

THE HIGH COURT

[2004 No. 1813/SS]

IN THE MATTER OF AN APPLICATION FOR BAIL AND IN THE MATTER
FOR AN APPLICATION TO ESTREAT RECOGNISANCE.

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND
JONATHAN KENNY

APPLICANT

Judgment of Mr. Justice Lavan delivered the 26th day of May, 2005

Facts

1. The applicant first came to apply to the High Court for bail on 7th April, 2003 when he was arrested and charged with an offence under section 3 of the Non Fatal Offences Against the Person Act, 1997. (This charge was later substituted for one contrary to section 19 of the Criminal Justice (Public Order) Act, 1994 involving an allegation against the applicant that he assaulted Garda Nicholas Paul Lynch with intent to resist or prevent the lawful apprehension or detention of one Gary Byrne for an offence). On that occasion, the applicant was admitted to bail by Gilligan J. On or about the 8th October, 2003, the applicant failed to appear in the Circuit Criminal Court, Court 8 in accordance with his bail conditions and a warrant was issued for his arrest. The applicant was arrested on foot of this warrant on 17th November, 2003. On 1st December, 2003, the applicant brought a second application for bail to this honourable Court which was refused by McKechnie J.

2. On the 29th March, 2004, the applicant brought a further bail application to this Court which application was heard by Kelly J. At this time, the application was in respect of one charge under section 19 of the Criminal Justice (Public Order) Act, 1994. The respondent was of the view that the matter was *res judicata* on the basis of the refusal of December, 2003 however, it was successfully argued on behalf of the applicant that he was entitled to bring a new application having suffered some trauma following the attempted suicide of his cellmate in prison.

3. The applicant's father, John Kenny, gave evidence to the Court on this occasion and stated that he was in a position to put a sum of €6,000 forward to support his son's application. He was specifically advised that this sum would be forfeited if his son did not comply with any aspect of his bail conditions.

4. Kelly J admitted the applicant to bail on 29th March, 2004 in the following terms:

- (1) his own bond of €300 of which 1/3 was to be lodged
- (2) one independent surety in the sum of €6,000 of which 1/3 was to be lodged – his father, John Kenny, acted as surety
- (3) that he reside at 10 Monsterboice Road, Crumlin with his father, John Kenny
- (4) that he sign on daily at Crumlin Garda station between the hours of 9 a.m. and 8 p.m. in a sober condition
- (5) that he abide by a curfew at 10 Monsterboice Road, Crumlin between the hours of 9 p.m. and 7 a.m.

5. Kelly J emphasised to the applicant that this bail would be revoked if he were to breach any of the conditions. Subsequently on 4th May, 2004, the applicant brought a further application for bail to the High Court. This application had to be brought so that the applicant could enjoy bail on a number of charge sheets which pre-dated his bail application of 29th March. The respondent objected to the applicant's application to consolidate these charge sheets with the exiting High Court bail of 29th March on the basis that the applicant had failed to sign on in accordance with his bail conditions on 24th April to 4th May inclusive. In addition, evidence was given at the bail hearing on 4th May that the applicant had not been at home on 1st April, 2004 when Gardaí called to his house after 9 p.m. so that he was also in breach of his curfew on that occasion.

6. O'Donovan J decided to admit the applicant to bail in respect of these charges in the following terms:

- (1) his own bond of €500
- (2) one independent surety in the sum of €5,000 of which €2,000 was to be lodged
- (3) that he reside at 10 Monsterboice Road, Crumlin with his father, John Kenny
- (4) that he sign on daily at Crumlin Garda station between the hours of 9 a.m. and 8 p.m. in a sober condition
- (5) that he abide by a curfew at 10 Monsterboice Road, Crumlin between the hours of 9 p.m. and 7 a.m.

7. On 6th October, 2004, the respondent made an application to the High Court for a warrant for the arrest of the applicant on the basis that the applicant was in breach of a number of his bail conditions. It is unclear under what section of the Bail Act the warrant was applied for. Having heard the evidence of Detective Garda Paul Lynch a warrant was issued for the arrest of the applicant.

