Neutral Citation: [2014] IEHC 484

THE HIGH COURT

JUDICIAL REVIEW

[2014 No. 499 J.R.]

BETWEEN

MICHAEL CASH

APPLICANT

AND

DISTRICT JUDGE ANTHONY HALPIN, DIRECTOR OF PUBLIC PROSECUTIONS AND GOVERNOR OF MOUNTJOY PRISON

RESPONDENTS

JUDGMENT of Ms. Justice Baker delivered on the 15th day of October, 2014

1. The applicant was convicted and sentenced at Tallaght District Court by the first named respondent on 9th December, 2013. This judicial review relates to the sentences imposed by the District Judge following on these three convictions and from the fact that each sentence was suspended in part. The District Judge ordered that the three individual sentences be served consecutively, the second and third of which were to be served immediately upon the termination of the previous sentence.

2. This judicial review raises the question of the status of a series of consecutive sentences directed to run immediately after the expiration of previous sentences when some or all of those are suspended. In particular, the question before me is how the court, or a prison governor detaining a convicted person, is to interpret and apply such suspended and consecutive sentences.

3. The other question that arises for consideration before me is whether I may order the unconditional release of the applicant by way of an order of mandamus, or whether such relief may be granted only by application for an inquiry under Art. 40 of the Constitution.

Facts

4. In each case the applicant was convicted on 9th December, 2013, at Tallaght District Court. The three offences arose from separate incidents. The first sentence was imposed for a conviction in respect of the offence of driving without insurance contrary to s. 56(1) of the Road Traffic Act 1961, as amended. The District Judge imposed a sentence of five months imprisonment in respect of this charge, and suspended the final two months of the five month term. The warrant of execution directed to the Governor of Mountjoy Prison commanded him to imprison the applicant for a period of the aforesaid sentence from 9th December, 2013. I will call this "the first sentence".

5. The second sentence was imposed in respect of a conviction under s. 107 of the Road Traffic Act 1961, as amended, for the offence of providing a false name and address. A sentence of three months imprisonment was imposed in respect of this offence with one month suspended. The District Judge specified that this sentence was to be served consecutively on the expiration of the sentence of five months imposed on the first offence referred to above, and one month of the three month sentence was suspended. I will call this "the second sentence".

6. The third sentence was imposed in respect of an offence contrary to s. 15(1) and (5) of the Criminal Justice (Theft and Fraud Offences) Act 2001, in respect of which a sentence of twelve months imprisonment was imposed, the last three months to be suspended. This sentence was ordered to be served on the legal expiration of the sentence of three months imposed on second sentence, and the warrant so stated. I will call this "the third sentence".

7. The net effect of the three convictions and sentences is that the applicant was sentenced to three separate periods of imprisonment, in each case with one part of the sentence suspended, and in the case of the second and third sentence to be served consecutive upon and immediately after the expiration of the previous term of imprisonment.

Arguments

8. The applicant claims that the District Judge erred in law in imposing three part suspended consecutive sentences and argues it is legally impermissible to suspend a sentence in part and thereafter to make another sentence consecutive upon the expiration of the first sentence. It is argued that each of the three sentences, albeit they were ordered to be served consecutively, had to be dealt with separately and that the correct means of interpreting the sentence was that the applicant should be released for the period of each of the two periods of suspension, so that after the three months were served on the first sentence, he should have been released for the period of suspension and later imprisoned on the expiration of the full five month sentence imposed on him, with a similar treatment to be afforded to the second sentence.

9. It is further argued that the orders made and warrants made on foot of these orders are not capable of being lawfully carried into effect, and that they are void for irregularity and uncertainty and cannot be interpreted.

10. The second and third respondents are represented by the same counsel but make different points. The DPP argues that the sentences were made within jurisdiction and it is not doubted by counsel for the applicant that the District Judge did have a power to impose the sentences which were imposed and to suspend part only of each of the sentences, nor is it doubted that the District Judge had the power to make sentences run concurrently. What the applicant argues is that the marrying of these two powers in this particular case gave rise to an incoherence and invalidity.

