

THE HIGH COURT

[2017 No. 5 S.S.P.]

IN THE MATTER OF AN APPLICATION UNDER ARTICLE 40.4.2 OF THE CONSTITUTION

BETWEEN

KENNETH LYONS

APPLICANT

AND

THE GOVERNOR OF THE MIDLANDS PRISON

RESPONDENT

JUDGMENT of Mr. Justice Eagar delivered on the 7th day of April, 2017

1. The applicant is a prisoner at the Midlands Prison, Portlaoise, Co. Laois. He is held on foot of two warrants, the first indicating a date of conviction on the 29th of November, 2016 with the Count No. 1 of attempting to rob D.L. contrary to common law. The sentence imposed by the court was one of three years' imprisonment to date from the 10th of March, 2017.

2. The second warrant related to a date of sentence of the 10th of March, 2017 where the offence was of attempted robbery of D.L. contrary to common law and the sentence of the court was that the accused be in prison for a period of five years and six months. This sentence was to date from the lawful expiration of the sentence of three years imposed on the previous warrant with the final four years of the combined sentences of eight years and six months suspended in terms as entered by the accused on this date in court.

3. The accused seeks an inquiry under Article 40 in the following circumstances: he states on affidavit that the warrants of imprisonment under which he is held refer to attempted robbery contrary to common law. He said that the common law offence of robbery was abolished by virtue of the Criminal Justice (Theft and Fraud Offences) Act 2001.

4. Section 3 of the Act provides as follows:

"3(2). Any offence at common law of larceny, burglary, robbery, cheating (except in relation to the public revenue), extortion under colour of office and forgery is abolished."

Robbery is now appropriately charged under s. 14(1) of the Criminal Justice (Theft and Fraud Offences) Act 2001.

5. However, the applicant is not detained on foot of warrants alleging robbery, rather warrants alleging attempted robbery. Attempted robbery is an incomplete or more formally an inchoate offence, one of three inchoate offences contrary to common law: attempt, conspiracy and incitement. The appropriate way to frame a charge of attempt is 'attempted to rob contrary to common law' (see Charleton, McDermott and Bolger, *Criminal Law* (Dublin, 2005)).

6. The abolition of the common law offence of robbery does not affect the inchoate offence of attempt to rob and in those circumstances the warrants holding the applicant in the Midlands Prison are perfectly legal.

7. In these circumstances the court will refuse to direct an inquiry into the grounds of the detention of the applicant.