THE COURT OF APPEAL

(CIVIL)

Birmingham J.
Mahon J.
Edwards J.

BETWEEN/

RECORD NO. 2016/328

SANDRA MAGUIRE

FIRST APPELLANT

- AND –

GOVERNOR OF MOUNTJOY PRISON (THE DOCHAS CENTRE)

FIRST RESPONDENT

BETWEEN/

RECORD NO. 2016/432

THOMAS BRENNAN

SECOND RESPONDENT

- AND –

GOVERNOR OF CASTLEREA PRISON

SECOND APPELLANT

BETWEEN/

RECORD NO. 2016/564

MORUFU ADEMOLA ANIMASHAUN

THIRD APPELLANT

- AND –

GOVERNOR OF MOUNTJOY PRISON

THIRD RESPONDENT

- AND –

THE DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

BETWEEN/

RECORD NO. 2017/80

NAPOLEON SILAGHI

FOURTH APPELLANT

- AND –

JUDGE JOHN O'HAGAN AND THE DIRECTOR OF PUBLIC PROSECUTIONS

FOURTH RESPONDENTS

BETWEEN/

RECORD NO. 2017/81

LUCIAN MARINA

FIFTH APPELLANT

- AND –

JUDGE JOHN O'HAGAN AND THE DIRECTOR OF PUBLIC PROSECUTIONS

FIFTH RESPONDENTS

JUDGMENT of Mr. Justice Mahon delivered on the 4th day of May 2017

1. Appeals in these unrelated cases were listed and heard together in this Court for convenience as the issues for determination in each broadly fall into one, or both, of the following categories:-

> (A) Whether an appeal from a criminal conviction and / or a sentence in the District Court to the Circuit Court requires a full rehearing in the Circuit Court in circumstances where the appellant fails to appear, or for other reason does not prosecute his appeal.
>
> (B) Whether the committal warrant issued by the Circuit Court following the imposition of, or affirmation of, a prison sentence in an appeal from the District Court need necessarily record that the Circuit Court judge considered making a Community Service Order prior to, or as an alternative to, the imposition of a prison sentence of twelve months or less, pursuant to s. 3 of the Criminal Justice (Community Service) (Amendment) Act 2011, and whether a committal warrant is invalidated because it omits a reference to the sentencing judge having considered the suitability of a Community Service Order prior to imposition of sentence.

2. The background facts in each of the cases are different. With the exception of the Silaghi and Marina cases which were heard together by one High Court judge, the cases of Maguire, Brennan and Animashaun were heard on separate dates by different High Court judges.

3. It is appropriate to briefly summarise the relevant facts, issues and the High Court judgments separately in each of the cases as follows:-

The Maguire case
4. Ms. Maguire, (the first appellant), was convicted in the District Court on the 11th September 2015 for an offence of stealing clothes valued at €23.50 from Penneys and was sentenced to three months imprisonment. She appealed her conviction to the Circuit Court and signed a recognisance in her own bond of €500 in relation thereto. Ms. Maguire appeared in the Circuit Court with counsel on the 16th October 2015. The case was adjourned to the 7th December 2015, whereupon Ms. Maguire's counsel indicated her client's intention to appeal against sentence only. The appeal was adjourned to the 11th January 2016. On that date, Ms. Maguire did not appear in court, although her counsel was present. The case was initially put to second call, and when Ms. Maguire was not present at second call her counsel sought an adjournment. The Circuit Court judge refused that application and proceeded to deal with the appeal by affirming the District Court order. No evidence of any nature was heard by the court.

5. A committal warrant issued in due course. It stated, inter alia, the following:-

> *"AND WHEREAS on the hearing of an appeal by the said accused against the said order, the Circuit Court judge for the County and the City of Dublin on the 11th of January 2016 ordered as follows:-*
>
> > *No appearance, Strike out appeal. Affirm conviction and order of the District Court and ordered that the accused be imprisoned for a period of three months."*

6. Ms. Maguire unsuccessfully applied to the High Court for relief pursuant to Article 40.4.2 of the Constitution. She has appealed the judgment and order of the High Court to this court.

7. Essentially, Ms. Maguire maintains that:-

> (i) the learned High Court judge erred in holding that the Circuit Court judge had jurisdiction to strike out the appeal and to affirm the custodial sentence imposed by the District Court without any hearing, and in her absence, and
>
> (ii) the learned High Court judge erred in holding that the committal warrant dated the 12th January 2016 was a lawful basis for her detention, and
>
> (iii) the learned High Court judge erred in holding that the "committal warrant after Appeal" did not require, to constitute a lawful basis for detaining her, to recite that either the District Court judge or the Circuit Court judge considered community service as an alternative to the sentence of imprisonment imposed.
>
> (iv) The learned trial judge erred in law in holding that the jurisdiction of the Circuit Court judge in the District Court Appeal hearing, where a custodial sentence had been imposed in the District Court, but where the appellant was absent when the appeal was listing for hearing, was limited to either issuing a Bench Warrant for the arrest of the appellant, adjourning the appeal or proceeding in the absence of the appellant.
>
> (v) The learned trial judge erred in law in holding that there was an onus on the appellant to prosecute her appeal to the Circuit Court such that, in her absence, when her appeal was listed for hearing, the appeal did not require to proceed.
>
> (vi) The learned trial judge erred in law in holding that the statutory provisions grounding the jurisdiction of the Circuit Court, in respect of appeals from the District Court in criminal matters, did not require the Court to hear the appeal if the appellant was not prepared to prosecute her appeal.

