Neutral Citation: [2014] IEHC 309

THE HIGH COURT

IN THE MATTER OF AN INQUIRY UNDER ARTICLE 40.4 OF THE CONSTITUTION

[2014 No. 919 SS]

BETWEEN

DAMIEN McCABE

APPLICANT

AND

GOVERNOR OF MOUNTJOY PRISON

RESPONDENT

JUDGMENT of Mr. Justice Hogan delivered on 3rd June, 2014

1. The question of the re-activation of suspended sentences in the manner envisaged by s. 99 of the Criminal Justice Act 2006 (as amended)("the 2006 Act") has not been without its difficulties. The Oireachtas has indeed intended to address some of these problems of interpretation and application by two further amendments of the 2006 Act, namely, s. 60(1)(a) of the Criminal Justice Act 2007 ("the 2007 Act") and s. 51 of the Criminal Justice (Miscellaneous Provisions) Act 2009 ("the 2009 Act").

2. The scheme envisaged by s. 99 of the 2006 Act is clear enough. Section 99(9)(as amended by s. 60(a) of the 2007 Act) envisages that where an accused has been "convicted of an offence" for which he has received a suspended sentence and he subsequently commits a further offence during the currency of that suspended sentence, the court (which I shall term for ease of reference "the second court") before which proceedings for the offence are brought "shall before imposing sentence for that offence, remand the person in custody or on bail to the next sitting of the court that made the said order".

3. It should be noted that, as originally enacted, s. 99(10) provided that the second court should impose sentence *prior* to sending the matter back to the original court for consideration in relation to the suspended sentence. The fact that, following the change effected by the 2007 Act, the second court is now required to remit the matter to the first court (*i.e.,* the court which originally imposed the suspended sentence) prior to imposing sentence is a matter which is central to the one of the principal arguments advanced by the applicant.

4. Section 99(10) provides that the court to which the accused has been remanded shall revoke the suspension of the sentence "unless it considers that the revocation of that order would be unjust in all the circumstances of the case."

5. Section 99(10A)(as inserted by s. 60(c) of the Criminal Justice Act 2007) provides that the court which imposed the original sentence shall remand the person in custody or on bail "to the next sitting of the court [which convicted the accused on the second occasion] for the purpose "of that court imposing sentence on that person for the offence" in question.

6. Section 99(12) further provides that:

> "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 or, or sentence imposed on, a person for an offence by the court that revoked the order."

7. In the present case the applicant was originally convicted by the District Court in June, 2012 of the offence of driving a motorcycle without insurance. He received a six months prison sentence, which was suspended for two years. That conviction and sentence was affirmed on appeal by the Circuit Court on 29th October, 2013. Under the scheme posited by the 1999 Act it is accepted that the Circuit Court is now the first court, *i.e.*, it was the Circuit Court (albeit sitting in its appellate capacity in an appeal from the District Court) which imposed the suspended sentence.

8. The applicant was, however, subsequently convicted in the District Court on 26th May, 2014, of an offence under s. 6(1) of the Criminal Justice (Public Order) Act 1994. That court then remanded the applicant back to the Circuit Court in accordance with s. 99(9). On the following day the Circuit Court then revoked the suspended sentence with immediate effect, so that the applicant commenced to serve his prison sentence of six months in relation to the original no insurance offence. It is pursuant to this sentence that the applicant is now in custody. Sentencing on the second charge has now been adjourned by the District Court to 4th June.

9. The applicant now moves this Court for an order of release pursuant to Article 40.4.2 of the Constitution. The applicant makes three main points in support of that contention. First, it is said that the meaning of the word "convicted" in s. 99(9) can only refer to a sentenced person so that the section as amended by the Oireachtas by the 2007 Act is effectively inoperable. Second, it is argued that the warrant detaining the applicant is bad on its face in certain respects, especially having regard to the judgment of the Supreme Court in *GE v. Governor of Cloverhill Prison* [2011] IESC 41. Third, the applicant contends that features of s. 99 are unconstitutional, specifically in that in the case of a person whose suspended sentence has been affirmed by the Circuit Court, there is (apparently) no right of appeal against the re-activation of the suspended sentence, the language of s. 99(12) notwithstanding. It has been agreed, however, that the constitutional argument can and must await the resolution of the non-constitutional grounds. This present judgment accordingly addresses the first two grounds only.

