Neutral Citation: [2016] IEHC 378

THE HIGH COURT

[2016 No. 725 S.S.]

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

BETWEEN

SANDRA MAGUIRE

APPLICANT

AND

THE GOVERNOR OF THE DÓCHAS CENTRE

RESPONDENT

JUDGMENT of Mr. Justice Eagar delivered on the 30th day of June, 2016

1. The applicant in this case has sought an inquiry under Art. 40.4.2 of the Constitution of Ireland on foot of the warrant entitled "committal warrant after appeal" issued by the Dublin Circuit Court on 11th January, 2016. The warrant authorises the imprisonment of the applicant for a period of 3 months. The warrant was executed on 22nd June, 2016.

2. It appears from the warrant that the applicant was convicted of stealing clothing, valued at €23.50, contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001. She was sentenced to 3 months imprisonment, commencing on 11th September, 2015.

3. The warrant recites certain matters which establish the jurisdiction of the District Court to deal with the said charge, namely that the facts alleged constitute a minor offence, and that the applicant was fit to be tried summarily.

4. It appears that on the same day, 11th September, 2015 the applicant lodged a notice of appeal against the order of the District Court and that she signed a recognizance that she would appear in Court 16 of the Criminal Courts of Justice (the District Court Appeals Court) on 16th October, 2015 at 10 a.m. in the sum of her own bond of €500.

5. On 16th October, 2016 the applicant was present in court and represented by counsel. Legal aid was assigned to Mr. Tony Collier, solicitor. The case was adjourned till 7th December, 2015 to allow for full instructions to be taken and for consideration to be given as to whether the applicant would appeal against severity of conviction and sentence, or appeal against severity of sentence only.

6. On 7th December, 2015 Mr. Collier appeared in court, but neither the applicant nor the prosecuting Garda were present on that day. Mr. Collier indicated to the court that the appeal was against severity of sentence only, and the case was adjourned to 11th January, 2016.

7. There is no evidence before the court as to whether (a) the applicant contacted Mr. Collier with a view to finding out when her appeal was listed, or (b) whether Mr. Collier wrote to the applicant informing her of the date to which the case had been adjourned.

8. On 11th January, 2016 counsel appeared for the applicant, but the applicant herself did not appear on that date. Counsel did not have instructions as to the applicant's whereabouts, and sought a second calling in respect of the case, which was granted by the court. On the second calling, counsel for the applicant stated that the applicant had not appeared, and counsel applied for another adjournment, however, the Circuit Court judge refused this application and affirmed the District Court order. No evidence had been tendered to the court in respect of the particulars of the charge or the applicant's circumstances and previous convictions.

9. Mr. Collier in an affidavit stated that the warrant contained an error on its face, in that it stated there had been a hearing of the appeal. In fact, there was no hearing of the appeal - the order of the Circuit judge was "no appearance, strike out appeal, affirm conviction on order of the District Court in order that the accused by imprisoned for a period of 3 months".

10. Unknownst to her solicitor, to the prosecuting Garda or to the Circuit Court, the applicant was in fact an in-patient at Connolly Hospital, Blanchardstown on 11th January, 2016. There is a certificate before this Court signed by Dr. Ruth McCarron, stating that the applicant was admitted to the Laurel Ward of Connolly Hospital on 6th January, 2016 and was due to be discharged on 17th February 2016.

Grounds to establish unlawful detention

11. Mr. Collier, solicitor for the applicant, stated in his affidavit that the applicant's detention was unlawful, by reason of the fact that she was convicted and sentenced by the Circuit Court judge in the absence of any evidence before the court in respect of the allegation made against her, and in that there was no information before the court as to the applicant's circumstances or whereabouts, The appeal in question was a *de novo* appeal from the District Court to the Circuit Court, and as such, evidence was required to be heard in the Circuit Court, as had been in the District Court.

12. He further states that it was not open to the Circuit Court to simply adopt the sentence imposed by the District Court, merely because the applicant was not present in court. There was an obligation on the Circuit Court judge to determine the appropriate sentence to be imposed on appeal. The Circuit Court judge was not bound to impose the same sentence that had been given in the District Court, and further, he did not have the jurisdiction to impose the same sentence mechanically without any consideration of the case.

