



## THE COURT OF APPEAL

**Birmingham J.  
Sheehan J.  
Mahon J.**

**2016/206**

**JOHN WILKINSON**

**APPELLANT**

**V**

**THE GOVERNOR OF MIDLANDS PRISON**

**RESPONDENT**

### **JUDGMENT of Mr. Justice Birmingham delivered on the 24th day of June 2016**

1. This is an appeal from a decision of the High Court (White J.) of the 3rd May 2016, refusing the application of the appellant for an order pursuant to Article 40 of the Constitution directing his release from custody.
2. The basic facts giving rise to this application and now to this appeal are that on the 20th January, 2016, the appellant was convicted at the District Court in Carlow of an offence of assault causing harm contrary to s. 3 of the Non Fatal Offences Against the Person Act 1997. He received a sentence of nine months imprisonment (hereinafter the Carlow sentence/the nine months sentence). Recognisances for the purpose of an appeal were fixed as follows: the applicant's own bond of €1,000 and a cash lodgement of €250. No appeal was lodged in the immediate aftermath of the conviction and sentence and he began to serve the sentence imposed.
3. On the 13th April, 2016, while still in custody serving the sentence imposed in Carlow, the applicant appeared in the District Court in Athlone where he was convicted of driving without insurance and was sentenced to three months imprisonment (the Athlone sentence/the three months sentence). This sentence was to be consecutive to the sentence of nine months imposed in Carlow. The warrant of the 13th April, 2016, in respect of the Athlone conviction, ordered that the applicant be imprisoned for a period of three months to be served on the legal expiration of the sentence of nine months imposed in case No. 2015/109689 in Carlow on the 28th January, 2016. No appeal against this Athlone sentence has ever been lodged.
4. On a date subsequent to the imposition of the Athlone sentence, a notice of appeal against the Carlow sentence was lodged. Were it not for the Athlone sentence, Mr. Wilkinson would have been entitled to be released from custody at that stage. Indeed, the appellant contends that having appealed the Carlow sentence, he was entitled to be at liberty, notwithstanding the Athlone sentence. The authorities dispute this and say that a sentence of imprisonment was validly imposed in Athlone which has never been appealed and must be served and which provides a lawful basis for his continued detention.

#### **Information put before the High Court**

5. An affidavit sworn on the 29th April, 2016, was put before the High Court by the Governor of the Midlands Prison stating that the appeal against the nine months was processed on the 28th April, 2016, that the three month sentence began to be served on that day and that the applicants' release date was the 4th July, 2016.

#### **The information that was before the High Court corrected**

6. A further affidavit, this time of the 8th June, 2016, sworn by the same deponent who swore the affidavit on the 29th April, 2016, has been put before this Court. This affidavit states that a number of errors occurred in the earlier affidavit. An apology is tendered for the errors which it is asserted were unintended. The errors, it is sworn, arose from human error on the part of the prison staff in dealing with the issues involved, leading to the prison Governor being misinformed as to the correct state of affairs which in turn resulted in the High Court being provided with wrong information.
7. The earlier affidavit of the 29th April, 2016, does not refer to the fact that a further and separate warrant was lodged in Midlands Prison by gardaí on the 27th April, 2016, in respect of Mr. Wilkinson. That warrant had been issued on the 29th March, 2016, by Judge Colin Daly in Carlow District Court and it commanded that Mr. Wilkinson be detained for 60 days (the 60 day warrant). The expiry date for that warrant was the 10th June, 2016. Had the existence of this warrant been known, it would have provided a complete answer to any request for an order for the release of Mr. Wilkinson. Indeed had the existence of the 60 day warrant been appreciated, it is inconceivable that there would have been any application for an inquiry under Article 40.
8. The second affidavit, that of the 8th June, 2016, also explains that the High Court was misinformed when told that the appeal against the nine month sentence had been processed by the prison authorities on the 28th April, 2016, when in fact this did not happen until the 26th May, 2016. Only after that did the appellant begin to serve the three month Athlone sentence with the result that the appellant's release date with remission is the 25th July, 2016.
9. To explain this in a little more detail, the situation is that if the appellant wished to secure his release pending an appeal, he ought to have lodged €250, signed a notice of appeal and entered into a recognisance within fourteen days of the order of the District Court in Carlow. He did not do so. Instead there was a successful application for an extension of time on the 20th April, 2016, in Carlow District Court. The effect of that extension was that the notice of appeal could be completed up to the 4th May, 2016. The sum of €250 was lodged in the prison on the 28th April, however, the further steps required involving the signing of the notice of appeal and the entry into a recognisance before a Governor did not take place. It is said that this was due to human error.
10. At some stage after the 29th April, 2016, prison staff realised that the appeal process had not been validly completed. This led to a further application on the 25th May, 2016, to extend time, an application which was once more successful. No Governor was available on the 25th May, following on Mr. Wilkinson's return from Carlow District Court. Mr. Wilkinson's appeal from the order of

White J. was listed before this Court on the 26th May, 2016. Following his return from the Criminal Courts of Justice, he formally entered into the recognisance and completed the appeal process. The position of the authorities is that thereupon, he was no longer detained in respect of the Carlow offence, but began to serve the Athlone sentence and with remission his release date is the 25th July, 2016.

