THE HIGH COURT

[2015 No. 925 S.S.]

BETWEEN

MARIANA KOVACS

APPLICANT

AND

THE GOVERNOR OF MOUNTJOY WOMEN'S PRISON,

THE DOCHAS CENTRE

RESPONDENT

JUDGMENT of Ms. Justice Baker delivered on the 30th day of June, 2015

1. This is an inquiry into the lawfulness of the detention of Ms Kovacs who is held under two warrants, both arising from convictions in respect of theft offences in the District Court. The questions raised in the inquiry are net. First, whether the applicant is estopped by acquiescence from raising any invalidity in the first warrant, which it is accepted was made following a conviction and sentence at summary trial in respect of which it is conceded by the respondent that the applicant was not put on her election. The second question relates to the effect of any frailty in the first conviction and warrant, and whether the second warrant, by which the applicant is to be detained for one month, to run on the "lawful determination" of the first term, is itself incapable of clear interpretation.

Facts

2. The facts are not in contention. The applicant is a mother of three young children and on the 13th January, 2014 she pleaded guilty to a theft offence contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001 (the Act of 2001), at Dun Laoghaire District Court and was sentenced to three months' imprisonment, suspended for a period of two years.

3. On the 15th September, 2014, and during the period of suspension the applicant was convicted of a theft offence at Blanchardstown District Court, and sentenced to one month in prison, to be served on the legal expiration of the sentence imposed in respect of the first offence.

4. On the 16th December, 2014, the matter having been transferred from Blanchardstown District Court to Dun Laoghaire District pursuant to the provisions of s. 99 of the Criminal Justice Act, Judge O'Donnell activated the previously suspended three months' sentence in full and remanded the applicant to Blanchardstown District Court for finalisation of sentencing.

5. On that same day, the 16th December, 2014, recognisances were fixed for the purposes of an appeal, and the applicant appealed the severity of the activation of the suspended sentence, and the second conviction and sentence.

6. On the 15th June, 2015 the appeal was heard, the delay arising from an administrative error with regard to an earlier listing, and Circuit Court Judge O'Sullivan affirmed the decisions of the District Court.

7. The applicant was represented in the District Court in respect of the first offence by solicitor and occasionally by counsel, and was represented by counsel in the Circuit Court on appeal. Counsel's notes of the various hearings were exhibited in the grounding affidavit and it is clear from these, and from the evidence of the solicitor who then represented and continues to represent the applicant, that neither counsel nor the solicitor advised her with regard to the right of election, nor was she was put on her election by the Court.

8. It is noteworthy that the first matter was listed in the District Court on a number of occasions, in some cases due to the non-attendance of the applicant at the District Court. It is also noteworthy that the first sentence was imposed 18 months ago, or thereabouts.

9. The warrants on foot of which the applicant is held are both dated the 15th June, 2015 and were made following the conclusion of the appeals process.

The first conviction and sentence: was the accused put on her election?

10. A person accused of theft under s. 4 of the Act of 2001 must be put on his or her election to be tried by jury, and it is not in contention that the putting of a person on election is a condition precedent to the District Court's exercise of its criminal jurisdiction. It is accepted by counsel for the respondent that the condition precedent operates objectively, and irrespective of whether or not an accused was independently or subjectively aware of a right of election, or whether or not, as a matter of fact, the accused would have, or would likely to have, elected for trial summarily in the District Court.

11. It is also not in contention that the accused was not put on her election and the respondent has conceded this, following a review of the DAR recording of the various hearings in the District Court. Thus, *prima facie* at least, the first conviction and sentence were made without jurisdiction.

12. The respondent however argues that the applicant has acquiesced, and that her acquiescence arises partly because she failed to raise the issue of lack of jurisdiction in a timely manner, and partly because she entered a plea of guilty in the District Court in respect of the first charge, and her arguments on the reactivation hearing and on the appeal of the second sentence were premised on an acceptance of the validity of the original conviction, her appeal and argument being confined to questions of severity.

