Neutral Citation: [2016] IEHC 287

THE HIGH COURT

[2016 No. 548 S.S.]

IN THE MATTER OF AN INQUIRY UNDER ARTICLE 40.4.2° OF THE CONSTITUTION OF IRELAND

BETWEEN

PATRICK DONOVAN

APPLICANT

AND

GOVERNOR OF MIDLANDS PRISON

RESPONDENT

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 26th day of May, 2016

1. In *Grant v. Governor of Cloverhill Prison* [2015] IEHC 768 (Unreported, High Court, 27th November, 2015) I considered the difficulty and confusion surrounding the format of committal warrants issued by the District Court for persons remanded in custody. The present application now raises the separate but related issue of confusion and difficulty regarding the forms of warrants of execution where the District Court sentences a person to a term of imprisonment. It might seem surprising that such bread-and-butter issues regarding the work of the District Court - work that carries on tasks entrusted to courts of summary jurisdiction on this island for centuries (justices of the peace being given statutory mention as far back as the Forcible Entry Act 1634, so far as statutes currently in force are concerned) – remain the subject of confusion. As I did in *Grant*, I might take the opportunity to respectfully suggest to the Oireachtas and the District Court Rules Committee that greater clarity be introduced in this regard.

Facts

2. It is admitted (the applicant having ultimately pleaded guilty in this regard) that on 23rd February, 2015 the applicant committed the offence of assault causing harm contrary to s. 3 of the Non-Fatal Offences against the Person Act 1997.

3. The applicant was duly charged and appeared in Kilkenny District Court on a number of dates, initially 15th September, 2015, and 13th and 20th October, 2015. On the latter date, a trial date was fixed.

4. On 10th May, 2016, the applicant, as noted above, pleaded guilty and was sentenced to imprisonment for a period of six months. Recognisances were fixed but these were not taken up. A warrant of execution was issued by Kilkenny District Court, and the applicant was detained in the Midlands Prison.

5. On the morning of Friday, 13th May, 2016, an application under Article 40.4 of the Constitution was moved on behalf of the applicant before Haughton J. I am told by Mr. Mícheál P. O'Higgins S.C. (who appeared with Mr. Karl Monahan B.L.) for the applicant that this concluded around 3pm or 3.30 p.m. An order directing an inquiry was made, returnable for approximately 4 p.m. or 4.30 p.m. that afternoon.

6. I am further informed that when the matter returned to Haughton J., the applicant sought a direction that all matters would proceed together at that point, whereas the respondent sought time to consider the issues further. Two categories of issues were identified, an allegation that the warrant was bad on its face for failure to recite that the District Court found the offence to be a minor offence fit to be tried summarily, and another alleged infirmity regarding the extent to which consideration of community service should be recited on the face of the warrant. I am told that the respondent was particularly anxious for time to deal with the latter issue.

7. The order made by Haughton J. on its face simply adjourned the matter to Monday, 16th May, 2016, at 2 p.m. However, I am informed by the parties what was, in fact, directed was that the first issue, namely the alleged error on the face of the warrant due to a failure to recite that the offence had been found to be minor, should proceed as a discrete and separate issue for hearing on the date so fixed, and the remaining issue would be tried at a later date. Thus, essentially, the direction was that the Article 40 application be tried in a modular manner. When the parties appeared before me (the matter having come on before me during the Whit vacation as duty judge assigned to sit on 16th May, 2016), it was on the basis that they had prepared for the hearing of that first issue alone.

8. I canvassed with the parties whether they wished to maintain this modular approach or whether it would be preferable to have all matters heard together on the same date by the same judge, but in the light of their responses to that query, I considered that the most appropriate course and the one best in keeping with the wishes of the parties was to maintain the modular approach as already directed by Haughton J., which was the basis on which they had prepared for the hearing on 16th May, 2016.

9. On that date I, therefore, dealt with the single identified issue referred to above. I indicated following the hearing that I was dismissing the application insofar as it dealt with that point and that I would give more detailed reasons at a later stage; which I now do. I also adjourned the balance of the Article 40 application to the duty judge sitting on Friday, 20th May, 2016, in an endeavour to balance the requirement or expedition with the need to ensure natural justice for the respondent and to permit reasonable preparation time for what are said to be novel points of law in that regard. I appreciate that, on one view, it would be more desirable if the same judge could deal with all aspects of a single Article 40 application (which was one of the reasons motivating my query to the parties already referred to). However, the outcome of the situation is essentially a consequence of the order already made by Haughton J., which, in effect, was intended to direct a modular trial of the application. Ideally, I would have liked to deal with the second "module" myself but I was not available on 20th May, 2016 and the requirement of expedition appeared to me to militate in favour of giving the applicant an early hearing of the remaining issues, even if that had to be before another judge.

