THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 176

Record Number: 2019/90

Birmingham P.
Whelan J.
McCarthy J.

IN THE MATTER OF SECTION 16 OF THE COURTS OF JUSTICE ACT, 1947

BETWEEN/

THE PEOPLE

AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

PROSECUTOR

- AND –

WILLIAM KIRWAN

DEFENDANT

JUDGMENT of the Court delivered by Ms. Justice Máire Whelan on the 27th day of June 2019

Introduction

1. This is a consultative case stated referred by Her Honour Judge Melanie Greally, judge of the Circuit Court, dated the 7th day of March, 2019. She seeks the opinion of the court on an issue of law arising in a matter involving William Kirwan, the defendant herein.

Factual background

2. On 8th of July, 2018, the defendant committed an offence of attempted robbery contrary to common law at Northumberland Road in Dublin. He was charged with same on the 26th of July, 2018. He was sent forward for trial under Bill No. DUDP1087/2018 to Dublin Circuit Criminal Court on the 16th of October, 2018.

3. The case was listed for mention before Dublin Circuit Criminal Court on the 9th of November, 2018. On that date the defendant was arraigned and pleaded guilty to attempted robbery, the sole count on the indictment. The case was then adjourned for sentence to the 17th of January, 2019.

4. At the sentencing hearing on the 17th of January, 2019 the Circuit Court judge was informed that the defendant had a previous conviction (the first offence) in the Dublin Metropolitan District Court on the 21st of March, 2018, for theft of a pair of sunglasses from Brown Thomas store in Grafton Street, Dublin contrary to s.4 of the Criminal Justice (Theft and Fraud Offences) Act 2001.

The First Offence

5. The first offence was committed on the 28th of January, 2018. On the 21st March, 2018, the District Court judge imposed a term of six months' imprisonment suspended in its entirety for a period of eighteen months pursuant to s.99(1) of the Criminal Justice Act 2006. The defendant duly entered into a bond on the said date before the District Court to keep the peace and be of good behaviour during the period of suspension.

6. Thus, the offence committed by the defendant on the 8th of July, 2018, triggered the operation of s.99 of the Criminal Justice Act 2006 (as amended), it having been committed within the period of suspension of the first sentence and during the currency of the bond.

***Moore* decision**

7. The reactivation of suspended sentences is governed by the provisions of Criminal Justice Act 2006 and in particular s.99. However, on 19th April, 2016, in the case of *Moore v DPP & Others* [2016] I.E.H.C. 244 the High Court held that s.99 (9) and (10) of the Criminal Justice Act 2006 were repugnant to the Constitution by reason that their operation in the reactivation of a suspended sentence resulted in inconsistency which was incompatible with the requirements of Article 38 of the Constitution that no person should be tried on a criminal charge save in due course of law, with the guarantee in Article 40.4.1 that no citizen shall be deprived of his liberty save in accordance with law, with the principle of equality before the law declared in Article 40.1 and with the guarantee in the said article to defend and vindicate the personal rights of citizens.

In *Wansboro v DPP* [2018] I.E.S.C. 63 Mr. Justice O'Donnell at para. 3 identifies the constitutional frailty that had led to s.99(10)

being struck down thus: -

> "The basic and insurmountable difficulty posed by s. 99(10) was that it required the sentencing court to revoke the suspension unless it considered it to be unjust, and furthermore required that step to be taken before sentence was imposed for the trigger offence. However, this procedure did not provide for the possibility that the trigger offence conviction might be set aside on appeal, in which case the suspended sentence ought not to have been reactivated, with consequent injustice to the individual."

Criminal Justice (Suspended Sentences of Imprisonment) Act of 2017

8. The legislature moved to address the *lacuna* that inexorably followed from the said determination in *Moore*. The Criminal Justice (Suspended Sentences of Imprisonment) Act of 2017 (the 2017 Act) was enacted in response to the *Moore* decision with the objective of putting in place constitutionally compliant procedural rules in lieu of s.99 subs. (9) and (10) for the reactivation of the suspended part of any earlier sentence where a person commits a further offence during the period of suspension. Section 2 (c) of the 2017 Act inserted subsection 8A into s.99 of the 2006 Act, the following parts of which are in particular relevant to this application: -

> "(8A) (a) Where a person to whom an order under subsection (1) applies—
>
> (i) commits an offence after the making of that order and during the period of suspension of the sentence concerned (in this section referred to as the 'triggering offence'), and
>
> (ii) subject to subsection (8B), is convicted of the triggering offence,
>
> the court before which proceedings for the triggering offence are brought shall, after imposing sentence for that offence, remand the person in custody or on bail to a sitting of the court that made the said order to be held—
>
> (I) no later than 15 days after such remand, or
>
> (II) if there is no sitting of that court within that period, to the next sitting of that court thereafter,
>
> and, if there is no sitting of that court on the day to which that person has been remanded, he or she shall stand so remanded to the sitting of that court next held after that day.
>
> (b) The remand of a person in custody or on bail under paragraph (a) to a sitting of the court that made the order under subsection (1) concerned applying to the person may be to a sitting of that court other than a sitting thereof referred to in paragraph (c).
>
> (c) Subject to paragraph (b), references in paragraph (a) to a sitting of a court shall be construed as references to a sitting of the court at a place and time appointed or fixed for sittings of that court by or under statute.
>
> (8B) Subsection (8A) applies to a conviction of a person for an offence if proceedings for the offence are instituted against the person during the period of suspension of the sentence concerned pursuant to the order under subsection (1) applying to the person and 12 months thereafter.
>
> (8C) Subject to subsection (8D), a court to which a person has been remanded under subsection (8A) shall revoke the order under subsection (1) concerned 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 the triggering offence) pending the revocation of the said order."

