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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION

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IN THE MATTER OF AN APPLICATION BY SHARON JORDAN, AN APPLICANT FOR BAIL

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Mr J Brolly (instructed by Phoenix Law, Solicitors) for the Applicant
Ms N Pinkerton (instructed by the PPS) for the Prosecution

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COLTON J

Introduction

[1] This application brings into sharp focus the potential conflict between the court's obligation to protect the public and the requirement of the courts to ensure that a citizen's right to liberty is properly protected.

[2] The applicant was arrested in August 2020. She has now been in custody for over three years, something which may well continue for a significant period of time. That this is so, must be of grave concern to the courts. By this application she seeks to be released from custody on bail. The length of time that she has served in custody, which is continuing, demands that the necessity of her continued detention must be subject to intense scrutiny by this court.

Background circumstances

[3] The applicant is charged with a series of serious offences relating to acts contrary to the Terrorism Act 2000, associated with a group who style themselves as the "New IRA". She faces seven counts in total as follows:

(i) Directing a terrorist organisation.

(ii) Belonging to a proscribed organisation.

(iii) Possession of an article for a terrorist purpose.

(iv) Conspiracy to direct terrorism x 2.

(v) Preparation of terrorist acts x 2.

[4] The court has the benefit of a detailed written submission on behalf of the PPS, prepared by Ms Pinkerton, setting out the background to the alleged offending.

[5] In summary, it is alleged that the applicant attended at meetings on 9 February 2020 in which a total of 11 people participated in Sixmilecross, Co Tyrone and a subsequent meeting on 19 July 2020, in Gortin, Co Tyrone, attended by the same people and some others.

[6] The meetings were the subject matter of video and audio surveillance. The court has read extensive transcripts of what was allegedly said during the course of those meetings. It is alleged that these meetings involved the leadership of the New IRA.

[7] It is the prosecution case that at the first meeting David Jordan (the applicant's husband) described himself as the Chair of the IRA Army Council. Another person present, Kevin Barry Murphy, is described as Chief of Staff of the IRA. The rest are purported to be members of the IRA army executive.

[8] In the course of extensive discussions, those present discussed amongst other matters, the membership and role of the army executive, the IRA constitution, potential future military strategy, potential recruitment strategy, interaction with other dissident republican groups, efforts to obtain weaponry, potential targets, how to handle propaganda and commemorations including Easter parades.

[9] The discussions on 19 July 2020 were in similar vein.

[10] The transcripts to which the court has been referred attribute the passages of conversations to individuals including the applicant.

[11] The basis of the attribution appears to be initially police attribution, subsequently confirmed by a report from a Dr Kirchubel, an expert in voice recognition analysis. Those attributions are supported by video evidence in which those present, including the applicant, have been identified, forensic evidence, which in the case of the applicant includes fingerprint impressions found on the porch door handle of one of the properties at which the meetings took place and DNA recovered from a folding chair in the same property. Some material on the applicant's phone links her with some others allegedly present at the meetings. Other material purports to show her support for the IRA.

[12] The applicant has a relevant criminal record which the prosecution say is admissible as bad character evidence. On 12 September 2014 she was convicted of

the offences of possessing a firearm in suspicious circumstances on 8 November 2011, attending a place used for terrorist training on 30 March 2012 and preparation of terrorist acts on the same date. She was sentenced to a determinate custodial sentence made up of four years' imprisonment and four years on licence. She was subject to counter terrorism registration for a period of 15 years.

History of the proceedings

[13] The applicant was arrested on 18 August 2020 and, as has already been said, has been remanded in custody since that date. It is clear that there is a vast amount of material relating to the charges faced by the applicant. There are multiple defendants. The case is clearly a complex one.

[14] The prosecution say that it was ready to proceed with committal proceedings in August 2021. Due to the volume and nature of the evidential material involved, the defendants, understandably, sought an adjournment to properly analyse the relevant material. The defendants have decided to exercise their statutory right to challenge the evidential basis for return for trial through the mixed committal process. The committal has been conducted before the District Judge since October 2022 and I am told by Mr Brolly that he has done so in a most careful and expeditious manner. The up-to-date position is that all the evidence in the committal process has now been heard. The District Judge has made his final rulings in relation to interim applications concerning the admissibility of evidence and other such matters. The final submissions in relation to whether there is sufficient evidence to return the defendants, including the applicant, for trial are listed for 30 and 31 October.

[15] In the event that the District Judge decides there is sufficient evidence to commit the applicant for trial, Mr Brolly suggests that an arraignment is likely to be listed in or around March 2024 and there is a risk that a trial will not actually commence until 2025.