The Brennan case
8. Mr. Brennan, (the second respondent), was convicted on the 16th May 2016 at Galway District Court of a number of road traffic offences and was sentenced to a total of nine months imprisonment. He appealed his conviction to the Circuit Court. The appeal was listed in the Circuit Court on the 22nd July 2016. On that morning, fearing that he would be late for court, the second respondent contacted his solicitor who so advised the Circuit Court judge. The case was put back and called on a further two occasions. As the second respondent had not turned up by the third calling the Circuit Court judge struck out the appeal and affirmed the orders made in the District Court. No evidence of any nature was heard in the Circuit Court.

9. The relevant part of the post appeal committal warrants issued in respect of the separate appeals were similarly worded (save for the imprisonment term). For example:-

> *"AND WHEREAS on the hearing of an appeal by the said accused against the said order, the Circuit Court judge for the County of Galway on the 22nd of July 2016 ordered as follows:-*

Affirm conviction and order of the District Court and ordered that the accused be imprisoned for a period of one month."

10. The second respondent sought relief pursuant to Article 40.4.2. The High Court proceedings were heard by Donnelly J. who ordered the respondent's release from prison on the 17th August 2016. That decision was appealed by the Governor, (the second appellant), on the 22nd August 2016, on the following grounds:-

(i) The learned High Court judge erred in determining that the committal warrant failed to show jurisdiction on its face, by virtue of the fact that it did not record the fact that the applicant had not appeared in person on the day the appeal was finalised.

(ii) The learned High Court judge erred in determining that the defect in the committal warrant, if there was such, was of a "fundamental" kind which should vitiate the lawfulness of the detention.

(iii) The learned High Court judge erred in determining the issue of the lawfulness of the detention by reference to the warrant, without sufficient regard to the uncontested and admitted facts which included the fact that the applicant had failed to appear.

The Animashaun case

11. Mr. Animashaun, (the third appellant), was convicted at Dublin Metropolitan District Court on the 7th June 2016 of the offence of driving without insurance contrary to s. 56 of the Road Traffic act 1961, as amended. Because of previous convictions and other factors, he received a sentence of six months imprisonment, a fine of €5,000, and was disqualified for driving for thirty years. The third appellant appealed against the decision of the District Court, and the appeal came before Dublin Circuit Court on the 10th November 2016. The Circuit Court judge upheld the conviction but varied the sentence imposed in the District Court by removing the fine, thus leaving the third appellant with a sentence of six months imprisonment. The third appellant represented himself in both the District and Circuit courts.

12. The committal warrant states, inter alia:-

"AND WHEREAS on the hearing of an appeal by the said accused against the said order, the Circuit Court judge of the County and the City of Dublin on the 10th of November 2016 ordered as follows:-

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

13. The third appellant applied to the High Court on the 12th December 2016 seeking his release from prison under Article 40.4.2 of the Constitution. The High Court (O'Connor J.) refused that application, whereupon the third appellant proceeded to appeal that refusal to this court. The third appellant's grounds of appeal are as follows:-

(i) the learned High Court judge erred in law or on fact in determining that the committal warrant was a lawful basis for depriving the appellant of his liberty and in determining that the failure of the committal warrant to recite on its face that community service has been considered as an alternative to the sentence of imprisonment imposed was an error on the face of the warrant which vitiated its lawfulness.

The Silaghi case

14. Mr. Silaghi, (the fourth appellant) appeared before the District Court sitting in Virginia, Co. Cavan on the 7th January 2014. He pleaded guilty to entering a factory premises as a trespasser with intention to commit an arrestable offence, to wit theft, and to an offence of stealing property to the value of €4,000, the property of Mr. John Fleming. He was sentenced to two terms of six months imprisonment in respect of these offences, and it was ordered that both sentences be served concurrently. Recognisance was fixed in a cash bond of €1,000 to facilitate the fourth appellant's appeal in respect of severity of sentence. The appeal came on for hearing before the Circuit Court in Cavan on the 9th June 2015, in the course of which the fourth appellant was represented by counsel.

15. Having heard the appeal His Honour Judge John O'Hagan, (the fourth respondent), affirmed the sentence of the District Court. The Committal stated, inter alia:-

"AND WHEREAS on the hearing of an appeal by the said accused against the said order the Circuit Court judge for the County of Cavan on the 9th of June 2015 ordered as follows:-

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

16. The fourth appellant sought leave from the High Court to apply for judicial review and was granted such leave on the 22nd June 2015 for the following:-

(i) An *Order of Certiorari* quashing the order of the fourth respondent made on the 9th June 2015 affirming a sentence of six months imprisonment imposed on the fourth appellant by the District Court on the 7th January 2014 and committing him to Castlerea prison for a period of six months for an offence of entering a building as a trespasser and committing an arrestable offence, to wit criminal damage therein.

