

**S 12 BONDS – BREACH  
PROCEEDINGS & THE  
CONSEQUENCES OF REVOCATION**

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**4 May 2017**

## **PREFACE**

This is an updated version of a paper presented at the Penrith Legal Aid Office in December 2012 and at the Legal Aid NSW Conference in 2014. It is hoped that it may prove useful to Local Court and District Court practitioners although the principles extrapolated may be applicable in other jurisdictions. If you are practising in the Children's Court jurisdiction, Slade Howell's paper *The Imposition and Revocation of Suspended Sentences' in the Children's Court of New South Wales* is a great resource.

## **INTRODUCTION**

Section 12 bonds are usually breached by either the commission of a fresh offence or the failure to comply with Community Corrections supervision. Practitioners representing clients who have allegedly breached s 12 bonds are typically confronted with 3 questions:

1. Has there been a breach of the conditions of the bond?
2. If there has been a breach, is the breach trivial in nature or are there good reasons to excuse the breach?
3. If the breach is not trivial in nature and there are no good reasons, then what sentencing options are available to the court?

If the alleged breach is a failure to comply with Community Corrections supervision and your client instructs you to contest the breach, I would recommend Derek Buchanan's very helpful paper *Defended Breach of Bond Proceedings*. For the purpose of this paper, it is assumed that the breach is proven or admitted.

Our focus therefore shifts to the second and third questions which are respectively governed by ss 98 and 99 of the *Crimes (Sentencing Procedure) Act 1999*. Persuasively addressing these questions requires an understanding of the nature and purpose of suspended sentences. The starting point is therefore s 12 of the *Crimes (Sentencing Procedure) Act 1999*.

## THE STARTING POINT – S 12

### *The legislation*

Section 12 of the *Crimes (Sentencing Procedure) Act 1999* reads as follows:

(1) A court that imposes a sentence of imprisonment on an offender (being a sentence for a term of not more than 2 years) may make an order:

(a) suspending execution of the whole of the sentence for such period (not exceeding the term of the sentence) as the court may specify in the order, and

(b) directing that the offender be released from custody on condition that the offender enters into a good behaviour bond for a term not exceeding the term of the sentence.

(2) An order under this section may not be made in relation to a sentence of imprisonment if the offender is subject to some other sentence of imprisonment that is not the subject of such an order.

(3) Subject to section 99 (1), Part 4 does not apply to a sentence of imprisonment the subject of an order under this section.

(4) An order under this section may be made after a court has decided not to make a home detention order in relation to the sentence of imprisonment.

The availability of suspending the execution of a sentence of imprisonment is predicated upon the length of the term of imprisonment. The sentence of imprisonment must be 2 years or less: s 12(1). The whole of the sentence of imprisonment is suspended under s 12(1)(a). Therefore the court cannot partially suspend the sentence of imprisonment: cf *R v Gamgee* (2001) 51 NSWLR 707 which considered an earlier version of s 12. The offender enters into a good behaviour bond which cannot exceed the term of the sentence: s 12(1)(b). However, reading the provisions carefully, it does not exclude the possibility of a good

behaviour bond which is less than the term of the sentence of imprisonment although this would appear inconsistent with legislative intent: see Ben Cochrane's discussion in his June 2010 paper entitled "*NSW Suspended Sentences*" at [3]-[4].

Part 4 does not apply to a suspended sentence: s 12(3). Part 4 of the Act concerns setting non-parole periods (s 44), commencement dates (s 47), and imposing consecutive or concurrent sentences (s 55). Therefore, when a court suspends a sentence under s 12, it does not set a non-parole period. A bond under s 12 bond commences from the date of its imposition. It cannot be backdated, post-dated or served wholly or partially cumulative with some other sentence: see *Pulitano v R* [2010] NSWCCA 45 at [9] and *R v JW* (2010) 199 A Crim R 486 at [218]. Part 4, however, will apply to the sentence should the court revoke the s 12 bond: s 99(1)(c)(ii). We will discuss this in some detail below.

The court cannot impose a suspended sentence for an offence where the offender is currently serving a sentence of imprisonment for another offence: s 12(2). Section 12(2) also applies where the offender is serving the balance of parole in respect of another sentence: *R v Edigarov* (2001) 123 A Crim R 551.

### ***Nature and purpose of suspended sentences***

Suspended sentences tend to attract significant judicial angst which reflects the tense relationship between suspended sentences and general sentencing principles. The notion that suspended sentences constitute a statutory vehicle by which offenders escape condign punishment is illustrated in *Dinsdale v The Queen* [2000] HCA 54 at [80] per Kirby J:

The question of what factors will determine whether a suspended sentence will be imposed, once it is decided that a term of imprisonment is appropriate, is presented starkly because, in cases where the suspended sentence is served completely, without reoffending, the result will be that the offender incurs no custodial punishment, indeed no actual coercive punishment beyond the public entry of conviction and the sentence with its attendant risks. Courts repeatedly assert that the sentence of suspended imprisonment is the penultimate penalty

known to the law and this statement is given credence by the terms and structure of the statute. However, in practice, it is not always viewed that way by the public, by victims of criminal wrong-doing or even by offenders themselves.

The "three step" approach to the imposition of a custodial alternative to full-time imprisonment is intended to counter this public perception:

1. The **first** step is to conclude that no penalty other than imprisonment is appropriate: s 5 of the *Crimes (Sentencing Procedure) Act*; *R v Zamagias* [2002] NSWCCA 17 at [25], and; *Douar v R* (2005) 159 A Crim R 154 at [69-72]. A suspended sentence is NOT an alternative to imprisonment: *R v Zamagias* at [25].
2. The **second** step is to determine the length of the sentence of imprisonment: *R v Foster* [2001] NSWCCA 215 at [30]; *R v Zamagias* at [26]. This step is determined without having regard to how the sentence should be served: *R v Zamagias* at [26].
3. The **final** step is to determine whether any alternative to full-time custody is available, such as a suspended sentence, and whether any available alternative should be utilised: *R v Zamagias* [27].