11. The DPP says the warrants are valid on their face and that the interpretation of the warrants was a matter for the Governor, the third respondent. Both respondents argue that the orders were made within jurisdiction and the way in which the Governor dealt with those warrants was also within jurisdiction. It appears that what the Governor did when he obtained the warrants was to add together the various periods of imprisonment, correctly coming to a total of twenty months, and subtracted form the total the three

relevant periods of suspension, six months in total, thereby treating the sentences as twenty months with six months suspended.

12. The respondents also argue that the orders made by the District Judge are not before me, and that I may not in those circumstances make an order quashing them. The applicant accepts that in the absence of copies of the three relevant orders his application for *certiorari* is confined to an application in respect of the warrant of execution made in each case commanding the imprisonment of the applicant, each of which was drawn on foot of the orders recited in the papers before me.

13. The applicant has in fact served the first two sentences and the only warrant of execution which now falls to be challenged by way of *certiorari* is the third warrant, the warrant directing the imprisonment of the applicant for a period of twelve months with three months suspended, such twelve month period to be served consecutively with the second sentence of three months.

14. I accept the argument that I may not quash the orders of the District Court if these are not before me and as the sentences which inform the first and second warrants have been served the only question before me is the validity and effectiveness of the third sentence and warrant.

The procedural history before the High Court
15. The applicant brought an application for an inquiry pursuant to Art. 40.4.2 of the Constitution before Herbert J. on 15th August, 2014. The inquiry was granted and returned before that judge at 2pm on that date. When the matter came back before the court it became apparent that the applicant had been released on temporary release minutes before the application was moved in the morning. It was then adjourned to Monday 18th August and Barton J. on Tuesday 19th August having heard arguments from counsel for the applicant and respondents held that relief pursuant to Art. 40.4.2 of the Constitution was not available to the applicant as he was no longer in custody. He gave leave to bring the application by way of judicial review and extended the time for the making of that application.

16. At that time, the applicant was released from custody on conditional temporary release which ran from week to week, and this has continued to run up to the date of the hearing before me and is expected to run until further order of the court or direction of the Minister. The conditional temporary release contains various conditions, nine in all, including an order that the applicant not enter a club, pub or other licensed premises, not change address, not convey messages in or out of prison, report to Tallaght Garda Station daily, be of "sober habits" and of good behaviour, and keep the peace. The order of temporary release was also called an order made for the reason of "pre-release/resocialisation" and the applicant was released to his identified home address. Failure to comply with any of these conditions is an offence punishable on conviction by imprisonment and would have involved the re-arrest and further detention of the applicant.

17. As Barton J. having heard the argument from both parties directed that an inquiry under Art. 40.4.2 was not the correct means by which the applicant should proceed, the applicant brought proceedings by way of judicial review seeking *certiorari* quashing the orders and warrants and seeking an order of *mandamus* directing his immediate and unconditional release.

The first question: an extension of time?
18. Both respondents make a similar argument that the applicant is out of time and that time began to run on 9th December, 2013 when the warrants were made, more than eight months ago, and that the applicant is long outside the time permitted by Or.84 of the Rules of the Superior Courts. At leave stage Barton J. extended the time for the bringing of the application for judicial review, but I accept the argument of counsel for the two respondents that his order does not bind me on the full hearing.

