THE COURT OF APPEAL

Judicial Review

Neutral Citation Number: [2018] IECA 125

[Court of Appeal number 2017/518]

[High Court Record Number 2017 No. 143 SS]

IN THE MATTER OF AN INQUIRY PURSUANT TO ARTICLE 40.2 OF THE

CONSTITUTION

Birmingham J.
Mahon J.
Whelan J.

BETWEEN

JASON HEAPHY

APPLICANT/

APPELLANT

AND

THE GOVERNOR OF CORK PRISON

RESPONDENT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

NOTICE PARTY

JUDGMENT of Ms. Justice Máire Whelan delivered on the 4th day of May, 2018

1. This is an appeal by the appellant against the judgment and orders made in the High Court by Ms. Justice Faherty (hereinafter "the trial judge") on 31st July 2017 refusing an application for an order of *certiorari* in relation to an order made by His Honour Judge David Riordan at Cork Circuit Court on 24th November 2015 on the basis that it was bad on its face. The appellant further appeals the determination of the trial judge that Judge Riordan was vested with jurisdiction to make an order activating part of a sentence which had been previously suspended by His Honour Judge Patrick Moran at Cork Circuit Court on 25th February 2008. The appellant also contests the finding of the trial judge that he is not in unlawful detention and the determination of the trial judge that the relief sought pursuant to Article 40.2 of the Constitution be refused.

The facts
2. The facts are set out in extensive detail in the judgment of the trial judge delivered on 31st July 2017 and it is not proposed to rehearse them save to the extent necessary.

3. The appellant was born on 20th October 1984. In March 2007 the appellant was found to be in possession of a large quantity of cocaine in Cork city and arrested and charged. On 25th February 2008 at Cork Circuit Court he entered a plea of guilty in respect of eight counts on the indictment in relation to the said charges. He was sentenced on the said date to a term of ten years imprisonment by His Honour Judge Patrick Moran in respect of count no. 3 on the indictment, being possession of a controlled drug for the purpose of selling or otherwise supplying to another in contravention of the Misuse of Drugs Regulations, 1988 and 1993 made under s. 5 of the Misuse of Drugs Act, 1977, contrary to s. 15A (as inserted by s. 4 of the Criminal Justice Act, 1999) (and as amended by s. 81 of the Criminal Justice Act, 2006) and s. 27 (as amended by s. 5 of the Criminal Justice Act, 1999 and as amended by s. 84 of the Criminal Justice Act, 2006) of the Misuse of Drugs Act, 1977.

4. The sentencing judge suspended three years of the ten year sentence upon the appellant entering into a bond to keep the peace and be of good behaviour for a period of three years. In dispute in these proceedings are the precise terms upon which part of the said sentence was suspended. It is common case that a bond was entered into orally by the appellant in court at the original sentencing hearing on 25th February 2008. The appellant was further disqualified from driving for a period of two years in respect of count no. 6 (dangerous driving contrary to s. 53(1) of the Road Traffic Act 1961 as amended). All other counts were marked as "taken into consideration".

5. The partly suspended sentence imposed at the Circuit Court on 25th February 2008 was backdated to 25th October 2007.

6. At the level of principle, it is noteworthy that the appellant did not seek to challenge the validity or severity of the sentencing order made in February 2008 or the validity of his detention thereunder.

7. Whilst serving the custodial aspect of the 2008 sentence the appellant was convicted of possession of a mobile phone and sentenced to one month imprisonment to be served consecutively to the sentence he was then serving. Subsequently, the appellant was released from custody on 15th February 2013.

8. The key contentions advanced on behalf of the appellant at the hearing in the High Court were as follows:

(i) There did not exist a valid written record of the sentencing order made at Cork Circuit Court on 25th February 2008.

(ii) In this regard, it was alleged that, as a result, Judge Riordan did not have before him at the subsequent activation/triggering sentencing hearings on 24th November 2015 a valid record of the order made by Cork Circuit Court on 25th February 2008 when revoking the suspended aspect of that sentence.

(iii) It was further contended that a bond entered into by the appellant before Cork Circuit Court on 25th February 2008 to keep the peace and be of good behaviour for a period of three years ran from the date of his imprisonment and not from the date of his release from prison on 15th February 2013.

(iv) The Appellant contended that there had been a failure by the original sentencing judge in pronouncing sentence made at Cork Circuit Court on 25th February 2008 to comply with the strict requirements of s. 99 (2)(b) of the Criminal Justice Act, 2006 and as a result the Circuit Court lacked any jurisdiction on 24th November 2015 to revoke the suspended portion of the 2008 sentence pursuant to s. 99 (10) of the 2006 Act.

9. The respondent opposed the application on all grounds.

The High Court Judgment

10. The trial judge noted that the judicial review proceedings had been instituted by the appellant arising from the judgment delivered in the High Court on 19th April 2016 in *Moore v. Ireland* [2016] IEHC 244 in which s. 99 (9) and (10) of the 2006 Criminal Justice Act were deemed unconstitutional. Subsequently, the decision of McDermott. J. in *Clarke v. Governor of Mountjoy Prison* [2016] IEHC 278, delivered in the High Court on 28th July 2016, was upheld on appeal by this Court. The practical consequence of the decision in Clarke was that persons in custody on foot of activated sentences were not automatically entitled to benefit from the findings of unconstitutionality in the Moore case. Each case fell to be determined upon its own facts.

11. It was conceded on behalf of the appellant that having regard to the principles enunciated in the jurisprudence he was not entitled to rely upon the decision in Moore and that aspect of his challenge to his detention fell away.

12. The first issue considered by the trial judge accordingly was whether the appellant's bond to keep the peace and be of good behaviour had been spent by the time he committed the triggering offences in 2015.

