Neutral Citation [2015] IEHC 641

THE HIGH COURT

JUDICIAL REVIEW

[2015 330 JR]

BETWEEN

MICHAEL MCHUGH

APPLICANT

AND

THE GOVERNOR OF PORTLAOISE PRISON AND THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND THE IRISH PRISON SERVICE

RESPONDENTS

JUDGMENT of Mr. Justice McDermott delivered on 20th day of October, 2015.

1. The applicant was tried jointly with a co-accused Noel Callan before the Special Criminal Court in respect of the capital murder of Sergeant Patrick Morrissey, contrary to s. 1(1) of the Criminal Justice Act 1964 and robbery contrary to s. 5 of the Criminal Law (Jurisdiction) Act 1964 on the 27th June, 1985. On 1st July, 1985, the applicant was remanded in custody awaiting trial in respect of these offences following his arrest, detention and charging. He was convicted by the Special Criminal Court and on 3rd December, 1985, was sentenced to death for capital murder and to a period of twelve years imprisonment in respect of the robbery. The Special Criminal Court directed that the twelve year sentence would date from 3rd December, 1985 as stated in the warrant of conviction and sentence. The sentence of death was commuted to a period of forty years penal servitude on 20th December 1985.

2. The applicant was remanded in custody and consequently remained in detention from 1st July to 3rd December, 1985. He is presently approaching the end of his custodial sentence. Following the abolition of the concept of penal servitude in 1997, he must be regarded as a prisoner undergoing a sentence of forty years imprisonment. Consequently, following the decision in *Callan v. Ireland and the Attorney General* [2013] 2 IR 267 he is entitled to the benefit of the appropriate remission period in respect of the forty year sentence of imprisonment under Rule 59 of the Prison Rules. The first named respondent (The Governor) in a letter dated 25th July, 2014 indicated that the date for the applicant's release with remission from Portlaoise prison is 1st December, 2015.

3. The applicant claims that in calculating his date of release, no credit has been given for the period of five months detention prior to his conviction and sentence. It is submitted that this could not have been a factor considered by the court of trial because of the nature of the sentence of death imposed on 3rd December, 1985. No reference is made to the five month period in the order of commutation made by Uachtarán na hÉireann. The applicant, in correspondence, requested that the Minister exercise her power to further commute or remit the sentence to reflect the fact that credit was not given for this period under ss. 23 and 23(A) of the Criminal Justice Act, 1951. It was submitted that since the backdating of the sentence was not possible in 1985 because a sentence of penal servitude could not, as a matter of law, be backdated, the Minister ought to have intervened, when requested, and exercised her powers under the section to remedy this unfairness. The applicant now seeks an order compelling the Minister to exercise her statutory discretion to commute or remit the sentence of forty years imprisonment to reflect the period of time spent on remand and to deduct that period from the overall sentence to be served by the applicant.

4. A number of other reliefs are also sought requiring the Minister to admit the applicant to a pre-release programme for long term offenders. This part of the application was rendered moot because of the behaviour of the respondents during the course of the proceedings to which I will return later in the judgment.

Statutory Developments

5. Since 1985 there have been a number of statutory developments relevant to this application. Section 1 of the Criminal Justice Act 1990 now provides that no person shall suffer death for any offence. Section 2 provides that a person convicted of murder shall be sentenced to imprisonment for life. Section 3 provides that the murder of a member of An Garda Síochána is a distinct offence in respect of which a court in passing sentence must specify a minimum period of imprisonment to be served by that person of not less than forty years. The statute permits a sentence in excess of forty years to be imposed in which case the minimal period of forty years must be served. Section 5 restricts the power of the Minister for Justice under s. 23 of the Criminal Justice Act 1951 to commute or remit the sentence imposed in a s. 3 murder before the expiration of the minimum period specified by the court under s. 4. The ordinary rules of remission of sentence apply to such a sentence under s. 5(2). However, s. 5(3) precludes the granting of temporary release under s. 2 of the Criminal Justice Act 1960, during the period for which the commutation or remission of punishment is prohibited by subsection (1) i.e. the minimum term of imprisonment imposed of forty years, unless for grave reasons of a humanitarian nature. Any such release must be for a limited period.

6. Section 11 of the Criminal Law Act 1997 abolished the concept of a sentence of penal servitude. A statute conferring a power to impose a sentence of penal servitude is to be regarded thereafter as empowering the court to pass a sentence of imprisonment for a term not exceeding the maximum term of penal servitude for which that sentence could have been imposed immediately before the commencement of the section. Furthermore under s. 11(5):-

> "Any person who, immediately before the commencement of this Act, was undergoing or liable to undergo a term of penal servitude shall, if that person is or ought to be in custody at such commencement, be treated thereafter as if he or she were undergoing or liable to undergo imprisonment and not penal servitude for that term".

