PEOPLE v AYLMER

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Walsh J.
Henchy J.
Griffin J.
Hederman J.
McCarthy J.

THE SUPREME COURT

THE PEOPLE (D.P.P.)

v.

RAYMOND AYLMER

JUDGMENT OF McCARTHY J. delivered the 18th day of December 1986

This appeal takes the form of a direct appeal to this Court from an order made in the High Court in the exercise of its criminal jurisdiction, that order having been made by Finlay P. on the 14th January 1985 whereby it was ordered that the appellant serve the balance of a sentence of ten years imprisonment initially imposed by Butler J. on the 16th March 1979. In substance, in my view, it is an enquiry in this Court as of first instance to examine the validity of the detention of the appellant. It was in the latter form, described as an initial application for a conditional order of habeas corpus and the making absolute thereof, that Woods' case[1]

[1]The State (Woods) v. The Attorney General and another (1985 I.R.) 385

was decided in the High Court and subsequently on appeal in this Court. Woods had been convicted in the Central Criminal Court and had brought an application for leave to appeal to the Court of Criminal Appeal, for whatever relevance it has, O'Shea's case[2] had not been decided and the question of a direct appeal from the Central Criminal Court to this Court had not been raised. If, as I conceive it to be, the true consideration in the instant appeal is the validity, as distinct from the desirability, of the form of order made by Butler J., then, in my judgment, the appellant's challenge cannot be defeated by any form of estoppel. In The State (O'Connor) v. O Caomhanaigh[3] this Court held that an accused was not estopped from raising, as a ground of appeal, the matter of the absence of particular evidence, notwithstanding the conduct of the defence at the trial in having the evidence withheld from the jury. Walsh J., at 150, said:-

> "With regard to the particular point upon which the Court of Criminal Appeal decided this case - and without going into the matter in great detail - I confine myself to expressing the view that in a criminal case an accused cannot on appeal be shut out

[2]The People (D.P.P.) v. O'Shea (1982 I.R.) 384

[3](1963 I.R.) 112

because the judge's ruling which he is challenging, or a failure in proof upon which he relies, was brought about by the legal submissions made on his behalf at the trial. The trial of a criminal case cannot be regarded in the same light as an action inter partes and if a mistrial results from the accused's own activities at the trial the appropriate way to deal with it is to order a new trial with such order as to costs as may be appropriate."

The issue raised here is not dependant on quite the same background, nor did I understand Mr. Peart to argue for any form of estoppel. He was content to rely upon the decision of this Court in Woods[4] and of the Court of Criminal Appeal in Cahill[5], where sentences of a similar kind had been imposed. In Woods' case the Court concluded that the sentence, as detailed at p. 412 of the report in the judgment of O Dalaigh C.J., was valid in law. In so far as this case turns upon a like consideration, I am of opinion that there was no invalidity in the sentence imposed by Butler J. As to its desirability, I think it would be invidious for me to express any view of intended general application in a sentencing matter. I would not

[4] supra
[5] (1980) I.R. 8

wish to circumscribe the judicial power in its application to the circumstances of a particular case.

I too would dismiss the appeal.

V.S.Inamd.

18.12.86.

P. AYLMER

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Walsh J.
Henchy J.
Griffin J.
Hederman J.
McCarthy J.

THE SUPREME COURT

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

v.

RAYMOND AYLMER

JUDGMENT delivered on the 18th day of December 1986 by

GRIFFIN J.

The facts and the circumstances in which these proceedings have arisen are fully set out in the judgment of Walsh J.

If the appellant was dissatisfied either with the duration or the form of the sentence imposed on him by the late Mr. Justice Butler on the 16th March 1979, it was open to him to apply to the Court of Criminal Appeal for leave to appeal against the sentence, or to appeal to this Court - it is not necessary for the purpose of this appeal to consider any other steps which may have been open to him. He did neither, presumably because he had under the order of the High Court a reasonable prospect of being released from prison at the end of three years - a period which would appear to be comparatively short having regard to the litany of serious offences (105 in all) to

which he had pleaded or of which he had admitted himself guilty. On the expiration of the three years the balance of the sentence was, on his application, suspended by the then President of the High Court Mr. Justice Finlay on the 23rd March 1982, on the appellant's entering into the bond the terms of which are referred to by Walsh J., and he was then released from prison. He was in breach of that bond by committing other serious offences within the specified period of five years, and on the 14th January 1985 Finlay P. reimposed on him the balance of the sentence imposed by Butler J.

