THE COURT OF APPEAL

Record Number: 2021/248

McCarthy J.
Kennedy J.
Donnelly J.

Neutral Citation No: [2023] IECA 36

IN THE MATTER OF AN ENQUIRY PURSUANT TO ARTICLE 40.4.2° OF THE CONSTITUTION

BETWEEN/

C (A MINOR)

APPLICANT/RESPONDENT

AND

THE GOVERNOR OF OBERSTOWN CHILDREN DETENTION CAMPUS

RESPONDENT/APPELLANT

JUDGMENT delivered on the 26th day of January 2023 by Ms. Justice Isobel Kennedy.

1. This is an appeal brought by the Governor of Oberstown Children Detention Campus against the order of the High Court (Heslin J.) of the 22nd September 2021, directing the release of the respondent pursuant to Article 40.4.2 of the Constitution. I am satisfied that there was no error in the decision of the High Court for reasons which will become clear in this judgment.

Background

2. On the 21st September 2021, the respondent pleaded guilty to several offences before Trim District Court and was sentenced to four months' detention at Oberstown Children Detention Campus. The District Court fixed recognisance in the respondent's own bond of €25 and an independent surety of €300 with €150 cash to be lodged. The requirement to lodge €150 cash is the issue in this appeal.

3. On the 22nd September 2021, the respondent challenged the legality of his detention pursuant to A.40.4.2 of the Constitution on the basis that the requirement for the independent surety to lodge €150 in cash was precluded by virtue of s. 5(4) of the Bail Act 1997, as amended, (hereafter 'the 1997 Act'). It was argued that the District Court had no power to fix recognisance relating to a juvenile offender which included the requirement that an adult independent surety lodge a sum in cash. The High Court (Heslin J.) agreed with the submission and directed the release of the respondent.

4. The respondent has appealed his sentence which was listed for the 8th November 2022 in Trim Circuit Court. Two grounds of appeal were filed but the appellant relies only on ground 1:

> *"The learned Trial Judge erred in law in finding that the District Court had no power in fixing terms of appeal bail relating to a juvenile which included a requirement that an adult independent surety lodge cash."*

5. The appellant will not seek the reincarceration of the respondent if successful.

The *Lough Swilly* Jurisprudence

6. Initially, three issues arose in this appeal: 1. Whether a court can impose sureties on children, however, it is accepted by the parties that the real issue concerns the condition requiring a lodgement of a *portion* of the independent surety. 2. Whether the appeal is moot and 3. Whether the Director is precluded from making arguments as a result of the *Lough Swilly Shellfish Growers Co-Operative Society Ltd v Bradley & Ivers* [2013] 1 IR 227 case.

7. However, as the appeal progressed, the issue of mootness substantially fell away in that, while the appellant acknowledged that the case is moot, the argument was made that the issue has such systemic importance and relevance that the Court should entertain it. In that regard, the respondent contended that it is a matter for this Court to assess whether the high threshold for entertaining a moot appeal has been met but accepted that the issue to be resolved has systemic importance.

8. I am satisfied to determine the substantive issue as the decision of the High Court has the potential to impact on the jurisdiction of the District Court as to whether or not to impose a requirement for monies to be paid into court pending appeal in the case of juveniles. This decision may have an impact on many criminal cases before the District Court and, as it is mandatory to fix recognisance pending appeal in terms of Order 101, Rule 4 of the District Court Rules, it is a matter which will regularly fall for consideration by the District Court.

9. This judgment is primarily confined to the substantive issue and to a lesser degree the impact of the *Lough Swilly* line of jurisprudence.

Submissions of the Appellant

10. The appellant relies on the "ancient and most fundamental" jurisdiction of a court to grant bail citing *Maguire v DPP* [2004] 3 IR 241. Section 31 of the Criminal Procedure Act, 1967

(as amended) governs the release of a person who is in garda custody on station bail by the Gardaí with or without sureties. Section 68 of the Children Act, 2001 (as amended by s. 21 of the Criminal Justice Act, 2007) provides for the admittance of a child to station bail by the Gardaí and the taking of a recognisance. Section 68 of the 2001 Act also explicitly provides for cash lodgements being taken and transmitted to court and s. 22 of the 1967 Act empowers a court to remand an accused (child or adult) on bail with sureties where remanding an accused on bail or sending him forward for trial. This section does not apply to recognisances pending appeal.

