

**THE HIGH COURT
JUDICIAL REVIEW**

[2006 No. 465 JR]

BETWEEN**MARK McMANUS****APPLICANT****AND****HIS HONOUR JUDGE TERENCE O'SULLIVAN****RESPONDENT****AND****THE DIRECTOR OF PUBLIC PROSECUTIONS****NOTICE PARTY****Judgment of Ms. Justice Dunne delivered on the 5th day of March, 2007**

1. Leave to apply for judicial review was granted herein on the 24th April, 2006 by order of the High Court (MacMenamin J.) for the following reliefs:

1. A declaration that the decision of the respondent to refuse to adjourn the prosecution *entitled Director of Public Prosecutions at the suit of Garda Shane Curran and Other v. Mark McManus* where the sentencing judge's attention was inappropriate and in excess of jurisdiction where another judge retained seisin of the proceedings.
2. A declaration that the Circuit Court if it retains a jurisdiction at this point to deal with an application to activate a custodial sentence in the proceedings against the applicant is obliged to exercise a judicial discretion whether and to what extent to do so in all the circumstances of the case.
3. An order prohibiting the imposition by the Circuit Court of a suspended sentence on the applicant outside the period of the suspension.

2. I have already decided to grant judicial review on the basis of the first of the reliefs sought herein. It is not necessary to deal any further with the application in respect of that point.

3. The only point at issue is the question of whether or not the applicant is entitled to an order prohibiting the imposition by the Circuit Court of a suspended sentence on the applicant outside the period of the said suspension. In order to consider this issue, it would be helpful to set out some of the background to this particular matter.

4. The applicant pleaded guilty to a number of offences in the District Court on the 24th November, 2004. The offences were as follows:

An offence contrary to s. 3 of the Non-Fatal Offences Against a Person Act, 1997

An offence contrary to s. 4 of the Criminal Justice (Public Order) Act, 1994

An offence contrary to s. 6 of the Criminal Justice (Public Order) Act, 1994.

5. He was sentenced to one month's imprisonment for the offence contrary to s. 3 of the Non-Fatal Offences Against a Person Act, 1997 and to one month's imprisonment for the offence contrary to s. 6 of the Criminal Justice (Public Order) Act, 1994. The other matter was taken into consideration.

6. The applicant appealed the sentence to the Circuit Court and the matter came on for hearing in the Circuit Court on the 25th January, 2005 before her Honour Judge Flanagan. The matter was adjourned before Judge Flanagan on a number of occasions to obtain a probation report and to facilitate the applicant in dealing with an alcohol problem. Ultimately the matter came back before the learned trial judge on the 26th July, 2005. On the basis of the probation report before the court, a payment of €2,000.00 in compensation, the matter was concluded by the suspension of the one month sentence imposed in the District Court for a period of 9 months on the condition that the applicant remain under the supervision of the Probation and Welfare Services, that he complete a 15 week course at the Stanhope Centre and any further programmes thereafter directed and that he enter into a bond in the sum of €100.00 to keep the peace and be of good behaviour for the duration of the nine-month period. In the affidavit verifying the Statement of Grounds filed herein, Phillip Hannon, Solicitor on behalf of the applicant exhibited the order of the Circuit Court which states as follows:

"Whereas on the hearing of an appeal by the defendant against the said order, the Circuit Court Judge for the Dublin Circuit Court on the 26th July, 2005 ordered as follows:

Affirm conviction of the District Court and vary order in that the said defendant

It was judged that the said defendant be convicted of the said offence and be imprisoned in Mountjoy (Male) Prison for the period of one month, said sentence to be suspended on condition that the said defendant be convicted of the said offence and enter a bond, himself/herself in the sum of €100.00 to keep the peace and be of good behaviour for the period of nine months and further to remain under the supervision of the Probation and Welfare Services and abide by all directions by them and to continue to engage with services at Stanhope Centre."

7. The said Phillip Hannon further deposes in the course of his affidavit that the bond entered into by the applicant was in the following terms:

"Do you acknowledge yourself bound to the people of Ireland in the sum of €100.00, the conditions being that you will keep the peace and be of good behaviour towards all the people of Ireland and further remain under the supervision of the Probation and Welfare Services and abide by all directions by them and continue to engage with services at Stanhope Centre and further that you will come up if called upon within the period of nine months to serve the sentence of the Court this day imposed on you, but suspended on your entering into this recognisance?."

