THE HIGH COURT

[2021] IEHC 159

[2019 No. 746 JR]

BETWEEN

JOSEPH BOYLE

APPLICANT

– AND –

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Ms. Justice Niamh Hyland delivered on 3 March 2021

Summary

1. This is an application for judicial review by Mr Boyle ("the applicant") in respect of an Order of the Circuit Court of 17 October 2019 remanding him in custody. A challenge is made to the jurisdiction of the Circuit Court to remand a person in custody or on bail pending a hearing under s.99(17) of the Criminal Justice Act 2006 as amended ("the 2006 Act") on revocation of a suspended sentence, with the applicant contending that s. 99 does not contain any such power. The applicant further argues that the warrant remanding him in custody does not show jurisdiction on its face.

2. The Director of Public Prosecutions ("the respondent") argues that s. 99 of the 2006 Act must be interpreted as implicitly providing for such a power or that an ancillary power to remand must be inferred, and, in the alternative, that the court has an inherent jurisdiction to remand the applicant in custody or on bail pending a hearing under s.99(17). The respondent considers the warrant valid on its face.

3. For the reasons set out in this judgment, I have concluded that there is no power under s.99, either explicit, implicit or ancillary, to remand a person pending a revocation hearing under s.99(17).

4. On the other hand, I consider that, in the circumstances of this case, including the length of time for which the applicant was remanded in custody (4 days, 2 of which were a weekend), the Circuit Court enjoyed an inherent jurisdiction to remand the applicant.

5. However, I find that the warrant of 17 October 2019 is bad on its face as it does not recite the basis upon which the applicant was remanded i.e. pursuant to the inherent jurisdiction of the Court. I therefore quash the Order of the Circuit Court of 17 October 2019 remanding the applicant in custody.

The proceedings

6. Leave to seek judicial review was granted by Allen J. by an Order dated 18 October 2019 and a Notice of Motion was filed on 19 November 2019. The applicant seeks various reliefs including an Order of *certiorari* quashing the Order of the Circuit Court of 17 October 2019 remanding the applicant in custody in the matter of s. 99 of the 2006 Act and a Declaration that the Circuit Court judge had no jurisdiction to make such an Order.

Chronology of events

7. The background to this case is as follows. On 4 April 2016 the applicant was sentenced to four years imprisonment by Judge Greally, with the final twelve months of the sentence

suspended upon the applicant entering a bond with various conditions attached. One of these conditions was supervision by the Probation Service of the applicant. The applicant was released from custody on 30 May 2018.

8. On 11 December 2018 the applicant was the subject of a Notice issued pursuant to s. 99(15) of the 2006 Act made returnable to 23 January 2019, which stated that Mr. Darren Ferguson, probation officer, had applied under s.99(14) to fix a date for the hearing of an application for an Order revoking the Order made by the Court suspending part of the sentence of imprisonment imposed on the application, due to failure to comply with the conditions of suspension. The Order directed him to appear before Judge Greally on 23 January 2019 for the hearing of an application for an Order revoking the Order of 12 April 2016. A further Notice was issued on 23 January 2019 and made returnable to 20 February 2019.

9. The applicant became subject to a bench warrant on 20 February 2019 and the bench warrant was executed on 3 September 2019. The applicant was admitted to bail on consent and required to attend at Dublin Circuit Court on 9 October 2019. The applicant failed to appear on this date and a further bench warrant was issued under s.99(16).

10. That bench warrant was executed at Dublin Circuit Criminal Court on Thursday 17 October 2019. Judge Nolan, the presiding judge at the time, suggested that the case be adjourned to Judge Greally, who had seisin of the case, that day at 2pm. However, the respondent indicated that a probation officer who was a necessary witness to the case would be unavailable at that time. The presiding judge remanded the applicant in custody until Monday 21 October 2019 so the hearing could be listed before Judge Greally and the probation officer available.

11. Counsel for the applicant submitted to the Court that there was no jurisdiction to remand the applicant in custody or on bail, was opposed in that by counsel for the respondent and Judge Nolan determined he had jurisdiction and refused bail, remanding the applicant in custody. On th date an Article 40 Inquiry was ordered.

12. On 18 October 2019 the Article 40 Inquiry was struck out and leave to seek relief by way of judicial review was granted with the consent of the respondent, given the significance of the issue raised. The applicant was admitted to bail.

Jurisdiction of the Circuit Court to remand under Section 99

13. The first question that arises is whether the Circuit Court has jurisdiction under s.99 to remand in custody or on bail a person pending a s.99(17) hearing in the circumstances of this case i.e. where the person has been brought before the Court on foot of a bench warrant issued under s.99(16), issued by reason of that person's failure to attend court following the issuing of a notice to attend under s.99(15).

14. The applicant contends there is no such power. The respondent argues that such a power derives from s.99 properly construed. Deciding this issue necessitates a detailed consideration of s.99.

15. Under s.99(1) where a person is sentenced to a term of imprisonment, the court may suspend whole or part of that sentence subject to the person entering into a recognisance to comply with the conditions of the order.

16. Under s.99(2), one such condition is that the person keep the peace and be of good behaviour. Under s.99(3) specific conditions tailored to the individual person may be imposed. Under s.99(4) the following conditions may be imposed:

    (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;

    (b) that the person undergo such—

        (i) treatment for drug, alcohol or other substance addiction,

        (ii) course of education, training or therapy,

        (iii) psychological counselling or other treatment, as may be approved by the court;

    (c) that the person be subject to the supervision of the probation and welfare service.

17. If there is a suspicion that a person has breached conditions, including those identified at s.99(4), there is a procedure identified for bringing that person back to court to determine breach as follows:

    (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 (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)(13A) 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.

