



THE COURT OF APPEAL

CIVIL

[2024 No. 117 CA]

The President

Neutral Citation Number [2024] IECA 212

McCarthy J.

Kennedy J.

IN THE MATTER OF THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS (DPP)

RESPONDENT

AND

D

APPELLANT

JUDGMENT of the Court delivered on the 17th day of July 2024 by Birmingham P.

Introduction

1. The appellant faces charges of demanding money with menaces (contrary to s. 17 of the Criminal Justice (Public Order) Act 2001), money laundering (contrary to s. 7 of the Criminal Justice (Money Laundering & Terrorist Financing) Act 2010) and a charge of threatening to kill (contrary to s. 5 of the Non-Fatal Offences Against the Person Act 1997). He applied for bail in the District Court, and was refused, and then brought a bail application before the High Court. On 22nd March 2024, the High Court declined to admit him to bail, and from that decision, he has appealed to this Court.

Background

2. The background to the charges and to the application for bail and to this appeal is to be found in events alleged to have occurred in November 2021. A complaint was made to

Gardaí by a Mr. ON that two men had called to his house on 6th, 14th and 16th November 2021. The same two men were involved in each visit, and he describes them coming to the front door and refers to the fact that one of the men seemed to be in charge and had a Northern Irish accent. The other man had a Dublin accent. The Northern Irish man – allegedly the more threatening of the two – said it was better that he and his colleague were calling to the house and not “somebody else”. The man with the Northern Irish accent – the prosecution case is that this is the applicant for bail/appellant – allegedly made a demand for €60,000, and subsequently, Mr. ON received a phone call requesting €100,000. On 14th November, another visit is alleged to have took place involving the same two men. On this occasion, Mr. ON is said to have given them €41,000. As the men left, it is said they stated they would return in two days for more money. On 16th November, they returned, and on this occasion, Mr. ON is said to have given them €3,000 in cash, wrapped in a white plastic bag in €50 notes. Shortly thereafter, Gardaí stopped a car with two occupants. The car transpired to be registered to the appellant, who was driving the car. From the glove compartment opposite the front seat passenger, €3,000 in cash was taken, which was wrapped in a white plastic bag and was in €50 notes.

3. On 22nd November 2021, the appellant and a co-accused were arrested and detained in respect of the matter. On 31st December 2021, Mr. ON, accompanied by his son, called to a Garda station and purported to withdraw his complaint. I have not seen this statement, but it appears from the transcripts of the bail hearings that the statement does not say that the incidents which had been reported did not happen, and it does not say that money was not sought or handed over, though it does say that the injured party was not in fear and may have been confused.

4. In the High Court, bail was objected to, pursuant to s. 2 of the Bail Act 1997, as amended (the “Bail Act”). The objection was on the basis that the refusal of bail was

necessary to prevent the commission of further serious offences by the appellant, the serious offences apprehended being offences in the nature of assault, criminal damage, and threats to kill or cause serious injury directed at witnesses in the case. An issue which featured in the proceedings before the High Court, and to some extent, before this Court, was a contention on behalf of the appellant that the objection to bail was, in reality, on *O'Callaghan (People (Attorney General) v. O' Callaghan* [1966] IR 501) grounds, as distinct from grounds under s. 2 of the Bail Act. The distinction might appear to be a fine one, but it is said to be of practical significance as it goes to the burden and standard of proof. The application for bail in the High Court was an unusually protracted one, with hearings taking place on 17th and 19th January, 12th and 19th February, and 1st, 15th and 22nd March 2024.

5. By way of further background detail, it should be explained that the alleged injured party, the complainant, does not have any criminal record and was not known to Gardaí prior to these events. However, his son was the subject of a money laundering investigation, the suggestion being that as part of his money laundering activities, he had gambled, both online and in shops, to the tune of some €1.5m on behalf of others, and those others appeared to have come to the view that he had siphoned off some funds for himself.

