



Association for Criminal Justice Research and Development

ACJRD SUBMISSION
TO
THE LAW REFORM COMMISSION

Suspended Sentences

October 2017

ACJRD seeks to promote reform, development and effective operation of the Criminal Justice System.

Registered Office: The Spade Enterprise Centre, St. Paul's, North King Street, Dublin 7 • Registered Company no. 340129 • Registered Charity no. CHY 15012. Tel: +353 (0)1 6174864 • Fax: +353 (0)1 6174895 • Email: enquiries@acjrd.ie • Web: www.acjrd.ie. Association for Criminal Justice Research & Development is a company limited by guarantee not having a share capital, registered in Dublin, Ireland.

ACJRD SUBMISSION ON SUSPENDED SENTENCES

The ACJRD

[1.1] The Association for Criminal Justice Research and Development (ACJRD) is a non-governmental organisation dedicated to promoting the reform, development and effective operation of the Irish criminal justice system. In particular, the ACJRD encourages innovation in criminal justice and seeks to facilitate interdisciplinary dialogue between agencies and practitioners in the sphere of criminal law.

[1.2] The ACJRD's membership is varied, but is largely comprised of individuals who have experience working within the criminal justice system and who have a strong interest in criminological matters. These include legal practitioners, academics, Criminal Justice Agencies and NGO's.

[1.3] The ACJRD's approach and expertise is therefore informed by the hands-on experience of practitioners and agencies who deal with all aspects of the criminal justice system, enhanced by the contribution of people with diverse experiences, understandings and practices.

[1.4] **The views expressed in this submission are those of ACJRD in its independent capacity and are not those of the ACJRD members' organisations or their employers.**

Introduction

'A Damocles Sword Guaranteed Irish'¹ is how Professor Osborough in the Irish Jurist described the common law on suspended sentencing back in 1982. He found that it evolved within the common law of Ireland, rather than England, with no record of its early use before the twentieth century. With the establishment of the 'Free State' the new District Justices began to impose suspended sentences in the 1920's as opposed to the reluctance on the part of the pre-independence Irish Magistrate who never claimed an inherent jurisdiction to impose a suspended sentence. Twenty four years later after publication of the learned article, 'the Suspended sentence was placed upon a statutory footing in this jurisdiction by s.99 of the Criminal Justice Act 2006.'² In the nine years since commencement on the 2nd of October, 2006³, it has been described in comparison as a worthy criminal litigation 'rival' of the consistently contested drink driving legislation.⁴ However sentencing data compiled by the Law Reform Commission suggests a percentage decrease in the use of suspended sentences and the Commission is unclear as to the precise reasons for this.⁵

Section 99 of the Criminal Justice Act 2006 has also been described as 'a perfectly legitimate and commendable aim'.⁶ This submission shall attempt an analysis of relevant legislation and case law and its development and problems, thereby attempting to determine how an entirely beneficial sentencing option which aimed to keep many offenders out of jail (particularly offenders who do not have a huge criminal history) whilst providing them with a powerful incentive to stay on the straight and narrow was deemed unconstitutional in *Moore*.⁷ Finally, this submission shall make an analysis of the proposed solutions to the problems of the '99 Act'⁸ by the yet to be commenced '2017 Act'.⁹

¹ Osborough. 'A Damocles Sword Guaranteed Irish' (1982) 17 Irish Jurist 221.

² Derek Dunne Judicial Review of Criminal Proceedings page 298.

³ The Criminal Justice Act 2006 (Commencement) Order 2006 (S.I. No. 390 of 2006), art. 4

⁴ James Dwyer B.L. 'Nine issues with Section Ninety-Nine' The Bar Review 2015, 20(5), 105-109

⁵ Law Reform Commission Issues Paper Suspended Sentences LRC IP 12-2017

⁶ O'Malley Sentencing Law and Practice 3rd ed (Round hall 2016) at paragraph 22-01.

⁷ Edward Moore and DPP, Ireland and the Attorney General High Court 2013 No. 54 J.R.

⁸ Section 99 of the Criminal Justice Act, 2006 (as amended).

The Purpose of the Suspended Sentence.

Very rarely is there a cross over between the world of academia and the busy legal practitioner whether they be a Solicitor or Barrister. However, an obviously very busy District Court Judge was able to produce a doctorate thesis on the role of the suspended sentence in Ireland. Judge David Riordan's thesis¹⁰ suggested that the suspended sentence serves one or more of five purposes:-

- a) it is a means of avoiding an immediate custodial sentence;
- b) it serves as a denunciation of the accused's behaviour;
- c) it is controlling and rehabilitative device;
- d) it has a deterrent effect on the individual offender; and
- e) it can serve as part of a crime prevention strategy focused on particular types of crime.

