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THE COURT OF APPEAL

**Neutral Citation Number: [2020] IECA 85
[2020 No. 21]
[2020 No. 23]**

**The President
McCarthy J.
Kennedy J.**

BETWEEN

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

PATRICK CURTIS

APPELLANT

AND

THE PEOPLE AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

STEPHEN CURTIS

APPELLANT

**JUDGMENT (Ex tempore) of the Court delivered on the 3rd day of April 2020 by
Birmingham P**

1. Before the Court are two appeals from a decision of the High Court (Eagar J) of 2nd January 2020, refusing bail. The appeals are linked appeals, in the sense that they arise out of the same bail hearing in the High Court, and much of the evidence that was before the High Court was common to both appellants, who are brothers. The appeals have been heard together “on the papers”.

2. The appellants are charged with similar, though not identical offences. The appellant, Patrick Curtis, is charged as follows:

- (i) Directing the activities of a criminal organisation in the State, contrary to s. 71(a) of the Criminal Justice Act 2006 – maximum penalty life imprisonment.
- (ii) With knowledge of the existence of a criminal organisation, participated in activities intending to facilitate the commission of a serious offence by that criminal organisation or any of its members, to wit, the murder of Patrick Hutch, contrary to s. 72(1)(b)(ii) of the Criminal Justice Act 2006 – 15 years maximum sentence.
- (iii) With knowledge of the existence of a criminal organisation, participated in activities, being reckless as to whether such participation would facilitate the commission of a serious offence by that criminal organisation or any of its members, to wit, the murder of Patrick Hutch contrary to s. 72(1)(b)(ii) of the 2006 Act – 15 years maximum sentence.
- (iv) With knowledge of the existence of a criminal organisation, participated in activities intending to facilitate the commission of a serious offence by that criminal organisation or any of its members, to wit, the murder of a person unknown, contrary to s. 72(1)(a)(ii) of the 2006 Act – 15 years imprisonment maximum sentence.
- (v) With knowledge of the existence of a criminal organisation, participated in activities, being reckless as to whether such participation would facilitate the commission of a serious offence by that criminal organisation or any of its members, to wit, the murder of a person unknown, contrary to s. 72(1)(b)(ii) of the 2006 Act – 15 years imprisonment maximum sentence.

- (vi) Conspiracy with one or more of the following, to murder Patrick Hutch, contrary to s. 71 of the 2006 Act, as amended, Michael Burns, Mohammad Smew, Mark Kapper, Stephen Curtis, Ciaran O’Driscoll, Glen Thompson, Gary Thompson, Robert Browne – 10 years imprisonment maximum sentence.
- (vii) Conspiracy with one or more of the following in order to murder a person unknown contrary to s. 71 of the said Act, as amended, Michael Burns, Mohammad Smew, Mark Kapper, Stephen Curtis, Ciaran O’Driscoll, Glen Thompson, Gary Thompson, Robert Browne – 10 years imprisonment maximum sentence.

The other appellant in this case, Stephen Curtis, is charged with offences (ii) to (vii) above, but is not charged with (i), the offence of directing the activities of a criminal organisation, which carries the sentence of life imprisonment.

Background to the Investigation

3. The evidence on behalf of the State, objecting to bail, was given by Detective Garda Charles. He explained the prosecution arose from an intelligence-led operation by the Garda National Drugs and Organised Crime Bureau. The operation targeted an organised criminal gang involved in an ongoing feud, commonly referred to as the ‘Hutch/Kinahan Feud’. He referred to the fact that 15 people have been murdered since 24th September 2015 in relation to the feud, and that there had also been a number of attempted murders during that same period. He said that a criminal investigation had been underway since the beginning of February 2018 into the activities of a group involved in the conspiracy to murder a particular person on behalf of an organised crime group, the group being part of the wider Kinahan organised crime group. During February and March 2018, Gardaí deployed surveillance, and in particular, audio surveillance, on a number of vehicles. Surveillance was placed on a

number of persons associated with the conspiracy and this included surveillance on a particular motor vehicle which was, at the time, in the possession of a named individual, Michael Burns. Between 26th February 2018 and 10th March 2018, audio recordings from this vehicle established the appellants' and co-conspirators' involvement in the planning and preparation of the murder of Patrick Hutch Snr. There was also physical and audio surveillance which showed the conspirators meeting on a number of occasions. Following these physical meetings, the audio surveillance from the car showed conspirators actively planning the murder thereafter.

