

No. 1

SUPREME COURT

Application for Leave and Notice of Appeal

For Office use

Supreme Court record number of this appeal	
Subject matter for indexing	

Leave is sought to appeal from	<input checked="" type="checkbox"/> The Court of Appeal	<input type="checkbox"/> The High Court
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[Title and record number as per the High Court proceedings]

Sandra Maguire	V	Governor of Dochas Centre
High Court Record 2016/725SS		Court of Appeal Record 2016/328
28/07/2017		
Name(s) of Applicant(s)/Appellant(s)	Sandra Maguire	
Solicitors for Applicant(s)/Appellant(s)	Tony Collier Solicitor, Unit F/G, Pier 19, Ushers Island, Ushers Quay, Dublin 8	
Name of Respondent(s)	Governor of Dochas Centre	
Respondent's solicitors	The Chief State Solicitor.	
Has any appeal (or application for leave to appeal) previously been lodged in the Supreme Court in respect of the proceedings?		
<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No	

Are you applying for an extension of time to apply for leave to appeal?	<input type="checkbox"/> Yes	<input checked="" type="checkbox"/> No
If Yes, please explain why		

1. Decision that it is sought to appeal

Name(s) of Judge(s)	Birmingham, Mahon, Edwards JJ. (Court of Appeal)
Date of order/ Judgment	Judgment of 4 th May, 2017; Order perfected 24 th July 2017

2. Applicant/Appellant Details

Where there are two or more applicants/appellants by or on whose behalf this notice is being filed please provide relevant details for each of the applicants/appellants

Appellant's full name	Sandra Maguire
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Original status

<input type="checkbox"/>	Plaintiff
<input checked="" type="checkbox"/>	Applicant
<input type="checkbox"/>	Prosecutor
<input type="checkbox"/>	Petitioner

<input type="checkbox"/>	Defendant
<input type="checkbox"/>	Respondent
<input type="checkbox"/>	Notice Party

Solicitor

Name of firm	Tony Collier Solicitor		
Email	info@tonycolliersolicitor.ie		
Address	Unit F/G	Telephone no.	01-6798222
	Pier 19, Ushers Island, Ushers Quay		
Postcode	Dublin 8	Ref.	

How would you prefer us to communicate with you?

Document Exchange
 Post

E-mail
 Other (please specify)

Counsel

Name	Mr. Colman FitzGerald, S.C.		
Email	cfitzgerald@lawlibrary.ie		
Address	Law Library	Telephone no.	01-8174378
	Four Courts Inns Quay	Document Exchange no.	816811
Postcode	Dublin 7		

Counsel

Name	Mr. Karl Monahan, B.L.		
Email	karl.monahan@gmail.com		
Address	Law Library,	Telephone no.	0876771554
	Four Courts, Dublin	Document Exchange no.	810263 Four Courts
Postcode	Dublin 7		

If the Applicant / Appellant is not legally represented please complete the following

Current postal address	
e-mail address	
Telephone no.	

How would you prefer us to communicate with you?			
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

3. Respondent Details

Where there are two or more respondents affected by this application for leave to appeal, please provide relevant details, where known, for each of those respondents

Respondent's full name	Governor of Dochas Centre
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Original status

<input type="checkbox"/>	Plaintiff
<input type="checkbox"/>	Applicant
<input type="checkbox"/>	Prosecutor
<input type="checkbox"/>	Petitioner

<input type="checkbox"/>	Defendant
<input checked="" type="checkbox"/>	Respondent
<input type="checkbox"/>	Notice Party
<input type="checkbox"/>	

Solicitor			
Name of firm	The Chief State Solicitor		
Email			
Address	Osmond House, Little Ship Street,	Telephone no.	01-4176100
		Document Exchange no.	186
Postcode	Dublin 8		

How would you prefer us to communicate with you?

<input type="checkbox"/>	Document Exchange	<input checked="" type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

Counsel: Mr. Remy Farrell, S.C.			
Address	Suite 237 The Capel Building Mary's Abbey	Telephone no.	01-8175222
		Document Exchange no.	810037
Postcode	Dublin 7		

Counsel Mr. John Gallagher, B.L.			
Address	Law Library Four Courts Inns Quay	Telephone no.	
		Document Exchange no.	
Postcode	Dublin 7		

Counsel	Ms. Elva Duffy, B.L.		
Address	Law Library Four Courts Inns Quay	Telephone no.	
Postcode	Dublin 7	Document Exchange no.	

If the Respondent is not legally represented please complete the following

Current postal address	
e-mail address	
Telephone no.	

How would you prefer us to communicate with you?