Personal Circumstances of the Appellant

6. With regard to the background and personal circumstances of the appellant, the High Court was told that, since 1994, he had accumulated a total of 28 previous convictions, the bulk of which were road traffic related, but the most significant of which came from Northern Ireland. In 1994, he was convicted of common assault, and in 1996, convicted of an assault on a police officer. In 2013, he was convicted on two counts of possession of firearms in suspicious circumstances. In relation to these charges, the Court was initially told that they came about as a result of an operation by the PSNI in relation to dissident republican activity.

This led to an objection by counsel on behalf of the appellant based on an assertion that the statement was hearsay. However, the judge indicated that if there was objection to the admissibility of the statement, the matter would be dealt with by the prosecution being permitted to call a witness from the PSNI. The Court was told that the appellant ordinarily resides in Castleblaney and works, in what was described as a casual but fulltime basis, driving trucks. He lived with his wife and two children.

The Initial Bail Hearing

7. At various stages in the course of the bail hearing, there were exchanges between counsel for the appellant and the High Court judge, with the judge asking questions about the significance of what he described as an “about turn”, which was a shorthand reference to the fact that the alleged injured party had told Gardaí about the earlier visits in time, doing so on the night before the final visit, with the result that a surveillance operation was in place, resulting in the stopping of a car, which contained cash in a plastic bag, matching what had been handed over by the alleged injured party.

8. The about turn being a reference to the fact that the statement of evidence and statement of complaint originally made was then withdrawn.

9. At one point, counsel for the appellant suggested that there might be a “plethora of reasons” as to why a statement of withdrawal would be made. When the judge responded by asking “[w]ell, like what?”, counsel indicated that “[p]erhaps the individual has simply lost interest in the matter and perhaps they don’t want to be involved”. The judge said “if he said he had lost interest, he would have said that, is that what he said?”. Counsel submitted that there was nothing significant in the particular facts of the case to permit the Court to make the supposition that what is suggested by the Gardaí must have occurred. Counsel said that

what was there for the Court to consider was whether or not to refuse the application because it did not come up to standard.

10. At another point during the initial bail application, counsel focused on his contention that what was in issue was an apprehension or fear of intimidation of witnesses, and that, accordingly, objection should have been formulated under the *O'Callaghan* grounds. He said that if the fear of intimidation referred to intimidation of witnesses by means such as criminal damage, threats to kill and assaults, if that were permitted, every single bail application, where there were legitimate concerns of intimidation, could be converted to a s. 2 objection. At this point, the judge interjected to say:

“But not every bail application involves a situation where somebody has co-opted the assistance of the guards and then decides that after that assistance apparently has brought them some benefit, then decides, no, do you know what, I don't want assistance anymore, I've lost interest. That's not a feature of every bail application. . . . but the gardaí can believe whatever they like. What I'm concerned with is whether there's any objective basis for fears that are expressed. And in this case, what I would anticipate the prosecution will say is that there is such a basis because there's a basis for inferring that it's already happened.”

11. I think it is fair to summarise the exchanges, as occurred during that initial bail application, as tending to suggest that the judge was clearly of the view that intimidation had occurred, and was therefore concerned that further intimidation would occur.

12. At a particular stage, the bail application took a slightly unusual direction. This happened at a point where counsel on behalf of the appellant was submitting that whatever fears the Court might have would be allayed by the fact that members of the Gardaí would keep his client under constant surveillance if released on bail. Counsel submitted that daily or more frequent signing on conditions would be significant, and then referred to the fact that

