THE COURT OF APPEAL

Birmingham P.
Edwards J.
McCarthy J.

Neutral Citation Number [2020] IECA 248

Record No: 2020/131

IN THE MATTER OF AN APPEAL AGAINST A REFUSAL OF BAIL

Between/

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

-V-

M. G.

APPELLANT

JUDGMENT of the Court delivered by Mr Justice Edwards on the 10th of September 2020.

Introduction

1. The appellant is charged with a number of offences arising from a single incident that is said to have occurred on the 25th of May 2020; including a charge of false imprisonment contrary to s.15 of the Non-fatal Offences against the Person Act 1997; a charge of theft contrary to section 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001; two charges of assault causing harm contrary to s.3 of the Non-fatal Offences against the Person Act 1997; two charges of threatening to kill, contrary to s.5 of the Non-fatal Offences against the Person Act 1997; a charge of burglary contrary to s. 12 of the Criminal Justice (Theft and Fraud Offences) Act 2001 and a charge of contravening a regulation to prevent, limit or minimize the spread of Covid 19, contrary to s.31A(6)(a) and (12) of the Health Act 1976 as amended by s. 10 of the Health (Preservation and Protection and Other Emergency Measures in the Public Interest) Act 2020.

2. The appellant sought bail, but it was objected to by the respondent who relied both on the provisions of s. 2 of the Bail Act 1997 and on both *O'Callaghan* grounds. The appellant was refused bail in the District Court on the 27th of May 2020 and appealed to the High Court. The State again relied both on the provisions of s. 2 of the Bail Act 1997 and on both *O'Callaghan* grounds. Following a hearing on the 23rd of June 2020 the High Court was not disposed to uphold the s.2 objection but upheld the objection on one of the *O'Callaghan* grounds, finding that there was a probability that the appellant would interfere with the principal witness against him, namely the complainant. In the circumstances the High Court refused to grant him bail. The appellant now appeals against the judgment and order of the High Court.

The evidence given before the High Court

3. The High Court heard evidence from Sergeant Eddie Howley who related details of a complaint received by An Garda Siochána from a Ms. P.F., a Czech national, who is a former partner of the appellant and who has a child by him. The complainant had stated that she was living with the family of her ex-partner and she, and her child who slept in the same room, had gone to bed on the evening of the 24th of May 2020. She had locked her bedroom door with the key having entered the room. In the early hours of the following morning, at about 3.00am, she was awoken by a knocking at her door. She got up and opened the door a small bit and upon doing so saw her ex-boyfriend, the appellant, there. He was said to have entered the house surreptitiously through a window in his brother's bedroom.

4. The evidence was that the complainant told Gardai that she immediately felt in fear of him, both for herself and for her daughter who was with her in the bedroom and asleep. The appellant is alleged to have pushed by her and to have locked the door, refusing to open it. Thereafter there was said to have been an angry exchange between the complainant and the appellant, initially involving threatening gestures towards the complainant by the appellant, and then the striking of the complainant across the face by the appellant with his open hand. The complainant had asserted in her statement that she began to scream but was immediately ordered to desist and stay quiet by the appellant who stated that he had a knife. The complainant claims to have believed that she faced a serious threat of being injured with a knife in circumstances where the appellant had on a previous occasion produced a knife and had placed it at her throat during a video call to the complainant's family who reside in the Czech Republic.

5. The complainant claims that she was then struck across the face with an open hand for a second time, but that on this occasion she didn't scream as she was afraid that the appellant would stab her, and she feared for her own safety and that of her daughter. The complainant had maintained that the appellant then took her phone and went through her contacts. He then video-called one of those contacts, who had been a childhood friend of the complainant, and forced the complainant to say nasty things of a sexual nature to him. The complainant had asserted that to induce her to do this the appellant again threatened to hurt her with a knife and that he also said that he would beat her. She told Gardai she believed he would do this and so she did what he demanded. Following the call, the appellant hit her two really painful slaps to her face causing injuries to her forehead and lips.

6. The complainant claimed that the appellant then used her phone to ring her social worker and that he had left a voicemail. She told Gardai that the message left stated that they had broken the rules, that he was at the house and that she had made him go there. The context for this emerged later in the evidence when the complainant herself gave certain testimony before the High Court. It emerged that, during the month of January prior to the incident giving rise the charges, another incident had occurred which wasn't reported to gardai, but which had come to the attention of Tusla. Tusla appears to have had concerns for the welfare of the couple's child and arising from that a social worker had

become involved with the couple. The evidence was unclear as to the precise nature of the concern, although it was implicit that it may have been in some way related to alleged domestic violence in circumstances where the evidence was that certain undertakings had been given which were ostensibly breached, and that both mother and child were moved to a refuge following the later alleged incident giving rise to the present charges. Seemingly, up until this alleged incident, whatever the concern was the social worker involved had been content to allow the child to continue to reside with her mother in the appellant's family's home, subject to the couple entering into a social work "contract" based on undertakings that the appellant would no longer live there and that he would stay away from the family home and the complainant. The reference in the voicemail to a breaking of "the rules" was understood to be a reference to a breach of those undertakings.

