Neutral Citation [2015] IEHC 782

THE HIGH COURT

IN THE MATTER OF SECTION 52 OF THE COURTS (SUPPLEMENTAL PROVISIONS) ACT 1961

[2015 No. 312 SS]

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS
(AT THE SUIT OF GARDA GARY H. PURTILL)

PROSECUTOR

AND
JOHN MURRAY

DEFENDANT

JUDGMENT of Ms. Justice Iseult O'Malley delivered 11th day of December 2015.

Introduction
1. This is a consultative case stated by District Judge Constantine O'Leary pursuant to s.52 of the Courts (Supplemental Provisions) Act 1961.

2. The opinion of this court is sought on the following question:

> *"Did the power of the District Court at Common law to suspend sentences of imprisonment survive the enactment of Section 99 of the Criminal Justice Act 2006 as amended?"*

3. The section referred to, which has been the subject of extensive litigation and amendment, deals with suspended sentences. It is common case that it does not expressly abolish the common law powers of a court to impose such sentences, and the issue is whether those powers have survived its enactment or whether the jurisdiction must now be seen as deriving wholly from, or regulated wholly by, statute.

The consultative case stated
4. The consultative case stated, dated 19th February, 2015, reads in full as follows:

> *1. The defendant is accused of and has pleaded guilty to an offence that he did unlawfully have in his possession a controlled drug to wit, diamorphine, at Blarney Road, Cork, on 24 January 2014.*
>
> *2. I am minded to impose a penalty in the form of a sentence of imprisonment, to be suspended on his entering a bond in the sum of €500 conditioned on his keeping the peace for a period of 12 months.*
>
> *3. I am aware of the statutory provisions for the suspension of sentences under the provisions of Section 99 of the Criminal Justice Act 2006 as amended.*
>
> *4. I am aware of the views expressed by the High Court in the cases of Director of Public Prosecutions v Carter [2014] IEHC 179 and Director of Public Prosecutions v Vajeuskis [2014] IEHC 265 which I understand to mean that sentences may now be suspended only in accordance with the provisions of said Section 99.*
>
> *5. I am aware of the extensive discussion on the issue of whether suspended sentences at common law survived the enactment of S.99 of the Criminal Justice Act 2006 at pages 355-364 of the thesis submitted by Judge David Riordan of the Circuit Court entitled "The Role of the Community Service Order and the Suspended Sentence in Ireland: A Judicial Perspective", in pursuit of the degree of Doctor of Philosophy.*
>
> *6. I am uncertain of the present law given the succinct nature of the reasons given for the conclusions expressed in Director of Public Prosecutions v Carter [2014] IEHC 179 and in the Director of Public Prosecutions v Vajeuskis [2014] IEHC 265.*
>
> *7. The opinion of the High Court is respectfully sought on the following question.*
>
> > *"Did the power of the District Court at Common law to suspend sentences of imprisonment survive the enactment of Section 99 of the Criminal Justice Act 2006 as amended?"*

Preliminary issue
5. Counsel for the prosecutor, Mr. O'Malley BL, has raised an issue concerning the factual background to the case. He informed this court that, according to the garda report, the defendant was, at the time he appeared before the learned trial judge, subject to subsisting suspended sentences from the Circuit Court. Counsel submits that before imposing any sentence for the current offence, the judge was required, under the terms of section 99(9) of the Criminal Justice Act 2006, to remand the defendant to the Circuit Court so that a decision on the reactivation of the suspended sentences could be taken. Under the statutory scheme, that court would deal with those matters and then remand him back to the District Court to be sentenced for the current offence. Counsel submits that since none of this has happened in the present case, the point has not yet been reached where the judge has to decide on the sentence for the current offence.

6. *DPP (Madden and Hynes) v. Carter* [2015] IESC 20 is relied upon as authority for the strict requirement imposed by s.99 (9) to remand the defendant to the "*next sitting*" of the court that imposed the suspended sentence.

7. The court is referred to the Supreme Court decision of *DPP (Travers) v. Brennan* [1998] 4 I.R. 67 as to the procedure to be followed for a consultative case stated:

> *"The proper procedure leading to the stating of a consultative case for the opinion of the Superior Courts is for the District Judge to hear all the evidence relevant to the point of law arising, to find the facts relevant to such point of law in the light of such evidence, then to state the case posing the questions appropriate to elucidate the point of law and*

finally, on receiving the answers to those questions to decide the matter before him on the basis of those answers."

8. The prosecutor submits that it is not clear that the judge has heard all the evidence relevant to the selection of sentence, since he cannot as yet be aware of what will transpire in the Circuit Court.

Conclusion on the preliminary issue
9. The requirements of *DPP (Travers) v. Brennan* are met if the case stated sets out with sufficient particularity the facts giving rise to the question of law. The case stated in the instant case, albeit brief, does set out the matters considered by the learned District Judge to be relevant to the question. It is clear that he wishes to impose a suspended sentence in relation to a minor offence, and he asks whether he has power to do so without operating the s.99 procedures.

10. It does not appear to be open to the parties in a case stated procedure to supplement the facts as set out with oral submissions (or, indeed, affidavit evidence) as to those facts. Whether or not the trial judge can, in the light of the circumstances of the case, take any particular course is a separate matter to be ventilated before him.

The section
11. Section 99 of the Criminal Justice Act 2006 has, as already noted, been extensively amended since its original enactment. The following is an unofficially consolidated version.

12. Subsections (1) to (5) deal with the imposition of a suspended sentence and the conditions upon which it is to be based. The convicted person must enter into a recognisance. There are specified minimum terms as to the content of the order, coupled with a discretion to add further specified conditions.

(1) Where a person is sentenced to a term of imprisonment (other than a mandatory term of imprisonment) by a court in respect of an offence, that court may make an order suspending the execution of the sentence in whole or in part, subject to the person entering into a recognisance to comply with the conditions of, or imposed in relation to, the order.