According to the abstract of Judge Riordan's thesis in 2009,¹¹ he stated: *'The suspended sentence continues to be used extensively. It operates partly as a decarcerative penalty but the purpose of deterrence may in practice overtake its theoretical purpose namely the avoidance of custody. Despite ongoing criticism of executive agencies such as the Probation Service and the Prosecution in the supervision of such penalties both sanctions continue to be used. Engagement between the Criminal Justice actors may facilitate better outcomes in the use of either sanction. The purposes for which both sanctions are deployed find their meaning essentially in the practices of the judges themselves as opposed to any statutory or theoretical claims upon their use or purpose.'*

The purpose of the suspended sentence was clearly defined by Judge Riordan, however what was to become unfortunately unclear for practitioners, lay persons and defendants alike was the correct mechanism as how to achieve one or more of those five purposes. Legislative clarification was required immediately after putting suspended sentences on a statutory footing by practitioners as to what was the correct working mechanism between s. 99 (1), soon to be judicially recognised as ['the first court, first offence or the suspending court'] s. 99 (9) ['the second court, second offence or the triggering offence'] and s. 99 (10) [revocation court].

Legislation

Section 99 of the Criminal Justice Act, 2006 originally provided:—

'(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.'

'(9) Where a person to whom an order under subsection (1) applies is, during the period of suspension of the sentence concerned, convicted of an offence, the court before which proceedings for the offence were brought shall, after imposing sentence for that offence, remand that person in custody or bail to the next sitting of the court that made the said order.'

'(10) A court to which a person has been remanded under subsection (9) shall revoke the order under subsection (1) unless it considers that the revocation of that order would be unjust in all the

⁹ Criminal Justice (Suspended Sentences of Imprisonment) Act 2017.

¹⁰ Riordan, D, 2009. The role of the community service order and the suspended sentence in Ireland: A judicial perspective. PHD Thesis UCC. Now Judge of the Circuit Court.

¹¹ Riordan, D, 2009. The role of the community service order and the suspended sentence in Ireland: A judicial perspective. PHD Thesis UCC.

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 during which the person was serving a sentence of imprisonment in respect of an offence referred to in subsection (9) pending the revocation of the said order.'

Initial Positive feedback

In an interesting thesis¹² by Ms. Rebecca Martin, Law Student DCU Ms. Martin observed the following: *'An example of the court's reasoning, subsequent to the 2006 Act, can be seen in DPP v McGinty.¹³ This case concerned an appeal on the grounds that the suspended sentence imposed was too lenient. Here, the respondent had been convicted of possession of drugs for sale or supply. It was noted that such an offence would 'normally warrant a custodial sentence' Murray CJ made particular reference to the fact that the respondent was a recovering drug addict, undergoing rehabilitation. The court sought to strike a balance between the respondent's circumstances and the public interest. The trial judge held that by allowing the respondent to complete his rehabilitation treatment, rather than imposing a prison sentence, he was more likely to become a 'law abiding citizen' in the future. In dismissing the appeal and upholding the five year suspended sentence the court found, 'Where there are special reasons of a substantial nature and wholly exceptional circumstances, it may be that the imposition of a suspended sentence is correct and appropriate in the interest of justice.'*

Some early doubts.

Following commencement back in October, 2006, some questions were being posed by practitioners. What was the position with a person during the period of suspension being convicted of an offence being an offence committed after the order of suspension? Also, what allowance (if any) was to be made as to a period spent in custody as per the 'triggering offence when revocation was being considered? Finally, via what mechanism was the 'revocation court' to remand a person in bail or in custody to the 'triggering offence' court therefore securing the individual's attendance before the 'triggering offence' court and thereby imposing sentence for the offence committed subsequent to the suspended sentence?

Amendments

Within a year of commencement subsections (9) and (10) were amended and a completely new subsection (10A) was inserted.¹⁴ Further amendments were required in 2009 to Section 99 (9).

Section 99 (9)¹⁵ now provided : 'Where a person to whom an order under subsection (1) applies is, during the period of suspension of the sentence concerned, convicted of an offence, **[being an offence committed after the making of the order under subsection (1)]**,¹⁶ the court before which

¹² Rebecca Martin Dissertation LG353 April, 2015: Is the suspended sentence sufficiently valuable to counter its associated problems, ensuring its continued use?

¹³ DPP V Mc Ginty Court of Appeal [2007] 1 IR 633.

¹⁴ Criminal Justice Act 2007 (no.29 of 2007), ss.1 (2) 60 (a) and 60 (b) and Criminal Justice (Miscellaneous Provisions) Act 2009 (No. 28 of 2009), ss. 1(3), 51

¹⁵ Section 99 (9) of the Criminal Justice Act 2006.

¹⁶ Criminal Justice (Miscellaneous Provisions) Act 2009.

proceedings for the offence were brought shall, before imposing sentence for that offence, remand the person in custody or on bail to the 'next sitting' of the court that made the said order.'