The arguments: The first (three month) warrant

13. The respondent accepts that as a matter of law that the rehearsal of a right of election is essential to jurisdiction, but argues

that the applicant did not raise the deficiency in a timely manner and that she has thereby acquiesced in any frailty and may not plead the frailty in aid of an argument that the conviction and sentence is invalid. The Governor relies on the observations of Henchy J., giving the judgment in the Supreme Court in the case of *DPP v. Aylmer* [1986] 301 WLJ-SC:

> *"In this case, not only did the appellant not take any steps to appeal the order of Butler J. but when the opportunity arose his counsel applied successfully on his behalf to Finlay P. to give effect to the order of Butler J. by suspending the balance of the sentence imposed by that order. The appellant thereby approbated the order and took advantage of it by getting the balance of the sentence suspended. It was only after he had broken the terms of the suspension of the balance of the sentence, and after he had been ordered by Finlay P. to serve the balance of the sentence, that he complained of the invalidity of the order of Butler J. It was then too late for him to do so. He stands estopped from doing so by his previous use of the order to his advantage."*

14. It is argued that a similar estoppel by acquiescence operates against Ms Kovacs as she pleaded guilty to the first offence, took advantage of a suspended sentence, and undertook to comply with the conditions of suspension. It is argued that because the applicant makes a purely procedural argument, acquiescence in a procedural frailty can operate in a suitable case to raise an estoppel.

15. The applicant argues on the other hand that no amount of acquiescence on the part of the applicant could raise an estoppel, or more especially that acquiescence cannot indirectly confer jurisdiction on the court when an essential pre-condition to the exercise of that jurisdiction, namely in this case the putting of the accused on election, is absent. Counsel for the applicant relies primarily on the decision of Hogan J. in *Cirpaci v. Governor of Mountjoy Prison* [2014] IEHC 76 and in particular the statement of Hogan J. at para. 29 of his judgment where he quoted with approval the judgment of Davitt P. in *The State (Hastings) v. Reddin* [1953] I.R. 134 as follows:-

> *"I do not think it matters whether the accused is aware of his right or not, or whether, if he is represented by counsel or solicitor, he is presumed to be aware of it. The duty imposed by statute on the Court is not to assume, or presume, or be satisfied – it is to make certain, by itself imparting the necessary knowledge to the accused."*

16. Hogan J. in Cirpaci described *"the mandatory nature of the obligation which is imposed on the District Judge with regard to informing the accused of his or her right to elect for jury trial before any summary disposal can take place."*

17. The decision of Hogan J. is authoritative with regard to the effect of a failure to put an accused on his or her election, but no question of acquiescence was determined by him, and the decision is for that reason of limited value in my analysis.

Acquiescence
18. The language used in the course of argument was that the applicant has acquiesced in the error of jurisdiction, but that word is shorthand for a series of arguments found in the authorities to which counsel have pointed, where acquiescence, or a failure to challenge a frailty in a timely manner, was found to bar a claim for relief whether under Article 40.4 or by way of judicial review. Certain threads can be found in the authorities which I now examine.

The case law
19. O'Neill J. in *Brennan v. Governor of Portlaoise Prison* [2007] IEHC 384 held that a complaint about a constitutional or legal defect could be lost by failure to exercise that right in a timely manner. His decision was upheld in the Supreme Court and Geoghegan J. accepted the general proposition as follows:-

> *"There is no doubt that under long established jurisprudence of the courts a jurisdictional objection must be taken as soon as is reasonably possible. Some judges have spoken of the parties effectively conferring a jurisdiction. I would prefer a slightly different formulation. Jurisdiction is conferred by law rather than by persons and, therefore, I think that it is somewhat more accurate to say that by law a bona fide exercise of jurisdiction is deemed to be a good exercise if objection is not taken at the appropriate time."*

20. Geoghegan J. noted that that approach would be very much in line with the judgments of the Supreme Court in *A. v. Governor of Arbour Hill Prison* [2006] 4 I.R. 88, which I will deal with below.

