



THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 236

**Birmingham J.
Edwards J.
Hedigan J.**

Mariana Kovacs

Appeal No. 2015/356

Applicant/Appellant

-and-

The Governor of the Mountjoy Women's Prison

Respondent

JUDGMENT of Mr. Justice Hedigan delivered on the 31st day of July 2017

Introduction

1. This is an appeal against the judgment and order of Baker J., made on the 30th June, 2015, and the 9th July, 2015, respectively, in an Article 40.4.2 application. The case relates to whether the appellant was lawfully imprisoned on foot of either, or both, of two committal warrants issued by the Dublin Circuit Court

2. The first warrant in time was in respect of a sentence of three months imposed by Dun Laoghaire District Court, and initially suspended entirely for two years, for an offence contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001 to which the appellant had pleaded guilty on the 13th January, 2014. The circumstances of this offence were that the appellant had stolen clothes from the Marks and Spencer shop in Dundrum Shopping Centre.

3. It was a condition of the suspension of the sentence that the appellant should not re-offend during the period of the suspension. The appellant breached that condition by stealing a pair of shoes from TK Maxx in the Blanchardstown Shopping Centre in April 2014. She was charged with theft arising from that incident (the triggering offence), and subsequently pleaded guilty to that offence before Blanchardstown District Court on the 15th of September 2014. The presiding District Court judge, on being made aware that the triggering offence had been committed in breach of the conditions on foot of which an earlier sentence had been suspended by Dun Laoghaire District Court, and before proceeding to sentencing for the triggering offence, remanded the appellant to the next sittings of Dun Laoghaire District Court, which was the following day the 16th of September 2014, purportedly pursuant to s.99(9) of the Criminal Justice Act 2006. (Strictly speaking this procedure was irregular because s.99(9) (as then enacted) required sentence to be imposed for the triggering offence before the matter was remitted to the court that had imposed the suspended sentence. However, no point has been raised in regard to that.)

4. On the 16th of September 2014 Dun Laoghaire District Court lifted the suspension of the three months sentence for the Marks & Spencer matter. The appellant would have commenced serving her three month sentence on that date but for the fact that, having entered into recognizances, she appealed to the Dublin Circuit Court against the order lifting the suspension of her sentence. The appellant was, however, remanded back to Blanchardstown District Court for sentencing in respect of the triggering offence.

5. On the 18th of September 2014 the appellant was sentenced to one month imprisonment consecutive to the activated sentence of three months. The appellant once again, having entered into recognizances, appealed to the Dublin Circuit Court against the sentence imposed on her for the triggering offence.

6. Both appeals came on before the Dublin Circuit Criminal on the 15th of June 2015 and were dismissed. This outcome generated the two committal warrants at issue in this case. Both are dated the 15th of June 2015. The practical effect of them was that the appellant was committed to Mountjoy Women's Prison (The Dóchas Centre) to commence serving her three month sentence on that date, with the consecutive sentence of one month to commence on the expiration of that sentence.

7. On the 17th of June 2015 the appellant sought an inquiry into the lawfulness of her detention under Article 40.4.20 of the Constitution.

8. Her complaint was based firstly on the contention that in respect of the first conviction in time, i.e., that for the Marks and Spencer's offence, she had not been put on her election (which is accepted), the carrying out of which procedure was a condition precedent to the District Court having jurisdiction to try her. Her case was that absent that having been done the District Court had tried her without jurisdiction and accordingly both her conviction and sentence for that offence were void *ab initio*.

9. Her complaint was based secondly on the proposition that as the warrant in respect of the consecutive sentence of one month stated that it was to commence on the expiration of the three month sentence, and as the three month sentence was to be treated as having been void *ab initio* i.e., to have never existed at all, that second warrant was consequently void for uncertainty.