(2) It shall be a condition of an order under subsection (1) that the person in respect of whom the order is made keep the peace and be of good behaviour during—

(a) the period of suspension of the sentence concerned, or

(b) in the case of an order that suspends the sentence in part only, the period of imprisonment and the period of suspension of the sentence concerned,

and that condition shall be specified in the order concerned.

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

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

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

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

(4) In addition to any condition imposed under subsection (3), the court may, when making an order under subsection (1) consisting of the suspension in part of a sentence of imprisonment or upon an application under subsection (6), impose any one or more of the following conditions in relation to that order or the order referred to in the said subsection (6), as the case may be:

(a) that the person co-operate with the probation and welfare service to the extent specified by the court for the purpose of his or her rehabilitation and the protection of the public;

(b) that the person undergo such—

(i) treatment for drug, alcohol or other substance addiction,

(ii) course of education, training or therapy,

(iii) psychological counselling or other treatment, as may be approved by the court;

(c) that the person be subject to the supervision of the probation and welfare service.

(5) A condition (other than a condition imposed, upon an application under subsection (6), after the making of the order concerned) imposed under subsection (4) shall be specified in the order concerned.

13. Subsections (6) and (7) provide for what is undoubtedly a new power – the matter may be re-entered during the currency of the suspension simply for the purpose of seeking the imposition of a new condition.

(6) A probation and welfare officer may, at any time before the expiration of a sentence of a court to which an order under subsection (1) consisting of the suspension of a sentence in part applies, apply to the court for the imposition of any of the conditions referred to in subsection (4) in relation to the order.

(7) Where a court makes an order under this section, it shall cause a copy of the order to be given to—

(a) the Garda Síochána, or

(b) in the case of an order consisting of the suspension of a sentence in part only, the governor of the prison to which the person is committed and the Garda Síochána.

14. Subsection (8) is intended to ensure that all relevant authorities are informed of the terms of the sentence.

(8) Where a court has made an order under subsection (1) and imposes conditions under subsection (4) upon an application under subsection (6), it shall cause a copy of the order and conditions to be given to—

(a) the probation and welfare service, and

(b) (i) the Garda Síochána, or

(ii) in the case of an order consisting of the suspension of a sentence in part only, the governor of the prison to which the person is committed and the Garda Síochána.

15. Subsections (9) to (12) inclusive deal with the process to be followed where a person is, during the currency of the suspension, convicted of another offence. They impose particular sequential obligations on the courts dealing with both offences. The original judge is given new discretionary powers in relation to the extent to which the suspended sentence must be activated.

(9) 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, being an offence committed after the making of the order under subsection (1), the court before which proceedings for the offence are brought shall, before 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.

(10) A court to which a person has been remanded under subsection (9) shall revoke the order under subsection (1) unless it considers that the revocation of that order would be unjust in all the circumstances of the case, and where the court revokes that order, the person shall be required to serve the entire of the sentence of imprisonment originally imposed by the court, or such part of the sentence as the court considers just having regard to all of the circumstances of the case, less any period of that sentence already served in prison and any period spent in custody other than a period spent in custody by the person in respect of an offence referred to in subsection (9) pending the revocation of the said order.

(10A) The court referred to in subsection (10) shall remand the person concerned in custody or on bail to the next sitting of the court referred to in subsection (9) for the purpose of that court imposing sentence on that person for the offence referred to in that subsection.

(11)(a) Where an order under subsection (1) is revoked under subsection (10), a sentence of imprisonment (other than a sentence consisting of imprisonment for life) imposed on the person concerned under subsection (10A) shall not commence until the expiration of any period of imprisonment required to be served by the person under subsection (10).

(b) This subsection shall not affect the operation of section 5 of the Criminal Justice Act 1951 [which deals with the aggregate term of consecutive sentences].

(12) Where an order under subsection (1) is revoked in accordance with this section, the person to whom the order applied may appeal against the revocation to such court as would have jurisdiction to hear an appeal against any conviction of, or sentence imposed on, a person for an offence by the court that revoked that order.

16. Subsections (13) to (18) deal with re-entry by the Gardaí, a prison governor or a probation and welfare officer on foot of a belief that the person has breached a condition of the sentence (other than the obligation not to re-offend). Previously, prison governors and probation officers would not have had a direct right to apply, but would have been confined to informing the prosecution authorities of the breach.

(13) Where a member of the Garda Síochána or, as the case may be, the governor of the prison to which a person was committed has reasonable grounds for believing that a person to whom an order under this section applies has contravened the condition referred to in subsection (2) he or she may apply to the court to fix a date for the hearing of an application for an order revoking the order under subsection (1).

(14) A probation and welfare officer may, if he or she has reasonable grounds for believing that a person to whom an order under subsection (1) applies has contravened a condition imposed under subsection (3) or (4), apply to the court to fix a date for the hearing of an application for an order revoking the order under subsection (1).

(15) Where the court fixes a date for the hearing of an application referred to in subsection (13) or (14), it shall, by notice in writing, so inform the person in respect of whom the application will be made, or where that person is in prison, the governor of the prison, and such notice shall require the person to appear before it, or require the said governor to produce the person before it, on the date so fixed and at such time as is specified in the notice.

(16) If a person who is not in prison fails to appear before the court in accordance with a requirement contained in a notice under subsection (15), the court may issue a warrant for the arrest of the person.

(17) A court shall, where it is satisfied that a person to whom an order under subsection (1) applies has contravened a condition of the order, revoke the order unless it considers that in all of the circumstances of the case it would be unjust to so do, and where the court revokes that order, the person shall be required to serve the entire of the sentence originally imposed by the court, or such part of the sentence as the court considers just having regard to all of the circumstances of the case, less any period of that sentence already served in prison and any period spent in custody pending the revocation of the said order.

(18) A notice under subsection (15) shall be addressed to the person concerned by name, and may be given to the

person in one of the following ways:

> *(a) by delivering it to the person;*
>
> *(b) by leaving it at the address at which the person ordinarily resides or, in a case in which an address for service has been furnished, at that address;*
>
> *(c) by sending it by post in a prepaid registered letter to the address at which the person ordinarily resides or, in a case in which an address for service has been furnished, to that address.*

17. Subsection (19) provides that the section does not affect the operation of statutory provisions relating to temporary release or to the provision for suspension, after a review, of the balance of a sentence imposed under s.15A of the Misuse of Drugs Act 1977.

