THE COURT OF APPEAL

CIVIL

[2022 No. 89]

The President **Neutral Citation Number [2023] IECA 48**

McCarthy J.

Kennedy J.

IN THE MATTER OF SECTION 16 OF THE COURTS OF JUSTICE ACT 1947

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

PROSECUTOR

AND

CIAN O'LEARY

DEFENDANT

JUDGMENT of the President delivered on the 2nd day of March 2023 by Birmingham P.

Introduction

1. Her Honour Judge Melanie Greally (as she then was), signed a consultative case stated dated 8th April 2022, and has posed a number of questions for answer by this Court. The questions posed are:

(i) What are the options available to the Court in sentencing the defendant?

(ii) Does the Court have any power to sentence the defendant in light of s. 145(11) of the Children Act 2001, in circumstances where the resumed hearing date nominated under s. 145(5) has now passed? (The reference to s. 145(11) would appear to be an error and the reference ought to have been to s. 144(11)).

(iii) Where the deferment date occurred when the defendant was a child, but the resumed hearing date occurred when the defendant was 18 years of age, does the Court have the jurisdiction to impose a period of detention under s. 144(9) of the Children Act 2001 on the defendant?

(iv) Where the deferment date occurred when the defendant was a child, but the resumed hearing date occurred when the defendant was an adult, does the Court have the jurisdiction to suspend the whole or a portion of the period of detention on the Defendant?

(v) If the answer to (iv) is yes, do the provisions of s. 99 of the Criminal Justice Act 2006 govern the suspension of the period of detention?

(vi) In the alternative, if the answer to (iv) is no, does the Court have an inherent jurisdiction to impose terms and conditions on the suspended period of detention?

Background

2. The actual background to the decision to state a case is set out fully and clearly in the case stated. What emerges is as follows.

3. The defendant was born on 4th February 2004. Along with a co-accused, he was returned for trial to Dublin Circuit Criminal Court in relation to various offences that were alleged to have been committed on 23rd September 2020, in Dublin city centre. In essence, it was alleged that he and another teenager who were passengers in a taxi, threatened the driver thereof, and demanded money, whereupon the driver fled from his vehicle. The taxi was then unlawfully seized by the defendant who drove it a short distance before coming to a stop. The defendant and his co-accused then fled on foot, but both were apprehended by Gardaí a short distance from the vehicle. They were arrested and detained. The defendant was interviewed

and made admissions. On 27th July 2021, the defendant, having been sent forward for trial, entered pleas of guilty. He was remanded on continuing bail for sentence and the preparation of a probation report was directed, as was required by s. 99 of the Children Act 2001 (the "2001 Act"). It should be noted that at this time, the defendant was detained pursuant to a High Court special care order, having been so detained since 1st April 2021, in order to protect his welfare, and he remained so detained until 7th October 2021. The High Court made the special care order against a background of severe drug abuse.

4. On 11th August 2021, the case was listed for sentence, but sentence was adjourned and a further probation report was directed. On 25th August 2021, the case was listed once more for sentence and was further adjourned. On 4th October 2021, the case was listed for sentence, and the judge heard evidence, remanded the defendant on bail, and directed the preparation of an updated probation report. The defendant was required *inter alia* to engage in treatment for substance misuse.

5. On 3rd November 2021, the case was re-entered by the Probation Service in circumstances where *inter alia* the defendant was suspected of re-engaging in substance abuse. At this stage, he had been discharged from special care and was living in a residential unit provided by Tusla by way of aftercare. Bail was revoked and the case was adjourned for three weeks. At this stage, the defendant was remanded in custody to Oberstown Detention Centre. On 26th November 2021, the case was listed again in the Circuit Court, this time for the purpose of updating the Court on the assessment process. On 30th November 2021, the defendant was again remanded in custody until 20th December 2021. The Circuit Court judge asked the Probation Service to suggest a list of conditions that might apply to a deferred sentence order if she were to impose one. On 18th January 2022, the matter proceeded to sentence. The judge indicated that she saw the aggravating factors as including premeditation, as well as the fact that a box-cutter knife was used to threaten the driver. The seizure of the

car was further aggravated by the dangerous driving, although there was no great excess of speed. In mitigation, the judge noted that the defendant had no previous convictions and that he was 16 years of age at the time of the offence. He had a difficult family life and had been exposed to violence and drugs. He also had adverse experiences while in care. The defendant appeared motivated to change. He had managed to become drug-free and had, in the main, behaved well while in detention.

