



THE COURT OF APPEAL

CIVIL

[2024 No. 37]

[2024 No. 38]

[2024 No. 44]

The President

Neutral Citation Number [2024] IECA 139

McCarthy J.

Ni Raifeartaigh J.

BETWEEN

MICHAEL ANDRECUT

APPLICANT

AND

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

(DPP)

RESPONDENT

DAVID AMAH

APPLICANT

AND

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

(DPP)

RESPONDENT

N.M. (A MINOR)

APPLICANT

AND

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

(DPP)

RESPONDENT

JUDGMENT of the Court delivered on the 7th day of May 2024 by Birmingham P.

Introduction

1. Before the Court are three linked appeals against the refusal of bail by the High Court. In two cases, those of Mr. Michael Andrecut and Mr. David Amah, the decision refusing bail was given on 17th January 2024, and in each of these two cases, the refusal of bail was by reference to traditional *O'Callaghan (People (Attorney General) v. O' Callaghan* [1966] IR 501) grounds, and also by reference to s. 2 of the Bail Act 1997, as amended (the “1997 Act”). In the case of the third named applicant, Mr. NM, a minor, refusal of bail was delivered on 24th January 2024, and on this occasion, refusal was by reference to s. 2 of the 1997 Act only.

Background

2. The background to the fact that each of the three applicants has been charged with the murder of Mr. Tristan Sherry is to be found in events that occurred at Browne’s Steakhouse, Blanchardstown, in Dublin on 24th December 2023.

3. On that occasion, there was a large group of people gathered together to dine, occupying several tables in the restaurant. Each of the three applicants for bail was among that group. At approximately 8.04pm, two gunmen entered the restaurant, and they opened fire on a male who was in this group, this being Mr. Jason Hennessy Snr. One of the gunmen fled the scene almost immediately, but the other, Mr. Sherry, was grabbed by Mr. Hennessy Snr., who seems to have been the intended victim of the shooting, and both individuals fell to the ground. The firearm that had been in the possession of Mr. Sherry when he entered the restaurant, fell to the floor. One of the group of diners took possession of the firearm and it was removed from the restaurant. After Mr. Sherry fell to the floor, he was attacked by a number of persons who had been present. Fatal injuries were inflicted upon Mr. Sherry. The conclusion of the pathologist was that the cause of death was blunt force trauma to the head.

4. Unusually, the entire incident was captured on CCTV. This footage was viewed by the High Court judge in the course of the bail applications and was viewed by the members of this Court in the course of the appeal hearing. The quality of the CCTV footage might be described as good, as distinct from great or exceptional. However, when we viewed it a number of times, with the ability to pause and replay, the actions of those involved in the incident are clearly visible. What we set out here is drawn from the submissions on behalf of the Director. We have no reason to doubt that they accurately record what can be viewed on the footage with repeated viewing. The submissions of the Director identify the following interaction by the applicant for bail, Mr. Andrecut, with the deceased, Mr. Sherry.

Mr. Andrecut

5. At 8.13pm, Mr. Sherry arrives in the vicinity of the table where Mr. Andrecut is sitting. He is tackled to the ground by Mr. Hennessy Snr. It is recorded that at 8.13.16pm, Mr. Andrecut stamps on Mr. Sherry's head/body. Six strikes with the right leg are recorded. At 8.14.05pm, it is recorded that Mr. Andrecut picks up a glass from the table, and then there is one downward strike on Mr. Sherry with the glass. At 8.14.46pm, one stamp on Mr. Sherry is recorded. At 8.15.57pm, one kick to the body of Mr. Sherry is recorded. It is noted Mr. Andrecut walks to a table and takes his phone from his jacket before putting his jacket back down. At 8.16.29pm, it is recorded that there are 11 kicks/stamps on the head of Mr. Sherry, and at this point, Mr. Andrecut is holding a sharp object. It is noted that at 8.16.30pm, Mr. Andrecut picks up a black bar, and with it, delivers 16 strikes to the head of Mr. Sherry. At 8.16.51pm, it is recorded that there are two kicks to the head of Mr. Sherry, that Mr. Andrecut takes a step back from the body. At 8.17.03pm, there are three strikes to the head of Mr. Sherry with a bar. At 8.17.04pm, it is recorded that Mr. Andrecut picks up a chair, and with the chair, delivers six strikes on the head of Mr. Sherry, then grabbing his jacket to leave. At 8.17.28pm, Mr. Andrecut is recorded walking away from Mr. Sherry. At

