



THE COURT OF APPEAL

**Finlay Geoghegan J.
Hogan J.
Mahon J.**

Appeal No. 2015/356

IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLE 40.4.2 OF THE CONSTITUTION

BETWEEN

MARIANA KOVACS

APPELLANT

AND

THE GOVERNOR OF MOUNTJOY WOMEN'S PRISON,

THE DÓCHAS CENTRE

RESPONDENT

EX TEMPORE JUDGMENT delivered on the 14th day of March 2016 by

Ms. Justice Finlay Geoghegan

1. This is a motion before this Court brought by the respondent to the appeal who is the Governor of Mountjoy Women's Prison, the Dóchas Centre, but in truth and reality the respondent was represented in the High Court by the Director of Public Prosecutions and it is under the Director's instructions that the appeal is being responded to and in respect of which this motion is brought.
2. The motion arises because of one of the grounds upon which the respondent proposes to rely in the appeal namely, that the appeal is now moot and should be dismissed for that reason. It is necessary to say that the appeal brought by Ms. Kovacs is against part only of a decision of the High Court (Baker J.) given in a judgment of the 30th June, 2014, in an Article 40 application.
3. The factual background was that the appellant, Ms. Kovacs had been convicted and sentenced to a three month suspended sentence. Subsequently she was convicted and sentenced on a plea of guilty to a one month sentence and that second conviction activated the prior suspended sentence. In the High Court Baker J. determined that the first warrant was void and the underlying reasoning was that there had been a failure to put the appellant on notice of her right to election, to be tried by a jury, prior to a conviction and sentence and in those circumstances it was determined that both the conviction and sentence, which gave rise to the first warrant were void.
4. In relation to the second warrant however, the High Court determined that the appellant was lawfully held under the second warrant and, as appears from her judgment, the terms of the second warrant was prescribed to commence "on the legal expiration of the sentence imposed by the first warrant". Having considered a number of authorities, the trial judge determined in relation to the requirement for certainty and lack of ambiguity in a warrant that as the appellant might be lawfully detained immediately on the passing of the sentence in respect of which the second warrant was made that there was no uncertainty. Baker J. added that the warrant which was conditioned to commence on the lawful expiration of the first sentence provided certainty and that accordingly she refused the application for release pursuant to Article 40.
5. Subsequent to her decision in the High Court, the appellant who had been on bail re-entered custody in Dóchas and was definitively released approximately one hour later. It is in those circumstances that the respondent to the appeal now contends that the appeal is moot.
6. The principles applicable to the determination of whether or not an appeal is moot and the circumstances in which the court should or should not proceed to hear an appeal which is determined to be moot are not in dispute. Both sides have very helpfully set out in their written submissions the relevant Supreme Court authorities and which were considered by this Court in *McDonagh v. The Governor of Mountjoy Prison* [2015] IECA 71 and set out in the judgment delivered by Hogan J. in that appeal.
7. The appellant contends firstly that the appeal is not moot. It is not in dispute that there is an aspect or a characteristic of mootness, as I think it was put, on behalf of the appellant by Mr. O'Higgins S.C., in the sense that the appellant has been definitively released now and is not at risk in relation to the sentence in respect of which the second warrant issued.
8. I should indicate as is known to the parties, that the Director has since the decision of the High Court issued judicial review proceedings seeking to quash the conviction and sentence in respect of which the first warrant was issued and therefore the freedom of the appellant is not at risk by any issue arising in this appeal.
9. However, it is submitted on her behalf that as she may have or has a potential civil claim in relation to a period of approximately three to four days during which she was in custody prior to the commencement of the Article 40 proceeding that this gives her an interest such that the appeal is not truly moot. In my view the potential existence of a civil claim which she may wish to bring does not meet the threshold of a live issue between the parties on this appeal, in accordance with the principles which have been fully set out in the submissions. Hence I would reject any contention that the appeal is not to be considered as moot.
10. However, the real issue on the motion is even if the appeal is moot whether, in accordance with the judgments of the Supreme Court, the court should exceptionally hear the appeal.

