Neutral Citation: [2014] IEHC 179

THE HIGH COURT

Record No. 2013/156SS

IN THE MATTER OF SECTION 52 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961

BETWEEN:

THE DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF GARDA MADDEN AND GARDA HYNES)

PROSECUTOR

AND

JEFFREY CARTER

DEFENDANT

Judgment of Ms. Justice Iseult O'Malley delivered on the 21st day of March, 2014

Introduction

1. This is a consultative case stated by District Judge Ann Watkin. The central issue concerns the operation of s.99(9) of the Criminal Justice Act, 2006 as amended, which deals with part of the process by which a suspended sentence may be activated in the event of a breach of the terms of the suspension.

2. The subsection provides that, where a person who is subject to an order imposing a suspended sentence is convicted of a further offence during the currency of the suspension, the court dealing with the further offence

> *"shall, before imposing sentence for that offence, remand the person in custody or on bail to the next sitting of the court that made the said order."*

3. Section 99(10) then deals with the power of "a court to which a person has been remanded under subsection (9)" to activate the suspended sentence.

4. The arguments in the case involve the meaning of "shall... remand the person ...to the next sitting".

Factual background

5. The defendant appeared before Judge Watkin on two dates in January 2011 in respect of separate offences. On the 14th January, 2011 Judge Watkin imposed a sentence of four months, the final three of which were suspended for 12 months. On the 26th January she imposed a further sentence of six months, suspended in its entirety for two years.

6. On the 11th March, 2011 the defendant committed two new offences (referred to as "the breach offences"). The prosecutor directed trial on indictment in respect of these matters and the defendant was sent forward for trial to the Circuit Criminal Court.

7. On the 23rd January, 2012 the defendant entered guilty pleas in the Circuit Court. He was remanded to the 26th March for sentence. During the sentence hearing the Circuit Court judge was informed of the fact that the breach offences were committed during the currency of the suspended sentences imposed by Judge Watkin. Having regard to the provisions of s.99 (9) of the Criminal Justice Act, 2006 as amended ("the Act"), the Circuit judge decided to remand the defendant to the District Court sitting in Court No. 17 in the Criminal Courts of Justice one week later, on the 2nd April, 2012.

8. It is recorded in the case stated that neither the prosecution nor the defence were aware of the reason why the remand was for a week but that no objection was raised by either side.

9. In accordance with the order of the Circuit Court the defendant appeared in Court 17 on the 2nd April, where District Judge McNamara was presiding. On that occasion, counsel for the defence made a submission that the case was not properly before the court because the defendant had not been remanded by the Circuit Court to the "next sitting" of the court that made the original order, as mandated by s.99(9) of the Act. Judge McNamara considered that, in any event, she could not deal with the matter and further remanded the defendant to appear before Judge Watkin on the 17th April.

10. The matter then came before Judge Watkin on the 17th April, 2012. It was again submitted on behalf of the defendant that the case was not properly before the court and that the court, therefore, had no jurisdiction to deal with it. Judge Watkin directed the parties to present written submissions and the matter was remanded from time to time thereafter.

11. On the 6th December, 2012 Judge Watkin ruled as follows:-

> *"I found that the use of the phrase 'next sitting' in section 99(9) of the 2006 Act (as amended) vis a vis the District Court required that the defendant had to be remanded to the very next day to any sitting of the District Court sitting in the Dublin Metropolitan District. I indicated that this would only apply to offences within the Dublin Metropolitan District.*
>
> *I found further that accordingly, the defendant was not properly remanded from the 26th of March 2012 to the 2nd of April 2012 in this case as per the provisions of section 99(9) of the 2006 Act (as amended) because he was remanded for a week rather than to the very next day that the District Court was sitting.*
>
> *However, I found that, as it appears that there were no objections to the matter being remanded for a week by the Circuit Court to Court 17 of the Dublin Metropolitan District, defendant had consented to this remand and essentially waived his rights to a remand to the next day that the Dublin Metropolitan District Court was sitting. I found that this had been so in the circumstances of this case as the defendant had been legally represented and had not been in*

custody at the time the order was made.

On foot of this finding I found that the matter was correctly before judge McNamara on the 2nd April2012 and that, accordingly, District judge McNamara had jurisdiction to remand the matter further to be dealt with by me."

12. The questions arising are the following: -

1) "Was I correct in holding that section 99(9) of the 2006 Act requires that the defendant be remanded back to the sitting of the court immediately following the order made under section 99(9) when the court is the District Court sitting in the Dublin Metropolitan District?