8.17.32pm, Mr. Andrecut returns to Mr. Sherry and delivers three kicks to the head. At 8.17.41pm, Mr. Andrecut is recorded as walking away from Mr. Sherry. At 8.18.18pm, Mr. Andrecut returns to Mr. Sherry and delivers one kick to the head, while recording Mr. Sherry's situation on a mobile phone. Mr. Andrecut then leaves the scene. At 8.18.48pm, Mr. Andrecut returns and delivers two kicks to the head of Mr. Sherry.

Mr. Amah

6. In the case of Mr. Amah, the available CCTV footage shows him approaching the scuffle taking place on the ground where Mr. Sherry was. At 8.13.43pm, he is seen to stamp on Mr. Sherry on his body. At 8.13.50pm, he is seen stamping again. At 8.13.15pm, Mr. Amah is crouched low at the head area of Mr. Sherry and movements consistent with punches can be seen, but the number cannot be determined. At 8.14.14pm, Mr. Amah can be seen stamping down twice and kicking Mr. Sherry's head area. At 8.14.20pm, Mr. Amah can be seen crouching low by Mr. Sherry and appears to be grabbing and shaking him. At 8.14.32pm, Mr. Amah is handed an object, which may or may not be a knife, and delivers two or three strikes. At 8.15.40pm, shortly after Mr. Hennessy Snr. has been removed from the restaurant, Mr. Amah is shown crouching low to Mr. Sherry and then shown stamping/kicking Mr. Sherry on two occasions in the head/body area. At 8.16.05pm, Mr. Amah is shown stamping/kicking Mr. Sherry in the head area and there is also a possible punch. At 8.16.15pm, Mr. Amah kicks Mr. Sherry two times to the head area. At 8.16.32pm, Mr. Amah is seen picking up a chair and striking Mr. Sherry twice with the chair to the body. At 8.17.03pm, Mr. Amah is shown videorecording Mr. Sherry, and kicks him once in his body.

Mr. NM

7. The situation of Mr. NM, a minor, is somewhat different. In his case, what emerges is that, following the entry of the gunmen into the restaurant, Mr. NM jumped from his seat and

ran to the bathroom area. He entered the male toilets and stayed there for approximately one minute. He then exited the bathroom and attempted to exit the premises *via* an emergency exit door, which he was unable to open. He then returned to the male toilets and remained there for a further minute. During this time, Mr. Sherry was being attacked and beaten by people in the restaurant.

8. After approximately two minutes in the bathroom, matters of significance which emerge from the CCTV are that at 8.15.30pm, Mr. NM stamps four times in the head area of Mr. Sherry. About five seconds later, he is seen picking up an item from a table. At 8.15.4pm, Mr. NM is seen delivering approximately 13 jabs to the body of Tristan Sherry in a stabbing motion, while delivering two or three kicks to the head area. At 8.15.45pm, the fact that there is an item in the right hand of Mr. NM can be seen. At 8.16.11pm, there are one or two jabs in a stabbing motion to the head area of Mr. Sherry. At 8.17.08pm, Mr. NM is seen picking up a chair and then hitting Mr. Sherry with that chair, striking his body and head area.

The Bail Application

9. All three applications for bail were opposed by the State on grounds both under *O'Callaghan* and s. 2 of the 1997 Act. In the case of Mr. Andrecut and Mr. Amah, evidence in opposition to bail was given by Detective Sergeant Mark Murphy, who indicated that he had a concern that if either man was granted bail, he would commit further serious offences. This was on the basis that it was the view of the Gardaí that the applicants for bail had murdered Mr. Sherry in order to avenge the shooting of Mr. Hennessy Snr. The subsequent death of Mr. Hennessy Snr. gave Gardaí cause to believe that the applicants would seek revenge for his murder. There was concern, in particular, in a situation where the second gunman had fled the scene of the shooting and was at large. Detective Sergeant Murphy's evidence was that the life of the second gunman would be in danger from the first and second

applicants if they were to be released. He pointed out that the firearms which had been brought to the scene had not been seized and he said the applicants might be in possession of information in relation to the whereabouts of the firearm which was removed from the venue.

