

THE HIGH COURT
JUDICIAL REVIEW

[2014 No. 705 J.R.]

BETWEEN

FRASINA COBZARU

APPLICANT

AND

HIS HONOUR, JUDGE JAMES O'DONOGHUE

AND DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Mr. Justice Eagar delivered on the 21st day of June, 2016

1. On 24th November, 2014 McDermott J. granted leave to apply for an order of certiorari by way of application for judicial review quashing the order of the first named respondent made at Dublin Circuit Criminal Court 16, at the Criminal Courts of Justice, on 24th November, 2014. This order was in respect of Garda Jennifer Wallace's charge sheet, remanding the applicant to a sitting of Tallaght District Court on 25th November, 2014 for a consideration of a penalty in respect of an offence contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001. McDermott J. also made an order that the proceedings be stayed until the determination of the application for judicial review.

2. It is important to note that the order that is being impugned is that of the first named respondent on 24th November, 2014.

3. The submissions of the second named respondent provide a useful chronology in relation to the proceedings:

a. In March, 2014 the Dublin District Court (sitting in Court 3, at the Criminal Courts of Justice) imposed a three months sentence of imprisonment on the applicant which was suspended for twelve months under s. 99 (1) of the Criminal Justice Act 2006, as amended.

b. On 9th April, 2014 the Dublin Circuit Criminal Court on appeal imposed a sentence of six months imprisonment on the applicant for a separate offence distinct to that described at para. a, which was suspended for two years under s. 99 (1) of the Criminal Justice Act 2006, as amended. It appears that the three month suspended sentence was not raised and referred back to District Court 3 under s. 99.

c. On 30th July, 2014 Garda Jennifer Wallace charged the applicant with an offence of theft contrary to s. 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001 as set out in the charge sheet 14971817.

d. The applicant was convicted before the Dublin Metropolitan District Court sitting in Tallaght Courthouse on 30th October, 2014. Judge Reilly heard the case and was made aware of the fact that the applicant was the subject of two live suspended sentences.

e. Judge Reilly made two orders under s. 99 (9) of the Criminal Justice Act, 2006, as amended, remanding the applicant to the next sitting of each court. Both remand orders were made returnable to the following day, 31st October, 2014. The orders were returnable separately to Court 3, at the Criminal Courts of Justice (District Court) and Court 16, at the Criminal Courts of Justice (Circuit Court).

f. After the orders were made, Garda Wallace became aware that a District Court appeals list was not due in Court 16 on 31st October, 2014. Upon contacting the Court Presenter's Office, she was informed that the Dublin Circuit Court was sitting on 31st October, 2014 in Court 5, Criminal Courts of Justice, which was dealing with indictable business. The Court had risen and the applicant had left the court vicinity so she was unable to inform the applicant that the case would be called in Court 5 rather than Court 16 the following day.

g. On 31st October, 2014 the applicant's case was called in Court 3 (District Court), at the Criminal Courts of Justice. Garda Wallace was not present but Garda Houlihan was present. The Court was presided over by Judge Walsh and the applicant was present.

4. As appears from the transcript, counsel for the applicant indicated to Judge Walsh that there was a remand to another remand court regarding the Circuit Court matter (Court 16) that day, but that Court 16 was not due to sit. While the matter was pending before Judge Walsh in Court 3 on that date, the Court Registrar and the prosecuting sergeant stated that Dublin Circuit Court 16 was not sitting. Judge Walsh referred to the conviction in March, 2014 and the three month suspended sentence and commented,

"There is a conviction, a suspended sentence in this Court and in respect of three separate offences on 9th April, 2014 in the Circuit Court which was suspended for six months"

And he asked,

"What happened to trigger off the matter coming before the Court this morning?"

Counsel responded that the Circuit Court matter ought to have triggered the Court 3 matter in March, so it should have been remanded back to the next available date, but was not, and Judge Walsh took the view that he should make no order in relation to the Court 3 matter.

