Neutral Citation: [2015] IEHC 165

THE HIGH COURT

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

[2013 No. 875 SS]

BETWEEN

THE DIRECTOR OF PUBLIC PROSECTIONS (AT THE SUIT OF GARDA FIONNUALA MOLONEY)

PROSECUTOR

AND

PHYLLIS O'CALLAGHAN

DEFENDANT

JUDGMENT of Ms. Justice Faherty delivered on the 20th day of March 2015

1. This is a consultative case stated by then District Judge Catherine Murphy, pursuant to s. 52(1) of the Courts (Supplemental Provisions) Act 1961. Essentially, the questions concern the interaction between the procedures for the reactivation of a suspended sentence set out ins. 99 of the Criminal Justice Act 2006 (as amended) (the 2006 Act) and an appeal from the conviction which triggers the reactivation process.

2. Section 99 of the Act of 2006 provides a complete codification governing the use of suspended sentences in this jurisdiction and it replaced the more informal common law system which had operated prior to the enactment of the 2006 Act. The particular provisions of the 2006 Act which are the focus of these proceedings are s.99-s.99(10A) and s.99(12).

Factual background

3. The facts are taken from the consultative case stated. The defendant appeared before Judge Ann Watkin at the Dublin Metropolitan District Court on foot of national charge sheet number 12752627 at the suit of the prosecutor to answer the compliant that she committed an offence contrary to s.. 78 (3) of the Finance Act 2005 (as amended).

4. On 17th September 2012, District Judge Watkin sitting in court 17, Criminal Courts of Justice, Parkgate Street, Dublin 8 convicted the defendant of the above mentioned offence following a contested trial. Judge Watkin was informed that the defendant had been convicted by Judge Murphy of two offences on the 4th January 2012 and that Judge Murphy had imposed a sentence of three months imprisonment on the defendant the entirety of which was suspended under s. 99(1) of the Criminal Justice Act 2006 (as amended) for a period of 12 months on the defendant entering into her own bond to keep the peace and be of good behaviour in the sum of €200. The defendant du1y entered into the bond before the court

5. Having regard to the provisions of s. 99 (9) of the 2006 Act, on 17th September 2012, Judge Watkin remanded the defendant on bail to court 18 before Judge Murphy (the suspending court) in the Criminal Courts of Justice.

6. On the 17th September 2012, Judge Murphy found that the defendant was properly before her for the purpose of the s.99 hearing. Judge Murphy was informed by the defendant's solicitor that the defendant had immediately instructed her that she wished to appeal her conviction on the triggering offence.

7. Judge Murphy was of the view (and so stated) that the defendant could not appeal her conviction for the triggering offence until such time as the matter had been finalised and the defendant sentenced by Judge Watkin (the convicting court). In support of her view, Judge Murphy relied on the Judgment of McCarthy J. in *Muntean v. Hamill* [2010] IEHC 391 Judge Murphy remarked that pursuant to s. 99 of the Act, as amended, the defendant could not be sentenced on the triggering offence until such time as the s. 99 hearing had been dealt with by her.

8. The defendant's solicitor made a submission that Judge Murphy had discretion not to revoke the suspended sentence on 17th September 2012 and she requested that Judge Murphy remand the matter back to Judge Watkin so that the defendant could be sentenced for the triggering offence and so that recognisances could then be fixed for her to appeal her conviction. She also submitted that Judge Murphy had discretion to remand the s. 99 application to a date in the future, pending the outcome of the appeal and that the s. 99 application could be dealt with once the appeal had been finalised. It was submitted that if this course was not followed, the defendant would effectively be deprived of her right to appeal in that she would have to be dealt with on the s. 99 hearing before being able to appeal the conviction on the triggering offence. The argument was made that if the defendant were to successfully appeal the triggering offence, then a "*grave injustice*" would flow from her having been dealt with on the s. 99 hearing, as that application could not have been brought without a conviction for the triggering offence. The defendant's solicitor relied on *Sharlott v Collins* 2010 IEHC 482.

9. Following a number of remands, the matter was again before Judge Murphy on 1ih October 2012. On that occasion, having heard the arguments made on behalf of the defendant, the solicitor for the prosecutor invited Judge Murphy to finalise the matter pursuant to s. 99(9) and indicated that it was a matter for Judge Murphy to exercise her discretion whether to revoke the suspended sentence in full, in part or not at all. It was also argued that Judge Murphy would have to deal with the s. 99 hearing prior to the defendant being sentenced for the triggering offence and prior to Judge Watkin being able to fix recognisances for appeal.

10. Counsel for the defendant submitted that pursuant to s. 99 of the 2006 Act, Judge Murphy in fact had discretion not to revoke the suspension at all if the court considered that the revocation of that order would be unjust in all the circumstances of the case.