19. Counsel for the applicant argues that the issue of delay must be seen in the somewhat unusual context of this case, namely that the applicant had available to him his remedy under Article 40.4.2 until his temporary release on 15th August 2014, minutes before he moved the unsuccessful application before Barton J. who refused to order an inquiry as the applicant was in his view no longer detained. There would have been no time bar to the application and successive applications are possible: see judgment of Hogan J. in *Joyce v Governor of Dóchas Centre* 2012 IEHC 326 where he held that on a true construction of the constitutional remedy an applicant could renew an application for an inquiry where for example new arguments were sought to be made

20. Further, I am persuaded by the statement in Dunne, *Judicial Review of Criminal Proceedings*, (Dublin, 2011) at para. 14.47 where he says that the fact that judicial review in criminal matters invariably concerns constitutional rights, the courts

> *"are slow to refuse to entertain judicial review applications on the grounds of delay or non-compliance with the prescribed time limits where ...there is a real and serious risk of an unfair trial."*

21. Still more it seems to me the court will be slow to refuse an applicant judicial review where matters of his personal liberty are at stake. This applicant finds himself in the unusual circumstances that when he first made the application to the High Court for an inquiry, the question of whether his status as a prisoner on temporary release was such as to preclude him from seeking an inquiry pursuant to Article 40.4.2 had not been authoritatively decided. Barton J. held that he was not competent to seek an inquiry, and it seems that he extended the time to bring judicial review in those circumstances, knowing, as he must have, that the time for seeking review under the Rules had passed. Further the applicant also found himself in another unchartered territory, now clarified by the Supreme Court in *Ryan v. Governor of Midlands Prison* [2014] IESC 54, as to the scope of the jurisdiction under Article 40.4.2 itself.

22. Accordingly, were I to refuse an extension of time it seems to me that the applicant would be denied a remedy for reasons of the form of the application where the legal landscape was changing and in those unusual circumstances I accept that the applicant is entitled to an extension of time for bringing this application.

Availability of an alternative remedy
23. The respondent also argues that the applicant had an alterative remedy in the form of an appeal of the sentences and that the applicant not having done this, is not now competent to seek judicial review of the orders or warrants. The applicant referred me to the case law of *Payne v. Brophy* [2006] 1 I.R. 560, *Whelton v. O'Leary* [2007] IEHC 460, and *Stefan v. Minister for Justice, Equality and Law Reform* [2001] 4 I.R. 203, from which the following principles can be gleaned:-

> (a) The fact that an alterative remedy exists does not preclude an applicant from bringing an application for judicial review.
>
> (b) The court will look at all of the circumstances to ascertain whether the relief sought is one which is more properly characterised for an application for judicial rather than appeal.
>
> (c) The court has a discretion to consider an application for judicial review notwithstanding the existence of alternative

remedies, and notwithstanding the fact that these alternative remedies were not pursued by an applicant.

(d) The essential question for the court is whether the application brought is for the type more properly dealt with by judicial review.

The last element of the test seems apposite, and had the applicant appealed the warrants would not have been quashed; the judge on appeal could have made fresh sentences, but could not have considered the validity of the warrants themselves. Accordingly, the relief is one which in my view is properly one for review rather than appeal.

The status of the suspended sentences
24. It is not doubted that the District Judge had power to suspend in part the sentence he imposed. This power is contained in s. 99 of the Criminal Justice Act 2006, and s. 99(1) makes it clear that a court may make an order "*suspending the execution of the sentence in whole or in part".*

25. What is also not doubted is that the District Court has a power to impose consecutive sentences and this power is contained in s.5 of the Criminal Justice Act, 1951 as amended by s. 12 of the Criminal Justice Act, 1984.

26. What is not apparent in the statutory scheme in Ireland is how a court, or the governor of a prison detaining or directed to detain a person, is to treat the consecutive terms. Section 104(2) of the UK Criminal Justice Act 1967, directs that when a sentence has been directed to be served consecutively, or where terms are wholly or partly concurrent, then those terms of imprisonment shall be treated as a single term if the sentences were passed on the same occasion or if the person was in custody pending sentence.

27. Counsel for all parties accept there is no Irish statutory provision that governs the interpretation and application of a series of consecutive sentences where the earlier sentences are suspended in whole or in part.

