mean that the dominant purpose was other than bringing the applicant to a criminal court. For example, had he been photographed under s. 12 of the Criminal Justice Act 2006, the time taken to do so wouldn't detract from the dominant purpose of taking him to a criminal court. More generally, in my view on balance (although as noted above I do appreciate that this is a relatively open question), if a person is in lawful custody, bringing him before a court to comply with either a direction or a request of a judge does not render the detention unlawful. The present situation is distinct from *The State (Trimbole) v. The Governor of Mountjoy Prison* [1985] I.R. 550, or similar cases where there was some form of stratagem or anything underhand; or as put by McKechnie J. in *Whelton v. O'Leary* at 575, something that would "*outrage, insult or defy the legal or constitutional authority or status of the court*". On the contrary, honouring a request from the judicial branch of government amounts to the authority of the court by the legal custodians. This is a different situation to that posited by Ms. Brennan, which was whether, if a judge requested someone's presence, the Gardaí could arrest that person. Such an arrest would require some form of bench warrant or other similar court order. However, the fact that the applicant was *already* in custody makes the situation significantly different. Facilitating the court's request was not of itself depriving the applicant of liberty. I don't think that the legality of a decision to facilitate a judicial request to see a detained person, "on the way" to the criminal court so to speak, can depend on the nature of the judicial request, but nonetheless it doesn't particularly help the applicant that:

    (i). the purpose of attendance was to vindicate the constitutional right to bodily integrity of another citizen; the Domestic Violence Act 2018 is designed to uphold the human rights and Constitutional rights of vulnerable citizens and the court must ensure that those rights are given effect to;

    (ii). more particularly in the present case, the barring order application arose from the self-same acts of the applicant (as found to the civil standard) that gave rise to the civil and alleged criminal liability;

    (iii). the inference to be drawn from Judge Furlong's reported comment about wanting to finalise the matter was that if the applicant wasn't brought to Dolphin House, the matter would have been adjourned again with the injured party being required to be brought to court again on a future occasion; and

(iv). the Gardaí themselves had a role in facilitating the making of the Domestic Violence Act application pursuant to the COVID Community Engagement Scheme.

22. Those elements are nonetheless just contextual, because I don't think the legality of the Garda actions here depend on why such a judicial request was made.

23. As regards the specific argument that the "*detour*", or as Ms. Brennan calls it, the "*frolic*", of attending the District Court meant that the applicant was not brought before a criminal court as soon as practicable for the purposes of s. 15(2) of the Criminal Justice Act 1951, Fennelly J. said in *O'Brien* (at 535), that this term "*allows some latitude to cater for practical problems such as travel or contacting judges and assembling courts*."

24. In *O'Brien*, a delay between the evening of Holy Thursday to noon on Good Friday was held not in breach of this requirement. The delay here is significantly less. Mr. McGillicuddy submits that going to Dolphin House did not in fact cause any significant delay, and indeed the hearing there only took 30 minutes. It seems to me that the legal system has to work in a joined-up manner and if multiple processes are going on at the same time, it would be counter-productive to demand that each be taken in isolation from all others. If a judge of the District Court requests the attendance of a prisoner to assist in facilitating the court, especially when that attendance is relatively brief, it would I think be unreasonable to hold that complying with such a request couldn't be accommodated by the notion of practicability for the purposes of the 1951 Act or would amount to a delay rendering an otherwise lawful detention unlawful.

Whether the requirement to bring the applicant to the District Court as soon as practicable was complied with overall

25. Mr. McGillicuddy submits that the clock stops at 4:40 p.m. on 25th August, 2020 when the applicant frustrated his being brought to a criminal court by falsely claiming to have COVID symptoms. I would agree that any delay thereafter must be his responsibility. The idea that the Gardaí should have ignored the Prison Service refusal of access through the custody suite and walked through the front door of the CCJ is not workable. It is clear from the evidence that neither Garda Carway nor any other colleague bypassed the procedures that she had been informed of, which are there, her evidence was, for safety purposes. That is doubly so where prisoners are claiming to have COVID symptoms. Bringing them through the front door would be irresponsible under those circumstances.

26. So the only relevant delay is between 11:47 a.m. when the applicant was charged and 4:40 p.m. when he would have been brought to court had he not frustrated that. In my view, that sort of delay is not in breach of the requirement to come before a court as soon as practicable in all the circumstances. That conclusion, which I have arrived at independently on the evidence in this particular case, is nonetheless reinforced by the fact that a period around three times that level of delay was accepted as lawful in *O'Brien*.

Order

27. Accordingly, the order I made on 26th August, 2020 was as follows:

(i). as I was satisfied that the applicant was in lawful custody, I dismissed the application;

(ii). I indicated that the applicant could therefore be brought to the District Court on the criminal matter; and

(iii). I adjourned the question of costs generally with liberty to apply.

28. Finally, I was informed that there doesn't seem to have been any amendment in the context of the COVID emergency to the obligations regarding bringing prisoners as soon as practicable to the court under s. 15(2) of the Criminal Justice Act 1951. Broadly I think no new legislation is necessary because the concept of practicability inherently builds in scope for difficulties such as those created by the pandemic, but if I am wrong about that, the matter can no doubt be considered in any future proposals for further legislation on the consequences of the COVID emergency for the legal system.