THE HIGH COURT [2005] IEHC 2
2004 No: 2074 SS
IN THE MATTER OF AN APPLICATION FOR AN INQUIRY UNDER ARTICLE 40.4. OF BUNREACHT NA H-EIREANN

BETWEEN:
DESMOND CARROLL
APPLICANT

AND

THE GOVERNOR OF MOUNTJOY PRISON
RESPONDENT

Judgment of Mr Justice Michael Peart delivered on the 12th day of January 2005:

At the outset it is desirable to state that on 20th December 2004, an application for Habeas Corpus was made on behalf of the applicant, which was made returnable for the following day, the 21st December 2004. On that occasion, the Respondent produced the applicant to the Court and certified the grounds for his detention. I heard argument from both sides, and on the following day the 22nd December 2004 I delivered an ex tempore judgment given the fact that it was out of term, and that from the commencement of the new term until the end of January 2005, I would be out on Circuit and unable to give a written judgment at a date early enough to meet the urgency of the case. I indicated at the time that I would give an outline ex tempore of my reasons for finding that the detention of the applicant was unlawful, and that I would give a more fully reasoned judgment in due course.

While I am still of the view that the detention of the applicant was unlawful, my further consideration of the facts, submissions and relevant case-law has led me to conclude that this is so for a reason which is other than the reason mainly relied upon in my ex tempore ruling, albeit a reason touched upon by me and which I intended at the time to expand upon to some extent.

Firstly, in my ex tempore judgment I did not deal fully with one of the grounds put forward by the applicant, namely the ground relating to the lack of certainty as to the date from which the sentences were to commence. I intended to do so, but in the pressure of the moment, overlooked to a large extent that part of my reasoning. I now set out my reasons under this head of argument.

Secondly, following some further consideration and research which time has permitted, I am not satisfied now that what I said ex tempore, and without opportunity for adequate research, is correct in relation to the failure of the trial judge to specify whether the sentences passed were to run concurrently or consecutively. I should perhaps add that during argument the Court was not referred to authority on this aspect of the application. I will deal with that ground in more detail in due course.

Nevertheless, I was at the time, and still am satisfied that the detention of the applicant was unlawful for the reason appearing.

The applicant was tried and convicted by a jury in his absence on fourteen counts. His trial had taken place over a period of eleven days from the 22nd January 2002 to the 5th February 2002. The trial judge adjourned sentencing until the 14th March 2002, and on that date, again in the absence of the applicant, sentenced the applicant in the following terms:

"the Court...Doth Order that the accused be imprisoned for a period of nine years on Counts No.1 and 4 and for six years on Counts 2 and 5 and for three years on Counts 11,12 and 13 with Counts 3,6,7,8,9,10 and 14 taken into consideration and Doth Order that such sentence do commence from the date of the arrest and imprisonment of the accused."

I should immediately draw attention to the fact that it is not indicated in this document whether these sentences are to run concurrently or consecutively, and that the date of commencement is some as yet unascertained date in the future.

The concluding paragraph of this "Warrant for Imprisonment" states as follows:

"This is to command you to whom this warrant is addressed to arrest the said Desmond Carroll of De Largey Avenue, Dundalk, Co. Louth and lodge him in Mountjoy Prison and there to undergo the above sentence. "

The warrant was addressed to the Superintendent, Garda Siochana, Bridewell, Dublin 7, and is signed *"M O'Neill, Acting County Registrar for Dublin".*

In this regard I would draw attention at this point to the fact that this is a warrant addressed to the Superintendent, Garda Siochana to arrest the applicant, and it is not the document which is more usually issued by the Court of trial following conviction and sentence, which is a document known as a "Return of Prisoner under Rule or Sentence" and which is addressed to the Governor of the Prison in which the convicted person is to be received for the purpose of undergoing sentence. It is something of a hybrid document created by combining elements of the normal Return of Prisoner under Rule or Sentence, with what one would find in a Bench warrant.

