THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 222

Birmingham J.
Edwards J.
Hedigan J.

Appeal No. 2017/137

Mark Finnegan

Applicant/Respondent

-and-

The Superintendent of Tallaght Garda Station and The Governor of Wheatfield Prison

Respondents/Appellants

JUDGMENT of Mr. Justice Hedigan delivered on the 27th day of July 2017

Introduction

1. This is an appeal against the judgment and order of Ní Raifeartaigh J. of the 7th November, 2016, wherein she declared the arrest of the applicant, the respondent herein, on the 10th November, 2014, not in accordance with law. The High Court judge also declared that the respondent's detention in Wheatfield prison from the 10th November, 2014, to the 10th December, 2014, was not in accordance with law.

2. The respondent was convicted on the 19th November, 2008, for the offence of allowing himself to be carried in a mechanically propelled vehicle without the consent of the owner contrary to s. 112(1)(b) of the Road Traffic Act 1961 as amended. He was sentenced, on the 27th May, 2009, to 16 months. The first two months were spent in Wheatfield prison at which point he was transferred to Shelton Abbey Prison. He escaped from Shelton Abbey on the 31st October, 2009, and remained unlawfully at large until his arrest in November, 2014. Immediately upon his absconding, the Gardaí at Arklow station were informed. It appears however that, due to an oversight or human error, there was no warning entry made on PULSE. His release date, had he served his full sentence, would have been the 27th September, 2010.

3. He returned to his family home in Tallaght where he had lived prior to his imprisonment. In 2011, he moved to a different address in Tallaght with his partner. He had a daughter in 2013. He collected social welfare in Tallaght. The High Court judge held that he had no Garda contact between the 31st October, 2009, and the 1st June, 2014. He presented himself at Tallaght Garda station on the 10th November, 2014, and was arrested and committed to Wheatfield prison. There was some dispute about interactions with the Gardaí prior to the respondent's arrest and whether he denied his identity in an attempt to evade arrest and recommittal to prison.

4. The High Court judge noted that the affidavit of the Garda Inspector admitted that there was no good explanation for what happened. That the respondent took no steps to conceal his whereabouts. The delay was on the wrong side of the notional dividing line between acceptable and unacceptable delay. The arrest and detention were in breach of constitutional justice and not in accordance with law.

The appellants' submissions

5. It was submitted by the appellants that it was valid and lawful to arrest and/or detain the respondent. The trial judge erred in failing to hold that the respondent must serve out his sentence. Having escaped he may be returned to prison summarily to serve out his sentence irrespective of any delay on the part of the arresting authorities. The respondent's position that he can set up the extent and longevity of his evasion as a reason for non-enforcement is perverse. Given that the escape would be cause for seeking a separate prosecution it is insupportable to invite the Court to hold that the balance of the respondent's sentence should be dissolved as a result of his successful avoidance of being returned to custody sooner. The respondent is asking this Court to condone and reward what appears to be an unlawful and criminal act.

6. At all times, the primary and effective cause of the respondent not being in prison was his decision to abscond and not voluntarily return. It is absurd to suggest that he has no agency or responsibility in this matter and that the sole issue is whether the State ought to have done more to locate him.

7. It was submitted that the entire purpose of formulating the respondent's argument about the technical definition of a committal warrant (as a command to the Gardaí to arrest and the governor to detain a convicted person) was to avoid any consideration of the unlawful act of the respondent giving rise to his situation. His sentence does not become ineffective merely on the basis of a highly tendentious reading of the committal warrant. Also, the respondent conflates the sentence of imprisonment with the instrument which authenticates the lawfulness of his detention.

8. The trial judge erred in equating the lack of a *post hoc* explanation for the delay with unfairness and/or breach of fair procedures or natural and constitutional justice in respect of the respondent's arrest at the time thereof. She further erred in finding unfairness and/or a breach of fair procedures or natural and constitutional justice in the respondent's arrest and detention when the right to fair procedures was necessarily abridged or sufficiently vindicated by no more than confirmation of his identity as someone unlawfully at large.

9. She erred in finding the arrest and/or detention not in accordance with law as a result of any breach of duty to act promptly in exercising a statutory power. Such a duty is not autonomous and not to be isolated and abstracted from the application of fair procedures generally which were afforded to the respondent.