9. Section 4(2) of the 2017 Act provides: -

> "(2) This Act shall come into operation on such day or days as the Minister for Justice and Equality may by order or orders appoint either generally or with reference to any particular purpose or provision and different days may be so appointed for different purposes or different provisions."

SI No. 1 /2019

10. By Statutory Instrument No. 1 of 2019, the 11th of January, 2019, was appointed as the day on which the 2017 Act came into operation.

11. At the defendant's sentencing hearing on the 17th January, 2019, it was clear to the Circuit Court judge that the offence in respect of which sentence was being imposed by her was a triggering offence committed during the currency of the suspended sentence imposed in the District Court on the 21st of March, 2018. An issue arose as to whether s.99(8A) of the 2006 Act (as amended) required her to make an order remanding the defendant to Dublin Metropolitan District Court for the consideration of revocation of the suspended sentence.

Arguments on behalf of the defendant

12. At the sentencing hearing in the Circuit Court, counsel for the defendant argued that s.99(8A), having been commenced on the 11th January, 2019, could not apply to him where the suspended sentence (imposed 21st March, 2018), the triggering offence (committed 8th July, 2018) and the guilty plea (entered 9th November, 2018) had all occurred prior to the commencement of s.99(8A) on the 11th January, 2019. It was argued that the power to remand provided for in s.99(8A) could not be exercised where the conviction for the triggering offence had occurred on a date before subsection 8A had come into force, as the condition precedent for the exercise of that jurisdiction by the court sentencing for the triggering offence was absent and that the conditions in s.99(8A) of the amending Act were not met. It was contended that the section could only have prospective effect and that retrospective effect for a criminal statute was prohibited. It was submitted that a reactivated sentence would not be mandatorily consecutive in the

event of a re-entry under the pre-2017 Act regime.

13. It was contended that the requirement to remand back to the first court following imposition of the sentence for the triggering offence under the amendment introduced by s.99(8A) and s.99(11) of the 2006 Act (as inserted by the 2017 Act) gave rise to the possibility of the suspended sentence imposed on the 21st March, 2018, being revoked and if so, the amending measure introduced the requirement that such a reactivated sentence be made consecutive to that imposed by the Circuit Court judge in respect of the triggering offence.

14. It was argued that the changes effected by the 2017 Act were substantive and penal in nature and could not be imposed retrospectively since the provisions of the 2017 amending Act were not in force when the defendant's conviction occurred in respect of the triggering offence on the 9th November, 2018.

Arguments on behalf of the DPP

15. On behalf of the DPP it was contended that the 2017 Act was mandatory in its terms and applied irrespective of the date on which the defendant had pleaded guilty to a triggering offence committed during the currency of the suspended sentence. The prosecutor contended that the issue of retrospectivity did not arise in the instant case and that no prejudice or unfairness had been visited upon the defendant.

Determination of the sentencing judge

16. On the 18th January, 2019, the Circuit Court judge sentenced the defendant on the triggering offence to five years' imprisonment with the final eighteen months suspended for a period of eighteen months and he duly entered a bond. In reaching her conclusion the Circuit Court judge indicated that the terms of s.99 of the 2006 Act (as amended) were clear.

17. Following the imposition of sentence for the triggering offence she held that s.99(8A) did apply to the defendant. She determined that she was required to remand the defendant back to Dublin Metropolitan District Court pursuant to s.99(8A) of the 2006 Act (as amended).

18. In her view, the changes effected by the 2017 Act to s.99 were not substantive in nature and that there was no unfairness caused to the defendant by them. She indicated that she did "not consider that the changes in s.99 constituted retrospective penalisation".

19. Counsel for the defendant requisitioned the Circuit Court judge to refer a question of law to this Court by way of consultative case stated pursuant to s.16 of the Courts of Justice Act 1947. At the hearing of the application it appears that "Counsel for the defendant indicated that, in the event of a case stated, no issue would be taken in due course in relation to *vires* of the court to make a s.99(8A) order in the event that the Court of Appeal held it was appropriate to make such an order in relation to the defendant."

Consultative case stated

20. On 7th March, 2019, the Circuit Court judge signed the consultative case stated which asked: -

> "Was I correct in law in finding that s.99(8A) of the Criminal Justice Act 2006 (as inserted by S. 2 of the Criminal Justice (Suspended Sentences of Imprisonment) Act 2017) required me to remand the defendant to Dublin District Court arising from the suspended sentence imposed in that court on March 21st 2018?"

