



**THE COURT OF APPEAL**

**Neutral Citation Number: [2018] IECA 382**

**[2018 No. 54]**

**The President**

**McCarthy J.**

**Kennedy J.**

**BETWEEN**

**IGNATIUS FORDE**

**ACCUSED/RESPONDENT**

**AND**

**HER HONOUR JUDGE ALICE DOYLE**

**SECOND RESPONDENT**

**AND**

**THE COURTS SERVICE**

**THIRD RESPONDENT**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**NOTICE PARTY/APPELLANT**

**JUDGMENT of Birmingham P. delivered on the 5th day of December 2018**

**Introduction**

1. This case addresses the question of what should happen in circumstances where, after a conviction or a plea of guilty to an indictable offence, the Circuit Court decides to deal with a matter by imposing a fine to be paid within a certain timeframe and where that time elapses without payment.
2. The matter comes before the Court as an appeal by the Director of Public Prosecutions from a decision of the High Court (Murphy J.) of 28th November 2017 quashing, by way of certiorari, a committal warrant issued in respect of Mr. Ignatius Forde (the applicant/accused).

**Background**

3. The background to this case is to be found in the fact that the accused was charged with the offence of attempted evasion of Excise Duty pursuant to s. 119(2) and (3) of the Finance Act 2001. The accused pleaded guilty and was sentenced by the second named respondent on 19th March 2013. At the sentence hearing, counsel for the applicant/accused urged the sentencing judge to exercise her discretion by not imposing a custodial sentence and, in his plea in mitigation, counsel for the accused referred to the accused's limited means and urged the judge to mitigate the fine to the maximum extent possible. In response, the Judge imposed a fine of €79,054.63 which she then mitigated by 50%, the maximum amount allowable by law, resulting in a fine of €39,527.32. Counsel for the accused indicated that twelve months would be sufficient time for the accused to discharge the fine. The Circuit Court allowed a period of twelve months to pay said fine, and, as authorised by s. 195 of the Criminal Justice Act 2006, the sentence provided for one year's imprisonment in default of payment. At the end of the sentencing hearing, counsel on behalf of the Director sought liberty to apply and this would seem to have been granted. No part of the fine was paid within the twelve months allowed. It should also be noted that the sentence was not appealed.
4. In May 2014, two months after the period for payment had elapsed, the accused was attending the Circuit Criminal Court in relation to other matters and the Director sought to re-enter the matter before the court. Counsel for the accused admitted that the fine had not been paid. The Circuit Court Judge sitting that day refused to deal with the matter as he was not the original sentencing Judge and stated that the "default of payment process would take its normal course".
5. On 8th September 2014, a committal warrant was issued for the arrest and detention of the accused as he had failed to pay the fine within the time permitted. The warrant was signed by a nominated signatory of the County Registrar, a person in the employ of the Courts Service and sets out the following:

" WHEREAS at a sitting of the Carlow Circuit Criminal Court held at The Courthouse, Carlow on the 19th date of March 2013 IGNATIUS FORDE was convicted of an offence on Count No. 2: Evasion of excuse [sic] duty contrary to Section 119(2) and (3) of the Finance Act 2001 as amended by Section 138 of the Finance Act 2002 and was ordered to pay as penalty therefore [sic] the sum of €39527.32 on Count No.2 such sum to be paid within 12 months from the 19th of March 2013 in default of payment within that time HE be imprisoned for a period of 1 year unless said sum be sooner paid AND WHEREAS no such sum whatever has been paid on foot of the penalty this is to command you to whom this Warrant is addressed to lodge the said IGNATIUS FORDE of 54 BURREN STREET, CARLOW in the prison at THE MIDLANDS PRISON, to be imprisoned for the period of 1 YEAR unless the said sum of €39527.32 be sooner paid and for so doing this present

Warrant shall be sufficient authority to all whom it may concern”

6. On 5th March 2015, the accused was arrested on foot of the aforementioned committal warrant and lodged in the Midlands Prison. On 10th March 2015, the accused sought to have his case re-entered before the second named respondent. Having heard submissions, the court stated that it was *functus officio* and did not have jurisdiction to deal with the matter.

