An Chúirt Uachtarach

The Supreme Court

O'Donnell CJ
Charleton J
Hogan J
Murray J
Collins J

Supreme Court appeal number: S:AP:IE:2022:000145
[2023] IESC 16
Court of Appeal record number: 2020/246
[2022] IECA 148
High Court record number: 2019/11 CAB
Circuit Criminal Court bill number: 1130/06

Between

The People (at the suit of the Director of Public Prosecutions)
Prosecutor/Appellant

- and -

Martin Morgan
Accused/Respondent

Judgment of Mr Justice Peter Charleton delivered on Thursday 29 June 2023

1. While the organisation of prostitution offences of which the accused was convicted, by a Circuit Court jury in 2008, date back as far as 2005, resulting in both imprisonment and a fine, the delay in finalising this case is, to a degree, accounted for by the subsequent application in the Circuit Court for, and making of, a confiscation order under the Criminal Justice Act 1994. This targeted what had been illegally earned. The legislation prescribes that failure to pay the amount confiscated may result in imprisonment, with maximum, but discretionary, penalties related to the amount. When default occurred on the part of the accused, in paying over the amount confiscated, the Director of Public Prosecutions applied, on notice to the accused, to imprison him for a term beyond that already served. Out of a surfeit of prudence, the DPP felt that the accused, though legally represented by solicitor and counsel, should be present were the High Court to add to his jail sentence and thus asked the judge to issue a bench warrant to secure his attendance. That was granted. The accused appealed the issue of that warrant to the Court of Appeal which ruled that while there may be power to order the arrest of the accused for the purpose of this process, that some lesser process, such as attachment and committal, ought to have been

used, and thus overturned the High Court order for a bench warrant to secure the accused's attendance.

2. Consequently, the issues which arise concern the power of the High Court in confiscation proceedings under the 1994 Act, where the decision is whether to add to an existing prison sentence because of monetary default, and the fixing of that sentence, to secure the attendance of the accused by issuing a bench warrant. Of the nature of this process, which adds to an existing penalty of imprisonment and fine, there has already been, firstly, a criminal trial and the imposition of a penalty and, secondly, a confiscation amount has already been set in respect of the illegal earnings of the accused and, finally, default on the part of the accused in paying that amount.

Determination

3. In the Determination of this Court to enable a further appeal from the Court of Appeal, [2023] IESCDET 16, and the subsequent case management, the appeal has been focused on these issues:

> 1. When does a criminal case end, in particular under the Criminal Justice Act 1994, as amended, where a confiscation order remains unsatisfied?
>
> 2. If a criminal case is not continued in the Circuit Court but an application for imprisonment in default of compliance with a confiscation order under the 1994 Act is made in the High Court, does the case then assume the character of a civil case whereby the criminal case is brought to an end?
>
> 3. During an application under the 1994 Act in the High Court, is there an inherent power in the court, be that the court of trial or the court where a default imprisonment order may be made on non-payment of a confiscation order, to order the accused arrested under warrant to make answer in person before the court?
>
> 4. If there is such a power, what is the origin of that power, under the Constitution and fair procedures, or under common law, and, if it is a power at common law, has that been superseded and thus abolished by the provisions of the 1994 Act or is there an inherent power in the High Court to order that someone who may be imprisoned for a substantial period be brought before the court under arrest to answer and give explanation in respect of default?
>
> 5. Could the High Court, notice of the application being proved, and the accused being represented for the purpose, it seems, of protesting jurisdiction, proceed in the absence of the accused to imprison him for up to 3 years?

Steps in the proceedings

4. On 22 February 2008 the accused was convicted in the Dublin Circuit Court of running a brothel contrary to s 11 of the Criminal Law (Sexual Offences) Act 1993 and also of organising prostitution under s 9 of the same legislation. On the basis of the evidence accepted as leading to this verdict, it had been proved that the accused had operated a large commercial brothel, with numerous sex-workers in various forms of accommodation,

including an apartment on Bachelor's Walk in the city centre. This premises had been placed under garda surveillance. At the time of sentencing for the crimes the DPP also indicated an intention to also seek a confiscation order. The accused appealed his conviction to the Court of Criminal Appeal. This was unsuccessful. See the judgment given by Finnegan J of 5 July 2011; [2011] IECCA 36. The accused asserted that a point of law of exceptional public importance arose from his conviction and sought leave to appeal to the Supreme Court but that was refused – judgment given by Finnegan J on 21 December 2011; [2011] IECCA 98. By this stage the accused had already served the period of imprisonment imposed on him.

5. That, absent the intervention of the Criminal Justice Act 1994, would ordinarily end the criminal proceedings against the accused. About 18 months after the last ruling of the Court of Criminal Appeal, however, in June 2013 on the application of the DPP, the Dublin Circuit Criminal Court assessed the level of return to the accused from his illegal operations and consequently made a confiscation order in the sum of €252,980.33. An unsuccessful appeal was then brought by the accused to the Court of Appeal against that decision; though in the judgment of Hedigan J, of 31 July 2018, the confiscation amount was varied downwards to €243,583 giving credit for cash funds seized in the brothel at the time of arrest; [2018] IECA 282. Matters now shifted to the High Court, as the 1994 Act envisages .

6. On 28 May 2019, the DPP issued an originating notice of motion in respect of the failure of the accused to pay the €243,583, or any sum thereof, and seeking an order for his imprisonment in respect of that default. Those papers were served on and accepted by the solicitors acting for the accused. That was normal; they were on record in the proceedings. Further to that, on 15 October 2019, the DPP issued a subsequent motion seeking an order for the attachment of the accused or, in the alternative, an order directing the issue of a bench warrant. Both of these, if granted, would compel the attendance of the accused in the High Court for the hearing of the assessment of how much, if any, further of a term of imprisonment the accused should serve due to default of payment. Counsel and solicitors acting for the accused attended at the High Court, answering to the motion on behalf of the accused. On 18 November 2020, Coffey J acceded to the application of the DPP to issue a bench warrant. It is uncertain, beyond the fact that both the DPP and the accused were represented, as to what submissions were made to the High Court. It suffices that Coffey J, in a concise ruling, considered that he had the power to issue a bench warrant and that, in the circumstances, should do so:

> I am going to accede to the application to grant a bench warrant. This application has been brought on notice to the respondent and the respondent is represented. The respondent has not brought an application to reduce the sum as determined by the Circuit Court and on appeal. There is a prima facie entitlement on the DPP to bring enforcement proceedings. Considering the fairness to the defendant, his personal attendance should be secured and so I am going to avail of my inherent jurisdiction.