It is important to bear in mind that it is against that last order only, and not against either of the earlier orders of Butler J. and Finlay P., that this appeal is brought. The appellant gave notice of appeal personally by two letters, confining his appeal to the severity or length of the sentence imposed by the President. At the hearing of the appeal, Counsel on behalf of the appellant applied for and obtained leave to deliver an amended notice of appeal against the order of Finlay P. in reactivating the sentence imposed on him i.e. by the order of the 14th January 1985. The essential grounds of appeal were that it was alleged in respect of each of the three orders that of Butler J. imposing the sentence, of Finlay P. in releasing the

appellant on his entering into the specified bond, and that of Finlay P. in reimposing the sentence - is null and void for want of jurisdiction.

It is accepted that in drafting those grounds Counsel had in mind the fact that on several occasions the Court of Criminal Appeal, in the course of the hearing of appeals against sentence in somewhat similar form, had referred to the undesirability of the imposition of a sentence in the form imposed in this case. For example, in the People (D.P.P.) v. Fagan, 7th November 1977, ex tempore, (Henchy, Murnaghan and Gannon JJ.), the People (D.P.P.) v. O'Toole, 26th May 1978 ex tempore, (Finlay P., Griffin and McWilliam JJ.), and the People (D.P.P.) v. Cahill, 26th July 1979 (Henchy, D'Arcy and Keane JJ.), 1980 I.R. p. 8, that Court in each case stated that a sentence reviewable in such form was undesirable and substituted an unreviewable but shorter sentence. The People (D.P.P.) v. Cahill was the only case in which a reserved judgment was delivered. In that case, in the course of the judgment of the Court delivered by Henchy J. four grounds were set out as being the most important grounds on which such a form of reviewable sentence was undesirable. It is not necessary for the purpose of this judgment to refer to those

grounds. I mention the matter solely because in the submissions in the argument on behalf of the appellant on this appeal Counsel relied on those four grounds and the appellant's case was based on them. While those submissions could be relevant if the validity of the order of Butler J. had been made the subject of an appeal to the Court of Criminal Appeal or to this Court, in my opinion they are not relevant on the hearing of this appeal, which is taken only against the order of Finlay P. of the 14th January 1985. In the absence of such an appeal the validity of that order or the jurisdictic of the Court to make it do not arise for decision. That order was a final order and its validity cannot now be assailed in these proceedings. Likewise, as there was no appeal taken against the order of Finlay P. made on the 23rd March 1982, the validity of that order requiring the appellant to enter into the bond stipulated by him as a pre-condition to suspending the balance of the sentence, or his jurisdiction to make it, cannot be questioned and does not arise for determination on this appeal.

Once the orders of the 16th March 1979 and the 23rd March 1982 are beyond the reach of this appeal, the only question which arises is whether the order of Finlay P. of the 14th January 1985 reactivati

the balance of the sentence of ten years was a valid order. The bond into which the appellant entered on that date in open Court before Finlay P. required the appellant to keep the peace and to be of good behaviour towards all the people of Ireland for a period of five years from that date. By committing the offences of burglary and malicious damage, of which he was subsequently convicted, he would appear clearly to be in breach of that bond. The amount stolen in the burglary was £2,751.50 and substantial malicious damage was alleged to have been caused to the building in the course of the breaking and entering thereof. Those offences would appear to be very serious offences by any standard, and the appellant was therefore properly brought back before the learned President, who had to consider whether he had been in breach of his bond, the onus being on the D.P.P. to establish that he was. The President was satisfied that the State had established that, in committing these offences, the appellant had been in breach of his bond. He expressed the opinion that, in the absence of an appeal against the order of Butler J., he had no jurisdiction to vary the sentence of ten years imposed on the appellant and he therefore imposed the balance of the sentence i.e. seven years, to date from the 13th June 1984.

