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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY LIAM TIERNEY FOR JUDICIAL REVIEW

Before Kerr LCJ and Campbell LJ

KERR LCJ

Introduction

[1] This is an application by Liam Tierney for judicial review of decisions and actions taken by the Police Service for Northern Ireland and the Prison Service in relation to a warrant issued by Enniskillen Magistrates' Court. The applicant had failed to appear for a scheduled hearing on 6 September 2004 and on 13 September 2004 the court ordered that the recognisance of £750, which he had entered as a condition of an earlier grant of bail, be estreated, together with costs of £5. The warrant was issued on 19 November 2004 in relation to his failure to discharge the sum. It stipulated that he should serve twenty-one days' imprisonment in default of payment of the estreated amount.

[2] The police service executed the warrant on 10 January 2008. The applicant was arrested and taken into custody and detained there until he was granted interim relief on 16 January. By this application Mr Tierney challenges the lawfulness of his arrest on foot of a warrant which, he claims, was neither executed within a reasonable time nor returned to the resident magistrate who made the order upon which it was issued with a certificate of reasons for the failure to execute it. He also asserts that his detention on foot of that warrant was unlawful.

Background

[3] The applicant had not appeared to answer his bail because, according to his solicitor's affidavit, he was subject to a threat, as a result of which he left the jurisdiction, returning in December 2006. He was arrested on 9 January 2008 on a charge of armed robbery and appeared on that charge before Belfast Magistrates' Court on 10 January. He was granted bail at that court on the robbery charge but was unable to perfect it and, in the meantime, the warrant of 19 November 2004 was executed and he was detained on foot of it also. Bail was perfected on 16 January and on the same date he was granted interim relief in the form of release from the custody based on the execution of the warrant when he applied for leave to apply for judicial review of the decisions that are under attack in the present proceedings.

[4] The applicant's solicitor contacted the police on 10 January 2008, asking whether the warrant had been returned to the magistrate who had issued it and, if so, whether it was accompanied by a certificate of reasons for the failure to execute it within a reasonable time. The arresting officer replied on 15 January that he could not offer any information about this, as inquiries would have to be made with the Antrim Road warrants' office or Enniskillen court. The police have not been able to locate the action sheet which should have recorded any attempts to execute the warrant. The applicant has claimed to be unaware of any attempts to execute it before 10 January 2008. It is now clear that the warrant had not been returned to the magistrate for re-issue.

[5] In an affidavit filed on behalf of the Prison Service, senior prison officer Laurence Clements has deposed that when the applicant arrived at HMP Maghaberry, he noticed that the warrant "incorrectly referred to" the applicant being liable to 21 days' detention. Mr Clements asserted that there was no provision in the Magistrates' Courts (Northern Ireland) Order 1981 for a 21 day period of imprisonment in default of payment of monies adjudged to be due on foot of a court order. He exhibited to his affidavit a Prison Service table of the days to be served in respect of various fines, and suggested that the period for a £750 fine was 28 days' imprisonment. When he advised Enniskillen Court Office of this, the official asked him to amend the warrant. Mr Clements suggested that warrants were regularly amended by prison officials on the instructions of a court clerk.

[6] On the hearing of the application for judicial review the respondents accepted that the practice of amending court orders in this way could not be defended. Moreover, it is now clear that Mr Clements was wrong in his claim that only a period of imprisonment of twenty eight days could be imposed in respect of a fine or other order to pay £750. Article 138(4) of the 1981 Order deals with the estreat of a recognizance: -

> "(4) Upon ordering the estreat of a recognizance the court may issue a warrant—
>
> > (a) to levy the amount forfeited by distress and sale of the property of any person bound by the recognizance, and
> >
> > (b) in default of distress to commit such person to prison as if for default in the payment of a sum adjudged to be paid by a conviction;
>
> and accordingly the period for which such person may be committed shall not exceed that specified in Schedule 3."

[7] Schedule 3 to the Order provides in paragraph (1): -

> "Subject to the following provisions of this Schedule, the periods set out in the second column of the following Table shall be the maximum periods of imprisonment which may be imposed in default of payment of a sum adjudged to be paid by a conviction due at the time imprisonment is imposed."

[8] For an amount exceeding £500 but not exceeding £1000, the stipulated maximum period of imprisonment is twenty-eight days. It follows that the magistrate was perfectly entitled to impose a period of imprisonment of twenty-one days. Even if he had not been, we are satisfied that the respondents were correct to accept (as they did) that the Prison Service did not have lawful authority to amend the warrant in the way that was done in this instance. If indeed there is a practice of prison officials amending warrants after consultation with court clerks, it should cease forthwith.