10. The trial judge erred in not identifying objective principles or standards as a touchstone for findings of unfair delay in arresting the respondent and/or a breach of duty to act promptly in exercising a statutory power. She erred in exculpating the respondent from responsibility to serve out his sentence.

11. The trial judge deprived the people of their right or expectation that the respondent must as a rule serve out his sentence having

been lawfully convicted and sentenced. The public interest in ensuring the respondent serve out his sentence is almost wholly ignored by comparison with the alleged individual unfairness for the respondent being returned to prison after some years. It is not unfair or unexpected that he would be located and made to finish his sentence. He chose to live with that risk.

12. The trial judge erred in failing to refuse the application on the grounds of ex *turpi causa non oritur actio*. It was submitted that the respondent was guilty of turpitude in two respects. First, he absconded from prison. Second, he misled the Gardaii. The respondent's own conduct bars him from the relief of having his return to detention declared unlawful. It was submitted that *Carrigaline Community Television Broadcasting Co. Ltd. v. Minister for Transport, Energy & Communication (No. 2)* [1997] 1 I.L.R.M. 241 stresses the availability of this plea in bar. It highlights the exceptional circumstances that cumulatively must exist before the plea can be circumvented. There must exist a procedure which if adhered to might have availed the claimant and an abridgment of that procedure amounting to a breach of the claimant's constitutional rights. Further, the party with the power in law to relieve the claimant against his own illegal conduct must have known about it and elected not to take any necessary steps against the claimant in the past. Neither of these applies to the present case.

13. The judgment was tantamount to commutation or remission which is reserved to the executive. Such remission or commutation would be a breach of the separation of powers. The Court was referred to the Supreme Court's *obiter dicta* remarks against passing sentences with built-in reviews in *The People (DPP) v. Finn* [2001] 2 I.R. 25 at 45 to 46 where it was regarded as akin to remission or commutation and a breach of the separation of powers. It was submitted that those remarks apply with equal force to what is being proposed in this case.

14. It was submitted that there was overwhelming and persuasive evidence before the High Court concerning whether the respondent was forthcoming once the Gardaii began making enquiries regarding his status. He was not forthcoming and denied on two occasions being the person of his name who escaped. The respondent's averments should have been considered against the backdrop of the fact that he had escaped lawful custody committing an indictable offence in the process. This is not altered by the relative ease of that escape. The appellants complain that the trial judge did not resolve the conflict of facts in relation to his interaction with the Gardaii between June and November, 2014. There were several Garda affidavits and the affidavit of Garda Rooney was supported by his contemporaneous notebook entries. The respondent's contradiction was by way of bare denial. The issue of evasion of arrest was of manifest and obvious relevance. This was the most significant factual issue in the case. This creates difficulty given the emphasis which the trial judge placed on the respondent having lived openly. It was submitted that the failure to review this factual issue amounts to a reviewable error.

15. It was submitted that this Court is not bound by *Hay v. O'Grady* [1992] 1 I.R. 210 in relation to findings of fact upon affidavit evidence alone. The appellants referred to the comments of Finnegan J. in the Supreme Court in *Minister for Justice v. S.M.R.* [2008] 2 I.R. 242 at 250 that without cross-examination an appellant court "is in as good a position to make findings of fact as was the trial judge". It is a myth that the affidavit evidence of an uncross-examined deponent must be accepted. In *Koulibaly v. Minister for Justice, Equality and Law Reform* [2004] IESC 50 Denham J. described this as "manifestly incorrect".

16. It was submitted that this Court can prefer one account over another. The respondent could have applied to give oral evidence or cross-examine the Garda witnesses. The respondent, as the applicant, bore the burden of proof and as such, a conflict of affidavit evidence could not be resolved in his favour. See *Molloy v. The Director of Public Prosecutions* [2000] IEHC 89.

17. Arguments on unfairness or oppression are necessarily highly context dependent. The trial judge's refusal to rule on the contested evidence means a very substantial part of the context was ignored.