In my opinion, in the circumstances of this case, the learned President undoubtedly had jurisdiction to determine whether there was a breach of the bond on the part of the appellant, and, if so, whether he should reactivate the balance of the sentence. He fully enquired into all the relevant circumstances of the case and gave proper consideration to the question as to whether there had been a breach of the bond and as to whether the balance of the sentence which he had previously suspended should be imposed on the appellant. He was, in my opinion, quite correct in holding that in the absence of an appeal against the order of the 16th March 1979, he had no jurisdiction to vary the sentence imposed by Butler J., and in imposing the balance of the sentence on the appellant.

I would accordingly dismiss this appeal.

21. 12. 1986

PEOPLE v AYLMERE

R3

Walsh J.
Henchy J.
Griffin J.
Hederman J.
McCarthy J.

THE SUPREME COURT

THE PEOPLE (D.P.P.)

v.

RAYMOND AYLMER

Judgment of Henchy J.
delivered the 18 December 1986

This appeal by Ronald Aylmer ("the appellant") is, in form, against the order of Finlay P. made on the 14th January 1985, but in essence it is an appeal against the order of Butler J. made on the 16 March 1979.

The sequence of events is as follows. On the 16 March 1979 Butler J. sitting as the Central Criminal Court sentenced the appellant to ten years imprisonment from the 16 March 1979 but directed that " he be brought back before the Court after he has served 36 calendar months and if in the meantime he has conformed with normal prison discipline and has tried to apply himself to learning a skill the Court will consider suspending the then balance of the sentence herein." The appellant, who did not seek leave to appeal

against that sentence, was duly brought back to the Central Criminal Court pursuant to that order (by which time Butler J. had died), and on the 23 March 1982, on the application of counsel for the appellant, Finlay P. sitting as the Central Criminal Court suspended the balance of the sentence upon the appellant acknowledging himself bound in the sum of £100 to keep the peace and be of good behaviour for the period of five years from the 23 March 1982 and to come up if called upon to do so at any time within the said period of five years to serve the balance of the sentence. The appellant, having committed further offences within the said period of five years, was brought before Finlay P., sitting as the Central Criminal Court, on the 14 January 1985, when it was ordered that the appellant serve the balance of the sentence of ten years imprisonment imposed by Butler J.

The present appeal rests on the contention that it was incompetent for Finlay P. thus to give effect to the order of Butler J., because the latter order was invalid.

It is true that the Court of Criminal Appeal on the 26 July 1979, in The People (D.P.P.) v. Cahill 1980 I.R. 8, held that an order of the kind made by Butler J. in this case was undesirable. In my opinion, it is not necessary for the purposes of this appeal to make a ruling as

to whether such an order is also invalid, as distinct from being undesirable.

As I have pointed out, the appellant, by his counsel, expressly relied on the order of Butler J. for the purpose of getting the balance of the sentence suspended by Finlay P. on the 23 March 1982. Having thus made use of the order of Butler J. to his advantage, he lost his right to challenge the validity of that order.

I consider it to be a well-founded rule that when a person freely and knowingly takes an advantage under an order of a court, he cannot later bring proceedings, appellate or otherwise, to have that order condemned as invalid: see, for example, M'Hugh v. McGoldrick 1921 2 I.R. 163. Having freely elected to approbate the order by taking a benefit under it, he cannot later be allowed to reprobate it.

In this case, not only did the appellant not take any steps to appeal the order of Butler J. but when the opportunity arose his counsel applied successfully on his behalf to Finlay P. to give effect to the order of Butler J. by suspending the balance of the sentence imposed by that order. The appellant thereby approbated the order and took advantage of it by getting the balance of the sentence suspended. It was only after he had broken the terms of the suspension of the

balance of the sentence, and after he had been ordered by Finlay P. to serve the balance of the sentence, that he complained of the invalidity of the order of Butler J. It was then too late for him to do so. He stands estopped from doing so by his previous use of the order to his advantage.