Written submissions of the defendant

21. Written submissions were furnished on behalf of the defendant. They raised various authorities relating to the presumption against retrospectivity.

22. Reliance was placed on the decision of this court in *People (DPP) v. Rattigan* [2013] I.E.C.C.A. 13 where at para. 11 O'Donnell J. quoted excerpts from Maxwell "*Interpretation of Statutes*" 12th Edn. Sweet & Maxwell London, 1969 where it is stated in relation to English Law that the presumption will apply unless "such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication". Reliance was also placed on excerpts from Bennion "*Statutory Interpretation*" 5th Edn. Lexus Nexus Edinburgh, 2008 where the author reaffirms the contention advanced by Maxwell cited above.

23. *Rattigan* concerned the retrospective effect of s. 16 of the Criminal Justice Act 2006 which permits in certain circumstances the admission into evidence of statements previously made by witness. The section was commenced after the alleged offence put before the trial of Mr. Rattigan began. At para. 14 of that judgment O'Donnell J. had rejected the defence's submission that the more serious the right that is affected, the more reluctant the court should be to categorise the legislation as merely procedural or evidential, he having observed that this was not a useful guide.

24. The decisions in *Chestvale Properties Limited v. Glackin* [1993] 3 I.R. 35, *Toss Limited v. District Court Justice* (unreported, High Court, Blayney J., 24th May, 1987) and Lord Alverstone C.J. in *Rex v. Chandra Dharma*, [1905] 2 K. B. 335 at pg. 338 were also cited.

25. It was contended that the most substantial relevant judicial engagement with the presumption against retrospective effect was to be found in *Rattigan*. It was noted that O'Donnell J. had observed that in its operation s.16 was: -

> "a significant distance from the concept of retroactive penalisation which underpins both the constitutional prohibition and the common law principle of statutory interpretation. Furthermore, on its face, the legislation acts prospectively. It only applies when at a trial, which necessarily must occur after the coming into force of the Act, a witness refuses to give evidence or denies making a statement or gives evidence which is materially inconsistent with the statement previously given. Until such an event occurs the Act is not triggered, or put in a different way, the triggering event can only occur at some time in the future, and after the coming into force of the Act. Second, the language of the section appears clear and unambiguous. On its face, and without recourse to any presumptions of interpretation, it appears to apply to any such event which occurs after the coming into force of the Act. Third, notwithstanding the careful and detailed argument made on behalf of the applicant in this case, it was not possible to draw the Court's attention to any parallel circumstance in which the presumption had been applied in respect of significant procedural changes in the administration of justice in criminal matters. Fourth, since the principle relied on by the applicant was a presumption applicable to the

interpretation of the statute, it was necessary to proffer some interpretation of the words of the statute to accord with the asserted presumption. Counsel had understandable difficulty in asserting how the provision was to be interpreted."

26. O'Donnell J. further stated that: -

> "The changes here were properly characterised as procedural and evidential in nature and accordingly the presumption did not apply. In any event, the change effected was essentially prospective in that it applies only to events occurring at trials after the coming into force of the Act. In so much as it could be characterised as having a retrospective effect in the sense that it altered the legal characteristics of statements made prior to the coming into force of the Act, such a change, while essentially procedural and evidential, was in any event a consequence of the clear language of the Act, and no other interpretation of the section is plausible. Accordingly, the applicant's argument on this ground fails."

27. It was noted that the Supreme Court had subsequently unanimously agreed with the Court of Criminal Appeal on the issue – O'Malley J. held as follows: -

> "I agree with the analysis of the Court of Criminal Appeal on both aspects of the issue raised in respect of the section. In the first instance, it is in my view manifestly within the category of 'procedural or evidential change'. All of the authorities are agreed that the presumption against retrospectivity has no application to that category."

28. It was argued on behalf of the defendant that the only case addressing the retrospective effect of s.99 of the 2006 Act, as originally enacted, was *The People (DPP) v. Gordon Ryan* [2009] I.E.C.C.A. 21. In that case the appellant had been the subject of a common law suspended sentence imposed prior to the coming into operation of the 2006 Act. The suspended sentence was sought to be revoked by the prosecution in circumstances where between the sentence date and the revocation hearing the 2006 Act had come into force. Finnegan J. had considered in particular s.99(2) which required the imposition of specific conditions in an order made pursuant to s.99(1) such as that the person in respect of whom the order is made keep the peace and be of good behaviour. He observed: -

> "This provision must be prospective only… The fact that this provision is prospective only will not of necessity prevent other provisions of section 99 having retrospective effect. The same is true in relation to the provisions contained in subsections (3), (4), (5), (6), (7), (8), (11), (13), (14), (15), (16), (18), and (19) in so far as they may in any subsequent case be found to be prospective only."