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

(iii) An *Order of Certiorari* by way of an application for judicial review quashing the committal warrant after appeal issued

by the fourth respondent on the 9th June 2015 committing the fourth appellant to Castlerea prison for a period of six months.

17. In due course the matter came on for hearing in the High Court on the 2nd February 2017 and on the 27th January 2017 White J. delivered his judgment refusing the fourth appellant relief.

18. The fourth appellant has appealed that refusal, on the following grounds:-

(i) The learned High Court judge erred in law and / or in fact in holding that the orders of the Circuit Criminal Court (District Court appeals) of the 9th June 2015 were a lawful basis for detaining the fourth appellant.

(ii) The learned High Court judge erred in law in holding that the committal warrants holding the fourth appellant were a lawful basis for depriving him of his liberty and, more particularly, in holding that the failure to recite on their face that community service had been considered as an alternative to the sentence of imprisonment imposed was not an error on the face of the record which vitiated the lawfulness of the same.

The Marina case

19. The details of Mr. Marina's, (the fifth appellant), conviction in the District Court and the appeal to the Circuit Court are identical to those in the Silaghi case. Both cases were heard in the High Court by White J. and he delivered a joint judgment in respect of both cases on the 27th January 2017. As in the Silaghi case, the relief sought was refused.

20. The grounds of appeal in this case are identical to those in the Silaghi case.

The costs issue

21. In the Animashaun, Silaghi and Marina cases, there are further grounds of appeal in relation to the issue of the costs of those applications to the High Court. These grounds of appeal will be left in abeyance until the determination of the substantive grounds of appeal as indicated above.

The Conduct of an Appeal from the District to the Circuit Court

22. Section 18 of the Courts of Justice Act 1928 states:-

"(1) An appeal shall lie in criminal cases from a Justice of the District Court against any order (not being merely an order returning for trial or binding to the peace or good behaviour or to both the peace and good behaviour) for the payment of a penal or other sum or for the doing of anything at any expense or for the estreating of any recognizance or for the undergoing of any term of imprisonment by the person against whom the order shall have been made."

23. Section 50 of the Courts (Supplemental Provisions) Act 1961 provides as follows:-

"Where:

(a) an order is made in a criminal case by a justice of the District Court convicting a person and sentencing him to pay a penal or other sum or to do anything at any expense or to undergo a term of imprisonment or to be detained in Saint Patrick's Institution, and

(b) an appeal is taken against the order, and

(c) either:

(i) the notice of appeal states that the appeal is against so much only of the order as relates to the sentence, or

(ii) the appellant, on the hearing of the appeal, indicates that he desires to appeal against so much only of the order as relates to the sentence,

then, notwithstanding any rule of law, the Circuit Court shall not, on the hearing of the appeal, re-hear the case except to such extent as shall be necessary to enable the court to adjudicate on the question of sentence."

24. In these appeals, it is accepted that an appeal from the District Court to the Circuit Court, be it relating to conviction or sentence only, is a de novo appeal by which is meant that on any substantive hearing of the appeal the Circuit court must rehear the evidence afresh and arrive at its own determination on issues of fact and of law. It is also accepted that the jurisdiction of the Circuit judge in terms of imposition of penalty is no greater than was available in the District Court. Subject to this restriction, the Circuit Court judge is free to affirm the order of the District Court, or vary it, including completely reversing the decision in the District Court. The Circuit Court judge may increase or reduce the penalties imposed in the District Court, subject to the limits of the jurisdiction of the District Court.

25. In *The State (Aherne) v. Cotter* [1982] I.R.188, the Supreme Court held that there was no limitation placed upon the exercise by the Circuit judge of the jurisdiction to determine an appeal under s. 18 of the Act of 1928 from a decision of a District Court judge, and the Circuit Court had jurisdiction to increase the sentence imposed by the District Court. In his judgment, Walsh J. stated:-

"Section 85 of the Courts of Justice Act, 1924, expressly conferred a right of appeal in criminal cases from a Justice of the District Court to a judge of the Circuit Court "against … for any term of imprisonment exceeding one month" by the person against whom the order shall have been made, and provided that the decision of the judge of the Circuit Court should be final, conclusive and not appealable. Section 22 of the Courts of Justice Act, 1928 repealed s. 85 of the Act of 1924. Section 18 of the Act of 1928 provides for an appeal in criminal cases from the District Court to the Circuit Court in respect of any order which imposes any fine or any period of imprisonment. The District Court which was established by the Act of 1924 was abolished in 1961 and the present District Court was established by s. 5 of the Courts (Establishment and Constitution) Act, 1961."

26. Concerning s. 50 of the Courts (Supplemental Provisions) Act 1961, Walsh J. said:-

> *"The jurisdiction of the Circuit Court to hear appeals from the District Court in criminal matters does not stem from s. 51 of the Act of 1924 as reenacted by the Courts (Supplemental Provisions) Act, 1961, but from s. 18 of the Act of 1928, as re-enacted and amended by that Act of 1961."*

27. Walsh J. went on to reiterate the fact that *"an appeal by way of retrial enabled a totally different case to be made by either side or both"*.