Following the decision in *Callan*, the applicant must be regarded as serving a sentence of forty years imprisonment which is now reflected in the Governor's letter indicating the application of the appropriate remission period to that sentence resulting in the proposed release date of 1st December, 2015.

7. It is submitted that every sentenced person is entitled to be given credit for any period of pre-trial custody already served in respect of the offence for which he/she is serving a sentence, unless the sentencing court expressly takes the period of remand into account when selecting the sentence to be imposed. It is also submitted that the respondents were under a duty to ensure that credit be given for this period to the applicant, particularly when the question of backdating the sentence did not and could not have arisen at the time of sentencing, since the sentence was not a finite custodial sentence but involved the imposition of a death sentence.

Commutation of Sentence

8. The sentence, which the applicant is now serving, is a commuted sentence which dates from 3rd December, 1985, the date upon which the applicant was convicted and sentenced for both offences by the Special Criminal Court.

9. The power to commute sentences is vested in Uachtarán na hÉireann under article 13.6 of the Constitution which at the time of the commutation of the applicant's sentence stated:-

> "13.6 The right of pardon and the power to commute or remit punishment imposed by any court exercising criminal jurisdiction are hereby vested in the President, but such power of commutation or remission may, except in capital cases, also be conferred by law on other authorities."

10. The twenty-first amendment of the Constitution inserted article 15.5.2 which provides that:-

> "The Oireachtas shall not enact any law providing for the imposition of the death penalty"

and removed all references to capital punishment from the Constitution including the words "except in capital cases" from article 13.6. The amendment was promulgated on 27th March, 2002.

11. At the time of the presidential commutation a limited power of commutation or remission of sentence was vested in the government under s. 23 of the Criminal Justice Act 1951 in respect of all cases except capital cases. The section was amended by s. 9 (and schedule 2) of the Criminal Justice Act 1990 and s. 17 of the Criminal Justice (Miscellaneous) Provisions Act, 1997 and provides:-

> "(1) The government may commute or remit, in whole or in part, any punishment imposed by a Court exercising criminal jurisdiction, subject to such conditions as they may think proper.
>
> (2) …
>
> (3) …
>
> (4) This section shall not affect any power conferred by law on other authorities."

Section 23(A) of the Criminal Justice Act 1951 as inserted by s. 17 of the 1997 Act, provides that the government may, by order, delegate to the Minister for Justice, any power of the government under s. 23 of the 1951 Act and revoke such an order. The reference to capital cases has also been removed from s. 23.

12. The origin and nature of the power of commutation and remission was considered by Walsh J. in *The State (O.) v. O'Brien* [1973] I.R. 50 at pp. 70-71:-

> "The power of commutation and remission which is conferred by Article 13, s. 6, of the Constitution of 1937 is a power which, although a power of a judicial character, is nonetheless expressly conferred by provisions of the Constitution upon the President and, in certain instances, upon the Executive or members thereof. It was, of course, quite open to the People when enacting the Constitution to confer powers of a judicial character upon the Executive or to provide by the Constitution means whereby it could be done by Act of the Oireachtas; but that does not alter the nature of the power. The fact that this power can be exercised in such a way as to determine the length of a sentence by ending it or by reducing it, while in the nature of judicial power, does not mean that it amounts to a power which can be equated with determining in advance what the period of the sentence shall be, or determining from time to time how long it shall endure …"

13. The dissenting judgment of McLoughlin J. chronicled the history of the executive's power to grant clemency and commutation. The learned judge described the power as executive in nature emanating from the crown's exclusive right to grant pardons at pp. 79-80 as follows:-

> "In exercising such a prerogative is the Crown exercising an executive function or judicial function? I think it is an executive function; where the legislature permits or compels a court to inflict some punishment the prerogative of mercy can step in to lessen it. Article 13, s. 6, of the Constitution of Ireland provides:-
>
> "The right of pardon and the power to commute or remit punishment imposed by any Court exercising criminal jurisdiction are hereby vested in the President, but such power of commutation or remission may, except in capital cases, also be conferred by law on other authorities.
>
> Article 13, s. 6, refers to the "right of pardon" (which I take to mean complete pardon) and "the power to commute" (which I take to mean the power to commute a death penalty to one of imprisonment) and "the power to … remit punishment imposed by any court exercising criminal jurisdiction." These are all functions corresponding to what formally was the royal prerogative of mercy which, in my view was an executive function."

14. The issue in that case concerned s. 103 of the Children Act, 1908. It provided that a sentence of death should not be pronounced against a young person, but that *in lieu* thereof, the court could sentence the person to be detained "during His Majesty's pleasure". The court held that s. 103 was consistent with the provisions of the Constitution because it was to be interpreted as authorising a court to determine the length of the young person's sentence in accordance with article 34 of the Constitution. In his dissenting judgment (at p. 80) McLoughlin J. determined that s. 103 "merely recognised the right to the exercise of the prerogative of mercy which right is now vested in the President by article 13, s. 6 of the Constitution." Therefore he did not accept that the section was unconstitutional.

