THE HIGH COURT

2022 No. 1030 JR

[2024] IEHC 458

BETWEEN

SIMON McCORMACK

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Ms. Justice Mary Rose Gearty delivered on the 24th day of July, 2024

1. Introduction

1.1 This case involves consideration of the word "consecutive" in the context of a sentencing provision. The Applicant was convicted of two offences and, in both cases, wholly suspended sentences were imposed. A third offence was committed the following year. This third offence is the triggering offence, to use the words of Section 99 of the Criminal Justice Act, 2006, as amended ("s.99"). That provision requires that the sentence for the third offence be imposed first and then, it triggers a potential reactivation of both previous sentences, whereby the original judge (or judges) considers reactivation of the suspended sentences imposed. The statute requires that the earlier sentences, if reactivated, shall run consecutive to the triggering offence.

1.2 Here, one sentence was made consecutive to the offence that was first in time. This is contrary to the express provision. The word "consecutive" has a precise meaning: a consecutive sentence begins the day after the previous sentence ends. The word does not mean "after". According to the Cambridge Dictionary: "*Consecutive events, numbers, etc. follow one after another without an interruption*", as sports fans know from references to consecutive cup wins or defeats.

2. Procedural History: Three Offences

2.1 The Applicant was convicted at the District Court on 14th October 2021 of an offence contrary to s.6 of the Criminal Justice (Public Order) Act, 1994, namely, breach of the peace, as set out in Charge Sheet 22017171. He was sentenced to one month in prison, which sentence was suspended for 2 years, pursuant to s.99(1) of the Criminal Justice Act 2006.

2.2 On 7th December 2021 the Applicant was convicted before the same District Judge of theft, contrary to s.4 of the Criminal Justice (Theft and Fraud Offences) Act, 2001, as set out in Charge Sheet 21403223. While this sentence was imposed after the sentence in respect of the breach of the peace offence, the theft offence itself was committed before October and the conviction and sentence for theft, therefore, did not trigger any provisions under s.99 in respect of the October suspended sentence. The Applicant was sentenced to 6 months for theft and, again, the sentence was suspended in full, for a period of 2 years.

2.3 The Applicant was then convicted before another District Judge on 21st September 2022 for a failure to appear in court, contrary to s.13 of the Criminal Justice Act, 1984. The relevant Charge Sheet number was 23907218. The offence was committed on 8th September 2022 and thus, the offence post-dated both suspended sentences, and s.99 required an order imposing a sentence and then

remanding the accused to the original judge in respect of each of those suspended sentences to consider reactivating the sentences. This third offence is the triggering offence, to use the words of the statute, and it triggers the reactivation provisions of s.99. In accordance with that section, the District Judge dealing with the failure to appear imposed a sentence in that regard first, and the Applicant received a six-month sentence. The Applicant was then remanded to the original sentencing Judge, pursuant to s.99, for consideration and potential reactivation of the earlier suspended sentences.

2.4 On 26th September 2022, the District Judge revoked the suspension in respect of the first offence, charge sheet 22017171, a breach of the peace. The Judge reactivated the sentence of one month and ordered that it be served in full, consecutive to the sentence of six months, imposed in respect of the triggering offence, charge sheet 2390218, failure to appear.

2.5 On the same date, the same District Judge reactivated the suspended sentence under charge sheet 21403223, in respect of the offence of theft. Rather than impose the sentence in full, he considered that a three-month sentence should be imposed. The Judge directed that this 3-month sentence should commence on the expiration of the sentence of 1 month imposed in respect of Charge Sheet 22017171 (failure to appear), which he had just reactivated. In other words, despite the wording of the section, the reactivated sentence in the third case was not made consecutive to the triggering offence, but consecutive to another, earlier, suspended sentence being reactivated that day.

3. **<u>Sentence Sequencing Provisions in Section 99</u>**

3.1 Section 99 governs the imposition of suspended sentences, the revocation of orders of suspension and related matters. Several subsections of s.99 provide

for the sequencing of reactivated sentences, including subsections 1, 8, 11 and 19. The most relevant portions of those provisions read as follows:

"s.99 (1) Where a person is sentenced to a term of imprisonment (other than a mandatory term of imprisonment) by a court in respect of an offence, that court may make an order suspending the execution of the sentence in whole or in part, subject to the person entering into a recognisance to comply with the conditions of, or imposed in relation to, the order.