<input type="checkbox"/>	Document Exchange	<input checked="" type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

4. Information about the decision that it is sought to appeal

Concise statement of the facts found in the High Court

The Applicant was convicted by the District Court on 11th September, 2015 of theft of clothing to the value of €23.50 and was ordered to be imprisoned for a period of three months. The Applicant appealed to the Circuit Court (District Court Appeals) and was released on bail on her own recognisance to appear at the District Court Appeals Court (Court 16, CCJ) on 16th October, 2015. On 16th October 2016 the applicant was present and represented. Legal aid was assigned to Mr. Tony Collier, solicitor. The case was adjourned till 7th December, 2015 to allow for full instructions to be taken. On 7th December, 2015 Mr. Collier appeared, but neither the applicant nor the prosecuting Garda were present. Mr. Collier indicated that the appeal was against severity of sentence only, and the case was adjourned to 11th January, 2016. On 11th January, 2016 counsel appeared for the applicant, but the applicant herself did not appear on that date. Counsel did not have instructions as to the applicant's whereabouts, and sought a second calling in respect of the case, which was granted by the court. On the second calling, counsel for the applicant stated that the applicant had not appeared, and counsel applied for another adjournment. The Circuit Court judge refused this application and then immediately affirmed the District Court order. No evidence was heard in respect of the particulars of the charge or the applicant's circumstances. Unbeknownst to her solicitor, to the prosecuting Garda or to the Circuit Court, the applicant was in fact an in-patient at Connolly Hospital at the time.

A "committal warrant after appeal" issued from the Dublin Circuit Court on 11th January, 2016. The warrant authorised the imprisonment of the applicant for a period of 3 months. The warrant was executed on 22nd June, 2016.

The warrant stated, *inter alia*:

"Whereas on the hearing of an appeal by the said accused against the said order, the Circuit Court Judge for the County and the City of Dublin on the 11-Jan-2016 ordered as follows: No appearance, Strike out Appeal, affirm conviction and order of the District Court and ordered that the accused be imprisoned for a period of 3 months."

The applicant contended in the High Court that her detention was unlawful because she was sentenced by the Circuit Court Judge in the absence of any evidence being given as to the particulars of the offence to which the applicant had pleaded guilty or as to the applicant's circumstances. The appeal was in law a *de novo* appeal from the District Court to the Circuit Court and as such, the applicant contended that, subject to the provisions

of Section 50 of the Courts (Supplemental Provisions) Act, 1961, evidence was no less required in the Circuit Court than in the District Court.

Furthermore the applicant contended that her detention was unlawful because the warrant certified as the ground of her detention was bad on its face firstly because, contrary to the recital in the said warrant that there was a hearing of the appeal, there was in fact no hearing of the said appeal and secondly because it did not recite that either the District Court Judge or the Circuit Court Judge considered community service as an alternative to the imposition of the custodial sentence actually imposed which, as such consideration is a mandatory prerequisite to the imposition of a sentence of less than 12 months, the applicant contended represented a failure to show jurisdiction on its face.

Dealing with the applicant's claim that the Circuit Court was required to hear evidence before affirming the sentence of the District Court, the learned High Court Judge held:

"43... *this Court takes the view that where a person is sentenced in the District Court and fails to appear at the appellate Court, it is appropriate, having regard to the terms of the recognisance and s. 6 (a) of the Bail Act, that the court has the authority to strike out the appeal and affirm the District Court's sentence. This Court accepts the authorities which say that when an appeal is presented before the Circuit Court for hearing, it is a de novo hearing, this is common case. What is not common case, however, is that when an accused fails to appear at their appellate court, that the court should proceed with a de novo hearing.*"

The Court further held:

"45. *I accept the authority of the Supreme Court in O'Brien v. Judge Coughlan and the Director of Public Prosecutions (Unreported, Supreme Court, 28th June, 2016), as regards the failure of the warrant to indicate that either the District Judge or the Circuit Judge failed to refer to the consideration of community service. This does not affect the legality of the warrant detaining Ms. Maguire.*

46. *I distinguish Ejerenwa v. Governor of Cloverhill Prison & Anor [2011] IESC 41 on the basis that the warrant for that detention was on foot of a direction of an immigration officer. The courts have always been particularly conscious of such detentions.*

47. *This Court is also conscious of the enormous change that any contrary decision would have on the already sparse resources of both the courts service and the Garda Síochána. This Court must have regard to the impact of holding that the Circuit Court would be required to conduct a full hearing of an appeal, in the absence of the applicant being present and moreover prepared to prosecute her appeal. This Court finds that the onus is on the applicant to prosecute her appeal. The applicant failed to appear on the 11th January, 2016, albeit she was in hospital. It is open to the applicant's solicitor to set this out to the Governor of the Dochas centre, who this Court thinks will take a compassionate view of the reasons for her absence at hearing.*

48. *I am satisfied that the statutory provisions do not require that the Circuit Court hear the appeal if the appellant is not prepared to prosecute the appeal."*

Concise statement of the judgement of the Court of Appeal

The Court of Appeal dismissed the Applicant's appeal in a judgment which also dealt with four other cases (*Brennan, Animashaun, Silaghi and Marina*) which raised similar issues.

