



THE COURT OF APPEAL

JUDICIAL REVIEW

Neutral Citation Number: [2018] IECA 381

Record Number: 2018/36

Edwards J.
McCarthy J.
Kennedy J.

BETWEEN/

MICHAEL COLLINS

APPELLANT

- AND -

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Ms. Justice Kennedy delivered on the 4th day of December 2018

1. This is an appeal by the appellant against the judgment and orders made in the High Court by Mr. Justice Barrett (hereinafter “the trial judge”) refusing orders of *certiorari* and declaratory relief in relation to orders of His Honour Judge Hickson at Wexford Circuit Court on the 9th December 2016. A number of grounds were put forward before the trial judge; including that the Circuit Court, in exercising its appellate jurisdiction, exceeded that jurisdiction by suspending a portion of the prison sentence imposed on the appellant for a period of five years. The appellant also contended that in suspending a portion of the sentence for a longer period than the actual term imposed, the Circuit Court failed to have regard to the issue of proportionality.

2. The facts are set out in the judgment of the trial judge delivered on the 21st December 2017 and this Court does not propose to rehearse them save to the extent necessary.

3. On the 1st February 2015, the appellant was found in possession of stolen power tools and two bicycles. The appellant was charged with three counts of handling stolen property contrary to s. 17 of the Criminal Justice (Theft and Fraud Offences) Act 2001, and on the 10th December 2015 following his guilty plea before the District Court, he was sentenced to an accumulative sentence of ten months’ imprisonment. The appellant appealed against the severity of the sentence and on the 9th December 2016, the final four months of that sentence were suspended for a period of five years and the appellant was disqualified from driving for a period of two years.

4. Whilst the appellant appeals the refusal of an order of *certiorari* to quash the sentence of ten months with the final four months suspended for a period of five years and the refusal of a declaratory order that such a sentence was in excess of jurisdiction, he does not appeal the refusal of an order of *certiorari* regarding the disqualification order.

5. It is contended on behalf of the appellant that the trial judge erred in finding that the sentence imposed was within the jurisdiction of the Circuit Court on appeal from the District Court and was proportionate in the manner that term is understood in *Heaney v. Ireland* [1996] 1 IR 580. It is contended that there must be some jurisdictional limitation in respect of the length of a suspended sentence which the District Court may impose having regard to the fact that the maximum aggregate sentence which the District Court may impose is two years’ imprisonment. The appellant contends that the length of the suspended period of the sentence is disproportionate and that the District Court and the Circuit Court on appeal ought to have regard to the jurisdictional limit on custodial sentences in order to give effect to the principle of proportionality and indeed this is the gravamen of his appeal.

6. The respondent opposes the application on all grounds.

The High Court judgment

7. The trial judge noted correctly that the power to suspend a sentence is governed by s. 99 of the Criminal Justice Act, 2006 (as amended). He referred to the decision of *DPP v. Murray* [2015] IEHC 782 and he observed that the determination of O’Malley J. in that decision was consistent with her judgment in the case of *DPP v. Carter* [2014] IEHC 179 which decision was upheld on appeal to the Supreme Court in *DPP v. Carter, DPP v. Kenny* [2015] IESC 20. Barrett J. in addressing s. 99 quoted from the *Murray* decision as follows:-

“...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...”

In these circumstance there is no scope for a “parallel jurisdiction” to be operated outside the statute.”

8. In considering the issue before him; that being as to whether there is jurisdiction pursuant to s. 99 to suspend a sentence for a

longer period than the actual sentence, Barrett J. had regard to the decision of Peart J. in *DPP v. Vajeuskis* [2014] IEHC 265. Barrett J. concluded, following his consideration of *Vajeuskis*, that the Circuit Court judge was not confined to suspending the sentence for a maximum period of two years and that the period of the suspension was not so disproportionate as to render it unfair, void, contrary to law or in excess of jurisdiction.

