



**THE COURT OF APPEAL**

**Birmingham J.  
Mahon J.  
Hedigan J.**

**14/15**

**15/15**

**The People at the Suit of the Director of Public Prosecutions**

**Respondent**

**V**

**Alan Jones**

**Appellant**

**JUDGMENT of the Court delivered on the 16th day of November 2017 by**

**Mr. Justice Hedigan**

**Introduction**

1. This is an appeal against severity of overall sentence. There are two appeals which are being heard together. They relate to sentences imposed in the Circuit Court on the 5th December, 2014, by Her Honour Judge Ryan and the 18th December, 2014, by His Honour Judge Hogan. The appellant is serving a total sentence of 13 years with the final three suspended arising from five bills of indictment. This is comprised of sentences in respect of four Circuit Court convictions for robbery contrary to s. 14 of the Criminal Justice (Theft and Fraud Offences) Act 2001, one attempted robbery and one offence contrary to s. 11 of the Firearms and Offensive Weapons Act 1990 ("the 1990 Act").

2. Two of the five bills relate to suspended sentences which were reactivated in accordance with s. 99 of the Criminal Justice Act 2006 as amended ("the 2006 Act").

**The circumstances of the offences**

3. The offence in bill number 626/2008 occurred on the 1st October, 2007, at an Ulster Bank branch in Tallaght. The appellant entered the bank armed with a knife. His face was partially covered with a scarf. There were people in the bank waiting to be served. He went to the counter and demanded money. A member of staff filled up a bag with money. The sum of €1,800 was stolen. The Appellant escaped initially on foot. He then got in a taxi. He left the taxi, having thrown a €20 note at the driver, and got on a bus. He was arrested on the 8th October and detained. He was identified from CCTV and made full admissions in interview. The appellant entered a guilty plea on the first mention date. The matter was adjourned from time to time to monitor the appellant's progress and to allow him to engage with services. It was noted that he had made "trojan efforts to rehabilitate himself". A sentence of three years suspended for three years was imposed on the 20th December, 2010, with probation supervision for 18 months. This was revoked on the 5th December, 2014.

4. The offence in bill number 1131/2009 occurred on the 10th July, 2008. The appellant and another man robbed a bookmakers in Tallaght. The appellant had a large kitchen knife while the other man had a hammer. Approximately ten members of the public were present. The staff members were threatened that the glass partition would be smashed. Money was demanded. The staff fled to a back room. They smashed a window and took between €2,000 and €3,000 in cash. The appellant entered a guilty plea. A fully suspended five year sentence was imposed on the 15th April, 2011, suspended for five years. This was consecutive to bill number 626/2008. On the 5th December, 2014, the suspended sentence was revoked.

5. The offence in bill number 889/2012 was committed on the 10th May, 2012. The appellant entered a guilty plea. He attempted to rob the handbag of a woman at a Luas stop. She refused to let go and was pulled to the ground. The appellant was restrained by passers-by and then arrested. Evidence was heard on the 8th March, 2013, and the appellant was placed under probation supervision before sentencing. Sentence was imposed on the 5th December, 2014. The appellant was sentenced to three years suspended consecutive to the sentences on bill numbers 626/2006 and 1131/2009. This offence was committed while he was on suspended sentences.

6. The offence in bill number 950/2013 occurred on the 19th April, 2013. The appellant robbed a woman at the ATM in a bank carpark in Tallaght using a knife. A man told her to empty her account. She gave evidence that she only noticed the knife when her hand hit off the blade which was protruding. The appellant had his right-hand over his face and said not to look at him. The appellant grabbed her by wrapping his arm around her and the blade was in and around her upper body. She said to leave her alone and that she wasn't going to give him anything. He grabbed her purse out of her hand and ran off. Her purse contained €60 and personal cards. The appellant was identified by the Gardai from CCTV of the incident. The victim's purse was found at the appellant's home address as was clothing matching the description. He was arrested on two occasions and denied involvement. The second arrest was on the 22nd August, 2013, and he has been in custody since that date.

7. The victim attended the sentencing hearing and gave evidence of the effect of the crime on her. She no longer goes to banks alone or walks alone. She takes taxis home if she finishes from about 8 pm onwards. She doesn't carry her purse, personal items or much money. She testified that she is terrified to be alone.

