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Judgment: approved by the Court for handing down | *Delivered:* **09.05.2003**

(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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THE QUEEN

v

COLIN HUGHES

_____

Before: Carswell LCJ and McLaughlin J

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CARSWELL LCJ

[1] This is an appeal, brought by leave, against an order made by His Honour Judge McFarland on 12 June 2002 in Omagh Crown Court, whereby he activated six months of a suspended sentence of fifteen months' imprisonment imposed by His Honour Judge Foote QC on 6 April 2000 at Omagh Crown Court.

[2] The history of the sentences passed upon the appellant is somewhat complex. On 9 December 1999 he pleaded guilty at Omagh Crown Court to an offence of burglary with intent to steal and was sentenced by Judge Foote on 6 April 2000 to fifteen months' imprisonment, suspended for two years. The burglary in question was committed on a bar in Dungannon in the early hours of 19 September 1998, when the appellant broke in through a window with another man and attempted to remove or break into a gaming machine. The men were disturbed by the arrival of police and hid

outside in brambles, but were apprehended. In consequence nothing was taken or damaged.

[3] The appellant then committed a series of road traffic offences over the next few months, as follows:

> **10 September 2000** – driving while disqualified and no insurance;
> **28 October 2000** – driving with excess alcohol, driving while disqualified, no insurance and careless driving;
> **3 February 2001** –excess speed, driving while disqualified, no insurance, failing to provide specimen, defective tyre and insecure load.

On 30 May 2001 he pleaded guilty to these offences in East Tyrone Magistrates' Court. The resident magistrate imposed fines on all of the charges except those of driving while disqualified, together with periods of disqualification. On each of the three charges of driving while disqualified she sentenced the appellant to four months' imprisonment, making the first two sentences consecutive and the third concurrent with them. The effective sentence was therefore one of eight months' imprisonment.

[4] The appellant appealed against these sentences to the county court, and the appeals were heard at Cookstown County Court by Judge Foote on 22 October 2001. Meanwhile the appellant had committed a further offence of driving while disqualified on 1 September 2001, for which he was sentenced by East Tyrone Magistrates' Court on 19 September 2001 to a further five months' imprisonment, consecutive to the eight months already ordered. Judge Foote dismissed the appeals and affirmed the four sentences of imprisonment, totalling thirteen months. He also purported to activate the whole of the suspended sentence of fifteen months which he had imposed on 6 April 2000.

[5] The appellant appealed to this court by way of case stated, on the ground that Judge Foote had no jurisdiction, when sitting in the county court on appeals from magistrates' courts, to activate the suspended sentence imposed by him when sitting in the Crown Court. We upheld this contention, allowed the appeal on 28 May 2002, admitted the appellant to bail and remitted the matter to the Crown Court for it to deal with the suspended sentence as it saw fit.

[6] The matter came before Judge McFarland in Omagh Crown Court on 12 June 2002, when he ordered, pursuant to section 19(1)(*b*) of the Treatment of Offenders Act (Northern Ireland) 1968, that the suspended sentence should take effect with the substitution of a term of six months for the original term of fifteen months. The reasons which he gave for taking this course, according to a note which he furnished to the court, were that he took into account the fact that the appellant had already served two months on foot of this sentence, being the equivalent of a sentence of four months with remission, then reduced the term by a further five months by way of mitigation for the delay and the "double jeopardy" effect of the appeal and resulting re-sentencing.

[7] The appellant on 2 July 2002 applied for and was granted leave to appeal against Judge McFarland's order. The grounds of appeal set out in his notice of appeal were as follows:

> "1.That the learned trial Judge imposed a sentence, which was manifestly unjust and unreasonable in all the circumstances.
>
> 2.That the learned Judge failed to take into account the totality principle when determining the Defendant's sentence.
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> 3.That the learned Judge failed to give sufficient weight to the fact that the Defendant had already served 2 months on remand.
>
> 4.That the learned Judge failed to give sufficient weight to a probation report compiled on behalf of the Defendant."

[8] The appellant had a record of driving offences, commencing in 1994, when he was aged 18 years (he is now 26). They show a pattern of irresponsibility and resulted in his being disqualified from driving on several occasions. Notwithstanding this, he persisted in driving motor vehicles, which led to his convictions and the prison sentences imposed by the resident magistrate and affirmed by Judge Foote. As the pre-sentence report points out, this was his first experience of prison, but he had been put on warning by the imposition of the suspended sentence in April 2000.