7. The evidence was that the complainant had told Gardai that she felt that she could not leave the room at any stage. She had said that she felt trapped and afraid and that something worse than a slap would happen. The complainant had asserted that the appellant had said that he would kill her first and then call her mum and show her the body. He had stated that he didn't care about prison and would go to prison no problem. This made her very afraid that he would kill her. He then took the SIM card from her phone and he left. It was said that he unlocked the door, ran very quickly down the stairs, exited the house, spent a few seconds in the garden and ultimately left by car. The entire incident as said to have lasted about forty minutes.

8. The complainant reported the matter to An Garda Siochána later that day and claimed to have suffered bruising and soreness to both sides of her jaw and swelling, bruising and soreness around the area of her left eye. She was noted to be exhibiting injuries and these were photographed.

9. Sergeant Howley gave evidence that the appellant has forty-three previous convictions including fourteen from the Czech Republic. The twenty-nine convictions recorded in Ireland included three convictions for burglary, two for s.2 assaults, one for a public order offence and the remainder were all road traffic offences. Seventeen of these twenty-nine convictions were committed by the appellant while he was on bail and all seventeen involved road traffic offences. He has served a number of custodial terms. On the previous occasions on which he was granted bail he had always turned up for his trial. The fourteen convictions recorded in the Czech Republic included five for theft offences, one for violation of domestic freedom, four for disorderly conduct, one for dangerous and threatening behaviour, one for damaging property, one for causing bodily harm and one for obstruction of the execution of an official decision.

10. The evidence was that one previous bench warrant had been issued in respect of the appellant in 2012 but that he had no convictions for failing to appear.

11. Sergeant Howley testified that he believed the appellant was a flight risk because other than his child with the complainant the appellant has no ties to this jurisdiction. On the contrary, he has a previous partner and five children in the Czech Republic. It was

understood that those five children had all been taken into care. The appellant and the complainant had met in the Czech Republic before coming to Ireland. Sergeant Howley further testified that he feared that if granted bail the appellant would commit further offences against the injured party and intimidate witnesses.

12. Sergeant Howley acknowledged under cross-examination that while the appellant is a Czech national he has been resident for approximately twenty-two years in Ireland. It was accepted that he has brothers living in this jurisdiction.

13. Ms P.F. was then called as a witness by counsel for the appellant. She gave evidence without the benefit of an interpreter and had poor English. Despite this, the gravamen of her testimony, although there were aspects of it that were by no means clear, was that she wished to withdraw her statement of complaint because:

> *"I make mistake, big, mistake, because I said very wrong words, yes And I need to fix because I can't sleep, I can't be like this, you know. I know he broke the plan with the social worker and the social worker said, "If somebody broke the plan, I have to take the baby," yes. And she's my only child and I'm very scared about her you know I don't have any family here in Ireland. I have just one: my daughter. And, you know, if he called the social worker and he said take the baby and like that. I'm very scared. And I have to make this because you know, she's my everything and I don't want to lose her, you know."*

14. The complainant went on to say that she had made her statement to the gardaí as she was very angry with the appellant because he had called the social worker and because he had another woman. She maintained that the bruising that she was exhibiting when the Gardaí saw her was due to something which had happened while she was on a bus, and that it was not due to the alleged events described by her in her statement. It was suggested to her that if the court were to grant the appellant bail he would have to stay away from her. She responded that she understood that, but stated "*I don't want him anymore*." The complainant confirmed that she now wished and intended to leave the jurisdiction with her child.

15. Under cross-examination the complainant confirmed that she had indeed made a statement to An Garda Siochána in the terms described by Sergeant Howley. She further confirmed that Gardaí had taken photographs of her injuries at the time of taking her statement. She further confirmed that she had had a conversation with a Garda Redmond on a Sunday evening just two days prior to the High Court bail hearing in which she had confirmed her intention to proceed with her complaint against the appellant. She stated that she was no longer living with the appellant's family. She was not in contact with the appellant but had spoken with her sister-in-law and with the appellant's father. She denied having been put under any pressure to testify the bail hearing and denied that anybody had demanded that she give this evidence.

