

**THE HIGH COURT**

**Record Number: 2013 No. 1762 SS**

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

**BETWEEN:**

**THE DIRECTOR OF PUBLIC PROSECUTIONS (AT THE SUIT OF GARDA NIALL COGAVIN)**

**PROSECUTOR**

**AND**

**AIGARS VAJEUSKIS**

**DEFENDANT**

**JUDGMENT OF MR JUSTICE MICHAEL PEART DELIVERED ON THE 23rd DAY OF MAY 2014:**

1. This is a Consultative Case Stated dated 2nd October 2013 by Judge Seamus Hughes of the District Court arising out of a prosecution of the defendant for certain offences under the Road Traffic Acts, and in respect of which the defendant was convicted by him on 27th June 2012 at Athlone District Court.
2. According to the Case Stated submitted, Judge Hughes decided, following conviction, that the defendant was a suitable candidate for imprisonment, but that he should be allowed an opportunity to demonstrate his remorse and to mark the seriousness of the offences. Accordingly, on 27th June 2012 he imposed fines amounting to the sum of €1500, directed also a contribution to the court poor box in a further sum of €1500, and adjourned the case until 25th July 2012 to enable the defendant to do so.
3. The matter came back before the District Court on 25th July 2012, and on that date the defendant made the payments as ordered. Judge Hughes proceeded to disqualify the defendant from driving for a period of six years, and sentenced him also to 4 months imprisonment, but suspending that sentence for a period of two years pursuant to the provisions of section 99 (1) of the Criminal Justice Act 2006.
4. According to the Case Stated, on 25th May 2013 the defendant was convicted of further offences committed during the period of this suspension, those matters coming before a different District Judge, namely Judge Denis McLoughlin, at Galway District Court.
5. Given the existence of the suspended sentence already imposed, Judge McLoughlin adjourned the case before him, and, as provided in section 99, remanded the defendant back to Athlone District Court so that Judge Hughes could consider whether the suspended sentence should be activated pursuant to the provisions of section 99 (10) of the Criminal Justice Act, 2006.
6. The matter came back before Judge Hughes for that purpose on 5th June 2013 when Counsel for the defendant raised an issue as to whether the District Court has jurisdiction to suspend a sentence of four months for a period of two years, i.e. to suspend the sentence for a period longer than the sentence itself.
7. Judge Hughes seeks the opinion of this Court on the following questions:
  1. Is the jurisdiction of the District Court to suspend a sentence, limited to its maximum sentencing jurisdiction in a given case?
  2. Cognisant that the sentencing jurisdiction of the District Court is limited to one year, or two years on two offences where the sentence is made consecutive and the charges arise from separate events, does that jurisdiction extend to the suspension of a sentence for the period greater than two years?
  3. In the absence of special circumstances, am I correct in law to suspend a sentence for a period longer than the length of the sentence that is actually imposed?
  4. In reference to the existing jurisprudence, particularly the judgment of Chief Justice Keane in the People (DPP) v. Hogan (unreported, Court of Criminal Appeal, 4 March 2002) what constitutes "special circumstances", and am I correct in law in finding that a third conviction constitutes a special circumstance?
8. Before addressing the submissions of the parties, and reaching any conclusions, I should set forth the relevant provisions of Section 99, sub-sections (1), (9) and (10) of the Act of 2006:
  - (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 recognizance to comply with the conditions of, or imposed in relation to, the order.
  - (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 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.*

9. James Dwyer BL for the prosecutor has first of all submitted that Judge Hughes ought not to have stated a case for determination by this Court, since in his submission the judge is *functus officio* as far as the sentence imposed is concerned, and cannot now revisit it even if it is a sentence which he was not entitled to suspend for a two year period. In this regard, Mr Dwyer has referred to the provisions of the Courts (Supplemental Provisions) Act 1961 which provides the statutory basis for a Case Stated to this Court. That section provides:

*"52 (1) – A justice of the District Court shall, if requested by any person who has been heard in any proceedings whatsoever before him (other than proceedings relating to an indictable offence which is not being dealt with summarily by the court) unless he considers the request frivolous, and may (without request), refer any question of law arising in such proceedings to the High Court for determination". [emphasis added]*

10. In the light of section 52, Mr Dwyer submits that the questions now posed in the Case Stated have not "[arisen] in such proceedings" before the District Judge on the revocation application, and arose if at all in the proceedings previously before him on 25th July 2012 when he imposed the sentence and suspended it. He submits that the only question arising on the matter before the District Judge on the 5th June 2013 when the defendant was before him for the purpose of section 99 (10) of the Act of 2006 was whether it would be unjust in all the circumstances to revoke the suspension – otherwise the suspension shall be revoked. It is submitted where the imposition of a suspended sentence for a period longer than the sentence itself was never challenged by way of appeal or judicial review, this Court should answer the questions posed in the Case Stated by saying that the questions asked are not "arising in such proceedings" since what is then before the court is simply an application to revoke the suspension of sentence under section 99 (10) the Act.

