THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Edwards J

Appeal Number: 2016/270

Paul Clarke

Appellant

And

Governor of Mountjoy Prison

Respondent

JUDGMENT of the Court delivered on the 28th day of July 2016 by Mr. Justice Birmingham

1. This is an appeal from a decision of the High Court (McDermott J.) of the 27th May, 2016, refusing the applicant an order directing his release pursuant to Article 40 of the Constitution.

2. The background to this case is that on 7th July, 2010, the appellant was before the Dublin Circuit Court for sentence on a number of counts on three indictments, being Bill No. 1498/2008, Bill No. 1383/2009 and Bill No. 699/2010. On Bill 1498/2008, the appellant pleaded guilty to offences of robbery and possession of a firearm. A sentence of five years imprisonment was imposed. On Bill No. 1383/2009, the appellant pleaded guilty to a count of robbery of €25,000, none of which was recovered. During the course of the robbery a sawn off shotgun was discharged in order to blast away a glass barrier surrounding the area in which staff worked. On this Bill, a sentence of eight years imprisonment was imposed with the final seven years suspended. There was also a count in relation to possession of a firearm and on that count a sentence of seven years imprisonment was imposed, suspended in its entirety. These sentences were consecutive to those imposed on Bill No. 1498/2008.

3. The applicant also pleaded guilty to a count of robbery on Bill No. 699/2010. This involved the robbery of a shop when accompanied by an accomplice, the use of two knives and an imitation firearm. He was sentenced to five year imprisonment with the final four years suspended. This sentence was also to be served consecutively to that imposed on Bill No. 1498/2008.

4. What is of significance in the context of the present proceedings is that arising from the sentence hearing on the 7th July, 2010, the applicant/appellant was subject to a suspended sentence of seven years imprisonment which was operative once the custodial element of the sentences was served. The sentences were suspended on condition that:

> (a) The applicant keeps the peace and be of good behaviour towards all the people of Ireland for a period of seven years from the date of his release from prison;
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> (b) That he place himself under the supervision of the Probation Service for a period of two years from the date of his release;
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> (c) That he would abide by all the directions of the Probation Service including attendance at a drug treatment course (residential or otherwise) and provide urine samples for testing as necessary;
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> (d) That he would come up, if called upon to do so, at any time within the period of seven years to serve the balance of the sentence imposed."

5. Having served the custodial element of the sentences, the applicant was released from custody in October 2013. Thereafter he breached the conditions applicable to the suspended sentence.

6. The question of whether the suspended sentences should be activated was brought before His Honour Judge Patrick McCartan who on the 4th November, 2014, reactivated all of the sentences that had previously been suspended and directed that they should run concurrently from the 30th April, 2014. The activation of the suspended sentences is central to the present appeal. The sequence of events is that having served the custodial element of the sentences, the appellant was released from prison in October 2013, but he remained subject to the suspended sentence element. On the 9th September, 2014, the applicant appeared before Cloverhill District Court and pleaded guilty to a number of charges arising out of two separate road traffic incidents that had occurred on the 10th February, 2014 and the 2nd April, 2014. The charges included driving a mechanically propelled vehicle without insurance. When the appellant pleaded guilty to the charges that he faced in the District Court he was remanded in custody to Dublin Circuit Criminal Court.

7. The matter first came before the Circuit Court on the 10th September, 2014, the activation/reactivation process was not completed on that occasion and the issue was finally determined by Judge McCartan on the 4th November, 2014, when the judge activated all of the sentences that had previously been suspended in full and directed that they should be served concurrently and dated from the 30th April, 2014.

8. Thereafter the appellant was remanded back to Cloverhill District Court in order to impose sentence in respect of the road traffic matters and on the 5th November 2014, a five month prison sentence was imposed. This five month sentence was itself suspended. There was also a 30 year driving ban.

9. By notice of appeal dated the 17th November, 2014, the applicant appealed against the sentences imposed on the 4th November, 2014. It was stated that grounds of appeal would be supplied by the appellant's solicitor, but in fact no grounds were provided up to

the time when the Article 40 application came on for hearing in the High Court. It is understood that grounds have been provided in recent weeks.