11. Order 101, Rule 4 sets out the position concerning recognisances pending appeal. The appellant relies on *Croake v Coughlan* [2017] IECA 65, in which Hogan J. accepted that the power to require sureties emanated from the District Court Rules.

12. Section 5 of the 1997 Act initially introduced a requirement that when granting bail, one third of the amount would have to be lodged in cash. Subsection (2) provides for a surety to be accepted in lieu. Section 33 of the Courts and Courts Officers Act, 2002 Act gave a discretion to courts to require the one-third lodgement (or a greater sum). Section 89 of the Children Act, 2001 inserted subsection (4) which removed the obligation in relation to children as follows **"this section shall not apply in relation to a person under the age of 18 years."**

13. While the respondent argues that the effect of s. 5(4) of the 1997 Act is such that the court cannot require a surety to lodge a portion of an independent surety in the case of a child, the appellant submits that this argument is based on the premise that s. 5 of the 1997 Act provides the basis upon which a court can require a cash lodgement and sureties. However, it is the appellant's position that this power derives from the common law and further, that s. 5 does not amount to a codification on the law of cash and sureties in relation to bail as, if it did, then bail could not be granted to a child accused at all.

14. In this regard, the appellant cites *O'Connor v McDonnell* [2002] IEHC 97 which concerned a District Court Judge who had held that s. 5(4) prohibited him from considering bail at all for a child. Ó'Caiomh J held that the District Court enjoyed this jurisdiction and granted an order of *mandamus* compelling the District Court to consider bail stating:

> *"This was a new provision in the bail law enacted in 1997 and the fact that it does not apply to minors by virtue of the Act of 2001 is such that the District Court is not deprived of jurisdiction to admit a minor to bail but is absolved from the application to any such application of the provisions of s. 5 of the Bail Act."*

15. *Butenas v Governor of Cloverhill Prison* [2008] 4 IR 189 is similarly relied on. This case concerned whether s. 16(4) of the European Arrest Warrant Act, 2003 which requires the High Court to commit a person to prison where an order of surrender is made, ousted the jurisdiction of a court to grant bail. Murray CJ held that the jurisdiction to grant bail had not been ousted, stating "…*if the Oireachtas had intended to oust the inherent jurisdiction of the High Court to grant bail in all cases where an order for surrender has been made,*

irrespective of the circumstances, it would have explicitly and unambiguously done so…" It is similarly submitted by the appellant herein that had the Oireachtas intended to abolish the power of the District Court to require cash and sureties for children accused it would have explicitly done so. It is noted that the 2001 Act disapplied s. 5 of the 1997 Act to children, however, s. 68 of the same Act explicitly provides for sureties and cash in lieu with station bail. The appellant submits that, reading the Act as a whole, it is clear there was no such intention as contended for by the respondent.

16. In summary, the appellant submits that the trial judge erred in directing the release of the respondent as the power to require a surety and a cash lodgement derives from the common law and not from s. 5 of the 1997 Act. It is the appellant's position that s. 5 of the Act simply provides for the lodgement of one third cash at the discretion of the court and the mechanism for sureties in lieu and therefore, has no application to the respondent.

Submissions of the Respondent

17. The respondent emphasises that the central issue for this Court is the interpretation of s. 89 of the Children Act, 2001 which inserted s. 5(4) into the 1997 Act. This provision, it is said had the effect of disapplying s. 5 of the 1997 Act to children.

18. The nub of the arguments made are twofold, firstly; was there ever a common law power to require a cash lodgement of a percentage or portion of an independent surety in addition to granting bail and requiring an independent surety, in the case of children? and secondly, if there was such a power, did it survive the enactment of s. 5(4) of the 1997 Act?

19. It is the respondent's position that the ordinary and natural meaning of s. 5 of the 1997 Act is sufficiently clear so as to make the application of the recognised canons of interpretation unnecessary. Failing that, the respondent relies on the principle that should there be an ambiguity in a penal statute dealing with issues of personal liberty, then any such ambiguity should ordinarily be resolved in favour of the accused. A number of cases are cited in support of both of these propositions, including the more recent case of *DPP (Murphy) v Joseph Cullen* [2021] IEHC 135.

20. It is submitted that the ordinary and natural meaning of s. 5(4) of the 1997 Act disapplies s. 5 of the Act to juveniles. Further, it is pointed out that the heading of s. 89 of the 2001 Act reads: 'Non-application of section 5 of the Bail Act 1997.'

