THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Edwards J.

Record No: CCA181/14

The People at the Suit of the Director of Public Prosecutions

Respondent

v

David Ahearne

Appellant

Judgment of the Court delivered on the 14th day of December, 2015 by Mr. Justice Edwards

Background to the Appeal :
1. In this case the appellant appeals against the reactivation of a suspended sentence, on the several grounds set forth in his Notice of Appeal.

2. The appellant was originally sentenced on the 8th of July 2008 at Clonmel Circuit Criminal Court to three years imprisonment in respect of an offence of assault causing harm contrary to s.3 of the Non Fatal Offences Against the Person Act 1997 committed on the 24th of February 2007, and six months imprisonment for assault contrary to s. 2 of the Non Fatal Offences Against the Person Act 1997 also committed on the 24th of February 2007, both sentences to be concurrent *inter se* but consecutive to a sentence of three years imposed on him for a further offence of assault causing harm contrary to s.3 of the Non Fatal Offences Against the Person Act 1997, committed on the 19th of August 2006. The last three years of the total or aggregate sentence of six years was suspended for five years on condition that the appellant enter into a bond to keep the peace and be of good behaviour for a period of five years from his release from prison, and to engage with the Probation Service and to comply with it's directions.

3. The offences committed on the 24th of February 2007 had involved two victims, a Mr James Cosgrove who was subjected to the s.3 assault, and a Mr Graham Johnson who was subjected to the s. 2 assault.

4. The circumstances of the assault on Mr Cosgrave were that a dispute had arisen between Mr Cosgrave and the appellant arising out of Mr Cosgrave having been refused admission to a house party in Clonmel being held by the appellant and others. In the course of this dispute the appellant had produced a knife and had stabbed Mr Cosgrave three times in the chest, causing a left sided haemothorax for which he required the surgical insertion of a chest drain, following which he spent three weeks in hospital. The assault on Mr Johnson, which occurred on the same occasion, had involved him being subjected to multiple kicks to the head and face, leaving him briefly unconscious and with bruising and abrasions to his face and head and with a query nasal fracture.

5. The offence committed on the 19th of August 2006 had involved a single victim, a Mr Aidan Phelan. On that occasion the appellant entered a flat in Clonmel in which a party was being held by the occupier and went over to the seat where Mr Phelan, a guest at the party, was sitting, pulled him out of his chair and subjected to repeated violent blows and punches to his face and body, as a result of which Mr Phelan sustained a broken nose, broken jaw and a broken right arm.

6. The appellant was released from prison in November of 2011, and engaged with the Probation Service up until April 2012, but at that point ceased to engage any further and ceased contact with his probation officer.

7. On the 22nd of April 2014 the Probation Service pursuant to s. 99(14) of the Criminal Justice Act 2006 (hereinafter the Act of 2006) re-entered the matter before His Honour Judge Teehan at Clonmel Circuit Criminal Court and sought to have the sentence re-activated on the basis that the appellant had breached a condition of his bond. The conditions of his bond had been that he would keep the peace and be of good behaviour and that he would engage with the probation and welfare service for a period of five years post release. The court heard brief evidence concerning the alleged breach, which was specified to be his failure to engage with the probation and welfare service. However, as the appellant was not present, the judge having been informed that he was in Cork Prison, the matter was adjourned to the 24th of July 2014 to afford the appellant an opportunity to be heard, and to enable it to be clarified concerning in what circumstances he was in Cork Prison as it was potentially relevant, and for further evidence and submissions.

