THE COURT OF APPEAL

Birmingham J
Mahon J.
Edwards J.

Neutral Citation Number: [2017] IECA 310

Record No: 2017/220

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 16 OF THE COURTS OF JUSTICE ACT 1947

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

Prosecutor

V

A.S.

Accused

JUDGMENT of the Mr Justice John Edwards delivered 28th of November 2017

Introduction

1. The matter comes before the court on foot of a consultative case stated referred by his honour Judge Thomas Teehan, a judge of the Circuit Court, and dated the 9th of March 2017, in which he seeks the opinion of the Court of Appeal upon a number of issues of law that have arisen in a case involving A.S., the accused herein.

2. The Circuit Court judge had previously on the 25th of July 2014 sentenced the accused, who at that time was child as defined by the Children Act 2001(the Act of 2001) to four years detention, to date from the 21st of March 2014, in a children detention centre (within the meaning of s.95 of the Act of 2001), to wit Trinity House, in the County of Dublin, for the offence of robbery contrary to section 14 of the Criminal Justice (Theft and Fraud Offences) Act 2001, with the final two years of that sentence suspended upon the conditions of a bond entered into by the accused, and expressed to be for the purposes of s.99(1) of the Criminal Justice Act 2006 (the Act of 2006) as amended, that the accused would keep the peace and be of good behaviour towards all the people of Ireland during his period of detention and for a period of four years from the date of his release from detention.

3. The accused was 15 years of age at the date of his sentencing, having been born on the 8th of February 1999. The aforementioned offence of robbery was committed on the 20th of March 2014. The accused had pleaded guilty to the said offence.

4. On the 14th of February 2017 the matter was re-entered by the prosecutor before the Circuit Court Judge, purportedly pursuant to s.99(13) of the Act of 2016, as amended, in circumstances where the prosecutor was contending that the accused had breached the conditions of his bond.

5. The Circuit Court Judge heard evidence, which the accused did not contest, that on the 25th of July 2015 the accused had escaped from detention. Further, on the 3rd of August 2015 while he was unlawfully at large following his said escape he committed a robbery on the Dublin Luas Light Rail System in the course of which he had stolen two mobile phones. He was later identified by Gardai as the perpetrator, and was arrested and charged with robbery and was subsequently convicted of that offence before the Dublin Circuit Criminal Court. He was also separately charged and prosecuted in the District Court with escaping from lawful custody, and he had also been convicted of that offence. The case stated is silent as to the penalties imposed for those offences.

6. The Circuit Court Judge also heard evidence that on the 27th of May 2016 the accused pleaded guilty before the Dublin Circuit Criminal Court to yet another robbery, and the 23rd of June 2016 pleaded guilty, again before the Dublin Circuit Criminal Court, to the further offence of causing criminal damage. He was sentenced in respect of both of these matters on the 27th of July 2016, when he received two years in detention for the robbery offence and one year in detention for the criminal damage offence.

7. In the light of this evidence the Circuit Court Judge was satisfied that the accused had indeed breached the terms of the bond on foot of which the sentence imposed on him on the 25th of July 2014 had been part suspended.

8. By this time the accused had attained his majority.

9. The Circuit Court Judge indicated that in the circumstances he was disposed in principle to require the accused to serve some, or perhaps all, of the suspended portion of the sentence. However, in the course of hearing submissions on what precisely he should do in that regard prosecuting counsel raised a concern as to whether the court in fact had power to activate the suspended portion of the part suspended sentence of detention in a child detention centre imposed in this case on the 25th of July 2014, having regard to the nature of the bond entered into (which was expressed to be for the purposes of section 99 of the Act of 2006) and also having regard to the status of the accused at the time of the re-entry (he was by then no longer legally a child).

10. In the light of the concerns raised by counsel, the Circuit Court Judge has stated a case for the opinion of the Court of Appeal as follows:

> i. Did I have jurisdiction pursuant to s.99 of the Act of 2006 (as amended), or otherwise, to suspend in part a sentence of detention on a child?
>
> ii. If so, do I now have power in this case to activate some or all of the suspended sentence?