21. Whilst the appellant argues on foot of the respondent's submission that bail could never be granted to a child if s. 5 represented a codification of the law on sureties and cash lodgements, the respondent submits that in the passage quoted by the appellant supra, Ó'Caoimh J makes it clear that bail can still be granted to children.

22. It is the respondent's position that s. 5 did not confer the jurisdiction to grant bail or to require a surety **but provided the basis for imposing the separate requirement of paying money into court.** The respondent says that the appellant's argument overlooks

this important distinction. It is submitted that in the case of adults, this section allows a court to impose a requirement for a surety and a separate requirement for cash and s. 5(4), then, makes it clear that this power is not available in the case of children.

23. In response to the appellant's core argument that the power to require a surety and cash derives from the common law and not from s. 5 of the 1997 Act, the respondent submits that this requires an acceptance of the idea that the Oireachtas legislated in vain and enacted a statute for no purpose.

24. In response to the appellant's submission that "had the Oireachtas intended to abolish the power of the District Court to require cash and sureties for children accused it would have explicitly done so", the respondent submits that s. 5(4) is an explicit abolishment of the power of the District Court to require cash and sureties for children accused.

25. *Kadri v Governor of Wheatfield Prison* [2012] IESC 27 clarifies that where the fundamental issue of the right to liberty is at stake, whatever the applicant's merits, he is entitled to rely on a literal interpretation of the statute.

26. Before proceeding to consider the substantive issues which I believe are properly stated by the respondent and referred to at para. 17 above, I will briefly address the issue of new arguments on appeal.

New Arguments on Appeal

27. On the issue of entertaining a new point on appeal which was not argued in the court below; the Director says that the respondent is bound by the concession in the High Court by the Director that the failure to file a notice of appeal did not have an impact on the case before the High Court, whereas this issue appeared as a ground of appeal amounting to a *volte-face* on the part of the appellant. This ground is not being pursued on appeal, however, the approach adopted by the Director on appeal differs somewhat to that argued in the court below where it was submitted that the court could read s. 5 in light of s. 68 of the Children Act, 2001 and that the age referred to in s. 5(4) was actually that of the surety. These points are not pursued on appeal.

28. The respondent cites *Moylist v Doheny* [2016] 2 IR 283 and the more recent judgment of *The People (DPP) v Philip O'Brien* [2021] IECA 290 in which case this Court would not allow the DPP to argue a point on appeal which had been specifically disavowed in the High Court. It is said that the issue in the present case is on all fours with *O'Brien* and lies at the extreme end of the continuum described in *Lough Swilly* and should not be permitted.

Decision on this Issue

29. As a general principle, the Court will not entertain a point which has not been argued in the court below; see *KD v MC* [1985] IR 697. It is argued by the appellant that the points argued on appeal differ only slightly from the arguments in the High Court. Moreover, the evidence remains the same and so this is a case which falls at the point on the spectrum where the arguments on appeal may to be permitted. O'Donnell J. (as he then was) in *Lough Swilly* said at para. 27:-

"There is a spectrum of cases in which a new issue is sought to be argued on appeal. At one extreme lie cases such as those where argument of the point would necessarily involve new evidence, and with a consequent effect on the evidence already given (as in K.D. (otherwise C.) v M.C. for example); or where a party seeks to make an argument which was actually abandoned in the High Court (as in Movie News Ltd. v Galway County Council;; or, for example where a party sought to make an argument which was diametrically opposed to that which had been advanced in the High Court and on the basis of which the High Court case had been argued, and perhaps evidence adduced. In such cases leave would not be granted to argue a new point of appeal. At the other end of the continuum lie cases where a new formulation of argument was made in relation to a point advanced in the High Court, or where new materials were submitted, or perhaps ***where a new legal argument was sought to be advanced which was closely related to arguments already made in the High Court, or a refinement of them, and which was not in any way dependent upon the evidence adduced****. In such cases, while a Court might impose terms as to costs, the Court nevertheless retains the power in appropriate cases to permit the argument to be made." (emphasis added)*

30. I agree with the submission made on behalf of the Director, it seems to me that the main concern for the respondent related to the second ground of appeal, now abandoned and that the remaining arguments made before this Court are so closely related to the issues raised before the High Court that such arguments may be ventilated before this Court.

