THE COURT OF APPEAL

Birmingham P.
Edwards J.
Hunt J.

Record No: 274/17

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

V

GERRY WALL

Appellant

JUDGMENT of the Court delivered *ex tempore* by Mr. Justice Tony Hunt on the 22nd of October 2018.

(1) Introduction
1. On 5th October, 2016, on a plea of guilty to a count of burglary contrary to s. 12(1)(b) and (3) of the Criminal Justice (Theft and Fraud Offences) Act 2001, the Dublin Circuit Criminal Court imposed a sentence of two years imprisonment suspended entirely pursuant to s. 99(1) of the Criminal Justice Act 2006, as amended, on the appellant acknowledging in open court to bound by the following conditions:-

> (i) that he would keep the peace and be of good behaviour to all the People of Ireland for a period of two years and six months from that date;
>
> (ii) that he would place himself under the supervision of the Probation Service for a period of two years from that date, attend all appointments, continue to address his offending behaviour, remain drug free, continue to address his training and employment needs with IASIO Officer;
>
> (iii) notify the Probation Service of any change in his contact details; and
>
> (iv) come up if called on to do so at any time within the said period of two years and six months to serve the sentence imposed, but suspended on him entering into that recognisance.

2. On the 24th of October, 2017, the matter was re-entered before the learned sentencing judge by the Probation Service pursuant to the provisions of s.99(14) of the 2006 Act, on the basis that the appellant had failed to comply with certain of the conditions of suspension acknowledged by him on 5th October, 2016.

3. The revocation application was heard on 20th November, 2017. The evidence of the probation officer, Ms. Clarke, was to the effect that shortly after the date of sentence in 2016, the appellant informed the Probation Service that he was moving to Cork, and Ms. Clarke transferred his case to the Cork Supervision Team in November of that year. By January 2017, he had not attended appointments, and the Cork office issued him with some warning letters. The appellant then informed the supervision team in Cork in March 2017 that he was moving to Dublin, so the case came back to Ms. Clarke. She sent him appointment letters throughout May, June, July and August, giving him some leeway to make contact.

4. As there was no contact by September 2017, Ms. Clarke re-entered the case. She indicated that since the case was transferred back to her in March 2017, she had no contact with Mr. Wall whatsoever, whether of a formal or informal nature. The appellant was not available on a mobile number that Ms. Clarke had from phone conversations that the appellant had with a probation officer in Cork. The appellant had a number of periods of probation supervision prior to the order in this case.

5. Having heard the evidence, the learned sentencing judge expressed the view that she was not in the business of supervising probation orders, and the appellant had shown no genuine commitment to engaging with the Probation Service since she suspended the sentence. Although the appellant had offered to engage with the Probation Services whilst serving a short sentence at that time of the revocation application, the learned sentencing judge did not feel that this offered any comfort in terms of his likely compliance once he was at liberty again. Therefore, she decided to revoke the suspension and impose the sentence in full.

6. Counsel on behalf of the appellant then requested the learned sentencing judge not to activate the sentence in full, given the elapse of time between the imposition of the sentence in October 2016 and the hearing of the re-entry application in November 2017. The learned sentencing judge stated that as a rule of thumb, where she imposed a suspended sentence for a particular period of time, and if the person went off the rails or did not comply at some point, she would generally give them some credit for period where they had, in fact, complied. However she noted that in this particular case, there had been no compliance from the outset. Therefore, she was not inclined to reduce the period of activation, and she proceeded as previously indicated, giving the appellant credit for any time that he had already spent in custody in respect of the matter.

(2) Grounds of Appeal
7. In essence, the appellant complains that the decision of the learned sentencing judge to reactivate the entirety of the two years and six months' imprisonment originally imposed was disproportionate.

(3) Appellant's Submissions
8. It is submitted that the appellant had abided by the fundamental requirement of the suspension of the sentence, which was to keep the peace and be of good behaviour. The terms actually breached by the appellant were characterised by the appellant as imposed by the learned sentencing judge with a view to ensuring that he maintained a particular minimum level of non-offending behaviour. Where the appellant had, in fact, been of good behaviour, it was submitted that the learned sentencing judge could have, on that basis, considered re-imposing only part of the suspended sentence, rather than the entirety of it.