10. On the 19th April, 2016, Moriarty J. delivered judgment in the case of *Moore and Others v. DPP, Ireland and the Attorney General* [2016] IEHC 244. The applicant/appellant claims that by reason of this judgment he is entitled to be released and moved for this relief on the day after the judgment was delivered. He says that the mechanisms whereby he was sent back to the court of trial which then dealt with his undoubted breaches of conditions and lifted the suspension and activated the sentences was held to be repugnant to the Constitution and invalid in *Moore and Others v. DPP* and that accordingly his detention is unlawful.

11. This case is but the latest that involves consideration of the operation of s. 99 of the Criminal Justice Act 2006. For ease of reference it is appropriate to set out that section in full:-

> 99(1) Where a person is sentenced to a term of imprisonment (other than a mandatory term of imprisonment) by a court in respect of an offence, that court may make an order suspending the execution of the sentence in whole or in part, subject to the person entering into a recognisance to comply with the conditions of, or imposed in relation to, the order.
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> (2) It shall be a condition of an order under subsection (1) that the person in respect of whom the order is made keep the peace and be of good behaviour during—
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> (a) the period of suspension of the sentence concerned, or
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> (b) in the case of an order that suspends the sentence in part only, the period of imprisonment and the period of suspension of the sentence concerned,
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> and that condition shall be specified in the order concerned.
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> (3) The court may, when making an order under subsection (1), impose such conditions in relation to the order as the court considers—
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> (a) appropriate having regard to the nature of the offence, and
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> (b) will reduce the likelihood of the person in respect of whom the order is made committing any other offence,
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> and any condition imposed in accordance with this subsection shall be specified in that order.
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> (4) In addition to any condition imposed under subsection (3), the court may, when making an order under subsection (1) consisting of the suspension in part of a sentence of imprisonment or upon an application under subsection (6), impose any one or more of the following conditions in relation to that order or the order referred to in the said subsection (6), as the case may be:
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> (a) that the person co-operate with the probation and welfare service to the extent specified by the court for the purpose of his or her rehabilitation and the protection of the public;
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> (b) that the person undergo such—
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> (i) treatment for drug, alcohol or other substance addiction,
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> (ii) course of education, training or therapy,
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> (iii) psychological counselling or other treatment,
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> as may be approved by the court;
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> (c) that the person be subject to the supervision of the probation and welfare service.
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> (5) A condition (other than a condition imposed, upon an application under subsection (6), after the making of the order concerned) imposed under subsection (4) shall be specified in the order concerned.
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> (6) A probation and welfare officer may, at any time before the expiration of a sentence of a court to which an order under subsection (1) consisting of the suspension of a sentence in part applies, apply to the court for the imposition of any of the conditions referred to in subsection (4) in relation to the order.
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> (7) Where a court makes an order under this section, it shall cause a copy of the order to be given to—
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> (a) the Garda Síochána, or
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> (b) in the case of an order consisting of the suspension of a sentence in part only, the governor of the prison to which the person is committed and the Garda Síochána.
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> (8) Where a court has made an order under subsection (1) and imposes conditions under subsection (4) upon an application under subsection (6), it shall cause a copy of the order and conditions to be given to—

(a) the probation and welfare service, and

(b) (i) the Garda Síochána, or

(ii) in the case of an order consisting of the suspension of a sentence in part only, the governor of the prison to which the person is committed and the Garda Síochána.

(9) Where a person to whom an order under subsection (1) applies is, during the period of suspension of the sentence concerned, convicted of an offence, the court before which proceedings for the offence were brought shall, after 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.

(10) A court to which a person has been remanded under subsection (9) shall revoke the order under subsection (1) unless it considers that the revocation of that order would be unjust in all the circumstances of the case, and where the court revokes that order, the person shall be required to serve the entire of the sentence of imprisonment originally imposed by the court, or such part of the sentence as the court considers just having regard to all of the circumstances of the case, less any period of that sentence already served in prison and any period spent in custody (other than a period during which the person was serving a sentence of imprisonment in respect of an offence referred to in subsection (9)) pending the revocation of the said order.