10. So far as the objections under *O'Callaghan* are concerned, Detective Sergeant Murphy pointed out that Mr. Andrecut had a history of six previous convictions, which are summarised as follows:

Misuse of Drugs Act 1977, section 3, date of offence 29th April 2019, date of conviction 23rd November 2023.

Misuse of Drugs Act, sections 3 and 15, date of offence 10th November 2017, date of conviction 27th January 2022.

Criminal Justice (Theft and Fraud Offences) Act 2001, section 14 in two cases, date of offence in one case 15th November 2019 and in the other case 13th December 2019, date of conviction in both cases 27th January 2022.

Criminal Justice (Public Order) Act 1994, section 6, date of offence 15th September 2021, date of conviction 22nd May 2022.

The witness drew attention to the fact that a bench warrant had been issued in respect of Mr. Andrecut in 2018. Moreover, the Court was told that when Mr. Andrecut's house was searched on 28th December 2023, in advance of his arrest, the applicant's passport was located in a small, black satchel bag, which was on top of a dog cage located in the kitchen area of the house. The witness was of the view that the passport was being kept close to hand and that this founded a concern that Mr. Andrecut would not attend his trial. The witness also drew attention to the fact that the applicant had sought to be admitted to bail in order to attend the funeral of Mr. Hennessy Snr., and the desire to attend the funeral was put on the basis that Mr. Andrecut's biological father was not part of his life, and that Mr. Hennessy Snr. filled that role for him, and Mr. Andrecut hoped he could pay his respects at the funeral. The

Director's view was that this indicated the strength of allegiance Mr. Andrecut had to the deceased, Mr. Hennessy Snr., and it was said that, because of the strength of this allegiance, Mr. Andrecut would be motivated to retaliate and commit further serious offences should he be released on bail.

11. In the case of Mr. Amah, in relation to the *O'Callaghan* objections, the witness accepted that Mr. Amah had no previous convictions, nor had bench warrants been issued in respect of him, but the witness advanced his objections on the basis that the applicant had no fixed living arrangements, that he had a transient lifestyle of staying with various friends and family.

12. In the case of the first and second applicants, Mr. Andrecut and Mr. Amah, the judge ruled on the applications on 17th January 2024.

The Judge's Ruling

Mr. Andrecut

13. In ruling, the judge first dealt with the situation of Mr. Andrecut. The judge said he was charged with a very serious offence, and he had to take into account the evidence and submissions made in relation to the matters specified under s. 2 of the 1997 Act. He took into account the nature and degree of seriousness of the offence with which he had been charged, and the sentence likely to be imposed on conviction, which would be a mandatory sentence of life, and noted that what Mr. Andrecut was charged with was probably "the most serious offence in the criminal canon". The judge referred to the fact that Detective Sergeant Murphy, in evidence, had concerns on behalf of the prosecution that further serious offending, arising out of the circumstances disclosed by the evidence and the CCTV, would occur if bail was granted, and on that basis, had asked the Court to deny bail in order to avoid that outcome. The judge said he was satisfied that there was a significant degree of weight to

be attached to Detective Sergeant Murphy's apprehensions, arising out of both the evidence as it related to the offence as charged before the Court, but also the broader circumstances in which those offences took place. The judge said he was also required to consider the nature and strength of the evidence in support of the charge. It seemed to him that the issue in the case is not whether or not Mr. Andrecut participated in violent conduct on the occasion in question, but rather whether that violent conduct was legitimated by considerations of self-defence. This was apparent from the answers Mr. Andrecut gave when interviewed in relation to the matter, when he had referred to natural instincts and the dilemma of "fight or flight".

