

Neutral Citation No: [2023] NIKB 98

Ref: HUM12290

*Judgment: approved by the court for handing down
(subject to editorial corrections)**

Delivered: 12/10/2023

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION

IN THE MATTER OF AN APPLICATION BY
AMANDA McCABE FOR BAIL

Joseph O'Keeffe (instructed by Phoenix Law) for the Applicant
Natalie Pinkerton (instructed by the PPS) for the PPS

HUMPHREYS J

Introduction

[1] This is the fifth application for bail brought by the applicant, a 52 year old woman from Lurgan, Co Armagh, who faces a number of terrorism charges arising out of the Operation Arbacia investigation into the activities of dissident republicans.

[2] All previous bail applications have been unsuccessful, although the applicant has twice been admitted to compassionate bail.

[3] The applicant faces the following charges:

- (i) Directing terrorism;
- (ii) Possession of an article likely to be used in terrorism;
- (iii) Membership of a proscribed organisation;
- (iv) Conspiracy to direct terrorism x2; and
- (v) Preparation of terrorist acts x2.

[4] She was arrested on 18 August 2020 and has now been in custody for some three years and two months.

[5] Committal proceedings have been ongoing before District Judge Ranaghan and these are now in their final stages, with submissions due to be heard on 30 & 31 October.

Bail - The Principles

[6] The principles applicable to the grant of bail are well established. Every accused is entitled to the presumption of innocence and a presumption in favour of bail. In order to justify detention, the prosecution firstly needs to establish reasonable suspicion that the applicant has committed the offence(s) in question. If this threshold is met, then the court must consider whether any of the three principal risks have been established, namely:

- (i) The commission of further offences;
- (ii) Absconding or not turning up for trial; and
- (iii) Interference with the course of justice.

[7] Once any of these risks are made out, the court must then consider whether suitable bail conditions can be imposed to mitigate against any such risks.

[8] The common law position is also reflected in article 5 ECHR which protects the right to liberty and security of the person. The Strasbourg jurisprudence emphasises the need to justify each period of detention.

[9] In *Idalov v Russia* No.5826/03 [2012] the Grand Chamber stated:

“The existence and persistence of a reasonable suspicion that the person arrested has committed an offence is a condition sine qua non for the lawfulness of the continued detention. However, after a certain lapse of time it no longer suffices. In such cases, the Court must establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds are ‘relevant’ and ‘sufficient’, the Court must also ascertain whether the competent national authorities displayed ‘special diligence’ in the conduct of the proceedings (see *Labita*, cited above, §§ 152 and 153). Justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities (see *Shishkov v Bulgaria*, no. 38822/97, § 66, ECHR 2003-I). When deciding whether a person should

be released or detained, the authorities are obliged to consider alternative measures of ensuring his appearance at trial.” [para 140]

[10] Where an applicant has made an unsuccessful bail application, it is necessary to show a material change of circumstances in order that the court can reconsider the question of bail.

The Circumstances of the Offending

[11] The prosecution case is that the applicant was present at two meetings of the leadership of the ‘New IRA’ which occurred in February and July 2020. Both meetings were subjected to video and audio surveillance and the prosecution relies heavily on the content of the recordings which were surreptitiously made.

[12] The prosecution say that two of the accused, David Jordan and Kevin Barry Murphy, are members of the Army Council of the New IRA, being the Chair and Chief of Staff respectively. The others present, including this applicant, are said to be members of the New IRA’s Executive.

[13] The issues discussed at the meetings include the acquisition of weaponry, financing, recruitment, the constitution and various roles of the members, the international dimension and potential targets.

[14] The admissibility and reliability of the evidence relied upon has been the subject of legal debate in the committal proceedings. It is not part of the role of the judge considering a bail application to determine guilt or innocence, but I am satisfied, on the basis of the submissions, that there is a reasonable suspicion that the applicant is guilty of the offences charged.

Criminal Record

[15] The applicant has no previous convictions of any nature.

