



THE COURT OF APPEAL

(CIVIL)

Sheehan J.  
Mahon J.  
Edwards J.

Appeal No.: 2016/164

The People at the suit of the Director of Public Prosecutions

Respondent

- and -

John Joseph Malone

Appellant

**Judgment delivered by Mr. Justice Mahon on the 29th day of July 2016**

1. This is an appeal against the judgment and order of Moriarty J. of 16th May 2016 and, more particularly, the refusal to grant the appellant bail on a charge that he murdered Ann Nancy Smyth at her home in Kilkenny city on 11th September 1987. The appellant's murder trial in the Central Criminal Court is scheduled for March 2017.

**Background facts**

2. Ms. Smyth was murdered in her home in Kilkenny on 11th September 1987. The appellant was, shortly afterwards, arrested and questioned in relation to the murder, but was released without charge. The gardaí re-opened their investigation in 2012, and on 15th October 2015, the appellant was arrested and charged with the murder.

3. The appellant is fifty two years old and has lived and worked for most of his life in Kilkenny. He spent a short period of time working in the U.K.. The appellant has twenty eight previous convictions, most of which were dealt with in the District Court. In 1992 he was convicted of the offence of failing to appear in court without reasonable excuse contrary to s. 13 of the Criminal Justice Act 1984. He failed to appear in relation to another matter in 2015 and this resulted in the issue of a bench warrant. It was executed by arrangement and the appellant was not charged in relation to his failure to appear. The appellant was also convicted of an assault on his brother contrary to s. 3 of the Non Fatal Offences Against the Person Act 1997 in 2008. The appellant was also charged with the intimidation of a witness (contrary to s. 41 of the Criminal Justice Act 1999) in relation to that assault, and was granted the 'Probation Act' in relation thereto. Ultimately, he received a suspended sentence in relation to the assault charge.

4. The appellant first sought bail from the High Court in relation to the murder charge on 9th November 2015. The application was heard and determined by Moriarty J.. Bail was refused following the hearing of evidence over three days, including evidence from the appellant. In his determination of that bail application, Moriarty J. declined to uphold the respondent's objections made pursuant to s. 2 of the Bail Act of 1997. He refused bail on the basis of the principles set out in *The People (Attorney General) v. O'Callaghan* [1966] I.R. 501, having regard to the nature of the case against the appellant, the seriousness of the offence with which he was charged, and the risk that the appellant would interfere with prosecution witnesses. Having given his reasons for refusing bail on 27th November 2015, Moriarty J. indicated (to quote from counsel's agreed note of those proceedings):-

*"...there remains a possibility even in a very serious case such as this that sufficient independent surety coupled with other conditions might be capable of addressing the objections, coupled with other conditions, but that no such proposal was put in those or any comparable terms by the appellant."*

5. The learned High Court judge also, in this context, referred to cases of persons accused of murder who had secured bail in circumstances where families had to combine what was for them substantial sums of money, and were accepted as independent sureties. He indicated that he was refusing bail *"..reluctantly in the absence of a tangible proposal such as this"*.

6. In March 2016 the appellant again applied to the High Court for bail. By consent, the matter was assigned to Moriarty J. because of his familiarity with the facts, and the evidence heard by him over three days in the previous November. No new evidence was heard in the course of this second bail application, with the exception of the appellant's brother, Mr. Michael Malone, who was being proposed as a surety. He informed the court that there was a cash sum of €2,000 available of which €1,200 was his own money, €300 was being contributed by the appellant's mother, a pensioner, with the remaining €500 being contributed by the appellant himself. These sums were significant sums for all concerned.

7. As had occurred in relation to the first application for bail in November 2015, the respondent objected to bail being granted.

8. At the conclusion of the second bail application, Moriarty J. ruled as follows:-

*"Although relying on off the hoof comments is perhaps less preferably than prepared judgments, in the circumstances of this case I do not see the value of dragging all of the parties back to court on a further appropriate date."*

*On a previous occasion of refusing bail in this case I had held open to a possibility that in the event that a significant financial surety was available, the prospect of bail could be opened to the applicant. I have a natural distaste for an accused person whom is presumed innocent being kept in custody pending trial. I note that Mr. Michael Malone has put together the sum of €1,200 which was augmented by the applicant's mother and the applicant to a total of €2,000. I note that Mr. Michael Moran presented as an admirable and caring person."*

*I have been strongly urged by the applicant's counsel that on the balance of probabilities, on the basis of O'Callaghan and DPP v. Broderick and other matters, in strongly worded submissions to grant bail."*

*The objection based on risk of flight recedes into a minor category in this case. The reason given for refusing the*

*applicant originally was in relation to the matter of interference with witnesses. The application stands or falls under the principles of the O'Callaghan case.*