16. The witness was then asked some questions by the High Court judge. She confirmed that she and the appellant had been living in the appellant's family home before the appellant

had taken up with another woman. He had left the family home and had gone to live in Cavan. She stated that she was now living in a refuge because the social worker had said that she couldn't stay in the appellant's family home anymore. The social worker had helped her to transfer to the refuge. The judge asked "*why did she say you couldn't be there?*", to which the complainant replied "*she said because she can't trust the family anymore.*" However, she added: "*[b]ut the family every time help me with everything. It's a very good family and I like them, yes.*" The judge then asked the witness if she could identify a lady at the back of the court and the witness confirmed that this was her sister-in-law, i.e., the appellant's sister.

17. The appellant did not give evidence himself. The High Court judge inquired if either side wished to call the relevant social worker and flagged that, if so, she would be prepared to adjourn the matter to facilitate that. Neither side availed of that offer. That concluded the evidence before the court.

The High Court's Ruling

18. Following submissions by counsel both sides the High Court judge ruled, inter alia, as follows:

> *"Now, while we had a situation here today that Ms. F has given evidence that somewhat indicates that what she said to the guards was borne out of anger with Mr. G because he had taken up with another woman, it raises significant question marks in relation to why she's come to say that, and it raises significant question marks as to whether what she has said to me is, in fact, true.*
>
> *What is clear to me is Ms. F is in fear; that's clear to me why she's in fear is what I now have to consider, because if I consider that she's in fear because of the applicant and a direct or indirect interference or intimidation of her, I must refuse bail because it raises it to a probability that there will be an interference or intimidation with the witness.*
>
> *Now, Ms. F is somebody who was resided with Mr. G's family. Mr G was no longer there. Mr. G was in Cavan. Mr. G is obviously entitled to a presumption of innocence in respect of what the initial allegations were. Mr. G's sister is here today, and clearly he's entitled to support, but that raises questions in itself in terms of what's going on here. Ms. F is now in a refuge. If these people were as wonderful as Ms. F has given evidence that they are, that they're so supportive, I'd find it very hard to believe that Tusla recommended that she would be removed from the residence and go into a refuge. The concept that Ms. F is anxious to leave the jurisdiction is also another very concerning aspect to that. Why would that be? I'm of the view in the circumstances of this case that there has been interference with this woman. We have a situation where there was an indication to the guard on Sunday that there was some issue with respect to social workers and her child but that she wished to proceed with her complaint and yet we now have a situation where it is quite unclear what, in fact, she is saying occurred on the night. So, if Ms. F, in the normal course, was given the opportunity to provide another*

statement to An Garda Siochána clearly an interpreter would be involved in relation to that and what she in fact, is saying may become all the clearer. But it's not clear here this morning. What is clear to me is that she is in fear. And for that reason, in light of the fact that she's in a refuge, the only situation that arises that she's in fear because of direct or indirect pressure being put on her. She, in fact, stated in her evidence that she was under pressure.

Now, she went on, and all occasions that she slipped. She went on, on all occasions, to indicate how wonderful the family were and how it was all her fault and she was under pressure because of her own situation and her own wrongdoings. I don't accept that evidence and for that reason, I'm of the view that there is a probability that there will be interference with this lady, and I'm refusing Mr. G bail."

Grounds of Appeal

19. The appellant has appealed on eight grounds and, as follows:

(i) the High Court judge erred in law, in refusing bail under the *O'Callaghan* principles, in failing to have adequate regard to the presumption in favour of bail and that in order to displace same, the prosecution must establish its objection via sufficiently cogent evidence, to the standard of probability.

(ii) The High Court judge erred in fact and in law in inferring that the chief prosecution witness had been intimidated, notwithstanding that the witness herself confirmed in evidence that she had not been intimidated and that you wish to give evidence freely that she had fabricated elements of the complaint, in circumstances where she wanted to get back at the applicant for previous infidelities in their relationship and that, as per the allegation that he had called her social worker/Tusla worker during the course of the dispute.

(iii) Without prejudice to the foregoing, in so inferring that the chief prosecution witness had been intimidated, the High Court judge nonetheless erred in law in failing to address whether there was any evidence supportive of the conclusion that the applicant himself had directly (or indirectly) intimidated the witness, or bore any role or culpability in respect of same and failed to have any or any adequate regard to the fact that he had remained in custody since the time of his arrest.

(iv) Without prejudice to the foregoing, the High Court judge erred in law in determining that if admitted to bail, that the applicant would intimidate the witness, absent any adequate evidence supportive of such a conclusion.

(v) The High Court judge erred in law in refusing bail under the *O'Callaghan* principles in failing to have any or any adequate regard to the weakening of the prosecution case, insofar as the chief prosecution witness and injured party had given evidence under oath that she had fabricated material elements of the complaint comprising

the subject matter of the charges, had given evidence of her motive for such fabrication and had been cross-examined by counsel for the prosecution.

