THE COURT OF APPEAL

Neutral Citation Number: [2016] IECA 411

2016/349

Birmingham J.
Mahon J.
Edwards J.

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

Between/

Anthony Foley

Appellant

- and–

The Governor of Portlaoise Prison

Respondent

JUDGMENT delivered by Mr. Justice Mahon on the 21st day of December 2016

1. The application for an inquiry under Art. 40.4.2 of the Constitution was heard by the High Court (McDermott J.) on 25th May 2016. In his reserved judgment delivered on 14th June 2016, McDermott J. refused the application. The appellant has appealed against the entire of that judgment.

2. The background facts and the chronology of events relevant to the application to the High Court are set out in detail in the judgment under appeal. Therefore I propose only to refer to them briefly in this judgment. On 11th October 2006 the appellant was sentenced at Dublin Circuit Criminal Court in respect of three offences, one concerning the handling of stolen property and two of false imprisonment. Two of the offences were committed on 12th October 2005, and one was committed on 25th January 2005. In respect of the first offence, the appellant was sentenced to twelve months imprisonment and in respect of the second and third offences, to terms of seven years imprisonment. The second and third offences were committed when the appellant was on bail for the first offence, so that the seven year sentences were directed to be served consecutively to the twelve months sentence. The total eight year sentence was however suspended on conditions for a period of five years. An application for a review of that sentence pursuant to s. 2 of the Criminal Justice Act 1993 was made by the DPP to the Court of Criminal Appeal, and that Court, on 19th April 2007, while upholding the total eight year term directed that only the final five years should be suspended, and subject to certain conditions. The five year suspended element of the sentence was for a period of five years from the date of release from the initial three year custodial term. The necessary bond was duly entered into before the Governor of the Prison prior to his release from prison. Subsequently, and following his release from prison, and within the period of the suspended sentence, the appellant was convicted of handling stolen property, on 19th August 2009. He was remanded to the Court of Criminal Appeal under s. 99(9) of the Criminal Justice Act 2006 (as amended). He was also convicted on 16th September 2009 for possession of a screwdriver with the intention that it be used in connection with the theft of property from a motor vehicle and likewise, he was remanded to the Court of Criminal Appeal pursuant to s. 99(9) of the 2006 Act in respect of that conviction.

3. An aspect of the case which was dealt with on 19th October 2011 by the Court of Criminal Appeal was the appellant's claim that he ought to properly have been sent back to the Circuit Criminal Court, rather than the Court of Criminal Appeal, in respect of the applications to activate all or part of the five year suspended sentence. The Court of Criminal Appeal proceeded to revoke the five year suspended sentence resulting in the appellant being sent back to prison. He continues to serve that sentence, but is expected to be released shortly from prison.

4. The Court of Criminal Appeal however also granted a certificate under s. 29 of the Courts of Justice Act 1924 certifying that the case involved a point of law of exceptional public importance namely:-

> *"Where the Court of Criminal Appeal has varied a sentence pursuant to s. 2 of the Criminal Justice Act by wholly or partly suspending it, is the Court of Criminal Appeal the appropriate Court vested with jurisdiction to consider the revocation of the suspended sentence pursuant to s. 99(10) of the Criminal Justice Act 2006, as amended?"*

5. The Supreme Court on 23rd January 2014, answered the question posed by the Court of Criminal Appeal in the affirmative.

6. On 9th July 2014 the appellant instituted declaratory proceedings by way of plenary summons seeking, *inter alia*, a declaration that s. 99(9)(10) and (12) of the Criminal Justice Act 2006 (as amended) are invalid having regard to the provisions of the Constitution and, in particular " (to the) Preamble Articles 34, 38 and 40 thereof and any rights implied therein". The proceedings also sought a declaration that s. 29 of the Courts of Justice Act 1924 (as amended) was unconstitutional insofar as it delimits an appeal under s. 99(12) of the Criminal Justice Act 2006 (as amended) from the Court of Criminal Appeal to the Supreme Court. An Order was also sought directing the release of the appellant from his detention in the event that it is established that there has been a breach of his constitutional rights with respect to his ability to appeal his sentence in that no provision exists for him to appeal. In these proceedings, following the delivery of a statement of claim, a defence was delivered on 21st November 2014. No further step has been taken in relation to the substantive issue in these proceedings since that time.

