

THE HIGH COURT
IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLE 40.4.2 OF THE
CONSTITUTION OF IRELAND

[2021] IEHC 734
RECORD NO. 2021/1470 SS

BETWEEN

A.H.

APPLICANT

AND

THE GOVERNOR OF CASTLEREA PRISON

RESPONDENT

EX TEMPORE JUDGMENT of Ms. Justice Niamh Hyland delivered on 26 October 2021

Summary

1. This Article 40.4.2 inquiry raises the following net issue. Does a valid committal warrant only operate to lawfully detain an applicant who is in unlawful detention immediately prior to the making or execution of same if he is first released from unlawful detention, or can it lawfully detain him even where there is no break between the execution of the warrant and the unlawful detention?
2. This conundrum arises in circumstances where no challenge is raised to the validity of the fresh committal warrant per se but where it is argued on behalf of the applicant that it cannot have legal effect as the applicant was not released from his unlawful detention before it was served and executed against him.

Background

3. The applicant is awaiting judgment from the Special Criminal Court (“the SCC”) having had a trial that ended on 6 August. Following the end of the trial, the committal warrant remanded him up to 22 October 2021 in circumstances where judgment was fixed for that date. However, the date for judgment was extended to 8 November 2021 but in error, no committal warrant was made for the period after 22 October.
4. It was in those circumstances that the application was made for an order under Article 40.4.2 directing the applicant’s release on the morning of 24 October.
5. I directed an inquiry in the morning of 24 October, and the matter was returned to that afternoon at 4pm. It appears from the affidavit of Mark Breen sworn 26 October after the hearing as directed by me that the SCC made a fresh committal order (the committal warrant of 24 October) sometime before 3.18pm which detained the applicant in lawful custody until 8 November 2021. A certificate was provided by the detainer, being the Assistant Governor of Castlerea Prison, certifying that he held the applicant in custody pursuant to the committal warrant of 24 October 2021.

Arguments of the Parties

6. Despite that change of circumstances, the application went ahead on behalf of the applicant on the basis that the detention remained unlawful as (a) the applicant ought to have been released from unlawful detention; (b) the committal warrant should then have been served upon him and (c) only at that stage could the execution of the warrant commence.

7. It was conceded that if those steps had been taken, the applicant could have been arrested on foot of the warrant and held pending his transfer to another prison provided the exclusive purpose of holding him was to execute the warrant.
8. There was also a further linked but distinct argument that holding him while waiting for the transfer to another prison was not part of the process of execution and thus not covered by the warrant.
9. On the other hand, while conceding the applicant's detention had been unlawful between the date of expiry of the first committal warrant and the making of the warrant of 24 October, the State argued that the applicant was in lawful detention from the time the SCC made the order issuing the 24 October committal warrant, without the necessity for a prior release of the applicant, or service of the warrant of 24 October upon him.

Relevant Case Law

10. I asked the parties to provide relevant authorities to me. The applicant cited *Hegarty v Governor of Limerick Prison* [1997] IEHC 39, *State (Trimbole) v The Governor of Mountjoy Prison* [1985] IR 550 and *Dunne v Clinton* [1931] 2 JIC 1201. The respondent cited *Gary Miller v Governor of the Midlands Prison* [2014] IEHC 176 and *McDonagh v Governor of Mountjoy Prison* [2016] IECA 32.
11. *Hegarty* concerned a situation where a judge had sat as a member of the SCC notwithstanding his removal as a member of that court. The applicant had been remanded in custody at a sitting where the removed judge was a member. It was decided to release the applicant and to then immediately re-arrest him as soon as he stepped out of the prison. He was then re-charged. The applicant argued that the re-arrest was a device to impede the proper vindication of the applicant's constitutional rights.
12. *Geoghegan J.* held that the original committal warrant was invalid and therefore he was not in lawful custody. He noted:

"As he was not in lawful custody, the Applicant was entitled to have the unlawful custody terminated. But this could not give him an immunity to prosecution for the offences which he was alleged to have committed and for which he had been charged. The Director had a public duty and indeed a constitutional duty to proceed with the prosecutions. He therefore had to consider how best this could be done effectively".
13. This passage is heavily relied upon by the applicant. This case is being relied upon to assert that where there is an unlawful detention, the only way a person can have the unlawful custody terminated is by being released from prison. In my view that case is not necessarily authority for that proposition. As ever, it is important to understand the context. In that case, the applicant had been in custody, had been released, had been re-arrested and the legality of his subsequent re-arrest was under challenge. The argument was not about whether he required to be released. That release had already taken place.