21. The facts of *Brennan v. Governor of Portlaoise Prison* require some analysis. The applicants were charged with membership of an illegal organisation and sent forward for trial before the Special Criminal Court. Prior to being arraigned, the applicants unsuccessfully challenged the jurisdiction of that Court to try them and they were subsequently convicted and sentenced to terms of imprisonment. The convictions were upheld by the Court of Criminal Appeal. No application was made for a certificate under s. 29 of the Courts of Justice Act 1924, but the applicants sought to challenge the legality of their detention under Article 40.4 contending that the circumstances of their arrest and detention were identical to those in another case, in which the Supreme Court had found that the detention and arrest were unlawful, *O'Brien v. Special Criminal Court* [2007] IESC 45. The respondent argued inter alia that the applicants had forfeited the point with regard to their detention, by failing to raise it at an earlier opportunity. Geoghegan J. pointed to the fact that each of the applicants came to raise the objection as to jurisdiction only after they had engaged fully with the trial at first instance and the appeal, and only as a consequence of the decision of the Supreme Court in O'Brien v. Special Criminal Court. It was critical in that context that Mr O'Brien had already commenced judicial review proceedings before the trial of the applicants before the Special Criminal Court had concluded, and before they sought and obtained leave to appeal the convictions to the Court of Criminal Appeal. Their jurisdictional objections were also included in the grounds of appeal to the Court of Criminal Appeal, and Geoghegan J. noted that the judgment of that Court expressly dealt with the point taken by Mr O'Brien and ultimately decided in his favour by the Supreme Court in October 2007.

22. I regard it of particular importance that Geoghegan J. referred to an extract from the book that he, and I suspect most judges of the Superior Courts, find excellent and helpful, Costello *The Law of Habeas Corpus in Ireland* (Four Courts Press, 2006) where he made the following comment:-

> *"The principle of finality under section 29 would be subverted if a complaint could, notwithstanding a prior determination by the Court of Criminal Appeal, be submitted under Article 40.4.2."*

23. Geoghegan J. thought this point was correct, subject to the proviso that there may be *"very exceptional cases where some fundamental jurisdictional defect is established in an Article 40 application which through nobody's fault had not been raised or considered in the appeal processes."*

24. I consider it implicit in the considered and detailed judgment of Geoghegan J. that he regarded knowledge of a defect, whether that be the knowledge of an applicant or his or her legal advisors, as an element in the analysis, and because he regarded the jurisdictional issues as already having been determined to the point of statutory finality in the appeals already processed by the applicants. Thus the analysis of the Supreme Court was founded on a conclusion that the point had already been judicially determined against the applicants, an example of estoppel by record, and because the applicants knew of the frailty on which they sought to later rely before the trial and appeal process had concluded. This second point, the knowledge of the applicant of the existence of the point is one to which I now turn.

Is knowledge an element in the test?
25. The principle of acquiescence, or the fact that a person may lose the right to complain about a procedural, legal or constitutional defect, is found in the judgment of Henchy J. in *The State (Byrne) v. Frawley* [1978] I.R. 326. The often quoted extract from that judgment at p. 350 is :-

> *"Because the prisoner freely and knowingly elected at his trial to accept the empanelled jury as competent to try him, I consider that he is now precluded by that election from claiming that the jury lacked constitutionality: see the decision of this Court in Corrigan v. Irish Land Commission [1977] I.R. 317. The prisoner's approbation of the jury was affirmed by his failure to question its validity when he formulated grounds of appeal against his conviction and sentence, and when his application for leave to appeal was argued in the Court of Criminal Appeal…. What has been lost in the process of events is not the right guaranteed by the Constitution but the prisoner's competence to lay claim to it in the circumstances of this case."*

26. The dicta of Henchy J. was quoted with approval by O'Neill J. in *Brennan v. Governor of Portlaoise Prison*, and Geoghegan J. in the appeal accepted that the jurisprudence was *"well established."*

27. The decision relied on by the Governor, *DPP v. Aylmer*, also rests in part on the question of knowledge and Henchy J. explained the rule as follows :-

