



THE COURT OF APPEAL

Kelly J.
Irvine J.
Hogan J.

380/14

In the matter of an application pursuant to Article 40 of the Constitution of Ireland

Between

Karl Mullen

Applicant

And

The Governor of the Midlands Prison,
The Irish Prison Service,
The Minister for Justice and Equality,
Ireland and the Attorney General

Respondent

Judgment (ex tempore) delivered on the 16th day of December 2014, by Mr. Justice Kelly

1. This is an appeal from a decision of Hedigan J. which was given on the 31st July, 2014. On that occasion he concluded an inquiry under Article 40 of the Constitution into the lawfulness of the detention of the applicant in the Midlands Prison and dismissed the application. The inquiry had been directed on the preceding day and on foot of the primary order, the Governor of the prison made a return in which he relied upon no fewer than six different warrants relevant to the applicant.

2. As it transpired only four of those warrants were in fact relevant to the lawfulness of the detention of the applicant at the date of the hearing in the High Court. The other two were spent.

3. Very helpfully the parties to the appeal have given each of the four relevant warrants an identity by reference to a letter of the alphabet. The relevant warrants are B, C, D and E. It is important to look at the terms of each of these warrants with a view to ascertaining whether or not the applicant's complaint as to the lawfulness of his detention is justified. Before looking at each of the warrants in detail, it is of course axiomatic that in order to detain somebody, it is necessary that there be a lawful authority so to do. That lawful authority should be without ambiguity. In that regard, I refer to the observations of Peart J. in *Carroll v. The Governor of Mountjoy Prison* [2005] 3 I.R. 292, where he said at 303:-

"A fundamental requirement for any authority to detain a person in custody is that the person detaining and the person detained should know precisely the duration of such detention. There should be no room for ambiguity in that regard. The proposition that a person shall know the length of the period for which he must be deprived of his liberty and that his detainer shall also know the same with certainty, seems so obvious as to require no authority for its statement.

As stated by Haugh J. in *The State (Caddle) v. Judge McCarthy and others* [1957] I.R. 359 at p. 365:-

'These warrants seem to possess a twofold purpose: when a sentenced person is still at liberty they enable the Court, through the police, to apprehend (and detain by force, if necessary) such person and to have him brought to and lodged with the governor of the appropriate gaol. When that object has been achieved, the document is then left with the governor, who gives a receipt to the police officer in the settled form.

Their second function is to inform the governor of the identity of the prisoner, the offence of which he has been convicted, and the nature and duration of the sentence.'

In the same case, Kingsmill Moore J., while concurring with the judgment delivered in that case by O'Daly J., took the opportunity to say the following at p. 379 in relation to the need for precision in the warrant as to the duration of sentence:-

'It seems to me that an authority to keep a man in prison must state with precision and without possible ambiguity the duration of the imprisonment, and that such duration and any other incident of the imprisonment stated in the warrant must correspond with the sentence legally imposed. I am not satisfied that the warrants in this case answer these requirements. Though I do not think there was any practical risk that the prisoner would have been kept from his liberty for an hour more than was justified by the sentence yet, where habeas corpus is concerned, I prefer to err if I do err on the side of strictness and accordingly, for the reasons given by Mr. Justice O'Daly, I would grant an order of habeas corpus, though without prejudice to the issue of a new and valid warrant under which a fresh caption could at once be effected.'

The topic is referred to in *Prison Law* by Paul Anthony McDermott, albeit in the context of an order of transfer of a prisoner by the Minister for Justice under s. 17 of the Criminal Justice Administration Act 1914, where the author states the following at para. 11-10:-

'Since the order of transfer is the authority under which the governor of the receiving prison detains the transferred prisoner, it should show on its face or by reference to some other document accompanying it the period for which the prisoner is to be detained. A failure to do this will mean that the transferred prisoner is not being lawfully detained.'

Mr. McDermott refers also to the judgment of Murnaghan J. in *The State (Holden) v. Governor of Portlaoise Prison* reported sub. nom *The State (Dickenson) v. Kelly* [1964] I.R. 73 at p. 80 - again in the context of a ministerial transfer of prisoner order - where the importance is stressed of specifying on the face of the document, or by reference to some accompanying document, the period for which a person is to be detained."

4. Those observations demonstrate the necessity to have certainty and a lack of ambiguity in warrants purporting to justify the

detention of a person.

5. In the present case, the following are the warrants which are relevant for consideration.

6. Warrant E: this was dated the 17th December, 2009 and ordered the imprisonment of the applicant for three years commencing on the 6th February, 2009.

7. Warrant D: this was also dated the 17th December, 2009 and ordered the imprisonment of the applicant for four years commencing on the 6th February, 2009.

8. Warrant C: this was also dated the 17th December, 2009 and ordered the imprisonment of the applicant for five years commencing on the lawful determination of the sentence imposed under Warrant E. The final two years of this sentence were suspended for three years.

9. Warrant B: this was dated the 11th March, 2010. It ordered the imprisonment of the applicant for five years "to run consecutively to the sentence which is currently being served". The final two and a half years of this sentence were suspended for three years.

10. The question which arose for determination in the High Court and again in this appeal is what was the sentence which was being served on the 11th March, 2010?

11. In the court below, the judge took the view that the sentences being served on that date were those imposed under Warrants E, D, and C. It is from that determination that this appeal is brought. It is said that the trial judge was wrong to conclude that the sentence imposed under Warrant C was one which was being served on the 11th March, 2010.

12. Whatever may have been the intention or mindset of the sentencing judge on the 11th March, 2010, the court must have regard to what is stated in the actual warrant (Warrant B) itself. In its terms, Warrant C, of the 17th December, 2009, imposed a term of imprisonment for five years which was not to commence until the lawful determination of the sentence imposed under Warrant E. It follows, therefore, in my view, that the term of imprisonment directed under Warrant C, had not commenced on the 11th March, 2010. The sentence of the 11th March, 2010, was to run consecutive to the sentence which was currently being served. By its very terms, Warrant C, was not at that stage operational. The term of imprisonment directed by it was only to commence on the lawful determination of the sentence imposed under Warrant E. On the 11th March, 2010, the sentences imposed under both Warrants E and D, were still being served by the applicant.

13. Accordingly, in my view, the High Court was not justified in treating the terms of imprisonment imposed under warrants E, D and C cumulatively so as to justify the continued detention of the applicant.

14. Warrant B referred to the sentence which was currently being served by the applicant. In fact, at that time, he was serving two concurrent sentences imposed under Warrants E and D, but from a practical point of view, nothing turns on that, because it is accepted that that the time when the matter was before the High Court, the terms of imprisonment under both of those warrants had expired and the sole basis justifying the continued detention of the applicant was Warrant B. But that detention could only be justified if it could be said that the applicant was actually serving a term of imprisonment under Warrant C, on the 11th March, 2010, when, the respondent argues, Warrant B came into operation. As the applicant was not serving a term of imprisonment under Warrant C, on the 11th March, 2010, Warrant C, cannot be utilised as a justification for the commencement of the calculation of the consecutive term of imprisonment directed under Warrant B.

15. This being so, it is my view that the trial judge was incorrect in the view which he took and this appeal must be allowed. There is no basis for the continued detention of the applicant and he must be released forthwith.

Irvine J. I agree.

Hogan J. I also agree.