4. On the morning of 10th March 2018, Gardaí intervened. Three males were intercepted in the rear of a van in an underground carpark close to the home of the intended target, Patrick Hutch Snr. A number of firearms were recovered from the scene. These were: a 9mm Beretta 92S semiautomatic pistol, a 0.38 Special Revolver, a 9mm PM-63 RAK submachine gun, and a 9mm Makarov semiautomatic pistol, this last weapon was found in the driver's door of an Audi A6 vehicle in which the men had travelled. Each of the firearms was loaded. Three phones were recovered in the underground carpark where the intervention took place, at which point Gary Thompson, Glen Thompson, and Robert Browne were arrested. There was CCTV evidence establishing that the three phones in question had been purchased by the appellant, Stephen Curtis, from a particular premises on the evening of 8th March 2018. So far as the appellant, Patrick Curtis, is concerned, who faces the additional charge of directing the activities of a criminal organisation, the prosecution allege that this appellant played a leadership role in the planned assassination. They allege that he was providing instruction to other conspirators and that they were reporting back to him. He was observed meeting with Glen Thompson and Robert Browne, who were two of the three intercepted by Gardaí with loaded weapons two days prior to the intervention by Gardaí. There were many meetings involving those three captured by audio surveillance. Conversations took place between them

about the conspiracy to murder. The appellant controlled the finances, the prosecution will allege, and supplied money for the purchase of items. Lists were found at his home which supported this, dealing, *inter alia*, with ‘diesel’ and ‘phones’.

The Prosecution’s Objections to Bail

5. There was objection to bail on *O’Callaghan* grounds (see *The People (Attorney General) v. O’Callaghan* [1966] IR 501) and also by reference to s. 2 of the Bail Act 1997. There were two elements to the *O’Callaghan* grounds: that the appellants would flee and would not present themselves for trial, and secondly, a concern about interference with witnesses. The objection in relation to interference with witnesses was not upheld by the trial judge. However, he did uphold the first objection to bail on *O’Callaghan* grounds *i.e.* that the appellants were a flight risk, and also upheld the objection on the basis of s. 2 of the Bail Act 1997.

6. In resisting bail, the respondent points to the seriousness of the charges and the fact that they would, if a conviction results, likely result in a very significant sentence. The offences charged carry sentences ranging from life imprisonment for directing the activities of a criminal organisation, to 15 years in respect of the offences contrary to s. 72 of the 2006 Act, to ten years in respect of charges of conspiracy to murder. The respondent draws attention to a recent decision of this Court in *DPP v. Aylmer* (CoA, 10 March 2020) another case concerning the Hutch/Kinahan feud in which the accused plead guilty to an offence contrary to s.72 of the Criminal Justice Act 2006. The Director sought, successfully as it turns out, to review a sentence of the Special Criminal Court on grounds of undue leniency resulting in a net sentence of four years and nine months being imposed. This is said to be indicative that very significant sentences would likely be imposed on conviction. As to the strength of the case against the appellants, it is contended on behalf of the respondent that

both were effectively caught “red-handed”, given the extent of the surveillance and phone evidence as well as the contents of audio recordings. The respondent says that the seriousness of the charges, combined with the strength of the evidence, provides a strong incentive to plea. The State evidence at the hearing of the application for bail was that there was a capacity to flee on the part of the appellants. Detective Garda Charles pointed out that from his investigations into the Kinahan organised crime group, he was in a position to say that the group had an ability to obtain genuine Passports using fraudulent details, and that such Passports were readily available to members of the group. The group had the financial resources, as well as overseas properties, which would be available to persons fleeing, to make flight a reality. The appellant, Stephen Curtis, points out that the evidence stopped short of suggesting, still less, establishing that he was actually a member of the Kinahan crime group.

7. In relation to the objections under s. 2 of the Bail Act, the respondent suggested that the statutory criteria were met. It was pointed out that the alleged offences were committed in the course of an ongoing feud, which had already taken many lives, that Garda intervention had saved the life of the target of this particular conspiracy, but that the object of the conspiracy remained unachieved. As such, there was a risk that a further serious offence may be committed if the appellants were granted bail. The commission of further serious offences could only be avoided by the refusal of bail.

