[2017] IEHC 779

THE HIGH COURT

2016 No. 958 JR

Between:

Michael Collins

Applicant

– and –

The Director of Public Prosecutions

Respondent

JUDGMENT of Mr Justice Max Barrett delivered on 21st December, 2017.

I

Facts

(i) General.

1. On 1st February, 2015, Mr Collins was found in possession of almost €7,000-worth of stolen power tools and two high-quality bicycles that were worth a total of just under €2,000 between them. The tools and bicycles had been stolen in Dublin a few days previously. The circumstances in which the tools came to be found in the possession of Mr Collins feature in the following extract from a transcript of the later Circuit Court appeal proceedings which has been exhibited before the court:

> *"Garda: …I received a call from…Enniscorthy station saying that Mr [H]…had contacted the station saying that he had been burgled a couple of days previous. It was a Sunday morning and he had travelled to the…market in Enniscorthy where he* [Mr H] *observed a number of tools that were stolen which belonged to him. He identified a vehicle…a red Ford transit which was parked….I met with Mr* [H]*…outside the market and he…pointed out the van where the tools were….He said he was able to recognise them because* [for] *a lot of the power tools he had made extension cords with yellow cable and these yellow cables were still on the power tools."*

2. On 10th December, 2015, Mr Collins was sentenced in the District Court to a cumulative sentence of ten months' imprisonment in respect of three counts of handling stolen property contrary to s.17 of the Criminal Justice (Theft and Fraud Offences) Act 2001 (ten months for handling the tools and two concurrent six-month sentences for the bicycles). Mr Collins lodged an appeal in respect of this sentence to the Circuit Court. That appeal was heard and decided by Hickson J. on 9th December, 2016. Hickson J., having heard the submissions before him and considered matters thoroughly, (i) affirmed the ten-month sentence but suspended the final four months of it for a period of five years, (ii) marked the two other offences as having been taken into consideration in lieu of the two six-month sentences, and (iii) disqualified Mr Collins from driving for a period of two years.

(ii) The Suspended Sentence.

3. When it comes to the imposition of the suspended sentence, the key segment of the transcript of the Circuit Court hearing indicates the learned Circuit Court judge to have said as follows:

> *"Judge….He* [Mr Collins] *has been interviewed by the probation service and the report is as I described it on the last occasion, like the curate's egg it is good in parts….*[T]*he probation officer who is experienced…in assessing risk assesses Mr Collins as* [presenting] *a moderate risk of re-offending in the next 12 months. There are three categories, low, moderate and high. Notwithstanding that he has been caught red-handed he is assessed as a moderate risk. Like his wife he has been bereaved by having three deaths in the family of children….There are two* [surviving] *sons, one I am told aged 28 and the other 22, and they live locally. Mr Collins is not a man who works and undoubtedly he has limited income. The receipt of stolen property is a huge temptation for him. But I am satisfied that he is a significant player in the off-loading of stolen property. I adjourned this case and I remanded him in custody to consider my options and if at all possible to deal more leniently with Mr Collins. I have to conclude that no error was made by the District Court judge in imposing a custodial sentence. It is appropriate that a custodial sentence be imposed on Mr Collins. I do that with the greatest regret and the greatest sympathy for the plight in which his wife finds herself….What I am going to do is as follows. I will reduce the term of imprisonment from 10 months to six months. I will suspend the last four months for a period of five years upon him entering into a bond to keep the peace and be of good behaviour. The bond should be measured in the sum of €100. In addition, because he was using his own van for the purpose of handling stolen property, I am going to disqualify him from driving for a period of two years."*

4. Notably, although the learned Circuit Court judge concluded "*that no error was made by the District Court judge in imposing a custodial sentence*", he 'softened the blow' somewhat by reducing the term of imprisonment from ten months to six months, suspending the last four months for five years. The reduction so effected appears to have come about in response to the argument of Mr Collins' own counsel on appeal who stated, *inter alia*:

> *"With respect to the submissions before the court my submission would be that he has put his hands up, he has come clean. He is a man whom, I submit, on my reading of the probation report…the probation officer does not see…as someone who is likely to go out and get into trouble again….And I think that should permit the court to take a certain approach with regard to holding him to his word with regard to giving him an opportunity to keep his nose clean.* [This, it appears to the court, is 'code' for a suspension of sentence.] *His record is pretty good….I think he deserves a chance, Judge, to stay out of jail, and to prove to this court that he can keep on the straight and narrow. That is my submission, Judge."*

II

Reliefs Sought

5. Notwithstanding that Hickson J. suspended a portion of Mr Collins' sentence, and that no objection was made by Mr Collins to the period of suspension upon the revision of sentence, Mr Collins now comes to court complaining that the length of the suspension of sentence was *ultra vires* the powers of the learned Circuit Court judge. In consequence, by notice of motion of 14th December, 2016, Mr Collins seeks, *inter alia*, the following reliefs: (1) an order of *certiorari* quashing the sentence imposed by the learned Circuit Court judge; (2) an order of *certiorari* quashing the driving disqualification order; (3) a declaration that it was in excess of jurisdiction to impose a suspended sentence of ten months with the final four months suspended for a period of five years.