Suspended sentences must be imposed in accordance with this principled approach: see *Ismael Amado v R* [2011] NSWCCA 197. The imposition of a term of imprisonment is, therefore, a "grave step" for a court to take: *R v Zamagias* at [31]. A sentence of imprisonment can be a significant and effective punishment even where the execution of that sentence is suspended. Howie J in *R v Zamagias* observed at [32]:

Further, a sentencing court must approach the imposition of a sentence that is suspended on the basis that it can be a sufficiently severe form of punishment to act as a deterrent to both the general public and the particular offender. Of course it must also be recognised that the fact that the execution of the sentence is to be immediately suspended will deprive the punishment of much of its

effectiveness in this regard because it is a significantly more lenient penalty than any other sentence of imprisonment. The question of whether any particular sentencing alternative, including a suspended sentence, is an appropriate or adequate form of punishment must be considered on a case by case basis, having regard to the nature of the offence committed, the objective seriousness of the criminality involved, the need for general or specific deterrence and the subjective circumstances of the offender. It is perhaps trite to observe that, although the purpose of punishment is the protection of the community, that purpose can be achieved in an appropriate case by a sentence designed to assist in the rehabilitation of the offender at the expense of deterrence, retribution and denunciation. In such a case a suspended sentence may be particularly effective and appropriate.

One can distil the following principles from the authorities:

1. Suspended sentences are often perceived within the community as a "soft option" which enables offenders to avoid deserved punishment.
2. A principled approach to the imposition of suspended sentences is necessary to refute this community perception.
3. A suspended sentence is not an alternative to a bond. A suspended sentence involves taking a "grave step"; the imposition of a term of imprisonment.
4. Principles of punishment, general and specific deterrence can, in the appropriate case, find their expression through the imposition of a suspended sentence.
5. In suspending the execution of the sentence of imprisonment, the effectiveness of punishment is significantly curtailed.
6. A suspended sentence reflects the principle that protection of the community may be facilitated through the rehabilitation of the offender.

The nature and purpose of suspended sentences provides a vital broader context from which to consider the penultimate question: if a s 12 bond is breached, can I argue that the breach is trivial in nature or that there are good reasons for excusing the breach?

## **BREACHES OF S 12 BONDS**

### ***The legislation***

An alleged breach of a s 12 bond triggers s 98:

#### **98 Proceedings for breach of good behaviour bond**

(1) If it suspects that an offender may have failed to comply with any of the conditions of a good behaviour bond:

- (a) the court with which the offender has entered into the bond, or
- (b) any other court of like jurisdiction, or
- (c) with the offender's consent, any other court of superior jurisdiction, may call on the offender to appear before it.

(1A) If the offender fails to appear, the court may:

- (a) issue a warrant for the offender's arrest, or
- (b) authorise an authorised officer to issue a warrant for the offender's arrest.

(1B) If, however, at the time the court proposes to call on an offender to appear before it, the court is satisfied that the location of the offender is unknown, the court may immediately:

- (a) issue a warrant for the offender's arrest, or
- (b) authorise an authorised officer to issue a warrant for the offender's arrest.

(1C) For the purposes of subsection (1) (c), a court is of superior jurisdiction to the court with which an offender has entered into a good behaviour bond if it is a court to which the offender has (or has had) a right of appeal with respect to the conviction or sentence from which the bond arises.

(2) If it is satisfied that an offender appearing before it has failed to comply with any of the conditions of a good behaviour bond, a court:

- (a) may decide to take no action with respect to the failure to comply, or
- (b) may vary the conditions of the bond or impose further conditions on the bond, or
- (c) may revoke the bond.

(3) In the case of a good behaviour bond referred to in section 12, a court must revoke the bond unless it is satisfied:

- (a) that the offender's failure to comply with the conditions of the bond was trivial in nature, or
- (b) that there are good reasons for excusing the offender's failure to comply with the conditions of the bond.

Action may be taken in respect of a good behaviour bond even if the term of the bond has expired, but only in respect of matters arising during the term of the bond: s 100.

Note that s 98(1)(c) allows a court of "superior jurisdiction" to deal with a breach of a bond under s 12. A court of "superior jurisdiction" is defined in s 98(1C). For example, if a fresh offence dealt with on indictment in the District Court also constitutes a breach of a s 12 bond imposed in the Local Court, the District Court may, with the consent of the offender, call up the s 12 bond for consideration of the breach proceedings: see, for example, *R v Michelin* [2008] NSWDC 204.

Conversely, if a bond under s 12 is imposed in the District Court for an offence dealt with on indictment and that bond is breached by a summary offence, the Local Court cannot call up the s 12 bond. This is because the Local Court is not the court with which the offender has entered into the bond; a court of like jurisdiction; or a court of superior jurisdiction: see s 98(1).



The situation may be different if the s 12 bond breached was imposed in the District Court following a successful sentence appeal from the Local Court. In these circumstances, it could be argued that the Local Court possesses jurisdiction to deal with the breach proceedings because it is a court of “like jurisdiction”: s 98(1)(b). This is because “*any sentence varied or imposed by an appeal court, and any order made by an appeal court under this Act, has the same effect and may be enforced in the same manner as if it were made by the Local Court*”: s 71(3) of the *Crimes (Appeal & Review) Act 2001*. It is clearly preferable to persuade a Local Court Magistrate to take this course as it preserves your clients appeal rights from an order revoking the bond and any consequent orders (see the discussion below under the heading “Appeals”).