18. The appellants submitted that the context in this case was firstly that the respondent had escaped. Second, he was liable to be returned as soon as identified. Third, he was engaged in a measure of active evasion from at least August, 2014. The significance of context in cases of alleged unfairness as a result of delay is apparent in *Cormack v. The Director of Public Prosecutions* [2009] 2 I.R. 208 at 223. It was submitted that this case leads to the observation first, that mere delay in executing any warrant is not to be ascribed automatically to Garda default. Second, the Supreme Court frankly acknowledges that external factors, including attempts to mislead, can contribute to the delay. It was submitted that this can also excuse. Third, as even regards bench warrants, continuing failure to execute does not lead inevitably to the prohibition of a trial but rather to an enquiry as to whether prohibition is warranted in the circumstances.

19. A wholly different context was under consideration in *Cormack* and the fair trial concerns which underpin it do not arise. This is the crucial distinction with any delay jurisprudence relating to bench warrants. Rights relating to a fair trial are inherently more perishable than those relating to family and private life which might feature in an enquiry about delay in executing a sentence. Delay may impact on the public interest in the continued execution of a sentence but the analysis cannot be divorced from the primary and proximate cause of the delay being the actions of the person asserting the right.

20. It was submitted that the only necessary fair procedure for an escaped prisoner is identification. The suggestion that the respondent has been denied fair procedures misunderstands the purely mechanistic role to be played by the Gardaii or other State authorities. Such an entitlement would give rise to a series of follow on questions about the nature and extent of the procedures to be adopted and the issue that falls for determination. The execution of a committal warrant whether immediately following sentence or sometime later cannot credibly be characterised as an event to which fair procedures have any meaningful application. The notion of a determination on whether judicial orders of sentence ought to be enforced fails to take account of the separation of powers.

21. This is not a case involving the discretion of a decision maker like in cases of extradition, temporary release, reactivation or execution of a bench warrant. There is in each of those cases an opportunity to avoid the outcome and procedural safeguards should ensure that the subject can make his best case to avail of that opportunity. Each of the respondent's cited authorities involve a decision making process. This case is beyond such a process. The decision to imprison the respondent has been made and requires no further judicial intervention is required for it to be enforced.

22. It was submitted that none of the cases opened by the respondent during the High Court hearing were on point. Relying on *Long v. O'Toole* [2001] 3 I.R. 548 is problematic as it was an extradition case which necessarily involved an actual adjudication of matters of fact and law. It was also surprising that the trial judge accepted the respondent's argument which was largely based on *Long* as it forms part of a line of authority that has not been followed in this jurisdiction for a number of years. In extradition cases the modern approach to delay was set out in *Minister for Justice v. Stapleton* [2008] 1 I.R. 669 where Fennelly J. held that delay is not a cogent objection to extradition if it can be raised in the criminal process of the requesting state. It has also been considered unhelpful to apply the authorities concerning delay in the execution of warrants to extradition proceedings. See *Minister for Justice v. Stalkowski* [2014] IEHC 647 per Edwards J. at p. 34. It was submitted that logically the converse should also apply. Authorities dealing with delay in extradition cases are of very limited value in a case such as the instant one. As such reliance on *Long* and related cases is

misplaced as the law has moved on.

23. It was submitted that there must be a distinction between a liminal delay in executing a penalty and a delay in finding and re-lodging an escapee. This is due to the fact that it is not for the executive to decide when and where to execute penalties which have been imposed for execution forthwith. This would be tantamount to a unilateral reservation of the timing of imposition. In the instant case the respondent has unilaterally decided that he did not wish to continue serving his sentence. It was submitted that the principle underpinning the authority relied upon by the respondent can be deployed against him.

24. The cases relied upon by the respondent share the idea that it is unfair that a person may be going about their business unaware that their liberty has been compromised. The opposite is the case here. Each of the cases referred to by the respondent involved a decision making procedure to be followed. There is no procedure to determine whether a sentence absconded from remains outstanding and ought to be served.

25. In *Grogan v. The Parole Board* [2008] IEHC 204 the High Court dismissed a claim for legal aid for the preparation of submissions for the parole board. McMahon J., at p. 17, observed that fair procedures "presuppose a legal hearing of some sort, where decisions will be made which may affect the applicant's rights or have serious consequences of a legal nature for the applicant". It was submitted that a right to fair procedures cannot be invoked where there was never a procedure with legal effect outstanding or at least not one that could be said to have been vitiated by delay. In this case the Gardaiì are not decision makers and have no discretion. There was no procedural opportunity to avoid re-committal. As such the respondent cannot have been prejudiced by a delay which might have been unfair had there been such an opportunity.