7. On 20th March 2015, an application was made before the President of the High Court pursuant to Article 40.4 of the Constitution. The High Court refused to direct an inquiry into the lawfulness of the accused’s detention but granted leave to the accused to challenge the committal warrant by means of judicial review.

8. In the High Court, the Director, a notice party to the proceedings, sought to defend the actions of the second and third respondents by acting in the role of *legitimus contradictor*. This was not the subject of any challenge by the accused, but was regarded by the Court as inappropriate in the case of the third named respondent who, as an independent statutory body, could have defended itself. This has not really featured as an issue before this Court, the appellant/accused taking the view that what the High Court Judge had to say in that regard was obiter. For my part, I do not see that the role played by the Director was an inappropriate one.

9. At the conclusion of the hearing, Murphy J. found that the committal warrant had been issued ultra vires by an employee of the Courts Service and therefore it must be quashed.

### **Grounds of Appeal**

10. There are eight grounds of appeal that allege some error, either in fact or in law, on the part of the learned High Court Judge. They are set out as follows:

- i. The High Court erred in law in quashing the warrant issued in respect of the accused;
- ii. The High Court erred in law or in fact in finding that the warrant was issued by the Courts Service and/or that it was ultra vires the Courts Service to do so;
- iii. The High Court erred in law or in fact in finding that the Director of Public Prosecutions was not the appropriate *legitimus contradictor* in these proceedings;
- iv. The High Court erred in law in finding that the Circuit Court Judge not only had jurisdiction to revisit her order after the end of the sentence hearing if there was a failure to pay the fine, but was obliged to do so;
- v. The High Court erred in law and/or in fact in finding that the fact of the Director ‘seeking liberty to apply’ at the end of the sentence hearing amounted to an acceptance that the matter would have to be re-entered before the court before a warrant could issue following the failure of the accused to pay the fine;
- vi. The High Court erred in law and/or in fact in finding that the accused did not have notice of the intention to issue the warrant;
- vii. The High Court erred in law and/or in fact in holding that the wording on the warrant was insufficient to show jurisdiction;
- viii. The High Court erred in her characterisation of what had transpired when she found that the nominee of the County Registrar determined that there had been a default and further presumably determined that there was no good reason for the default.

### **The Warrant was issued without Lawful Authority by a Civil Servant**

11. The Director submits that while it is accepted that the issuing of a warrant is a judicial act, the drawing up of a warrant to reflect an order of the Court is not and may be carried out by a non-judicial body. Moreover, this is provided for in O. 4 of the Circuit Court Rules.

12. The Director, relying on the decision of Humphreys J. in *Walsh v. Governor of Cork Prison & Ors.* [2016] IEHC 323, states that there is a long-accepted proposition that an order is made by a court and a warrant reflects that order which is then the basis on which a Prison Governor detains a person.

13. The appellant contends that while the warrant was drawn up by an employee of the third named respondent that this does not mean that the warrant was issued by that employee in any legal sense. There was no decision by the employee on the amount of the fine, the period that was allowed for payment, or any decision in relation to the default provision. The person drawing up the warrant was simply giving effect to the order of the Circuit Court Judge.

14. The Director further submits that the Northern Irish decision of *McLarnon & Ors (Judicial Review)* [2013] NIQB 40, which was relied upon by the High Court as an authority for finding the warrant was issued ultra vires, can be distinguished as it has a very different legal and factual background to the case at hand. The statutory scheme considered in *McLarnon* differs to the procedures set out in the Courts (No. 2) Act 1986 which, in any event, are confined to proceedings in the District Court. Moreover, the Director submits that in *McLarnon* the practice found to be improper was the effective determination of a default consequence and sentence by the Northern Ireland Courts and Tribunal Service in the absence of any order of the Court. In contrast, the case currently before this Court deals with a scenario where the default provision was ordered by the Circuit Court on 19th March 2013