28. The issue in the *Maguire* and *Brennan* cases is essentially concerned with appeals from the District Court which were not *prosecuted* in the Circuit Court, by which I mean they were not proceeded with. Generally, such may happen for a variety of reasons, including a failure to appear in the Circuit Court by the appellant, or a decision to seek to withdraw the appeal made on behalf of the appellant. Also, on occasion, an appeal is *allowed* or *conceded* where, for example, a motor insurance certificate or driving licence is produced in the Circuit Court and the presiding judge is informed on behalf of the prosecuting garda that the document is in order. It is the common practice of the Circuit Court in all of these instances to strike out, or allow if appropriate, the appeal without any hearing of evidence or oral submissions from either side.

29. Essentially, these appeals pose the question whether, in circumstances where, for whatever reason, an appellant who has been convicted and sentenced in the District Court and who embarks on the processing of an appeal of that conviction or an appeal limited to sentence fails to appear in the Circuit Court, is it necessary for the Circuit Court judge to hear afresh the prosecution case before satisfying himself or herself of the guilt or innocence of the appellant, or in the case of a sentence appeal, what that sentence should be. In both cases, the appealed judgments are in favour of the proposition that a *de novo* hearing in the Circuit Court is not required if the appellant fails to appear. The difference in the outcomes to both cases in the High Court is down to the validity of the committal warrants. In *Brennan*, Donnelly J. decided in favour of the second respondent and ordered his release from prison because the warrant stated that there had been a hearing of the appeal, whereas no such hearing had taken place because of the appellant's non appearance. This error, in the learned High Court judge's view, invalidated the committal warrant rendering continued detention unlawful.

30. Section 10 of the Criminal Justice Act 2007 provides as follows:-

> *"10. The Act of 1997 is amended by the insertion of the following section after section 6:*
>
> > *"6A. Section 6 applies in relation to recognisances entered into by persons appealing against sentences of imprisonment imposed by the District Court with the following modifications:*
> > *(a) by the substitution of the following paragraph for paragraph (a) of subsection (1):*
> >
> > *(a) the recognisance shall be subject to the following conditions, namely, that the appellant shall:*
> >
> > *(i) prosecute the appeal,*
> >
> > *(ii) attend the sittings of the Circuit Court until the appeal has been determined, and*
> >
> > *(iii) ;*
> >
> > *(b)*
> >
> > *(c) "*

31. The word *"prosecute"* is apt to cause confusion. The term is perhaps more commonly understood in the context of the process whereby the Director of Public Prosecutions alleges that an accused has committed an offence, and, thereafter, the due processing in a court of law of the case against him on that basis with a view to having his guilt or innocence established, and if the former, the imposition of a sentence. That process is subject to a host of statutory and non-statutory rules and regulations including the right of the accused to be present in court, to be legally represented (with legal aid if necessary), and to participate fully in the proceedings.

32. However, the term also has a secondary meaning. In the *Concise Oxford Dictionary* that secondary meaning is stated in the following terms, *"continue with a view to completion"*. The use of the term *"prosecute"*, in the context of an appellant lodging and processing an appeal from the District Court to the Circuit Court, undoubtedly encapsulates this secondary meaning. An appellant's undertaking to *"prosecute"* an appeal (by entering into a recognisance) is, in reality, and in general terms, his or her agreement to facilitate a rehearing of the appeal de novo in the Circuit Court (in relation to conviction or sentence as the case may be) based on a legal entitlement to appeal, and having so appealed engage with a full rehearing, in his presence and with his participation, with or without legal representation.

33. The practice of the Circuit Court striking out appeals from the District Court in the absence of hearing any evidence or oral submissions is a very old one, in those instances where there is a failure, for whatever reason, to prosecute them by the appellants. It has often been referred to in the Superior Courts with approval. For example see *R (McMonagle) v. Chairman and Justices of County Donegal* [1905] I.R. 644, *Phelan v. Judge Catherine Delahunt and Ors* [2014] IEHC 142 and *McCann v. Judge Groarke and the DPP* [2001] 3 I.R. 431.

34. In the latter case, Herbert J. remarked:-

> *"If the applicant was not heard on this occasion it was entirely due to his own failure to attend before the court, or alternatively or additionally, due to his solicitors' failure to notify him of the adjourned date to appear before the court. In the absence of some compelling evidence which would establish that the decision of the first respondent was in the circumstances irrational, unreasonable or tainted with bias - there is no such evidence to be found in this case - the proper administration of justice must require that the court has and utilises the power to strike out or to dismiss an appeal for default of appearance on the part of the applicant or anyone on his behalf."*

35. The right of an appellant, or indeed an individual facing trial at first instance, to be present and to participate in the hearing of the case against him is without doubt. In *Lawlor v. Hogan* [1993] ILRM 606, Murphy J. identified three relevant principles, as follows:-

> *"1. An accused has a fundamental constitutional right to be present at and to follow the proceedings against him.*
>
> *2. In so far as the judicial process in criminal matters expressly requires matters to be dealt with by or in relation to the individuals accused, clearly he must be present to enable these functions to be performed.*
>
> *3. If a trial judge is satisfied that the accused has consciously decided to absent himself from the trial (at a time when his presence is not essential to enable some particular procedure to be complied with) then the trial judge would be entitled in his discretion to proceed with the trial notwithstanding the absence of the accused."*

36. In *O'Brien v. District Judge Coughlan and the DPP* [2011] IEHC 330, the court was concerned with an application for an order of *Certiorari* to quash a conviction and penalty imposed on a defendant *in absentia* by the District Court judge. The case was particularly concerned with circumstances where the judge took no step to ensure the defendant's presence before imposing a prison sentence.