26. The respondent does not differentiate between his pleas of denial of fair procedures and unfairness or oppression. It is unclear how they can be measured or judged. They have enormous definitional problems and would import uncertainty into the law. The trial judge did not identify objective principles or standards as a touchstone for finding the delay to be unfair or oppressive. The simple effluxion of time cannot equate to unfairness. This plea is an appeal to the gut feeling of the Court and subjective notions of justice. This is not consistent with the separation of powers and the executive's powers of remission and commutation. Only where the unexplained delay amounts to procedural unfairness can it be unfair and oppressive. In this regard, it was submitted that even *Cunningham v. Governor of Mountjoy Prison* [1987] I.L.R.M. 33, which comes closest to supporting the respondent's case, can be distinguished. There was a private, uncommunicated decision to rescind the statutory privilege of temporary release which went un-actioned for seven months. The respondent in that case lost something of his opportunity to prevent re-activation. Cunningham only cited one case in which the Supreme Court emphasised fairness of procedures.

27. It was an error to equate a lack of explanation for the delay in locating and detaining the respondent with unfairness or oppression. The delay was explained. Arklow Garda station was the only station notified and as such it was unlikely that the authorities would become aware of the respondent's escape and arrest him.

The respondent's submissions

28. The respondent submitted that the four and half months it took the appellants to lodge the appeal demonstrates again the lack of urgency attached by the State to the return of the respondent to custody.

29. It was submitted that the appellants argue a ground not in the notice of appeal. It is inappropriate for this Court to be asked to find that the trial judge erred in declining to resolve a factual dispute without same appearing in the notice of appeal. The appellants did not pursue such a resolution in the High Court or maintain that it was of central importance. The appellants are seeking to rerun their case in a different manner. The appellants admitted in the High Court that no steps were taken for four years and seven months to locate and arrest the respondent. The respondent had issued a notice to admit facts. This was the basis on which the trial judge decided the case. The appellants did not object to the invitation to the trial judge to deal with the matter on this basis. Their submissions suggested that Garda Rooney's version of disputed contested conversations was more credible but they did not pursue a resolution of such or maintain it was of central importance.

30. It was submitted that an appellate court can only hear and determine an issue which has not been tried and decided in the court of first instance in the most exceptional circumstances. See *KD v. MC* [1985] I.R. 697 at 701 and *Movie News Ltd. v. Galway County Council* (Unreported, Supreme Court, 15th July, 1977). In *Lough Swilly Shellfish Growers Co-Operative Society v. Bradley* [2013] 1 I.R. 227 at para. 28 O'Donnell J. remarked that the court might permit it where it's a "new formulation of argument" related to a point made in the court below or where there are new materials or legal argument "which closely related to the arguments already made". A party cannot revive an abandoned argument or introduce a point which would require new evidence. It was noted that this case did not radically alter the established jurisprudence. The appellants did not pursue a resolution of the factual dispute.

31. The appellants could have sought leave to give oral evidence and/or cross-examine the respondent. In *Director of Corporate Enforcement v. Seymour* [2006] IEHC 369 O'Donovan J. noted the necessity of cross-examination as "it is impossible for a judge to resolve a material conflict of fact disclosed in affidavits". As it was not part of the respondent's case that the resolution was necessary for the proper disposal of the issues it was not incumbent on him to seek to give oral evidence or cross-examine. If the appellants wished to make the case that resolution was necessary, it was for them to seek to do so on the basis of oral evidence being the only proper way to resolve the conflict.

32. The appellants' authorities do not support the contention in the circumstances of this case that this Court is entitled to prefer one account over another. In Koulibaly there was a conflict on the affidavits and oral evidence was given. The applicant did not object or give oral evidence. It was on this basis that the Court rejected the submission that the applicant's affidavit must be accepted because he was not cross-examined on it. It was also in this context that the Supreme Court held the submission to be "manifestly incorrect". The facts in this case are different. The respondent has not made the case that his account should be accepted as he wasn't cross-examined.