> *"I consider it to be a well-founded rule that when a person freely and knowingly takes an advantage under an order of a court, he cannot later bring proceedings, appellate or otherwise, to have that order condemned as invalid: see, for example, McHugh v. McGoldrick 1921 2 I.R. 163. Having freely elected to approbate the order by taking a benefit under it, he cannot later be allowed to reprobate it."*

28. Hardiman J. giving the judgment of the Court of Criminal Appeal in *DPP v. Hughes* [2012] IECCA 69 pointed to the fact that a factor in the decision in *State (Byrne) v. Frawley* was that the case by which was struck down the exclusion of women from the types of persons eligible to serve as jurors was decided while Mr Byrne's trial was ongoing, and that his trial had continued without objection after that decision, a point he also failed to take on appeal. Knowledge of the possible argument was "imputed" to Mr Byrne.

29. I will return to *DPP v. Hughes* later in this judgment, but I do not consider that *DPP v. Hughes* offers assistance on the point of acquiescence in the absence of knowledge. As is discussed below, that judgment deals with the absence of retrospectivity in the face of a later finding of unconstutionality in proceedings by an unrelated party.

The import of the decision in A. v. Governor of Arbour Hill Prison
30. The respondent relies on *A. v. Governor of Arbour Hill Prison* [2006] 4 I.R. 88 as authority for a broad proposition that an applicant may be estopped by acquiescence from raising a jurisdictional frailty. He points to the obvious fact that there are a number of similarities to the facts of this case, namely that both applicants had exhausted all statutory appeal processes available to them, the applications were by way of an inquiry under Article 40, and that broadly similar periods of time had elapsed between the conviction and the application for the inquiry. The facts of that important case scarcely bear repeating, but it is important to note for the purposes of my analysis that that applicant's claim was founded on an argument that his conviction and sentence under s.1(1) of the Criminal Law Amendment Act 1935 ought to be set aside as the section that created the offence of which the applicant was convicted was struck down in proceedings *CC v. Ireland* [2006] 4 I.R. 1. The Supreme Court unanimously, although for somewhat differing reasons, held that there was no implied or express principle of retrospective application of constitutionality in the Constitution, and that the consequence of striking down legislation could only crystallise in respect of the immediate litigation which gave rise to the declaration of invalidity. Murray C.J. stated the following general proposition:-

> *"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 the general principle."*

31. Hardiman J. described the applicant as attempting to *"piggyback on a declaration of invalidity or inconsistency obtained by another person."*

32. What was essential to the analysis contained in all of the lengthy judgments in the Supreme Court was that at the time of the making of the conviction and sentence in respect of which Mr A. brought the challenge, the law was settled and no application of a declaration of the incompatibility of the relevant statutory provision with the Constitution could be called in aid retrospectively. The Supreme Court accepted that at the time of the conviction of Mr A the trial court did not lack jurisdiction.

33. Similarly in *DPP v Hughes* the prisoner did not assert the point that arose after the Supreme Court decision in *Damache v. DPP* [2012] IESC 11, and was declared not to be entitled to take that point, not because the point was not a good one, but because it was a point that had developed only after he had pleaded guilty. As Hardiman J. said the applicant entered a plea of guilty, as he put it, *"in the belief that s.29 had been validly enacted and was good and operative law"*.

The relevance of the plea of guilty
34. In *DPP v. Hughes*, Hardiman J. placed particular importance on the fact that the conviction had arisen upon a plea of guilty. As he stated:-

> *"He did so quite freely and willingly, and having been advised by solicitor and counsel of his own choosing. By doing so, he acknowledged that he was guilty of possession of explosives and a firearm as alleged against him. The seriousness of these charges needs no additional emphasis. To state the obvious, but sometimes the obvious requires to be stated, a plea of guilty is 'a plea by the accused that he committed the offence'. See Murdochs Dictionary of Irish Law 5th Edition,*

Tottel Publishing 2009."

35. The considered approach of Hardiman J. was that, because s. 29 related only to the mode of search which revealed the existence of guilt, when that guilt was admitted it relieved the prosecution of the necessity to produce that evidence. It was not that a guilty plea could confer jurisdiction, but it might relieve the prosecution from proving the case.

