Neutral Citation Number: [2007] IEHC 151

THE HIGH COURT

JUDICIAL REVIEW

[2006 No. 1692 SS]

IN THE MATTER OF SECTION 52(1) OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961 (NO. 39 OF 1961)

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS (AT SUIT OF GARDA THOMAS LYNCH)

PROSECUTOR

AND

M.W. (A MINOR)

ACCUSED

AND

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS (AT SUIT OF GARDA MICHAEL POWER)

PROSECUTOR

AND

M.W. (A MINOR)

ACCUSED

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS (AT SUIT OF GARDA GERARD BRENNAN)

PROSECUTOR

AND

M.W. (A MINOR)

ACCUSED

BETWEEN

DIRECTOR OF PUBLIC PROSECUTIONS (AT SUIT OF GARDA PADRAIC JENNINGS)

PROSECUTOR

AND

M.W. (A MINOR)

ACCUSED

Judgment of Mr. Justice Budd delivered on the 4th day of May 2007

The issues for trial in this case came before the court by way of a consultative Case Stated by Judge Catherine Murphy, Judge of the District Court assigned to the Dublin Metropolitan District, sitting at the Children's Court at Smithfield in the County of the City of Dublin, pursuant to the provisions of s. 52 of the Courts (Supplemental Provisions) Act 1961, for the determination of the High Court.

In summary, the subject matter of this Case Stated concerned the prosecution of the accused M.W. who pleaded guilty to a number of offences before District Court Judge Cormac Dunne on 6th April 2005, who disposed of the cases by way of making the accused the subject of a probation order and probation bond for six months with conditions and terms attached. Following upon an application granted upon the Information of Lena Timoney of the Probation and Welfare Service, a "warrant to arrest" was signed by District Court Judge Angela Ni Chonduin on 23rd September 2005, but it was not until close to four months later, on 16th January 2006, that this warrant was executed and the accused M.W. was brought back before the District Court. M.W. was remanded on continuing bail to 27th January 2006, then on to 2nd February 2006, and finally to 1st March 2006, appearing before District Court Judge Catherine Murphy on each appearance. On these occasions, and as set out at paras. 21 to 24 of the signed Case Stated, the defence argued that the stipulated period of six months in the probation bond had expired on 6th October 2005. The matter came before Judge Catherine Murphy again on 27th January 2006, when submissions were made by the defence to the effect that the probation bond period referred to had expired, and accordingly that the court had no further jurisdiction. According to the Case Stated, on 2nd February 2006, Judge Catherine Murphy was the presiding judge when the proceedings came on again. On this date Margaret MacEvilly, the solicitor who appeared on behalf of the accused, argued that the six month probation bond had been entered into on 6th April 2005, and that the arrest warrant had been applied for on 23rd September 2005. She submitted that as this arrest warrant had only been executed on 16th January 2006, more than six months after the accused had been placed on the bond, the probation bond in the meantime had expired and that the court no longer had jurisdiction to make further order. Judge Catherine Murphy wished to read the decision of Roderick Murphy J. dated 27th July 2005, in *DPP v. C.T. (a minor)* and reserved her decision until she had further considered this case. In these circumstances Judge Catherine Murphy further remanded the accused to 1st March 2006.

For completeness, I propose to set out the entire of her Consultative Case Stated as the progress and sequence of events is important and has been carefully and clearly narrated:-

1. Relevant factual background

1.1 On 19th day of January 2005 the Accused appeared before Dublin Metropolitan District Court No. 55 (hereafter referred to as "the Children's Court") charged with the offence set out on Charge Sheet 342110 prosecuted by Garda Thomas J. Lynch (copy Charge Sheet attached as Appendix I). Evidence of arrest, charge and caution was given in respect of this charge and in respect of this matter and another charge contrary to s. 4 Criminal Justice (Theft and Fraud Offences) Act, 2001 prosecuted by Garda Padraic Jennings, the Accused was remanded on continuing bail to appear again on the 9th day of February 2005.

1.2 On the 24th day of January 2005 the Accused appeared before the Children's Court charged with the offence set out on Charge Sheet 346256 prosecuted by Garda Michael Power (copy Charge Sheet Attached as Appendix II). Evidence of arrest, charge and caution was given in respect of this charge and the Accused was remanded on continuing bail to appear on the 9th day of February 2005 when other mattes were listed.

1.3 On the 9th day of February 2005 and in respect of the alleged offence prosecuted by Garda Lynch, it was communicated to the Court by a Garda standing in for Garda Lynch that the Director of Public Prosecutions was directing summary disposal in respect of that particular offence. I was the presiding District Judge on this date and after hearing an outline of the facts for the purposes of considering whether or not to accept jurisdiction, I duly accepted jurisdiction. The Accused thereafter elected for summary disposal and offered a plea of guilty in respect of this offence. Guilty pleas were also offered in respect of the complaints prosecuted by Garda

Jennings and Garda Power. As I was unhappy with the limited facts available this day in respect of the complaint prosecuted by Garda Lynch, I remanded the Accused and these proceedings to the 23rd day of March 2005 when fuller facts could be presented by the prosecuting member of An Garda Síochána. I also directed that a Probation and Welfare Service Report be prepared in respect of the Accused. Without any facts being heard in respect of same, the proceedings prosecuted by Garda Power and Garda Jennings were also put back to the 23rd day of March 2005.

1.4 On the 23rd day of March 2005, evidence of arrest, charge and caution was given in respect of an alleged offence as set out on Charge Sheet 352884 prosecuted by Garda Gerard Brennan (copy Charge Sheet attached as Appendix III). It was communicated to the Court that the Director of Public Prosecutions was directing summary disposal in respect of the complaint. District Judge Cormac Dunne proceeded to accept jurisdiction. The Accused having elected for summary disposal proceeded to plead guilty to the offence. The facts of this offence were opened to the Court by the prosecution. The facts in respect of the other sets of proceedings before the court on this day, guilty pleas having been entered on the 9th day of February 2005, were also given. A Probation and Welfare Service Report was also before the court on this day (copy of report attached as Appendix IV). District Judge Dunne ordered that if the Accused paid over, in respect of Garda Brennan's Charge Sheet 352884, the sum of money amounting to the value of the diesel taken without payment to the party at a loss, he would implement the recommendations of the Probation and Welfare Service Report. District Judge Dunne proceeded to remand the Accused on continuing bail to the 6th day of April 2005.