Article 158 of the 1981 Order

[9] Article 158 (1) of the Order deals with the duration of validity of warrants. It provides: -

> "A warrant issued in connection with proceedings before a magistrates' court by a resident magistrate or lay magistrate shall remain in force until it is executed or until it is withdrawn by the person who issued it, or if he is unable to act, by any resident magistrate."

[10] For the applicant, Mr Sayers accepted that the effect of this provision in the present case was that the warrant issued in November 2004 remained in force. No challenge was made to its enduring validity. Rather, the focus of the applicant's attack was on the validity of the purported execution of the warrant. For the respondents, Mr David Dunlop argued that the continuing validity of the warrant meant that it could be executed at any time, notwithstanding other provisions in the Order. The resolution of these competing arguments depends critically on the effect of article 115 to which we now turn.

Article 115

[11] The cross heading of this article is 'Duties of Constabulary and others with respect to warrants'. Mr Dunlop attached a great deal of significance to the fact that the provision was designed to deal with the duties of police officers. He argued that the imposition of duties on police officers was not intended to restrict the power to execute the warrant. We will consider that issue presently.

[12] Under paragraph (1) of the article the provisions of any enactments regulating the duties of police officers with respect to warrants and their execution are to apply to warrants issued under this Order to members of the Police Service of Northern Ireland. Paragraph (2) is the most important provision in this context. It provides: -

> "Without prejudice to paragraph (1), where for any reason the person to whom a warrant is addressed is unable to execute it within the time fixed by the warrant (or if no time has been so fixed, within a reasonable time), he shall return the warrant to the resident magistrate or other justice of the peace [now lay magistrate] who issued it or who made the conviction or order upon which it was issued together with a certificate in the prescribed form of the reasons why the warrant has not been executed."

The effect of failure to comply with article 115 (2)

[13] Mr Dunlop argued that we should construe this provision as containing merely a directory instruction and that a failure to observe it should not lead to the quashing of the execution of the warrant. Mr Sayers submitted that such an approach would unwarrantably dilute the important safeguard of judicial superintendence of the execution of a warrant when an inordinate time had elapsed from the time that it had first been issued.

[14] *R (Shields) v Justices of Tyrone* [1907] KB 46 is authority for the proposition that the section 33 of the Petty Sessions (Ireland) Act 1851 (which is in similar terms to article 115 (2)) enables justices to issue a second warrant, even where the constable cannot prove that he was unable to execute one issued earlier. The requirement that a constable return to court where he is "unable" to execute the warrant was held to be directory and not mandatory.

[15] The modern approach to the consequences of procedural failures is no longer preoccupied with the question whether the provision is directory or mandatory. It is now well settled that one should seek to ascertain what the legislature intended should be the effect of a failure to comply with a procedural requirement – see, for instance, *R v Immigration Appeal Tribunal, ex parte Jeyeanthan* [1999] 3 All ER 231 and, in this jurisdiction, *Re Misbehavin' Ltd* [2005] NICA 35. The most recent statement of this principle is to be found in the judgment of Fulford J in *R v Ashton, R v Draz, R v O'Reilly* [2006] EWCA Crim 794, guardedly approved in the opinion of Lord Bingham in *R v Clarke, R v McDaid* [2008] UKHL 8, at paragraph 14*:* -

> "In our judgment it is now wholly clear that whenever a court is confronted by failure to take a required step, properly or at all, before a power is exercised ('a procedural failure'), the court should first ask itself whether the intention of the legislature was that any act done following that procedural failure should be invalid. If the answer to that question is no, then the court should go on to consider the interests of justice generally, and most particularly whether there is a real possibility that either the prosecution or the defence may suffer prejudice on account of the procedural failure."

[16] In *Waugh v Lord Advocate* the High Court of Justiciary in Scotland held that it would be oppressive to execute a warrant fifteen months after it had been issued. Delivering the judgment of the court, the Lord Justice Clerk referred to a similar case of *Beglan, Petr* (2002 SCCR 932) in which there had been a delay of almost a year. In that case the Crown had given no satisfactory explanation why the warrant had not been executed and it was concluded that the failure of the authorities to execute the warrant was oppressive. It was determined that a similar result in *Waugh* was inevitable since the essential feature in both cases was a seemingly unreasonable and oppressive delay that the Crown cannot justify. It is significant that, in the present case, no explanation for the failure to execute the warrant has been proffered. In particular, it has not been suggested that the applicant's absence between September 2004 and December 2006 made the execution of the

warrant impossible. It has not proved possible to say whether any attempt to execute was made during that period.