Under s 98(2), a court which is satisfied that an offender has breached a good behaviour bond may take no action, vary the bond or revoke the bond. A breach of a s 12 bond, however, triggers s 98(3) which is expressed in mandatory terms; a court must revoke the bond unless the failure to comply is trivial in nature or unless there are good reasons for excusing the offender’s failure to comply with the conditions of the bond. There is a legal presumption that the bond will be revoked unless the court is satisfied that the statutory exceptions in s 98(3)(a) and (b) apply: *Binge v DPP* [2010] NSWDC 288 at [23].

### ***Section 98(3)(a) – Trivial in Nature***

Judicial consideration of “trivial in nature” appears scant. It does not appear, for instance, that the scope of s 98(3)(a) has been ventilated before the Supreme Court.

In *Green v R* [2008] NSWDC 378, Cogswell DCJ at [16] suggested that a court determining whether a failure to comply with the conditions of a bond was trivial in nature should focus on the facts which amount to the alleged non-compliance with the condition of the bond. In *Green v R*, the offender was subject to a s 12 bond. The bond was breached by an offence of malicious damage. The police facts simply noted that the offender and the victim were in a domestic relationship; that a verbal argument ensued, and; in the course of the argument a window was broken. There was no indication as to how the window was broken. Cogswell DCJ at [20]

concluded that, on the evidence before the court, the failure to comply with the conditions of the s 12 bond was trivial in nature.

The term "trivial nature", as opposed to "trivial in nature" under s 98(3)(a), appears in the *Crimes (Sentencing Procedure) Act 1999* within the legislative framework of discharging offenders under s 10. Assessing whether an offence is of a trivial nature is, of course, one of the factors the court can take into account in dismissing a proven offence without recording a conviction: s10(3)(b). The High Court has observed that the triviality of the offence should be determined and assessed by reference to the actual offence committed by the defendant and the circumstances surrounding the offence and not by the reference to the maximum penalty prescribed for the offence: *Walden v Hensler* (1987) 163 CLR 561 at [184].

Where the conduct giving rise to the breach is a fresh offence, a court may be reluctant to conclude that the offender's failure to comply with the conditions of the bond was trivial in nature on the basis that the prescribed maximum penalty renders the offence too serious to fall within the ambit of s 98(3)(a). In these circumstances, it may be worth highlighting the maxim in *Walden v Hensler*; focus should be on the surrounding circumstances and the offending itself, not the maximum penalty. Whilst it is conceded that the design and purpose of s 98 is different from that of s 10, it is suggested that, in the absence of authority to the contrary, the judicial consideration of "trivial nature" under equivalent legislation to s 10 can inform the meaning of "trivial in nature" pursuant to s 98(3)(a).

A number of the principles extracted from *DPP v Cooke & Anor* [2007] NSWCA 2, in particular Howie's J observations on the jurisdictional exercise under s 99(3), are also relevant. *DPP v Cooke & Anor* is carefully scrutinised below.

***Section 98(3)(b): Good reasons for excusing the offender's failure to comply with the conditions of the bond***

The leading authority on "good reasons" is Howie's J judgment in *DPP v Cooke & Anor*. Good reasons are narrowly construed to exclude, for example, the subjective

features of the offender at the time of revocation. However, there is sufficient scope to widen the good reasons net if the appropriate case presents itself.

## 1. Jurisdiction

Where the conduct giving rise to the breach of the s 12 bond is a criminal offence, it is important to recognise that the court is exercising two separate and discrete jurisdictions; the breach proceedings pertaining to the suspended sentence constitutes a separate and distinct judicial exercise from the sentence proceeding for the fresh offence: *DPP v Cooke & Anor* at [27].

If the court revokes the s 12 bond, the court should formally make an order revoking the bond before determining what orders will be made consequent upon revocation and before determining what penalty will be imposed for the conduct giving rise to the breach: *R v Cooke*; *Cooke v R* [2007] NSWCCA 184 at [18]. This approach recognises the separate and distinct jurisdictions a court exercises when the breach of a s 12 bond is also a fresh offence.

The failure to formally revoke the bond does not constitute an error which would otherwise invalidate any orders made upon revocation: *R v Cooke* at [19]. However, a court which takes no action on a breach of a s 12 bond without formally making a finding under either s 98(3)(a) or s 98(3)(b) may demonstrate appellable error: see *DPP v Burrow* [2004] NSWSC 433 at [12] and [27]; *DPP v Nouata & Ors* [2009] NSWSC 72 at [6].

It is preferable that the breach proceedings and the sentence for the offence constituting the breach occur before the one court: *DPP v Cooke & Anor* at [28]. This recognises the probability that the exercise mandated in each jurisdiction, although separate and distinct, may involve overlapping findings of facts. The principles of totality are also still applicable should the court revoke the suspended sentence and consider the imposition of a fresh term of imprisonment: *DPP v Cooke & Anor* at [28].

It is essential, however, that the court resolves the breach proceedings before imposing sentence for the fresh offence: *DPP v Cooke & Anor* at [28]; *Siemek v R*

[2017] NSWCCA 18 at [54]. This is because the outcome of the breach proceedings may affect the availability of sentencing options for the fresh offence.