5. The applicant's case was called before Court 5 in the Dublin Circuit Criminal Court. This Court notes with some surprise that neither the applicant's solicitor nor counsel made enquiries at this stage, given that this was the only Circuit Criminal Court that was sitting during vacation that deals with District Court appeals. This Court takes the view that enquiries should have been made, and this is a matter of relevance in the exercise of the court's discretion in relation to granting relief by way of judicial review. The court was told of the remand under s. 99 (9). Of course the accused was absent at this time, and Ring J., who was presiding, adjourned the matter to 10th November, 2014 in Court 16. The prosecution would then caution the accused to be in court on the next date. In fact, the State Solicitor indicated that the Court Sergeant believed that the accused may be downstairs, and if she was there then she could be asked to attend. Ring J. gave the prosecution an opportunity and when the case was recalled, the State Solicitor said he had no instructions (which seems an unusual position for a state solicitor to indicate to a court) and in due course Ring J. adjourned the matter to 10th November, Court 16, and said that the State should caution the applicant, and her final words were, "everyone to appear on that date." On 10th November, 2014, the case came before the District Court Appeals list of the Dublin Circuit Criminal Court. Garda Wallace had been unable to caution the applicant to attend on that date, and the applicant was further remanded for two weeks in her absence. On 13th November, 2014 Garda Wallace wrote to the applicant (by both registered post and by hand delivery) indicating that her case was before the Circuit Court on 24th November and cautioned her to attend. On calling to the house, Garda Wallace was told by the applicant's daughter that the applicant was in Romania. On 24th November, 2014 the applicant was not present before Dublin Circuit Criminal Court when the matter was listed. The Court was presided over by the first named respondent. On the application of the DPP, no order was made on the revocation and the applicant was remanded in her absence back to the District Court for sentencing under s. 99 of the Criminal Justice Act, 2006, as amended. On the same date, leave was granted by McDermott J. by way of ex parte application for judicial review on behalf of the applicant. On 25th November, 2014, the applicant was listed before Tallaght District Court having been remanded the previous day under s. 99 (10) (a). She was not present on that date either. The case was adjourned to the 9th January, 2015 and subsequently to the 19th January, 2015.

Relevant legislation

6. The relevant legislation is contained in s. 99 of the Criminal Justice Act, 2006, as amended:

"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."

7. If a person is convicted of an offence during the currency of the bond, the defendant should be remanded to the court that imposed the suspended sentence. Section 99 (9):

"(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, being an offence committed after the making of the order made under subsection (1) 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.

(10A) The court referred to in subsection (10) shall remand the person concerned in custody or on bail to the next sitting of the court referred to in subsection (9) for the purpose of that court imposing sentence on that person for the offence referred to in that subsection."

The applicant's submissions

8. The applicant submits that the court order as issued from Tallaght District Court on 30th October, 2014 requiring the applicant to appear before Court 16 in the Criminal Courts of Justice on 31st October, 2014 was defective as her remand was to a time and date when Circuit Court 16 was not sitting, or scheduled to sit. It failed accordingly to comply with the provisions of s. 99 (9) of the Criminal Justice Act 2006.

9. The applicant submits that the scheduled sittings of the Circuit Courts, and more particularly Circuit Court 16, are designated in advance with these dates readily available from the Courts Service's Office and the Courts Service's website and in accordance with O. 2 of the Circuit Court Rules, notice of these sittings are published in advance in *Iris Oifigiúil*. It was submitted that the representatives of the second named respondent are, or should be, deemed to be aware of the above information and were required to draw the District Court's attention to this information in advance of that court finalising a remand order. It is interesting to note that the order of District Judge Reilly, dated 30th October, 2014, is not the subject of challenge.

10. When the matters appeared before Court 3, in the Criminal Courts of Justice, on 31st October, counsel for the applicant submits that counsel on behalf of the applicant informed the court presenter and the Court Clerk of the difficulty that had become evident affecting the remand to Circuit Court 16.

11. This matter was opened before Judge Walsh who was sitting on that occasion. It was submitted that at no stage did any representative of the second named respondent inform the applicant, her legal representatives, or the District Court, that Remand Court 16 was being, or had partly been transferred to Circuit Court 5, despite the Court Presenter's Office having prior notice of the difficulty. They submit there was therefore no explanation given as to how, when the Court Presenter's Office was notified by Garda Wallace on 30th October, 2014 of the issue relating to the applicant's remand, the court presenting in Court 3 was not in a position to identify this change in the circumstances, and to cancel on the 31st October, 2014.