8. The respondent's application for a warrant was based on the following breaches of his bail bonds:

- (1) that he failed to sign on at Crumlin Garda station on 11th July, 2004, 6th to the 13th August, 2004 inclusive, 2nd October, 2004, 7th October, 2004 and 20th October, 2004;
- (2) that he failed to abide by the curfew imposed on him in the bail bonds, namely to remain indoors at his home between the hours of 9 p.m. and 7 a.m. on 25th July, 2004 (when he was arrested on the Crumlin Road at 4.40 a.m.) and on 7th August, 2004 (when he was taken for the Cashel Road by ambulance to hospital at 4.39 a.m.), and on 8th September, 2004, 11th September, 2004 and 4th October, 2004;

(3) that he failed to be of good behaviour having been charged with an offence under section 8 Criminal (Theft and Fraud) Offences Act, 2001, arising from an incident on 25th July.

9. The warrant issued by the High Court was executed on 22nd October, 2004 and the applicant was taken into custody.

10. On 26th October, 2004, an application was made by the respondent to revoke the bail of the applicant based on the breaches of bail outlined above. Counsel for the Director of Public Prosecutions read to the court the provisions of Section 9(1) of the Bail Act 1997. This application was heard Finnegan P. On hearing the evidence, the President decided that he would revoke the applicant's bail and at the respondent's request estreat the recognisances in this case, notably the two sureties of €6,000 and €5,000 of the applicant's father, Mr. John Kenny. The applicant was remanded in custody.

11. It was agreed between the parties that the application before the President of the High Court had not contained full submission, authorities and that the arguments before me, for practical reasons, should be treated as a hearing of the application de nova.

Submissions of the applicant

12. Counsel for the applicant stated that the estreatment of recognisance was a separate proceeding and the matter should be adjourned to a separate list

13. It is submitted by the applicant that Section 9 (1) of the Bail Act 1997 does not apply, and should not have been applied in this application to estreat the recognisance of the surety. It is submitted that from the wording of Section 9(1) that the court shall only order the estreatment of the recognisance if the accused person has failed to turn up in court to answer his recognisance. The applicant has submitted that the facts show that the applicant had turned up on all of his court appearances and had not failed to appear in court to answer his recognisance and therefore section 9(1) does not apply.

14. It is submitted by the applicant that if the applicant failed to abide by his bail conditions as set out by the Detective Garda than the correct format for estreating bail is pursuant to section 9(2) of the Bail act.

15. It is further submitted that when an accused person fails to turn up in court to answer his recognisance then it is for that court in which he failed to appear who shall order the estreatment of bail. Therefore no application should be made to the High Court sitting as the Bail Court for the estreatment of bail where either the District Court or the Circuit Court or the Central Criminal Court have issued a warrant or the arrest of an accused person for failing to appear to answer to estreat bail. The applicant was not remanded to appear before the High Court sitting as the Bail Court and therefore section 9(1) of the Bail Act does not apply.

16. It is further submitted by the applicant that section 9 of the Bail Act 1997 substantially adds to section 32 of the Criminal Procedure Act 1967, which latter section simply recognises that;

"where a person has failed to appear before a court in accordance with this recognisance, any proceedings to estreat the recognisance shall be taken in that court."(emphasis added).

17. The applicant argues that this provision makes it clear that, for example the District Court cannot estreat a recognisance requiring a person to appear before any other court.

18. It is submitted by the applicant that the function to estreat an accused person or his surety is a mandatory function on behalf of the court in which an accused person fails to answer his recognisance and is not a function for the Director of Public Prosecutions to raise in the High Court after an order was made to revoke the accused's bail where he has failed to meet the conditions of his bail. The applicant has argued that the procedure that should have been carried out in this case is that the Garda should have applied to the High Court who originally granted the applicant bail and he should have applied for the issuing of a warrant pursuant to section 6(5) or section 9(2) of the Bail Act 1997. If he applies for a warrant under section 6(5) the court may revoke the bail but cannot estreat the bail, but if he applies for the warrant under section 9(2) and having been arrested on foot of this warrant and brought before the court, then the court must revoke the bail and estreat the bail.

19. Recognisance can only be estreated if the accused person has been arrested pursuant to section 9(2) and brought before the court pursuant to subsection (6). It is submitted that if the accused person is brought before the court for any other reason, and it is alleged he breached his bail conditions, his bail may be revoked but the court could not estreat his recognisance as the accused had not been arrested pursuant to section 9(2).

Summary of the submissions of the Applicant

1. Section 9(1) of the Bail Act 1997 does not apply to the applicant as he has not failed to appear in the High Court sitting as the Bail Court to answer his recognisance and it is only the court before which an accused person has failed to appear that can estreat the recognisance.

