



THE COURT OF APPEAL

Record No. 2/2016

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

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

DEAN O'MAHONY

APPELLANT

JUDGMENT (ex tempore) of the Court delivered by Mr. Justice Mahon on the 28th day of July 2017

1. The appellant pleaded guilty and was convicted at Clonmel Circuit Criminal Court on the 25th July 2014 in respect of a number of separate offences, namely:-

Bill no. 39/2011: Possession of a controlled drug for the purpose of unlawful sale or supply contrary to s. 15 and s. 27 of the Misuse of Drugs Act 1977 in contravention of Regulations made under s. 5 of the Misuse of Drugs Act 1977 (as amended by s. 6 of the Misuse of Drugs Act 1984). The street value of the drugs was €2,205.

Bill no. 40/2011: A similar offence to 39/2011. This involved drugs with a street value of approximately €2,600.

Bill no. 25/2012: A similar offence to 39/2011 and 40/2011. The drugs were cannabis herb and resin to a value of €459.

Bill no. 26/2012: A similar offence to the foregoing offences, involving drugs with a street value of over €100.

Bill no. 27/2012: A similar offence to the foregoing offences, involving drugs with a street value of just under €600.

Bill no. 61/2014: Handling stolen property namely a laptop and an xbox contrary to s. 17 of the Criminal Justice (Theft and Fraud Offences) Act 2001.

2. On the 18th November 2014 the appellant received a total sentence of six years imprisonment in respect of these offences, dating from 22nd July 2014. The entire of that term was suspended on the appellant entering into a bond in the sum of €100 to keep the peace and be of good behaviour for a period of five years from the 18th November 2014 and other conditions. One condition was that the appellant must attend addiction services wherever he is residing and must remain under the auspices of the Probation Service for a period of two years from the 18th November 2014, and another, that he liaise with the Probation Service so as to facilitate the Probation Service verifying that he attended addiction services on a regular basis. The appellant also undertook to raise €1,000 annually for five years for the AisEiri centre in Cahir, Co. Tipperary.

3. On the 10th June 2015, the appellant committed a theft offence at Lifestyle sports shop in Clonmel, Co. Tipperary when he stole a Liverpool football club jersey valued at €74. The commission of this offence occurred within the period of suspension of the aforesaid six year sentence imposed on the 18th November 2014, prompting an application to activate all or part of the said suspended sentence pursuant to s. 99 of the Criminal Justice Act 2006.

4. That application came before His Honour Judge Thomas Teehan for hearing on the 3rd December 2015 at Clonmel Circuit Court. Judge Teehan had imposed the suspended sentences in question.

5. The relevant statutory provisions are:-

(i) Section 99(1) of the Criminal Justice Act 2006, which states:-

"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.

(ii) Section 99(10) of the Act of 2006 states:-

"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 during which the person was serving a sentence of imprisonment in respect of an offence referred to in subsection (9)) pending the revocation of the said order."

6. The theft of the football jersey was admitted by the appellant some six weeks after it was stolen when interviewed and shown CCTV footage. The appellant maintained that he was unable to remember the incident as he was on prescription drugs and was drinking at the time. Full compensation was paid by him at a later date in respect of the stolen jersey.

7. Judge Teehan activated four of the six year suspended sentence. He suspended the remaining two years of the six year suspended sentence for a period of three years, on conditions. Subsequently he received a month's imprisonment for the theft offence in the District Court. It is against the imposition of the four year prison sentence that the appellant now appeals.

8. In his sentencing judgment, Judge Teehan stated:

"Well, when Mr. O'Mahony left court a year ago he knew that the grasp he had on his liberty was highly tenuous, to say the least, highly tenuous. He had to know that if he were to avoid the lengthy prison sentence imposed by this court then that he had to be whiter than white. Whiter than white he has not been. He has shown a disregard for his obligation to engage with the Probation Service. He has saved not a penny, despite his ability to go drinking on the occasion when he says this offence occurred. He asks the court to believe that he has no memory of it because he was so drunk that it occurred while he was effectively out of his mind with drink, notwithstanding the fact that the crime itself took some planning and required careful execution. But he committed that offence. Even if such an offence had not been committed, if the matter had been re-entered by the Probation Service, then the court would be left with little option but to impose a custodial sentence. But the commission of this crime on top of that, on top of all these other matters, leaves the court with no alternative but to impose a custodial sentence here today.

Mr. O'Mahony was very lucky on the last occasion. He did come back from Australia, but rather than come back to meet this and handing himself straight into the garda station, he waited for the gardaí to come to him. No doubt I was unimpressed with that a year ago, but I was prevailed to go along with it positive matters which Mr. Quirke brought out at that time. But Mr. O'Mahony has to know, and other persons have to know that when a chance is given by this court it must be taken and it must be taken to the full. There is no halfway house, and it would be charitable to describe the course taken by Mr. O'Mahony as a halfway house, even."

9. It is contended on behalf of the appellant that the learned sentencing judge erred in principle in imposing that portion of the suspended sentence that he chose to do upon the matter being re-entered pursuant to s. 99. It is argued that the triggering offence was one of a very minor nature with no loss ultimately to the shop concerned. It is further argued that the original conditions attached to the suspended sentence were of an onerous nature, and that this should be taken account of when the appellant's failure to abide by them in full is considered.

10. The appellant has three previous convictions, including a significant assault conviction for which he received a four year suspended sentence in 2007. An immediate but pertinent observation is that the decision to suspend entirely the sentence imposed on the appellant was very lenient indeed, and undoubtedly the appellant must have felt an enormous sense of relief when that sentence was handed down. The quid pro quo, and this would have been absolutely clear to the appellant at the time, was that he would comply with certain conditions and avoid behaviour of a criminal nature for a period of five years. While these conditions may not have been particular easy for him compliance was nevertheless more than possible. In further offending the appellant broke the trust and opportunity generously afforded to him.

11. In a judgment of this court in *DPP v. Ahearne* [2015] IECA 292, the following was stated:-

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

12. It is probably the case that the six year entirely suspended sentence was maximised at the time it was imposed because of the decision to suspend it entirely. It is doubtful that a sentence which was mostly custodial in nature would have been of that length in relation to the offences in question.

13. The triggering offence was a minor offence and, in isolation, demanded a lenient sentence as indeed transpired.

14. In the circumstances, and when this minor offence triggered the sentence reactivation process pursuant to s. 99 of the Act of 2006, the learned sentencing judge was required also to consider the other breaches of conditions, as he did. It is however the court's view that the decision to activate four years of the suspended term was disproportionate, and the court will therefore quash that sentence and resentence the appellant as of today.

15. In deciding the appropriate period to activate the court has taken account of the multiple breaches of conditions imposed as part of the suspended sentence, and also the fact that the original six offences were committed during a period of an earlier suspended sentence.

16. The court will activate three years of the suspended term to date from the same date as directed in the court below. The balance of the original six year sentence, namely three years, will remain suspended for three years post release on similar conditions to those imposed in the court below.