12. The submissions on behalf of the applicant dealt with matters which occurred without notice to the applicant by An Garda

Síochána.

13. In relation to what happened in Court 5 on 31st October, 2014 (again not an order that is sought to be impugned by the applicant), the applicant's submissions stated there was no justification given as to how the purported transpositions from Circuit Court 16 to Circuit Court 5 was effected or manifested, nor under whose authority it occurred.

14. During the course of business in Circuit Court 5 on 31st October, 2014 representatives of the second named respondent mentioned the applicant's case to Ring J.. It appears that although the court was informed that the matter before it was the subject of a s. 99 District Court appeal, the court was not informed that the matter had in fact been remanded to Circuit Court 16. Ring J. remanded this matter to Court 16 on 10th November, 2014. The submissions of the applicant say that the originating order remanding the applicant to Court 16 was defective and invalid, yet this is not sought to be impugned in the proceedings.

15. In relation to the hearing in Court 16 on 10th November, 2014 the applicant was not represented nor did she attend and it was stated that neither the applicant or her legal representatives were made aware of this date and no effort was made to contact the applicant or her legal representatives informing of the date. In relation to the order of which leave was granted by McDermott J. 24th November, 2014, counsel appeared on behalf of the applicant, but it was submitted that the presentation as proffered by counsel on behalf of the applicant was in fact correct and consistent with the proceedings as the applicant and her legal representatives. The first named respondent remanded the applicant back to the next sittings of Tallaght District Court for 25th November, 2014 for sentence.

Submissions on behalf of the second respondent

16. Counsel on behalf of the second named respondent stated that District Judge Reilly was faced with the situation where there were two live suspended sentences in existence and was compelled to make two remand orders under s. 99 (9). He submitted that while there is a requirement that such an order be made returnable to the next sitting of the court to which they were remanded, the Supreme Court has commented that there is no constraint on when such an order is made provided it is made before the sentence is imposed. He quoted O'Donnell J. in *Director of Public Prosecutions v. Carter and Director of Public Prosecutions v. Kenny* [2015] I.E.S.C. 20. In any event both orders were made remanding the applicant to appear in both the District Court and the Circuit Court, both sitting in the Criminal Courts of Justice the following day.

17. Counsel submitted that the applicant's affidavit suggested the applicant was remanded to a particular *courtroom*, namely Court 16 in the Criminal Courts of Justice (this Court's emphasis). The Act clearly provides for remand to a particular court, not a courtroom. The order made in April, 2014 was made by Dublin Circuit Court which the applicant had appealed from the District Court.

18. Counsel submitted that there was a sitting of the Dublin Circuit Criminal Court on the 31st October, 2014. There was no specific list dealing with District Court appeals, however the list dealing with indictable matters can (and frequently does) deal with District Court appeals.

19. Counsel submits that it was the next sitting of Dublin Circuit Criminal Court which was dealing with indictable matters on that date. Had the s. 99 (9) remand been made to the next District Court appeals list, that would have not been the next sitting of Dublin Circuit Criminal Court and the order would have been incorrectly made. Again, he quotes from O'Donnell J. in *Director of Public Prosecutions v. Carter and Director of Public Prosecutions v. Kenny* [2015] I.E.S.C. 20:

"Although it does not arise directly in this case, it seems notable that the section speaks of "court" and makes no reference to venue. Thus it appears that the section contemplates that the individual will be remanded to the next sitting of the particular Circuit, in the case of the Circuit Court, and of the relevant District, in the case of the District Court, and not to the next sitting of that Court at the venue of the original trial or sentence."

He submits that the applicant omits to mention any efforts made by the applicant or her solicitor to ascertain whether her Circuit Court case was listed on that date.

The order made on 24th November, 2014, by the first named respondent

20. Hogan J. delivered judgment in the case of *McCabe v. Ireland* [2014] I.E.H.C. 435, on 30th September, 2014. In that case, given the absence of a right of appeal from the revocation of a suspended sentence imposed by the Circuit Court on appeal, the Court held it was unconstitutional to execute the revocation of a suspended sentence imposed by the Circuit Court on appeal. Counsel submitted that following this judgment, a practice had evolved in District Court appeals whereby no order was made on revocation applications and the defendant was remanded back to the triggering court for sentence. Counsel submits that this is what happened in the present case.