37. In the course of his judgment, Kearns P., expressed the following view:-

> *"It is a regrettable aspect of the administration of justice in modern times that both prosecuting authorities and the courts are expected to at every juncture to facilitate defendants who themselves neglect or decline to co-operate in the procedural requirements which require to be observed by both prosecution and defence so as to permit the criminal justice system to function effectively. It is thus by no means uncommon to hear that members of An Garda Síochána are required to devote a great deal of time and energy to the execution of bench warrants where persons remanded on bail fail to turn up for designated sittings or simply ignore the process altogether. It is often later argued or contended that it was an injustice for the court to proceed further in the absence of the person accused or charged with a particular offence."*

38. The *O'Brien* case was appealed to the Supreme Court. In his judgment, Charleton J., under the heading *"Right to due process"*, stated:-

> *"Thus, while there is a right of the accused to attend at his or her own criminal trial and to participate in it, that entitlement can be lost through persistent misconduct and can also be waived through a decision not to turn up. In reality, this means that the prosecuting authorities should do what is practicable to inform an accused as to when he or she should appear in court. Once there, further dates as announced are the responsibility of the accused. As Kearns P adverted to in his judgment, non-appearance by the accused characterises many criminal trial lists and undermines the efficiency of court proceedings."*

39. In both *Maguire* and *Brennan*, the appellants to the Circuit Court were legally represented in that court. In both, the matter was let stand in the Circuit Court in order to give the appellants the opportunity to turn up. It was only at a point in time where it appeared that the appellants would not turn up that the Circuit Court judge in each case proceeded to strike out the appeals and again, in each case, having heard no evidence or other submissions before so doing. In the case of Brennan, Donnelly J. remarked that the Circuit Court judge had *"behaved impeccably giving him plenty of time to appear on the day"*. In both cases, the appeals had been listed on previous occasions and had not proceeded. In both cases, also, prison sentences had been imposed in the District Court and both appellants (as they were then) were aware that a similar fate, (in terms of sentence), awaited them in the Circuit Court in circumstances where, either, they appeared and prosecuted their appeals but failed to have the decision of the District Court reversed or failed to appear. In his judgment in *Maguire*, Eager J. noted that the first appellant had a number of previous convictions and was aware of court procedure.

40. I am satisfied therefore that a Circuit Court judge is empowered to strike out an appeal from the District Court (against conviction or sentence as the case may be) and to affirm the decision of the District Court in circumstances where an appellant fails to turn up in court. Such jurisdiction is subject to basic principles of justice and respect for the constitutional rights of an accused person which govern the proceedings and decisions of all courts. In neither case is there any evidence of unfairness or breach of constitutional rights in the manner in which these appeals were disposed of in the Circuit Court.

41. What then is the form of the order that is to be made by a Circuit judge in these circumstances? Is it appropriate that a Circuit Court judge merely affirms the order of the District Court without, so to speak, replacing it with an order of the Circuit Court, albeit in similar terms to that of the District Court. Rule 41.5 of the Circuit Court Rules provides as follows:-

> *"Whenever an appeal in an criminal case from a justice of the District Court to a judge of the Circuit Court shall not have been prosecuted, or the original order shall have been confirmed or varied on appeal, or either parties shall upon appeal have been ordered to pay a specified sum for costs, the judgment may direct the issue by the County Registrar of all warrants necessary and proper for the execution of the original Order or of such varied Order and to enforce the payment of such costs."*

42. In *A.G. v. William Mallen* [1953] I.R. 344, Lavery J. stated:-

> *"I have thought it necessary to set out the procedure in some detail because it shows, in my opinion, that the conviction or order, though appealed to the Circuit Court and there either confirmed or varied, retains its essential character of a conviction or order of the District Court.*
>
> *The appeal is a true appeal though by way of rehearing and it is not a retrial expect in form. The defendant appealing comes before the Circuit Court as a convicted person. He does not rid himself of the conviction by serving notice of appeal. He is not called on to plead and his task is to show, if he can, that the conviction was wrong in whole or in part. This situation is not altered by the circumstances that there is a rehearing."*

43. *Mallen* was a case in which an appellant prosecuted his appeal in the Circuit Court and fully participated in a rehearing in that court.

The Community Service issue

44. Section 3 of the Criminal Justice (Community Service) (Amendment) Act 2011 provides as follows:-

> *"3. Section 3 of the Principal Act is amended:-*

(a) by the substitution of the following subsection for subsection (1):-

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

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

45. This provision imposes a mandatory requirement on a sentencing judge, before the imposition of an appropriate sentence of up to twelve months imprisonment, to consider as an alternative a community service order. This section replaced a provision in the Criminal Justice (Community Service) Act 1983 which merely provided the option to a sentencing judge to make an order for community service as an alternative to imprisonment.

46. In the instant cases under appeal separate or cumulative prison sentences were imposed of, respectively, three months, nine months, six months, two terms of six months and two terms of six months. In none of the cases did the Circuit judge make explicit reference to having considered community service in the committal warrants that issued in respect of each of the cases.