(vi) The High Court judge erred in fact and in law in refusing bail under the *O'Callaghan* principles in failing to have any, or any adequate regard to the impact of the complainant's evidence that she intended to leave the jurisdiction with her child. In particular, the High Court judge failed to have any or any adequate regard to her evidence, and that of the prosecuting Sergeant, that the complainant had limited (if any) ties to this jurisdiction, the likely impact of such an intention on the prospect of the applicant intimidating her, where he to be admitted to bail and as to its likely impact on the prospect of his conviction at trial.

(vii) The High Court judge erred in law and in fact in failing to adequately consider, whether conditions could be imposed that would remedy a concern that the appellant might interfere with witnesses, in particular, to have no contact directly or indirectly with the complainant, remain within the jurisdiction, abide by a sign-on, curfew, and mobile phone condition.

(viii) The High Court judge erred in law in all the circumstances in failing to vindicate the constitutional rights of the appellant inter alia, failing to properly consider the merits of the application and further failing to afford fair procedures to the appellant in that he was not given adequate opportunity to address the ultimate evidential basis for refusal of bail.

Submissions

20. We have received helpful written and oral submissions from both sides, for which we are grateful. The Court has also been referred to a number of authorities, which we have considered carefully. In particular, both sides have referred us to the Supreme Court's decision in *The People (Director of Public Prosecutions) v Mulvey* [2014] 1 IR 119, while the respondent has also referred us to *The People (Attorney General) v O'Callaghan* [1966] IR 501; *The People (Director of Public Prosecutions) v Tristan McLoughlin* [2010] IR 590; and *Vickers v The DPP* [2010] 1 IR 548.

Discussion and Decision

21. As a preliminary to indicating our decision in respect of this application we wish to make some observations concerning the jurisdiction that is being invoked, the procedure involved, the jurisprudence in this area and certain unsatisfactory features of the present case which have created difficulties for this court.

22. Every person in this country, whether citizen or not, has a presumptive right to liberty in circumstances where they are merely accused of a crime but have not yet been convicted of it. This operates as an effective presumption in favour of bail where it is applied for by a person who has been remanded in custody.

23. Notwithstanding this effective presumption an application for bail may be refused upon one or more of several possible grounds, where the granting of bail is objected to by representatives of the State, either in the guise of An Garda Siochána or the relevant

prosecuting authority (usually the Director of Public Prosecutions). Among the grounds upon which bail may be validly refused are the *O'Callaghan* grounds, so called after their elucidation in the seminal case of *The People (Attorney General) v O'Callaghan* [1966] IR 501, and of which there are two, i.e., (i) a concern established at the level of probability that the applicant, if granted bail, will not turn up for his trial; and (ii) a concern established at the level of probability that the applicant, if granted bail, would seek to interfere with the court's process through the intimidation of witnesses or jurors. The raison d'etre for these grounds is the maintenance of the court's authority, the maintenance of confidence in the law and the protection of the court's process.

24. In addition, other possible grounds upon which bail may be validly refused are provided for by statute and specifically in the Bail Act 1997 (as amended), including s. 2 thereof. This Court is no longer concerned with the s. 2 objection that was initially relied upon in this case in circumstances where the High Court judge was not disposed to refuse bail on s.2 grounds, and no cross appeal has been filed against that aspect of her ruling by the DPP. Accordingly, for the purposes of this judgment we need only concern ourselves with *O'Callaghan* grounds.

25. It is clear that the effective presumption which exists in favour of bail may be rebutted. However, it is also well established that when objecting to the granting of bail, the objecting party must establish its objection as a matter of probability and the evidence supporting that objection must have a degree of cogency sufficient to satisfy the court concerned that the objection has been made out as a probability, which finding should be stated expressly by the court concerned. See the remarks of Dunne J, on behalf of the Supreme Court, to that effect in *The People (Director of Public Prosecutions) v Mulvey* [2014] 1 IR 119 at para [24], citing in turn Hardiman J's judgment in the earlier Supreme Court case of *The People (Director of Public Prosecutions) v. McLoughlin* [2010] IR 590 at para [58].

26. The authorities make it clear that the procedure is adversarial. The objector bears a burden of proof and the standard of proof is proof on the balance of probabilities. Accordingly, the basis for any objection must be clearly articulated by the objecting party and evidence must be adduced in support of the objection, sufficient both quantitively and qualitatively to discharge the burden of proof. It is not an inquiry. Neither is it a sui generis procedure. It is unequivocally adversarial by virtue of the effective presumption in favour of bail.

