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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION

IN THE MATTER OF AN APPLICATION FOR FORFEITURE OF A SECURITY

DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

and

VICTORIA MACKEY

Respondent

Lauren Chesire BL (instructed by the PPS) for the Applicant
Aaron Thompson BL (instructed by Madden & Finucane, Solicitors) for the Respondent

ROONEY J

Introduction

[1] The defendant, Kevin Conway, is charged with the murder of Shane Whitla ("the deceased") on 12 January 2023.

[2] On 17 January, the defendant was arrested. He applied for bail on 17 February 2023. Following a hearing before the learned District Judge, the defendant was granted bail subject to stringent conditions. The Public Prosecution Service (PPS) appealed the grant of bail to the High Court pursuant to section 10 of the Justice (Northern Ireland) Act 2004.

[3] On 20 February 2023, following oral representations made on behalf of the prosecution and the defendant, the High Court dismissed the appeal and made an order that bail be granted to the defendant subject to a number of stringent conditions. Significantly, of particular relevance to this application, was the imposition of a condition that the defendant must not be in possession of any device capable of accessing the internet nor to have any access to the internet whatsoever.

[4] The defendant was admitted to bail in his own recognisance of £500. The bail order also provided that an additional cash security of £4,000 was to be lodged in court by Victoria Mackey, the defendant's sister, in order to ensure the personal appearance of the defendant before a Magistrate's Court sitting at Craigavon Courthouse on 10 March 2023, and on each remand date thereafter. The order also stated that the grant of bail would terminate upon the Magistrate either committing the defendant for trial or discharging the defendant in accordance with article 37 of the Magistrates' Courts (Northern Ireland) Order 1981.

[5] On 25 February 2023, Ms Patrice Whitla, a sister of the deceased, became aware that at approximately 0400 hours on the same date the defendant was on-line on Facebook Messenger. Ms Whitla suspected that the defendant was in breach of the said bail condition, namely a prohibition on access to the internet. She took a screenshot of the Facebook Messenger and forwarded images to the police.

[6] On 25 February 2023 at approximately 2023 hours, Constable Wallace attended at the defendant's bail address in Newry. He was carrying out enquiries relating to the defendant's suspected breach of his bail conditions. The defendant opened a downstairs window and informed the police that the front door key was under the front door mat and the police used this key to open the front door. Constable Wallace explained the nature of his enquiries to the defendant who immediately became highly emotional. At 2040 hours, the defendant was arrested on suspicion of breach of bail and made no reply after caution. It is clear that, on his arrest, the defendant was in the lawful custody of the police. Following the arrest, the police permitted the defendant to retrieve a packet of cigarettes, and after he had smoked a cigarette at the front door, the defendant absconded from police custody and ran away in the direction of the Belfast Road, Newry. Constable Wallace pursued the defendant on foot calling out on a number of occasions for him to stop. Police officers gave chase but lost sight of the defendant and ultimately, they were unable to trace the defendant.

[7] Due to the fact that the defendant had absconded, the consequences for the surety, Victoria Mackey, the sister of the defendant, were real and obvious to her. In an affidavit from Ms Mackey, she avers that when she discovered the defendant had breached his bail and absconded, she contacted the defendant's solicitor and offered her assistance in an effort to find the defendant and to persuade him to surrender to police immediately. Ms Mackey further avers that she was able to make contact with friends of the defendant and informed them that it was imperative the defendant handed himself in and returned to the custody of the police. Ms Mackey further states that she was assured by the friends of the defendant that he would return to the custody of the police on the following morning. This information was passed to the defendant's solicitor and to the police.

[8] On 27 February 2023 the defendant voluntarily returned to the custody of the police. Bail was subsequently revoked by the learned District Judge and, on appeal by the defendant, the revocation order was confirmed by the High Court.

Nature of the Application

[9] The procedural regime governing bail matters in the High Court is contained in Order 79 of the Rules of the Court of Judicature (NI) 1980 (hereinafter "RSC"). Pursuant to Order 79 RSC, Rule 8, the PPS brought an application to estreat the recognizance. In my view, since the surety had lodged £4000 cash as directed by the court, this constituted a security and, accordingly, the application should have been brought under Order 79 RSC, Rule 9, namely, to forfeit the security. I agreed to amend the application. No objection was raised by the defence.

