THE COURT OF APPEAL

(CIVIL)

Birmingham P.
Edwards J.
Whelan J.

Neutral Citation Number: [2019] IECA 174

Appeal No: 2019/236

High Court Record No: 2019/25 EXT

IN THE MATTER OF AN APPEAL FROM A REFUSAL OF AN APPLICATION FOR BAIL

BETWEEN/

THE MINISTER FOR JUSTICE

Respondent

And

BARRY McARDLE

Appellant

JUDGMENT of Mr Justice John Edwards delivered on the 27th June 2019.

Introduction

1. In this case we have been told that the appellant is the subject of a European arrest warrant issued by the kingdom of the Netherlands in respect of two offences (voluntary manslaughter and concealing a body from criminal investigation). The appellant was initially tried for these offences before the District Court of Amsterdam in circumstances where he had been surrendered to the Dutch authorities by the Irish courts on foot of an earlier European arrest warrant.

2. The appellant had sought to resist surrender on foot of this earlier warrant, as was his entitlement. The litigation in connection with that previous European arrest warrant was lengthy and protracted, going all the way to the Supreme Court. Ultimately, the Supreme Court rejected his appeal and an order of the High Court made on the 28th of March 2014 surrendering him to the Netherlands was upheld. However, before the Supreme Court appeal was heard a lengthy domestic sentence that the appellant was already serving expired. Notwithstanding that he had been granted bail on the EAW matter pending the hearing of his Supreme Court appeal, he apparently decided at that point that he would, after all, surrender voluntarily to the Netherlands and seemingly did so. It was suggested in the High Court in the present bail proceedings, by counsel who was then acting for the appellant, that the appellant also dropped his appeal to the Supreme Court at this time. However, that does not appear to be correct. The Supreme Court heard the appeal and gave judgment on 25th of June 2015 – see Minister for Justice and Equality v McArdle and *Minister for Justice and Equality v Brunell* [2015] IESC 56. The judgment makes no mention of the appeal having been abandoned by Mr McArdle and, indeed, the first paragraph of it expressly records that the appellant was represented by both senior and junior counsel at the appeal hearing. I think it likely, however, that the reason the appeal proceeded notwithstanding the appellant's late voluntary surrender was because his co-accused, Mr Brunell, was still resisting surrender and the common point that had been raised on behalf of both appellants and certified by the High Court as being one of exceptional public importance, remained live and was by no means moot in those circumstances.

3. In any event, upon his return to the Netherlands the appellant was held on remand for a period of nine months, following which he was then released on bail by the Dutch courts pending the commencement of his trial which was still not ready to proceed. During the time he was on bail awaiting trial he was allowed to travel home to Dublin with a requirement that he sign on at the Dutch Embassy in Dublin on a weekly basis. He complied fully with his bail conditions and once his trial was listed he returned to Amsterdam for that trial, as required. After the evidence was heard, and pending the verdict which was reserved, he was permitted to return to Dublin on the same terms as previously, and he again complied with his bail and returned in due course to Amsterdam to receive the verdict.

4. He was acquitted of the manslaughter offence but convicted of the second offence of concealing a body from criminal investigation, for which he received a two-year term of imprisonment. As he had effectively served all of that sentence while on remand at various times in the Netherlands he was immediately released and he returned to Ireland. However, as is possible under Dutch law, the prosecutor appealed the acquittal verdict, as well as the sentence imposed for the matter in respect of which there was a conviction, to the Amsterdam Court of Appeal. The appellant did not attend the appeal hearing in person although he was represented by a lawyer. The Amsterdam Court of Appeal overturned the acquittal at first instance and recorded a conviction against the appellant. It further sentenced him to an overall term of 13 years' imprisonment in a judgement delivered on 17 May 2018. We have not been told how that was structured and/or apportioned as between the two offences for which he faced sentencing, but it is unnecessary to know that for the purposes of a bail application, which this is. The Amsterdam Court of Appeal's decision has in turn now been appealed to the Dutch Supreme Court for the purposes of a cassation review.