28. The question then comes down to whether the warrants are capable of being interpreted without logical or practical difficulty or error. Had the sentences been stated to run in each case consecutive upon the expiration of the custodial element of the previous sentence, there would have been no error or possible confusion. The power of the Governor to interpret the sentences in this way as has been noted, but is not a ground on which leave was granted. However, it seems to me that the fact that the Governor could and did so interpret the sentences in this manner gives rise to difficulty in two respects: the true singular nature of the individual sentences were not respected; and the interpretative process could give rise to different results.

The nature and purpose of the suspended sentence
29. The purpose of a suspended sentence is to a large extent rehabilitative. It is argued by the applicant that the suspended part of the sentence must be respected in that context and again the case law of the Court of Appeal of England and Wales is of assistance.

30. In *R v. Sapiano* (1968) 52 Cr App R 674 the Court of Appeal of England and Wales pointed to the fact that as Lord Chief Justice Parker said "*the main object of a suspended sentence is to avoid sending an offender to prison at all*". That case involved the imposition of an immediate custodial sentence in respect of one charge, and two suspended sentences imposed to run consecutive to that custodial sentence. The court held that that sentence was wrong because "*in many circumstances it just will not work*", and because the interpretation of the sentence would not give effect to the intention of the sentencing judge, who by suspending a sentence in part or in full expressed an intention to rehabilatate or facilitate the rehabilitation of the prisoner.

31. That decision was applied in *R. v. Goodlad* [1973] 1 WLR 1102, also a decision of the Court of Appeal of England and Wales. The court in that case expressed the view that as far as possible a court should endeavour to avoid mixing an immediate and suspended sentence, because otherwise the court would not properly give effect to its intention in the first of a series of suspended sentences which was to avoid sending a person to prison. Lord Widgery C.J. expressed the view that the trial judge should make up his mind "*whether on the case as a whole prison is inevitable or not*". The court did make it clear that it was not to be assumed that in no case an immediate and suspended sentence could live together, and gave the example of a suspended sentence being imposed in January, and in March, a custodial sentence imposed with a view that it would take immediate effect. The court said that there would be circumstances where a court would have no alternative but to sentence a person to an immediate imprisonment but said this could result in "*undesirable mixing*" of sentences.

The meanings of the warrants
32. As I have said above, this application deals only with the third warrant, the warrant which imposes the third sentence of twelve months with three months suspended. That term was defined as follows:-

> *"The period of twelve months to serve on the legal expiration of a sentence of three months imposed on CASE NO. 2013/230142(3)."*

33. The term of twelve months was to be served on what was described as "the legal expiration" of the second sentence explained above. Counsel for the accused makes the point that the warrant is void for uncertainty and it is incapable of being properly interpreted. It seems to me that he is correct for a number of reasons. In the first place, one possible interpretation, and the one that comes first to mind is that the twelve month sentence was to commence on the expiration of the two month custodial element of the second sentence. That second sentence in turn was to commence on the expiration of the previous sentence, part of which was also suspended, and again at first it looks like the second sentence was to commence on the expiration of the three month custodial element of the first sentence.

34. However, an alterative view could be taken of the precise meaning of the third warrant. If it is the function and purpose of a suspended sentence to reflect the view of the District Judge that part of the sentence imposed by him should not be served by way of imprisonment, then he must have intended that in respect of each sentence taken separately that a period of freedom, albeit freedom subject to conditions or recognisance imposed during the period of suspension, would be enjoyed by the convicted person. The expressed intent of the District Judge was that part of each separate sentence was intended to be served otherwise than by a period of imprisonment, and the interpretation of the sentence in order to give practical effect to this intent could have the effect, as happened in this case, that the suspended periods were ignored.

35. Another less obvious difficulty is how the governor of a prison holding a convicted person under a series of consecutive part suspended sentences is to deal with the circumstances that might arise if some or all of the suspended periods are activated. In the case of the third sentence, this is a particularly acute problem, as it was possible that either the first or second sentence, each of which contained a separate element of suspension, could have in the events which evolved resulted in the accused person having some or all of the suspended element activated, with the effect that the suspended element would be revoked. Were that to have

occurred, the governor of the prison would not have known with certainty when the third sentence was stated or directed to commence.