13. A further point made by Mr. Collier in his affidavit refers to s. 3 (1) (a) of the Criminal Justice (Community Service) Act 1983 as substituted by s. 3 of the Criminial Justice (Community Service) (Amendment) Act 2011. He states there was a requirement under that section that the warrant would indicate that the judge had considered as an alternative to the sentence the issue of whether to

make a community service order. The warrant was executed by the arrest of the applicant on 22nd June, 2016 on foot of the committal order.

14. In brief, the arguments of counsel for the applicant, setting out that the applicant is unlawfully detained, are two-fold:

> 1. Where a District Court appeal comes before the Circuit Court there must be a hearing. If the appeal is on sentence only, by virtue of s. 50 of the Courts (Supplemental Provisions) Act 1961, it is not required to be a full hearing but a partial hearing is required. Even if the appeal is on sentence only, it is nevertheless that a District Court appeal to the Circuit Court is a de novo hearing; it is axiomatic that a person who comes before the criminal courts, and whose liberty is in issue, is entitled to a hearing. The lack of a de novo hearing establishes grounds for this Court to hold that the applicant was not lawfully detained.
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> 2. Counsel argues a further, ancillary point; that the failure of the Circuit judge to consider imposing a community service order renders the applicant's detention unlawful.

15. Mr. Fitzgerald conceded that what happened in the present case happens frequently, but that the argument he raises before the Court are novel.

16. He argued that the suggestion that the onus shifts to the appellant to prosecute his appeal is a misconception, caused by the commonly used terminology, that *an appellant prosecutes an appeal* (this Court's emphasis). He states that the onus to prove an accused person's guilt beyond reasonable doubt remains on the prosecution throughout the initial hearing, and at any subsequent hearings conducted on appeal.

17. In answer to this Court, Mr. Fitzgerald stated that he was not seeking an order of judicial review quashing the decision of the Circuit judge on the basis that Ms. Maguire was in hospital.

Submissions on behalf of the applicant

The entitlement of the applicant to a de novo hearing
18. Mr. Fitzgerald stated that the jurisdiction of the Circuit Court in relation to District Court appeals is described in s. 18 of the Courts of Justice Act 1928. He referred the Court to the Supreme Court decision in *The State (Aherne) v. John Cotter* [1982] I.R. 188. The facts of this case concerned Mr. Ahern seeking expressly to restrict the scope of his appeal to the Circuit Court to an appeal against conviction only, following from the Circuit Court increasing the sentence imposed by the District Court. This appeared permissible under the District Court Rules, 1948. The Supreme Court held that as there was no relevant limitation placed upon the exercise by the Circuit judge of the jurisdiction to determine an appeal under s. 18 of the Act of 1928 from a decision of a District Court, the Circuit Court had jurisdiction to increase the sentence imposed by the District Court.

Walsh J. in his judgment stated,

> "Section 85 of the Courts of Justice Act, 1924, expressly conferred a right of appeal in criminal cases from a Justice of the District Court to a judge of the Circuit Court "against … for any term of imprisonment exceeding one month" by the person against whom the order shall have been made, and provided that the decision of the judge of the Circuit Court should be final, conclusive and not appealable. Section 22 of the Courts of Justice Act, 1928, repealed s. 85 of the Act of 1924. Section 18 of the Act of 1928 provides for an appeal in criminal cases from the District Court to the Circuit Court in respect of any order which imposes any fine or any period of imprisonment. The District Court which was established by the Act of 1924 was abolished in 1961 and the present District Court was established by s. 5 of the Courts (Establishment and Constitution) Act, 1961."

Walsh J. then referred to s. 50 of the Courts (Supplemental Provisions) Act, 1961. He then continued:

> "The jurisdiction of the Circuit Court to hear appeals from the District Court in criminal matters does not stem from s. 51 of the Act of 1924 as reenacted by the Courts (Supplemental Provisons) Act, 1961, but from s. 18 of the Act of 1928, as re-enacted and amended by that Act of 1961."

This is the statutory basis of an appeal from a District Court to a Circuit Court.

19. Walsh J. continues:

"An appeal by way of retrial enables a totally different case to be made by either side or both."

20. Counsel also referred to the decision of Griffin J. in *The State (Aherne) v. John Cotter* [1982] I.R. 188 which sets out the relevant line of authority. Griffin J. quotes from a decision of Palles C.B., in *Ex parte M'Fadden* (Judgment of the Superior Courts in Ireland, 1903 ed. p. 168):

> "One thing is perfectly plain—that in an appeal given by statute simpliciter, and without any limitation of the powers of the Court of Appeal, the Court must decide solely upon the evidence that was brought before it, as distinguished from the evidence that was brought before the Court from which the appeal is taken."