11. Being of the opinion that questions of law arose, Judge Murphy referred the following questions for determination:-

> *"1. Where a Defendant has been remanded to the District Court under section 99 (9) of the criminal Justice Act 2006 (as amended) for the purpose of considering whether to revoke a suspended sentence, does the Court, on being advised by Solicitor or Counsel for the defence that the Defendant is considering or wishes to appeal the conviction for the triggering offence - in those circumstances is the Court entitled and does the Court have jurisdiction to proceed to revoke the suspended sentence before remanding the Defendant back to the other Court under section 99 (I OA).*

2. In such circumstances where a Defendant has been remanded to the District Court under section 99 (9) of the Criminal Justice Act 2006 (as amended) for the purpose of considering whether to revoke a suspended sentence is the court, before remanding the Defendant back to the other court under section 99 (IOA) required to defer making a decision on the revocation and for that purpose to adjourn the matter generally and where should the appeal not proceed to hearing, the matter will, in effect fall into limbo.

3(a) If the answer to the above is yes- what are the consequences for the court to which the Defendant is remanded back and which is precluded from sentencing (which must predate any appeal) under such time as the initial offence has been finalised by the first court?

3(b) If the answer to the above is yes then what are the consequences where the period of suspension has expired in the interim and where, should the appeal not proceed to hearing- the matter will, in effect, fall into limbo?

4. What orders can the District Court make when a Defendant has been remanded to it under section 99 (9) of the Criminal Justice Act 2006 (as amended)? "

The Law

At this juncture, it is apposite to set out the salient provisions of the legislation with which the court is primarily concerned.

12. Section 99 of the Criminal Justice Act 2006 (as amended by section 60 of the Criminal Justice Act 2007 and section 51 of the Criminal Justice (Miscellaneous provisions) Act 2009) provides, in part, as follows:-

"(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 ...

(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 were 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.

(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. "

The parties' submissions

Counsel for the prosecutor submitted that the case is not moot despite being of some antiquity and the period of suspension having expired, since the application to revoke the suspended sentence was made within time. Counsel for the defendant did not gainsay this argument.

13. Counsel for the prosecutor submitted that in the context of what was Judge Murphy's statutory obligation once the defendant had been remanded back before her by Judge Watkin, and where Judge Murphy was apprised of the defendant's intention to appeal her conviction, Judge Murphy must nonetheless deal with the matter of the revocation before remanding the defendant back to Judge Watkin pursuant to s. 99 (10A). The matter, counsel argued, is a simple question of statutory interpretation. Once a remand was made pursuant to s.99(9), the suspending court must deal with the issue of revocation, as it is required to do pursuant to s.99(10) and must then make an order under s. 99(1OA) remanding the matter back to the convicting court. Counsel made the case that there is no potential for injustice being visited on the defendant. If her suspended sentence were to be revoked by Judge Murphy, in whole or in part, she could appeal that revocation to the Circuit Court, pursuant to s. 99(12) of the 2006 Act and, pending appeal, she would be entitled to bail under s. 18 of the 1928 Act and the District Court Rules. By entering into recognisances, the defendant need not spend a single minute in custody pending the determination of the appeal against the revocation order. It was submitted that, in any event, it is not uncommon for people to spend time in custody while dealing with bail, recognisances etc., only later to win their appeals. Once the revocation is dealt with, the defendant is then sent back to the convicting court for sentence to be imposed and when sentenced she can then appeal her conviction and sentence *de novo* to the Circuit Court. Again, she is entitled to bail pending that appeal. There are therefore two appeals before the Circuit Court. Counsel submitted that the Circuit Court (as the appellate court in both instances) can make orders, in the interests of justice, in relation to the sequencing of the two appeals and which are protective of the defendant's right to a fair trial pursuant to Article 38 of the Constitution. Counsel outlined the manner by which this could be achieved: The appeal against revocation can be adjourned until the appeal against the conviction for the triggering offence is heard. If the defendant is successful on that appeal, the Circuit Court then allows the appeal against revocation. If the defendant is unsuccessful in her appeal against the triggering offence, then the appeal against the revocation can be revisited. Counsel also contended that, given the antiquity of the proceedings, it is open to the suspending court to exercise its discretion under s. 99(10).

14. Counsel submitted that the law was settled as regards the mandatory requirement on Judge Watkin (the convicting court) to remand pursuant to s.99(9) before imposing sentence, notwithstanding that the defendant had immediately evinced the intention to appeal her conviction. Counsel referred the court to the jurisprudence of the High Court on this issue.

15. In *Muntean v. Hamill & DPP* [2010] IEHC 391, McCarthy J. had to consider, inter alia, the provisions of s.99(9) of the 2006 Act.