36. That same emphasis on a guilty plea was found in *Gorman v. Judge Mary Martin* [2005] IESC 56. Kearns J. delivering the judgment of the Supreme Court expressed disquiet with regard to an argument as to the invalidity of the return for trial to the Circuit Court of the applicant following the decision of the Supreme Court in *Zambra v. District Judge McNulty & DPP* [2002] 2 ILRM 506 as follows:-

> *"…does that not open the possibility that an applicant who from day one has a point to make which might, or might not, be successful, could hold that point in reserve to see if the sentence imposed was acceptable? Even if it was acceptable, he could allow the time for appeal to expire so that the Director of Public Prosecutions could not make application to the Court of Criminal Appeal to review the sentence. It would then be open to him to make his case in judicial review which might have the effect of altogether quashing a conviction and sentence in circumstances where he had pleaded guilty in the first instance and in circumstances where it might later well prove impossible ever to have a trial, because at the time when the issue of remitting the matter back to the District Court might arise, witnesses might no longer be available and other relevant evidence might have disappeared or been disposed of."*

37. Kearns J. refused to quash the sentence but he gave the decision in part because the applicant was himself aware of a possible frailty. At p. 12 of the judgment he made the following observation:-

> *"It might, of course, be argued that the applicant was given erroneous legal advice and/or that he lacked legal representation when he elected to have his case dealt with by means of a plea in the Circuit Court. That, however, ignores that fact that the applicant was himself aware of his entitlements under the Criminal Procedure Act, 1967. He apparently dismissed his legal advisors because they were not persuaded by the merits of his contentions at the time. Then on the following day when the matter came before the second named respondent, the applicant was offered alternative legal representation, but declined to avail of this offer, electing instead to plead guilty to the offence with which he had been charged.*
>
> *In the particular circumstances I can only see this behaviour on the part of the applicant as a form of acquiescence. He has made no claim in the course of this application that he was innocent of the offence with which he was charged. He freely admitted the offence by pleading guilty and there is no suggestion he was under any form of pressure to do so."*

Jurisdiction: A question of law

38. Counsel for the applicant relies on the judgment of the Supreme Court in *Caffrey v. Governor of Portlaois Prison* [2012] IESC 4, and in particular the judgment delivered by Denham C.J. where she considered the management of the service by the applicant of a life sentence imposed by a court in the United Kingdom, and in respect of which a warrant pursuant to s. 7 of the Transfer of Sentence Persons Act 1995 was made in Ireland. The applicant sought an inquiry into the lawfulness into his detention pursuant to Article 40.4 of the Constitution, and the Supreme Court on appeal from a decision of Charleton J. in the High Court, held that the detention was unlawful. Importantly for the discussion in this case, Denham C.J. affirmed the approach of Charleton J. with regard to the question of acquiescence, waiver or estoppel. She quoted and adopted the following from the judgment of the High Court:-

> *"What I do not believe can ever happen is that a prisoner, by his consent incidental to the process whereby he is imprisoned, or by failing to take a point as to jurisdiction at the appropriate time, or by apparently acquiescing in the form of his detention, can render what is not in law a valid form of imprisonment into a lawful detention. If a prisoner cannot be detained by a court in accordance with law, then incidental aspects of consent, acquiescence, or delay cannot make lawful what is unlawful….There is only one issue in this kind of enquiry: is the prisoner lawfully detained or not? That admits of only one answer where there is no legal foundation to a sentence of imprisonment."*

39. Denham C.J. affirmed this approach in succinct terms:-

> *"I would affirm this approach by the learned High Court judge. The issue for the Court was whether the appellant was lawfully detained or not. The appellant could not be lawfully detained on the basis of his consent or acquiescence; it is a question of law."*