For example, "A" is sentenced at Sydney District Court for robbery in company which is a strictly indictable offence. The Court sentences him to a term of imprisonment but suspends the sentence on "A's" entry into a s 12 bond. During the term of the s 12 bond, "A" is charged with driving whilst disqualified. "A" appears at Burwood Local Court and pleads guilty to driving whilst disqualified; the plea is an admission that he has breached a condition of his s 12 bond. The Local Court should notify the District Court of the breach of the s 12 bond and adjourn the sentence proceedings for the drive whilst disqualified offence until the conclusion of the breach proceedings in the District Court: see the comments of Howie J in *R v Nicholson* [2010] NSWCCA 80 at [13]-[16].

## 2. Policy considerations – "bringing suspended sentences into disrepute"

It is suggested that any submission that urges the court to find "goods reasons" (or indeed "trivial in nature") must address the policy considerations that underpin suspended sentences: *DPP v Burrow* at [23]. Howie J in *DPP & Cooke & Anor* said:

The court does not determine the existence of good reasons in a vacuum. It does so in the context of the policy and purpose behind the suspended sentence regime and by recognising that by excusing the breach the implicit threat made to the offender at the date of the imposition of the suspended sentence will not be carried out. If the realisation of this threat is avoided in inappropriate cases, it can only result in the lowering of respect for the orders of the court by the offender and the public in general.

We have already extrapolated the principles from *Dinsdale v the Queen* and *R v Zamagias*; such authorities should be at the forefront of the court's mind not only at the time of imposition of the suspended sentence but also at the time of revocation proceedings.

A suspended sentence is not an alternative to a bond. It is a "grave step" involving the imposition of a term of imprisonment. The suspension of the sentence of imprisonment was "an act of mercy" designed to facilitate the rehabilitation of the offender at the expense of punishment and denunciation: *DPP v Cooke & Anor* at [24]. The sentence was suspended on the understanding that if the offender does not fulfil the conditions of the bond the sentence will be imposed: *R v Deborah Grant* [2015] NSWSC 759 at [18]. Therefore, there is no unfairness in requiring the offender to serve the sentence where the conditions have been breached: *DPP v Cooke & Anor* at [24]; *R v Deborah Grant* [2015] NSWSC 759 at [18] and [28].

Note also Kirby's J comments in *Dinsdale v Queen* with regard to the public's misgivings about suspended sentences. If courts do not revoke s 12 bonds where there is a breach in the usual case, both offenders and the public will treat suspended sentences as nothing more than a legal fiction designed to allow an offender to escape deserved punishment: *DPP v Cooke & Anor* at [23]. This would bring "*suspended sentences into disrepute*": *DPP v Cooke & Anor* at [23]; *R v Dinh* (2010) NSWCCA 74 at [85]. Unless a significant breach of a s 12 bond normally leads to its revocation, the suspended sentence would be deprived of its salutary quality and of its viability as a sentencing option for serious offences: *DPP v Burrow* at [23]. Non-revocation tends to undermine the integrity of the system of suspended sentences and their effectiveness as a means of deterring offenders: *R v Marston* (1993) 60 SASR 320; BC9300249 at p4 per King CJ.

An argument that there are "good reasons" must acknowledge these underlying policy considerations and counter a prosecutor's suggestion that failure to revoke the bond "tends to bring suspended sentences into disrepute": *DPP v Cooke & Anor* at [23].

Much of this discussion does not assist defence lawyers. It is certainly suggestive of the need for revocation in the usual case. However, it is undeniable that the courts are emphasising an approach to breach proceedings which is both principled and responsive to the "policy and purpose behind the suspended sentence regime". Such an approach is a clear rebuke to the Magistrate or Judge who construes a breach of a good behaviour bond under s 12 as a *fait accompli*. It is suggested that a

mechanical or automated response to revocation proceedings is contrary to authority; it exhibits the capacity to undermine the integrity of suspended sentences and reduce public confidence in the administration of justice.

3. The focus is on the conduct giving rise to the breach of the bond

The question posed by s 98(3)(b) is not whether there are good reasons for not taking action on the breach of the bond. This is largely irrelevant to court's exercise under the section. The principal consideration is the conduct giving rise to the failure to comply with the conditions of the bond and whether *that* conduct can be excused: *DPP v Cooke & Anor* at [15].

Extenuating circumstances of sufficient importance to explain the behaviour giving rise to the breach may persuade the court to find good reasons and take no action on the breach: *DPP v Cooke & Anor* at [16]. Howie J gives the example of an offender driving under the influence of alcohol in an emergency situation. However, s 98(3)(b) is not restricted to extenuating circumstances of that kind: *DPP v Burrow* at [24].

4. What does the conduct giving rise to the breach disclose about the offender's attitude to the conditions of the bond?

It is suggested that the court, when exercising its jurisdiction under s 98(3)(b), is considering whether the conduct giving rise to the failure to comply with the conditions of the bond "*represents a contumelious act of defiance or disregard of the conditions of the bond*": *DPP v Cooke & Anor* at [16].

In determining whether the behaviour which constitutes the breach of the bond reflects a "contumelious act of defiance," it is relevant to assess:

- i) the seriousness of the behaviour which constitutes the breach, and;
- ii) what that behaviour discloses about the attitude of the offender with regard to the obligations imposed by the bond: *DPP v Cooke & Anor* at [26].

These questions are also relevant to the sentence to be imposed for the offence giving rise to the breach: *DPP v Cooke & Anor* at [26]. They are relevant, however, in a different way, reflecting the court's separate and distinct jurisdictions on breach proceedings and the sentencing exercise for the fresh offence.

Generally, the more serious the conduct giving rise to the breach the less likely that a court should find good reasons: see for example, the observations in *R v Cooke; Cooke v R* [2007] NSWCCA 184 at [26]. It is suggested that a serious breach supports the inference that an offender has displayed a contumelious defiance or disregard for the conditions of the bond. Furthermore, failing to revoke s 12 bonds for objectively serious breaches would tend to bring the system of suspended sentences into disrepute.