14. In Hegarty, Geoghegan J. concluded that as a consequence of the actions of the parties, the applicant was lawfully now in exactly the same position as he would have been had there been no unlawful remand by an unlawfully constituted SCC. He was therefore satisfied that the applicant was being detained in accordance with law.
15. The applicant also relies upon Trimbole and in particular on the passage where Finlay C.J. refers to the courts having a positive duty to protect persons against the invasion of their constitutional rights and says that, where an invasion has occurred, the court must restore as far as possible the person to the position in which he would have been in if his rights had not been invaded. In that case, there was of course a scheme deliberately involving abuse of the process of the courts.
16. I should highlight that part of the judgment at p.575 where Finlay C.J. observes as follows:

“It is clear that not every unlawful arrest, even though it may be classified as conscious and deliberate, gives to a person so arrested, after his necessary release from illegal detention, any immunity from the proper enforcement of due processes of law or makes him unamenable to answer to criminal offences in our courts.”

Those words “necessary release from illegal detention” might on one reading suggest there is an immutable rule that a person unlawfully held must be released before any further step can lawfully be taken to detain him or her.
17. However, that was not a question before the court in Trimbole. Moreover, that same statement may also be a statement of an uncontroversial proposition i.e. that when a person is unlawfully detained with no basis to justify his or her detention, they must be released. This is the very principle that Article 40.4.2 establishes. In other words, it is not necessarily contemplating the position in this case i.e. that a person who is unlawfully detained is subsequently the subject of a valid order detaining him or her, albeit without any break in the detention. For that reason, I do not treat those words as requiring release in this case.
18. Importantly, at p.577, Finlay C.J. observed that if the challenge to the legality of the prosecutor’s detention had been based on a want of jurisdiction or if the successful challenge to the original arrest had been one of form, creating an illegality but not constituting either a conscious and deliberate violation of his constitutional rights or the abuse of a process of the court, then the orders of the district judge, having been made within jurisdiction, would justify the detention of the prosecutor irrespective of the method by which he had been brought before the court.
19. That seems to me an important statement as it seems to envisage some circumstances in which a prior illegality resulting in a person being brought before the court will not necessarily invalidate an otherwise valid order. It will depend upon the nature of the prior illegality.

20. Dunne v Clinton was also relied upon by the applicant, in particular the passage where it is asked whether it is justification for a prolonged detention or imprisonment to say that the crime is being investigated. The response was that it was not, as the principle underlying habeas corpus cannot be waived aside for the sake of some indefinite investigation within the will and determination of the police officers themselves. In my view that case has no particular application to the facts of this case.
21. Finally, I should address the case of McDonagh v Governor of Mountjoy Prison, where the question was whether a detainer who no longer wished to rely on the original certificate was required to seek leave from the High Court to amend or replace the existing certificate. In that case, the original warrant of committal was defective but it had been corrected by the District Court prior to the hearing. The High Court held the original warrant of committal was legally infirm and the applicant's release was directed.
22. The Court of Appeal decided it was permissible to seek leave from the High Court to amend or replace the existing certificate during Article 40.4.2 proceedings save where it was prejudicial or unfair or where the application was too late.
23. In that particular case, the applicant was on bail. However, the court held that the fact that the applicant was on bail was not a relevant factor.
24. It is in my view implicit in that decision that a detainer might be able to justify the detention of a prisoner who had been unlawfully held on foot of the original certificate on the basis of an amended certificate. At a minimum, the decision must be interpreted as inconsistent with the proposition that there is an absolute requirement that an unlawful detention must result in release before an otherwise lawful detention can take effect. If that was the case, there would be little point in giving leave to amend a certificate certifying the basis of the detention since, in the vast majority of cases, the necessity to amend the certificate comes from the fact that the original certificate does not provide a valid basis for the detention.

Summary of Applicable Principles

25. In summary, having regard to the case law, it seems to me the following principles apply:
 - Unlawful detention that remains in being at the time of the inquiry must result in an order for release;
 - Unlawful detention may in principle be terminated either by release or by a fresh valid committal warrant. No authority has been cited for the proposition that unlawful detention must be terminated exclusively by release;
 - The case law considered above does not in my view impose an absolute prohibition on execution of a valid warrant on a person in unlawful custody, although it is true to say that none of the cases raise this particular point squarely. However, I have come to this conclusion, inter alia, having regard to the observation in Trimbole that a District Court order made within jurisdiction can justify the detention of the prosecutor irrespective of the method by which he had been brought before the

court (thus accepting that a prior illegality does not necessarily invalidate an otherwise valid detention) and having regard to the decision of the Court of Appeal in McDonagh for the reasons stated above;