[16] The applicant has made three applications to the District Judge for bail which have been refused; on 4 September 2020, 16 December 2020 and on 10 August 2023. It is the latter decision which is the subject matter of the appeal to this court. This is the first substantial hearing in respect of bail by this applicant before the High Court.

[17] The applicant was granted compassionate bail to permit her to attend her mother's funeral on 2 December 2022. She was released from 10am until 6pm, on the basis of a surety of £10,000 lodged in court, when she was accompanied by chaperones identified and approved by the court, together with some other supplementary conditions.

[18] She complied with the conditions which were imposed.

[19] There have been numerous bail applications by the applicant's co-accused. Three have been granted bail.

[20] Mr McDaid was released on his first application on 18 November 2021.

[21] Dr Bassalat was released on his fifth application on 10 December 2021.

[22] Mr Barr was released on his fourth application on 8 July 2022.

[23] Mr Murphy was refused bail on 6 September 2023.

[24] Ms Duffy has had a fourth application for bail refused in July 2023.

[25] Mr Hayden has been refused bail on three occasions by the High Court, most recently on 22 December 2022.

[26] The remaining three, Mr Reynolds, Mr McLaughlin and Mr Jordan have not applied for bail.

[27] I understand that those who have been released on bail to date have complied with bail conditions.

Bail – The Principles

[28] Every suspect in a criminal investigation is entitled to both the presumption of innocence and the presumption in favour of bail.

[29] This well-established common law principle is augmented by article 5 of the European Convention on Human Rights which is part of domestic law by reason of the Human Rights Act 1998.

[30] Article 5(1) provides:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> …
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his

committing an offence or fleeing after having done so; …"

Article 5(3) provides:

> "3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

[31] Thus, it will be seen that there are two separate phases of detention which are subject to judicial control. The first relates to the requirement to produce a person arrested "promptly" before a judge.

[32] The second, which is at issue here, is that judicial control is required after such production, that is the period pending eventual trial.

[33] A third important aspect to article 5(3) is that it requires that a person detained on remand be tried within a reasonable time.

[34] Harris, O'Boyle and Warbrick: Law on the European Convention on Human Rights, 5th Edition, 2023, in discussing article 5(3) contains the following passage at page 353:

> "Consistent with the importance of the right to liberty, the whole thrust of article 5(3), as interpreted by the court, is against any rule that individuals (and even more so children) awaiting trial should be held in detention. Rather, a detention effected under article 5(1)(c) during the remand stage must actually be necessary in the individual circumstances of the case and the person must be released pending trial unless a state can show that there are 'relevant and sufficient' reasons to justify his continued detention. Justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities."

[35] The authors go on to say, quoting the case of *Ilijkov v Bulgaria No.33977/96* [2001] para [84]:

> "To satisfy article 5(3), what is required from the domestic authorities are 'specific indications of a genuine requirement of public interest which, notwithstanding,

> the presumption of innocence, outweighs the rule of respect for individual liberty.'"

[36] Even if detention is justified under article 5(3), that provision may still be infringed if the accused's detention is prolonged beyond a reasonable time.

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

> "140. 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."

Reasonable suspicion/prima facie case

[38] In order to remand the defendant in custody, the court must be satisfied of the existence of reasonable suspicion that he/she has committed the offence in question and the circumstances are such as to justify his/her being detained in custody.

[39] Can the prosecution establish a reasonable suspicion that the applicant has committed the offences for which she is charged?

[40] In the course of a lengthy hearing both Ms Pinkerton and Mr Brolly delved in considerable detail into the evidence against the applicant.

[41] I mean no disservice to the industry of counsel by indicating that I merely propose to summarise the arguments. I have already referred to the summary of the prosecution evidence provided in the written submission to the court. In short, Ms Pinkerton alleges that there is ample evidence that the meetings to which she refers were ones carried out by the leadership of the New IRA. The content of those discussions, it is argued, demonstrate that those present were engaged in planning

for terrorist activities. The applicant was an active and willing participant in those discussions.

[42] Mr Brolly informs the court that the applicant strenuously denies the charges. He outlines matters which he says call into question the strength of the prosecution case.

[43] To summarise, he says that the entire episode arises from the actions of a state agent who instigated, organised and directed the meetings which form the subject matter of the charges. In short, any criminal activity here is one instigated by the State and the prosecutions are an abuse of the court's process. He says that there will be challenges to the admissibility and reliability of the evidence from Dr Kirchubel, in accordance with recent jurisprudence in the cases of *R v O'Doherty* [2002] NI 263, *R v Fitzsimmons, Duffy & McCrory* [2022] NICC 27 and *R v Gleeson* [2023] NICC 17.