8. When the matter came on again on the 24th of July 2014 the appellant was present and was represented by counsel. His counsel sought to proffer an explanation for his client's non engagement with the probation service. He stated that as a result of the behaviour that had resulted in the sentence of the 8th of July 2008 the appellant's family home was targeted quite violently for a period of time, and the appellant had concluded that the best course of action to ensure his family's safety was to remove himself from the situation. However, it was accepted that he did not notify the probation services that he was changing address nor did he inform his family of where he was going as he felt it necessary to completely remove himself from the situation. The court heard that the appellant lived elsewhere in this country for a period of time, and then went to Holland for a period, and subsequently to England where had remained until his return to Ireland. Counsel went on to make a plea *ad miseracordiam* that while his client had dealt with his difficulties inappropriately, he had absented himself for worthy motives, and particularly for the protection of his family, and the court was urged in the circumstances not to require the appellant to serve the suspended portion of the sentence.

9. The court was further briefly told that the appellant was in custody at that time on foot of a sentence of three year and six months imprisonment, with the final six months suspended, imposed earlier that year at Waterford Circuit Criminal Court. However, His Honour Judge Teehan was provided with no further details.

10. While the transcript of the proceedings before the Circuit Court on the 24th of July 2014 was vague as to the circumstances of the appellant's return from England, and contained no details as to the circumstances in which the sentence imposed upon him at Waterford Circuit Court had arisen, this Court has since ascertained the exact position having bespoken a transcript of the proceedings before Waterford Circuit Court on the 5th June 2014.

11. The position is that the appellant was returned to Ireland on the 5th of March 2014 on foot of a European arrest warrant to face

trial before Waterford Circuit Criminal Court arising out of events that had occurred on the 9th of April 2012 when a Mr John Michael Lawlor was seriously assaulted at a party in an apartment in Waterford by being slashed across the neck with a Stanley knife. The appellant pleaded guilty on the 21st of May 2014 to assaulting Mr Lawlor on the occasion in question, causing him harm, contrary to s. 3 of the Non Fatal Offences Against the Person Act, 1997 and also pleaded guilty to production of an article capable of inflicting serious injury in the course of a dispute, contrary to s.11 of the Firearms and Offensive Weapons Act, 1990. On the 5th of June 2014 Her Honour Judge Codd sentenced the appellant to three years and six months imprisonment, with the final six months thereof suspended, in respect of the s.3 assault and to two years imprisonment in respect of the s.11 offence, both sentences to run concurrently and to date from the 5th of March 2014.

12. It emerged in the course of the evidence at the sentencing hearing before Judge Codd that the appellant's whereabouts in the UK had become known to the Irish authorities because he had also run foul of the law there, and had been imprisoned there on foot of sentences, of twelve months and eighteen months, respectively, to run consecutively, imposed on him at the Inner London Crown Court on the 11th of March 2013 for offences of robbery and wounding with intent. It was in those circumstances that he was rendered amenable to being recovered on foot of the aforementioned European arrest warrant. It is unclear how he came to be surrendered as early as the 5th of March 2014 in circumstances where he commenced an aggregate sentence of 30 months on the 11th of March 2013. It may possibly have been a conditional surrender, something which is provided for in the European arrest warrant framework decision should a state wish to opt to provide for it in its transposing domestic legislation; however, that is not something that is of any direct relevance to the proceedings before this Court

13. Returning to the proceedings before Clonmel Circuit Criminal Court on the 24th of July 2014, his honour Judge Teehan, having considered the evidence adduced and the parties' submissions, lifted the suspension on the last three years of the total or aggregate sentence of six years imposed on the 8th of July 2008 and ordered the unserved balance to run consecutively to the further three years then being served on foot of the sentence imposed by Her Honour Judge Codd at Waterford Circuit Criminal Court on the 5th of June 2014.

