

THE HIGH COURT**JUDICIAL REVIEW****[2015 No. 354 J.R.]****BETWEEN****NAPOLEON SILAGHI****FIRST APPLICANT****AND****JUDGE O'HAGAN****RESPONDENT****THE HIGH COURT****JUDICIAL REVIEW****[2015 No. 355 J.R.]****BETWEEN****LUCIAN MARINA****SECOND APPLICANT****AND****JUDGE O'HAGAN****RESPONDENT****JUDGMENT of Mr. Justice White delivered on 27TH January 2017**

1. By separate orders of leave of 22nd June, 2015, the High Court granted the applicants leave to apply for judicial review for the following reliefs.

(i) An order of *certiorari* by way of an application for judicial review quashing the order of the respondent made on 9th June, 2015, affirming a sentence of six months imprisonment imposed on the applicant by the District Court on 7th January, 2014, and committing the applicant to Castlerea Prison for a period of six months for an offence of entering a building as a trespasser and committing an arrestable offence, to wit criminal damage herein.

(ii) An order of *certiorari* by way of an application for judicial review quashing the order of the respondent made on 9th June, 2015, affirming a sentence of six months imprisonment imposed on the applicant by the District Court on 7th January, 2014, and committing the applicant to Castlerea Prison for a period of six months, for an offence of stealing property to wit copper wires, electrical motors, electrical fuses, aluminium parts and various metal parts.

(iii) An order of *certiorari* by way of an application for judicial review quashing two committal warrants after appeal issued by the respondent on 9th June, 2015, each committing the applicant to Castlerea Prison for a period of six months and numbered #1 and #2 respectively.

The court has been informed that while leave was granted on paras. 4 and 5 of the order that these are not being proceeded with.

2. The applications were grounded on the affidavit of John M. Quinn, Solicitor, sworn on 22nd June, 2015. Motions were issued on 23rd June, 2015 in each case returnable for 24th June, 2015.

3. A statement of opposition was filed in each case on 22nd June, 2016, supported by affidavits of Rory Hayden, State Solicitor for Co. Cavan sworn on 18th January, 2016.

4. Both applicants were admitted to bail pending the judicial review.

5. The matter was heard before this Court on 14th of October, 2016, and judgment reserved. It was conceded on behalf of the Respondent that the committal warrant in respect of the First Applicant on the offence contrary to Section 12(1) (b) and (3) of the Criminal Justice (Theft and Fraud Offences) Act 2001, was bad on its face and the First Applicant was entitled to an order of *certiorari* in respect of same.

6. The court was also informed that the First Applicant was no longer seeking to argue that there should have been disparity in sentencing between him and the other accused because of his less blemished previous record. Counsel for the First Applicant accepted that in the light of a recent Court of Appeal decision DPP v O'Neill [2016] IECA 58. that argument was not longer being made. That is a correct interpretation of the law, even though this courts view was that the sentence imposed on Mr Silaghi was somewhat harsh considering the difference in his previous record from the other co- accused, and the explanation offered to the appeal court of the nature of the one blemish on his character, the road traffic conviction.

7. Both applicants appeared before Virginia District Court on 7th January, 2014, facing a number of charges and the applicants pleaded guilty to the following offences:-

(i) on the 5th August, 2013, at Bailieboro Foundry, Bailieboro, Co. Cavan in the court area and district aforesaid, having entered a building known as Bailieboro Foundry as a trespasser with intention to commit an arrestable offence to wit theft; and

(ii) on the 5th August, 2013, at Bailieboro Foundry, Bailieboro, Co. Cavan in the court area and district aforesaid did steal

property to with electrical fuses, aluminium parts and various metal parts estimated at €4,000, the property of John Fleming.

8. Facts were heard and mitigation was offered in the District Court where Judge McBride sentenced both applicants to six months imprisonment on each of the two charges same to be served concurrently,

9. Recognisances were fixed in the applicant's bonds of €1,000 cash. Appeals were lodged in respect of severity of sentence which came on for hearing before the respondent sitting in Cavan Circuit Court on 9th June, 2015.