[44] He points out that the District Judge has already ruled that the attributions of the PSNI in the transcripts are not admissible.

[45] Furthermore, he says that any fair analysis of what was said at the meetings rather than demonstrating the activities of a dangerous terrorist organisation, reveals an unserious group of people full of idle talk and fantasy.

[46] Nothing is decided. Nothing is planned. Nothing emerges from the meetings. There is an absence of any real purpose or strategy. He categorises the entire meetings as a "talking shop."

[47] My conclusion, having carefully considered the submissions and having read the transcripts, and considered a summary of the supporting evidence is that the prosecution has established a reasonable suspicion that the applicant has committed the offences for which she is charged <u>for the purposes of a bail application</u>.

[48] In those circumstances can the prosecution rebut the presumption in favour of bail? Or, in the language of the Convention jurisprudence do the circumstances of the case justify the deprivation of the applicant's liberty?

[49] The prosecution objects to bail on three grounds, namely that if she is released, she will:

(i) Commit further offences;

(ii) Abscond or not turn up for trial; or

(iii) Interfere with the course of justice.

[50] There has been much judicial consideration of the assessment of the risk of committing further offences in the context of those charged with offences under the Terrorism Act 2000.

[51] It is beyond doubt that the seriousness of an offence for which someone is charged is not of itself a ground for refusing bail. Nonetheless, the nature of the offences can be relevant in assessing the risk of reoffending on bail. Cases such as *In Re Coney's Application* [2012] NIQB 110; and the judgments in the bail applications of the applicant's co-accused, Amanda Duffy and Kevin Barry Murphy, set out the court's concerns in this regard. In short, those engaged in alleged terrorist activity on behalf of dissident republicans demonstrate a commitment to the ideology of violent republicanism. In the applicant's case this is demonstrated by her criminal record. She was on licence for the previous offences for which she had been convicted at the time of these alleged offences. She had been subject to counter terrorism notification requirements.

[52] The charges against the applicant must also be seen in the context of the ongoing activities of the New IRA. In February 2023, DCI John Caldwell was shot in Omagh, in respect of which the New IRA claimed responsibility. The threat against security forces, in particular, is characterised as severe. In September of this year, cash, handguns, grenades, ammunition and plastic explosives were discovered in Derry.

[53] The New IRA is clearly intent on dragging us back to a violent past society had hoped had been firmly left behind. Their actions have no support within the community and the public is entitled to expect that the courts take steps to ensure their protection.

[54] The applicant is described as being in a position of "middle leadership" of this organisation which remains active and constitutes an ongoing threat.

[55] In those circumstances it is reasonable for the prosecution to say that there is a risk of the applicant reoffending if admitted to bail.

[56] That does not mean that all of those who face charges under the Terrorism Act by reason of dissident republican activity are not entitled to bail. This is evident from the fact that three of the applicant's co-accused have been granted bail despite their engagement in this alleged terrorist activity. At the very least two of those (McDaid and Barr) on the face of it were on an equal footing to the applicant in terms of their involvement in the alleged offending.

[57] Mr Brolly referred me to a number of persons charged with serious offences involving alleged dissident republican terrorism who are currently on bail.

[58] As is customary in disputed bail applications, the parties point to similarities/differences which justify a different approach to bail to those facing

similar charges. This is understandable as judicial consistency is highly desirable on such an important issue. However, whilst it may be a cliché, the fact remains that each case turns on its individual facts. For example, bail has been granted to three of the applicant's co-accused notwithstanding the strident objections on behalf of the prosecution. However, the reasons for bail being granted in each case is apparent from the particular circumstances of each application.

[59] In short, having regard to the case that is made against the applicant and the circumstances of that case, together with her previous conviction, I consider that the prosecution can establish that there is, indeed, a risk of reoffending should she be released on bail.

[60] For reasons which may be apparent from the applicant's personal circumstances which I discuss below, I do not consider that the risk of absconding is such as to justify a refusal of bail.

[61] I take a similar view in relation to the interference with the course of justice. Insofar as that relates to this particular investigation, I note that the offences had been committed over three years ago. In the event that it relates to further offending then it clearly overlaps with the risk I have already identified.

Passage of time/delay

[62] In light of this analysis, had this application come before me in the months after the applicant's arrest I would not have been persuaded that she was an appropriate candidate for bail.