- Despite the absence of an outright prohibition, the constitutional right to liberty nonetheless requires that a court consider carefully in any habeas corpus application whether an order that prima facie provides a lawful basis for detention is in fact of no legal effect because it has been applied to a person who was, immediately prior to its execution, in unlawful detention;
- The court must consider whether permitting reliance upon the valid warrant as a basis for detention would infringe the constitutional rights of the applicant including but not limited to considering;
 - the positive duty on a court to restore as far as possible the person whose constitutional rights have been breached to the position in which he would have been had his rights not been invaded;
 - whether upholding the legality of the detention would be prejudicial or unfair on the applicant;
 - Finally, and importantly, it must carefully consider the nature of the prior illegality. A conscious and deliberate breach of the applicant's rights is likely to have very different consequences for the validity of his subsequent detention as compared to a situation such as that in Hegarty where the parties wished to regularise the irregular and were determined to do this by lawful means.

Application of Principles

26. First, in considering whether permitting reliance upon the warrant of 24 October as the basis for his detention would infringe the constitutional rights of the applicant, I note that I must seek to restore him as far as possible to the position in which he would have been had his rights not been invaded. In one scenario, he would have been released on 22 October when his warrant expired, and he may therefore not have been available for the warrant of 24 October to be executed against him. However, even on the applicant's case, it is accepted that at this point in the case, should he be released, he would be liable to be immediately re-arrested. This seems to me an appropriate concession: following Hegarty, when an attempt is being made to regularise a situation, and there is no malign purpose or lack of bona fides, it is permissible to release and re-arrest.
27. A release and immediate re-arrest so that the warrant of 24 October can be executed against him ultimately puts him in no different a situation than he is at present. It does not represent a vindication of his constitutional rights except perhaps in the most technical of senses.
28. Accordingly, the application of that principle does not require that his current detention pursuant to the warrant of 24 October requires to be declared unlawful and his release ordered.

29. Second, I should consider whether upholding the legality of the detention would be prejudicial or unfair on the applicant. The matters to be considered in this respect are similar to those in respect of the previous consideration. In truth, his situation is precisely the same whether the 24 October warrant is treated as capable of being executed hard on the heels of his unlawful detention with no break between its execution and the unlawful detention, or as only capable of being executed once he has been released and re-arrested on foot of same. The first scenario does not in my view prejudice him. The second scenario is not fairer to him.
30. Finally, I must look at the circumstances of the prior illegality. The prior unlawful detention appears to have been caused by inadvertence i.e. a failure to order a new committal warrant on the expiry of a previous warrant and the applicant appears to accept this is the position. There is no evidence and no allegation of a deliberate and conscious breach of the applicant's rights or mala fides. I infer that the order made by the SCC was done to regularise the situation, as in Hegarty. The regularisation process was done lawfully and there is no challenge to the committal warrant of 24 October.
31. In summary, there is no failure to vindicate the applicant's constitutional rights by the execution of the 24 October warrant in circumstances where the warrant provides a legal basis for holding him, thus bringing to an end his illegal detention, and where he is in no different a position than he would have been had his rights not been breached.
32. In all those circumstances, I conclude that despite the absence of a break between the unlawful detention, and application and execution of the warrant of 24 October, the applicant's constitutional rights did not require his release prior to the application and execution of the warrant and accordingly I refuse the application on this ground.

Execution of the warrant

33. There was a separate ground of objection made by counsel for the applicant i.e. that execution only commences once the armed prison escort arrives to collect him and that the mere making of the order by the SCC did not render the detention lawful. Accordingly, he says there was no legal basis for the detention post the making of the order.
34. However, counsel for the State argues that from the time the committal warrant was made by the SCC, it took legal effect and there is no difference between the making of the warrant and the execution of the warrant insofar as its legal effect is concerned. She also submitted that holding the applicant until the armed guard could arrive was part of the execution process.
35. During the course of the hearing it transpired that although when the hearing commenced the applicant was being held in Castlerea prison, in fact during the hearing the applicant had been collected from Castlerea prison by armed escort and so by the time the matter was adjourned for me to consider my judgment, it appeared that he was in transit.
36. In those circumstances, counsel for the applicant submitted that the urgency of the matter had somewhat lessened. I considered that it was desirable that before I gave my

ruling, I would have the benefit of evidence from the State as well as from the applicant since up to that point – for understandable reasons given the urgency of the matter - I was simply being given factual updates by counsel for the State.