[10] For the sake of completeness, I have set out below in full Rules 8 and 9 of Order 79 RSC:

> "***Estreat of recognizances***
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> 8.-(1) Where a recognizance has been duly entered into for the appearance of a defendant at a Crown Court or a magistrates' court, the recognizance may be estreated by the court at which he is to appear.
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> (2) Where a recognizance has been duly entered into following a direction by the High Court or the Court of Appeal and it appears to that Court that default has been made in performing any condition of the recognizance, the Court may Valentine General Law of NI – Nov 2012 – Rules of the Court of Judicature 359 either of its own motion or on the application of the prosecutor order the recognizance to be estreated in any such sum not exceeding the amount of the recognizance as it thinks fit to order.
>
> (3) Upon ordering the estreat of a recognizance under paragraph (2) the Court may issue a warrant to levy the amount forfeited by distress and sale of the property of any person bound by the recognizance and in default of distress to commit such person to prison as if for default in the payment of a sum adjudged to be paid by a conviction, and accordingly the period for which such person may be committed shall not exceed that specified in Schedule 3 to the Magistrates Courts (Northern Ireland) Order 1981.
>
> ***Forfeiture of security***
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> 9.-(1) Where security has been duly given by or on behalf of a defendant for his surrender to custody to a Crown Court or a magistrates' court, as the case may be, such security may be forfeited by the court to which he is to surrender.
>
> (2) Where security has been duly given by or on behalf of a defendant to the High Court or the Court of Appeal for

> his surrender to custody and that court is satisfied that he failed to surrender to custody, then unless it appears to the Court that he had reasonable cause for his failure, the Court may either of its own motion or on the application of the prosecutor order the forfeiture of the security in any such sum not exceeding the value thereof, as it thinks fit to order.
>
> (3) A security which has been ordered to be forfeited under paragraphs (1) or (2) shall to the extent of the forfeiture:
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> (a) if it consists of money, be accounted for and paid in the same manner as a fine imposed by the court; and
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> (b) if it does not consist of money be enforced by such magistrates' court as may be specified in the order."

[11] In compliance with Order 79 RSC, Rule 2, the relevant application was contained in form 39. Paras (1)-(3) of Form 39 summarised the relevant facts, emphasising that in breach of the defendant's bail conditions, he absconded from 25 February 2023 until 27 February 2023. Para five of the said application provided as follows:

> "5. Ms Mackey has lodged £3,000 (sic) in cash with the court office as surety to the defendant's bail. As the defendant failed to surrender himself for two days, and Ms Mackey was unable to prevent the breach, the surety falls to be estreated."

[12] I pause at this stage to provide some guidance and clarification regarding certain terminology which has been confusingly adopted in this application. The confusion surrounding the term 'surety' which has been used to describe not only the person who undertakes to ensure that the person on bail will surrender to custody, but also the amount of money which such person undertakes to pay if the person on bail fails to so surrender (ie the recognisance). The term 'surety' was also used interchangeably with the term 'security.'

[13] A surety is a person who provides an assurance or guarantee that the person released on bail will surrender to custody. This guarantee will take the form of a recognizance, which is an undertaking entered into by the surety to pay a particular sum of money if the person released on bail fails to surrender to bail. An application can be made to estreat the recognizance from the surety if the person on bail fails to surrender to custody. On other occasions, a security will be provided. A security is an amount of money or other form of security (such as deeds to a property) which will be lodged with the court or police in order to ensure the surrender of the defendant to the custody of a Crown Court of Magistrates' Court. The security can be forfeited if the person released on bail fails to surrender.

[14] In *Re James Maughan* [2010] NIQB 16, McCloskey J stated at para [13]:

> "[13] The provisions of Part II of the [Criminal Justice (Northern Ireland)] Order 2003 place in sharp focus the distinction between the concepts of bail and recognizance. Whereas a person released on bail is under a personal statutory obligation to surrender to custody, on pain of prosecution and punishment for commission of a criminal offence, the obligations undertaken by a surety in the execution of a recognizance are more properly viewed as an undertaking, or guarantee, belonging to the realm of civil law. Where a breach occurs, the sanction is the forfeiture of a monetary bond, in whole or in part. This may be contrasted with the commission of a criminal offence."