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Stephen Curtis

9. The appellant, Stephen Curtis, has raised the following issues by way of his Notice of Appeal and submissions:

- (i) The seriousness of the offence alleged, strength of the evidence and likely sentence.
- (ii) Flight risk, generally.
- (iii) **REDACTED**
- (iv) Access to money and false travel documents.
- (v) **REDACTED**
- (vi) Insufficiently distinguished from co-accused.
- (vii) The apprehended offence.
- (viii) Identifying evidence in support of the charge.
- (ix) **REDACTED**
- (x) **REDACTED**
- (xi) Section 2(a) relied on without specific opinion or belief.
- (xii) Failure to take into account his peripheral or secondary role.
- (xiii) Pre-trial custody.
- (xiv) Failure to give reasons.
- (xv) Failure to consider conditions.

So far as the question of the likelihood of the appellant seeking to evade justice is concerned, the seriousness of the charges, the strength of the case, and why it should be said that there is an incentive to flee is self-evident. **REDACTED** As to the contention that the judge failed to have regard to the fact that the allegations against him were less serious than those against his co-accused, and that the allegation was of him playing a lesser, logistical role, it does seem to me that the judge was fully *au fait* with the details of what was alleged against each appellant. While the allegations against each appellant were not identical, it is clear that the allegations against both accused, and specifically, against Stephen Curtis in this instance, were very serious indeed. The appellant describes the evidence to his alleged activities as being

“peripheral and secondary” and makes the point that the book of evidence, which was not available at the bail hearing, it had not been served at that stage, contains only sparse references to him. The case is to be distinguished from *DPP v. Aylmer*, in that, here, the alleged criminal conduct is placed fairly and squarely in the context of a conspiracy to murder. We find it had to see that the role alleged to have been played by Stephen Curtis, as described by Detective Garda Charles in his evidence, could ever really be described as “peripheral and secondary”.

10. As to the issue in relation to access to travel documents and phones, the appellant protests that the judge effectively was tempted into engaging in speculation. We do not agree. In considering the extent to which an individual is a flight risk, it is only sensible to have regard to the ability and capacity of the individual to flee, if that is what he has decided to do. So, the existence of a location to which flight is possible and access to documents and resources is a relevant consideration. In the course of submissions, the point was made on behalf of Stephen Curtis that insofar as there is a concern of flight, and in particular, of flight to a location outside the jurisdiction, that the scope for travel is reduced by the current Covid-19 crisis.

11. So far as the refusal on s. 2 grounds is concerned, the appellant, Stephen Curtis, makes the point that in upholding this ground of objection, the Court did not sufficiently take into account the logistical support role rather than directing role alleged to have been played by him, **REDACTED** that the Court did not sufficient identify the apprehended offences **REDACTED**. There was also a suggestion that the Director was relying on s. 2A of the Bail Act 1997. This point seems somewhat misconceived, in that there was no invocation of s. 2A of the Bail Act 1997. While s. 2A was not invoked, the Director did refer to s. 2(2)(iii) which provides that:

“[w]here the Court has taken into account one of the specified matters, it may also take into account 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 on bail if a person is charged with an offence punishable by imprisonment for a term of ten years or a more severe penalty.”

It seems to the Court that one cannot ignore the fact that these alleged offenses were committed, on the prosecution case, in the course of a feud, that the object of the particular conspiracy was brought close to fruition before Garda intervention, and the nature of the firearms to which co-conspirators had access showed how real and serious the danger was.

12. The appellant, Stephen Curtis, further contends that insufficient, if indeed any, regard was had to the expected duration of pre-trial custody if bail was to be refused. It is said that the judge failed to consider the question of imposing bail conditions, perhaps stringent bail conditions, which would meet such concerns as there were. Linked with this, it is said that there was a failure to provide reasons. In fact, the judge’s reasons emerge very clearly from the transcript. He accepted and was prepared to act on the evidence of Detective Garda Charles. It is clear that the judge was of the view that admitting to bail, but subject to conditions, would not adequately meet concerns. The question, really, is: was he right?