18. There is no explicit identification of the court in question before which the person is to be brought back but a reasonable interpretation is that it ought to be the court that imposed the sentence and set conditions. In this case, the original s.99(15) Notice specified that

the matter come back before Judge Greally, although because of the necessity to issue a bench warrant, when the warrant was executed, the applicant was brought back before Judge Nolan, who transferred it to Judge Greally.

19. Importantly, on application being made to it, under s.99(15) the court fixes a date for the hearing of the application seeking an order of revocation (my emphasis), and not a date upon which the person will first appear following receipt of the notice. In other words, the statutory scheme does not envisage a gap in time between the person being brought to court and the hearing of the application to revoke.

20. Section 99(6) provides for the issuing of a bench warrant if the person does not show up on the date identified in the notice under s.99(15).

21. The provisions providing for the power to issue (a) a notice identifying a date for the revocation hearing and (b) a bench warrant if the person does not turn up for the revocation hearing, clearly suggest that the legislature intended that the person should be present for the revocation hearing for obvious reasons. In contradistinction, it did not provide for the remand of a person pending the revocation hearing, perhaps because it was not anticipated that the revocation hearing might not proceed on the date identified in the notice.

22. The reality is that on the date identified in a notice, either the person the subject of the notice or the probation officer or both may not be ready to proceed with the application and may require an adjournment. I understand from submissions made during the oral hearing that in fact, the normal course in such a revocation application is that the matter will be put back to a subsequent date.

Explicit power to remand pending a Section 99(17) hearing

23. There is no explicit power to remand a person on custody or bail pending a revocation hearing under s.99(17), unlike the position where a person serving a suspended sentence is convicted of an offence, accordingly breaching a condition of suspension and necessitating a revocation hearing. Section 99(8A) addresses that situation. It provides in relevant part:

> *(8A)(a) Where a person to whom an order under subsection (1) applies —*
>
> *(i) commits an offence after the making of that order and during the period of suspension of the sentence concerned (in this section referred to as the "triggering offence"), and*
>
> *(ii) subject to subsection (8B), is convicted of the triggering offence, the court before which proceedings for the triggering offence are brought shall, after imposing sentence for that offence, remand the person in custody or on bail to a sitting of the court that made the said order to be held —*
>
> *(I) no later than 15 days after such remand, or*

(II) if there is no sitting of that court within that period, to the next sitting of that court thereafter,

and, if there is no sitting of that court on the day to which that person has been remanded, he or she shall stand so remanded to the sitting of that court next held after that day.

(b) The remand of a person in custody or on bail under paragraph (a) to a sitting of the court that made the order under subsection (1) concerned applying to the person may be to a sitting of that court other than a sitting thereof referred to in paragraph (c).

(c) Subject to paragraph (b), references in paragraph (a) to a sitting of a court shall be construed as references to a sitting of the court at a place and time appointed or fixed for sittings of that court by or under statute.

24. Counsel for the applicant rightly points to the detail of s.99(8A)(b) and (c), emphasising the limit of 15 days for which a person may be remanded and pointing to the sharp contrast with s.99(17) hearings, where no such power of remand exists.

25. Given there is no explicit statutory power to remand pending a s.99(17) revocation hearing, I must consider whether the respondent is correct in its submission that there is an implied or ancillary power under s.99.

Implicit power to remand pending a Section 99(17) hearing

26. The respondent accepts that there is no express power of remand contained in s. 99(14) but it submits that once the matter is before the court, the judge must have the power, if the matter is to go back, to decide whether a person should be held on remand so as to enable the judge to manage their own processes and enforce their own orders. It submits that what is reasonably incidental to what is expressly provided for can be implied, citing case law where there was no explicit statutory power to issue a bench warrant, but the court was deemed to have a power to do so ancillary to the statute giving it the power to try the offence. I deal below with that argument and the line of case law relied upon by the respondent.

27. The respondent argues that s.99 should be interpreted as containing an implied power to remand, citing various cases where powers were implied into statutes. It cites the decision of Kelly J. in *An Blascaod Mor Teo v. Commissioners of Public Works* [1996] IEHC 45 where it was held that a Minister had an implied power to make regulations under an Act that did not expressly provide for such an entitlement as such a power was "*reasonably incidental*" to the provisions of the Act. It notes the "*reasonably incidental*" principle is often supplemented by the allied principle of effectiveness: *ut res magis valeat, quam pereat* (see Hogan and Morgan, 4th edition, paragraphs 10-41 *et seq*). The respondent further referred to *Minister for Transport and Power v. Trans World Airlines Inc,* (Unreported, Supreme Court, 6 March 1974) where the Supreme Court held that a Minister has an implied power to prescribe landing charges at airports. In the criminal sphere, in *McGlinchey v. Governor of Portlaoise Prison* [1988] I.R. 671, the Supreme

Court were prepared to hold that in the absence of an express power being contained in the Offences Against the State Act 1939, as amended to appoint members of the Special Criminal Court, the Government had an implied power so to do. That this was so *was "a necessary inference*" (p. 681, per Lynch J.) given the Government had express power to establish the Court in the first place.

28. Each case on statutory interpretation will depend on the specific terms of the statute and the nature of the power sought to be implied. I accept that in principle powers may be implied having regard to the terms of the statute in question, even where they have not been explicitly identified in the statute. The nature of the power to be implied and the overall statutory framework must be examined in each case to see whether the power contended for can be implied. As each case turns on its own context, the various cases relied upon are of only marginal relevance, save that they establish that powers may be implied into statutes in certain instances. I would note however that in *McGlinchey*, provisions of the Offences Against the State Act strongly suggested that the Government had the power to establish the first special criminal court, with Lynch J. observing:

> *"I have no doubt at all, however, but that a necessary inference arises that the Government is given power to establish the first criminal court following the making of the proclamation, having regard to the mandatory terms of s.38(1), that such court should be established and the powers given to the Government by s.38(2) to establish further courts, and by s.39(2) to appoint persons to be members of all or any of such courts."*

29. In this case, as I explore below, no inference arises from the terms of s.99 that a court enjoys an implied power to remand. What is being sought to be implied here is a power to remand, which, depending on how it is exercised, may operate to deprive persons of their liberty. Such a power should not lightly be implied.