27. In that regard, in the *McLoughlin* case, cited already, Hardiman J, again at para [58], alludes to *"[t]he question of what the State must establish in order to successfully oppose a bail application"*, thereby making clear his view that there is a burden of proof to be discharged. He elaborates by citing the following passage from the judgment of Walsh J in the *O'Callaghan* case, which passage was also quoted with approval by Keane J in *The People (Director of Public Prosecutions) v. McGinley* [1998] 2 IR 408 at p. 413, :-

> *"… 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 witness 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' (emphasis added).

28. Hardiman J comments in respect of this passage at para [59] of his judgment in the *McLoughlin* case that:

> *"[59] 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. If the court could deprive a person of liberty simply by noting that the government, or the Director of Public Prosecutions, or one or more gardaí sincerely believe that the objection is made out, then the court would be abdicating its duty in favour of those persons or bodies."*

29. In the *Mulvey* case, the State's objection to the applicant's bail in respect of charges relating to allegations of violent and threatening behaviour, demanding money with menaces, entering a building as a trespasser, violent disorder, intimidation and criminal damage, all (with one exception) arising out of a single incident which is alleged to have occurred on 25th of August 2013 and involving four complainants, was said to be based on *O'Callaghan* grounds and the provisions of s. 2 of the Act of 1997. Prior to the applicant's bail hearing the four complainants had attended at Finglas Garda station where they made statements, which were recorded on videotape, withdrawing their original statements of complaint. They then, in the context of Mr Mulvey's bail application, furnished a joint affidavit through their solicitor to the State's legal representatives reiterating that they wished to withdraw their statements of complaint.

30. Evidence was received by the High Court of the background to the charges, and of the history and circumstances of previous bail applications in relation to those charges. The court heard that two of the applicant's co-accused had obtained bail in the District Court. It further heard evidence as to the making of statements by the alleged injured parties on the date of the alleged incident, of the attendance by the injured parties at Finglas Garda station a few days later seeking to withdraw those statements, and of the furnishing of a

sworn document. Evidence was adduced that the applicant had seven relatively serious previous convictions, two of which were committed while on bail, the last in 2007 being a Circuit Criminal Court matter and involving attempted robbery, firearms offences and the unlawful taking of a mechanically propelled vehicle. There was also evidence of the fact that, previously, the applicant had been the subject of three bench warrants.

31. Although the prosecution had articulated an objection to bail based, *inter alia*, on *O'Callaghan* grounds, it was non-specific with respect to which of those grounds was being relied upon. Indeed, it was entirely vague in that regard. The Garda Sergeant who gave evidence in support of the State's objection alluded to the seriousness of the charges, and to the fact that the case depended on the witness testimony of the complainants. He referred also to a family connection between the applicant and the complainants, and to the fact that one of the complainants was in treatment for cancer and that the applicant was aware of that. It was common case, however, that at no time did he seek to suggest in terms that the complainants had withdrawn their statements due to intimidation. Neither did he say that the applicant, Mr Mulvey, was suspected of having been involved in, or connected with, intimidation of the complainants, nor did he express a concern in terms that the applicant, if granted bail, would be likely to interfere with witnesses in the future. Towards the end of his evidence in chief he confirmed in answer to counsel for the State that certain conditions proposed by the applicant's legal team would not allay his concerns.

32. The possibility that there might have been intimidation was one that was raised by the trial judge, rather than by either side in the case. In response to this, the applicant had gone into evidence and had expressly testified that he knew nothing about intimidation, and he was not cross-examined in that regard by counsel for the State.

33. Despite this being the state of the evidence, the trial judge in the *Mulvey* case had been prepared to infer that the complainants had been intimidated into withdrawing their statements and accordingly refused bail on the basis that granting bail to the applicant, having regard to the circumstances that had occurred, could endanger the process in the case and could endanger the persons concerned.

34. The refusal of bail was then appealed to the Supreme Court and amongst the arguments made there was a contention that the trial judge had erred in drawing an inference that there had been intimidation in the absence of an adequate evidential basis for doing so. Giving judgment on behalf of the Supreme Court, Dunne J, having considered authorities such as *Northern Bank Finance v Charleton* [1979] IR 149 and *Hay v O'Grady* [1992] 1 I.R. 210 concerning whether, and if so when, an inference based on circumstantial evidence drawn by a judge at first instance might be interfered with on appeal, concluded:

> *"[32] I am satisfied that it was open to the trial judge to draw the inference from the facts given in evidence before him as to the making of complaint by the alleged injured parties and as to the withdrawal of the statements of complaint within days, that the reason for the withdrawal of the statements was intimidation. Allowing that*

it was open to the trial judge to draw the inference that the alleged injured parties had been intimidated, it does not necessarily follow that the applicant's application for bail should have been refused."