Accordingly, I would dismiss this appeal.

S.H.
18/12/86

~~PEOPLE~~ v. CONNOLLY
P. v. AYLMER

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Walsh J.
Henchy J.
Griffin J.
Hederman J.
McCarthy J.

(23/85)

THE SUPREME COURT

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PROSECUTIONS)

v.

RAYMOND AYLMER

JUDGMENT OF WALSH J. delivered on the 18th day of December 1986

On the 16th March 1979 the appellant pleaded guilty in the Central Criminal Court to the offence of robbery contrary to s. 23 of the Larceny Act, 1916, as inserted by s. 5 of the Criminal Law (Jurisdiction) Act, 1976. He was sentenced to ten years imprisonment by the presiding Judge, the late Mr. Justice Butler. The order of the Court which was drawn up after the conviction directed "that the accused be brought back before the Court after he has served 36 calendar months and if in the meantime he has conformed with normal prison discipline and has tried to apply himself to learning a skill, the Court will consider suspending the then balance of the sentence herein." The transcript of the hearing records the following words as having been uttered by the learned trial Judge:-

"In respect of the charge of robbery I impose a sentence of ten years imprisonment, detention in respect

> of two minors, Ryan and Collins. Ten years imprisonment in respect of Aylmer ..... I direct they serve 36 months of the sentence. If, in the meantime, they observe prison discipline and try to learn a skill and I can get some hope that they will be able to get into useful gainful employment and keep out of crime I will consider suspending the balance in each case. I recommend that if it is possible or if the Minister considers it proper that provisions be made that Aylmer be transferred back to St. Patrick's. [Aylmer indicated he would prefer to go to prison].
> Judge - I am imposing the sentence on Mr. Aylmer.
> In all cases I recommend that the prison authorities try to see whether all the accused can be given some trade or training."

Collins and Ryan were co-accused.

No appeal was ever taken to the Court of Criminal Appeal or elsewhere against either the sentence or the form of the sentence. On that occasion the appellant also asked that 104 other offences be taken into account.

Thirty six months later namely, on the 16th March 1982, the appellant appeared before the Central Criminal Court again pursuant to the order made on the date of his conviction. On that occasion

the presiding Judge was the then President of the High Court and now Chief Justice, Mr. Justice Finlay. The matter was adjourned until the 23rd March and on that occasion the learned President of the High Court ordered that the balance of the sentence to be served by Aylmer be suspended, and Aylmer in open Court acknowledged himself bound to the people of Ireland in the sum of £100, the conditions being that he would keep the peace and be of good behaviour towards all the people of Ireland for the period of five years from the 23rd March 1982, and further that he would come up if called upon to do so at anytime within the said period of five years to serve the balance of the sentence of the Court of the 16th March 1979; the appellant having acknowledged himself so bound was discharged.

On the 2nd March 1984 he was convicted in Limerick on two charges of breaking and entering and causing malicious damage. On the 14th January 1985 on the motion of the Director of Public Prosecutions the matter appeared in the list of the Central Criminal Court again presided over by the then President of the High Court, Mr. Justice Finlay. The Director of Public Prosecutions brought to the attention of the Court the fact that the accused was in breach of the bond in which he had entered into on the 23rd March 1982, and applied that the

balance of the suspended sentence should be brought into effect. In addition to the malicious damage and breaking and entering charges there was also evidence that he had in the interval been convicted of several other offences. On that occasion the then President of the High Court recalled that the sentence of Mr. Justice Butler had never beeen appealed and that there was no way in which he could "conceivably have any jurisdiction to interfere with it." He also recalled the fact that it was he who suspended the sentence after the thirty six months in prison, but that he did not have any jurisdiction to reduce that sentence. He took the view that he could either uphold or refuse to uphold the balance of sentence but he couldn't interfere with the term of it. He also said "it seems to me that I am entirely precluded from inquiring into the correctness of the sentence imposed by Judge Butler. I think the venue for that could only be an appellate Court and the time for that has long since expired." In reply to a plea on behalf of the appellant that a discretion be exercised with regard to serving the balance of the sentence, the President took the view that his function was to decide whether on the evidence he had heard it had been established that the appellant had been in breach of his bond and indeed he was satisfied that he was so

in breach. The President decided to put into force the balance of the sentence and used the following words in addressing the appellant.