On the return of this application for Habeas Corpus before me on the 21st December 2004, the Assistant Governor of Mountjoy Prison certified that he held the applicant in custody "pursuant to warrants dated 14th October 2002", and he attached seven such warrants marked A to F inclusive, and each being in respect of a Count in respect of which the applicant was convicted and sentenced in his absence on the 14th March 2002.

It is immediately apparent that the warrants under which the applicant is held in custody post-date the date of sentence by seven months. The reason for this seems to be, though there is no averment to this fact, that the applicant was not within the jurisdiction for the purpose of his arrest pursuant to the Warrant for Imprisonment issued on the 14th March 2002, and the authorities sought his rendition from Northern Ireland. For that purpose it would appear that the Warrant for Imprisonment document which is signed by "M O'Neill Acting County Registrar" was not sufficient for the Northern Ireland authorities, and that in its place the seven individual warrants to which I have already referred were prepared, and which relate to each of the offences for which the applicant was convicted and sentenced, and each was signed by the trial judge rather that by the Acting County Registrar. In all other respects each warrant is in the same terms as the Warrant for Imprisonment, and are addressed to "The Superintendent, An Garda Siochana, Bridewell Garda Station, Chancery Place, Dublin 7".

These seven new warrants were backed in the usual way and each bears an indorsement indicating that the warrants were executed, almost two years later, by the arrest of the applicant by a member of the Northern Ireland Police at 10.15am on the 15th June 2004 at Magilligan prison. Each bears a further indorsement dated 2nd July 2004 which states:

"Executed warrant on the 2/7/04 by arresting Desmond Carroll and lodging him in Mountjoy Prison".

This is signed by a member of An Garda Siochana.

Blaise O'Carroll SC on behalf of the applicant raises a number of matters which in his submission render the detention of the applicant unlawful. These are conveniently set forth in the affidavit of the applicant sworn on the 20th December 2004, paragraph 4 thereof, as follows:

"(a)…they do not authorise and/or empower the Respondent to receive and/or detain the Applicant in Mountjoy Prison, inter alia in respect of the several sentences imposed on him in his absence for the offences set out therein by the Honourable Circuit Court Judge, Frank O'Donnell on the 14th March 2002.

(b)… the said warrants in the singular and severally are bad on their face more particularly in that they do not contain any words commanding the Governor of the Penal Institution, Mountjoy Prison, where the applicant is presently detained on foot thereof, to receive into his custody the Applicant named in the aforesaid Warrants.

(c) The said sentences imposed by the Honourable Judge of the Circuit Court on the 14th March 2002 are not clear and/or certain in respect of:

(i) the period of time that the applicant has been sentenced for the offences set out in the several warrants in particular that they are not expressed to be concurrent and/or consecutive;
(ii) the commencement of the several sentences for the offences as set out in the several Warrants more particularly as they appear to commence from an uncertain date in the future for commencement effect dependent only upon the arrest and execution of the aforesaid Warrants by a member of An Garda Siochana, as opposed to from the date of imposition of sentence by Order of the Honourable Circuit Court Judge, Frank O'Donnell.

I shall deal with each of these points in the order in which they are raised in that affidavit.

1. The warrants do not authorise and/or empower the Respondent to receive and/or detain the Applicant:

I am not satisfied that this point of objection can be sustained. In my view the fact that the warrant to arrest is directed to

the Superintendent, An Garda Siochana and commands the arrest of the applicant and his lodgment in Mountjoy Prison is a sufficient authority to the Governor of that place to receive him for the purpose of undergoing the sentence of the Court.

In the present case the applicant was not present in Court when sentence was passed. One consequence of that fact is that the Court did not make out there and then the usual "Return of Prisoner under Rule or Sentence" which is a document directed to the Governor of the prison where the convicted person is to serve out his sentence.

That document in the standard or usual form used for the purpose states:

"To the Governor of…….
Receive into your custody the body of the above named person tried and convicted at [Central Criminal Court/Circuit Criminal Court] held at the Four Courts, Dublin 7 on the day of 2004 and following days before [Judge] and cause said person so convicted to undergo the sentence as set out above."