Section 99 (10) now provided : 'A court to which a person has been remanded under subsection (9) shall revoke the order under subsection (1) unless it considers that the revocation of that order would be unjust in all the circumstances of the case, and where the court revokes that order, the person shall be required to serve the entire of the sentence of imprisonment originally imposed by the court, or such part of the sentence as the court considers just having regard to all of the circumstances of the case, less any period of that sentence already served in prison and any period spent in custody [**other than a period spent in custody by the person in respect of an offence referred to in subsection (9)**]¹⁷ pending the revocation of the said order.'

Section 99 (10) was amended by insertion of the following subsection (10 A) after subsection (10) as follows: '**[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.]**'¹⁸

According to James Dwyer B.L. the reasons for the amendments were as follows: ¹⁹ *'The Section was amended in 2007 to change the process of revocation. In the section as promulgated, where an accused was convicted and suspended for an offence in breach of a bond, he was then remanded to the court that suspended the sentence for revocation. The 2007 Act reversed this providing that revocation occurs between the conviction and the sentence for the triggering offence so that the sentences are imposed in chronological order. The section was further amended in 2009 to provide that only an offence committed within the currency of the bond would trigger a revocation. Previously there was an anomalous situation where the section required a revocation hearing where an accused was convicted of an offence during the currency of a bond even if the offence committed pre-dated the bond.'*

Notwithstanding the immediate reaction of the Oireachtas to some early difficulties, further problems were encountered and Judicial Reviews were activated by a number of applicants. Leave was granted in turn to the following applicants: *Colin Harvey*²⁰ on the 26th of November, 2007; *Maria Muntean*²¹ on the 15th of June 2009; and again on the 19th of October, 2009 to *Anthony Sharlott*.²²

James Dwyer B.L. had commented in the Bar Review back in 2007 about this area and by 2015 the same practitioner went so far as to describe the difficulties as 'ninefold' in 2015 and listed them in script fashion accordingly;²³

- (a) Section 99 and remanding to the next sitting for revocation;
- (b) Section 99 and remanding to the next sitting for sentence;

¹⁷ Criminal Justice Act 2007 s. (1) (2) 60 (b).

¹⁸ Criminal Justice Act 2007 (no.29 of 2007), s.1 (2) 60 (c)

¹⁹ James Dwyer B.L. 'Nine issues with Section Ninety-Nine' The Bar Review 2015, 20(5), 105-109

²⁰ Colin Harvey and District Judge Claire Leonard and the DPP High Court [2007 No. 1565].

²¹ Maria Muntean v Hamill and the Director of Public Prosecutions High Court [2009 No. 610 J.R.]

²² Anthony Sharlott and Judge Collins et al and the DPP High Court [2010] IEHC 482

²³ James Dwyer B.L. 'Nine issues with Section Ninety-Nine' The Bar Review 2015, 20(5), 105-109

- (c) Section 99 and revisiting the original sentence on a revocation hearing;
- (d) Section 99 and suspension for a period longer than the sentence imposed;
- (e) Section 99 and appealing against the triggering conviction;
- (f) Section 99 and suspended sentences imposed by the Circuit Court on appeal;
- (g) Section 99 and multiple revocations;
- (h) Section 99 and the Court of Criminal Appeal;
- (i) Section 99 and the non-severability of conviction and sentence.

The problems associated with s.99 are condensed for the purposes of this submission as 'generic' within the problems associated with 'remands' 'appeals', 'the act' and the position of the 'common law' on suspended sentences in relation to s.99 of the 2006 Act. Finally, an analysis is made of the recent developments within Habeas Corpus that followed when s.99 of the 2006 Act was deemed so problematic it was determined by the High Court in *Moore* to be unconstitutional in parts.

The problem with remands.

It was submitted by the applicant in *Harvey* that a District Court exercising summary jurisdiction has no jurisdiction under s.99(9) as (amended) to remand an accused for consideration of a suspended sentence. According to the applicant in summary procedure it is alleged, a conviction does not have a free standing efficacy divorced from penalty.

Judge Hedigan held, *'The challenge is based on what I consider the mistaken view that conviction and sentence are so inextricably linked that nothing of substance can occur between them, That proposition cannot be correct. Experience over many years shows practitioners that District Judges regularly convict and put back for sentence. There may be sought probation or other reports or all manner of further evidence before sentence is imposed. The procedure contemplated s.99 is obviously different but nonetheless clearly occurring within the same hiatus between conviction and sentence. The reality in all such cases is that the accused has been convicted and awaits sentence. The wording of the Act could not be clearer and its meaning is also clear. The requirement on the District Judge is mandatory and the District Judge's actions were exactly in accordance therewith.'*

As mentioned in the case of *Carter*²⁴, as per Judge O'Donnell, *'However, and as illustrated by the present cases, the reactivation of a suspended sentence can, and most often will, involve two courts: the first court, which imposed the suspended sentence, and the second court which convicts the person of an offence during the period of good behaviour, thus triggering the possibility of revocation of the suspension.'*²⁵