The Submissions

[15] Ms Cheshire BL, on behalf of the prosecution, argues that Ms Mackey was willing to act as a surety and lodged a security of £4000 in order to guarantee the defendant's attendance at court. Since the defendant absconded and failed to surrender to custody for two days, it is argued that the court should make an order pursuant to Order 79 RSC, Rule 9 and/or the inherent jurisdiction of the court to forfeit the entirely of the security. On the facts of this case, Ms Cheshire BL accepts that no blame attaches to Ms Mackey. Nevertheless, she submits that there is no requirement to prove fault on the part of the surety for the recognizance or the security to be forfeited. The defendant, it is argued, was aware that his release on bail was subject to a cash surety and the risk of forfeiture if he absconded. The main thrust of the prosecution is that, when bail is breached and the defendant absconds, there is a strong public interest in adopting a robust approach to the forfeiture of the recognizance or the security in order to highlight the risks and responsibilities for the surety and the applicant for bail and to send a clear and unequivocal message that breaches of bail conditions will result in detrimental consequences and financial liabilities.

[16] Mr Thompson BL, on behalf of Ms Mackey, does not take any issue with the powers of the court as stated under Order 79 RSC. However, he argues that the court has a discretion to forfeit the whole or a part of the recognizance or security depending on the facts of each particular case. Mr Thompson submits, that when exercising its discretion, the court should look at the absence of fault or culpability on the part of the surety and the best efforts of the surety to ensure that the defendant returned to police custody. In this case, it is submitted that Ms Mackey did everything in her power to make contact with the defendant and to secure his return to custody, while at the same time assisting and updating the police as each and every step.

[17] I remain grateful to counsel for their succinct written and oral submissions, particularly as the court explored the legal impact of various scenarios arising out the factual matrix of this case.

Decision

[18] The Northern Ireland Law Commission, in its consultation paper, *Bail in Criminal Proceedings* (2010) NILC 7 at para 5.32 refer to the extent of the obligations imposed upon a surety and the ongoing debate as to whether a surety is bound to ensure that the accused complies with all bail conditions or just an obligation to appear at court. It is noted that the Northern Ireland Law Commission in its report, *Bail in Criminal Proceedings (2012)* stated at para 4.26:

> "The Commission is persuaded that the obligation of a bail guarantor should be limited to securing that the person granted bail surrenders to custody. In the view of the Commission, the imposition of an obligation to ensure that the person on bail complies with all or even some bail conditions would be too onerous and may dissuade suitable persons from performing the role of bail guarantor."

[19] In England and Wales, the general rule is that the obligations of a surety extend only to securing the accused's attendance at court, and so a surety is not responsible for preventing any other possible defaults of the accused while on bail, (eg intimidation of witnesses or breach of a bail condition). However, under the Bail Act 1976, which does not apply in Northern Ireland, where the accused is under the age of seventeen and a parent or guardian stands surety, the court may require the parent or guardian to ensure that the accused complies with any bail condition. (See Blackstone's "*Criminal Practice 2023"* at D7.59.

[20] In *R (Shea) v Winchester Crown Court* [2013] EWHC 1050 (Admin) the Divisional Court ruled that there is no power under the Bail Act 1976 or otherwise to require a surety to ensure that the person released on bail does not engage in further offending. The court ruled that a surety can be obtained only for the purpose of securing surrender to custody and not for any other purpose. As stated in Blackstone's *"Criminal Practice 2023"* at D7.55, it follows that one or more sureties should be required only in cases where there appears to be a risk of absconding.

[21] It is my view that the general rule, applicable in England and Wales, that the obligations of a surety extend only to securing the person on bail's attendance at court should apply to this jurisdiction. As stated above, this general rule has been endorsed and recommended by the Northern Ireland Law Commission (see recommendation 17). However, there may be exceptions to the general rule if, for example, in addition to requiring the surety to secure the accused's surrender to custody, the court expressly imposes a further condition on the surety, i.e., requiring the accused to attend his GP or specified medical appointment.

[22] Returning to the facts in this case, the police attended at the defendant's home address and spoke to him regarding a suspected breach of a bail condition. Pursuant to Article 6(3) of the Criminal Justice (Northern Ireland) Order 2003, the police have the power to arrest without warrant any person who has been released on bail if there are reasonable grounds for suspecting that the person has broken a bail condition. On the facts presented to this court, it is my view that the arrest was justified and that at the time of the arrest, the defendant was in the lawful custody of the police.

