

THE HIGH COURT**[2015 No. 478 SS]****IN THE MATTER OF AN INQUIRY UNDER ARTICLE 40.4.2 OF THE CONSTITUTION OF IRELAND 1937****BETWEEN****MARGARET CONNORS****APPLICANT****AND****THE GOVERNOR OF THE DÓCHAS CENTRE****RESPONDENT****AND****MINISTER FOR JUSTICE AND EQUALITY****NOTICE PARTY****JUDGMENT of Mr. Justice McDermott delivered on the 1st and 15th day of April, 2015**

1. On the 7th March, 2015, an application was made to this Court for an inquiry under Article 40.4.2 of Bunreacht na hÉireann in which it was claimed that her detention by the respondent was not in accordance with law because the warrants under which she was imprisoned had expired and were of no legal effect.

2. On 4th February, 2015, the applicant appeared before Cavan District Court charged with an offence contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001, and was sentenced to a period of 30 days imprisonment following conviction. On the 5th February 2015, ten committal warrants extant in relation to the applicant were executed. The applicant's solicitor examined the committal warrants on foot of which she is now detained and ascertained that she had been sentenced to a total of 22 months imprisonment. Each of the warrants issued following a Circuit Court appeal. There are as follows:-

Case No.	Original District Court Date and Sentence	District Court Appeal Date and Sentence	Date on Committal Warrant
2013/88111	10th May, 2013 (9 months imprisonment)	28th November, 2013 (affirm District Court order)	28th November, 2013
2013/88113	10th May, 2013 (9 months imprisonment consecutive to the sentence imposed on 2013/88111)	28th November, 2013 (affirm District Court order)	28th November, 2013
2013/47906	10th May, 2013 (4 months imprisonment consecutive to the sentence imposed on 2013/88113)	28th November, 2013 (affirm District Court order)	28th November, 2013
2013/88115	10th May, 2013 (3 months imprisonment)	28th November, 2013 (affirm District Court order)	28th November, 2013
2013/88118	10th May, 2013 (6 months imprisonment)	28th November, 2013 (affirm District Court order)	28th November, 2013
2013/88120	10th May, 2013 (6 months imprisonment)	28th November, 2013 (affirm District Court order)	28th November, 2013
2013/88121	10th May, 2013 (6 months imprisonment)	28th November, 2013 (affirm District Court order)	28th November, 2013

2013/88123	10th May, 2013 (6 months imprisonment)	28th November, 2013 (affirm District Court order)	28th November, 2013
2013/88124	10th May, 2013 (6 months imprisonment)	28th November, 2013 (affirm District Court order)	28th November, 2013
2013/88119	10th May, 2013 (6 months imprisonment)	28th November, 2013 (affirm District Court order)	28th November, 2013

3. A warrant in respect of Case 88115 which purported to impose a sentence of three months imprisonment upon the applicant for an offence contrary to s. 4 of the Criminal Justice (Public Order) Act 1994, as amended by s. 22 of the Intoxicating Liquor Act 2008, could not stand having regard to the maximum penalty which may be imposed for such an offence, which is a fine of €500.00.

4. The court directed that the inquiry be conducted at 2.00pm on 27th March and that the respondent certify in writing the grounds of detention, but since the issue arising in the case could be addressed by way of legal argument, the court did not direct the production of the applicant in court. The respondent relies upon the warrants issued by the Circuit Court as constituting lawful grounds for the applicant's detention.

5. The applicant was convicted of using various vehicles without insurance in cases No. 88118, 88119, 88120, 88121, 88123 and 88124 on six different dates in 2011. On conviction, she was sentenced to six months imprisonment in respect of each of these offences which were not expressed to be consecutive. The applicant was also convicted in Case 88111 and sentenced to nine months imprisonment for stealing a case of Budweiser beer valued at €36.27. At the same District Court hearing the applicant was convicted in Case 88113 of stealing two crates of Budweiser valued at €30.00 on the same date and sentenced to nine months imprisonment consecutive to the sentence imposed on Case 88111. On the same date she was also convicted in the District Court of theft of a muscle whey protein valued at €43.98, and sentenced to four months imprisonment consecutive to the nine months imposed in respect of the offence under Case 88113. The total term of imprisonment to be served following the District Court convictions was 22 months imprisonment. She appealed convictions and sentence, but failed to appear at her appeal before the Circuit Court on 28th November, 2013, and all of the convictions and sentences were affirmed.