11. Clearly the first question must be addressed come what may. However, the second question will only require to be addressed if the first question has been answered in the affirmative.

12. There are two components to the first question. The first component is concerned with whether s.99 of the Act of 2006 provided the judge with the suggested jurisdiction? The second component is concerned with whether the judge otherwise possessed the suggested jurisdiction. It is proposed to consider each component separately.

Did s.99 of the Act of 2006 as amended provide the suggested jurisdiction?
13. Section 99 of the Act of 2006, as amended (up to the date of the consultative case stated, and excluding subss (9) and (10) which were held to be repugnant to the Constitution in *Moore and others v. Director of Public Prosecutions, Ireland and the Attorney General* [2016] IEHC 244), is in the following terms:

> *99.—(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.*
>
> *(2) It shall be a condition of an order under subsection (1) that the person in respect of whom the order is made keep the peace and be of good behaviour during—*
>
> *(a) the period of suspension of the sentence concerned, or*
>
> *(b) in the case of an order that suspends the sentence in part only, the period of imprisonment and the period of suspension of the sentence concerned,*
>
> *and that condition shall be specified in the order concerned.*
>
> *(3) The court may, when making an order under subsection (1), impose such conditions in relation to the order as the court considers—*
>
> *(a) appropriate having regard to the nature of the offence, and*
>
> *(b) will reduce the likelihood of the person in respect of whom the order is made committing any other offence,*
>
> *and any condition imposed in accordance with this subsection shall be specified in that order.*
>
> *(4) In addition to any condition imposed under subsection (3), the court may, when making an order under subsection (1) consisting of the suspension in part of a sentence of imprisonment or upon an application under subsection (6), impose any one or more of the following conditions in relation to that order or the order referred to in the said subsection (6), as the case may be:*
>
> *(a) that the person co-operate with the probation and welfare service to the extent specified by the court for the purpose of his or her rehabilitation and the protection of the public;*
>
> *(b) that the person undergo such—*
>
> *(i) treatment for drug, alcohol or other substance addiction,*
>
> *(ii) course of education, training or therapy,*
>
> *(iii) psychological counselling or other treatment,*
>
> *as may be approved by the court;*
>
> *(c) that the person be subject to the supervision of the probation and welfare service.*
>
> *(5) A condition (other than a condition imposed, upon an application under subsection (6), after the making of the order concerned) imposed under subsection (4) shall be specified in the order concerned.*
>
> *(6) A probation and welfare officer may, at any time before the expiration of a sentence of a court to which an order under subsection (1) consisting of the suspension of a sentence in part applies, apply to the court for the imposition of any of the conditions referred to in subsection (4) in relation to the order.*
>
> *(7) Where a court makes an order under this section, it shall cause a copy of the order to be given to—*
>
> *(a) the Garda Síochána, or*
>
> *(b) in the case of an order consisting of the suspension of a sentence in part only, the governor of the prison to which the person is committed and the Garda Síochána.*
>
> *(8) Where a court has made an order under subsection (1) and imposes conditions under subsection (4) upon an application under subsection (6), it shall cause a copy of the order and conditions to be given to—*
>
> *(a) the probation and welfare service, and*
>
> *(b) (i) the Garda Síochána, or*
>
> *(ii) in the case of an order consisting of the suspension of a sentence in part only, the governor of the prison to which the person is committed and the Garda Síochána.*
>
> *(9) [Held to be repugnant to the Constitution]*
>
> *(10) [Held to be repugnant to the Constitution]*

(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.

(11) (a) Where an order under subsection (1) is revoked under subsection (10), a sentence of imprisonment (other than a sentence consisting of imprisonment for life) imposed on the person concerned under subsection (10A) shall not commence until the expiration of any period of imprisonment required to be served by the person under subsection (10).

(b) This subsection shall not affect the operation of section 5 of the Criminal Justice Act 1951 .