(11) (a) A sentence (other than a sentence consisting of imprisonment for life) imposed—

(i) in respect of an offence committed by a person to whom an order under subsection (1) applies, and

(ii) during the period of suspension of sentence to which that order applies,

shall not commence until the expiration of any period of imprisonment that the person is required to serve of the sentence referred to in paragraph (b) either by virtue of the order under subsection (1) or a revocation under subsection (10).

(b) This subsection shall not affect the operation of section 5 of the Criminal Justice Act 1951 .

(12) 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 of, or sentence imposed on, a person for an offence by the court that revoked that order.

(13) Where a member of the Garda Síochána or, as the case may be, the governor of the prison to which a person was committed has reasonable grounds for believing that a person to whom an order under this section applies has contravened the condition referred to in subsection (2) he or she may apply to the court to fix a date for the hearing of an application for an order revoking the order under subsection (1).

(14) A probation and welfare officer may, if he or she has reasonable grounds for believing that a person to whom an order under subsection (1) applies has contravened a condition imposed under subsection (3) or (4), apply to the court to fix a date for the hearing of an application for an order revoking the order under subsection (1).

(15) Where the court fixes a date for the hearing of an application referred to in subsection (13) or (14), it shall, by notice in writing, so inform the person in respect of whom the application will be made, or where that person is in prison, the governor of the prison, and such notice shall require the person to appear before it, or require the said governor to produce the person before it, on the date so fixed and at such time as is specified in the notice.

(16) If a person who is not in prison fails to appear before the court in accordance with a requirement contained in a notice under subsection (15), the court may issue a warrant for the arrest of the person.

(17) A court shall, where it is satisfied that a person to whom an order under subsection (1) applies has contravened a condition of the order, revoke the order unless it considers that in all of the circumstances of the case it would be unjust to so do, and where the court revokes that order, the person shall be required to serve the entire of the sentence originally imposed by the court, or such part of the sentence as the court considers just having regard to all of the circumstances of the case, less any period of that sentence already served in prison and any period spent in custody pending the revocation of the said order.

(18) A notice under subsection (15) shall be addressed to the person concerned by name, and may be given to the person in one of the following ways:

(a) by delivering it to the person;

(b) by leaving it at the address at which the person ordinarily resides or, in a case in which an address for service has been furnished, at that address; (c) by sending it by post in a prepaid registered letter to the address at which the person ordinarily resides or, in a case in which an address for service has been furnished, to that address.

(19) This section shall not affect the operation of—

(a) section 2 of the Criminal Justice Act 1960 or Rule 38 of the Rules for the Government of Prisons 1947 (S.R. & O. No. 320 of 1947), or

(b) subsections (3G) and (3H) of section 27 of the Misuse of Drugs Act 1977 .

12. At this stage I would draw attention in particular to subss. (9) and (10) being the subsections in issue in the *Moore* case and also I would draw attention to the provisions of subs. (17). In the course of his judgment in the High Court, McDermott J. observed that "the jurisdiction of the sentencing court is extensive". He made that remark having referred to the provisions of subs. (10) and having

also drawn attention to the provisions of subs. (13) which contemplates an intervention by a member of An Garda Síochána or a prison Governor if there are reasonable grounds for believing that a prisoner has breached the mandatory conditions imposed under subs. (2). Judge McDermott also drew attention to subs. (14) which provides a role for the Probation Service in bringing the matter before the court if there are reasonable grounds for believing that the prisoner has breached the conditions imposed under subss. (3) or (4).