6. Committal warrants in respect of all ten offences were issued on 28th November, 2013, and directed to the Superintendent, An Garda Síochána, Tallaght, Dublin 24.

7. Counsel on behalf of the applicant submits that the committal warrants issued in respect of each of the convictions on appeal should have been renewed in accordance with the Rules of the District or Circuit Courts. Each "committal warrant after appeal" recites as follows:-

"AND WHEREAS on the hearing of an appeal by the said accused against the said order, the Circuit Court Judge for the County and the City of Dublin on 28-Nov-2013 ordered as follows:

No appearance, Strike out Appeal, affirm conviction and order of the District Court and ordered that the accused be imprisoned for a period of (the term imposed)..."

8. Order 26(11) of the District Court (Criminal Justice Act 2006) Rules 2007 (S.I. No. 203 of 2007) provides that:-

"Where a warrant, other than

- a warrant for the arrest of a person charged with an indictable offence,
- a warrant for the arrest of a person who has failed to appear in answer to a summon respect of an offence,
- a bench warrant for the arrest of a person who has failed to appear in compliance with the terms of a recognisance, or
- a search warrant,

is addressed, transmitted or endorsed for execution, to any person and he or she is unable to find the person against whom the warrant has been issued or to discover where that person is or where he or she has goods, such person having the execution of the warrant shall return the warrant to the court which issued the same (within such time as is fixed by the warrant or within a reasonable time, not exceeding six months where no time is so fixed) with a certificate (Form 26.4, Schedule B) endorsed thereon stating the reason why it has not been executed, and the court may re-issue the said warrant, after examining any person on oath if the court thinks fit so to do concerning the non-execution of the warrant, or may issue any other warrant for the same purpose from time to time as shall seem expedient."

9. Order 101 of the District Courts (Appeals to the Circuit Court) Rules 2003, as amended and applicable at the time to this case, provides, *inter alia*:-

"11. In criminal cases...where an appeal is lodged and the recognisance, if any, is entered into, and the warrant to execute the Order has not been issued, such warrant shall not be issued until the appeal is decided...if the warrant has been issued but not executed, the clerk shall forthwith notify the Superintendent of An Garda Síochána that an appeal has been lodged under a recognisance, if any, entered into, and such Superintendent shall return the warrant to such a Clerk for consideration by the Court.

12. In every appeal, other than an appeal in a civil case, the Clerk shall sign and transmit to the County Registrar, together with the documents specified in Order 43, rule 1 of the Rules of the Circuit Court, 1950 (S.I. No. 179 of 1950), a Certificate which shall be in accordance with Form 101.8, Schedule D.

Execution of Orders after Appeal

13. Where Form 101.7, referred to in rule 12 is returned with the County Registrar's Certificate duly completed thereon, and if the Circuit Judge has not caused the necessary warrant to enforce the Order to be issued, the Clerk shall forthwith prepare and the Judge of the District Court shall issue the necessary warrant or warrants and take all further steps required for the execution of the conviction or Order as confirmed, or varied and for the enforcement of payment of any costs, compensation or expenses awarded by the Circuit Judge. In a criminal case the Superintendent of An Garda Síochána shall inform the Clerk of any case in which the Circuit Judge has not caused the necessary warrant to be issued."

10. Section 23 of the Courts of Justice (District Court) Act 1946, provides:-

"Where an appeal from the District Court in any matter is determined (whether before or after the passing of this Act) by the Circuit Court, then, unless the Circuit Court has issued the instrument necessary to enforce its decision, the District Court shall issue the said instrument."

11. Order 41, r. 5 of the Circuit Court Rules provides that:-

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

12. Order 36, r. 12 of the Circuit Court Rules provides:-

"An order for execution if unsatisfied shall remain in force for one year only from and exclusive of the date of its issue."

13. It is submitted that the time limit applicable to the execution of warrants following conviction and sentence in the District Court is equally applicable to orders made by the Circuit Court affirming the order of the District Court in criminal cases.