15. In *Brennan v. The Minister for Justice* [1995] 1 I.R. 612 Geoghegan J., in an application brought by a district judge to quash decisions of the Minister for Justice to remit fines imposed on a number of parties, considered the nature and extent of the power and its reviewability by way of judicial review. The learned judge considered that the observations by Walsh J. in the *O* case, concerning the power of commutation and remission conferred by article 13, s. 6 of the Constitution, were *obiter dicta*. He noted that Walsh J. clearly expressed the view that the power to commute or remit sentences is a judicial power, but one expressly conferred by provisions of the Constitution upon the President and in certain instances upon the executive. Geoghegan J. preferred the analysis of McLoughlin J. as to the nature of the power and stated (at pp 625 to 627):-

> "The judge then, having quoted the whole of Article 13, s. 6 of the Constitution, goes on to observe that Article 13, s. 6 refers to the right of pardon, the power to commute, the power to remit a punishment imposed by any court exercising criminal jurisdiction and that these are all functions which, in his view, corresponded to what formerly was the royal prerogative of mercy and was an executive function. If, as I believe, the observations of Walsh J. are *obiter dicta* and not binding on this court, I would find more convincing the analysis of McLoughlin J. In later Irish decisions, including in one instance, at least, a judgment of Walsh J., it seems to have been accepted that the power under article 13, s. 6 is an executive one … The power to remit is the executive administration of mercy rather than the judicial administration of justice in my view …
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> But even if the power derived from article 13, s. 6 is a judicial power or forms part of the administration of justice, the consequences flowing from that interpretation would be no different from the consequences flowing from the view which I have taken. In neither event does it follow that any of the requirements of Article 34 of the Constitution must necessarily be incorporated into the exercise of the power under article 13, section 6. It would be an incorrect approach to consider Article 13, s. 6 as introducing some newly invented concept first created by the Constitution of Ireland, 1937. It must, I think, be read and interpreted in the light of the prerogative powers of mercy which existed at least up to 1922 and the equivalent of which exists in most countries of the world. It has never been a feature of the exercise of that power that it should involve some kind of hearing in public. …"

16. In *Brennan*, Geoghegan J. held on the evidence that the thousands of petitions received by the Minister for remission of fines or commutation of prison sentences annually indicated that there was a perception that the power was exercised quite routinely. He stated (at pp. 628-29) that:-

> "… Article 13, s. 6 …. was never intended to create a parallel or alternative system of justice to that provided for by Article 34. Yet that is precisely what is happening in these cases. There is no evidence that the Minister found exceptional or unusual circumstances to justify her modifying the judge's order. The kind of points put forward are all points which either were or could have been put before the judge when he was considering sentence. There was nothing in any of the reports before the Minister to indicate that was not done and, if so, that it could not have been done. I am not necessarily suggesting that the Minister can only exercise her power if there was a change of circumstances following on the District Court Judge's order. Indeed I think it would be unwise to attempt any definition of what precisely the exceptional circumstances would have to be to justify a remission of a fine. I think that in very exceptional cases a Minister might be able to exercise his or her power in circumstances where he or she believed that the judge's decision was wholly unsupportable. But it is not easy to conceive of circumstances where that would be justified, even on an exceptional basis, in the case of a District Court judge's order which can be appealed to the Circuit Court, which Court must in turn embark on a complete rehearing. Even though the appeal to the Circuit Court would be final, a Circuit Court judge who acted wholly irrationally would be subject to judicial review by the higher courts. It would seem to me, therefore, that it would be only in the rarest of circumstances (and I cannot conceive what they might be) that the Minister can modify a District Court Judge's order imposing a fine on the basis that he or she thought that the decision was wrong. There might be circumstances where some genuine unintended mistake was made by the judge which would lead to a legitimate exercise of the power. But in general it would seem to me that having regard to the clear provisions of the Constitution relating to the courts, the power under Article 13, s. 6 must have been intended to be exercised sparingly. Indeed, this is reinforced by the fact that the power is, by the Constitution itself, vested only in the President. But the Article enables the power to be also vested in some other authority if it is conferred by law …"

17. The learned judge also stated that it was constitutionally necessary that all evidence and information leading up to, and the reasons for, the exercise of the power be recorded. This followed logically from the nature of the power which was to be exercised only in special cases. Nevertheless, some accountability was essential. He was satisfied that the only way that the Minister could in practice be made accountable for the proper exercise of the power is by means of judicial review in an appropriate case. It was therefore necessary that all the information upon which a decision to exercise the power and the stated reason for its exercise should be recorded. He envisaged that the most common instance of legitimate exercise of the power might be provided by "some relevant change of circumstance since the Court's decision and outside the time for normal appeal."