2. The correct procedure to estreat the recognisance of an accused person who has breached his bail conditions other than failing to appear to answer his recognisance should have been pursuant to section 9(2) of the Bail act 1997.

3. No written notification was given to the applicant or his surety as laid down by section 9(8) of the Bail Act 1997 and also Order 84 Rule 17 of the Superior Court Rules 1986, the District Court Rules 1997 and 1948 and section 34 of the Petty sessions (Ireland) Act 1851.

4. Only the court in which the applicant has failed to appear can estreat the recognisance, as per section 32 of the Criminal Procedure Act 1967.

Respondent's Submissions

20. The respondent accepts that at the time of his application for a warrant of the arrest of the applicant on 6th October, the applicant has shown up for all of his court appearances. In these circumstances, the respondent accepts that the application for the warrant was not made under section 9(1) of the 1997 Act.

21. The respondent submits that the basis for the application for the warrant is somewhat incidental in this case. The respondent has made this submission for a number of reasons:

(1) the fact that the applicant failed to appear in Dublin Circuit Criminal Court on 13th October, 2004, a date subsequent to the application for a warrant by the respondent but prior to the execution of that warrant by the respondent,

(2) due to the findings of the President of the High Court on 26th October, 2004 that the applicant had as a matter of fact, been in breach, on a number of occasions, of both of his bail bonds.

22. The respondent also submitted that the applicant is incorrect in the argument that where bail is granted to an accused person and that person fails to appear in court it is for the court in which that person fails to appear to estreat the recognisance of any surety or sureties. The respondent states that the argument of the applicant would lead to results not intended by the legislation.

23. In relation to the argument on the failure to provide the applicant with written notice, the respondent contends that the provisions of section 9(8) of the Bail Act 1997 on the matter refer to 'notice' *simpliciter* being given to the accused person and any surety.

24. It is submitted by the respondent that this requirement of notice has been fulfilled as both the applicant and his surety were present in court when the order to estreat was made and the President went on to advise the applicant and his surety of their options under section 9(8) of the 1997 Act, namely to apply within 21 days to vary or discharge the order made.

Summary of the Respondent's Submissions

25. The submissions of the respondent can be summarised thus;

(1) The respondent submits that although the original *ex parte* application for a warrant for the arrest of the applicant on 6th October, 2004 was not made under section 9 of the 1997 Act (due to the fact that the applicant had until that time attended for all court appearances) the application to revoke bail was made under section 9 (1) on the basis that the applicant had failed to appear at the Dublin Circuit Criminal Court on 13th October thereby bringing him within the provisions of section 9(1) and making it mandatory for the court to have estreated the recognisances on the occasion of the revocation application on 26th October. The fact that the applicant had failed to appear in court in the 13th October was submitted in evidence by the respondent at the revocation application.

(2) The jurisdiction to estreat recognisances of any surety does not lie exclusively with the court in which an accused person fails to appear.

(3) Even if the application to estreat should have been made to the Dublin Circuit Criminal Court, being the court at which the application failed to appear on 13th October, as application could still be made by the respondent to that court.

(4) Section 9(8) of the Bail Act, 1997 does not require the respondent to give written notice to the applicant or his surety of their right to apply to the High Court for an order varying or discharging the order made estreating the recognisances of the surety.

(5) Neither the applicant nor his surety were in any way prejudiced by the passage of time between the surety being advised of the fact that the applicant had breached his bail and the execution of the arrest warrant against the applicant.

Estreatment of Bail

26. The circumstances in which recognisances can be estreated and monies forfeited where there has been a breach of bail are set out in section 9 of the Bail Act 1997. The Bail Act 1997 makes a separate provision for the estreatment of a recognisance or forfeiture of a sum of money lodge *in lieu* of a surety or sureties in two situations; firstly in section 9(1) of the Act where a court issues a warrant for the arrest of a person who has failed to appear before the court in answer to his bail and secondly where a person has been brought before a court on foot of a warrant commanding his appearance to answer to his bail, and secondly in section 9(2) where a person has been brought before a court on foot of a warrant commanding his appearance to answer the charge that he has failed to comply with one of the secondary conditions of his bail.

27. In this case section 9(1) of the Bail Act is being relied upon to estreat the monies paid into the court by the applicant and his surety.