30. When considering the correct interpretation of s.99, the principle of *expressio unius exclusio alterius* (something expressed nullifies what is unexpressed) is of considerable assistance, as contended by the applicant who refers to the description of same in Dodd at para 5.89 in *Statutory Interpretation in Ireland* (Bloomsbury, 1st edition, 2008):

> *"Where the legislature in the text deems it appropriate to expressly cater for particular matters, and could have included other matters, but did not, then the inference arises that such omissions are deliberate and that such matters are intended to be excluded from the provision".*

31. The applicant also relies on the case of *Browne v. Ireland* [2003] 3 I.R. 205 where the Supreme Court held that secondary legislation could not create an indictable offence in the absence of an express power to do so. Keane C. J. found that, as the power to create such offences was expressed elsewhere in the Act, the omission was deliberate, applying the principle of *expressio unius exclusio alterius*.

32. The applicant submits that the Browne case is relevant where here, the Oireachtas conferred the power to remand on custody or on bail on a court in the case of revocation for triggering offences (s. 99(8A)) but did not do so when s.99(14) is invoked by a probation officer for the purpose of convening a s.99(17) hearing. The lack of express provision of a power to remand signifies that the legislature did not intend for a Court to have jurisdiction to remand a person in circumstances where a probation officer invokes s.99(14). The applicant points to the corresponding lack of provisions limiting the period a person could be remanded in custody, in contrast to s.99(8A) which limits the period to 15 days subject to certain exceptions.

33. In my view, the presence of explicit powers of remand on a triggering offence, and the absence of equivalent powers in respect of a person the subject of a s.99(17) hearing, strongly suggests that the legislature did not intend to provide for such powers. The invocation of the principle of *expressio unius exclusio alterius* is apt.

34. Further, it is noteworthy that there is an explicit power to provide for the issuing of a bench warrant where a person does not turn up to court following the service upon him or her of a notice issued under s.99(14). Again, the explicit power given to the court in this respect suggests that it was not intended that a power to remand, which may involve a deprivation of freedom equal to or greater than the issuing of a bench warrant, should be simply implied into s.99.

35. The legislature was free to include the power to remand if it wished to ensure that a person would be before the court for the purposes of a s.99(17) hearing following an adjournment: it chose not to do so.

36. Moreover, s.99 is undoubtedly a penal statute. The applicant argues that if there were any ambiguity in s. 99(14), such an ambiguity would have to be resolved in favour of the applicant, given the principle that "*an enactment creating a penal, or taxation liability or other detriment should be construed strictly so as to prevent the imposition of penal liability unfairly by the use of oblique or slack language*" (Dodd's *Statutory Interpretation in Ireland* at para. 11.54).

37. In *Mullins v. Harnett* [1998] 4 I.R. 426, O'Higgins J. quoted with approval the following passage from Maxwell, *The Interpretation of Statutes*, 12th edition (p. 239-2401):

> *"…the strict construction of a penal statute seems to manifest itself in four ways: in the requirement of express language for the creation of an offence; in interpreting strictly the words setting out elements of an offence; in requiring the fulfilment of the letter of the statutory conditions precedent to the infliction of punishment; and in insisting on a strict observance of technical provisions concerning criminal procedure and jurisdiction". (para. 42).*

38. The applicant suggests that the penal nature of s.99 manifests itself in two ways in particular: a remand in custody constitutes detriment and thus can be treated as the infliction of punishment; and s.99 contains technical provisions concerning criminal

procedure and jurisdiction and as such those provisions require to be strictly observed. I agree.

39. There is no dispute but that penal statutes must be interpreted strictly: where statutory provisions relate to the imposition of a penal sanction, s. 5 of the Interpretation Act 2005 explicitly disapplies the rules requiring a construction reflecting the plain intention of the Oireachtas to be given to ambiguous or obscure provisions or those leading to absurd interpretations.

40. In *DPP (Broderick) v. Flanagan* [1979] I.R. 265 at p. 280 Henchy J. in the Supreme Court observed as follows:

> *"… a cardinal principle in the judicial interpretation of statutes that the range of criminal liability should not be held to have been statutorily extended except by clear, direct and unambiguous words. If the lawmakers wish to trench on personal liberty by extending the range of the criminal law, they may do so, within constitutional limitations; but an intention to do so should not be imputed to them when the statute has not used clear words to that effect. No man should be found guilty of a statutory offence when the words of the statute have not plainly indicated that the conduct in question will amount to an offence. The requirement of guilty knowledge for the commission of the offence presupposes as much".*

41. In this case, what is at issue is not a statutory offence; but nonetheless, the power to remand in custody trenches on personal liberty and therefore the principles identified by Henchy J. appear to me applicable. Clear words would be required to give the court the statutory power to remand pending a s.99(17) hearing. No such words appear in s.99.

42. It was suggested by the respondent that I should imply a power to remand because there is a reference in s.99(17) to *"any period spent in custody pending the revocation of the said order"*. The respondent argues that this must mean there is a power to remand as otherwise there could be no period spent in custody pending revocation.

43. In addressing this argument, it is instructive to compare the relative subsections dealing with, on the one hand, a person convicted of a triggering offence, and on the other hand, a person alleged to have breached a condition of their sentence. The triggering offence provision is at s.99(8C) and provides:

> *(8C) Subject to subsection (8D) , a court to which a person has been remanded under subsection (8A) shall revoke the order under subsection (1) concerned 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 spent in custody by the*

person in respect of the triggering offence) pending the revocation of the said order.