8. The appellant was convicted of robbery and an offence under s. 11 of the 1990 Act following an eight day trial on the 13th October, 2014, before His Honour Judge Hogan. For this reason, the sentencing in this matter took place separately to the other four bills. The appellant did not give evidence, accepted the verdict and apologised in the victim's presence. He was sentenced on the 18th December, 2014, to five years with the final three suspended. This was consecutive to the sentences on bill numbers 626/2006 and 1131/2009. He was on bond for bill number 1131/2009 and on bail pending finalisation of sentencing for bill number 889/2012.

9. The offence in bill number 43/2014 took place on the 15th August, 2013. The appellant robbed an off licence with a large kitchen

knife. Money was demanded from a member of staff. The knife was waved in a threatening manner. The one customer present ran from the shop. The appellant stole €415. He was wearing gloves, a baseball hat and had his hood up. The member of staff was put in fear and pressed the panic button. After the appellant left he chased him with a baseball bat and hit him to try stop him until the Gardai arrived but the appellant ran away. Based on the description provided the appellant was apprehended shortly afterwards with a knife and bag of cash. He was arrested and detained. During the two interviews he denied involvement. At the time, he was on bail for the offence in bill number 889/2012. He entered a guilty plea on the 10th November, 2014, the trial date. An indication was given a week before that a guilty plea would be entered. On the 5th December, 2014, a two year suspended sentence was imposed. This was made consecutive to the three year suspended sentence on bill number 889/2012.

#### **The appellant's personal circumstances**

10. The appellant was born in 1975 and is now in his 40s. He has had a long-standing heroin addiction. His addiction problems go back to when he was 11 years old. He left school at 13 years old. His previous convictions date back to when he was 15 years old. During his 20s and 30s he went through periods of addiction, offending, rehabilitation and then non-offending. He made efforts to rehabilitate himself. He has attended counselling, undertaken education, obtained certificates and carried out charity work. He has worked as a window cleaner and at a sign company. It was noted at sentencing that he has the support of his partner and four children who are all minors.

11. Evidence was given that the appellant had 34 previous convictions, 12 in the Circuit Court. There were 6 for robbery. These were for, *inter alia*, robbery, possession of knives and other articles, production of an article in the course of a dispute/fight, criminal damage, theft, misuse of drugs, ss. 112 and 113 Road Traffic Act, s. 2 Larceny Act, assault and larceny, s. 34 Forgery Act, s. 47 Offences Against the Person Act, failing to appear, public order, s. 2 assault and road traffic matters.

#### **Sentencing**

12. On the 5th December, 2014, the appellant had the sentences on bill numbers 626/2006 and 1131/2009 reactivated in full given the nature of the triggering offences. The appellant was then sentenced in relation to bill numbers 889/2012 and 43/2014.

13. In relation to bill number 889/2012, the attempted handbag robbery, the sentencing judge found the aggravating factors were that it was a crime of violence and the serious nature of the charge. The mitigating factor was his early guilty plea.

14. She took into account that at that time he hadn't come to Garda attention since 2008. The Court was advised that at the time of the offence his partner rang the Gardai to say that he had taken illicit substances. The Court put him on probation for that offence. The judge marked the seriousness of the offence and took into account the appellant's personal circumstances including his efforts to rehabilitate himself, the principles of totality and proportionality and imposed a sentence of three years suspended for three years on condition that he enter into a bond of €150 to keep the peace and be of good behaviour for a period of three years and place himself under the supervision of the Probation and Welfare Service for 18 months post release and comply with any of their directions as regards addiction programmes and/or drug rehabilitation. The judge gave liberty to the Probation and Welfare Service to re-enter the matter before the Court for the purpose of reactivation of the sentence in the event of noncompliance. It was consecutive to the sentences in bill numbers 626/2008 and 1131/2009.

15. In relation to bill number 43/2014, the off licence offence, the aggravating factors were that it was a serious case, it was a crime of violence and a knife was used. The mitigating factors were his plea of guilty and expression of remorse. The Court took account of his personal circumstances, his wish now to leave behind his criminality as expressed in his letter and his expression of remorse.