29. It was pointed out that in each of the cases relied upon by the defendant the presumption against retrospective effect was rebutted or did not apply. In *Rattigan and McDermott* the provisions in question fell squarely within the category of evidential changes as each related to the admission of evidence. *Toss Ltd* concerned the retrospective effect of the new method of issuing a District Court Summons, a matter which was clearly procedural in nature. *Chestvale Properties Ltd. v. Glackin* and other decisions cited were civil cases which did not engage the Constitutional and ECHR protected principles of *nullum crimen sine lege* and *nulla poena sine lege* and the prohibition on the retrospective application of heavier penalties.

30. It was contended that, by contrast, the retrospective application of subs.99(8A) and (11) of the 2006 Act would clearly operate to penalise the defendant. Under the pre-2017 Act regime, which had operated from 19th April, 2006, to 11th January, 2019, he would have been able to argue that any revoked sentence should not be made consecutive. Under the post-2017 Act regime, this argument is not available as consecutivity is mandatory. This was characterised as a loss of opportunity operating to his detriment and penal in nature.

The defendant further contended that application of s.99(8A) would offend the principle that there is no retrospective application of heavier penalties. The dicta of Finlay-Geoghegan J. (obiter) in *Enright v. Ireland* [2003] 2 I.R. 321 was cited:

> "… the rights guaranteed by Article 38.1 must include the right only to be punished for a crime in accordance with the law which existed at the date of commission of the crime."

31. Reliance was placed on Art. 7(1) of the ECHR which provides: -

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

The jurisprudence in regard to Art. 7(1) was cited including *Del Río Prada v. Spain* [2014] 58 E.H.R.R. 37 where the ECtHR stated that: -

> "In practice the distinction between a measure that constitutes a 'penalty' and a measure that concerns the 'execution' or 'enforcement' of the 'penalty' may not always be clear-cut."

The ECtHR had also stated: -

> "In the light of the foregoing the Court does not rule out the possibility that measures taken by the legislature, the administrative authorities or the courts after the final sentence has been imposed or while the sentence is being served may result in the redefinition or modification of the scope of the 'penalty' imposed by the trial court. When that happens, the Court considers that the measures concerned should fall within the scope of the prohibition of the retroactive application of penalties enshrined in Article 7(1) *in fine* of the Convention. Otherwise, States would be free – by amending the law or reinterpreting the established regulations, for example – to adopt measures which retroactively redefined the scope of the penalty imposed, to the convicted person's detriment, when the latter could not have imagined such a development at the time when the offence was committed or the sentence was imposed."

32. It was contended that the presumption against retrospective effect applies in the instant case and further that subs.99(8A) and (11) of the 2006 Act, as substituted by the 2017 Act, work a clear detriment on the defendant. It was argued that they are penal and substantive in nature, rather than procedural or evidential. To apply the said provisions, it was contended, would violate the prohibition on the imposition of heavier penalties than were applicable at the time of the offence in that they would result in the mandatory imposition of a consecutive sentence arising from the commission of the triggering offence during the currency of the sentence suspended by the District Court. This would deprive the defendant of the right to advocate for non-consecutive sentences.

33. It was further argued that, having regard to s.27 of the Interpretation Act 2005, the insertion of s.99(8A) and (11) into the 2006 Act cannot affect any right acquired by the defendant pursuant to the previous version of s.99 (where the hearing would have been conducted under s.99(17) to advocate for a non-consecutive sentence).

Written submissions of the DPP

34. On behalf of the DPP it was noted that it is not in issue that the commission of the offence of attempted robbery on the 8th July, 2018, constituted a breach of the District Court suspended sentence imposed on the 21st March, 2018. The only issue is as to the appropriate means by which the prosecution can seek the revocation of that suspended sentence and the imposition of such part, if any, of same as the District Court may be minded to order.

35. It was argued that in light of the commencement of the 2017 Act by the S. I. 1/2019 on the 11th day of January, 2019, the Act was in operation at the date of sentence. From 11th January, 2019, a court dealing with or continuing to deal with a person who has committed a triggering offence now has to follow the procedures laid down under the new regime.

36. The DPP contends for the plain meaning of the words of the 2017 Act and that in its ordinary meaning, anyone appearing before a second court in respect of a triggering offence on or after the 11th of January, 2019, is subject to the provisions of the 2017 Act. No other interpretation of the 2017 Act is plausible. Once it is in force the Act does not identify any basis on which persons who are before the court in respect of a triggering offence can be dealt with other than pursuant to its provisions.

37. It was submitted that there is a common law presumption against a statutory provision having retrospective effect unless the Act expressly, or by implication, provides to the contrary. On the other hand, where legislation deals with procedural matters, then the opposite situation prevails and at common law it is presumed to be retrospective: the decision in *Toss Ltd* was relied upon to elucidate this principle.

38. It was contended that, contrary to the contentions on behalf of the defendant, the provisions of the Interpretation Act, 2005, ss. 26 and 27, do not appear to be applicable by reason that whereas ss.99(9) and (10) were declared to be unconstitutional by the High Court in *Moore*, they were never repealed and the 2017 Act was enacted to put new provisions in place to fill the procedural lacuna that had arisen.

