

APPROVED



REDACTED

**THE COURT OF APPEAL
(Civil)**

Court of Appeal Record No. 2022/204

**Birmingham P
McCarthy J
Kennedy J**

Neutral Citation Number [2022] IECA 293

IN THE MATTER OF AN APPLICATION FOR BAIL:

**THE PEOPLE (AT THE SUIT OF
THE DIRECTOR OF PUBLIC PROSECUTIONS)**

PROSECUTOR/RESPONDENT

-AND-

B.M.

ACCUSED/APPELLANT

JUDGMENT of the Court (ex tempore) delivered by Mr Justice McCarthy on the 11th day of November 2022

1. The appellant is charged with the offences set out below which occurred on divers dates between the 8th of November 2018 and the 24th of February 2020. The alleged victim was his then partner. The seven offences are as follows: -

Count 1

Assault contrary to Section 3 of the Non-Fatal Offences Against the Person Act, 1997

Count 2

Controlling and coercive behaviour contrary to Section 39 (1) and (3) of the Domestic

Violence Act, 2018

Count 3

Criminal damage contrary to Section 3 of the Criminal Damage Act, 1991

Count 4

Assault contrary to Section 3 of the Non-Fatal Offences Against the Person Act, 1997

Count 5

False imprisonment contrary to Section 15 of the Non-Fatal Offences Against the Person Act, 1997.

Count 6

Rape contrary to Section 48 of the Offences Against the Person Act, 1861 and Section 2 of the Criminal Law (Rape) Act, 1981 as amended by Section 21 of the Criminal Law (Rape) (Amendment) Act, 1990

Count 7

False imprisonment contrary to Section 3 of the Non-Fatal Offences Against the Person Act, 1997

2. The alleged victim had been cohabiting with the appellant in his residence. The appellant and the alleged victim have a child together and she is currently pregnant with their second child. Her address is now an alternate address to that of the appellant.

3. The appellant, having been charged, was brought before the District Court and ultimately sent forward for trial from the District Court to the Central Criminal Court on the 9th of March 2022. Bail was granted on the following conditions:-

- i. *Own Bond of €10,000 cash to be lodged*
- ii. *Independent surety [a named person], €5,000 cash to be lodged*
- iii. ***No contact direct or indirect with the injured party... or [a named witness]... any other witnesses to include social media.***
- iv. *All access suspended pending an order of the District Court regarding access. Bail terms & offences to be made known to the Court.*
- v. *Weekly schedule to be furnished to the Gardaí... regarding work schedule for the following week. Specifics to be included.*
- vi. *Sign on weekly on a Saturday between 9 am & 9 pm at... Garda Station.*
- vii. *Provide mobile number to Gardaí and be available at all times to Gardaí.*
- viii. *Not to commit any further offences.*
- ix. *Not to leave the jurisdiction and hand up passport to Gardaí by 7pm 28th October 2021.*
- x. *Reside at... [a specific address].*
- xi. *Curfew from 10 pm to 6 am.*
- xii. *Direct that dogs are locked up at back of house and do not interfere with Garda visits.*

[Our Emphasis]

4. This is an appeal from an order of the Central Criminal Court made on the 29th of July 2022 revoking bail by virtue of a breach of condition. The matter was before her in relation to legal aid and representation issues.

5. On the 22nd of July 2022 at approximately 7.30am the appellant was arrested at his home (for unrelated criminal matters) and conveyed to a local Garda Station. The appellant was held until 7pm that evening. When the Gardaí attended that morning, shortly after 7am, a Detective Sergeant Scahill heard what he believed to be a female voice from within the house coming from a back bedroom (he knew the layout of the house). He did not recognise the voice.

6. A number of hours later, Detective Sergeant Scahill returned at 12.44pm with another garda colleague because he had concerns that it may have been the alleged complainant. Attempts were made to contact the alleged complainant in the intervening period however this proved fruitless. Detective Sergeant Scahill confirmed that he was aware of the bail conditions. Having returned to the house he knocked on the front door but received no answer for a number of moments when he met the complainant.

7. It is these events which gave rise to the application to revoke on the ground that he had breached the condition that: -

“No contact direct or indirect with the injured party... or [a named witness]... any other witnesses to include social media.”

8. The application was moved on Detective Sergeant Scahill’s affidavit and his oral testimony. There is no substantive difference between the facts deposed to in his affidavit and the latter. We think that the following extract from his oral testimony bears repetition: -

“A. Your honour, I again attended on the 22nd of July '22 at 12.44 along with my colleague... When I attended at... the home of [B.M.], I knocked on the door. There

was no answer for a number of moments. I did notice that all the windows in the house were open, I did also notice that the beds in the house were made which they hadn't been made a couple of hours previous while I was there. I did notice that the kitchen had been tidied as well. I called out a number of times for somebody in the house and nobody answered. I then called out the name [of the alleged victim] and after a number of moments [the alleged victim] came out of a back bedroom which goes into the sitting room and then she came to the window and spoke to me. I told [her] I was concerned for her safety and wished to speak to her. [She] then came to the front door. At the front door of... the home of B.M., there is a number of cameras which gardaí are aware that they visually record, but we also believe that they audio record. Due to my fear for the safety of [the alleged victim], I asked her to go to the front gate where there was no camera that I could speak to her in confidence. [The alleged victim] came out to the front gate with me, I again told her about the concerns I had for her and her child who was in the house. She had informed me that her child was there in the house with her, that the child was in bed.