33. In relation to the appellants' reliance on Molloy it was submitted that the respondent did not ask the High Court to resolve the conflict of evidence in his favour. The respondent took the view that the conflict was not material in light of the appellants' formal admissions. *Molloy* hinged on the Court being satisfied as to the accuracy of the account given on affidavit. The Court could not resolve the conflict without oral evidence so the applicant did not prove his case. That is not the situation in the instant case. It was decided on undisputed facts.

34. The respondent noted that upon leaving Shelton Abbey he returned to his home where he lived prior to arrest. In 2011, he moved to a new address in Tallaght with his partner. At all times he collected social welfare payments in Tallaght. He became a father in 2013. In November, 2013 members of the Gardaiì called to the respondent's address and said they believed someone may have given his details and requested he attend Tallaght Garda station. He did so, his details were checked and he was informed he was free to go.

35. It was submitted that in his affidavit of the 10th December, 2014, Inspector Peter Burke, in addition to noting that only Arklow Garda station were informed and that there must have been an oversight or human error, remarked that he was "at a loss to explain in detail the circumstances" in which years elapsed. It was submitted that the factual circumstances are very simple and very stark. The respondent was not evading arrest. No explanation was offered for the delay.

36. In relation to the appellants' contention that they could arrest and detain the respondent at any time it was submitted that there is a duty to act in accordance with fair procedures when exercising powers of arrest and detention. Delay can breach the duty to act with reasonable expedition required by fair procedures which can render the exercise unlawful. To allow a delay of any length would be extraordinary and would permit arbitrary, capricious and even deliberate delay on behalf of the State.

37. It was submitted that the appellants' contention that in effect the respondent is asking the Court to find that the balance of his sentence can be dispensed with as he successfully avoided being returned to prison sooner is a mischaracterisation of his case and the facts. The appellants have never contended that the respondent avoided being returned. They admitted doing nothing to arrest him. He was living in plain sight.

38. It was submitted that basing their arguments on the respondent's duty to serve his sentence entirely misunderstands the nature of a sentence. A prison sentence is an order of the court. It is a power which must be exercised lawfully and in accordance with fair procedures. The order is effected by the Gardaiì arresting and lodging him in prison and the prison governor detaining him. These powers must also be exercised in accordance with fair procedures and the right to a fair trial. The 2014 arrest and detention were rendered unlawful by the unjustified and unexplained delay.

39. The respondent has still not been charged with an offence for escaping custody. There is a public interest in sentences being served but the weight attached to it depends on the circumstances of each case. In *Minister for Justice & Equality v. P.G.* [2013] IEHC 54 the respondent's rights under Article 8 of the ECHR were considered in a European arrest warrant case. Edwards J. set out the applicable principles and a balancing test was formulated. It was noted that the weight attached to the public interest varied depending on the particular circumstances of the case. It was submitted that this applies to domestic enforcement of criminal law. The public interest in the execution of the sentence in the instant case must be significantly less weighty given the disregard of the sentence for almost five years. The trial judge was correct in finding that the public interest in seeing serious offenders returned to prison is best served by holding authorities to account regarding their obligation to act with reasonable expedition.

40. The respondent accepts that arguments on unfairness are highly context dependent. It was submitted that the trial judge also accepted this. The decision in *Cormack* supports the respondent's case. The respondent did not rely on cases relating to the execution of bench warrants and the fairness of any ensuing trial. The respondent relied on cases where there was a conviction and delay in effecting the warrants of imprisonment or related statutory powers. The respondent's cases are closely similar and establish principles of direct relevance.

41. The respondent referred the Court to the trial judge's comment on his authorities and that they establish the need for reasonable expedition when the State are effecting warrants of imprisonment or related statutory powers. The Court was referred to *Dutton v. District Judge O'Donnell & Ors* [1989] I.R. 218 at 221 where it was held that acting fairly means acting promptly. In *Dalton v. Governor of the Training Unit* [2000] IESC 49 Denham J. held that the power to execute warrants must be done in accordance with constitutional justice. In *Cunningham,* the principles of fair procedures were applied in deciding that the delay in arresting the applicant after a breach of a conditional release was unlawful.