35. Referring specifically to Hardiman J's remarks at para [59] of his judgment in the *Mc'Loughlin* case (quoted earlier in this judgment) Dunne J then observed:

"[34] Bearing in mind the agreed note of the hearing and of the decision of the trial judge herein, it is somewhat surprising that the trial judge found that the witnesses had been intimidated in circumstances where the State had never made that case against the applicant."

36. The appeal was ultimately allowed because, as Dunne J explained:

"[36] There is an absence of evidence in this case to indicate as a matter of probability that the applicant, if granted bail, will interfere with witnesses. Whilst it was open to the trial judge to draw an inference as to intimidation of the alleged injured parties, the fact remains that there was no evidence before the court of the kind described by Keane J. in The People (Director of Public Prosecutions) v. McGinley [1998] 2 I.R. 408. The case made by the State in opposing bail did not set out to establish that the applicant as a matter of probability would interfere with witnesses.

[37] On the facts of this case, it was the trial judge who first adverted to the issue of intimidation and the applicant was then examined by his counsel on the matter of intimidation. He gave evidence that he did not know anything about intimidation and he was not cross-examined on his evidence. The State does not appear to have relied on the possibility of interference with prospective witnesses in objecting to bail."

37. The learned Supreme Court judge added:

"[39] In this case there is a lack of evidence to support the conclusion as a matter of probability that the applicant was involved in or connected to any intimidation of the alleged injured parties. The applicant was not in a position to do more than deny the possibility of intimidation. He certainly was not in a position to call any witness to deal with the subject and he could hardly have cross-examined Sergeant O'Donovan on the matter, given that Sergeant O'Donovan had not given any evidence to the effect that the applicant had or would interfere with or intimidate the witnesses.

[40] Bail is not the automatic right of an individual awaiting trial but it is an important aspect of the individual's constitutional right to liberty, a right which can only be restricted on limited grounds supported by cogent evidence. There is a balance between the individual's right to freedom and the public's right that the integrity of the trial process be protected."

[41] …

[42] …

[43] The trial judge, in considering the facts before him, was entitled to be concerned that the alleged injured parties had been intimidated but, as pointed out, in the absence of evidence to demonstrate that the applicant was involved in or connected to any intimidation, the decision of the trial judge cannot stand and I will allow the appeal and set aside the judgment of the High Court. I would remit the matter to the High Court."

38. In a concluding observation, Dunne J commended to the State's legal representatives that the following would represent best practice in future cases:

> *"If the State wishes to rely on a particular ground related to an applicant in any given case, the State should, in the course of the bail application, set out clearly which of the O'Callaghan grounds it seeks to invoke. That is not to say that an issue could never arise during the course of the hearing in appropriate circumstances. If the O'Callaghan grounds are invoked in general terms without indicating specific grounds relied on in a given case, the task of the judge hearing the application is not made easy, particularly, if one bears in mind the large volume of bail applications that have to be dealt with by a judge in the High Court in the course of the regular bail list. However, if the State sets out clearly the specific grounds relied on in a particular case, the minds of all those involved in the bail application will be focused on the evidence required to establish or challenge those grounds and this will make easier the task of assessing that evidence for the decision maker. On the contrary, it would have the advantage of clarifying the issues before the court for all the parties concerned. It is not unduly burdensome to ask that such a practice be adopted when the State intends to object to bail."*

39. Turning then to the present case, we note that the Supreme Court's recommendation was ostensibly followed in this case, in that the witness for the State did express concerns about both a flight risk and a risk that witnesses would be interfered with. To the extent that the second of the *O'Callaghan* grounds was being relied upon, there was, we feel, perhaps a missed opportunity to adduce, isolate and point to what was said to be the cogent evidence, whether direct or circumstantial, that was considered to establish as existing at the level of probability the risk or risks apprehended. Nobody suggested in terms, or sought to elicit from any witness, that the applicant had been involved in, or was connected to, the intimidation of PF, or even suggest in terms that there was a basis in the evidence for suspicion, much less an inference, in that regard. That PF might have been intimidated was never expressly suggested. The high-water mark of it was that prosecuting counsel, in his closing submission, urged upon the court that Sergeant Howley had a expressed a concern in relation to potential witness interference and that:

"that, I would respectfully submit to you, can be viewed in the context of what has transpired in court this afternoon and what has been said in the witness box and to the court's own inquiry in relation to whom and whom was not present in court."

40. There were other unsatisfactory aspects to the hearing before the High Court. It was highly unusual, although not irregular, for the applicant to have called the complainant as a witness. There is, of course, no property in a witness and providing dealings with her are conducted with propriety there is no reason in principle why a complainant cannot be called as a witness in support of an application for bail. Being conducted with propriety means putting the prosecution on notice of the intention to call the complainant (which was done); showing due regard for the fact that she would be a prosecution witness at any subsequent trial (we note, in fairness, that in this case the witness was spoken to by counsel for the applicant in advance of testifying with the consent of counsel for the prosecution, and in the presence of a Garda); and with due regard for the rights of the witness.