7. In 2016 the High Court (Moriarty J.), in *Moore and ors. v. DPP and ors.* [2016] IEHC, 244, ss. (9) and (10) of the 2006 Act were declared invalid on the basis that they were repugnant to the Constitution. The issue in *Moore* was the requirement under s. 99 (9) and (10) that the activation of a sentence be considered prior to any appeal that might be taken against the conviction and the determination by the original sentencing Court as to whether the suspended sentence or a part of the suspended sentence be activated. Moriarty J. decided that the said subsections were repugnant to the Constitution because they unduly interfered with the right of appeal from the District or Circuit Courts insofar as they prevented persons from initiating and concluding appeals against

conviction prior to the determination of the activation issue. The High Court held that the provisions were invalid as being repugnant to Art. 38.1 and Art. 40.3 of the Constitution.

8. In this case, the appellant's grounds of appeal are as follows:-

> (i) The learned High Court judge erred in law in his interpretation and application of the established case law (primarily *A. v. Arbour Hill*) to the facts of this case. (This is described by the appellant as his primary ground of appeal).
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> (ii) The learned High Court judge incorrectly applied what is colloquially called "the rule in *A v. Arbour Hill"*, the appellant having submitted that on the face of the rule established by the Supreme Court in that case, that this rule did not apply to the appellant having regard to the circumstances of this case.
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> (iii) The learned High Court judge erred in finding that the appellant did not impugn the conduct of the prosecution on any grounds in law which may be open to him before the case reaches finality, on appeal or otherwise.
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> (iv) Contrary to the learned High Court's judge analysis, the appellant is not seeking to rely on the finality principles set out in *A. v. Arbour Hill*. Rather, the finality principle in *A* was the basis by which the Supreme Court decided that particular appellant, on his facts, should be declined relief to which he was otherwise entitled. It is viewing matters upside down to say the appellant is relying on the finality argument. The appellant is relying on Article 40.4.2 of the Constitution and the fact that the legalisation underpinning his current detention has been found to be repugnant to the Constitution. It is well established that that declaration applies *erga omnes* and renders the statutory provision in question void *abi nitio*.
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> (v) The warrants purported justify the appellant's detention suffer from fundamental errors on the face of the record in that they refer to s. 99(9) and s. 99(10) of the Criminal Justice Act 2006 which said provisions are repugnant to the Constitution and void *abi nitio.*
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> (vi) The public policy considerations which are extensively outlined in *A. v. Arbour Hill* were set out to justify the finality principle and were not intended to constitute free standing basis for refusing to give a person challenging his detention the benefit of the declaration of repugnancy.
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> (vii) The learned High Court judge erred in finding that the principle of finality as stated in *A. v. Arbour Hill* applied to the appellant having found, erroneously, that the appellant's case had reached finality without the appellant have impugned the bringing or the conduct of the prosecution.
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> (viii) In the alternative, if the learned High Court judge was correct in finding that rule in *A. v. Arbour Hill* did apply to the appellant, he erred in failing to conclude that the appellant, on the singularly unusual facts of his case fell within the exceptions to the rule in *A*.
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> (ix) The learned High Court judge erred in finding the differences and the prejudice identified in the decision of *Moore v. Ireland* [2016] IEHC 244 and the prejudice identified by the appellant in his case disentitled the appellant to relief.
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> (x) The learned High Court judge erred in attaching significance to the appellant's plea of guilty to the "trigger" offences. The detaining order is the activated sentence, not the sentence on the trigger offences. Secondly, to the extent it is in any way relevant, the appellant did not acquiescence in the activation order being made against him.
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> (xi) The learned High Court judge erred insofar that he found that the appellant acquiescenced in the process whereby the sentence was activated. Neither "acquiescence" or "waiver" arises on the facts of this case in the sense in which those terms are correctly understood in the authorities.
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> (xii) The learned High Court judge erred in law in his understanding of the type of "conduct" that is required to deny an appellant relief to which he is otherwise entitled.
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> (xiii) The continued detention of the appellant gives rise to a demonstratable injustice of a fundamental nature. He is currently not be detained in accordance with law. The sections underpinning the orders which have lead to his detention never existed in law. He impugned s. 99 both before and after the trials consideration of the activation question and this was long before the *Moore* judgment saw the light of day.
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> (xiv) The learned High Court judge erred in concluding that it was only in the most exceptional cases that an appellant may secure his release post conviction under Art. 40 and it should only be in the most exceptional circumstances that a declaration of invalidity within the rules set out in *A. v. The Governor of Arbour Hill* should apply retrospectively.
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> (xv) The learned High Court judge erred in concluding that there was any onus on the appellant to demonstrate circumstances which establish such a default of the fundamental requirements and fair procedures that would justify his release. The onus in an Art. 40 application lies on the detainer not on the applicant.

