THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 295
Record No.: 2020/137

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

-AND-

S.F.

APPELLANT

JUDGMENT of the Court delivered by Ms. Justice Donnelly delivered on the 3rd day of November, 2020

Background

1. On the 10th September, 2020 this Court heard an appeal against the refusal of bail by the High Court (Owens J.) on the 10th June, 2020. Having heard the appeal and considered the matter, this Court decided, and so informed the parties at the remote hearing, that the trial judge had been entitled to refuse bail. The Court informed the parties that it would give the reasons for this decision later. This judgment is the giving of reasons for this Court's decision to refuse bail.

2. The background to the bail application is that the applicant for bail ("the appellant") stands charged with three offences, offences of possession of firearms namely a submachine gun and a sawn-off shotgun, of possession of ammunition and having contravened the regulations designed to prevent or minimise the spread of Covid-19.

3. The circumstances under which the appellant was charged with those offences is that on the 27th May, 2020, gardaí stopped two vehicles at Clara, County Offaly. The vehicles appeared to have been travelling in convoy. In the first car, there were three occupants, and located in the car was a sawn-off shotgun and a submachine gun. The second car had a sole occupant; the appellant, S.F.. In the car S.F. was driving, on the passenger front seat, was a mineral bottle filled with petrol and a lighter. CCTV footage from a petrol station showed that it was one of the occupants of the first vehicle who had filled the petrol bottle and placed it into the second vehicle. There was evidence of the cars travelling in convoy, including the fact that both cars had also stopped to fill up with fuel at a second petrol station.

4. In the High Court, the trial judge refused bail on *O'Callaghan* grounds, taking the firm view that the appellant was a flight risk.

5. On behalf of the appellant, a number of grounds of appeal were advanced. Although the grounds of appeal had initially stated that the High Court judge erred in taking the view that the appellant was a flight risk, this was quite understandably limited to the more stateable ground that the trial judge had erred in failing to consider whether financial terms and conditions would meet the situation of the risk of flight. The second ground advanced was that the trial judge failed to distinguish the appellant from his co-accused by reason of his good character; one co-accused had previous convictions; by reason of his lawful immigration status, he was in Ireland on a student visa, and by reason of his ties to the jurisdiction. The reference to ties to the jurisdiction is apparently a reference to the fact that he is the tenant of an apartment in Temple Bar. It was also stated that he works as a Deliveroo driver, but there was no evidence in this regard. The High Court was told that a sum of €2,000 was on offer by way of a bail bond.

6. In terms of the appellant's background and personal circumstances, he is a Brazilian national, in Ireland on a student visa, having arrived here in 2019. He had been charged with a s. 15 Misuse of Drugs Act, 1977 offence and that case is pending. He was on bail in respect of that offence when arrested in respect of the present charges.

7. The hearing in the High Court took some considerable time. In the course of the evidence the trial judge asked questions relating to the work and student status of the appellant which were being relied upon by counsel to establish ties of the appellant to this State.

8. Owens J., having held that the threshold of proof in relation to the O'Callaghan objections was made out held:-

> "*It seems to me that if I give you all bail, that you're simply not going to attend at your trial. I think that there is a strong circumstantial case against all of you. If I might start with [S.F.], there is a strong circumstantial case against [S.F.]. The evidence being that he proceeded in a motor car from Dublin, that it pulled up in Kinnegad and petrol was got and put in a plastic container by another person associated with this enterprise. That the vehicle is heading from Kinnegad to Clara and Tullamore and another alleged co-conspirator googled an address, and a person that is of remarkable interest to Gardai resides at that address. It seems to me that a jury confronted with that information and also the information relating to the travel in convoy, what the jury might conclude is an obvious lie in relation to a barbeque in the small hours in the morning. They might conclude that [S.F.] is involved in a joint enterprise for a shooting to take place and intended to barbeque a car. In relation to the machine gun, the sawn off shotgun and the bullets, I conclude that there is strong evidence of [S.F.]'s association with all these matters and a man that can achieve possession of these items, can also disappear. In particular [S.F.] has chosen not to give evidence to explain precisely what he is studying at this college and may indeed be working in the State but appears to be operating in a 'Scarlet Pimpernel' existence that nobody knows what on earth he has been up to."*

Submissions

9. The appellant made the case that it is imperative that the Court must consider the individual circumstances of the case before it, including not just the nature and gravity of the offence, but also the financial circumstances of the accused and his ties or connections to this jurisdiction. It was submitted that it was incumbent on the judge to consider "*all the circumstances relevant to [the] applicant and the offences with which he is charged*" per Denham CJ. in *Li Jiuan Choong v. DPP* [2014] 2 I.R. 721 at p.730.

10. The appellant accepts that this is a serious case and that the appellant is likely to receive a severe custodial sentence if convicted. The main contention was that there was no consideration of what terms could ameliorate the risk of flight *i.e.* the guarantees that could be given to reduce that risk so it could be discounted. This was particularly important where, it was submitted, there was a failure to distinguish between this appellant and his co-accused. That was so because even though he was alleged to be part of a joint enterprise the evidence against him was different to that of his co-accused. Moreover, his ties to this State were different to that of the others, who appeared to have no lawful right to be in the State. He had a residence in Dublin and was a student. He had told the gardaí that he was a Deliveroo driver and the gardaí had not investigated that. He is a person with no previous convictions and no bench warrants. The appellant referred to the absence of reasoning in the trial judge's decision. In so far as he referred to the Scarlet Pimpernel, that sobriquet more properly described his co-accused and not him

11. The appellant relied upon *DPP v. P.F. & Others*, (Court of Appeal, Sheehan J., 10th March, 2017 at p. 16) (*no copy of this case was furnished to the Court and the Court was unable to obtain a copy of this report through any of the databases or reports*) where on behalf of the Court of Appeal Sheehan J. determined that:

> *"While it might be inferred that, having heard the evidence including the cross-examination of* [the witness alleged to be in danger] *which included a question as to whether she would feel assured as to her safety if it was a condition of bail that the appellants stay away from her home and her husband's shop and observe certain other conditions, the High Court judge considered that evidence and rejected the possibility of such conditions, she never the less in her ex tempore judgment does not appear to have given consideration to that possibility. It was necessary to give consideration to the possibility that stringent conditions might be sufficient to reasonably ensure the safety of the family* [of the witness] *and if necessary reject it on a reasoned basis in respect of each applicant separately"*

It was submitted that the above passage applies to the present case in circumstances where the case considered by Sheehan J. involved a bail hearing with multiple appellants and where each appellant, as well as having different personal circumstances, all had different levels of alleged involvement in the offences and varying degrees of familiarity or knowledge of the alleged injured parties. In the circumstances, it was submitted that the onus to provide express and delineated considerations in respect of each appellant separately arises in that particular context.

12. It was submitted that the seriousness of the charge and the concerns expressed by Inspector Farrell, who gave evidence on behalf of the DPP, ought to be reflected by setting bail and surety amounts at suitably high levels relative to the means of the appellant, coupled with the imposition of exacting terms and conditions.

13. On behalf of the DPP, it was submitted that the trial judge had correctly applied the test of whether there was cogent evidence that he was a flight risk. The matters referred to in *O'Callaghan* are considerations that are relevant as guides to the decision on the probability of the accused evading justice. The judge made the clear decision that he was not going to attend his trial on grounds as referred to in the judgment which referred to the strength of the evidence, the seriousness of the offence, the likelihood of conviction and the lack of ties to the jurisdiction. Counsel for the DPP submitted that no error of the trial judge had been made out. There was ample evidence (as was now conceded) to demonstrate that he was a flight risk. The trial judge had been entitled to take into account the seriousness of the charge and therefore the likely sentence as well as the strength of the evidence. The trial judge was entitled to take the view that he did. His judgment was reasoned and indicated that he was a flight risk no matter what conditions may be imposed.

Conclusion

14. In the present case, the trial judge based his decision to refuse bail on the *O'Callaghan* principles. He gave a clear and concise judgment stating his view that if granted bail the appellant would simply not turn up to his trial. He gave reasons which were individualised to this appellant (and separate individualised reasons for the co-accused).

15. In relation to the strength of the evidence against this appellant, the trial judge took a view that there was strong circumstantial evidence against this appellant. That view was based upon the evidence before him and was one that he was entitled to take. The trial judge clearly set out the evidence on which the prosecution sought to rely on to link this particular appellant to the offence. This evidence was different to that alleged against the co-accused. There is no suggestion that the trial judge was mistaken in his recital of the evidence.

16. The evidence against his co-accused may well have been stronger than the evidence against this appellant. The mere fact however, that evidence against a co-accused may be stronger does not mean that the evidence against another accused cannot also be designated as strong. The trial judge took the view, as he was entitled to do, that this was a situation where there was a strong circumstantial case against this particular appellant based on the facts as applying to this appellant. In all the circumstances there is no basis for the submission that he did not distinguish on the facts alleged between the appellant and his co-accused.

17. The trial judge also dealt on an individual basis with the appellant's personal circumstances. He accepted that he may be working in the State, but he was entitled to take into account that no evidence was given to him of what precisely he was studying in the State. The lack of information about what he was doing in the State led the trial judge to use the colourful phrase to describe the appellant's existence in this State.

18. In so far as the core of the complaint is that the trial judge did not take into account whether there were any conditions, financial or otherwise, which could provide guarantees for his attendance, this Court does not accept this proposition. It is true to say that there was no explicit mention of that factor in the judgment, but it was certainly implicit therein that the trial judge was holding that there were no guarantees that could be given to ensure the attendance of the appellant at trial. This is evidenced by the wording the trial judge used. Having stated that if he gave bail the accused were "*simply not going to attend at…trial.*" The use of the word "simply" was emphasising that no matter what the circumstances were, there would be no attendance. He also stated that a man, such as the appellant that can be in possession of the firearms and ammunition could also "disappear". The reference to disappearance in the context of an application for bail by a foreign national with minimal ties to the State, having regard to the nature and seriousness of these charges, was a clear indication that no amount of conditions would guarantee attendance.

19. While one might say that a judge should include in each decision in which bail is being refused that he or she is satisfied that no guarantees would be effective to ensure attendance at trial, to insist that it be explicit in every case would be to overlook the importance of the factual circumstances in which each decision is being made. In the first place, the bail hearing is a dynamic event, there is often interaction by the judge during the course of the evidence and in the submissions. The judgments are usually *ex tempore* and may give in a concise form the reasons for the decision. Moreover, each judgment is given by a judge who is aware of the constitutional importance of bail and the presumption in favour of bail.

20. In the present case, the trial judge gave his *ex tempore* decision against the background of all the evidence that he had heard, his own interactions and in light of the submissions. He was clear in his judgment that the appellant was simply not going to attend his trial if granted bail. From all that this Court can see on the agreed note, it was clear from what was said by the trial judge that no conditions/guarantees would lessen the likelihood that this appellant would not attend his trial. To require, in this case, that the trial judge should have added the words "and no conditions that I might impose would meet the objection to bail" would be entirely otiose in the particular and clear circumstances of this case. There may well be cases where a trial judge should expressly deal with the issue of conditions and guarantees. This was not a case where that was required. It was implicit in his judgment, indeed almost to the extent of being explicit, in this case that no such guarantees could ensure the attendance at trial.

21. It is for these reasons that the appeal against the refusal of bail was dismissed.