Patrick Curtis

13. As one would expect, there is a substantial overlap with the grounds relied on by the appellant, Patrick Curtis, though his grounds are formulated in somewhat terms. While the formulation is different, the substance is the same, with, in addition, reliance on issues that have arisen subsequent to the refusal of bail on 2nd January 2020. He formulates his grounds as follows:

- (i) That the judge erred in law in refusing bail where, on the evidence, it had not been established as a matter of probability that the appellant would fail to appear if granted bail.
- (ii) That the judge erred in law and in fact in finding that the appellant was a likely flight risk in circumstances where the evidence on which the respondent proposes to rely had been put to the appellant in interview and he had not sought to evade apprehension since, and where **REDACTED** there was no bench warrant history.
- (iii) That the judge erred in law in finding that it was reasonably necessary to refuse bail to prevent the commission of a serious offence and failed to have adequate regard to the presumption of innocence in favour of the appellant.
- (iv) That the judge erred in law and in fact in failing to consider adequately, or at all, whether the evidence had established that the refusal of bail was reasonably necessary to prevent the commission of a serious offence on any other basis than the contested allegations giving rise to the charge.
- (v) The judge erred in law in failing to properly consider and/or give weight to the issue of whether stringent bail conditions could meet the objections to bail, as outlined on behalf of the respondent.

14. The issues about the seriousness of the charges apply, as they do to the co-accused, with the additional factor that this appellant faces the charge of directing the activities of a criminal organisation, carrying the maximum sentence of life imprisonment. The contention by the Director that the appellant would face a very significant sentence, if convicted, applies with equal, indeed, greater force. Again, the argument is made that the case is a very cogent one, that the appellant was, in effect, “caught red-handed”. In that regard, the Court would

observe that in considering the strength of the case against the appellant, which is of course a relevant consideration in assessing the extent to which there is an incentive to flee, and therefore, a likelihood of flight, that one has to have regard to the fact that a very significant challenge is likely to be mounted to the admissibility of the evidence in question. This consideration applies, not just to the appellant, Patrick Curtis, but to both appellants. The appellant says that this is a case where the presumption of innocence was not to the forefront, and indeed, was dis-applied. In making this argument, the appellant draws attention to the fact that the trial judge, when addressing the question of the s. 2 objection, made a reference to “further offences”. It is said that the reference to “further offences” reveals that the judge was, in fact, operating on the premise that Mr. Patrick Curtis was guilty of the offences charged. The submissions go so far as to suggest that this was an explicit finding that he was guilty of the offences charged, being offences other than the “further offences contemplated”.

15. In contending that the evidence relied on in support of the view that Mr. Patrick Curtis, and indeed, his co-accused, would not stand trial, lacked the cogency to justify a refusal of bail, the appellant points to the fact that the matters emerged during the surveillance operation were put to them in interview. So, they had a good idea of the evidence against them, and that, on one view, it was damning, but that it is the situation that when they were released, they did not leave the jurisdiction. It was only nine months later that they were charged following arrests which took place at their homes. A similar point was made in relation to the s. 2 objection. It is said that if the concern was that further feud-related offences would be committed, targeting Mr. Hutch or relatives or friends or associates of his, that had not happened in the nine months between initial arrest and charge.

16. In terms of the background and personal circumstances of the appellant, the appellant, Stephen Curtis, was aged 32 years and the father of three children aged 14, 8 and 4. The

appellant, Patrick Curtis, was 38 years and was the guardian to a son aged 3 and to stepsons aged 3 and 13. The 13-year old has epilepsy.

17. The appellant has also sought to rely on matters that have developed subsequent to the bail hearing on 2nd January 2020. In particular, reliance has been placed on a note of 21st January 2020 from a General Practitioner.

18. There is a further report from the same General Practitioner dated 30th March 2020. From these reports, it emerges that Patrick Curtis first attended mental health services aged 17. The doctor commented that when Patrick Curtis was first committed to Portlaoise Prison on 5th December, the doctor saw him on the following day. He described symptoms of anxiety, depression, panic disorder, Obsessive Compulsive Disorder and claustrophobia. The doctor refers to the fact that Patrick Curtis was terrified of being separated from his brother and that he was distressed, tearful and agitated. The doctor formed the view that he was at risk of suicide if separated from his brother, and that in response, the prison Governor agreed to accommodate them in the same cell. The doctor refers to Patrick Curtis as suffering from intense anxiety, intermittent panic attacks, obsessional thoughts, depressed mood and claustrophobia. The doctor comments that in the four years that he had been dealing with prisoners, and in his 20 years' experience as a General Practitioner, he had never before come across a patient with such disabling anxiety. The doctor took the unusual, indeed, some might question the propriety of this, step of recommending that Patrick Curtis be permitted bail on medical grounds. The initial note of 21st January 2020 canvassed that Patrick Curtis would be better accommodated in an open setting. The Director, opposing the appeal, apart from making the point that these issues raised as to what has emerged post-the refusal of bail ought to be raised in the High Court by way of a renewed application based on a change of circumstances, or alternatively, by means of some entirely different form of proceedings, says that, if anything, the fact that the appellant finds custody particularly difficult is a further

straw in the wind, a further indication that he will not attend for his trial, but if given an opportunity, will seek to flee justice.