21. Mr. Fitzgerald argued that the applicant's breach of recognizance, or her failure to make an appearance on the date set for the hearing is not a basis to have no hearing at all. He likened the present situation to one where a person failed to appear in the District Court – there, the judge could not say he was going to impose a sentence without conducting a hearing. The judge in such an instance would issue a bench warrant for the arrest of that person.

22. Mr. Fitzgerald relies on *Ex parte M'Fadden* (Judgment of the Superior Courts in Ireland, 1903 ed. p. 168) as authority for the contention that the court must form a decision based on the evidence brought before it, as an appellate court; the evidence before the inferior court is not evidence that the appellate court can accept without conducting it's own hearing.

23. Mr. Fitzgerald states that in this case, there was no consideration by the Circuit judge of the evidence, the judge simply affirmed the order of the District Court. The judge had no information about the case, save that there was a 3 month sentence being appealed.

Errors on the face of the warrant
24. Mr. Fitzgerald then referred the Court to a decision of the Supreme Court in *Ejerenwa v. Governor of Cloverhill Prison & Anor* [2011] I.E.S.C. 41. The appellant in that case refused permission to enter the State and was detained pending his removal from the State in Dundalk Garda Station, and subsequently in Cloverhill Prison. The appellant was informed of the reasons for the refusal, and he was given notice in writing of these reasons. The detention order had been made out to the member in charge of Dundalk Garda Station and signed by the immigration officer.

The challenge to the legality of the detention was brought on the basis that the *document was defective on its face* (this Court's emphasis) because it did not show that the immigration officers or the Garda Síochána had suspected with reasonable cause that the appellant had been unlawfully in the State for a continuous period of less than 3 months. The appellant was subsequently released on this basis by the Supreme Court.

25. Mr. Fitzgerald stated there are two errors on the face of the warrant in question. The first is that the warrants states as follows:

> "Whereas on the hearing of an appeal by the said accused against the said court the Circuit Court for the county and city of Dublin, ordered as follows 'no appearance, strike out appeal, a firm conviction, an order of the District Court, an order of the accused be imprisoned for a period of three years".

He states that this is palpably not so, because there was not a hearing of the appeal.

Secondly, the warrant is flawed as there was no consideration of community service.

Submissions on behalf of the respondent

26. Mr. Gallagher appeared on behalf of the Director of Public Prosecutions. He conceded that a person does have a right to a *de novo* hearing, provided that they diligently process the appeal. This was clearly not so in this case, where the applicant failed to appear in court on the date set for hearing.

27. He states that Mr Fitzgerald's submission, that the court should have run the appeal in the absence of the applicant is unworkable in practical terms. At the new hearing, the person's sentence could be increased, and for this to happen in the accused's absence would be contrary to all principles of natural justice. He makes the general point that if there was an imperative on a court to hear an appeal in an appellant's absence, every appeal would remain in abeyance until the appellant made an appearance at trial, wasting Garda and court resources. He notes that there is no evidence of communication from the applicant to her solicitor as to when the appeal was adjourned. He argues that the applicant was fully aware of the consequences of not making an appearance at court.

Jurisdiction to strike out an appeal
28. Mr Gallagher argues that the jurisdiction to strike out an appeal is well established in law. He quotes from James Woods, "District Court Practice and Procedure in Criminal Proceedings" (Limerick, 1994) 541, which discusses appeals from the District Court to the Circuit Court:

> "If the appellant does not appear, the appeal should be struck out".
>
> The author cites *R. (McMonagle) v. Chairman and Justices of Co. Donegal* [1905] I.R. 644 as authority for this contention.
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> Mr Gallagher quoted from the judgment of McDermott J. in *Director of Public Prosecutions v. Circuit Judge Alison Lindsay and D.C.* [2016] I.E.H.C. 54. This case related to the jurisdiction of the Circuit Court concerning an appeal against severity of sentence imposed on a young offender who failed to prosecute their appeal.
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> The facts of the case were as follows. The young offender pleaded guilty to an offence, having been a passenger in a stolen car. The matter was remanded for consideration of a probation report, and on the hearing date, the District judge indicated that he proposed to impose a sentence of 4 months detention. The detention would have been in either Oberstown or Trinity House, but there were no places available at the time, and thus the matter was adjourned again. When it was indicated to the court that a place was available, the sentence was imposed. The District Court order imposing the sentence was appealed to the Circuit Court, and the accused was released on entering the recognizance, fixed in respect of the appeal. On the first occasion that the appeal was listed, the accused was not produced from Trinity House (where he was detained in respect of other charges). The matter was adjourned to another date. On that date, the accused failed to attend (having previously been released from Trinity House). When the case was adjourned the matter was listed peremptorily and the court adjourned the matter again to another date, but no explanation was offered for non-attendance. On that date, the Circuit judge recorded the non-attendance of the accused, struck out the appeal and affirmed the conviction and order of the District Court. At para. 12 McDermott J. stated:
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> "In cases involving non-minors who are convicted of offences, the failure to attend and prosecute an appeal may result in an order striking out the appeal and affirming the District Court order. The Circuit Judge will act within jurisdiction in making such an order if she/he does not embark upon the appeal."

29. Mr Gallagher also cites *Phelan v. Circuit judge Catherine Delahunt & Ors.* [2014] IEHC 142, where the applicant made a claim that he had a right to be personally notified of the date of his appeal, in order to enable him to be present at the hearing of the appeal. In that case, contact was made with the applicant's brother by his solicitors. The applicant accepted that his brother had contacted him to inform him of the adjourned date, and the applicant did not explain his failure to return calls from his solicitor. At para. 13 McDermott J. said,

> "In the District Court the applicant pleaded guilty to all charges upon which he was sentenced. He entered a recognisance in which he gave an address at which he could be contacted."

McDermott J. quoted *Lawlor v. Hogan* [1993] I.L.R.M. 606, where Murphy J. stated the basis upon which the Court might proceed in the absence of an accused as follows:

> "1. An accused has a fundamental constitutional right to be present at and to follow the proceedings against him.
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> 2. In so far 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 these functions to be performed.

3. If a trial judge is satisfied that the accused has consciously decided to absent himself for 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 notwithstanding the absence of the accused."

30. In the case of *McCann v. Judge Groarke and Director of Public Prosecutions* [2001] 3 I.R. 431, the applicant pleaded guilty to criminal charges in the District Court. After sentence, the applicant appealed both conviction and sentence. On the first hearing date, the appeal was adjourned and the applicant consented to a later sitting of the Circuit Court in Dundalk. On that date, there was no appearance by the applicant, or any solicitor acting on his behalf. The Circuit judge made an order striking out the appeal and affirming the order of the District Court. Herbert J. held that it was at all times the duty of the applicant and of his solicitors to prosecute the appeal, and to take active measures to apprise themselves as to the adjourned date for hearing. It was their duty to be present on that date, or at any date to which the court might have occasion to further adjourn the appeal. The Circuit Court Office was under no duty whatsoever to assume the functions of a watchdog for the applicant or his solicitors with regards the date of his appeal. Herbert J. held it was unlikely that the accused had mistaken an upcoming date of a court hearing, which had been announced when he was present in court:

"If the applicant was not heard on this occasion it was entirely due to his own failure to attend before the Court or alternatively or additionally due to his solicitor's failure to notify him of the adjourned date to appear before the court. In the absence of some compelling evidence which would establish that the decision of the first respondent was in the circumstances irrational, unreasonable or tainted with bias – there is no such evidence to be found in this case – the proper administration of justice must require that the Court has and utilises the power to strike out or to dismiss an appeal for default of appearance on the part of the applicant or anyone on his behalf."

31. Mr. Gallagher argued that the authorities confirmed that it is not only a duty to open an appeal but to diligently prosecute the appeal, it is not for the state to nurse maid an applicant to bring their appeal. The contention of Mr. Fitzgerald runs against this recently decided law.

32. Mr. Gallagher also suggested that since the order of the Circuit Court striking out the appeal was made, no effort had been made by the applicant to enhance her position, for example, the applicant did not take any judicial review proceedings on the basis that she had been in hospital when the appeal was struck out.

33. Ms. Duffy B.L., instructed by the Chief State Solicitor's Office, represented the Irish Prison Services. She stated a recognizance had been entered into for the purposes of the said appeal. One of the conditions of the recognizance was that the accused would appear before Court 16, CCJ, District Court Appeals on 16th October, 2015 at 10 a.m., and for any adjournments thereafter. She stated that the onus was on the appellant to prosecute the appeal, and that there was no request for the judge to enter into a de novo hearing. If the Court had proceeded with a hearing in the absence of the appellant, this would have been a marked departure from established law.