The circumstances were as follows: the applicant was convicted of an offence in the District Court. The offence was committed within the currency of a suspended sentence imposed by another court. The applicant was remanded under s. 99(9) to that other court to reactivate the suspended sentence. Meanwhile, the applicant sought to prosecute an appeal to the High Court by way of case stated against his conviction. The matter came before the High Court by way of judicial review of the respondent District Judge's refusal to state a case on the basis that he had not yet sentenced the accused. McCarthy J. rejected the applicant's argument that there was no jurisdiction in the District Court to remand the accused to the court of first conviction due to the lodgement and service of the application to state a case as such application will, once an appropriate recognisance is entered into, operate as a stay. He held that:-

> *"Since no appeal lies before sentence, by definition, a stay cannot operate by virtue of a purported application which a court has no jurisdiction to entertain."*

16. McCarthy J. relied on a decision of the Supreme Court in *State (Aherne) v. Cotter* [1982] IR 188 where that court held that an accused cannot prosecute an appeal de novo to the Circuit Court under s. 18 of the Courts of Justice Act 1928 against conviction alone. He referred to the dictum of Walsh J. who had held that this was:-

> *"..the view of the Oireachtas when it passed the Courts (Supplemental Provisions) Act, 1961, and made special provision for the possibility of appealing against sentence as distinct from conviction. It did not make any such provision for an appeal against conviction solely. Section 18 of the Act of 1928 extended the right of appeal to all cases where any fine or any imprisonment was imposed, but it made no provision for appealing against conviction alone or penalty alone."*

17. Accordingly, McCarthy J. refused *certiorari* to quash the refusal of the respondent judge to state an appeal by way of case stated, holding that:

> *" ..the learned District Judge had jurisdiction to remand the applicant pursuant to s. 99 of the Act of2006 and indeed had a duty to so do."*

This court notes that the learned judge was alert to the potential adverse consequences of the mandatory nature of s.99(9). He stated: "*it may follow that a suspension might be discharged with the requirement to serve a custodial sentence, in circumstances where a party might successfully appeal his second conviction. One might serve a term of imprisonment where it might ultimately be held there was no basis for bringing the suspension to an end This would constitute a significant dilution of the benefit accruing to a party appealing from the District Court, namely, the benefit of remaining at liberty. Such an appellant has effectively been held to be in the position of someone enjoying the presumption of innocence, notwithstanding the summary conviction, though, of course, the fact of a conviction might be relevant in adjudicating on whether or not continuing bail ought to be afforded*"

18. This court was also referred to the decision in *Sharlott v. Collins* [2010] IEHC 482. The relevant facts were as follows. The applicant was convicted of an offence in the District Court. It came to the court's attention that the applicant had a five year suspended sentence from the Circuit Court. The conviction took place within the currency of the five year bond. The applicant was remanded to the Circuit Court under s. 99(9). When the matter came before the Circuit Court, the applicant argued that it should not be heard as he had lodged an appeal against the "triggering offence", which was still outstanding. In the High Court, the applicant sought prohibition of his revocation hearing before the Circuit Court pending his appeal. He raised two issues: Firstly, whether the District Court judge had jurisdiction to remand the matter to the Circuit Court, as the applicant claimed that the District judge was *functus officio* at the time of the remand. Alternatively, the applicant contended that if the order was to be correct it would have been made subject to a stay pending the outcome of the Circuit appeal. The second issue was whether the applicant's undoubted right to fair procedures mandated the High Court to stay the procedure in the Circuit Court under s. 99 of the Act of 2006 until after the District Court appeal of the triggering offence had been finalised.

19. In refusing the relief sought Hanna J. held:-

> *"14. The terms of s. 99(9) of the Act of2006, in my view, are mandatory on the learned District Judge. With or without any application, she was bound to remand the applicant to the next sitting of Dublin Circuit Criminal Court. The learned District Judge has convicted but not yet sentenced the applicant. The question of her being functus officio in the circumstances, does not arise.*
>
> *15. The decision of the Supreme Court in State (Aherne) v. Cotter [1982] JR. 188 ('Aherne'), and more recently the decision of McCarthy J. in Muntean v. District Judge Hamill and D.P.P. [2010] I.E.HC. 391, (Unreported, High Court, McCarthy J., 6th May, 2010) ('Muntean'), hold that appeals from the District Court to the Circuit Court in criminal matters cannot be brought against conviction alone. I appreciate that a different view was offered by Charleton J. in Burke v. D.P.P. and McNulty [2007] 2 I.L.R.M 371. However, it appears that Aherne was not opened to Charleton J. in written or legal submission....."*

20. In *Sharlott*, reference was made to the decision in *Harvey v. District Judge Leonard & DPP* [2008] IEHC 2009, in particular to what Hedigan J. had to say regarding the efficacy of separating conviction from sentence. In *Harvey*, the applicant had argued that the whole s. 99 process was inoperable because it provided for the conviction and sentence of the triggering offence to occur at different stages of the process. As such, it was argued that the applicant could not be said to have been convicted of an offence.