18. Geoghegan J. considered that "the power to commute or remit sentences under s. 23 must be exercised within these limits…that is to say sparingly and for special reasons with proper maintenance of records." The power of remission and commutation may only be exercised in exceptional circumstances "such as where there are particular grounds for clemency or where there are other special factors which would justify an interference with the judicial independence guaranteed by the Constitution."

19. The Supreme Court has considered the tension that exists between the exercise of the executive power under s. 23 to commute and the judicial power in imposing sentence when the court reserves the power to consider the partial suspension of a custodial sentence to a later date having regard to the behaviour of the accused. In *People (DPP) v. Finn* [2001] 2 ILRM 211 it was held that a judge may review a custodial sentence and consider its partial suspension at a later date having regard to the subsequent behaviour of the accused. The court offered guidance to trial judges in respect of the review procedure. It acknowledged that it was an important mechanism which helped to ensure the rehabilitation of convicted persons. Keane C.J. accepted that a trial judge, in imposing a review sentence, did not in any way interfere with the statutory power of the Minister to commute or remit the sentence pursuant to s. 23. There was in law nothing to prevent the Minister from exercising his/her power of commutation or remission during a period between the imposition of the sentence and the review date. The court identified a different legal fragility in the review procedure (at pp 230 to 231):

> "It is that, when the review date arrives and the…(sentencing court), on being satisfied that the relevant conditions have been met, suspends the balance of the sentence and orders the release of the convicted person, it is in substance exercising the power of commutation or remission which the Oireachtas has entrusted exclusively to the government or the Minister for Justice to whom the power may be delegated. The Minister cannot, of course, in exercising that power do what the court purports to do at the review stage, i.e. impose a suspended sentence which would normally involve the convicted person being returned to prison on foot of the order of a court in the event of his being convicted of further

offences or breaking other conditions attached to the sentence. But if one looks to the substance of the order made by the court at the review date it is clearly an order which releases the convicted person before the completion of the sentence which the judicial arm of government considered appropriate at the sentencing stage and must, accordingly, be regarded as, in all but name, the exercise by the court of the power of commutation or remission which, during the currency of the sentence imposed by the court, is vested exclusively in the executive.

The making of such orders is not merely inconsistent with the provisions of s. 23 of the 1951 Act: it offends the separation of powers in this area mandated by Article 13.6 of the Constitution. That provision expressly vests the power of commutation or remission in the President but provides that the power may also be conferred by law, on other authorities. Since under Article 15.2.1 of the Constitution the sole and exclusive power of making laws for the State is vested in the Oireachtas, it was for the legislative arm alone to determine which authorities other than the President should exercise that power. In enacting s. 23 of the Criminal Justice Act of 1951, the Oireachtas conferred the power of commutation or remission on the government or, where it delegated its power, the Minister. … It would seem to follow that the remission power, despite its essentially judicial character, once vested under the Constitution in an executive organ, cannot, without further legislative intervention, be exercised by the courts …"

The court, therefore, concluded that review sentences were undesirable having regard to the serious legal questions which arose to their validity and that the practice of imposing them should be discontinued.

20. Following the conviction and sentencing of the applicant in this case, and the exhaustion of any right of appeal, the trial of the applicant in due course of law under article 38.1 of the Constitution was at an end. The judicial arm of government was *fuctus officio*. It was for the executive to implement the sentences passed in accordance with law and to exercise its discretion to commute or remit them. The President duly commuted the sentence to one of forty years penal servitude. By operation of law this became a sentence of forty years imprisonment. The legal process whereby the applicant is now regarded as serving a sentence of forty years imprisonment follows a "constitutionally permissible" alternation of the original sentence imposed as fully described in the judgments of the Supreme Court in the *Callan* decision.

21. The appellant in that case (the co-accused of the applicant) had also been sentenced to death on 3rd December, 1985 and his sentence was commuted under article 13.6 of the Constitution to one of "penal servitude" for forty years. Under s. 11(5) of the Criminal Law Act 1997 any person then undergoing a period of "penal servitude" was to be treated as if he or she was undergoing "imprisonment". The plaintiff sought remission of his sentence but his claim was dismissed by the High Court on the grounds that he was serving a "commutation" rather than a "sentence" and the power of remission under Rule 59 of the Prison Rules, 2007, did not apply to him. On appeal to the Supreme Court it was held, allowing the appeal, that the plaintiff was eligible to earn remission of sentence and that a person lawfully sentenced to death whose sentence was commuted to penal servitude under article 13.6 was "undergoing" a term of imprisonment under section 11(5). It was also held that a constitutionally permissible variation to a sentence imposed by a court did not transform the status of a person from one who had been sentenced to one who is not serving a sentence. In order to be considered a person serving a sentence, one must have pleaded guilty before, or been convicted by a court of competent jurisdiction, and the nature of the sentence must have been determined by that court, or in accordance with a prescribed legal and constitutional process.