42. *Dutton* and *Cunningham* were quoted in *Long* which applied the principles of fair procedures to considering whether it was unjust, oppressive and invidious to order the applicant's extradition to serve the remainder of his sentence.

43. It was submitted that the authorities establish that delay when exercising a lawful power can breach fair procedures and render the exercise unlawful.

44. In *Cunningham*, the applicant was released five weeks in to a six month sentence on temporary release but breached the condition thereof and his re-arrest was requested. The arrest was not made until seven months later. It was held that the re-activation after such a delay without explanation was unfair. Egan J. also remarked that if the delay had been years without explanation he did not think it would be lawful. In the instant case, like in *Cunningham*, there was no warrant but the exercise of the power to return the respondent to custody following a request from the prison governor. *Dutton* quoted *Cunningham* with approval and found that the delay in exercising a lawful power will not be allowed to deprive someone of a constitutional right. *Dutton* and *Cunningham* were cited with approval in *Dalton*.

45. *Cunningham* was of assistance in *Long*. The appellants did not make the case to the trial judge that the decision in *Long* was not to be relied upon as delay in extradition cases is now seen as being a matter to be raised in the requesting state's criminal process. They sought to distinguish it as only relevant to a specific statutory framework. The new argument misses the point. This is not an extradition case. Where delay in such cases should be litigated is of no relevance. *Long* is relevant as it approves the principles and reasoning in Cunningham when the courts are considering the effect of delay on the lawfulness of the exercise of state powers.

46. It was submitted that it is not the case that all the respondent's authorities can be distinguished on the basis of their involving a decision making process or some measure of discretion. There was no issue about whether the committal warrant could be set aside in *Dutton*. The warrants were already made in *Dalton*. The issue in *Cunningham* was not the making of the decision but the delay in bringing the person before the governor. The High Court judge was correct in finding that these were cases decided on the basis of delay.

47. It was denied that any right to fair procedures was abridged or sufficiently vindicated by the confirmation of the respondent's identity. The right to fair procedures is not forfeited if a person engages in a wrongful act. No authority has been cited to support such forfeiture. The respondent's acts do not cancel the obligation on the State authorities to exercise powers in accordance with fair procedures.

48. In relation to the principle *ex turpi causa non oritur actio* it was submitted that it has no relevance to these proceedings. It cannot prevail against a breach of constitutional rights such as a breach of fair procedures. In *Carrigaline Community Television Broadcasting Co. Ltd.*, referenced by the appellants, it is noted that the maxim should not deprive citizens of their right to natural justice and fair procedures.

49. It was submitted that the separation of powers does not prevent the courts from requiring the executive to act in accordance with the principles of constitutional fairness. It requires the courts to assume this role. The trial judge's finding was correct. This case

does not involve clemency or mercy but preventing the exercise of State powers in breach of the respondent's constitutional rights.

Decision

50. The following issues arise in this appeal;

> (a.) was the arrest and detention of the respondent, who had escaped lawful custody in Shelton Abbey , in order to have him complete his sentence, a lawful arrest and detention,
>
> (b.) notwithstanding any delay on the part of the authorities in arresting the respondent, may they return him summarily to prison to serve out his sentence,
>
> (c.) does the absence of an explanation for the delay in arresting the respondent amount to a breach of fair procedures or natural and constitutional justice in respect of his arrest and return to prison,
>
> (d.) must the power to arrest a person who has escaped from lawful custody be exercised expeditiously. Does a failure to do so amount to a breach of natural and constitutional justice.

51. Much is made by the respondent of the absence of any explanation for the delay on the part of the authorities in finding and recommitting him to prison during a period of almost five years. In fact, a reason is given by the authorities albeit not one which does much credit to the same authorities. Upon his simply "walking out" of the open prison of Shelton Abbey, his absence was immediately notified to the Gardaiì at Arklow. Details of his absconding should have been but were not entered up on the PULSE system. The reason is not known but plainly is due to human error. Such errors should not but, in the real world, do actually occur. As a result, no notification to Gardaiì nationwide was made – specifically the Gardaí in Tallaght were not put on notice. Had they been, it is reasonable to assume that a visit to the respondent's family home in Jobstown, would have followed quickly. As it was they had no reason to do so. Even had Gardaí recognised the respondent, absent any notification of his being unlawfully at large, they might well have thought he had benefited from some form of early release. Neither he nor his offence ranked anywhere but at a relatively modest level of criminality. A nationwide hue and cry did not appear justified. The simple human error of failing to enter details on the PULSE system reasonably resulted in the respondent not being pursued by the Gardaí in his area.

