Neutral Citation Number: [2024] EWHC 91 (Admin)

Case No: AC- 2024- LON- 000206

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 January 2024

Before :

MR JUSTICE CONSTABLE

- -

Between :

JAKE HAMMOND

Claimant

- and -

GOVERNOR OF HMP WINCHESTER

Defendant

- -
- -

Mr Khalid Missouri (for LLM Southampton Limited) for the Claimants
Ms Ruth Lynch (for Government Legal Department) for the Defendants

Hearing dates: 29, 30 December 2023

- -

JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 4 January 2024 at 10am.

Mr Justice Constable:

Introduction

1. At around midday on Saturday 30 December 2023, I ordered that the Claimant, then being detained at HMP Winchester, must be released subject to the bail conditions which had been imposed on him by Magistrates at Southampton Magistrates Court on 23 December 2023. The order was made following consideration of the Claimant's application for a writ of habeas corpus issued on 29 December 2023.

2. I indicated that full written reasons would follow, and these are those reasons. I am grateful to Mr Missouri of LLM Southampton Ltd, representing the Claimant, and Ms Lynch of the Government Legal Services, for their submissions at two hearings held by Teams at unsociable hours on the evening of Friday 29 December 2023, and the morning of Saturday 30 December 2023.

The Facts

3. On 23 December 2023 Mr Hammond attended Southampton Magistrates' Court in respect of offences of strangulation, assault by beating and criminal damage. Mr Hammond pleaded not guilty and the matters were sent to Southampton Crown Court for a PTPH to be heard on 24 January 2024.

4. Mr Hammond was granted conditional bail by the magistrates following an application at which the prosecution made representations resisting bail. Conditions imposed prevented Mr Hammond from going to a particular location, and also to be monitored by way of GPS tag. This was granted (according to the Notice of Appeal against the granting of bail) at 13.51 on 23 December 2023 (there was a typographical error in relation to the date, but this is of no import).

5. Four minutes later, at 13.56, the CPS gave oral notice to the court that they wished to appeal against the grant of bail under s 1(1) of the Bail Amendment Act 1993. The written Notice of Appeal against bail was then served. It is not suggested by the Claimant that this was served invalidly.

6. A Remand Warrant After Bail Appeal by Prosecutor was issued. This stated:

> '*Date of warrant 23 December 2023*
>
> *Written notice of appeal lodged at: 13:56 on 23 December 2023.*
>
> *The appeal must be commenced at the Crown Court within 48 hours, excluding weekends and any public holiday, from the date on which oral notice of appeal is given.*
>
> *Basis of remand: Pending appeal by prosecutor against grant of bail.*'

7. 48 hours (excluding weekends i.e. Sunday 24 December 2023 and, in this case, Christmas Day and Boxing Day), expired at the end of 28 December 2023. As at the date of the application before me, made the following day, it is not in dispute that no appeal had been commenced. Ms Lynch informed the Court, on instructions, that (a) the appeal had been listed for 2 January 2024 and (b) the CPS had indicated that it

would not withdraw its appeal notwithstanding the fact that no appeal hearing had been commenced with 48 hours. Ms Lynch also informed the Court that on the basis of investigations undertaken in the time available (and for which more time was given following the initial hearing on the evening of 29 December 2023), there existed no other matters for which the Claimant was being detained other than the subject matter of the warrant set out above.

8. The single, but important, issue that arises, therefore, is whether the continued detention of the Claimant and HMP Winchester was lawful in circumstances where the hearing of the appeal against bail was not commenced within 48 hours.