8. The applicant duly entered into the bond.

9. Subsequently on the 21st March, 2006 the case was re-entered before the Circuit Court at which time his Honour Judge O'Sullivan was sitting. He declined to adjourn the matter to a date when her Honour Judge Flanagan was sitting and he proceeded to hear evidence as to alleged breaches of the bond entered into by the applicant. Having heard the evidence of the alleged breaches the matter was adjourned to the 3rd May, 2006 solely for the purposes of allowing legal argument as to whether the matters raised by the Probation Officer and in respect of which evidence had been given amounted in fact to breaches of the term to "keep the peace and be of good behaviour".

10. From the above, it will be clear that the matter was first re-entered before the Circuit Court within the nine month operative period of the bond. The adjournment of the hearing until the 3rd May, 2006 was an adjournment to a date outside the operative period of the bond. Before the matter came back before the court, leave had been granted to apply for judicial review as indicated above on the 24th April, 2006. It is in those circumstances that the question now arises as to whether or not the Circuit Court has jurisdiction to impose or reactivate the suspended sentence on the applicant outside the period of the suspension. In his submissions on this point counsel on behalf of the applicant referred to the decision in the case of *DPP v. Traynor* (Unreported, High Court, 27th July, 2005, Murphy J.). In that case the accused had been placed under a probation bond for a period of 12 months on the 22nd January, 2004. The matter came back before the District Court on a number of occasions and on the 10th February, 2005 it was sought to impose a sentence on the accused. It was held by Murphy J. that a District Judge must convict and sentence a person in respect of a breach of a probation bond within the period of the bond. That case was governed by the provisions of s. 1(1) of the Probation of Offenders Act, 1907 which provides that:

"The court may, without convicting, make an order either...

(II) Discharging the offender conditionally on his entering into a recognisance, with or without assurities, to be of good behaviour and to appear for conviction and sentence when called on during such period, not exceeding three years, as specified in the order."

11. In considering the provisions of that section, Murphy J. commented at page 6 of his judgment as follows:

"A probation order may, therefore, be imposed for a period of up to three years but where it is imposed for a shorter period, as in the instant case, it appears that a court cannot proceed to convict and sentence an accused outside that time period."

12. Counsel on behalf of the applicant has argued that that decision is authority for the proposition that sentence cannot be reactivated outside the period of the bond. It was submitted that the wording in the section left no discretion to the court as to whether the sentence can be activated or imposed outside the period of the bond.

13. Not surprisingly, counsel for the Notice Party does not agree with that proposition. At first sight, it does appear that the situation in the case of *DPP v. Traynor* is analogous to the situation in the present case. However, it is my view that there is one significant difference. In that case, the court was concerned with an expressed statutory provision and it was that provision that was interpreted by Murphy J. as not permitting the court to proceed to convict and sentence an accused outside the specified time period. One important distinction between that case and the present case is that of course by virtue of the provisions of the Probation of Offenders Act, 1907, the purpose of giving the offender the benefit of the Probation of Offenders Act, 1907 is to avoid the recording of a conviction against the offender provided that the offender complies with the terms of the bond for the period specified. In the present case, the applicant has already been convicted and sentenced. Thus, in my view, the facts of the present case can be distinguished from the facts of the *Traynor* case.

14. Counsel for the Notice Party submitted that the relevant date to consider in terms of whether or not the sentence could be reactivated or imposed was the date of application to reactivate the sentence. It was submitted that once the application was made within the period of the suspension it was not necessary for the suspension to be actually imposed within the operative period. In particular it was submitted that there may good reason for an adjournment of the application. For example, the application to reactivate may be requested by the accused. It may of benefit to an accused to produce up to date reports from for example drugs rehabilitation courses that he may have attended, alcohol awareness programmes as in the present case or indeed updated probation reports. Another possibility is that the matter is adjourned to come before the court that imposed the condition. This is expressly provided for in the case of offenders who are subject to orders under the Probation of Offenders Act, 1907 which provides at s. 6(3):

"The court before which an offender on apprehension is brought, or before which he appears in pursuance of such summons as aforesaid, may, if it is not the court before which he is bound by his recognisance to appear for conviction or sentence, remand him to custody or on bail until he can be brought before the last mentioned court."