Being a document designed for the purpose of having the convicted person transferred directly from the Court to the prison, it must clearly be directed to the Governor, since no intervention by way of arrest is required on the part of the Garda Siochana.

In the present case, however, the applicant was dealt with *in absentia*. His arrest and incarceration were therefore required before his sentence could commence. Once arrested, the obligation on An Garda Siochana was to forthwith lodge the applicant in Mountjoy Prison. It must follow that the Governor of that prison is authorised to detain the person so received. This implied power to detain the prisoner brought to the Prison on foot of a warrant directed to the Superintendent of An Garda Siochana is referred to in **The State (Caddle) v. Judge McCarthy and others [1957] I.R. 359** at p. 383, albeit in the context of a warrant issued under the Rules of the District Court. In his judgment in the Supreme Court in that case, O'Daly J. states as follows:

"…….Rule 76 then takes the matter further in the case of a warrant to commit a person to prison. In such a case the officer or member of the Garda Siochana or other person whose duty to is to convey such person to prison is required to deliver warrant and prisoner to the governor of the prison named in the warrant who must thereupon give a receipt for the prisoner……. The Rule adds:- 'The Governor shall detain the said prisoner for such period and in such manner as is stated in the warrant'."

It follows logically that there would be no distinction in this regard between a warrant emanating from the District Court and one, as in the present case, emanating from the Circuit Court. This Rule would appear to have its origins in s.25 of the Petty Sessions (Ireland) Act, 1851which states, inter alia, as follows;

"1. All warrants in proceedings as to offences punishable either by indictment or upon summary conviction, which shall be issued in any petty Session District, shall be addressed to the sub-inspector or Head Constable of Constabulary who shall act for the place where the Petty Sessions for such District shall be held;;

2……..And it shall not be necessary to address any warrant of committal to the Keeper of the Gaol, but upon the delivery of any such warrant by the person charged with its execution to the keeper of the Gaol to which the committal shall be made, such keeper shall receive and detain the person named therein, (or shall detain him if already in his custody) for such period and in such manner as it shall appear from the warrant that the said person is to be imprisoned; ……."

Of some relevance also is the fact that in relation to the Court of Criminal Appeal, Order 86, Rule 36 RSC states:

"Any warrant for the apprehension of an appellant issued by the Court shall be deemed to be, for all purposes, a warrant issued by a Judge of the District Court for the apprehension of a person charged with any indictable offence under the provisions of the Petty Sessions (Ireland) Act, 1851, or any statute amending same."

It must follow that the fact that the warrant on foot of which the applicant in the present case does not specifically authorise the Governor of Mountjoy to receive and detain the applicant has not of itself rendered the warrant invalid. This is sufficient to dispose of the objections set forth at paragraph 4 (a) and (b) of the applicant's said grounding affidavit.

In the present case the Trial Judge could no doubt have postponed sentencing until the applicant was arrested and brought before the Court. Presumably his absence was a breach of his bail. For that purpose, he could have issued a Bench Warrant so that the applicant could be arrested and brought before the Court for the purpose of a sentencing hearing in the presence of the applicant. It could be said perhaps that such would have been the better course as things have turned out.

It has not been sworn to in the applicant's grounding affidavit as to what circumstances resulted in the applicant's absence from his trial, conviction and sentencing, and neither has the Respondent informed the Court. In fairness to all concerned, the Court did not raise that question at the time this application was moved. The Court has conducted its own limited inquiry in that regard by reference to the original Court file but there is nothing informative appearing. The facts of the case, as known, certainly permit of the possibility that at the time of his trial on these charges, the applicant may have been in Magilligan prison serving a sentence there, since it would appear that at the expiration of a sentence in June 2004 he was arrested for the purpose of his rendition to the State. Since I am finding on other grounds that the detention of the applicant is not in accordance with law, I leave over any further consideration and determination of this question to any other occasion on which it may arise for determination. But I could perhaps usefully at this stage state the following.

