THE COURT OF APPEAL

Birmingham J.
Mahon J.
Edwards J.

Appeal No.: 55/2015

The People at the Suit of the Director of Public Prosecutions

Respondent

- and -

Eddie Darcy

Appellant

Judgment (ex tempore) of the Court delivered on the 15th day of February 2016 by Mr. Justice Mahon

1. The appellant was convicted of robbery contrary to s. 14 of the Criminal Justice (Theft and Fraud Offences) Act 2001. This offence involved the robbery of cash from a person while armed with a knife. The appellant pleaded guilty at Clonmel Circuit Criminal Court on 17th July 2014 and was sentenced to a six year prison sentence, but with the entire of that sentence suspended for a period of six years, on strict conditions. The learned sentencing judge subsequently revoked the suspended sentence in its entirety on 26th February 2015, (pursuant to s. 99 of the Criminal Justice Act 2006 (as amended)), the appellant having committed further offences within the term of the suspended sentence, and which breached the conditions attached to the suspended sentence.

2. The appellant has appealed against the activation of the six year suspended sentence. On 20th September 2014 and on 9th November 2014 further offences were committed by the appellant, being respectively three road traffic offences (including drink driving, the unauthorised taking of his uncle's car, and driving without insurance) and the possession of a knife. These offences triggered the reference back to the Circuit Criminal Court because of their commission during the period in which the six year suspended sentence remained operative. The learned circuit court judge duly activated the six year sentence in its entirety, and it is this activation that is the subject of the appeal to this court. In due course, the triggering offences were the subject of the imposition of one month sentences in the district court, to be served consecutively to the activated six year term.

3. Undoubtedly, the suspension of the entire prison sentence on 17th July 2014 was lenient given that the offence involved, a robbery, while armed with a knife. This sentence was clearly a significant incentive to the appellant to mend his ways and to remain out of trouble for a number of years. Yet, he went on to commit the four offences already referred to within a matter of months – and of particular importance, one of these offences involved the possession of a knife, albeit it in less serous circumstances than those relevant to his September 2012 offence which prompted the six year sentence.

4. The appellant maintains that the activation of the six year sentence was wrong in principle for, essentially, the following reasons:-

> (i) A failure to take sufficient account of the appellant's young age. He is now aged twenty, and was seventeen years old when the 2012 offence was committed.
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> (ii) Insufficient weight was placed on the report of Mr. Glenville, the consultant clinical psychologist. That report very comprehensively detailed the appellant's addiction and other personal problems, and his dysfunctional family background.
>
> (iii) The relatively (as described by the appellant) minor nature of the triggering offences.

5. Section 99 of the Criminal Justice Act 2006, as amended by s. 60 of the Criminal Justice Act 2007 and s. 51 of the Criminal Justice (Miscellaneous Provisions) Act 2009 provides, insofar as is relevant, as follows:-

> *(9): Where a person to whom an order under subsection (1) applies..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 are 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.*

6. Section 99(10) of the 2006 Act (as amended) provides that the court *shall* revoke the suspended sentence *unless* it considers that such revocation would be unjust. It was clearly therefore the intention of the legislature that the suspension of the custodial element of a prison sentence should be forfeited in whole or in part in circumstances where the incentive provided by the decision to suspend was not utilised by an offender, unless doing so was manifestly unjust.

7. The learned sentencing judge stated at the outset of his sentencing judge:-

> *"…the test that I apply in these situations is, are there extraordinary circumstances which would justify me in departing from my usual course which is to impose the suspended portion of any sentence which I have previously passed.."*

8. The learned sentencing judge went on to conclude that in this case he had been given no reason to depart from his usual practice. The case of *DPP v. David Ahearne* [1015] IECA 292 dealt specifically with this issue, inter alia, when dealing with a re-activation of a suspended sentence by the same trial judge and concerning the use of the term *"extraordinary circumstances".* At para. 46, Edwards J., in the course of delivering the judgment of the court stated the following:-

> "The appellant has complained that the Circuit Court judge applied the wrong test. The trial judge asked himself "are there exceptional and compelling reasons why the sentence which was imposed and then suspended should not be activated in whole or in part?" While the form of wording used by the sentencing judge was not that used in the statutory provision, and it would have been preferable if he had used the statutory formulation, this Court considers that the substantive gap between the two formulations is not all that wide. As has been correctly pointed out in submissions to this Court what the statute requires is that there "shall" be revocation "unless it [the court] considers that in all of the circumstances of the case it would be unjust to do so". This implies that revocation shall be the norm and that non-revocation shall be exceptional but nevertheless mandated where justice requires it. Accordingly there was nothing wrong with the trial judge asking whether exceptional reasons existed such as might justify the non-revocation. Similarly, that the interests of justice would demand non-revocation in the circumstances of the particular case is surely correctly to be characterised as a compelling reason. We consider that the test as formulated by the trial judge, while not technically correct, was if anything somewhat wider in its terms and therefore potentially easier for an offender to satisfy than if the test had been properly formulated using the tighter language of the statutory provision. We are not therefore satisfied that the appellant was in fact prejudiced by the way in which the trial judge formulated the test."

9. This court again re-iterates what it stated in Ahearne as to the approach that ought to be taken in s. 99 cases. The approach taken by the learned sentencing judge, while perhaps not technically correct, was nevertheless acceptable and was not in conflict with the governing statutory provisions.

10. It was open to the learned circuit court judge to activate the entire or part of the six year sentence, or indeed none of it. In the court's view he was quite correct in his decision that the appellant should serve time in custody, and a considerable time at that. The fact that the appellant received just one month imprisonment in respect of the district court offences was probably more to do with the principle of totality (such sentence necessarily had to be served consecutively to the activated sentence) then as an indicator of their minor nature. Indeed, the offences were not minor; they included serious road traffic offences and the offence of possessing a knife. They were not offences of a type which the learned circuit court judge could reasonably have effectively overlooked or have treated as simple minor offending. The offences were such as clearly indicated that the appellant had breached the trust placed in him at the time of his sentencing in July 2014, and to a considerable degree.

11. It is incumbent on a judge when deciding whether to activate all, or part, or none of a previously suspended sentence to consider all the relevant circumstances pertaining to the offences in question and to the individual offender, as if he was sentencing afresh, albeit in the context of a review of an earlier suspended sentence, and including taking into account of the nature of the triggering offence or offences.

12. The court is of the view that there was an error of principle on the sentencing judge's part in his decision to activate the entire of the six years in that he did not attach sufficient weight to certain factors in particular, these being the appellant's young age, the report of Mr. Glanville and the fact that the triggering offences, while not minor, where nevertheless not of the most serious nature. They were summary offences. The activation of the entire six years was, in those circumstances excessive.

13. The court will therefore quash the activated six year sentence and will in its place impose a term of four years imprisonment to date from 17th July 2014, having considered the letter from a potential employer, Mr. Walsh, letters from the head teacher and a counsellor at Limerick Prison, and the appellant's own letter addressed to the court. The remaining two years of the suspended six year sentence remains suspended on the same conditions as were originally imposed, and will continue to hang over the appellant until 17th July 2020.