(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…*

(8C) … 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.

S.99 (11) (a) Where an order under subsection (1) applying to a person is revoked under subsection (8C), any period of imprisonment required to be served by the person as a result of that revocation <u>shall be consecutive on any sentence of imprisonment</u> (other

than a sentence consisting of imprisonment for life) *imposed on the person in respect of the triggering offence…*

(19A) If, in relation to a person, the application of subsection (11) conflicts with any of the other consecutive sentencing provisions with regard to the sequence in which the following shall be served by the person, namely—

(a) a sentence of a term of imprisonment imposed … for the triggering offence,

(b) the period of imprisonment required to be served … under subsection (8C), and

(c) a sentence of a term of imprisonment imposed … for another offence…,

the court referred to in subsection (8C) or any other court concerned may determine that sequence in such manner as it considers just, provided that the sentences of imprisonment referred to in paragraphs (a) and (c) and the period of imprisonment referred to in paragraph (b) shall be consecutive on each other.

(19B) [the sentence for the triggering offence and any sentence which must be imposed consecutive to that sentence as a result of this section] shall not exceed 2 years."

4. Interpretation of Penal Statutes

4.1 In *Heather Hill Management Co. CLG v. An Bord Pleanála* [2022] IESC 43 the Supreme Court considered the task of statutory interpretation in depth. In his judgment, Murray J. warned against applying an overly literal interpretation. In particular, he referred to the risk of pushing an analysis of the context of a provision too far from the language of the section. Murray J. noted that this "*debate reveals an obvious danger in broadening the approach to the interpretation of legislation in the way suggested by the more recent cases — that the line between the permissible admission of 'context' and identification of 'purpose', and the impermissible imposition on legislation of an outcome that appears reasonable or sensible to an*

individual judge or which aligns with his or her instinct as to what the legislators would have said had they considered the problem at hand, becomes blurred." (Paragraph 112)

4.2 Murray J. suggested the following propositions of statutory interpretation, in paragraphs 113 to 116 of the judgment:

i. Legislative intent is a misnomer. A court cannot see into the minds of parliamentarians as they enact legislation.
ii. A court is concerned to ascertain the legal effect attributed to the legislation by a set of rules and presumptions developed through the common law.
iii. The text of legislation is the only source of information a court can be confident all members of parliament have access to and have in their minds when statute is passed. The words of a statute are given primacy. Therefore when deciding the legal effect that should be given to those words their plain meaning is a good point of departure.
iv. The statute must be read as a whole. The Oireachtas does not enact a collection of disassociated provisions, it enacts one entire statute with a pre-existing context and for a purpose. Sometimes, in order to understand the statute, one must look at reliable and identifiable background information. Where used to displace the apparently clear language of a provision the context and purpose must be clear and specific and decisively probative of an alternative construction.

4.3 In considering criminal statutes, there are several further principles arising from the caselaw: criminal law provisions should be clear and must be interpreted strictly. If extending criminal liability, this must be done by using unambiguous terms, to paraphrase Henchy J. in *DPP v. Flanagan* [1979] IR 265. A full exploration of the interpretation of criminal provisions is set out in the decision of *The People (DPP) v McAreavey* [2024] IESC 23.

4.4 The provision under consideration here enables the reactivation of suspended sentences and is a penal section in almost every respect. The relevant subsection, which dictates the sequence of sentencing events, is one that must be interpreted strictly and, if possible, in accordance with the precise wording of the legislation in question.

4.5 The argument made in this case was that s.99(11), in dictating the sequence of sentences imposed for the triggering offence and then for any reactivated sentence, meant no more than that the second sentence be imposed after the first. This cannot be correct. Noting the warning of Murray J. in *Heather Hill* and looking only at the language and plain meaning of the section, the reactivated sentence must be one which is consecutive on the sentence imposed for the triggering offence and the word "*consecutive*" has a precise meaning.