14. In so deciding, His Honour Judge Teehan stated:

> *"Well, when these matters come back before the Court, having been referred by either on a section 99 basis or by the state or by the Probation Service, the test which I apply is this: are there exceptional and compelling reasons why the sentence which was imposed and then suspended should not be activate in whole or in part? In this case, Mr Ahearne left the family home. I accept that he left it for good reasons, which was to protect his family. I cannot accept for a moment that he felt he had no obligation to notify the Probation Service, with which he had engaged on his release from prison. Certainly he had nothing to fear from the Probation Service if he kept in contact with it, and I simply do not accept, as I say, because when he left court here, having been sentenced by me back in 2008, he had to know that the portion of his sentence which was suspended could well be activated even in fairly unexceptional circumstances, but simply leaving the country without any reference whatever to the Probation Service and simply failing to contact them for a period of a number of years is not acceptable. So, the balance of the sentence which I suspended will be activated and will take effect at the conclusion of the sentence which he is currently serving in Cork Prison."*

The Grounds of Appeal

15. The appellant seeks to have the order re-activating his suspended sentence set aside on the following grounds:

> 1. The sentencing Judge erred in law and in fact by failing to have regard to the grounds advanced for failing to engage with the Probation Services.
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> 2. The sentencing Judge erred in law and in fact by failing to give due weight to the danger the appellants family were in.
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> 3. The sentencing Judge erred in law and in fact by failing to take account of the totality of the sentence being imposed.
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> 4. The sentencing Judge erred in law and in fact by making the sentence consecutive to the sentence currently being served.
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> 5. The sentencing Judge erred in law and in fact by failing to have due regard to the fact that the appellant was willing to now engage with the Probation Service.
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> 6. The sentencing Judge erred in law and in fact by failing to have regard to the fact that the appellant's failure to engage with the Probation Service was not malicious or intentional, but simply a misunderstanding.
>
> 7. The sentencing Judge erred in law and in fact by failing to take account of the mitigating factors relating to the re-activation and by failing to give any effect to any such mitigating factors.
>
> 8. Such further grounds as may be advanced in due course at the hearing of the appeal.

16. Two further grounds of some substance were in fact advanced both in submissions, and at the hearing. The first additional point relied upon was that the sentencing judge had applied the wrong test in considering whether or not to require the appellant to serve the suspended portion of the sentence imposed upon him on the 8th of July 2008. The second additional point was that the sentencing judge, having decided to lift the suspension, exceeded his jurisdiction in further requiring the outstanding balance to be served at the end of the three year sentence imposed on the 5th of June 2014 by Waterford Circuit Criminal Court, in circumstances where the referral back to Clonmel Circuit Criminal Court had been made, not by Waterford Circuit Criminal Court pursuant to s. 99(10) of the Act of 2006, but rather by the Probation Service invoking its entitlement to do so under s. 99(14).

17. In circumstances where both points had been addressed in the appellant's written submissions which had been with the respondent's side for some time, and indeed had been engaged with and replied to in the respondent's written submissions, and where no objection was being raised by the respondent to these further points being pursued, this Court was disposed to allow the appellant to rely upon them de bene esse, notwithstanding that they had not been formally pleaded in Notice of Appeal as filed.

The Legislative Background

18. The relevant statutory provisions are those contained in s.99 of the Act of 2006 as amended by s.60 of the Criminal Justice Act 2007, which provides:

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 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.

(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.

(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.

(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 .

(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.

(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.

(19) This section shall not affect the operation of—

(a) section 2 of the Criminal Justice Act 1960 or Rule 38 of the Rules for the Government of Prisons 1947 (S.R. & O. No. 320 of 1947), or

(b) subsections (3G) and (3H) of section 27 of the Misuse of Drugs Act 1977 .

(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 Appellant's Case

19. The Court was asked to note that reasons were put forward on the appellant's behalf at the hearing before the Circuit Court as to why he had not engaged with the Probation Service – namely that, as a result of the criminality that had resulted in the imposition of the sentences, his family home had received unwanted attention and his family were put in fear, leading to the appellant making the decision to leave the area. In accepting what had been advanced on behalf of the appellant, the Court noted that he left the area *"for good reasons"* However, the Court had gone on to say that the test to be applied was whether or not there were *"exceptional and compelling reasons"* why the sentence should not be revoked.