47. In the *Maguire* and *Brennan* cases there was no explicit reference or other indication on the part of either Circuit Court judge, prior to striking out the appeals and affirming the orders of the District Courts, any indication that consideration was given to the making of a Community Service Order as an alternative to a term of imprisonment. In the cases of *Animashaun* and *Silaghi* and *Marina* no reference was made by the respective Circuit Court judges at any stage in the course of the hearing of their appeals and / or prior to the imposition of prison sentences, to s. 3 of the Criminal Justice (Community Service) (Amendment) Act 2011. In all the appeals it is contended that there was a failure on the part of the respective judges to consider the relevant provisions of the Act of 2011 prior to the imposition of prison sentences and furthermore, it is contended that a failure to recite on the face of the committal warrant in each case a reference to the sentencing judge having considered as an alternative to imprisonment, the making of a community service order, renders the warrant invalid.

48. In *O'Brien v. Judge Coughlan and Another* [2014] IEHC 425, Kearns P. rejected the contention that an order of conviction and sentence (four months imprisonment) should be quashed because the District judge did not explicitly refer to his having considered community service as an option before imposing sentence. He said:-

"There is no challenge made in this case to the reasons offered by the respondent judge for imposing a custodial sentence, rather it is a challenge based on the fact that, although required by law to consider the option of community service, the judge did not explicitly state in his ruling that he had done so. That is akin to arguing that a judge must in every case enumerate every legal responsibility which devolves on him or be taken as not having discharged that onus. That would be an unrealistic requirement when judges must be assumed to know the statutory regime under which they operate."

49. The *O'Brien case* was appealed to this court ([2015] IECA 245). In his judgment, Ryan P., stated:-

"The judge was required to take into account the option of community service when deciding on sentence. That does not mean that he had to spell out expressly that he had performed his statutory duty in this regard. Obviously, he had to take it into account but he did not have to state that he had done so. It may well be desirable in general circumstances for him to do so, if only to reassure anybody who might be in doubt about the matter, but it is not an obligatory requirement in the sense that failure to do so inevitably results in the invalidation of the judgment that he gives."

He also stated:

"… the point is that the failure to specify that he had taken into account the question of community service does not furnish a sufficient or any basis for invalidating the judgment."

50. There are very many requirements and principles to be applied, considered and taken into account by a judge before sentencing a person found guilty of an offence. Some, but not all, are statutory requirements. Some examples are the provision of legal aid, credit for an early plea of guilty (s. 29(1) of the Criminal Justice Act 1999), and the principles of totality and proportionality to mention but a very few of many. While it is always useful and helpful in understanding the basis for a particular sentence for the sentencing judge to spell out the various matters taken into consideration by him or her in arriving at a particular sentence, there is no absolute requirement that such be done in all cases. It can be assumed in most cases, unless the contrary is evident, that a sentencing judge formulates and structures a sentence in compliance with statutory requirements and other relevant principles. Indeed it would be absurd to suggest that a failure on the part of the sentencing judge to refer to each and every such requirement or principle undermines the sentence imposed.

51. In *O'Brien* Ryan P. said:-

"Any such omission does not infringe the precept that a Court is expected and required to give reasons for its decision. Kearns P. was correct in saying that it would be absurd to expect every judge to recite everything that he or she had taken into account in arriving at the decision. That would impose an obligation to specify a long list of legal and factual matters in every case and would be wholly unrealistic."

52. He also said:-

"It is proper for the defence lawyer to invite the judge to impose a community service order instead of prison. There is something seriously wrong with a model of justice which would leave a busy judge dealing with a long list exposed to judicial review because he omitted to mention a matter that is in the interest of the defendant, that the latter's legally-

aided solicitor should propose for consideration if relevant, that the solicitor could inquire about and confirm after sentence that the judge had taken it into account.

A defence solicitor who failed to refer to community service in submissions may be open to criticism. It is difficult to see how a defendant can impeach his conviction on the ground merely because the judge did not say that he had considered community service when his own lawyer (1) could and arguably should have proposed that course and (2) if in doubt whether the judge might have overlooked the statutory requirement could have inquired or reminded the judge after sentence. It is unacceptable that a solicitor would lie low, so to speak, and say nothing in the hope that the judge would fail to mention community service and then seek judicial review."

53. In circumstances where, for whatever reason, an appeal to the Circuit Court is not prosecuted, the Circuit Court judge, being entitled to affirm the sentence imposed in the District Court in the absence of a rehearing of the appeal, is not required to consider the suitability of the convicted person for a Community Service Order as an alternative to a prison sentence as per s. 3 of the Act of 2011. In such circumstances the Circuit Court is merely affirming the sentence imposed by the lower Court and is not engaged in the process of imposing a freshly considered sentence on an appellant.

54. In her judgment in the *Brennan* case, Donnelly J. said:-

"In any event, I don't consider that the court has to consider community service in the particular circumstances where it is not embarking on the hearing of an appeal because of the failure of the applicant to in fact prosecute his appeal."