22. The governor of the prison is entitled to rely upon, the order of conviction and sentence of death together with the order of commutation in order to defend the legality of the prisoner's detention in proceedings under article 40 of the Constitution, if called upon to do so. The Special Criminal Court was required to impose a sentence of death upon the prisoner upon conviction of capital murder and the President was bound to commute that sentence when so advised by the government. It was appropriate to describe the period of incarceration to be served thereafter as a sentence. The Supreme Court held that Rule 59 was therefore applicable to the applicant in the light of the provisions of s. 11(5) of the 1997 Act. As stated by Clarke J. in *Callan v Ireland* [2013] 2 IR 267, 288:-

"59. The real issue that falls for decision in this case is to how a Presidential commutation fits into such a scheme of things.

60. It seems to me that, at the level of principle, the first condition that must be met in order that a person can properly be said to have been sentenced or to be serving a sentence is that the person concerned must have been convicted (or, of course, pleaded guilty) by or before a Court of competent jurisdiction. Thus it may be said that for imprisonment to be on foot of a sentence, it must be consequent and contingent on a determination of guilt by a court.

61. The second limb of the test seems to me to require that the nature of the sentence be determined either by a court or in accordance with a prescribed legal and constitutional process. In the vast majority of cases this test will be met by a determination by the court of the appropriate sentence from the range of sentences that the law allows or the imposition by the court of a mandatory sentence in those cases where there is only one option. However, it does not seem to me that the scope of the circumstances that can properly be described as involving a "sentence" is necessarily confined in that way. Where a person is, in fact, sentenced by a court but where there is a constitutionally permissible method by which the sentence imposed by the court can be varied, it does not seem to me that the status of the person to whom the varied penalty is applied changes from one who has been sentenced to one where that person cannot be said to be serving a sentence.

62. Mr. Callan was undoubtfully sentenced (to death) by the Special Criminal Court. In accordance with a constitutionally permissible commutation, that sentence was varied to one of penal servitude for 40 years. However, in my view, Mr. Callan remained someone who had been sentenced in the ordinary sense of that term even though the precise terms of that sentence had been, in a constitutionally permissible manner, altered. The very fact that his conviction and initial sentence by the Special Criminal Court was quite properly relied on as part of the certification process justifying Mr. Callan's detention … seems to me to demonstrate this point. Mr. Callan's conviction and sentence by the Special Criminal Court remains part of the legal basis for his continuing detention. His detention is justified on a composite basis by each of the measures to which reference has already been made. The fact that there are additional, constitutionally permissible, measures involving the advice of the Government to commute and the presidential act of commuting, does not, in my view, change Mr. Callan's status from one where he can properly be described as having been sentenced even though the penalty to which he is now exposed is different to that contained in the original sentence.

63. It is, of course, the case that on any view Mr. Callan's original sentence no longer stands by virtue of its commutation by the President. But the period of imprisonment to which he is now subject (or undergoing "in the words of the Act 1997) is a constitutionally permissible variation of the original sentence. It seems to me that such a constitutionally permissible

variation does not alter the essential character of the fact that Mr. Callan is undergoing or serving a sentence imposed by a court but varied in a constitutionally permissible manner by the President. It seems to me that in ordinary usage Mr. Callan would be described as serving a sentence, albeit one which has been varied from that originally imposed.

23. Hardiman J. summarised the matter in the following way in *Callan*:-

> "29. The first sentence imposed on the plaintiff, which is a sentence of death, was changed or altered to a sentence of forty years' penal servitude. By a statute of 1997 a person serving a sentence of penal servitude is to be regarded in law as serving a sentence of imprisonment. … By the Act of 1997 this second sentence was itself changed for legal purposes, into a sentence of imprisonment. …
>
> 30. In Ireland at the relevant time (December, 1985) the court was bound to impose a death sentence on conviction of capital murder. The President of Ireland was bound to commute that sentence if so advised by the Government. It is clearly appropriate to describe the period of incarceration to which the plaintiff was condemned by the commutation by act of the President, on the advice of the then Government, as a sentence."

24. It is clear, therefore, that the applicant is entering the final stages of the commuted sentence imposed by the President on the advice of the government. This sentence was imposed by the Special Criminal Court, but has been changed in a constitutionally valid manner pursuant to the commutation. It was then changed by operation of law from a sentence of penal servitude to one of imprisonment with all the benefits attaching thereto.

25. Article 13.8.1 of the Constitution provides:-

> "The President shall not be answerable to either House of the Oireachtas or to any Court for the exercise and performance of the powers and functions of his office or for any act done or purported to be done by him in the exercise and performance of these powers and functions."