10. The applicants were represented by counsel.

11. In respect of the first applicant, counsel made a plea of mitigation to the respondent as follows:-

"May it please the court in relation to Mr. Silathi who is 31 years of age, lives in Ireland since 2008 with his wife, he is married with two children who are eight and four. He brings his eldest child to school while his wife cares for the younger child. His wife is unwell with stomach problems and depression, he is a mechanic by trade and is presently on job seekers allowance, €126 per week, he is earning additional monies from the work as a mechanic part time. His rent is €125 per month, in relation to the offences he is apologising my Lord, he is not making any excuses. He did make admissions in garda interview. The position was he had come to happen to buy a car, that transaction fell through and this was an opportunistic crime which the three men engaged in on their way home. He does not have any similar previous convictions as the court heard, his previous convictions were only for road traffic. The court has not dealt with this but Judge McBride in the District Court accepted the explanation given by Mr. Silathi in relation to those offences which was he had been using the vehicle which was a private vehicle as a commercial vehicle and that is why the tax was wrong and he was not covered by insurance. The inspector in the District Court confirmed that the vehicle he was driving on the night of this offence was entirely road legal as it were. He is willing to engage in the probation services including with a view to performing community service, he understands the mechanism of a suspended sentence and is willing to comply with any conditions of a bond that the court might impose. I will respectfully submit that particularly in light of his position the previous convictions and so on, that the immediate custodial sentence of six months, particularly in Mr. Silathi's case may thought by the court as somewhat disproportionate particularly in the light of other punitive measures the court might have imposed in lieu of that".

12. Counsel then went on to deal with the second applicant as follows:-

"Yes in relation to Mr. Marina, he is 34 years of age, he is married with one child who is aged two. He has spent seven years in Ireland, his wife is here eight years, he is a self employed plumber earning approximately €200 plus per week, again he was with Mr. Silaghi who was intending on buying the vehicle. There was no intention to commit a crime in coming to Cavan, it was an opportunistic event on their way home. He was particularly remorseful in the interview and made an apology. And again he is willing to engage with the probation service including a view to performing community service if that is something that the court would consider. Also he understands the workings of a suspended sentence and would be fully willing to comply with any conditions that the court might impose. His wife is unwell and he has given me a letter??? conditions that his wife has at the moment. He is quite concerned in relation to those."

13. In imposing sentence, the respondent stated:-

"Well a very astute and diligent piece of detective work on behalf of the gardaí has resulted in Mr. Fleming, the owner of the foundry being reunited with copper and other items to the value of €1,500. Three young men came to the Cavan area apparently to buy a motor car and in an opportunist way as I am told an opportunist crime, they visited the yard of Mr. Fleming and proceeded to load up onto a motor vehicle €1,500 worth of goods i.e. steal €1,500 worth of good and in the processes of transporting them away presumably to trade them in with some unscrupulous scrap dealer and get money. Each of these young men bar one have previous convictions for theft. One has a previous conviction, Mr. Silaghi for road traffic offences. Each of them was on a common and joint enterprise. Each of them were well qualified and well educated young men. One is a mechanic, one is a plumber and the other is a skilled, I would take it skilled because he adds a skill to his construction qualifications as being involved or able or capable of doing painting. Each is married and each has a family and in two of their cases they have been in trouble on and off since 2009. I think Judge McBride in this case was extremely lenient and if I am tempted to do anything it is to increase the sentences. But rather than add fuel to the fire I am simply affirming the sentences in every way. So I affirm all convictions and sentences."

14. Counsel did not address the respondent on any other matters except housekeeping matters.

15. The applicant has referred the court to s. 3(1) of the Criminal Justice (Community Service) Act 1983, as inserted by s. 3 of the Criminal Justice (Community Service) (Amendment) Act 2011, which provides as follows:-

"(1)

(a) Where a court, by or before which an offender stands convicted, is of opinion that the appropriate sentence in respect of the offence of which the offender is convicted would, but for this Act, be one of imprisonment for a period of 12 months or less, the court shall, as an alternative to that sentence, consider whether to make an order (in this Act referred to as a 'community service order') in respect of the offender and the court may, if satisfied, in relation to the offender, that the provisions of section 4 have been complied with, make a community service order in accordance with this section."