11. In relation to whether the judge was '*functus officio*' once he has passed sentence, Mr Dwyer has referred to the judgment of O'Daly J. (as he then was) in *A-G v. Simpson (No.2)* [1959] I.R. 335 at p. 346, where, in a dissenting judgment, but in any event by way of *obiter dictum*, he stated:

*"The Justice here, even if he had, in conformity with Rule 55 of the District Court Rules, immediately entered up his ruling that the evidence sought in cross-examination was admissible, would nonetheless, up to the moment of making his order sending forward for trial or refusing informations, have been free to state a case on a question of law. Every question of law may be said to be "arising" in the case while the justice is still not functus officio."*

Mr Dwyer submits that it is clear therefore that once the District Judge imposed the sentence of four months imprisonment, and suspended it for two years, he is thereafter '*functus officio*' as far as any consideration of whether it was a lawful sentence is concerned, and that thereafter, the sentence imposed may be re-visited only by way of appeal or judicial review, neither of which has occurred in this case. He has submitted also that this is consistent with the dicta of Hardiman J. in cases such as *Cleary v. DPP* [2012] IESC 43, 1 ILRM 449, and *People (DPP) v. Stewart*, unreported, Court of Criminal Appeal, 12 January 2004.

12. Micheál P. O'Higgins SC for the defendant has submitted that on the application to revoke the suspension, the District Judge was not '*functus officio*' as far as these proceedings are concerned. He describes the revocation application as one "to lock a person up on foot of a previous sentence", and accordingly submits that it must be seen as arising from the proceedings, and therefore that the District Judge is perfectly entitled to consider issues arising from the imposition of the original sentence, and to seek the guidance of this Court.

13. Mr O'Higgins notes that where a sentence of four months is imposed, but is suspended for a period of two years, the sentence is hanging over the head of the defendant for six times the length of the sentence itself, and that this must be considered to be disproportionate. He urges that point in the context that under section 99 (10) of the Act of 2006 the District Judge is required to revoke the suspension of sentence unless he considers that it would be unjust to do so in all the circumstances. One example of where a judge might consider that it would be unjust that a suspension of a sentence should be revoked (or in other words that the sentence be activated) would be where the so-called 'trigger offence' was committed during the period of suspension, but towards the very end of that period. But Mr Higgins submits that even in the present case, the District Judge would be entitled to take the view that the length of the suspension period (two years) in the context of a sentence of four months, is disproportionate and therefore unjust, and would be entitled to decide that he should exercise his discretion not to revoke the suspension.

14. Mr O'Higgins submits also that the issue raised as to the length of the suspension of a four-month sentence is not confined simply to whether the District Judge is entitled to suspend a sentence for longer than the length of the sentence itself, but that it goes to the question of jurisdiction in relation to the revocation application under section 99 (10) as did the issue in *DPP v. Carter*, unreported, O'Malley J, 21st March 2014. The issue in that case arose from the fact that whereas section 99 (9) of the Act of 2006 provides that the judge dealing with a 'trigger offence' shall remand the person "to the next sitting" of the court that imposed the suspended sentence, for the purpose of the revocation application, the defendant was remanded to that court, but to one sitting one week later than the next sitting. O'Malley J. was satisfied that section was mandatory, the wording was clear and did not permit of any discretion to remand the defendant to any sitting other than "*the next sitting*" no matter how reasonable or short the period of time beyond that next sitting the matter was remanded to. In this regard, she concluded:

*"The question here is ultimately one of jurisdiction. The issue is not whether the defendant was properly brought before the District Court, but whether a lawful foundation had been laid for the exercise by the District Court of its powers under subs. (10) of the Act. It seems to me that this issue must be approached on the basis that the powers in relation to suspended sentence are now entirely governed by statute, and that the statutory power to revoke such a sentence under subs. (10) of the Act depends on a valid order having been made under subs. (9). I propose therefore to follow Devine and hold that in this case the District Court had no jurisdiction to deal with the applicant. I do so on the basis that Devine is a decision of the Court of Criminal Appeal directly concerned with the proper interpretation of the statutory provisions in issue in this case."*

15. Mr O'Higgins submits that in the present case also, the lawfulness of the suspended sentence goes to the question of jurisdiction of the District Court to consider a revocation of the suspension under section 99 (10), since it cannot be said that a District Judge would have jurisdiction to make an order the effect of which would be to incarcerate a person on foot of the sentence the suspension of which was unlawful. He submits that at a minimum there is a question mark over the validity of the sentence which was imposed. I do not accept that submission as correct. In the present case, the issue which has been raised in this regard does not go to jurisdiction. The District Judge passed sentence and suspended it and did so within jurisdiction. That sentence was not appealed or

otherwise challenged. It was a lawful sentence for reasons which will appear below. The matter was therefore properly before Judge Hughes on the 5th June 2013.