18. Subsection (20) provides for the operation of consecutive sentences, where one of the sentences is part-suspended.

> *(20) Where a court imposes a sentence of a term of imprisonment that is to run consecutively to a sentence of a term of imprisonment the operation of a part of which is suspended, the first-mentioned sentence shall commence at the expiration of the part of the second-mentioned sentence the operation of which is not suspended.*

The suspended sentence at common law

19. The first comprehensive analysis of the Irish suspended sentence appears to be that by Professor Osborough in *A Damocles' Sword Guaranteed Irish* ((1982) 17 Irish Jurist 221). He finds that it evolved within the common law of Ireland, rather than England, with no record of its use before the early 20th century.

20. It is important to note that the pre-independence Irish magistrates and justices never had a power to suspend sentences, since they could not claim any "*inherent*" or non-statutory jurisdiction. Osborough cites Palles C.B. in *Quinn v. Pratt* [1908] 2 I.R. 69 –

> *"Magistrates have no power, either at common law or by virtue of their commission, to act in a matter of summary jurisdiction unless there is a statute giving them power to do so. Justices, as is well known, were not an institution known to the common law."*

21. Paley's *Law and Practice of Summary Convictions* (8th ed., 1904) is to the same effect, stating that

> *"[t]he powers of the convicting magistrate are confined, in general, to enforcing the punishment for the particular offence against which judgment has passed, the usual jurisdiction of the magistrate not enabling him to compel the offender to give security against a future breach of the law."*

22. However, it is clear that with the establishment of the Free State the new District Justices began to impose such sentences in the 1920s. Osborough refers to a number of examples.

23. The legal validity of such sentences was first confirmed by the Supreme Court in *In Re McIlhagga* (unrep., Supreme Court, 29th July 1971) where the Court said:

> *"The 'suspended' sentence has long been recognised in the Courts in Ireland as a valid and proper form of sentence… Under the usual form of 'suspended' sentence the condition of suspension is accepted by the accused and he or she undertakes to carry out the condition then and there e.g., enter a psychiatric hospital for treatment."*

24. Osborough's view was that the sentence was composed of five individual elements.

> *"The order is one warranting the imposition of (i)* ***a custodial sentence.*** *Attached is (ii)* ***an authority to suspend the execution of the sentence*** *for the duration of the prescribed probationary period. Suspension, in turn, is made conditional upon (iii) an* ***undertaking by the offender as to his future conduct.*** *Variation is permitted in the scope of the requisite undertaking but two conditions appear invariably to be insisted upon: (a) to 'keep the peace and be of good behaviour' (sometimes in more recent years restricted to 'to be of good behaviour' alone); and (b) 'to come up for judgment' if called upon to do so. The first condition incorporates the promise of real substance; the second additionally enshrines the procedural mechanism to which the prosecution is free to resort should the decision be taken to put the sentence into force. This undertaking is secured by (iv)* ***a requirement to lodge a money sum (or recognisance) as guarantee****; sometimes, independent or other sureties may also be sought. If the offender observes the terms of his undertaking for the prescribed period and so passes his 'test', the sentence is never put into force and its effect is extinguished (and the recognisance is returned). The order thus contains, finally,(v)* ***an inbuilt timed self-destruct element****."*

25. In Ryan & Magee, *The Irish Criminal Process* (Mercier Press, 1983), the authors note that the judges of Ireland had "*long assumed the power*" to suspend the operation of a prison sentence. After describing the type of order now known as a version of the "*part-suspended*" sentence, it is said that

> *"[t]he more usual order is to impose the sentence, often somewhat more severe than what would have been imposed as a 'custodial sentence', i.e. one to take effect immediately, and then to suspend its operation upon the offender entering into a recognisance, with or without sureties, to keep the peace and to be of good behaviour for a specified period, and further conditions may be imposed: if the offender is in breach of his recognisance then the sentence comes into full operation without any further order."*

26. A footnote to this passage states that no reported authority for the proposition could be found, but that it appeared to be "*generally accepted*".

27. A Law Reform Commission consultation paper on sentencing in 1993 described the sentence as follows:

> *"A suspended sentence is imposed by prescribing a custodial sentence and then suspending it on condition that the offender enters into a recognisance, with or without sureties, to keep the peace and be of good behaviour for a*

specified period. Further conditions may be imposed, at the court's discretion…"

28. The 1994 edition of *Woods District Court Practice and Procedure*, at p. 242, contains the following brief description:

> *"A District Judge has an inherent jurisdiction to suspend a sentence of imprisonment on such conditions as he shall think fit. In conformity with the fundamental principles of fair procedures and constitutional justice any such conditions should be fair and reasonable."*

29. In Walsh, *Criminal Procedure* (Round Hall, 2002), he describes the sentence as follows:

> *"The net effect of suspending a prison sentence is that time begins to run from the imposition of the sentence and if the offender does not do anything which results in another appearance before the court in a criminal matter the sentence will expire at the end of its specified term without the offender spending a day in prison. Typically the sentence of imprisonment will be suspended upon the offender entering into a recognisance, with or without sureties, to keep the peace and be of good behaviour for a specified period. Further conditions may also be added."*

30. In O'Malley, *Sentencing Law and Practice* (Thomson Roundhall, 2nd ed., 2006) the suspended sentence (pre-statute) was described as the imposition of a sentence followed by its suspension on conditions,

> *"…a common condition being that the offender enters into a bond to keep the peace and be of good behaviour for a defined period. Further conditions may be added in specific cases requiring, for example, that the offender undergo a course of treatment, stay away from a particular locality or refrain from making further contact with a victim."*

31. A notable feature of the common law jurisdiction was that if the offender was brought before the court for breach of a condition, the judge had a discretion not to activate the sentence only if the breach was trivial or *de minimus*. Otherwise, the sentence had to be imposed in its entirety – there was no power to vary it or to activate it only in part (see *People (DPP) v. Stewart*, unrep., CCA, 12th Jan. 2004).