> "The legal position in this case is in my view quite clear. The late Mr. Justice Butler in 1979 imposed a sentence of ten years imprisonment on a plea of guilty to a serious offence of robbery from the person using violence. He put a lenient provision into that in providing that after 36 months in prison you should be entitled to apply to the Court for the suspension of the balance of your sentence. You made such an application. The late Mr. Justice Butler unfortunately had died when the matter came before me, and on hearing evidence and the evidence from a Probation Officer of your apparent move towards rehabilitation, I suspended your sentence, but I specifically warned you that if within the three year period of the bond to be of good behaviour, you got involved in serious crime the sentence would have to be served in its entirety. It had been established to my satisfaction that you had been convicted of what I consider to be a serious crime for which the District Court imposed the maximum sentence. Your appeal against that was withdrawn and it was confirmed at the Circuit Court. I have no option but to reimpose that sentence and it seems to me that it is within my power to reimpose it from the date you were first sentenced on these other charges, and that you should serve only one of these sentences. If I can be informed of

> that precise date, that is the only concession I can make. It seems only just that I should do that. The State could have moved like lightning and brought their application. That is not practical but it gives me the power not to impose consecutive sentences."

The present appeal is against that order of the Central Criminal Court of 14th January 1985, the operative part which reads as follows:-

> "And the Court having heard the evidence tendered and the submissions made on behalf of the respective parties doth order that the accused be imprisoned to serve the balance of the sentence of ten years imprisonment imposed by the Court on the 16th March 1979, but suspended on the 23rd March 1982, making allowances for remission of sentence if any, earned or to be earned, the said sentence to date from the 13th June 1984."

The original notice of appeal was in the form of a letter from the appellant, dated the 4th August 1985, who was then in Limerick Prison. At that time he was also serving other sentences.

Since there was no Legal Aid Certificate to cover an appeal directly from the Central Criminal Court to this Court, the Minister for Justice in the special circumstances of the case indicated that he was prepared to meet the costs of fees, appropriate expenses

and reasonable disbursements in the case on an ex gratia basis as if it were a legal aid case, so as to enable the appellant to have legal representation in this Court. The notice of appeal dated the 21st March and drawn up by the legal representatives of the appeallant was permitted by this Court to be accepted and the hearing of this appeal was conducted on the basis of that notice of appeal.

The grounds of appeal claimed that the sentence imposed by Mr. Justice Butler was null and void for want of jurisdiction and that the order of the President of the High Court of the 23rd March was also null and void for want of jurisdiction because of the alleged invalidity of the order of Mr. Justice Butler. It was also claimed that the order of the President of the High Court of the 14th January 1985, which was the order under appeal was null and void for want of jurisdiction.

In the alternative it was claimed that the President of the High Court misdirected himself in law in holding that he could not interfere with the sentence imposed on the appellant and in failing to consider whether or not it had been made in excess of jurisdiction. It was also claimed in the alternative that the President of the High Court misdirected himself as to whether or not to reactivate the

appellant's suspended sentence.