[17] In the Republic of Ireland, a series of cases have challenged the validity of the execution of a warrant under article 40.4.2 of the Irish Constitution. The relevant parts of article 40.4 are: -

> "1° No citizen shall be deprived of his personal liberty save in accordance with law.
>
> 2° Upon complaint being made by or on behalf of any person to the High Court or any judge thereof alleging that such person is being unlawfully detained, the High Court and any and every judge thereof to whom such complaint is made shall forthwith enquire into the said complaint and may order the person in whose custody such person is detained to produce the body of such person before the High Court on a named day and to certify in writing the grounds of his detention, and the High Court shall, upon the body of such person being produced before that Court and after giving the person in whose custody he is detained an opportunity of justifying the detention, order the release of such person from such detention unless satisfied that he is being detained in accordance with the law."

[18] In the unreported 1991 case of *Dunne v DPP*, dealing with the duty of a police officer in relation to the execution of a warrant the court said: -

> "A warrant of apprehension is a command issued to the Gardai by a Court established under the Constitution to bring a named person before that Court to be dealt with according to law. It is not a document which merely vests a discretion in the Guards to apprehend the person named in it; it is a command to arrest that person immediately and bring him or her before the Court which issued it. That it is a command rather than merely an authority or permission to arrest can be clearly seen from the terms of the warrant in the instant case."

[19] In *The State (Flynn and McCormick) v. The Governor of Mountjoy Prison,* (unreported, High Court 6 May 1987) Barron J stated: -

> "In my view, it is implicit that the warrant should be issued there and then when the sentence is imposed, and, where the sentence is imposed on appeal, as soon as is reasonably possible. Likewise, once it has issued, it must be executed as soon as is reasonably possible. If not, then a defendant sentenced to a term of imprisonment may find himself or herself serving such sentence at a future date merely through a failure of administrative processes. The term of a sentence is not its only feature; its commencement date is equally important. If it is likely to be delayed, then there can be no certainty as to the sentence imposed; and, if it is delayed, then the sentence served may well not be the sentence imposed. Of course, none of this is applicable to a case where the failure to execute the warrant is the result of evasion on the part of the defendant himself.

[20] Both *Dunne* and *Flynn and McCormick* were cited with approval by Denham J in *Dalton v Governor of the Training Unit* [2000] IESC 49, a case involving a warrant for imprisonment for non-payment of fines. *Casey v Governor of Cork Prison* [2000] IEHC 64 and *Bakoza v Dublin Metropolitan District Court* (unreported High Court, July 2004) are further cases in which warrants were quashed for delay in service, of periods which are significantly less than that in this case. The reasons given for quashing the warrants included prejudice to the defendant's right to a fair trial, but it is to be noted that *Dalton* and *Flynn and McCormick* both dealt with warrants issued after conviction, and it was held that delay was still tainted them.

[21] It appears to us that article 115 (2) provides an important protection against the tardy execution of warrants in requiring the persons to whom they are addressed to return the warrants to the magistrate who issued them or who made the convictions or orders upon which they were issued. If a failure to execute a warrant could simply be overlooked, this would represent, in our opinion, a considerable inroad in the efficacy of the safeguard that is provided for in the article. In this context, the fact that the duty is cast on the police officer does not sound on the question whether non-compliance should have the consequence of making the unreasonably delayed execution of a warrant invalid and we must reject as misplaced Mr Dunlop's emphasis on this aspect.

Conclusions

[22] We have concluded that where there has been a delay in the execution of a warrant, article 115 (2) requires the police officer to whom the warrant was

issued to return it to the magistrate who authorised its issue. An explanation – if any is available – for the failure to execute the warrant should be provided. Provided he or she is satisfied that there is a reasonable explanation for the failure to execute the warrant, the magistrate may authorise its re-issue.

[23] For the reasons that we have given, the effluxion of time does not affect the validity of the warrant but it will invalidate the execution of the warrant unless the period of time that has elapsed is not unreasonable. We have also concluded that the Prison Service did not have lawful authority to amend the warrant in the manner that occurred in this instance. The execution of the warrant must therefore be quashed and we will issue an order of certiorari to that effect.