In relation to the disposal of a District Court Appeal without fresh evidence being heard, the Court cited Section 10 of the Criminal Justice Act, 2007, which provides:

"The Act of 1997 is amended by the insertion of the following section after section 6:

"6A. Section 6 applies in relation to recognisances entered into by persons appealing against

sentences of imprisonment imposed by the District Court with the following modifications:

(a) by the substitution of the following paragraph for paragraph (a) of subsection (1):

(a) the recognisance shall be subject to the following conditions, namely, that the appellant shall:

(i) prosecute the appeal,

(ii) attend the sittings of the Circuit Court until the appeal has been determined, and

(iii) ;

(b)

(c) ”

Applying this, the Court held *inter alia*, that:

“33. The practice of the Circuit Court striking out appeals from the District Court in the absence of hearing any evidence or oral submissions is a very old one, in those instances where there is a failure, for whatever reason, to prosecute them by the appellants. It has often been referred to in the Superior Courts with approval...” (original emphasis)

The Court went on to hold that:

“40. I am satisfied therefore that a Circuit Court judge is empowered to strike out an appeal from the District Court (against conviction or sentence as the case may be) and to affirm the decision of the District Court in circumstances where an appellant fails to turn up in court. Such jurisdiction is subject to basic principles of justice and respect for the constitutional rights of an accused person which govern the proceedings and decisions of all courts. In neither case is there any evidence of unfairness or breach of constitutional rights in the manner in which these appeals were disposed of in the Circuit Court.”

In relation to the issue of whether the committal warrant required to contain a recital that community service had been considered as an alternative to community service, the Court did not expressly rule on this, but by implication ruled that it was not necessary. In this regard, the Court reiterated previous jurisprudence (which the applicant did not dispute) to the effect that a Judge was not required to state openly that he had considered community service as an alternative to a short prison sentence. The Court also made reference to the case of *Freeman v The Governor of Wheatfield Place of Detention* [2016] IECA 177 in which the Court of Appeal had held that the failure of a warrant to recite the directions of the Director of Public Prosecutions was at most of such a technical nature as could not invalidate what was otherwise a valid warrant. Whilst the Court did not expressly apply this finding to the instant case, it apparently intended to convey similar reasoning to the question at issue.

5. Reasons why the Supreme Court should grant leave to appeal

Regarding the nature of the procedure required to be had before the Circuit Court hearing a District Court appeal where an appellant has failed to appear:

The decision sought to be appealed from is incompatible with the jurisprudence of this Honourable Court and the former Supreme Court as to the nature of a *de novo* appeal from the District Court to the Circuit

Court.

On the authorities, the Circuit Court, in a criminal matter, hearing a District Court Appeal *de novo*, embarks upon a fresh hearing and any sentence it imposes is a fresh sentence. It is no more permissible for a Circuit Court Judge to impose a custodial sentence without hearing evidence of the nature and circumstances of the offence and of the accused person's circumstances than it would be for a District Court Judge at first instance to so act. A District Court Judge faced with the non-appearance of an accused person can lawfully (a) proceed to hear the case in the absence of the accused; (b) adjourn the case; or (c) issue a warrant for the arrest of the accused person to secure their attendance before the Court. If adopting course (a), it is not open to a District Court Judge to impose a custodial sentence without hearing evidence. A Circuit Court Judge faced with the non-appearance of an accused person in a District Court Appeal has the same options available.

With respect to the authorities which the High Court and Court of Appeal held supported the proposition that it is lawful for the Circuit Court to strike out an appeal from the District Court without hearing any evidence or oral submissions where there is a failure, for whatever reason, by the appellant to prosecute the appeal they are all ultimately based on the decision in the case of *R. (McMonagle) v. Chairman and Justices of County Donegal* [1905] I.R. 644 which is not an authority for that proposition, but rather the contrary.

Regarding the requirement for a committal warrant in respect of a sentence of 12 months or less to recite on its face that the sentencing Judge considered community service as an alternative:

A committal warrant must show jurisdiction on its face. Consideration of a Community Service Order as an alternative to the imposition of a custodial sentence of 12 months or less is a mandatory statutory prerequisite to a court's jurisdiction to impose any such sentence (Section 3 of the Criminal Justice (Community Service) Act, 1983, as substituted by Section 3 of the Criminal Justice (Community Service) Act, 2011) and must be recited on a committal warrant.

Ejerenwa (or se. G.E.) v Governor of Cloverhill Prison [2011] IESC 41 held, in respect of a Detention Order issued under the Immigration Acts that a document grounding a person's detention should contain clear information on its face as to the basis of its jurisdiction. Whilst that case related to an administrative warrant the principle is of general application (McKechnie J. in *O'Farrell v Governor of Portlaoise Prison* [2016] IESC 37).

