THE COURT OF APPEAL

Neutral Citation Number [2020] IECA 370

Record Number: 2020 212

Edwards J.
McCarthy J.
Kennedy J.

BETWEEN/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

- AND -

JASON MURTAGH

APPLICANT

JUDGMENT of the Court delivered on the 25th day of November 2020 by Ms. Justice Isobel Kennedy.

1. The applicant's trial is currently pending before Dublin Circuit Criminal Court. He is charged with four offences which are all alleged to have occurred on the 23rd May 2020. The applicant seeks to appeal against a refusal of the High Court (Owens J.) of the 29th September 2020 to hear his renewed application for bail, having deemed the matter *res judicata*.

Factual Background

2. By way of background, the applicant was arrested on the 9th June 2020. He was charged with an offence contrary to s. 33 of the Domestic Violence Act 2018. He was brought to the District Court and refused bail. A hearing date of 7th July 2020 for the summary trial of the offence was fixed. The applicant was remanded in custody to 26th June 2020.

3. On the 26th June 2020, the prosecution indicated further charges were likely. The July 7th hearing date was vacated. The applicant was remanded in custody to 10th July 2020. Further charges were preferred including assault causing harm, production of a knife in the course of a dispute and theft.

4. On the 14th July 2020, an application for bail was refused by the High Court.

5. On the 6th August 2020 the applicant was sent forward for trial to Dublin Circuit Criminal Court.

6. On the 31st August 2020 an application for bail was made to Dublin Circuit Criminal Court and was refused.

Application of the 29th September 2020 before the High Court

7. Following the refusal of bail in the Circuit Court the applicant applied for bail before the High Court.

8. Counsel for the applicant stated that the application came before the Court by way of appeal from the Circuit Court. The High Court judge rejected this assertion, stating that this was a fresh application, invoking the original jurisdiction of the High Court to hear bail applications.

9. Counsel for the respondent outlined that in the previous application for bail before the High Court and before the Circuit Court, the State had objected to bail on the basis of section 2 of the Bail Act 1997 and in accordance with the principles in *People (Attorney-General) v. O'Callaghan* [1966] IR 501.

10. Counsel for the applicant indicated that there was now an independent surety offered in respect of the applicant in the sum of €1000. It was argued by counsel for the applicant that this surety would allay the fears that the applicant would interfere with the injured party as had been suggested in previous applications.

11. In refusing to entertain the bail application, the High Court judge stated that the offer of a surety did not represent a significant change of circumstance as it did not go to the root of the refusal of the previous applications. The sum offered made no difference in circumstances where the applicant had been refused bail on different grounds. The trial judge further rejected the argument that the surety offered some security that the applicant would not interfere with the injured party. Acknowledging the multiplicity of bail applications made by the applicant the trial judge concluded that the offer of a surety was not sufficient so as to warrant hearing another application. In other words, the offer of a surety did not amount in the circumstances to a material change in circumstance so as to permit of a renewal of the application for bail.

Submissions of the applicant

12. In oral submissions, Mr Dwyer SC who appears for the appellant on appeal makes two arguments. Firstly, he says that an appeal lies from the Circuit Court to the High Court at common law and/or pursuant to s.28(3)(a) of the Criminal Procedure Act 1967 , as substituted by s.19 of the Criminal Justice Act 2007.

13. It is argued that should an appeal lie from the Circuit Court to the High Court, consequences follow. That is, that the applicant need not demonstrate any change in circumstance but simply has the right to appeal.

14. Secondly, it is said that the judge erred in refusing to entertain the application on the basis of a material change in circumstance. The applicant says that the judge erred in holding that the presence of an independent surety in the sum of €1,000, which was previously unavailable was not a change of circumstance sufficient to ground a renewal of

the application. The applicant also refers to the fact that he had been sent forward for trial since the previous High Court bail application which also represented a change in circumstances.

15. The applicant refers to *DPP v. Gray* (unreported Supreme Court, November 10, 1997) where the Supreme Court reversed the finding of the High Court that the issue of bail was *res judicata*. In *Gray* the applicant was able to tender evidence of a new address available to him in this jurisdiction. The Supreme Court held that this represented a change in circumstance which meant that the matter could not be regarded as *res judicata* and the matter was remitted to the High Court.

16. The applicant submits that in light of there being a surety he was entitled to have the issue litigated again and there was no basis for the suggestion by the Court that the presence of a surety would not have impacted on the previous decisions in refusing bail.

Submissions of the respondent

17. The respondent submits that the change in circumstances must go to the heart of the refusals of the previous applications and where it was the case that the applicant had previously been refused under section 2 of the Bail Act, 1997 and the principles outlined in *People (Attorney-General) v. O'Callaghan* [1966] IR 501, a surety would not be a sufficient change of circumstance to address the grounds for previous refusals of bail.