14. The jurisdiction of the Circuit Court on appeal in criminal matters was considered by the Supreme Court in *The State (Caddle) v. McCarthy* [1957] I.R. 361, which concerned the validity of temporary committal warrants following the affirmation on appeal of the District Court orders of conviction and sentence. Having affirmed the convictions and sentence, the Circuit Judge directed that the defendant be forthwith taken into custody and imprisoned pending the issue of a warrant by the District Court for the execution of the order as varied, and that the County Registrar should forthwith issue a temporary warrant for the execution of the order of the court. This procedure still applies under O. 41, r. 6 of the Circuit Court Rules. The history of the Circuit Court's jurisdiction in this regard was outlined by Lavery J. (at p. 377):-

"It seems to be obvious that a court of criminal jurisdiction must have power to direct how the sentence imposed by it is to be enforced and where the rule making authority has prescribed a procedure and this has been followed there is no more need be said. But there is statutory authority. Section 72 of the County Offices and Courts (Ir.) Act 1877, provided that in every appeal from an order of justices in any case of summary jurisdiction, where the original order shall have been confirmed or varied on appeal, the Court of Appeal shall have and may exercise the same powers, jurisdiction and authority to issue all necessary and proper warrants for the execution of the original order or of such varied order as the court which made the original order had, or might have, exercised when making such order.

This power and jurisdiction was transferred to the Circuit Court by s. 51 of the Courts of Justice Act 1924. This section of the County Offices and Courts (Ir.) Act 1877, was not referred to in the recent judgment of this Court in *The Attorney General v. Mallen* [1957] I.R. 344, and the judgment of the court does not refer to it. It does not affect the substance of the judgment, but the historical survey of the jurisdiction there set out should have referred to it."

15. In the *Mallen* case the Supreme Court considered the nature of an appeal from the District Court. Lavery J. stated (at p. 351):-

"The appeal in a criminal matter from the District Court to the Circuit Court is under s. 18 of the Courts of Justice Act, 1928, as amended by s. 58 of the Courts of Justice 1936.

This section replaces s. 85 of the Courts of Justice Act 1924, which in turn took the place of the appeal from petty sessions to quarter sessions under s. 24 of the Petty Sessions (Ireland) Act 1851. Section 24, subsection (6) of the Petty Sessions (Ireland) Act, 1851, provided expressly that the Court of Quarter Sessions might "...confirm, vary, or reverse the order made by the Justices..." and that the Clerk of the Peace should certify such decision at foot of the form of appeal and return the same to the justices.

Section 24 subsection (7) provided that the Justices should issue the warrant for execution of the order as affirmed or varied. The appeal was by rehearing, as indeed all unlimited appeals on fact and law must be.

The procedure under the Courts of Justice Acts has, in essentials, been the same. The appeal is by way of rehearing.

The only material difference so far as I can discover is that while the orders of Justices confirmed or varied on appeal had to be returned to the Justices for execution, the Circuit Court Judge may direct the issue by the County Registrar of all warrants necessary for the execution of the original or of such varied order (Rules of the Circuit Court, 1950, Order 42, rule. 5). But the old procedure continues as an alternative.

Rule 198 of the District Court Rules, 1948, reproduces s. 24(7) of the Petty Sessions (Ireland) Act 1851, and provides the form of appeal (A5) and provides for this form being returned after the determination of the appeal with the certificate at the foot thereof stating the decision of the Circuit Judge signed by the County Registrar and whether a warrant has been issued by the Circuit Court. If this has not been done, the Justice is to issue the warrant and to take all steps requisite for the execution of the conviction or order as confirmed or varied by the Circuit Court.

This procedure is prescribed by s. 23 of the Courts of Justice (District Court) Act, 1946, which provides that where an appeal from the District Court is determined by the Circuit Court, then, unless the Circuit Court has issued the instrument necessary to enforce its decision, the District Court shall issue the said instrument.

I have thought it necessary to set out the procedure in some detail because it shows, in my opinion, that the conviction or order, though appealed to the Circuit Court and there either confirmed or varied, retains its essential character of a conviction or order of the District Court."