44. Section 99(17) provides:

(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.

45. Section 99(8C) makes explicit reference to a court to which a person has been remanded under s.99(8A), whereas there is no such identification of the court in s.99(17). In both cases, the court must be satisfied that the person has contravened a condition of the order and shall revoke the order unless they consider it would be unjust to do so in the circumstances. In both cases, where the order is revoked, the person is required to serve the entire of the sentence originally imposed, or such part as the court considers just, less any part of the sentence already served in prison and any period spent in custody pending the revocation of the said order.

46. The applicant argues that s.99(17) is broad enough to apply both to revocation for breach of condition and for a triggering offence and therefore the reference to periods in custody can be construed as referring to those periods in custody spent by persons convicted of a triggering offence. On balance, I agree with the respondent that s. 99(17) should be construed to exclude persons found guilty of a triggering offence, given that s.99(8C) explicitly and exclusively addresses the position of those persons. That means that the reference in s.99(17) to periods spent in custody cannot be referring to periods spent in custody by persons convicted of a triggering offence pursuant to s.99(8A).

47. Alternatively, the applicant suggests that it must refer to a period spent in custody by a person the subject of a bench warrant, who must remain in custody during the execution of that warrant. The respondent argues that any such period is likely to be so insignificant that it cannot be what was being referred to in s.99(17).

48. I conclude that the reference to time spent in custody may be a recognition of an inherent jurisdiction to remand pending a hearing under s.99(17), as discussed below. Equally, it may be a recognition that time may be spent in custody where a bench warrant is executed, although any period in custody in that respect is likely to be short.

49. But whatever the reason for its inclusion, in my view the mere reference to a period spent in custody pending revocation, in circumstances where there is no power under s.99 to remand in custody pending a s.99(17) hearing, is not enough to justify the inference of

such a power. This is particularly so in circumstances where an explicit power to remand is identified in respect of persons convicted of a triggering offence.

50. As already noted, a remand in custody involves the removal of a person's freedom and simply showing that the legislature provided for the consequences of such a power being exercised, without providing for the power itself, is insufficient to justify the inference of such a power.

51. In seeking to explain away the significance of the absence of an express power to remand pending a s.99(17) hearing, counsel for the respondent explained the necessity for an explicit power in a s.99(8A) case on the basis that the convicting court for the triggering offence would not necessarily be the same as the court who made the original order under s.99(1); that it was necessary to ensure the person came before that latter court as it was only that court who could revoke the order made under s.99(1); and that an explicit power of remand was therefore necessary.

52. All that is likely true: but in fact, in the instant case, when the matter was listed pursuant to the s.99(15) Notice, it did not come back before Judge Greally who had imposed the original sentence, because the applicant was ultimately brought before the court on a bench warrant, and the judge before whom the matter was listed adjourned it, *inter alia*, so that Judge Greally could deal with the s.99(17) hearing. Thus, an adjournment to bring the matter before the judge who imposed the original sentence may often be necessary and was in the instant case.

53. Accordingly, a power to remand may be as necessary for a s.99(17) as for a s.99(8C) hearing to ensure the person comes before the court that imposed the original sentence.

54. Finally, I should deal with an argument made by the applicant to the effect that there is a clear reason why the Oireachtas has not legislated for a Court to remand a person where s. 99(14) is engaged. Section 99(14) occurs in the context of a probation officer alleging that the person who is the subject of a suspended sentence has breached a condition of their bond. The applicant argues that it must be assumed that the person has not breached their bond prior to the determination of the matter at the s.99(17) hearing. Therefore, the Oireachtas intended that persons should not lose their liberty pending the determination of that question and so did not provide for remand, whereas when s. 99(8A) is invoked it is because the person has been convicted of a triggering offence.

55. But that is not a convincing argument given that, when a person is ordinarily charged with an offence, that person enjoys the presumption of innocence, but the Circuit Court nonetheless has the power to remand. Moreover, even where a triggering offence has taken place, under s.99(8C) the court has a discretion not to revoke the suspension and therefore it cannot be assumed that the convicted person will serve any further time in custody.

Ancillary power under s.99 to remand

56. Separately, by way of analogy the respondent makes an argument that there is a power ancillary to statute to remand pending the determination of the revocation application, drawing on case law which identifies such a power in respect of bench warrants.

57. The first of the cases relied upon is in *The State (Attorney General) v. Judge Roe* [1951] I.R. 172, a case where four men accused of criminal offences appeared before the Circuit Court in Clonmel and objection was taken on the basis that there was no evidence before the Court to show that the accused had been duly returned for trial. On the following day, the Circuit Court judge declared that he had no jurisdiction.

58. Orders of *certiorari* quashing the Order of the Circuit Court judge were subsequently made. In respect of the application for mandamus, Gavan Duffy P. observed that the accused men had been returned for trial, that a new return day was now required and that they should be summoned in the first instance. Addressing the question of what was to happen if they did not appear, he observed that a defendant who did not appear could be arrested on a bench warrant issued by the Circuit Court judge. However, no statutory power to issue a bench warrant existed in the circumstances of the case and he was therefore obliged to consider whether there was any other basis for issuing a bench warrant. I quote from the judgment *in extenso* in this respect given the reliance placed on it by the respondent.