The first ground of appeal was based among others on the submission that the form of sentence imposed by Mr. Justice Butler was unconstitutional in that it was alleged to interfere with the executive power of government. It was claimed that by permitting the sentence to be suspended upon the conditions which were laid down that Mr. Justice Butler had in some way impinged upon the powers vested in the executive by s. 23 of the Criminal Justice Act, 1951, namely, the power to commute the sentence in accordance with Art. 13 s. 6 of the Constitution, and that accordingly, Mr. Justice Butler's order in that respect was null and void for want of jurisdiction. In my view this submission is entirely without substance. Mr. Justice Butler had the undoubted power to impose a sentence of ten years imprisonment for the offence. He also had power to suspend the sentence in whole or in part upon such conditions as he might fix. The power of the executive to which the appellant's counsel has referred is a power to commute sentences not to suspend them. If the executive in its wisdom had chosen to commute the sentence of ten years in such a manner as to produce the result that even the thirty six months would not have been served then there would have been nothing

left to serve. Mr. Justice Butler's order then would have had no sentence upon which to operate. That did not happen. As for the suggestion that the later Mr. Justice Butler's order would in some way impede the executive from exercising its power of commuting a sentence, I think it was abundantly clear the effect of the order was that at the end of the thirty six months, when the appellant had the right to apply to the Court for a suspension. It was clear that the order postulated the continued existence of the sentence. There is no way in which it could be construed as a direction expressed or implied to the executive not to exercise the powers of commuting the sentence. The sentence imposed by Mr. Justice Butler in no way involved an encroachment by the judicial arm of government upon the executive power. The sole power to impose a sentence is vested in the judicial arm of government and the sole arm to attach conditions to it is the judicial arm. The executive cannot impose a sentence of any description nor can it attach any conditions to a sentence. Its power in respect of sentences is one of commuting or remitting sentences imposed by a court exercising criminal jurisdiction. It was also claimed that Mr. Justice Butler in directing that the appellant should be brought back "before him on a date three years in the

future", sought to nominate himself to exercise the jurisdiction of the Central Criminal Court and to that extent he was in some way usurping the functions of the President of the High Court, who nominates the judge who will from time to time preside in the Central Criminal Court. This is based upon the transcript of the proceedings in which Mr. Justice Butler speaks in the first person. It is quite clear that he is speaking of the Court, though it is probable that had he not unfortunately died, if and when the matter had come up again he would have been the judge nominated to deal with this matter in the Central Criminal Court. Mr. Justice Butler was quite familiar with the procedure, as a similar sentence imposed by him had been the subject of proceedings in this Court seven years earlier, see The State (P. Woods) v. The Attorney General 1969 I.R. p. 38. In that case the actual words which he used were as follows as they appear in p. 407 of the Report:-

> "I impose a sentence of 7 years penal servitude. An I direct as follows:- that if and when you have completed 36 months of that sentence, dating from to-day. if you have completed 36 months from to-day and have complied with prison discipline in obeying the prison rules that would, in the normal way, allow you leniency I will then suspend the balance of your sentence, on

> your entering into a bond, in your own bail of £500 to keep the peace for the remaining four years of the sentence."

In that case because of certain imprecision in the formal order which was drawn up it was claimed that this power of suspension was in effect being left to the Prison Governor. That claim was rejected by this Court which stated at p. 412 of the Report:-

> "The modification of sentence held out by Mr. Justice Butler to the prosecutor, if he complied with prison discipline for three years, was one which was to be executed entirely within the judicial domain. The point need not be further laboured. If the warrant had been drawn with greater particularlity, the possibility of this erroneous submission being made could never have arisen."

In the present case there is nothing ambiguous about the order of the Court and there is nothing whatever in the transcript to support the claim that Mr. Justice Butler was in anyway attempting to arrogate to himself functions which should vest in the Central Criminal Court. In any case in which a suspended sentence is imposed by any Court it is quite possible that the judge who imposed it may have retired, or may unfortunately have died, before any question of

a breach of the conditional suspension comes to be considered. There is no doubt in my mind that it is the Court which imposes a sentence and it is the Court which will consider and act upon the consequences of a breach of the conditions of the suspension. I have no doubt that the presiding Judge, namely, the President of the High Court, who suspended the sentence and eventually was asked to reactivate it was fully entitled to do so, as all sentences and all orders are the sentences and orders of the Court, and constitute the decisions of the Central Criminal Court in the matter. See The People v. Conmey 1975 I.R. 321.