20. It was submitted that this was the wrong test. S.99 (17) of the Criminal Justice Act 2006 ("the 2006 Act") states (as does s. 99(10)) that the Court shall revoke the suspended sentence *"unless it considers that the revocation of that order would be unjust in all the circumstances."* Having been informed of the circumstances that lead to the omission, and the fact that the appellant was willing to undertake whatever steps were necessary to remedy the situation with the Probation Service, it was submitted that the sentencing judge was in error in failing to have due regard to the reasons advanced on behalf of the appellant and in failing to address the justice of the situation. The failure to comply with the condition of his bond requiring him to engage with the Probation Service, while in itself a serious matter, was not in this instance a deliberate or malicious breach, especially in light of the fact that the appellant did adhere to this condition for some time after his release from custody in November 2011. It was submitted that these factors went to the heart of the matter and in requiring the appellant to the serve in full the suspended portion of his sentence, the Court failed to do justice in all the circumstances of the case.

21. In support of these arguments the Court was referred to *The People (Director of Public Prosecutions) v Connors* [2012] IECCA 45 (Court of Criminal Appeal, *ex tempore*, 8th February 2012); *The People (Director of Public Prosecutions) v Aylmer* [1995] 2 ILRM 624 and *The People (Director of Public Prosecutions) v Raymond Coady* [2009] IECCA 133 (Court of Criminal Appeal, ex tempore, 30th July 2009).

22. The *Aylmer* case is the first in time, and while it predates the regime established by s. 99 of the Act of 2006, it is relied upon as authority for the proposition that a judge considering whether or not to lift the suspension of a sentence should first establish whether or not there has been a breach of the conditions upon which the sentence was suspended and, secondly, determine whether or not the breach was of a serious or trivial nature.

23. In the *Connors* case the Court of Criminal Appeal noted that a sentencing judge, before whom a matter was brought back pursuant to s. 99 of the Act of 2006 has three options: *i.e.,* to activate the sentence in full; activate it in part; or to ignore the breach if the Court is satisfied the breach is of a *de minimis* nature.

24. The appellant relying on both *Aylmer* and *Connors* complains that the Circuit Court judge failed to even consider whether or not the fact of failing to engage with the Probation Service post-release was a *de minimis* or trivial breach of the condition imposed in 2008.

25. The *Coady* case is relied on as being an explicit authority for the proposition that any judge considering whether or not to lift the suspension of a sentence must deal with that issue in a proportionate manner. It is suggested that this requires the court to first examine the range of penalties available in respect of the breach and then determine where on the scale of seriousness the breach lies and apply any applicable mitigating factors. The appellant complains that in this instance, no such determination occurred. Having decided that there were no exceptional reasons why the suspension should not be revoked, the Circuit Court judge simply lifted the entirety of the suspension, without addressing whether or not a discount could be given. It was submitted that no consideration was given to the mitigating factors that were present with regard to the breach of the conditions imposed and no aspect of mitigation was acknowledged by the Circuit Court judge in restructuring the sentence. The failure to embark on such an exercise was, it was submitted, a grave error in principle as it failed to give effect to the rights of the appellant to procedural fairness.

26. It was further submitted that in lifting the entirety of the suspension and making the unserved balance in effect consecutive to the Waterford sentence the Circuit Court judge failed to respect the totality principle, and also had exceeded his jurisdiction.

27. In support of the contention that the judge failed to respect the totality principle the appellant relies upon *The People (Director of Public Prosecutions) v T.B.* [1996] 3 I.R. 294. In the T.B. case the court of Criminal Appeal outlined the circumstances to be taken into account in considering both the issues of consecutive sentencing and totality of sentencing. In particular, it noted that the totality principle dictates that a sentencing judge must step back and address the entirety of the sentence being imposed, by reference to other crimes if needs be. It was submitted that in the instant case, the effective nine-and-a-half year sentence imposed – taking into account the time already spent in custody on foot of the 2008 sentence, the sentence imposed in the Waterford matter, and the unserved balance of the 2008 sentence now required to be served at the end of sentence currently being served – exceeded what would be expected in cases of manslaughter or other crimes more serious than those of which the appellant was convicted and for which he was sentenced in 2008. It was submitted that in failing to have regard to such an eventuality, the sentencing judge failed to have regard to all the circumstances in the case, rendering the sentence flawed and in breach of the totality principle.