Judge O'Donnell also commented in *Carter*, *'I am not convinced that the sequence the act adopts of making the sentencing court halt its sentence process and remit the matter to the suspended court is the wisest or most logical course. The sentencing for the current offence should arguably be concluded before the business of remittal and reactivation is addressed.'*

Judge O'Donnell observed few difficulties with the convicting court adjourning matters and the suspending court dealing with the matter within a time scale, however he remarked, *'it is only when the suspending court had dealt with the question of reactivating the suspended portion of the sentence that the section comes into play again and prescribes that the person then be remanded to the next sitting of the convicting court.'*

²⁴ DPP V Carter Supreme Court Appeal No. 203/2014

²⁵ DPP V Carter Supreme Court Appeal No. 203/2014

The Supreme Court finally held in *Carter* that the District Court had no jurisdiction to deal with the revocation of the suspended sentence as the order made by the court under s.99(9) was not valid on the basis the defendant has not been remanded to the 'next sitting' of the District Court which had imposed the suspended sentence.

The problem with Appeals

In *Muntean* Mr. Justice McCarthy held: *'the learned District Court Judge has jurisdiction to remand the applicant pursuant to s.99 of the 2006 Act and indeed, a duty to do so'*.

In *Sharlott* the applicant raised two issues namely the jurisdiction to remand the matter back to the Circuit Court under s.99(9) from the District Court and alternatively if the remand order was to be correct it would have been made subject to a stay pending the outcome of the Circuit appeal. Finally whether the right to fair procedures mandated the High Court to stay the procedure in the Circuit Court under s. 99(9) until after the District Court Appeal has been finalised.

The decision in *Sharlott* as per Justice Hanna acknowledged the '**mandatory**' nature of s.99(9). Justice Hanna Held: *'The terms of s.99(9) of the Act of 2006 in my view, are mandatory on the learned District Judge. With or without any application, she was bound to remand the applicant to the next sitting of Dublin Circuit Criminal Court the Learned District Judge has convicted but not yet sentenced the applicant. The question of her being functio officio, in the circumstances, does not arise.'* Judge Hanna added: *'It is eminently within the discretion of the Circuit Court to enable the applicant to pursue his appeal from the District Court.'*

In *Phyllis O'Callaghan*²⁶ Ms. Justice Faherty held: *'The issue for this court was ultimately one of statutory interpretation. The mandatory nature of the process ordained pursuant to s.99(9) – s. 99(10A) require the suspending court, once a person has been remanded to it from the convicting court, to deal with the issue of revocation as it sees fit, having regard to the justice of the case, and then remand the mater back to the convicting court. When a defendant had been remanded to it under s.99(9), the District Court can make:*

- (a) An order revoking the suspended sentence in full then remanding the defendant back (under s.99(10A)) for sentence to the court where the conviction for the triggering offence occurred;*
- (b) An order revoking the suspended sentence in part then remanding the defendant back (under s.99(10A)) for sentence to the court where the conviction for the triggering offence occurred;*
- (c) An order remanding the defendant back (under s.99(10 A)) for sentence to the court where the conviction for the triggering offence occurred, having declined to order the revocation of any of the suspended sentence'*

The Common Law and Section 99.

It became clear by 2015 and nearly a decade after the introduction of the 2006 Act, that when it came to suspended sentences the common law's days were gone and in its place was the Section 99 statutory scheme alone.

*John Murray*²⁷ was a consultative case stated by District Judge Constantine O'Leary sought the opinion of the High Court on the following question:

²⁶ DPP V Phyllis O'Callaghan 2015 IEHC 165; unreported High Court, Faherty J., March 20, 2015

²⁷ The Director of Public Prosecutions and John Murray High Court [2015 No. 312 SS]

“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?”

Judge O’Malley concluded: *‘Even after significant amendment s.99 of the Act causes serious difficulties for the courts attempting to implement it-see“Nine issues with Section Ninety-nine” (Dwyer, the Bar Review, Nov, 2015). Many of the problems arise from the perhaps overly prescriptive approach to the procedures for revocation of suspension, but there may well be also as yet- unidentified lacunae. However, 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. 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-the five purposes identified by Judge Riordan (described above) are as easily accommodated in the statutory scheme as they were under the previous regime. 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.’*

However, there has been no explicit statutory removal of the common law as to suspended sentences since the decision of *Murray*.

The problem with the Act.

On the 19th of April, 2016, Judge Moriarty delivered judgment in the case of *Moore*.²⁸

There were five further Plaintiffs in *Moore* Mr. Justice Moriarty summarised the point being made by the Plaintiffs: *‘In what was to become a constant argument in similar cases, it was submitted on behalf of Mr. Moore that he wished to appeal the conviction in the District Court and have an outcome pronounced prior to any hearing in the Dublin Circuit Criminal Court.’*

Mr. Justice Moriarty held: *‘The Constitution cannot be pronounced upon for reasons of expedience or popularity, but it is not a factor of utter irrelevance that judges from all jurisdictions have expressed at best pronounced wariness towards the provisions of s. 99, especially subs. 9 and 10, that a weekly and apparently increasing incidence of Judicial Review and Article 40 applications relevant to the section is apparent, and that protagonists, lay and professional, in the arena of criminal law simply do not know at present where they stand.’*

‘In all the circumstances of the case, and having given the matter much careful consideration as I can, I am persuaded that notwithstanding the presumption of constitutionality that exists in relation to enactments, and the regard and respect that Courts must show to enactments of the Oireachtas, the subsections under review of s.99 fall to be viewed as unconstitutional in the context of the facts reviewed and the arguments made.’