13. The trial judge was satisfied that a purported Circuit Court order (hereinafter " the purported court order") unsigned and bearing no court seal containing many factual errors in its recitals did not reflect the order made by the sentencing judge on 25th February 2008. There was much confusion regarding the provenance and authenticity of the purported court order. It appears it had been sent by email from Cork Circuit Court office to counsel for the appellant in July 2016. It is manifest on its face and from a cursory perusal that it is not a contemporaneous record of the February 2008 sentence. The trial judge concluded in regard to same;

> *"Accordingly, insofar as the applicant relies on this document in support of his claim that on 24th November 2015, the Circuit Court lacked jurisdiction by reason of the fact that his term of suspension was spent by the time of the commission of the triggering offences his claim to be in unlawful detention in this particular falls away."* (para. 59 of the High Court judgment)

14. The next question addressed by the trial judge was whether a written record existed of the orders made at Cork Circuit Court on 25th February 2008. In that regard the trial judge considered in particular affidavits sworn by Mr. Martin O'Donovan, then Deputy County Registrar, on 16th March 2017 together with the exhibits annexed thereto. The trial judge was satisfied that a handwritten document signed by Martin O'Donovan on 25th February 2008 and which was sent to the prison with the appellant on that date ". . . is sufficient for this Court to find that it constitutes a record of the order of Judge Moran of 25th February 2008. This was also the document exhibited at 'LOB1' in Detective Sergeant O'Brien's affidavit" as stated at para. 62 of the judgment.

15. The trial judge proceeded to elaborate stating;

> *"I am satisfied that this handwritten document, as created by Mr. O'Donovan on a template, is a written version of the Order made on 25th February 2008. It bears the seal of the Circuit Court and has the words "by order of the Court". While "warrant" is written on the document, it is not on the title of the document. Accordingly, the document is not just a warrant . . . contrary to what is maintained by the applicant's counsel. This document contains everything that is required to constitute an order of the Circuit Court of 25th February, 2008."* (para. 63 of the judgment)

16. The trial judge further stated;

> *"For the purposes of the applicant's argument, this Court accepts that in order for the Circuit Court on 24th November 2015 to satisfy itself that the terms of the applicant's suspended sentence had been breached there had to be evidence before the Circuit Court as to what order was made in February, 2008."* (para. 66 of the judgment)

17. The trial judge noted that Mr. Martin O'Donovan averred to having transcribed the order of the trial judge made by Judge Moran on 25th February 2008 onto the "Trials Book Record Sheet";

> *"It is not altogether clear from Mr. O'Donovan's affidavit that this particular document was before Judge Riordan. The document is however evidence of the spoken order of 25th February, 2008. At para. 6 of his affidavit, Mr. O'Donovan avers that when the applicant was convicted in November 2015, "evidence was given in relation to the 2008 conviction and the matter was adjourned to enable the 2008 file [to] be brought back before the Court." Mr. O'Donovan further avers that Judge Riordan had before him "the terms of the order made by Judge Moran in 2008."* (para. 67 of the judgment)

18. The trial judge noted on this issue;

> *"Overall, in the context of what was before Judge Riordan on 24th November, 2015, there is nothing which causes the Court to apprehend that there exists any unusual or special circumstances that might require me to exercise my discretion in this case and not regard the handwritten document prepared by Mr. O'Donovan on 25th February, 2008, or the trial ledger sheet, or the s.96 Certificate or indeed the Order of Judge Riordan of 24th November, 2015 as evidencing the order made on 25th February, 2008, especially as I can do so "without any oral or extrinsic evidence or any explanation which cannot be gleaned from the face of the documents offered by the respondent", to quote Baker J. in*

Miller v. The Governor of the Midlands Prison." (para. 70 of the judgment)

The trial judge concluded;

> *"Thus insofar as the applicant seeks to impugn the lawfulness of his detention on the basis that there was no evidence of the 25th February, 2008, Order before the Circuit Court on 24th November, 2015, that argument is rejected. Furthermore, in so far as the case was made that there was no compliance with s.99(7) of the 2006 Act, that argument is rejected as the Court is satisfied that the handwritten document of 25th February, 2008, as created by Mr. O'Donovan, and which contains, inter alia, the "warrant" to the Governor fully meets the requirements of s.99(7)."* (para. 71 of the judgment)

19. The third key aspect of the appellant's case before the trial judge concerned an alleged failure to comply with the provisions of s. 99(2)(b) of the 2006 Act. In this regard, it was contended that compliance with the abovementioned section was a condition precedent to Judge Riordan's jurisdiction to revoke the suspended sentence imposed on the appellant in February 2008 in order to activate the three year suspended portion of same sentence. Specifically, the appellant alleges that Judge Riordan was required to satisfy himself at the sentencing hearing on 24th November 2015 that s. 99(2)(b) of the 2006 Act had been complied with at the original 2008 sentencing hearing. In particular, the appellant asserted that since the sentence being imposed in 2008 was being suspended in part then the requisite order which the 2006 statute mandated Judge Patrick Moran to make in February 2008 was one pursuant to the provisions of s. 99(2)(b) of the 2006 Act.

20. The trial judge accepted "the general proposition put forward by the respondents that it was not the function of the Circuit Court on 24th November, 2015, when the revocation of the applicant's suspended sentence was being considered, to enquire into the lawfulness or otherwise of the Order which was made on 25th February, 2008." (para. 86 of the judgment)

21. The trial judge continued;

> *"What confronted Judge Riordan on 24th November, 2015 was the undisputed factual matrix that the applicant had been convicted of offences committed in the three years suspension period, in breach of the bond entered into by him on 25th February, 2008 to keep the peace and be of good behaviour towards all the people of Ireland for three years post his release from prison on 15th February, 2013. In the absence of any challenge by the applicant to the 25th February, 2008 Order, either in February, 2008 or, more particularly, on [24th] November, 2015, I am of the view that it was not incumbent on Judge Riordan to put himself on inquiry as to the validity or otherwise of the Order of 25th February, 2008."* (para. 87 of the judgment)

22. The trial judge found at para. 89 of the judgment;

> *"It is the case that there is no evidence on the face of any of the documents put before the Circuit Court on 24th November, 2015 of compliance by the original sentencing court with the requirement that the applicant keep the peace and be of good behaviour during the period of his incarceration, which is one aspect of the condition to be attached when a sentence is being suspended in part, as provided for in s. 99(2)(b) of the 2006 Act."*

23. The trial judge concluded, having reviewed the events surrounding the sentencing of the appellant in February 2008, and having considered the fact that he never appealed the 10 year sentence which was partly suspended, as follows;

> *"I am not satisfied that the non-specification by Judge Moran that the applicant keep the peace and be of good behaviour while in prison can be equated with the deficits that were found to exist in The State (Browne) v. Feran or in The State (Roche) v. Delap."* (para. 95 of the judgment)

24. The trial judge concluded;

> *"Accordingly, in the circumstances of this case I do not find that the failure of Judge Moran to impose a condition on the applicant that he keep the peace and be of good behaviour during the period of his incarceration to be such as to amount to a deficit of the fundamental requirements of justice that the applicant's detention on foot of the Order made by Judge Riordan on [24th] November, 2015 may be said to be wanting in due process of law."* (para. 97 of the judgment)

