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*Ex tempore Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **31/5/2019**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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REGINA

-v-

JAMES KIDD

_____

Before: Stephens LJ, Deeny LJ and McBride J

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DEENY LJ (delivering the judgment of the court)

[1] The applicant was sentenced on 12 May 2017 by His Honour Judge Lynch QC at Craigavon Crown Court to a sentence of one year's imprisonment suspended for three years on the charge of possession of a Class B controlled drug and further sentenced concurrently to the same sentence for being concerned in the supply of such a drug, both offences having occurred on 14 July 2016.

[2] On 8 October 2018 the applicant was arrested at his home at Gilford on suspicion of harassment and common assault in respect of his neighbour. The allegations were that the applicant had verbally assaulted and threatened his neighbour over the garden hedge on two separate occasions within a 24 hour period.

[3] The applicant subsequently appeared at Banbridge Magistrates' Court sitting in Newry on 27 December 2018. He ultimately pleaded guilty to the charges and the District Judge proceeded to sentence him to 3 months' imprisonment but suspended that for 18 months. In accordance with administrative practice and the statutory provisions the fact that there had been a breach of the earlier sentence was conveyed to the attention of the Crown Court Judge for consideration pursuant to Section 20(3) of the Treatment of Offenders (Northern Ireland) Act 1968. The matter, after an adjournment, came before Her Honour Judge McColgan to be dealt with i.e. whether the sentence imposed by Judge Lynch was now to be activated. We have now to hand a transcript of the hearing before the learned judge whose decision is being appealed. She heard from Mr Tannahill of counsel for the prosecution and Mr Taggart of counsel and she determined to impose a half of the sentence that Judge Lynch had imposed i.e. a sentence of 6 months' imprisonment rather than 12 months. She activated 6 of the 12 months.

[4] The applicant, James Kidd, applied for leave to appeal that sentence which was refused by Mr Justice Huddleston. The court has granted an expedited hearing of the matter today.

[5] Counsel in his skeleton argument in support of the notice of appeal raised a point of law which is appropriate to deal with relating to a matter that arose in the course of the hearing before Judge McColgan. That point was that she proceeded to activate a part of this sentence and therefore send the man to prison, where he now is, without obtaining a pre-sentence report and without giving reasons for that. Counsel referred this court, but not the lower court, to Article 9 of the Criminal Justice (Northern Ireland) Order 2008 which insofar as relevant reads as follows:

> "9: Procedural Requirements for Custodial Sentences
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> (1) In forming any such opinion as is mentioned in Article 5(2) or 7(2), a court shall take into account all such information as is available to it about the circumstances of the offence or (as the case may be) of the offence and the offence or offences associated with it (including any aggravating or mitigating factors).
>
> (2) Subject to paragraph (3), a court shall obtain and consider a pre-sentence report before forming any such opinion as is mentioned in Article 5(2), 7(2), 13(1)(b) or 14(1)(b)(i)."

[6] Now pausing there it might be argued that Article 5(2) is relating to the original sentence imposed by a judge rather than for the activation process given its wording which refers to the test of whether a custodial sentence is justified. This is not something on which we feel it necessary to express any concluded opinion but for the purposes of Mr Taggart's submissions we will take it as though Article 5(2) did apply without dealing with that in any final way. But we take notice of the fact that this was not an original sentencing.

[7] To return to Article 9, paragraph (3) reads:

> "Paragraph (2) does not apply if, in the circumstances of the case, the court is of the opinion that it is unnecessary to obtain a pre-sentence report; and where the court does not obtain and consider a pre-sentence report, it shall state in open court that it is of that opinion and what the circumstances are."

[8] Now pausing there it must be acknowledged that Her Honour did not give reasons and did not state in open court that her opinion was that a pre-sentence

report was unnecessary. There was no pre-sentence report and none was directed. She did not state what the circumstances are. Is that a fatal flaw? First of all one notes that Article 9(5) expressly says that no custodial sentence shall be invalidated by the failure of a court to obtain and consider a pre-sentencing report before forming an opinion referred to in paragraph (2). So there is express statutory provision that the failure to have the report, if it was a failure, shall not invalidate the sentence imposed by the court. That does not preclude an appellant, it is contended, from taking the point that the decision and the sentence should be altered by this court because of that omission and because of the omission to provide reasons. Mr Valentine in his book on Criminal Procedure helpfully refers to an earlier decision of Lord Lowry presiding in this court in *The Queen v Ernest Law* which is to be found in [1973] NIJB Volume 1. The court there was dealing with the imposition of suspended sentences and addressed comparable language in its judgment at page 5, from which I quote:

> "Section 19(1) provides that where an offender is convicted of a subsequent offence … and the offence was committed during the operational period of his suspended sentence … then, unless the sentence … has already taken effect, the court shall consider his case and deal with him by one of the following methods - (the four methods are then set out). This shows that it is the court's duty where an offender is convicted of a subsequent offence to operate the suspended sentence procedure and even whether method (d) of making no order is adopted that fact is to be recorded: Section 19(6). Furthermore, it is the court's duty to adopt method (a) by ordering the suspended sentence to take effect 'unless the court is of opinion that it would be unjust to do so in view of all the circumstances which have arisen since the suspended sentence was passed including the facts of the subsequent offence and where it is of that opinion the court shall state its reasons."

