



THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 289

Birmingham J.
Edwards J.
Hedigan J.

Appeal No. 2017/19

In The Matter of an Application

Pursuant to Article 40.4.2 of the Constitution of Ireland

Edward Conroy

Applicant/Appellant

-and-

The Governor of Castlereagh Prison

Respondent

JUDGMENT of Mr. Justice Hedigan delivered on the 2nd day of November 2017

Introduction

1. This is an appeal against the judgment and order of Noonan J., made on the 15th December, 2016, in an Article 40.4.2 application. The appellant had two warrants from the 9th February, 2016, each for nine months imprisonment. The second was consecutive to the first. They were both in respect of District Court convictions for assault contrary to s. 2 of the Non-Fatal Offences Against the Person Act 1997. He was subsequently sentenced in the Circuit Court, on the 26th May, 2016, to five years for firearms offences with concurrent sentences of four months for RTA offences. These sentences were to commence on the legal termination of the 18 months received in the District Court. The appellant entered a guilty plea to all of the offences.

2. On consent, subsequent to the Article 40 inquiry, on the 2nd March, 2017, an order of *certiorari* was made in the High Court in relation to the two District Court warrants. This was perfected on the 6th April, 2017. The sentences exceeded the maximum permitted by law being six months. This was acknowledged at the Article 40 inquiry and it was noted that the detainer was no longer standing over those warrants.

3. These proceedings challenged the sufficiency of the Circuit Court order. Noonan J. held that the Circuit Court order was good and sufficient and the appellant was detained in accordance with law. He applied the decision in *Kovacs v. Governor of Mountjoy Women's Prison* [2015] IEHC 418 which was also appealed to this Court. Both of these appeals were heard at the same time and Mr. O'Higgins S.C. appeared for both appellants. The decision in *Kovacs* was given in this Court on the 31st July, 2017. That appeal was dismissed as the decision of the learned High Court judge was found to be correct.

The appellant's submissions

4. It was submitted by the appellant that the Circuit Court warrant was bad in law for five reasons. First, the District Court sentences did not terminate, legally or otherwise, having never commenced.

5. Second, under the ordinary meaning of "terminate" a sentence comes to an end due to the lapse of time. This sentence never started so it did not come to an end. The latter sentences were contingent on an event which never happened.

6. Third, the Circuit Court commencement date was uncertain and lacked precision. The start date and duration must be set out in clear terms on the face of the warrant. In *E.(G). v. Governor of Cloverhill Prison* [2011] IESC 41 Denham C.J. held that the document "should contain clear information on its face as to the basis of its jurisdiction" which information is to be available to the person in custody, the governor and the court. In *O'Farrell v. Governor of Portlaoise Prison* [2016] IESC 37 McKechnie J. held that the principle stated above applies to all warrants and that warrants must be accurate, reflecting the nature and duration of the sentence and not vague, uncertain or so as to cause confusion. The jailer should know the precise commencement date and term. There can be no genuine ambiguity. It was submitted that in the instant case there are five possible dates when the invalidity in the base sentence commenced.

7. In *Mullen v. Governor of the Midlands Prison* [2014] IECA 26 Kelly J. held that the lawful authority to detain someone should be without ambiguity and he referred to a number of authorities which made this point. It was submitted that *Mullen* is authority for the proposition that if the warrant states that the sentence will operate in the future it cannot ground the lawful detention at the time of the Article 40 inquiry.

8. Fourth, the Circuit Court sentences were without jurisdiction as they were consecutive to sentences that were not operative.

9. Finally, there were errors on the face of the warrant.

10. It was submitted that this case is distinguishable from *Kovacs*, it was wrongly decided and should not be followed. It was submitted that the governor's certificate could not provide a lawful basis for the detention where the warrants were invalid and subsequently quashed. It was submitted that there is difficulty pinpointing a date for termination. If the Circuit Court warrant steps into the shoes of the quashed warrants then it would run from the 9th February, 2016, but this is not reflected in the governor's certificate.