How many categories of offences exist for the purposes of warrants of execution?
10. At one level it seems surprising that there could still be doubt or confusion as to the number of categories of criminal offences that could be the subject of warrants of execution, or as to the appropriate form of such warrants. Could it be the case that matters as basic as these can still be the subject of debate? Apparently it could.

11. It is not possible to assess the challenge to the warrant of execution in this case without first endeavouring to systematise the types of criminal offences and the forms of warrant in each case. At the most basic level, it seems to me that there are three categories of criminal offences:

(a) offences that are summary only;

(b) offences triable either way; or

(c) offences that are indictable only.

12. As regards offences that are summary only, these are relatively straightforward and are inherently minor offences. Order 25, rule 1 of the District Court Rules provides a number of forms of warrants of execution, but does not specifically spell out which warrants apply to which categories of offences. However, it seems to me that the appropriate warrant for a sentence of imprisonment for a summary only offence is Form 25.1. That form does not recite either a finding that the offence is minor or that the D.P.P. has consented to summary disposal. Those omissions are consistent only with the form being applicable to summary only offences.

13. Offences "triable either way" constitute Type B. While Mr. Conor Power S.C., for the respondent used the expression "hybrid offence" in a very refined and special sense in his argument, I did not find that attempt at conceptual and terminology biodiversity to be particularly helpful. Speaking of the American context, Posner J. has said that "[*p*]*roliferation of legal categories is a chronic problem*" (U.S. v. Johnson 380 F.3d 1013, 1014 (7th Cir., 2004). It is clear from *Dillon v. Judge McHugh v. D.P.P.* [2013] 1 I.R. 430 at 446 that Denham C.J. treated the expression "*hybrid offence"* as equivalent to "one which may be prosecuted either summarily or on indictment". Thus, it is best to use the term "hybrid offence" (if it must be used at all) as merely a synonym for an offence triable either way.

14. There are two subcategories of "either-way" offences:-

B1. Either-way offences triable summarily without the consent of the accused. The vast majority of "either-way" offences come into this category. The consent of the accused is not generally required for a summary trial of such offences (see *The State (McEvitt) v. Delap* [1981] I.R. 125 at 131 per O'Higgins C.J. citing *Attorney General (O'Connor) v. O'Reilly* (Unreported, High Court, 29th November, 1976). The court must nonetheless be satisfied that the offence is a minor offence (McEvitt at pp. 132 and 133 *per* Henchy J.).

B2. Either way offences triable summarily only with the consent of the accused. These are a select group of "scheduled offences" set out in s. 2 of and the First Schedule to the Criminal Justice Act 1951. A specific form for a warrant of execution for a custodial sentence for these offences is set out Form 25.4 of the District Court Rules.

15. The offence at issue in the present case, that of assault causing harm under s. 3 of the Act of 1997, is of Type B1. It is triable either way, but without the consent of the accused being necessary for summary disposal.

16. Mr. O'Higgins submits that Form 25.4 applies, and that an express finding that the offence is minor is necessary. However it seems to me that Form 25.4 is directed to scheduled offences, which I have referred to as type B.2, and thus has no application to the present case.

17. It is notable that the paragraph on which Mr. O'Higgins relies is not preceded by an asterisk, which, in the forms, indicates "*delete whichever inapplicable*". Furthermore if Form 25.4 is applicable it would require the deletion of half of a recital (the words "*and the accused, on being informed by the court of his/her right to be tried with a jury, did not object to being tried summarily*"), a cumbersome, unlikely and confusing result which could not have been intended, and for which there is no textual support. To apply Form 25.4 would be very much to shoehorn this case into it and lay the ground for procedural confusion.

18. The form actually issued in this case purports to be Form 25.1 (see notation on top right hand corner), although it clearly departs from that form because it includes reference to "*the Director of Public Prosecutions having elected for summary trial*", a phrase not included in Form 25.1.

19. Form 25.1 does not include any appropriate recitals suitable for an either-way offence of Type B1. In my view, it simply is not designed to apply to such offences.

20. The consequence of that analysis is that there is not in fact a specific form for offences of type B1, namely either-way offences which can be tried summarily without the consent of the accused.

21. As regards category C, indictable-only offences, it is important to make one definitional point clear at the outset. These are offences for which the statute creating the offence makes no provision for summary trial – not offences where a summary trial is in principle impossible, because certain general statutes apply in this regard even to an offence that on its face can only be prosecuted on indictment.