There is no challenge to the exercise of the President's power to commute the death sentence in these proceedings, nor could there be. A sentence of penal servitude took effect *in futuro* as a matter of law because of the historical peculiarities of the sentence of transportation, which it was designed to replace. As already stated, the sentence was then transposed by operation of law to a sentence of imprisonment. The *Callan* judgment addresses the legal incidents of that change insofar as they benefit the applicant. It is clear that s. 11(5) relates to the treatment of persons who had been sentenced to penal servitude who are "thereafter" liable to be regarded as serving sentences of imprisonment. I am not satisfied that the section requires the executive to remit the sentence imposed by the court and constitutionally varied by commutation, by altering the date of its commencement to take account of a period spent in pre-sentence detention. Furthermore, the sentence of imprisonment in respect of the robbery was not backdated. This was a judicially imposed sentence which was not the subject of a commutation.

26. The applicant claims that the failure by the Minister to consider, or grant, a further commutation or remission to cover the five month period breaches his right to constitutional fairness. However, the starting point in the applicant's case must be that he is serving a sentence of forty years imprisonment which commenced on 3rd December, 1985 following an act of executive clemency. The Minister's power under section 23 is not defined or limited by judicial sentencing principles, but is of a much wider and completely separate nature which derives from Article 13.6 of the Constitution.

The Absence of Credit for Pre-Trial Custody

27. Though there is limited authority in the jurisprudence of the Court of Criminal Appeal and the Supreme Court for the principle that a sentencing judge should take into account the fact that a convicted person has spent time on remand in custody when considering the appropriate sentence to be imposed following conviction, I am satisfied that it is well established, as a principle of sentencing, in this jurisdiction. In a different context this issue was considered by the Supreme Court in *The State (Tynan) v. Keane* [1968] I.R. 348. The prosecutor was convicted of common assault and sentenced to a term of imprisonment. This conviction was quashed on the ground that it was made without jurisdiction and void *ab initio*, but by that time the prosecutor had served part of his sentence. A summons was subsequently served on the prosecutor in respect of the same assault charge. An order of prohibition of the further prosecution of the offence was sought. The Supreme Court refused relief because the conviction was made without jurisdiction and void. Therefore, it was not a bar to the further prosecution of the same offence. In particular, though the Supreme Court held that the fact that the prosecutor had served ten days in custody on foot of the void conviction, was not a bar to his further prosecution, nevertheless Ó'Dalaigh C.J., stated, (at pp 351-352: Walsh and Budd JJ. concurring):-

> "The ten days which the applicant spent in prison are, therefore, no part of any punishment which the applicant may, if convicted, be required to undergo. This is not to say that, if there should be a conviction and a sentence of imprisonment should be imposed, the court should not, in determining the duration of the sentence, take into account such imprisonment as the applicant has already undergone. Quite the contrary; justice requires that the court should do so. It is, moreover, very desirable that the court in such a case should expressly indicate that the sentence that it imposes is a net sentence, that is to say, that the court has deducted from what it would otherwise consider a proper sentence, the period which the prisoner has already spent in prison under the conviction that was set aside. It is to be recommended in this type of case that the court should act on principles of good book- keeping and that the court should state first, the sentence which the offence warrants in the judgment of the court; that the court should then expressly deduct the imprisonment already served, and then, finally, the Court should impose the balance remaining as the court's net sentence. In cases where a prisoner has served the full sentence that was imposed upon him in the first instance, this in effect, will mean that on being convicted within jurisdiction he will be given his discharge".

28. The court is satisfied that it would be an error of principle if proper consideration or allowance of time spent in pre-trial custody were not considered by a sentencing judge either by way of a "book-keeping" exercise or by making allowance for it when calculating the term of imprisonment to be served. It would likely give rise to a ground of appeal. The error of principle could then be remedied by the Court of Appeal and the sentence varied appropriately. A similar principle operates in other common law jurisdictions. The sentencing of a convict is a judicial function, subject only to review, as a matter of right, on appeal to the Court of Appeal or, in 1985, to the Court of Criminal Appeal. Once the appellate process has been exhausted (absent a claim of miscarriage of justice) no other form of judicial redress exists.

29. In the applicant's case, because he was sentenced to death, a mandatory penalty, the issue of the period of pre-trial custody could not, and did not, arise for consideration by the sentencing court, nor could it have been addressed by the exercise of a right of appeal. The commutation of the sentence is wholly separate from the judicial process. The courts have no function in exercising powers of pardon, commutation or remission; a very wide executive discretion is conferred on the President and the Minister for

Justice and Equality deriving from article 13.6. The applicant claims that, had he been subjected to normal sentencing principles governing the proper application of the backdating of his sentence, he should now, as an incident of the sentence of imprisonment which he is now serving, be entitled credit for the five month period. Furthermore, he claims to be entitled to an order of *mandamus* compelling the Minister to consider the commutation or further remission of his sentence and directing her to commute or remit the sentence by reducing the sentence by five months. While there is authority for the proposition that the exercise of the power to remit in favour of an individual is subject to very limited judicial review, there is no authority for the proposition that the Minister may be compelled to exercise a power of commutation or remission under s. 23 of the 1951 Act. I am not satisfied that there is any legal basis for the proposition that a failure by a sentencing court or the executive when exercising its power of commutation or remission, to backdate a sentence, imposes an obligation upon the Minister to consider a further commutation of sentence or to grant it.