Family Circumstances

[16] The applicant is a mother of five children and grandmother of six. Her daughter Kirsty gave birth to a son in January 2022 following a difficult and traumatic labour. The young boy suffered a brain injury, the consequences of which are unclear at the moment. Kirsty has an elder son who is struggling with his mental well-being. The applicant’s daughter and her grandsons are in need of both emotional and practical support.

[17] The applicant’s parents live in Lurgan as do all five of the applicant’s children and the wider family circle.

Change of Circumstances

[18] The period of time spent in custody, the lack of any criminal antecedents and the applicant's family situation were all opened to O'Hara J in July 2023 when he refused the most recent application for bail.

[19] It is therefore incumbent on the applicant to establish a material change of circumstances. Three arguments are made:

- (i) The time spent by the applicant in custody now exceeds three years;
- (ii) The strength of the prosecution case has materially diminished as a result of a ruling in relation to voice attribution made by District Judge Ranaghan; and
- (iii) Colton J recently granted bail to one of the co-accused, Sharon Jordan.

[20] The time spent on remand in this case is of significant concern. The Report of the Criminal Justice Inspectorate dated January 2023 reveals that, as of February 2022, there were 13 prisoners on remand in Northern Ireland for a period of over three years, representing 1% of the prison population. It is evident that such a period of time is rare but not unprecedented.

[21] Comparisons have been drawn with the system in England & Wales where statutory custody time limits require the release of defendants after a period of six months, albeit that the courts do have a power to extend this period. Such comparisons are difficult to draw since that jurisdiction no longer has committal proceedings which can, as in this case, lengthen considerably the time between charge and trial.

[22] There is no criticism of the applicant in exercising her statutory right to test the prosecution case through the holding of a mixed committal nor is there any basis to allege that the prosecution have been guilty of some culpable delay in pursuing the matters.

[23] On 18 September 2023 District Judge Ranaghan ruled that the voice attribution evidence of police officers be excluded. However, it will still be open to the tribunal of fact to watch the videos and listen to the audio evidence, as well as consider expert evidence to be adduced on the issue by the prosecution.

[24] Central to the applicant's submission is, however, the recent judgment of Colton J in *Re Sharon Jordan's Application* [2023] NIKB 95. In it, the learned judge concluded that the passage of time tilted the balance in favour of the applicant, and determined that she could be admitted to bail on stringent conditions despite the established risk of reoffending. Colton J stressed that he was making no precedent in respect of any co-accused but, not surprisingly, his reasoning and a comparison

between this applicant and Sharon Jordan formed key parts of the applicant's submissions.

Judicial Consistency

[25] Counsel accepted that the grant of bail to a co-accused can constitute a relevant change of circumstances and is a relevant factor for this court to take into account.

[26] Of the ten accused in the Operation Arbacia, four have been admitted to bail:

- (i) Patrick McDaid in November 2021 following a disavowal of violence and with the benefit of a £50,000 cash security from Raymond McCartney, a prominent elected representative;
- (ii) Joseph Barr in July 2022 following a disavowal of violence and on production of an £85,000 cash security from his parents;
- (iii) Issam Bassalat in December 2021 after having suffered a heart attack in custody and with a £40,000 cash security;
- (iv) Sharon Jordan in October 2023 to live with her father with £15,000 in cash securities provided.

[27] By contrast, I refused bail to Kevin Murphy, the alleged Chief of Staff of the New IRA on 6 September 2023, having found that the risk of reoffending could not be managed by bail conditions.

[28] Whilst judicial consistency is important, it also remains the case that each application for bail must be dealt with on its own individual merits. This applicant has no criminal record which contrasts with Sharon Jordan who was convicted in 2014 of terrorist offences and received an 8 year determinate custodial sentence.

Change of Circumstances

[29] I am satisfied that the decision to release Sharon Jordan on bail after an identical period of time in custody, on the basis primarily of the passage of time, represents a material change of circumstances which entitle me to revisit the question of this applicant's entitlement to bail.

[30] I propose therefore to address the objections put forward by the prosecution and, if satisfied in relation to any of these, whether and to what extent they can be managed by the imposition of bail conditions.