1.5 On the 6th day of April 2005 when the proceedings came before him again, and as the money directed to be paid over had been paid over, District Judge Dunne placed the Accused on a six month probation bond (in the Accused's own bond of €250) with conditions to the effect that the Accused continue to be involved with Youthreach and comply with the directions of the Probation and Welfare Service.

1.6 On the 23rd day of September 2005, District Judge Ni Chonduin received an information, sworn on that same date, from Ms. Lena Timoney of the Probation and Welfare Service which claimed that the Accused was in breach of the recognisance entered into pursuant to the provisions of the Probation of Offenders Act 1907 and which grounded an application for a warrant to arrest the Accused (copy Information attached as Appendix VI). District judge Ni Chonduin signed this warrant which commanded the Superintendent of Crumlin Garda Station to arrest the Accused and bring him before her or another Judge so that he might be dealt with according to law (copy warrant attached as Appendix VII).

1.7 The aforementioned Arrest Warrant was executed on the 16th day of January 2006 when District Judge Hamill was presiding Judge. The Accused appeared before the Children's Court in custody as other outstanding bench warrants were also to be executed. Following upon a bail application, the Accused was re-admitted to bail and was remanded to the 27th day of January 2006 in respect of those proceedings associated with the Probation Bond and other matters.

2. Post execution of Arrest Warrant/Defence Submissions

2.1 When the proceedings the subject matter of this case stated came before me on 27th day of January 2006, a submission was made by the defence to the effect that the Probation Bond entered into on the 6th day of April 2005 had expired, so that the Court had no further jurisdiction. I further remanded the Accused to the sitting of the Children's Court on the 2nd day of February 2006, so that I might hear from the Accused's Probation Officer and ascertain what the position was in relation to the Probation Bond.

2.2 I was again the presiding Judge when the proceedings came before the Court on the 2nd of February 2006. On this date Ms. Margaret MacEvilly, Solicitor appeared on the Accused's behalf and argued that the Probation Bond had been entered into on the 6th of April 2005, with an Arrest Warrant being applied for on the 23rd of September 12005. As this Arrest Warrant had only been executed on the 16th of January 2006 more than six months after the Accused had been placed on the bond, it was further argued that the Probation Bond had expired and that I could make no further order. I wished to re-read the decision of Mr. Justice Roderick Murphy dated the 27th day of July 2005 in *The DPP v. C.T. (A Minor)* (copy Judgment attached as Appendix V) and I reserved my decision until I had done so. In these circumstances, I further remanded the Accused to the 1st of March 2006.

2.3 On 1st day of March 2006, Ms. MacEvilly again submitted that on the basis of the facts of the instant case and the aforementioned decision in *C.T*,. the District Court could make no further order as the Probation Bond had expired. I did not accept this submission and offered the view that once the breach of recognisance proceedings had been initiated and once sworn information had been furnished to the Court of breach of the Probation Bond and once a warrant had issued for the arrest of the Accused, the Probation Bond was at an end and I could proceed to deal with the Accused as the court deemed it appropriate.

2.4 The Defence further submitted that while the Probation and Welfare Officer, Ms. Timoney acted quite correctly in seeking the warrant on the 23rd September 2005, within the six month period, the prosecution had failed to execute the warrant within the period of the Probation Bond and had only executed same on the 16th January 2006. It was argued that it was incumbent on the prosecution to execute these warrants with expediency and certainly within the period of the bond.

2.5 At this point I concluded that this matter needed clarification and I requested Ms. Margaret MacEvilly, Solicitor to draft a case. Ms. Lena Timoney was in court for the duration of the hearing and submissions on the 1st March 2006. She did not make any submission herself, nor was she requested to. For the avoidance of doubt, I wish to make it clear that this is a case stated by me and not at the request of the parties.

3. QUESTIONS FOR THE DETERMINATION OF THE HIGH COURT

3.1 And whereas I, the said Judge of the District Court, am of the opinion that questions of law do arise, I now refer the said questions of law to the High Court for determination:-

I) Does

a) the initiation of the breach of Probation Recognisance proceedings and/or

b) the furnishing to the Court of Sworn Information of breach of the Probation Bond and/or

c) the issuing of a Bench Warrant for the arrest of the Accused pursuant to the evidence of breach of the Probation Bond within the period recited in the Probation Bond of itself bring said bond to an end, thus allowing the Court to proceed to deal with the Accused as it may deem appropriate, including, if appropriate, proceeding to conviction and sentence even if it proposes to do so outside of said period?

Dated this 22nd day of November 2006.

Signed: C.A. Murphy,

Catherine Murphy Judge of the District Court

Assigned to the Dublin Metropolitan District."

Crucial Issue
The net point in this Case Stated is whether or not a person who has had an information sworn and a warrant issued against him during the period of a probation bond has been adequately called on at any time during such period and can be dealt with by the court if the period of the bond has elapsed and is over by the time the person has been brought back in before the court.

Relevant dates
(i) On 6th April 2005, Judge Cormac Dunne placed the accused on a six month probation bond.

(ii) On 23rd September 2005, District Judge Angela Ni Chonduin received an information sworn by the probation officer which asserted that there had been a breach of the probation bond and she issued an arrest warrant on the same day.

(iii) On 6th October 2005, on this day the period of the bond expired.

(iv) On 16th January 2006, on this day the warrant was executed and the accused was arrested.

(v) On 27th January 2006, the defence raised the issue about the courts alleged lack of jurisdiction to deal with the matter.

(vi) On 2nd February 2006, further legal submissions were made on this issue.