11. That incomplete and inaccurate information was put before the High Court is very regrettable. I note and welcome the unequivocal apology that has been tendered, but I would urge that procedures should be reviewed so as to reduce the likelihood of any repetition in the future.

12. The errors that occurred have placed this Court in a difficult position. No inquiry has been conducted in the High Court by reference to the true factual situation. On one view, this means that if this Court proceeds with the hearing of the appeal, it would be constituting itself a Court of First Instance. However, the High Court judgment was addressed to one legal issue only namely, whether Mr. Wilkinson could be detained by reference to the Athlone sentence when he had appealed the nine month Carlow sentence. Now that the 60 day sentence has been served in full, the only basis on which it can be contended that he is in lawful custody is by reference to the Athlone sentence. To that extent, the issue that is once more centre stage is the same issue which had to be considered by White J., and is the same issue that was raised in the notice of appeal to this Court. I do not believe that the task of this Court has been made more difficult by the putting of inaccurate information before the High Court, unfortunate as that was. If this Court decided not to proceed with the appeal that would in all likelihood see a fresh application to the High Court. It is quite likely that the outcome would be the same as the Judge before whom the matter came would probably feel it appropriate to follow the approach of White J. If that happened there would be an appeal and it would be necessary to assemble a court to hear and determine the same issue as now before this Court. Such a procedure would be wasteful of court time and resources. In a situation where counsel for the appellant has urged that he be permitted to proceed with his appeal and counsel for the DPP, while not going so far as to urge the Court to proceed, has not argued against that course of action, the Court decided to allow the appeal proceed.

13. A good starting point for consideration of the issues that arise on this appeal is the terms of the warrant of execution in relation to the Athlone offence. The operative part is in these terms:

"AND WHEREAS the accused has been convicted of the said offence and ordered to be imprisoned for the period of three months to be served on legal expiration of sentence of nine months imposed on case No. 2015/109689/1 in Carlow on 20/1/2016.

THIS TO COMMAND YOU to whom this warrant is address to lodge the accused **John Wilkinson** of Pairc Mhuire, Bagenalstown, Carlow, in the Midlands Prison there to be imprisoned by the Governor there for the period of the aforesaid sentence."

14. The position of the appellant is that on entering into an appeal in respect of the Carlow matter, a conviction and sentence was stayed. He says that this means that the sentence which was expressed to commence upon the legal expiration of the sentence in question should also be stayed or held in abeyance until the determination of the appeal.

15. The appellant draws attention of O. 101, rules 4 and 6 of the District Court Rules:

"4. Subject to the provisions of O. 12, r. 20, where a person is desirous of appealing in criminal proceedings or in a case of an order for committal to prison under the Enforcement of Courts Orders Acts 1926 and 1940, a recognisance for the purpose of appeal should be fixed by the Court. The amount (if any) of the recognisance in which the appellant and the surety or sureties, if any, are to be bound shall be fixed by the Court and where an amount is so fixed, it shall be of such reasonable amount as the Court shall see fit. An application to the Court to fix the amount of a recognisance may be made ex parte. A sum of money equivalent to the amount (if any) conditioned by the recognisance may be accepted in lieu of a surety or sureties. The recognisance shall be in accordance with the form 18.4, schedule B, and should be entered into within the fourteen day period fixed by rule 1 of this Order.

#### **Stay of execution in criminal cases, etc.**

6. On the entering into a recognisance in accordance with rule 4 of this Order, execution of the order appealed shall be stayed and the appellant, if in custody, shall be released. In any case where a monetary penalty has been imposed on the appellant, or the appellant has been required to perform a condition, the Court may, not later than six months from the expiration of the time allowed by the order for payment of the penalty, or for performance of the condition, issue the warrant of committal in default of such payment, or in default of such performance, as the case may be, unless the appellant shall have entered into a recognisance."