Thereafter the trial judge concluded;

> *"Thus, on the question of whether the Order made by Judge Riordan on 24th November, 2015, was bad on its face, for the reason set out above, I am not persuaded by the arguments canvassed by counsel for the applicant.*
>
> *As I am satisfied that Judge Riordan was vested with jurisdiction to make the Order he made on 24th November, 2015, it follows that the applicant is not in unlawful detention and accordingly, the relief sought pursuant to Art. 40. 4.2 of the Constitution is refused.*
>
> *It follows that the relief sought by the applicant under the judicial review proceedings is also denied. The refusal of relief in the judicial review proceedings renders the respondents' arguments on the issue of delay and insufficiency of pleading in the judicial review proceedings entirely moot."* (paras. 100-102 of the judgment)

Grounds of appeal

25. By notice of appeal dated 8th November 2017 the appellant relies on four separate grounds to challenge the determination of the High Court as follows;

> (i) That the trial judge erred in concluding that the failure to comply with the provisions of s. 99(2)(b) of the Criminal Justice Act, 2006 in the sentence order made at Cork Circuit Court on 25th February 2008 was not such as to deprive that Court of jurisdiction under s. 99(10) of the 2006 Act to revoke the suspended portion of the 2008 order on the 24th November 2015;
>
> (ii) That the trial judge erred in holding that there exists a written record of the 2008 order.

(iii) That the trial judge erred in holding that Judge Riordan had before him on 24th November 2015 a written record of the 2008 order.

(iv) That the trial judge erred in holding that the term of the bond entered into by the appellant on 25th February 2008 had in fact run from the date of his release in 2013 as opposed to the date of his incarceration pursuant to the 2008 order.

Arguments advanced by appellant

Ground 1;
Whether there was failure to comply with the provisions of s. 99(2)(b) of the Criminal Justice Act, 2006 in the sentence order dated 25th February 2008 in the proceedings CK224/2007 such as to deprive that Court of jurisdiction under s. 99(10) of the 2006 Act to revoke the suspended portion of the 2008 order on 24th November 2015

26. The appellant contends that the jurisdiction to suspend a sentence of imprisonment in whole or in part is now an exclusively statutory regime by virtue of s. 99 of the Criminal Justice Act, 2006 (as amended). Likewise the jurisdiction to revoke such an order either in whole or in part is governed by the section.

27. The appellant relies on s. 99(2)(b) of the Act contending that the language in that section makes it a condition of an order which suspends a sentence in part only that the convicted individual should keep the peace and be of good behaviour throughout the period of imprisonment in addition to a specified period of time post release and that this must be specified on the face of the order.

28. The appellant contends that a condition precedent to the revocation of a suspended sentence is that there must be in existence a valid order which complies with subsections (1) and (2)(b) before a court can later enter into a revocation of a suspended sentence since only an order made in accordance with the said subsections can be subject to the power to revoke which was specified in the now impugned s. 99(10).

29. In essence the appellant contends that non-compliance with the statutory requirements, particularly in relation to subsections (1) and (2)(b) renders the 2008 order liable to be quashed.

30. It is further contended that the failure of Judge Riordan to record on the face of the November 2015 order that there had been compliance with s. 99(2)(b) renders the latter activating order also liable to be quashed. The appellant contends that penal statutes are to be construed strictly and where ambiguity arises in the provision of a penal statute this ambiguity must be resolved in favour of the person charged. The decision of the Supreme Court in DPP v. Moorehouse [2006] 1 I.R. 421 is relied on in support of the proposition that penal statutes must be construed strictly. Further, the appellant relies on The People (DPP) v. Devine [2011] IECCA 67 and DPP v. Jeffrey Carter [2014] IEHC 179 as authorities for the proposition that non-compliance with the statutory requirements of s. 99(1) and (2) deprived the court in November 2015 of authority to revoke the 2008 suspended sentence.

31. The respondent contends that the appellant's construction of subsection (2) cannot be gleaned from a plain reading of the section and would in practice be unworkable. By way of example, it was pointed out that sentences are frequently backdated and were the appellant's construction to be accepted by the Court, this would result in a bond being entered into by an offender which would in effect consist in part of a promise to be of good behaviour in the past.

32. The respondent further contends that even were the Court to find that there was non-compliance with the relevant subsections of s. 99, on the facts of this case same would not be such as to amount to a deficit of the fundamental requirements of justice and it is urged that this Court should not interfere with the determinations of the High Court in this regard.

33. The respondent further asserts that the proceedings pursuant to Art. 40, insofar as they seek to litigate an alleged breach of s. 99(2), constitute a classic collateral attack on the trial process which had been litigated to a finality in 2008 in circumstances where the appellant never challenged the original order on any basis and did not appeal the determination of the court at the time.

34. The respondent seeks to rely on DPP v. Vajeuskis [2014] IEHC 265 as authority for the proposition that any infirmity in an order suspending a sentence could not be revisited at a subsequent revocation hearing.

Ground 2
That the trial judge erred in holding that there exists a written record of the 2008 order.

35. The appellant contends that s. 99 of the 2006 Act envisages that a written order must be produced whenever a court suspends a custodial sentence in whole or in part and that the said order must also contain the conditions subject to which the order is made.

36. It is further asserted that it is obligatory that such an order specify all potential consequences of non-compliance or failure to abide by any conditions contained in the said order. It is asserted that otherwise s. 99 is susceptible to a constitutional challenge and reliance is placed on *J. O'G v. The Governor of Cork Prison* [2006] IEHC 236. It is contended that an individual at the point of sentence is entitled to be furnished with an order expressly specifying all possible consequences of failing to abide by any conditions contained therein.

37. The appellant contends that an instrument created on the date of sentencing by Martin O'Donovan, and dated 25th February 2008, cannot constitute an order for the purposes of s. 99 of the 2006 Act as it does not contain the mandatory condition that the appellant keep the peace and be of good behaviour during the entire period of imprisonment as well as the suspended portion of the sentence which, as the appellant contends, is a mandatory prerequisite by virtue of s. 99(2) in all cases where a partially suspended sentence is imposed.

38. The respondent contends that there is no authority for the proposition that an order is required to spell out and specify the consequences of failure to comply with the bond entered into at the time of imposing a partly-suspended sentence anymore than it is a requirement to inform a prisoner that they might for instance lose remission or privileges in the event of misconduct while serving a sentence of imprisonment.