9. It is useful at this juncture to set out the relevant provisions of s. 99 of the Criminal Justice Act 2006. They are:-

> 99.(1) Where a person is sentenced to a term of imprisonment (other than a mandatory term of imprisonment) by a court in respect of an offence, that court may make an order suspending the execution of the sentence in whole or in part, subject to the person entering into a recognisance to comply with the conditions of, or imposed in relation to, the order.
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> (2) It shall be a condition of an order under subsection (1) that the person in respect of whom the order is made keep the peace and be of good behaviour during:-
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> > (a) the period of suspension of the sentence concerned, or
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> > (b) in the case of an order that suspends the sentence in part only, the period of imprisonment and the period of suspension of the sentence concerned,
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> > and that condition shall be specified in the order concerned.

(9) Where a person to whom an order under subsection (1) applies is, during the period of suspension of the sentence concerned, convicted of an offence, the court before which proceedings for the offence were brought shall, after 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.

(10) A court to which a person has been remanded under subsection (9) shall revoke the order under subsection (1) unless it considers that the revocation of that order would be unjust in all the circumstances of the case, and where the court revokes that order, the person shall be required to serve the entire of the sentence of imprisonment originally imposed by the court, or such part of the sentence as the court considers just having regard to all of the circumstances of the case, less any period of that sentence already served in prison and any period spent in custody (other than a period during which the person was serving a sentence of imprisonment in respect of an offence referred to in subsection (9)) pending the revocation of the said order.

(12) Where an order under subsection (1) is revoked in accordance with this section, the person to whom the order applied may appeal against the revocation to such court as would have jurisdiction to hear an appeal against any conviction of, or sentence imposed on, a person for an offence by the court that revoked that order.

(17) A court shall, where it is satisfied that a person to whom an order under subsection (1) applies has contravened a condition of the order, revoke the order unless it considers that in all of the circumstances of the case it would be unjust to so do, and where the court revokes that order, the person shall be required to serve the entire of the sentence originally imposed by the court, or such part of the sentence as the court considers just having regard to all of the circumstances of the case, less any period of that sentence already served in prison and any period spent in custody pending the revocation of the said order."

10. The learned High Court judge, in the course of his judgment, referred in some detail to a number of decisions of the Superior Courts. Two of these, the *A* case and the *Moore* case are of paramount importance and central to these proceedings.

11. The *A* case was decided by the Supreme Court on 10th July 2006. The appellant in that case was convicted in the Circuit Criminal Court on 15th June 2004, having pleaded guilty to unlawful carnal knowledge contrary to s. 1(1) of the Criminal Law Amendment Act 1935, and was later sentenced to three years imprisonment. The appellant sought release from custody pursuant to Art. 40.4.1 of the Constitution contending that his detention was unlawful on the basis that on 23rd May 2006 the Supreme Court declared s. 1(1) of the Criminal Law (Amendment) Act 1935 to be inconsistent with the Constitution (*C.C. v. Ireland [2006] IESC 33*). It was this section that created the offence of which the appellant was convicted. The appellant sought to have his conviction quashed on the basis that the relevant statutory provision was unconstitutional, albeit the fact that the relevant provision was found to be unconstitutional subsequent to the date of his conviction and the conclusion of his proceedings arising therefrom.