[23] Where an individual has been placed under arrest whilst on bail, the fact of the arrest does not supersede or impact on the court order granting bail. Consequently, the bail conditions will remain until a court revokes the bail order. Therefore, until a court makes an order revoking bail, even when in police custody, the defendant remains subject to bail conditions and is obliged to abide by them insofar as is reasonably practicable.

[24] Under Article 4 of the Criminal Justice (NI) Order 2003, a person released on bail shall be under a duty to surrender himself to the lawful custody of a court, police or prison at a time and place as required. Article 5 of the 2003 Order provides that if a person who has been released on bail and has failed, without reasonable cause, to surrender to bail, he shall be guilty of an offence. If the person fails to surrender to custody at the appointed place and time as is reasonably practicable, he shall be guilty of an offence.

[25] The facts in this case are exceptional. This is not a case where the defendant has absconded and has failed to attend court. Rather, following a lawful arrest of the defendant for breach of a bail condition, whilst under the detention and supervision of the police, the defendant has been permitted to escape or abscond from their lawful custody. In my view, the court is entitled to take this matter into consideration in the exercise of its discretion as to whether the security should be forfeited.

[26] Ms Cheshire BL, on behalf of the prosecution, draws the court's attention to the decision of the Court of Appeal in *R v Crown Court at Maidstone, Ex Parte Lever* [1995] 2 All ER 35 and the dicta of Butler-Sloss LJ at 37–38:

> "The general principle is that the purpose of a recognisance is to bring the defendant to court for trial. The basis of estreatment is not as a matter of punishment of the surety but because he has failed to fulfil the obligation which he undertook. The starting point on the failure to bring the defendant to court is the forfeiture of the full recognizance. The right to estreat is triggered by the non-attendance of the defendant at court. It is for the surety to establish to the satisfaction of a trial court that there are grounds upon which the court may remit from forfeiture part or, wholly exceptionally the whole recognizance. The presence or absence of culpability is a factor but the absence of culpability, as found in this case by the judge, is not in itself

> a reason to reduce or set aside the obligation entered into by the security to pay in the event of a failure to bring the defendant to court. The court may, in the exercise of a wide discretion, decide it would be fair and just to estreat some or all of the recognizance. Unless the exercise of the Judge's discretion is outside that which a reasonable Judge on the facts would have done or was an irrational or perverse decision, judicial review will not lie."

[27] It is worth noting that on the facts in *R v Crown Court at Maidstone, Ex Parte Lever*, despite attempts by the sureties to locate and re-apprehend the accused, they were not successful, and the accused did not appear at his trial. In that case, it was a condition of bail that the accused must report each evening at his local police station. One day he failed to do so. No steps were taken by the local police to inform anyone of that fact, not even the police officer in charge of the case. Two days later, one of the sureties learnt that the accused had not been home for the previous two nights and at once telephoned the police. The trial judge expressly took into account the lack of culpability of the two sureties and also the negligence of the police (which he nevertheless held did not contribute to their lack of success in re-apprehending the accused). However, he was only prepared to remit about 15% of each recognisance. The Court of Appeal held that the remission, though small, could not be said to be perverse, irrational or outside the general principles to be applied.

[28] The burden of satisfying the court that the full sum should not forfeited rests upon the surety and is a heavy one (see *R v Uxbridge Justices, Ex Parte Heward Mills* [1983] 1 All ER 530. In this case, the prosecution argues that an enquiry into the financial means of the surety will not be relevant as the money has already been lodged with the court.

[29] Order 79, Rule 9(2) RSC provides as follows:

> "9(2) Where security has been duly given by or on behalf of a defendant to the High Court or the Court of Appeal for his surrender to custody and that court is satisfied that he failed to surrender to custody, then unless it appears to the Court that he had reasonable cause for his failure, the Court <u>may</u> either of its own motion or on the application of the prosecutor order the forfeiture of the security in any such sum not exceeding the value thereof, <u>as it thinks fit to order</u>." (Emphasis added).

[30] In my judgment, Order 79 RSC, Rules 8 and 9 gives the High Court (and indeed the Court of Appeal) a discretion in its consideration as to order the forfeiture of a recognizance or a security when the person on bail fails to surrender to custody. This interpretation is endorsed by the Northern Ireland Law Commission in his report *"Bail in Criminal Proceedings [2012]"* at para 4.33.