32. Activation of a suspended sentence depended on the making of an application to the Court by the prosecution. The relevant District Court Rules provided that a warrant to enforce an activated sentence could not be issued more than six months from the expiry of the operational period of suspension.

Judge Riordan's thesis

33. The thesis referred to in the case stated is a fascinating piece of work, combining as it does a close analysis of the legal nature and derivation of suspended sentences with the practical knowledge of an experienced District (now Circuit) Judge. A full appreciation of the research carried out is not possible in this judgment but I consider it helpful to note the following aspects.

34. The suspended sentence is described in the following passage:

> *"Typically, the suspended sentence involves the imposition of a determinate sentence of imprisonment which the offender would be called upon to serve, if s/he is in breach of a number of conditions which may be recited in the order. The primary condition is that s/he does not re-offend within a prescribed period which is known as the operative period. On completion of the period of suspension or the operative period, if the convicted person has complied with his/her conditions, including if required his/her recognisance to keep the peace, s/he is discharged from all further liability under the penalty and is not liable for sentencing for any infractions outside of the operative period."*

35. Judge Riordan describes four variations of the suspended sentence. The first is the straightforward suspension of a sentence. The second is the reviewable sentence (also described as a "Butler order"), which was effectively held to be invalid for Constitutional reasons in *DPP v. Finn* (Unrep. 24th November, 2000, Keane C.J.). The third is the part-suspended sentence, where a custodial period is followed by a suspended portion. The fourth is a distinctive version which apparently is, or at any rate was, common in the District Court, whereby the accused is not required to enter into a bond. Rather, the judge records the custodial sentence, but stays the issue of the warrant of execution on condition that the accused is not convicted of another offence within a specified period of up to two years in duration. This latter procedure does not, it seems, require the consent of the accused, or at least not formally.

36. It is suggested by Judge Riordan that the suspended sentence serves one or more of five purposes:-

a) it is a means of avoiding an immediate custodial sentence;

b) it serves as a denunciation of the accused's behaviour;

c) it is a controlling and rehabilitative device;

d) it has a deterrent effect on the individual offender; and

e) it can serve as part of a crime prevention strategy focused on particular types of crime.

37. However, Judge Riordan considers that the search for a rationale remains inconclusive.

38. It is stated by the learned author that one of the most salient aspects of the system is the "*scant possibility*" that the accused will ever have to serve the sentence, even if in breach of the conditions. He refers to a widespread knowledge of this feature amongst accused persons, their legal advisors and the judiciary. This lack of enforcement appears to be laid at the door of the executive authorities, since the re-entry of the case before the court was their function.

39. Dealing with the impact of s.99, Judge Riordan draws a number of distinctions between the common law process and the statutory one. One is that the judges themselves are now obliged to re-enter cases for consideration of revocation. Referring to the statutory re-entry procedure, he comments that

> *"So comprehensive are the procedures it is likely that the fractured and ad-hoc procedures used to date to operate the common law suspended sentences will effectively wither and die and will be entirely replaced by the new statutory arrangement."*

40. He says that some of the judges surveyed are attached to the "*old system*" and may resist attempts to limit the practices developed under it.

41. The theory that the common law jurisdiction remains in existence is based on the fact that the legislature did not, as it might have, express a clear intention that all powers heretofore exercised were to be abolished, with the suspension of sentences to be regulated only by the statute. This is compared, by way of example, to the manner in which certain common law offences were abolished and replaced by the Non-Fatal Offences Against the Person Act 1997.

42. Examining the relevant principles of statutory interpretation, Judge Riordan says that there is a presumption against implied repeal or revocation of common law rights by statute, exemplified by *CW Shipping Ltd v. Limerick Harbour Commissioners* [1989] I.L.R.M. 416. He cites the commentary on this case in Hogan & Morgan *Administrative Law in Ireland* (Sweet and Maxwell, 2nd ed., 1991) as supporting the proposition that the courts will favour the survival of common law rights unless the Oireachtas employs clear statutory language to the contrary.

43. The following passage from Maxwell on the Interpretation of Statutes (12th ed.,1969) is cited:

> *"It is thought to be in the highest degree improbable that Parliament would depart from the general system of law without expressing its intention with irresistible clearness, and [to] give any such effect to general words merely because this would be their widest, usual, natural or literal meaning would be to place upon them a construction other than that which Parliament must be supposed to have intended."*

44. Bennion on *Statutory Interpretation* (2nd ed., 1992) is referred to for the proposition that the courts prefer to treat an Act as regulating, rather than replacing, a common law rule where this is appropriate.

45. Finally, reference is made to the situation in Northern Ireland. The practice of "recording" sentences (in a process with some similar features to the suspended sentence in this jurisdiction) survived the enactment of the Treatment of Offenders Act, 1968 until expressly abolished in 1989.

Submissions on behalf of the prosecutor
46. Mr. O'Malley refers to the High Court and Supreme Court judgments in the cases of *DPP (Madden and Hynes) v. Carter* [2014] IEHC 179; [2015] IESC 20 and *DPP (Cogavin) v. Vajeuskis* [2014] IEHC 265.

47. *Carter* concerned the obligation under s. 99(9) to remand the accused to "*the next sitting*" of the court that had imposed the suspended sentence, in order that the matter be dealt with under s. 99(10). I said (at para. 39):

> *"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)."*

48. In *Vajeuskis* Peart J. agreed with that comment and continued:

> *" Given my conclusion that the courts' jurisdiction to impose a suspended sentence, and in certain circumstances to revoke that suspension, and the relevant procedures in that regard, are now provided for by statute alone, the previous regime which was based on the common law is obsolete and replaced entirely by section 99 of the Act of 2006 and its amendments. Accordingly, it seems to me that the reliance which Mr O'Higgins has placed on certain dicta from cases pre-dating these enactments no longer have the relevance that they once did."*

49. *Vajeuskis* concerned a question as to the power of a District Judge to suspend a sentence of four months for a period of two years. Since the Act imposed no limitation as to the length of suspension, Peart J. concluded that no limitation could be implied by the court.