13. McDermott J. pointed out that subss. (9) and (10) were directly related to the return of the case to the sentencing court following on a further conviction, but noted that the court is vested with extensive powers under s. 99(17) which are exercisable if a court is satisfied that any conditions imposed had been breached. McDermott J. said that the essence of the decision under s. 99(17) is similar to that to be made under s. 99(10). However, the judge noted that s. 99(17) had a wider ambit than s. 99(10), (13) and (14) in that it provides for a more general jurisdiction to revoke a suspended sentence. Subsection (17) is not specifically referable to any of the subsections under which the matter is returned to the sentencing court: rather the subsection directs the court to revoke a suspended sentence once it has been satisfied that a condition of the suspension has been breached unless doing so would be unjust.

14. Counsel on behalf of the appellant has submitted that subs. (17) has no relevance to the present case and he contends that it is clear that the matter was brought back before the Circuit Court pursuant to s. 99(9) and was then dealt with pursuant to s. 99(10). These subsections have been found to be unconstitutional and he contends that it is therefore clear that the procedure followed was an invalid one and that accordingly his client is not in lawful custody.

15. In the course of a detailed and careful judgment, McDermott J. reviewed the *Moore* and related cases pointing out that central to the decisions in those cases was the restriction that was placed on someone who has been convicted of a fresh offence appealing that conviction before the earlier sentence was reactivated when the matter was returned to the original sentencing court. The present case, as McDermott J. recognised, is very different in that Mr. Clarke pleaded guilty to the triggering offences, the road traffic matters and had never sought to appeal his District Court convictions.

16. The High Court addressed the question of whether the declaration of invalidity in relation to the two subsections gave rise to a mere procedural defect in procuring the attendance of Mr. Clarke before the Circuit Court which was cured by his appearance or whether the declarations operated to vitiate the jurisdiction of the Court to make the orders in question. In the High Court the respondent had sought rely on a line of authorities such as *State (Attorney General) v. Fawsitt* [1955] I.R. 39, *DPP (Ivers) v. Murphy* [1999] 1 I.R. 98 and *Killeen v. Director of Public Prosecutions* [1997] 3 I.R. 218. However, the High Court felt that the return of the case to the sentencing court under s. 99(9) was coupled with a specific power which was exercisable because of the convictions in the District Court under s. 99(10) which had also been declared invalid. So, the High Court approached the case on the basis that the real issue was whether the appellant/applicant was entitled to the benefit of the declaration of invalidity in the circumstances of the case and that the issue was not whether his return to the court of trial on foot of an illegality may be deemed inconsequential to the Court's exercise of its activation jurisdiction.

17. In the High Court the judge summarised his conclusions as follows:

> "I am satisfied that each case of this kind must be examined on its own merits and that the authorities do not establish that a declaration of invalidity of the two subsections has a blanket retrospective effect. The applicant is not to be excluded from seeking the benefit of the declaration because his appeal under s. 99(12) is still pending and the proceedings under s. 99 have not been concluded. However, I am satisfied that he is not entitled to its benefit for the following reasons. Firstly, he engaged fully in the original sentencing process whereby following his plea for leniency he undertook to abide by the several conditions set down in the order for the purpose of securing his early release from custody. In response, the State intended to devote significant resources to secure his rehabilitation during the course of the suspension. As a result he obtained his release from custody. These decisions were made following advice and involved the making of an irreversible commitment by the applicant and the State. Secondly, absent a breach of those conditions the trial was at an end. Thirdly, he failed to challenge the s. 99 procedure at any stage. These procedures were relied upon and applied by the State in good faith and were the relevant law in force at the time. Furthermore, he cannot identify any substantive injustice or breach of his right to fair procedures or any unfair prejudice or discrimination suffered by him the course of the hearings leading to the revocation. He seeks the technical benefit of the declaration which has no relevance to the merits of his case. To permit the applicant's release on that basis would tend to place a premium on a formal and rigid application of the declaration of invalidity which is not justified or mandated by the decisions of the Supreme Court and the Court of Criminal Appeal set out above, nor is it justified on the facts of this case.
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> For all the foregoing reasons I am satisfied that the applicant is detained in accordance with law. The application is refused."