28. In support of the contention that the judge exceeded his jurisdiction the point is made that the court was concerned with a complaint made by the Probation Service pursuant to s. 99(14) and not with a referral back from the Waterford Circuit Criminal Court, which, if it had been made, although it was not made, would have been made pursuant to s. 99 (10). The question facing the Clonmel Circuit Criminal Court on this occasion was solely in relation to a failure to engage with the Probation Service – therefore, the question of making the sentence consecutive to the Waterford matter was fundamentally incorrect as that matter was not properly before the court. The Clonmel Circuit Criminal Court was not in possession of the circumstances surrounding both matters which it would have required in order to fully assess whether or not a consecutive sentence was appropriate and proportionate in all of the circumstances. It was not able to make a determination as to whether or not the crimes were related in any way (apart from the nature of the charges) or what factors were at play in respect of the Waterford matter. Had such enquiries been made, the Court might have been informed of some striking feature that would have influenced its determination on that issue. However, the prosecution did not present any evidence to the Court on any aspect of the Waterford matter – nor were they obliged to, in circumstances where that matter was not properly before the Court. It was submitted that by requiring the outstanding balance of the sentence imposed in 2008 to be served commencing at the end of the sentence then being served for the Waterford matter, and in effect making them consecutive, the sentencing judge engaged in a process that was inherently unfair and exceeded his jurisdiction.

The Respondent's Case

29. It was submitted that the Circuit Court was clear in the terms of its Order on the 8th day of July, 2008 and the appellant could have been in no doubt as to what was expected of him and as to the consequences of any subsequent breach of terms.

30. It was submitted that Judge Teehan, notwithstanding the submissions made on behalf of the appellant, did not accept that the appellant's failure to comply with the court's directions was in any way accidental or non-deliberate in nature. The judge's views were said to be evident from the following passage:

> *"I cannot accept for one moment that he felt he had no obligation to notify the Probation Service, with which he had engaged on his release from prison…and I simply do not accept…because when he left Court here, having been sentenced by me back in 2008, he had to know that the portion of his sentence which was suspended could well be activated even in fairly unexceptional circumstances, but simply leaving the country without any reference whatever to the Probation Service and simply failing to contact them for a period of a number of years is not acceptable."*

31. It was submitted that the Judge Teehan considered the appellant's non-engagement with the Probation and Welfare Service to amount to a significant breach and that it warranted the re-activation of the entirety of the sentence. That was a matter within his discretion.

32. It was further submitted that, although the judge did not expressly state that *"the justice of the case requires"* the re-activation of the suspended sentence in full, he did, nonetheless, look to whether there were any *"exceptional and compelling reasons".* It was submitted that while the judge clearly did not utilise the wording of the section, it is implicit that the Court did in fact have regard to the justice of the case. The Defence raised no point, and made complaint, at the hearing concerning the judge's approach and neither side felt it necessary to address the judge as to any perceived error based on the wording that he had used.

33. It was further submitted that the judge was at all times acutely aware of his options regarding the re-activation of the sentence and the possibility of not re-activating same in whole or in part. It was submitted on behalf of the respondent the activation of the entire suspended sentence was appropriate, having regard to all the circumstances of the case. It was submitted also that the judge had exercised his discretion properly and that he had had adequate and appropriate regard for the totality principle throughout his deliberations. Finally, it was submitted that the sentence which was imposed by the learned Judge was appropriate and necessary to serve as a deterrent for any similar pattern of behaviour in the future.