Grounds of Appeal

9. By notice of appeal dated the 31st January 2018, the appellant relies on six separate grounds to challenge the determination as follows: -

- (i) that the learned High Court judge erred in holding that the sentence of ten months with the final four months suspended for a period of five years was within the jurisdiction of the District Court;
- (ii) that the District Court must be limited in its jurisdiction to impose a suspended sentence and in particular must be limited in terms of the duration of the suspension period;
- (iii) that the learned judge erred in holding that the failure by the appellant's counsel to raise the issue that the Circuit Court on appeal was exceeding jurisdiction by suspending four months of the sentence for a period of five years was of any consequence or that it could serve to deny the appellant relief by reason of acquiescence;
- (iv) that the learned High Court Judge erred in law and ruled incorrectly by holding that suspending four months of the suspended sentence for a period of five years is not disproportionate and that this sentence was valid in law;
- (v) that the learned High Court judge erred in law by holding that there had been no failure to provide reasons for the imposition of the suspended sentence of four months for a period of five years; and
- (vi) in all the circumstances of the case the learned High Court Judge erred in holding the suspended sentence to be valid, within jurisdiction and not disproportionate.

10. The appellant submits that given the maximum sentences which can be imposed by the District Court and to which the Circuit Court on appeal is confined, the period for which a sentence is suspended cannot exceed the prescribed maximum or that at the very least a court should have regard to the prescribed maximum period in considering the issue of proportionality. It is further argued that there must be a limit to the jurisdiction of the District Court and the position adopted by the respondent, in failing to place any such limit on the period for which a sentence may be suspended, fails to respect the rights of the appellant and disregards the issue of proportionality.

11. The appellant relies upon the decision of *People (DPP) v. Hogan* (CCA, ex tempore judgment of the court delivered by Keane CJ, 4th March 2002.) The Court in considering a sentence of 3 years which was suspended for 5 years stated as follows:

"The court does not want to lay down any fast or hard rule in relation to this. It may be possible to envisage circumstances in which that is an appropriate course, namely, to suspend the sentence for a longer period than the sentence actually imposed. But it would need special circumstances because after all, a person who is the subject of a suspended sentence and then spends 3 years or whatever period it is without getting into any trouble of any sort with the law and takes the chance that he is being offered by the court and honours, as it were, that chance that he is being given, is entitled, in general terms, to have a line drawn under the matter at that stage. The court is not satisfied that, in general, it is a desirable practice to do what was done in this case and suspended for a longer period than the actual term imposed"

12. The foregoing reflects the common law position and the 2006 Act now governs the imposition of suspended sentences. It is properly accepted by the appellant that the decision in *Hogan* is not authority for the proposition that to suspend a sentence beyond the term imposed is unlawful. It is accepted that the 2006 Act does not provide for a temporal limitation on the suspended period.

13. The appellant seeks to distinguish his case from that of *DPP v. Vajeuskis* in that it is submitted that the issue of proportionality was only challenged at the activation stage in that case, whereas the appellant is challenging the matter at the stage the sentence was in fact imposed. This Court does not see that there is a distinction in this respect. However, Mr. Lynn S.C. on behalf of the appellant further argued that whilst the *Vajeuskis* decision is authority for the proposition that a District Court is not limited as regards the duration of the suspended sentence, he makes the point that the issue of proportionality and in particular by reference to the maximum sentence/s which may be imposed by the District Court was not considered in that particular decision.

14. The appellant submits that the duration of the period of suspension is far in excess of the custodial period and inadequate reasons were offered by the Circuit Court judge sufficient to amount to "special circumstances" in terms of *People (DPP) v. Hogan*.

15. The respondent contends that the decision in *Vajeuskis* is authority for the proposition that the sentencing judge was not confined to imposing a maximum two-year suspension and that the judge did not fail to provide adequate reasons for the length of the period of suspension and it is further argued that such period is not so disproportionate so as to render the matter unfair, void, contrary to law or in excess of jurisdiction. The respondent relies upon the decision in *DPP v. Vajeuskis* and also the decision of this Court in *Heaphy v. The Governor of Cork Prison* [2018] IECA 125.