*I take into account the defence submissions in relation to Judge Teehan having imposed a sanction under the Probation Act in relation to the previous conviction of the accused for witness intimidation but this together with the fact that there was a further incident of the accused indicating a disposition to interfere with witnesses together with the fact that Kilkenny is a small medieval city in size and could not be compared to Dublin or even Cork or Galway, and it is currently proposed that the accused would live within close proximity to the witnesses in the case.*

*This is not a case comparable to the Butterly decision to which I previously referred which arose in circumstance where that case gave rise to a lengthy trial in which there was ultimately a culpable deficient on the part of the prosecution after a significant delay and further that bail in that case was initially granted for Christmas and extended further, that temporary arrangement having gone well. The sums proposed as sureties in that case were very significant and were sourced from a wide range of family members.*

*Notwithstanding the significant efforts of the applicant's brother and mother who have done their level best and in spite of my distaste of an accused being kept in custody for perhaps another year, I would suggest that that application should be made to Mr. Justice McCarthy with a view to bringing the trial date forward if at all possible should a gap in the diary become available and that certainly would be something the court would endorse but I can put the matter no further as it is ultimately a matter for Mr. Justice McCarthy.*

*Ultimately, given the two incidents in relation to witnesses in the past, the conviction in 2008 and the interaction with Mr. Curran in 2010, the size of Kilkenny, difficulties with the residents and other grounds I must reluctantly affirm my previous decision not to grant bail."*

9. The learned High Court judge was then asked to grant liberty to re-apply for bail in the event that the appellant could secure a suitable address outside Kilkenny city in which he would reside pending his murder trial. The learned High Court judge responded to this request as follows:-

*"I could not close the door completely on the matter but in the present circumstances of the case I do not feel that an alternate address outside the area of Kilkenny would materially affect his concern with regard to witnesses and I refuse the application for liberty to apply."*

### **The grounds of appeal**

10. Fifteen grounds of appeal have been submitted on behalf of the appellant. It is appropriate, for the purposes of this judgment, to summarise them as follows:-

(i) The learned High Court judge failed to strike the appropriate balance between the appellant's constitutional right to liberty and the public interest in ensuring the integrity of the trial process, notwithstanding the objection to the granting of bail.

(ii) The learned High Court judge failed to expressly find that, as a matter of probability, the appellant (or someone of his behalf) had intimidated or interfered with witnesses, or that such would occur before the trial.

(iii) The learned High Court judge erred in preferring the testimony of Mr. Curran to that of the appellant, and in circumstances where Mr. Curran had travelled from Kilkenny with members of An Garda Síochána on at least two occasions prior to giving his sworn testimony to the High Court in November 2015.

(iv) The learned High Court judge attached disproportionate weight to a previous recorded against the appellant contrary to s. 41 of the Criminal Justice Act 1999, in circumstances where the Probation Act was applied.

(v) The learned High Court judge erred in law and in fact in finding that the said conviction was sufficient to support an O'Callaghan objection to the application for bail.

(vi) The learned High Court judge failed to attach sufficient weight to the fact that no complaints of threats, intimidation or interference with witnesses had arisen in relation to the appellant in connection with the investigation of the murder with which the appellant was charged.

(vii) The learned High Court judge failed to identify a surety amount which would satisfy the court in circumstances where it was determined that the proffered sum of €2,000 was inadequate.

(viii) The learned High Court judge failed to have sufficient regard to other conditions that might be imposed for the granting of bail, including a curfew and strict gardaí reporting restrictions. Furthermore, it is contended that in circumstances where the appellant had not secured an alternative place of residence outside of Kilkenny city in the period November 2015 to March 2016, it was unrealistic that he could now satisfy a condition of residency as immediately required by the court.

### **The People (Attorney General) v. O'Callaghan [1966] 1.R. 501**

11. The judgment in *O'Callaghan*, continues to constitute the leading authority on bail law in Ireland. In his judgment, Walsh J. stated at p. 517:-

*"...naturally a Court must pay attention to the objections of the Attorney General or other prosecuting authority, or the police authorities, when considering an application for bail. The fact that any of these authorities objects is not of itself a ground for refusing bail and indeed to do so for that reason would only be, as Mr. Justice Hanna pointed out in *The State v. Purcell* [1926] I.R. 207), to violate the constitutional guarantees of personal liberty. Where, however, there are objections they must be related to the grounds upon which bail may validly be refused. Furthermore they cannot be simply made in vacuo, but when made must be supported by sufficient evidence to enable the Court to arrive at a conclusion of probability, and the objections made must be open to questioning on the part of the accused or his*

*counsel. It is not sufficient for the opposing authority or witnesses to have a belief, nor can the Court simply act upon the belief of someone else. It must itself be satisfied that the objection is sufficient to enable the Court to arrive at the necessary conclusion of probability."*

12. In *DPP v. McLoughlin* [2009] IESC 65, Hardiman J. in commenting on the above quoted passage of the judgment of Walsh J. in *O'Callaghan*, said:-