Discussion

19. In the Court's view, the evidence that was presented that both appellants were a flight risk and that both appellants would not stand trial, was cogent and compelling. While we recognise that the role which it is suggested each appellant was playing was not identical, and indeed, the offences with which they are charged are not identical, we believe the point applies with full force in respect of both appellants. Specifically, we do not accept that the role assigned to Stephen Curtis could properly be described as "peripheral and secondary". On the basis of the outline of the prosecution case that was offered to the High Court by Detective Garda Charles, the evidence against both men appears particularly strong. We make that comment, conscious of the fact that if the case is contested, that presumably, issues as to admissibility of evidence will be raised. We do believe that the fact that the alleged offences were in furtherance of the objectives of an organised crime group is a relevant consideration. We have no reason to doubt, no more than the High Court judge did, that the organised criminal group in question had the resources to enable individuals flee the jurisdiction. We do not ignore the fact that the evidence in the case stopped short of suggesting that Stephen Curtis was an actual member of the organisation, but we do not have any difficulty drawing the inference that if someone carries out tasks of significance on behalf of such an organisation, that one would be in a position to draw on the resources available to that organisation, if required.

20. If there is a matter that causes us to hesitate, it is the fact that the appellants must have been aware, from when they were first arrested, that there was what would appear to be a strong case against them. Yet, despite the fact that they must have known that, it is the case that they did not flee at that stage, but were available to be arrested at their homes nine

months later. We regard this as a point of some significance, and it was a point very ably made in the High Court by counsel on their behalf. We have given it full and careful consideration. Nonetheless, we are satisfied that the evidence before the High Court fully justified the conclusion that both appellants were a flight risk and that both appellants would be unlikely to stand trial.

21. As to the objections on s. 2 grounds, we think that in assessing the risk of further offences, that one cannot ignore the fact that this was an alleged conspiracy to commit offences as part of and in furtherance of a feud that had already taken 15 lives. On the prosecution case, very considerable planning and preparation went into the carrying out of the objective of murdering the target, Mr. Hutch, and it seems to us that the conclusion reached by the trial judge, that if admitted to bail, the appellants would not disengage from the conspiracy, but rather, would commit further offences in pursuance of it, was one that was open to him.

22. Specifically, we are of the view that the trial judge was entitled to take the view, as he clearly did, that the imposition of conditions would not meet the situation. We are also satisfied that the judge gave his reasons for coming to the view that he did, stating those clearly and succinctly.

23. In relation to the supplemental submissions of the appellant, Patrick Curtis, we see there as being two aspects to these. There are, firstly, the difficulties that Patrick Curtis says he is experiencing in custody, which was the subject of the doctor's note of 21st January 2020. Then there is the further element that it is said that the appellant must be at significant risk of a more restrictive form of confinement, depending on whether the Coronavirus enters the prison where he is detained. The appellant, Patrick Curtis, frankly acknowledges that in the ordinary course of events, developments which postdate an application for bail would be dealt with by way of a renewed bail application. However, he says, in the particular

circumstances of the rapidly developing situation relating to the Covid-19 pandemic, that this Court should consider the issue. The Court has given consideration to this request, but we are firmly of the view that this is not a matter for an appellate Court. It is a change of circumstance which was not, and indeed, could not have been considered by the High Court. If the appellant wishes to raise this issue, then his opportunity to do so is by way of a renewed application for bail in the High Court, contending that there has been a change of circumstances. We would hasten to add that nothing in this judgment should be taken as indicating that the Court is of the view that there is, or might be, a change of circumstance, and whether, if a change of circumstances is established, that would justify or require a different approach to admitting or refusing bail. At this stage, we would simply say that it is not a matter to which we could or should give consideration.

24. In summary, we have not been persuaded that the High Court judge erred in refusing bail on *O'Callaghan* grounds and also on s. 2 Bail Act grounds.

25. We will, therefore, dismiss the appeal.

26. It has been indicated that both appellants are making an application for the Custody Issues Scheme and we are prepared to make such a recommendation in respect of both appellants, in each case the recommendation will be for the scheme on the basis of a solicitor and Senior Counsel and Junior Counsel.