The Relevant Provisions of the Bail (Amendment) Act 1993

9. Section 1 of the Bail (Amendment) Act 1993 ('the Act') provides:

> "*(1) Where a magistrates' court grants bail to a person who is charged with, or convicted of, an offence punishable by imprisonment, the prosecution may appeal to a judge of the Crown Court against the granting of bail.*
>
> *...*
>
> *(4) In the event of the prosecution wishing to exercise the right of appeal set out in subsection (1) above, oral notice of appeal shall be given to the court which has granted bail at the conclusion of the proceedings in which bail has been granted and before the release from custody of the person concerned.*
>
> *(5) Written notice of appeal shall thereafter be served on the court which has granted bail and the person concerned within two hours of the conclusion of such proceedings.*
>
> *(6) Upon receipt from the prosecution of oral notice of appeal from its decision to grant bail the court which has granted bail shall remand in custody the person concerned, until the appeal is determined or otherwise disposed of.*
>
> *(7) Where the prosecution fails, within the period of two hours mentioned in subsection (5) above, to serve one or both of the notices required by that subsection, the appeal shall be deemed to have been disposed of.*
>
> *(8) The hearing of an appeal under subsection (1) ... above against a decision of the court to grant bail shall be commenced within forty-eight hours, excluding weekends and any public holiday (that is to say, Christmas Day, Good Friday or a bank holiday), from the date on which oral notice of appeal is given."*

Case Law

10. The number of authorities touching upon this part of the Bail (Amendment) Act 1993 are few, and none deal directly with the issue before me. However, they do shed

some light on the question I have to decide. I will therefore set out what may be drawn from those authorities insofar as relevant to the issue before me.

11. In Isleworth Crown Court, ex parte Clarke [1998] 1 Cr App R 257, the question was whether the requirement to give oral notice of appeal at the conclusion of proceedings pursuant to section 1(4) of the Act was held to be satisfied where notice was given to the court officer about five minutes after the court rose but before the accused had been released from custody. The Divisional Court held that it was, stating that it was not prepared to regard a delay of five minutes or so as bringing the case into the category in which it cannot be said that the oral notice was given at the conclusion of proceedings when the person concerned had not as yet been released from custody. Although not couched in such terms, the latter element, namely the fact that release had not yet occurred, appears to be consideration of the absence of prejudice to the claimant. In relation to points taken about the service of written notice, Jowitt J said:

> '*Once there was in being that right to have the matter heard by the Crown Court, the Crown Court had a cognate duty to hear the appeal and His Honour Judge Bathurst Norman was right to rule as he did that he had jurisdiction. It is unnecessary to consider whether the various rules upon which Miss Humphreys has relied are mandatory or declaratory because they simply do not affect the question whether there was here a right of the prosecution to have the appeal heard. The justices cannot by failures on their part or failures on the part of their clerk, deprive the prosecution of its right to appeal any more than a defendant could deprive the prosecution of right to appeal were he to abscond*.'

12. There is no suggestion that the appeal in Isleworth had not been commenced within 48 hours, in accordance with section 1(8) of the Act. It is in this context that the duty upon HHJ Bathurst Norman to hear the appeal, referred to, is seen.

13. Chronologically, the next case is Middlesex Guildhall Crown Court, ex p. Okoli [2000] 1 Cr. App. R. 1, DC. This is the only authority which deals explicitly with section 1(8). The applicant sought judicial review of a decision by the Crown Court that it had jurisdiction to hear the prosecutor's appeal against grant of bail. Oral notice of the prosecution's intention to appeal against the magistrate's decision to grant bail was given at 11.50am on the morning of 7 June 2000. The appeal commenced at around 3pm on 9 June 2000, some 51 hours later. The applicant argued that upon the proper construction of section 1(8) the appeal should have been commenced by 11.50 a.m. on 9th June 2000, i.e. strictly 48 hours later, and as such the Court did not have jurisdiction to hear the appeal.

14. The Divisional Court decided the case primarily on the basis of the general principle that, in computing a period of time, no regard is paid to fractions of a day. As such, the proper construction of section 1(8) was that the appeal must commence within two working days of the date (not precise time) of decision of the Magistrates Court, and oral notice which followed. In a judgment given by Laws LJ, the Court accepted that if a strict construction were adopted it would result in '*troublesome*' practical consequences:

> '*One example given by Mr. McGuinness is of a case where the oral notice of appeal in a Magistrates' Court is given, let it be supposed, at 11 a.m. on 7th June; and the prosecutor's appeal is listed at 10.30 on the 9th, but there are other*

bail applications before the same judge so that it is not reached until 11.30, half an hour late. On Mr. Murphy's approach the prosecutor would be out of court. That seems to me a real and not a fanciful situation, and it must be our duty to construe a provision such as section 1(8) so as to accord so far as possible with the practical realities in which it is intended to work.'