(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.

(13) Where a member of the Garda Síochána or, as the case may be, the governor of the prison to which a person was committed has reasonable grounds for believing that a person to whom an order under this section applies has contravened the condition referred to in subsection (2) he or she may apply to the court to fix a date for the hearing of an application for an order revoking the order under subsection (1).

(14) A probation and welfare officer may, if he or she has reasonable grounds for believing that a person to whom an order under subsection (1) applies has contravened a condition imposed under subsection (3) or (4), apply to the court to fix a date for the hearing of an application for an order revoking the order under subsection (1).

(15) Where the court fixes a date for the hearing of an application referred to in subsection (13) or (14), it shall, by notice in writing, so inform the person in respect of whom the application will be made, or where that person is in prison, the governor of the prison, and such notice shall require the person to appear before it, or require the said governor to produce the person before it, on the date so fixed and at such time as is specified in the notice.

(16) If a person who is not in prison fails to appear before the court in accordance with a requirement contained in a notice under subsection (15), the court may issue a warrant for the arrest of the person.

(17) A court shall, where it is satisfied that a person to whom an order under subsection (1) applies has contravened a condition of the order, revoke the order unless it considers that in all of the circumstances of the case it would be unjust to so do, and where the court revokes that order, the person shall be required to serve the entire of the sentence 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 pending the revocation of the said order.

(18) A notice under subsection (15) shall be addressed to the person concerned by name, and may be given to the person in one of the following ways:

(a) by delivering it to the person;

(b) by leaving it at the address at which the person ordinarily resides or, in a case in which an address for service has been furnished, at that address;

(c) by sending it by post in a prepaid registered letter to the address at which the person ordinarily resides or, in a case in which an address for service has been furnished, to that address.

(19) This section shall not affect the operation of—

(a) section 2 of the Criminal Justice Act 1960 or Rule 38 of the Rules for the Government of Prisons 1947 (S.R. & O. No. 320 of 1947), or

(b) subsections (3G) and (3H) of section 27 of the Misuse of Drugs Act 1977 .

(20) Where a court imposes a sentence of a term of imprisonment that is to run consecutively to a sentence of a term of imprisonment the operation of a part of which is suspended, the first-mentioned sentence shall commence at the expiration of the part of the second-mentioned sentence the operation of which is not suspended.

14. It is clear from its terms that s.99 only applies to sentences of "imprisonment". What constitutes imprisonment for the purposes of s.99 is in turn defined in s. 98 of the Act of 2006 as amended by s. 17 of the Prisons Act 2015. The terms of that definition are such that it *"includes detention in a place provided under section 2 of the Prisons Act 1970 and 'sentence of imprisonment' shall be construed accordingly".* It has been argued before us on behalf of the prosecutor that because s.98 uses the word *"includes"* this Court would be justified in construing s.98 as extending the power of suspension to sentences of child detention. I do not consider that this would be a correct interpretation of s.98 for reasons that I will return to later in this judgment.

15. Section 2 of the Prisons Act 1970 provides that:

> *"The Minister may, for the purpose of promoting the rehabilitation of offenders, provide places other than prisons for the detention of persons who have been sentenced to penal servitude or imprisonment or to detention in Saint Patrick's Institution."*

16. The accused in the present case was sentenced to detention in a children detention centre (within the meaning of s.95 of the Act of 2001), to wit Trinity House, in the County of Dublin. I am satisfied that he was not, and could not have been, sentenced to either penal servitude, or imprisonment (as defined in s. 98 of the Act of 2006), or to detention in St Patrick's institution as legislative policy reflected in the Act of 2001 would have prevented such a sentence being imposed upon him.