30. The applicant's solicitors requested that the Minister and/or the Governor should remedy the failure to give credit for the five months in the administration of his sentence. Of course, the Minister may, at any stage, exercise her discretion under s. 23 in favour of the applicant to take account of the applicant's submissions in this regard. However, she is not obliged to do so and there are many other considerations that may be taken into account in the exercise of that power, apart from the grievance in respect of the five months, for example, the grievous nature of the offence. The power to commute or remit, on whatever grounds, whether they be family, health reasons, compassionate grounds, purely political reasons or otherwise "is a quintessentially executive function and one which is discharged … as a matter of policy pursued by the executive at given times and subject to variation at the discretion of the Executive" (see *O'Neill v. Governor of Castlerea Prison* [2004] 1 I.R. 298 at paragraphs 41 to 43 and *Director of Public Prosecutions v. Tiernan* [1989] ILRM 149 at page 153).

31. The Supreme Court in *O'Neill* indicated that the power should only be exercised in conformity with the Constitution and any correction in cases where it is not so exercised is exclusively a matter for the judicial arm. It must be exercised in good faith and in a manner which cannot be characterised as arbitrary, capricious or irrational. There is no evidence that the failure of the Minister to commute or remit the applicant's sentence by a further five months could be described in that way, even if it were similarly reviewable. I am satisfied in this case that the separation of powers under the Constitution precludes this court from interfering with the exercise of the Minister's power under s. 23, nor is there any basis in law or fact upon which an order of *mandamus* might issue against the Minister compelling her to further commute or remit the sentence. I therefore refuse the application.

Temporary Release and the Pre-Release Programme

32. The balance of the grounds in this application relate to the orders of *mandamus* sought requiring the Minister to make a decision on the application for a place on a "pre-release programme" for long-term offenders and/or to grant temporary release. A number of related declarations are also sought.

33. The applicant's solicitors proposed that he be considered for a "pre-release programme" which might ordinarily commence for long-term prisoner's twelve months prior to his/her intended release date. It was later accepted that the application was first made on 6th January, 2015. Under a pre-release programme a prisoner is granted temporary release. In the first six months of the programme the prisoner is granted four periods of release involving two overnight absences from prison and in the last six months six periods of three overnight absences. It was claimed, on his behalf, that having applied for a copy of his "pre-release programme" and asked whether it would be implemented without any further delay in March 2015, he was informed that it was not ready. The applicant's solicitors requested that the prison authorities confirm the accuracy of these instructions from his client, but the matter was not addressed in the response received.

34. The programme applies to prisoners serving a sentence of more than ten years. In a letter dated 29th May, 2015, it was acknowledged by the Assistant Governor of Portlaoise prison that the applicant had made an application for temporary release "which is under consideration by the Minister at the moment".

35. In a statement of opposition dated 7th July, 2015, it was stated, in paragraph 13, that a decision had been made by the Minister on 6th July, 2015, rejecting the applicant's application for a "pre-release/re-socialising temporary release programme". It was contended that there was, therefore, no basis for the granting of an order of *mandamus* compelling a decision to be made on this application.

36. In a supporting verifying affidavit, Mr. Tony Hickey, an assistant principal officer in the Irish Prison Service, confirmed that an application for pre-release/re-socialisation temporary release had been made in January, 2015. He stated that the matter remained under consideration. There was a legal question over the eligibility of the applicant to apply for the programme which caused some delay in processing the matter, but the Minister made a decision to refuse the application on 6th July, 2015. This was later corrected and it was indicated to the court that the decision had been made on 3rd July. The court is satisfied that the respondents failed to inform the applicant, his solicitors or the court, of the fact that this application was not put before the Minister or given any consideration as an application under the pre-release scheme in January, 2015.

37. The programme usually consists of day release and weekend periods of temporary release only and does not involve releasing the applicant early from sentence. The prisoner continues to serve the sentence until the date of final release, in the case of the applicant, until 1st December, 2015, apart from occasional short periods of temporary release in the community. It was indicated that entry to the programme may be considered at times ranging from a month before a prisoner's expected date of release or up to twelve months beforehand. It was stated that the applicant was receiving considerable assistance from the prison authorities, which involved meetings between the applicant and the training and employment officer in Portlaoise prison on five occasions since January, 2013. The probation officer was also meeting with him since the end of April, 2014.