6. The Circuit Court judge indicated an intention to impose a detention order in the following terms, which she deferred pursuant to s. 144(3) and (5) of the 2001 Act:

> "(a) Count 3 – (Unlawful seizure of a vehicle) 30 months detention i.e. 2 and a half years
>
> (b) Count 4 – (Production of an article capable of inflicting serious injury) 12 months detention
>
> (c) Count 5 – (Dangerous driving) 10 months detention
>
> (d) Count 11 – (Driving without insurance) 2 months detention".

The judge nominated the date of 30th March 2022 for the resumption of the hearing pursuant to s. 144(5)(b) of the 2001 Act ("the resumed hearing").

7. The defendant was remanded on bail to 30th March 2022, it being a condition of bail that he attended a residential drug treatment programme at a drug treatment unit, the Aislinn Centre in Kilkenny.

8. On 4th February 2022, the defendant turned 18 years of age. On 25th February 2022, the case was re-entered as the defendant had left the Aislinn Drug Treatment Centre where he had been residing. The case was adjourned in the defendant's absence for one week until 4th March 2022, as he was also required to attend the Children's District Criminal Court in Smithfield, Dublin.

9. On 4th March 2022, the case was once more listed before the Circuit Court judge. She heard evidence that the defendant had made efforts to re-engage with treatment for drug abuse. In these circumstances, the defendant was remanded on bail for further review a week hence. One week later, on 11th March 2022, she revoked the defendant's bail due to continuing non-compliance with bail conditions, which related to engaging with treatment for substance misuse and he was remanded in custody to Cloverhill Prison.

10. On 30th March 2022, on the date of the resumed hearing pursuant to s. 144(8) of the 2001 Act, there was an updated probation report before the Court. On this occasion, the Circuit Court judge indicated that she was minded to deploy s. 99 of the Criminal Justice Act 2006 when sentencing the defendant as he was then an adult, and adult sentencing options were now open to her. However, counsel for the defendant submitted that she was constrained by the terms of the 2001 Act, which required the Court to impose detention as the defendant was only liable to sentence pursuant to s. 144(9) of the 2001 Act. In addition, it was submitted that she had no power to impose a sentence of imprisonment, but only detention, as expressly provided by s. 144(9) of the 2001 Act, and further that "detention" under that Act means, save where context otherwise requires, detention in a "children detention school or a children detention centre". It was also pointed out that the Court of Appeal had stated that an adult cannot be subject to a detention order, with reference to *DPP v. PMcC* [2018] IECA 309, though it was not clear if this statement of the law was made in contemplation of s. 144(8) and (9) of the 2001 Act.

11. Prosecuting counsel submitted that if the Court imposed an order for detention that the defendant would not be accepted by Oberstown as he was now over 18, and that Mountjoy Prison would not receive the defendant on foot of a detention order. Moreover, s. 144 of the 2001 Act only appeared to envisage detention. At that stage, the Circuit Court judge indicated that she intended to state a case for the opinion of the Court of Appeal in

relation to the sentencing options available to the Court in sentencing the defendant. It appeared to her that it was unclear how effect should be given to s. 144(9) of the 2001 Act, which apparently only permitted deprivation of liberty by way of detention, in circumstances where the defendant had been a child at the time of the deferment on 18th January 2022, but was 18 years of age at the date of the resumed hearing, the latter circumstances being expressly contemplated by s. 144(8) of the 2001 Act. Further submissions were made by counsel for the defendant that the judge could not further adjourn the resumed hearing by reason of s. 144(11) of the 2001 Act.