The Circuit Court Hearing

16. This Court was furnished with an unofficial transcript prepared from the digital audio recording of the appellant's sentence hearing before His Honour Judge Hickson on the 1st and 9th December 2016. I have already referred in summary to the facts of the criminal prosecution underlying this appeal. Having heard the evidence on the 1st December 2016, the judge adjourned the matter for the imposition of sentence to the 9th December 2016 to enable the judge to consider the matter before him. On the 9th December 2016, in imposing sentence the judge noted that the appellant presented with a moderate risk of reoffending within a period of twelve months. Having outlined the appellant's personal circumstances, the judge went on to note that the receipt of stolen property was a huge temptation for the appellant and that the appellant was a significant player in the offloading of stolen property. The sentencing judge then suspended the final four months of the ten-month sentence for a period of five years upon the condition that the appellant enter into a bond to keep the peace and be of good behaviour and the bond being in the sum of €100. He then also proceeded to disqualify the appellant from driving which is not the subject of this appeal.

Findings of this Court

17. In the first instance it is imperative to recall the relevant provisions of s. 99 of the Criminal Justice Act 2006.

"99(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 sub section (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 a 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."

18. It is quite clear that s. 99 constitutes a comprehensive code governing all aspects of suspended sentences. Counsel for the appellant submits that where a sentence of ten months is imposed with the final four months of that sentence suspended for a period of five years, the sentence which is hanging over the appellant's head is fifteen times the length of the sentence itself and as a consequence this is disproportionate.

19. When one examines the provisions of s. 99 of the Act of 2006, there is no provision for any maximum period of time for which a sentence may be suspended and whilst the Oireachtas has amended s. 99 on two occasions, this remains the position.

20. In his judgment in *DPP v. Vajeuskis* at page 10 Peart J. states: -

"It follows also in my view in so far as it is relevant at all (but it may be helpful in general to say this), that Judge Hughes was not restricted as to the length of time for which he could suspend the sentence of four months which he imposed, and that it is not the law of this state that a sentence may not be suspended for any period longer than the sentence itself. The Act is silent in that regard and as to the maximum of length of any such suspension. That is what the Oireachtas has decided the law should be. In so far as any convicted person might consider that any sentence imposed and suspended is not a lawful and appropriate sentence, he/she must address that issue by way of appeal as to severity of sentence, or perhaps in an appropriate case by way of judicial review. But it is not appropriate to try and have the issue dealt with a part of the consideration as to whether it is unjust that the suspension should be revoked."

21. It is quite clear that, as Peart J. observed, the Act is entirely silent as regards the maximum length of any period of suspension.

22. Counsel for the appellant submitted that whilst a court of limited and local jurisdiction is not confined when suspending all or part of a sentence to limiting the period of suspension so that it equates with the term of the *actual* sentence, he argued there must be proportionality in the sense of *Heaney v. Ireland* and that when considering the issue of proportionality, the court should have regard to the maximum aggregate sentences that may be imposed by the court which in this instance is a maximum aggregate sentence of two years imprisonment. The key issue in this appeal therefore was more nuanced than that canvassed before the trial judge.

23. This Court is satisfied that there was no error on the part of the trial judge in coming to the same conclusion of Peart J. in the decision of *DPP v. Vajeuskis*, that whilst the District Court may not impose a sentence exceeding an aggregate period of two years, the Court is not limited by statute as regards the length of time for which a sentence may be suspended.

Proportionality

24. It is argued on behalf of the appellant that the jurisdictional limit of the custodial term of a court of local and limited jurisdiction, being in this instance, as previously stated, one of a maximum sentence of two years' imprisonment, is a relevant factor in the proper application of the principle of proportionality. It is contended that this is the prism through which the period of time for which a sentence can be suspended should be viewed.