18. It is further submitted that the applicant could not advance to the Court that any judge who had previously dealt with the applications for bail had indicated that the presence of a surety would allay their concerns and result in a benign view been taken to the objections to bail.

19. In terms of the applicant's reliance on *DPP v. Gray* (unreported Supreme Court, November 10, 1997) it is submitted that this is misplaced as the facts in *Gray* relate to an application to reduce the independent surety fixed for bail, where the applicant had initially indicated that he would reside out of the jurisdiction. The applicant now had an address in the jurisdiction and wished to have the level of the independent surety reduced. Therefore, the change of circumstances went to the core of the issue for bail.

20. The respondent further submits that the sending forward of the applicant is not in itself a change of circumstance and this was not relied upon by the applicant as a change of circumstance before the High Court.

21. Insofar as it is argued on behalf of the applicant that an appeal lies in common law and pursuant to statute, in oral submission, Ms. Cox BL for the Director, says that the position is as stated by Charleton J. in *Roche v. Governor of Cloverhill Prison* [2014] IESC 53 that at common law, an applicant may apply to the court of trial or to the High Court for bail, but where the application is renewed, the applicant must show a material change in circumstance.

Discussion

22. Mr Dwyer SC contends that the respondent erred in submitting to the High Court judge that the applicant had exhausted his right of appeal. It is correct to say that the applicant had been refused bail before the District Court, he was then refused bail by the High Court in July 2020, following which he was sent forward to the Circuit Criminal Court for trial, applied for, and was refused bail before that Court, it being the court of trial and with seisin of the matter.

23. The applicant then again applied to the High Court for bail on the basis, firstly, that the application was by way of appeal from the Circuit Court and secondly, that there existed a material change in circumstances.

24. Two affidavits were filed in the High Court, which were not included in the book of appeal and which this Court requested. After the hearing of the appeal, the documents were provided. While the absence of material is unsatisfactory, an explanation has been given to us which we accept.

25. Insofar as the two affidavits are concerned, the first affidavit is dated the 15th September 2020 and fails to mention that there had been a previous application before the High Court which had been refused. This necessitated an adjournment in the High Court. Again, an explanation for the absence of this significant information has been given to us and the solicitor for the applicant accepts full responsibility. However, the absence of such an averment in a sworn document could have operated to mislead the Court. An affidavit on behalf of an applicant must contain all relevant material necessary for the determination of an issue.

26. We have examined the affidavits, which provide limited information. The alleged offences are set out. In the first affidavit, it is averred that the appellant cannot offer an independent surety, the second affidavit contains a contrary averment.

27. From the agreed note of the evidence, insofar as his jurisdiction to rehear a bail application, the judge said:-

> "You can always apply to the High Court for bail but there would have to be something which makes life different. Now are you telling me that in relation to all of the Courts that dealt with this that they would have given bail but for the surety?"

28. He then went on to say:-

> "[S]significant change in circumstances must be a change in circumstances which goes to the root of the decisions that were made previously by Judges refusing bail…"

29. The High Court judge stated that the application made was not in the form of an appeal and emphasised the original jurisdiction of the High Court to grant bail.

The Jurisdiction of the High Court

30. Walsh J. traced the full original jurisdiction of the High Court to grant bail in terms of the common law power in *People (Attorney-General) v. O'Callaghan* [1966] IR 501 and said at p.510 as follows:-

> "While there is a distinction between applications for bail in the cases of prisoners who are on remand and those who have already been committed for trial and in the case of persons who have already been convicted and in respect of which an appeal is pending, there are certain underlying principles common to all three forms of bail motion. The jurisdiction of the High Court to grant bail is an original jurisdiction and is in no sense a form of appeal from the District Court or from any other Court which may have dealt with the question of the bail of the applicant."

31. At paragraph 15 of Charleton J.'s judgment *in Roche v. Governor of Cloverhill Prison*[2014] IESC 53 , he says: –

> "The reality is that at common law, an accused is entitled to apply to the court of trial or to the High Court for bail and is under no limitation in that regard, save perhaps that of showing a relevant and **appropriately probative change of circumstances** where repeated calls on that jurisdiction are made." (Our emphasis)

Does an appeal lie as a consequence of s.28(3)(a) of the 1967 Act, as substituted by s.19 of the Criminal Justice Act 2007?

32. This is undoubtedly an interesting issue and the Court would have preferred to have more detailed submissions in respect thereof. However, in some respects, the submission is a simple one. Mr Dwyer contends that s.28 is unclear, but may suggest that an appeal lies from the Circuit Court. Section 28(3) (b),(c) and (d) have not as yet commenced. The relevant portion of the section now provides:-

> "(1) A justice of the District Court […] shall admit to bail a person charged before him with an offence, other than an offence to which section 29 applies, if it appears to him to be a case in which bail ought to be allowed.
>
> (2) Refusal of bail at a particular appearance before the District Court shall not prevent a renewal of the application for bail at a subsequent appearance or while the accused is in custody awaiting trial.
>
> (3)(a) An applicant for bail or the prosecutor may appeal to the High Court if dissatisfied with a refusal or grant of the application for bail or, where bail is granted, with any matter relating to the bail."