16. The Court marked the seriousness of the offence but also took into account his personal circumstances and the principles of totality and proportionality. A sentence of two years suspended for three years was imposed on the same conditions as above. This was consecutive to the sentence imposed on 889/2012. The sentences were backdated to take account of the time the appellant had spent in custody. The result of these sentences were that the appellant had sentences amounting to 13 years, 8 in custody and 5 suspended for 5 years.

17. On the 18th December, 2014, the appellant was sentenced on bill number 950/2013, the ATM robbery. The sentencing judge found that if this was a stand-alone offence it would be at the higher end of the middle range of robbery. He was armed, the victim felt the knife and he put his arm around her. The aggravating factors were the seriousness of the offence and violence. The mitigating factors were the appellant's remorse, efforts to deal with his addiction and personal and family circumstances. Account was taken of the fact that this was a conviction after a trial.

18. It was noted that five years would be the appropriate tariff considering the seriousness of the violence and the suffering of the victim. The judge then considered the principle of proportionality and suspended the final three years. The suspension was on condition that he enter a bond to keep the peace and to be of good behaviour for a period of five years post-release. During his period in custody, if available, he is to undergo a drug treatment programme or if it cannot be offered to him then on his release, should it then be deemed necessary by the probation service. He must comply with all requirements of the drug treatment programme. If he doesn't comply with the conditions of such a drug treatment programme, when he's in custody, liberty was given for the matter to be brought back before the Court as that could be deemed to be a breach of the condition.

19. This sentence was consecutive to that imposed on bill number 1131/2009 making his sentence in effect one of 13 years with 3 suspended.

#### **Appellant's submissions**

20. It is submitted that the previously suspended sentences were revoked under s. 99(10) of the 2006 Act which has since been struck down. This Court found in *Clarke v. Governor of Mountjoy Prison* [2016] IECA 24 4 that s. 99(17) provides a free-standing power to revoke not predicated on a valid s. 99(9) order. This Court can make such order as it deems appropriate. The appeal can proceed on the basis that the orders were made under section 99(17). This subsection allows for partial revocation, as did section 99(10).

21. The offences the subject matter of the revoked sentences occurred in 2007 and 2008. He was sentenced in 2010 and 2011 respectively. At that point, it was noted he was making "trojan efforts to rehabilitate". From 2008 to March, 2013 he did not come to adverse Garda attention save for the attempted robbery.

22. It is submitted that all the circumstances, referred to in s. 99(17), would include substantial periods before and after the imposition of the suspended sentence when conditions were abided by. A breach on the first day should be considered differently to a breach on the last day. In all the circumstances, a complete revocation of eight years was not warranted.

23. The Court of Criminal Appeal, through O'Donnell J., in *The People (DPP) v. Farrell* [2010] IECCA 68 at pp. 9 and 10 articulated the principle of totality in imposing consecutive sentences. It was held that in consecutive sentences the principle of totality means that "a court must be careful to take account of the overall impact of the sentence, the moral blameworthiness of the accused and the prospect of rehabilitation, and therefore recognises that the total sentence in some cases should be less than the sum of the component parts".

24. It is submitted that in *The People (DPP) v. Molloy* [2010] IECCA 20 a greater number of robberies over a shorter period received a sentence of three years which was increased to six on appeal.

25. It is submitted that the sentences imposed combined with the revocations resulted in a sentence which was disproportionate in the circumstances.

#### **Respondent's submissions**

26. It is submitted that the general principle of sentencing is set out in *The People (DPP) v. McCormack* [2000] 4 I.R. 356 at 351. In each case the appropriate sentence is that which suits the crime committed by that particular criminal.

27. Where offences fall into a similar pattern or were committed in a short timeframe there is a tendency to avoid consecutive sentences as was held in *The People (DPP) v. Yusuf* [2008] IECCA 37. It is submitted that the current offences were not committed in a short timeframe.

28. In *The People (DPP) v. Coady* [2009] IECCA 133 the issue of not requiring an offender to serve the full revoked sentence arose. There was a suspended 18 month sentence for assault causing harm. The breaches were for offences under ss. 4 and 6 of the Criminal Justice (Public Order) Act 1994. It was held to be an error to have not regarded "the nature of the breach compared to the gravity of the original offence". Revocation should have been dealt with in a proportionate manner. It is submitted that the gravity of the breach is an important circumstance to consider in relation to the discretion to impose all or part of the sentence. While there is a powerful argument for not activating or only activating part of a sentence following a minor breach there should be a link between the decision to reactivate and the offence which occasioned the breach. In the present case, the offence was of the same character and possibly more serious than the original offences as a knife was used.