The Law Reform Commission issues paper on suspended sentences provides useful commentary on *Moore*, part 8.2 is entitled *‘activation and right to appeal’* Part 8.2.1 of the same paper is entitled, *‘Constitution requires that activation process must await completion of subsequent criminal charge, including appeal.’* Paragraph 8.04 of the Law Reform Commission²⁹ issues paper on suspended sentences also provides a very succinct analysis of *Moore*:

²⁸ *Moore and Others v DPP, Ireland and the Attorney General* High Court [2016] IEHC 244

²⁹ Law Reform Commission LRC IP 12-2017 Issues Paper Suspended Sentences paragraph 8.04

'Prior to the decision in Moore, Section 99(9) and (10) provided that where an individual was convicted of a subsequent offence, he or she was to be remanded to the original court to have the suspended sentence for the original offence activated before he or she would be sentenced for the subsequent or triggering offence. The High Court held that this activation procedure breached the convicted person's right to appeal the subsequent conviction. The result was the individual's original suspended sentence could be converted into a sentence of immediate imprisonment before he or she had an opportunity to challenge on appeal, the conviction for the subsequent offence. If an individual successfully challenged the subsequent conviction, then the activation process for the original suspended sentence should not have occurred as no subsequent or triggering offence was committed.'

Habeas Corpus.

However, a later part of the '99 Act' which had so far been under little if any scrutiny was brought to the attention of the Court of Appeal by the Respondent's legal team in a case called *Clarke*³⁰. By way of reminder, Section 99(17)³¹ provides as follows:

'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.'

Soon after parts 99 (9) and (10) of the 2006 act were determined to be unconstitutional, Article 40 applications were made by a number of applicants including *Paul Clarke*³² and *Anthony Foley*.³³ In *Clarke* Judge Birmingham delivered Judgment in the Court of Appeal on the 28th of July, 2016 with Judge Edwards and Sheehan both in agreement.

The application in *Clarke* was an appeal from a decision of the High Court (Mc Dermott J.) of the 27th of May, 2016³⁴, refusing the applicant an order directing his release pursuant to Article 40 of the Constitution. The following paragraphs were of significance in the Court of Appeal.

Paragraph 4: *'What is of significance in the context of the present proceedings is that arising from the sentence hearing on the 7th of July, 2010, the applicant/appellant was subject to a suspended sentence of seven years imprisonment which was operative once the custodial element of the sentences was served.'* The conditions were outlined in the Judgment.

Paragraph 6: *'The Activation of the suspended sentences is central to the present appeal.'*

Paragraph 12: *'At this stage I would draw attention in particular to subs. (9) and (10) being the subsections in issue in the Moore case and also I would draw attention to the provisions of subs (17).'*

Paragraph 18: *'The starting point for consideration of this issue has to be that the applicant/appellant is a convicted person who pleaded guilty to offences of the utmost gravity, was*

³⁰ Paul Clarke and the Governor of Mountjoy Prison Court of Appeal 2016/270

³¹ Section 99(17) of the Criminal Justice Act 2006.

³² Paul Clarke and the Governor of Mountjoy Prison Court of Appeal 2016/270.

³³ Anthony Foley and the Governor of Portlaoise Prison Court of Appeal 2016/349.

³⁴ Paul Clarke and the Governor of Mountjoy Prison High Court [2016 No. 459 SS].

treated with considerable leniency, and failed to abide by conditions which were imposed when large elements of his sentences were suspended. The Principles set out in the well-known case of State (Mc Donagh V Frawley [1978] I.R. 131 are therefore very much on point.'

Paragraph 19: *'Similar language is to be found in the judgment of Henchy J in State (Aherne) v Cotter [1982] I.R. 188, at p.203.'*

Paragraph 21: *'The behaviour of the applicant and the other circumstances of the case also had to be considered.'*

Paragraph 30: *'I acknowledge that the Court did not indicate whether in doing so it was exercising its wider function under subs (17) but it seems to me that the reading of the two transcripts would suggest that is what was happening. In forming that view I do not lose sight of the fact that the reference in subs. (10) to "unjust in all the circumstances of the case" and makes clear that the Court when dealing with a matter under subs (10) is not confined to a consideration of the facts of the triggering offence.'*

