THE COURT OF APPEAL

CIVIL

Neutral Citation Number: [2016] IECA 342

Irvine J.
Sheehan J.
Mahon J.

Appeal No.: 2015/520

Jake Freeman

Respondent

- and -

The Governor of Wheatfield (Place of Detention)

Appellant

Judgment of Mr. Justice Mahon delivered on the 16th day of November 2016

1. Mr. Freeman, the respondent, was convicted of an offence under s. 15 of the Misuse of Drugs Act 1997 (as amended) in the District Court (the Childrens Court) on 28th September 2015. He was sentenced to four months imprisonment. The warrant on foot of which the respondent was committed to prison made no reference to the determination of the DPP that the matter be tried summarily.

2. The respondent was duly lodged in prison on foot of the warrant. He sought and obtained an inquiry under Art. 40.4.2 of the Constitution in relation to his committal to prison on the basis that the failure to recite on the relevant committal warrant the fact that the Director of Public Prosecutions had elected to proceed summarily rendered the committal warrant bad on its face.

3. The respondent succeeded in his application to the High Court. The order and judgment of the High Court (Noonan J.) of 9th October 2015, it was found that *"the said return to the said order dated the 7th October 2015 is insufficient to satisfy the detention of the Applicant as aforesaid doth order that the Applicant be released forthwith from such detention".*

4. The respondent was duly released from custody on foot of the said order of the High Court having served close to two weeks of the four month sentence at that point in time. The appellant appealed the ordered and judgment of the High Court to this court. Had the four month prison sentence run its course without interruption, the respondent would have completed serving his sentence by the end of January 2016, or indeed prior to that date in the event of being granted parole in accordance with normal practice. Undoubtedly, the prison term would have more than run its full course by the time this Court determined the appeal against the decision of Noonan J. on 15th June 2016.

5. This Court allowed the appeal. In the course of my judgment in that case, it is stated:-

> *"Even if it was strictly necessary to so recite this on the face of the warrant (and which I do not believe to be the case), such a failure was, in the circumstances, of such a technical nature that its absence could not invalidate what was otherwise a perfectly good warrant."*

6. When the matter came before this Court for hearing, it was contended on behalf of the respondent that the case was moot because the appellant had not sought or obtained a stay on the order of the High Court (or at any time subsequently) and that this had resulted in the four month prison sentence imposed by the District Court on 28th September 2015 continuing to run, and duly expiring by effluxion of time by late January 2016. It was argued on behalf of the respondent that the Court should decline to entertain the appeal for this reason.

7. Having considered this aspect of the case, I stated in the course of my judgment:-

> *"As to whether the case is indeed moot I do not express any definite view. In order to do so it would be appropriate to have further and more detailed submissions from both sides. If indeed the appeal is moot, I nevertheless believe it appropriate that this court should make a determination in relation to the substantive issue raised in the appeal particularly because that issue potentially affects other warrants issued on foot of District Court convictions, and it is therefore in the public interest that a determination be made in relation thereto.*

8. The case has now returned to this Court at the behest of the appellant on foot of an application that the respondent should serve the balance of the four month sentence which was, (as was subsequently found), incorrectly interrupted by the inquiry before the High Court. The appellant poses three questions, namely:-

> (i) Does this Court have the power to direct the re-arrest of the respondent?
>
> (ii) Is the sentence spent?
>
> (iii) Is this matter moot?

9. It is argued on behalf of the appellant that the respondent should not reap a benefit from being freed from prison in the course of proceedings challenging his incarceration, but which said proceedings were ultimately unsuccessful.

10. Subsequent to his unsuccessful application to the High Court on 9th October 2015, and which resulted in his immediate release from prison, the appellant was convicted of separate offences and is currently serving a sentence in relation thereto, and which said sentence is due to run until January 2017. For this reason, and without prejudice to his other written and oral submissions, it is contended by the respondent that it is not open to this Court to direct the issue of a fresh warrant for his arrest for the purposes of having him lodged in prison to serve the remaining portion of the four month sentence. The issue of such a warrant would, it is

argued, be both impractical and meaningless, because the respondent is already lawfully in prison.

11. My immediate observation in relation to this particular submission is that there is no particular prohibition to the Court issuing such a warrant in such circumstances should it be of a mind to so do. It is permissible (and is sometimes appropriate or necessary) to arrest a person while in prison; for example, on suspicion of murder. A direction that, having been arrested, the prisoner should be detained in a prison on foot of such warrant for the purposes of serving a particular sentence (or, as in this case, to complete a sentence), is not in conflict with, nor does it in any sense undermine, the individual's continued service of a separate and previously imposed sentence.

12. In any event, and leaving to one side for the moment the issue as to whether or not a warrant may be issued for a person already incarcerated in prison, the substantive issue in this case concerns whether or not, in the circumstances of this case, the four month prison sentence interrupted by the successful application to the High Court after less than two weeks of the sentence had been served, can be re-activated in respect of the un-served portion, (being approximately three months and two weeks), following upon a ruling from this Court that the original committal to prison had at all times been lawful, and at a point long after the four month period as originally envisaged had passed.