17. In that regard, s156 of the Act of 2001 provides (inter alia) that *"[n]o court shall pass a sentence of imprisonment on a child"*. As Paul Anthony McDermott and Tessa Robinson, Barristers at Law, have pointed out in their annotated commentary on the Children Act 2001 (Thompson Round Hall: 2003) at p.111:

> "The central plank of Pt 9 [which sets forth the powers of courts in relation to child offenders] is to be found at the very end of it where s. 156 provides that no court shall pass a sentence of imprisonment on a child or commit a child to prison. Pt 9 seeks to provide a sufficient range of alternative options to prison, ranging from a reprimand at one end of the spectrum to a period of detention in a child detention centre at the other end."

18. Having considered the Act of 2006 as a whole, and having regard to the place of s.98 within that Act, and specifically within Pt 10 of that enactment which is entitled "Sentencing", I do not find any support for the notion that the Oireachtas could have intended to row back on the public policy objectives given effect to in Pt 9 of the Act of 2001, in the absence of express words indicating such an intention. It is primarily for this reason that I reject the interpretation of s.98 commended by the prosecutor.

19. Therefore I consider that in so far as s.99 only provides for the suspension of sentences of imprisonment as defined in s.98, and that definition does not cover sentences of detention in a children detention centre, the sentence passed on the 25th of May was bad to the extent that, in so far as it was partly suspended, the suspension was expressed to be for the purposes of s. 99(1) of the Act of 2006.

20. That being my view, it then begs the further question: did the sentencing judge have jurisdiction, other than under s.99 of the Act of 2006, to partly suspend a sentence of detention in a children detention centre? Moreover, in the event of this question being in the affirmative, it might then be necessary to consider how the reference to s.99 which appears in the sentencing order should be treated. This would involve consideration of whether the whole sentencing order is to be regarded as invalid, or whether the reference to s.99 might be severed on the basis that it merely represents surplus wording that is devoid of legal effect.

Did the Circuit Judge otherwise possess the suggested jurisdiction?
21. It has been argued before us that such a jurisdiction might still exist at common law. Certainly, prior to the enactment of s.99 of the Act of 2006, a jurisdiction existed at common law to suspend a sentence of imprisonment. The origins and history of the common law power to suspend a sentence of imprisonment is carefully traced and recounted by Prof W.N. Osborough in an erudite article published in the Irish Jurist in the early 1980's, and entitled *"A Damocles' Sword Guaranteed Irish: The Suspended Sentence in the Republic of Ireland*" The Irish Jurist 1982, 15(2), 221-256.

22. However, it has been held by the High Court in *Director of Public Prosecutions (Garda Purtill) v Murray* [2015] I.E.H.C.782 (unreported, High Court, O'Malley J, 11th December 2015) that the common law power to suspend a sentence of imprisonment did not survive the enactment of s. 99 of the Act of 2006. This case also involved a consultative case stated in which the High Court was expressly asked asked *"Did the power of the District Court at Common law to suspend sentences of imprisonment survive the enactment of Section 99 of the Criminal Justice Act 2006 as amended?"*

23. O'Malley J held that:

> "…in my view it is clear from the provisions of the section that the legislature's intention was to regulate the suspended sentence by putting it on a statutory footing. In so doing the objective was to provide a complete code in so far as the minimum conditions of suspension, the supervision of offenders, the enforcement powers of the court and the discretion in relation to activation are concerned."

24. The learned High Court judge (as she then was) added in conclusion:

> "In these circumstances there is no scope for a *"parallel jurisdiction"* to be operated outside the statute. I will therefore answer the question posed in the negative".

25. In the present case, however, it has been argued that in so far as s. 99 of the Act of 2006 was found to represent a complete code for the purposes of regulating the suspended sentence, it could only be such a code with respect to suspended sentences of imprisonment, because that is all that s.99 purports to apply to. I am aware of certain Supreme Court authorities that would tend to support such an argument, in particular *Mavior v Zerko* [2013] 3 I.R. 268 and In *Re F.D.* [2015] 1 I.R. 741, and in those circumstances I have no difficulty in accepting that argument in so far as it goes. Accordingly, if a parallel jurisdiction existed at common law to suspend a sentence imposed on a child involving detention that was not imprisonment, such a power could potentially have survived the enactment of s. 99 of the Act of 2006. Whether such a power could have survived the enactment of Pt 9 of the Act of 2001 is quite another issue. I will address that later in this judgment.