39. It was argued that the two conditions precedent to the application of s.99(8A)(a)(i) and (ii) of the 2017 Act are established, namely that the triggering offence has been committed during the currency of the suspended sentence and that there is a conviction in respect of it. There being no dispute in the instant case but that both conditions have been fulfilled, counsel argued that the key questions are (i) was the initial act engaged in by the defendant a crime (which it was namely, theft) (ii) was the maximum sentence for commission of that offence known to the defendant at the date he committed the triggering offence on the 8th July, 2018 (there was no suggestion that it was not) and (iii) whether that sentence had in the intervening time been altered in any material manner (the answer was no). In such circumstances it was contended that there was no basis for the arguments being advanced on behalf of the defendant that he was prejudiced by the statutory amendment.

40. Counsel for the DPP engaged in an analysis of the old and new schemes, including the regime that obtained prior to the decision in *Moore*, the regime that operated between 19th April, 2016 and 11th January, 2019, and the statutory scheme that operates by virtue of the 2017 Act and s.99(8A). He emphasised that the court which deals with the application for reactivation of the suspended sentence retains all of the discretion originally provided for pursuant to ss.99(9) and 99(10) of the 2006 Act.

41. It was contended that the essential consideration of O'Donnell J. in *Rattigan* was whether there was any fundamental unfairness shown:

> "the presumption speaks to the requirement for fairness of a profound and fundamental kind. Th mischief prohibited is the fundamental unfairness of an act retrospectively criminalised after its presumptively lawful commission or a scenario where the penalty for that act is subject to retrospective increase after it has been carried out. No such issue arises herein".

42. It was argued that the distinction made by the Circuit Court judge in the present case as between substantive provisions and provisions which are "procedural or evidential only" is one which has the support of both the Court of Criminal Appeal and the Supreme Court. The decision of O'Malley J. in the Supreme Court in *Rattigan* was relied on where at para. 42 of the judgment she stated: -

> "The appellant did not acquire any particular right in respect of any of the witness statements at the time when they were made. What he acquired was the right, once charges were brought against him, to a fair trial."

It was submitted that, by analogy, in the instant case: -

> "When the accused was originally given a suspended sentence he did not acquire any particular right as to how it might be reactivated were he to be convicted of a further crime during the period of suspension. Rather what he acquired was a right that any hearing held for the purpose of considering what part of the suspended sentence to now require him to serve would be held in a fair manner. That right is fully vindicated by the operation of the new regime."

43. It was argued that notwithstanding the defence arguments, reactivated sentences were always intended to be consecutive pursuant to the statutory regime. Thomas O'Malley in "*Sentencing Law and Practice*", 3rd edn., was cited at para. 22-30: -

> "Any prison sentence (unless it is a life sentence) imposed by the later court would not commence until the expiration of any prison term imposed by the first court following the full or partial revocation of the suspended sentence."

44. It was argued that there was no legitimate expectation that the procedural *lacuna* that had arisen on 19th April, 2016, would not have been addressed in the event that the defendant was brought before the courts in respect of a triggering offence during the operation of the suspended sentence. He could have had no legitimate expectation that there would not be in place by then a mechanism to allow the sentencing court which dealt with a triggering offence to send him directly back to the first court, namely the District Court nor that – subject to the dictates of justice and fairness – any sentence as might be imposed would be consecutive.

45. It was argued that no unfairness could actually arise under the new regime since the original judge who imposed the suspended sentence retains complete discretion as to what to do with the defendant when he is remanded to the original sentencing court for a revocation hearing. It was contended that there was nothing identified in the 2017 statutory regime which breached any principle of the constitutional justice such as might lead the court to see if another interpretation can be given to the plain meaning of the

wording of the 2017 Act. There is no explicit constitutional prohibition on the retrospective application of criminal penalties.

46. It was argued that the jurisprudence on Art. 7(1) of the ECHR makes clear that what is prohibited is no more than the imposition retrospectively of a penalty which is more severe than the maximum sentence provided for by law at the date of commission of the offence. The decision in *Coeme v. Belgium* E.C.H.R. 22 June 2000 was relied on in support of that proposition.

47. It was contended that the decision of the Court of Criminal Appeal in *DPP v. Gordon Ryan* was material where the Court determined that s.99(1) was "no more than a restatement in statutory form of the position at common law rather than as the creation of a statutory jurisdiction". It was argued that the only issue in the instant case was whether the finding that the remand requirement in the 2017 Act was procedural rather than substantive was offensive to justice or constituted a fundamental unfairness. It was submitted that neither was the case.

48. It was submitted that the defendant had failed to establish that the application to him of the 2017 Act offended either the Constitution or the European Convention on Human Rights.