9. It was suggested that the learned sentencing judge did not properly consider such a course of action. The appellant relied on the following extract from the decision of the learned sentencing judge:-

> *"I am of the view that a suspended sentence is just that. It is suspended subject to conditions, and if the conditions are not observed, and if there is not some reasonable and compelling justification for non-compliance as far as this Court is concerned, the basis for the suspension is gone and the sentence should be served."*

The learned sentencing judge went on to observe that she did not see any evidence from the probation report to support the idea that the appellant had ever intended to keep the conditions of suspension as undertaken by him on 5th October, 2016.

10. It was submitted that because the learned sentencing judge had not given express or cogent reasons why she considered the mitigating factors to be insufficient in the instant case to support only partial reactivation of the suspended sentence, the conclusion should be drawn that she did not consider those factors either properly or at all. It was argued that the learned sentencing judge focused on the aggravating factors, and that her decision was affected by her apparent failure to equally consider the mitigating factors. It was claimed that the learned sentencing judge had failed to consider the totality of the factors, and operated a de facto policy excluding proper consideration of the alternatives of allowing the suspension to continue, or of partial reactivation of the suspended sentence.

(4) Respondent's Submissions
11. The respondent referred back to concerns expressed by the learned sentencing judge when the matter first came before the court for sentence. She expressed the view that having heard the evidence and the extent of the appellant's previous convictions, the appellant was coming to the end of the line in terms of lenient treatment, as such treatment in the past had little or no apparent effect on his behaviour. Counsel for the appellant indicated in response that the appellant was very much aware that he was *"looking down the barrel in this matter"*. The respondent pointed out that by April 2016, the learned sentencing judge received a report that was, in the words of the learned sentencing judge, *"not what would have been hoped for in the context of the previous convictions and the remarks I made on the last occasion"*. However, she adjourned the matter to allow a final opportunity for Mr. Wall to engage with the Probation Services. In putting the matter back to October 2016, the learned sentencing judge observed that *"the situation is very tenuous for Mr. Wall's point of view and if the matter is re-entered it's simply a case of imposing a prison sentence"*.

12. The respondent also relied on the expressions and reasoning set out by the learned sentencing judge in imposing the suspended sentence on 5th October, 2016. Her remarks made it clear to the appellant that he was expected by her to demonstrate real motivation and commitment in addressing all of the difficulties which caused him to offend in the past. The respondent submitted that the failure to submit contact details was not a simple breach of a minor condition, but had the result that the other conditions were set at naught, because the appellant could not and did not engage with Probation Services in circumstances where they had no possibility of maintaining contact with him. It was submitted that there was no error on the part of the learned sentencing judge, where the appellant was given clear conditions to follow, and the breaches of the order had the effect that the majority of the terms and conditions of suspension could not be addressed by either the Probation Services or the appellant.

(5) Conclusion
13. We have carefully considered the transcript of the sentence hearing and the written and oral submissions in this Court. In the first instance, any s. 99 revocation hearing must be considered in the context of the record of the sentencing process as a whole. In this case, the applicant had a bad previous record, in that he had previously been the subject of a number of suspended sentences. Although none of these sentences had been activated for breach of a bond condition, they did not have the desired effect of inducing the appellant to desist from further offending.

14. In the original sentencing hearing in relation to this matter, the learned sentencing judge was understandably reluctant to travel the suspended sentence route again, having regard to the appellant's previous record and his less than full previous cooperation with the Probation Services. Notwithstanding her justifiable reservations, she very fairly gave the appellant a last chance, and in doing so, warned him in clear terms of the necessity of demonstrating concrete motivation and commitment to addressing his personal difficulties.

15. On the disposal of the reactivation application, the learned sentencing judge did, in fact, consider whether some less stringent approach than full activation was appropriate and, in all of the circumstances, declined so to do. She particularly referred to the fact that there was no compliance at all with the conditions of the bond that she had previously set in relation to probation supervision.

16. In all of the circumstances of this case, the learned sentencing judge had ample evidence before her to justify taking the view that she did, when regard is had to the sentencing process taken as a whole. Section 99(17) requires that in considering an application under s.99(14), where it is satisfied that there has been breach of a probation condition, a court shall revoke the probation order and activate the entire of the sentence imposed, or such part thereof as it considers just in all of the circumstances of the case, less any time spent in custody.

17. The learned sentencing judge considered all of the relevant circumstances of the particular case under the applicable statutory provision. She specifically considered the alternative to full revocation and decided against that course of action. In the circumstances, the appellant has not identified any error of principle in the approach adopted by the learned sentencing judge, and his appeal is accordingly dismissed.