The Substantive Issue

31. The issue before me is a net one – can a court order the payment of a portion of any monies into court when fixing recognisances where the accused who is seeking to appeal is a juvenile?

The Relevant Statutory Provisions

32. The relevant portions of s. 5 of the Bail Act 1997, as amended, provide: -

"(1) Where a court admits a person who is in custody to bail the court may, having regard to the circumstances of the case, including the means of the person and the nature of the offence in relation to which the person is in custody, order that the person shall not be released until—

(a) an amount equal to one third, or

(b) such greater amount as the court may determine,

of any moneys to be paid into court under a recognisance entered into by a person in connection therewith has been paid into court by the person.

(2) (a) Where a Court requires payment of moneys into Court by a person or any surety as a condition of a recognisance, it may accept as security, in lieu of such payment, any instrument that it considers to be adequate evidence of the title of a person to property (other than land or any estate, right or interest in or over land.)"

(b) [ ]

(i) [ ]

(ii) [ ]

(3) [ ]

(4) This section shall not apply in relation to a person under the age of 18 years.

(5) [ ] "

33. Section 5 of the 1997 Act was amended by s. 33 of the Courts and Courts Officers Act, 2002 which provided a discretion to courts to require a one-third lodgement and, s. 89 of the Children Act, 2001 inserted subsection 5(4) which subsection disapplied the section insofar as persons under the age of 18 are concerned. Whilst the Children Act predates the Courts and Courts Officers Act, in fact, the 2002 Act commenced first. Therefore, the discretionary element of s. 5 was introduced prior to s. 5(4); the amendment which disapplied the section to children.

The Jurisdiction to Grant Bail

34. There is no doubt but that a court's jurisdiction to grant bail is an ancient one. This is clear from an examination of texts and jurisprudence. The determination to grant bail is, of course, discretionary and the principles governing this determination are set down by the Constitution, the common law and by statute, specifically, the 1997 Act.

35. Blackstone's *Commentaries on the Laws of England* Book III (5th ed, Dublin, 1773) provides at page 290:-

"When the defendant is regularly arrested, he must either go to prison, for safe custody; or put in special bail to the sheriff. For, the intent of the arrest being only to compel an appearance in court at the return of the writ, that purpose is equally answered, whether the sheriff detains his person or takes sufficient security for his appearance, called bail (from the French word, bailler, to deliver) because the defendant is bailed, or delivered, to his sureties, upon their giving security for his appearance; and is supposed to continue in their friendly custody instead of going to gaol. The method of putting in bail to the sheriff is by entering into a bond or obligation, with one or more sureties (not fictitious persons, as in the former case of common bail, but real, substantial, responsible bondsmen) to insure the defendant's appearance at the return of the writ; which obligation is called the bail bond."

36. Further, Blackstone's *Commentaries on the Laws of England* Book IV (5th ed, Dublin, 1773) provides at page 294:-

> *"Upon a principle familiar to which, the Athenian magistrates, when they took a solemn oath, never to keep a citizen in bonds that could give three sureties of the same quality with himself, did it with an exception to such as had embezzled the public money or been guilty of treasonable practices. What the nature of bail is, hath been shown in the preceding book; a delivery, or bailment, of a person to his sureties, upon their giving (together with himself) sufficient security for his appearance: he being supposed to continue in their friendly custody, instead of going to gaol. In civil cases we have seen that every defendant is bailable; but in criminal matters it is otherwise. Let us therefore enquire, in what cases the party accused ought, or ought not, to be admitted to bail.*
>
> *And, first, to refuse or delay to bail any person bailable, is an offence against the liberty of the subject, in any magistrate, by the common law; as well as by the statute Westm 1. 3 Edw I. C.15. and the habeas corpus act, 31 Car. II. C. 2. And lest the intention of the law should be frustrated by the justices requiring bail to a greater amount than the nature of the case demands, it is expressly declared by statute 1. W. & M. st. 2. c. 1. That excessive bail ought not to be required: though what bail shall be called excessive, must be left to the courts, on considering the circumstances of the case, to determine."*