16. In this case the Circuit Court affirmed the orders of the District Court and issued its own "committal warrant after appeal". It is submitted that because the order of the Circuit Court retains the essential character of a conviction or order of the District Court that the time limit applicable under the District Court Rules of six months for the execution of a warrant issued by the District Court should apply equally to that of the committal warrant which issued following the appeal in the Circuit Court. There is nothing in the Circuit Court Rules to suggest that this is so. As noted in the judgment of Lavery J., in *Mallen*, the Circuit Court Judge was vested under the Rules of Court with authority to issue all warrants necessary for the execution of the original order or of the varied order. If a warrant has not been issued by the Circuit Court, the Judge of the District Court is to issue a warrant and take all steps requisite for the execution of the conviction or order as confirmed or varied by the Circuit Court under s. 23 of the 1946 Act. The statutory basis for the existence of the Circuit Court jurisdiction in that regard was traced by Lavery J. in the *Caddle* case as set out above. I am not satisfied that there is anything in the Circuit Court Rules relating to appeals concerning criminal cases from the District Court to the Circuit Court which restricts the period within which warrants issued by the Circuit Court must be executed. There is no equivalent rule to O. 26 concerning the endorsement, addressing, execution or re-issue of warrants. There is no statutory obligation upon the person to whom the warrant is addressed to return it to the Circuit Court which issued the warrant within a period of six months, with the certificate stating the reason why it has not been executed. The elaborate procedure outlined in O. 26, r. 11 is not replicated under the Circuit Court Rules, nor is there anything in the Circuit Court Rules which states that in relation to the execution of the Circuit Court warrants following appeal, the District Court Rules shall apply.

17. Counsel on behalf of the applicant submits that there is no reasonable basis upon which to allow for the execution of a Circuit Court warrant following a District Court appeal beyond the period of six months which would have applied had the orders, now affirmed, not been appealed or had, the Circuit Court not caused its own warrants to issue, as a result of which the District Court would have issued the warrants in accordance with section 23 of the 1946 Act. Though this anomaly exists, it does not follow that the court must construe the execution of a Circuit Court warrant following appeal as subject to the District Court Rules. The order of the Circuit Court once the appellate jurisdiction has been invoked is a fresh order and is entirely separate from the order made at first instance, and derives from the nature of its extensive jurisdiction to hear the case *de novo*. As stated by Davitt J. in *The State (McLoughlin) v. Shannon* [1948] I.R. 439:-

"It seems to me that when a defendant, aggrieved by the decision of a District Justice in a criminal case, takes an appeal therefrom to the Circuit Court he seeks, and obtains, a hearing of the case *de novo*. He, in effect, asks the Circuit Judge to hear the whole matter again and to substitute for the order made by the District Justice (of which he disapproves) the order of the Circuit Court (of which he hopes he can approve). He impliedly admits the jurisdiction of the Circuit Court to substitute its own order for that of the District Court. It would, I think be a grave matter for appellants if it were held that the Circuit Court had no power to substitute its own order for that appealed from."

18. In the *State (Roche) v. Delap* [1980] I.R. 170, the Supreme Court held that a Circuit Court Judge had inappropriately exercised his appellate jurisdiction by adjourning the hearing of an appeal to enable the applicant to move for *certiorari* in the High Court to quash a defective order of the District Court, despite the fact that the applicant had appealed to the Circuit Court. Henchy J. (delivering the judgment of the court) stated that:-

"Once the appellate jurisdiction had been invoked, and especially where the appeal had been opened and the representative of the complainant had directed the judge's attention to his power at the end of the hearing to amend the defective order under appeal, the Circuit Judge only had one option "namely, to make a fresh order which would show jurisdiction and which would confirm, vary or reverse the sentence: see per Dixon J. at pp. 186-7 of the report of the *State (Attorney General) v. Connolly* [1948] I.R. 176".

I am, therefore, satisfied that once the committal warrants in this case issued from the Circuit Court and not from the District Court, the limitations on execution contained in the District Court Rules did not apply.