2) If the answer to question 1 is yes, was I correct in holding that failure to remand the defendant back to the sitting of the court immediately following the order made under section 99(9) of the 2006 Act would deprive the court of jurisdiction to deal with the hearing under section 99(10) of the 2006 Act?

3) If the answer to question 1 is yes, was I correct in holding that a defendant can consent to waive the requirement that he be remanded back to the sitting of the court immediately following the order made under section 99(9) of the 2006 Ac thus giving the court jurisdiction?

4) If the answer to question 1 is yes, was I correct in holding that a defendant's consent to waive the requirement that he be remanded to the sitting of the court immediately following the order made under section 99(9) could be implied by his failure to make any objection to a longer remand?"

Submissions

13. Counsel for the parties are agreed on a number of issues. Firstly, the case is not moot despite the fact that the period of suspension has long since expired (on the 26th January, 2013- three days after the case stated was signed), since the requisite application was made within the appropriate time.

14. They are further agreed that the jurisdiction of the District Court cannot be conferred by acquiescence or consent and that the question is whether the statutory jurisdiction conferred by the Act contemplates the procedure adopted in this case. (However, the prosecutor submits that the issue of acquiescence is nonetheless relevant should the procedure be found to be unlawful.)

15. Finally, counsel are agreed that Judge Watkin was correct in interpreting "the next sitting" as meaning (at least in the Dublin Metropolitan District) the next day and that the "court" sitting on that day does not have to be the judge who imposed the original sentence.

16. On behalf of the prosecutor, Mr. James Dwyer BL submitted that the point of s.99 is to provide a statutory mechanism for the revocation of suspension of a sentence before sentence is passed on the breach offence. It is not integral to this process that the revocation happen on the day following the appearance of the accused in court in relation to the breach offences and the normal practice would not be to deal with the matter on that day. In the circumstances, he submitted that the subsection, insofar as it refers to the "next sitting," should be regarded as directory rather than mandatory. He referred to *State (Elm Developments) v An Bord Pleanala* [1981] I.L.R.M. 108 and *Monaghan UDC v Alf-A-Bet Promotions* [1980] I.L.R.M. 64 as authorities for the proposition that legislative requirements may be seen as directory only, and non-compliance with them excused, where they are "*not of the substance of the aim and scheme of the statute*".

17. Reference was made to the judgment of Hedigan J. in *Harvey v District Judge Leonard* [2008] IEHC 209, where the powers of the judge making the remand order are described as follows:-

"It also seems to me that the first named respondent has jurisdiction to prescribe the procedure in relation to remanding the matter before the other court pursuant to s.99(9) of the Act as amended, notwithstanding the absence of rules of Court and Court forms specifically governing the procedure. The lack of such forms and rules, it seems to me, cannot interfere with the duty of the first named respondent to comply with s.99(9) but rather leaves the judge with the discretion as to how the duty is to be performed."

18. As an alternative argument, reliance was placed on the judgment of the Supreme Court in *DPP (Ivers) v Murphy* [1999] 1 I.R. 98 as authority for the propositions that a) legislation governing criminal procedure may be given a purposive interpretation and b) an illegality attaching to the process by which the accused came before the court does not necessarily have any effect on the jurisdiction of that court to deal with the matter.

19. *Ivers* concerned the proper interpretation of s.6(1) of the Criminal Justice (Miscellaneous Provisions) Act, 1997, which introduced the procedure whereby evidence of arrest, charge and caution could be given by certificate in cases involving an arrest without warrant. The argument made on behalf of the defendant was that the prosecution was obliged, as a condition precedent to the admissibility of the certificate, to prove that the arrest in question had in fact been without warrant. This succeeded in the High Court on the basis of the literal meaning of the provision.

20. In allowing the prosecutor's appeal, the Supreme Court held *inter alia*, that the application of the literal rule in this instance led to an absurdity and was clearly contrary to the intention of the legislature. (The point here was that the section was intended to allow the relevant evidence to be given without necessitating the attendance of the arresting officer- it was therefore absurd to say that he or she had to be present to give evidence of the absence of a warrant.)