While the balance of the section has not yet commenced, it is instructive to observe its content as follows:-

> "(b) Where the applicant has been remanded in custody by the District Court and the offence with which the applicant is charged is triable by the Circuit Court, the High Court may transfer the appeal to the judge of the Circuit Court for the circuit in

which the prison or place of detention to which the applicant has been remanded is situated.

(c) The judge of the Circuit Court referred to in paragraph (b) shall exercise jurisdiction in respect of the appeal..

(d) An appeal against a decision by the Circuit Court under this section lies to the High Court at the instance of the applicant or prosecutor."

33. It is clear therefore, that either the applicant or the Director may appeal to the High Court, and when the section is commenced, the High Court may transfer that appeal to the Circuit Court, should it be an offence triable by that Court. That decision then may be the subject of an appeal to the High Court.

34. In our view, s.28(3)(a) does not envisage that an appeal lies from the Circuit Court. When we look at the entire section, it is our view that s.28(3)(a) is concerned with the District Court.

35. It is the position that s.28(3)(a) provides for an appeal by the applicant and the prosecutor from the District Court to the High Court, but it seems, in the experience of this Court that most applications are not on the basis of an appeal but are on the basis of a *de novo* application to the High Court.

36. The jurisdiction of the High Court to grant bail, as repeatedly stated, is an original jurisdiction, which of course means that in hearing a *de novo* application for bail, the High Court may grant bail to an applicant who has been refused bail in another court. However, that is subject to the limitation that the applicant, in seeking to renew a bail application, must demonstrate a material change in circumstance.

Change in circumstances

37. The second point raised is that the judge erred in declining to hear the application on the basis of a material change in circumstances. It is said in this respect that the judge did not have sufficient background material relating to the July application in order to come to this conclusion, in particular Mr Dwyer says that the judge was not made aware of whether the High Court judge in July, refused the application on grounds of objection pursuant to s.2 or on the principles in *People (Attorney-General) v. O'Callaghan* [1966] IR 501or both.

38. When we examine the agreed note of the proceedings before the High Court, it is clear that the judge was aware that objections has been raised pursuant to s.2 of the Bail Act 1997 and also in terms of the principles in *People (Attorney-General) v. O'Callaghan* [1966] IR 501, in particular that of the alleged intimidation of a witness.

39. However, the judge was provided with very limited material upon which he could make a determination as to whether the provision of an independent surety could constitute a material change in circumstance. The judge was made aware that the applicant had made a number of bail applications in different jurisdictions, but while he knew that objections

had been raised under s.2 he had no further information other than that and did not know whether the refusal was pursuant to the objections advanced under s. 2 of the 1997 Act.

40. Moreover, the judge was not informed of the basis underpinning the objection under *People (Attorney-General) v. O'Callaghan* [1966] IR 501, save to say that it related to the alleged intimidation of a witness.

41. We do not intend to comment on whether the provision of an independent surety could amount to a material change in circumstance in any given case or indeed in this case, but confine ourselves to the observation that a change in circumstance must be a change of some substance which impacts on the reason why bail was previously refused. It must be an alteration in circumstances which goes to the heart of the matter and does not simply relate to a peripheral issue.

Conclusion

42. Firstly the learned judge was fully familiar with the nature of his jurisdiction and quite properly did not consider the matter as an appeal from the Circuit Court. He viewed the issue for consideration as to whether, on a *de novo* hearing there was a material change of circumstance which was sufficient to justify a renewal of the application for bail.

43. However, we have a concern that the judge was not provided with the material necessary for him to make a proper determination. At the minimum he should have been made aware of the basis of the refusal of bail on the initial application before the High Court. Where such an application for a renewal is moved, it is not necessary that the application be a lengthy one, but the judge should be given the necessary information, which would include, *inter alia*, the nature of the offences alleged, the basis of the objections raised by the prosecutor and the grounds of the refusal, and of course the basis for the contention of a material change in circumstances.

44. The judge in the present case had very limited information, in particular as to the evidential basis for the refusal of bail on the first High Court application, the reasons given by the judge for that refusal, whether the refusal was on s.2 grounds or *O'Callaghan* grounds or both.

45. Consequently, and for that reason alone, we will allow the appeal and remit the matter to the High Court to enable that Court to determine whether there exists a sufficient change in circumstance to permit a renewal of the application for bail. If the Court so determines, the application is heard *de novo*.