5. Cassation procedures are common in civil law systems. The court of cassation is usually a high level appellate court and typically it

does not re-examine the facts of the case but rather only re-examines the case from the point of view of how the law was applied and interpreted. That this is so in the instant case is apparent from the additional information furnished to the High Court by the Dutch authorities in a letter dated 10/12/18 in which the Dutch authorities stated *"the Supreme Court monitors whether the lower court satisfied the requirements of due process and to secure uniform application of material and procedural law"*.

6. The present European arrest warrant has been issued for the purposes of securing the appellant's attendance before the Dutch Supreme Court for the purposes of his cassation review.

7. The warrant in question was endorsed by the Irish High Court on the 17th of January 2019, and the appellant was arrested on foot of it on a date on the 3rd of May 2019. He intends to contest his surrender at a section 16 hearing which is currently pending before the High Court. The appellant was remanded in custody following his arrest and he now seeks bail. He does so in circumstances where he is a convicted person, albeit that he has a cassation appeal pending which could possibly result in his conviction being overturned. However, he is not a person who enjoys the presumption of innocence at this time.

Applicable legal principles
8. In these circumstances the legal principles set out in the case of *Minister for Justice Equality and Law Reform v. Zeilinski* [2011] IEHC 45 apply, rather than those in *Minister for Justice Equality and Law Reform v. Fustiac* [2011] IEHC 134. There is no presumption in favour of the granting of bail. On the contrary, what the deciding court was required to do was to engage in an assessment of the risk of the prisoner absconding to determine if there is a real and significant risk in that regard. As the High Court said in the *Zielinski* case:

> *"There will, of course, be a theoretical risk of absconding in every case but the existence of a mere theoretical risk alone and without more should not inhibit a Court from releasing a prisoner. More than that will be required to justify a decision not to release. The Court would be justified in deciding not to release the prisoner on bail if, having considered all relevant circumstances including evidence adduced by the applicant and any objector, it perceived the existence of a real and significant risk that the prisoner might abscond notwithstanding any restrictions or conditions that might be placed upon him. However, it is not necessary for the Court to be satisfied that as a matter of likelihood the prisoner will abscond before it would be justified in denying him bail"*

The evidence before the High Court
9. The application for bail was grounded upon an affidavit of the appellant sworn on 9 May 2019, which is before the court. This affidavit sets out the background to the issuance of the European arrest warrant and the appellant's personal circumstances. In the latter regard it asserts, inter alia, that the appellant is 33 years old having been born on 21 December 1985. It states that prior to being incarcerated he had worked part-time as a painter. It states that he suffers from diverticular disease and that his partner is currently unwell. It further states that he has two children with whom he resides, a daughter aged 17 years and a son aged 1 year. He also cares for two boys aged 15 years and 9 years respectively who are children of his partner.

10. The High Court heard evidence from Detective Garda Eoin Kane that the respondent was objecting to bail in circumstances where there was a belief that the appellant is a flight risk. The witness pointed in the first instance to the fact of a conviction recorded in the Netherlands and the length of the sentence handed down, namely 13 years' imprisonment. Reliance was also placed on the fact that the appellant had failed to answer bail in this jurisdiction on a previous occasion. It was explained that he had been granted station bail on 14 July 2008 which he had failed to answer.

11. The witness further told the High Court that the appellant had been evading arrest since the issuance of the European arrest warrant. Following the endorsement of that warrant contact was made with the appellant's partner, Ms Vicky Smith, on the 5th of February 2019 and also with the appellant's mother. Both these persons were apprised of the fact that a European arrest warrant was in existence and that the gardai wished to talk to the appellant and to execute the warrant, ideally by arrangement. Despite this the appellant did not make himself available to gardai. On the contrary he went to ground. The evidence was that subsequent to this the appellant moved between addresses in Dublin and Galway. There was evidence that he failed to attend an appointment in the Department of Social Protection, and he did not sign on or collected his social welfare in this period. Prior to being made aware of the issuance of the warrant he had been doing this.