In my opinion there was no invalidity in the sentence imposed by the late Mr. Justice Butler. I should also add that when this form of sentence coupled with a suspension of the same kind came to the notice of this Court in The State (Woods) v. The Attorney General and later in The People v. Cronin 1972 I.R. 159 it did not attract any adverse comment from the Court touching either its validity or its desirability.

I have dealt with the question of validity of Mr. Justice Butler's order although there was no appeal taken against it but because it has been attacked in this appeal as the basis for an attack upon the order of the President of the High Court which depended upon the order of

Mr. Justice Butler. In my opinion no invalidity has been shown to exist in the order of Mr. Justice Butler or in either of the orders of the President of the High Court. I am also of the opinion that the learned President of the High Court was correct in the view that he took that as he was not an appellate Court he could not vary the terms of the sentence. His function was simply to decide whether or not the circumstances of the case warranted the reimposition or the reactivation of the sentence he had previously suspended.

The other grounds of appeal have been directed towards the desirability of that type of sentence and also raised the question as to whether it was in accordance with the principles of good penology. These are matters which might properly be raised if an appeal had been taken against the sentence but such was not the case. The Court of Criminal Appeal in The People (at the suit of the Director of Public Prosecutions) v. Cahill 1980 I.R. p. 8, took the view that an order of that kind made by Mr. Justice Butler was undesirable. It should be pointed out that in that case the Court was dealing with a sentence of penal servitude and not one of imprisonment. When the questi of whether any particular sentence is in an undesirable form or not falls to be considered by the appropriate appeallate Court it is one whic

must be determined by the circumstances of the case. This Court is not hearing an appeal in respect of the order made by Mr. Justice Butler nor called upon to express any view upon the matter. I do however agree with the opinion expressed by the President of the High Court that Mr. Justice Butler had dealt leniently with the appellant. The learned President of the High Court also was as lenient as he could have been, having regard to circumstances of the case and I see no reason in anyway to vary or allow an appeal against his order. I would therefore dismiss this appeal.

18-12-86.

THE SUPREME COURT

Walsh J.
Henchy J.
Griffin J.
Hederman J.
McCarthy J.

THE PEOPLE (AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

: RESPONDENT

-v-

RAYMOND AYLMER

: APPELLANT

JUDGMENT OF HEDERMAN J.
Delivered the 18th day of December 1986

On the 16th day of March 1979 the Appellant, having pleaded guilty to Robbery, contrary to Section 23 of the Larceny Act, 1916, as inserted by Section 5 of the Criminal Law (Jurisdiction) Act 1976, was sentenced to ten years imprisonment by the late Mr. Justice Butler, The Trial Judge. in sentencing the Appellant, (with two others), directed:-

"They serve thirty six months of the sentence. If, in the meantime they observe prison discipline and try to learn a skill and if I can get some hope that they will be able to get into useful gainful employment and keep out of crime I will consider suapending the balance in each case".

The Trial Judge further recommended:

"That the Prison Authorities try to see whether the accused can be given some trade or training".

In imposing the sentence, at the request of the Appellant, the Court took into account 104 other charges, of which 11 were pending in the Central Criminal Court. From this sentence the Appellant did not appeal, and did not at any time apply to extend the time within which to Appeal to the Court of Criminal Appeal or to this Court.

On the 16th March 1982 the Appellant appeared before Mr. Justice Finlay, then President of the High Court, for a review of the sentence imposed by the late Mr. Justice Butler. The matter was adjourned to the 23rd March 1982 because the Appellant was not legally represented. On the 23rd March 1982, having heard evidence adduced by the Prosecution, Mr. Justice Finlay suspended the balance of the sentence after the Appellant in open Court acknowledged himself bound to the people of Ireland in the sum of £100.00, the condition being that he keep the peace and be of good behaviour towards all the people of Ireland for a period of five years from the 23rd March 1982, and further that he willcome up, if called upon to do so, at any time within the said period of five years to serve the balance of the sentence of the Court of the 16th day of March 1979. The Appellant was warned that if he got involved in serious crime he would have to serve the balance of the sentence in its entirety. Again from this Order of the Central Criminal Court, there was no Appeal, nor was any application made on behalf of the Appellant to extend the time for Appealing the Order of the 23rd March 1982, to the Court of Criminal Appeal or to this Court.