Paragraph 31: *'However, that notwithstanding, it seems to me that what happened here was that the Court decided to take a broader view as it was entitled to do under subs. (17). The relevance of this of course, is that it is not a precondition to the exercise of a subs. (17) jurisdiction that the person be brought before the court pursuant to subs. (9). In so far as subs (17) is a broad and general jurisdiction it seems to me that the route by which the appellant was brought before the Circuit Court is not material and that accordingly the State (Attorney General) V Fawcitt and DPP (Ivers) v Murphy line of authority is applicable. In these circumstances I would take the view that the appellant is not in unlawful custody and so would dismiss the appeal.'*

Paragraph 32: *'If I am wrong about that I would in any event follow the reasoning of Mc Dermott J. in the High Court. I accept, as he did, that a notice of appeal was lodged, which means that Mr. Clarke's position is to be distinguished from that of A v Governor of Arbour Hill Prison. However, Like Mc Dermott J., I do not believe that the fact that because an appeal was lodged and accordingly that matters had not been finalised before Judgment in Moore that it follows that Mr. Clarke is entitled to be released. The position is that Mr. Clarke committed offences of the utmost gravity. He persuaded the Circuit Court to deal with him in a very lenient fashion indeed and then very shortly after his release, having served the custodial element of his sentence, he breached the conditions of his suspended sentences in a number of respects. There was a full and fair hearing in the Circuit Court over two days which addressed the issue of whether the sentence could be activated. The Judge in the Circuit Court decided to activate the sentence. Mr. Clarke has a right of appeal from that decision and has invoked that right by lodging notice of appeal. On hearing of that appeal Mr. Clarke can argue that the activation of the sentences in full was an excessive and disproportionate response.'*

Paragraph 33: *'In those circumstances I cannot see how it can be said that there was a default of fundamental requirements such that the detention could be said to be wanting in due process of law or that his detention arises from a departure of fundamental rules of natural justice to use the language of State (Mc Donagh) v Frawley and State (Aherne) V Cotter.'*

Paragraph 34: *'Rehabilitation is an important aspect of penal policy. The possibility of a suspended sentence is a vital tool in promoting the objective of rehabilitation. The objective of rehabilitation will be frustrated if not indeed set at nought if those who chose to breach conditions attached to suspended sentences do not suffer the consequences. I find the reasoning of the High Court compelling and I would dismiss the appeal.'*

Further attempts were made to litigate upon *Clarke*.³⁵ Four other attempts at release following *Moore* are mentioned in the Judgment of *Heaphy* including, *Gheorge Pasare*,³⁶ *Edward O'Sullivan*,³⁷ *Foley*,³⁸ *Ryan*³⁹ and *Larkin*.⁴⁰

A question has been duly posed by the Law Commission in its issues papers on Suspended Sentences.⁴¹ Do you think *section 99(17) of the Criminal Justice Act 2006, which provides for the activation of a suspended sentence in whole or in part-where the individual that is subject to the suspended sentence breaches a condition of suspension during the operational period, represents a more general power to activate a suspended sentence, in that the commission of a subsequent offence could also be activated under section 99(17)?*

Recent developments.

The applicant *Jason Heaphy*⁴² challenged the lawfulness of an order of the Circuit Court made on the 24th of November, 2015 whereby a three year suspended part of a ten year sentence imposed on 25th February, 2008, was re-activated, pursuant to the provision of s. 99 of the Criminal Justice Act, 2006 ("the 2006 Act") upon the conviction of the applicant for offences committed in May, 2015. This application was unusual as it combined an article 40.4.2 inquiry with a Judicial Review.

It was held by Ms. Justice Faherty on the 31st of July, 2017 that the High Court was satisfied that Judge Riordan in the Circuit Court was vested with jurisdiction to make the order he made on the 24th of November, 2015, and it followed the Applicant was not in unlawful detention and accordingly, the relief sought pursuant to Art. 40.4.2 of the Constitution was refused.

Judge Faherty held: '*Accordingly, in the circumstances of this case I do not find that the failure of Judge Moran to impose condition on the applicant that he keep the peace and be of good behaviour during the period of his incarceration to be such as to amount to a deficit of the fundamental requirements of justice that the applicant's detention on foot of the Order made by Judge Riordan on 25th November, 2015 may be said to be wanting in due process of law.*'

It follows that the relief sought by the applicant under the judicial review proceedings was also denied. It is understood an appeal has been lodged with the Court of appeal by the Applicant's legal team in *Heaphy*. A question has also been duly posed by the Law Commission in its issues papers on Suspended Sentences⁴³ on the following basis, '*Do you think there should be a list of conditions of suspension set out in legislation?*

Criminal Justice (Suspended Sentences of Imprisonment) Act 2017

Enacted in response to the *Moore* cases. The new act is defined as 'An Act to amend section 99 of the Criminal Justice Act 2006 in certain respects; and to provide for related matters.'⁴⁴ The '2017 Act' has not commenced as per October, 2017. S.99 of the Criminal Justice Act 2006 (as amended) remains in force.⁴⁵

³⁵ Anthony Foley and the Governor of Portlaoise Prison Court of Appeal 2016/349 Judgment 21st of December, 2016.