III

Two Statutory Provisions

(i) Introduction.

6. Although Mr Collins was convicted under s.17 of the Act of 2001, it is two other statutory provisions, s.27 of the Road Traffic Act 1961 and s.99 of the Criminal Justice Act 2006, that are of particular relevance in the context of the application at hand.

(ii) Section 27 of the Act of 1961.

7. Section 27 of the Act of 1961 provides, *inter alia*, as follows:

> *"(1)(a) Where a person is convicted of an offence under this Act or otherwise in relation to a mechanically propelled vehicle or the driving of any such vehicle…or of a crime or offence in the commission of which a mechanically propelled vehicle was used, the court may, without prejudice to the infliction of any other punishment authorised by law, make an order (in this Act referred to as an ancillary disqualification order) declaring the person convicted to be disqualified for holding a driving licence."*

(iii) Section 99 of the Act of 2006.

8. Section 99 of the Act of 2006 provides, *inter alia*, as follows:

> *"(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."*

IV

Some Case-Law of Relevance

(i) The Section 27 Point.

9. As is clear from the outline of facts given above, Mr Collins' handling offences were detected after a party who had been burgled reported that his valuable stolen tools had been sighted in Mr Collins' van at the market in Enniscorthy (along, it turned out, with a couple of valuable stolen bikes). In imposing the disqualification order, the learned Circuit Court judge expressly cross-referenced the imposition of that disqualification with the fact that Mr Collins had been using his van for handling stolen property. "[B]*ecause*" Hickson J. said, "*he* [Mr Collins] *was using his own van for the purpose of handling stolen property, I am going to disqualify him from driving for a period of two years*."

10. There is really no doubt but that the foregoing involved a proper application of the power available to the learned Circuit Court judge under s.27 of the Act of 1961. This Court has been referred by counsel for Mr Collins to *DPP v. Sweeney* [2014] IECA 5 and *DPP v. Cunningham* [2015] IECCA 2. However, there is no comparison between the facts of those cases and the facts at play in the within application. In *Sweeney*, the accused used a false name when selling a stolen van; in *Cunningham*, Mr Cunningham had not actually employed a vehicle in his crime. In the within matter, by contrast, the use of his van by Mr Collins, a man described by Hickson J. as "*a significant player in the off-loading of stolen property*" was central to what transpired in terms of the placing of the stolen materials in his van and the driving of same to the market in Enniscorthy.

11. Worth recalling in this regard are the following observations of Walsh J. in *Conroy v. Attorney General* [1965] I.R. 411, 442, as cited, at greater length, by Hogan J., in his judgment for the Court of Appeal in *Sweeney*:

> *"It is obvious that the protection of the common good requires that the right to drive a motor car cannot be unrestricted. The right may therefore be lost if a Court, on a consideration of the relevant facts and materials, determines that the person concerned, by reason of his general recklessness or thoughtlessness or of his propensity to drink, or by reason of disease or other* ***disability or his abuse of the right by exercising it in the furtherance of criminal activities,*** *is unfit to exercise the right to drive a motor car. Such disqualification is not a punishment notwithstanding that the consequence of such finding of unfitness might be both socially and economically serious for the person concerned….Undoubtedly disqualification may have a deterrent quality but that does not make it a punishment. It is a regulation of the exercise of a statutory right in the interest of public order and safety."*

[Emphasis added].

12. As Hogan J. observes in *Sweeney*, para.12:

> *"While it is true that Conroy is ultimately a determination of the nature of a disqualification order in the context of the minor/non-minor offence distinction for the purposes of Article 38.2 of the Constitution, the reasoning of Walsh J. must nonetheless inform any wider analysis of the nature of such a disqualification order, whether it is imposed pursuant to either s.26 or s.27 of the 1961 Act."*

13. To borrow from the above-quoted wording of Walsh J., the learned Circuit Court judge in the case at hand in effect determined "*on a consideration of the relevant facts and materials"* that Mr Collins "*by reason of his…abuse of the right* [to drive] *by exercising it in the furtherance of criminal activities, is unfit to exercise the right to drive a motor car"* and thus imposed the disqualification

order that he imposed. The court does not see any legal flaw to present in this regard. It was imposed *intra vires*, and there is no basis for the contention that it ought now to be quashed *ex debito justitiae* (by reason of some obligation of justice).