10. By a judgment delivered on the 30th of June 2015 Baker J. held that the first warrant was indeed void *ab initio* as the appellant had not been put on her election. She held however that the second warrant was valid. It was clear and without uncertainty. The appellant could therefore be detained immediately on the passing of the sentence. She held that, as a result of her decision, the finding in relation to the first warrant meant that the period of detention therein lawfully determined and the second sentence was then to be served. The appellant is appealing this finding and the awarding of 65% of the costs of the proceedings. There was a cross appeal by the respondent in relation to the first warrant but that was withdrawn prior to hearing. An objection to this appeal proceeding was raised earlier on the grounds of mootness and in an *ex tempore* judgment given on the 14th March, 2016, this Court determined that while the appeal was moot it should be allowed to proceed in the interests of the due and proper administration of justice.

The appellant's submissions

11. It was submitted by the appellant that the second warrant for the one month sentence was bad in law as the three month

sentence did not expire. It never commenced being void ab initio as it was imposed without jurisdiction. Ordinarily a sentence expires due to the lapse of time, i.e. it runs out. This was not possible as it did not start. As such it is illogical and absurd to regard the sentence as having expired. The one month sentence was not to come into effect unless and until the three month sentence expired. As such it never commenced being contingent on an event that never took place.

12. It was submitted that the warrant is unduly vague and uncertain. It does not allow the governor to ascertain the length of the sentence. The problem is compounded by the fact that both sentences were appealed and recognisances were entered on separate dates. It was submitted that there was uncertainty amongst the governor's staff and legal advisors about when the first sentence ended. There is also uncertainty about how the period already spent in prison might be lawfully reckoned when calculating the period to be served.

13. It was submitted that the warrant did not fulfil the basic requirement of stating with precision and without possible ambiguity the duration and commencement date of the imprisonment. The Court was referred to *Mullen v. Governor of the Midlands Prison* [2014] IECA 26 at paras. 3 and 4 where this Court emphasised the need for certainty in ascertaining the start and end date of warrants. Kelly J. noted that the lawful authority for detention should be without ambiguity. It was submitted that despite being relied upon at hearing this judgment does not feature in the *High Court decision*. In *O'Farrell v. Governor of Portlaoise Prison* [2016] IESC 37 at para. 59 the Court was in agreement that it was necessary for a custodial warrant to be clear, certain and free of ambiguity.

The respondent's submissions

14. The cross appeal was abandoned having considered the views expressed by this Court during the mootness hearing.

15. It was submitted that in normal English, "expiry" or "expiration" is an uncomplicated concept which denotes the termination or the ending of the life of something. A permission or licence may expire whether or not it is used beforehand. The phrase was considered in a not dissimilar context by Barron J. in *The State (Gleeson) v. Martin* [1985] ILM 577 where legal expiration was held "to be clear and to mean upon the actual determination of the sentence whenever that legally occurs".

16. The High Court finding, that the three month sentence was void, was precise and unequivocal. It definitively brought expiration to the sentence just as if it had been quashed. It has been acknowledged by Charleton J., at p. 17, in *Child & Family Agency v. McG and J.C.* [2017] IESC 9 that Article 40 orders can effectively negate the impugned orders. It was submitted that once the High Court, in Article 40 proceedings, declares detention unlawful that detention must be taken to have expired as it no longer retains any legitimate legal force.

17. It was submitted that in *Wilkinson v Governor of Midlands Prison* [2016] IECA 190 the Court considered a consecutive sentence which was conditioned on the 'legal expiration' of the base sentence. The Court considered the question of what happened to the second sentence when the first sentence was stayed following an appeal. Having dealt with the applicant's argument which was similar to that raised by the appellant herein, Birmingham J held that, "Appealing the first in time of two sentences, but not the second has the effect of bringing forward or triggering the commencement date of the second sentence". If effective expiration was found in that case, on the mere staying of the sentence, then this conclusion must apply with even greater force where the base sentence has been negated in a conclusive manner.