In rejecting a similar argument that conviction and sentence cannot be severed, Hanna J. referred to what was said in *Harvey*:-

> *"17. Hedigan J in Harvey v. District Judge Leonard and D.P.P. [2008] I.E.H.C. 209 (Unreported, High Court, Hedigan J, 3rd July, 2008), although appearing to follow Charleton J, nevertheless has the following helpful paragraph:-*
>
> *'The challenge is based on what I consider the mistaken view that conviction and sentence are so inextricably linked that nothing of substance can occur between them. That proposition cannot be correct. Experience over many years shows practitioners that District Judges regularly convict and put back for sentence. There may be sought probation or other reports or all manner of further evidence before sentence is imposed The procedure contemplated by s. 99 is obviously different but nonetheless clearly occurring within the same hiatus between conviction and sentence. The reality in all such cases is that the accused has been convicted and awaits sentence. The wording of the Act could not be clearer and its meaning is also clear. The requirement on the District Judge is mandatory and the District Judge's actions were exactly in accordance therewith. In regard to the Probation Act any loss the applicant might suffer is provided by law.*
>
> *It also seems to me that the first named respondent has jurisdiction to prescribe the procedure in relation to remanding*

the matter before the other Court pursuant to s. 99(9) of the Act as amended, notwithstanding the absence of rules of Court and Court forms specifically governing the procedure. The lack of such forms and rules, it seems to me, cannot interfere with the duty of the first named respondent to comply with s. 99(9) but rather leaves the Judge with the discretion as to how the duty is to be performed. For all the above reasons I refuse the reliefs sought in these proceedings. '"

Hanna J. went on to state:-

"*18. In my opinion the District Court is still seised of this case. A District Court trial is still in being awaiting the sentencing phase. The applicant maintains his innocence. He seeks to appeal. Since he cannot appeal against conviction alone, the sentence phase will have to be concluded before he may proceed with his appeal*."

21. Reference was also made to the decision of Moriarty J. in *Murphy v. Judge Watkin & othrs*. (unreported 11 July 2014), where the applicant's challenge to the order of the District Court remanding him under s.99(9) of the 2006 Act to the Circuit Court, and the latter court's order partly reactivating a suspended sentence previously imposed was considered. The applicant argued, inter alia, that as he had not been "convicted", in that he had not been sentenced, the District Court had no jurisdiction to remand him. The basis of the applicant's submissions on this issue rested on the proposition that conviction and sentence cannot be severed and that s.99(9) required a matter be remanded in respect of the earlier offence before the imposition of the later offence. Following the dictum of Hedigan J. in *Harvey* as to the severability of conviction and sentence, Moriarty J. dismissed the application.

Counsel for the prosecutor submitted that the approach of the courts in *Muntean* and *Sharlott* in particular, while dealing ostensibly with the mandatory provisions of s. 99(9) of the 2006 Act, is also determinative of the prosecutor's argument in these proceedings, namely that Judge Murphy (the suspending court) is statutorily bound, pursuant to s.99(10), to deal with the revocation question, once the defendant has been remanded pursuant to s.99(9) notwithstanding the stated intention to appeal the triggering conviction. In this regard, counsel referred to the following dictum of Hanna J. in *Sharlott*:-

"19. No doubt the learned District Judge was presented with a somewhat awkward situation. She was told by the prosecution she must remand to the Circuit Court. She was asked by the defendant to fix recognisances. However, the matter now rests in one sense with the Circuit Court. The applicant is apprehensive that the suspended sentence may be activated before he has the opportunity to pursue his appeal. Were he ultimately to succeed and to stand innocent of the District Court charge, he would undoubtedly suffer a grave injustice were the Circuit Court sentence in the meantime activated.