41. In the latter regard, we have some reservations as to whether the rights of the complainant in this case were adequately respected. It is manifest from the transcript that her English was extremely poor, yet she was not provided with an interpreter. As complainant, she was a possible victim of a crime (admittedly one that had not yet been established as having occurred to the standard of beyond reasonable doubt), and as such she was entitled to expect that facilities would be made available to enable her to adequately explain herself. This was all the more important where she was being called in circumstances where it was believed that she was going to, or that it was at least possible that she would, resile from her statement of complaint, notwithstanding that just two days previously she had confirmed her resolve to proceed with it to Garda Redmond.

42. Even more significantly, in stating on oath that she had made a false complaint to Gardai, the complainant was ostensibly admitting in the witness box to having committed a criminal offence. In that regard it matters not that the trial judge did not believe her testimony and was prepared to draw the inference that she had been intimidated. The important point is that it was not unanticipated before she went into the witness box that she would give that evidence. Despite this, the transcript does not suggest she was cautioned as to potential consequences, or that the judge was requested to caution her as to potential consequences, or that anybody advised her or reminded her that she enjoyed a privilege against self-incrimination. Nowhere on the transcript is there any ostensible engagement with such issues. There is nothing on the transcript to indicate that the complainant had been independently legally advised. Counsel for the respondent did put to her in cross-examination, but this was ex post facto the ostensibly incriminating admissions which were offered during her evidence in chief, that when she had given her statement to the gardai "*it was explained to you that the statement was true to the best of your knowledge and belief and that you make it knowing that if it wasn't correct, that you will be liable for prosecution, you could get in trouble yourself and you signed the statement; isn't that correct?"* The witness responded: "*Yes. Yes, yes, I signed it.*"

43. There is a further unsatisfactory aspect to how matters were conducted in the High Court. *The People (Attorney General) v O'Callaghan* makes clear that a relevant consideration for the court in any case in which bail is being objected to is the strength of the prosecution's case against the applicant. Following the complainant's indication that she was resiling from her earlier statement to An Garda Siochána, nothing was offered to the court concerning the potential implications of that for the strength of the prosecution's case, and concerning the weight to be attached to it by the judge in considering the issue of bail. At one level it is self-evident that, in a case such as the present, it is never good news for the prosecution that a complainant should, for whatever reason, seek to resile from her complaint. Any case is undoubtedly going to be weakened by that to some degree, but the development might not necessarily be fatal. It might be possible to introduce the original statement of complaint using the procedure under s.16 of the Criminal Justice Act 2006, and there might perhaps be other evidence tending to corroborate or support the original complaint.

44. One could readily foresee that in the present case evidence might be secured in relation to the voicemail said to have been left on the social worker's phone. The original complaint also refers to a call made to a childhood friend of the complainant during the incident, during which the complainant was said to have been forced to make sexual suggestions to that friend, opening the possibility of the introduction of both human and technical evidence to establish both that the call was made, its duration and possibly its contents. There was also reference in the original complaint to an incident during a previous video call to the complainant's family in the Czech Republic in which a knife was said to have been held to the complainant's throat, thereby providing a further potential means of securing evidence supportive of an aspect of the original complaint.

45. However, for some reason, the trial judge in this matter was not addressed at all at the bail hearing concerning the implications of the complainant's resilement in terms of the strength of the case. The court does not wish to be unduly critical of counsel in that regard because it is clear that news of the witness's ostensible change of heart had come late in the day, and very possibly there had not been time to either consider the position in depth or to take full instructions. However, an adjournment could have been sought to that end.

46. There was also the concerning issue that the trial judge felt that she was not being provided with the full picture. In her ruling she alludes to the language difficulty and the fact that matters were "*not clear*" given the absence of an interpreter, and specifically comments:

> *"We have a situation where there was an indication to the guard on Sunday that there was some issue with respect to social workers and the child but that she wished to proceed with her complaint and yet we now have a situation where it is quite unclear what, in fact, she is saying occurred on the night. So, if Ms. F, in the normal course, was given the opportunity to provide another statement to An Garda Siochána clearly an interpreter would be involved in relation to that and what*

she in fact, is saying may become all the clearer. But it's not clear here this morning."

47. Both sides were afforded the opportunity of considering whether they wished to call the social worker to provide evidence of the child protection concern to the extent that it was relevant to the bail issue. It is clear that the trial judge would have welcomed hearing from him or her, and it was implicit in the judge's invitation to them to consider that possibility that she would have been prepared to facilitate any party who wished to do so with an adjournment. However, the invitation was not taken up by either side.