21. Subsequently the Court of Appeal, on 22nd July 2015, allowed the appeal of the *Director of Public Prosecutions in McCabe v. Governor of Mountjoy Prison* [2015] I.E.C.A. 156. The appellate court described the existence of a right of appeal to the Court of Appeal against the revocation of a suspended sentence by the Circuit Court on appeal. Now the practice has reverted to the previous situation of hearing revocation applications for which there is now a right of appeal.

22. Counsel submits that the applicant in this case was entirely successful in having the April suspended sentence not revoked at all. The only complaint then could be that the s. 99 (10) (A) order was made by the first named respondent remanding her back to Tallaght District Court. Again he quotes O'Donnell J. in *Director of Public Prosecutions v. Carter and Director of Public Prosecutions v. Kenny* [2015] I.E.S.C. 20:

"That court is exercising its power to impose sentence in respect of a matter properly before it. The jurisdiction to do so comes from the court's jurisdiction to try the offence. Trial, adjudication and sentence are normally indivisible parts of the administration of justice. Accordingly, the power to impose a sentence does not appear to be created or conferred by section 99(10A), or to be dependent upon it. That section at best merely provides a mechanism to secure the individual's attendance before the court."

In his written submissions, counsel for the second named respondent refers to the impact of *Moore & Ors. v. Ireland & Ors.* [2016] I.E.H.C. 244, in which Moriarty J. delivered judgment striking down subs. (9) and (10) of s. 99 as being repugnant to Article 38 of the Constitution.

23. Counsel submitted that the applicant in these proceedings never sought to assert the unconstitutionality of any part of s. 99 of the 2006 Act, but seeks to rely on its provisions to argue that they were not correctly followed by the respondent.

The authorities

24. In addition to *Director of Public Prosecutions v. Carter* and *Director of Public Prosecutions v. Kenny* [2015] I.E.S.C., the Court was assisted by references to *Clarke v. Governor of Mountjoy Prison* [2016] 5 J.I.C. 2702. McDermott J. in *Clarke* stated:

"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 to 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 concluded."

25. This Court is of the view that, as O'Donnell J. states in *Director of Public Prosecutions v. Carter* and *Director of Public Prosecutions v. Kenny* [2015] I.E.S.C. 20, the s. 99 order is to a sitting of a court, not a courthouse, and in these circumstances it appears to me that, while it was unhelpful that Garda Wallace had not been able to inform either the solicitor or the applicant in respect of the appearance of that case appearing in Court 5, the order of Ring J. was appropriate to put the matter back to Court 16 before the first named respondent, and she appropriately indicated that the applicant should be cautioned by the State as to the next date, which was 10th November, 2014. When the Court sat on that date the applicant was not present and the second named respondent remanded the case to Court 16 on 24th November, 2014. At this stage the applicant had been notified by registered post and by Garda Wallace calling to the applicant's house and speaking to her daughter. Having regard to the practice of the Director of Public Prosecutions pending the judgment of the Court of Appeal in *McCabe v. Governor of Mountjoy Prison* [2015] I.E.C.A. 156 to strike the matter out, the first named respondent was then left with dealing with the original conviction.

26. I am satisfied that the decision of the Supreme Court in *Director of Public Prosecutions v. Carter* and *Director of Public Prosecutions v. Kenny* [2015] IESC 20 is the authority for the contention that the power to impose a sentence is not created or conferred by s. 99 or to be dependent upon it. O'Donnell J. in that case stated, at para. 39 of the judgment:

"However, it should be noted that this reasoning would not necessarily apply in the same way to a remand from a reactivating court under section 99(10) to the convicting court under section 99(10A). That court is exercising its power to impose sentence in respect of a matter properly before it. ... Accordingly, the power to impose a sentence does not appear to be created or conferred by section 99(10A), or to be dependent upon it. That section at best merely provides a mechanism to secure the individual's attendance before the court."

27. In these circumstances, having regard to this, this Court is of the view that the applicant is refused the order of certiorari in relation to the order of 24th November, 2014 made by the first named respondent, and this Court is of the view that the order is valid having regard to all the circumstances.