

**THE HIGH COURT**  
**JUDICIAL REVIEW**

[2016 No. 276 J.R.]

**BETWEEN****PAUL O'SHEA****APPLICANT****AND****IRELAND, THE ATTORNEY GENERAL AND THE DIRECTOR OF PUBLIC PROSECUTIONS****RESPONDENTS****JUDGMENT of Mr. Justice Richard Humphreys delivered on the 19th day of January, 2017**

1. The legal right to a proportionate sentence was recognised over 800 years ago in the original text of the Magna Carta of 1215, which provides that "[a] *freeman shall only be amerced for a trivial offence in accordance with the seriousness of the offence. For a grave offence, he shall be fined correspondingly, leaving him his contenement*" (c. 20) and that "[e]arls and barons shall be amerced only by their peers, and only in proportion with the degree of the offence" (c. 21).

2. The entitlement to a proportionate sentence can come under challenge in a number of contexts, particularly through the increasing complexity of criminal law, which may have the result that a single criminal act may involve multiple statutory offences, technical or otherwise, or where statutory provision is made for mandatory sentencing, including mandatory consecutive sentencing. Hence the importance of the totality principle, whereby the court stands back to ask if the proposed overall sentence would be unjust in all the circumstances. That can be given effect to in a number of ways, including a discretion to depart from the mandatory sentence, or a discretion to suspend the whole or a part of a sentence, if not to do so would be unjust.

3. Section 99(11) of the Criminal Justice Act 2006 provides that where a person has received a suspended sentence on an original offence, and is then, during the period of suspension, sentenced for a subsequent offence which triggers the reactivation of the suspended sentence, any term of imprisonment for the subsequent offence shall not commence until the expiry of the original sentence. In these proceedings, the applicant, who is awaiting sentence for the triggering offence in his case, contends that s.99 (11) is unconstitutional and contrary to his fundamental rights.

4. The applicant pleaded guilty to two offences under the Misuse of Drugs Act 1977 s. 15 and was sentenced on 10th May, 2011, to two 5 year sentences, 3 years of which were suspended.

5. On 21st July, 2015, he pleaded guilty to 4 counts of burglary and on 27th October, 2015, to two counts of theft. These triggering offences were committed during the period of suspension. Accordingly the 3 year suspended period was re-entered and activated from 27th October, 2015. As noted above, the applicant now awaits sentencing for the triggering offence. If that involves a custodial sentence, such sentence must be mandatory.

**Legal background**

6. In *Moore v. D.P.P.* [2016] IEHC 244, Moriarty J. decided that s. 99(9) and (10) were unconstitutional having regard to their inconsistent and inequitable impact especially by reference to the possibility of appealing the triggering conviction. That decision was not appealed.

7. In reliance on that decision, the applicant brought Article 40 proceedings [2016 No. 472 SS] seeking his release, but those proceedings were dismissed ex tempore by Barrett J. on the basis of the Supreme Court decision in *A. v. Governor of Arbour Hill* [2006] 4 I.R. 88. A series of other similar Article 40 applications by other applicants met a similar fate.

8. The unconstitutionality of s. 99(9) and (10) means that the subsection challenged here, sub-s. (11), cannot have a prospective application. In its current form, and until such time as the section is amended, the application of sub-s. (11) is confined to persons who have already been subject to the procedures in sub-s. (10) prior to the decision in *Moore*, handed down on 19th April, 2016. In the present case, the provisions of sub-s. (10) which require the reactivation of the suspended sentence were applied to this applicant on 27th October, 2015. Thus sub-s. (11) is applicable to this applicant.

9. I note in passing that it is a matter of record that the present challenge comes at a time when a Government Bill seeking to amend the section, including sub-s. (11), is pending before the Oireachtas but I mention that as context only and do not have regard to that issue for the purposes of this case. In particular there was no suggestion that the case was moot because of any proposed legislative change.

**The right to a proportionate sentence**

10. Article 49.3 of the EU Charter of Fundamental Rights provides, in the EU law context, that "[t]he severity of penalties must not be disproportionate to the criminal offence". The U.S. Supreme Court has similarly held that a grossly disproportionate and excessive punishment is contrary to the clause against "*cruel and unusual punishment*" of the Eighth Amendment (*Coker v. Georgia* (1977) 433 U.S. 584). This principle also in my view reflects an unenumerated right under the Constitution to a proportionate sentence (as suggested in *Gilligan v. Ireland* [2013] 2 I.R. 745, *per curiam* at p. 760). However a mandatory sentence may still be a proportionate sentence as long as the court retains a minimum degree of judicial discretion (such as allowing for the imposition of a suspended sentence for the triggering offence) sufficient to avoid any unconstitutionally excessive impact on the rights of the individual.