21. The Court also laid emphasis on the nature of the process under examination. Denham J. referred to the "well established jurisprudence" that the presence of the accused in court when the charge was laid cured any defect in the procedure. In a passage relied upon by the prosecutor in the instant case, Keane J. referred (at p. 113) to his own earlier judgment in *Killeen v Director of Public Prosecutions* [1997] 3 I.R. 218, as being at that time the most recent restatement of a "well settled principle":

"I said (atp.228):-

'It can, in general, be said that the jurisdiction of the District Court to embark on any criminal proceeding, including the holding of a preliminary examination, is unaffected by the fact, if it be the fact, that the accused

person has been brought before the court by an illegal process. This was so held by Davitt P. in The State (Attorney General) v Fawsitt [1955] I.R. 39 at p. 43 where he said:-

> *'The usual methods of securing the attendance of an accused person before the District Court, so that it may investigate a charge of an indictable offence made against him, is by way of arrest or by way of formal summons, but neither of these methods is essential. He could, of course, attend voluntarily, if he so wished: so far as the exercise of the Court's substantive jurisdiction is concerned it is perfectly immaterial in what way his attendance is secured, so long as he is present before the District Court in court at the material time. Even if he is brought there by an illegal process, the Court's jurisdiction is nonetheless effective.' "*

22. Keane J. went on to point out that the general principle was subject to certain qualifications. He instanced, *inter alia*, the possibility that the process by which a person was brought before the court might involve a deliberate and conscious violation of constitutional rights, in which case the court might be justified in refusing to embark upon the hearing, or in an appropriate case to remand the matter so as to enable the person concerned to apply to the High Court.

23. Seen in this context, according to Mr. Dwyer, the term "the next sitting" in the subsection should be seen as a "technical" or "peripheral" phrase.

24. In answer to a query from the Court as to whether this interpretation could be applied where a person was in custody, Mr. Dwyer submitted that a remand in custody in these circumstances would not be unlawful if it was for a "reasonable" time.

25. It was argued that acquiescence (in this case the failure to make any objection in the Circuit Court when the order was made) is relevant to the considerations raised by Keane J. in *Killeen* (above, in the passage quoted from *Ivers*). The point here is that an absence of objection demonstrates that any illegality in the process could not be of such an order as to call for a refusal to embark on a hearing on the part of a judge.

26. On behalf of the defendant, Mr. Micheal P. O'Higgins SC submitted that the issue is one of statutory interpretation and that the legislative intent behind the subsection is clear and does not lead to absurdity. Mr. O'Higgins referred to the judgment of Blayney J. in *Howard v Commissioners of Public Works* [1994] 1 I.R. 101 where the following passage from *Direct United States Cable Company v Anglo American Telegraph Company* [1877] 2 A.C. 394 was cited:

> *"The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the lawgiver."*

27. Reliance was placed upon the decision in People *(DPP) v Devine* [2011] IECCA 67. In that case, the Court of Criminal Appeal had imposed a suspended sentence. During the currency of the suspension, the accused appeared before the District Court and pleaded guilty to a number of summary charges. The District Judge, who was not informed of the amendment brought about by s. 60 of the 2007 Act, imposed a three month sentence and then remanded him to the Court of Criminal Appeal for the purposes of s.99. The Court held that, having regard to the provisions of the section as amended, the District Court should first have remanded the accused to the next sitting of the Court of Criminal Appeal so that the suspended sentence could be reinstated in whole or in part. The latter court would then have remanded him back to the next sitting of the District Court for the imposition of sentence.

28. In deciding what the consequences of the irregularity were, the Court of Criminal

Appeal ruled as follows: -

> *"Both the Court of Criminal Appeal and the District Court are creatures of statute and have such jurisdiction as is conferred upon them by statute. The District Court had no jurisdiction to impose sentence on the respondent without first complying with section 99(9) as amended. The effect of section 99(9) as amended on the jurisdiction of this court is that its jurisdiction to revoke in whole or in part the suspended portion of the respondent's sentence arises only if the respondent is remanded to this court in accordance with section 99(9). As the respondent has not been remanded to this court in accordance with section 99(9) this court has no jurisdiction to carry out its function envisaged under section 99(1OJ and (1OA). For the jurisdiction of this court to arise it would be necessary that the orders made by the District judge on the 22nd April 2008 be set aside and an order in compliance with section 99(9) of the Criminal justice Act 2006 made remanding the respondent to this court."*

29. The court therefore made no order.

30. Mr. O'Higgins stressed that the requirement is only to bring the defendant before a "court" rather than necessarily the same judge who imposed the original suspended sentence -this is in ease of the process and permits a further remand to that judge. However, for the latter to have jurisdiction under subsection (10), the defendant must have been the subject of a valid order under subsection (9).