36. A warrant must not only be clear but capable of clarity in its application and interpretation. These warrants admit of a number of possible interpretations, or which could, depending on how circumstances evolved, have the effect that the date of commencement or termination of a term could vary. While the duration of the sentence imposed on the third warrant is clear, i.e. it was a period of twelve months, three months of which were to be suspended, the legal nature of the sentence was not clear in that it could not be said with any degree of certainty on the date it was perfected, what the commencement date of the sentence was.

37. I note the judgment of the Supreme Court in *Sweeney v. Governor of Loughan House Open Centre & Ors* [2014] IESC 42, where Murray J. made it clear that it was the "legal implications of any sentence which counts", and considered what the "legal nature and duration" of the sentence imposed in that case. He quoted from Lord Bingham in *R. (Smith) v. Parole Board* [2005] 1 WLR 3550, where he addressed the nature of the custodial sentence at para. 24 as follows:

> *"... the sentence passed is not (as it has not within living memory been) a simple statement of the period the defendant must spend in prison. The sentence is in reality a composite package, the legal implications of which are in large measure governed by the sentence passed "*

The "composite package" of the third warrant is that it was sentence of twelve months, three months were suspended and it was to be served on the expiration of another sentence, part of which had also been suspended, and the date of commencement would depend on whether the suspended portion of the first and/or second sentence had been activated.

38. Clarke J. in that case also asked the question as to how "the true legal nature" of a sentence was to be characterised and took the view in that case a period of sixteen months imposed on Mr. Sweeney was in its true legal nature a term of eight months imprisonment with eight months of supervision in the community subject to recall. Importantly Clarke J. took the view that, and I quote in full:-

> *"The form and legal nature of a sentence in Ireland is a single sentence, with the possibility of remission."*

39. The form and legal nature of a sentence in Ireland is that a sentence is a single entity with the possibility of remission, or in the case of a sentence where part is suspended, with the possibility of custodial and non custodial elements. The non custodial element is part of a single sentence and capable of being revoked or activated, but if true effect is to be given to the singularity of each sentence, severance or amalgamation of the sentence with others is not always straightforward. The Governor had no assistance from the form of the warrants themselves to guide him in his interpretation, as the warrants did not provide for the service of the second sentence on the determination of the custodial element of the first, and of the third sentence on the determination of the custodial element of the second.

40. Accordingly, in my view the third warrant is defective and cannot lawfully detain the applicant. It is incapable of clear and unambiguous interpretation, capable of more than one interpretation, and fails to give effect to and recognise the singularity of the first and second sentences, and the clear intention expressed in each of them that a period of non custodial and rehabilitative time be served in each sentence imposed. The true nature of the sentence, then, cannot be unequivocally discerned from the warrant and it should be quashed.

The availability of judicial review as a remedy for release

41. The DPP and the Governor argue that the appropriate remedy where a person seeks an order for his release from custody is an inquiry under Article 40.4.2. Barton J. has already held that this remedy is not available to this applicant as he is not in custody.

42. The courts must take note of the importance of the rule of law and the fundamental and central role of the right of personal freedom to these principles. There must in the context of these fundamental and central principles be an effective remedy, and the availability of such is acknowledged in the jurisprudence of our courts and in the ECHR. As Me Kechnie J. said in *O'Sullivan v. The Chief Executive of the Irish Prison Service & Ors.* [2010] 4 I.R. 562:

> *"The further requirement that there be an effective remedy can be seen as an extension to the right of access. As stated, it is fundamental to governance based on the rule of law that access to the courts be both meaningful and purposeful. For such right to have any substance this must of course include the potential for an effective remedy. As noted, the threshold of "exceptional public importance ... in the public interest" is not insurmountable. There have been several cases where this standard has been met. In this regard it could therefore not be said that the threshold excludes an effective remedy in such a way as to breach either the Convention or Charter. Furthermore, it is clear that notwithstanding the possibility of an appeal, s. 16 itself is an effective remedy which an applicant may use to vindicate his rights. Again, there have been many cases in which persons have successfully challenged a European arrest warrant seeking their surrender. "*

43. The Supreme Court recently considered the availability of the remedy of *habeas corpus* in *Ryan v. Governor of Midlands Prison*, 2014 IESC 54. In that case the applicant applied for an inquiry under Article 40.4.2 of the Constitution and the Court held that the remedy of an inquiry under Article 40.4.2 arises only if there has been an absence of jurisdiction, a fundamental denial of justice or a fundamental flaw. The Court described the holding of such an inquiry as "extraordinary procedure", and later in the judgment as "special and extraordinary" procedure.

44. The court took a view with regard to the nature, scope and purpose of the remedy:-

> *"The traditional remedy of Habeas Corpus, now subsumed in Article 40 of the Constitution, is the great protection of the citizens ' liberty. It protects our citizens from arbitrary detention and imprisonment without legal warrant, not to mention 'disappearances ' which, historically and now, are all too common in dictatorial regimes. The Courts must always enquire immediately into the grounds of any person's detention, when called upon to do so.*
>
> *But the fact that every person detained has a right to have the legality of his detention examined by the Superior Courts does not mean that such a person has a right to have every complaint he may have examined under the same extraordinary procedure. "*

45. The Supreme Court refused an inquiry in that case and directed that the matter raised, namely the entitlement of the applicant to remission, more properly fell to be dealt with by judicial review. The Governor makes one primary argument in this case, namely that

the remedy of judicial review is not a suitable means by which a person in custody may obtain an order for his or her release. The Governor makes the point that *habeas corpus* or an inquiry under Article 40 is the correct procedure. The second named respondent supports him in that argument. The applicant says the argument of the DPP and the Governor leads him to a procedural merry go round.

46. Barton J. has already decided that having regard to the fact that the applicant is not in custody, and is released by way of a temporary release subject to conditions, that *habeas corpus* does not lie. He gave leave to apply for judicial review. Similarly, in *Ryan v. Governor of Midlands Prison*, the Supreme Court said, without expressly deciding, that the appropriate remedy available to Mr. Ryan may be an appeal or an application for leave to seek judicial review. Further, I take note of the fact that in *Sweeney v Governor of Lough an House Open Centre & Ors*, Clarke J. having held that the warrant which gave effect to the transfer of Mr. Sweeney was one which ought to be quashed, expressed the view that it followed that the immediate release of Mr. Sweeney should be directed, and made the order in a judicial review. Murray J. did not expressly direct the release of the prisoner although he did take the view that the court should make what he described as the "*necessary declaration*" that Mr. Sweeney was not entitled to be detained on foot of the warrant.

47. The jurisprudence clearly points to the fact that the court can in a suitable case grant an order for the release of a person from detention by way of an order of *mandamus*, or other relief under the rubric of the remedy of judicial review. To hold otherwise would be to deny an applicant in a case where he is held not to have for one reason or another, an available remedy under Article 40.4.2 an effective remedy to support his constitutional and human right to freedom.

48. It seems to me that having regard to the decision of Barton J. in this case that an inquiry under Article 40 is not appropriate, the only means by which I can give effect to the imperative that the applicant be entitled to an effective remedy is to accept the argument on the part of the applicant that I can through the remedy of judicial review order the release of the applicant from his term of imprisonment. It makes no difference that the applicant is now on temporary release and his freedom is constrained to the extent of the conditions imposed upon him.

Conclusion

49. Accordingly, I made an order of *certiorari* quashing the third warrant and it follows that an order be made directing the immediate and unconditional release of the applicant.