11. While Mr. Mark de Blacam S.C. (with Ms. Louise Troy B.L.) makes an elaborate argument on behalf of the applicant as to why the provision is unconstitutional, the terms of s.99 (11) cannot be sensibly distinguished from the very similar effect of s. 13 of the Criminal Law Act 1976, which requires consecutive sentencing for offences committed during a period of imprisonment, and which was upheld by the Supreme Court in *Gilligan v. Ireland*.

12. The fundamental flaw in the applicant's argument, which was pointed out in the corresponding context by the Supreme Court in *Gilligan* (in a *per curiam* decision delivered by MacMenamin J.), and on which reliance is placed by Mr. Shane Murphy S.C. (with Mr. Niall Nolan B.L.) for the respondents, is that the court sentencing for the subsequent offence is not obliged to impose a term of imprisonment, and can tailor the sentence to what is just and appropriate in the circumstances. Mr. de Blacam calls this "subterfuge" and "wrong in principle", but on the contrary, it is simply the presumption of constitutionality in action.

13. The power to suspend in such a case is acknowledged in Mr. Tom O'Malley's textbook, *Sentencing Law and Practice* (3rd ed., 2016) p. 120 citing *The People (D.P.P.) v. Dennigan* (1989) 3 Frewen 253. Mr. O'Malley also points out that the totality principle applies, citing *The People (D.P.P.) v. Farrell* [1989] 3 Frewen 257 and *The People (D.P.P.) v. Cole* (Unreported, Court of Criminal Appeal, 31st July, 2003). Likewise Murray C.J. in *Osmanovich v. D.P.P.* [2006] 3 I.R. 504 at 514 referred to "the implied power to suspend" in the context of mandatory sentencing provisions.

14. Other similar statutory provisions exist by virtue of s. 11(1) of the Criminal Justice Act 1984 (in relation to bail) and s. 54A of the Criminal Justice (Theft and Fraud Offences) Act 2001 (inserted by s. 2 of the Criminal Justice (Burglary of Dwellings) Act 2015), which requires consecutive sentences for burglary of dwellings in certain circumstances (see also s. 5 of the Criminal Justice Act 1951, which is a general power to impose consecutive sentences). There is nothing disproportionate about providing for mandatory consecutive sentences in respect of offences committed during the period of a suspended sentence, while on bail, or while in prison, or indeed hypothetically while on temporary release or in any other circumstances where the Oireachtas considers appropriate. Indeed teasing out the logical implications of the submission made, it is hard to see how a disproportionality argument could be mounted against even a hypothetical rule that generally prohibited concurrent sentences for any offence, as long as a judicial discretion was retained (such as to suspend a sentence) in the interests of ensuring that any individual combination of sentences was not excessive. On a similar basis, a mandatory sentence for any given offence appears constitutional on proportionality grounds as long as the court can depart from it if it would be unjust not to do so (see e.g., *Ellis v. Minister for Justice and Equality* [2016] IEHC 234 (Unreported, Twomey J., 9th May, 2016)).

15. Mr. de Blacam suggests that it is disproportionate for the court to be given a discretion not to activate the suspended portion but not to be given discretion in relation to the consecutive nature of the sentence for the triggering offence. Such an arrangement is not disproportionate if the court is allowed to arrive at a proportional result overall by way of a different mechanism, such as by suspending the sentence for the triggering offence.

16. A regime of mandatory consecutive sentencing is not unconstitutional if, as here, the sentencing court is not thereby obliged to impose a sentence that is excessive overall, and can have regard to the totality of duration of custody in the context of the full circumstances when imposing a sentence on the subsequent offence. Reactivation of the previously suspended sentence in full is not unconstitutionally disproportionate because that sentence has already been imposed in due course of law, as has the condition as to good behaviour with which the offender has failed to comply. It will be a matter for the court sentencing for the subsequent offence as to what, if any, additional penalty of imprisonment is discretely required in respect of the triggering offence.

**Order.**

17. Accordingly, the proceedings will be dismissed.