> *"Mr. Serjeant Hawkins says:—"Also it seems clear, that wherever a statute gives to any one justice of the peace a jurisdiction over any offence . . . it impliedly gives a power to every such justice to make out a warrant to bring before him any person accused of such offence . . . for it cannot but be intended, that a statute giving a person jurisdiction over an offence, doth mean also to give him the power incident to all courts, of compelling the party to come before him"(Hawk. P.C., 8th ed., vol. 2, book 2, c. 13, s. 15.)*
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> *Chitty's Criminal Law, 2nd ed., 1826, vol. 1, c. 8, pp. 337-8, says:—"Wherever the king grants an authority of oyer and terminer, the power to issue process is incidentally given; for as there can be no inquiry respecting offences, without the presence of the party, wherever the power is entrusted of determining the former, there must also be authority to compel the latter. For the same reason, justices of the peace, whenever they are authorised to inquire, hear, and determine, may thus compel the defendant to appear; and, indeed, this is expressly declared by the words of their commission. The same observations apply, of course, to all magistrates whatsoever, who are invested with the power to try offenders."*
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> *The four defendants here are all charged with felony and the complex old procedure in Ireland, taken from the English practice with a view to the outlawry of a contumacious criminal, was more drastic in case of a charge of felony than for a misdemeanour: (see Gabbett's Criminal Law, vol. 2, book 2. c. 7.)*
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> *However, Hayes' Criminal Statute Law, 2nd ed., vol. II, tit. "Process," at p. 712, says: "In cases of misdemeanour, and in Ireland, in cases of felony also, where it is*

not intended to proceed to outlawry, the ordinary mode of making a defendant amenable after indictment found against him, is by a bench-warrant."

In Nun & Walsh (2nd ed., 1844), vol. 1, at pp. 195-6, it is said:—"Where a bill of indictment is preferred and found, without any previous warrant issued against the party, the usual and proper course is for the prosecutor to apply either to the judge of assize, or the court of quarter sessions, as the case may be, before whom such indictment has been found, who will grant a bench-warrant"; and see p. 384 to the like effect.

I have cited these common law authorities, because I know of no statute applicable; s. 18 of the Petty Sessions Act, 1851, would be in point, but for the fact that it is directed to arrest after indictment found by a grand jury, and it remains unadapted. In my opinion, the existence of that enactment to meet grand jury indictments in no way precludes us from relying on the position at common law where that enactment does not apply; and I think the passages cited from Hayes and Nun & Walsh show what the position under common law would have been in Ireland a hundred years ago in such circumstances as those we have had to consider. I think both authors speak of an "indictment found" against a man, only because that was the normal procedure; the right to issue a bench-warrant arose from the fact that there was before the Court a charge of an offence properly laid before the Court, and that happened to be by indictment found. The citations from Hawkins and Chitty show the true foundation of the jurisdiction to arrest; and it must not be forgotten that the Circuit Court has by statute all ancillary powers.

Accordingly, in my opinion, a rule in the nature of mandamus, as claimed by the Attorney General, should issue in each of the four cases"(pages 193-195).

59. That decision appears to suggest that the power to issue a bench warrant where there was no explicit statutory basis derived from a multitude of sources, including the common law, the statute creating the relevant criminal offence, and the statutory conferral on the Circuit Court of all ancillary powers.

60. This decision was followed in *The State (Attorney General) v. Judge Fawsitt* [1955] I.R. 39 where a Circuit Court judge declined jurisdiction to try the accused who was charged with forgery on the basis that, although there was a return for trial, there was no proof that it referred to the accused. The Order was quashed and it was held that a rule in the nature of mandamus should issue to the Circuit Judge as was directed in *State (Attorney General) v. Roe*. In his judgment, Davitt P., having quoted the passages identified above from the decision in Roe, observed:

"These passages contain a clear recognition and acceptance of the principle that where a statute confers upon a Court a substantive jurisdiction to try a person charged with a criminal offence it impliedly confers likewise the adjective or ancillary jurisdiction necessary to compel that person to attend the Court to take his trial; that this principle applies to the Circuit Court and to the enactments which

confer upon it its jurisdiction in criminal cases; that all ancillary powers are expressly conferred by the Act of 1924 [being the Courts of Justice Act 1924] upon the Circuit Court; and that it has the power to issue a bench warrant to compel the attendance of a person properly indicted before it".

61. That passage seems to suggest that such powers derive both from the statute pursuant to which the court is given jurisdiction to try a person and also from the 1924 Act.

62. The third in the trilogy of cases referred to by the respondent is the more recent decision of Finlay Geoghegan J. in *Stephens v. Governor of Castlerea Prison* [2002] IEHC 169. This was an inquiry under Article 40.4 of the Constitution. The applicant was being detained in Castlerea prison pursuant to a remand warrant. It was alleged that the bench warrant of 21 July 1999 issued by Judge O'Sullivan in Ballinasloe District Court to arrest the accused as a person remanded on bail and failing to appear was invalid and stale.

63. Counsel for the applicant submitted that the District Judge had had no jurisdiction under the District Court Rules, 1977 to issue a bench warrant pursuant to O. 22 of the District Court Rules, 1977. The warrant referred to both an extraditable and non-extraditable offence, and it appears from the judgment that the District Court rules did not cover the issuing of a bench warrant in respect of the extraditable offence where the accused might be in another country.

64. Considering the jurisdiction of the District Court to issue a bench warrant, Finlay Geoghegan J. observed:

"The jurisdiction of the District Court to issue a bench warrant is not based on O. 22 above but appears to be part of the inherent jurisdiction of the Court which flows from the jurisdiction to try the offences in question and also to release an accused on bail by recognisance to appear before a subsequent sitting of the Court. I find support for this proposition in the judgment of Gavan Duffy P. in The State (Attorney General) v. Judge Roe [1951] I.R. 172" (para. 43).

65. The court then recites the quotes from Hawkins and *Chitty* set out above and quotes from the passage in *Fawsitt* where Davitt P. refers to the adjective or ancillary jurisdiction to compel a person to attend before the Court to take his trial.