*"That passage seems to me to be absolutely central in our system of judicial control of liberty, or custody of a person who has been charged with, but not convicted of, a criminal offence. It is authority for two central propositions, firstly that the prosecution must establish their objection to bail as a matter of probability and secondly, that the evidence supporting the objection must have the degree of cogency which satisfies the court itself that the objection has been made out as a probability..."*

#### **The evidence of Mr. Jude Curran**

13. In the course of the first application for bail, in November 2015, Mr. Curran gave evidence. He is said to be one of the persons to whom the appellant confessed killing Miss Smyth. Mr. Curran, in the course of his evidence, described how, in 2010, the appellant came to his house at night. He sat at the kitchen table having picked up a large knife from a block of knives sitting on the table. He began to stick the knife into the table while at the same time telling Mr. Curran that he (Mr. Curran) could have him (the appellant), arrested and sent to prison for what he had told him, in relation to the killing of Miss Smyth. Mr. Curran was a pensioner at the time. He told the court that he found the appellant's behaviour to be threatening. He did however tell the court that subsequently, he passed the appellant in the street in Kilkenny, and they had simply greeted each other and went on their separate ways. Other than the incident referred to in his home in 2010, there had been no other incident as between himself and the appellant and that he had not been threatened or intimidated in any way by him. Mr. Curran also gave evidence that one of the appellant's brothers, Mr. Paul Malone, had approached him outside his house and showed him witness statements in relation to the murder case, including one made by himself, Mr. Curran. Mr. Curran suggested that Mr. Malone had stated to him that the gardaí would not always be around to protect him, and that he, Mr. Curran, found this to be threatening.

14. The appellant denied any involvement of this incident involving his brother. Neither was there any evidence that he had been involved in relation to this incident in any way. Nevertheless, and understandably, Mr. Curran assumed that this barely veiled threat from the appellant's brother was made for the benefit of the appellant, and was made on behalf of the appellant.

15. At the outset of the hearing of this appeal, counsel for the respondent made a preliminary objection to the appeal being heard on the basis that it sought to revisit issues determined by Moriarty J. in his decision to refuse bail in November 2015 in relation to evidence heard at that time. The respondent effectively sought to restrict the appeal to a review of refusal of bail by Moriarty J. on 16th March 2016 based only on new evidence (that of the appellant's brother), and submissions heard and made on that date.

16. The court acceded to this objection on the basis that no appeal had been brought in respect of the November 2015 decision of Moriarty J., and no transcripts or agreed counsels' notes of that hearing were available. Therefore, it would determine this appeal on the basis that issues decided by Moriarty J. in November 2015 based on evidence heard by him at that time were not now contested. In particular, for the appeal to proceed as currently constituted it was necessary for the appellant to accept the findings of Moriarty J. that an incident had occurred in 2010 as recounted by Mr. Curran in evidence in November 2015 in which he, Mr. Curran, believed himself to have been intimidated by the appellant, and which had been denied by the appellant. The appellant agreed that the appeal could be heard and determined on this basis.

17. Accordingly, the appeal is effectively confined to consideration of:-

- (i) the address at which the appellant would, if released on bail, reside pending his trial in 2017. It was explained to the court that the only address available to the appellant was his mother's house, 46 New Park, Kilkenny City;
- (ii) Other conditions that would apply if bail was granted, including the amount and source of any surety ordered;
- (iii) the continuing objection to bail by the respondent because of her concern that prosecution witnesses would be intimidated.

18. Notwithstanding such objection, the Court will grant bail on a number of strict conditions. It does so having regard to, in particular, the appellant's constitutional presumption of innocence and the lack of evidence of any actual or attempted intimidation of Mr. Curran or any other prosecution witness by the appellant since 2010, and the fact that the appellant's trial is not scheduled to begin until March 2017.

19. The conditions for the granting of bail are:-

- (i) One or two independent sureties lodge (in total), €7,500 in cash;
- (ii) the appellant will reside at his mother's address at 46 Newpark, Kilkenny and will not travel outside County Kilkenny without notice to, and the permission of, An Garda Síochána;
- (iii) the appellant will not enter into that part of Kilkenny city north of the River Nore other than for the purposes of reporting to Kilkenny Garda Station, travelling thereto for that purpose and returning therefrom to his residence immediately thereafter;
- (iv) the appellant will report to Kilkenny Garda Station daily between 11 a.m. and 4 p.m.;
- (v) the appellant will provide Kilkenny Garda Station with a mobile phone number, and will carry the mobile phone on his person at all times, for the purposes of facilitating An Garda Síochána contacting him;
- (vi) the appellant will refrain from contacting, directly or indirectly, Mr. Curran and other prosecution witnesses;
- (vii) the appellant will not leave the jurisdiction, and will provide An Garda Síochána with his passport, and will not apply for a new or duplicate passport or other documentation for the purposes of facilitating travelling outside the jurisdiction.

[Note: In relation to condition (iii) it was clarified in court that the part of Kilkenny described as 'north' of the River Nore is a reference to the part of the city on the other side of the river to that in which the appellant is required to reside]