(vii) On 1st March 2006, further legal submissions were made and Judge Murphy indicated that she, on her own initiative and not at the request of either of the parties, intended to State a Case to the High Court. (see 2.5 of the Case Stated).

The proper interpretation of s. 1(1)(ii) of the Probation of Offenders Act 1907
Section 1(1) provides that

> "… the court may, without proceeding to conviction, make an order either -
>
> > (i) dismissing the information or charge; or
> >
> > (ii) discharging the offender conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour and to appear for conviction and sentence when called on at any time during such period, not exceeding three years, as may be specified in the order."

The words underlined for emphasis are the key to this matter. The issue is whether the swearing of the information, the consideration thereof by the District Court and the issuing of the warrant amount to a person "being called on". The submission on behalf of the Director of Public Prosecutions is that this phrase is a demand and that the person who is on probation and allegedly in breach of the bond is being called on by the issue of the warrant against him. Whether the person has an answer to the call, and if so, what that answer is, and what occurs when the call is answered by the probationer is a further and separate matter.

Under s. 52 of the Courts (Supplemental Provisions) Act 1961, a judge of the District Court may (without request) refer any question of law arising in proceedings before her (other than proceedings relating to an indictable offence which is not being dealt with summarily by the court) to the High Court for determination. The distinctive feature about this particular option is that the Case may be Stated during the Case and before the judge has given her decision in the case. In other words she can interrupt the proceedings for the purpose of obtaining a ruling from the High Court on the point of law in issue. Section 52 in fact is a similar provision to its predecessor, s. 83 of the Courts of Justice Act 1924, which it largely reproduces and also repeals.

I propose to set out the relevant provisions of the Probation of Offenders Act 1907 for ease of reference. Section 1 deals with the power of courts to permit the conditional release of offenders:

> 1(1) Where any person is charged before a court of summary jurisdiction with an offence punishable by such court, and the court thinks that the charge is proved, but is of opinion that, having regard to the character, and antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to release the offender on probation, the court may, without proceeding to conviction, make an order either-
>
> > (i) dismissing the information or charge;
> >
> > (ii) discharging the offender conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour and to appear for conviction and sentence when called on at any time during such period, not exceeding three years, as may be specified in the order."

Broadly speaking this enabled the court to impose a probation order on an offender in certain circumstances. This was a radical and enlightened move to try to create an opportunity for rehabilitation and to avoid incarceration of the miscreant and also to give suitable persons a chance to avoid having a conviction on their record and to allow them a chance to reform and make good for the benefit of themselves and the community. Under s. 2 of the Act, "a recognizance ordered to be entered into under this Act shall, if the court so order, contain a condition that the offender be under the supervision of such person as may be named in the order during the period specified in the order and such other conditions for securing such supervision as may be specified in the order, and an order requiring the insertion of such conditions as aforesaid in the recognizance is in this Act, referred to as a probation order".

Section 6 contains provisions in case the offender fails to observe the conditions of release:

> "Section 6(1) If the court before which an offender is bound by his recognisance under this Act to appear for conviction

> or sentence by any court of summary jurisdiction, is satisfied by information on oath that the offender has failed to observe any of the conditions of his recognizance, it may issue a warrant for his apprehension or may, if it thinks fit, instead of issuing a warrant in the first instance, issue a summons to the offender and his sureties (if any) requiring him or them to attend at such court and at such time as may be specified in the summons.
>
> (2) The offender when apprehended, shall, if not brought forthwith before the court before which he is bound by his recognizance to appear for conviction or sentence, be brought before a court of summary jurisdiction.
>
> (3) The court before which an offender on apprehension is brought, or before which he appears in pursuance of such summons as aforesaid, may, if it is not the court before which he is bound by his recognizance to appear for conviction or sentence, remand him to custody or on bail until he can be brought before the last-mentioned court.
>
> (4) ---.
>
> (5) A court, before which a person is bound by his recognizance to appear for conviction and sentence, on being satisfied that he has failed to observe any condition of his recognizance, may forthwith, without further proof of his guilt, convict and sentence him for the original offence or …".

It is necessary to read s. 1 and s. 6 in conjunction. Section 6 provides for the issuing of a warrant for the apprehension of the accused where the court is satisfied by information on oath that he has failed to observe any of the conditions of his recognizance. First, the legislation recognises the fact that there may be cases where a person will breach a probation order but will not then be amenable to the court. In such circumstances Counsel Paul A. McDermott makes the submission that s. 1 should not be interpreted so as to mean that the sentencing process must be concluded within the period set out in the probation bond and he urges that the court should look at the wording and plain intention of the entire of the Act. Such a construction would certainly militate against an interpretation which would entail that, despite a breach of the terms of the bond and the miscreant not being or making himself amenable, nevertheless the completion of the sentencing process would have to be concluded within the time limit supposedly fixed by the period set out in the probation bond, which is clearly intended to be the duration in which the former miscreant and probationer must comply with the terms and conditions of the bond.

Counsel for the Director of Public Prosecutions correctly submits that it is a principle of construction that legislation should be interpreted as a whole. He refers to the passage in *East Donegal Co-Operative Livestock Mart Limited v. Attorney General* [1970] I.R. 317 at 341 where Walsh J., speaking of the Marts Act, remarked:-

> "The words of the Act, and in particular the general words, cannot be read in isolation and their content is to be derived from their context. Therefore, words or phrases which at first sight might appear to be wide and general may be cut down in their construction when examined against the objects of the Act which are to be derived from a study of the Act as a whole including the long title. Until each part of the Act is examined in relation to the whole it would not be possible to say that any particular part of the Act was either clear or unambiguous".