18. The starting point for consideration of this issue has to be that the applicant/appellant is a convicted person who pleaded guilty to offences of the utmost gravity, was treated with considerable leniency, and failed to abide by conditions which were imposed when large elements of his sentences were suspended. The principles set out in the well known case of *State (McDonagh) v. Frawley* [1978] I.R. 131, are therefore very much on point. There O'Higgins C.J. had commented:-

> "Where a person such as the prosecutor is detained for execution of sentence after conviction on indictment, he is prima facie detained in accordance with law and, as was held in the High Court by Maguire P. at p. 435 of the report of *The State (Cannon) v. Kavanagh*, it would require 'most exceptional circumstances for this Court to grant even a conditional order of habeas corpus to a prisoner so convicted'. . . . In a case such as the present, the production of the warrant by the governor of the prison will normally be a sufficient justification of the detention.
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> The stipulation in Article 40, s. 4(1), of the Constitution that a citizen may not be deprived of his liberty save 'in accordance with law' does not mean that a convicted person must be released on *habeas corpus* merely because some defect or illegality attaches to his detention. The phrase means that there must be such a default of fundamental requirements that the detention may be said to be wanting in due process of law. For *habeas corpus* purposes, therefore, it is insufficient for the prisoner to show that there has been a legal error or impropriety, or even that jurisdiction has been inadvertently exceeded. For example, if the judge at a murder trial in which the accused was convicted were to impose a sentence of imprisonment for life, instead of penal servitude for life as required by the statute, the resulting detention would be imposed technically without jurisdiction. But the prisoner would not be released under Article 40, s. 4, for it could not be said that the detention was not 'in accordance with the law' in the sense indicated. In such a case the Court would leave the matter of sentence to be rectified by the Court of Criminal Appeal; or it could remit the case to the

court of trial for the imposition of the correct sentence."

19. Similar language is to be found in the judgment of Henchy J. in *State (Aherne) v. Cotter* [1982] I.R. 188, at p. 203, where Henchy J. commented:-

> "Before a convicted person who is serving his sentence may be released under our constitutional provisions relating to habeas corpus, it has to be shown not that the detention resulted from an illegality or a mere lapse from jurisdictional propriety but that it derives from a departure from the fundamental rules of natural justice, according as those rules require to be recognized under the Constitution in the fullness of their evolution at the given time and in relation to the particular circumstances of the case. Deviations from legality short of that are outside the range of *habeas corpus*."

20. Much time has been spent on both sides of the Court addressing the significance of *A. v. Governor of Arbour Hill Prison* [2006] 4 I.R. 88, perhaps, more time than was strictly necessary as McDermott J. was clear that an appeal under s. 99(12) had been lodged and was still pending and that as a result the applicant was not precluded from raising a point concerning the invalidity of the statute under which he was returned to the Circuit Court under s. 99(9) and (10).

21. In effect, the judge in the High Court was satisfied that Mr. Clarke had won what might be described as the finality argument, but as he made clear at para. 41 of his judgment, he was not satisfied that the finality argument must always prevail against all others in determining the retroactivity of such a declaration or indeed that it must prevail in this application. The behaviour of the applicant and the other circumstances of the case also had to be considered. The applicant was in principle entitled to the benefit of the *Moore* decision, but the Court also had to inquire into, in the words of Henchy J. in *The State (Byrne) v Frawley* [1978] I.R. 326, whether by reason of other facts and circumstances the applicant had lost the competence to lay claim to the right guaranteed by the Constitution in the circumstances of the case.

22. The warrants in this case issued by the Circuit Criminal Court are good and valid on their face and do not display a jurisdictional error. The operative part of the orders is in these terms:

> Bill No. 1382/2009
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> "The court doth order that the accused serve the balance of the sentence imposed on him on the 7th day of July 2010 [being the final seven years of a sentence of eight years imprisonment imposed on count No. 1 and the entire seven years of a sentence of seven years imposed on count No. 2] it having been established by the court on this the 4th day of November 2014 that the said Paul Clarke had failed to comply with the condition of the bond entered by him before the Prison Governor such balance of sentence of seven years imprisonment on each of counts Nos. 1 and 2 to run concurrently and to date from the 30th day of April 2014."