20. The quia timet nature of this application is something which counsel for the notice party complains, and in my view rightly so. Without taking an overly prescriptive view, it seems to me that matters which have arisen, although not provided for in statute, can be resolved with the Circuit Court and District Court where one can only and does presume that all and any necessary steps will be taken to uphold and vindicate the applicant's rights to fair procedures, liberty and due course of law. (See Blanchfield v. Hartnett [2002] 3 I.R. 207 and of the decision of Gannon J in Clune v. D.P.P. [1981] I.L.R.M 17). It is eminently within the discretion of the Circuit Court to enable the applicant to pursue his appeal from the District Court. I am not at all persuaded that the remarks of the learned Circuit Judge indicate anything other than a determination to make a decision in the matter. I refuse the application. "

22. The court was also referred to *McCabe v. Governor of Mountjoy* [2014] IEHC 309 where Hogan J., in the course of his consideration of an application pursuant to Article 40.4.2 of the Constitution for the release of the applicant, had cause to consider how the word "*convicted*" ins. 99(9) should be interpreted. In that case the applicant was the subject of a suspended sentence imposed by the Circuit Court in its capacity as an appellate court. The applicant was later convicted in the District Court and remanded back to the Circuit Court for the suspension to be revoked. Hogan J. agreed with the decision in *Muntean* that an appeal against the triggering conviction could only be taken after sentence had been imposed. After considering the provisions of s. 18 of the Courts of Justice Act 1928 and s. 50 of the Courts (Supplemental) Provisions Act 1961 and the legislative history of the Criminal Justice Act, 2006, he held:-

"15 ..... that the meaning of the word ""conviction" has not been fixed unalterably by some sacred legal tablet of stone which has permanently abridged the capacity of the Oireachtas to give this word any different meaning, even in a suitably different legal context of the 2006 Act. "

16. This is indeed what has happened here. Moreover, as counsel for the State ... pointed out, the word used by s. 99(9) is not "conviction", but rather the words "convicted of an offence". While these are doubtless cognate words, they are capable of bearing a slightly different meaning. Where, for example, the District Court were to find an accused guilty of an offence, but had adjourned the issue of sentence to a later date, lawyers and laypeople alike would nonetheless correctly say that the Court had "convicted" the accused of the offence, even if any appeal to the Circuit Court of the "conviction" had to await the actual imposition of sentence at a later date."

17. More fundamentally, this is another classic example where the principle of noscitur a sociis ("known by its companions") comes into play....."

As to the meaning of ss.99(9)-99(10) of the 2006 Act, he expressed the following view:-

"20. This principle applies with a particular force to the present case. The entire language, structure and format of s. 99- and particularly s. 99(9) and s. 99(10) - expressly presupposes that the second court will transfer the question of the re-activation of the suspended sentence to the first court and that this will be done before the second court imposes sentence. "

He went on to state:-

"21. For all of these reasons, I consider that the reference ins. 99(9) to the phrase "convicted of an offence" refers in this context to the situation where the accused has been found guilty by the second court, but where sentence has yet to be imposed by that court. To ascribe any other meaning to these words would render the sub-sections unworkable and, in any event, that meaning is re-inforced by an application of the noscitur a sociis principle. "

23. There was a marked divergence between the State's position (as set out above) and counsel for the defendant as to what must happen once a convicting court remands to the suspending court pursuant to s. 99(9). In the first instance, counsel for the

defendant contended that the prosecutor's approach to the questions posed by Judge Murphy was, in effect, a one size fits all approach. He argued that the prosecutor did not address the concerns raised in the case stated. The defendant, upon her conviction of the triggering offence, immediately advised the convicting court of her intention to appeal. Notwithstanding this, she was brought immediately before the suspending court and, again, that court was immediately told that the defendant wished to appeal the triggering conviction. Counsel referred to, and acknowledged, the mandatory word "*shall*" in s. 99(9). He submitted however that once the matter is brought back to the court that made the order imposing the suspended sentence, the presiding Judge has discretion to make a number of orders, including an order adjourning the question of whether to revoke or not pending the determination of the appeal against the triggering conviction. It was submitted that this discretion flows from the wording in s. 99(10), in particular, the words "*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*". Counsel contended that these words are of paramount importance to the rights of the defendant. It was argued that a person to whom s. 99 applies should be entitled to appeal the triggering offence prior to the s.99 matter being finalised and that the mechanism for doing so is contained within the provisions of s. 99(10). S 99(10) is of assistance as to the parameters of the suspending court's discretion in that the court shall only revoke if it is not unjust in all the circumstances of the case to do so. Counsel contended that this wording gives the suspending court jurisdiction to make the orders which had been requested by the defendant's solicitor and argued that such an approach is not precluded by the provisions of s. 99. Thus, the case was made that, as the defendant intended to appeal a matter which had been fully contested by her, the interests of justice (with which s.99(10) was, inter alia, concerned) dictated that revocation should be deferred pending the outcome of that appeal. Counsel referred to the dictum of Hanna J. in *Sharlott* (paragraphs 18-20 of the Judgment, as quoted above) and placed particular reliance on the learned Judge's obvious concern that if the applicant in that case was to succeed in his appeal (against the triggering offence), he would undoubtedly suffer a grave injustice were the suspended sentence in the meantime revoked.