Mr. McDermott contends that he can rely on the simple straightforward meaning of the s. 1(1) and s. 6 combined in that the court can discharge the offender conditionally when the offender has entered into a recognisance to be of good behaviour and to appear for conviction and sentence when called on at any time during such period, not exceeding three years, as may be specified in the order. This is further elucidated in s. 6 which states that, if the court for which an offender is bound by his recognizance under the Act to appear for conviction or sentence, or any court of summary jurisdiction, is satisfied by information on oath that the offender has failed to observe any of the conditions of his recognisance, it may issue a warrant for his apprehension. Section 6(5) makes it clear that a court, before which a person is bound by his recognisance to appear for conviction and sentence, on being satisfied that he has failed to observe any condition of his recognisance, may forthwith, without further proof of his guilt, convict and sentence him for the original offence. Mr. McDermott submits that the clear and straightforward meaning of the sections is that there must be a call on the accused within the six month period of this bond. He concedes that the swearing of the information alone does not "call upon" the probationer but then he contends that the combination of the swearing of the information, when taken with the furnishing to the court of the sworn information of the breach of the probation bond and the issuing of the arrest warrant for the apprehension of the accused on account of the evidence of the breach of the probation bond within the period recited in the probation bond, of itself fulfils the requirements of the Act thus allowing the court to proceed to deal further with the accused as seems appropriate to the court.

This interpretation seems eminently pragmatic and sensible for two further reasons. Firstly, if the probationer is not amenable in the sense of either being "on the run or simply holed up at home" and not prepared to cooperate with the court or the probation officer, then the "calling on him" is likely to take place in an application to the court ex-parte or in his absence. Thus a two stage procedure is envisaged, which is practical, sensible and in keeping with the principle that the probationer, who is being accused of being in breach of the terms and conditions of his probation bond, is thereby given an opportunity to come to court to explain the situation and to make the case that he was in compliance all along and not in breach of any of the terms and conditions of the bond, or else that he has reason and excuse and justification if he is in default. The reality is that the person on probation would not be on notice of the court hearing on the 23rd September, 2005, in all probability, when District Judge Angela Ní Chonduin received the information sworn by the probation officer and issued "an arrest warrant". It is significant that she did not issue "a bench warrant" which would be applicable if the probationer had failed to turn up when he should have been present. Instead, she issued an arrest warrant because there was no obligation on the accused to be present on 23rd September, 2005, when the probation service had sworn and produced the information and brought the matter back to the attention of the court. The District Court Judge heard the complaint about the breach of the terms of the bond and then duly called on the probationer to come in to explain himself and to deal with the complaints and in the absence of satisfactory explanation or excuse to appear for conviction and sentence as indicated in s. 6(5). The second good point about this two stage procedure as being envisaged is that it allows the accused probationer to come in and make his case and to either maintain that he has complied with the terms and conditions of his bond or else that he has a justifiable, explicable and acceptable reason for his failure in compliance.

Mr. McDermott made a further sound point in relation to construing the provision as envisaging a two stage procedure. At the first stage when the information has been sworn and is furnished to the District Court, then the judge can read the Information and consider it and decide whether there has in fact been a breach of the bond. Counsel gave a simple instance of the merit of this first step in the procedure by giving an example. He suggested that if, for instance, the condition in the bond stipulated that the probationer should report once a month to the probation service, then if the person who has sworn the information was under the mistaken impression that there was a weekly reporting requirement in the condition then because of such an erroneous misunderstanding there would then be no justification, at least on that ground alone, to call on the probationer to appear. This seems to be a valid point and taken with the *audi alteram partem* principle makes the wording of the "calling on provision" practicable and

laudable in that it gives a fair opportunity to be heard to the probationer accused of being in default.

Furthermore Mr. McDermott firmly made the point that the function of the High Court in respect of such a Consultative Case stated is to answer the question which has been posed by the District Court Judge in the Case Stated and to avoid being sidetracked into other issues, such as the validity of the arrest warrant or the fact that several judges participated in the chain of events in court. In fact with regard to the last point, it would seem quite clear from the wording of the phrase "the court" that this means that it is "the District Court" and not a particular individual judge who has jurisdiction in this matter. There is ample authority for the proposition that the High Court should concentrate on the issue and questions raised in the Case Stated, not least because this is what is requested and required but also because the facts set out in the Case Stated have been found and have been selected and narrated because they are the facts which are thought to be relevant to the issue in respect of time which is at the core of the request and the facts have been set out to give the context and background to that particular aspect only. In short, usually there are strong reasons to avoid being attracted into side avenues in the trees containing issues not explored or even raised in the District Court, and thereby losing sight of the wood, being the question posed in respect of whether the construction of the Act contains a strict time limit involving the falling of an arbitrary cut off like a portcullis, while the transaction envisaged in the probation bond remains in train and is still moving along and has been neither completed nor concluded.

To complete the picture given by the Case Stated, I should make it clear that the probationer had appeared in court and pleaded guilty to a burglary in Walkinstown on 1st January 2005, where Garda J. Lynch was the prosecuting garda. Secondly, he was charged with disorderly conduct on a large public service vehicle at Terenure Road East and duly pleaded guilty in court on 16th January 2005, the prosecuting Garda being Garda M. Power. The third charge was that of theft of diesel from a Statoil Garage in Rathcoole on 26th January 2005 and Garda Brennan was the guard involved in that case. The report of Ann Gallagher, the probation and welfare officer, made clear that in March 2005, the accused was aged fifteen and came from a family in Tallaght. At that time in March 2005, M.W. had been attending Youth Reach in Tallaght and was doing well on the course and was interested in doing an apprenticeship in carpentry. The probation officer recommended that M.W. should continue to attend Youth Reach and complete the course, that he should follow all directions given by the probation and welfare service and that he should attend for all his appointments with his probation officer. I mention this because it is clear that if the District Court Judges are to follow the suggestions of Walsh J. in *D.P.P. v. Tiernan* [1988] IR 250 to the effect that the Judge in the disposition of a case should take particular note of not just the nature and gravity of the offences but also the particular background circumstances, personality and talents of the miscreant, then it would seem vital that the District Court Judges be given the effective means to ensure that, if the miscreant is given the opportunity for rehabilitation and good behaviour afforded by the provisions of the Probation Act, then they should be able to ensure that the probation officers can supervise the implementation of and compliance with the terms and conditions of the bond. It is important that there is a sanction and also an encouragement to ensure that the probationer avails of the opportunity, in this case to attend Youth Reach, and thereby to gain self respect and confidence and perhaps stimulation, and also to go on to become an apprentice carpenter, and thereby acquire a useful, rewarding and highly regarded skill.