4.6 Had the Oireachtas intended to provide only that the reactivated sentence be served at some point after the sentence imposed for the triggering offence, it would have provided for this in express terms by using phrases such as "*at any time after*" or even simply "*subsequent to*". The word "*consecutive*" has a more specific meaning; a consecutive event follows immediately on conclusion of the prior event, without a break. As noted in the introduction, most sports fans are familiar with this term from sporting references to consecutive wins or defeats. Legal language is, or should be, even more exacting than sporting references; we rely on clarity of expression in legislation to regulate our lives, to impose sanctions fairly, and to provide notice as to how sanctions will be imposed.

4.7 As already noted, the Cambridge Dictionary provides a definition which describes consecutive events as occurring without interruption. One may not often consider the precise meaning of the word "*consecutive*" as the situation in which it most often arises is when only two events are under consideration. In

such a case, no judge would even consider providing for a break between sentences. Here, as there were three sentences under consideration, the wording of the provision is unambiguous: the reactivated sentences in each case must be consecutive to the triggering offence, not to each other. In any other context, a judge imposing more than one sentence might naturally impose sentences consecutive on each other, in other words, each consecutive to the last as carriages behind the engine of a train, but this statutory provision is unambiguous and clear. Here, what is required is that two carriages be hitched to the same engine rather than one behind the other.

4.8 The Respondent relied on s.5 of the Criminal Justice Act 1951 (the "1951 Act") to make a separate argument about the powers of the courts to impose consecutive sentences but this section itself does not use the word consecutive. Section 5 uses the following phrase: *"the sentence shall commence at the expiration of any other term of imprisonment".* In other words, this statutory provision, in describing sentences to be imposed in sequence, also suggests that the sentences run back-to-back, in unbroken sequence, and without interruption.

4.9 The reality in this case is that the sentencing judge undoubtedly considered the impact of the three sentences as a whole and tailored the final sentence to ensure that the overall sentence was not unjust. Nonetheless, the strict interpretation is that which must be applied, and this requires that the final sentence in respect of theft should have been consecutive to the sentence in respect of the failure to appear, the triggering offence, and not to that imposed for the public order offence. Had this been done, the two reactivated sentences would have run concurrently. The Applicant should have been sentenced to six months for failing to appear and two reactivated sentences of one month and three months, concurrent to each other but consecutive to the six months, making a total of nine months to serve, instead of the total ten months imposed.

5. Section 5 of the Criminal Justice Act of 1951

5.1 A second argument was made to the effect that, if the Judge was incorrect in terms of sequencing as provided for in s.99, his approach was nonetheless correct under s.5 of the 1951 Act (as amended). It was further suggested that, if so, and if s.5 conflicted with s.99(11), then this would have brought s.99(19A) into play which would have allowed the Judge a discretion as to the sequence in which the sentences could be imposed. According to the Respondent, the effect of s.5 is that a District Court Judge has discretion to decide the manner in which sentences are imposed, including their sequence, so long as that the aggregate term of imprisonment does not exceed two years.

5.2 The effect of s.5 of the 1951 Act, as now submitted, was not positively pleaded in the Statement of Opposition. Section 19(19A) was pleaded, in that it was relied upon to justify the course chosen by the District Judge. The pleading point is not only an important one but, in this case, is an unanswerable argument. While subsection 19A suggests that another section will be relied upon – for a conflict there must be a second provision with which the conflict is said to exist – it is not possible, or fair, for the Applicant to have to guess as to what that might be before submissions are exchanged close to the hearing date. The Applicant is entitled to succeed on this issue on that point alone.

5.3 For several reasons, I will consider this argument, but my comments are *obiter dicta*, given the above ruling. My reasons are firstly, as this is the first time that this aspect of s.99(11) is being considered in depth, secondly, because the argument was made and met at the hearing in substance (despite the strong pleading point also made) and thirdly, because indicating a view may be of some assistance to judges in future cases. Section 5, as amended, provides that:

"Where a sentence of imprisonment is passed on any person by the District Court, the Court may order that the sentence shall commence at the expiration of any other term of imprisonment to which that person has been previously sentenced, so however that where two or more sentences passed by the District Court are ordered to run consecutively the aggregate term of imprisonment shall not exceed 24 months."