> In contending that it is within the discretion of Judge Murphy to allow the defendant pursue her appeal, so as to uphold her right to fair procedures, liberty and due course of law, counsel invoked the words of Hanna J.
>
> *"it seems to me that matters which have arisen, although not provided for in statute, can be resolved with the Circuit Court,. and District Court where one can only and does presume that all and any necessary steps will be taken to uphold and vindicate the applicant's rights to fair procedures, liberty and due course of law ..... It is eminently within the discretion of the Circuit Court to enable the applicant to pursue his appeal from the District Court. "*

24. To allay the concern counsel perceived in the second question in the case stated, it was submitted that if the revocation decision is adjourned and the matter remanded back to the convicting court, there is a mechanism available to the suspending court to ensure that the defendant prosecutes her appeal with reasonable expedition. When granting the requested adjournment it is open to the suspending court to impose a condition that the appeal be prosecuted with reasonable expedition or, alternatively, to require an undertaking from the defendant to do so.

25. Counsel argued that the prosecutor's reliance on s.99 (12) of the 2006 Act, and the right to bail, as the requisite safeguards for the defendant, is an illusion, since no regard had been paid to the realities or practicalities of the defendant's potential situation. Counsel presented the following scenario: If the suspended sentence were to be revoked, the defendant would be in a position of having been convicted of two offences. She would be immediately taken into custody, pending bail, from the time the suspension was lifted and would have to then make arrangements to have her s. 99 (12) appeal entered and recognisances fixed. Even if she were successful in her appeal against the revocation, she may be in the situation of having served some of the reactivated sentence. Were this only a matter of hours, counsel submits that this is not good enough, in circumstances where there is a mechanism available to the suspending court, as has been outlined to the suspending court, and to this court.

26. It was also argued that the approach advocated by the prosecutor fails to recognise the fact that the defendant has a statutory right to appeal the triggering conviction, and indeed a constitutional right of appeal, as part of due process. It was submitted that the real question for this court is whether or not the provisions of s. 99 (10) preclude the suspending court from dealing with the matter in the manner suggested by the defendant.

27. Consideration

These proceedings concern the operation of section 99 of the 2006 Act by two courts at the same jurisdictional level. The first thing to be said is that the provisions of s. 99 (9) of the 2006 Act are entirely mandatory in that the court which convicts a person of an offence committed during a period of suspension must remand that person to the suspending court before imposing sentence for that offence. The dicta of my learned colleagues in *Muntean*, *Sharlott*, and *Harvey* and the dictum of Hogan J. *McCabe v. Gov. of Mountjoy underscore the mandatory* nature of s. 99(9).

In the instant case, the suspending court was confronted with the stated intention of the defendant to appeal the triggering conviction. For someone in the defendant's circumstances, it is axiomatic that she has the statutory right to appeal both the conviction for the triggering offence, and any revocation order that might be made by the suspending court. The process for appealing a conviction in the District Court is as follows:

Section 18(1) of the Courts of Justice Act 1928, as amended by ss.58 and 59 of the Courts of Justice Act 1936 and s.100 of the Criminal Justice Act 2006, provides for a right to a full *de novo* appeal in criminal matters before the Circuit Court from the District Court. Section 18(1) of the Act of 1928 provides that:-

"*[a]n appeal shall lie in criminal cases from a Justice of the District Court against any order (not merely an order returning for trial or binding to the peace or good behaviour or to both the peace and good behaviour) for the payment of a penal or other sum or for the doing of anything at the expense or for the entreating of any recognizance or for the undergoing of any term of imprisonment by the person against whom the order shall have been made, including an order under section 100(1) of the Criminal Justice Act 2006*"

Order 101 of the District Court Rules regulates the procedure in relation to appeals from the District Court to the Circuit Court. Order 101, r.4, as amended, requires a District Court judge to set bail pending appeal where an application is made to "fix recognisances". Order 101, r.6 provides that a stay on the relevant District Court order will only arise once recognisances have been entered into. This process is available to the defendant here, once sentence is imposed for the triggering offence. The law is settled as to when the defendant can appeal the triggering conviction: she must await sentence to be imposed (*Muntean*).

Section 99(12) of the 2006 Act recognises and provides for an appeal against the revocation of a suspended sentence. The section provides for a right of appeal where a suspended sentence is revoked "*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 the order*". Therefore, were

the defendant's suspended sentence to be revoked; she has a full appeal to the Circuit Court. The importance of this right of appeal was alluded to by Hogan J. in *McCabe v. Attorney General & another* [2014] IEHC 435 in the following terms:-

"*..it must also be stressed that s.99(10) does not provide for the automatic re activation of a particular sentence, since it recognises that there may be circumstances where the re-activation of a suspended sentence might be unjust. This is precisely why the right of appeal provided for by s.99(12) in respect of there activation of a sentence is of such vital importance*."