In the instant case, neither the applicant, the prison Governor nor the Court is in a position to know from the face of the committal warrant herein whether the District Court Judge or the Circuit Court Judge gave consideration to the imposition of a Community Service Order and accordingly to know whether the said Judge acted within or outside jurisdiction.

To the extent that the Court of Appeal found that such consideration did not require to be given by the Circuit Court Judge as such Judge was entitled simply to affirm the Order of the District Court, that does not cure the defect in the warrant because the warrant does not show on its face whether the District Court Judge gave such consideration.

6. Ground(s) of appeal which will be relied on if leave to appeal is granted

1. The Court of Appeal erred in law in ruling that a Circuit Court dealing with a District Court Appeal in a criminal matter is entitled in, the absence of the appellant but in the presence of the appellant's legal representatives, to dismiss the appeal and to affirm the Order of the District Court without hearing any evidence or other information in relation to the charge or the appellant's personal circumstances.
2. The Court of Appeal erred in law in ruling that a committal warrant in respect of a custodial sentence of 12 months or less which fails to recite that consideration was given by the sentencing Judge to the imposition of a Community Service Order as an alternative to such sentence is a valid basis for depriving the person sentenced of their liberty.

Name of solicitor or (if counsel retained) counsel or applicant/appellant in person:

Karl Monahan, B.L.

Colman FitzGerald, S.C.

7. Other relevant information

Neutral citation of the judgment appealed against e.g. Court of Appeal [2015] IECA 1 or High Court [2009] IEHC 608

Unknown.

References to Law Report in which any relevant judgment is reported

1. *Ex Parte M'Fadden*, Judgements of the Superior Courts in Ireland, 1903 ed., p. 168
2. *R. (McMonagle) v. Chairman and Justices of Co. Donegal* [1905] I.R. 644
3. *State (McLoughlin) v. Judge Shannon* [1948] I.R. 439
4. *Attorney General v Mallen* [1957] I.R. 344
5. *Attorney General (Lambe) v. Fitzgerald* [1973] I.R. 195
6. *The State (Aherne) v. Cotter* [1982] I.R. 188
7. *The State (Dunne) v. Martin* [1982] I.R. 229
8. *McCann v. His Honour Judge Groarke and Director of Public Prosecutions* [2001] 3 IR 431
9. *Ejerenwa v Governor of Cloverhill Prison* [2011] IESC 41
10. *Phelan v Circuit Judge Delahunt and Ors.* [2014] IEHC 142

11. *Fitzgibbon v. Law Society* [2015] 1 I.R. 516
12. *Connors v. Governor of The Dochas Centre* [2015] IEHC 243
13. *O'Brien v Coughlan* [2015] IECA 245
14. *The Director of Public Prosecutions v Circuit Judge Lindsay* [2016] IEHC 54
15. *Ilie v Governor of Castlerea Prison* [2016] IEHC 373
16. *O'Brien v. Coughlan & Anor.* [2016] IESCDET 88
17. *O'Farrell v. Governor of Portlaoise Prison* [2016] IESC 37
18. *Freeman v Governor of Wheatfield Place of Detention* [2016] IECA 177

8. Order(s) sought

Set out the precise form of order(s) that will be sought from the Supreme Court if leave is granted and the appeal is successful:

An Order (1) setting aside the Order of the Court of Appeal; (2) directing the release of the applicant.

What order are you seeking if successful?

Order being appealed: set aside vary/substitute

Original order: set aside restore vary/substitute

If a declaration of unconstitutionality is being sought please identify the specific provision(s) of the Act of the Oireachtas which it is claimed is/are repugnant to the Constitution
 N/A

If a declaration of incompatibility with the European Convention on Human Rights is being sought please identify the specific statutory provision(s) or rule(s) of law which it is claimed is/are incompatible with the Convention
 N/A

Are you asking the Supreme Court to:
 depart from (or distinguish) one of its own decisions? Yes No

If Yes, please give details below:

make a reference to the Court of Justice of the European Union?

Yes

No

If Yes, please give details below:


Will you request a priority hearing?

Yes

No

If Yes, please give reasons below:

Signed:



(Solicitor for) the applicant/appellant
Tony Collier
Solicitor,
Unit F/G, Pier 19, Ushers Island,
Ushers Quay,
Dublin 8.

Please submit your completed form to:
The Office of the Registrar of the Supreme Court
The Four Courts
Inns Quay
Dublin

together with a certified copy of the Order and the Judgment in respect of which it is sought to appeal.
This notice is to be served within seven days after it has been lodged on all parties directly affected by the application for leave to appeal or appeal.