

THE HIGH COURT

[Record No. 2021/922 JR]

BETWEEN

DARREN REDMOND

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS AND THE SUPERINTENDANT OF
BRIDEWELL GARDA STATION

RESPONDENTS

**JUDGMENT of Ms Justice Marguerite Bolger delivered on the 14th day of March
2024**

1. This is an application for judicial review, including declaratory and injunctive relief, arising from a suspended prison sentence of one month that was imposed on the applicant. For the reasons set out below, I am granting judicial review.

Background

2. The applicant was charged with criminal damage. He pleaded not guilty and at a hearing before the District Court on 20 October 2021, he was convicted and sentenced to one month imprisonment, which was suspended pursuant to s. 99(1) of the Criminal Justice Act 2006 (hereinafter referred to as 'the 2006 Act'). The DAR of the hearing confirms the decision of the District Judge and his statement "*I will fix recognisance in his own bond, €500, lodge 100 cash*". The Judge concluded the hearing by saying "*[h]e needs to sign his bond*". Later that day, it emerged that the applicant had left the courthouse without signing the bond and the Judge stated "*[w]ell, if he doesn't sign it, he's to be incarcerated*". The applicant's solicitor explained that the applicant had left before his solicitor could speak to him to advise him about signing the bond, to which the Judge said, "*I told him on his way out of the court he'd need to sign the bond*". The Judge refused the solicitor's application to remand the matter to the next day in order to allow the applicant to enter into the bond but did allow the solicitor to apply to him later that day as he was sitting in the evening court.

The applicant did not attend that evening because his solicitor was unable to contact him until later that night, by which time, evening court had ended. The applicant attended court the following day, but the District Judge said he was *functus officio* and had no jurisdiction to deal with what he referred to as "yesterday's case". The applicant was purportedly taken into custody, but the Prison Service said they could not detain him as there was no committal warrant.

3. The issue for this Court is summarised by the applicant's written submissions as follows:

"The central issue to be determined therefore is whether a Committal Warrant will issue by default where a recognisance is not entered into in accordance with s.99(1) and whether the District Judge was indeed functus officio as a result. It is respectfully submitted by the applicant that no Committal Warrant had issued, and the District Judge did entertain a jurisdiction to allow him to enter into his recognisance."

4. The respondents say that the applicant was aware, when he left the court, that he was to sign a bond having been specifically informed of that by the Judge and that the Judge allowed him to return that day in order to do so. In those circumstances, they said the Judge was within jurisdiction to determine that the applicant had deliberately sought to frustrate the court order and was not going to sign the bond. They say the Judge had made the order to issue the committal warrant which, for some reason, was not drawn up, but this does not invalidate the order which was a final one made within jurisdiction. They submit that this Court should defer to a lower court's management of its list once its decision was proportionate, as the respondents said it was in this case.

Legal provisions

5. Sections 99(1), 99(3) and 99(13A) of the Criminal Justice Act 2006 provide:

"99. Power to suspend sentence

(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...

(3) The court may, when making an order under subsection (1), impose such conditions in relation to the order as the court considers—

(a) appropriate having regard to the nature of the offence, and

(b) will reduce the likelihood of the person in respect of whom the order is made committing any other offence,

and any condition imposed in accordance with this subsection shall be specified in that order...

[(13A) The Director of Public Prosecutions may, if he or she has reasonable grounds for believing that a person to whom an order under subsection (1) applies has contravened a condition imposed under subsection (3), apply to the court to fix a date for the hearing of an application for an order revoking the order under subsection (1).]"

Orders 25(3) and 28A(2) of the District Court Rules provide:

"Order 25

3. Where the Court, upon imposing sentence of imprisonment, conditionally suspends the execution thereof, it may, upon the application of the prosecutor, issue a warrant of committal (Form 25.8, Schedule B) on being satisfied of the failure of the accused to comply with the terms upon which the said sentence was suspended."

"Order 28A

2. Where a person has been sentenced to a term of imprisonment and the Court makes an order under section 99(1) of the Act suspending the execution of the sentence in whole or in part, subject to the person entering into a recognisance with or without surety to comply with the conditions of, or imposed in relation to, the order, the order and the recognisance shall be in the Form 28A.1, Schedule B."

Discussion

6. Central to the jurisdiction purportedly exercised by the District Judge are three factual matters:-

(1) Whether the Judge told the applicant he was to sign the bond;

- (2) Whether, as the respondents contend was determined by the Judge, the applicant deliberately sought to frustrate the court order by not signing the bond;
- (3) Whether, as the respondents contend, a committal order had been made by the Judge, albeit not drawn up by the court staff.

7. I have reviewed the DAR. It is clear that, on the day after the hearing, 21 October, the Judge's recollection and his basis for the views he was adopting, was that he had told the applicant on his way out of court after the hearing on the previous day that he needed to sign the bond. However, the DAR for 21 October confirms that what the Judge told the applicant's solicitor, who was addressing him at that point in time, was: "*He needs to sign his bond*". The applicant swore an affidavit in which he averred, "*I did not appreciate that the imposition of a suspended sentence was conditional on me entering the bond*". The applicant also said in that affidavit "*I wish to make clear. I was not at any stage refusing to enter a bond for the purpose of giving effect to the suspended sentence imposed on me*". Neither averment has been challenged by the respondent.