37. I therefore directed the filing of an affidavit setting out the relevant facts and I received same on 25 October. That sets out the chain of events as follows:
- "4. I continued to liaise regularly with the CSSO over the course of the afternoon and at 3.18pm I received copy of a new warrant from Special Criminal Court which detained AH in lawful custody until the 8th November '21.
 5. I say and believe that I informed Chief Officer Donnelly (Castlerea) and Detail Office that we may need to bring prisoner to Portlaoise to execute warrant so they could make provisional preparations.
 6. At 3.33pm I got through to the Registrar of the Special Criminal Court on her mobile phone to organise receipt of the actual warrant. As there was no Prison Service staff on duty in the Criminal Courts of Justice I asked her to bring it to Mountjoy for the attention of Chief Officer Bayley to ensure that the Prison Service had possession of the warrant, she duly obliged. I asked C.O. Donnelly to contact C.O. Bayley to inform him of the situation and to secure the warrant safely.
 7. I contacted 'Operations Out of Hours Requests' at 3.56pm to confirm that the warrant needed to be executed in Portlaoise Prison. I then received a phone call and e-mail from Don Culliton (Director of Operations) confirming that warrant should be executed in Portlaoise Prison. I continued to liaise regularly with Don Culliton over the course of the afternoon and evening over the phone and via e-mails.
 8. I asked Chief Officer Donnelly to contact Chief Officer Bayley from Mountjoy Prison to request that the warrant be brought directly to Portlaoise and to inform the Chief's Office in Portlaoise of same.
 9. I then received a scanned certificate from the CSSO for this relevant warrant which I signed and scanned back to the CSSO at 4.17pm, with a copy of the fresh warrant from the Special Criminal Court.
 10. At 5.30pm I entered the new warrant on PIMS and C.O. Donnelly confirmed same prior to the escort's departure. At 5.45pm C.O. Donnelly requested approval of the Transfer Order from Operations which was approved by Don Culliton at 5.56pm.
 11. I say and believe that the escort departed Castlerea at 6.11pm, the warrant was executed in Portlaoise Prison and the escort arrived back in Castlerea at 10.27pm. I say and believe that while the warrant was duly executed, I am informed that this did not involve the release and re-arrest of the prisoner as this was not mandated by the warrant.

12. I further say and believe that the prisoner is now in custody on foot of this warrant, following the execution of the warrant in Portlaoise Prison and lodging within the prison system, and further that once the Applicant had been lodged in Portlaoise prison had taken place the prisoner was transferred to Castlerea prison as part of the normal executive functions in this regard.”
38. It may be seen that the affidavit treats the warrant as being executed once the applicant reached Portlaoise. However, given that the standard wording of the warrant is that the person to whom the warrant is addressed must lodge the applicant in Portlaoise prison, and all committal warrants issued by the SCC are in similar terms, the warrant must at least authorise detention for the purposes of bringing a person to Portlaoise prison. If that were not the case, there would be no legal basis for detaining persons for that purpose.
39. In this case, I find as a matter of fact that having regard to the affidavit evidence filed before me, in particular paragraph five, the continued detention of the applicant after 3.18pm was exclusively for the purpose of executing the warrant and was therefore lawful detention. Similarly, by the time I rose to consider my judgment, the applicant was in transit and now, at the date of delivery of this judgment, the warrant has clearly been executed against him.
40. In summary, because the detention post the making of the order of 24 October was for the purpose of executing the warrant, I find the applicant was lawfully held in custody in Castlerea prison pursuant to the committal warrant of 24 October from the time of its making and I refuse the application on this ground also.

Service of the warrant

41. Finally, the applicant objects to the fact that the fresh committal warrant was not served on the applicant in custody. No authority is cited to support an entitlement to have a fresh committal warrant served in those circumstances. It is clear that the committal warrant of 24 October was brought to the attention of the applicant’s solicitor as he was aware of same by the time the matter came back before me at 5pm on 24 October.
42. In my view, no procedural or substantive prejudice that I can identify has accrued by the failure to serve in this case, although I consider that it would have been better for the warrant to be served upon the applicant as soon as the Assistant Governor of Castlerea prison received same, as the applicant would then have known that his unlawful custody had terminated and that he was now being held in Castlerea exclusively for the purposes of executing the fresh warrant. In summary, I do not therefore find his detention unlawful by reason of the failure to serve the fresh warrant.

Conclusion

43. In the circumstances, I find that the applicant’s detention on the basis certified is lawful and I therefore refuse the application under Article 40.4.2.