14. The judge said there were other matters of minor relevance in the context of Mr. Andrecut's application, elaborating that it was not entirely clear to the judge whether any of Mr. Andrecut's previous offences were committed while on bail, albeit he did have previous convictions, but they were not significant in nature or number in the current context. The judge said the matter fell to be decided by reference to subsections (a), (b) and (c) of sub-s. (2) of the 1997 Act, and he did take these matters into account. He said he wanted to make some brief comments on the nature and strength of the evidence in the case:

"I think that his assertion that this is a matter of natural instinct and fight or flight is very problematical in the light of the CCTV evidence in this case. I have, personally speaking, absolutely no sympathy for Mr Sherry and I doubt that very many people would in the circumstances that he provoked in this case. But the law does not approach cases of this kind on the basis of generalities. Every use of force to be legitimate must be based on honest and genuine apprehension of the need to use force and the use of force thereafter is conditioned by reasonableness and proportionality. The assertions about fight or flight are not, in my view, borne out by the CCTV in this case. What happened was that Mr Sherry was quickly brought to the ground by the late [Mr. Hennessy Snr.] and quickly separated from his firearm. That was the

situation that presented itself to Mr Andrecut when he emerged from the nearby seating. At no point could it ever be said that he was confronted by a man actively waving a firearm. It appears to me that the firearm fell on the ground, was quickly removed. Now, I don't know whether he actually saw that or not, but it seems to me that he was certainly lined up in that direction at the relevant part of the CCTV. But whether he did see it or not, he could never have seen Mr Sherry in possession of a firearm, because he wasn't ever in possession of a firearm.

...

The statement about natural instinct is even more worrying, because what the CCTV reveals about Mr Andrecut's natural instincts would be very, very worrying indeed in the context of the matters that I have to take into account under 1 section 2 of the [1997 Act]. What happens here is that Mr Andrecut, in my view -- perhaps some people would say understandably, I make no comment on that -- he engages in a very clear act of retribution and revenge. He comes back again and again armed in different ways, using his feet. Ultimately, it seems to me, he has to be cajoled to leave the scene. His last act indeed is to film the deceased lying on the ground. It's entirely clear to me that this was a vicious assault carried out on somebody who, for the most part, was disarmed and disabled from an early stage of these events. And the fact that Mr. Andrecut came back time after time, again and again, to mete out extreme violence to the person of Mr Sherry shows that he didn't feel there was any threat. Any threat had long since been dissipated."

The judge said there was strong evidence in support of the idea that there should be a conviction for murder in the case, however, there was a "landing strip" available to a jury who might take the view that Mr. Andrecut had used excessive force in self-defence. If that view was taken, it would entitle the applicant to a manslaughter verdict, but even in those

circumstances, a significant pre-mitigation headline sentence would be called for. The judge felt the scope for a complete acquittal, in the circumstances disclosed by CCTV, was “narrowed to non-existent”.

15. The judge said at an early stage of the transaction, there might well be an argument for saying that lethal force in response was justified, however, that moment passed quickly, and what Mr. Andrecut was seen doing was in no way consistent with any reasonable argument of self-defence. He commented, “[t]his was revenge retribution pure and simple”. It revealed a natural disposition which was violent and uncontrolled, and therefore was a matter the judge was entitled to take into account, having taken into account the matters at s. 2 sub-ss. (2)(a), (b) and (c) of the 1997 Act, and which he surmised as, “... the nature and likelihood of any danger to the life and personal safety of any person or danger in the community that may be presented by the release of a person charged with an offence punishable by a term of 10 years or a more severe penalty.” He said he was satisfied that the release of Mr. Andrecut in the circumstances would be reckless and irresponsible and he was not in the habit of engaging in reckless and irresponsible acts.

16. The judge stated that, in his view, the refusal of an application for bail was reasonably necessary in the case of Mr. Andrecut in order to prevent the commission of further serious offences by the accused, and he stated that the fears expressed by Detective Sergeant Murphy in that respect, in the circumstances arising from what was seen on the CCTV were, in his view, entirely justified, and the judge saw this as a textbook case for the application of s. 2 of the 1997 Act, and on that basis, he refused bail.

17. The judge then said, for the sake of completeness, he was also refusing bail on the basis of the *O’Callaghan* rules in the case of Mr. Andrecut. The judge did not believe there was any accident or carelessness about the positioning of the passport. He was satisfied that there would be a significant incentive for Mr. Andrecut to avoid the consequences which

were now likely to follow, and the finding of the passport in the circumstances in which it was found would support that notion in this case. The judge said he had no doubt that in the particular circumstances of the case, an *O'Callaghan* refusal was also justified. He went on to say that nothing he had heard in terms of proposed terms or conditions would allay any of his concerns.