50. The decision of this court in *Carter* was upheld on appeal. However the following comments were made by O'Donnell J. in his concluding remarks:

> *"… I should, for completeness, say that this conclusion rests upon the assumption upon which the case was argued, that section 99 now replaces all common law power, and is the sole and statutory basis for both the imposition and the reactivation of suspended sentences. While the question of whether there remains a common law power to reactivate a suspended sentence which was not removed by the creation of the statutory jurisdiction under section 99, was touched on in this Court, it was not the subject of detailed argument in the High Court or on this appeal and accordingly I express no opinion thereon.*
>
> *However, it should be noted that this reasoning would not necessarily apply in the same way to a remand from a reactivating court under section 99(10) to the convicting court under section 99(10A). That court is exercising its power to impose sentence in respect of a matter properly before it. The jurisdiction to do so comes from its jurisdiction to try the offence. Trial, adjudication and sentence are normally indivisible parts of the administration of justice. Accordingly the power to impose a sentence does not appear to be created or conferred by section 99(10A), or dependent upon it, and that section at best merely provides a mechanism to secure the individual's attendance before the court. That however does not arise in this case…"*

51. Mr. O'Malley submits that one possible reading of the first paragraph in this passage would suggest that the Supreme Court accepted that the power to *suspend* a sentence is now entirely covered by s.99 of the 2006 Act, while leaving open the question of whether there might still exist some common law power in relation to the *reactivation* of such a sentence. It is submitted that if this is the correct reading, it would in any event clearly answer the question posed in the present case stated which relates only to the common law power to *suspend* a sentence.

52. However, the primary submission is that the section has implicitly abolished the common law powers.

53. Reference is made to the test for the implied repeal of legislation as set out in *West Ham (Church Warden and Overseers) v. Fourth City Mutual Building Society* [1892] 1 Q.B. 654, where Smith J. said (at p.658):

> *"The test of whether there has been a repeal by implication by subsequent legislation is this: Are the provisions of a*

later Act so inconsistent with, or repugnant to, the provisions of an earlier Act that the two cannot stand together?"

54. This test was quoted with approval by Henchy J in *DPP v. Grey* [1986] I.R. 317.

55. Mr. O'Malley suggests that this test needs to be adapted where the issue concerns a judicially-created power. Parliament should not readily be taken to have impliedly repealed a statute, but a somewhat less stringent test may be appropriate to issues such as the one under consideration.

56. By reference to the authority of *People (DPP) v. Mc Donagh* [1996] 2 I.L.R.M. 468, Mr. O'Malley has put some material relating to the legislative and parliamentary history of the section before the Court, as an aid to discovering the legislative intent. The material is not extensive, but it is worth noting the views of the then Minister for Justice, Equality and Law Reform as communicated to the Select Committee on Justice, Equality, Defence and Women's Rights on the 11th May, 2006, and to the Seanad on the 30th June, 2006.

57. On the former occasion the Minister said:

> *"First, the proposals provide a statutory basis for suspending and partly suspending sentences. At present, there are some difficulties in this regard."*

58. Speaking to the Seanad, the Minister said:

> *"There are four main elements to this Part. First, the power of the courts to suspend all or part of a sentence is put on a statutory basis. Section 99 deals with this issue…"*

59. It is submitted that, ultimately, the question of whether s.99 of the 2006 Act implicitly repealed the former common law power must be determined by considering the section in its entirety. The contention is that the section, by the sheer extent of its detail and comprehensiveness, can only be interpreted as manifesting a definite legislative intent to create a statutory regime which would henceforth be the sole and exclusive basis for the imposition and reactivation of the suspended sentence. Certain of its provisions are clearly at variance with the arrangements as they applied at common law, such as the previously limited options available to the court in the event of a breach of a condition. It is submitted that these variations were deliberate, and that the subsequent amendments to the Act were made in order to copper fasten the system. It is further submitted that the legislature must be taken to have intended to cure the deficiency of the previous system in relation to bringing matters back before a court in the event of a breach.

60. Mr. O'Malley submits that this entire legislative effort would have been in vain if courts were to continue to exercise the common law power to impose suspended sentences. The case of *Nestor v. Murphy* [1979] I.R. 326 is relied upon for the proposition that the court should adopt a "*schematic or teleological approach*", examining the pattern and purpose of the Act. Looked at in this manner, it is clear from the terms of the section itself that it could not reasonably have been intended that the old system should co-exist with the new.

Submissions on behalf of the defendant

61. It is submitted by Ms. McGillicuddy BL on behalf of the defendant that s. 99 goes further than to merely restate the pre-existing common law. It was carefully drafted, and the omission of any reference to abolition of pre-existing powers must be taken to have been intentional. *Wedick v. Osmond & Son* [1935] I.R. 820 is cited for the proposition that "*clear and unmistakeable language*" would be required before a common law right is removed by legislation.

62. The question giving rise to the quotation relied upon from *Wedick v. Osmond & Son* was whether or not the right to prosecute as a common informer had been abolished by s.9(2) of the Criminal Justice (Administration) Act, 1924. The prosecutor argued that he was, in the language of the section, an unofficial person authorised by the law for the time being in force to bring a prosecution. That argument was accepted, with each of the three judges of the High Court describing a common informer as having a "*right*" to prosecute, which should not be found to have been abrogated in the absence of clear words or inconsistency with the statutory provision.

63. Ms. McGillicuddy also refers to *National Assistance Board v. Wilkinson* [1952] 2 Q.B. 648, where Lord Devlin said at 661:

> *"It is a well-established principle of construction that a statute is not to be taken as effecting a fundamental alteration in the general law unless it uses words that point unmistakably to that conclusion."*

64. In *National Assistance Board v. Wilkinson* it was held that the common law rule that a husband was not obliged to maintain a wife who deserted him was not affected by a statutory provision that, for the purposes of the Act, a man was liable to maintain his wife and children and a woman was liable to maintain her husband and children. The Court considered that the section did not create a new liability, and that its purpose was to relieve other relatives of a liability that had existed under older legislation.