Discussion

34. The root of the problems that have arisen in this case is traceable back to the fact that when the appellant was before Waterford Circuit Court for sentencing in June of 2014 the statutory procedure provided for in s. 99(9) of the Act of 2006 was not followed. The appellant should not have been sentenced at that point. Rather Her Honour Judge Codd should have been informed that the convicted person before her for sentencing had committed the offence for which she was being asked to sentence him during the period of the suspension of another sentence that had earlier been imposed on him by His Honour Judge Teehan at Clonmel Circuit Criminal Court. If Her Honour Judge Codd had been so informed, she would undoubtedly have adjourned sentencing and have remanded the appellant in custody to appear before His Honour Judge Teehan at the next sitting of Clonmel Circuit Criminal Court to be dealt with in accordance with s.99 (10) of the Act of 2006. Then, once His Honour Judge Teehan had decided what action to take on foot of s.99(10), the matter would have been re-entered before Honour Judge Codd in the normal way, who would then have been in a position to sentence the appellant appropriately with the benefit of knowing what action Judge Teehan had taken in terms of requiring the appellant to serve the unserved balance, either in whole or in part, of the sentenced imposed in 2008.

35. It was not the fault of Her Honour Judge Codd that the statutory procedure was not correctly followed because it appears from the transcript of the proceedings in Waterford on the 5th of June 2014 that neither the prosecution nor the defence informed her that the appellant had offended again during the period of the suspension of another sentence. On the contrary the transcript reveals that the Court was given incorrect information suggesting the contrary. The prosecuting Garda gave the following evidence:

> "Q. He got a three year sentence for two section 3 offences previously?
>
> A. Yes.
>
> Q. And what that was 2009?
>
> A. Yes.
>
> MR O'SHEA: 2008.
>
> Q. Yes. 2008?
>
> A. 2008 in Clonmel Circuit Court. They relate to different dates.
>
> Q. They relate to different incidents on different dates?
>
> A. Correct, yes.
>
> Q. Is there any suggestion that he was on bail, bound to the peace or under suspended sentence at the time that he committed this offence on the 9th of April 2012?
>
> A. No. It would be to my knowledge he had just come out of serving that sentence from the convictions that I've given from Clonmel Circuit Court and he had moved to Waterford at that stage.
>
> Q. Okay?
>
> A. He was out a number of months.
>
> Q. He was out a number of months and there was no suspended period operative at the time?
>
> A. Not to my knowledge."

36. When the matter came before His Honour Judge Teehan in July of 2014 it was on foot of an application by the appellant's Probation & Welfare Officer pursuant to s. 99 (14). This is a different means by which a matter may be re-entered before a judge who had imposed a suspended sentence from the procedure provided for in s. 99(9). In the case of s. 99(14) the matter can be re-entered at the behest of a Probation and Welfare Officer, whereas in the case of s. 99(9) it can re-entered at the behest of another court.

37. The former usually occurs when a Probation & Welfare Officer is concerned that the sentenced person may be in breach of some condition on foot of which his sentence had been suspended. Typically, and as occurred in this case, s.99(14) is invoked where there has ostensibly been non-engagement, or non-co-operation with, the Probation Service where such engagement or co-operation was a condition of the suspension of the sentence. However, a Probation & Welfare Officer is entitled to seek to have a matter re-entered for breach of any condition, and not just those relating to engagement or co-operation with the probation and welfare service.

38. The latter usually occurs when the sentenced person is before another court for sentencing and that other court is informed that the offence in question was committed during the period of suspension of a earlier sentence imposed by another court.

39. Be all of that as it may, we are satisfied having considered the full terms of s.99 of the Act of 2006, and its place within the Act of 2006 viewed as a whole, that once a case is re-entered before the judge that suspended the sentence at issue, the judge in question is not confined to considering only the complaint that has led to the matter being re-entered. He or she is entitled to, and ought to, take account of any and all information put before him concerning the offender's compliance or otherwise with the conditions of his suspension.