On the 2nd March 1984 at Limerick District Court the Appellant was convicted of two charges - one being Burglary and stealing goods to the value of £2,750.50, and the other Malicious Damage of a dwelling house to an amount in excess of £50. On both charges he was sentenced to twelve months imprisonment, the sentences to run concurrent. The Appellant appealed against both convictions but subsequently withdrew his Appeal and on the 11th December 1984 the Appeals were Struck Out in the Circuit Court and the sentences of the District Court affirmed.

After the sentences had been affirmed by the Circuit Court the Respondent had the case re-entered before Mr. Justice Finlay, then President of the High Court, in the Central Criminal Court. Having heard the evidence and the submissions from the Respondent and the Appellant on the 14th day of January, 1985, the Court ordered the Appellant:

> "Be imprisoned to serve the balance of the sentence of ten years imprisonment imposed by the Court on the 16th day of March 1979, but suspended on the 23rd March 1982, making allowance for remission of sentence, if any, earned or to be earned, the said sentence to date from the 13th June 1984".

On the 15th January 1985, and the 4th August 1985 the Appellant wrote to the Registrar of the Supreme Court indicating his decision to Appeal the Order of the 14th January 1985. It is therefore clear that the Appellant when he gave notice to the Registrar, of his intention to Appeal the Order of the Court made on the 14th January 1985, was within the time allowed for such Appeal. This Court allowed an Amended Appeal dated the 21st day of March 1986, and it is that Appeal which is now before the Court.

In his Amended Notice of Appeal of 21st March 1986 the Appellant Appeals "against the Judgment and Order of the Hon. Mr. Justice Finaly..... given and made on the 14th January 1955" re-activating the sentence imposed upon the Appellant by the late Mr. Justice Butler in the Central Criminal Court on the 16th March 1979, in respect of a conviction for Robbery contrary to Section 23 of the Criminal Law (Jurisdiction) Act 1976 and suspended by Mr. Justice Finlay aforesaid on the 23rd day of March 1982 on the grounds hereinafter set out.

The five grounds are then set out and the relief sought in the Notice of Appeal seeks -

"An Order from the Court declaring that the Order of Mr. Justice Finlay of the 14th day of January 1985 is null and void or alternatively that it will be reversed, quashed, varied or altered in such manner and on such terms as this Honourable Court shall consider fit and proper".

Though Counsel on both sides made submissions to this Court on the validity of the Orders of the Central Criminal Court of the 16th March 1979 and 23rd March 1982, in my view it is not open to this Court in this Appeal to consider the validity of these Orders, as no application was made to this Court for leave to enlarge the time to appeal against these Orders. In the circumstances I feel I should not make any observations on the propriety or validity of the Orders.

Had an application been made to enlarge the time to appeal these Orders I cannot see any grounds on which this Court could grant such extension. Clearly they were long out of time and further the Appellant had never considered appealing the said Orders till so advised in 1986. Further the Appellant relied on the validity of the Order of the 16th March 1979 when obtaining his conditional release on the 23rd March 1982 and also accepted the validity of the jurisdiction of the Central Criminal Court when entering into his recognisance on the 23rd March 1982 prior to his release.

The remaining grounds of Appeal relate to the Order of the Central Criminal Court made on the 14th day of January 1985. Having regard to the specific terms of the Order of the 23rd March 1982, the only matters which this Court can consider are, whether it had been established beyond reasonable doubt by the Respondent that the Appellant was in breach of his recognizance, entered into before the Court on the 23rd March 1982, and if so satisfied, whether the breach was a serious or trivial breach. I am satisfied that if it could have been shown that the breach was a trivial breach, the Court would have had a discretion not to impose the balance of the sentence as indicated, but the offences for which the Appellant had been convicted in the District Court in Limerick could not by any stretch of the imagination be termed anything other than a serious offence.

I would accordingly dismiss this Appeal.

15-12-86