65. Comparison is made with a number of other examples in the area of criminal law where the legislature expressly abolished certain common law doctrines – for example, the common law requirement that the unsworn evidence of a child be corroborated (s. 28 of the Criminal Evidence Act 1992); the distinction between felonies and misdemeanours (s.3 of the Criminal Law Act 1997) and the "*year and a day*" rule in murder cases (s. 38(2) of the Criminal Justice Act 1999).

66. The following passage is cited from *Bennion on Statutory Interpretation* (Lexis Nexis, 6th Ed., 2013) at p.741:

> *"It is a principle of legal policy that law should be altered deliberately rather than casually, and that Parliament should not change either common law or statute law by a sidewind, but only by measured and considered provisions. In the case of common law, or Acts embodying common law, the principle is somewhat stronger than in other cases. It is also stronger the more fundamental the change is."*

67. At p. 744 of that edition there is a statement that

> *"Alteration of the common law is presumed not to be intended unless this is made clear."*

68. Ms. McGillicuddy refers, as did Mr. O'Malley, to the judgment of Henchy J. in *DPP v. Grey*. She relies upon the following passage:

> *"It may be stated as a general rule that the courts lean against the repeal or exclusion of earlier statutory provisions by*

implication. The rationale underlying this approach is that a statutory provision, formally and solemnly enacted by Parliament, should not be deemed to have been abrogated or excluded, obliquely or indirectly or inadvertently, by a provision in a later statute, when that later statute contains no expression of an intention to abrogate or exclude the earlier provision. Modern statutes tend to be meticulous in indicating, usually in a special schedule, the earlier statutory provisions that are being repealed or amended."

69. Applying that test, it is submitted that an implied repeal or abrogation of an earlier law will be found only where there is an inconsistency or conflict between the earlier and later provisions which cannot be reconciled. The provisions of the common law regarding suspended sentences are not so inconsistent with or repugnant to the provisions of s. 99 that the two cannot stand together.

70. In *DPP v. Grey* the defendant had been charged with 18 offences under the betting regulations. By virtue of the relevant legislation, s. 78 of the Excise Management Act, 1827, such offences were punishable by a fixed mandatory penalty, with the judge having discretion only to mitigate downwards by not more than half of the fixed sum.

71. Section 8 of the Criminal Justice Act, 1951 provided that where a person convicted of one offence admitted his guilt in respect of another, the judge could take that other offence into consideration in determining sentence. The defendant would then not be liable to separate convictions and punishments.

72. The issue in the case was whether the District Judge was entitled, the defendant having pleaded guilty to one offence and admitted guilt in respect of the other 17, to take the latter into consideration. The defendant relied upon the fact that there was no express provision in the 1951 Act to suggest that the legislature had intended to exclude excise offences from its ambit. An alternative submission was made in relation to the principles applicable to implied repeal or amendment of the earlier statutory provisions by the 1951 Act.

73. Giving the judgment of the majority in the Supreme Court, Finlay C.J. accepted that s.8 had to be liberally construed in favour of the person on whom a penalty was being imposed in a criminal case. However, he considered that the section was applicable only where the sentencing judge had a genuine choice as to the penalty to be imposed. The power to mitigate did not confer a genuine discretion since it applied only where the penalty had been incurred – in other words, on conviction. In those circumstances it was not necessary that the legislature should have expressly excluded the benefit of s.8 from excise offences.

74. Finlay C.J. said that he did not, therefore, consider it necessary to rule on the alternative submission. He reserved the question whether the canon of construction as to implied repeal or amendment was applicable to criminal statutes, given the rule that such provisions must be strictly construed and, what he deemed to be the corollary of that rule, the principle that provisions alleviating the position of those charged with criminal offences must be liberally construed.

75. Henchy J., by contrast, saw the central question as being whether s. 78 of the 1827 Act had been impliedly repealed or made inoperative by s. 8 of the 1951 Act, and both the reference to the *West Ham* case and the passage cited above at paragraph 53 arise in that context. He concluded that the later provision did not render the earlier one inoperative, on the application of the maxim *generalia specialibus non derogant*.

76. It may be noted that McCarthy J., who dissented as to the result in the case because of what he saw as the plain meaning of s.8, observed that no authority had been referred to in which the principle that earlier statutes should not be held to have been indirectly affected by general words had been applied to criminal legislation. The proper principle to be applied to the latter was that the more lenient of two reasonable constructions must be given.

77. It is argued by Ms. McGillicuddy that the abolition of a common law power is a legislative function reserved to the Oireachtas under Article 15.2.1 of the Constitution. Clear words must be required before the courts could properly hold that well-established common law rights had been displaced or abolished. It is contended, therefore, that to find abolition by implication might involve the Court trespassing upon the legislative function.

78. It is submitted that there are some advantages in retaining the common law power to suspend sentences as in practice s.99 has proved to be cumbersome, and the retention of the common law power to suspend sentences is a useful supplement to the statutory provisions. Reliance on the common law does not, however, undermine the respect due to those provisions. Conflicts between the common law power to suspend sentences and the statutory power to suspend sentences can be avoided if for example a court makes it clear whether the sentence is being suspended under the statutory provisions or under the common law.

Authorities on statutory provisions and inherent jurisdiction

79. It seems to be clear that the pre-2006 suspended sentence was a creation of the Irish judiciary. In my view it should be seen as emanating from the inherent jurisdiction of a court seised of a criminal offence to select, in its discretion, an appropriate sentence for the person convicted. However, that jurisdiction is, obviously, to be exercised in accordance with law.

80. A number of recent authorities demonstrate that matters within the inherent jurisdiction of a court are amenable to regulation by the Oireachtas, or indeed ouster of the jurisdiction, where such alteration does not fall foul of Constitutional principles.