Discussion

49. As was observed by Thomas O'Malley in "*Sentencing Law and Practice*", 3rd edn. at 22-01:

> "Although it was first placed on a statutory footing in this jurisdiction in 2006, the suspended sentence has existed in Ireland, North and South, since the late nineteenth century. For a century or more here in the Republic, the suspended sentence was governed solely by judicially-developed rules and principles which, from a legal perspective at least, were largely trouble-free. Apart from a few occasions when they had to address problems arising from reviewable sentences… appeal courts seldom had to contend with any procedural difficulties connected with the suspended sentence. All of this changed radically with the enactment of s.99 of the Criminal Justice Act 2006 which provided the suspended sentence with a statutory foundation, although it did not expressly repeal the pre-existing common-law power. One major objective of s.99 was to provide an effective mechanism for dealing with those who re-offended or who breached a specified condition during the operational period of a suspended sentence."

50. Section 99 of the Criminal Justice Act 2006 (as amended) has given rise to more than its fair share of judicial and legislative interventions. In the case of *Wansboro*, O'Donnell J. outlined key aspects of the somewhat intricate legislative and jurisprudential history of suspended sentences in this jurisdiction. At para. 2 he noted: -

> "Section 99 of the Criminal Justice Act 2006, as amended, ('the 2006 Act') did not, of course, invent the suspended sentence. It has a long and broadly beneficial history in Irish law, as recounted in the valuable article by Osborough, '"A Damocles" sword guaranteed Irish: the suspended sentence in the Republic of Ireland', (1982) 17(2) Irish Jurist 221. Despite (or perhaps because of) its frequent use in Irish courts, until recent legislative intervention, s. 99 it had given rise to few issues which troubled the superior courts. In my judgment in *Director of Public Prosecutions v. Carter* [2015] IESC 20, [2015] 3 I.R. 58, I said that the provisions of the section may have represented a worthy attempt to place the practice of the suspended sentence on a sound legislative footing. However, it was also observed that the section was drafted in a prescriptive fashion (no doubt to try and control the process and ensure a smooth and prompt processing of the reactivation of suspended sentences), but that it was unfortunately open to real doubt whether s.99 was capable of achieving those objectives. In the event, the doubts there expressed crystallised and the section was found to be repugnant to the provisions of the Constitution in *Moore v. Director of Public Prosecutions* [2016] IEHC 244, (Unreported, High Court, Moriarty J., 19 April 2016). For present purposes, the important outcome of that judgment was that s. 99(9) and (10) of the 2006 Act was therefore invalid in accordance with the provisions of Article 15.4.2° of the Constitution."

51. Section 99 has at all material times been based on the principle that where a triggering offence is committed which results in a conviction during the period of suspension of a prior sentence, the defendant is required to be remanded back to the court which imposed the suspended sentence in the first place for the issue of reactivation to be considered. Until 19th April, 2016, the issue of reactivation was considered prior to imposing sentence for the second offence. Since 11th January, 2019, reactivation is considered after sentencing for the second offence has concluded. The operative facts in the instant case fall clearly within the ambit of the 2006 Act as amended by the 2017 Act since, notwithstanding that the plea of guilty to the second offence occurred in November, 2018, the Circuit Court judge was bound to operate the procedural law as it applied at the date of sentencing on 17th January, 2019.

52. The mechanism whereby such a convicted person is brought before a sitting of the court which imposed the suspended sentence in the first place for consideration of reactivation of sentence and revocation in whole or in part of the suspended sentence is a purely procedural matter that falls to be determined in accordance with the procedural law applicable as of the date when sentence is imposed for the triggering offence. The language of s.99(8A) makes this clear. In the instant case sentence was imposed on 17th January, 2019, and accordingly it is the operative procedural law on that date which is applicable.

19th April 2016 -11th January 2019

53. Following the striking down of s.99(9) and (10) of the Act by the High Court in the *Moore* case as repugnant to the Constitution, the practice that had obtained of remanding a defendant back to the original sentencing court ended. Instead, the court that convicted a defendant of the second triggering offence concluded the case and imposed sentence. Thereafter, the issue of revocation and/or reactivation of a suspended sentence had to be addressed subsequently by a separate application pursuant to s.99(13) or (17) which provided for mechanisms for revocation under s. 99(17) where consecutivity was not mandatory. Notwithstanding the post-*Moore* state of the law and the unconstitutionality of sections 99(9) and 99(10), there remained at all times a statutory mechanism by way of sections 99(13) and 99(17) which permitted the revocation and reactivation application to be made.

54. The key amendment effected by the 2017 Act restored the process whereby the court imposing sentence for the triggering offence is now empowered to remand the defendant either in custody or on bail directly back to a sitting of the court that imposed the suspended sentence in relation to the original offence in the first place. The legislative measure addressed the constitutional issue identified in the *Moore* decision and reversed the order in which the sentences were to be imposed.

55. It is clear from s.26(2)(c) of the Interpretation Act 2005 that proceedings taken pursuant to a former enactment may continue under and in conformity with a new one. This is subject to s.27(1) which provides, *inter alia*, that any right, privilege, obligation or liability already acquired cannot be affected and penalty or punishment incurred under the old regime cannot be affected. However, in the instant case there is no breach of s.27 since the original six-month suspended sentence never changed and continued unaltered

after the commencement of the 2017 Act as it did prior to its commencement.