7. That decision was appealed by the accused. On 23 June 2022 the Court of Appeal, judgment of Edwards J, allowed the appeal, ruling that rather than a bench warrant some less intrusive or burdensome form of compulsion should have been used. The judgment also makes it clear that it remained open to the DPP to bring a further application for the attachment of the accused; [2022] IECA 148.

8. Before considering the reasoning of the Court of Appeal, it is appropriate to set out the legislative provisions whereby the 1994 Act enabled the trial court following conviction to make a confiscation order in addition to a prison sentence or fine in respect of certain offences, usually in the Circuit Court, and moved the jurisdiction of imposing an additional penalty in default of payment of that confiscation order, to the High Court.

Legislative overview

9. The two offences of which the accused was convicted were brothel keeping contrary to s 11(b) of the Criminal Law (Sexual Offences) Act 1993 and organising prostitution contrary to s 9 of the same Act. Section 9 provides:

> A person who for gain—
>
> > (a) controls or directs the activities of a prostitute in respect of prostitution,
> >
> > (b) organises prostitution by controlling or directing the activities of more than one prostitute for that purpose, or
> >
> > (c) compels or coerces a person to be a prostitute,
>
> shall be guilty of an offence and shall be liable—
>
> > (i) on summary conviction to a fine not exceeding £1,000 or to imprisonment for a term not exceeding 6 months or to both, or
> >
> > (ii) on conviction on indictment to a fine not exceeding £10,000 or to imprisonment for a term not exceeding 5 years or to both.

10. As can be seen, monetary liability as of the passing of this legislation was limited to a fine (since updated) and imprisonment. Section 11 of the 1993 Act is in the following terms:

> A person who—
>
> > (a) keeps or manages or acts or assists in the management of a brothel,
> >
> > (b) being the tenant, lessee, occupier or person in charge of a premises, knowingly permits such premises or any part thereof to be used as a brothel or for the purposes of habitual prostitution, or
> >
> > (c) being the lessor or landlord of any premises or the agent of such lessor or landlord, lets such premises or any part thereof with the knowledge that such premises or some part thereof are or is to be used as a brothel, or is wilfully a party to the continued use of such premises or any part thereof as a brothel,
>
> shall be guilty of an offence and shall be liable—

> (i) on summary conviction to a fine not exceeding £1,000 or to imprisonment for a term not exceeding 6 months or to both, or
>
> (ii) on conviction on indictment to a fine not exceeding £10,000 or to imprisonment for a term not exceeding 5 years or to both.

11. Again, that was the limit of criminal liability. Increasingly, however, public policy as expressed in legislation began to address the issue of enrichment through criminal activity and how on serving out a sentence, benefit to the convict might be removed through application to seize assets. Indeed the Criminal Justice Act 1994 Act enabled the State to ratify various international agreements, including the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime (1990).

In this case, by statement under s 10 of the Criminal Justice Act 1994 dated 20 October 2008, the prosecution sought to nullify the accused's earnings from the offences for which he had been convicted. Hence, paragraph 3 thereof (quoted as found) asserted:

> It appears to the Director of Public Prosecutions that Mr. Morgan has benefited from the offences of which he has been convicted. During the trial, evidence was given by Gardaí that from the examination of the "Business Records" and from the statements made by persons working as prostitutes or in the administration of the Defendant's business, that the return to the Defendant after the deduction of all outgoings and expenses (1,000,000 euros approximately) was €3,029,600 approximately per annum. The period referred to in the charges covers the period from the 22nd of August 2005 to the 10th day of October 2005 both dates inclusive. This equals forty nine days. Two shifts worked each day so this equals ninety eight shifts worked during this period. On the "Worksheets" seized the money earned by the prostitutes was split fifty/fifty between the prostitute and Martin Morgan. The total due to Martin Morgan on each of the … nightly … "Worksheets" was €4,625 ……. Divided in half, this gives an average profit to Martin Morgan of €1,369.86 …… per shift. This multiplied by ninety-eight shifts gives a monetary sum of €…134,246.573. The Director therefore claims €134,256.573……. as the financial benefit gained by Martin Morgan for the period between the 22nd day of August 2005 and the 10th day of October 2005, both dates inclusive.

12. The Criminal Justice Act 1994 as amended provides a detailed code for the confiscation of the benefits to a convict of crime. Two categories are divided as between drug trafficking and other crimes. Section 9 enables an application to the court of trial after sentence to seek confiscation, at the time of sentence or later. Hence:

> (1) Where a person has been sentenced or otherwise dealt with in respect of an offence, other than a drug trafficking offence, of which he has been convicted on indictment, then, if an application is made, or caused to be made, to the court by the Director of Public Prosecutions the court may, subject to the provisions of this section, make a confiscation order under this section requiring the person concerned to pay such sum as the court thinks fit.
>
> (2) An application under this section may be made if it appears to the Director of Public Prosecutions that the person concerned has benefited from the offence of

which he is convicted or from that offence taken together with some other offence (not being a drug trafficking offence) of which he is convicted in the same proceedings or which the court has taken into consideration in determining his sentence.

(3) An application under subsection (1) of this section may be made at the conclusion of the proceedings at which the person is sentenced or otherwise dealt with or may be made at a later stage.

(4) For the purposes of this Act, a person benefits from an offence other than a drug trafficking offence if he obtains property as a result of or in connection with the commission of that offence and his benefit is the value of the property so obtained.