15. Another possibility is that an offender who has been given the benefit of a suspended sentence may simply decide not to appear in court when required to do so for the purpose of considering the issue of reactivation of or imposition of the sentence. In the course of argument, counsel on behalf of the applicant in this case conceded that an accused person who had been given the benefit of a suspended sentence could hardly defer its imposition simply by making himself unavailable to the court by failing to appear.

16. Counsel on behalf of the notice party also referred to the District Court Rules and in particular O. 25, r. 3 and r. 4 of the District Court Rules which provide as follows:

"3. Where the court upon imposing a sentence of imprisonment, conditionally suspends the execution thereof, it may, upon the application of the prosecutor, issue a warrant of committal on being satisfied of the failure of the accused to comply with the terms upon which the said sentence was suspended .

4. Where by order the execution of a sentence of imprisonment has been conditionally suspended, no warrant shall be issued, to enforce such sentence, later than six months from the expiration of the time fixed by the said order for the performance of the condition."

17. Thus it was argued by counsel on behalf of the notice party that a warrant can be issued for the committal of an offender outside the operative period.

Conclusions

18. Having considered the arguments of counsel herein, the written submissions and the oral submissions together with the authorities

opened to me it seems to me that a number of conclusions can be drawn. The first conclusion is that in the case of an application to activate a suspended sentence in the District Court or the Circuit Court on appeal from the District Court, there appears to be no doubt that the court has jurisdiction to activate the suspended sentence provided that the same is done within six months of the operative period. O'Malley In Sentencing Law and Practice (2nd Edition) at p. 463 notes that this is so. He comments:

"The rules also provide that no warrant shall issue to enforce a suspended prison sentence later than six months from the expiration of the time fixed by the court's order for the performance of the condition. The six-month period runs, not from the date on which the sentence was suspended, but from the end of the operational period."

19. The second and perhaps somewhat self-evident point to note is that the alleged breach of the bond must occur within the period of the bond. It seems to me that from time to time there maybe some confusion as to this particular point. For example, is a conviction recorded during the period of the bond in respect of an incident which occurred prior to the operational period of the bond a breach of the bond? It is difficult to see how this could be so given that the bond entered into requires the accused to be of good behaviour during the period of the bond and the recording of a conviction for an offence committed outside the period of the bond would not appear to be a breach of the bond.

20. During the course of argument in this case the issue was raised as to whether a sentence could be activated and imposed outside the period of the bond in circumstances in which there was an alleged breach of the bond the matter was re-entered within the period of the bond and the offender evaded attempts to have him brought back before the court. Counsel for the applicant conceded that in such circumstances it would still be open to a court to activate the sentence. Clearly in the case of a conviction in the District Court or on appeal in the Circuit Court, the Rules of the District Court have as already indicated placed a time limit on the issue of a warrant. Apart from that provision however, it does not seem to me that it should be possible for someone to escape justice by evading justice.

21. The final point I would make relates to the issue of whether the sentence could be imposed in circumstances where an offender sought further time to put matters before the relevant court in ease of the offender such as probation reports etc. Again in those circumstances it seems to me that it would be somewhat difficult to come to a view that in those circumstances the matter having been adjourned at the request of the offender thus bringing it outside the operational period that the sentence could not be imposed. If one takes one specific example this may be made clear. It is possible to imagine circumstances where an accused facing an allegation that he is in breach of the probation bond might require to produce evidence through witnesses who are unavailable when the offender was first brought before the court. In those circumstances it is hard to imagine that a court could or would refuse the opportunity to the offender to challenge the evidence that he was in breach of the bond. If in order to produce such evidence it is necessary to adjourn beyond the period of the bond again it is in my view impossible to say that the sentence could not be imposed if after a hearing it was concluded that there was a breach of the bond which was neither trivial or nor *de minimis*.

22. Without going through an exhaustive list of circumstances which might give rise to an application to activate suspended sentence outside the period of the bond it does seem to me that there are circumstances in which such a course may be permissible and it is clear that in the case of the District Court the Rules of the District Court recognise such a possibility. Given that there are a number of other circumstances which in my view would justify the imposition of a suspended sentence outside the period of the bond I have come to the conclusion that there is no hard and fast rule to the effect that a suspended sentence cannot be activated outside the period of the bond.

23. In the circumstances of this case and given the time that has now passed since the matter was last before the Circuit Court and having regard to the provisions of O. 25, r. 4 I am not directing that this matter should be remitted to the Circuit Court for further hearing.