56. The defendant never acquired any entitlement not to have the suspended sentence imposed on him in the District Court on the 21st March, 2018, revoked in the event that he breached a condition of the suspension or the bond entered into by him at that time. The provisions of s.27 of the Interpretation Act 2005 do not avail the defendant and do not support the contentions being advanced on his behalf.

Discretion

57. An argument advanced on behalf of the defendant was that from the date of the decision in *Moore* until S.99(8A) came into force – between 19th April, 2016 and 11th January, 2019 respectively – under the procedure operating pursuant to s.99(17) whilst the court which imposed the original suspended sentence was, in principle, required to revoke that sentence, it enjoyed a discretion not to do so if it considered revocation would be unjust in all the circumstances. Where a suspended sentence was revoked the court had a discretion as to what proportion the defendant would be required to serve. The sentencing judge could direct that a reactivated sentence run concurrently with one already being served in respect of the triggering offence. Since 11th January, 2019, consecutivity is mandatory.

58. However, it is clear from s.99(8C) that at a revocation/reactivation hearing the obligation to revoke the suspended sentence is not absolute: Revocation arises "...unless it considers that the revocation of that order would be unjust in all the circumstances of the case". Further, the sentencing judge has complete discretion as to the quantum of the sentence that is reactivated; "such part of the sentence as the court considers just having regard to all the circumstances of the case."

59. Accordingly, whilst a reactivated suspended sentence is required to run consecutively to the sentence for the triggering offence, nevertheless the court which deals with an application for revocation retains all of the discretion originally provided for pursuant to s.99(9) and 99(10). The sentencing judge at the reactivation application is free to determine whether revocation would be unjust in all the circumstances of the case such that the application ought not be granted in the first place. Further, the judge determines whether a defendant will serve all, some or none of the suspended sentence having due regard to the interests of justice and the circumstances of the case.

60. The sentencing judge exercises discretion with full knowledge of the triggering offence and the sentence imposed. The statutory function regarding reactivation is exercised, as with every imposition of a sentence, in accordance with the fundamental principles of sentencing law including the principles of totality, justice, and proportionality. Such factors will be taken into account in determining the justice of the case. Furthermore, such a defendant enjoys the right of appeal in respect of severity of sentence as they may be advised.

Retroactive

61. A close analysis of s.99 (8A – 8F) and s.99(11) makes clear that the operation of the amending measures are substantially procedural in nature. They operate to streamline and render more efficient the reactivation of suspended sentences that fall within s.99 of the Act. As such, the presumption against retrospectivity does not operate as Dodd in "*Statutory Interpretation in Ireland*" 2008 observes at para. 4.117: -

> "There is a distinction… between retrospection and retroactivity …A statute is commonly said to be retrospective in effect when it affects any vested rights acquired under existing laws or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of matters already passed. Retroactive statutes are statutes dealing with truly procedural and evidential matters."

It is noteworthy that O'Donnell J. in *Rattigan* cited the said extract with approval and further observed: -

> "What these different statements of a broad principle all have in common is that they acknowledge that matters which are described as 'procedural or evidential only' are not subject to the rule, or more accurately the presumption.

As explained by Bennion at pg. 320: -

'Because a change made by the legislator in procedural provisions is expected to be for the general benefit of litigants and others, it is presumed that it applies to pending as well as future proceedings. This presumption does not operate where, on the facts of the instant case, to apply it would contravene the principle that persons should not be penalised under a doubtful enactment.'"

62. A central consideration identified by O'Donnell J. in *Rattigan* is whether the operation of a measure would be "offensive to justice", and he points out, citing Maxwell, that it is that consideration which is at the heart of the presumption against retrospectivity.

63. It is material that the statutory regime that operated prior to the High Court decision in *Moore* expressly provided that sentences were intended to be consecutive. In particular, s.99(11) (which was a substitution inserted by the Criminal Justice Act 2007) provided: -

> "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)."

64. Merely because s.99(11) was not available in respect of the defendant's case by reason of s.99(10) having been struck down as unconstitutional on 19th April, 2016 in the *Moore* decision, did not vest in the defendant any entitlement to have potential reactivation of his suspended sentence considered at a revocation hearing based on procedural measures other than those which were operative as at the date of the hearing as provided by s.99 (8A).

65. At a superficial level, a view might be taken that it is disadvantageous to a defendant to be remanded to a revocation hearing for the purposes of reactivation of a suspended sentence by reason of the sentencing regime which precludes the option of the sentencing judge imposing a reactivated sentence of any duration which runs concurrently with any custodial sentence imposed in respect of the triggering offence. However, the spectrum of options available to the sentencing judge at the reactivation application is very broad and ranges from a discretion, where it would be unjust in all the circumstances pursuant to s.99(8C), not to revoke the suspension in the first place. Otherwise, there is discretion to reactivate the sentence either in its entirety as 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…" which encompasses the possibility of a defendant ultimately serving no part of the suspended sentence.