39. The respondent further contended that the record created by Mr. O'Donovan, on 25th February 2008 constitutes a valid record for all material purposes regarding the conviction and sentence. The said document records as follows;

"Ten years imprisonment to date from 24/10/07. Suspend final three years of this sentence on accused entering into a bond to keep the peace and be of good behaviour for a period of three years post release. Bond entered into orally."

Ground 3;
That the trial judge erred in law and/or in fact in holding that Judge Riordan had before him on 24th November 2015 a written record of the 2008 order

40. The appellant contends that it is a prerequisite for a judge who purports to revoke a suspended sentence that they must have the written order of sentence in order to satisfy themselves that the conditions alleged to have been breached were in fact imposed upon the convicted person in the first instance.

41. The appellant further contends that the document executed by Mr. O'Donovan, at the original sentence hearing on 25th February 2008 recording the sentence in detail was not in fact placed before Cork Circuit Court at the revocation hearing on 24th November 2015.

42. The respondent disputes the appellant's contention that a written order made pursuant to s. 99(1) must be before the judge hearing the revocation application pursuant to s. 99(10). The respondent asserts that the sole requirement in regard to a written copy of an order is to be found in s. 99(7) of the 2006 Act which mandates that a copy of an order which suspends a sentence in full must be given to the Garda Síochána, or in the case of an order consisting of the suspension of a sentence in part only, the Governor of the prison to which the person is committed as well as the Garda Síochána.

43. The respondent further asserted that there has been full compliance with s. 99(7) of the Act.

44. It is contended that there is no plain or express requirement in the statute that a copy of a written order be before the sentencing court at a revocation hearing. Further, it is pointed out that the appellant was represented by solicitor and counsel at the hearing on 24th November 2015. At that hearing no issue of any kind was raised in regard to the terms of the sentence originally imposed in February 2008. In particular it was acknowledged that the appellant had entered into a bond at the original sentence hearing to keep the peace and be of good behaviour for a period of three years post release.

Ground 4;
That the bond entered by the appellant on 25th February 2008 had run from the date of his imprisonment as opposed to the date of his release on 15th February 2013

45. As stated above, it appears that prior to the institution of the proceedings, Junior Counsel for the appellant obtained the purported court order from the Circuit Court Office in Cork on 6th July 2016 which suggested that the appellant had in open court acknowledged himself bound to the people of Ireland, to keep the peace and be of good behaviour for a period of three years "from this date" (25th February 2008). Thus the appellant contends that the bond entered upon by him expired three years subsequent to his incarceration.

46. The appellant further contends that this purported court order is the only document which meets the legislative requirements contained in s. 99 and offers definitive proof that the bond was to run for three years from commencement of imprisonment only. As such therefore, the argument goes, the subsequent revocation of the suspended aspect of the sentence on 24th November 2015 was invalid.

47. The respondent counters that the purported court order does not constitute evidence of the orders made at the original trial on 25th February 2008 and further that same was generated electronically, subsequent to the 24th November 2015, when sentencing for the "triggering offences" took place. Further, the respondent offers evidence including affidavits of Martin O'Donovan together with exhibits contemporaneous to the original sentencing of the appellant on 25th February 2008, all of which indicate that the final three years of the appellant's ten year sentence of imprisonment was suspended for a period of three years post release.

48. With regard to the appellant's contention that reliance on extraneous documentation is impermissible in light of the express statutory requirements contained in s. 99 the respondent relies on the decision in *Miller v. Governor of the Midlands Prison* [2014] IEHC 176 which clarifies that a court is entitled to seek and find clarification and assistance in the records of the court to assist in interpreting the grounds for detention and the details of same. Accordingly, the respondents contend that it is proper and just to find that the appellant was required to keep the peace and be of good behaviour for a period of three years post release and that the determination of the trial judge which was based on the evidence that was assessed should not be disturbed in that regard.

Findings of this Court
49. In the first instance it is necessary to recall the relevant provisions of s. 99 of the Criminal Justice Act, 2006;

> "99.—(1) Where a person is sentenced to a term of imprisonment (other than a mandatory term of imprisonment) by a court in respect of an offence, that court may make an order suspending the execution of the sentence in whole or in part, subject to the person entering into a recognisance to comply with the conditions of, or imposed in relation to, the order.
>
> (2) It shall be a condition of an order under subsection (1) that the person in respect of whom the order is made keep the peace and be of good behaviour during—
>
> (a) the period of suspension of the sentence concerned, or
>
> (b) in the case of an order that suspends the sentence in part only, the period of imprisonment and the period of suspension of the sentence concerned,
>
> and that condition shall be specified in the order concerned."

50. If one accords to the language of the subsections its ordinary meaning a part suspended sentence is subject to one mandatory condition, namely that the offender enters into a bond to keep the peace and be of good behaviour during both the period of imprisonment and the subsequent period of suspension. It is open to the sentencing court to impose any additional conditions which it

considers appropriate in light of the nature of the offence and which is considered likely to reduce the risk of re-offending. Every condition imposed by the Court must be specified in the order.

51. Part suspended sentences, generally characterised as reviewable sentences, were part of the common law prior to the coming into operation of s. 99 of the Criminal Justice Act, 2006. Whilst the Act did not expressly repeal the pre-existing common law power to suspend sentences, the practical consequence of s. 99, when viewed in the context of Part 10 and of the entire statute, is that the sentencing regime in regard to part and wholly suspended sentences is now exclusively governed by the statute.

52. It was the legislative intent that s. 99 should constitute a comprehensive code governing all aspects of the operation of suspended sentences. That statutory intent is to be found in subsection (1) of the section.