[31] Returning to the factual circumstances of this case, in my consideration of the potential liability of the surety and whether the sum of £4,000 should be forfeited, I pay particular significance to the following matters. Firstly, this is not a case where the defendant has absconded and failed to turn up for his trial. Rather, having been arrested into the lawful custody of the police he was allowed to escape from their custody and to remain at large for two days. In my view, a convincing argument has been made that the surety should not be penalised or held responsible for the failure of the police to detain the defendant. Secondly, due to considerable efforts made by Ms Mackey, the defendant voluntarily surrendered to custody. In her affidavit, Ms Mackey states that when she was alerted to the fact that the defendant had absconded, she indicated that she would exercise her best efforts to locate the defendant and to persuade him to surrender to the police. Accordingly, she made contact with friends of the defendant and convinced them to explain to the defendant that it was imperative he handed himself into the police station immediately. Ms Mackey informed the police that she had been assured that the defendant would surrender himself to police custody on 27 February 2023. This information was relayed to the police and to the defendant's solicitor. On 27 February 2023 the defendant returned of his own volition to the custody of the police.

[32] In *Harrow Crown Court, Ex Parte Lingard* [1998] EWHC 233 (Admin), Dyson J (at [20]) with whom Lord Bingham CJ agreed stated as follows:

> "It is clear from authorities such as *Ex Parte Smalley* [1987] 1 WLR 237 and *R v Reading Crown Court, Ex Parte Bello* [1992] 3 All ER 353, that, in an exceptional case, where the security is entirely blameless and the failure of the defendant to surrender to bail is wholly outside the control of, and unforeseeable by, the surety the court may in the exercise of its discretion remit the whole or a substantial part of the amount of the recognizance."

[33] In *Choudhry v Birmingham Crown Court* [2007] EWHC 2764 (Admin) at para 43, Gibbs J emphasised that, although the court may so remit, there is no principle in law which requires it do so. This is a matter entirely within the discretion of the court.

[34] In England and Wales, the Criminal Practice Directions (Crim PD) III provides at para 14F.5:

> "The court has a discretion to forfeit the whole sum, part only of the sum, or to remit the sum. The starting point is that the surety is forfeited in full. It would be unfortunate if this valuable method of allowing a defendant to remain at liberty were undermined. Courts would have less confidence in the efficacy of sureties. It is also important to note that a defendant who absconds without in anyway forewarning his sureties does not thereby release them from any or all of their responsibilities. Even if a surety

> does his best, he remains liable for the full amount, except at the discretion of the court."

[35] As a matter of public policy, a court should order forfeiture of a recognizance or a security in order to maintain the integrity and confidence of the system of taking sureties. However, due to the complexities and circumstances that can arise from differing factual matrices, it is incumbent upon the court to exercise its discretion in a lenient and fair manner. As stated by McCloskey J in *R v James Maughan* [2010] NIQB 16, any question relating to the proper construction of Order 79 RSC engages the overriding objective enshrined in Order 1, Rule 1A which provides:

> "1A.-(1) The overriding objective of these Rules is to enable the Court to deal with cases justly.
>
> (2) Dealing with a case justly includes, so far as is practicable –
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) saving expense;
>
> (c) dealing with the case in ways which are proportionate to:
>
> (i) the amount of money involved;
> (ii) the importance of the case;
> (iii) the complexity of the issues; and
> (iv) the financial position of each party;
>
> (d) ensuring that it is dealt with expeditiously and fairly; and
>
> (e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases.
>
> (3) The Court must seek to give effect to the overriding objective when it:
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> (a) exercises any power given to it by the Rules; or
>
> (b) interprets any rule.
>
> (4) Paragraph (3) above shall apply subject to the provisions in Order 116A, rule 2(1) and Order 116B, rule 2(1)."

[36] In my judgment, this is an exceptional case. For the reasons given above at para [31], the surety was entirely blameless, and she bears no responsibility for the

failure of the police to detain the defendant. The fact that the defendant absconded from police custody was totally outside her control. However, this is not the only relevant factor. This is not a case where the defendant has absconded and failed to turn up for his trial. The surety made commendable efforts to ensure that the defendant returned to the custody of the police. The defendant remains in custody with his bail revoked. If this situation had been that, despite the best efforts of the surety, the defendant had failed to return to police custody, then it is likely that an order to forfeit all or part of the security would have been made.

[37] Accordingly, on the basis of the exceptional circumstances of this particular case, I refuse the prosecution's application to forfeiture the security, which should be remitted in full to Ms Mackey.