15. Mr. Forde argues that in the absence of any statutory authority, the third named respondent engaged in a decision-making process that culminated in the issuing of the warrant. This process went beyond merely giving effect to the order of the Court and accordingly, the actions of the third named respondent were ultra vires. The accused relies on *In re Haughey* [1971] I.R. 217 in submitting that to allow a non-judicial body to issue a committal warrant circumvents the requirements of the constitutional guarantee of fair procedures. As the issuing of a committal warrant results in the deprivation of one’s liberty, it can only be lawfully achieved by the exercise of a judicial function. Further, it is suggested that, despite the Director’s arguments to the contrary, *McLarnon* is a valid authority with near-identical facts and was correctly relied upon by the High Court judge.

### **The Court was functus officio**

16. The Director submits that the High Court judge was wrong in stating that the accused must be brought back before the Court in the event of default. Once the order was made, the Circuit Court Judge was *functus officio* and the order could not be re-visited by the sentencing judge. There is no provision for a sentencing judge to extend time for payment of fines in respect of indictable matters. Whilst s. 2 of the Criminal Justice Administration Act 1914 and the Payment of Fines Act 2014 did set out such procedures, the former applied only to the District Court and the latter was not commenced at the relevant time. The appellant further claims that the High Court acted inappropriately in seeking to apply the principles of a law that was not enacted at the relevant time, or procedural rules that are relevant only in District Court. It was accepted that it was possible to envisage circumstances where, through unforeseen circumstances, the accused is unable to discharge a fine, but that is not the case pleaded here. In any event, no matter the reason for default, the sentencing judge does not have jurisdiction to vary the order. In addition, the fact that the Director sought liberty to apply could not be interpreted as recognising a jurisdiction to vary an order or to confer or create such a jurisdiction.

17. The accused submits that a court does not become *functus officio* in instances where it makes a conditional order. Where a term of imprisonment is conditional on there being a default then such a term of imprisonment could only be imposed or activated by a person holding judicial office and having *seisin* of the case. It is submitted that the range of options available to the sentencing judge upon the matter coming back to her is irrelevant. At the very least, an intervention by a judge sitting in court was required in order to activate the term of imprisonment.

18. The accused submits that in cases where there were no mechanisms available in law to enforce the order, the High Court Judge was correct in asserting that one must go back to general principles and she was correct to apply the principles demanded by natural and constitutional justice. Furthermore, by seeking liberty to apply, the Director created a situation that permitted the parties to return to the sentencing judge to clarify an issue and to deal further with the matter.

### **Errors on the face of the Warrant**

19. The Director submits that despite its imperfections, namely, the reference to 'Excuse Duty' rather than 'Excise Duty' and the fact that it is headed 'Warrant' *simpliciter* rather than described as a committal warrant or otherwise described, the warrant showed jurisdiction on its face and the order of the Court is set out clearly. It is well established that the function of a warrant is so that a prisoner, the Governor, and the courts can ascertain the basis of the detention, the length of the detention, and the start/end date of the detention. It is accepted that s. 195 of the Criminal Justice Act 2006 is not referred to in the warrant, being the relevant section providing for the activation of a term of imprisonment when a convicted person defaults on payment, but says that explicit reference to the section was not necessary. Moreover, the Director relies on the *dictum* of Ryan P. in *O'Brien v Coughlan* [2015] IECA 245:

"[e]rror of law on the face of the record is in general a non-jurisdictional error. There is no obligation to quash where the applicant cannot realistically point to any prejudice or detriment"

It is suggested that where an accused has pleaded guilty and the sentence imposed was within jurisdiction he cannot be said to have suffered any prejudice by the fact that the section was not cited on the face of the warrant.

20. In response, the accused outlines that the warrant, on its face, does not inform the detainer of the actual reasons for the detention of the accused as it states the offence as being one of "evasion of excuse duty" and fails to refer to s. 195 of the Criminal Justice Act 2006. Relying on *GE* and *Joyce v Governor of the Dochas Centre* [2012] 2 IR 666, Mr. Forde claims that the import of this manifest error on the face of the warrant is to deprive the warrant of the capacity to inform a reader of the reasons for the detention of the accused. However, the Director says that the reference to 'Excuse Duty' rather than 'Excise Duty' was a simply typographical error which could never have confused anybody, and most certainly, could not have confused the accused/applicant who was present in court when the order was pronounced.