(5) Where a person derives a pecuniary advantage as a result of or in connection with the commission of an offence, he is to be treated for the purposes of this section as if he had obtained as a result of or in connection with the commission of the offence a sum of money equal to the value of the pecuniary advantage.

(6) The amount to be recovered by an order under this section shall not exceed—

(a) the amount of the benefit or pecuniary advantage which the court is satisfied that a person has obtained, or

(b) the amount appearing to the court to be the amount that might be realised at the time the order is made,

whichever is the less.

(7) The standard of proof required to determine any question arising under this Act as to—

(a) whether a person has benefited as mentioned in subsection (2) of this section, or

(b) the amount to be recovered in his case by virtue of this section,

shall be that applicable in civil proceedings.

13. The burden of proof is on the prosecution to demonstrate the probable benefit of the crime and the order is directed to what may probably be realised from the convict. Under s 11 the convict may be required to provide information as to assets and the provenance thereof, but it is not an offence to fail to comply with a court order in that regard, though an inference may be raised from non-compliance. A person who has died or absconded after conviction may, under s 13, be the subject of a confiscation order in the High Court, as distinct from the court of trial where they are available to answer proceedings. Where absconding occurs, the court must wait two years. Further, the principle of hearing from a party before a binding order is made against interest is preserved in that it is specified that "the court shall not make a confiscation order against a person who has absconded unless it is satisfied that the Director of Public Prosecutions has taken reasonable steps to contact

him" and it is further provided that "any person appearing to the court to be likely to be affected by the making of a confiscation order by the court shall be entitled to appear before the court and make representations." Under ss 16 and 17 a confiscation order may be varied or may be appealed in the ordinary way.

14. Crucial to the disposal of this appeal is s 19. In essence, this provides a dual pathway to ensure that any order of confiscation made by the court of trial is not set at nought. Firstly, the order becomes a debt as between the State and the convict. This may be enforced in the ordinary way through summary summons or by remedies available in consequence of any court order; including specifically the appointment of a receiver over property under s 20. Even prior to an application in the High Court, s 24 gives a *Mareva* - type jurisdiction in the form of restraining orders against persons in dealing with realisable property. Secondly, the order may be enforced by an additional term of imprisonment consequential upon the failure to pay. Section 19 provides:

> (1) Where a court makes a confiscation order, then (without prejudice to the provisions of section 22 of this Act enabling property of the defendant in the hands of a receiver appointed under this Act to be applied in satisfaction of the confiscation order) the order may be enforced by the Director of Public Prosecutions at any time after it is made (or, if the order provides for payment at a later time, then at any time after the later time) as if it were a judgment of the High Court for the payment to the State of the sum specified in the order (or of any lesser sum remaining due under the order), save that nothing in this subsection shall enable a person to be imprisoned.
>
> (2) Subject to subsection (3) of this section, if, at any time after payment of a sum due under a confiscation order has become enforceable in the manner provided for by subsection (1) of this section, it is reported to the High Court, by the Director of Public Prosecutions that any such sum or any part thereof remains unpaid, the court may, without prejudice to the validity of anything previously done under the order or to the power to enforce the order in the future in accordance with subsection (1) of this section, order that the defendant shall be imprisoned for a period not exceeding that set out in the second column of the table to this section opposite to the amount set out therein of the confiscation order remaining unpaid.
>
> (3) An order under subsection (2) of this section shall not be made unless the defendant has been given a reasonable opportunity to make any representations to the court that the order should not be made and the court has taken into account any representations so made and any representations made by the Director of Public Prosecutions in reply.
>
> (4) Any term of imprisonment imposed under subsection (2) of this section shall commence on the expiration of any term of imprisonment for which the defendant is liable under the sentence for the offence in question or otherwise, but shall be reduced in proportion to any sum or sums paid or recovered from time to time under the confiscation order.

15. The order for confiscation is made in the court where the accused is convicted and may be part of or a later aspect of the sentencing jurisdiction, but for the separate purpose

of removing the benefit of crime. In at least one sense, this may be viewed as part of the punishment for the offence, but the route and the purpose are different. The order for enforcement, where there has been absconding, death or default, is made in the High Court.

16. What is clear from the interpretation section is that while the court of trial is charged with dealing with the sentencing of an offender, meaning a fine or imprisonment, and with the identification of profits from the particular offences on which a conviction is recorded, there is a choice then vested in the offender. That offender may pay the sum or, the offender will no doubt be advised that the order made by the court of trial is not a futile exercise in merely declaring confiscation: the provisions of the Act are enforceable in the High Court through *Mareva* applications as and from the making of the confiscation order; the confiscation order becomes a debt to the State; carrying with that order the power to appoint a receiver over property and all other consequential remedies in respect of the order; and that default in paying what is realisable (being the choice of the legislature instead of what has been earned) may be enforced through an additional period of imprisonment.

17. Central to this is the stipulation in s 19(3) that no such order is to be made "unless the defendant has been given a reasonable opportunity to make any representations to the court that the order should not be made", the court being specifically required to take these into account in addition to those "made by the Director of Public Prosecutions in reply".

18. The switch from the court of trial, where the assessment as to profit from crime is made necessarily in the presence of the convict, to the High Court where the issues as to non-payment arise due to death, default or absconding, potentially enables the argument made here on behalf of the accused, which is that civil and criminal proceedings have been melded together. That is not the point. What is in issue is construction of the powers of the High Court. Accordingly, it may be asked was it the intention of the Oireachtas, in having this kind of bi-cameral procedure, to cause the second enforcement part in the High Court to act as a continuation of the criminal proceedings to the extent of enabling the judge with the powers and duties of a judge hearing a criminal case. In that regard, s 3(16) requires certain provisions "shall have effect for the interpretation of this Act". Under Article 15.5.1º of the Constitution the "Oireachtas shall not declare acts to be infringements of the law which were not so at the date of their commission." Hence, it may be noticed that what occurs in this legislation is not a re-definition of offences, either retrospectively or at all, but instead an additional consequence of conviction has been prescribed. Perhaps out of prudence, and certainly to define where these additional consequences, as inclusive of possible forfeiture, date from, there are definitions in s 3 as to when the proceedings commence:

> (e) proceedings for an offence are instituted—
>
> > (i) when a summons or warrant for arrest is issued in respect of that offence,
> >
> > (ii) when a person is charged with the offence after being taken into custody without a warrant,

> and where the application of this section would result in there being more than one time for the institution of proceedings, they shall be taken to have been instituted at the earliest of those times . . .