Mr. Amah

18. The judge then turned to the application by Mr. Amah. The judge said he had to have regard to the same issues, these being the nature and degree of seriousness of the offence with which Mr. Amah was charged, the nature and degree of what is apprehended should he be at liberty, and the nature and strength of the evidence in support of the charge. The judge referred to Mr. Amah as a “violent and volatile person who is not subject to any restraint or control”, adding that his violent and volatile nature was demonstrated by his actions on the CCTV footage. The judge pointed out the fact that he was legally a child, by a few days, at the time, but said that was where the applicability of the word ends. He referred to the fact that Mr. Amah was an “imposing physical specimen” and “nothing about his behaviour or conduct on the CCTV suggests any childlike nature or childishness”. He said that, on the contrary, Mr. Amah drove a reasonably fancy car and interacted in an adult way with those around him. The judge said the plea based on age was very limited. The judge said:

“He too has chosen to reveal his nature and, as I pointed out yesterday, when somebody reveals their nature, you ignore that at your peril. And I’m not going to put the rest of the community into the kind of peril that is -- would be involved by his release back into the community any more than that of Mr Andrecut. So, having taken the same matters into account and taken the additional matter as to community safety that I’m entitled to take into consideration in these particular circumstances, I come to the same conclusion in relation to section 2 [of the 1997 Act]. Mr Amah is a person of

considerable physical bulk and, in my view, he repeatedly came back time and again in order to place his bulk directly and violently on the head of the individual on the ground. That's what the CCTV shows and that's what I'm being asked to release back into the community. There are no terms that address my concerns as to how his nature is to be controlled in the circumstances now presenting, so I refuse in his case also on the basis of section 2 [of the 1997 Act] for the same reasons."

19. Turning to the *O'Callaghan* objections, the judge said that the idea that Mr. Amah would be released back to the address suggested was "equally delusional", along with the idea that he would be going off with the permission of this Court to funerals in these circumstances. The judge said he could not see what kind of address, even if he was simply dealing with the *O'Callaghan* objection, could be produced so as to allay the concerns that would naturally arise for any place this individual might be in the circumstances in which he has now placed himself. The judge concluded by refusing bail, in Mr. Amah's case, on both grounds, also.

Mr. NM

20. The application by Mr. NM came before the Court approximately a week later, on 23rd January 2024. It was dealt with by the same judge who had heard the earlier applications. On this occasion, evidence in opposition to the bail application was given by Garda Tom McCarrick, who explained that he was opposing bail both on s. 2 of the 1997 Act grounds, and, under *O'Callaghan*, on the basis of a concern that the applicant would not attend for trial if granted bail. So far as the s. 2 objection is concerned, he stated it was clear, in his view, that Mr. NM murdered Mr. Sherry in order to avenge and revenge the shooting of Mr. Hennessy Snr. Garda McCarrick said that in circumstances where Mr. Hennessy Snr. died on 4th January, he believed Mr. NM would seek revenge for his death. The second gunman was still at large, and the witness felt that the life of the second gunman was in danger. The Garda

commented that he believed “the level of violence displayed by NM in the CCTV footage shows that he is more than capable of engaging in such violence again and is therefore a danger to the community”. The Garda referred to the fact that one of the guns involved in the incident is still outstanding, at large in the community. Dealing with his concerns about the fact that the applicant would not attend for trial, the witness said the applicant was an Irish national whose parents were from the Democratic Republic of the Congo (DRC). He said he was aware that Mr. NM had previously visited the DRC and did have family connections there. This caused the judge to say, “[w]ell, his parents come from there; it wouldn’t be surprising that he has family connections. I don’t know if that’s the biggest point in the world”.

21. In the course of exchanges between counsel for Mr. NM and the judge, counsel suggested that the State would have to acknowledge, to some degree, that this was a case where there was an unusual and high level of provocation involved. The judge initially responded by saying, “[n]ot provocation in the legal sense, in the ordinary sense of the word, yes. But not provocation -- ... -- that would afford a defence to anyone.” The judge said that provocation would result in the applicant getting a manslaughter verdict and that a manslaughter verdict would have a headline sentence of somewhere around 15 years for this kind of activity.