15. Given this conclusion, it was not necessary to decide the second issue before the Court, namely whether section 1(8) of the Act is mandatory or directory. Laws LJ, however, indicated at [24] his 'provisional assessment' as follows:

'*the sub-section imposes a mandatory requirement. The context is one where the citizen's liberty is involved. It is of the highest importance that provisions of this kind should be construed so as to promote legal certainty as far as that may be done. If section 1(8) were to be treated as directory, there would as I see the matter (and I repeat, provisionally) be the potential for much uncertainty as to whether, on any given set of facts, an appeal was competent or not.*'

16. In R. (on the application of Jeffrey) v Warwick Crown Court [2003] Crim LR 190, the applicant, who had been granted bail, applied for judicial review of a decision by the Crown Court to hear the prosecution's appeal against the decision to grant bail. Oral notice of appeal had been given at the conclusion of the proceedings in which bail had been granted. However, the prosecution, for reasons outside its control, had failed to serve written notice of appeal upon the application within two hours of the conclusion of the proceedings in which bail had been granted. It was submitted that the appeal should be deemed to have been disposed of pursuant to section 1(7) of the Act. On the basis of the facts found by the judge below, Hooper J rejected this, concluding:

"*9. The delay of three minutes in this case did not cause the claimant any prejudice. The claimant knew at the conclusion of the proceedings before the magistrates' court that the prosecution was exercising its right of appeal. He knew that he was being detained in custody as a result of that oral application.*

...

11. In my judgment, Parliament did not intend that subsection (7) could defeat an appeal if the prosecution has given itself ample time to serve the notice on the defendant within the two hour period, has used due diligence to serve the notice within that period and the failure to do so is not the fault of the prosecution, but is due to circumstances outside its control. If it were necessary to rewrite subsection (7) to achieve Parliament's intention, I would do so by adding the following at the conclusion of the sub-section: "unless such failure was caused by circumstances outside the control of the prosecution and not due to any fault on its part."

17. In R. (Cardin) v Birmingham Crown Court and Birmingham Magistrates' Court [2017] EWHC 2101 (Admin); [2018] 1 Cr. App. R. 3, DC. In that case, following the giving of oral notice by the prosecution after bail had been granted by the DDJ, the normal procedure for detaining the defendant for a period of two hours for the purposes of serving the written notice of appeal was not followed due to an administrative error. Proper written notice was given by the prosecution to the relevant court officer at the Magistrate Court, but the court office erroneously

generated a remand warrant for the Claimant which stated, incorrectly, that the written notice of appeal had already been served on the defendant when it had not. This led to the claimant being transferred to prison from the Court without having been served the notice. When the error was discovered, various steps were taken to attempt service of the document on the defendant. These included sending a fax to the prison (which arrived but which was inexplicably not given to the claimant), and service on the solicitor who had been representing the defendant (who stated he had no instructions to accept service). In the event, no written notice was served on the defendant within the stipulated two hour notice period. Prison staff were, however, unpersuaded that the warrant was unlawful and decided it would be a matter for the Crown Court judge to decide whether they had jurisdiction. The defendant was therefore detained until, within the 48 hours prescribed by s.1(8) of the Act, he was produced court for the hearing of the prosecution appeal, which was allowed.

18. The Divisional Court endorsed the approach of Hooper J in Jeffrey, noting at [36] that it accorded with the approach advocated by the House of Lords in R v Soneji [2006] 1 AC 340 to an alleged failure to comply with a provision prescribing the doing of some act before a power was exercised; namely, to ask whether it was a purpose of the legislature that an act done in breach of that provision should be invalid. It considered Okoli and, in particular, Laws LJ's view that the provisions of s.1(8) were mandatory rather than directory, quote above at paragraph 15. Andrews J (as she then was) stated:

> '*Those are observations with which this Court would respectfully agree. however, there is no issue as to the mandatory nature of s.1(5) . Nor does the construction of s.1(7) adopted by Hooper J enable the prosecution to opt out of service of the written notice within the time prescribed without suffering the consequences, if it is possible for it to effect service. The issue is whether s.1(7) should be construed so as to deprive the appellate court of jurisdiction to reverse a decision by the magistrates to grant bail if the prosecution could not have served the defendant within the two hours, however hard it tried*.'