Submissions on behalf of the probationer
I am grateful to counsel on both sides of this case for their clear and careful submissions and I propose to set out the response of Niall Nolan and Michael L. O'Higgins S.C. instructed by Terence Lyons and Company to the argument put forward by Paul A. McDermott. They too set out the sequence of events culminating in the position on 1st March, 2006, confronted by Judge Catherine Murphy when she offered the view that once the proceedings for the breach of recognizance had been initiated and once the sworn information had been furnished to the court in respect of the breach of the probation bond and the arrest warrant had issued for the arrest of the probationer, then the probation bond was at an end and she could deal further with the proceedings and so proceed to convict and sentence the accused. However she went on to say that she concluded that the matter did need clarification and she, of her own motion, requested the solicitor for the minor probationer to draft the Consultative Case Stated.

In their helpful introduction to the relevant law, Counsel referring to s. 1 of the Probation of Offenders Act, 1907 made it clear that Probation Orders provide the District Court with a means of disposing of a minor offence in a manner which puts the focus on rehabilitating offenders and preventing re-offending behaviour. They refer to Professor Dermot Walsh's remarks in his *"Criminal Procedure"* (First Edition 2002) describing the nature of a probation order as follows at paragraph 21 – 29 (p. 1046),

> "Broadly speaking, a probation order is a formal warning to a person that if he does not keep the peace and abide by conditions imposed by the court for a specified period he is liable to be brought before the court for punishment."

Counsel helpfully point out that s. 4 of the Act deals with the probation officer's functions as being to make contact with the offender and to assist him in complying with the conditions of his probation bond. The probation officer must see that the offender abides by the conditions and should report to the court on the offender's progress. Furthermore if there has been any breach of any of the conditions of the probation order and an information is sworn to this effect, then the court can issue a warrant for the arrest of the probationer. He will then be brought before the court which, pursuant to s. 6 of the 1907 Act, may then sentence the defendant for the original offences, if the court is satisfied as to the reality of the breach of a condition. Counsel on behalf of M.W. submit firstly the general proposition that the Probation of Offenders Act, 1907 provides for the discharge of an offender conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour and to appear for conviction and sentence when called on at any time during such period (underlining added), not exceeding three years, as may be specified in the order (s. 1(1)(ii)). The accused was discharged conditionally pursuant to s. 1(1)(ii) of the P.O.A 1907 on 6th April, 2005 for a specified period of six months. This period recited in the recognizance entered into by the accused having elapsed, it is submitted that it is not now possible for the court which so bound him over to proceed to hale him in to court at this stage and to convict and sentence him.

The second submission is that a consideration of the unreported judgment of Mr. Justice Roderick Murphy in *DPP v. Colm Traynor* delivered on 27th July, 2005 particularly assists a resolution of the issues arising in this case and indeed such is the "proximity of the issues for resolution" in that case to those in the instant case that it in fact formed part of the District Judge's 'Signed Case Stated appearing at appendix V in the Case Stated. My reaction to this point is that the learned District Court Judge did indeed adjourn the matter in order to study the judgment of Murphy J. but she actually came to the conclusion that the facts in the two cases were dissimilar and concluded that the relevant sections gave her jurisdiction and she proceeded to express this view. Nevertheless she of her own volition felt that there was an important point involved which warranted the Stating of a Consultative Case to the High Court for consideration of the true construction of the sections. I heartily commend her interest and enthusiasm and desire for certainty in respect of the usefulness and importance of the provisions in this enlightened Act.

I expect that it is no coincidence that District Judge Catherine Murphy was involved in the Consultative Case Stated in *DPP v. Colm Traynor* in which the judgment and answer to the questions in the Consultative Case Stated were delivered by Roderick Murphy J. on 27th July 2005. Counsel has helpfully summarised the facts in *Traynor* in which the substantive District Court Proceedings concerned the prosecution of the defendant who pleaded guilty to a number of drugs offences in respect of which the District Court judge on 22nd January 2004 made her disposition by way of making the accused the subject of a probation order and bond for a period of one

year with conditions attaching. The proceedings were listed in the District Court on 17th September 2004, the 4th October 2004, the 15th December 2004 and 10th February 2005. In the Probation and Welfare Officers Reports of the 17th September 2004, 15th December 2004 and 10th February 2005 it was stated that the accused was not complying with the terms of the probation order. On 10th February 2005 Garda Comiskey also set out what he said were breaches of the probation order. The conditions included a curfew, urine analysis testing, full co-operation with the Probation and Welfare Services and also attendance at the Aislinn Drug Treatment Centre. The accused was remanded on continuing bail to 17th September 2004 and a progress report was directed. That report then was obtained and stated that the accused had not complied with certain conditions attaching to the Probation Order, in particular the requirement to attend for urine analysis and other requisite attendances at the Aislinn Centre. It was also stated that the accused had recently been charged with other matters. On 4th October 2004 the adjourned proceedings had then come before Judge Murphy who varied the conditions of the accused's bail bond so that the accused had to:-

> Maintain a curfew from 10 p.m. to 7 a.m;
>
> Attend urine analysis twice weekly;
>
> Attend regularly at school;
>
> Attend an addiction counsellor;
>
> Attend probation officer meetings; and
>
> Keep away from two named individuals