12. The judge decided to adjourn the case to 8th April 2022 in order to allow the parties an opportunity to agree a case stated. She remanded the defendant in custody. It appears she also directed that affidavits should be obtained from the authorities in Oberstown Detention Centre and in Mountjoy Prison, confirming the information that the Court had been given that the defendant would not be accepted by either institution if sentenced to imprisonment.

13. The defendant was remanded in custody to Cloverhill Prison.

14. Parallel to processing the case stated proceedings, the defendant sought an inquiry pursuant to Art. 40 of the Constitution, contending that his detention was unlawful.

15. On 14th April 2022, the High Court refused to order the release of the defendant. From that refusal, an appeal was brought to this Court. Thus, when this matter first came into the Court's list, there were two separate, but linked, aspects: the consultative case stated; and, the appeal against the refusal to order the release of the defendant in the course of the Art. 40 inquiry.

The Appeal

16. In the course of the appeal hearing, which up to that point had been focused on the consultative case stated aspect, members of the Court indicated they felt that the legal issues

raised were far from straightforward and would require time for consideration and discussion between members of the Court. Members of the Court raised the question of whether consideration had been given and whether it would be appropriate to release the defendant on bail so as to allow time for a full consideration of the issues raised in the case stated. The matter was put back for some days to allow the parties to consider the situation. When the matter was listed again, it was indicated on behalf of the Director that while she was maintaining her opposition to bail, there had been discussions between the parties, as a result of which, terms had been agreed as being the terms which would be appropriate if, notwithstanding that opposition to bail was being maintained, the Court was minded to admit the defendant to bail. In these circumstances, the defendant was admitted to bail on the terms indicated.

17. It may be convenient at this point to draw attention to certain statutory provisions, in particular, provisions of the 2001 Act, which appear to be relevant to this controversy. Section 3 of the 2001 Act is the interpretation section. Insofar as relevant it provides:

> "3.—(1) In this Act, unless the context otherwise requires—…
>
> 'child' means a person under the age of 18 years;…
>
> 'detention' means detention in a children detention school."

It is further stated that "community sanction" has the meaning assigned to it by s. 115, which provides:

> "In this Part, 'community sanction' means any of the orders referred to in paragraphs (a) to (j) which may be made by a court on being satisfied that a child is guilty of an offence—
>
> (a) in the case of a child of 16 or 17 years of age, a community service order under section 3 of the Act of 1983,
>
> (b) an order under section 118 (a day centre order),

(c) an order under section 2 of the Act of 1907 (a probation order),

(d) an order under section 124 (a probation (training or activities) order),

(e) an order under section 125 (a probation (intensive supervision) order),

(f) an order under section 126 (a probation (residential supervision) order),

(g) an order under section 129 (a suitable person (care and supervision) order),

(h) an order under section 131 (a mentor (family support) order),

(i) an order under section 133 (a restriction on movement order), or

(j) an order under section 137 (a dual order)."

The section primarily in issue is s. 144. So far as is material, it provides:

"(1) Without prejudice to section 145, where a court—

(a) has considered a probation officer's report or any other report made pursuant to this Part,

(b) has heard the evidence of any person whose attendance it may have requested, including any person who made such a report,

(c) has given the parent or guardian of the child concerned (or, if the child is married, his or her spouse), if present in court for the proceedings, or, if not so present, an adult relative of the child or other adult accompanying the child, an opportunity to give evidence, and

(d) is of opinion that the appropriate way of dealing with the child would be to make a children detention order,

it may defer making the order, in accordance with the provisions of this section, if a place is not available for the child in a children detention school or for any other sufficient reason.

(2) The court shall defer the making of a children detention order only if the court is satisfied that, having regard to the nature of the offence and the age, level of

understanding, character and circumstances of the child concerned, it would be in the interests of justice to defer the making of the order.

(3) Where the making of a children detention order is deferred, the court shall adjourn the hearing and order that the child concerned be placed under the supervision of a probation and welfare officer.

(4) In case the making of the order has been deferred because a place for the child is not available in a children detention school, the court shall order that the Director of that school shall apply to the court to make the children detention order when such a place becomes available.