26. The prosecutor in this case has advanced two possible bases on which the Circuit Judge might be regarded as possessing the jurisdiction to suspend a sentence of detention in a child detention centre. She has argued firstly that such a power is necessarily to be implied from the terms of the Act of 2001; alternatively there is a residual common law power to suspend such a sentence which has survived the enactment of the Act of 2001.

27. The counter arguments are that the Act of 2001 does not confer a general power to suspend, in whole or in part, a sentence of detention in a child detention centre, either expressly or by implication. On the contrary it is said that the Act of 2001 creates, in s. 144(9) thereof, only a very limited and restricted power of suspension to apply only in circumstances where the making of a detention order has been deferred in the circumstances provided for in s.144(1); and that a proper construction of the statute leans in favour of an interpretation that the Oireachtas did not intend to confer any wider power of suspension on a court when sentencing a child to detention in a child detention centre.

28. In addition it is argued that no residual common law power to suspend a sentence of detention in a children detention centre has survived the enactment of the Act of 2001. A power to suspend such a sentence appears to have existed at common law, certainly up until the enactment of the Act of 2001. In that regard Osborough (*op cit*) cites examples of cases where in the past Irish courts have been prepared to suspend sentences of detention (e.g. the case of Forbes, 1926, mentioned on p.227 of the article, in which the Court of Criminal Appeal when dealing with the case of a 16 year old who had been convicted of perjury substituted a suspended sentence of six months detention (in a Borstal) for the sentence of two years detention imposed at first instance). While it is not disputed that the power to suspend such a sentence may have existed at common law, it is suggested on behalf of the accused that the Act of 2001 provided a complete code for the sentencing of children and that, to use the words of O'Malley J in *Director of Public Prosecutions (Garda Purtill) v Murray* with reference to s.99 of the Act of 2006, it leaves no scope for a parallel jurisdiction to be operated outside of the statute.

29. I have considered carefully the arguments on both sides in respect of each of these contentions.

30. In so far as the prosecutor contends that a power of suspension may be implied from the terms of the Act 2001, that argument

goes as follows. The entire thrust of the Act of 2001 is that the sanction of detention (i.e., deprivation or restriction of a child's liberty within the confines of, or subject to the regime of, either a children detention school or a children detention centre) should be imposed only a last resort. Express effect is given to this policy in s.143 of the Act of 2001 which provides (*inter alia*): *"The court shall not make an order imposing a period of detention on a child unless it is satisfied that detention is the only suitable way of dealing with the child".* It is said that any court involved in sentencing a child must therefore have in its toolbox the fullest range of sentencing options short of actual custodial detention, and accordingly since a suspended sentence is for all practical intents and purposes a form of non-custodial disposal any such court must, by necessary implication, be vested with the power to suspend a sentence of detention in a children detention centre, either in whole or in part.

31. It is argued in response on behalf of the accused that the Act of 2001 contains a very wide range of non-custodial options other than suspended sentences, and that the failure to expressly provide for suspended sentences other than in s.144(9) must be regarded as a conscious and deliberate policy choice. That it might be so regarded is not surprising in that the conventional suspended sentence is focussed primarily on the deterrent effect of the notional "Sword of Damocles" hanging by a thread over the head of the offender, whereas current legislative policy as reflected in the Act of 2001 requires a different focus, namely the encouragement of natural desistance from anti-social behaviour and criminal activity through community based rehabilitation.