28. Section 9(1) states;

"9. —(1) Where an accused person who is admitted to bail on his or her entering into a recognisance with or without a surety or sureties conditioned for his or her appearance before a specified court on a specified date and at a specified time and place fails to appear in accordance with his or her recognisance and the court issues a warrant for the arrest of the person, the court shall order the recognisance of the accused person and the recognisance of any surety or sureties to be estreated and shall order the forfeiture of the amount paid into court by the accused person and any surety or sureties"

29. The applicant has argued that section 9(1) is the incorrect section to have been used in these circumstances as it is accepted that the applicant has met all his condition with regard to court appearances. It has been argued by the applicant that the procedure which should have been followed is the use of section 9(2), which states:

"Where an accused person is admitted to bail by a court on his or her entering into a recognisance with or without a surety or sureties, the court may, on the application of a member of the Garda Síochána and upon information being made in writing and on oath by or on behalf of such member that the accused person has contravened a condition (other than the condition referred to in subsection (1)) of the recognisance, issue a warrant for the arrest of the accused person"

30. The applicant has put forward detailed arguments that only the court in which the applicant has failed to appear can estreat the recognisance, as per section 32 of the Criminal Procedure Act 1967. It is my opinion that this is not a matter which arises in this case since it is not an issue that the applicant has met his conditions with regard to court appearances.

31. The Bail Act was enacted to tighten up the law with regard to the bail, specifically the sections on estreatment of bail were

intended to simplify the law on estreatment. Therefore it is reasonable to assume that the legislature intended the Act to clarify the law in the area of bail. In the Bail Act 'court' is to be interpreted as any court exercising criminal jurisdiction, there is no reason to see why this would not include the High Court. Section 9(6) of the Bail Act 1997 states;

"A person arrested pursuant to this section shall, as soon as practicable, be brought before the court that made the order directing that the recognisance be entered into."

32. With regard to the facts of this case, it is the High Court which made the order directing that the recognisance be entered into and therefore the High Court would be the correct court to apply to for an order to estreat bail under section 9(2).

33. As estreatment of bail has predominantly come under the function of the District Court, regard must be had to the Rules of the District Court for guidance. Order 27, Rule 2 of the District Court Rules 1997 states the venue for application to estreat bail;

"An application for an order to estreat such recognisance or to forfeit such sum of money shall be made by a superintendent of the Garda Síochána and may be made at any subsequent sitting of the court at which the order directing that the recognisance be entered into was made or before which the principal party was bound by the recognisance to appear"

34. If the High Court has made the order directing that the recognisance be entered into, then it would concur with these procedural rules that an application to estreat can be made to that Court.

35. The respondent has made the argument that the interpretation of the legislation given by the applicant would unnecessarily complicate estreatment of bail, to such extent that it would be the incorrect interpretation of the legislation. I do not agree with the respondent on this matter and find that the Bail Act has gives clear guidance on the procedure that should be taken. Sections 9(2), 9(6) and 9(7) of the Act of 1997, read in conjunction outline the procedure which should be taken when estreatment of bail is sought for non compliance with the conditions of bail.

36. Section 9(7) of the Bail Act 1997 states that;-

"Where a person is brought before a court pursuant to subsection (6) and the court is satisfied that the person has contravened a condition of his or her recognisance, the court shall order the recognisance of the person and of any surety or sureties to be estreated and the moneys paid into court by the accused person and any surety or sureties or any part thereof to be forfeited"

37. From the facts of this case, I find that section 9(2) would have been the more appropriate section with which to have applied for estreatment.

38. The respondent has argued that section 9(1) of the Act is applicable as the applicant failed to meet court appearance conditions subsequent to the issue of the warrant. It is my opinion that this is an incorrect interpretation of section 9(1) as this section clearly envisages a past happening and does not have retrospective effect.

Notice

39. The respondent puts forward the argument that it is not clear what is meant by 'notice' in section 9(8) but the fact that the applicant and his surety were both present at the time the order was made seems to comply with adequate notice. Since it was ordered by the President of the High Court in estreating bail that the Chief Prosecution Solicitor gave notice to the applicant and the surety stating that an application may be made to the court to vary or discharge the order to estreat, it is my opinion that further notice than mere notice is necessary. Therefore it is my opinion that the applicant is correct in his assertion that he had not received adequate notice in compliance with section 9(8) of the Bail Act 1997.

40. I will therefore vacate the order of the 26th October, 2004. I also wish to make it clear that a fresh application to estreat bail may now be maintained on proper notice to the surety as aforesaid.