37. And at page 295:-

> *"Bail may be taken either in court, or in some particular cases by the sheriff, coroner, or other magistrate; but most usually by the justices of the peace. Regularly, in all offences either against the common law or act of parliament, that are below felony, the offender ought to be admitted to bail, unless it be prohibited by some special act of parliament. In order therefore more precisely to ascertain what offences are bailable.*
>
> *Let us next see who may not be admitted to bail, or, what offences are not bailable. And here I shall not consider any one of those cases in which bail is ousted by statute, from prisoners convicted of particular offences; for then such imprisonment without bail is part of their sentence and punishment. But, where the imprisonment is only for safe custody before the conviction, and not for punishment afterwards, in such cases bail is ousted or taken away, wherever the offence is of a very enormous nature: for then the public is entitled to demand nothing less than the highest security that can be given; the body of the accused, in order to ensure that justice shall be done upon him, if guilty. Such persons therefore, as the author of the mirror observes, have no other sureties but the four walls of the prison. By the antient common law, before and since the conquest, all felonies were bailable, till murder was excepted by statute: so that persons might be admitted to bail before conviction almost in every case. But the statute Westm. I. 3 Edw. I. c. I5. takes away the power of bailing in treason, and in divers instances of felony."*

38. Ryan and Magee on *The Irish Criminal Process* (Dublin, 1983) provides at page 177:-

> *"The concept of admitting persons to bail has an ancient pedigree. The word 'bail' itself derives from the old French verb bailler meaning to take charge of, and in earlier times, when the State was less centralised and sophisticated than it is today, it was considered desirable to release accused persons into the custody of others who would have a vested financial interest in ensuring that they would present themselves for trial at a specified future date. Not only did the admission of persons to bail satisfy the inviolable axiom of the criminal law that a man be presumed innocent until proved otherwise but, at a more pragmatic level, it relieved the immediate community of the burden of having to maintain accused persons in custody until their trial."*

39. In *The People (Attorney General) v O'Callaghan* [1966] IR 501, Walsh J. observed at page 511 that:-

> *"The jurisdiction of the Courts to grant bail to accused persons has existed from the earliest times and has been stated to be 'as old as the law of England itself (see Stephen's History of the Criminal Law, vol. 1, at page 233).'"*

40. In *Re the Criminal Law (Jurisdiction) Bill 1975* [1977] IR 129, it was stated at page 154:-

> *"What is termed a right to bail is not a constitutional right but a recognition by the Courts that a person presumed to be innocent shall not have his liberty interfered with unnecessarily pending his trial on a criminal charge. It is subject to the paramount requirement that he shall be available to stand his trial."*

41. And then in *The People (DPP) v Maguire* [2004] 3 IR 241 at para 10 Hardiman J. said:-

> *"In considering a bail application, the courts are exercising one of their most ancient and most fundamental jurisdictions."*

42. Having analysed Blackstone's *Commentaries on the Laws of England*, he said at para. 11:-

> *"It is therefore clear that the jurisdiction to grant bail is an ancient one, exercised in classical times and in the earliest period of the common law for which there is any surviving evidence. It is scarcely surprising that the early modern statutory references cluster in the later 17th century: the Stuart monarchs had effectively used the denial of bail as a form of internment. Thus, the English Habeas Corpus Act and still more notably the Bill of Rights of 1688, both of which were declaratory of the common law, provided that excessive bail should not be required."*

43. The above case law and commentary clearly demonstrates the ancient nature of the jurisdiction to grant bail and its link with the equally historic fundamental principle of the presumption of innocence. It is undoubtedly the case that the common law jurisdiction of the court to grant bail pre-dates any statute conferring or modifying such jurisdiction. The

broad nature of this jurisdiction is noted by Blackstone; *"though what bail shall be called excessive, must be left to the courts, on considering the circumstances of the case, to determine."*

44. I am satisfied that there is a broad common law power vested in a court to determine issues relating to bail, which includes the power to nominate an appropriate figure and any conditions necessary to secure the attendance of the detainee at trial. However, aspects of that common law power are now governed by statute following the enactment of the 1997 Act.

45. In that regard, the long title to the Act is instructive:

"AN ACT TO MAKE FURTHER PROVISION IN RELATION TO BAIL, TO AMEND THE CRIMINAL PROCEDURE ACT,1967, AND TO PROVIDE FOR RELATED MATTERS."

Thus, the 1997 Act makes further provision for bail, but the common law still has application.

Section 5 of the Bail Act 1997

46. I now turn to s. 5 of the 1997 Act, which provision is not at all complicated or elaborate in its wording. It is absolutely clear and unambiguous. Applying the first rule of statutory construction, the words may be given their plain and ordinary meaning.

