



THE COURT OF APPEAL

Civil

Neutral Citation Number: [2018] IECA 178

2018/149

**Mahon J.
Edwards J.
Hedigan J.**

IN THE MATTER OF AN APPLICATION FOR BAIL

BETWEEN

THE PEOPLE

(AT THE SUIT OF THE DIRECTOR OF PUBLIC PROSECUTIONS)

AND

MICHAEL LYNN

RESPONDENT

APPELLANT

JUDGMENT of the Court delivered on the 14th day of June 2018

by Mr. Justice Hedigan

1. The appellant is charged with 21 counts of theft which are pending before Dublin Circuit Criminal Court. The charges relate to alleged wrongdoing in connection with the process of obtaining mortgages on certain residential properties in Dublin on various dates in 2006 and 2007. The appellant left the State in 2007 at a time when certain proceedings brought by the Law Society against him were pending in the High Court. He moved firstly to Portugal and subsequently in 2011 to Brazil. Whilst the appellant was in Portugal, there was considerable correspondence between An Garda Síochána and the appellant's various legal representatives in connection with arranging interviews with him. It was intended that An Garda Síochána would interview the appellant in Portugal. The interviews never took place as they were cancelled and deferred from time to time by the appellant himself.
2. The appellant was made the subject of arrest warrants issued by Dublin District Court in relation to 33 allegations including 21 allegations of theft plus an additional 12 allegations under the Criminal Justice (Theft and Fraud Offences) Act 2001. The appellant was consequently made the subject of an extradition request from the Irish authorities to the Republic of Brazil. On foot of this request the appellant was arrested and committed to custody on the 29th August 2013 in Brazil. The appellant has been in custody since that date. He has thus spent four years and six months in custody in Brazil and has now been in custody in Ireland for four months.
3. The appellant contested his extradition on various grounds. In this process, the Brazilian court ultimately authorised the appellant's extradition in respect of the said allegations of theft only. The appellant was ultimately returned to the State on the 1st March 2018. On that date the appellant was formally charged with the 21 allegations of theft and was brought before Dublin District Court where he applied for bail. This application was refused and the appellant was sent forward for trial to Dublin Circuit Criminal Court. He appealed the refusal of bail to the High Court. The hearing of that appeal took place before Ní Raifeartaigh J. on the 6th April 2018. The High Court refused bail and the appellant now appeals against that refusal.
4. The appellant submits that the learned High Court judge erred in law and/or in fact on the basis that the respondent had established on the balance of probabilities that the appellant was a flight risk but without considering whether the imposition of appropriate conditions would obviate any such flight risk. The judge held as follows:

"Now, overall, having taken into account the history and his current situation, and having taken into account the evidence, it seems to me that while it is possible that Mr Lynn has reconciled himself to facing his charges and would not leave the jurisdiction, and while it is very possible that he would simply accept matters and devote himself to his family and preparation for his case, and resign himself to his fate that he would be facing trial in Ireland, the history unfortunately gives me too many causes for concern, and I am of the view that the State has satisfied the burden of proof in relation to... that he is a flight risk."
5. The appellant submits that the learned High Court judge erred in her approach in that having established on the balance of probabilities that the appellant was a flight risk, she did not then go on to consider whether the imposition of appropriate conditions could obviate a requirement of custody until trial.
6. The appellant has now been given a trial date of the 13th January 2020. That is 18 months away. If bail is not granted it is argued that the pre-trial custody will be oppressive. This is because by the trial date he will have been in custody for six years and four months. This, it is argued, equates to a sentence of about eight years when allowance is made for the standard remission of 25 %. The Court is referred to certain comparator cases in one of which, following a contested trial, an accused was convicted of theft of almost €52 m and received a nine-year sentence in respect of the theft charges. Allowing for remission, that sentence should wind up as six years and six months served in custody. Thus it is argued, if he is refused bail, by the date of his trial, the appellant would have served in full what is likely to be the sentence imposed. At the very least, he will have served a very large portion of any likely sentence.

7. The Court is referred to the fact that the Irish authorities assured the Brazilian authorities when requesting his extradition, that the appellant would, in accordance with the almost invariable practice of the Irish courts, be given credit for time served in the requested country i.e. Brazil whilst he exercised his right to resist the extradition request. In the context of his being a flight risk, he has now little reason to embark again in flight as on almost any predictable sentence, he would actually have little time left to serve.

8. In a most unusual submission, the Court is referred to a decision of the District Court of Dresden in Germany in the case of one Paul Lange heard over five days from the 19th of April 2017. Mr Lange had been extradited from Brazil to Germany. He had been held in custody pending his removal in the very same prison in which the appellant herein was held. Following hearing evidence of the harsh and dangerous conditions in that prison, the German court allowed two and a half days for every one day of incarceration in that prison, in calculating credit to be allowed against his sentence, for the period of time already served. The appellant argues that if the Irish courts were to follow this approach, he would almost certainly have already served any likely sentence, were he to be convicted.

9. It is further argued that the appellant's ability to defend himself in what is likely to be a trial of some complexity probably involving extensive disclosure of voluminous quality will be greatly prejudiced if he remains in custody.