40. I also consider the judgment of the Court of Appeal in the recent case of *O'Malley v. District Judge Paul Kelly and DPP* [2015] IECA 67 to be instructive and to guide my analysis. In that case Mr O'Malley was convicted of 33 offences at Letterkenny District Court, 30 of which related to offences committed in Donegal, and 3 to offences committed in other District Court areas. He pleaded guilty to the charges, and indeed urged the District Judge to accept jurisdiction in respect of all of the matters including those committed outside the Letterkenny District Court area. Mahon J., giving the judgment of the Court on the 27th March, 2015, dealt *inter alia* with the point of acquiescence. He accepted that Mr O'Malley played "*a pivotal role*" in his conviction for the three non-Donegal cases in the Donegal District Court, and that he had actively sought to persuade the District Judge to hear his cases, and that he had "*very consciously submitted to the jurisdiction of the respondent*". Mahon J. quoted from the judgment of Henchy J. in *State (Byrne) v. Frawley*, referred to above at para. 25. He took the view that the non-Donegal offences were "*void ab initio*" as they had resulted from a jurisdictional error, and even the "*very significant degree of acquiescence*" could not avoid this conclusion.

41. The Court of Appeal upheld the judgment of McDermott J. delivered on the 7th November, 2014 where he pointed to the fact that the orders were void and not voidable, a distinction he explained as follows:-

> *"They (other judgments opened to him) were not challenged on the basis of a technicality or procedural irregularity. The challenge was based on a jurisdictional error central to the exercise of judicial power by the respondent under Article 40.4 of the Constitution."*

42. The distinction between a void and a voidable judgment is one that can usefully be applied to the instant case. When one follows the analysis of, *inter alia*, Hogan J. in *Cirpaci v. Governor of Mountjoy Prison* the error of failing to put an accused on his election is so fundamental as to be an essential precondition to jurisdiction. I consider it important that Hogan J. stated that since it was agreed that the applicant had never been afforded his right of election "*a finding that the ensuing conviction was entirely without jurisdiction merely amounts to a statement of the obvious*". His language, and the use of the words "*entirely without jurisdiction*" supports the

view that a conviction made without the right of election is void.

43. The same approach is found in the recent decision of O'Malley J in *DPP v. Carter* [2014] IEHC 179, upheld by the Supreme Court, in [2015] IESC 20 and I adopt the following statement from her judgment:

> *"The issue here is fundamentally 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 ….*
>
> *If this analysis is correct, the relevance of acquiescence in the only aspect contended for by the prosecution does not arise"*

O'Donnell J. in the Supreme Court accepted that the error went to jurisdiction and seems to have recognised the correctness of the concession made by the DPP that acquiescence cannot confer jurisdiction:

> *"It also follows that the High Court Judge was correct to conclude that the true interpretation of section 99 was jurisdictional or perhaps more correctly, that failure to comply with section 99 could not be treated as a mere defect in securing the attendance of the accused in court. On its true interpretation, section 99(10) required that for the court to exercise jurisdiction under the section the person must be validly remanded under section 99(9). Subsection 10 of section 99 opens with the words "A court to which a person has been remanded under subsection (9)…" which must mean that a valid remand under subs. (9) is a predicate for the exercise of power conferred by subs. (10)".*

Conclusion

44. The cases relied on by the Governor in support of the arguments that the applicant is estopped by acquiescence have, as shown above, in each case relied on actual or imputed knowledge of an accused. In the leading case of *The State (Byrne) v. Frawley*, and in the authoritative Supreme Court judgments in *Brennan v. Governor of Portlaoise Prison*, *Gorman v. Judge Mary Martin* and *DPP v. Aylmer* the knowledge of a frailty was central to the analysis. I reject the argument by the respondent that, as the applicant has not averred on affidavit that she knew of her right of election, or that she was advised in any way by her solicitor and/or counsel as to the existence of that right, and as to whether advice was given to her as to the best course of action, I ought to impute knowledge to her. The facts as established on affidavit point me to the conclusion that the applicant was not informed of her right of election, and it would seem in fact that neither the prosecution nor the defence averted to the frailty in the District Court jurisdiction, and that the matter only came to light when Ms Kovacs came to consider whether to plead to the second charge. I consider that her knowledge cannot inform my decision, but that were it to be a factor, that she did not have knowledge of the frailty until she took advice with regard to the plea on the second charge.