there was an offer of an independent surety of €20,000. At that point, the judge immediately interjected to ask who was offering the surety and was told it was the applicant's mother-in-law. The judge asked whether that had been looked at and counsel for the Director said it was her understanding that the provenance of the money was not made known to Gardaí up to that point. Counsel for the appellant observed that it would be a matter which would arise after bail when an independent surety was approved. However, the judge said "[n]o, it's a matter for me. I'm not going to say, oh with surety to be approved. I want to know if a proposal that's being made to me is a genuine proposal, and that the money is genuine, not moved around". The judge made the point that the proposal in relation to an independent surety was being put as part of a package and that it was not indivisible. Of some note is the fact that, in exchanges between counsel for the co-accused and the judge, when counsel referred to the fact that, in the two years that had passed, there had been no indication of further intimidation, the judge referred to the fact that, during this period, a statement of complaint had been withdrawn, but matters had moved on, and it was now the situation that the Director was proceeding with the prosecution, notwithstanding the withdrawal. At trial, the alleged injured party had to be available for cross-examination if s. 16 of the Criminal Justice Act 2006 (the "2006 Act") was to be invoked, and he said that, in those circumstances, there had to be a concern about the alleged injured party appearing in Court.

The Bail Hearing on 19th January 2024

13. The judge took time to consider the matter, and when it next came before the Court, he addressed various matters set out in s. 2(2) of the Bail Act. He referenced the nature and degree of seriousness of the offence with which the appellant was charged and the sentence likely to be imposed on conviction. He saw the offence of demanding money with menaces, and related offences committed in the circumstances alleged, as serious, likely to attract a

significant sentence, and the sentence would be pitched at a level which would reflect the fact of relevant serious previous convictions. He referred to the nature and degree of seriousness of the offences apprehended, being offences involving threats to kill or cause serious injury, criminal damage, and offences involving assaults. He referred to the nature and strength of the evidence in support of the charge, including the fact that the complainant had contacted Gardaí while the offending was ongoing, with the result that when the final visit to the complainant was made and the final sum of money was handed over, there was a Garda surveillance operation in place, leading to the stopping of a car driven by the appellant, with the co-accused as the passenger, and from that car the sum of €3,000 in €50 notes was retrieved, bundled together and placed in a plastic bag. He referred to the relevant previous convictions. The judge again rehearsed the evidence in the case and what had been said by Sergeant Domhnall O'Connell in the course of his objection to bail and commented, "...that there was an established basis upon which Sergeant O'Connell should and indeed must fear that there is a prospect of further intimidation of the witness and further intimidation of the witness by means of scheduled type offenses..." He said there was no doubt in his mind about the realistic substance of the prosecution evidence in this case. He said, having taken all matters into account, there was no doubt in his mind that a refusal should reasonably be considered necessary in order to prevent the commission of serious offences by the appellant.

14. In my view, the judge's view that further intimidation was likely, intimidation already having taken place, was unimpeachable, and any other conclusion would fly in the face of reason.

The Appeal

15. In the course of the hearing of this appeal, counsel on behalf of the appellant referred to the cases of *DPP v. Mulvey* [2014] 1 IR 119 and *DPP v. McLoughlin* [2010] 1 IR 110, and

says the evidence of the cogency contemplated by those decisions is not present in the instant case. He says that perhaps the alleged injured party was persuaded to withdraw his complaint upon an intervention by his son. It may be noted that there was no such speculation suggested in the High Court, and insofar as the idea has been floated in this Court, it represents unsubstantiated speculation. It seems to me that the evidence in this case in support of a refusal of bail is unusually strong. There is the evidence of a succession of visits to the home of the alleged injured party, with money being demanded, and large sums handed over, of contact being made with Gardaí and advice and assistance being sought from them, of ongoing cooperation by the alleged injured party with Gardaí in terms of making bank account records and telephone records available, of Gardaí putting in place a surveillance operation and stopping a vehicle driven by the applicant in close proximity to the home of the alleged injured party, an intervention that was close, both in terms of time and place. Gardaí, conscious of the nature of the offence under investigation, took the precaution of having all their dealings with the injured party video recorded. The appellant and his co-accused were arrested, detained and questioned, and there followed what was described as the about turn on the part of the complainant, though it appears the withdrawal was not a total, clear and unequivocal one.

Discussion

16. For my part, had I been dealing with the matter at first instance, I would have been disposed to refuse bail on the basis that refusal was reasonably necessary to prevent the commission of further offences of the type described in order to intimidate witnesses. I would have been of that view, even though I would have had to give consideration to the fact that the object of intimidation had been in part achieved. However, I would have concluded that it had been only in part been achieved, and given the possibility – indeed, the very strong

probability – of the invocation of s. 16 of the 2006 Act, there was more to be done from the perspective of a would-be intimidator.