81. In *Brennan v. Windle* [2003] 3 I.R. 494, the applicant had been convicted of an offence in his absence. He claimed that he had not received the summons. The relevant provision of the Courts of Justice Act, 1991 provided that service of a summons could be deemed good "*upon proof*" of specified steps having been taken. There was no evidence before the court in the judicial review proceedings that those steps had been proved in the District Court. The respondents attempted to rely upon the principle that a court order, regular on its face, created a presumption that the proceedings which led to it were in order.

82. This argument was rejected by the Supreme Court, which held that the presumption was displaced by the statutory provision. Hardiman J. said:

"That specific provision requires proof of certain matters. If, that proof having failed, the person who had sought to rely on the subsection could fall back on a more general presumption, the statutory requirement of proof would be rendered entirely meaningless. Expressio unius exclusio alterius : the specific provision introduced in aid of the prosecution, has replaced the common law in this area.."

83. In *G.McG. v. D.W. (No.2) (Joinder of Attorney General)* [2000] 4 I.R. 1, the issue under consideration by the Supreme Court was whether or not the Attorney General could be joined as a party in High Court proceedings after judgment in the case had been

delivered. (The purpose of the application was so that the Attorney General could appeal the substantive High Court ruling in a case involving the recognition of a foreign divorce.)

84. A section in the relevant family law statute governing the case provided that the High Court judge had the power to order that notice of the proceedings be given to the Attorney General. If the Attorney applied to be joined, the application had to be granted. If the court requested the Attorney, whether as a party or not, to argue a particular issue, the Attorney was obliged to comply. A declaration made in the case would be binding on the State only if the Attorney General was a party.

85. Part of the argument concerned the contention on behalf of the Attorney General that the court had an inherent jurisdiction to join him as a party. Dealing with this issue Murray J. said:

> *"The concept of inherent jurisdiction necessarily depends on a distinction between jurisdiction that is expressly attributed to the courts by law and those that a court possess implicitly whether owing to the very nature of its judicial function or its constitutional role in the administration of justice. The interaction between the express jurisdiction of the courts and their inherent jurisdiction will depend in each case according to the scope of the express jurisdiction, whether its source is common law, legislative or constitutional, and the ambit of the inherent jurisdiction which is being invoked. Inherent jurisdiction by its nature only arises in the absence of the express…*
>
> *…Where the jurisdiction of the courts is expressly and completely delineated by statute law it must, at least as a general rule, exclude the exercise by the courts of some other or more extensive jurisdiction of an implied or inherent nature. To hold otherwise would undermine the normative value of the law and create uncertainty concerning the scope of judicial function and finality of court orders. It may indeed be otherwise where a fundamental principle of constitutional stature is invoked against a statutory or regulatory measure determining jurisdiction, but that is not the case here."*

86. Referring to the role given to the Attorney General by the relevant statutory provisions, Murray J. said that they represented "*conscious choices of the Oireachtas in the enactment of the legislation in question*". In the circumstances, neither the High Court nor the Supreme Court could attribute to itself a further inherent jurisdiction going beyond the scope of the Act.

87. These observations were followed in *Mavior v. Zerko Ltd* [2013] 3 I.R. 268, where, in a case concerning the jurisdiction to order security for costs, Clarke J. said:

> *"It seems to me that what Murray J. cautioned against in the passages cited was the creation of parallel jurisdictions for resolving much the same area of controversy, founded on, on the one hand, existing law and, on the other hand, an asserted inherent jurisdiction. As Murray J. pointed out, to attempt to invoke an inherent jurisdiction of the courts so as to go beyond delineation specified, in a constitutionally permissible way, in a statute, would be for the courts to trespass on the legislative role of the Oireachtas. If, in a constitutionally permissible way, the Oireachtas have defined the limits of a particular jurisdiction then it is not for the courts to extend those limits by invoking a vague "inherent jurisdiction"…*
>
> *…It is not appropriate that such issues be addressed by the creation of a parallel "inherent jurisdiction". What would the point be of an elaborate analysis of the circumstances in which an order of the type under consideration in this case could be made under the Rules if it were possible to by-pass the Rules and the existing case law altogether by invoking a separate inherent jurisdiction…If it would not be appropriate, for whatever reason, to engage in revisiting the scope of the jurisdiction under the Rules then it does not seem to me that the same end can properly be achieved by using the backdoor of an alleged inherent jurisdiction."*

88. The same principles were applied by the Supreme Court in the recent case of *Re F.D.* (12th November 2015) [2015] IESC 83. This concerned a question raised as to whether the High Court had the power to sanction the creation of a trust to protect the property of a person lacking in mental capacity. The power contended for was said to arise in the exercise of the Court's *parens patriae* jurisdiction, outside of the provisions of the wardship legislation.

89. Giving the judgment of the Court, Laffoy J. referred to the judgments of Murray J. and Clarke J. quoted above. She continued at para. 32:

> *"On this appeal the issue is whether there exists, alongside the wardship jurisdiction expressly vested by statute in the High Court, an inherent jurisdiction, which exists outside the wardship jurisdiction, to enable and regulate the protection of the property of a person who may lack mental capacity. As was established with clarity by the decision of this Court in the D case, the current jurisdiction of the High Court in matters involving mental incapacity is the jurisdiction expressly vested in the High Court by the Oireachtas by virtue of subs. (1) of s. 9 of the Act of 1961 and exercisable in the manner stipulated in subs. (2) of that section. Neither the nature of the High Court's judicial function nor its constitutional role in the administration of justice, in my view, permits the recognition of an inherent jurisdiction in the High Court to make provision for the protection of persons with mental incapacity outside the wardship process by, for example, sanctioning the establishment of a trust to protect the assets of a person believed to be incapable of managing his or her own property affairs. The rationale underlying the judgment of Murray J. in GMcG v. DW and of Clarke J. in the Mavior case makes it clear why such recognition is not permissible. No fundamental principle of constitutional stature has been invoked to justify a different conclusion. The effect of a finding that such an inherent jurisdiction exists by this court would be, in the words of Clarke J., to "trespass on the legislative role of the Oireachtas"."*

90. There are also cases where the courts found that legislation did not entirely oust the common law jurisdiction. For example, in *Butenas v. Governor of Cloverhill Prison* [2008] IESC 9 (12th March, 2008), the Supreme Court considered a provision in the European Arrest Warrant Act, 2003 that required the High Court, when making an order for surrender, to also make an order committing the person concerned to prison "*there to remain pending his or her surrender*". The judgment of the court refers to the fundamental nature of the inherent jurisdiction to grant bail, and the necessity of such a power to safeguard the liberty of an unconvicted person and protect against an unnecessary or arbitrary loss of liberty. It concluded that the power to remand under the section was for ensuring that the person concerned was available for surrender when required, and that the section was at most declaratory of that purpose.