Consideration of Community Service Orders
Mr Gallagher further quoted a number of authorities including *Michael O'Brien v. District Judge Coughlan and the Director of Public Prosecutions* [2014] IEHC 425. This was a judicial review case taken resulting from a District judge failing to conduct any enquiry into the applicant's suitability for a community service order where, under s. 3 (1) (a) the District judge must avert to his obligation to consider community service in a clear and public way and indicate why the report is not needed. The Court notes that Kearns P. in that judgment quoted from *Lyndon v. Judge Collins* [2007] IEHC 487, where Charleton J. stated:

"[I]t is not essential that district judges give reserved decisions or in every case to giver reasons to a high standard of academic excellence. What is essential, however, is that people know going out of any district criminal court what they have been convicted for and why they have been convicted."

Kearns P. stated:

"I have carefully considered the submissions of both parties in relation to the obligation under s.3 (1) of the 2011 Act and am satisfied that the first respondent was not required to expressly state reasons for not imposing community service where the same was not sought or consented to. The clear legislative intention behind the provision is to reduce the number of short term custodial sentences imposed and it therefore places an onus on all judges to consider community service as an alternative. Judges of the District Court deal with a large number of cases on a daily basis and are often required to consider the imposition of a short custodial sentence and so s. 3 (1) is of particular relevance to their work. It must be presumed that District Judges are aware of their obligation to consider community service as an alternative without the need to openly and in detail articulate the reasons why community service is not suitable in every individual case […] I am satisfied that the District Judge, having regard to all of the evidence before him in relation to the seriousness of the offence and the applicant's previous offences, considered all of the sentencing options available to him and was of the view that a custodial sentence was merited."

Response of counsel for the applicant
34. In response, Mr. Fitzgerald stated it was perfectly fair procedure for a judge to proceed in the absence of the accused, although he conceded it would be more commonplace to issue a bench warrant. He quoted Lord O'Brien L.C.J. in *R. (McMonagle) v. Chairman and Justices of Co. Donegal* [1905] I.R. 644 in support of this contention:

"The prosecutor, McMonagle, was charged on summons before the magistrates at Petty Sessions with the detention of certain books and documents, the property of the Finn Valley Co-operative Agricultural and Dairy Society. He was fined £2 2s., and ordered to deliver up the books and documents, or in default to be imprisoned for two months. The prosecutor duly served notice of appeal, and entered into the usual recognizance."

When that case was called at Quarter Sessions, neither McMonagle nor his solicitor appeared and an order was made by the Court of Quarter Sessions striking out the appeal. It was contended that this order was wrong, that under s. 24 of the Petty Sessions Act the Court of Quarter Sessions, the court should have confirmed the order made below and that, not having done so, continuances should have been entered so that the appeal may have been properly disposed of. Lord O'Brien L.C.J subsequently states:

"If there is no-one there to prosecute [the appeal] the court cannot entertain the appeal, and the entertaining of the

appeal is a condition precedent to confirming, varying or reversing it."

35. Mr. Fitzgerald argues that this supports his contention that an appellate court may not simply affirm an order of the court below it. However, he concedes that this judgment was delivered according to the Petty Sessions (Ireland) Act 1851, and that the present day statutory basis is now the Courts of Justice Act 1928, and the Courts (Miscellaneous Proceedings) Act 1961.

36. Mr Fitzgerald noted that the terminology of *prosecuting an appeal* (this Court's emphasis) was utilised by both counsel on behalf of both the Director of Public Prosecutions and the Prison Service. He stated that the onus remains on the prosecution to prove the accused's guilt at every stage of the criminal justice process. He questioned the logic of how it can be argued that by stating the phrase 'prosecution of the appeal', that the onus of proof resting on the prosecution to prove the guilt of the accused shifts, when there is an appeal *de novo.*

37. The appeal required is a full re-hearing, and Mr. Fitzgerald relied on the Court of Appeal judgment delivered in *O'Brien v. Judge Coughlan and the Director of Public Prosecutions* [2015] I.E.C.A 245 in support of this contention. This judgment concerned the failing of the respondent to consider a community service order. Ryan P. stated:

> "The argument on Mr. O'Brien's behalf is that the respondent was under an obligation, not only to address himself to the question of community service in the particular case, but to express himself as having done so. He was under an obligation to say that he had in fact considered community service. He had to, at the very least, make some reference to community service. It was therefore not open to the learned President to infer that the judge had taken it into account. It was submitted that the statutory obligation goes further and the Court must obtain a report in respect of the suitability of the offender to be made subject to a community service order. In my view, one can reject the latter submission at once. It is clearly the intent of the section and is so stated that the report is to be obtained in circumstances where the judge considers that the offender is a person who may be appropriate for a community service order. If the judge is not of that view, there is no requirement, nor could there be, on the judge to direct a report. The judge's consideration that the offender may be appropriate is the first step. It would make no sense to require the preparation of a probation report in every case when the judge was not satisfied that it was appropriate to consider such alternative to a prison sentence."

In this case the President noted a particularly serious feature of the case, namely the repeated criminal offending.

38. Mr. Gallagher handed in the Bail Act 1997 as amended by s. 10 of the Criminal Justice Act 2007. Section 6 (a) states:

> "6A.— Section 6 applies in relation to recognisances entered into by persons appealing against sentences of imprisonment imposed by the District Court with the following modifications:
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> (a) by the substitution of the following paragraph for paragraph (a) of subsection (1):
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> '(a) the recognisance shall be subject to the following conditions, namely, that the appellant shall—
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> (i) prosecute the appeal,
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> (ii) attend the sittings of the Circuit Court until the appeal has been determined, and
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> (iii) not commit an offence while on bail,';
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> (b) references in that section to an accused person or a person charged with an offence are to be construed as references to persons so appealing;
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> (c) the reference to a court in subsection (8) is to be construed as a reference to the District Court;
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> and with any other necessary modifications.".

39. Mr. Fitzgerald in response to acknowledged the serious consequences for failing to answer a recognizance, or not making an appearance at trial; it is a criminal offence under s. 13 of the Bail Act 1997. However, he submitted that this does not take away from his contention that the Circuit Court must hear the application de novo. The Circuit Court cannot decide not to exercise its jurisdiction and simply affirm the decision of the court below. He referred to *Freeman v. Governor of Wheatfield Place of Detention* [2016] I.E.C.A. 177. In that case, the central issue was the absence from the warrant (on foot of which the respondent was committed to prison) of a reference to the determination made by the Director that the matter be tried summarily. Whether or not such absence invalidates the warrant, the Court of Appeal (Mahon J.) stated:

"Warrants committing individuals to prison on foot of court orders are not merely pieces of paper containing information of a formal nature. The fact that a warrant acts to deprive an individual of his liberty for a prolonged period renders it an important document."

40. Mr. Fitzgerald quoted the *State (McLoughlin) v. Judge Shannon* [1948] I.R. 439 and submitted that this was an authority for the proposition that an appeal from the District Court to the Circuit Court requires *de novo* hearing, citing Davitt J.:

"It was next contended that, the order of the District Justice being bad, the learned President of the Circuit Court had no power to amend it and make it good, or to make a good order in lieu thereof. 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 also cited the decision of the *Attorney General (Lambe) v. Michael Fitzgerald* [1973] I.R. 195, where Henchy J. stated:

> "It is well settled when a defendant appeals to the Circuit Court against a decision the District Court in a criminal case, he is entitled to a hearing of the case *de novo*".

Mr. Fitzgerald said it is a duty of the Circuit Court Judge to hear and determine fully matters pertaining to sentence or conviction. Simply affirming the order of the District Court amounts to refusing to hear the case, and is in effect a refusal of the court to exercise it's jurisdiction. He referred then to a decision of Humphreys J. in *Adhamh Grant v. Governor of Cloverhill Prison* [2015] I.E.H.C. 768, where Humphreys J. at para. 54 stated:

> "The State argues that long or inveterate practice must diminish the scope to find that a practice is erroneous. I would rather incline to the opposite view. If a practice is irregular, the longer it goes on, the greater the inroad made into rule of law considerations."

This Court permitted Mr. Gallagher to reply, on the basis that he had become aware of a determination made (the day prior to the hearing of this case) by the Supreme Court in an appeal of the High Court decision of *O'Brien v. Judge Coughlan and the Director of Public Prosecutions* (Unreported, Supreme Court, 28th June, 2016). The Supreme Court did not grant leave to appeal on a point relating to community service orders.