22. There appear to be three sub-categories of such offences as follows:-

C1. Indictable-only offences where the accused pleads guilty and the D.P.P. consents to the matter being dealt with summarily. In such a case, by virtue of s. 13 of the Criminal Justice Act 1951, by derogation from the strictly indictable nature of such offences, the District Court has jurisdiction to impose a sentence, with certain exceptions. It seems to me that given the setting out of a maximum sentence for such purposes in s. 13 itself, that section must be read as referable only to "indictable-only" offences. If the section applied to "either-way" offences, there would be a clear conflict between the sentencing regime in the substantive statute and that in s. 13 itself. Indeed s. 13 would have no real role to play if the offence was potentially triable in the District Court in any event. The appropriate form for a warrant of execution in such a case appears to me to be Form 25.3.

C2. Indictable-only offences alleged to have been committed by children, which with certain exceptions can be dealt with

summarily by virtue of s. 75 of the Children Act 2001, unless the court is of opinion that the offence is not minor or the child does not consent. No specific form for a warrant of execution for offences of Type C2 was brought to my attention.

C3. Indictable-only offences which cannot be disposed of in the District Court. This category includes all contested charges brought against adult defendants. The question of a District Court warrant of execution for category C3, therefore, cannot arise because all such offences are destined to be dealt with on indictment.

23. It seems to me that with a clear overview of the categories of offences and the appropriate applicable forms, a number of the legal questions arising in this case become considerably simpler. As I now turn to those questions, I will summarise for convenience the categories of offences that may arise and the relevant forms of warrants of execution:-

A. Offences that are summary-only – Form 25.1

B. Offences triable either-way, consisting of:

B1. Either-way offences triable summarily without the consent of the accused – no specific form;

B2. Either way offences triable summarily only with the consent of the accused – Form 25.4;

C. Offences that are indictable-only, consisting of:

C1. Indictable-only offences where the accused pleads guilty and the D.P.P. consents to the matter being dealt with summarily – Form 25.3.

C2. Indictable-only offences alleged to have been committed by children – no specific form;

C3. Indictable-only offences which cannot be disposed of in the District Court – no District Court warrant of execution can arise.

Is there an obligation on the District Court in dealing with an offence to be satisfied that it is a minor offence?
24. It seems to me that an obligation on the District Court to be satisfied that an offence being substantively dealt with is a minor offence must be regarded as a continuing and ongoing obligation of a jurisdictional nature by virtue of Article 38.2 of the Constitution. I do not find the argument advanced by Mr. Power that this is simply a veto to jurisdiction, as opposed to a threshold that must be met, to be a very convincing proposition. Whether an offence is major or minor is primarily determined by the penalty involved. Thus "summary only" offences are inherently minor, given that by definition they cannot be visited with non-minor penalties. "Either way" offences or even "indictable only" offences may, depending on the circumstances, be either major or minor. Where the District Court is dealing with such offences, it must be positively satisfied that they are minor if the court is to go on to deal with such matters substantively. I appreciate that part of the common parlance of the situation is to speak of the District Court "*declining jurisdiction"* as Macken J. did at in *Reade v. Judge Reilly* [2010] 1 I.R. 295 at 311. But in the absence of the court being of the view that the offence is minor, the court does not have jurisdiction under Article 38.2. Thus it is not really a question of "declining jurisdiction" if the offence is non-minor but rather of the court only having jurisdiction in the case of minor offences.

Is there an administrative law obligation to set out a finding that the offence is minor on the face of the warrant?
25. The applicant's submission that a finding that an offence was minor should be recited was supported by reference to the recent decision of Noonan J. in *Freeman v. Governor of Wheatfield Prison* [2015] IEHC 615 (Unreported, High Court, 9th October, 2015) (citing The State (*Kiernan) v. Governor of Mountjoy Prison* (Unreported, High Court, Finlay J., 19th February, 1973) and *The State (Browne) v. Ferin* [1967] I.R. 147 and *The State (D.P.P.) v. Ó hUadhaigh* (Unreported, High Court, O'Hanlon J, 30th January, 1984)), a decision that relates to the need to recite the consent of the prosecution.

26. Because a finding that an offence triable either way or indictable only is a minor offence amounts to a jurisdictional prerequisite for the District Court dealing substantively with it, it appears to me that such a matter should be set out on the face of the order, either expressly or by implication, on the basis of the law as set out by the Supreme Court in *G.E v. Governor of Clover Hill Prison* [2011] IESC 41 (Unreported, Supreme Court, Denham C.J., 28th October, 2011) at paras. 27 and 28, citing *Gossett v. Howard* [1845] 10 Q.B. 411 (see also *Joyce v. Governor of the Dóchas Centre* [2012] 2 I.R. 666 (Hogan J.)).

27. A matter that must be set out on the face of a warrant can however be set out impliedly by reference to other matters that are expressly set out, and it is to that issue that I now turn.