19. This provision assumes importance in the context of the non-retroactive nature of the provisions of the legislation whereby under s 3(14) the provisions do not apply to actions done prior to the commencement of the Act; on this see the analysis of the European Court of Human Rights in *Welch v. The United Kingdom* (Application no 17440/90) 09 February 1995 where similar confiscation provisions in the Drug Trafficking Offences Act 1986 which had retroactive effect were held penal in nature. This points towards the legislation being more than merely administrative. Any issue as to constitutional implication has not been argued here and could not be since these offences with confiscation consequences in potential were well after the passage of the Act. Further s 3(16) also defines when the criminal case comes to an end:

> (f) proceedings for an offence are concluded—
>
> (i) when the defendant is acquitted on all counts;
>
> (ii) if he is convicted on one or more counts, but no application for a confiscation order is made against him or the court decides not to make a confiscation order in his case; or
>
> (iii) if a confiscation order is made against him in connection with those proceedings, when the order is satisfied,
>
> (g) an application under section 7 or 13 of this Act is concluded—
>
> (i) if the court decides not to make a confiscation order against the defendant, when it makes that decision; or
>
> (ii) if a confiscation order is made against the defendant as a result of that application, when the order is satisfied,
>
> (h) an application under section 8 or 18 of this Act is concluded—
>
> (i) if the court decides not to vary the confiscation order in question, when it makes that decision; or
>
> (ii) if the court varies the confiscation order as a result of the application, when the order is satisfied,
>
> (i) a confiscation order is satisfied when no amount is due under it,
>
> (j) an order is subject to appeal until (disregarding any power of a court to grant leave to appeal out of time) there is no further possibility of an appeal on which the order could be varied or set aside.

20. Finally, in terms of the scope of the 1994 Act, where an accused is capable of being served, as opposed to being dead or it being a situation where the convict has absconded

and the High Court is satisfied that the DPP has made all reasonable efforts to communicate with him or her, which is what the legislation requires, if the accused has not complied with the order, then there is a titrated table as to the consequences in terms of imprisonment, which can be proportionately ameliorated by payment during such term. There is nothing to indicate that any imprisonment in default of payment is mandatory. Rather, it is clear from the terms of s 19 that the High Court "may, without prejudice to the validity of anything previously done under the order or to the power to enforce the order in the future" as opposed to any period being mandatory. Such further imprisonment is for "a period not exceeding that set out in the second column of the table to" s 19.

21. Hence the table under s 19 is:

Amount outstanding under confiscation order	*Period of imprisonment*
Not exceeding £500	45 days
Exceeding £500 but not exceeding £1,000	3 months
Exceeding £1,000 but not exceeding £2,500	4 months
Exceeding £2,500 but not exceeding £5,000	6 months
Exceeding £5,000 but not exceeding £10,000	9 months
Exceeding £10,000 but not exceeding £20,000	12 months
Exceeding £20,000 but not exceeding £50,000	18 months
Exceeding £50,000 but not exceeding £100,000	2 years
Exceeding £100,000 but not exceeding £250,000	3 years
Exceeding £250,000 but not exceeding £1 million	5 years
Exceeding £1 million	10 years

21. It follows from this legislative compilation that the consequences of serious indictable crime include, since 1994, not only the prospect of a fine or imprisonment on conviction but also that the offender would be stripped of such realisable assets as remain in profiting from offending. When the matter goes to the High Court, the essential question is whether there is a need for an offender to be present before the consequences of receivership or debt or potential imprisonment up to the terms stated in the table. If such a need arises, another issue is as to the transfer from the criminal court of trial of the powers and jurisdiction of a judge in criminal litigation.

Judgment of the Court of Appeal

22. In the Court of Appeal [2022] IECA 148, the issue considered was whether the High Court had jurisdiction to issue a bench warrant to secure the attendance of the accused in the circumstances as described by Coffey J in the High Court. The judgment of Edwards J analyses the 1994 Act and its interpretation, the jurisdiction of the courts in issuing bench warrants in the context of whether an application under s 19(2) should be considered civil or criminal in nature: [56] to [63]. At issue on the appeal, however, is not a simple civil/criminal dichotomy but whether the intention of the Oireachtas has been to continue with the powers of a criminal judge in the disposal of a s 19 application. The confiscation order, according to this analysis of Edwards J, represents an important tool in the fight against crime and the aim of such procedure is in the public interest of deterring crime and ensuring that those who commit crime should not enjoy their ill-gotten gains.

23. Most significantly, Edwards J considered that issuing a bench warrant where the accused had been notified and had not presented himself in the High Court, but rather had been represented by solicitor and counsel, to have been wrong in law; an order for attachment would be preferable. At [69] the Court states that an order for attachment may have been better suited as it does not require any demonstration that the accused was in default of a process that had demanded his attendance before the court. Hence:

> 64. It is clear to us from our review of the law on bench warrants that such a warrant may only be exercised by a court that is exercising criminal jurisdiction. That requirement was met by the nature of the s.19(2) proceedings. However, that alone does not mean that the issuance of a bench warrant was otherwise appropriate to compel the attendance of the person concerned before the court.
>
> 65. As to what might constitute appropriate circumstances, we recall in the first instance the point made by Professor O'Malley, alluded to at paragraph 49 above, that the general rule is that the method to secure an accused person's attendance before a court should be that which is least restrictive of the person's liberty. We have already suggested that a defaulter (such as the appellant here) should, where possible and practical, be requested to attend before the court voluntarily in the first instance. There is no evidence that that was done in this case, nor is there any evidence as to whether it was possible or practical to do so. (We do note that the appellant, although not in attendance, was legally represented at the hearing of the motion but our papers are silent as to his attitude and as to whether he would have been willing to attend voluntarily if requested).
>
> 66. At any rate, even if the appellant in this case had been invited to attend voluntarily but had simply not been willing to do so, there is no evidence that there was any legal process commanding his attendance that he was in default of. As our earlier review demonstrates, a bench warrant is normally issued (whether pursuant to statutory authority or on the basis of inherent jurisdiction) only where there is default in responding to a summons to attend court, or a court order (e.g., a remand upon recognizances) requiring an appearance before the court on a certain date and at a certain time and place. It is potentially problematic that in the case of a s.19(2) application, the DPP may not be able to point to a default on the part of the subject person in responding to a summons, or to non-compliance with a court order requiring his/her appearance, such as would normally justify the issuance of a bench warrant. That was the position here, and accordingly a bench warrant does not immediately suggest itself to us as having been the appropriate option to be availed of. This problem might or might not have been insurmountable in circumstances where the person concerned was potentially in peril of imprisonment, and his attendance was required in the interests of respecting his rights and ensuring that he was afforded due process and fair procedures –however in circumstances where we have not received arguments directed to these issues, we can express no view at this time.
>
> 67. At this point it is appropriate to consider whether the alternative option might have been more readily availed of, i.e., the possibility of securing the subject person's attendance by order for attachment (in personam). The first thing to be said is that a motion seeking an order for attachment may be sought both in civil and in criminal contempt proceedings. While a motion seeking an order of attachment (and/or committal) is the invariable way in which proceedings for civil

> contempt are commenced, it is also possible to seek the relief in criminal contempt proceedings on foot of a similar motion. Where it is done in the latter context some procedural adaptation and drafting modifications may be required. The Notices of Motion in both instances will seek to attach the person in question to show cause why they should not be committed to prison for contempt, although in the case of civil contempt it will likely be worded "should not be committed to prison until such time as you purge your contempt for (the specified act or failure)", or similar; and in the case of criminal contempt "should not be found to have been in contempt of court for (the specified act or failure) and committed to prison for such period as the court may determine in accordance with law in punishment of such contempt", or similar.
>
> 68. We think that it would have been open in principle to the High Court judge on foot of the DPP's Notice of Motion dated the 15th of October 2019, seeking (inter alia)"an order for the attachment of the respondent" (i.e., the respondent to the motion, the appellant in this appeal) to have issued an order so as to have the appellant brought before the court to show cause as to why he should not be found to have been in contempt of court for failing to comply with the confiscation order in this case and committed to prison in punishment of such contempt for such period as the court might determine in accordance with law. There might, had the court given serious consideration to the attachment option, have been room for argument in the circumstances of this case as to the adequacy of the drafting of the actual Notice of Motion in question, and the evidence in support of it. But it is academic in circumstances where the court below opted instead to issue a bench warrant. What we can say is that, assuming the said Notice of Motion were to be regarded as adequate, and further assuming that appropriate evidence had been presented in support of it, it would in principle have been open to the court to have made an order for the appellant's attachment (in personam).
>
> 69. Moreover, in our view this was the preferable of the two options, as it did not require any demonstration that the appellant was in default of a process that had commanded his attendance before the court. Unfortunately, it was not the option that was availed of by the High Court judge.

24. Consequently, in allowing the appeal of the accused against the issuance of a bench warrant, the Court of Appeal stated:

> 70. In circumstance where it had not been demonstrated that the appellant was in default of a process that had commanded his attendance before the court, we are not satisfied that the decision of the High Court judge to issue a bench warrant for the arrest of the appellant to secure his attendance before the court in the context of an application under s 19(2) of the Act of 1994 was appropriate in the circumstances of this case. We will therefore allow the appeal.
>
> 71. In doing so, we wish to make clear that the DPP remains at liberty to bring a fresh and appropriately drafted Notice of Motion in the existing s 19(2) proceedings, or in any further such proceedings, seeking the attachment of the appellant so as to have the appellant brought before the High Court to show cause as to why he should not be found to have been in contempt of court for failing to comply with the confiscation order in the case and committed to prison in

punishment of such contempt for such period as the court might determine in accordance with law.

Notice

25. The case resolves on a simple question of notice. Fundamental to the disposal of a case where the result is that a person is charged with an obligation arising at law in consequence of a decision by a judge is that this person should be given the opportunity to present to the court the point of view as to fact and law held by them; then a judicial assessment as to whether the case pleaded is made out or should be rejected becomes possible. Fairness demands that both sides be heard before a final and binding decision of a court is made. To this there are exceptions; as where an interim injunction may be granted on a limited basis to secure the subject matter of a dispute for a necessarily limited time so that the final order of the court is not overtaken by accomplished fact, or where the law enables consequences to preserve a situation for such short period as may be necessary until both parties may be heard. As to criminal proceedings, *Kelly: The Irish Constitution* (5th edition) states from 6.5.63:

> The presence of the accused during trial may be an element of a trial in due course of law, but it is not an absolute requirement…. [6.5.64] There is, however, no absolute rule – provided that the essentials of justice are observed – prescribing the presence of the accused throughout the trial. Thus, in *The People (Director of Public Prosecutions) v Kelly* [1983] IR 1 the defendant, who had absconded on the forty-first day of his trial, after giving direct evidence but before being cross-examined, was convicted and sentenced in his absence. Where a summary trial takes place in the District Court, a summons stating the complaint having been served on the defendant, then, 'if he disregards the requirement of attendance, [he] may be tried in his absence: see r 64 of the [District Court] Rules of 1948': per Henchy J in *Director of Public Prosecutions v Gill* [1980] IR 263.
>
> [6.5.65] In *Lawlor v Hogan* [1993] ILRM 606, the applicant had been charged with robbery before the District Court and consented to summary trial. He did not, however, turn up at his trial, but was there represented by a solicitor who conducted the proceedings on his behalf. The applicant claimed that his conviction was invalidated by reason of his absence and Murphy J [at 610] took the opportunity to articulate three general propositions:
>
> > '(1) That in so far as the judicial process in criminal matters expressly requires matters to be dealt with by or in relation to the individual accused, clearly he must be present to enable those functions to be performed.
> >
> > (2) The right of an accused to be present and to follow the proceedings against him is a fundamental right of the accused which every court would be bound to protect and vindicate.
> >
> > (3) If a trial judge is satisfied that the accused has consciously decided to absent himself from the trial (at a time when his presence is not essential to enable some particular procedure to be complied with) then the trial judge would be entitled in his discretion to proceed with the trial in the absence of the accused.'
>
> [7.4.154] … Where an accused is absent from criminal proceedings without explanation to the court, the judge must be satisfied that the accused was actually

> aware of the proceedings before imposing any sentence of imprisonment; *Brennan v Windle* [2003] 3 IR 494. While an accused should generally not be sentenced in his absence, a sentence of imprisonment may be imposed *in absentia* where the accused has consciously decided to absent himself from the trial; *DPP v Kelly*…

26. The point of bail, whereby someone is remanded in a non-custodial situation on a promise to appear in court on a given date or from time-to-time when notified, subject to conditions, is to secure attendance. Failure to appear is a criminal offence; Criminal Justice Act 1984 s 13. The normal situation is that every step during proceedings addresses not only the court but the party whose interests may be affected by a judicial decision.

27. What the 1994 Act states on this matter is not strictly necessary to the legislative scheme, since it is already implied by law, but the repetition of procedural rights within legislation may underline the duty of fairness. In that regard, provisions as to notice within the legislation not only enforce an existing right but also demonstrate by stating what is necessary that such steps are adequate in terms of upholding a right. Hence, there is nothing clearer than what is stated in s 19(3) that an order of imprisonment for default of collection of what is confiscated "shall not be made unless the defendant has been given a reasonable opportunity to make any representations to the court that the order should not be made". That is the limit of what is needed: notice to the accused in order that thereby representations as to whatever may be relevant to that side of the case (that all the money has been spent and the accused had no other realisable funds or assets with which to pay the confiscation order, that funds will take time to be unravelled from fixed assets or foreign investments, are examples) be put forward. The legislation does not say that the accused must be present. There is nothing in the process that is redolent of the necessity of the accused's presence.

28. It may be noted as well that the scheme of this enactment extends to a situation where an accused is dead but has left a confiscation order unsatisfied and to a court faced with an order against a person who has either escaped from prison or has received a suspended or conditional sentence and then absconded. The duty to give notice remains the same where someone has absconded, though in different terms, as where, as here, a prison term has been served and the accused has decided not to come to court for this part of the process. Where a person has absconded, a court may not make an order unless there is the equivalent of notice. In that instance, since a person is gone, they may not be served, but nonetheless an obligation remains. Since s 13 provides a necessary context, it should be quoted:

> (1) Subsection (2) of this section applies where a person has been convicted on indictment of one or more offences.
>
> (2) If the Director of Public Prosecutions asks it to proceed under this section, the High Court may exercise the powers of a court under section 4 or section 9 of this Act, in the case respectively of a conviction for a drug trafficking offence or a conviction for an offence other than a drug trafficking offence, to make a confiscation order against the defendant if satisfied that the defendant has died or absconded.
>
> (3) Subsection (4) of this section applies where proceedings for one or more offences in respect of which a confiscation order may be made under this Act have been instituted against a person but have not been concluded.

> (4) If the Director of Public Prosecutions asks it to proceed under this section, the High Court may exercise the powers of a court under section 4 or section 9 of this Act, where the relevant proceedings have been instituted respectively in respect of a drug trafficking offence or an offence other than a drug trafficking offence, to make a confiscation order against the defendant if satisfied that the defendant has absconded.
>
> (5) The power conferred by subsection (4) of this section may not be exercised at any time before the end of the period of two years beginning with the date which is, in the opinion of the court, the date on which the defendant absconded save where it appears to the High Court that it would be reasonable in the circumstances.
>
> (6) In any proceedings on an application under this section—
>
> > (a) sections 5 (2), 10 (3) and 10 (4) of this Act shall not apply,
> >
> > (b) the court shall not make a confiscation order against a person who has absconded unless it is satisfied that the Director of Public Prosecutions has taken reasonable steps to contact him, and
> >
> > (c) any person appearing to the court to be likely to be affected by the making of a confiscation order by the court shall be entitled to appear before the court and make representations.

29. No more than reasonable steps are needed to contact an accused who has absconded where it has already been demonstrated that he or she has made themselves absent. Similarly, if property is held jointly, a notice obligation is implied in the entitlement of a person affected. An accused does not have to be physically present for the hearing of a case of this kind if a solicitor has been instructed. The Act is self-contained and provides expressly that he must have the opportunity to make representations; s 19(3). That exhausts any requirement of fairness and, furthermore, is quite inconsistent with the contention that the High Court must always direct an accused's attendance for the hearing.