22. During the course of the bail hearing, the mother of the applicant was called to give evidence. She explained that her son would be doing the Leaving Certificate mock exams in March and the actual exams in June. Reference was made to the fact that it was proposed he would engage in after-school study. This led to an intervention from the judge to ask whether it was seriously suggested that the boy would be going in and out of school and after-school study. He asked, rhetorically:

“[a]re you asking this court to consider that risk on behalf of all the other children in the school? Is he not as likely to be a lightning rod for trouble as much as the rest of them?

...

You’re asking me to permit liberty under a set of conditions which has him wandering in and out of classrooms where there’s other children[?]”

Counsel for the Director drew the Court’s attention to sub-s. (2) (iii) of s. 2 of the 1997 Act which, she said, allowed the Court to take into consideration the nature and likelihood of any danger to the life or personal safety of any person or danger to the community that may be presented by the release of Mr. NM. Counsel for the applicant said, in his experience, the Director had never taken the position that the Court ought to refuse bail to someone who might otherwise be admitted to bail in the context of sub-s (2) (iii) of the 1997 Act. In the course of further exchanges with counsel, the judge repeated concerns about the risks that would arise should the applicant be at liberty and re-enter his school. The judge’s concerns seemed to be that reprisals might be directed at Mr. NM, and that these reprisals would expose other members of the school community to grave risk.

23. Having taken time to consider the matter overnight, the judge reviewed the evidence, conducting an analysis as to the strength of the prosecution case. He felt that the prosecution case in relation to murder was a strong one and that there was little prospect of a complete acquittal. He addressed the possibility of a conviction for manslaughter, either on the basis of provocation, although, there, he saw difficulties for the defence in terms of the fact that Mr. NM had gone to the bathroom for a period, making it difficult to argue that there had been a sudden and complete loss of control, and also on the basis of excessive force self-defence. Again, he clearly had in mind his concerns for those who might be in the company of or in close proximity to Mr. NM if reprisals were directed against him. The judge said:

“So, this young man is, like others who elected to involved themselves in this situation, now a lightning rod for trouble and danger, and I make no apologies for saying so. And as I say, if anybody ultimately believes differently, I also raise my hat in their direction. That’s my assessment of the nature and gravity of what we’re dealing with here. And as I say, I am not prepared to say that there is no risk of anything arising from the circumstances of these deaths. Because ultimately, there were two deaths and we’ve had two funerals under the conditions recently in which they have taken place. That does not suggest to me that the garda authorities believe that this is a situation which is free from ongoing risk. And I think as I say, anybody who believed that, just looking at the CCTV, without knowing anything else, anybody who believed that would want to cop themselves on as being naïve in the extreme. This properly, I think, engages the matter set out in the legislation as to the dangers that arise by the release on bail of a person charged with an offence like this, arising in these circumstances. I am satisfied there are very substantial risks attendant to the community or to persons who might be in, wittingly or unwittingly, around this young man, who plainly is in serious danger as a result of all of this. And therefore, I am satisfied that that provision of the [1997 Act] is also engaged, having taken into account the nature and seriousness of the offence concerned and the strength of the evidence relating to it. I am overwhelmingly satisfied that a refusal of bail is necessary in this case, to avoid the substantial risk presented of further serious offending should a release take place. Whether [Mr. NM] realises or not, he is now committed in the context of whatever dispute and factions underlay these events, and serious consequences flow for him and for those around him in that particular context.”

24. The judge then addressed the question of whether there were any terms and conditions which would address the risks he had identified and that would allow him to vindicate the dual presumptions in favour of bail, the ordinary presumption of innocence and the particular presumption, because of the fact that Mr. NM was a minor, and concluded there were no such conditions. Of note is that the judge said he was going to confine the refusal to s. 2 of the 1997 Act because that provides a time limited situation whereby the continued detention is subject to review. He observed there might be more force in four months' time in saying there had been no other violent incidents. The judge added there was no *O'Callaghan* risk which could not be met. This was not the concern in this case; the concern was the risk and danger presented by release.