13. It is submitted on behalf of the respondent that the four month sentence continued to run its course subsequent to his release from prison on 9th October 2015 and that it has now expired by effluxion of time.

14. The issue was considered by this Court in the judgment of Hogan J. in *McDonagh v. Governor of Mountjoy Prison* [2015] IECA 71, when he observed as follows, under the paragraph headed *"Whether the sentence of imprisonment has now expired by effluxion of time?"*:-

> *"It would have to be said that question of whether the making of an order of release by the High Court under Article 40.4.2 has the effect of interrupting the underlying sentence of imprisonment or whether that sentence continues to operate in the absence of the prisoner is a question of no little difficulty on which there is, it might be thought, surprisingly little authority. While it is clear that, as Ó Briain J. said in The State (Woods) v. Governor of Portlaoise Prison (1973) 108 I.L.T.R. 54, 57, a sentence of penal servitude "once commenced continues to run without cessation" and that it "cannot be stopped from running by any court", this may simply reflect one of the special features of penal servitude. This principle may not necessarily apply to a sentence of imprisonment, the abolition of the distinction between penal servitude and imprisonment by virtue of s. 11 of the Criminal Law Act 1997 notwithstanding.*
>
> *In my view, it would be undesirable to determine this novel and difficult question for the purpose of determining whether the appeal was moot unless such was strictly necessary. Since I am of the view that, for the reasons which I will proceed to set out, this Court should hear the appeal it is not necessary to express any further views on this question."*

15. The issue was also considered by the Supreme Court, nearly fifty years ago, in the case of *The State (Browne) v. Feran* [1967] 1 I.R. 147. In that case, the prosecutor obtained in the High Court conditional orders, and subsequently, absolute orders of *Habeas Corpus* and *Certiorari*. He was, accordingly, released from prison. On appeal to the Supreme Court, the question arose as to whether, in the event of the Supreme Court finding that the detention was indeed lawful was it empowered to order the re-arrest of the prosecutor. In the course of his judgment, Walsh J. stated (at pp. 169/170):-

> *"If this court, on appeal, is satisfied that the detention was lawful it means, first of all, that the order of the High Court is to be set aside. The question of how the former prisoner may be retaken may depend upon the precise circumstances of each case. A prisoner who is released from an unlawful detention in which he was held while on remand remains still subject to the further order of the court dealing with his case, and he may be remanded in custody insofar as that is permitted by law. In the case of a convicted prisoner, a fresh warrant of execution could be issued if it were to be held that the original warrant, which was held in the High Court to be unlawful or insufficient to warrant the detention complained on, is spent by its initial execution.*
>
> *I do not see why this court, in the exercise of its inherent jurisdiction in reversing the order of the High Court, should not direct a warrant for the apprehension of the former prisoner for the purpose of his re-commital to a place of detention… it may well be that while the appeal is being determined, the former prisoner is no longer available for apprehension, but that cannot affect the jurisdiction of the court to hear and determine the appeal."*

16. Some years later, in the case of *Cornelis Zwann* [1981] I.R. 395, the same issue was again touched upon by O'Higgins C.J. in the course of his judgment. He stated, at p. 401, the following:-

> *"…If this court on appeal is satisfied for any reason that the orders in question ought not to have been made then these orders must be set aside. If the Court declined to do so merely because the orders had been acted upon and practical difficulties were thereby created, it would be declining to exercise its proper appellate jurisdiction. This view has, I think, been implicit in many previous decisions of this court: see, in particular, The State (Browne) v. Feran at p. 169 and The State (Dillon) v. Kelly."*

(The practical difficulties is a reference to the fact that Mr. Zwann, having been released from prison on foot of the High Court order, had left the jurisdiction.)

17. The strong focus of the argument made by the appellant is that a person who has been sentenced to a term of imprisonment, who is released before that sentence is served on foot of a court order and where subsequently that court order is reversed or quashed, should not benefit from the time spent free. To find otherwise, it is contended, would incentivise less than meritorious applications to the High Court in the hope that freedom from prison would be achieved earlier than expected and that, then, because of the unavoidable delay between a hearing at first instance and a hearing on appeal, the term of the sentence may expire by effluxion of time.

18. Given the fact that there will almost always be a gap of a number of months between hearings in the High Court and any appeal arising therefrom, the consequences for the administration of justice in circumstances where an order of the High Court directing that a convicted person be released from custody is reversed on appeal is obvious, particularly in instances where relatively short sentences are concerned. A gap in time between the hearing at first instance and an appeal hearing is a feature of any legal system. In *Kemmy v. Ireland* [2009] 4 I.R. 74, a case in which the plaintiff sought damages for his wrongful conviction for rape, having served his sentence prior to his appeal being heard, McMahon J. remarked (at p. 102):-

> *"The real problem in the plaintiff's case was that there was an inevitable delay between the original trial and the hearing of the appeal in the Court of Criminal Appeal. Before the corrective mechanism took effect the plaintiff had served his sentence. But, by definition, the appeal can only come on after the original trial, and such a delay cannot be avoided. Even if the appeal had been organised on the day after the trial, the plaintiff's complaint, if his appeal was successful, would in principle be the same …."*

19. It is well established that a High Court order directing the release of an individual following an inquiry under Art. 40 must take immediate effect (*State (Trimbole) v. Governor of Mountjoy Prison* [1985] I.R. 550 at 567). The person cannot be held in custody pending an appeal from the order of the High Court.