19. Counsel for the applicant also submitted that O. 36, r. 12 insofar as it provides that an order for execution if unsatisfied shall remain in force for one year only from the date of its issue, applies equally to warrants of the Circuit Court issued following an appeal on a criminal matter. Order 36, r. 13 provides that an execution order may on the application of the person and party entitled thereto be renewed in the office at any time during its currency for a period of not more than one year from the date of such renewal. It also provides that the fact of the renewal shall be endorsed thereon and the order shall be resealed and furthermore, that the renewed order shall take effect and be entitled to priority according to the time marked thereon as the date of its original issue. I am satisfied that the provisions of O. 36 are directed towards enforcement and execution of judgments in civil matters and in accordance with the process of execution contemplated by s. 22(7) of the Courts (Supplemental Provisions) Act 1961. Order 36 deals specifically with execution orders against goods, orders for possession, attachment and committal, attachment of debts by garnishee, appointment of receivers by way of equitable execution and inter-pleader. There is nothing in the provisions of O. 36 or the forms applicable thereto supporting the proposition that O. 36, r. 12 applies to criminal matters.

20. For the above reasons I am not satisfied that the time within which committal warrants on foot of which the applicant is detained by the respondent must be executed within a period of six months or twelve months by reason of the provisions of the District Court Rules or O. 36 of the Circuit Court Rules.

21. There remains one issue in respect of a wider point which the applicant wished to advance as part of this inquiry that the warrants of committal did not confer an unfettered jurisdiction on the executive as to when imprisonment should commence, and that there was a duty on the executive to ensure that the warrants were executed within a reasonable time. It was submitted that there had been unreasonable and inexplicable delay in their execution such as to render the continued detention of the Applicant unlawful. Though this point was made at the outset, the evidence set out in the grounding affidavit was very limited. This was explained as being due to the fact that there was insufficient time to gather the relevant evidence and that the applicant would need some further time to place all relevant evidence before the court in a further affidavit. The respondent indicated that, if this opportunity was given to the applicant, inquiries would have to be carried out with the gardai involved as to the reasons for the delay in executing the warrants. Undoubtedly, in this case there was a delay between 28th November, 2013, and 5th February, 2015, in executing the Circuit Court warrants. The court's obligation is to ensure that all grounds relevant to the inquiry are considered. Since both parties wished to adduce further evidence and make submissions in relation to this issue, I granted leave to both sides to furnish further affidavits in relation to this aspect of the case. The court gave its judgment of the more narrow legal grounds of the application on the 1st April and adjourned the remaining issue for further hearing to the 15th.

22. In a supplemental affidavit dated 9th April, 2015, details of the applicant's whereabouts and availability to the authorities for the purpose of executing the warrants between 28th November, 2013, and 4th February 2015 were set out. It emerged that the applicant had been obliged to move into a Women's Refuge Centre in Wexford in February/March, 2014 and remained there for a number of months. Her presence there was known to the authorities including An Garda Síochána. Following her arrest and conviction in respect of a separate offence in Carlow District Court, the applicant was placed on a nine month probation bond on 11th September, 2014. The Probation Services indicated that she had attended every appointment with them and made considerable progress in her personal life during that time. The affidavit also stated that she had been present during the search of her sister's home in Wexford by gardai on numerous occasions in respect of issues which did not concern her. Her name and address were taken on a number of those occasions. She attended Wexford Garda Station on at least two occasions between February and April, 2014 in respect of family members and was obliged to prove her identity and give her address on both occasions. She continued to deal with the Probation Service in Smithfield, Dublin and in Carlow throughout 2014 and up to the time of her arrest. She also visited her husband in Portlaoise Prison during a period of nine months imprisonment which he served there up to December, 2014. The gardaí visited her apartment in Carlow in December, 2014 on a number of occasions. She was on social welfare and collected her payments every week. The applicant was not in any way attempting to avoid the gardaí and rudimentary inquiries would easily have revealed her whereabouts.

23. This aspect of the claim was based on a number of authorities including *Dalton v. Governor of The Training Unit, Glengarriff Parade* [1999] 1 ILRM 439, *Dutton v. O'Donnell* [1989] I.R. 218, and *The State (Flynn) v. Governor of Mountjoy Prison* (Unreported, High Court, Barron J., 6th May, 1987). On the resumed hearing on 15th April, the respondent accepted that the delay in execution of the Circuit Court warrants in this case was not caused or contributed to by the applicant, that there was a duty on the executive to ensure that execution took place within a reasonable time but that this had not happened. The respondent did not file any further affidavit. It was, therefore, properly conceded that the detention of the applicant on foot of those warrants was not in accordance with law. Accordingly, the court must direct her immediate release. The applicant is also entitled to an order for the costs of these proceedings.