66. This decision was followed in *Kiely v. Ní Chonduin* [2008] IEHC 370. The applicant was serving a sentence, and there was a custody remand order in place in respect of separate assault charges. The applicant was granted temporary release in respect of the sentence she was serving, the prison authorities not being aware of the remand order. On the date on which the remand order was returnable, 4 December 2006, she failed to appear and a warrant was issued for her arrest. She sought an order of *certiorari* quashing that warrant.

67. Quoting from the decisions in *Roe, Fawsitt* and *Stephens*, Sheehan J. held that it was clear from the judgment of Finlay Geoghegan J. that the jurisdiction of the District court

to issue a warrant is not confined to the circumstances envisaged by O.22 of the District Court rules and that the District Court in this case had the necessary inherent jurisdiction to issue the warrant.

68. It may be seen from the above review of the cases that in earlier cases the court has focused on adjective or ancillary jurisdiction to statute, either the statute creating the offence or the 1924 Act as the source of the power to issue a bench warrant whereas in the later cases, the focus is on the inherent jurisdiction of the Court. That may be explicable, at least in part, by the fact that the later cases were concerned with the District rather than the Circuit Court.

69. I must therefore decide whether there is an ancillary power to remand a person in custody or on bail pending the s.99(17) hearing, and if so, the source or sources of this power.

70. The approach taken in the quotes from *Hawkins* and from *Chitty* is that, where a statute gives a power to a court to try a person for an offence, that statute gives an implied power to make out a warrant to bring that person before the court so that the person can be compelled to appear. Both Hawkins and Chitty, as well as Nun & Walsh, are discussing the issuing of a warrant rather than a power to remand. No cases were cited by counsel that deal with the power to remand. However, by analogy, counsel for the respondent argues that just as the Circuit Court has a power to issue a bench warrant even where there is no explicit statutory power in order to ensure the attendance of the person before the court, so too should there be an implied power to remand to ensure that the person is before the court for the s.99(17) hearing.

71. In the absence of any authority on this point, I am prepared to accept that the rationale underpinning the cases discussed above also exists in the case of a power to remand i.e. the person must be before the court for the s.99(17) hearing and therefore the court must have a power to bring the person before the court.

72. However, the question arises as to whether that power derives from a power ancillary to statute or from the inherent jurisdiction of the court. I have already considered the terms of s.99, and for the reasons set out above, I have concluded that there is no implied power under that section to remand a person pending a s.99(17) hearing. It seems to me that an ancillary power and an implied power must be very similar in nature in the circumstances of this case, and certainly no distinction between them was identified by the respondent. Accordingly, the reasons I identified in the context of implied power that mitigate against such a power being implied into s.99 apply equally here. I cannot discern an ancillary power under s.99 (insofar as that differs from an implied power) to remand a person. The mere fact that s.99 creates a jurisdiction to hold a revocation hearing under s.99(17) does not seem to me sufficient to ground an ancillary power to remand pending that hearing, in the absence of express words.

73. I should add that no argument was made that the 1924 Act gives a power to the Circuit Court to remand in these circumstances and that Act was not opened to me, although the

decision of *Fawsitt* was opened. Rather, the argument of the respondent focused on the power to remand being ancillary to s.99.

74. Given that I am not considering the issuing of a bench warrant here, but rather a power to remand, I do not consider myself bound by the decisions in *Roe* and *Fawsitt* to conclude s.99 contains an ancillary power to remand, since those decisions are exclusively concerned with the power to issue a bench warrant. It is true that both cases, but particularly *Fawsitt*, identify the principle that where a statute confers upon a court a substantive jurisdiction to try a person charged with a criminal offence, it impliedly confers the adjective or ancillary jurisdiction necessary to compel that person to attend the court to take his trial. However, given that s.99 does not confer a substantive jurisdiction to try a person charged with a criminal offence and given that those cases were concerned with bench warrants, I do not consider them binding in the circumstances of this case.

Conclusion

75. In summary, for the reasons set out above, I conclude there is no power under s.99 to remand, either expressly or by way of implied or ancillary powers, a person brought before a court on foot of a bench warrant issued under s.99(16), pending a s.99(17) revocation hearing.

Inherent Jurisdiction of the Court

76. Separately, the respondent argues that the jurisdiction to remand is part of the inherent jurisdiction of the court, following *Stephens*. No other cases on the inherent jurisdiction of the court were cited to me apart from *Stephens* and *Kiely*. However, the concept of inherent jurisdiction was described by Murray J. in *McG v. DW* [2000] 4 I.R. 1, as follows:

> *"The concept of inherent jurisdiction necessarily depends on a distinction between jurisdiction that is explicitly attributed to the courts by law and those that a court possess implicitly whether owing to the very nature of its judicial function or its constitutional role in the administration of justice. The interaction between the express jurisdiction of the courts and their inherent jurisdiction will depend in each case according to the scope of the express jurisdiction, whether its source is common law, legislative or constitutional, and the ambit of the inherent jurisdiction which is being invoked. Inherent jurisdiction by its nature only arises in the absence of the express."*

77. Thus, I must consider whether the court possesses a power to remand pending a s.99(17) revocation hearing, by virtue of its judicial function or its constitutional role in the administration of justice. I must also consider the relationship between any such jurisdiction and any relevant express jurisdiction.

78. Taking the latter question first, it is clear both from *McG* and from *Mavior v. Zerko Ltd* [2013] 3 I.R. 268, that where there is express jurisdiction in respect of the matter where inherent jurisdiction is claimed, the courts will not proceed on the basis of inherent jurisdiction, since as Murray J. notes in the above quote, it only arises in the absence of express jurisdiction. Here, as identified above, there is no express jurisdiction to remand

persons pending a s.99(17) hearing and therefore the question of preclusion of inherent jurisdiction by virtue of the existence of a statutory provision does not arise. There is nothing in s.99 that suggests that the courts are excluded from exercising inherent jurisdiction in this arena. Rather, s.99 is simply silent on the question of remand in these circumstances. No aspect of s.99 suggests that a person ought not be remanded pending a s.99(17) hearing, assuming the existence of an appropriate power.