The meaning of the word "convicted"

10. There is little doubt but that, at least so far as summary convictions are concerned, the word "conviction" implies that the accused has not only been convicted of the offence (in the sense of being found guilty), but also that he has received a sentence for this offence. The Supreme Court has twice held that conviction and sentence are entirely intertwined (see *The State (Kiernan) v. de Búrca* [1963] I.R. 348 and *The State (de Búrca) v. Ó hUadhaigh* [1976] I.R. 85), so much so that an invalid sentence "cannot be

severed from a conviction so as to validate the conviction on its own": see *The State (de Búrca) v. Ó hUadhaigh* [1976] I.R. 85, 92, *per* Henchy J.

11. It is also clear from the provisions of s. 18(1) of the Courts of Justice Act 1928, that the right of appeal from the District Court in criminal matters is confined to those cases where sentence has been imposed:

> "An appeal shall lie in criminal cases from a Justice of the District Court against any order (not being merely an order returning for trial or binding to the peace or good behaviour or to both the peace and good behaviour) for the payment of a penal or other sum or for the doing of anything at any expense or for the estreating of any recognizance or for the undergoing of any term of imprisonment by the person against whom the order shall have been made."

12. In this respect, I entirely agree with McCarthy J.'s comprehensive analysis of this question in his illuminating judgment in *Muntean v. Hamill* [2010] IEHC 391, where commenting on the effect of this section, he observed:

> "As will be seen from this provision, for the purpose of brevity in the present context, an appeal can be taken only after sentence and, by definition, accordingly only after the matter is completely concluded, and not merely after conviction even if, sentence happens to be adjourned following conviction, for whatever reason."

13. Furthermore, s. 50 of the Courts (Supplemental) Provisions Act 1961 provides that: "...when an appeal is taken against an order in a criminal case made by a Justice of a District Court convicting a person and sentencing him to undergo a term of imprisonment and either

> (i) the notice of appeal states that the appeal is against so much only of the order as relates to the sentence or
>
> (ii) the appellant, on the hearing of the appeal, indicates that he desires to appeal against so much only of the order as relates to the sentence, then, notwithstanding any rule of law, the Circuit Court shall not, on the hearing of the appeal, re-hear the case except to such extent as shall be necessary to enable the court to adjudicate on the question of sentence."

14. As McCarthy J. pointed out in *Muntean*, in *The State (Aherne) v. Cotter* [1982] I.R. 188, the Supreme Court held that insofar as s. 50 of the 1961 Act allows for an appeal against sentence only, this was simply a special exception to the general rule that an appeal had to be against both conviction and sentence. Although the appeal to the Circuit Court which was at issue in *Aherne* had purported to be against conviction only, the sentence had nonetheless been affirmed on appeal. The Supreme Court rejected the argument that this was unlawful. As Henchy J. put it ([1982] I.R. 188, 206):

> "Section 50 of the Act of 1961 is to be read as encompassing no more than a special exception to the general rule that an appeal from the District Court to the Circuit Court is to be a re-hearing *de novo* on which all issues, of law and fact are open."

15. But if, in general, the law (and specifically the statutory law) treats conviction and sentence are inseparable, this does not mean that this is so for all purposes or, more particularly, that the Oireachtas is not free to depart from these concepts. It follows that the meaning of the word "conviction" has not been fixed unalterably by some sacred legal tablet of stone which has permanently abridged the capacity of the Oireachtas to give this word any different meaning, even in the plainly different legal context of the 2006 Act.

16. This is indeed what has happened here. Moreover, as counsel for the State, Mr. Barron S.C. pointed out, the word used by s. 99(9) is not "conviction", but rather the words "convicted of an offence". While these are doubtless cognate words, they are capable of bearing a slightly different meaning. Where, for example, the District Court were to find an accused guilty of an offence, but had adjourned the issue of sentence to a later date, lawyers and laypeople alike would nonetheless correctly say that the Court had "convicted" the accused of the offence, even if any appeal to the Circuit Court of the "conviction" had to await the actual imposition of sentence at a later date.

17. More fundamentally, this is another classic example where the principle of *noscitur a sociis* ("known by its companions") comes into play. This principle reflects the fact that in the English language words do not always have fixed meanings, but they take their meaning from the context in which they appear. As Stamp J. famously observed in *Bourne v. Norwich Crematorium Ltd.* [1967] 1 W.L.R. 691, 696:-

> "English words derive colour from those which surround them. Sentences are not mere collections of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put back into the sentence with the meaning which one has assigned to them as separate words."

18. This principle is also illustrated by the classic judgment of Henchy J. in *Dillon v. Minister for Posts and Telegraphs*, Supreme Court, 3rd June, 1981. In that case an election candidate sought to avail of the free postage facilities available to such candidates. Objection was, however, taken to his electoral literature on the ground that it was "grossly offensive" within the meaning of Inland Postal Warrant 1939 because it claimed that "Today's politicians are dishonest because they are being political and must please the largest number of people".