The Prosecution Objections

[31] The prosecution say that all three objections are present in the instant case. In relation to reoffending, stress is placed on the nature of dissident republican ideology, wedded to the continued use of violence for political ends. Recent events, including the attempted murder of DCI John Caldwell in February 2023 demonstrate that the New IRA has both the intention and the capacity to carry out serious acts of terror.

[32] In the bail application in July 2023 on behalf of this applicant, O'Hara J stated:

“Dissident republicans are extremely active and dangerous at present. They are clearly determined to kill, maim and terrorise...Those who lead them, join them and co-operate with them must understand that by doing so they engage in activity which has consequences. One of those consequences is loss of liberty, whether short term or long term.”

[33] I am satisfied on the evidence that there is a real risk of reoffending if the applicant were released on bail. This is based on the nature of the activities discussed at the meetings which were under surveillance and the experience of the actions of dissident republicans generally. I recognise that the applicant has a clear criminal record but that alone cannot determine this issue in the applicant's favour.

[34] In relation to the risk of absconding, the prosecution point to the serious nature of the offences and the fact that other dissident republicans have failed to surrender to bail. However, this applicant has strong ties to the local community in Lurgan and her particular family circumstances provide a significant incentive for her to not to abscond. I am not satisfied that this risk is made out.

[35] The risk of interference with justice is said to arise because the applicant discussed the need to co-ordinate defence statements between co-accused in other criminal proceedings during one of the meetings. Again, I am not satisfied that a real risk of interference has been established on the evidence.

Bail Conditions

[36] The applicant now proposes to be bailed to her parents' address in Lurgan. I heard evidence from her father, Dermot McCabe, who expressed his disapproval of both violent republicanism and sectarianism. He described his family as well-respected in Lurgan and he has no criminal convictions. If he discovered that she had breached any conditions of bail, he stated unequivocally that he would report his daughter to the police.

[37] I was impressed by Mr McCabe who presented as a straightforward and honest man whose family have been greatly affected by the arrest and detention of the applicant.

[38] A total of £27,000 in cash securities has been put forward by the family. For each of them this represents a very significant amount of money.

[39] In light of the passage of time, the applicant's alleged role in the offences, her clear criminal record and her family circumstances, I am persuaded that she can be admitted to bail on conditions which mirror those of her co-accused Sharon Jordan. There are significant factors distinguishing this application from that of Kevin Murphy, who did have a criminal record and whose alleged role in the New IRA was at a much more significant level.

[40] The applicant be admitted on her own bail of £750 with cash securities of £27,000 as follows:

- (i) £8,000 Caolan McEnoy;
- (ii) £9,000 Ciara McStravick;
- (iii) £5,000 Kirsty McEnoy;
- (iv) £5,000 Dermot McCabe.

[41] The grant of bail is subject to the following conditions:

- (i) She resides at [REDACTED] and at no other address;
- (ii) She returns home each evening on or before 10 pm and does not go outside the walls of the building at her curfew address in which the electronic monitoring unit is installed before 7 am in the morning and during these hours is subject to electronic monitoring and must present herself at the door during those hours if required to do so by police or electronic monitoring service supplier to ensure compliance with their electronic monitoring agreement and other conditions. She must also answer the G4S installed phone as and when required to ensure compliance with their electronic monitoring agreement and or other conditions;
- (iii) She reports three times per week to the PSNI at a police station on days and at times specified by the police;
- (iv) She must not attend any meeting, rally or demonstration relating to dissident republican political activities and shall not attend or stand on any platform at

any meeting organised by any political group or other organisation supportive of dissident republican activity;

- (v) She must not enter any premises being used or operated on behalf of the group known as Saoradh;
- (vi) She must only have use of one mobile phone, which may have internet access. The make, model, IMEI number and access code of this phone must be provided to police. She may not use any other internet enabled communication device;
- (vii) She must surrender her passport to the PSNI and is not allowed to apply for another passport;
- (viii) She shall not leave the jurisdiction without the leave of the court;
- (ix) She must not attempt to see, speak to or in any other way contact the co-defendants either directly or indirectly;
- (x) She must notify the police of the make, model and registration number of any private vehicle in which she intends to travel.