53. In his judgment in DPP v. Carter [2015] 3 I.R. 58 at p. 69 O'Donnell J. stated;

> *"Section 99 of the Criminal Justice Act 2006 ("the 2006 Act") is an apparently innocuous procedural provision. It has already been amended twice in its short life . . . Nevertheless it has given rise to innumerable practical difficulties and problems of interpretation, only some of which are illustrated by the present cases. What these cases do demonstrate clearly however is that the provision is one of considerable complexity and difficulty, requiring some learned debate, fine distinctions and considerable argument. Only one thing is clear and beyond dispute: s. 99 is in need of urgent and comprehensive review."*

54. Of assistance also is the decision of the High Court in *DPP v. Carter* [2014] IEHC 179 (O'Malley J., 21st March 2014) where she states at para. 39;

> *"The question here is ultimately one of jurisdiction. The issue is not whether the defendant was properly brought before the District Court, but whether a lawful foundation had been laid for the exercise by the District Court of its powers under subs.(10) of the Act. It seems to me that this issue must be approached on the basis that the powers in relation to suspended sentences are now entirely governed by statute, and that the statutory power to revoke such a sentence under subs.(10) of the Act depends on a valid order having been made under subs. (9)."*

55. The learned judge considered whether acquiescence could be raised against a party in relation to the activation of a sentence following the decision in *People (DPP) v. Devine* [2011] IECCA 67. O'Malley J. at para. 41 states;

> *"I am conscious of the fact that the defendant's legal representatives made no objection to the order in question. It is of course the case that the primary obligation to ensure that a judge in criminal proceedings does not fall into error rests upon the prosecution. In turn, that should not be seen as absolving counsel for the defence from his or her duty to protect his or her client from being subjected to an unlawful order. However, it seems clear in the instant case that neither the judge nor any of the lawyers present adverted at the time to the possible infirmities of the order.*

56. The Court of Criminal Appeal judgment in People (DPP) v. Devine [2011] IECCA 67 stated at p. 7;

> *"Prior to the regulation of revocation of sentences suspended in whole or in part by statute the practice was that where a sentence imposed by the Court of Criminal Appeal was suspended in whole or in part any application to revoke the suspension was made to the court of trial and not to the Court of Criminal Appeal: The People (At the Suit of the Attorney General) v. Peter Grimes [1955] I.R. 315. However the procedure is now regulated by statute and any application to revoke a sentence suspended in whole or in part is made to the court which imposed that sentence."*

57. In the Devine case the consequence of irregularity was considered by the Court in circumstances where a District Judge had failed to remand the respondent to the Court of Criminal Appeal which had been the original sentencing court. Although such an issue does not arise in the instant case, at the level of principle the decision does support the proposition that non-compliance with such a strict statutory prerequisite, and in particular failure to remand to the appropriate court in accordance with s. 99(9), deprives the latter court of jurisdiction to carry out its functions pursuant to s. 99(10) and 10(a).

Purposive construction

58. In the decision of *DPP v. Moorehouse* [2006] 1 I.R. 421, at p. 443 Kearns J. states;

> *"It is a well established presumption in law that penal statutes be construed strictly. This requirement manifests itself in various ways, including the requirement to use express language for the creation of an offence and the further requirement to interpret strictly words setting out the elements of an offence [Maxwell on The Interpretation of Statutes, (12th ed.) at pp. 239 and 240]."*

At. p. 444 the said judge continues;

> *"That is not to say that a penal statute cannot be construed in a purposive manner, or that the court should readily adopt a construction which leads to an artificial or absurd result."*

59. It appears in the plain language of subs. (2) that the legislature drew a distinction between sentences which were suspended in their entirety and those which were suspended in part only. In substance, to impose a valid part suspended sentence there is a mandatory requirement that the offender enter into a recognisance to comply with an expressed condition; to keep the peace and be of good behaviour during both the period of imprisonment and the period of suspension of the sentence concerned as well as any other condition as may be specified and imposed in the order.

60. The appellant argues that failure of the sentencing judge in 2008 to fully comply with subs. 2(b) in merely imposing a mandatory condition to keep the peace and be of good behaviour only throughout the period of three years post release rather than for the aggregate period i.e. the period of imprisonment together with the period post release, as is manifestly the statutory intent, invalidated the suspended part of the sentence. The question falls to be determined as to what impact, if any, this deficit has on the validity of the sentence imposed on the appellant by the Circuit Court on 25th February 2008 and subsequently in respect of the triggering offences and the activated sentence on 24th November 2015.

Habeas corpus application

61. It is well settled in our law that not every defect or illegality attached to detention will invalidate the detention. In *McDonagh v. Frawley* [1978] I.R. 131 at p. 136 it provides;

> "The stipulation in Article 40, s. 4, sub-s. 1, of the Constitution that a 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."

62. In the earlier decision of *The State (Royle) v. Kelly* [1974] I.R. 259 Henchy J., at p. 269, reached back to Magna Carta to offer a rationale for the Supreme Court's approach;

> "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."

63. The Court is satisfied that the facts in the instant case fall within the ambit of circumstance considered by the Supreme Court in *Ryan v. The Governor of Midlands Prison* [2014] IESC 54 where, at para. 18, Denham C.J. stated;

> ". . . the general principle of law is that if an order of a Court does not show an invalidity on its face, in particular if it is an order in relation to post conviction detention, then the route of the constitutional and immediate remedy of habeas corpus is not appropriate. An appropriate remedy may be an appeal, or an application for leave to seek judicial review. In such circumstances the remedy of Article 40.4.2 arises only if there has been an absence of jurisdiction, a fundamental denial of justice, or a fundamental flaw."

64. The Chief Justice continued, at para. 23;

> "The traditional remedy of *Habeas Corpus*, now subsumed in Article 40 of the Constitution, is the great protection of the citizens' liberty. It protects our citizens from arbitrary detention and imprisonment without legal warrant, not to mention "disappearances" which, historically and now, are all too common in dictatorial regimes. The Courts must always enquire immediately into the grounds of any person's detention, when called upon to do so. But the fact that every person detained has a right to have the legality of his detention examined by the Superior Courts does not mean that such a person has a right to have every complaint he may have examined under the same extraordinary procedure."

65. In *Roche (orse Dumbrell) v. Governor of Cloverhill Prison* [2014] IESC 53 Charleton J. noted;

> "There are many instances where, within jurisdiction, a court may fall into an error of interpretation or base its decision on a mistaken view of the law. This does not in consequence remove jurisdiction. There are legal structures in place to deal with such commonplace situations and these fall outside the obligation of the High Court to enquire into and to declare that a detained person is either lawfully detained or not."

That passage was subsequently cited with approval by Denham C.J. in *Ryan v. Governor of Midlands Prison* [2014] IESC 54.

67. The authorities affirm the position that the lawful application of the jurisdiction created under the Constitution does not turn an error within jurisdiction into the destruction of that jurisdiction.

The triggering offences

68. It appears that on 4th May 2015 the appellant was found in possession of controlled drugs and was arrested. On 11th November 2015, the appellant was found guilty of two offences in connection with this incident. The appellant was sentenced in respect of these offences ("the triggering offences") on 24th November 2015.