(5) In any other case, the court shall state in open court—

(a) the period of detention that is being deferred,

(b) the date of the resumed court hearing, and

(c) that the court will take into account at that hearing the information in the probation and welfare officer's report concerning the child's conduct in the meantime and the other matters mentioned in subsection (7)(b).

(6) The court shall also explain to the child in open court in language appropriate to the level of understanding of the child—

(a) why the making of the children detention order is being deferred and for what period,

(b) any of the conditions referred to in section 117 which the court suggests should be complied with by the child during that period,

(c) the expectation of the court that the child will be of good conduct during that period and the possible consequences for the child of his or her failure to comply with any such conditions, and

(d) the expectation of the court that the child's parents or guardian, where appropriate, will help and encourage the child to comply with any such conditions and not commit further offences.

(7) (a) The probation and welfare officer under whose supervision the child has been placed shall prepare a report on the child for consideration by the court at the resumed hearing.

(b) The report shall contain information on the child's conduct after the finding of guilt, including the extent to which the child has complied with any conditions suggested by the court, or any change in the child's circumstances and on any reparation by the child to the victim, together with any other information which the officer considers to be relevant.

(c) The officer shall make all reasonable endeavours to ensure that the report is lodged with the clerk or other proper officer of the court at least 4 working days before the date of the resumed hearing.

(8) The resumed court hearing shall take place not later than one year from the date of the adjourned hearing and may take place notwithstanding that the child has attained the age of 18 years in the meantime.

(9) At the resumed hearing the court shall consider the report prepared by the probation and welfare officer and, if the court thinks it necessary, hear evidence from the officer and shall by order—

(a) impose the period of detention which it had deferred or any shorter period,

(b) suspend the whole or any portion of a period of detention so imposed, or

(c) impose a community sanction appropriate to the age of the child concerned,

and shall explain to the child in open court the reasons for its decision in language that the child understands.

(10) Where—

(a) the Director of a children detention school applies to the court pursuant to an order under subsection (4), and

(b) the court proposes to make a children detention order,

it may issue a summons requiring the child to appear before it and, if the child does not appear in answer to the summons, may issue a warrant for his or her arrest.

(11) Where the making of a children detention order has been deferred under this section it may not be further so deferred."

18. The parties take very different positions as to how the situation that has developed should be addressed. The defendant takes as his starting point the fact that the interpretation section (s. 3) is introduced by the words "unless the context otherwise requires". He says that s. 144(9), dealing with the resumed hearing, is a situation where the context otherwise requires. There is specific provision in s. 144(8) for the resumed hearing taking place at a time after the individual who has been before the Court has attained the age of 18 years. The defendant draws attention to the fact that it is required that the resumed hearing shall take place not later than one year from the date on which the hearing was adjourned. There is a prohibition in s. 144(11) on a deferred order being further deferred. The effect of this is that the matter before the Court has to be finalised before the person appearing in court turns 19 years of age. It is suggested that this provides comfort and reassurance to a Court. It is said that in those circumstances, the Court having *seisin* of the matter is required to proceed by reference to the menu of options set out at s. 144(9)(a) and (c). It is said that the Court should not be influenced by the fact that, if an order of detention is pronounced, Oberstown Detention Centre would not accept him, nor would Mountjoy Prison be in a position to accept an adult – a person over 18 years – who had been sentenced to a term of detention. Indeed, the defendant goes so far as to say that having regard to the question of whether there was a

venue available where the detention would take place would risk breaching the separation of powers.

19. The Director takes a very different position. She says that at the resumed court hearing, the Court found itself dealing with an adult, someone who had turned 18, and in those circumstances, the Court had available to it the full range of sentencing options that are available to a Court when dealing with an adult in respect of these offences. This would include the power to sentence to a term of imprisonment, and if thought appropriate, to suspend that sentence in whole or in part.