12. The High Court (Laffoy J.) held that the effect of the decision of the Supreme Court in *C.C.*, in 2006, was that the relevant statutory provision ceased to have effect from 1937, and therefore did not exist in law at the time when the charge was laid against the appellant. This decision was reversed by the Supreme Court. The Supreme Court held, (as per the head note), that there was neither an express nor an implied principle of retrospective application of unconstitutionality in the Constitution. It was not a principle of constitutional law that cases which have been finally decided and determined on foot of a statute which was later found to be unconstitutional must invariably be set aside as null and void and of no effect. Once finality had been reached and the parties had in each case exhausted there actual or potential remedies the judicial decision must be deemed valid and lawful.

13. In the course of his judgment, Murray C.J. stated *The general principle* to be as follows:-

"In a criminal prosecution where the State relies in good faith on a statute in force at the time and the accused does not seek to impugn the bringing or conduct of the prosecution, on any grounds that may in law be open to him or her, including the constitutionality of the statute, before the case reaches finality, on appeal or otherwise, then the final decision in the case must be deemed to be and to remain lawful notwithstanding any subsequent ruling that the statute, or a provision of it, is unconstitutional. That is not the general principle.

I do not exclude by way of exception to the foregoing general principle, that the grounds upon which a court declares a statute to be unconstitutional or some extreme feature of an individual case might require for wholly exceptional reasons related to some fundamental unfairness amounting to a denial of justice, that verdicts in particular cases are a particular class of cases be not allowed to stand.

I do not consider that there are any grounds for considering this case to be an exception to the general principle. The applicant, like all persons who pleaded guilty to or were convicted of an offence contrary to s. 1(1) of the Act of 1935 had available a full range of remedies under the law. They could have sought to prohibit the prosecution on several grounds including that the section was inconsistent with the Constitution. Not having done so they were tried or either convicted or acquitted under due process of law. Once finality is reached in those circumstances, the general principle should apply."

14. Murray C.J. also said:-

"I am quite satisfied that the Constitution never intended to visit on that ordered society the potential unravelling of judicial decisions over many decades when a particular Act is found unconstitutional solely on the consideration of the abi nitio to the exclusion of all others.

15. In her judgment, Denham J. (as she then was) stated:-

"Not only do they not permit an appellant to appeal a "triggering conviction", prior to the determination of an activation hearing."

16. Reference has already been made in the course of his judgment to Moore. In the concluding part of his judgment in that case Moriarty J. made the following determination:-

"…I am persuaded that notwithstanding the presumption of constitutionality that exists in relation to enactments, and the regard and respect that Courts must show to enactments of the Oireachtas, the sub sections under review of

section 99 fall to be viewed as unconstitutional in the context of the facts reviewed and the arguments made."

(The subsections referred to are (9) and (10)).

Discussion

17. It is contended by the respondent that the declaration in 2016 that s. 99(9) and (10) of the 2006 Act are unconstitutional did not retrospectively invalidate their application and use in the prosecution of the appellant, and more specifically in the activation of the appellant's suspended sentence and did not therefore undermine orders made, and more particularly, could not undermine orders made in concluded proceedings prior to such a declaration being made. The respondent relies on the Supreme Court's decision in A as the primary authority for such contention.

18. The appellant maintains that A does not preclude the appellant from bringing his challenge and benefiting from the decision in *Moore.* The appellant maintains that his case comes within the exception to the rule as provided for in *A.* He also maintains that since the declaration of repugnancy operates to render the sub sections void *abi nitio*, the court activating the suspended sentence lacked jurisdiction on two separate and distinct grounds, firstly the remand order pursuant to subsections 9 on foot of which the appellant was brought before the activation court was invalid and devoid of legal effect and, secondly, the statutory power utilised by the activation court to activate the sentence and order the appellant's imprisonment was not available to the court as it was a power that no longer existed.