12. The High Court was told of the circumstances in which the warrant was in fact executed on the 3rd of May 2019. On that occasion a number of gardai arrived at the appellant's address at No 5, Oranhill Ave, Oranmore, Co Galway. They were met there by the appellant's partner who informed the gardai that he was not present at the address. Gardai entered the house and located the appellant upstairs. They were met with initial resistance from the appellant who was angry and hostile and, in those circumstances, the gardai were unable to discuss the European arrest warrant with him. He was arrested and taken to a Garda station in Galway where he then calmed down and was prepared to, and subsequently did, discuss the warrant with gardai. It was conceded by the arresting Garda in the course of being cross-examined that although the appellant had been initially resistant at the time of his arrest to engaging with Gardai, leading that Garda in his evidence in chief to describe the situation in the house as *"a potentially volatile situation"*, the appellant did not attempt to evade being arrested at that point.

13. The court was told that the appellant has 19 previous convictions including a previous conviction for possession of controlled drugs worth in excess of €13,000, contrary to section 15A of the Misuse of Drugs Act 1977. That related to an incident in 2008 when the appellant was found in possession of 5 kg of heroin worth approximately €1 million. During the pre-trial procedures in connection with that matter the proceedings were temporarily struck out in circumstances where a Book of Evidence was not ready for service. The appellant had availed of the opportunity that this presented to leave the jurisdiction. It was true that he was not obliged to remain in the jurisdiction while the position was being regularised and the struck out proceedings re-instated. However, they were regularised and re-instated, and a European arrest warrant had to be obtained for the purpose of securing his return to this state so that he could be tried. The view was expressed by the State's witness in the High Court that the appellant has *"fluidity of residence"*. At the time that he left the jurisdiction in the circumstances described, he had family, including children, who were resident and settled in this jurisdiction. Despite this, he abruptly left the jurisdiction leaving them behind. The appellant's other convictions were solely for road traffic matters.

14. The witness was questioned in cross-examination about the appellant's earlier litigation seeking to resist his surrender to the Netherlands to be tried in respect of the offences of which he has now been convicted. He confirmed that the appellant had been granted bail by the High Court pending a decision by the Supreme Court on his appeal, but that he never took it up. At this time, he was still serving the domestic sentence imposed on him for the s.15A offence. He had sought bail on the EAW matter so that there would be no inhibition to him receiving temporary release in order to attend college, in respect of the s.15A sentence which was nearing an end, were the executive of a mind to grant it to him. It is not clear why the bail was not taken up. Possibly, although it is

to speculate, the hoped-for temporary release may not have materialised. At any rate nothing turns on it. As previously stated, when he was released from serving his domestic he handed himself in so that he could be returned to the Netherlands and effect could be given to the High Court's order of surrender.

15. Garda Kane was further cross-examined concerning his contention that in the period between the appellant's partner and mother being informed that a European arrest warrant seeking the appellant's surrender to the Netherlands had been endorsed, and the date of arrest, the appellant was actively seeking to evade being arrested. It was put to him that the appellant had been living in Galway and that he had two near neighbours who were in fact gardai with whom he had been interacting regularly for more than two years. The witness denied awareness of any such interactions *"since the endorsement of the warrant"*. He stated that he had spoken to the two gardai n question and had confirmed that there had been no such interactions. He stated that *"if he had interacted with them he would have been arrested on sight."* He agreed that the appellant's family home was in Galway and that his mother resides in Dublin, and that he would stay with his mother when in Dublin. However, he reiterated that the appellant was not sighted at the Galway address after the endorsement of the warrant until the date of his arrest. The witness stated that he had called to the appellant's mother's address on 5 February 2019 to inform her about the warrant, and he stated that he outlined to her that bail would be a matter for the court. He further stated that gardai had called to the Galway address on numerous occasions, and had spoken with the appellant's partner

16. Garda Kane confirmed that since the Amsterdam District Court had acquitted the appellant of manslaughter the appellant had not acquired any further convictions. He stated that the appellant's mother *"is a fine lady"*. He stated that he was not aware that she was offering a sum of €6,000 by way of independent surety, but he confirmed that she would be a suitable surety.