20. In his book, the *Criminal Process*, Prof. Tom O'Malley states (at p. 2012) that:-

> *"… A person released following an Article 40 inquiry may be rearrested in the event of a successful appeal by the respondent to the Supreme Court or in circumstances where the appellant can validly be detailed in another place or on other legal grounds".*

21. In *State (Dillon) v. Kelly* [1970] I.R. 174, the Supreme Court noted that it had repeatedly held that in circumstances where detention had been declared illegal because the person was being held in a place not authorised by law, it was the duty of the court which ordered the release to ensure that the prisoner was immediately re-arrested and lodged in a lawful place of detention to serve out the remainder of his sentence. In that case, the court itself issued a warrant directing that the applicant be arrested and lodged in a named prison.

22. In *State (Woods) v. A.G.*[1969] I.R. 385, the Supreme Court stated as follows:-

> *"Where a prisoner has been erroneously released in the High Court it is the duty of this court on appeal to ensure that the prisoner is re-arrested to serve the un-expired period of his lawful sentence. The court at the conclusion of the argument, having allowed the appeal, immediately issued an order for this purpose and directed that the prosecutor be delivered into the custody of the Governor of Mountjoy Prison in accordance with the sentence imposed by Mr. Justice Butler, who has since procured the issue of a warrant drawn in explicit compliance with the terms of the sentence that he pronounced."*

23. One of the written submissions made on behalf of the respondent is as follows:-

> *"In respect to the first question, the respondent accepts that this court has jurisdiction to issue a warrant for the arrest of a convicted person which it concludes that it must overturn the High Court releasing the (respondent) pursuant to Art. 40, and then concludes that there remains time left to serve on foot of the warrant it is the latter proposition that the applicant in this case does not agree with i.e. the warrant is spent and there is no time left to serve of it."*

This was in response to the appellant's contention that this court can issue a warrant for the arrest of the respondent.

24. This is a qualified acknowledgement by the respondent that, at least, the mere fact of a person being released on foot of a High Court order in an Art. 40 case can be returned to prison in the event of that order being subsequently reversed on appeal. The point however being made by the respondent in this respect is that if a person is fortunate enough, having been released by order of the High Court, to face a delay while awaiting the hearing of an appeal against that order (albeit a delay outside his control) beyond the term of the prison sentence in question (measured from the date of sentence without interruption), the consequence will be the avoidance of the obligation to serve a sentence lawfully imposed in the first place.

25. It is also contended on behalf of the respondent that it would be inappropriate that this court, in the event that it was to find in favour of the appellant, direct that the respondent serve the balance of the term of his imprisonment, as this court is an appellate court, because the effect of so doing would be to deprive the respondent the possibility of appealing same. However, in my view, such an argument is unsustainable, as it fails to appreciate the fact that this is an appeal from a decision of the High Court to release the respondent from serving a legitimately imposed prison sentence, and that it is appropriate and necessary that this Court should make all necessary orders on the basis of, and in the consequence of, its determination on the substantive issue. To adopt the terminology used by Hogan J. in his judgment in *McDonagh v. The Governor of Mountjoy Prison* [2015] IECA 71, it is, I believe, *strictly necessary* to determine *this novel and difficult question* as part of the appeal.

Conclusion

26. I am satisfied that, in the circumstances of this case, where the respondent was released from prison by order of the High Court approximately two weeks into serving a legitimately imposed four month prison sentence, (a sentence which the respondent acknowledges was legitimately imposed), and where this court has reversed that decision, albeit at a point in time well after the said four month period has passed the un-served period of that sentence remains live, and the respondent continues to be subject to it.

27. It is appropriate that the respondent serve the balance of the four month prison sentence, and I would direct that he do so.

28. I would direct that the original warrant be reissued and amended to reflect the direction that the respondent serve the four month term of imprisonment as originally imposed by the District Court, with full credit for the period of that term already served. The reissued warrant should be directed to the Governor of the prison wherein he, the appellant, is presently incarcerated.

29. The said four month sentence, and more particularly, the un-served balance of that sentence is to be served concurrently with the sentence or sentences in respect of which the respondent is currently in custody. The four month sentence as originally imposed was not directed to be served consecutively with any other sentence, and in the absence of such direction a presumption of concurrency applies (see *State (Blackhall) v. Mangan* [1953] 87 ILTR 65; *Carroll v. Governor of Mountjoy Prison* [2005] 3 I.R. 292).