18. The commencement date of a consecutive sentence depends on the base sentence and how it is affected by remissions or appeal. Certainty in relation to commencement can only mean readily ascertainable and not a date which is fixed. Once the first warrant was declared invalid the one month sentence had to be given immediate effect from the date on which it was imposed. As a reference point it could not be any clearer. The respondent adopts the trial judge's finding that detention could follow "immediately upon the passing of the sentence" on the second warrant.

19. The possibility of different dates on which the sentence might commence and the fact that there was a legal issue about the period spent on bail are not matters which infect the sentence with uncertainty. It is a calculation issue for the governor which is decided in accordance with law. Arguments about the effects of remission were discussed and rejected in *Martin and Stanners v. O'Leary* [2004] IECCA 26. It is common for consecutive sentences to be given on top of a sentence which is later appealed. The appellant does not explain why uncertainty regarding commencement does not apply here.

20. To allow the uncertainty here as to the exact date to make a warrant unenforceable would mean that any person whose sentence may depend on lawful contingencies like appeal and remission is in a similar position. Just because the precise release date may change until matters are settled is not a ground for ordering immediate discharge. It was recognised in *O'Farrell* that the warrant does need to give the specific release date but the term to be imposed should be certain and the correct commencement date given. It was submitted that in the instant case the commencement date was precisely stipulated. It was contingent but not uncertain or unascertainable.

21. The Court was referred to the comments on Peart J. in *Carroll v. Governor of Mountjoy Prison* [2005] IEHC 2 where he endorsed the writing of O'Malley that "the courts are unlikely to hold a warrant bad on this ground unless there is a genuine ambiguity or uncertainty". This cannot be the case where it is "possible to ascertain the precise date" of commencement even if it is not "apparent on the face".

22. In *In re Tynan* [1969] I.R. 273 Walsh J. in the Supreme Court remarked that where the sentence was to start at the expiry of another, that expiry may depend on factors arising after the passing of the sentence, so that even though the precise date was not given, the sentence was sufficiently identified so that the warrant, read with the court records, made the commencement date ascertainable. It was submitted that genuine ambiguity refers to cases such as *Cash v. District Judge Halpin* [2014] IEHC 484.

23. In *Mullen* while reference was made to some of the wider principles regarding ambiguity the case was decided on the issue of interpretation being that on a true construction of the warrant the sentence had run its course.

24. It was submitted that the rule of law should be used to maximise legal effectiveness not legal invalidity. If a chain of consecutive sentences could be invalidated by one conviction being found unlawful this would magnify rather than minimise the legal invalidity and have profound consequences for many convicted persons. This interpretation is contrary to established principle and common sense.

The decision of the Court

25. This Court refused *in limine* a motion to extend the grounds of appeal herein. This was because the grounds were raised too late, referred to issues associated with this particular case and did not raise issues of general principle. Moreover, the latest time for amending the grounds was considered to be at the mootness hearing which took place in March, 2016. In that hearing the Court found that whilst the proceedings were moot, the appeal would be allowed to proceed on the basis that it raised an issue on a point

of law of exceptional public importance which required to be determined in the interests of the due and proper administration of justice. Finlay Geoghegan J. identified that issue succinctly at para. 16 of her judgment delivered *ex tempore* on 14th March, 2016:

"It appears to me that whilst the principles in relation to the requirements for certainty and a lack of ambiguity in warrants as set out (amongst other places) in the judgment of this Court in *Mullen v. Minister for Justice* [2014] IECA 26, may be considered to be well established, their interaction with the situation which arose in the High Court in this case, (where the conviction and sentence in respect of which the first warrant was issued had been held to be void and there was a second warrant which was prescribed to commence on the legal expiration of the sentence imposed by the first warrant) has not been considered by either the Supreme Court or this Court. In those circumstances it appears to me that consistent with the principles as set out by Murray J. in *Shui Jie Liu* there is the additional feature that it is in the interests of the due and proper administration of justice that this appeal be permitted to continue and that the issue against which the appellant appeals be heard and determined by this Court."