23. It will be noted that there is no reference to s. 99 of the Criminal Justice Act 2006, and more particularly there is no reference to subss. (9) and (10) of that section in the order.

24. It is also the case that a reading of the transcripts of the Circuit Court hearings of the 7th October, 2014, and the 4th November, 2014, being the two dates on which the Court considered in a substantive way the question of whether the suspended sentences should be activated do not record any mention by the presiding judge or the practitioners appearing of s. 99 and more particularly any mention of s. 99(9) and (10). Indeed, the only reference at all in the course of the two transcripts to s 99 is when the Registrar called "section 99 re-entries, Paul Clarke". Normally, the fact that there was no mention of the legislation under which the matter was brought before the Court and pursuant to which the matter was being dealt with would be of no significance. However, in the present case the manner in which the activation/reactivation issue proceeded means that the failure to mention subss. (9) and (10) does become potentially significant. It is appropriate to look in some detail at what actually transpired on these two occasions.

25. At the commencement of proceedings on the 7th October, 2014, the judge was reminded by junior counsel for the appellant that he had imposed a sentence of thirteen years imprisonment with seven suspended for a period of seven years with probation and welfare supervision for a period of two years back on the 2nd July, 2010 and that accordingly there was a seven year reactivation hanging over her client's head. Garda Stephen Coleman was called, who gave evidence in relation to the stopping of a vehicle on the 2nd April, 2014, at Coolock Drive, Coolock, by him and also without objection, gave evidence in relation to the stopping of another vehicle on the 10th February, 2014, by Garda Janice Grey who was detained in another court. When the garda concluded his evidence, the judge commented "I dealt with him in 2010, do you have his record?" The garda responded that he had details of previous convictions and the judge then asked has he had anything since then and was told no. The judge put the question again asking whether he had been in trouble since and the answer was "not in trouble since, no judge".

26. Counsel for the appellant then indicated that she had two letters to hand in that she thought might be of assistance referring to the fact that he had applied for a residential drug programme. She commented that she was asking the judge to make no order in relation to the matter and to take the view that it would be disproportionate to reactivate all or any of the seven year sentence hanging over her client's head, taking into account the nature of the offences which are road traffic offences, which she described as very minor offences. Counsel asked the judge to make no order and went on to say that if the judge was not prepared to do that, she would ask that the matter be put back so that she could get a report. In the course of exchanges with counsel, the judge commented that there were indications that Mr. Clarke was still using illicit drugs and driving motor cars that were not licensed or insured. Counsel responded that her client was not at present using any illicit drugs which caused the judge to observe that he must have misread the letter asking why was Mr. Clarke seeking a sixteen month residential rehabilitation programme in Tiglin. The judge explained that that suggested to him that in fact Mr. Clarke had relapsed. Counsel said "oh no, he had when he got out of prison".

27. There was then rather general reference to Coolmine and the Fr. Peter McVerry Programme. The judge commented that the more counsel was talking to him, the more he was becoming confused, so that what he proposed to do is to defer the matter until he heard from the probation service and got some clear insight as to what exactly the man was doing. He added that he took the point that counsel was saying that the offences were not of the same moment or seriousness, but nonetheless he had a situation where a man within months of being released from prison, with a record, with serious convictions of robbery, possession of firearms and the like, is back driving motor cars in circumstances where he has to have known that it is against the law to do so. The judge added "however, there is nothing else on record against him, but I need to be sure that Mr. Clarke is someone who is taking his position seriously" and so he was going to consult the Probation Service and find out exactly what was going on with the man, to find out if he was subject to the supervision of the Probation Service, if he was responding, if the Probation Service knew about his situation and what exactly the letters that had been handed to him meant in terms of his present drugs status. At that stage the judge indicated that he was putting the matter back for four weeks on bail, speaking directly to Mr. Clarke to say "needless to say you need to stay out of any further trouble of any nature". At that stage the judge noted that Mr. Clarke had appeared before the Court in custody, something

that he had not realised up to that point. When he inquired what the position was he was told by the accused/appellant directly "I am in on another matter, your Honour". The judge asked counsel for the appellant "do you know about that?" to which she responded "yes judge, but he has the presumption of innocence in relation to that matter".