Q. The child is two; isn't that correct?

A. The child is two, or nearly two, yes, it's a young child, yes. And she told me the child was in bed. So, she spoke to me at the front door. She told me she was aware that B.M. had been arrested that morning, she said that had nothing to do with her, that she wanted no more trouble with B.M. I then spoke to her about her welfare concerns, was she there of her own free will, did she fear for her safety and at all times [the alleged victim] said that she was there of her own free will, that she'd no safety concerns. I gave my concerns to her as a result of my knowledge of her relationship with [a third party], or with B.M. She said she was fine. I spoke to her then in relation to her children and the safety of her children. At this point [she] got

upset and she went back into the house, she closed the door and refused to speak to us at any further points.

Q. I think she made certain observations regarding his bail and what was happening regarding his compliance with that?

A. Oh, sorry, she was informed about the breach of the bail. She was fully aware that her being was there a breach of the bail. That was all explained to [her] and she was fully aware of it.”

In cross-examination he did not deviate from that testimony and added nothing of substance.

9. It was submitted in the Central Criminal Court, as here, that there was no evidence that “...[the alleged victim] who is the complainant... was actually living in the premises”. Here, it is submitted there was no direct evidence that she was the female in the house in the morning nor evidence that the appellant was present in the premises in the complainant’s company, indeed the contrary since he was under arrest. There was no evidence, it is said, as to when she entered.

10. In any event the judge ruled in these terms: -

“So, this matter comes before the Court by way of an application by the prosecution to revoke the bail of B.M. in circumstances where there's an affidavit before the Court to which Detective Garda David Scahill gave evidence. There were a number of conditions of bail, but the one that's at issue here this morning is the condition that he was to have no contact direct or indirect with the injured party... to include social media.

Evidence was given that [the alleged victim] was located at B.M.'s house on the date in question as evidence given by An Garda Síochána. That's a breach of his bail conditions, to establish breach of the bail conditions it is not necessary at this point to

establish that she was in fear, how long she was there, the nature of the contact or otherwise. There was clearly contact in breach of this man's bail conditions.

These are very, very serious charges. He has put up a lot of money in terms of this bail and this was the central and most important condition of his bail.

There's absolutely no obligation on the prosecution to seek him out to vary his bail, if he wishes to do that is his obligation. In fact, there isn't even any obligation on [the alleged victim]. The bail conditions are for him, it's for him to comply with them and for him to make contact with the prosecution should he wish to vary them. All of the obligations rest with him in this matter. He was given that very generous opportunity in light of everything, in light of the very serious charges and he has now decided to breach that very central and core condition.

In those circumstances the Court has no alternative but to revoke his bail at this stage. Thank you."

11. Counsel for the appellant rightly says that the judge drew an inference from the factual matters proved and submits there was no evidential basis upon which she could reach the conclusion she did that there was a breach of the relevant term. It must be borne in mind that the standard of proof in respect of the revocation application is the civil standard. We think that the judge was entitled on the evidence to reach the conclusion she did; the fact that a woman's voice was heard relatively early in the morning coming from a back bedroom is relevant; the limited time period between the time the Gardai first called to the applicant's home and the second time is relevant; it is also relevant that when the Garda returned to the house, he observed that the windows were open, the kitchen had been tidied and the beds made in the intervening period. Moreover, no issue was taken with the evidence that the young child was asleep in the house when the Garda called on the second occasion. No

suggestion was put to the witness that the complainant was not present in the house when the Gardaí first called shortly after 7am. This series of facts, when married or taken cumulatively, provide ample evidence to justify a conclusion that the appellant was in breach – indeed, the alternative is a series of what for him constitute unfortunate coincidences, which, as a probability is not the case.

12. There was, accordingly, evidence enabling the judge to draw the inference that the complainant was present in the house earlier that morning when a female voice was.

Accordingly, the judge was justified in finding that there was a breach of a condition of bail.

The question then arises as to whether it was a proportionate response to revoke the bail on foot of that breach.

13. In that context it is important to note that this was a breach of a significant condition of bail (as pointed out by the judge) and that the breach itself was of a significant order. The conditions were imposed in respect of serious alleged offences. The complainant was present in the applicant's house at a time when the relevant condition was to the effect that he was to have no contact of a direct or indirect kind with her. There will be cases when a prohibition in bail conditions of contact with a complainant or witness will not be of the utmost importance, even if appropriate. In a case involving an allegation of domestic violence of the utmost seriousness (including charges of coercive control) such a term is particularly significant and a breach is similarly so.

14. We are not persuaded that the judge erred in revoking the bail and we therefore dismiss this appeal.