³⁶ *Gheorge Pasare* (application for Habeas Corpus)[2016] IEHC 312

³⁷ *Edward O'Sullivan* (application for Habeas Corpus)[2016] IEHC 311

³⁸ *Foley v the Governor of Portlaoise Prison* [2016] IECA 411

³⁹ *Ryan v DPP* (application for Habeas Corpus)[2016] IEHC 380

⁴⁰ *Larkin V the Governor of Mountjoy Prison* [2016] IEHC 680

⁴¹ Law Reform Commission LRC IP 12-2017 Issues Paper Suspended Sentences page 126

⁴² *Jason Heaphy and the Director of Public Prosecutions* High Court [2016 464 J.R.]

⁴³ Law Reform Commission LRC IP 12-2017 Issues Paper Suspended Sentences page 126

⁴⁴ Preamble - Criminal Justice (Suspended Sentences of Imprisonment) Act 2017.

⁴⁵ October, 2017.

Section 2 of the '2017 Act'⁴⁶ amends 'by the insertion of' s.99(7), (8), (13), (18) and(19). Section 2 of the '2017 Act' deletes 'by the deletion of' s. 99(10A) and Section 2 of the '2017 Act' also adds 'by the addition of' s. 99 (21), (22) and (23).

The amendments by inserting sections (8A) to (8 H) attempt to resolve the problems post *Moore* associated with the activation procedures for suspended sentences. According to paragraph 8.04 of the Law Reform Commission on suspended sentences, '*Where a person subject to a suspended sentence has committed a subsequent offence. The activation process for the original offence will not occur until after the individual has been sentenced for the subsequent offence and, should he or she wish to appeal, after the appeals process for the subsequent offence has been fully exhausted*'.

Post Moore and construction of references-Sections 99(9) to (8A) (8B) and 99(10) to (99) (8C).

S.3 of the '2017 Act'⁴⁷ states 'A reference in any enactment, within the meaning of the Interpretation Act 2005, to- (a) subsection (9) of section 99 of the Act of 2006 shall be construed as a reference to subsections (8A) and (8B) (inserted by section 2 (c) of the said section 99, and (b) subsection (10) of section 99 of the Act of 2006 shall be construed as a reference to subsections (8C) (inserted by section 2 (c) of the said section 99. It appears sections 99(9) and (10) are provided for and not repealed in the 2017 act notwithstanding the difficulties in the very recent past.

Conclusion

The Law Reform Commission in their issues paper on suspended sentences comment that there has been a decrease in the use of the suspended sentence. This is hardly surprising with the multitude of Judicial Reviews, Habeas Corpus and constitutional challenges surrounding s.99. The Criminal Justice (Suspended Sentences of Imprisonment) Act 2017 has not commenced as of October, 2017. Notably, Sections 99(9) and 99 (10) of the 2006 Act as amended are not repealed by Criminal Justice (Suspended Sentences of Imprisonment) Act 2017.

Lawyers never hesitate to criticise the drafters of legislation. The drafting of the '2017 Act' and the circumstances surrounding meant the legislation was drafted with great urgency. One could argue a completely new 'stand-alone' piece of legislation for suspension of sentences would have been appropriate as opposed to the somewhat piecemeal approach of amending by inserting, deleting and constructing of references. However, this criticism could be levelled at most areas of criminal law and in particular and in parallel the Road Traffic Acts where codification has unfortunately never occurred and the legislation is frequently contested in the District Courts and the Superior Courts, sometimes by case stated/consultative case stated, Judicial Review or plenary summons.

Notwithstanding the 2017 Act, The Law Reform Commission⁴⁸ cites further problems, with persons committed to prison following the activation of a suspended sentence in the Circuit Court having no right to bail pending the determination of the Court of Appeal. The suspended sentence will usually be served by the time the appeal is heard. The Law Reform Commission also notes there is a limit on the period of suspension in England and Wales, Northern Ireland and Australia which are all common law jurisdictions. Furthermore the operational period of the suspended sentence remains without limit as per *Vajeukis*.⁴⁹

⁴⁶ s. 2 Criminal Justice (Suspended Sentences of Imprisonment) Act 2017.

⁴⁷ Construction of references, s. 3 Criminal Justice (Suspended Sentences of Imprisonment) Act 2017.

⁴⁸ Law Reform Commission Issues Paper Suspended Sentences LRC IP 12-2017

⁴⁹ DPP v Vajeukis [2014] IEHC 265

If activation problems are to continue with the eventual commencement of the '2017' act then the percentage drop in the use of the suspended sentence shall possibly gather pace by a reluctant judiciary hesitant to implement suspended sentencing if they are subject to Judicial Review and challenge. The obvious fear and ultimate sanction for the Judiciary is a person or persons facing a significant serious sentence being released on Habeas Corpus due to frailties within the amended Act when commenced.