25. It is important not to conflate the two different senses in which "proportionality" falls to be considered in sentencing. Firstly, there is proportionality in the constitutional law sense of requiring that any measure that may impact negatively on the personal rights of an individual should be proportionate to, but be no more than is required by, the legitimate aim being pursued. This is the type of proportionality spoken of in *Heaney v. Ireland*. Secondly, then, there is proportionality as a distributive principle, which is the sense in which it is most commonly used in sentencing jurisprudence. Used in this sense it is concerned with the question of *how much* punishment is deserved in a particular case having regard to the gravity of the offending conduct on the one hand, and the circumstances of the individual offender on the other hand. The appellant's reliance on proportionality is primarily concerned with alleged disproportionality in the constitutional law sense, although he also makes a subsidiary case that the sentence imposed upon him, suspended on the terms on which it was, was too onerous, and to that extent is also relying on alleged disproportionality in the distributive sense.

26. The appellant relies upon the decisions of *McCarthy v. Judge Brady and the DPP* [2007] IEHC 261 and *People (DPP) v. Hogan* in submitting that there must exist special circumstances before a court may suspend a sentence for a longer period than the sentence actually imposed. It is quite clear that s. 99 of the Act of 2006 makes no reference at all to special circumstances in this or any regard. It is the position that in *People (DPP) v. Hogan* the Court indicated that it was not a desirable practice to suspend a sentence for a longer period than the actual term imposed in the absence of special circumstances. However, there are two points to be made in this respect; firstly, and quite obviously, the decision of *Hogan* pre-dates the 2006 Act and s. 99 now constitutes a comprehensive code in respect of all aspects of suspended sentences and makes no reference to the existence of "special circumstances" before a judge can suspend the sentence for a longer period than the actual term imposed. Secondly, it is quite clear that Keane C.J. was referring to a desirable practice as opposed to a rule of law.

27. I am satisfied that a sentencing court does not have to expressly refer to "special circumstances" in suspending all or a portion of a sentence or any particular duration of time in terms of s.99 of 2006 Act but, of course, there must be before the sentencing judge evidence upon which he or she can make a decision as regards the duration of the suspensory period of a sentence.

28. A suspended sentence is a valid and proper form of sentence and it is the position that an offender is alert to the possibility of the activation of the custodial term of imprisonment if he or she breaches the conditions of suspension. A sentence may be partially suspended where it is just to do so. This is the decision which the sentencing judge took in this instance. In the assessment of proportionality in the constitutional sense, one must look to the period for which the sentence has been suspended; that is the operational period and to the conditions of suspension. It is important to note in the instant case that there is only one condition imposed, namely, that the appellant keep the peace and be of good behaviour. Indeed, that is a mandatory condition in terms of the legislation. Therefore, the condition upon which the sentence was suspended could hardly be said to be an imposition on the appellant.

29. The trial judge referred to the transcript of the sentencing court wherein the judge referred to the personal circumstances of the appellant including a risk assessment, placing the appellant as a moderate risk of re-offending, and the view of the sentencing judge that the receipt of stolen property was a huge temptation for him. This Court can find no error in the trial judge's findings in this respect. The sentencing judge undoubtedly had reasons for suspending the sentence for the period he did and expressed his concerns regarding the appellant which were noted by the trial judge.

30. It is submitted on behalf of the appellant that in light of the circumstances of the appellant, the duration of the suspended portion of the sentence is disproportionate to the legitimate aims of the sentencing judge and as a consequence the judge acted in excess of jurisdiction which entitles him to an order of *certiorari* quashing the sentence imposed by Hickson J. on the 9th December 2016.

31. I have considered the principle of proportionality and whether the trial judge erred in concluding that the period of suspension was not so disproportionate as to render it unfair, void, contrary to law or in excess of jurisdiction. I am satisfied that the penalty imposed here was proportionate both in the constitutional law sense and in the distributive sense. S.99 of the Criminal Justice Act, 2006, makes no reference to a court having regard to the maximum sentence to be imposed in any instance in order to determine the appropriate period for which a sentence may be suspended. Such a determination is entirely within the discretion of a sentencing judge on a consideration of the evidence. There is no reason in principle why the operational period cannot be of a greater length than the custodial term. Such a decision cannot be an arbitrary one but must be based on the evidence. It is ultimately a matter for the proper exercise of the discretion of the trial judge.

32. I find that there was no error in the findings of the trial judge and therefore will dismiss the appeal and affirm the orders of the High Court.