47. Dodd on *Statutory Interpretation in Ireland* (1st ed, Dublin, 2008) at para 5.07 provides:-

> *"The literal approach arises from an oft-repeated logic: the fundamental object of all interpretation is to give effect to the intention of the legislature. The pre-eminent indicator of the legislature's intention is the text actually chosen by the legislature itself to indicate its intention. In construing the text chosen by the legislature, the first consideration is to give the words used their literal meaning. If that meaning is plain and unambiguous, the interpreter's task is at an end."*

48. The relevant subsection is that of s. 5(4) of the 1997 Act which provides: "This section shall not apply in relation to a person under the age of 18 years."

49. Construed literally, giving each of these words their ordinary and natural meaning, the subsection can be taken to mean that "this section" being section 5, the section pertaining to the "payment of moneys into court", does not apply to children. This meaning is plain and unambiguous and, therefore, it follows that the release of a child on bail cannot be made conditional on the payment of moneys into court pursuant to statute. I do not believe the respondent disagrees with this interpretation but rather argues that bail is a creature of the common law and that the 1997 Act did not codify the jurisdiction to grant or refuse bail, but simply added to it. It is said that s. 5 merely provides the mechanism whereby the payment of monies may be effected.

50. The 16th Amendment to the Constitution permitted a court to refuse bail in order to prevent the commission of further serious offences by an applicant, however, the 1997 Act also made other changes governing bail, which included the payment of monies into

court pursuant to s. 5 of the Act. The Act provides that a court may order that, before a person may be released on bail, a portion of the recognisance must be paid into court by any person or any surety as a condition of a recognisance.

51. This additional requirement, if ordered, means that before a person may be released on bail, an amount equal to 1/3 or such greater amount as a court may determine of the recognisance entered into by the individual or by any surety must be paid into court by virtue of s. 5 of the 1997 Act. Section 5(4) of the Act specifically disapplies this section to minors.

Does section 5(4) of the 1997 Act supersede any common law power regarding the lodgement of a *portion of a surety* insofar as juveniles are concerned?

52. Following the hearing of the within appeal, this Court was informed that the respondent wished to refer the Court to a judgment not opened at the hearing. This Court permitted the judgment to be lodged along with brief submissions from both parties. The judgment is that of McKechnie J.; *In re the Adoption Act 2010, s. 49(2) and in the matter J.B (a minor) and KB (a minor)* [2019] 1 IR 270 to which we will refer presently.

53. The jurisdiction to grant bail has deep common law roots, however, common law principles are not invulnerable to statutory enactment. The example used by Blackstone is the Statute of Westminster's removal of the power to grant bail in the instance of treason but there is a myriad of more contemporary examples; s. 24 of the Non-Fatal Offences Against the Person Act, 1997 abolished the common law rule in respect of immunity of teachers from criminal liability for punishing pupils and the common law defence of "reasonable chastisement" was removed by s. 28 of the Children First Act, 2015. In much the same way, it can be said that while the power to require a portion of the monies be lodged by an independent surety on behalf of a child in order to secure that child's release on bail may have existed at common law, it was subsequently removed by the enactment of s. 5(4) of the Bail Act 1997, as inserted by s. 89 of the Children Act 2001.

54. The judgment of O'Malley J in *The Director of Public Prosecutions (at the Suit of Garda Madden and Garda Hynes) v Jeffrey Carter* [2014] IEHC 179 is also instructive in this regard.

55. *Carter* concerned a consultative case stated relating to the operation of s. 99(9) of the Criminal Justice Act, 2006, as amended, which dealt with the activation of the suspended portion of a sentence where the terms of the suspension are breached. It provided, as follows:-

> *"Where a person to whom an order under subsection (1) applies is, during the period of suspension of the sentence concerned, convicted of an offence, the court before which proceedings for the offence were brought shall, after imposing sentence for that offence, remand the person in custody or on bail to the next sitting of the court that made the said order."*

56. The District Court judge imposed a sentence of four months on the defendant, the final three of which were suspended for a period of twelve months. The defendant

subsequently committed two offences for which he entered guilty pleas in the Circuit Court. At the sentence hearing, the Circuit Court judge, having regard to s. 99(9) of the 2006 Act, remanded the defendant to the District Court. The matter came back before the District Judge who found that the words "next sitting" required the defendant to be remanded to the very next day to any sitting of the District Court and consequently, the defendant was not properly remanded.