I entirely agree with the view expressed by the learned Judge.

The issue which concerns the defendant is one of timing. She wishes to avert a "*grave injustice*" of the type referred to by Hanna J. in *Sharlott*. On her behalf, it was argued before Judge Murphy that she wished to appeal her triggering conviction and have it determined, prior to Judge Murphy embarking on a consideration of the revocation issue.

Thus, once a person has been remanded by the convicting court under s.99(9), the question is what scope, if any, is given to the suspending court under s. 99 (10) to accede to the type of application that was made to Judge Murphy in the present case? Where does the approach that the courts have taken to date to the interaction between the revocation of suspended sentences and the process of appealing the conviction that triggered the issue of reactivation of sentence leave the defendant?

The first thing to be said is that the language used in s.99(10) (like that of s.99(9)) is prescriptive: it provides *"A court to which a person has been remanded under subsection (9) shall revoke the order ....."* (Emphasis added). The prescriptive nature of this language is however tempered by the statutory discretion which is vested in the suspending court, pursuant to the provision. Firstly, the court has the discretion to not revoke the suspension where "*it considers the revocation of[the] order would be unjust in all the circumstances of the case*". Secondly, where the court revokes, it may direct that only part of the sentence should be served. Thus, the suspending court can order that the entire of the original imposed sentence be served or such part of the sentence *"as the court considers just having regard to all of the circumstances of the case*", less any period already served for the original offence or any period spent in custody in relation thereto.

28. Counsel for the defendant urged on this court that, in effect, the provisions of s.99(10) vests the suspending court with jurisdiction to accede to the application to remand the matter back to the convicting court, without dealing with the revocation at that time, for the latter court to impose sentence, thereby allowing the defendant to pursue her appeal.

29. It would appear to be the case that once a matter has been remanded back to the suspending court, that court is not obliged to deal with the matter of revocation of sentence there and then (subject always to the constitutional, statutory and procedural rights of the person before the court). I note that in the present case, Judge Murphy adjourned the matter on a number of occasions, remanding the defendant on bail, pending the response of the prosecutor to the submissions made by the defendant's solicitor and counsel. Indeed a suspending court may wish to adjourn the issue of revocation pending the completion of any report or the obtaining of information which might be of assistance to the inquiry the court may carry out into a person's personal circumstances for the purposes of whether or not to exercise its discretion not to revoke or to direct that part only of the sentence be served. This type of activity takes place in the context of the suspending court being seized of the matter for the purpose of revoking or not the suspended sentence, once a remand has been lawfully made by the convicting court.

30. What arises for consideration here is whether the specific discretion given to the suspending court under s.99 (10) permits of a situation where, upon the request of a person who wishes to appeal the conviction that has triggered the remand to the suspending court, that court can defer dealing with the reactivation issue and simply remand the person back to the convicting court for sentencing by that court, thereby enabling the appeal of the triggering conviction to proceed.

I find that I cannot agree with counsel for the defendant that the provisions of s. 99 (10) permit of such an interpretation. In my view, the language in the section is clear: the discretion is envisaged as being exercised by the suspending court in the context of a consideration whether to revoke or not the suspended sentence, or if it is to be revoked, to direct that only part of the sentence imposed should be served. Thus, the statute presupposes that the discretion will be exercised in the course of *dealing* with the revocation issue, as the suspending court is mandated to do under s.99(10). The import of both s. 99(9) and s. 99 (10) is that the suspending court will deal with the issue of revocation in a substantive manner, and then remand back to the convicting court under s. 99 (10A) for that court to impose sentence. The provisions of s. 99 (9), s.99 (10) and s. 99(10A), when read together, clearly ordain that a decision on revocation, whatever its nature, has to be made before the convicting court imposes sentence.

It seems to me that the interpretation urged on the court by the defendant's counsel would negate the legislative purpose of s. 99(9)-s.99 (1OA). Furthermore, the interpretation of s.99(10) urged by counsel would necessarily involve the suspending court, seized of the revocation issue after a s.99(9) remand, remanding back to the convicting court in circumstances other than provided for by the 2006 Act. If it remands back without having dealt with the revocation question, it cannot obviously make such a remand pursuant to s.99 (10A), as no decision has been taken on revocation. To my mind, the approach advocated by counsel for the defendant would leave the convicting court with the conundrum of being asked to sentence the defendant, as must occur in order for the defendant to be able to pursue her statutory right of appeal, in advance of a revocation decision, notwithstanding that the legislative provisions set out ins. 99 (9) to s. 99 (10A) ordain a different sequence and, more importantly, where the legislative intent is that the convicting court is precluded from sentencing until the matter has been dealt with by the suspending court. In finding myself compelled to reject the interpretation of s.99 (10) urged by counsel for the defendant, I adopt the words of Hogan J. in *McCabe v. Governor of Mountjoy* that:-