40. Accordingly, even though in the appellant's case the matter was re-entered by his Probation & Welfare Officer pursuant to s. 99(14) on the basis of a concern that he had breached the condition requiring his engagement relating to engagement or co-operation with the probation and welfare service, when it emerged in the course of the hearing that the appellant was in Cork Prison serving another sentence for an offence committed during the period of the suspension of his sentence the judge would have been entitled in principle to take that into account and ought to have done so.

41. S. 99(17) mandates how a judge before whom a matter has been re-entered pursuant to s. 99(14) should be approached. The subsection requires revocation of the suspension by the court, where the court is satisfied that the offender has breached a condition on which his sentence had been suspended*, "unless it considers that in all of the circumstances of the case it would be unjust to so do".* Moreover, it further gives the court a discretion, when revoking a suspension, concerning whether to require the offender 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."*

42. As was pointed out in counsel's submissions, any judge considering whether or not to lift the suspension of a sentence must deal with that issue in a proportionate manner. Clearly, having regard to the emphasis in both components of s. 99(17) on the justice of the case, it is incumbent on a court intending to take into account subsequent offending as part of the overall circumstances to enquire fully into the circumstances of that subsequent offending. Moreover, natural justice and fair procedures require that an offender must be informed that the trial judge intends having regard to subsequent re-offending as part of the overall circumstances, where that is the case; and having been so informed, the offender should be permitted to make representations to the court and the court should take any such representations into account in the exercise of its discretion, affording such weight to them as it considers appropriate.

43. If, having learned that the appellant was then serving another sentence in Cork Prison, the Circuit Court judge whose order is now under appeal had taken steps, as this Court has done, to ascertain precisely the circumstances of the Waterford conviction, he would unquestionably have been entitled, indeed he would have been obliged, to revoke the suspension of the unserved balance of appellant's 2008 sentence. The serious nature of the Waterford conviction, coupled with the fact of yet further re-offending in England were highly relevant to the justice of the case. Moreover, the credibility of the appellant's contention that his non-cooperation or non engagement with the Probation & Welfare Service was for entirely worthy reasons would have had to be viewed against the objective facts of his absconding to England in the early aftermath of the commission of the Waterford offence, his subsequent offending in England, and the fact that he had had to be extradited in order to be tried for the Waterford offence. It is inconceivable, in this Court's view, that the Circuit Court Judge could have done other than revoke the suspension if he had been apprised of the full circumstances of the case.

44. Moreover, if the Circuit Court judge had had the full picture, it would have been legitimately within his discretion to decide, with full regard to the totality principle and the need for his intervention to be proportionate, that the unserved balance should be served at the end of the sentence then being served by the appellant in Cork prison for the Waterford matter.

45. The problem in this case is that the Circuit Court Judge did not have the full picture, and to the extent that he dealt with the matter on the limited basis that he did, he fell into error in at least one respect.

46. The appellant has complained that the Circuit Court judge applied the wrong test. The trial judge asked himself *"are there exceptional and compelling reasons why the sentence which was imposed and then suspended should not be activated in whole or in part?"* While the form of wording used by the sentencing judge was not that used in the statutory provision, and it would have been preferable if he had used the statutory formulation, this Court considers that the substantive gap between the two formulations is not all that wide. As has been correctly pointed out in submissions to this Court what the statute requires is that there *"shall"* be revocation *"unless it [the court] considers that in all of the circumstances of the case it would be unjust to so do".* This implies that revocation shall be the norm and that non-revocation shall be exceptional but nevertheless mandated where justice requires it. Accordingly there was nothing wrong with the trial judge asking whether exceptional reasons existed such as might justify non-revocation. Similarly, that the interests of justice would demand non-revocation in the circumstances of the particular case is surely correctly to be characterised as a *compelling* reason. We consider that the test as formulated by the trial judge, while not technically correct, was if anything somewhat wider in its terms and therefore potentially easier for an offender to satisfy than if the test had been properly formulated using the tighter language of the statutory provision. We are not therefore satisfied that the appellant was in fact prejudiced by the way in which the trial judge formulated the test.