It is important to reflect upon what the conduct which culminates in the breach discloses about the offenders' attitude to the conditions of the bond. Conduct which is best characterised as foolish, thoughtless or "stupid" may not reflect a contumelious disregard for the conditions of the bond: see *R v James Mervyn Hillhouse* [2009] NSWDC 427 at [15] and [19].

An illustrative example is *R v Sutton* [2010] NSWSC 1273. Adams J found good reasons to excuse the offender's failure to comply with the conditions of a s 12 bond for driving whilst disqualified where the conduct giving rise to the breach was an offence of manslaughter. Although his Honour did not undertake a thorough dissertation of the authorities on "good reasons", it is clear that the momentary, unpremeditated and aberrant nature of the breach conduct was instrumental in his Honour finding that there were "good reasons".

The authorities clearly indicate that the court must focus upon the breach itself and what it reflects about the offender's attitude to the bond. However, it may be open to submit that the breach should not be considered in a vacuum. Where an offender has predominantly complied with a lengthy s 12 bond, submissions for the offender may involve highlighting the otherwise strict compliance with the conditions of the bond before and even after the alleged breach. This would be relevant only to a submission that the behaviour was an aberration and therefore does not reflect a

"contumelious disregard" for the conditions of the bond. It is suggested that, if framed in the context of what the conduct represents about the offenders attitude toward the bond, such a submission is not inconsistent with *DPP v Cooke & Anor*.

#### 5. What is the role of the subjective circumstances of the offender?

The subjective circumstances of the offender at the time of the revocation proceedings are generally irrelevant in determining whether there are good reasons to excuse the breach: *DPP v Burrow* at [26]; *DPP v Cooke & Anor* at [34].

However, the subjective circumstances of the offender at the time of the breach may be relevant to the court's consideration of the offender's failure to comply with the conditions of the s 12 bond: *DPP v Cooke & Anor* at [34]. For example, if the offender suffers from a psychological disorder that may explain the breach, this is relevant to a finding of good reasons: *R v Marston* per King CJ at [321]; *DPP v Cooke & Anor* at [34]. Hidden J also suggests that the subjective circumstances of the offender may affect an assessment of the seriousness of the offence constituting the breach: *DPP v Burrow* at [25].

#### 6. Impact of revocation

It is trite to observe that revocation of s 12 bonds will almost inevitably have dire consequences for an offender. *DPP v Cooke & Anor* is authority for the proposition that the consequences of revocation are not generally relevant to a finding of good reasons under s 98(3)(b).

However, there is persuasive authority that pre-dates *DPP v Cooke & Anor* which supports an alternative approach; that is, that the impact of revocation may be a relevant factor to take into account when the court exercises its jurisdiction under s 98(3)(b).

In *R v Marston* (1993) 60 SASR 320; BC9300249, the South Australian Court of Criminal Appeal considered a similar section to s 98(3). The offender had previously been sentenced to a term of imprisonment of 3 years with a non-parole period of 2



years for an offence of armed robbery. The sentence of imprisonment was suspended upon her entering into a good behaviour bond. Three months into the bond, Ms Marston stole two muffins and a butter knife. She was convicted of larceny which constituted a breach of the good behaviour bond.

King CJ delivered the principal judgment. The court focused its attention upon the circumstances of the breach. It concluded that the breach offence was committed impulsively to satisfy the offender's hunger and that the offence was relatively minor. However, King CJ (at [322]; BC9300249 at pp4-5) did not limit himself to the circumstances of the behaviour giving rise to the breach but also placed great emphasis upon the "*marked disproportion between the seriousness of the breaching offence and the length of the sentence which is activated by the revocation of the suspension.*"

This aspect of *R v Marston* was seized upon in a single court decision in the NSW Supreme Court. Hidden J in *DPP v Burrow* at [25] suggested that "*(w)here the offence is relatively minor, it might be appropriate to weigh its gravity against the consequences of revocation of the bond, particularly where the suspended sentence is a long one.*"

Howie J in *DPP v Cooke & Anor* did not purport to settle the question definitively: at [20]. His Honour acknowledged the South Australian position yet sought to distinguish it in two ways:

Firstly a suspended sentence is more restricted in this State because it can be given for no more than two years. The sentence suspended in *Marston* was one of three years. Secondly, and perhaps more significantly, the impact of revocation of the bond can be ameliorated in this State by ordering that the sentence that is enlivened by the breach be served by periodic detention or home detention. There has also been a recent change to the legislation so that the non-parole period is fixed at the date of revocation and not when the sentence was passed but suspended: see s 12(3) and s 99(1)(c)(ii). These differences indicate to me that, assuming that a court could take into account

the impact of revocation of the bond, it would be a rare case indeed in which it would be appropriate to do so in this State.

In *R v Cooke; Cooke v R* [2007] NSWCCA 184 at [28] the Court of Criminal Appeal also declined to express a settled view on the approach taken in *R v Marston*. But the Court expressly endorsed Howie's J observations at [20]: *R v Cooke; Cooke v R* at [28].

Therefore, it would appear that the current state of the law gravitates strongly, although not conclusively, toward the approach espoused by Howie J. That is, it will be a rare case in which the impact of revoking a s 12 bond can be taken into account in determining whether "good reasons" exist.