The accused was remanded to 15th December 2004 and further reports were directed. On 15th December 2004 the court considered the progress report, and the accused was remanded on strict terms to 10th February 2005. The progress report described the accused's compliance as being very unsatisfactory and said that he was not co-operating with the drug counselling advisors. A further report was directed. It was indicated to the accused that he was being given one last chance to offer complete compliance with the terms of the probation bond. A progress report on 10th February 2005 expressed views, *inter alia*, that attendance at probation appointments had been unsatisfactory, that the accused was not co-operating with attempted referrals for drug counselling and, without prejudice, that the accused had come to the unfavourable attention of the Gardaí in relation to breaches of curfew and of anti-social behaviour conditions on 24th October 2004 to the day before the hearing. The breach of curfew included driving a car at 2 a.m. and again at 11.40 p.m. on 9th January and there was a finding of ecstasy tablets in the front garden of the accused's home on 3rd January 2005. Judge Catherine Murphy, having considered matters, and the most recent progress report on 10th February 2005, indicated that she wished to sentence the accused as she had indicated on 15th December 2004 that she had given the accused then one further chance to comply with the terms of the probation bond imposed on 22nd January 2004. When District Judge Murphy made clear that she wished to proceed to sentence the accused, objections were raised to this proposed course of action by Sarah Molloy, the Solicitor acting for the accused. Her objections were essentially grounded on the argument that as the period of the probation order had ended it was no longer possible for the District Court Judge to proceed to sentence the accused and it was in this context that the Consultative Case was stated.

Two questions were posed for the High Court's consideration in the *Traynor* case, the second being reformulated by Murphy J. The questions for determination were:-

> 1. In order for a District Judge to properly proceed to conviction and sentence ín circumstances where the accused had been in breach of conditions of a probation order, must this be done within the period of the said probation order?
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> 2. Where, within the period of probation, the judge adjourns conviction and sentence outside the period of probation to give a further chance to an accused who has breached the conditions of the probation order, does this extend the period of the probation bond for the purpose of considering conviction and sentence?

There are certainly passages in the judgment of Roderick Murphy J. which are helpful to the propositions being put forward by counsel for the probationer. For example at p. 14 and 15 of the judgment Murphy J. states:-

> "Probation is, of course, a statutory scheme within the criminal justice administration. The effects of a breach of a probation bond is to activate a conviction and sentence. Penal provisions must be construed strictly. It follows that in order for a District Judge to properly proceed to conviction and sentence, in circumstances where accused had been in breach of condition(s) of a probation order, this must be done within the period of the said probation order."

Earlier at p. 6 of his judgment Murphy J. had stated:-

> "A probation order may, therefore, be imposed for the period up to three years but where it is imposed for a shorter period, as in the present case, it appears that a court cannot proceed to convict and sentence an accused outside that time period (underlining added)".

On the basis of these two passages the submission is made that s. 1(1)(ii) of the 1907 Act constitutes a statutory imperative, judicially confirmed as the position in *Traynor*, that if an offender placed on a probation bond is to be brought before a court for the purposes of conviction and sentence, then all relevant matters including ultimate disposal must be attended to by the relevant parties within the time period of the bond. Indeed counsel goes on to contend that it is implicit in the terms of the *Traynor* judgment that the courts must be careful not to intervene or trespass into the legislative domain. In this regard, it is submitted that it is of significance that there is no provision within the Probation and Welfare Services Statutory or Regulatory Code as set out in the 1907 Act, as amended or elsewhere to the effect that where there is either:-

> D. The initiation of breach of probation recognisance proceedings; and/or
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> E. The furnishing to the court of sworn information of breach of probation bond; and/or
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> F. The issuing of a bench warrant for the arrest of the accused pursuant to the evidence of breach of probation bond.

(the terms in which this Case Stated have actually been put), that any of these events should operate individually or cumulatively as either some form of stay on the balance of the bond or determining events. In passing it might be mentioned that it was not a "bench warrant" that actually issued in these proceedings – those type of warrants arising due to a failure to attend court on a particular

date – but it was in fact a "warrant to arrest" the accused apparently due on the face of it to an alleged failure to abide by a condition of his probation bond. This point was made about there being this distinction that, while "a bench warrant" was issued for the arrest of the accused in Colm Traynor's case because he had failed to attend court on a particular date, on the other hand in the M.W. case it was a "warrant to arrest" which was issued by District Court Judge Angela Ni Conduin on foot of the Sworn Information to the effect that the probationer M.W. had failed to abide by the conditions of his probation bond. Attention was also drawn to a further distinguishing feature between *Traynor* and the facts of M.W. in that, in the former case, it appears that it had been found or at least conceded, within the period of the probation bond, that there had been breaches of the terms of the bond in circumstances where there was presiding the very judge who proposed and ordered the probation bond ultimately entered into, and who was in receipt of the views of the Probation Officer who was dealing directly with the particular offender. Moreover, this was a case where the accused was present and legally represented and was therefore in a position to contest the various allegations made against him. In fairness this factual background was drawn to the attention of the court by counsel for the probationer, M.W., as having largely given the grounds for the prosecutor's argument in *Traynor* that the District Judge's decision giving a final chance to the offender to comply with the terms of the probation bond was what had brought the probationer outside the limit of the period of one year stipulated in the bond. The argument accordingly was made for the DPP in *Traynor* that this concession of further time for compliance with terms of the bond logically constituted a variation or extension of the period of the probation bond pursuant to the provisions of s. 5 of the 1907 Act (as amended by s. 9 of the Criminal Justice Administration Act, 1914). Counsel correctly says that this argument was rejected by the High Court as the requisite "calling on" of the probationer occurred outside the time limits fixed in the probation bond in *Traynor's* case.

It is appropriate to tackle these contentions that the findings in the *Traynor* case are helpful as well as the contention that the actual issues are similar or comparable to the matters under consideration in the present M.W. case. I think that the matters in issue in the *Traynor* case were very different. This can be shown simply by setting out the relevant dates in that case which were as follows:-

> 1. 24th January, 2004: a 12 month probation bond was imposed;
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> 2. 24th January, 2005: the 12 month period in the probation bond expired;
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> 3. 10th February, 2005: there was a bad progress report and the District Judge indicated that she wished to proceed to sentence the accused.