> *"The court is of the view that 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."*

91. In another bail-related case, *Roche v. Governor of Cloverhill Prison* [2014] IESC 53 the Supreme Court held that the provisions of the Bail Act 1997 did not constitute a complete code for purposes of all issues that might arise in respect of bail. Thus, the common law powers of a trial court seised with a criminal offence to revoke and estreat bail continued to exist.

Discussion and conclusions
92. It seems to me that the authorities cited in respect of the interpretation of statutes effecting changes in the common law must be looked at in the light of, firstly, the scepticism expressed by the majority of the Supreme Court in *DPP v Grey* as to their applicability to criminal statutes, and, secondly, the Supreme Court judgments cited above concerning statutory intervention in matters considered to be within the inherent jurisdiction of the courts.

93. In any event, I am not convinced that all of the authorities cited necessarily bear the weight placed upon them.

94. *CW Shipping* does not, on my reading of it, involve a presumption in relation to implied repeal or revocation. O'Hanlon J. held, in the first instance, that the owner of a tugboat did not come within a provision relating to the owner of "*a lighter, ferry-boat or other small boat*", so as to be required to take out a licence under the relevant Act. That decision was based on ordinary principles of statutory interpretation. He did go on to say that if a licence was required, it had been wrongly refused. An applicant for a licence must, he said, be entitled to certain minimum rights, and in particular to the benefit of the rules of natural and constitutional justice, in circumstances where the ordinary common law rights to use the waters of the harbour were being curtailed. He did not suggest that there was any presumption that the common law rights were not to be curtailed by the Act. In my view the case involved the application of normal principles of public law, not a presumption against alteration of the common law by statute.

95. The passages quoted above from Bennion are followed by the observation (at p. 744) that the presumption against alteration is weaker in the case of modern Acts. The paragraph continues in a way that casts serious doubt on its currency:

> *"The enormous output of legislation in the past two hundred years has meant that whole areas previously regulated by the common law are now the province of statute law, whether enacted by way of codification, development or replacement of common law rules.*
>
> *Judges still pay respect to 'our lady the common law'. Thus we can continue to find dicta like that of Lord Reid when he said that Parliament 'can be presumed not to have altered the common law farther than was necessary'. It is submitted that the better view is that earlier expressed by Lord Wright extra-judicially when he said that the principle that an Act of Parliament should be construed so as not to change the common law more than seemed unavoidable is now discredited."*

96. *Wedick v. Osmond & Son and National Assistance Board v. Wilkinson* are both cases where the common law rule in question was one which conferred a right on individuals – in the first instance, the right to prosecute as a common informer and, in the second, the right to rely on a spouse's desertion to defeat a claim for maintenance. It is, manifestly, appropriate that the courts would require legislative abrogation or curtailment of legal rights to be executed by clear language. Similar considerations arose in, for example, *Butenas*. However, the defendant has not identified any common law right of his, arising from the pre-2006 system of suspended sentences, which is in any way affected by the statutory provision.

97. Leaving aside the procedural requirements of s.99, which have undoubtedly created a number of problems for judges seeking to comply with them, the main changes brought about by the section are:-

> • the requirement to enter into a bond, which must contain an undertaking to be of good behaviour (I include this on the basis of the District Court practice described above, where a bond may not be required);
>
> • The right of re-entry by persons with supervisory responsibility for the conditions of the sentence;
>
> • The obligation of a judge to remand a matter back to the court which imposed the suspended sentence for consideration of activation; and
>
> • The power to determine whether the sentence should remain suspended, or should be activated in full, or should be activated only in part.

98. I do not see that a defendant had any "*right*", before 2006, to have a suspended sentence imposed without his or her formal consent as expressed by entry into the bond. Nor could it be said that the power of probation officers and prison governors to have the matter brought before the court in appropriate circumstances alters the legal position of defendants. They were always at risk of re-entry in the event of a breach, and making the re-entry procedures more efficient does not alter their legal position. Similarly, the obligation imposed on a judge to remand a defendant to the court that imposed a suspended sentence is obviously intended (however awkwardly it works in practice) to vindicate the authority of sentencing courts and ensure that their orders are enforced. Again, I cannot see that this amounts even to an alteration in the legal rights of a defendant. Finally, the discretion conferred in relation to the activation of suspended sentences is manifestly in the interests of the defendant rather than an abrogation of pre-existing rights.

Conclusion
99. Even after significant amendment, s.99 of the Act causes serious difficulties for the courts attempting to implement it – see "*Nine issues with Section Ninety-nine*" (Dwyer, *The Bar Review*, Nov. 2015). Many of the problems arise from the perhaps overly prescriptive approach to the procedures for revocation of suspension, but there may well also be as-yet-unidentified *lacunae*. However, in my view it is clear from the provisions of the section that the legislature's intention was to regulate the suspended sentence by putting it on a statutory footing. In so doing the objective was to provide a complete code in so far as the minimum conditions of suspension, the supervision of offenders, the enforcement powers of the court and the discretion in relation to activation are concerned. It is also important to note that the section does not in any way interfere with the objectives of the judiciary in relation to suspended sentences – the five purposes identified by Judge Riordan (described above) are as easily accommodated in the statutory scheme as they were under the previous regime.

100. In these circumstances there is no scope for a "*parallel jurisdiction*" to be operated outside the statute. I will therefore answer the question posed in the negative.