16. The appellant draws particular attention to the statement that "an appeal shall operate as a stay of execution in criminal proceedings". The appellant submits that the process of entering into an appeal of the sentence imposed in respect of the first sentence does not involve the "expiry or expiration" of the sentence that was imposed in respect of the first matter but rather involves a "stay of execution" of the sentence pending appeal. The appellant says that staying a sentence, which is what happens when an appeal is lodged, is not the same thing as determining the sentence or extinguishing it or bringing it to an end. It is said that when the appeal is finalised, the sentence not appealed again becomes live. The appellant says that if the situation were otherwise, the system would be open to abuse in that an individual who had received a consecutive sentence could effectively eliminate the consecutive element by entering into an appeal and then withdrawing it. It is said that in this situation an unmerited windfall would accrue. I would prefer to defer consideration of this somewhat hypothetical speculation until the issue arises, but I would not assume that judges of the District Court and of the Circuit Court would not be able to take the necessary steps to frustrate such a stratagem. The appellant says that if one looks at the warrant of execution by reference to which alone he is now held that the commencement of the sentence of three months has not yet arrived. That is something that will happen at some stage in the future, but it has not happened yet and the fact that a time may come when he will be validly detained does not mean that he is **at present** in lawful custody. He draws attention to the case of *Shu Jie Liu v. Governor of Dóchas Centre* [2011] IEHC 372, a decision of Hogan J. and says that this clearly establishes that what is in issue is whether the detention is valid at present, i.e. at the time when the inquiry is embarked upon and that what may or indeed is likely to happen in the future is not a relevant consideration.

17. The respondent has engaged in a survey of the relevant statutory provisions and Rules of Court. He draws attention to s. 59 of the Courts of Justice Act 1936, which is in these terms:-

"Notwithstanding anything contained in any other enactment and, in particular, notwithstanding anything contained in s.

18 of the Courts of Justice Act, 1928 (No. 15 of 1928), as amended by this Act, **every appeal which lies to the Circuit Court from an order of the District Court in a criminal case**, under the Licensing (Ireland) Acts, 1833 to 1927, or under the Registration of Clubs Acts, 1904 to 1927, shall lie to the judge of the Circuit Court within whose circuit is situate the licensed premises or the club premises **or in respect of which the offence the subject of such order was committed or to which such order otherwise relates.**" (Emphasis of the respondent)

18. The respondent emphasises that the appeal is against an order of the District Court in a criminal case, and that it relates to the offence, the subject matter of such order, and submits that this puts beyond doubt that the Circuit Court has jurisdiction to deal with an appeal against the order that is the subject of the appeal, but equally that the jurisdiction is confined to that order and that order alone.

19. The respondent says that also of significance are the provisions of s. 23 of the Courts of Justice (District Court) Act 1946 which 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." (Emphasis of the respondent).

20. Of note is that both the District Court Rules and Circuit Court Rules give effect to these statutory provisions. They provide that either the Circuit Court itself or alternatively the District Court can issue the relevant committal warrant in order to give effect to the decision of the Circuit Court upon the appeal before it.

21. The respondent submits that his review of the statutory provisions and the relevant Court Rules offer no support for the appellant's contention that appealing one order ipso facto stays an order that was not appealed.

### **The High Court ruling**

22. The trial judge dealt with the issue as follows:-

"The sentence of three months imprisonment, issued on the 13th April, 2016, is certain. Unless appealed, it has to be served. It has not been appealed. The problem arises with the commencement date. I am satisfied that the effect of an appeal from the District Court to the Circuit Court of a sentence of imprisonment where a warrant has issued and been executed prior to the notice of appeal being given and recognisances entered into, and where a consecutive sentence has been imposed to that sentence and where such consecutive sentence has not been appealed, is to bring forward the commencement date of that consecutive sentence to the date the appeal is successfully entered into in respect of the sentence which immediately pre-dates it.

I am satisfied that, on the successful entry of an appeal, where recognisances have been entered into – in other words where the person is at liberty pending the appeal – that the original sentence of the District Court has been legally determined pending the final decision on appeal in the Circuit Court. So, Mr. Wilkinson is, in fact, in legal detention."

### **Discussion**

23. A number of possibilities arise as to what happens next. The appeal might be allowed, and in that context it is of some significance that the appeal is against conviction and sentence. The appeal might be dismissed or the order of the District Court might be varied with the sentence imposed being reduced or perhaps even increased. However, whatever the outcome, a new instrument, whether of the Circuit Court or of the District Court will issue to enforce the decision whatever that will be. The original Carlow order will be overtaken or supplanted by a new order. I agree with the High Court judge that appealing one of two sentences in issue does not have the effect of staying the sentence that is not appealed. Appealing the first in time of two sentences, but not the second has the effect of bringing forward or triggering the commencement date of the second sentence. That being so it follows, therefore that Mr. Wilkinson is and has at all times been in lawful custody and accordingly I would dismiss the appeal.