The key debate in the *Traynor* case was as to whether the judge had on 15th December 2005 extended the period of the probation bond. However, Murphy J. had in that case directed his focus as to whether the submission on behalf of the DPP was correct that the period in the bond had been extended on that date of 15th December, 2005. This was the crucial issue and in fact he found that no valid application under the legislation had been made for such an extension and so the question of such an extension simply did not arise and accordingly that date ceased to have any significance in terms of the legal issues in the case. In short *Traynor* was a case in which any "calling upon the accused" occurred outside of the period stipulated as the duration of the bond. In other words, the relevant allegation that *Traynor* had breached the bond (i.e. the allegation on foot of which the judge decided to sentence him) was made in a progress report that was only before the court on 10th February 2005 which was after the bond had expired on 22nd January 2005. Perhaps some confusion crept in because the submissions on behalf of the prosecutor conclude by saying, in the circumstances it is submitted that the answer to the second question is "yes" and that this might lead a person erroneously to think that Roderick Murphy J. was saying that the District Court Judge had extended the period of the probation bond to the 10th February 2005 and that accordingly she was in a position to proceed to consider convicting and sentencing the accused and that in the circumstances it was submitted that the answer to the second question was "yes". However, this is not a correct reading of the judge's decision. Under the heading Decision of the Court Roderick Murphy J. said:-

> "Section 6 gives power to the court to vary the terms or conditions of the recognisance upon the application of the probation officer where it appears to the court that it is expedient. It seems to this court that the terms of the probation officer's report, or the progress report in this case, does not make such application. The relevant reports of 17th September 2004, 15th September 2004 and 10th February 2005, recite the conditions of the appropriate bond and comment on the progress or lack thereof after stating the conclusion of the probation officer's report of 10th February 2005, which to put it mildly was dismal since Mr. Traynor had not adhered to the conditions of his bond and had come to the unfavourable attention of the Gardaí which was a matter of serious concern and, even worse, that the prognosis regarding the risk of further re-offending must remain guarded."

In fact the conclusion of Roderick Murphy J. was that no application was even made for a variation. Moreover, the Probation and Welfare Officer, who was very conversant with the evolution of this case, stated that the accused "completed his bond on 22nd January 2005". Accordingly there had been no extension of the terms of the probation bond and, while it was clearly in the accused's interest to be given one last chance, this could not be construed as being a variation of the probation order and the judge reiterated that there was no extension of the probation period. This is what the *Traynor* case was about, namely whether there was an extension of the period and he emphatically concluded that there was no such extension. Extension of time was the nub of the *Traynor* case and *obiter dicta* should be read bearing this in mind. For example on page 14 of the unreported judgment there is a statement to the following effect:-

> "Probation is of course a statutory scheme within the Criminal Justice Administration. The effect of a breach of probation bond is to activate a conviction and sentence. Penal provisions must be construed strictly. It follows that in order for a District Judge to properly proceed to conviction and sentence, in circumstances where accused had been in breach of condition(s) of a probation order, this must be done within the period of the said probation order."

These are generalisations about the situation in the *Traynor* case where the concentration was on the question of whether there had been an extension of time and there had not been any such extension. The effects of a breach of a condition of a probation bond is to permit steps to be taken to activate a conviction and sentence as was done in the M.W. case. Where the accused has been in breach of conditions of the probation order, then the appropriate steps have to be taken within the terms and conditions of the probation bond and order. The contention of the DPP and the view of the District Judge stating the case in M.W. is that the swearing of the information and the furnishing of the information to the court and the issuing of the arrest warrant all occurred on 23rd September 2005 and this constituted "a calling on" the probationer at a time during the period stipulated in the bond and thus activated the procedure which would or could culminate, in the absence of acceptable excuse or reason or explanation, in the imposition of conviction and sentence.

The *Traynor* case can clearly be distinguished because there is no debate whatsoever about the meaning of "call upon" and no discussion of its significance or its efficacy.

Another difference between the two cases is that in the *Traynor* case the court was dealing with a probationer who was attending in the District Court on each occasion. In the M.W. case the situation differed in that M.W. was not attending the court and so the question remains as to what constitutes being "called on at any time during such period", and what this means in the context of a probationer who is not coming in and attending in the court and had no reason to attend unless and until he was called on to come in and attend. Thus in the present case s. 6 of the P.O.A. 1907 is very relevant whereas s. 6 was simply not an issue in the *Traynor* case at all. In M.W., District Court Judge Angela Ní Conduin did all that she could do in the circumstances where the accused was not before the court and this involved her in having to consider the Sworn Information which was furnished to her in court and to issue an arrest warrant as a means of "calling on" the probationer. It would assuredly have been wrong to have convicted and sentenced the accused probationer in his absence and without giving him an opportunity to make his case in respect of the alleged breach of the terms and conditions. It was manifestly inappropriate for her simply to have dealt with him in absentia during the period of the bond. If the argument being made on behalf of the probationer is to prevail then a person against whom a warrant issues in the last part of the period before a warrant expires, if that person does not make himself amenable with the consequence that the warrant cannot be executed then the absurdity would be that such a person would become immune from the consequences of the breach of the bond or must be sentenced in absentia, both of which smack of manifest injustice and even of absurdity. I should add that it seems to me that the Director of Public Prosecutions in his argument is not asking the court to depart from what was decided in the *Colm Traynor* case but rather the submission of the DPP is to the effect that the point at issue in this case was simply not touched on, much less decided, in the *Colm Traynor* case.

Counsel for M.W. has referred to the Supreme Court case of *State (Murphy) v. Kielt* [1984] I.R. 458 which deals with the matter of fair procedures which should take place before a temporary release could be revoked in circumstances where an offender had been charged with serious offences. At p. 478 McCarthy J. remarked:-

> "Accordingly, if, for instance, a person on temporary release is suspected by a member of the Garda Síochána to have committed a breach of the peace, the person may be arrested without warrant and returned to the prison from which he was released. In a given case this might occur years after the commencement of the temporary release – with the immediate statutory consequence that the period for which he was temporarily released would thereupon be deemed to have expired. It is demonstrably contrary to any concept of justice that such a sequence of events could take place without fair procedures being enforced. One must interpret the requirement of a suspicion by a member of the Garda Síochána on the basis that the suspicion is to be formed upon reasonable grounds, but the person on temporary release who is arrested must be given the opportunity of contesting those grounds."