28. The matter was back before the Court on the 4th November, 2014. On this occasion counsel for the appellant submitted once more that it would be disproportionate to reactivate a partial or even a half or a quarter of the seven year sentence given that the triggering offences were purely of a road traffic nature. She commented that he was in custody in relation to another matter in respect of which a trial date was going be fixed the following day and she suggested that the judge would make no order and leave matters in abeyance until the trial matter was resolved. If there was a conviction the question of reactivation would arise for consideration at that stage.

29. However, the judge ruled on the matter as follows:-

> "The matter comes before me today by reason of the fact that the accused has reoffended since his release from custody and the submissions made to me that because they are of a minor matter, that therefore it would be utterly disproportionate to activate any, in effect what Ms. Frayne is suggesting: she went as low as a quarter, but in fact what she is saying is it would be disproportionate to activate any of the sentence. To my mind, that completely misses the issue of what is before the Court and what is of concern to the Court. The accused man has pleaded guilty, as far as this Court is concerned, to three separate offences of robbery, using firearms, in which people were terrorised in the pursuit of money and it is common case that those monies were needed for the purposes of feeding his out of control heroin addiction. The offences were committed on separate days when he was on bail in respect of one and others and therefore, of necessity, the sentences had to be consecutive. They involved the use of firearms which therefore required a minimum sentence in respect of some of the offences, all of which, I don't need to rehearse. A gun was put and produced to women working in shops: a gun was discharged on another occasion: and people were, frankly, terrorised. The accused man had a record and, having listened to everything that was said on his behalf, I imposed significant sentences. I have to accept, but reflecting the serious nature of this offending. An imitation firearm was used on one occasion: a firearm was actually discharged on another and on a third occasion a firearm was recovered and the accused admitted using it. So these were not just minor offences, and these are the matters that I have to consider today, not the triggering offences to which Ms. Freyne attaches much, in terms of how minor they are, for the purposes of my actions today.
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> I structured the sentences originally in the hope that, having spent some time in custody, being punished, that it would help Mr. Clarke come to his senses and also tackle his addictions and then on release, with a significant suspended sentence, that he would be encouraged by that threat of sentence, to pursue a crime free path, drug free. When the matter came before me on the 7th October, last, because of the nature of the two offences, the fact that he was driving two separate motor cars, which he had purchased himself, to what end, was not clear and what he was about wasn't clear. I was very unhappy about the level of information that the Court was then given about Mr. Clarke and how he was getting on and so, of my volition and my movement, I decided to consult the probation Service and I adjourned the sentence matter back to today's date. As Mr. Clarke was leaving the dock, for the first time I realised that in fact he was in custody, a fact that had not been drawn to my attention by either prosecution or defence, the defence in particular pursing in essence a fact that this was all terribly minor –road traffic offences, hardly to trouble the Court – and that Mr. Clarke was making great efforts towards rehabilitation, residential treatment and all other such like. So having then discovered that in fact, he was in custody for some time because of further offending alleged against him, presumption of innocence of course, that he has been charged and put in custody pending his trial, and realising that I was getting very little assistance as to what exactly was going on, I looked for an updated probation report to find out how the accused man was in fact doing. Now what emerges from that is further information: that the primary condition of his release from custody was that he would be in attendance at the Coolmine drug treatment day programme 'Paul failed to comply with supervision, relapsed into drug abuse and did not sustain contact with the Coolmine drug programme, or the McVerry Trust stabilisation programme'. So the very purpose of the structured sentence was – failed: did not work: something I was not apprised of on the last occasion to any depth or significance. And what does then emerge is that there is while he is back in custody a request that Tiglin might involve itself: another spin on the merry-go-round and that assessment is in progress at the moment. The Probation Service fairly indicates that he quickly relapsed into drug abuse, failed to attend treatment and support services and failed to comply with a court order of probation supervision. Now, it does beg the question why the Probation service has not moved to re-enter these matters, but in any event it is here before me now with some better information as to what's actually happening. Mr. Clarke unfortunately is a man who is in the grips and troubled by a heroin addiction which he has no capacity, it would seem to me, to deal with effectively at this juncture. Every possible opportunity was given him and every incentive was put his way and unfortunately, he has not been able to abide by it. And the upshot of that is that in those circumstances, he represents a serious threat to the community: a man who is prepared to rob and for the purpose of so doing is prepared to arm himself. Now I don't know why he was buying motor cars and driving about without insurance or licence but I have my suspicions. What I do know is that he has singularly failed to abide by an order of this Court placing at jeopardy of going back to prison should he reoffend or continue to reoffend. He has failed with all the conditions of supervision, as imposed above. He is back offending and he leaves me now at this juncture with no option but to activate the entirety of the sentence I otherwise suspended. I will give him time for what he has spent in custody, so that someone in this Court can give me an accurate date as to when he went into custody, be it on remand or otherwise, I will backdate the activation of the suspended portion of the sentence to that date."