5.4 Section 99 was enacted long after the 1951 Act and the purpose of s.5 of the 1951 Act appears to have been to enable consecutive sentences in a general way and, when imposing such sentences, to ensure that the aggregate time to be served does not exceed a length of time, which has now been increased to 24 months.

5.5 The 1951 Act made no attempt to put the sentences in any order, the point of the provision was to state clearly that if consecutive sentences were imposed, the sum of all sentences imposed must not exceed this number. Here, this provision does not apply as the cumulative total of the sentences imposed did not amount to a sentence greater than 24 months. The problem of multiple lengthy sentences, leading to a conflict with s.5, did not arise here.

5.6 Further, while this issue was not argued in any detail, it appears that the rule *lex specialis derogate legi generali* applies in this case. The principle provides that a law governing a specific subject matter overrides a law that governs general matters. Here, s.99 is a provision expressly enacted to govern the imposition of reactivated sentences in the event of further offending during a period of suspension and, if there is an issue about which should apply, the specific provisions of s.99 override those of the more general provision in the 1951 Act.

5.7 Mr. Justice Simons dealt with the effect of the rule in a very different context, that of planning law. In his judgment in *Friends of the Irish Environment v. An*

Bord Pleanála [2019] IEHC 80, at paragraphs 84 - 87, he describes the relevant provisions and draws a useful analogy with two judgments of the Supreme Court. In *Ashbourne Holdings Ltd. v. An Bord Pleanála* [2003] 2 I.R. 114 and in *Dublin Corporation v. Hill* [1994] 1 I.R. 86, as he points out, the Supreme Court appears to suggest that where a measure falls within a specific statutory power under the planning legislation, which is subject to restrictions, it is not legitimate to rely on a general power to seek to achieve the same result.

5.8 One could describe the provisions of s.99 and of s. 5 of the 1951 Act in similar terms with respect to their ambit and respective objectives. Section 5 describes a general power to impose consecutive sentences, it does not address reactivated sentences: such sentences are specifically provided for by s.99 and that provision overrides any other, more generally applicable, sentencing provision. This interpretation is also in line with the principles which require a court to adopt the interpretation most favourable to an accused person, where possible, and to interpret penal legislation strictly.

5.9 The effect of the above conclusions is that s. 99(19A), which allows the judge a discretion in sequencing sentences in the event of a conflict between different legislative provisions, does not arise in this case. No conflicting section, other than s. 5 of the 1951 Act, was identified, and s. 5 cannot apply here.

6. Practical Effects and Conclusions

6.1 In theory, the misapplication of s.99(11) meant that the Applicant was sentenced to an extra month in prison. In real terms, as he was subsequently convicted of a separate offence and received a longer, but concurrent sentence, the issue is one of less concern to the Applicant in this case than it might otherwise have been. In other words, the extra month in prison would have

been served in any event, as part of a longer sentence later imposed by the Circuit Court. Nonetheless, all parties agreed that the issue arising was significant, the parties would benefit from clarity in this regard, and it remains a live issue insofar as the sentence remains on the Applicant's record which should accurately reflect only sentences imposed in accordance with law.

6.2 The sentencing Judge referred to the charge sheet number and date of the first offence (a public order offence) in the warrant of imprisonment as being the triggering offence. This was incorrect as it was the last offence, committed in 2022, which triggered the revision of both earlier suspended sentences. According to the clear terms of s.99 of the Criminal Justice Act, 2006, both of those suspended sentences should have been consecutive to that imposed in respect of the triggering offence. The word "*consecutive*" has a specific meaning and does not mean "*at some point after*" another sentence, but immediately after.

6.3 As regards the reference to an incorrect date on the warrant, this was something that might otherwise have been corrected using the slip rule but as the sentences were imposed in an order which was not provided for by statute, the imposition of the second reactivated sentence must be quashed and it is unnecessary to consider the issue of the error on the face of the record further.

6.4 *Certiorari* is granted quashing the reactivated sentence of three months. That reactivated sentence is the one which relates to an offence of theft on charge sheet 21403223. I will hear the parties as to the necessary consequential orders.

6.5 My provisional view is that the Applicant is entitled to his costs as he has been successful in his application.