[63] However, in the context of the jurisprudence to which I have referred, I must now consider this application in the context of the passage of time/delay since she was originally brought before a court, now in excess of three years.

[64] It is clear from what I have set out above and, indeed, as has been accepted by Humphreys J in the case of a co-accused, there is no evidence of what can be referred to as "culpable delay" in this case. The state authorities have acted with reasonable expedition. Equally, the applicant has exercised her statutory entitlement to a committal hearing.

[65] The prosecution of the applicant is the subject matter of ongoing judicial consideration and supervision. She is not languishing in prison awaiting trial due to any delay in respect of the prosecution itself.

[66] In this regard, I feel I must say something about the use of committal proceedings in this jurisdiction. The enactment of the Criminal Justice (Committal Reform) Act (Northern Ireland) 2022 which abolished preliminary investigations and mixed committals with effect from 17 October 2022 is to be welcomed. In my view, the delays incurred as a result of this procedure has had consequences for victims,

defendants and public confidence in the rule of law. The development of the law on abuse of process, the longstanding no bill procedure, the disclosure process and the court's ability to rule on admissibility of evidence provides ample protection for those in the applicant's position. Indeed, it is clear from Mr Brolly's submissions that it is probable that such applications will be the next stage in the proceedings should the District Judge decide that there is sufficient evidence to return the applicant and her co-accused for trial.

[67] I am conscious that the committal process is nearing its end stage. There is a temptation to await the outcome of the committal procedure and in the event of the applicant being returned to trial, to leave the question of bail to the Crown Court judge who will be managing the trial.

[68] However, given that I am dealing with the liberty of the subject and the importance that the law attaches to the protection of the right to liberty, I feel that I must determine the application rather than defer it to other judiciary. As I have said previously, justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities.

Bail conditions

[69] Having accepted that there is a risk of the applicant reoffending should she be admitted to bail, I must consider whether I can impose conditions which will address that risk. In the words of the jurisprudence, I am "obliged to consider alternative measures of ensuring her appearance at trial." I carry out that exercise in the context of someone who has been in custody now for in excess of three years.

[70] In the course of the hearing I heard much about the applicant's personal circumstances. She is a member of a close-knit community in the Galbally area in Co Tyrone. Her father lives nearby, as does her sister, her daughter and other relatives including a young nephew who suffers from autism and who is close to his aunt. Understandably, he is not aware of the reason for her absence in his life. None of the aforementioned have any criminal records. As with anyone who is detained in custody the applicant has been absent for major life events including the sudden and unexpected death of her mother.

[71] I heard evidence from the applicant's father who has indicated that he would propose that the applicant live with him should she be admitted to bail. He said to the court that he would ensure, insofar as he can, that she would comply with any bail conditions imposed by the court. He told me that he totally disavows violence for political means and thoroughly disapproves of the activities of dissident republicans such as the New IRA. He is willing to put forward a £5,000 cash surety from his modest savings. The applicant is also in a position to provide another cash surety totalling £10,000 by a Mr Conrad McQuaid who is described as a respectable businessman in Dungannon, without any previous convictions.

[72] Her sister is also prepared to act as a surety in the normal way.

[73] I am aware that the co-accused in this case who have been granted bail have provided sureties for substantially larger figures. However, a small sum from a person of modest means can be just as significant as a large sum from those with greater access to funds.

[74] I was impressed by the applicant's father and his willingness to put forward a cash surety and give evidence in this application. I am not naive or blind to the fact that he cannot guarantee his daughter's compliance with any bail conditions, but he has gone a significant way to assuage my concerns.

[75] Those concerns are, of course, further assuaged by the provision of a second cash surety.

[76] As I have already indicated the fact that the applicant is now in custody in excess of three years awaiting trial is a matter of grave concern. By way of comparison Mr Brolly draws my attention to the strictly enforced custody time limits in England & Wales of six months. The applicable period in Scotland is one of eight months. Of course, these limits are achievable, in no small part, due to the lack of the committal procedure which I have discussed earlier, and which has contributed to the passage of time in this case. The passage of time in this case compels the court to look again at alternative means to custody for the applicant. That passage of time, in my view, tilts the balance in favour of the applicant, having regard to the conditions which are available to the court.

[77] There are, of course, a suite of conditions available to the court which can address the concerns about reoffending. Given the risks that I have identified such conditions will need to be intrusive and extensive.

[78] Having considered all the issues that arise in this application, I have concluded that this applicant, and I stress I am making no precedent in respect of other co-accused, can be admitted to bail under strict conditions.

[79] I will hear the prosecution on conditions it is considered to be appropriate.