69. The sentence imposed by the court on the appellant in respect of the two triggering offences was a term of three years imprisonment in respect of each. The said three year sentences were to run concurrently with one another but consecutive to the revoked 2008 three year suspended sentence. It will be recalled that the lawfulness of the 2008 sentence remained uncontested between 2008 and 2016.

70. The appellant did not appeal conviction or sentence in respect of the triggering offences. No valid basis has been advanced in law by the appellant to impugn the triggering sentences and same are valid. The sentencing court directed on 24th November 2015 that the said sentences were to run consecutively to the activated suspended sentence of imprisonment, the suspended portion of which was revoked by Judge Riordan in the Circuit Court on 24th November 2015.

71. The contention on behalf of the respondent that requiring a recognisance to comply with the condition to keep the peace and be of good behaviour during the period of imprisonment and the period of suspension of a sentence is unworkable in practice is not sound and does not withstand close scrutiny.

72. The original sentence imposed falls into two discrete parts: the custodial element and the suspended element. The suspended element, the so-called "sword of Damocles", may never fall to be executed depending on the circumstances and depending on the offender complying with the recognisance entered into at the time of sentencing. Hence the offender remains entitled to raise issues regarding the validity and ambit of the suspended aspect of the sentence at the point where activation is sought.

73. This Court finds that the decision in *DPP v. Vajeuskis* [2014] IEHC 265 is distinguishable insofar as it concerned a consultative case stated by the original sentencing judge at a point where the suspended sentence was sought to be activated pursuant to s. 99(10) of the Criminal Justice Act, 2006 by reason of subsequent offences alleged to have been committed. Mr. Justice Michael Peart found that the District Judge was not restricted as to the length of time for which he could suspend the four month sentence and that the law was silent as to whether a sentence may not be suspended for a period longer than the sentence itself and as to the maximum length of such suspension. The learned judge concluded that there was no restriction as to length of time for suspension of a sentence.

74. Whilst clearly the custodial element and the suspensory element of the sentence are severable, nonetheless the language, structure and form of s. 99(1) and (2) appear clear.

75. The respondent's contention that it is not clear whether the suspended sentence was revoked pursuant to s. 99(10) or s. 99(17) would not appear to be correct. The documentation relied upon to return the appellant to custody on 24th November 2015 is clear on its face that the order was made pursuant to s. 99(10) of the Act.

Ground 2
76. It is clear from the affidavit of Martin O'Donovan sworn on 27th March 2017, and in particular paras. 10 and 11 thereof, that it is not the normal practice to draw up orders of the Circuit Court in a particular form. It is asserted that unlike the District Court which is subject to O. 12, r. 2 of its own court rules " . . . *there is no requirement in the Rules for the Circuit Court to record the contents of an order* in a particular fashion."

77. Whilst on the evidence in this case it is clear that the so-called purported court order generated a certain degree of confusion, all uncertainty was amply addressed in the affidavits sworn by Martin O'Donovan and in the affidavits of Laurence O'Brien. In this regard there is clear evidence as to the precise terms of the sentence imposed on 25th February 2008.

78. Prior to the hearing in the High Court it had been clearly established that the purported court order did not constitute the order nor could it. The document is replete with errors including erroneously identifying the judge who heard the original matter at Cork Circuit Court on 25th February 2008. Furthermore, on the face of the purported court order it makes reference to events which occurred many years after the handing down of the 2008 sentence. Further, it is not signed or stamped and appears to have been generated solely for the purposes of permitting a new computer system to generate a sentencing order in 2015.

79. The decision in *J.O'G. v. The Governor of Cork Prison* [2006] IEHC 236 is distinguishable insofar as it pertains to committal for contempt of court.

80. To an extent there is a deficit of clarity as to what precisely was before the sentencing judge at the activation hearing on 24th November 2015. However no objection was raised on behalf of the appellant at that hearing and it is clear that the sentence as reactivated is wholly consistent with the document created and executed by Martin O'Donovan, the acting county registrar, and dated the 25th February 2008 as corroborated by all other documentations and instruments relied upon by him in his affidavit including the certificate executed by him on the 28th March 2008 issuing after conviction pursuant to s. 96(1) of the Criminal Justice Act, 2006.

81. A suspended sentence is a real sentence which may end up being served if the defendant breaches a condition. There is no formal limit on the operational period for which a sentence may be suspended by the Court. This Court is satisfied that the operational period of the suspended sentence imposed in the instant case excluded the period of imprisonment and accordingly that part of the sentence imposed on the 25th February 2008 that was partly suspended failed to comply with the strict requirements of s. 99(1) and (2) of the Act.

82. For the reasons stated above the Court is satisfied that there does exist a written record of the 2008 order.

83. Separately, the question arises as to whether the oversight of the sentencing judge could be said to have had any material adverse impact on the appellant and whether it informs the Court's exercise of discretion as regards the application for extension of time or as regards the exercise of this Court's undoubted discretion to grant *certiorari.*

Ground 3
84. With regard to Ground 3, the Court is satisfied that at the sentencing hearing on 24th November 2015 there was sufficient probative evidence before the judge of the nature and terms of the sentence imposed previously on the 25th February 2008 including the express terms on which the final three years of the sentence were suspended, the terms of the bond entered into by the appellant and the duration of the said bond being for three years post release.

85. Further, it is clear that s. 99(7) was fully complied with as deposed to in the affidavits of Mr. Martin O'Donovan.

Ground 4 – the duration of the bond
86. Whilst the purported court order provided to counsel for the appellant created some initial confusion, it is clear from six separate sources as well as the trial ledger sheet and the s. 96 Certificate and the manuscript document created contemporaneously by Mr. Martin O'Donovan that the bond entered into by the appellant was to keep the peace and be of good behaviour for a period of three years post release. There is thus no valid basis for the appellant's contention that the bond entered into was operative for 3 years from the date of his incarceration.

87. This Court is satisfied that self evidently the purported court order was not before the court on 24th November 2015 and was subsequently generated and the recitals and statements therein contained are only consistent with such a state of affairs. Further, there are clear errors on the face of the document which has no probative value and is acknowledged to lack any probative value by Martin O'Donovan. Hence it could not be a copy of the order made in the Circuit Court on 25th February 2008. The appellant is not entitled to rely on this document as having probative value in regard to any matter at issue in this appeal. Further the appellant's solicitor, Dianne Hallahan, in her affidavit sworn on 7th July 2016 exhibits a record of the proceedings that had transpired in court on 24th November 2015 duly signed by or on behalf of the county registrar which expressly records that the suspended period is operative post release.