55. I have carefully considered the submissions of both parties in relation to the obligation under s. 3 (1) of the 2011 Act and I am satisfied that the first respondent was not required to expressly state reasons for not imposing community service where the same was not sought or consented to. The clear legislative intention behind the provision is to reduce the number of short term custodial sentences imposed and it therefore places an onus on all judges to consider community service as an alternative. Judges of the District Court deal with a large number of cases on a daily basis and are often required to consider the imposition of relatively short custodial sentences, so s. 3.1 is of particular relevance to their work. It must be presumed that all judges engaged in the process of sentencing offenders, at first instance or on appeal, in cases covered by s. 3.1 are aware of their obligation to consider community service as an alternative to prison without the need to openly and in detail articulate that they have done so and state reasons why it is not suitable in the particular case. As was made clear in the judgments of Kearns P. and Ryan P. outlined above the reasons for a District judge's decision can be clearly implied in some cases without being expressly stated in any particular form

The committal warrant

56. It is argued that the absence in a committal warrant of a reference to the sentencing judge having considered the suitability of the imposition of a Community Service Order in compliance with s. 3 of the 2011 Act invalidates the warrant.

57. The essential purpose of a committal warrant is to ensure that there exists a formal written record authorising the deprivation of an individual's liberty on the basis of the exercise of lawful jurisdiction, and that it contains on its face sufficient information as conveys such to the person being deprived of his liberty and to the party directed to effect that deprivation of liberty. It also fulfils the important function of clearly conveying to a Prison Governor the duration of the sentence imposed to enable the term to be measured for administrative purposes and to ensure that the sentence imposed is not exceeded.

58. In *The State (Royal) v. Kelly* [1974] I.R. 259, Henchy J. stated:-

"The mandatory provision in Article 40, s. 4, sub-s. 2, of the Constitution that the High Court must release a person complaining of unlawful detention unless satisfied that he is being detained "in accordance with the law" is but a version of the rule of habeas corpus which is to be found in many Constitutions. The expression "in accordance with the law" in this context has an ancestry in the common law going back through the Petition of Right to Magna Carta. The purpose of the test is to ensure that the detainee must be released if - but only if - the detention is wanting in the fundamental legal attributes which under the Constitution should attach to the detention.

The expression is a compendious one and is designed to cover these basic legal principles and procedures which are so essential for the preservation of personal liberty under our Constitution that departure from them renders a detention unjustifiable in the eyes of the law. To enumerate them in advance would not be feasible and, in any case, an attempt to do so would only tend to diminish the constitutional guarantee. The effect of that guarantee is that unless the High Court (or, on appeal, the Supreme Court) is satisfied that the detention in question is in accordance with the law, the detained person is entitled to an unqualified release from that detention. It is the circumstances of a particular case that will usually determine whether or not a detention is in accordance with the law.

Where, as in the present case, the prisoner has been convicted and sentenced by a court established by law under the Constitution, and the jurisdiction of that court to try the offence and impose the sentence has not been challenged, it would be necessary to show that the procedure has been so flawed by some basic defect as to make the conviction a nullity before it could be held that the detention was not in accordance with the law."

59. In the *State (McDonagh) v. Frawley* [1978] I.R. 131, O'Higgins J. endorsed statements, all to similar effect, in the judgments in *The State (Cannon) v. Kavanagh* [1937] I.R. 428; *In re Beggs* [1944] N.I. 121 and *In re Featherstone* (1953) 37 Cr App R. 156, and went on to state:-

"The stipulation in Article 40, s. 4, sub-s. 1, of the Constitution that the citizen may not be deprived of his liberty save "in accordance with law" does not mean that a convicted person must be released on habeas corpus merely because some defect or illegality attaches to his detention. The phrase means that there must be such a default of fundamental requirements that the detention may be said to be wanting in due process of law. For habeas corpus purposes, therefore, it is insufficient for the prisoner to show that there has been a legal error or impropriety, or even that jurisdiction has been inadvertently exceeded."

60. In *McDonald and O'Rafferty v. Governor of Portlaoise Prison* [2016] IESC 37, the following is stated by O'Donnell and Clarke JJ in their jointly delivered judgment on the 12th July 2016, under the heading *"The Validity of the Warrant"*:

"The starting point for any discussion on this question must be to emphasise the importance of ensuring that any court order which imposes a significant obligation on any party be clear and unequivocal in its terms. This principle is of particular importance in the context of any court order or warrant which justifies depriving a person of their liberty.

Persons, such as the Governor in this case, who are entitled to detain individuals as a result of an order made by a court should be given, by the order in question, clarity as to the precise terms of the deprivation of liberty authorised by the order concerned."

61. In *Ejerenwa v. The Governor of Cloverhill Prison* [2011] IESC 41, the Supreme Court emphasised the importance that certain information be clearly stated on the face of a warrant. In her judgment, Denham C.J. said:-

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

62. The importance of the document was also referred to by Peart J. in *Macharia v. The Governor of Cloverhill Prison* [2009] IEHC 42, when he said, referring to a committal warrant:-

… Such an important document - an authorisation for the deprivation of the liberty of the applicant - must be properly and carefully prepared. Great care must be taken not only to enable the detainer to be aware of the authority under which he is to detain the person, but so that the detainee can by inspecting the document be aware of precisely the lawful authority under which he is held."