All, however, is not lost. It is readily apparent that Howie's J approach is a reasoned conclusion deduced from a series of premises. The premises which support his Honour's conclusion that courts should not generally take into account the impact of revocation are:

1. A suspended sentence in NSW cannot exceed 2 years: s 12(1).
2. If the suspended sentence is revoked, the court can ameliorate the impact of revocation by ordering that the sentence be served by way of an Intensive Corrections Order (ICO) or a Home Detention Order (HDO): s 99(2).
3. The impact of revocation can also be ameliorated because the court sets the non-parole period after revocation and can vary the statutory ratio by making a finding of special circumstances: s 44(2).

It is respectfully suggested that his Honour's conclusion relies heavily upon the second premise; the proposition that the impact of revocation can be ameliorated by the imposition of custodial alternatives. Indeed, Howie J appears to concede that the second premise is more significant than the first: at [20]. The third premise is supplementary to the second; it focuses upon the capacity of the court to ameliorate

the impact of revocation. Yet the third premise only offers limited amelioration; the offender is still being sentenced to gaol after all.

The second premise proceeds on an assumption that custodial alternatives are available which can ameliorate the impact of revocation. The assumption may generally prove true but it is not infallible. On occasions, and through no fault of the offender, the offender may not be suitable for an ICO and/or HDO. Similarly, those custodial options may not be available in the circumstances of the matter.

For example an offender may suffer from a physical disability, mental illness or drug addiction which may preclude imposition of an ICO. It may often be useful to ask the court for a pre-sentence report (PSR) when a breach of bond under s 12 is admitted or proven. A PSR may reveal that your client is unsuitable for community service. Community service, of course, is an essential component of an ICO.

Similarly, a HDO is not available for certain offences such as assault occasioning actual bodily harm or stalk/intimidate charges contrary to s 13 of the *Crimes (Domestic and Personal Violence) Act 2007*: see s 76 of the *Crimes (Sentencing Procedure) Act 1999*. A HDO is also not available for offenders with a certain criminal history: s 77 of the *Crimes (Sentencing Procedure) Act 1999*. It is also worth noting that a HDO is unavailable where the term of imprisonment exceeds 18 months: s 6(1) of the *Crimes (Sentencing Procedure) Act 1999*. Community Corrections are also far less likely to assess a client suitable for a HDO where the client is homeless or has a history of illicit substance use or is mentally ill.

If ICO's and HDO's are unavailable as sentencing options or your client will not be suitable, the impact of revocation cannot be ameliorated through custodial alternatives. In such circumstances, it could be argued that the force of Howie's J conclusions at [20] are weakened and can be distinguished. Consequently, the court *should* be able to take into account as a relevant factor the impact upon the offender of revoking the bond when determining whether there are "good reasons" to excuse the failure to comply with the conditions of the bond: see *R v Michelin* [2008] NSWDC 204 at [6]; *DPP v Binge* [2010] NSWDC 288 at [34]; *DPP v Hillhouse* at [16]-[19].

This submission is arguably strengthened where the offence the subject of the s 12 bond would warrant a custodial alternative if the bond was revoked yet those custodial alternatives are unavailable: *DPP v Binge* at [33]; *DPP v Hillhouse* at [19].

The court's inability to ameliorate the impact of revocation is exacerbated where the custodial alternatives are not available and the sentence of imprisonment is 6 months or less. If the court were to revoke the suspended sentence in such a case it could not set a non-parole period: s 46. Yet the subjective features of the offender are only relevant post-revocation; i.e. their relevance is limited to the determination of how the term of imprisonment should be served and the setting of a non-parole period: *DPP v Cooke & Anor* at [34]. Where custodial alternatives are unavailable and the length of the suspended sentence precludes the setting of a non-parole period, the offender's subjective factors cannot be taken into account at any stage of the sentencing exercise: see the analogous circumstances in *R v Michelin* at [6]. This would buttress the submission that the impact of revocation upon the offender should be taken into account; otherwise the offender's subjective factors are deprived of consideration: *R v Michelin* at [6]; *R v King*, NSWLC (20 January 2014) per Heilpern LCM at [28]-[33].

There are several published District Court decisions and one Local Court decision where the sentencing Judge or Magistrate has distinguished *DPP v Cooke & Anor* and taken into account the impact of revocation in the assessment of "good reasons": *R v Michelin* [2008] NSWDC 204 at [6]; *DPP v Binge* [2010] NSWDC 288 at [34]; *DPP v Hillhouse* at [16]-[19]; *R v King*, NSWLC (20 January 2014) per Heilpern LCM; see also *R v Bell* [2014] NSWDC 299 at [40]-[43].

In *R v Michelin* [2008] NSWDC 204, the offender came before Cogswell DCJ for sentence. The offender committed a supply prohibited drug offence which was a breach of a bond under s 12 imposed for a driving offence. In accordance with *DPP v Cooke & Anor*, his Honour dealt firstly with the breach proceedings. Neither periodic detention nor home detention was available. The suspended sentence predated the legislative amendments referred to in Howie's J observations at [20]; the non-parole period was set at the time the suspended sentence was imposed.

The court accepted the submission that the impact of revocation could not be ameliorated. Cogswell DCJ found “good reasons” and took no action on the breach of the bond. In doing so, his Honour took into account the powerful subjective factors of the offender and concluded that full-time imprisonment would reverse a steady process of rehabilitation: at [7]

In *DPP v Binge* [2010] NSWDC 288, Nicholson DCJ took into account the impact of revocation and found “good reasons” where weekend detention and home detention were unavailable to ameliorate the impact of revocation of the suspended sentence. His Honour concluded that “(f)ull time incarceration is counter productive to rehabilitation.” Importantly, in concluding that it was appropriate to take into account the impact of revocation, his Honour highlighted the unavailability of periodic detention because the offender lived in a rural area. His Honour stressed the importance of the doctrine that all are equal before the law and refused to entrench “geographical discrimination.”