However positives still remain: *'Despite being placed on a statutory footing by the Criminal Justice Act 2006 the sentence is still governed, to a large extent, by judicial discretion.'*⁵⁰

Furthermore, according to Rebecca Martin's dissertation on this topic⁵¹ *'Although the Act fails to specify when the imposition of a particular condition is appropriate, the procedures concerning the reactivation of the sentence are set out in the Act.'*

As mentioned in *Carter*, *'...the reactivation of a suspended sentence can, and most often will, involve two courts.'* The two courts whether they be District, Circuit, Central, Court of Appeal, or Special Criminal Court obviously remain involved in the reactivation of a suspended sentence within the '2017 Act.'

For practitioners, Judiciary and court administrators alike the difficulty in the implementation of suspended sentences is bringing the relevant Court(s), Judge(s), Prosecutor(s), and Defendant(s) together at the appropriate time, sitting and place and maintaining jurisdiction for the purposes of proper finalisation of the Defendant's criminal litigation. This shall remain a continuing challenge for the various administrators of justice notwithstanding the best endeavours of the '2017 Act'.

ACJRD.

⁵⁰ Rebecca Martin Law Student DCU Dissertation LG353 April, 2015: Is the suspended sentence sufficiently valuable to counter its associated problems, ensuring its continued use?

⁵¹ Rebecca Martin Law Student DCU Dissertation LG353 April, 2015: Is the suspended sentence sufficiently valuable to counter its associated problems, ensuring its continued use?

LRC Issues Paper – Section 8 Questions

ACJRD views on the following questions:

8 (a) Do you think that the common law power to suspend a sentence of imprisonment should be expressly repealed?

8 (b) Do you think there should be a limit on the length of the custodial sentence that may be suspended?

8 (c) Do you think the operational period of a suspended sentence should be limited in length to, for example, 5 years?

8 (d) Do you think that the operational period of a suspended sentence should not exceed the length of the actual sentence of imprisonment?

8 (e) Do you think there should be a list of conditions of suspension set out in legislation?

8 (f) Do you think that the subsequent or triggering offence should continue to be an offence or should it, at the very least, be an offence that is punishable with imprisonment?

8 (g) Do you think that section 99(17) of the Criminal Justice Act 2006, which provides for the activation of a suspended sentence in whole or in part-where the individual that is subject to the suspended sentence breaches a condition of suspension during the operational period, represents a more general power to activate a suspended sentence, in that the commission of a subsequent offence could also be activated under section 99(17)?

COMMENTS:

The ACJRD Council have reviewed the above questions and feel that the following comments best represent the ACJRD views on suspended sentences:

- 1) The ACJRD would welcome deeper research on the impacts of suspended sentences in Ireland on matters to include the following:
 - a. sentences imposed
 - b. sentences that are partly suspended and partly supervised by The Probation Service
 - c. impact on offending behaviour i.e. is recidivism minimised?
 - d. effects on the resources and outputs of The Probation Service and The Courts Service and other agencies.
- 2) As a starting point it is recommended that the technical problems with the existing legislation be addressed to ensure that the practice and procedures for imposing suspended sentences are efficient and effective, before the expansion of suspended sentences is considered.
- 3) New legislation should be based on evidence of current Irish practice and procedure and specifically researched empirical analysis and it should be commensurate with the overall aims of sentencing, including proportionality principles.
- 4) Judicial discretion should not be fettered by the introduction of prescriptive time limits regarding the length of the suspended sentence and or the manner of that suspension, as each case should be distinguished on its facts, as is the current norm.
- 5) Judicial discretion is supported but should be consistent and with sentences that are universally regarded as proportionate.

- 6) The operational period of a suspended sentence should be purposeful and proportionate i.e. available empirical evidence implies that longevity does not imply greater effectiveness in achieving desistance.
- 7) A suspended sentence should not be activated by an offence which is not punishable with imprisonment in itself and/or is less serious than the 'suspended offence'.
- 8) The types of conditions which may be imposed in circumstances where a sentence is suspended is already dealt with in the legislation s99 (3) of the Criminal Justice Act 2006
- 9) Useful parallels from a legislative drafting perspective could be drawn from
 - (a) International research on the impact of supervision, looking at length, conditions, etc.
 - (b) COUNCIL FRAMEWORK DECISION 2008/947/JHA on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions. Article 4 , Types of probation measures and alternative sanctions.
<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32008F0947>
 - (c) COE European Probation Rules 2010. Rules 5, 61, 85, 86 and 87 specifically.
<http://www.cep-probation.org/wp-content/uploads/2015/03/CMRec20101E.pdf>

Acknowledgements

ACJRD was assisted in this submission by:

Tom Conlon, Office of the DPP, in a personal capacity as a supporter of ACJRD. The submission does not reflect the views of the DPP.

And by:

The Final Year Dissertation of Rebecca Martin, DCU

And by:

ACJRD members