29. It is submitted that the appellant received many chances and was making efforts to rehabilitate himself which led to adjournments and very lenient sentences for the first two bills. At this point, there were similarities to *Molloy*. The appellant did not take the chances and committed further offences. His Honour Judge Hogan considered the totality principle and imposed a very lenient sentence for the offence in bill number 950/2013. He also received a fully suspended sentence for the final robbery in bill number 43/2014.

30. It is submitted that there should be a relationship between the seriousness and type of triggering offence and the decision to revoke all or part of the suspended sentence. Overall consideration should be given to the principle of totality. In the instant case reactivation was triggered by a very serious offence which was identical in character to the original offences. Overall totality has been considered and there is no error of principle in the sentences.

#### **Decision**

31. The cumulative sentence that the appellant is now serving amounts to one of 13 years imprisonment with the final three years suspended. The appellant argues that the full eight years should not have been re-imposed following revocation of the suspended sentences. Account, it is argued, should have been given to the fact that between 2008 and 2012 the appellant had not come to the attention of the authorities. He did seem to be making efforts to deal with his addiction problems which, he maintains, are the source of his offending.

32. The relevant law is s. 99(17) of the Criminal Justice Act 2006. It provides as follows;

*"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."*

33. The general principle of sentencing is set out in *The People (DPP) v. McCormack* [2000] 4 IR 356 at p. 359 as follows;

*"Each case must depend upon its special circumstances. The appropriate sentence depends not only upon its own facts but also upon the personal circumstances of the accused. The sentence to be imposed is not the appropriate sentence for the crime, but the appropriate sentence for the crime because it has been committed by that accused."*

34. The Court has been referred to the judgment in *DPP v. Yusuf* [2008] IECCA 37 and in particular to the following passage;

*"It may be said at the outset that the imposition of consecutive sentences does not require statutory authorisation and is a well established feature of Irish criminal law. That said, there is a strong tendency evident in the jurisprudence of this Court to avoid the imposition of consecutive sentences where the offences might be described as falling within a similar pattern of offences or occurring within a relatively short timeframe."*

35. There is authority for the proposition that upon revocation of a suspension order, account should be taken of the relative gravity of the triggering offence. In *The People (at the suit of the Director of Public Prosecutions) v. Raymond Coady* [2009] IECCA 133 an eighteen month sentence was reactivated. The triggering offence was a relatively minor one. The court found at para. 10 as follows;

*"In all the circumstances of the case the Court is of the view that the learned trial judge erred in not having regard to the nature of the breach compared to the gravity of the original offence. The Court is of the view that the learned trial judge should have dealt with the issue of revocation in a proportionate manner."*

Thus the gravity of the triggering offence is something that ought to be considered and weighed against the original sentence imposed when invoking the discretion to impose the whole or part of that original sentence. In the case of a triggering offence which is relatively minor by reference to the original one, there should be a relationship of proportionality between the two. Thus the Court revoking the suspension may give consideration to revoking only a part of the suspended sentence rather than imposing the full

sentence where the triggering offence is relatively minor by comparison with the original one.

36. In this case the triggering offences were of much the same character as the original offences. In the attack on a woman at an ATM in Tallaght on 19th April, 2013 and in the robbery at an off-license in Marino on 15th August, 2013, a knife was used. Both Judges Ryan and Hogan referred to the triggering offences as, respectively, "crimes of violence and at the higher end of the middle range of robbery". The triggering offences were one of violence and very similar in nature to the original offences. It was thus perfectly appropriate for Her Honour Judge Ryan in this matter to reactivate in full the sentences previously suspended. The appellant has been given many chances by way of suspended sentences for serious crimes. He has not taken the opportunities that have been afforded to him. On 18th December, 2014 His Honour Judge Hogan took full account of the sentences to which the appellant was subject and applied the totality principle when he sentenced the appellant to five years imprisonment and suspended three years, the sentence to follow consecutively. The result was the ten year cumulative sentence with a current release date of 18th February, 2021.

37. The Court can identify no error of principle in the careful manner in which both judges approached the task of sentencing herein and thus will not interfere. The appeal is dismissed.