*DPP v Binge* is particularly useful for two reasons:

- Unlike *R v Michelin*, it was open to the court to set a non-parole period to ameliorate, in part, the impact of revocation. However, Nicholson DCJ concluded that the adverse consequences of the offender serving any period of full-time custody outweighed the public interest in revoking the bond: see [37].
- His Honour’s observations regarding “geographical discrimination” are capable of application to other forms of “discrimination”; for example, to the offender deemed unsuitable for an ICO or HDO because of her homelessness or mental illness.

## 7. Appropriateness of the original suspended sentence

The court exercising its jurisdiction under s 98(3) is not sitting as a court of review or appeal: *DPP v Cooke & Anor* at [31]. The original decision suspending the sentence

or imposing a particular term of imprisonment is not relevant to a finding of "good reasons." The court presiding over the breach proceeding proceeds on the basis that the suspended sentence was properly imposed: *DPP v Binge* at [17]. Therefore, it is crucial to appeal against suspended sentences where the sentence appears excessive on its face.

#### 8. Possible penalty for the breach must be ignored

The court cannot have regard to the severity of the penalty to be imposed for the breach offence in determining whether there are "good reasons" for excusing the offender's failure to comply with the conditions of the bond: *DPP v Burrow* at [26]; *DPP v Cooke & Anor* at [26]. This of course is not the same as considering the seriousness of the breach: *DPP v Cook & Anor* at [26].

#### 9. "Good reasons"

Sometimes prosecutors and judicial officers will forcefully resist a submission that s 99(3)(b) is satisfied on the basis that the circumstances giving rise to the breach must be sufficiently "special" or "exceptional" to excuse the conduct. This of course is not the test; the offender must only demonstrate "good reasons". Terms such as "exceptional" and "special" are of common usage in the criminal law. If the legislature intended to postulate a higher standard, it would be reflected in the text of the statutory provision. These observations may appear trite. However, it is not uncommon to appear before a court which misstates the statutory requirement. When confronted with such a scenario, the language of the statute is the most effective response.

#### 10. Different offence

If the breach offence is of a different kind to the offence the subject of the suspended sentence this will not on its own constitute good reasons: see the discussion in *DPP v Burrow* at [13]-[15].

### ***What happens next?***

If the court is satisfied that the offender has discharged the onus under s 98(3), the court should indicate whether the failure to comply with the conditions of the bond was “trivial in nature” or whether there are “good reasons” to excuse the offender's failure to comply with the conditions of the bond. The court returns to s 98(2) and determines whether it should take no action or vary the conditions of the bond.

If the court excuses the breach of the bond, defence practitioners should ensure that the Magistrate or Judge:

- Makes a finding under s 93(3)(a) or (b), and;
- Provides reasons which address the requirements of those subsections.

A failure to do so may provide grounds for the prosecution to seek relief in the Supreme Court: see, for example, *DPP v Nouata & Ors* [2009] NSWSC 72.

If the court is not satisfied that the exceptions under s 98(3) are met, the court formally revokes the bond and the provisions of s 99 are activated.

## **CONSEQUENCES OF REVOKING A S 12 BOND**

### ***The Legislation***

Section 99 reads as follows:

(1) If a court revokes a good behaviour bond:

(a) in the case of a bond referred to in section 9, it may re-sentence the offender for the offence to which the bond relates, or

(b) in the case of a bond referred to in section 10, it may convict and sentence the offender for the offence to which the bond relates, or

(c) in the case of a bond referred to in section 12:

(i) the order under section 12 (1) (a) ceases to have effect in relation to the sentence of imprisonment suspended by the order, and

(ii) Part 4 applies to the sentence, as if the sentence were being imposed by the court following revocation of the good behaviour bond, and section 24 applies in relation to the setting of a non-parole period under that Part.

(2) Subject to Parts 5 and 6, a court may, on revoking a good behaviour bond referred to in section 12, make an order directing that the sentence of imprisonment to which the bond relates is to be served by way of an intensive correction order or home detention.

(3) An order made under subsection (2) is taken to be a home detention order made under section 6 or an intensive correction order made under section 7, as the case requires.

(4) This Act applies to the sentencing or re-sentencing of an offender under this section in the same way as it applies to the sentencing of an offender on a conviction.

(5) An offender who under this section is sentenced by a court for an offence has the same rights of appeal as the offender would have had if the offender had been sentenced by that court on being convicted of the offence.

The sentence of imprisonment commences on the date the s 12 bond is revoked: s 99(1)(i). The offender is neither sentenced nor re-sentenced for the offence to which the bond relates: *R v Tolley* [2004] NSWCCA 165 at [29]. The only orders the court can make under s 99 is whether the sentence of imprisonment should be served by way of an ICO or HDO [s 99(2) & s 99(3)], and the considerations mandated in Part 4 and s 24 [s 99(1)(ii)]: see *R v Tolley* at [30]. The court, therefore, cannot impose another suspended sentence for the offence which was the subject of the s 12 bond. Furthermore, s 12(2) constitutes a legislative bar to the imposition of a further suspended sentence for the offence giving rise to the breach.

Part 4 provides legislative guidance with respect to, amongst other things, the setting of a non-parole period; the commencement date of the sentence; the ratio between



the non-parole period and the total sentence, and; whether sentences of imprisonment should be served consecutively. Relevantly, s 24 requires a sentencing court to take into account any time for which the offender has been held in custody in relation to the offence; the fact that the offender has been subject to a good behaviour bond, and; anything done by the offender in compliance with the offender's obligations under the bond. It is suggested that the length of compliance with the conditions of the bond would be a relevant factor under s 24 to the limited sentencing exercise under s 99.