16. The applicant argues that the committal warrant should show in its face that the respondent considered sentencing options other than an immediate custodial sentence. In addition, the applicant submits that the sentencing judge in pronouncing sentence should specifically, in the course of giving reasons, set out that he has considered the option of community service but has declined to apply same for stated reasons.

17. The applicants have set out in their draft submissions, the following:-

"Thus, the court imposing sentence was of opinion that the appropriate sentence for the offence in question was one of twelve months or less. In those circumstances, the court was obliged to consider community service as an alternative sentence and see the decision of McDermott J. in *Ilie v. Governor of Castlereagh Prison* [2016] IEHC 373. It is further submitted that the judgment of the Court of Appeal in the case of *O'Brien v. Coughlan* [2015] IECA 245, is authority, at

least by implication, for the proposition that one cannot draw the inference that a sentencing judge considered community service, despite making no mention of this, where the possibility of community service had been expressly drawn to his attention."

18. The applicant further submits that the committal warrant in each case is bad on its face as it does not show that the respondent considered non-custodial sentence options, in particular community service.

19. The respondent has submitted that none of the matters the applicant has now put before the court in judicial review were raised before the respondent at the appeal hearing.

20. In respect of the issue of community service, the Director of Public Prosecutions relies on the High Court judgment of *O'Brien v. Coughlan & DPP* [2014] IEHC 425, and the Court of Appeal decision on appeal from that judgment [2015] IECA 245, a judgment of the Court of Appeal of 10th November, 2015.

21. In their legal submissions, they state:-

"It is respectfully submitted that it must follow by virtue of the foregoing that there was no requirement either to articulate reasons for not favouring community service disposal or for a recital to appear on the face of a committal warrant, to the effect that community service or indeed any other non-custodial option was considered but deemed not appropriate."

Legal Principles.

This issue has been considered in a High Court decision of 19th September 2014 of Kearns P, Michael O'Brien v District Judge John Coughlan and DPP [2014] IEHC 425. and the Court of Appeal judgment in the same case of 10th November 2015.[2015]IECA 245. At paras 12 and 13 of the Court of appeal judgment Ryan P stated

12. "A Court is under an obligation not simply to give its decision, but to give the reasons why it reached the decision. That is, however, a quite different obligation from what is proposed in this case. The judge was required to take into account the option of community service when deciding on sentence. That does not mean that he had to spell out expressly that he had performed his statutory duty in this regard. Obviously, he had to take it into account but he did not have to state that he had done so. It may well be desirable in general circumstances for him to do so, if only to reassure anybody who might be in doubt about the matter, but it is not an obligatory requirement in the sense that failure to do so inevitably results in the invalidation of the judgment that he gives."

13." It is also true that a judge's reasoning does not have to be set out in any specific or particular form. It is clear that the judge thought that this case was a serious one, a view which he was perfectly entitled to reach, having regard to the circumstances. The particularly serious features were the repeated criminal offending in the same fashion. It would indeed have been a very lenient view if the judge thought that this was a suitable case for community service. Whatever about that, the point is that the failure to specify that he had taken into account the question of community service does not furnish a sufficient or any basis for invalidating the judgment."

22. In his plea of mitigation, on behalf of the applicants, at the hearing of the appeal before the Circuit Court, counsel specifically drew attention to the court, the willingness of each accused to perform community service.

23. It is obvious from the transcript that the judge on appeal took a serious view of the offences committed by each accused as he expressed the opinion that the District Judge had been extremely lenient in the sentence that he imposed. There is no specific responsibility on the judge in pronouncing sentence to particularise that he had considered an alternative sentence of community service. As it was urged on him either to consider community service or a suspended sentence, it must be implied that he considered and decided against that course.