19. The Divisional Court rejected the application for judicial review, on the basis that the claimant's submissions could create remarkable consequences which Parliament could ever have intended:

> '*If bail is granted in circumstances when it should not have been, it cannot have been Parliament's intention that the Prosecution should be deprived of the ability to challenge that decision on appeal by reason of a technical failure to comply with the provisions of the statute that was no fault of the Prosecution and caused the defendant no prejudice*.'

20. Most recently, in Re Glenn Rainey [2019] NIQB 65, McAlinden J considered whether appropriate notice of the appeal was served on the applicant, Mr Rainey, within the time stipulated by Section 10(6) of the Justice (Northern Ireland) Act 2004 (section 10 of the Justice (Northern Ireland) Act 2004 being in materially identical terms to section 1 of the Act). The oral notice was given at 15.44. The written notice stated, wrongly, that oral notice of appeal was given at 4.00 pm. The prison acknowledging receipt of the notice at 17.03, but it was not served until 17.55, eleven minutes outside the two hours window.

21. The Judge said:

> '*Despite the strict wording of the relevant statutory provisions in Great Britain and Northern Ireland it is clear that the courts in England and Wales and Northern Ireland have been prepared to interpret the relevant statutory provisions so as to import an element of flexibility which is somewhat surprising in the context of a criminal statutory provision dealing with the liberty of the subject. In the context of the Northern Ireland statutory provision Mr Justice Deeny stated in his ruling in Thompson that*:
>
> > *"I would respectfully agree with Mr Justice Hooper that if the prosecution had used due diligence and the delay was not its fault but was due to circumstances outside its control, particularly there as here the delay is a modest one of about half an hour in this case even less in that case I would not feel it was in accordance with the decisions of the courts over the decades and perhaps longer to strike down the notice for that error".*
>
> *It is clear that the key matters to be considered are:*
> *(i) The exercise of due diligence by the prosecution.*
> *(ii) Delay and whether it is the fault of the prosecution.*
> *(iii) Whether the delay is due to circumstances outside the control of the prosecution.*
> *(iv) Whether the delay is of a modest nature.'*

22. Applying these principles to the facts of the case, McAlinden J found that there was a failure to serve the written notice within the two hour period and that the appeal was therefore 'disposed of'.

23. Although not dealing with the Act, it is of relevance finally to be reminded where the burden clearly lies in the context of writs of habeas corpus. As clearly observed recently by Chamberlain J in Walid Niagui v The Governor of HMP Wandsworth [2022] EWHC 291:

> "*First, no-one (including a Serco employee, a police custody officer or a prison officer or governor) may detain another person, except with lawful authority. ....*
>
> *Second, a person who complains of unlawful detention does not have to show that there is no authority to detain him. Once it is shown that he is being detained, the detaining authority has to show that there is authority to detain him. That is so whether the complaint is made by application for a writ of habeas corpus or by a claim for false imprisonment. This is not just a procedural quirk. It is central to the protection accorded by the common law to the liberty of the subject."*

Discussion

24. The remand warrant was clear. The basis of remand was '*Pending appeal by prosecutor against grant of bail*.' If there was no appeal lawfully pending, for example, because it had been withdrawn or it was no longer legally open to the prosecutor to pursue its appeal, the basis of detention falls away and continuing detention is unlawful.

25. If it is claimed, as in this case, that it is no longer open to the prosecution to pursue an appeal because of a failure to comply with one or more elements of the Act, once a prima facie non-compliance is substantiated, the burden falls squarely on the prosecution to establish, notwithstanding some non-compliance, that its right remains.

26. It is plain from those cases involving sections 1(4) and 1(5) of the Act that strict non-compliance may not of itself prove fatal to the continuing right on the part of the prosecution to pursue its appeal. That is as a result of, as Laws LJ put it in Okoli, *'our duty to construe a provision such as section 1(8) so as to accord so far as possible with the practical realities in which it is intended to work'*. However, it is plain for the fundamental common law rights of liberty with which these provisions are concerned, the scope for flexibility is extremely narrow.