47. We do, however, consider that the Circuit Court judge fell into error in as much as, having decided to revoke the suspension, and also that the appellant should serve the entirety of the unserved balance, he then went on to direct that the unserved unbalance should be served at the end of the sentence for the Waterford matter in circumstances where he had little or no information concerning the circumstances of the Waterford case. Without such information he could not have properly assessed whether his proposed action was proportionate, and whether it was permissible having regard to the totality principle.

48. In the circumstances we are satisfied that the Order of His Honour Judge Teehan of the 24th of July 2014 should be quashed, and it now falls to this Court to address afresh under s. 99(17) the questions as to whether the suspension of the appellant's 2008 sentence should be revoked, and if so, whether and from when he should serve all or part of the remaining balance.

49. In accordance with established jurisprudence counsel on both sides were invited to place before the Court any additional materials that they might wish to have taken into account in the event of the Court having to proceed to a re-consideration of the s.99 (17) issues. That was done and in the appellant's case certain additional materials were placed before the Court. These comprised a letter from Merchants Quay Ireland confirming that the appellant has been engaging positively in Wheatfield prison with the Addiction Counselling Service there, and has completed a number of therapeutic courses; and a number of achievement certificates in respect of the completion of courses relating to Relapse Prevention, Enhanced Thinking Skills, and Alternatives to Violence. The Court takes these into account.

50. Having regard to the full circumstances of the case as outlined earlier in this judgment, this Court is satisfied that the appellant separately breached two conditions of the suspension of his sentence for the 2008 offence, namely the condition that he engage and

co-operate with the Probation & Welfare Service, and the further condition that he keep the peace and be of good behaviour. The circumstances of his case are very bad and we are completely satisfied that this Court is required by the terms of s.99(17) to revoke the suspension, and that it would not be unjust in all the circumstances of the case to do so.

51. The Court has considered the appellant's explanations and excuses for breach of the condition requiring his engagement and co-operation with the Probation & Welfare Service as advanced by his counsel. While there was some confirmation in the Circuit Court of attacks having been carried out on the appellant's home this Court is not satisfied to accept that these provided the sole motivation for his leaving the jurisdiction having regard to temporal proximity between the commission of the Waterford offence and his departure. It is clear that he absconded primarily to avoid being arrested and tried for the Waterford offence. The Court is satisfied that in these circumstances, and in the further circumstances of him having seriously re-offended during the period of his suspension, there would be nothing wrong in principle for him to be required to now serve the entirety of the unserved balance of the sentence imposed on him in 2008. However, in recognition of the fact that there has been considerable procedural irregularity in this case, and the possibility that if the correct procedure had been followed at the outset it might have inured somewhat to the appellant's benefit to have had a s.99 (10) hearing dealt with and concluded before he was sentenced for the Waterford matter, the Court will, exceptionally, not require him to serve the final twelve months of the unserved portion of the 2008 sentence. Accordingly, the appellant will now be required to serve two years of the three year suspended sentence (being the last three years of a total or aggregate sentence of six years) imposed on him on the 8th of July 2008, but the final twelve months will remain suspended on the same terms as were originally imposed.

52. The Court has considered carefully the question as to the date from which he should commence serving the unserved balance of the 2008 sentence that he is now required to serve. In so deciding the Court must have regard both to the requirement that its intervention should be proportionate, and the further requirement that it should respect the totality principle. The Court considers that it would be justified in the circumstances of the present case in following the lead of the Circuit Court judge and directing that the unserved unbalance should be served at the end of the sentence for the Waterford matter. Accordingly the Court will so direct.