24. This case is distinguished from the High Court judgment of McDermott J. in *Ion Ilie v. Governor of Castlereagh Prison* [2016] IEHC 373, delivered on 24th June, 2016, when the honourable judge considered the transcript of the Circuit Court hearing and noted that the judge had specifically stated: "No, I'm not going to consider a community service order ..."

25. That is not the case here. It is desirable that a State solicitor dealing with appeals on severity of sentence where the sentence imposed in the District Court was less than twelve months, should open the relevant sections of the Act. It is not a mandatory obligation but it would assist the court if this practice was followed.

26. There was no obligation on the respondent to recite specifically that he had considered the relevant section of the Community Service Act and had decided not to impose a sentence of community service. The Court of Appeal in *O'Brien v. District Judge John Coughlan & DPP*, delivered by the President of the Court on 10th November, 2015, stated that a judge's reasoning does not have to be set out to any specific or particular form.

27. When one considers the transcript of the appeal and the judge's remarks, there was no doubt as to how seriously he viewed the offences in question.

THE COMMITTAL WARRANTS.

28. Each committal warrant states the same. The Marina warrant, states:-

"Lucian Marina of 30 Montpelier View, Jobstown, Tallaght, Dublin 24, was on the 7th January, 2014, at Virginia, the Courthouse, Virginia, Co. Cavan in District No. 5 in the District Court area of Virginia charged that he/she on 5th August, 2013, at Bailieboro Foundry, Bailieboro, Co. Cavan in the court area and district aforesaid, did steal property to wit electric copper wiring, electric motors, electric fuses, aluminium parts and various metal parts estimated at 4,000 euro the property of George Fleming, contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001 and whereas the court was of the opinion that the facts alleged constitute a minor offence fit to be tried summarily and the accused on being informed by the court of his/her right to be tried that the jury did not object to be tried summarily and whereas the Director of Public Prosecutions has consented to summary trial.

The above named accused was convicted of the said offence on 7th January, 2014 at Virginia, the Courthouse, Virginia, Co. Cavan in District No. 5 in the District Court area of Virginia the following orders were made. It was adjudged that the said defendant be convicted of the said offence and be imprisoned in Castlereagh Prison for a period of six months commencing 7th January, 2014.

And Whereas on the hearing of an appeal by the said accused against the said order, the Circuit Court Judge for the County of Cavan on 9th June, 2015, ordered as follows.

Affirm conviction and order of the District Court and ordered that the accused be imprisoned for a period of six months.

This is to command you to whom this warrant is addressed to lodge the accused Lucian Marina of 30 Montpelier View, Jobstown, Tallaght, Dublin 24 in Castlereagh Prison there to be imprisoned by the Governor thereof for the period of the aforesaid sentence making allowance for any part of the original sentence already served.

Dated: 9th June, 2015

Signed: Deirdre Leonard, nominated signatory on behalf of the County Register

To the Superintendent of An Garda Síochána, Tallaght, Dublin 24.

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29. A warrant in similar terms was issued for the first applicant.

30. Paragraph 31 of *Ejerenwa v. Governor of Cloverhill Prison & Anor* [2011 IESC 41, judgment of the Supreme Court of 28th October, 2011, states:-

“A document, such as in issue here, should contain clear information on its face as to the basis of its jurisdiction. This information is required so that it be available to, for example, (a) the person in custody, such as the appellant; (b) the Governor of the Prison, or any other, who is holding a person in custody; and (c) the Court which is requested to inquire into the custody pursuant to Article 40 of the Constitution.”

31. The committal warrant is clear on its face. It discloses the criminal offence and the penalty. There is no requirement to add into it that the Circuit Court Judge had considered the relevant provisions of the Criminal Justice(Community Service) Act 1983 as amended and decided not to impose community service.

32. The Court thus refuses the reliefs sought by both applicants, with the exception of the order required in respect of one of the committal warrants.