30. Under the European Convention on Human Rights as well as under the Constitution, the right of an accused to be present in the court where potential conviction and consequent penalty are being decided is a component of Article 6 of the convention, one inescapably bound up with the entitlement to defend a charge and to instruct counsel; *Sejdovic v Italy* (Application no 56581/00) 1 March 2006, *Medenica v Switzerland* – (Application no 20491/92). What is required is the exercise of due diligence in making the accused aware of the nature of the proceedings; *Colozza v Italy*, (Application no. 9024/80); *MTB v Turkey*, (Application no. 47081/06). A hearing under European criminal law may be held in the accused's absence if he or she has waived the right to be present at the hearing; see *Spetsializirana prokuratura* Case C-569/2020 of 19 May 2022. What is required is that an accused have effective knowledge of the proceedings against him or her; *Yeğer v Turkey* (Application no. 4099/12). A court cannot be impeded from ever hearing a case because an accused exercises knowing abstention. The consequence would be that court lists may be atrophied, evidence may be dispersed, or witnesses may be rendered less certain in recollection; miscarriage of justice due to delay always being a possibility that must be guarded against. Of itself, holding a hearing in the accused's absence does not infringe the constitutional guarantee of a trial in due course of law once sufficient notice has been given. These principles have been confirmed in Irish law through the exercise of

the surrender provisions of the European Arrest Warrant Act 2003. Section 45 thereof provides that a person is not to be surrendered if:

> (a) he or she was not present when he or she was tried for and convicted of the offence specified in the European arrest warrant, and
>
> (b) (i) he or she was not notified of the time when, and place at which, he or she would be tried for the offence, or
>
> (ii) he or she was not permitted to attend the trial in respect of the offence concerned,
>
> unless the issuing judicial authority gives an undertaking in writing that the person will, upon being surrendered—
>
> (i) be retried for that offence or be given the opportunity of a retrial in respect of that offence,
>
> (ii) be notified of the time when, and place at which any retrial in respect of the offence concerned will take place, and
>
> (iii) be permitted to be present when any such retrial takes place.

31. This is not a codification of the rights of trial in a wider context of European law but an example of a system of rights that is not necessarily closed. Article 4a of the Framework Decision and Article 6 of the Convention permit *in absentia* trials, including the surrender of persons convicted in such trials, in circumstances other than those set out in section 45: see Case C 416/20 *PPU TR* and Joined Cases C-514/21 and C-515/21, *LU & PH* (Case and C-569/20, *IR* as examples. Further, these principles are affirmed in the several cases where this Court has affirmed the propriety of surrender; *The Minister for Justice and Equality v Slawomir Wiktur Palonka* [2022] IESC 6, *The Minister for Justice and Equality v Marius Bogdan Zarnescu* [2020] IESC 59, *The Minister for Justice and Equality v Ferenc Horvath* [2017] IESC 15. Apart from severe disruption of the trial process, an accused in Irish law who answers to bail is entitled to be present throughout. That carries the entitlement to be notified but does not specify or imply any higher entitlement under this legislation.

Bench warrant

32. If an accused fails to appear personally or through counsel, or indeed if the judge considering a decision to send him to prison wants that accused there in court, the clear intention of the Oireachtas was to continue the inherent powers enjoyed by a criminal court: that is the only consequence one can attach to the direction that the criminal proceedings continue until the confiscation order is paid; s 3(16)(f). In addition, that is confirmed by the statutory definitions as to when a case commences. While the answer to the first issue is dispositive of the appeal, the reality must be that in the future the High Court will be faced with a situation where there has been default on a very large amount whereby the confiscation order term of imprisonment for non-payment may zone into the potential 10-year category. In those circumstances, a judge may well regard the presence of solicitor and counsel as not obviating the need to ensure the presence of the accused, if only to be certain that whatever instructions set out in affidavit and whatever the changing circumstances are as to the state of argument or possibilities of payment are backed up by the physical presence of the person who may be about to be imprisoned. In *Dunphy v Judge Crowley* (Supreme Court, unreported, 17 February 1997) this Court decided that a summons in respect of Road Traffic Act offences was a personal one and in default of appearance

by the accused that, even though a solicitor was present, a bench warrant might issue. This conclusion was based on the interpretation of the relevant legislation, the effect of which, Blayney J concluded, was to impose such an obligation to attend. Blayney J, however, cautioned against easy resort to this measure, stating at 15-16:

> It is hardly necessary to point out that it is unlikely that there will be many occasions on which a District Court judge will think it necessary to order the arrest of a defendant who fails to attend in obedience to the summons. There are two alternative options open to the Court. Firstly, under r. 64 subr. (2) of the District Court Rules the judge may proceed to hear and determine the complaint [in the absence of the defendant], and secondly, if there are good grounds for adjourning the case, an order to that effect may be made. Most cases where a defendant does not attend will normally fall to be dealt with in either of those two ways. But if the Court, in the exercise of its discretion, considers that a warrant should issue for the arrest of the defendant, there is clear jurisdiction under r. 40 to make such an order.

33. In the absence of relevant provisions in the Rules of the Superior Courts, the jurisdiction to direct an arrest must be considered inherent. The motion here was, it seems, issued on that basis. From [39] to [48] of the Court of Appeal Judgment in this case, Edwards J presents an analysis of bench warrant powers, their origin and usage, set in the context of criminal proceedings. Prior to this case, in *Stephens v Governor Castlerea Prison* [2002] IEHC 169, the High Court had considered whether a court of trial exercising criminal jurisdiction could issue a bench warrant. The point here is that the Oireachtas, in the legislative scheme outlined above, and even apart from any observations in *Welch v. The United Kingdom*, decided to enable the judge in the High Court in enforcement of the confiscation order to exercise such a jurisdiction. It is plain that that was the intention. In *Stephens*, Finlay Geoghegan J, analysed what such powers consisted of, concluding that requiring the presence of an accused was an inherent instrument of justice whereby a judge could issue a warrant:

> The jurisdiction of the District Court to issue a bench warrant is not based on [Order 22 of the Rules of the District Court] 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 where at p. 193 he stated: -
>
> > 'If a defendant, duly summoned, does not appear, I think he can be arrested on a bench warrant issued by the Circuit Court Judge. 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). 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.'

Davitt P. in *The State (Attorney General) v. Judge Fawsitt* [1955] I.R. 39 at p. 52 considered that the above 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.'

I would respectfully agree with the above statements of principle. Order 22 is not, in my view, intended to limit such inherent jurisdiction. Hence, I consider that a District Judge having issued a bench warrant under 0. 22, r. 2 which includes a reference to both an extraditable and non-extraditable offence has an inherent jurisdiction to issue a warrant referring only to the extraditable offence, upon being informed that the accused may be in another country. If he did not he would have no way of compelling the attendance of an accused to face trial for an extraditable offence. Accordingly, I conclude that District Judge O'Sullivan did have jurisdiction on 21st July, 1999 to issue a warrant for the arrest of the applicant referring only to the criminal damage charge. Further that any defects in the recitals to the warrant issued are not of such fundamental nature on the particular facts of this case to justify a finding of illegality of the current detention of the applicant.