It is of course preferable and desirable that a convicted person should be present at the sentencing hearing. Otherwise, how can the sentencing judge be in a position to adequately take into account the personal circumstances of the convicted person in deciding on an appropriate sentence for the particular convicted person?

Addressing this question, Prof. O'Malley in his well-known work on **Sentencing Law and Practice, Roundhall, 2000 at para 10-29** states as follows:

"At common law a sentence for a felony could not be passed in the absence of the accused……..However, there is also authority for the proposition that a sentence for an indictable offence should not be passed in the absence of the accused, even if the charge is disposed of summarily. In Lawlor v. Hogan[1993] I.L.R.M. 606 Murphy J. laid down three propositions to govern the matter:

'1. That insofar as the judicial process in criminal matters expressly requires matters to be dealt with by or in relation to the individual accused, clearly he must be present to enable those functions to be performed.

2. The right of an accused to be present and to follow the proceedings against him is a fundamental constitutional right of the accused which every Court would be bound to protect and vindicate.

3. If a trial judge is satisfied that the accused has consciously decided to absent himself from the trial (at a time when his presence is not essential to enable some particular procedure to be complied with) then the trial judge would be entitled in his discretion to proceed with the trial in the absence of the accused.'

The second proposition is a strong statement of the principle that there should be neither a conviction nor a sentence in the absence of the accused. The third proposition allows for an exception to the general rule, and presumably 'conscious abstention' includes situations where the accused has been removed from the court because of unreasonably disruptive behaviour……."

If in the present case, and the Court does not know this with any certainty, the accused person was not present in court for his trial or his sentencing hearing because he was at the relevant time incarcerated in Northern Ireland, then this Court, in addition to looking at the integrity of the warrants under which this applicant was detained in Mountjoy Prison, would be entitled to consider also whether the conviction and sentencing of the applicant in his absence was in accordance with law, in determining whether his detention was in accordance with law. Of interest in this regard is the judgment of Viscount Reading C.J. in **R v. Governor of Lewes Prison, ex parte Doyle [1917] 2 KB. 254** where at p. 269 he states as follows:

"But, even though we had come to the conclusion that the warrant of commitment was bad on the face of it, as this is a case of commitment after conviction we are again not only entitled but bound to look at the conviction in order to see whether there is more than a mere technical defect in the commitment. On behalf of the applicant it has been strenuously contended that we are dealing with the liberty of the subject, but we are also administering justice, and we have to see whether or not there is any ground for alleging that the applicant has not been properly convicted and committed. Rex v Hawkins and Rex v. Taylor are authorities which abundantly support the proposition that in considering the validity of the committal the conviction must be looked at... Those two authorities clearly support the principle that we are entitled, and I think bound to look at the conviction in the present case……."

The fact that such an objection as to the conviction of the applicant in absentia has not been made on behalf of the applicant in this case would not, in my view, impede the breadth of the Court's inquiry into the lawfulness of an applicant's detention. In this regard, I refer to the remarks of O'Dalaigh C.J. in **Re: Application of Michael Woods [1970] I.R. 154 at 162,** which I quote towards the end of my judgment. However the factual situation would have to be firmly established, and it is not thus far.

It is interesting to note in this regard that in the context of applications for extradition coming before the High Court under the European Arrest Warrant Act, 2001, it is necessary, in relation to a person who was convicted and sentenced in absentia, for the requesting State to undertake to the judicial authority in the requested State, that upon his return to the

requesting State the person will be facilitated with a retrial, and that in the absence of such an undertaking, extradition shall not be ordered.

2. The period of time that the applicant has been sentenced for the offences set out in the several warrants in particular that they are not expressed to be concurrent and/or consecutive:

It is a fact that the trial judge did not specify whether the sentences imposed for the various offences for which he was sentencing the applicant were to run concurrently or consecutively. It is certainly the practice of the Courts to so specify, but the question which arises is whether the failure to do so gives rise to uncertainty for the Respondent as to the length or duration of the applicant's incarceration. This ground is raised in the applicant's grounding affidavit, but no detailed submissions addressed this ground in argument.