79. Turning to the core question, whether the court has an inherent jurisdiction to remand a person pending a s.99(17) hearing, it seems to me that the court has such a power both because of its judicial function and because of its constitutional role in the administration of justice for the following reasons.

80. The respondent points out that where a person is brought before the court on a s.99(15) notice, they may need to time to prepare for the hearing, including obtaining legal advice, and accordingly the s.99(17) hearing may be adjourned from time to time. To ensure a proper and fair revocation hearing, the court must have the power to adjourn, while ensuring that the person is before it when the revocation hearing goes on. Accordingly, the respondent suggests it must have an inherent jurisdiction to remand the person pending the full hearing.

81. It is manifest that an adjournment of a matter coming before the court either pursuant to a s.99(15) notice or a bench warrant issued under s.99(16) may be required for various reasons. First, it is desirable that the s.99(17) hearing takes place before the court that imposed the original sentence, and this may require an adjournment. Second, the person the subject of the s.99(14) application may require an adjournment to obtain legal advice. Third, the probation officer moving the application may require an adjournment, as happened here. There may be other reasons necessitating an adjournment. The Circuit Court has a power to adjourn proceedings before it. It must have the means to ensure that, following the adjournment, the person the subject of the application is before it.

82. If the person is not before it on the return date for the revocation hearing, either the case goes on without the person, fundamentally offending against the constitutional right to fair procedures, including the right to be heard, or there will be significant difficulties in hearing the matter in the absence of the person, if they decide not to attend on the return date. This latter situation would seriously inhibit the statutory intent that a hearing in respect of revocation should take place when a probation officer alleges breach of a condition of the suspension.

83. Therefore, both in order carry out its judicial function and its constitutional role of ensuring fair procedures in the administration of justice, I am satisfied that a court has an inherent jurisdiction to exercise powers of remand to ensure the presence of the person at the revocation hearing. That jurisdiction must of course be exercised proportionality i.e. in the least restrictive manner sufficient to achieve the ends sought to be achieved.

84. I am fortified in my conclusion in this respect by the case of *Stephens*, where a comparable jurisdiction was identified in respect of the issuing of a bench warrant. Bench warrants and remand powers share many common features. The former does, and the second might, involve a curtailment of the right to liberty. Both are employed to ensure, *inter alia*, that a person is before the court so that their right to be heard is vindicated in the context of proceedings that might affect their liberty. In *Stephens*, the Court referred to the inherent jurisdiction of the Court flowing from the jurisdiction to try the offences in question. Applying the principles in *Roe*, Finlay Geoghegan J. noted that without such an inherent jurisdiction, the court would have no way of compelling the attendance of an accused to face trial for an extraditable offence. Importantly, she did not characterise the power as one ancillary to the statute creating the offence. Rather she identified it as part of the inherent jurisdiction of the court.

85. Here, the court has a power under s.99(15) to set a date for the hearing of the revocation hearing and under s.99(17) a power to conduct a revocation hearing, with power to revoke the suspension in whole or part if the breach of condition is established. That statutory jurisdiction, although different to the power to try a person for an offence identified in *Stephens*, nonetheless has important implications for the person on a suspended sentence and may result in a deprivation of their liberty. It is necessary that the court has a way of compelling the attendance of the person at the revocation hearing, which the court has the power to conduct under s.99. Accordingly, I am satisfied that the rationale underlying the finding of inherent jurisdiction in *Stephens* applies *mutatis mutandi* to the exercise of remand powers.

86. I conclude that the court has an inherent jurisdiction to exercise powers of remand where same are necessary to ensure that a person the subject of a s.99(14) notice is present for a revocation hearing under s.99(17), where that person would otherwise be unlikely to appear at that hearing, provided it is exercised proportionally.

87. The applicant objects to an inherent jurisdiction of this nature, on the basis that exercising a power of remand without statutory authority is to make law. He asserts that I will be obliged to decide the length of remand, just as was done in some considerable detail under s.99(8A) and that this is an impermissible exercise.

88. I accept of course that I have no power to make law. However, here I am not asked to make law but rather to decide whether the power exercised by the Circuit Court on 17 October 2019 was unlawful and should be quashed. The matter came before Judge Nolan on 17 October 2019 when the bench warrant was executed. It was made clear that it was a case that Judge Greally had seisin of, and it was suggested it be adjourned to 2pm that day before her. Counsel for the DPP indicated the probation officer, a necessary witness, was not available and there was opposition to bail in circumstances where the applicant had 25 bench warrants and had given a false name when arrested the previous evening. It was in those circumstances that Judge Nolan remanded the applicant in bail till Monday 21 October 2019 for the attention of Judge Greally and the hearing of the s.99(17)

revocation hearing. In total, Judge Nolan remanded the applicant for a four day period, two of which were non sitting days, being a Saturday and Sunday.

89. In the circumstances, by upholding the validity of the remand in custody on the basis of the inherent jurisdiction of the court to ensure that the applicant would be present for the s.99(17) hearing, I am not making law. Rather, I am accepting the proportionality of the remand period having regard to all the circumstances.

Errors on the Face of the Warrant

90. The applicant makes a separate argument to the effect that the Order of 17 October 2019 is bad on its face as the relevant subsection of s. 99 is not recited on the Order, the necessary minimal information showing jurisdiction does not appear on the Order, and the Order does not specify the length of the remand Order. The applicant submits that the Order fails to show on its face what the Supreme Court in *G.E. v. DPP* [2009] 1 I.R. 801 found to be essential ingredients in a warrant purporting to deprive a person of his/her liberty. The applicant argues that, as the Order did not reveal the subsection authorising the detention of the applicant, a prison governor could wrongly assume it was issued under a subsection of s. 99 which permits for remand on custody, such as s. 99(8A) but, had the Order specified s. 99(14), a governor would have declined to receive the applicant into his custody.