57. During the consultative case stated, the prosecution, relying on the cases of *The Director of Public Prosecutions (Ivers) v Murphy* [1999] 1 IR 98 and *Killeen v The Director of Public Prosecutions* [1997] 3 IR 218 argued that, notwithstanding the interpretation of the District Judge, s. 99(9) had no effect on the common law jurisdiction of the District Court to deal with a criminal matter when a person is brought before the court.

58. O'Malley J held that:-

> *"The question here is ultimately one of jurisdiction. The issue is not whether the defendant was properly brought before the District Court, but whether a lawful foundation had been laid for the exercise by the District Court of its powers under subs.(10) of the Act. It seems to me that this issue must be approached on the basis that the powers in relation to suspended sentences are now entirely governed by statute, and that the statutory power to revoke such a sentence under subs.(10) of the Act depends on a valid order having been made under subs. (9)."*

59. In *re the Adoption Act 2010, s. 49(2) and JB (a minor)* concerned a case stated where all members of the Supreme Court agreed on the answers to the questions posed, however, different views were expressed concerning a residual question; "the analysis and potential availability" of s. 92 of the Adoption Act, 2010. On this issue, O'Donnell J. (as he then was) and McKechnie J. dissented, taking the view that Article 42A.4.1A of the Constitution could not supersede the Act and the Hague Convention.

60. The Adoption Act, 1952 was amended from time to time including in 1991 and ultimately the law concerning adoption in this jurisdiction was consolidated in the Adoption Act, 2010.

61. The respondent refers to a portion of para. 92 in the addendum to the submissions, however, it is worthwhile expanding on the extract where McKechnie J. stated:

> *"……the provisions of s. 2(2) of the 1991 Act, and also because of a well-recognised and established principle of statutory interpretation, namely, that where the Oireachtas has intervened in any given area the subject matter thereof is thereafter dealt with on that basis in substitution for the previous common law principles."*

62. The extract continues:

> *"It will be recalled that when dealing with the 1991 Act earlier in this judgment ….I referred to ss. 2, 3, 4, 4A (inserted by the 1998 Act) and 5 as enlarging the*

common law basis on which foreign adoptions may be recognised in this State. The first such provision was s.2; subs. (2) of that section read as follows:-

"(2) This section and sections 3, 4 and 5 of this Act are in substitution for any rule of law providing for the recognition of adoptions effected outside the State.""

63. The 1991 Act was repealed by the 2010 Act but, as stated by McKechnie J., there is no provision in that Act which compares to s. 2(2) of the 1991 Act. However, in that regard he went on to say:-

"Even so, however, I am unaware of any rule of construction which by omission could reinstate a principle of the common law which has previously been repealed by way of express substitution."

64. The above case differs from the present case in that the particular provision of the 1991 Act was expressly stated to be in substitution for any rule of law regarding the recognition of adoptions outside the State, whereas there is no such express provision/s contained in the 1997 Act. The 2010 Act did not repeat the repeal of the common law effected by s. 2(2) of the 1991 Act, but that omission did not mean that the common law was reinstated.

65. It is clear that the Oireachtas has intervened in the area of bail by virtue of the 1997 Act, but the 1997 Act does not fully codify the law on bail. It introduced, amongst other matters, a new ground on which to refuse bail and it amended the existing common law; such as the payment of monies into court under s. 5 as a condition of recognisance.

66. Section 5 places the previous common law position concerning the payment of a portion of monies into court as a condition of recognisance on a statutory footing. However, it is expressly stated that the additional requirement of a portion of the surety to be lodged does not apply to minors. This does not mean that a court may not fix bail in respect of a minor, for example, an independent surety in the sum of €500 or cash in lieu, but a court may not require an additional condition that a portion of a surety be lodged in the case of a minor.

67. So, again, *In Re the Adoption Act*, while not directly on all fours with the present case, is instructive in terms of statutory interpretation.

Conclusion and Decision

68. The common law permits of broad powers concerning bail and the terms thereof, however, the payment of a portion of monies into court as a condition of release is now entirely governed by statute. Section 5 sets out that an additional requirement to lodge a portion of funds may be ordered, but s. 5(4) expressly states that this does not to apply to persons under the age of 18 years. The terms of the section disapplying such orders in respect of minors, and the common law power to so order in connection with minors did not survive the enactment of s. 5(4) of the 1997 Act.

69. Accordingly, I find no error in the order of the High Court and dismiss the appeal.