11. It was submitted that the District Court sentences prejudiced the mind of the judge when passing sentence in the Circuit Court. The sentences are interlinked and cannot be conveniently severed.

12. The final sentence of the warrant which refers to allowance for time served is unduly vague, uncertain and does not enable the governor to examine the warrant and ascertain the exact length of the sentence from the four corners of the document. The trial

judge erred in law in holding the Circuit Court order valid where the period already served was not enumerated and was otherwise impermissibly vague.

13. In *Kovacs*, the warrant used the word expiration whereas in the instant case the warrant said termination. The Court was referred to the Oxford English Dictionary definitions of the words and it was submitted that the definition of termination imports the cessation of that which is continuing. To be terminated something must be subsisting. The District Court sentences were void *ab initio* meaning they never commenced or terminated. Hence the Circuit Court sentences never commenced being dependent on the occurrence of an event that never occurred.

14. The phrase legal termination is not defined but first principles require the strict interpretation of a custodial warrant. See *The Director of Public Prosecutions v. Gilvarry* [2014] IEHC 345 which requires the strict interpretation of penal statutes.

15. Ambiguity in a warrant should be resolved in favour of the prisoner. While Barron J. appeared to indicate that legal expiration is equivalent to legal determination in *The State (Gleeson) v. Martin* [1985] ILRM 577 that case was in a different context and it is difficult to reconcile with the principle that genuine ambiguities in a custodial warrant should be resolved in favour of liberty.

16. It was submitted that in *Wilkinson v. Governor of Midlands Prison* [2016] IECA 190 it was a completely different situation as there it was at least possible to pinpoint the date on which the first warrant terminated, namely on the entry of the appeal.

The respondent's submissions

17. The respondent submitted that the appellant was in lawful detention as the interpretation of the Circuit Court warrant was governed by *Kovacs* meaning that warrant was deemed to commence when the sentence was imposed on the 26th May, 2016. There was no prejudice or injustice to the appellant as he was serving another unrelated sentence during the period from the 9th February to the 26th May, 2016.

18. The High Court judge held that there was a distinction without any difference between legal termination and legal expiration. An order which was void *ab initio* could have no termination or expiration date. In relation to credit for time served it was found that it was simply necessary that the dates be ascertainable and they were. It was submitted that the governor records the time spent in custody on each charge and the release date is calculated thereby.

19. It was submitted that *Kovacs* was correctly decided and should be followed. Further as far as the cases were the same Ms. O'Neill B.L. adopted the submissions made by the respondent in the *Kovacs* appeal.

20. It was accepted that a word should be given its ordinary meaning. The respondent referred to the Oxford English Dictionary definition of "expiration" and "termination" and also to the Oxford Dictionary Thesaurus synonyms for "expire" and "terminate". It was noted that "terminate" is a synonym for "expire". If it can be said that the Circuit Court sentence did not expire it can equally be said that it did not terminate. It is a distinction with no difference. To terminate or expire something must end. The first sentences in the instant case and in *Kovacs* were found to be void *ab initio*. All arguments advanced for terminate must equally apply to expire so that if *Kovacs* is upheld the *ratio* applies equally here.

21. A warrant cannot have effect until it has issued. Therefore, the commencement date was the date the sentence was pronounced with credit for time served. There can be no confusion as to the start date upon reading the warrant in the context of the *Kovacs* judgment.

22. The issue in *Mullen* was when did the last sentence commence being consecutive to a partly suspended sentence. There was no confusion as to the sentence being served when the last sentence was imposed. It was submitted that the factual basis and legal decision were entirely different to the instant case. There was a valid sentence and as such it is entirely distinguishable from the factual position in this case.