48. We think that the High Court judge did not receive as much assistance as she might have, in the unusual circumstances of the case. We are satisfied that was not due to an unwillingness on either side to be of assistance, but rather think that it may have been due to a rapidly unfolding dynamic and a lack of opportunity for much reflection before developments were responded and reacted to. Unfortunately, it did result in the judge's task being made more difficult, both in terms of being faced with an evidential deficit and on account of the procedural deficiencies we have alluded to.

49. Be all of that as it may, we have ultimately no hesitation in concluding that the High Court judge was entitled, even on the incomplete and limited evidence before her, to draw the inference which she did, namely that as a matter of probability the complainant had been intimidated. It does seem to us, however, that much the same difficulty exists in this case as existed in the *Mulvey* case, namely that of then connecting the applicant to that intimidation which the judge would have had to do in order to have justified the further step taken by her of refusing bail on the basis that the applicant would, as a matter of probability, seek to interfere with a witness or witnesses if granted bail.

50. We do not interpret the *Mulvey* decision as saying that in a case in which there is a basis for inferring that witness intimidation has already occurred, it cannot further be inferred in an appropriate case, and in the absence of evidence to the contrary, that the applicant for bail was, as a matter of probability, involved in or connected to that intimidation. In our view a critical difference on foot of which the present case might be distinguished from the *Mulvey* case is the fact that in *Mulvey* the applicant for bail had given positive evidence that he had no knowledge of any intimidation, and he was not challenged or cross-examined about that. In the present case, however, there was no such evidence. The appellant did not give evidence at the bail hearing, which was his entitlement. However, it is clear from the re-examination of PF by counsel for the appellant that it was clearly understood that, on the state of the evidence at that point, the possibility that PF had been intimidated was at least implicit and needed to be addressed. The questions asked in re-examination, which could technically be justified on the basis that the witness had said at one point while under cross-examination that she felt under pressure, and which sought to, and did, elicit confirmation from the witness that she had not been interfered with by intimidation, were ostensibly intended to address that. However, if the witness was in continuing fear she was scarcely likely to admit to having been intimidated. Appreciating that reality, and that the implication of possible intimidation

might still not have been fully dispelled (as indeed it wasn't, as the judge's subsequent ruling makes clear), there was then an opportunity for the applicant to give sworn evidence expressly disavowing any knowledge of intimidation, as had occurred in the *Mulvey* case, but it was not availed of.

51. If the *Mulvey* decision were to be interpreted as effectively saying that, in a case such as the present, the prosecution require to have the assistance and co-operation of the person the subject matter of the alleged intimidation in order to establish that intimidation, it would be to place a premium on an accused being successful in his intimidation, and that would be inimical to the interests of justice, and a direct threat to the court's process. If there is a basis for inferring that intimidation has occurred we see no reason in principle why in an appropriate case it cannot also be inferred from the available circumstantial evidence, where that includes evidence of a connection between persons who were the likely instruments of that intimidation and the applicant, that the applicant had been involved in or was at least connected with that intimidation, in the absence of credible evidence to the contrary.

52. It is implicit in the High Court judge's remarks in the present case that she believed that members of the appellant's family had likely been the instruments by means of which the complainant was intimidated. If they were believed to have been instrumental in that way regard would have to be had to the fact that it was at least possible that this was a solo run on their behalf and that pressure was applied without the knowledge or acquiescence of the appellant. However, the standard of proof in an application such as this is proof on the balance of probabilities. The judge would also have been entitled, had she considered it, to reject that possibility in favour of a conclusion that, in the absence of evidence tending to suggest lack of knowledge or acquiescence by the appellant, such as was provided in *Mulvey* by the applicant's unchallenged testimony, it was inherently more likely, and indeed probable, that because of the familial connection, and also the dependency of the complainant and her child on the appellant's family for a home, that the appellant at the very least knew of and acquiesced in intimidatory action by members of his family, and that his family members were effectively acting as his agents.

53. Finally, we note that the judgment of the High Court judge is silent on whether there was any express consideration of the possibility that the intimidation, which we are satisfied she was justified in concluding had occurred, could have occurred without the knowledge and acquiescence of the applicant. The trial judge may well have considered this but it is difficult to be certain in that regard where the judgment does not specifically allude to it. Overall, we consider that because the proceedings before the High Court were unsatisfactory in the many respects that we have identified, the just and most appropriate course for this court to take is to allow the appeal and set aside the judgment of the High Court. However, the matter will be remitted to the High Court for a re-hearing at which we would hope that the issues that we have identified, and arising on both sides, would be appropriately addressed.

Birmingham P: I agree

McCarthy J: I also agree