19. Henchy J. pointed out that the words "grossly offensive" did not appear in isolation, as the statutory prohibition was rather against "any words, marks or designs of an indecent, obscene or grossly offensive character." He continued:-

"That assemblage of words gives a limited and special meaning to the expression 'grossly offensive' character...Applying the doctrine of *noscitur a sociis* ...the expression must be held to be infected in this context with something akin to the taint of indecency or obscenity. Much of what might be comprehended by the expression of it if it stood alone is excluded by its juxtaposition with the words 'indecent' and 'obscene'. This means that the Minister may not reject a passage as disqualified for free circulation through the post because it is apt to be thought displeasing or distasteful. To merit rejection it must be grossly offensive in the sense of being obnoxious or abhorrent in a way that brings it close to the realm of indecency or obscenity. The sentence objected to by the Minister, while many people would consider it to be denigratory of today's politicians, is far from bring of a 'grossly offensive character' in the special sense in which that expression is used in the [Inland Postal Warrant]."

20. This principle applies with a particular force to the present case. The entire language, structure and format of s. 99 -and particularly s. 99(9) and s. 99(10) - expressly presupposes that the second court will transfer the question of the re-activation of the suspended sentence to the first court and that this will be done *before* the second court imposes sentence. If the phrase "convicted

of an offence" were to have the meaning for which the applicant contends, then these provisions would be otiose and unworkable.

Conclusions regarding the meaning of s. 99(9) of the 2006 Act
21. For all of these reasons, I consider that the reference ins. 99(9) to the phrase "convicted of an offence" refers in this context to the situation where the accused has been found guilty by the second court, but where sentence has yet to be imposed by that court. To ascribe any other meaning to these words would render the sub-sections unworkable and, in any event, that meaning is re-inforced by an application of the *noscitur a sociis* principle.

Is the warrant bad on its face?
22. The second argument is that the warrant of detention is bad on its face because it fails to recite the nature of the second offence which triggered the potential re-activation of the first sentence and, specifically, whether that offence was committed "after the making" of the suspended sentence itself. This latter requirement was itself inserted by s. 51 of the Criminal Justice (Miscellaneous Provisions) Act 2009.

23. The warrant itself recites the fact that the accused was "convicted" of the second sentence on the previous day and that he was remanded under s. 99(9) to appear before this Court. The warrant continues:

> "And whereas the said accused was this day before the Court and the Court being satisfied upon reading the said order that the accused was convicted before the District Court on the 26th day of May, 2014, and that such conviction occurred during the 2 year period of suspension of a 6 month sentence of imprisonment imposed by this Court on the 29th day of October, 2013, in the above entitled proceedings. The Court makes an order under section 99(1) of the above-mentioned Act of2006: That said suspension be revoked and that [the applicant] shall serve the entire sentence of 6 months."

24. The warrant further schedules the first offence with the details of the suspended sentence.

25. It seems to me that the warrant satisfies the requirements set out by the Supreme Court in *GE v. Governor of Cloverhill Prison* [2011] IESC 41 and by myself in *Joyce v. Governor of the Dachas Centre* [2012] IEHC 326, [2012] 2 I.R. 666. In GE an arrest warrant was held to be invalid because it did not disclose the reason for the arrest. Likewise, in Joyce the detention warrant did not refer to the offence for which the applicant had been convicted.

26. The present case is entirely different. Unlike the situation in *Joyce*, it refers to the first offence and details not only the offence, but also the jurisdiction and general circumstances

by which the first court came to re-activate the sentence. The question of whether s. 99(9) and s. 99(10) should be applied is not, however, a matter for the first court: it is rather a question for the second court which must then be satisfied that these jurisdictional requirements are satisfied.

27. This, however, is what occurred before the second court (in this instance, the District Court) in that the order of 26th May, 2014, expressly recited that the offence in question had been committed *after* the making of the suspended sentence by the first court.

Conclusions on the question of whether the warrant is good on its face
28. It follows, therefore, that the warrant of the Circuit Court satisfies the requirements articulated by the Supreme Court in *GE* and is good on its face for all the reasons just stated.

29. So far, therefore, as the non-constitutional issue are concerned, I am satisfied that the applicant's detention has been shown to be in accordance with law. The court can now proceed to consider separately following further argument the constitutional issues which have been adjourned pending the resolution of the first two issues.