On the face of the warrants there can be no doubt that it is unclear whether this applicant is to be imprisoned for a period of nine years, being the longest of the sentences imposed, or whether he is to remain in prison for the aggregate of the terms of imprisonment imposed, namely eighteen years. The fact that common-sense might suggest that the latter cannot have been in the contemplation of the trial judge is irrelevant. The face of the warrants certainly flies in the face of what I have already set forth regarding the need for certainty appearing as to the length of sentence to be served, so that the Governor of the prison is not left in doubt or in a position in which he must operate on a presumption of what the Trial Judge intended. The Court record can in some cases assist in clearing up any ambiguity arising since the Circuit Court is a court of record, but in the present case, the record does not assist in determining what was in the mind of the trial judge. It is also silent as to whether the sentences are to run concurrently or consecutively.

The Court in some instances is mandated to pass consecutive sentences, such as where an offence is committed while the accused was already remanded on bail in relation to another offence. But in other cases, the Court enjoys a discretion. In this regard, Prof. O'Malley states in his work on **Sentencing Law and Practice** at para 6-90 that *"it is now clearly lawful to impose consecutive sentences for all offences except, of course, that a sentence cannot be expressed to take effect after a life sentence, or, apparently, vice versa."* It is therefore not sufficient in the present case to point to the fact that on the face of the warrants there is nothing to indicate that these were offences in respect of which mandatory consecutive sentences were required to be imposed, and 'ergo' the sentences must be concurrent. It would appear that the learned Circuit Court Judge had a discretion as to whether the sentences should be concurrent or consecutive.

However, there has been authoritative judicial pronouncement to the effect that the absence of the phrases "concurrently" and "consecutively" from the order does not make it bad. The same issue arose in **State (Blackhall) v. Mangan [1952] 87 ILTR 6 -** a case which I should perhaps have been aware of without it being referred to by Counsel, since my uncle, the late Noel Peart SC, instructed by my father, Denis R. Peart appeared for the unsuccessful prosecutrix ! However, Maguire C.J. was quite clear about this particular issue when he stated at p. 66:

"It is clear that in the absence of either of these words the rule of law will determine whether the sentences are to run concurrently or consecutively. Accordingly their absence from an Order does not make it bad on its face."

This statement received endorsement, if that be necessary, when in **State (McCarthy) v. Governor of Mountjoy Prison [1997] 2 I.L.R.M. 361** at 365 (decided in 1967), O'Dalaigh C.J. stated the following:

> *"It is true that the orders do not specify whether the sentences are concurrent or consecutive. The answer to this submission is that it is not necessary to say so. Where sentences are not expressed to be consecutive then they are, as a matter of law, to be construed as being concurrent. This question was settled by the judgment of this Court in State (Blackhall) v. Mangan 87 ILTR 65."*

The point, perhaps understandably in the light of the above, was not the subject of submission by Mr O'Carroll, but nevertheless it is a ground appearing in the applicant's grounding affidavit, and it is appropriate to state, inspite of what I said ex tempore in the context of apparent uncertainty on the face of the warrants, that it is a point which has no merit in the light of the authorities quoted.

3. The commencement of the several sentences for the offences as set out in the several Warrants more particularly as they appear to commence from an uncertain date in the future for commencement, effect dependent only upon the arrest and execution of the aforesaid Warrants by a member of An Garda Siochana, as opposed to from the date of imposition of sentence by Order of the Honourable Circuit Court Judge, Frank O'Donnell:

In the course of my ex tempore judgment delivered on the 22nd December 2004, I omitted to deal with this point of objection other than by simply referring to it. It is appropriate that I should do so now, since my failure to do so then was

unintentional.

A fundamental requirement for any authority to detain a person in custody is that the person detaining and the person detained should know precisely the duration of such detention. There should be no room for ambiguity in that regard. The proposition that a person shall know the length of the period for which he must be deprived of his liberty, and that his detainer shall also know the same with certainty, seems so obvious as to require no authority for its statement.