66. There is no question of exposure on the part of a defendant to a risk that he will be subjected to a sentence greater than that applicable at the date the offence was committed. The language of the amending provision of s.99 (8A) - (8F) inclusive makes that clear, in particular ss.99(8A), 99(8C) and 99(11). Thus, the constitutional right not to be subjected to a heavier penalty than was applicable at the date the offence was committed is not in anywise infringed.

67. Regarding the arguments concerning Art. 7(1) of the ECHR, neither parts of that subsection are engaged in the instant case. The first element of the article provides: -

> "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed."

The said provision is not engaged in the instant case. The theft of sunglasses from Brown Thomas in Grafton Street on 28th January, 2018, was an offence pursuant to s.4 of the Criminal Justice (Theft and Fraud Offences) Act 2001 on the said date and has continued at all times thereafter to constitute such an offence.

68. With regard to the second element in Art. 7(1) it provides: -

> "...nor shall a heavier penalty be imposed than the one which was applicable at the time the criminal offence was committed."

It is clear from the jurisprudence of the ECtHR, including the decision of *Coeme v. Belgium* E.C.H.R. 22 June 2000, that Art. 7(1) is directed towards the prohibition of the imposition of a penalty retrospectively which is of greater severity than the maximum sentence provided for by law at the date of the commission of the offence. Of particular note is the following extract from the said judgment: -

> "The Court must therefore verify that at the time when an accused person performed the act which led to his being prosecuted and convicted there was in force a legal provision which made that act punishable, and that the punishment imposed did not exceed the limits fixed by that provision… since the term 'penalty' is autonomous in scope, to render the protection afforded by Article 7 effective the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a 'penalty' within the meaning of this provision…"

69. The six months suspended sentence imposed on the defendant on the 21st March, 2018, remained unchanged at all material times thereafter and continues to be operative. The sole aspect that falls for consideration, following a procedural process now modified by the amending legislation, is that the defendant is remanded to a revocation hearing at a sitting of the District Court which imposed the suspended sentence initially for a consideration as to whether the suspended sentence or any part thereof be reactivated. The process is compliant with the Constitution and the ECHR.

Conclusions

70. I am satisfied that the statutory regime resulting from the operation of the 2017 Act gave rise to no material prejudice to the defendant.

71. I am fortified in my views as to the procedural nature of the relevant subsections in light of what is stated by O'Donnell J. in *Wansboro* at para. 6: -

> "Section 99 of the 2006 Act… merely sets out a procedure for the reactivation of suspended sentences. There is nothing wrong in principle with the idea that if a sentence is suspended on certain terms, then it should be open to reactivation in the event that those terms are not complied with, most obviously if a further offence is committed. Indeed, insomuch as the imposition of a suspended sentence is considered to be the administration of justice, then the prevention of any mechanism for reactivation of the sentence might be seen to be incompatible with, and indeed a frustration of, the administration of justice."

He also noted that section 99 was drafted in clearly prescriptive terms. Each step is required and the subsequent steps are made conditional on the completion of the prior steps.

72. The contentions advanced on behalf of the defendant that he risks that a reactivation hearing may result in the imposition of a sentence greater than was available during the period of the statutory *lacuna* from 19th April, 2016 - 11th January, 2019, fails to have regard to the robust and comprehensively principled approach that is intrinsic to the discharge by a sentencing judge of their sentencing function, based on the principles of totality, justice and proportionality and the obligation to take into account the circumstances and the justice of the case.

73. The statutory provisions now operative pursuant to s.99 (as amended) do not trench in any material respect upon those principles and there is no basis for the contention that they give rise to fundamental unfairness or could or might be offensive to justice. To advance such a contention is to disregard the broad discretion that a sentencing judge enjoys in this jurisdiction and the right of a defendant to appeal against severity in the event that the principles of totality, justice or proportionality are not properly applied. Furthermore, the clear language of the amending provisions and the spectrum of options available to the sentencing judge at a reactivation hearing are inconsistent with the arguments advanced on behalf of the defendant.

74. I am satisfied that the Circuit Court judge was correct in her conclusion that the changes effected pursuant to the 2017 Act were procedural and not substantive in nature and further, there was no unfairness caused to the defendant by the statutory amendments in question. She correctly identified that the changes brought about by the statutory amendments did not constitute retrospective penalisation and that she was entitled to remand the defendant pursuant to s.99(8A)(a) for sentence to the Dublin District Court for a consideration of a revocation of the suspended sentence and any reactivation of same as the District Court judge in question may consider just having regard to all the circumstances of the case.

75. I am of the view that the Circuit Court judge was correct in law in finding that s.99(8A) of the Criminal Justice Act 2006 (as inserted by s.2 of the Criminal Justice (Suspended Sentences of Imprisonment) Act 2017) required her to remand the defendant to Dublin District Court arising from the suspended sentence imposed in that Court on March 21st, 2018. Accordingly, the answer to the case stated is yes.