23. It was submitted that *O'Farrell* can be distinguished as it was a transfer of prisoner case where there was an issue on the face of the warrant. In relation to *Wilkinson* it was submitted that in that case once the first appeal was lodged it was not clear from the warrant for the second sentence that anything had changed but the warrant would have to have been read in light of the fact that something else happened and a similar analogy can be made in relation to what has occurred in this case.

24. It was submitted that if *Kovacs* was decided correctly this case was decided correctly.

Decision

25. This Court must consider whether the Circuit Court warrant meets the requirements for certainty and lack of ambiguity in warrants as set out in *Mullen* (and elsewhere).

26. The principles identified in *Mullen* are as follows:

- a) A warrant authorising the detention of a person should not be ambiguous.
- b) The person detaining and the person detained should know precisely the duration of the detention. There is no room for ambiguity in that regard.
- c) The function of such a warrant 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.

27. In identifying these principles Kelly J. relied upon *Carroll v. the Governor of Mountjoy Prison* [2005] 3 I.R. 292 and *State (Caddle) v. Judge McCarthy & Ors.* [1957] 1 I.R. 359.

28. Did the invalidity of the two District Court warrants, by reason of the sentences being in excess of the maximum punishment prescribed by the statute, result in ambiguity or uncertainty in the length of detention authorised by the Circuit Court warrant? The Circuit Court warrant issued on the 26th May, 2016, in relation to the five year sentence states:-

"The Court Doth Order that the Accused be imprisoned for a period of 5 years, on Count No. 3, such sentence to commence on the legal termination of sentence of 18 months received at Tuam District Court on 9th February 2016. Credit to be given for time served."

29. It is clear from this warrant that the authority to detain on foot of this warrant commences upon the legal termination of the 18 month sentence. As held by Birmingham J. in *Wilkinson*, appealing the first in time of two sentences but not the second has the effect of bringing forward or triggering the commencement of the second sentence. The Court was referred to the Oxford English Dictionary definition of "termination" which included "bringing something to an end" and it was noted that "terminate" is a synonym for "expire". This Court accepts the learned trial judge's view that any distinction between "expiration" and "termination" is a distinction without any difference. This Court accepted in my judgment delivered in *Kovacs* that a clear, simple and satisfactory definition of "expiry" is "the time when something ends or ceases to be valid". When that was applied to the facts of *Kovacs* it was held that the three month sentence imposed upon the appellant expired when its validity ceased which was when the High Court found it to be void *ab initio*. The same principle applies here to the termination of the sentence. It was accepted at the Article 40 inquiry that the District Court warrants were bad in law. The addition of the word "legal" neither adds nor detracts from the meaning of the word "termination" in the warrant. The terms of the Circuit Court warrant were clearly such that it was activated and authorised the governor to detain the appellant for five years from the invalidation of the District Court sentences. Any time already served should be allowed.

30. This Court has found that the decision in *Kovacs* was correctly decided. It follows that the High Court judge was correct in following that decision. It is a relatively simple exercise for the governor to ascertain what if any time is to be allowed in respect of time served and set that off against the five year sentence. It is thus not possible to identify any ambiguity or uncertainty in the second warrant and it therefore meets the requirements of clarity and certainty outlined in *Mullen*.

31. It was conceded that the result of this appeal would be determined by the decision of this Court in *Kovacs*. It is indeed clear that all the grounds of appeal brought by the appellant herein are answered in that judgment save for the ground that relates to the possibility that the judge in the Circuit Court may have been influenced by the existence of the two District Court convictions subsequently quashed. This argument is wholly hypothetical. In any event, it actually flies in the face of the facts. The judge heard of the appellant's seventy four previous convictions which included assault and burglary. He was given a full background by the prosecuting Garda. He heard an extensive plea in mitigation outlining the appellant's personal circumstances. He found that there were no grounds that would entitle him to depart from the imposition of the mandatory minimum five year sentence. It is hard to see how he could have come to any other conclusion. That is the sentence that he actually imposed making it consecutive to the District Court sentences. This ground also clearly fails. The appeal is dismissed.