34. It might be commented that this case was in the nature of a *Dunphy v Crowley* situation where the legislation or nature of the case imposed an obligation to attend. By contrast there is nothing in the 1994 Act whereby that obligation is imposed upon an accused. The Court of Appeal was urged that a lesser form of interference with the right to liberty of the accused would be appropriate, that of attachment for the purpose of committal. There are three reasons why this inventive proposition from the accused is wrong. Firstly, a bench warrant power should be exercised where it is necessary to do so and not arbitrarily. This constitutes a sufficient safeguard of the rights of the accused. No judge is going to issue a bench warrant without sufficient reason whereby the interests of justice may be secured through the presence of the accused. The entitlement to notice suffices. Secondly, it being clear from the statutory analysis above that the intention of the Oireachtas was that the High Court be empowered as if a criminal case were being conducted, it has not been argued that civil powers of attachment and committal are available. The choice for the legislature was as between one or the other and that choice has been made in clear terms: the powers of the criminal judge are continued into the High Court application. Thirdly, it is not at all certain that attachment and committal are less intrusive of the rights of the subject of same.

35. Order 44 Rule 1 of the Rules of the Superior Courts makes attachment available "to answer the contempt in respect of which the order is issued". Appendix F form 11 is that to be used. This commands "the Commissioner and members of the Garda Síochána . . . to attach the said CD [the accused in this case] so as to have him before the High Court . . . there to answer for the contempt which by reason of such default he has committed". Committal, under Order 44 Rule 2 is a direction that "upon his arrest the person against whom the order is directed shall be lodged in prison until he purge his contempt" and

form 12 makes the nature of that even more starkly apparent in terms of being "guilty of contempt".

36. What, it might be asked, is the suggested contempt in the present case? The answer suggested by the Court of Appeal's judgment would be: non-payment of the confiscation order. But it must be remembered that this order was made in another court. This enforces the analysis that this characterisation of the s 19 jurisdiction conferred on the High Court, was not correct. It is clear that it is a *sui generis* statutory procedure which cannot be equated with criminal contempt. Further, the s 19 process is not a determination of a criminal contempt. This perhaps brought into play the identification by the Court of Appeal of a constitutional issue as to 19(2); see [63] of the judgment. This issue was based on the idea that the High Court was enforcing through criminal contempt the prior orders of the Circuit Criminal Court. The statutory procedure, however, is one which does not set up a criminal contempt. Instead, that procedure defines, in itself, what is to be done. The accused was given notice that he might make representations. That is what he set about doing. Where is the order of the High Court that the accused did not obey? No order was made, only an arrest order on the application of the DPP. On what basis can this jurisdiction be exercised save, as in the usual way in High Court civil proceedings, that of an order being bespoken and having inscribed the consequences of non-obedience thereto in red ink along the side in explicit terms? That was not done here. Instead, it seems, an originating notice of motion to start the proceedings under the 1994 Act was issued, presumably under Order 136 Rule 17, whereby notification took place in accordance with the legislation. To that the accused responded. There was no disobedience of any court order in the accused deciding simply to be represented legally and not to appear personally. That was precisely what the legislation contemplated. No contempt was committed thereby, nor could it have been. In contrast to such cases as *Dunphy v Crowley*, it could not be said that there was personal obligation to attend imposed by either the rules of court or by the legislation.

Delay

37. In any legal system, there is a point at which delay will begin to make the administration of justice more difficult. An unusual feature of the 1994 Act, in contrast to the legislation considered by the European Court of Human Rights in *Welch v. The United Kingdom* is in the transfer of enforcement to the High Court. Arguably the legislative motivation was from a desire to provide demonstrably fair procedures. In moving from one court jurisdiction to another, the tendency may be that delay threatens. And that is what occurred here: but undesirably. If the process had been proceeded with more speedily and closer to the sentencing phase, the availability of the accused and attention to the consequences of non-compliance would have remained in focus. Hence, the whole question of securing attendance would scarcely have arisen because the making of the confiscation order and any default and consequential imprisonment would all have occurred at a time when in all likelihood the defendant was in custody. The fact that the 1994 Act transfers enforcement to the High Court may have been prompted by a desire to ensure a separate hearing and consideration before a prison term was triggered for default, but that should not mean that the process should be delayed, since that delay inevitably creates additional problems of enforcement such as arise in this case .

Result

38. The accused was entitled to notice under the process whereby default in the payment of a confiscation order might result in imprisonment under the Criminal Justice Act 1994.

Having such notice, this was not a personal summons to appear. Hence, he could answer the process through instructing counsel and, in due course, through presenting evidence in the appropriate way. Whether that was effective or not was a matter for him.

39. In terms of law the High Court was close to being correct in the interpretation of this novel procedure. The foregoing analysis is that the High Court had jurisdiction to issue a bench warrant, under its jurisdictional powers that were continued under the 1994 Act. But such a warrant, while possible, was not necessary in this case. The High Court judge was correct that the jurisdiction to issue a warrant existed but, in error, did not consider or address whether it was necessary to exercise that jurisdiction in the context of these particular circumstances. If that matter had been addressed and it had been concluded that it was necessary to have the accused before the court before any additional term of imprisonment for default was imposed, the High Court could have issued the warrant. Since this is within a discretionary analysis, an appellate court would have been slow to interfere.

40. Hence, the bench warrant should be set aside on the precise ground that Coffey J in the High Court did not consider if it was necessary to issue it; and, further, as a matter of law it was not necessary since this procedure could have validly been considered in the accused's absence. On this narrow ground, which departs from the reasoning of the Court of Appeal, the appeal of the DPP should be dismissed.