Discussion and Decision

Objection under s. 2 of the 1997 Act

25. Each of the three applicants for bail was refused bail on the grounds of s. 2 of the 1997 Act. It is clear the judge had concerns that all three applicants were at risk of reprisals, and if reprisals were to follow, there would be risks to the community, in particular, to those who might find themselves, wittingly or unwittingly, in close proximity to one or other of the applicants who might be at risk. We fully understand the reasoning of the judge. However, we cannot lose sight of the fact that s. 2(1) of the 1997 Act states:

“Where an application for bail is made by a person charged with a serious offence, a court may refuse the application if the court is satisfied that such refusal is reasonably considered necessary to prevent the commission of a serious offence **by that person.**”

[emphasis added]

The concerns about the commission of serious offences by those before the Courts is grounded on the belief that each of the applicants involved in the murder of Mr. Sherry were

acting in revenge for what had happened to Mr. Hennessy Snr. It seems to us that there are some difficulties with that theory. What is shown in the CCTV footage certainly supports the view that each of the three men were engaged in serious violence when the restaurant in which they were eating was entered by gunmen and an individual in their company was targeted, it may not go so far as to establish that their state of knowledge was such as to give rise to a desire for revenge, however, it seems to us to be quite a stretch to infer from the fact that individuals engaged in violence in the circumstances that the three applicants did, when an incident developed spontaneously, to go so far as to conclude that they will go out and plan and prepare to murder. While one has to have concerns that one or all of the applicants might engage in actions seeking to avenge the death of Mr. Hennessy Snr., it does not seem to us to reach the threshold of causing us to believe that refusal of bail is reasonably necessary to prevent the commission of a serious offence. In the circumstances, we would be prepared to consider bail, despite the objections under s. 2 of the 1997 Act. Insofar as the refusal of bail to Mr. NM was based on s. 2 of the 1997 Act only, this means we would be prepared to consider releasing Mr. NM on bail. However, if he were to be released, it would have to be on stringent conditions, which would have to address the concerns that remain: that the applicant might become involved in criminality in pursuit of revenge; and also to address the concerns that the applicant would be a flight risk, even if the risk is not at a level where it could be said that there were no terms or conditions which would dispel the anxieties that exist.

Objection under O'Callaghan

26. So far as the other two applicants are concerned, we take a different view. While the concerns about future offending by both applicants does not, in our view, meet the threshold to justify a refusal of bail on s. 2 grounds, the concerns in that regard are sufficiently strong that if bail was being considered, it would have to be on stringent conditions. What

distinguishes these cases from the situation of Mr. NM is that, in the case of the first and second applicants, bail was also refused on *O'Callaghan* grounds.

27. The assessment of the flight risk is informed by the fact that, unusually, the entire incident was caught on CCTV, from beginning to end. There can be no doubt about the seriousness of the incident. The charges each applicant faces are the most serious in the criminal calendar, bearing a mandatory sentence of life imprisonment. Based on the CCTV footage, it appears clear that, in each incidence, the prosecution's murder charge is a strong one. At trial, a jury would have the option of returning a verdict of manslaughter, and there are at least two routes to that verdict – provocation or excessive force self-defence. From a defence perspective, each route has considerable difficulties. A conviction for manslaughter would be expected to result in a significant sentence. Our assessment is that a complete acquittal would seem a remote prospect. What is more important, and this is one of the most significant aspects of the availability of the CCTV footage, is that each of the three applicants now know in full detail the case against them and must have an appreciation of just how serious their individual situations are, and the temptation to flee and avoid trial must be very great. So far as Mr. Andrecut is concerned, there is the fact of the passport being found in the bag in a dog cage in the kitchen. Notwithstanding arguments made by counsel on behalf of Mr. Andrecut, it seems to us that the judge was entitled to reach the conclusion he did in relation to the passport, that he did not believe there was any accident or carelessness about its positioning. It is also the case that both Mr. Andrecut and Mr. Amah have links to other countries. There is nothing unusual about that, and it is certainly not the case that because someone has links to another country, one cannot be granted bail, but it is a factor to be weighed in the balance.

28. Overall, we are of the view that the risk of flight is significant indeed and is not a risk which can be effectively addressed by admitting the applicants to bail and imposing rigorous terms and conditions.

29. For that reason, we would uphold the decision of the High Court to refuse bail to the first and second applicants on the *O'Callaghan* grounds.