88. There is clear authority from the Supreme Court in *The State (Ryan) v. Edmond J. Kelly & Ors.* [1970] 1 I.R. 69 that any ambiguities or uncertainties in relation to a Circuit Court sentence can be resolved by reference to records of the Circuit Court pertaining to the spoken decision on sentence.

89. This Court is accordingly satisfied that the trial judge was within her discretion in determining that the term of the bond entered upon by the appellant on the 25th February 2008 had in fact run from the date of his release on the 15th February 2013 as opposed to the date of his incarceration pursuant to the 2008 order.

Delay
90. It is acknowledged on behalf of the appellant that the within proceedings were not brought within the three-month period prescribed by O. 84, r. 21 of the Rules of the Superior Courts. The appellant contends that where an application by way of judicial review seeking an order of *certiorari* raises an issue as to the legality of the detention of an individual it warrants being treated as an application pursuant to Art. 40 of the Constitution irrespective of the form in which the proceedings are taken.

91. Separately, this appellant instituted proceedings pursuant to Art. 40.4 of the Constitution seeking an enquiry as to the validity of

his detention and no time period applies in respect of such proceedings.

92. With regard to the appellant's application for an extension of time in relation to bringing these judicial review proceedings O. 84, r. 21(3) provides that a court can extend the time period within which an application for judicial review may be made, but will only do so if satisfied that there is good reason for doing so and the circumstances that resulted in the delay were either outside the control of or could not have been reasonably anticipated by the appellant.

93. In support of their application for an extension of time it is asserted that neither the appellant nor his legal advisers were in possession of the details of the order made on 25th February 2008. It appears the appellant's advisers took no steps to obtain details of the 2008 sentence at the time of the hearing on the 24th November 2015. It is asserted that the legal advisers were unaware of the non-compliance of the 2008 order with the strict statutory requirements of s. 99(1) and (2). A perusal of s. 99(1) and (2) of the Act in light of the evidence adduced at the sentencing hearing undermines the viability of this line of argument.

94. The respondent asserts that the appellant did not seek leave in regard to this application until July 2016 eight months following the sentencing hearings in respect of the activation of the partly suspended sentence and the triggering offences. Further, the respondent also asserts that the application was motivated by the judgment of the High Court in *Moore v. DPP* and was brought three months following the delivery of the latter judgment.

95. The respondent contends that the appellant has not established a valid basis to obtain an extension of time to seek judicial review and if the appellant had no *locus standi* prior to the decision in *Moore*, he cannot now use the *Moore* decision as a collateral attack on the trial process which proceeded to finality in November 2015.

96. In the instant case the Court is satisfied that the appellant and his legal advisers were aware of the terms of the sentence imposed upon the appellant on 25th February 2008 and same was discussed and considered in open court in their presence on 24th November 2015 at the sentence activation hearing. The terms and tenor of the sentence as discussed in court in November 2015 have subsequently been demonstrated to have been correctly articulated to the Court. The appellant and his legal advisers must be taken to have been aware of the terms of s. 99(1) and (2) of the 2006 Act.

97. Accordingly they were at all material times aware that the order made in 2008 partly suspending the sentence was upon its terms confined to a period of three years post release and did not extend to any part of the period of detention up to the said release.

98. Whilst it is true that some delays were encountered in the appellant obtaining correct details in regard to the terms of the 2008 order it appears clear that no effort was made to procure a copy or details of the terms of same until the month of July 2016.

99. Order 84, rule 21 of the Rules of the Superior Courts (Judicial review) 2011 (S.I. 691 of 2011) came into effect on 1st January 2012 and is framed in terms which indicate a clear intent to reduce delay and to further limit time periods which previously existed for applications for judicial review pursuant to the same order prior to its amendment.

100. The time limit is specified as being within three months from the date when grounds for the applications first arose or six months where the relief sought is *certiorari*, ". . . unless the Court considers that there is good reason for extending the period within which the application shall be made."

Time
101. The appellant is clearly out of time to bring this judicial review application. The appellant asserts that there is good and sufficient reason for extending time and further argues that he has a special grievance in line with the decision in *State (Kelly) v. The District Justice (Bandon District) and The Circuit Court Judge of Cork* [1947] I.R. 258. Further the appellant alleges that a public wrong has been committed against him and as such he is entitled to an order of *certiorari* in respect of the impugned order made on 24th November 2015, as delay alone should not of itself disentitle him to the said relief. Murnaghan J. in the Supreme Court judgment in *State (Kelly) v. The District Justice (Bandon District)* [1947] I.R. 258 at p. 261 states;

> *"In the exercise of its discretion, however, the Court makes a distinction between persons who have a special grievance, and persons who apply merely as members of the public. In the case of persons who have a special grievance, where there are grounds for the issue of the order, the order is granted ex debito justitiae unless the applicant has, by his conduct, disentitled himself to relief. In the case of a conviction where the penalty is awarded in a manner not justified by the law, the convicted person has, according to a long line of authorities, a special grievance."*

102. The Court is satisfied that it was apparent to the appellant and his legal team at the hearing in November 2015 as to what the precise terms were of the sentence originally imposed in the Circuit Court on 25th February 2008. In particular that it was known to them;

(a) that it was a partly suspended sentence,

(b) that the period suspended was for three years post release only,

(c) that the suspension did not operate during the custodial aspect of the sentence .

The Law

Discretion
103. The Court has discretion to refuse reliefs sought by an appellant even where it is demonstrated that a claim is correct on its merits. In the context of a statutory provision even where an appellant can demonstrate to the Court that the impugned decision was strictly unlawful, the Court is entitled, in the exercise of its discretion, to refuse to exercise its supervisory jurisdiction and consequently refuse to grant judicial review. Discretion operates in respect of the question whether or not the relief itself should be granted.

Jurisdiction
104. Demonstrably, the trial judge in 2008 did have jurisdiction to deal with the case on indictment and to impose the sentence. No want of jurisdiction has been established in that regard.

105. The High Court should not intervene to quash decisions made in error if it can be shown that the error is within the jurisdiction of the decision maker.

106. In the instant case it must be recalled that the sentence stood unchallenged for over eight years from February 2008 until July 2016.