17. The court below also heard evidence from the appellant's partner in which she confirmed the matters that have been put to the gardai in cross-examination concerning the appellant's domestic arrangements and residences. She denied that there had been a deliberate attempt not to interact with their Garda neighbours. The failure to attend the Department of Social Welfare and to sign on was attributed to illness on the part of the appellant, including bowel disease, anxiety, stress and depression. She stated that a further reason why the appellant had stopped signing on was that he had been doing a bit of painting.

The High Court Judge's Ruling

18. Having heard the evidence, the High Court Judge ruled as follows:

> *"The 5th of February is the date on which Mr. McArdle's mother was informed about this warrant. It is undoubtedly the case she must've been aware of it from that time, if not earlier and while I fully accept that a person doesn't have to seek out the gardai in connection with charges that may or may not be pending or any matters in respect of which the gardai may be interested in them, the fact is that it is now more than three months since then and Detective Garda Kane has said that there has been difficulty locating Mr. McArdle. His words were that "he's gone to ground", he has not been in places that he would normally be. It is very significant, I think, that he is not collecting his social welfare although a reason for that has been given, but when you put it all together, all of these factors, it is very difficult not to have a concern that Mr. McArdle might not turn up to face this application for his surrender and in the circumstances, therefore, I feel I must decline the application."*

Discussion and Decision

19. While it is true to say that the High Court judge's ruling was short and somewhat terse, it is clear that he weighed carefully the risk of the appellant not turning up for his trial and that he found that risk to be real and significant having regard to the evidence, even though he did not use those precise words. Against a background of the appellant being wanted to serve a sentence of 13 years' imprisonment for very serious offences of which he had been convicted, albeit that a cassation appeal remains in being, the trial judge concluded that *"it is difficult not to have a concern that Mr. McArdle might not turn up to face this application for his surrender."*

20. The evidence before the High Court, some of which the trial judge specifically alluded to, was that the appellant, upon learning of the warrant's existence, had gone to ground and had remained elusive for more than three months. There had been difficulty locating him, and even when he was located, his demeanour upon being discovered communicated clearly his unhappiness at having been discovered and at having to face the proceedings consequent upon this warrant. Moreover, there had been a specific attempt by his partner to conceal his presence, in that she lied on his behalf and told Garda Kane and his colleagues that the appellant was not home, when he was in fact upstairs. The trial judge noted the reason given for not collecting his social welfare, and although he does not do so in terms, it is clearly to be implied from his remarks that he rejected the explanation given. Again, although he does not allude to it specifically, the fact that on two previous occasions a European arrest warrant had to be deployed to secure the appellant's attendance in court to answer charges preferred against him was clearly relevant, as was his previous failure to answer station bail, and as they were canvassed in evidence it is to be inferred that the trial judge also took account of these matters.

21. While the appellant was granted bail previously by the High Court pending the hearing of his Supreme Court appeal, that was in circumstances where he had not yet been convicted of any offence. The same is true of the bail granted to him by the Dutch courts. While the appellant did not take up the bail granted to him here, in the circumstances outlined earlier in this judgment, and while he did honour the bail granted to him by the Dutch courts, significance might nonetheless have been attached to the fact that he did not attend the hearing before the Amsterdam Court of Appeal at which the verdict at first instance was reversed. This is so notwithstanding his claim that he did not attend following legal advice that he did not need to do so.

22. We find no error of principle in the High Court judge's approach to this bail application. The appellant was not entitled to the benefit of any presumption in favour of bail. The sentencing judge was required to conduct a risk assessment. He manifestly did so, and his conclusion was not unreasonable in the light of the evidence he had received. He had heard comprehensive evidence, rehearsed earlier in this judgment, concerning the circumstances of the case and concluded in substance, following an appraisal of that evidence, that there was a real and substantial risk that the appellant would not turn up for his surrender hearing, and that the risk perceived by him existed at a level sufficient to warrant a denial of bail. That was a view that was open to him on the evidence, and accordingly the decision that he came to was a legitimate one within the range of his discretion.

23. In the circumstances, I would dismiss the appeal.