11. It is relevant to a consideration of this issue to note that there is extant the High Court order in this case in which it is determined that the applicant may not lawfully be detained pursuant to the three month committal warrant, but may be lawfully detained pursuant to the one month committal warrant. There is also the judgment of the High Court which determines that in circumstances where there are warrants which impose consecutive sentences and where the second warrant is prescribed to commence on the legal expiration of the sentence imposed by the first warrant, and where the conviction and sentence in respect of which the first warrant is issued are held to be void, the second warrant is considered as lawful authority to detain the subject of the warrant in custody.

12. The relevant principles appear to me to be succinctly stated by Murray J., in an ex tempore judgment in *Shui Jie Liu v. Governor of the Dóchas Centre* (Unreported, Supreme Court, 27th June, 2013) with which Denham C.J. and MacMenamin J. agreed, in essence repeating what the Supreme Court had said in *Irwin v. Deasy* [2010] IESC 35:

"The general practice of this Court is to decline, in principle, to decide moot cases. In exceptional circumstances where one or both parties has a material interests in a decision on a point of law of exceptional public importance, the court may in the interests of the due and proper administration of justice determine such a question. However, the discretion to hear an appeal where there is no longer a live controversy between the parties should be exercised with caution, and academic or hypothetical appeals should not be heard. Exceptions may only arise where there is a question of exceptional public importance at issue and there are special reasons in the public interest for hearing the appeal."

13. I am satisfied that the point of law at issue is one of exceptional public importance. It determines whether or not a person may be held in lawful custody. However, that of itself does not warrant the hearing of an appeal as has been made clear by Denham C.J. in her judgment in *Lofinmakin v. Minister for Justice* [2013] 4 I.R. 274 at para. 22. There must be other factors which arise and those have been characterised as including per Murray J. in the *Shui Jie Liu* case a point which requires to be determined in the interests of the due and proper administration of justice.

14. The Supreme Court in *DPP v Farrell* [2014] IESC 30 again revisited these questions and in that case where there was a point of law of systemic importance to criminal procedure, they determined that they would hear the appeal and Denham C.J. in her judgment set out the reasons for which she decided on the facts of that case that she would hear that particular appeal. In that case it must be pointed out that the appellant was again a governor of a prison, but in effect the appeal was being pursued by the Director of Public Prosecutions. One of the reasons given by Denham C.J. was that the decision had an effect on criminal proceedings which was of real and reasonable concern to the appellant in the case and another was that the decision potentially affected many criminal cases and a third was that the decision had a systemic relevance to cases before the court where an application of judicial review was granted.

15. In my view there are some similar reasons in this case, albeit that I have considered carefully that the appellant is not the Director but is an individual who, for the reasons I have indicated, does not have an interest in the outcome of the appeal herself. Nevertheless, the decision of the High Court does have an effect on criminal proceedings in the sense that it has an effect on the lawfulness of the detention of persons who are potentially detained under two warrants in respect of sentences which are to run consecutively. It is of systemic relevance to Article 40 applications before the court which concern the liberty of the citizens and by reason of s. 99 of the Criminal Justice Act 2006, as amended, there is a significant prevalence of two or more consecutive sentences in respect of warrants issued by the courts and in particular where a first suspended sentence is caused to be activated by a second conviction.

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

Hogan J.: I have had the opportunity to listening to the judgment which has just been delivered by Ms. Justice Finlay Geoghegan and I agree with it. I agree in particular that while this appeal is moot for the reasons which she has just given, I consider that this is an appeal which comes within the might be termed the *Shui Jie Liu* and *Farrell* exceptions. I therefore agree that it is in the interests of justice that this Court should hear the appeal.

Mahon J.: I agree with the judgment of Ms. Justice Finlay Geoghegan.