17. In the High Court, the judge, although firmly of the view that there was cogent evidence in relation to the fact of intimidation to that point and the likelihood of further intimidation in the future, was not content to refuse bail. Instead, he addressed his mind to the question of whether an independent surety in a significant amount could allay his concerns. That the judge was prepared to go down this route was much to his credit, and it must be said that his approach was very much in ease of the appellant. Insofar as he was attaching such significance to the potential ability of the surety to influence events, and for my part, I would have been slow to attach such significance, it was very understandable that he would have placed the emphasis he did on establishing the true independence of the surety, and establishing that if anyone was to suffer as a result of misconduct and due to a failure to comply with the conditions of bail by the appellant, the burden would actually fall on the person who had offered the surety.

18. The manner in which establishing the independence of the proposed surety was dealt with gave rise to a major issue in the course of this appeal. In the High Court, the State indicated that in order for them to be in a position to express a view in relation to the proposed independent surety, they would need access to the bank account and statements of the appellant and to the bank accounts and statements of the independent surety. However, when the matter had been adjourned, the appellant indicated that he would not disclose copies of his bank statement to the State but would deal with the matter by providing a financial statement pursuant to the terms of s. 1A of the Bail Act. This gave rise to an *impasse*. It is important to appreciate the circumstances in which the controversy about access to the bank accounts of the appellant has arisen. There was no suggestion that access was being sought by reference to any statutory power. Rather, a stage had been reached where the judge was

indicating that if he could be satisfied in relation to the position of the independent surety, then he might be prepared to admit the applicant to bail, notwithstanding his view that the evidence in the case had rebutted the presumptive entitlement to bail. It seems to me that, in those circumstances, it was very much within the prerogative of the judge to determine what would and what would not satisfy him. As he was placing the significance that he was on the independent surety, and I have already indicated that I would not have done so, it seems to me that the judge was justified in seeking clear information about the independent surety's financial position, and in particular, it was understandable that he would wish to satisfy himself, to the extent possible, that the independent surety was not being artificially financially supported and not rendered immune from suffering damage in the event of a failure on the part of the applicant for bail to adhere to bail conditions.

Parity with the Co-accused

19. In conclusion, I want to comment briefly on one other argument that has been advanced and on which emphasis was placed in the written submissions. While the judge refused bail to the appellant, he admitted the co-accused to bail, subject to strict conditions. He did so, notwithstanding the fact that the evidence against the co-accused was stronger than it was against the appellant. The co-accused had made certain admissions when interviewed, and indeed, had made admissions in the District Court when giving evidence, despite being advised by counsel for the Director and by the judge that he did not need to incriminate himself. It is suggested that the judge's ruling, which admitted to bail the person against whom there was the stronger case, but refused bail in the case of the appellant, where the prosecution case was less strong, was irrational and contrary to principle. I see little reality whatever in that argument. As the *O'Callaghan* case recognised, the strength of the prosecution case is a relevant consideration when considering bail, the argument being that where the prosecution case is a strong one, the incentive to flee may be increased. However,

the attempt to make what is in effect a parity argument ignores the fact that, even without the admissions, there was, as has already been referred to, strong evidence against both co-accused. That being so, I find it perfectly understandable that the judge would take the view that the manner in which the co-accused responded to the case against him – first by admissions in interview and then by admissions in open Court – put the judge in a position where he could conclude that this was not an accused who, having been suspected of involvement in serious criminality, would compound his involvement by becoming engaged in further offending. I see nothing illogical or irrational in the judge deciding that fairness required him to differentiate between the two co-accused.

Conclusion

20. Had I been dealing with this matter in the High Court, I would have refused bail to the appellant. In the circumstances, I am firmly of the view that this is a case where the appeal should be dismissed.