16. Writing in the year 2000 and therefore before the Oireachtas provided a statutory basis for the imposition of a suspended sentence and for its revocation in section 99 of the Act of 2006, Prof. Thomas O'Malley in his work entitled *Sentencing: Law and Practice* [2000] Round Hall noted that the suspended sentence has been endorsed as being "a valid and proper form of sentence", and one "so well established in our legal system as not to require any elaboration", and one which "is obviously a very beneficial one for judges to possess". In that regard he footnoted *In re McIlhagga*, unreported, Supreme Court, July 29 1971, O'Dalaigh J., and *O'Brien v. Governor of Limerick Prison* [1997] 2 ILRM 349. The learned author goes on to state at paragraph 9 – 52:

*"Because suspended sentences are unregulated by statute, there are no limits to the length of sentence that may be suspended, the length of time for which it may be suspended or the conditions that may be attached to it".*

He went on in the same paragraph to note that the Law Reform Commission in its Report on Sentencing [L.R.C 53 - 1996] "has recommended a limit of three years on the length of sentence that may be suspended and, as had been envisaged by the Criminal Justice Bill 1967, the same limit on the length of time for which a sentence may be suspended". He noted also that "these are sensible recommendations which should be implemented by legislation".

14. Nevertheless one finds that nowhere within the provisions of section 99 of the Act of 2006 has any provision been made for any maximum length of sentence which may be suspended, or any limit to the length of any such suspension. Subsequently the Oireachtas has twice enacted amendments to section 99 of the Act of 2006, and on neither occasion did it take the opportunity to include any limitation on the maximum length of sentence which may be suspended, nor the length of any such suspension. In such circumstances, it seems to me necessary to conclude that the intention of the Oireachtas is clear, namely that there should be no such limitations imposed by statute, despite the urgings of the Law Reform Commission in that regard and, one might say, the views expressed by Prof. O'Malley above. I agree with the comment of O'Malley J. in *Carter* above, that the regime for the suspension of sentences is one now entirely regulated by statute.

15. I agree with Mr Dwyer's submission that on the revocation application it is not open to the District Judge who imposed the suspended sentence to enter then upon the question of whether the sentence imposed is a lawful one. That question must be dealt with by way of an appeal or else by way of judicial review. As far as the sentence itself is concerned, there could be no question of the judge reconsidering the sentence. To that extent he is *functus officio* as far as any reconsideration of the sentence is concerned. In my view it would follow that when he is considering whether it would be unjust to revoke the suspension because another offence has been committed during the period of suspension, he must disregard for that purpose any question of whether the suspended sentence was lawfully or appropriately imposed. He must look to other facts and circumstances when deciding whether it would be unjust to revoke the suspension, and it would not be appropriate to set forth in any manner whatever the variety of facts and circumstances which might render it unjust to revoke, as each case will be individual as is each convicted person.

16. On the issue of whether the particular questions asked in this Case Stated are questions "arising in such proceedings" for the purpose of section 52(1) of the Act of 1961, Mr Dwyer is strictly speaking correct given my conclusion that on the revocation application the District Judge may not reconsider in any way the lawfulness or appropriateness of the suspended sentence imposed. Nevertheless, I do not rule out that in another case an issue may arise upon an application to revoke a suspended sentence and which does arise from the proceedings in which the suspended sentence was imposed. I cannot envisage what that issue or issues might be, but I would not wish this judgment to be regarded as authority for any proposition that on an application to revoke a suspended sentence a District Judge may never submit a Case Stated for the consideration of the High Court.

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

18. It follows also in my view, in so far as it is relevant at all (but it may be helpful generally 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 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.

19. Having reached these conclusions I should answer the questions asked upon this Case Stated as follows:

(i) Is the jurisdiction of the District Court to suspend a sentence, limited to its maximum sentencing jurisdiction in a given case?

Answer: No, because the Act of 2006 is silent on the matter.

(ii) Cognisant that the sentencing jurisdiction of the District Court is limited to one year, or two years on two offences where the sentence is made consecutive and the charges arise from separate events, does that jurisdiction extend to the suspension of a sentence for the period greater than two years?

Answer: Yes, because the Act provides no limit to the period of the suspension.

(iii) In the absence of special circumstances, am I correct in law to suspend a sentence for a period longer than the length of the sentence that is actually imposed?

Answer: Yes, because section 99 of the Act of 2006 makes no reference to special circumstances.

(iv) In reference to the existing jurisprudence, particularly the judgment of Chief Justice Keane in the People (DPP) v. Hogan (unreported, Court of Criminal Appeal, 4 March 2002) what constitutes "special circumstances", and am I correct in

law in finding that a third conviction constitutes a special circumstance?

Answer: Does not arise.