As stated by Haugh J. in **The State (Caddle) v. Judge McCarthy [supra]** at p.365:

"These warrants seem to possess a twofold purpose: when a sentenced person is still at liberty they enable the Court, through the police, to apprehend (and detain by force, if necessary) such person and to have him brought to and lodged with the governor of the appropriate gaol. When that object has been achieved, the document is the left with the governor, who gives a receipt to the police officer in the settled form.

Their second function is to inform the governor of the identity of the prisoner, the offence of which he has been convicted, and the nature and duration of the sentence."

In the same case, Kingsmill Moore J. while concurring with the judgment delivered in that case by O'Daly J. took the opportunity to say the following at p. 379 in relation to the need for precision in the warrant as to the duration of sentence:

"……..It seems to me that an authority to keep a man in prison must state with precision and without possible ambiguity the duration of the imprisonment, and that such duration and any other incident of the imprisonment stated in the warrant must correspond with the sentence legally imposed. I am not satisfied that the warrants in this case answer these requirements. Though I do not think there was any practical risk that the prisoner would have been kept from his liberty for an hour more than was justified by the sentence yet, where habeas corpus is concerned, I prefer to err if I do err on the side of strictness and accordingly, for the reasons given by Mr Justice O'Daly, I would grant an order of habeas corpus, though without prejudice to the issue of a new and valid warrant under which a fresh caption could at once be effected."

The topic is referred to in **Prison Law - Paul Anthony McDermott**, albeit in the context of an order of transfer of a prisoner by the Minister for Justice under s. 17 of the Criminal Justice Administration Act, 1914, where the learned author states the following at para 11-10:

"***No reference to period of detention.*** *Since the order of transfer is the authority under which the Governor of the receiving prison detains the transferred prisoner, it should show on its face or by reference to some other document accompanying it the period for which the prisoner is to be detained. A failure to do this will mean that the transferred prisoner is not being lawfully detained."*

Mr McDermott refers also to the judgment of Murnaghan J. in **The State (Holden) v. The Governor of Portlaoise Prison [1964] IR. 80** - again in the context of a Ministerial transfer of prisoner order - where the importance is stressed of specifying on the face of the document, or by reference to some accompanying document, the period for which a person is to be detained.

Turning to the warrants in the present case, the simple question to be asked is whether, by reference to the face of the warrants or by reference to any accompanying document, it is clear to the applicant and to the respondent the precise period for which the applicant shall be incarcerated. Leaving aside the question of whether the sentences imposed are to run concurrently or consecutively, I am of the view that there exists uncertainty as to the length of the period of imprisonment having regard to ambiguity as to the date of commencement of the term. The sentences are stated to commence *"from the date of the arrest and imprisonment of the accused"*. In the present case it appears from the endorsement of execution on the face of the warrants that the applicant was arrested firstly on the 15th June 2004 at 10.15am by a member of the Northern Ireland Police, presumably at the conclusion of a sentence served in that prison. A period of seventeen days then passes during which presumably the applicant was held in custody. There is a further endorsement by a member of An Garda Siochana that on 2nd July 2004 the applicant was arrested and lodged in Mountjoy Prison.

The obvious question which must arise in the mind of the Respondent is from which date is he to calculate the length of detention i.e. the 15th June 2004, being the date of the arrest of the applicant in Northern Ireland, or the 2nd July 2004. On each occasion the applicant was arrested. I have little doubt that the learned trial judge did not have in mind the fact that the applicant, at the time he might be arrested in the future for the purpose of serving the sentences imposed, would be outside the jurisdiction, but the fact that it is so has produced an uncertainty in the length of sentence to be served.

It has been submitted on behalf of the Respondent that if there is any infirmity in the warrants it is not so fundamental as to

affect the validity of the warrants, and the Court has been referred to the judgment of Laffoy J. in **Walsh v. The Governor of Limerick Prison, unreported, High Court, 31st July 1996** wherein the learned judge referred to a passage from the judgment of O'Higgins C.J. in **The State (McDonagh) v. Frawley [1978] I.R. 131 at p.136** as follows:

" The stipulation in Article 40, section 4, subsection 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 seems to mean 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, 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."