10. The appellant is prepared to accept any conditions of bail. At para. 21 in his grounding affidavit for his High Court application he offered the following conditions himself. These were as follows;

"(i) Reside at 76 Carton Square, Maynooth, Co. Kildare;

(ii) Submit my passport and undertake not to apply for a new passport or any other travel documentation;

(iii) Observe a curfew at 76 Carton Square, Maynooth, Co. Kildare, as and from 9 pm each evening until 6 am the following morning or such further or other times as this Honourable Court may direct with liberty to the Gardaí to check that I am at that address during those hours;

(iv) To sign on at Maynooth Garda Station on a daily or twice daily basis if necessary between the hours of 9 am and 9 pm;

(v) To carry a mobile telephone and be available to Gardaí on that telephone 24 hours per day;

(vi) To stay away from all ports and airports;

(vii) Not to leave the jurisdiction of this Honourable Court;

(viii) Any other conditions the Court feels fit to impose."

Moreover he gave oral testimony in Court of his firm intention now that he was back in Ireland to be reunited with his wife and family. He now has four children. His wife gave evidence that the eldest child was starting in the local primary school in April of this year and two of the younger children were starting at the same time in pre-school. She emphasised that she had no intention of moving anywhere else.

11. Finally, the appellant's sister gave evidence that she and her husband were prepared to act as independent surety for him in the sum of €100,000.

12. The DPP opposes bail solely on the basis that he is a flight risk. The Court is reminded of the efforts required by the State to bring the appellant back to Ireland to face trial. Whilst it is conceded that when he left Ireland and travelled firstly to Portugal and thence to Brazil he did so lawfully, nonetheless it had to be recollected that he had quite deliberately put himself first of all beyond the reach of the Irish authorities and subsequently beyond the reach of the EU authorities. The prosecuting Garda gave evidence of his belief that if the appellant were granted bail he would seize the opportunity to flee and avoid his trial. The DPP argues that any intention to stay in Ireland and face his charges was a very recently formed one.

The decision of the Court

13. The principles which should guide the Court in approaching an application such as this are to be found in the judgment of the Supreme Court in *Maguire v. Director of Public Prosecutions* (No. 2) [2005] 1 IR 371. There the Supreme Court granted bail to the applicant. Taking into consideration a pre-trial incarceration period of 20 months, Hardiman J. held as follows:

"In these circumstances we consider that the interests of justice require the release on bail of an untried prisoner to whom the State cannot afford a trial until June, 2005. ... It is sufficient for the purpose of the application that, on the basis of the materials produced in this case, it appears to us that the interests of justice require the release of the applicant on bail."

In an earlier Supreme Court decision Keane C.J. in *The People (Director of Public Prosecutions) v. Coffey* [2002] 4 IR 526 stated;

"... the court has expressed its concern and its very deep concern that in a case where the applicant was arrested and charged with the offence of murder in December, 2000, the court is now informed that because of the state of the lists in the Central Criminal Court, the case will not be heard until June 2003, so that at that stage he will have spent two and a half years in custody on a charge of which he is presumed by the law to be innocent. That, of course, is a very unacceptable state of affairs indeed and pays scant respect to the clearly established right of the applicant to a trial with reasonable expedition, a right particularly important in circumstances where there is pre-trial incarceration as there undoubtedly is in this case. That is a factor which this court considers must be taken into account in considering whether the applicant should be admitted to bail at this stage."

In this case the appellant will be in pre-trial custody for a period of 18 months from now, 22 months from when he was returned to Ireland. Such a delay is indeed very disturbing and, as in *Coffey* above, is a factor that this Court must take into account in considering whether the applicant should be admitted to bail at this stage.

14. Is the appellant a flight risk? It is quite clear that there is at least some risk that one who has fled before will do so again. When the appellant first left Ireland he did so in defiance of the order of the President of the High Court who had ordered him to appear to answer questions about his business dealings. It is particularly disreputable that he took this attitude to the Court of which, as a

solicitor, he was an officer. He fled first to Portugal. There, and shortly after in Brazil, he led Gardaí to believe he would meet with them and answer their questions about his business dealings. He repeatedly made arrangements for such meeting but failed to conclude them. His excuses for this behaviour, given in evidence before the High Court, were evasive and do little to enhance his credibility even now. It is however clear that the situation has now altered very considerably. He has been in custody for almost five years. Almost all that time has been served in a prison whose reputation is apparently a very bad one. He is now back in Ireland albeit involuntarily. If he is convicted, any sentence he is likely to receive may well have been served in considerable part when account is taken, as it should be, of his time in custody. Moreover there now is almost nowhere he can flee to from where he could not be retrieved and indeed jailed again pending such return. He now has a family of four young children. His wife expressed movingly in her evidence in the High Court the tragic family situation in which she and her four young children now find themselves. They long for his presence in their home. Taking account of all these factors, whilst it is not possible to find that there is not on the balance of probabilities a flight risk, it appears clear that it is now a very much diminished one.

15. In the light of the authorities cited above this Court must take account of the lengthy delay there will be in bringing the appellant to trial. We have to consider where the interests of justice lie and must pay full respect to the presumption of innocence. Doing that, it appears to us that we must move to consider whether conditions may be imposed which would meet the now much diminished risk of flight. Such conditions would need to be stringent and compliance therewith closely monitored.

16. The conditions offered in the High Court together with the independent surety of €100,000 seem to the Court to be broadly adequate to this end. The surety must be provided in such a way as to be readily available to the authorities should the need arise. Senior Counsel for the appellant in the High Court referred to funds frozen in a bank account and we would consider that appropriate. We will therefore allow the appeal and will admit the appellant to bail subject to stringent conditions. We will hear counsel on any changes in the conditions referred to above which at this stage they may consider necessary.