Discussion and Decision

20. It must be said that neither side's approach is free from difficulty. The defendant takes as his starting point that there is no difficulty in making a detention order and that the Circuit Court has got itself unnecessarily, and indeed, wrongly, caught up in considerations of how a sentence of detention would be implemented, something, which it is said, is exclusively a matter for the executive. However, I am not at all convinced that the ability of the Court to order the detention of a person who has turned 18 is as clear cut as the defendant believes to be the case. Detention, as we have seen, is defined in the interpretation section of the 2001 Act as meaning detention in a children detention school. The same section itself (s. 3) defines "children detention school" and does so as meaning:

> "(a) any certified reformatory school or industrial school that becomes a children's detention centre by virtue of section 159,
>
> (b) a place, school, premises or building designated as a children detention school pursuant to section 160, or
>
> (c) an amalgamated school within the meaning of section 163A (inserted by section 14 of the Children (Amendment) Act 2015;"

Section 142 deals with the question of detention orders. It provides:

> "A court may, in accordance with this Part, by order (in this Part referred to as a 'children detention order') impose on a child a period of detention in a children detention school specified in the order."

It seems clear from the statute that a detention order, referred to as a children detention order, may be imposed on a child, providing for a period of detention in a children detention school. On the face of it, there does not appear to be any authority for making a detention order in respect of someone who is no longer a child and has become an adult.

21. It seems to me, therefore, that the question is not one of administration, in the sense of identifying the location where someone subject to a detention order can be placed, but the more fundamental one of whether there is jurisdiction to order the detention of somebody who has turned 18 years of age. It seems to me that the 2001 Act does not make provision for the making of orders in such circumstances.

22. The Director takes the position that the person before the court has turned 18, is an adult, and says that, accordingly, the Court has the full range of powers available to it, as are available when an adult is before the court for sentence. However, it seems to me that the difficulty with that is that the 2001 Act is quite prescriptive in terms of what is to happen at a resumed court hearing. It specifies that the resumed hearing shall take place not later than one year from the date of the adjourned hearing. It does provide, and I do not lose sight of this, that the resumed hearing may take place, notwithstanding that the child has attained the age of 18 years in the meantime. It then states in terms at s. 144(9):

> "At the resumed hearing the court shall consider the report prepared by the probation and welfare officer and, if the court thinks it necessary, hear evidence from the officer and shall by order –
>
> (a) impose the period of detention which it had deferred or any shorter period,

(b) suspend the whole or any portion of a period of detention so imposed, or

(c) impose a community sanction appropriate to the age of the child concerned,

and shall explain to the child in open court the reasons for its decision in language that the child understands."

It seems to me that the effect of the section is to provide the Court with a menu of a restricted choice of options. The custodial options available pursuant to statute are the imposition of the period of detention which had been deferred, or a shorter period, with the option to suspend any period of detention in whole or in part. The section does not provide a basis for imposing a longer period of detention. More importantly, in the context of the present case stated, it does not provide for the imposition of a period of imprisonment. For my part, I do not believe it is possible to read into the section an implied power to sentence to imprisonment. The section specifically adverts to the possibility of the deferred hearing taking place after the child has turned 18, but no additional options are made available to the Court for dealing with a young person in that situation. In these circumstances, it would seem that the only option available to a Court is to consider a community sanction. However, while s. 115 of the 2001 Act has some ten community sanctions, it would seem that all but one of these, a probation order under s. 2 of the Probation Act 1907, are unavailable, either because the defendant is not a child of 16 or 17 years, or is not a child.

23. The conclusions that I have reached mean that the situation is far from satisfactory, and I have reached the conclusions that I have with considerable reluctance, but I do not believe the 2001 Act can be interpreted in any other way.

24. In those circumstances, I answer the questions posed as follows:

(i) The only option available to the Court is to make an order pursuant to s. 2 of the Probation Act 1907.

(ii) The Court does not have any power to sentence, apart from the making of a probation order pursuant to s. 2 of the Probation Act 1907.

(iii) In the circumstances described, the Court does not have a power to impose a detention order.

(iv) In circumstances where the Court does not have power to impose a detention order, the question of suspension in whole or in part does not arise.

(v) In circumstances where the Court does not have a jurisdiction to impose a detention order, the question of suspension in whole or in part pursuant to any inherent jurisdiction of the Court does not arise.

(vi) In circumstances where the Court does not have the power to impose a detention order, the question of imposing terms and conditions on the suspended period of detention does not arise.