26. Thus the only issue that arises for consideration in this Court is whether the second warrant in this case meets the requirements for certainty and lack of ambiguity in warrants as set out in *Mullen* (and elsewhere). All other issues are moot.

27. The principles identified in *Mullen v. Governor of Midlands Prison & Ors.* [2014] IECA 26 are as follows:

- a) A warrant authorising the detention of a person should not be ambiguous,
- b) the person detaining and the person detained should know precisely the duration of the detention. There is no room for ambiguity in that regard,
- c) the function of such a warrant is to inform the governor of the identity of the prisoner, the offence of which he has been convicted and the nature and duration of the sentence.

28. In identifying these principles Kelly J. relied upon *Carroll v. the Governor of Mountjoy Prison* [2005] IR 292, *State (Caddle) v. Judge McCarthy & Ors.* [1957] IR 359 and *Prison Law* by P.A. McDermott at para. 11.10.

29. Did the decision of Baker J. of 30th June, 2014 that the first warrant was void create an ambiguity or uncertainty as to the length of detention authorised by the second warrant? The argument of the appellant is that it is not possible to deduce the starting point of detention under the second warrant because the first one had not expired. It is argued that as the first warrant has been found to have been void ab initio, it never existed at all. What never commenced could not end. The one month sentence was not to commence until the expiry of the three month sentence provided by the first warrant. As no such date could exist, the warrant was entirely uncertain and vague or at the very least so ambiguous as to fail the test set out in *Mullen*. It would not be possible for the governor to calculate the length of the sentence from such a warrant. The appellant further relied upon the judgment of the Supreme Court in *O'Farrell v. Governor of Portlaoise Prison* [2016] IESC 37 where at para. 59 McKechnie J. was in agreement that a custodial warrant must be clear, certain and free from ambiguity.

30. The warrant which the respondent argues is the authority for the detention of the appellant for one month is the second warrant which was issued in the Circuit Court on 15th June, 2015. In the operative part it states:

"Affirm conviction and order of the District Court and ordered that the accused be imprisoned for a period of one month to be served on legal expiration of sentence three months imposed on 24-175020 in Court 16 CCJ on 15th of June, 2015"

31. The governor was commanded to imprison the appellant for one month to be served on the legal expiration of the three month sentence and to make allowance for any part of the original sentence already served.

32. It is clear from this warrant that the authority to detain on foot of this warrant commences upon the legal expiration of the three month sentence. As held by Birmingham J in *Wilkinson* (cited above), a judgment delivered after both the High Court hearing and the mootness hearing, appealing the first in time of two sentences but not the second, has the effect of bringing forward or triggering the commencement of the second sentence. Some considerable time was spent at the hearing of this appeal in consideration of the meaning of the word "expiration". The Court ultimately was referred to the Oxford English Dictionary definition of the word. There "expiry" is defined as "the time when something ends or ceases to be valid. This seems a simple but very clear definition and I find it a satisfactory one. Applying that definition in the context of the case herein, the three month sentence imposed upon the appellant expired when its validity ceased. That validity ceased when the High Court judge decided in her judgment delivered on 30th June, 2015 that the three month sentence was void ab initio. The addition of the word "legal" neither adds nor detracts from the meaning of the word "expiration" of the warrant. It is clear that an order under Article 40 is one that effectively quashes an order that unlawfully detains an applicant therefor; see *Child & Family Agency v SmeG and JC* 23rd of February 2017 Charleton J. The terms of the second warrant were clearly such that it was activated and authorised the governor to detain her for one month upon the invalidation of the first sentence. Any time already served should be allowed. As the High Court judge found in her judgment, the appellant could be lawfully detained immediately upon the passing of the sentence in respect thereof. It is a relatively simple exercise for the Governor to ascertain what if any time is to be allowed in respect of time served and set that off against the one month sentence. It is thus not possible to identify any ambiguity or uncertainty in the second warrant and it therefore meets the requirements of clarity and certainty outlined in *Mullen*. The judgment of the learned High Court judge was correct and the appeal is dismissed.