He also conferred his approval to a passage in the judgment of the High Court of Barron J. who said at p. 465:-

> "In my view, the essentials of a valid hearing in the present case required at the least:-
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> 1. Evidence from which it would have been fair to hold in favour of the allegation;
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> 2. Notification to the prosecutor of the nature of such evidence sufficient to enable him to prepare a defence;
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> 3. Time for the prosecutor to prepare a defence;
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> 4. An opportunity to make that defence.
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> Such a hearing should have been held and should have been seen to have been held. Such hearing did not have to be of a very formal nature, provided the minimum requirements to which I have referred were met."

While this point is not the gravamen of the Case Stated, it seems to me that the procedure outlined by Mr. McDermott of a two stage procedure in which the probationer is first of all "called on" and then is subsequently given an opportunity to refute the allegations of breach of condition made against him, does appear to be eminently sensible and to take cognisance of the need to tell the probationer of the allegations made against him as to the breach of the terms and conditions and to give him a proper opportunity to be represented and to prepare his case to meet the allegations. Indeed, there could well be occasions when the probationer and his advisers might well wish to seek a deferment of the second stage hearing of the procedure envisaged under s. 1(1) and s. 6 of the Act.

Conclusion:
In *Director of Public Prosecutions v. Moorehouse* [2006] 1 I.R. 428 Murray C.J. at p. 428 said:-

> "It is axiomatic that the starting point of the interpretation of any statutory provision is the text of the provision itself, which falls to be interpreted according to its ordinary and natural meaning.

In *Howard v Commissioners of Public Works* [1994] 1 I.R. 101 Blayney J. in a statement, which has also been cited with approval in subsequent judgments of this court stated at p. 151:-

> "The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expand those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the lawgiver. 'The tribunal that has to construe an Act of a legislature, or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words it is natural to enquire what is the subject matter with respect to which they are used and the object in view.'"

In my view the simple and straight forward interpretation of the relevant provisions is that a two part procedure is envisaged and that the swearing of an information, the furnishing to and consideration of this by the court and then the issue of an arrest warrant is "the calling on" of the probationer alleged to be in default and that he, the probationer, is then given the chance to refute the suggestions of the alleged breaches on his part. It is clear that "the calling on" must be done within the time period stipulated in the provision but, once the calling on has been done within this time period, then the rest of the procedure can take place with due and fair process, giving the probationer time to investigate and prepare his case to meet the allegations of breach of conditions.

The alternative construction of the provisions would lead to a surprising situation, bordering on absurdity, in that if the entire process had to be completed within the period of the six month bond then the period of time for which a six month bond would actually be effective, in the sense that default could attract a penalty, would be for a period somewhat less than the six month given limit. This

is because one would have to deduct whatever time it takes both to bring a defaulting probationer before the court and then also to finalise the conviction and sentencing process. Thus, although the judge who imposed the bond and the conditions therein intended them to be effective for the full six months, the bond would only be effective for a considerably shorter period. This could well also encourage defaulting probationers to avoid making themselves amenable to the court until after expiry of the period in the bond. It would be ridiculous that a defaulting probationer would be untouchable and escape retribution with impunity for failing to observe the terms and conditions of the bond. To my mind the efficacy of the enlightened scheme underlying the Probation Act depends on District Court Judges and other judges having the powers to encourage and facilitate compliance with the conditions and terms of the probation bond. This should be by the encouragement of the "carrot of no conviction on the record" (despite the facts requisite having been found proven). As against this there should also be the corollary of "the stick of an effective inducement" to comply with the conditions by the strong likelihood of punishment from the retributive sword of Damocles hanging over the defaulting probationer in the event of breach in compliance with the terms and conditions of the probation bond which was entered into by the miscreant when being allowed to become such a probationer. Accordingly both on a simple and practical interpretation of the meaning of the relevant provisions in s. 1 and s. 6 and the entire tenor of the contents of this enlightened Act, I am in agreement with the interpretation clearly held by the learned District Court Judge. I hope that this judgment may resolve any residual doubts in her own view of the matter which inspired her to state the Consultative Case, no doubt with the hope of resolving any lingering doubts which she and her colleagues may have entertained in relation to such an important piece of legislation involving the rehabilitation particularly of young offenders, and also of those of more mature years who are belatedly aspiring towards more responsible citizenship.

I have noted with interest over the years of my visits, (not for an overnight stay), to nearly every prison in Ireland with my colleague Mr. Justice Kinlen, that many experienced Governors of Prisons take the view that inmates, when aged about 25 to 30 years, ,may wish for a change of direction in their life style, often associated with a stable relationship with a life partner and their children. While sitting in the Court of Criminal Appeal, I have realised that several Circuit Court Judges and particularly the careful and prudent Circuit Court Judge, who was an experienced social worker dealing particularly with hardened criminals before practising at the Bar, since her elevation to the Bench has responded in appropriate cases to a plea based on a genuine desire, aspiration and intention to reform, by devising a sentencing disposition based on her practical understanding of the situation of a prisoner who appears to be honestly seeking rehabilitation and is aspiring "to go straight" in future. If the alternative construction put forward on behalf of the defaulting probationer were to be accepted, no doubt judges would be even more cautious about applying the Probation Act in the absence of the knowledge that failure to abide by the terms and conditions may not sever the thread by which hangs the retributive sword of Damocles over the head of a miscreant on a probation bond.

Accordingly the answer to the questions posed is that the initiation of the breach of probation recognisance proceedings and the furnishing to the court of the sworn information as to the breach of the probation bond and the issuing of the bench warrant for the arrest of the accused on foot of the evidence of the breach of the probation bond within the period recited in the probation bond of itself brings the bond to an end, thus allowing the Court to proceed to deal further with the accused as the Court may deem appropriate including, if apposite, proceeding to conviction and sentence even when the Court proposes to do this outside the period fixed for the expiry of the bond.

I will hear counsel as to the appropriate terms of the order to be made.