The report also describes his addiction to alcohol and drugs, as well as his fascination with cars. The probation officer's conclusion was as follows:

> "Colin Hughes is a 25 year old man who is before the Court on several driving related offences. He presented as rather a withdrawn man through interview. However, it is clear that he took unacceptable risks to drive, whilst disqualified and under the influence of alcohol, without any thought of the consequences for himself or other road users. Mr Hughes is fully aware that the Court may consider an immediate custodial sentence. However this will be his first experience of incarceration and whilst this will be the ultimate restriction on his liberty it does not address the fundamental problems associated with his offending behaviour, namely his alcohol misuse, impulsive and risk taking behaviour in relation to driving."

[9] The activation of suspended sentences is dealt with in section 19(1) of the Treatment of Offenders Act (Northern Ireland) 1968, which provides:

> "**19.**-(1)Where an offender is convicted of a subsequent offence for which the court has power, or would, but for section 1, have power to sentence him to imprisonment, and the offence was committed during the operational period of a suspended sentence or order for detention and either he is so convicted by or before a court having power under section 20 to deal with him in respect of the suspended sentence or order for detention or he subsequently appears or is brought before such a court, then, unless the sentence or order has already taken effect, the court shall consider his case and deal with him by one of the following methods –
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> (a)the court may order that the suspended sentence or order for detention shall take effect with the original term unaltered;

(b)it may order that the suspended sentence or order for detention shall take effect with the substitution of a lesser term for the original term;

(c)it may by order vary the original order under section 18 by substituting for the period specified therein a period expiring not later than three years from the date of the variation; or

(d)it may make no order with respect to the suspended sentence or order for detention;

and a court shall make an order under paragraph (a) 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 or order for detention was passed or made, including the facts of the subsequent offence and where it is of that opinion the court shall state its reasons."

[10] In our opinion Judge McFarland was quite correct in his decision to put the suspended sentence into operation. The "triggering" offences committed during the period in which the suspension operated were of a nature serious enough to justify significant terms of imprisonment, and the fact that they were of a different nature from the original offence of burglary is not a reason for not putting the suspended sentence into operation. As this court stated in *R v Lendrum* [1993] 7 NIJB 78 at 80:

> "The fact that an offence committed during the operational period of a suspended sentence is of a different character from the offence for which the suspended sentence was imposed is not in itself a ground for not activating the suspended sentence … Indeed, there are a number of reported cases directly in point in which suspended sentences for motoring offences were put into effect consecutively to sentences for dishonesty and conversely …"

[11] We have regularly reminded sentencers that they are required to put into effect in full, unless there is a sufficient reason to decide against doing so. One such reason is that the offender may have spent some time on remand for which he would not receive credit if the sentence were operated in full: see *Re Price's Application* [1997] NI 33. The judge did take that into account in the present case, and quite correctly reduced the sentence accordingly.

[12] Another such reason, on which counsel for the appellant placed his main reliance, is the principle of totality. In this respect the approach which should be taken to the activation of a suspended sentence is somewhat analogous to that which is appropriate to the imposition of consecutive sentences. The English Court of Appeal explained that approach in *R v Munday* (1972) 56 Cr App R 220. When a sentencer is considering activating a suspended sentence he should obtain information about the original offence, then consider whether it would have been appropriate or disproportionate to impose the original sentence (without suspension) plus the sentence imposed for the instant offence, which is in effect a consecutive sentence. If the sum of the two sentences makes for a total which would have been unjustifiable as punishment for the original offence plus the instant offence, then the suspended sentence could properly be put into operation for a shorter period.

[13] The totality of the sentences passed on the appellant, when Judge McFarland put the suspended sentence into operation as he did, was in effect just over 22½ months. That sum is obtained by adding the 13 months for the driving offences, the six months activated and a period of 3½ months to represent the time of one month and 24 days that the appellant had spent in prison over and above the term to which he had been sentenced of 13 months. In effect accordingly he activated 9½ months of the suspended sentence, and the totality of the sentences for the burglary and the driving offences was 22½ months. It has to be considered, on the *Munday* principle, whether this is disproportionate for the burglary plus the driving offences. We do not consider that it could be so regarded. It was a serious burglary, which only failed because of the arrival of the police, and could quite properly have attracted an immediate custodial sentence of at least fifteen months and possibly rather longer. The appellant persisted in committing road traffic offences and the consecutive sentences for them were in our view appropriate. If a court had been sentencing the appellant on a single occasion for the whole series of

offences, the burglary and the road traffic offences, it would in our view have been quite justified in imposing an effective sentence of 22½ months. We therefore do not consider that the appellant's case on totality has been made out.

[14] We do not find any fault with Judge McFarland's disposition of the matter and dismiss the appeal.