8. I am satisfied, on the evidence before me, that the applicant did not understand that he had to sign the bond when he left the court without doing so and was not refusing to enter the bond. Indeed, the applicant returned to court the following day, which was the first opportunity for him to do so after his solicitor succeeded in making contact with him.

9. As pointed out by O'Malley J. in *DPP v. Carter* [2014] IEHC 179, at para. 39, "*the powers in relation to suspended sentences are now entirely governed by statute*". Section 99(13A) requires the Director to make an application for a hearing date to revoke an order for a suspended sentence made under s. 99(1) where a person has contravened a condition imposed under s. 99(3). Here, one of the conditions imposed was that the applicant was to sign the bond, which he did not do. This is a mandatory requirement as confirmed by the Court of Appeal in *Heaphy v. Governor of Cork Prison* [2018] IECA 125. No application was made here by the Director to revoke the suspended sentence. Neither did the prosecutor apply for a warrant of committal to be issued, as is required by O. 25, r. 3 of the consolidated District Court Rules. As far as the Irish Prison Service were concerned, there was no warrant of committal and they had no legal basis on which to detain the applicant in custody.

10. The condition for suspending the sentence that was imposed by the District Judge to sign the bond did not identify a time within which this was to be done. The District Judge

took the view that, if the bond was not signed on the day of the imposition of sentence, the condition had not been complied with and he was *functus officio* to address the issue on the following day. However, O. 25, r. 4 headed "*Restriction on issue of warrant*" states,

"Where by order the execution of sentence of imprisonment has been conditionally suspended, no warrant shall be issued to enforce such sentence later than six months warrant from the expiration of the time fixed by the said order for the performance of the condition."

That seems to envisage that a condition, the non-performance of which could lead to the enforcement of the original sentence, would fix a time for the performance of the condition. Here, even if a committal order was made (as the District Judge contended occurred), without an application by the prosecutor, it was made orally. The time for the performance of the condition would, therefore, have to be implied by law. I am satisfied that the law requires the implication of a reasonable time having regard to all the circumstances, which must be strictly construed given that the applicant's constitutional right to liberty was at stake. I find support for the implication of this type of reasonable and flexible approach in the decision of O'Malley J. in *Richards v. O'Donohoe* [2017] 2 IR 157, where the Supreme Court found that the Circuit Court, in making an order on an appeal from a conviction by the District Court, retained a jurisdiction to alter that order within a reasonable time where sufficient reason was promptly offered to the court. O'Malley J. qualified that jurisdiction by reference to what were clearly constitutional principles of fair procedures, the requirement to give reasons and to act rationally. I would similarly qualify the jurisdiction pursuant to which the District Court can impose a suspended sentence for failure to sign the bond, to do so within a reasonable time and qualified by the convicted person's constitutional right to fair procedures and more fundamentally, to liberty.

11. O'Malley J. referred, at para. 43 of her decision in *Richards*, to the need "*to display a degree of flexibility when dealing with problems that can arise in busy lists*". In addressing the issue of the "*breast of the court*" line of authority, she said:-

"there must be, for at least some reasonable period of time, a jurisdiction to vacate an order made in those circumstances where sufficient reason is offered promptly to the court. I agree with Birmingham J. and with the observations of Geoghegan J. in Kennelly v. Cronin that the sheer volume of cases dealt with in the District Court

and, on appeal, the Circuit Court, requires the availability of a relatively informal mechanism for the correction of mistakes and misunderstandings."

She described as "*tempting*" the suggestion that a sitting should be restricted to the day on which an order is made but concluded "*that would inevitably give rise to problems*". She specifically rejected that such an issue of principle could be determined by the speed of an accused person in exiting a building and concluded,

"considerations of equality, fairness and the interests of justice require that a mechanism for the correction of mistakes or innocent failure to appear be available to the prosecution as well as the defence, on comparable terms." (at para. 51)

12. On the facts of this case, I am satisfied that the application to sign the bond that was made on the day after the sentence was imposed arose from the applicant's genuine misunderstanding and was made promptly once he became aware of what had happened, albeit on the day after the order was purportedly made. Given that the applicant's constitutional right to liberty was at issue, the District Judge was not deprived of jurisdiction to deal with the matter and was still *functus officio* on 21 October, whether because no committal order had been applied for or made or, if it was made, that the condition imposed of signing the bond was subject to being complied with within a reasonable time. In the circumstances of this case, a reasonable time was the next day (21 October) when the applicant attended court, being the first occasion on which he could physically do so once he had been advised of his mistaken understanding about the conditions applied to the suspension of the prison sentence that had been imposed on him.

13. The District Judge made it clear that it was only his lack of jurisdiction – as he incorrectly viewed it – that prevented him from allowing the applicant to sign the bond on 21 October. I have found that he did have jurisdiction to do that. Therefore, the applicant is entitled to a Declaration in terms of para. (i) of the notice of motion, "*[a] declaration that the applicant is entitled to enter into a bond pursuant to s99 (1) of the Criminal Justice Act, 2006, following the imposition of a suspended sentence in respect of charge no: 21475841*" and, if necessary, para. (ii) "*[a] declaration that the Court is not functus officio in respect of the applicant complying with this procedure.*" As no warrant has been issued, it may not be necessary to grant the injunction sought at para. (iii) or the other declaratory reliefs sought, but I will put the matter in for mention at 10.30am on 12 April 2024 and hear counsel on what final orders should be made.

Counsel for the applicant: Michael O'Higgins SC, Kevin Roche BL

Counsel for the respondents: Oisín Clarke BL