38. The first indication given to the applicant's solicitors of the refusal of the application of a place on this pre-release programme was in the Statement of Opposition of 7th July, 2015.

39. In a further affidavit Mr. Hickey confirmed that the application for inclusion on the pre-release programme was made on 6th January, 2015. He stated that the matter was reviewed in January, 2015, by the Irish Prison Service. On 23rd January, 2015, the Director General of the Prison Service decided that the Prison Service would be recommending to the Minister that the application be refused. He then states that "as the period in question had, in effect, now expired it appears that no formal decision on the application was made by the Minister at that time". This refers to the fact that the application sought an initial temporary release period between the 22nd and 24th January as part of the pre-release programme. Mr. Hickey further stated that when preparing opposition papers to the application for judicial review it became evident that no formal decision had ever been made by the Minister in respect of the January application. It was decided that a formal decision should be sought in order to complete the process. It would appear that the application was not under consideration between 23rd January and 2rd July, 2015 at all. The initial application was apparently only considered as an application for a two-day temporary release period, but the Minister was not involved at all in the decision at that time.

40. On the 2nd July a submission was forwarded to the Department by the Irish Prison Service asking for a decision in respect of the request made by the applicant to be granted temporary release between the 22nd and 25th January, 2015 as part of the pre-release programme. This was an entirely futile exercise calculated to give some measure of formal propriety to a process that was seriously inadequate. It was done in the face of judicial review proceedings challenging that process. That submission was apparently considered and determined by the Minister on 3rd July, 2015.

41. In paragraph 11 of the affidavit, Mr. Hickey refers to the suggestion that the applicant was told that his pre-release programme was not ready. He states that "in the time available the Irish Prison Service had made enquiries but had not been able to identify anyone who recalls any such conservation".

42. Mr. Dermott Woods, a principal officer in the Security and Northern Ireland Division of the Department of Justice and Equality, deposed in an affidavit of 30th July, 2015 that the Minister made a decision to refuse the application for temporary release between 22nd and 25th January as part of a pre-release programme on 3rd July, 2015. The reasons for that decision were:-

> "(i) the nature of the applicant's offence;
>
> (ii) the fact that he was barred from receiving relief under section 5 of the Criminal Justice Act 1990."

43. Legal advice (sought and obtained after the 3rd July but prior to the date of the Statement of Opposition and Mr. Hickey's first affidavit) indicated that ground (ii) should not have been relied upon as it involved an incorrect interpretation of the section. However, the Minister was satisfied that the nature of the applicant's offence was a sufficient reason for the decision. A letter was furnished, in the course of the hearing of the case, dated 28th July, 2015 setting out the Minister's decision.

44. Further advice was received from counsel on 29th July, 2015, that since the applicant was making a complaint about lack of access to the pre-release programme in the course of his judicial review then at hearing, and since six months had elapsed since the application was made in January, the Minister should "in the interest of providing certainty" make a fresh decision dealing with whether or not the applicant should be placed on a pre-release programme at this time.

45. As the hearing progressed, the Minister was again briefed by the Irish Prison Service with the facts and circumstances relating to the application (made in January 2015). On 30th July, the Minister made a decision to refuse the applicant access to the pre-release programme. Mr. Woods states that the Minister considered all matters relevant to the issue whether or not to allow someone avail of the programme. The reasons for the decision were:-

> (i) the nature and gravity of the applicant's offence;
>
> (ii) the fact that the applicant has not done any therapeutic work around the offence that might offer him some insight into his offending behaviour and show that his risk of reoffending has reduced over the course of his sentence."

46. A letter was written to the applicant's solicitor dated 30th July, 2015 which was exhibited in the affidavit. The court was then informed of these events. I find the stance adopted by the respondents during the course of this hearing and the manner in which their evidence was assembled and furnished to the court to be entirely unsatisfactory. The behaviour of the respondents has rendered the applicant's judicial review proceedings in respect of the pre-release programme entirely moot: it has also resulted in a waste of court time The respondents failed to present clear and untrammelled evidence concerning how the application was dealt with by the Prison Service or by the Minister. The court expects the respondents to be forthright and complete in their evidence as to how and why decisions were made or not, as the case may be. Judicial review of executive action, or inaction, is only effective if the court is furnished with an accurate history of the decision-making process. The facts should be readily ascertainable from the contents of the official files which are invariably in the possession of the decision-maker and were central to the issues in this case. It is not acceptable that such records should be presented in a piecemeal manner to the court.

47. The applicant requested an opportunity to consider these developments. I therefore will not make any further observations on the making of the decision of 30th July. The applicant had the option to seek an amendment of the relief and grounds in these proceedings by seeking further relief in relation to the decision of 30th July (if so advised) or to proceed by a fresh application for leave to apply for judicial review. The latter option was taken.

Decision

48. For the reasons set out above the application is refused.