> *"the entire language, structure and format of s. 99- and particularly s. 99(9) and s. 99(10) - expressly presupposes that the second court will transfer the question of the re-activation of the suspended sentence to the first court and that this will be done before the second court imposes sentence. "*

31. Clearly, the questions posed in the consultative case stated by the learned judge arose in circumstances where the suspending court was alerted by the defendant's solicitor of a potential "*grave injustice*", as alluded to by Hanna J. in *Sharlott*, and which has been articulated by counsel for the defendant before this court. The manner in which the reactivation of sentences has been legislated for leaves a person who has been convicted of an offence during the currency of a suspended sentence, and who wishes to appeal, in a bind. By the time he or she gets to exercise their right of appeal of the triggering offence, the suspended sentence may be revoked in full or in part (perhaps involving a period of custody), yet the very event which reactivated the suspended sentence may ultimately be successfully appealed.

In short, the provisions of ss.99 (9)-99(1OA) constitute a legislative barrier to the possibility of a person convicted while under a period of suspension being able to stave off a possible revocation of the suspension pending appeal of the triggering conviction. That

however is the state of the law. In *Sharlott*, Hanna J. opined that, although not provided for in statute, the dilemma for the applicant could "be resolved with the Circuit Court, and District Court where one can only and does presume that all and any necessary steps will be taken to uphold and vindicate the applicant's rights to fair procedures, liberty and due course of law." He expressed the view that "*[i]t [was] eminently within the discretion of the Circuit Court to enable the applicant to pursue his appeal from the District Court*."

While counsel for the defendant cited the aforesaid dictum in support of his argument that Judge Murphy has discretion to make no order regarding the revocation of sentence and that she could simply adjourn the matter until the defendant's conviction appeal is determined, and then have the matter returned to her, I am not convinced that Hanna J.'s dictum lends support to the defendant's arguments as to the meaning of s.99(10). The learned Judge was dealing with a situation where the suspended sentence had been imposed by the Circuit Court and where the applicant was convicted of the triggering offence in the District Court, and intent on appealing the latter conviction to the Circuit Court. It seems to me that Hanna J. expressed his opinion in the context of the intended appeal and the question of revocation arising for determination at the same jurisdictional level. While he contemplated as to how the Circuit Court could accommodate the applicant's desire to appeal the triggering offence conviction, I do not find the dictum of the learned Judge as expressly saying that there is a residual discretion in the suspending court not to deal with the question of revocation of sentence, in circumstances where a remand has been made pursuant to s.99(9), until the convicting court has imposed sentence.

32. It may be that it that in the present case, the potential difficulties for the defendant, as outlined by the defendant's counsel, could become a reality. Counsel for the prosecutor has outlined the optimum chronology for the appeals processes available to the defendant. I accept that the solution as outlined is far from ideal and there is perhaps little comfort to be derived from it, as far as the defendant is concerned. The matter, however, now rests with the suspending court to deal with the revocation issue, as it sees fit. To paraphrase Hanna J, one can only presume that all and any necessary steps will be taken to uphold and vindicate the defendant's rights to fair procedures, liberty and due course of law. However, the type of step advocated on behalf of the defendant in the course of these proceedings is not one open to the suspending court where it is prescribed by statute that that court must deal with the revocation of the suspended sentence before sentence can be imposed by the convicting court, a step which itself must be completed before the defendant can appeal the conviction imposed by the latter court.

33. The issue for this court was ultimately one of statutory interpretation. The mandatory nature of the process ordained pursuant to s. 99 (9) - s. 99 (10A) require the suspending court, once a person has been remanded before it from the convicting court, to deal with the issue of revocation as it sees fit, having regard to the justice of the case, and then remand the matter back to the convicting court.

34. Accordingly, I propose to answer the questions in the consultative case stated as follows:

1. Yes

2. No.

3(a) Does not arise.

3(b) Does not arise.

4. When a defendant has been remanded to it under s.99(9), the District Court can make:

(a) An order revoking the suspended sentence in full then remanding the defendant back (under s.99(10A)) for sentence to the court where the conviction for the triggering offence occurred;

(b) An order revoking the suspended sentence in part then remanding the defendant back (under s.99(10A)) for sentence to the court where the conviction for the triggering offence occurred;

(c) An order remanding the defendant back (under s.99(10A)) for sentence to the court where the conviction for the triggering offence occurred, having declined to order the revocation of any of the suspended sentence.