### ***Custodial Alternatives***

The importance of s 99(2) should not be understated. In *Lambert v R* [2015] NSWCCA 22, the appellant had initially been sentenced to a term of imprisonment of 2 years for an offence of supply prohibited drug. The sentence was suspended pursuant to s 12 upon the offender entering into a good behaviour bond. The appellant breached the s 12 bond by committing an offence (possession of a prescribed restricted substance, namely Xanax) and failing to comply with Community Corrections supervision.

At first instance in the District Court, the appellant's lawyer conceded that the bond must be revoked; did not address the possibility of custodial alternatives pursuant to s 99(2), and; urged the court to find special circumstances. The primary Judge revoked the bond; imposed a full-time term of imprisonment, and; declined to find special circumstances. The primary judge did not consider the availability or suitability of custodial alternatives under s 99(2).

Simpson J, (as her Honour then was) with Ward JA and Davies J agreeing, said that the failure to advert to the possibility of imposing an ICO constituted error and that the sentencing discretion miscarried as a result: at [46]. Her Honour observed at [46]:

- Not every case will mandate consideration of s 99(2).

- But if an ICO is a realistic sentencing outcome, which it was in the appellant's case, the court should advert to the appropriateness of this sentencing option.
- The appellant's lawyer at first instance did not offer the assistance to the primary judge "that was due to him". But Simpson J did note that the appellant's instructions to her lawyer were unknown.

### ***Pre-sentence custody***

A suspended sentence cannot be backdated when it is imposed: *Pulitano v R* [2010] NSWCCA 45 at [9]. Therefore, upon revocation an issue is enlivened with respect to credit for pre-sentence custody. In *Pulitano v R* at [9], the court suggested that pre-sentence custody can be taken into account in two ways:

1. At the time the s 12 bond is imposed: by reducing the sentence (which also includes the manner in which the sentence is to be served), or;
2. After the bond is revoked: by backdating the sentence of imprisonment.

It appears that the preferred approach is to back-date the sentence: *White v R* [2009] NSWCCA 118 at [11]. However, there are a number of situations in which it would be inappropriate to adopt the backdating approach: see *White v R* at [12].

In *White v R*, the initial sentence proceedings occurred before English DCJ. The offender had served 2 months in pre-sentence custody. Counsel for the offender during the sentence proceedings highlighted the period of pre-sentence custody. Counsel appeared to do so in the context of urging for suspension of the sentence of imprisonment. English DCJ appeared to consider the issue of pre-sentence custody very briefly, noting that the offender "*did spend two months in custody and no doubt received a short, sharp shock as a result.*" Her Honour imposed a term of imprisonment of 18 months and suspended the execution of the sentence pursuant to s 12.

The offender failed to comply with the conditions of the bond. The breach proceedings were heard before Hock DCJ. The s 12 bond was revoked. Her Honour

ordered the sentence to be served by way of full-time custody. Her Honour concluded that English DCJ had already taken into account pre-sentence custody in suspending the sentence of imprisonment. The sentence of imprisonment was therefore not backdated and commenced from the date of revocation.

The offender appealed to the NSWCCA on the basis that either English DCJ had erred in failing to demonstrably take into account the pre-sentence custody or that Hock DCJ erred by failing to back-date the sentence after revoking the bond. Hulme J (with Howie and Grove J agreeing) dismissed the appeal. The submission that English DCJ did not “demonstrably take into account” the pre-sentence custody was rejected. His Honour surmised that “(t)he conclusion is inescapable, it seems to me, that the issue of pre-sentence custody was very clearly in her Honour’s mind and she gave the applicant credit for it by acceding to the submission that had been made by counsel on his behalf.”

### ***Totality***

The principle of totality applies where the breach of the suspended sentence is also an offence: *DPP v Cooke & Anor* at [28]; *Edwards v R* [2009] NSWCCA at [15]-[17].

In *R v MAK* (2005) 155 A Crim R 252 at [112], the CCA observed that a court applying the totality principle must not appear to offer an offender a discount for committing multiple offences. These observations are particularly pertinent where an offender faces sentencing for an offence previously subject to a s 12 bond and the breach offence: *Edwards v R* at [17]. The policy consideration that courts must vigilantly ensure that suspended sentences are not brought into disrepute endures when the court turns to questions of accumulation, concurrency and totality: *Edwards v R* at [15-17]; *R v Dinh* [2010] NSWCCA 74 at [83-84] and [91-92].

### **Appeals**

In the recent past, appeal rights did not exist from an order revoking a s 12 bond and any orders flowing from revocation: see *Barrett v DPP* [2006] NSWCCA 210 at [35] – [36]. However, the position was remedied through statutory amendments in 2006.

Any person who has been sentenced by the Local Court may appeal against the sentence: s 11(1) *Crimes (Appeal and Review) Act 2001*. The definition of “sentence” under the Act includes “any order made by the Local Court revoking a good behaviour bond and any order made as a consequence of the revocation of the good behaviour bond.”

## **Conclusion**

Appearing as the defence practitioner in revocation proceedings relating to s 12 bonds is challenging. The state of the case law is not favourable. The stakes are high for our clients. It is hoped that this paper might assist practitioners to formulate arguments resisting revocation and provide some guidance in the event that the court revokes the bond.

Any feedback, comments or questions about the paper are very much welcomed. I can be contacted by phone on (02) 9213 5213 or by email - [Riyad.El-Choufani@legalaid.nsw.gov.au](mailto:Riyad.El-Choufani@legalaid.nsw.gov.au).

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