19. The so called exception to the rule in *A* is the following reference, in the course of his judgment, by Murray C.J.:-

> *"In a criminal prosecution where the State relies in good faith on a statute in force at the time and the accused did not seek to impugn the bringing or conduct of the prosecution, on any grounds that may in law be open to him or her including the constitutionality of the statute before the case reaches finality, on appeal or otherwise, then the final decision in the case must be deemed to be and to remain lawful notwithstanding any subsequent ruling that the statute, or a provision of it, is unconstitutional. That is the general principle."* [Emphasis added]

20. The appellant submits that he sought *to impugn the bringing or conduct of the prosecution* prior to its conclusion in early 2014, some six months or so prior to the institution of his civil proceedings.

21. The appellant maintains that he did *impugn* the *bringing or conduct of the prosecution* on the basis that in the course of his appeal to the Court of Criminal Appeal the appellant raised a preliminary point as to the applicability of the Statute and the unfairness that might arise where a particular construction be given to it. That prompted the Court of Criminal Appeal to refer a question to the Supreme Court, and which was answered as already stated. The appellant maintains that on this basis he should retrospectively have the benefit of the decision in *Moore*. The appellant also further maintains that the reference in *A* by Murray C.J. to *before the case reaches finality* on appeal or otherwise should be considered in the context of the appellant's civil proceedings commenced in July 2014 constituting an otherwise scenario. The appellant argues that the institution of these proceedings in which the constitutionality of s. 99 is clearly an issue, albeit arising after the conclusion of the criminal proceedings and before the decision in *Moore*, ought to be deemed an exception to the rule in *A* as contemplated by Murray C.J. in the aforementioned quotation from his judgment.

22. The tight restraint on the retrospective effect of declarations of unconstitutionality in relation to statutory provisions as enunciated by the Supreme Court in A has clearly been followed by subsequent decisions of the Superior Courts. In *Ryan v. DPP* [2006] IEHC 380, a case in which the applicant sought to benefit from the decision in *Moore*, Regan J. in rejecting that application stated as follows:-

> *"I am satisfied that in a case such as the within application for certiorari the case law provides that each case must be examined on its own merits and the authorities do not establish that a declaration of invalidity has a blanket retrospective effect.*
>
> *I am satisfied that the applicant's criminal case had reached finality prior to the institution of the within judicial review application and that this judicial review application could not be considered part of the process in order to establish that finality had not yet been reached, notwithstanding that judicial review was sought within the time limits afforded."*

23. Having set out his basis for this finding, O'Regan J. went on to state as follows:-

> *"Furthermore, even if finality had not been reached, the applicant in the instant matter is debarred by his conduct from securing the reliefs claimed by him on the basis that:-*
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> *(a) The applicant pleaded guilty to the trigger offence.*
>
> *(b) He had breached the two conditions of the suspended sentence, namely to be of good behaviour and to remain entirely alcohol free.*
>
> *(c) He did not maintain an appeal of the revocation of a portion of the suspended sentence under s. 99(12).*
>
> *(d) The trigger offence was committed eight months following his release from prison.*
>
> *(e) The trigger offence was that of criminal damage, being one of the offences in the initial offence.*
>
> *(f) At the hearing of the revocation to suspend the sentence, the applicant did not raise a constitutional issue and in fact engaged with the provisions of s. 99(10) in or about securing a partial revocation of the suspended sentence."*

24. In *Larkin v. The Governor of Mountjoy Prison* [2016] IEHC 680, similarly a post *Moore* Art. 50 application, Eager J. re-iterated that, based on the authorities, a declaration of the invalidity of a statutory provision does not have blanket retrospective effect.

25. The use of the word *impugn* by Murray C.J. in A must be read within the context of the section of his judgment to which it refers, and the overall purpose and intention of the Supreme Court in that case. Taken literally, the word could be said to mean any challenge of any nature to the bringing or conduct of a prosecution including, simply, a plea of not guilty or other challenge to the

prosecution. This is hardly what was intended by the Supreme Court. Furthermore the subject of the challenge that was made by the appellant in the course of his criminal proceedings, and more particularly as part of his appeal to the Court of Criminal Appeal related to a different issue than was the subject of *Moore*. To the extent that any such challenge occurred in the course of the criminal proceedings, it was determined by the Court of Criminal Appeal and / or the Supreme Court as part of those criminal proceedings.