31. Mr. O'Higgins submitted that the provision cannot be seen as directory only, since it contemplates a remand in custody and must therefore be construed as a penal statute.

32. It was contended that the argument, based on *Ivers* and *Killeen*, that a court can have jurisdiction even if the order is bad, cannot sit with the reasoning in *Devine*. Suspended sentences are now entirely governed by a statutory step-by-step procedure and cannot be compared with the common law jurisdiction to deal with a criminal complaint when a person is brought before a court. The jurisdiction under subs. (10) can only arise where a person is remanded to the court under subs.(9).

Discussion and conclusions

33. In my view the first issue -whether the requirement to remand to the next sitting is mandatory or directory- can be dealt with in short order by considering what would have happened if the Circuit Court judge in this case had remanded the defendant in custody. I have no doubt but that there would have been an immediate application to the High Court under Article 40.4, on the basis that the period of the remand exceeded that prescribed under the statute. I do not consider that an argument based on the proposition that the statute in fact conferred a discretion to remand for a "reasonable" time could have succeeded. The cases dealing with regulations under the Planning Acts are not of assistance in this regard.

34. The provision does not distinguish between the situations of persons in custody and those on bail and must be amenable to an

interpretation applicable to both situations. It must therefore, in my view, be held to be mandatory.

35. The issue then arises as to the consequences of a breach of the terms of the statute.

36. It seems to me that there may be a degree of tension between the classic view, as endorsed by the Supreme Court in *Ivers,* relating to the general immateriality of the lawfulness of a procedure by which a defendant is brought before a court, and the stricter approach of the Court of Criminal Appeal in *Devine*. It may be that Mr. O'Higgins is right in saying that the distinction is between the common law analysis of the position when a person is brought to answer a complaint and the proper construction of a mandatory, self-contained statutory procedure. Another example of the latter can be seen in *O'Brien v Special Criminal Court* [2007] IESC 45. In that case the Supreme Court held that to bring a person before the Special Criminal Court 15 hours after arrest might well, in the circumstances, have been as soon as was practicable; but it did not comply with the statutory requirement that he be charged "forthwith". By statute, the jurisdiction of the Special Criminal Court depends on the accused being "lawfully brought" before it, and the breach of that provision meant that the court had no jurisdiction.

37. However, *Broe v DPP* [2009] IEHC 549, is an example of the *Killeen* and *Ivers* approach being adopted in relation to a statutory provision. In that case, the applicant had been released from detention under s.4 of the Criminal Justice Act, 1984. He was then re-arrested for the same offence for which he had been detained - this was permissible under the Act because it was for the purpose of charging him "forthwith". Because it was a Sunday, there was a delay of some three hours and 45 minutes before a District Court sitting was arranged.

38. Having considered *O'Brien*, Ryan J. held that the delay, however innocent, was a breach of the statutory obligation to charge "forthwith". However, having regard to *Ivers*, and also to the decision of McGuinness J. in *DPP v Bradley* [2000] 1 I.R. 420 (where the accused had been brought before the court on foot of an arrest without warrant for which there was no lawful authority), he considered that there had been no breach of the applicant's rights such as to justify a finding that the District Court had no jurisdiction to deal with the complaint against him.

39. The question here is ultimately one of jurisdiction. The issue is not whether the defendant was properly brought before the District Court, but whether a lawful foundation had been laid for the exercise by the District Court of its powers under subs.(10) of the Act. It seems to me that this issue must be approached on the basis that the powers in relation to suspended sentences are now entirely governed by statute, and that the statutory power to revoke such a sentence under subs.(10) of the Act depends on a valid order having been made under subs. (9). I propose therefore to follow *Devine* and hold that in this case the District Court had no jurisdiction to deal with the applicant. I do so on the basis that *Devine* is a decision of the Court of Criminal Appeal directly concerned with the proper interpretation of the statutory provisions in issue in this case.

40. If this analysis is correct, the relevance of acquiescence in the only aspect contended for by the prosecution does not arise.

41. I am conscious of the fact that the defendant's legal representatives made no objection to the order in question. It is of course the case that the primary obligation to ensure that a judge in criminal proceedings does not fall into error rests upon the prosecution. In turn, that should not be seen as absolving counsel for the defence from his or her duty to protect his or her client from being subjected to an unlawful order. However, it seems clear in the instant case that neither the judge nor any of the lawyers present adverted at the time to the possible infirmities of the order.

42. In the circumstances I propose to answer the questions in the case stated as follows:

1. Yes.

2. Yes.

3. Does not arise.

4.No.