Prof. O'Malley in his work on **Sentencing Law and Practice** states the following at para 10-69 thereof:

> *"Courts must observe the requirement of certainty when specifying or indicating the date on which a sentence is to begin. This can become an issue when the offender is already serving or subject to other prison sentences. However, the courts are unlikely to hold a warrant bad on this ground unless there is a genuine ambiguity or uncertainty."*

The learned author then refers to two such cases, **State (McNally) v. O'Donovan [1974] IR. 272 and Re: Tynan [1969] IR. 273,** where the Court refused to find sufficient uncertainty to quash the warrant. In each case it was possible to ascertain the precise date from which the sentence was to commence, even though it was not apparent on the face of the document. In that sense, one could say that there was not a "genuine ambiguity or uncertainty".

However, in the present case, I am of the view that there is a genuine ambiguity or uncertainty which cannot be cleared up by reference to the warrants themselves, or any other documents. The Court record itself does not clarify the date from which sentence should commence. If it did, I should have been prepared to consider and possibly hold that since the Circuit Court is a Court of record, the Court record of the sentencing could be called in aid of clarification. But that is not the case in the present instance. This Court, and in my view also the Respondent, is unable to know with any precision or certainty at all, whether the sentence of the applicant is to commence from the 15th June 2004 or from the 2nd July 2004. That is a genuine ambiguity going to the core of the warrant, and is not such as to constitute the sort of *"legal error or impropriety"* considered by O'Higgins C.J. in State (McDonagh) v. Frawley to be insufficient to justify the applicant's release from custody. The defect in the present warrants is more than what is commonly referred to as "a mere technicality". It is fundamental and therefore the Court has ordered the release of the applicant.

There is one further matter which should be stated in the interests of all concerned. Referring to the requirement on the Court to order the release of the applicant unless satisfied that he is detained in accordance with law, O'Dalaigh C.J. has stated the following in **Re: Application of Michael Woods [1970] IR.154 at 162:**

> *"This means that both courts [High and Supreme] are not confined to an examination of the illegality complained of by the applicant but are required to be alert for other grounds which could render the detention unlawful. But neither the High Court nor the Supreme Court warrants, by its decision in an application for habeas corpus, that every possible ground of complaint has been considered and ruled. This would cast on the Court an impossible burden. Such matters as are considered by the Supreme Court in its judgment are finally decided for the High Court. But this will not preclude an applicant from later raising a new ground even though that ground might have been, but was not, put forward on the first application.*
>
> *The principles which apply in litigation inter partes are not applicable in habeas corpus. The duty which the Court has under the Constitution of ordering the release of a person, unless satisfied that he is lawfully detained, requires that the Court should entertain a complaint which bears on the question of the legality of the detention - even though in earlier proceedings the applicant might have raised the matter but did not do so. The duty of the courts, to see that nobody is deprived of his liberty save in accordance with law, overrides considerations which are valid in litigation inter partes."*

Given the nature of the Court's obligations in Habeas Corpus applications, a question which could arise on an application for the release of this applicant would be whether the warrants on foot of which the applicant was detained were in fact stale at the date of arrest, given that the warrants are dated 14th October 2002, and his detention on foot of same commenced either on the 15th June 2004 or the 2nd July 2004, almost two years later. Given that the Court is directing the release of the applicant on another ground, it is sufficient at the moment simply to refer again to Prof. O'Malley's work on **Sentencing Law and Practice** at paragraph 10-61 et seq.where he deals with this question in a manner which seems to be relevant to these warrants. I do so in order to raise the question whether the lapse of time between the date of the warrants and their execution without any re-issue of the same warrants or the issue of new warrants has rendered them stale. I have not

determined that question. I merely raise it for the moment so that if necessary on another occasion it can be the subject of legal submissions.