[9] So pausing there, for the outcome of this appeal it is important to note that that is the statutory provision i.e. that a suspended sentence should take effect unless the court thinks it would be unjust to do otherwise. There is a series of decisions of this court reinforcing that.

[10] Lord Lowry went on at page 6:

> "We consider that merely by using the phrase 'in view of the all circumstances' the Magistrates' Court did not comply with its duty to state its reasons for not ordering the suspended sentence to take effect:

> that this is so appears clearly from the wording of Section 19(1). On the other hand we consider the provisions should directory and not imperative: it could not be intended that an accused person who benefits from the decision not to adopt to course (a) is deprived of that benefit by the court's failure to state the reasons for its action. On the other hand mandamus may be available to compel an inferior court to state its reasons and thereafter if the reasons are by any chance incapable of supporting the court's decision, that decision might conceivably be impugned."

[11] One can see therefore that the context is somewhat different than this particular case, but the view of this court in that decision holding that the obligation to give reasons is directory and not imperative is one that weighs with this court and confirms the view that would be indicated by the statutory provision that we should not strike down this sentence because of the omission of the judge to give reasons.

[12] The 2008 Order goes on to provide at Article 9(5) as follows:

> "No custodial sentence shall be invalidated by the failure of a court to obtain and consider a pre-sentence report before forming an opinion referred to in paragraph (2) but any court on an appeal against such a sentence—
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> (a) shall, subject to paragraph (6), obtain a pre-sentence report if none was obtained by the court below; and
> (b) shall consider any such report obtained by it or by that court.
>
> (6) Paragraph (5) (a) does not apply if the court is of the opinion—
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> (a) that the court below was justified in forming an opinion that it was unnecessary to obtain a pre-sentence report; or
>
> (b) that, although the court below was not justified in forming that opinion, in the circumstances of the case at the time it is before the court, it is unnecessary to obtain a pre-sentence report."

[13] This court rose to consider its attitude to this matter. The view of the court is that the court below was justified in forming an opinion as described at paragraph 6(a) i.e. it was unnecessary to obtain the report. It seems to us there are four factors that would weigh in favour of such a view. We acknowledge that it is regrettable that the judge did not express her reasons and make it clear what her opinion was but one can take it as implied by what she said in the course of her remarks.

[14] First of all, although Mr Kidd was represented by counsel before Her Honour and there was a discussion about pre-sentence reports, at no stage did he ask for a report. That is not necessarily a criticism of counsel who may have had good reasons at that time for thinking that was the wiser course. The sentencing remarks disclosed that Mr Kidd was facing other charges which presumably would have been elaborated on in the pre-sentence report. If there was not an implied waiver there was certainly a clear impression left with the judge that such a report was not sought by the defence. Secondly, none had been sought at the court below. Thirdly, the defence did choose to submit medical reports relating to the heart condition of the defendant Kidd at that time which to them may have seemed an advantageous way to proceed. Fourthly, as briefly adverted to above, this was not the imposition of an original custodial sentence; this was in the context of the activation of a suspended sentence already imposed in the Crown Court. So we formed the view that we could proceed with this matter and proceed to do so.

[15] We have considered the other grounds set out in the cogent written argument of counsel for the appellant and we have read the responding skeleton arguments on behalf of the prosecution. As I have said the usual approach is to impose a suspended sentence unless it is unjust to do so. It is true that the offence of harassment and assault which activated the application for the suspended sentence were not of the same character as the drugs offences that Judge Lynch had sentenced Kidd for. But as acknowledged in the case law that is not a bar to activating a suspended sentence. Citizens should obey the law and they cannot go around committing offences in different areas of the law and expect to get a suspended sentence each time.

[16] Mr Taggart relied on the case law including *The Queen v McQuade* [1974] NIJB 756,759 in his submissions and sought to argue in his written submissions and succinctly in his oral submissions that the modesty of the offence was a factor for not activating the earlier suspended sentence. But he did not and could not gainsay the remark of the judge at first instance that this was "not a trivial offence" and it clearly was not a trivial offence because it was not dealt with by a small fine or absolute discharge or anything of that kind but by a custodial sentence albeit one that was suspended by the District Judge in the Magistrates' Court. In those circumstances it was open to the judge to activate the sentence. We acknowledge that a judge might have chosen not to do so, but we note that what she did do was to reduce the 12 months that she might have imposed or activated to 6 months. We see no factors that she has overlooked that would call into question her right to arrive at that

sentence. The medical evidence is not of such a nature as to preclude her from doing so and in all the circumstances we dismiss the appeal.