26. Insofar as the institution of the current civil proceedings in July 2014 can be said to be an otherwise event such as might delay the *finality* of the criminal proceedings beyond January 2014, it is very difficult and indeed unlikely such an argument can be considered sustainable. If such was the case the institution of proceedings, such as the civil proceedings in this case instituted in July 2014, could, conceivably commence years after the conclusion of the criminal proceedings. Surely, it could not be argued in those circumstances that the commencement of such civil proceedings effectively operated to delay or otherwise stay the conclusion of the criminal proceedings such as to extend and permit the retrospectivity of a finding of unconstitutionality and thereby undermining a criminal conviction or a sentence long pre-dating same.

27. Referring to the judgment of Murray C.J. in A the learned High Court judge said:-

> *"The appellant's submission, if correct, would undermine the principle as set out by the learned Chief Justice insofar as an applicant could at any time following the conclusion of criminal proceedings initiate, by way of plenary summons, declaratory proceedings in respect of the constitutionality of the Statute. If those proceedings were not concluded by the time a declaration of invalidity was delivered in parallel proceedings by another applicant the plaintiff in the plenary proceedings could claim to be entitled to the benefit of the declaration notwithstanding the fact that he has not issued proceedings or taken any step to challenge the constitutionality of the Statute during the course of his own criminal proceedings. He would claim to do so on the basis that his plenary proceedings had not concluded. I am satisfied that this is contrary to the spirit intention and purpose of the principle established in A."*

28. As to the differences in the focus of the issues in Moore and these civil proceedings instituted by the appellant in July 2014, the learned High Court judge stated:-

> *"As already stated, I do not consider that the difficulties raised in respect of the process of revocation which was the subject of the Moore judgment are relevant to this case. It is clear that the plenary proceedings initiated by the appellant following that judgment challenged the validity of s. 99(9), (10) and (12). It is equally clear that the main focus of the challenge is sub section (12) on grounds which are materially different to those relied upon in Moore case. The applicant's claim is framed on the basis of a challenge grounded on the alleged unfairness and unjustifiable discrimination between those whose sentences were revoked under the proceedings in respect of the right of appeal under s. 99(12) and his own."*

29. In the concluding part of his judgment, he stated:-

> *"This case was dealt with in accordance with the law then applicable. Though the applicant makes a claim in respect of the unconstitutionality of s. 99(12), no effort was made to make such a challenge during the course of the hearing or pending the determination of the Court of Criminal Appeal to revoke. While the applicant continues to pursue that declaration of invalidity in the plenary summons which are still pending, he expressly denied to do so in this application. However, the submission was made as already discussed, that the effect of the deficiency in the appeal procedure gives raise to a fundamental injustice in his case which constitutes a breach of his constitutional rights. In effect, that is another way of presenting the argument that he is entitled to the retrospective effect of the declaration of invalidty and Moore because the injustice caused by the application of s.s. 99(9) and (10) is compounded by the deficiency in the appeal procedure set out in s. 99(12). For the reasons already given I did not accept that the applicant is entitled to relief under Art. 40 on the basis of this submission."*

Conclusion

30. I am satisfied that the appellant cannot succeed in his appeal. He is not entitled, in my view, to benefit from the declarations of unconstitutionality in *Moore* in relation to subsections (9) and (10) in a manner which would serve to undermine or invalidate the activation of his five year suspended sentence at a time approximately two years prior to the decision in *Moore* and at a considerable remove after the conclusion of his criminal proceedings. I am also satisfied in the circumstances that the institution by the appellant of civil proceedings in July 2014, some six months following the conclusion of the criminal proceedings, can not reopen the retrospectivity aspect of the decision in *Moore* in a manner which could undermine or invalidate the activation of the five year suspended sentence, or the basis of his imprisonment in consequence of such activation.

31. I would therefore dismiss the appeal.