107. In substance, the question arises whether as a matter of law the omission on the part of the sentencing judge is of such a nature as to visit prejudice or injury upon the appellant. The Court must also have regard to whether as a result he suffered loss or a wrong was visited upon him. All the indications available to this Court is that in circumstances of good faith the sentencing judge in February 2008 may, to a limited extent only, have misconstrued the provisions of s. 99(2). He took a view that it vested in him a right in imposing a partly suspended sentence to elect as to the ambit and duration of the recognisance to be fixed and bond to be entered into. This Court is satisfied that on balance, in the absence of any injurious impact upon the appellant arising from the sentence imposed in February 2008, that constituted an error within jurisdiction on the part of the sentencing judge.

108. No wrong befell the appellant arising from the sentence as it was structured.

109. In the instant case no finding of fact on the part of the sentencing judge is challenged as erroneous. The sentencing judge was lawfully exercising a jurisdiction when by error or inadvertence he omitted to impose upon the appellant a sentence of greater severity. In substance, the complaint is not as to want of jurisdiction on the part of the sentencing judge but rather as to error in the exercise of such jurisdiction. There is jurisprudence which suggests that for such error *certiorari* does not lie (*The State (Davidson) v. Farrell* [1960] I.R. 438 at p. 442 (Maguire C.J.)).

110. It has not been contended on behalf of the appellant that the conditions attached exceeded what was lawfully permissible pursuant to s. 99(1) and (2) of the Act. Rather it is contended that the sentence imposed did not reach the level of severity provided for under the Act. The duration of the bond entered into by the appellant was shorter than the legislation provided for. Demonstrably, therefore, the line of authorities dealing with excess of jurisdiction are not relevant in the Court's view.

111. This Court is satisfied in light of the jurisprudence including *Killeen v. DPP* [1997] I.R. 218 and the *dicta* of the Supreme Court that such error of law as arose here can be committed within jurisdiction without the High Court having to intervene.

112. Keane J. in the Supreme Court in *Killeen v. DPP* [1997] IR 218 at p. 228, following the judgment of O'Brien L.C.J. in *R.(Martin) v. Mahony* [1910] 2 I.R. 695, stated;

> "To grant *certiorari* merely on the ground of want of jurisdiction, because there was no evidence to warrant a conviction, confounds… want of jurisdiction with error in the exercise of it. The contention that mere want of evidence to authorise a conviction creates a cesser of jurisdiction, involves, in my opinion, the unsustainable proposition that a magistrate has . . . jurisdiction only to go right; and that, though he had jurisdiction to enter upon an inquiry, mere miscarriage in drawing an unwarrantable conclusion from the evidence, such as it was, makes the magistrate act without and in excess of jurisdiction."

113. Keane J. noted in the course of his judgment at p. 227;

> "It may be that an error of law committed by a tribunal acting within its jurisdiction is not capable of being set aside on certiorari: see *The State (Davidson) v. Farrell* [1960] I.R. 438. It is otherwise where the error of law has as its consequence the making of an order which the tribunal had no jurisdiction to make."

114. In the decision of *DPP v. Judge Kelliher & Anor*. [2000] IESC 60 delivered on 24th June 2000, Keane C.J. citing *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 AC 147 suggested that save in extreme cases it is not a matter for the High Court or an appellate court in considering whether to quash a conviction to inquire into the merits of a decision. Clarke J. cited that judgment with approval in *Sweeney v. District Judge Fahy* [2014] IESC 50.

115. In the context of proportionality and reasonableness a material fact which this Court takes into account is the absence of any adverse significant consequence for the appellant. The appellant has failed to meet the exceptional standard as is required to demonstrate that the sentences imposed in February 2008 and November 2015 were handed down otherwise than in due course of law and that the matter cannot be set right save by *certiorari*, having due regard to all the relevant circumstances of the case including the failure and omission to appeal either sentence.

116. In circumstances such as the present where at the point of imposition of the sentence in February 2008 an inadequate and incomplete assessment of the legislative provisions took place which operated in a manner entirely to the benefit of the appellant, as evidenced by the fact of his non-appealing of that sentence, it is appropriate that the Court have regard to the particular factual matrix disclosed in the affidavits and exhibits. The practical consequence of the omission enured to the benefit of the appellant.

117. Indeed had the full rigours of s. 99(2) of the Act been brought to bear on the express terms of the sentence imposed in February 2008 as his counsel conceded in the course of the appeal, the suspended aspect of his sentence would have been activated during the custodial part of his sentence arising from his conviction during that time. The practical consequences of the omission or mistake as occurred at the original sentence hearing is not consistent with the proposition that the error in question destroyed jurisdiction.

118. This Court is satisfied in all the circumstances that what occurred was an error within jurisdiction. The statutory provision, for all its limitations, requires to be construed in a purposive manner. This Court is satisfied accordingly that it should exercise its discretion in refusing to extend time pursuant to O. 84.

Conclusions

119. The trial judge was correct in determining that there exists a written record of the order made in the Circuit Court on 25th February 2008.

120. The trial judge was correct in determining that the Circuit Judge had before him on 24th November 2015 sufficient probative evidence as constituted a valid record of the terms of the sentence imposed on 25th February 2008 when he came to determine activation of the partly suspended sentence and the triggering offences.

121. The trial judge was correct in finding as a fact that the term of the bond entered upon by the appellant before the Circuit Court on 25th February 2008 was expressed to run from the date of his release which transpired to be the 15th February 2013 and not from

the date of his initial incarceration as he had contended.

122. Entitlement to an order of habeas corpus is not made out.

123. The appellant is not entitled to an order pursuant to O. 84, r. 21 of the Rules of the Superior Courts extending time for the bringing of the within application seeking judicial review having due regard to the principles of proportionality and reasonableness. In the absence of procedural unfairness this Court should exercise its discretion to refuse to extend time pursuant to Order 84, rule 21.

124. This Court is prepared to find, insofar as it is necessary, that any error on the part of the sentencing judge in 2008 was one made within jurisdiction on the available facts.

125. That part of the sentence imposed on 25th February 2008 which sought to partly suspend the sentence being imposed by the trial judge was not entirely in accordance with the mandatory requirements to be found in s. 99(2) (b) of the Criminal Justice Act, 2006. However, the Court is satisfied that this did not result in any deficit of the fundamental requirements of justice. The sentence imposed had a clear and lawful foundation. The omission enured to the appellant's benefit – a fact manifest from his subsequent conviction and sentencing during the term of his imprisonment for an offence committed whilst in prison.

126. Accordingly the Court would dismiss this appeal on all grounds.