45. Further, the jurisdiction of the District Court to try a theft offence summarily does not as a matter of law depend on the subjective knowledge of the right of the accused to be put on his or her election, and the law as explained above is not in doubt. The matter goes to jurisdiction and no subjective knowledge of an accused or error on the part of his or her legal representatives, nor on the part of the DPP can confer jurisdiction. The court itself must be satisfied that the election is made. As a result of the decision in *Caffrey v. Governor of Portlaoise Prison* the absence of jurisdiction is a question of law and the question of knowledge is "incidental".

46. The law as found in *A v. Governor of Arbor Hill* and *DPP v. Thomas Hughes* is not on point, as in these cases the trial court did not lack jurisdiction at the time of the conviction or sentence. The District Court in the instant case did lack jurisdiction, and that is not contested.

47. I must approach the question in the light of the analysis of the Court of Appeal in the recent case of *O'Malley v. District Judge Kelly* as the case which seems to be the most directly on point, and having regard to the uncontested proposition of law that failure to put an accused on election goes to the matter of jurisdiction, in the absence of jurisdiction the conviction must be seen as making the conviction and sentence void *ab inito*.

48. It follows that the first conviction and sentence were made without jurisdiction, are void and cannot support the detention of the applicant, and the applicant may not lawfully be held on the first warrant by which she was committed to prison for three months.

The second warrant: Does it stand?

49. Counsel for the applicant makes the point that if she is not lawfully detained on the first warrant by reason of the frailty identified above, the Governor may not lawfully detain her on foot of the second warrant because it is prescribed to commence "on the legal expiration" of the sentence imposed by the first warrant. Reliance is placed on my judgment in the case of *Cash v. Judge Halpin & Ors.* [2014] IEHC 484 where the relevant warrants were quashed because, although the duration of the sentence imposed by the relevant warrant was clear, the legal nature of the sentence was not as it could not be said when it was to commence. It is not disputed that certainty is one keystone in the question of the validity of a warrant, but the respondent says there is no ambiguity or lack of certainty as to when the second sentence is to commence. I agree.

50. Barron J. in *The State (Gleeson) v. Martin* [1985] ILRM 557 considered the meaning of the expression "*legal expiration*", akin in my view to the expression "*legal expiry*", of a sentence. At page 581 he expressed the matter as follows:-

> *"I would regard the expression 'legal expiration' to be clear and to mean upon the actual determination of the sentence whenever that legally occurs. I do not regard any of the impugned orders as been void for uncertainty."*

51. The impugned warrant in *Cash v. Judge Halpin & Ors*. was one of a series, or, as it was called by counsel, a "tower", of sentences, each of which contained a suspended element, and the decision with regard to the third warrant in the chain arose as a result of a finding that it was incapable of clear and unambiguous interpretation, and capable of more than one interpretation. There were also a number of other factors noted, namely that the third warrant failed to give effect to the "*clear intention expressed in each*" of the warrants that a period of noncustodial and rehabilitative time be served in each sentence imposed.

52. The second warrant is not unclear, and having regard to the view that I take that the first warrant was void, and that the applicant could never have been detained on foot of that warrant, she may be lawfully detained immediately upon the passing of the sentence in respect of which the second warrant was made. There is no uncertainty in this, and no possibility that the Governor could misinterpret the second warrant, as was a possibility in *Cash v. Judge Halpin & Ors. The Governor* does not have to engage in any interpretative process which might led him to differing results. The first warrant may not support detention, but the second warrant may, as the period of detention upon which it is conditioned to commence has been lawfully determined. To consider otherwise, would be to fail to recognise that the result of this inquiry is a judicial determination that the first sentence was not validly

imposed. While I accept, as counsel for the applicant says, that the first warrant is not quashed by means of an inquiry under article 40.4 as would occur by order under a judicial review, I consider that the legal effect of the determination in favour of the applicant on the first warrant is that the period of detention in the first warrant has lawfully determined, and that the second sentence must now be served.

53. Accordingly, I refuse relief in respect of the second warrant.