52. Whatever about the failings of the authorities in this matter, little credit may be accorded to the respondent other than that he has not offended against the law since his escape from custody. That escape is itself an indictable offence, a point that should not be overlooked in considering all the circumstances of the case. His escape from Shelton Abbey was moreover a serious breach of trust in that he had been allowed a transfer from the enclosed prison of Wheatfield to the open centre of Shelton Abbey. There is some dispute as to whether from June until November, 2014 he had misled the Gardaí as to his identity in order to avoid his return to custody. The learned High Court judge in effect "stopped the clock" in June. It seems an acceptable course for her to have taken since it enabled her to avoid an unnecessary resolution of a dispute that was only marginal to the central issue in the case. That central issue lies in the years that the respondent failed to report to the authorities, remaining unlawfully at large. That constituted a lengthy period of simply ignoring the lawful sentence passed upon him in May, 2009. This constituted in itself a protracted evasion of justice. Whether it continued from June to November, 2014 or involved misleading the Gardaiì during that short period is of only marginal significance. During four and a half or five years he evaded serving his prison sentence. Whether it is one period or the other makes little difference in the overall picture herein. That said, however, it does appear from the evidence of the Gardaí herein that between June and November, 2014, the respondent did in fact actually mislead the Gardaí as to his identity. This Court is in just as good a position as the High Court to assess that affidavit evidence (see *Minister for Justice v. S.M.R.* [2008] 2 I.R. 242, Finnegan J. at para. 15). There is no evidence that the authorities were aware of the presence of the respondent at large in the Tallaght area during those years. There is no evidence of any capricious or other motivation in leaving him at large until sometime when they might choose to pick him up and re-imprison him. The respondent appears as a person who, through a failure to input details of his absconding from Shelton Abbey, fell between the cracks of the Gardaí's PULSE information technology system. Such systems are ineffective when human error fails to input correctly or at all the information it needs in order to work. In short, the respondent escaped from lawful custody, his escape was inadvertently not recorded by Arklow Gardaí, he remained unlawfully at large for almost five years until he was finally located and arrested by Gardaí in Tallaght.

53. It is clear that the authorities have an obligation to implement any sentence of imprisonment imposed by a court of law. That duty includes returning an escaped prisoner promptly to custody as soon as can be. It is equally clear that any person sentenced to a term of imprisonment has an obligation to serve that sentence. As a consequence of any sentence of imprisonment, a prisoner loses his right to liberty. Moreover, escape from lawful custody is an indictable offence. There is further a clear public interest that a convicted prisoner should serve out any term of imprisonment imposed upon him until its lawful determination.

54. Was the respondent denied fair procedures by reason of the delay in effecting his return by the authorities to serve his sentence? This was the central question posed by the respondent to the High Court and as argued before this Court. Added to this was the question as to whether it would be unfair, oppressive or unjust to return him to prison to serve out the remainder of his sentence.

55. It is hard to see how issues of fair procedures could arise in the case of returning an escaped prisoner to custody. The role of the Gardaí is to catch such an escapee and hand him over to the prison authorities as quickly as practicable. There is no process, as is the case in the legal authorities upon which the respondent relies herein. There is no inquiry such as occurs in an extradition case, a temporary release or the reactivation or execution of a bench warrant. There is no trial where fairness might be endangered by the passage of time. There is no decision making procedure. The escaped prisoner has already had his trial and the process of returning him to lawful custody requires no judicial intervention. The Gardaí have no discretion to exercise. The escapee must be returned to the prison authorities in order to serve out the sentence lawfully imposed upon him.

56. In the result, I find that the arrest and imprisonment of the respondent herein was made in accordance with law. The appeal should be allowed. The judgment of the High Court will be set aside.