He contends that this is direct authority for his contention that there had been no breach of the Criminal Justice (Community Service) (Amendment) Act 2011, by the judge failing to consider whether to make a community service order in respect of the applicant as an alternative to a custodial sentence.

Decision

41. This Court finds that the relevant statutory authority for District Court appeals is set out in the Courts of Justice Act 1928 s. 18(1):

> "An appeal shall lie in criminal cases from a Justice of the District Court against any order (not being merely an order returning for trial or binding to the peace or good behaviour or to both the peace and good behaviour) for the payment of a penal or other sum or for the doing of anything at any expense or for the estreating of any recognizance or for the undergoing of any term of imprisonment by the person against whom the order shall have been made."

42. The next relevant statutory authority is contained in s. 50 of the Courts (Supplemental Provisions) Act, 1961, which relates to appeals from District Court in criminal cases against sentence only, and it recites as follows, where:

> "(a) an order is made in a criminal case by a justice of the District Court convicting a person and sentencing him to pay a penal or other sum or to do anything at any expense or to undergo a term of imprisonment or to be detained in Saint Patrick's Institution, and
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> (b) an appeal is taken against the order, and
>
> (c) either—
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> (i) the notice of appeal states that the appeal is against so much only of the order as relates to the sentence, or
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> (ii) the appellant, *on the hearing of the appeal* [this Court's emphasis], indicates that he desires to appeal against so much only of the order as relates to the sentence,
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> then, notwithstanding any rule of law, the Circuit Court shall not, on the *hearing of the appeal* [this Court's emphasis], re-hear the case except to such extent as shall be necessary to enable the court to adjudicate on the question of sentence."

The final statutory provision relevant in respect of appeals from the District Court to the Circuit Court is contained in s. 6(a) of the Bail Act as inserted by s. 10 of the Criminal Justice Act, 2007 which is referred to above.

43. Mr. Fitzgerald has raised a very novel position in relation to a practice which has existed for as long as I was practising as a solicitor in the Circuit Court. And whilst this Court subscribes to the remarks made by Humphreys J. in *Grant v. The Governor of Cloverhill Prison* [2015] I.E.H.C. 768, this Court takes the view that where a person is sentenced in the District Court and fails to appear at the appellate Court, it is appropriate, having regard to the terms of the recognisance and s. 6 (a) of the Bail Act, that the court has the authority to strike out the appeal and affirm the District Court's sentence. This Court accepts the authorities which say that when an appeal is presented before the Circuit Court for hearing, it is a *de novo* hearing, this is common case. What is not common case, however, is that when an accused fails to appear at their appellate court, that the court should proceed with a de novo hearing.

44. This applicant in particular had a number of previous convictions, and is aware of court procedure. There is also a failure in this Court's view on the part of the applicant to clarify whether or not either the applicant contacted her solicitor to find out the adjourned date of the appeal, or of evidence of the solicitor writing to the applicant. I do not criticise Mr. Collier in any way, as it is the duty of the applicant to satisfy herself as to what happened on the date on which she did not appear in court.

45. I accept the authority of the Supreme Court in *O'Brien v. Judge Coughlan and the Director of Public Prosecutions* (Unreported, Supreme Court, 28th June, 2016), as regards the failure of the warrant to indicate that either the District Judge or the Circuit Judge failed to refer to the consideration of community service. This does not affect the legality of the warrant detaining Ms. Maguire.

46. I distinguish *Ejerenwa v. Governor of Cloverhill Prison & Anor* [2011] IESC 41 on the basis that the warrant for that detention was on foot of a direction of an immigration officer. The courts have always been particularly conscious of such detentions.

47. This Court is also conscious of the enormous change that any contrary decision would have on the already sparse resources of both the courts service and the Garda Síochána. This Court must have regard to the impact of holding that the Circuit Court would be required to conduct a full hearing of an appeal, in the absence of the applicant being present and moreover prepared to prosecute her appeal. This Court finds that the onus is on the applicant to prosecute her appeal. The applicant failed to appear on the 11th January, 2016, albeit she was in hospital. It is open to the applicant's solicitor to set this out to the Governor of the Dochas centre, who this Court thinks will take a compassionate view of the reasons for her absence at hearing.

48. I am satisfied that the statutory provisions do not require that the Circuit Court hear the appeal if the appellant is not prepared to prosecute the appeal.

49. In all of the circumstances, this Court will refuse the application for relief pursuant to Art. 40.4.2 of the Constitution of Ireland.