### **Lack of Notice of Intention**

21. The Director contends that the accused was fully aware from 19th March 2013 that if he did not pay the fine within the year, that he would be imprisoned for twelve months. Mr. Forde received a Notice of Imposition of Penalty which was exhibited in his affidavit in the High Court, although this was wrongly stated by the High Court Judge as being exhibited in the Director's affidavit. Mr. Forde was also present in court on 15th May 2014 when the Judge sitting that day stated that the "default process would take its normal course".

22. The accused submits that the actions of the Director, in seeking liberty to apply and subsequently requesting to have the matter re-entered, acknowledge that the Circuit Court is the entity required to take steps to enforce the default. He further argues that the actions of the Director led him to believe that a further adjudication by the Circuit Court was necessary to issue the warrant and activate the sentence.

### **Discussion**

23. It is worth considering what the position would have been on 19th March 2013 had someone posed the question "what happens if the fine is not paid within the year?" It seems to me that nobody would have answered "Mr. Forde will be brought back before a judge who will decide what to do". It seems to me that the universal response would have been "Mr. Forde will be imprisoned for twelve months", that would have been the universal response because that was what the judge, acting within jurisdiction, had decided should happen and had so stated in clear and unequivocal terms. It is, of course, the case that the Courts Service or its officials cannot decide to issue a warrant, but that is not what happened here. The decision that Mr. Forde should be imprisoned for a period of twelve months if he failed to pay the fine within the prescribed time was a decision that was taken by Judge Alice Doyle on 19th March 2013. No further decision thereafter was required. Had a Notice of Motion or some other procedure been instigated with a view to having Mr. Forde back before the Circuit Court for a further hearing, it is very likely that he and his advisers would have challenged the procedure on the basis that what was happening was taking place without any statutory or other foundation.

24. It is true that if one takes the position that the proceedings had concluded when the Circuit Court Judge pronounced sentence, imposed a fine, and made provision for imprisonment in default, that it does raise the question of what is to happen if there is some wholly unexpected development during the twelve months which would render payment of the fine impossible, such as catastrophic injuries sustained in an accident, grave illness or the like. However, that is not Mr. Forde's situation and he cannot argue someone else's case. He has not provided any explanation or justification for the failure to pay the fine. Again, in the present case, the failure to pay within the time prescribed is not in dispute, there was no need for any determination that there had been default. I do not find it necessary to express any view on what procedure should be followed if a case arose where there was a dispute because, again, that is not Mr. Forde's case, and again, he cannot argue the case of some theoretical third party.

25. In my view, the High Court Judge erred in concluding that an official of the Courts Service had decided or determined that Mr. Forde should serve a period of imprisonment. The decision that Mr. Forde should serve a period of imprisonment in default of payment of the fine was one taken by the Judge in the Circuit Court and the actions of the official in the Courts Service in drawing up the warrant were simply designed to give effect to the Judge's decision and order. Mr. Forde was lodged in the Midlands Prison on 5th March 2015 because Judge Doyle had decided that was what should happen if there was default and the fine was not paid. Accordingly, I am satisfied that the primary ground of challenge raised by the applicant, Mr. Forde, fails.

26. As to the form of the warrant, I am satisfied that the warrant met all the necessary requirements, in that it recited the issuing court, the Bill Number, the offence in respect of which there had been a conviction, the date of the conviction, the order made by the Circuit Court, including the default provision, and the fact that the fine had not been paid. I regard the reference to 'Excuse Duty' as an obvious typographical error. In that regard, I respectfully agree with the observations of Charleton J. in *DPP v. Mallin* [2011] IECCA 29, that "courts should be slow to invalidate warrants on the grounds of typographical, grammatical or transcription errors which are neither calculated to mislead, nor in truth, do mislead any reasonable reader of the words".

27. That being so, I would allow the appeal and set aside the order of the High Court.