Can a finding that the offence is minor be inferred from the nature of the penalty imposed?
28. It seems to me that this issue, which is really the central point in the case, has already been decided by the Supreme Court in *The State (Gleeson) v. Connellan* [1988] I.R. 559, where Griffin J., at p. 563, and Hederman J., at p.566, were both of the view that a statement that the offence was a minor offence did not have to be set out expressly and could be derived or inferred from the nature of the penalty imposed.

29. Mr. O'Higgins places considerable reliance on comments of Griffin J. at p. 563, to the effect that where a sentence for a second or subsequent offence which is greater than the maximum penalty for a first offence is being imposed, the fact being relied on should be set out. But that seems to me to be quite a separate point and not particularly relevant to the matter at hand.

30. In short, it seems to me that this issue is already the subject of an authoritative decision of the Supreme Court. Having said that I do not wish to stigmatise as entirely devoid of merit the submission made by Mr. O'Higgins that there is arguably some circularity to this particular chain of reasoning, because, seeing as the District Court can only impose a sentence within the "minor" range, its sentence if valid will always impliedly involve a contention that the offence is minor. If a non-minor sentence was imposed by the District Court, that in itself would constitute a separate and independent ground for regarding the warrant as bad. However it seems to me that this analysis is really academic because all is establishes is that perhaps *Gleeson* was a decision within the range of possibilities open to the Supreme Court rather than one which was absolutely inevitable. Such a position, even if established, does not dilute the binding nature of the *Gleeson* decision. Nor does it seem to me that subsequent Supreme Court decision such as G.E. can in fact truly be said to have altered the position as found in *Gleeson*.

Is there an obligation under the rules of court to set out a finding that the offence is minor?

31. In the absence of a clear statutory form applying to a warrant of execution of this type (as found above), there can be no question of a separate duty arising from the forms set out in rules of the court to expressly reside a finding that the offence is minor.

If there is a departure from the prescribed form does section 12 of the Interpretation Act 2005 apply?
32. In the light of the forgoing finding, this question (identified by the respondent) does not arise.

If there is an error in the form, should an opportunity be given to amend it prior to the Article 40 application being finalised?
33. It is clear from *Ryan v. Governor of Midlands Prison* [2014] IESC 54 (Unreported, Supreme Court, Denham C.J., 22nd August, 2014) and *F.X. v. Clinical Director of the Central Mental Hospital* [2014] 1 I.R. 280 (Denham C.J.), and my own decision in Grant at para. 99(ii) in that in principle even an order of a court may be an insufficient basis to justify detention if it contains an error on the face of the record. However, as discussed in Grant, the court should react to such errors in a proportional manner, and may in appropriate circumstances consider giving the respondent an opportunity to have the error corrected before the Article 40 application is finalised (see the recent decision of the Court of Appeal in *McDonagh v. Governor of Mountjoy Prison* [2016] IECA 32 (Unreported, Court of Appeal, Hogan J., 17th February 2016)).

34. In the present case, the only error on the face of the warrant is the statement at the top right hand corner that it purports to be in Form 25.1. I consider that Form 25.1 applies to summary only offences, what I refer to as Type A.

35. While this is an error, it seems to me it is not of a jurisdictional nature or one which, at least on its first appearance, justifies an order for release. If a pattern were to emerge of using the incorrect form, the matter might be different. Subject to hearing argument, it may be relevant to the question of costs as part of the overall issue of confusion as to the appropriate form to be used. But it is not a basis for release of the applicant in this case. It follows from the discussion above that the omission of an express recital that the offence is minor is not an error on the face of the record.

36. If I were of the view that there was an error on the face of the record that could potentially make release a proportionate response, of the nature canvassed in this case, I would have considered giving the respondent a short opportunity to rectify a warrant. However as I have not found such an error to exist, this question does not arise.

37. I would however respectfully suggest that consideration be given in early course to a much clearer definition of the types of warrants of execution that may arise, with appropriate forms provided for each of those categories, in a manner defined more specifically than arises from the current O. 25, r. 1 of the District Court Rules, which says rather opaquely that *"[w]here a person has been sentenced to imprisonment the Court shall issue the warrant of committal (Form 25.1, 25.3, or 25.4, Schedule B as the case may be)".* One wonders if it would be too much to ask for a list of the different situations where a warrant of execution could arise together with an appropriate form for each situation. In such a re-draft it might also be considered prudent to make express what is potentially implied by current arrangements, namely that in every case the court is satisfied that the offence is a minor one.

Order
38. For the foregoing reasons, on 16th May, 2016, I ordered:-

(a) that the application be dismissed insofar as it related to a complaint that the warrant failed to recite a finding that the offence was minor;

(b) that I would retain seisin of the issue of the costs of the hearing on 16th May, 2016, which matter was adjourned to a date to be fixed; and

(c) that the second "module" being the balance of the Article 40 application be adjourned to the duty judge on 20th May, 2016.