91. The applicant argued that the case of *E(G) v. Governor of Cloverhill Prison* [2011] IESC 41 is instructive in this instance, as that case dealt with a detention order which had defects on its face. The Supreme Court in *GE* held that the detention order failed to contain adequate details on its face and therefore directed the release of the applicant on that basis. Denham C.J. observed:

> *"31. A document, such as in issue here, should contain clear information on its face as to the basis of its jurisdiction. This information is required so that it be available to, for example, (a) the person in custody, such as the appellant; (b) the Governor of the Prison, or any other, who is holding a person in custody and (c) the Court which is requested to inquire into the custody pursuant to Article 40 of the Constitution".*

92. The respondent disputes the applicant's contention that the warrant issued on 17 October 2019 is bad on its face. The respondent identifies that the warrant refers to the applicant, states that the warrant is on foot of a s. 99 re-entry and submits that the period of remand is easily ascertainable as it identifies that "*the said matter to be adjourned to Dublin Circuit Criminal Court … on the 21/10/2019*". While the warrant does not refer to a specific number of days for the applicant to held on remand, the respondent submits that the period of remand is clearly 17-21 October 2019.

93. It also asserted by the respondent that mere errors in an order of conviction are non-jurisdictional errors and it relies on the Court of Appeal judgments in *O'Brien v. Judge Coughlan and the DPP* [2015] IECA 245 and Ignatius *Forde v. Judge Doyle and the DPP* [2018] IECA 382 as authority for this proposition. In Forde Birmingham P. wrote on behalf of the Court that:

> *"As to the form of the warrant, I am satisfied that the warrant met all the necessary requirements, in that it recited the issuing court, the Bill Number, the offence in respect of which there had been a conviction, the date of the conviction, the order made by the Circuit Court, including the default provision, and the fact that the fine had not been paid. I regard the reference to "Excuse Duty" as an obvious typographical error. In that regard, I respectfully agree with the observations of Charleton J. in DPP v. Mallin [2011] IECCA 29, that 'courts should be slow to invalidate warrants on the grounds of typographical, grammatical or transcription errors which are neither calculated to mislead, nor in truth, do mislead any reasonable reader of the words" (para. 26).*

94. In the same case, Birmingham J. also noted that it is well established that the function of a warrant is so a prisoner, the governor and the courts can "*ascertain the basis of the detention, the length of the detention, and the start/end date of the detention*" (para.19).

The warrant

95. The warrant is headed up "*Remand Warrant – In the matter of Section 99, Criminal Justice Act 2006*". Under the heading "*Order*" the following appears:

> *"It was adjudged that the said matter be adjourned to Dublin Circuit Criminal Court sitting at Court 19 CCJ at 10.30 on the 21/10/2019 before Her Honour Judge Melanie Greally for S.99 Re-entry.*
>
> *The accused has been remanded in Custody."*

96. The applicant correctly points to the paucity of information in the warrant as compared with the bench warrant pursuant to which the applicant was brought before the court. The bench warrant was headed up "*Bench warrant (Non appearance on notice) Section 99(16) Criminal Justice Act 2006*" and identifies the original Order made under s.99(1), the application by the probation officer under s.99(14), the Notice issued to the applicant requiring him to appear for the hearing of an application for an Order revoking the Order suspending part of the sentence, the failure to appear, the previous issuance of a bench warrant, the execution of same, the admission to bail and the subsequent failure to appear. Most importantly, the bench warrant clearly identifies on its face its jurisdictional basis – s.99(16).

97. Here, I find there was an error on the face of the record in that the warrant did not record the basis upon which the Order was made. I have concluded above that the court did not have a statutory power, explicit, implicit or ancillary, to remand but that it did have a power to do so pursuant to its inherent jurisdiction. However, that ought to have been identified upon the face of the warrant. At present, upon reading the warrant, it is not possible for the reader to identify the jurisdictional basis upon which the detention was ordered.

98. The reference to a s.99 re-entry is insufficient where there is a subsection under s.99 that identifies a power to remand – s. 99(8A) - but which does not apply in the circumstances

of this case. In fact, the reference to s.99 has the effect of obfuscating the legal basis for the detention rather than clarifying it. A prison governor considering the warrant is not in a position to ascertain whether he or she is lawfully detaining the prisoner or not, particularly given the length and complexity of s.99. This may give rise to prejudice or detriment to the applicant, as identified in O'Brien and *Forde*.

99. In those circumstances, the warrant cannot be considered to meet all the essential requirements, as identified in *O'Brien* and *Forde*, since it does not identify the key component: the legal basis for the detention. It lacks what is identified in *G.E. v. DPP* as the essential ingredient in a warrant purporting to deprive a person of his/her liberty - clear information on its face as to the basis of its jurisdiction. This is not a case where the deficit was typographical, grammatical or an error of transcription or any other type of non-jurisdictional error. The warrant is therefore bad on its face.

100. However, I do not agree that it was unclear insofar as the period of remand is concerned. The period is easily ascertainable as the warrant is dated 17/10/2019 and states that the matter is to be adjourned to the Dublin Circuit Criminal Court on the 21/10/2019. In those circumstances, the period of remand is clearly identifiable.

Conclusion

101. Because the warrant is bad on its face for failure to identify the jurisdictional basis for detaining the applicant, I therefore quash the Order of the Circuit Court of 17 December 2019 remanding the applicant in custody and I will hear counsel as to whether any other orders are required.