63. In *Freeman v. The Governor of Wheatfield Place of Detention (No. 1)* [2016] IECA177, this Court was concerned with an appeal from a decision of the High Court following an enquiry under Article 40.4.2 of the Constitution, releasing Mr. Freeman from custody on the basis that there was a deficiency on the face of the warrant. Mr. Freeman had been sentenced to four months imprisonment in the District Court, and the warrant on which he was committed to prison made no reference to the determination of the Director of Public Prosecutions that the matter be tried summarily. This Court held that the warrant was not defective, and that it was not necessary that it recite on its face that the Director of Public Prosecutions had directed that the offence was to be heard and determined in a summary fashion in the District Court. It was the view of this Court that even if such information ought strictly to have been recited on the face of the warrant (and which it believed was unnecessary) such a failure was in the circumstances of such a technical nature that its absence could not invalidate what was otherwise a perfectly good warrant. In my judgment in that case, I quoted with approval a post script in a judgment delivered by Kearns P. in *Moore v. The Governor of Wheatfield Prison* [2015] IEHC 147 as follows:-

As already indicated in this judgment, this Court is most unhappy at the idea of a procedural technicality trumping substantive justice. The notion of justice being frustrated on a technicality is damaging to the concept of justice itself and gives rise to public unease and disquiet. That is particularly the case when all parties in this case, including the water rates protesters themselves, agree that the trial judge conducted the hearing with exemplary fairness and no appeal has been brought against any part of his order.

Obviously- and as described by Denham C.J. in FX v. Clinical Director of the Central Mental Hospital [2014] IESC 01 (at para. 53) - the right to apply to court for release from detention under Article 40 may be seen as "the great remedy"' which has "deep roots in the common law". It has a special place in our Constitution and is a right jealously- some might say zealously- fostered and protected in this jurisdiction.

That should not however lead to a situation where technical errors on the face of the record, even errors of more than a trivial kind, can be relied upon in every instance to set aside committal orders in the absence of any prejudice or injustice being demonstrated by an applicant in circumstances where he has been properly tried, convicted and sentenced. That was the view expressed by O'Higgins C.J. in (McDonagh) v. Frawley [1978] I.R. 131, a view with which this Court strongly concurs. Ideally, hearings of inquiries under Article 40 should permit rectification of the record during the course of that inquiry, such as, for example, by permitting the filing during the hearing of a long form warrant with all appropriate information. It is clear from the decisions of Hogan J. in Joyce v. Governor of the Dóchas Centre [2012] 2 I.R. 666 and, more particularly, of Baker J. in Miller v. Governor of the Midlands Prison [2014] IEHC 176 that considerations of this sort featured in those cases. This would venture to suggest that the status of Article 40 is enhanced by such an approach."

64. In the case of *Brennan* (the second respondent), the Governor of Castlerea Prison (the second appellant) has appealed that part of the judgment of Donnelly J. which held that the committal warrant was defective and invalid because it conveyed, incorrectly in the view of the learned High Court judge, that a hearing of the appeal had taken place in the Circuit Court. In her view, this apparent error on the face of the warrant was not merely a technical matter, such as occurred in Freeman. She stated:-

"…If a court is to be entitled to imprison a person for nine months, or indeed for any period of time, without hearing any evidence at all, the basis for that jurisdiction cannot be considered technical and it must be shown upon the order"

65. As earlier indicated, the recital on the face of the warrant stated *"AND WHEREAS on the hearing of an appeal by the said accused …"*. In fact, Mr. Brennan did not appear in the Circuit Court, and no evidence was heard.

66. If the term "hearing" as stated in the committal warrant was intended to convey that a *de novo* hearing of Mr. Brennan's appeal had taken place in the Circuit Court prior to the decision of the Circuit Court judge to affirm the order of the District Court, such is incorrect as no such hearing took place. On the other hand, arguably, the term "hearing" as it appears on the warrant is a reference to the process which took place in the Circuit Court, namely the processing of the appeal in the absence of any appearance by Mr. Brennan, and not necessarily an actual hearing of evidence. As earlier indicated in this judgment, the determination of the appeal by the mere affirming of the District Court order was legitimate in circumstances where an appellant failed to turn up and prosecute his appeal in the ordinary way.

67. In any event, whichever view is correct, it cannot be a matter which can be said to go to jurisdiction. If the use of the term "hearing" was erroneous, its appearance on the face of the warrant amounts to nothing greater than a technical deficiency which does not undermine its validity in circumstances where it represents a lawful order of a Court. The fact that the appeal was disposed of by the Circuit Court judge in the absence of any rehearing was known to Mr. Brennan so that he was not taken by surprise or otherwise subjected to unfairness by the error, if indeed it was an error. Furthermore the error, being of such a technical nature and unrelated to jurisdiction, did not act to misinform the Prison Governor as to information particularly relevant for him in his capacity as the person authorised to give effect to the court order for the deprivation of liberty.

68. I am therefore of the view that the error on the face of the warrants, such as it was, did not invalidate the document. I therefore respectfully disagree with the learned High Court judge and would hold that the Warrant is valid.

Summary of conclusions

69. I would dismiss the appeals in the cases of *Maguire, Animashaun, Silaghi* and *Marina*, and I would allow the appeal in the case of *Brennan*.