30. It seems to me that consideration of this issue by the Circuit Court expanded beyond the confines of subs. (10) and that the Court was having regard to all of the information that was emerging on foot of inquiries that it set in motion. I acknowledge that the Court did not indicate whether in doing so it was exercising its wider function under subs. (17) but it seems to me that the reading of the two transcripts would suggest that is what was happening. In forming that view I do not lose sight of the fact that the reference in subs. (10) to "unjust in all the circumstances of the case" makes clear that the Court when dealing with a matter under subs. (10) is not confined to a consideration of the facts of the triggering offence.

31. However, that notwithstanding, it seems to me that what happened here was that the Court decided to take a broader view as it was entitled to do under subs. (17). The relevance of this of course, is that it is not a precondition to the exercise of a subs. (17) jurisdiction that the person be brought before the court pursuant to subs. (9). Insofar as subs. (17) is a broad and general jurisdiction it seems to me that the route by which the appellant was brought before the Circuit Court is not material and that accordingly the *State (Attorney General) v. Fawsitt* and *DPP (Ivers) v. Murphy* line of authority is applicable. In these circumstances I would take the view that the appellant is not in unlawful custody and so would dismiss the appeal.

32. If I am wrong about that I would in any event follow the reasoning of McDermott J. in the High Court. I accept, as he did, that a notice of appeal was lodged, which means that Mr. Clarke's position is to be distinguished from that of A. v. Governor of Arbour Hill Prison. However, like McDermott J., I do not believe that the fact that because an appeal was lodged and accordingly that matters had not been finalised before judgment in *Moore* that it follows automatically that Mr. Clarke is entitled to be released. The position is that Mr. Clarke committed offences of the utmost gravity. He persuaded the Circuit Court to deal with him in a very lenient fashion indeed and then very shortly after his release, having served the custodial element of his sentence, he breached the conditions of his suspended sentences in a number of respects. There was a full and fair hearing in the Circuit Court over two days which addressed the issue of whether the sentence should be activated. The judge in the Circuit Court decided to activate the sentence. Mr. Clarke has a right of appeal from that decision and has invoked that right by lodging a notice of appeal. On the hearing of that appeal Mr. Clarke can argue that the activation of the sentences in full was an excessive and disproportionate response

33. In those circumstances I cannot see how it can be said that there was a default of fundamental requirements such that the detention could be said to be wanting in due process of law or that his detention arises from a departure from fundamental rules of natural justice to use the language of *State (McDonagh) v. Frawley* and *State (Aherne) v. Cotter.*

34. Rehabilitation is an important aspect of penal policy. The possibility of a suspended sentence is a vital tool in promoting the objective of rehabilitation. The objective of rehabilitation will be frustrated if not indeed set at nought if those who chose to breach conditions attached to suspended sentences do not suffer the consequences. I find the reasoning of the High Court compelling and I would dismiss the appeal.