(ii) The Section 99 Point.

14. Was Hickson J. on appeal, or indeed the District Judge at first instance, restricted as to the length of time for which sentence could be suspended? The power to impose suspended sentences is now regulated entirely by statute, specifically by s.99 of the Act of 2006, as amended. That this is so is clear, *inter alia*, from the judgment in *DPP v. Murray* [2015] IEHC 782 where O'Malley J. states, *inter alia* as follows in respect of s.99, at paras. 99-100:

> *"99*….[I]*t 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 insofar 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. It is also important to note that the section does not in any way interfere with the objectives of the judiciary in relation to suspended sentences….*
>
> *100. In these circumstances there is no scope for a 'parallel jurisdiction' to be operated outside the statute."*

15. O'Malley J.'s determination in this regard is consistent with her judgment in *DPP v. Carter* [2014] IEHC 179, para.39, and her decision in that later case was upheld on appeal by the Supreme Court in *DPP v. Carter; DPP v Kenny* [2015] IESC 20.

16. The foregoing has the result that the pre-eminent case on the point raised in relation to Mr Collins' sentence, i.e. whether there is jurisdiction under s.99 to suspend a sentence for longer than the sentence stated is that of Peart J. in *DPP v. Vajeuskis* [2014] IEHC 265. That was a consultative case stated in which Peart J. concluded that because the Act of 2006 is silent on the point, a District Judge is not restricted by the maximum sentencing jurisdiction in a given case as to the length of time for which he can suspend a sentence. However, the effect of *Vajeuskis* is not to establish an unfettered sentencing power on the part of sentencing judges. As Professor O'Malley observes in his learned text, *Sentencing Law and Practice*, 3rd ed., 658:

> "*Vajeuskis* [is not] *to be interpreted as giving courts an entirely free hand in deciding on the length of an operational period* [*i.e*. the period other than the custodial term]. *That* [operational] *period is, after all, part of the punishment, and all the more so where there are onerous conditions attached*."

17. It follows from this last-quoted observation, which the court respectfully endorses, that it is not the case, as was submitted by counsel for the DPP that, for example, the observations of de Valera J. in *McCarthy v. Brady* [2007] IEHC 261 fall now to be treated as entirely irrelevant on the contended-for basis that *McCarthy* was a case concerned with whether under the *common law* the District Court had the requisite jurisdiction to suspend a sentence for longer than the sentence imposed, whereas this Court is now treating with the position under *statute law*. When it comes to this aspect of matters, it seems to the court that all that O'Malley J. states in *Murray* (as echoed by her in *Carter*) is that (i) there is now a statutory suspended sentence regime and (ii) there is no parallel common law suspended sentence regime. But she is not saying that never and in no instance can a court ever look to case-law which pre-dates the statutory regime. So, for example, although it no longer remains the case that a suspended sentence has to be revoked in its entirety or not at all, it seems to the court that de Valera J., in *McCarthy*, made, as indeed Professor O'Malley observes, again at 658, "*valid observations*", of some continuing relevance, "*about the hardship that the applicant* [in *McCarthy*] *would experience if, say, the suspension were revoked after 35 months* [of a 36-month operational period]". Those are the type of concerns to which an appellate court could legitimately have regard in the context of an appeal on grounds of severity and to which this Court can have regard in the context of a judicial review on the grounds of illegality. The unfortunate difficulty that presents for Mr Collins is that, even having regard to the observations of de Valera J. in *McCarthy*, (i) it is clear from *Vajeuskis* that when it comes to the Act of 2006, the learned Circuit Court judge was not confined to imposing a maximum two-year suspension, (ii) there was no failure on the part of the learned Circuit judge to provide reasons, and (iii) the period of the suspension was not so disproportionate as to render it unfair, void, contrary to law or in excess of jurisdiction.

18. One final point occurs regarding the s.99 dimension of the within application. The court cannot but note that Mr Collins did have a choice at the point in time when Hickson J. gave his judgment, which choice was to enter the bond and thereby bind himself to the peace and to be of good behaviour for a period of five years, or, alternatively, to serve his last four months' imprisonment and be done with matters upon the elapse of that period. Mr Collins freely elected to choose the former option. That is a factor which the court considers it could have appropriately borne in mind had it reached the point where it had to decide whether to exercise its discretion to grant any or all of the reliefs sought by Mr Collins in the within application. However, Mr Collins for the reasons aforesaid has failed to establish any legal frailty or flaw in what Hickson J. did and thus the decision as to whether or not to grant the discretionary reliefs sought, in the face of such frailty or flaw, does not present.

V

Conclusion

19. For the reasons aforesaid, the various reliefs sought by Mr Collins at this time are respectfully refused.