32. Moreover, counsel for the accused points out, the Act of 2001 in fact contains many non custodial options optimised towards those goals which are not in truth all that different in their practical features from those found in conventional suspended, or partly suspended, sentences. Thus, we find included in the list of community sanctions (to be found in s.115) various types of probation orders (ss. 124 to 126), a care and supervision order (s.129), and a mentoring order (s.131), to name but some, each with potential measures that might be applied in the event of non-compliance. In addition, the possibility exists of attaching conditions to community sanctions (with an inexhaustive list of possibilities in that regard appearing in s.117), such as a requirement to be of good behaviour, or to submit to supervision or to attend/engage with support services (such as the Probation Service). The imposition of similar conditions commonly arises as a feature of the conventional suspended sentence. It might also be said that s.151 of the Act of 2001, which provides for a detention and supervision order, offers an analogue for the partly suspended sentence that broadly approximates it, but which better reflects modern penalogical thinking in the area of child offenders whom it is considered must be subjected to the last resort of some actual detention.

33. I have carefully considered the entire scheme of the Act of 2001, as well as its long title and its detailed provisions and having done so I am not persuaded by the arguments advanced by the prosecutor. In particular, I find the absence of an express power to impose a suspended sentence other than in the circumstances set forth in s. 144(9) to be of significance. I am satisfied that no basis exists for implication of the power that the prosecutor invites us to imply. The Act is clear in its terms and I have no reason to believe that the failure to provide for an express general power to suspend sentences of detention in either a children detention school or in a children detention centre was other than a deliberate policy choice by the legislature. The Act is neither ambiguous nor does a literal interpretation lead to an absurdity. There is no basis for affording it the purposive or teleological interpretation that the prosecutor would have us do.

34. In circumstances where I reject the idea that the suggested jurisdiction arises by implication under the Act of 2001, it remains to be considered whether the undoubted former jurisdiction to suspend a sentence of detention imposed on a child could have survived the enactment of the Act of 2001. I am satisfied that it could not for the following reasons.

35. The Act of 2001 is expressed in its long title to *be "An Act to make further provision in relation to the care, protection and control of children and, in particular, to replace the Children Act, 1908, and other enactments relating to juvenile offenders, to amend and extend the Child Care Act, 1991, and to provide for related matters."*

36. Child law as a discipline embraces both the care and protection of children and juvenile justice. Reform of child law in this jurisdiction was commenced with the Child Care Act 1991 which was concerned with updating the law relating to the care and protection of children but which did not address juvenile justice at all. It is clear from the long title to the Act of 2001, from its scheme and from its detailed provisions, that it was intended to build upon (i.e*. "make further provision for"*) the reforms commenced in the Child Care Act 1991 in so far as the care and protection of children were concerned, but also to completely replace the pre-existing law with respect to juvenile justice which up to that point was to be found, for the most part, in the Children Act, 1908, and related enactments. Although the pre-existing common law power to suspend a sentence of detention imposed on a child is not expressly alluded to in the Act of 2001 I am satisfied that in so far as the Act is concerned with juvenile justice it was intended to completely replace the pre-existing and outdated law in that regard, including residual common law powers, with a new and hopefully coherent and comprehensive statutory framework.

37. I further note, though it is only in passing in circumstances where my view in that regard has been arrived at solely based upon a detailed consideration of the legislation itself, that McDermott and Robinson (op cit), in an introduction and general note at the start of their text, record that the then Minister for Justice, in the course of the Dáil debates on the Bill that was to become the Act of 2001, described it as "a blue print for a new system of juvenile justice" and stated that "its provisions are the distillation of the accumulated wisdom and the best practice world-wide in the area of juvenile justice" (Mr John O'Donoghue TD, 517 *Dáil Debates* Col 32).

38. Accordingly, applying the same logic as was applied by O'Malley J in Director of *Public Prosecutions (Garda Purtill) v Murray*, it is clear that the common law power to suspend a sentence of imprisonment did not survive the enactment of the Act of 2001, and in particular Pt 9 thereof.

Conclusions

39. The first question posed in the case stated must be answered in the negative.

40. It is not necessary in those circumstances to address the second question posed in the case stated.

41. Equally, it is also unnecessary to address the possible subsidiary questions identified at paragraph 20 above as potentially arising in the event of an affirmative answer to the first question.