27. I have little hesitation in concluding that the provisions of section 1(8) are mandatory in nature, for the reasons given, albeit provisionally, by Laws LJ. This conclusion was endorsed by the Divisional Court (albeit *obiter* insofar as it related to section 1(8) which was not directly relevant to the matter then in dispute).

28. It is, of course, correct that section 1(8) does not set out the consequence that failure to commence the appeal in 48 hours from the date on which oral notice was given is that the appeal is 'disposed of' (in the way section 1(7) does in relation to the oral and written notices). However, this is not determinative against its mandatory nature. If it were not mandatory in nature, the remarkable outcome would be that a person's detention would lawfully extend for a potentially indefinite and uncertain period of time pending the appeal, which might be delayed for any number of reasons. That the requirement to commence the appeal within 48 hours is to be construed as mandatory is no more than the application of the fundamental protection accorded by the common law to the liberty of the subject to construction of the provision.

29. The narrow band of flexibility which has been recognised in the forgoing authorities as applicable to the requirements of sections 1(4) and (5) is, plainly, equally applicable to the mandatory provision in section 1(8).

30. Those factors identified by McAlinden J, quoted in paragraph 21 above, are correctly drawn from the authorities, and in particular from the construction of section 1(7) by Hopper J in Jeffrey as endorsed by the Divisional Court in Cardin. I would respectfully adopt them. The first three relate to the conduct of the prosecution, and for the reasons set out above, it is for the prosecution to establish that it has acted with due diligence, that the delay is not its fault and that the delay was outside its control.

31. I would note McAlinden J's fourth factor is in reality a subset of the question of prejudice to the defendant. Whilst the extent of delay may be an element of prejudice, there are other factors which may be relevant (for example, whether the defendant was released because of delay, however short). However, it is equally clear that although in a number of authorities the Court have identified the absence of prejudice to the defendant as part of the reasoning, as Re Glenn Rainey makes clear, the absence of prejudice is far from determinative of the matter in the prosecution's favour. The delay of just 11 minutes in Re Glenn Rainey did not prevent the appeal from being 'disposed of'.

32. Applying these principles to the present case, there is no dispute that the appeal was not commenced within 48 hours. The burden falls upon the prosecution to justify its continuing right to appeal, and the continuing detention of the Claimant. In the comments that follow, I imply no criticism whatsoever of Ms Lynch, representing the Defendant and to whom I granted rights of audience (the Defendant having decided not to instruct Counsel). Ms Lynch had acted extremely conscientiously in seeking to obtain instructions, both in the time (some 24 minutes) between receiving the papers as duty solicitor at the Defendant on Friday night and attending the first hearing at 9pm, and then in the time given (until 11am Saturday morning) for further instructions to be sought. However, the only information provided to the Court through Ms Lynch was that the CPS had applied to list the appeal and the Court had listed it at 10am on 2 January 2024. The submission which followed, on instructions, was that the detention remained lawful as the appeal was pending, that the CPS was not responsible for listing matters, and that, as the CPS was not withdrawing its appeal, the Claimant should remain in detention until the listed hearing on 2 January 2024.

33. It is plain that this is wholly inadequate in circumstances where, on the face of it, the Claimant is being detained in breach of the clear and mandatory provisions of Act. Indeed, the Claimant had, as at the date of the application, been in detention for 5 days, due to the fact that the bail application had taken place on a Saturday followed by Sunday, then Christmas and Boxing Day, (although, of course, this was the legitimate consequence of the express provisions of section 1(8)). No attempt was made to explain matters such as (a) the timing and communications between the CPS and the Crown Court listing (b) the efforts by the CPS to ensure the matter was listed on the 27th or 28th December 2023 (when Southampton Crown Court was open), including providing explanations of the importance of the appeal taking place on one of those two days; and (c) the reasons given why listing was not possible. Whilst listing is not directly within the control of the CPS, it is in no way possible for me to conclude, without any evidence of the efforts it took, the obstacles it faced and how it sought to overcome them, that the fact that the appeal did not commence within 48 hours was not by reason of or contributed to by the prosecutions fault, or, similarly, that it was out of its control.

34. However, in this case, even if it had been established that the listing difficulties were entirely outside the control and fault of the prosecutors and despite every effort, the matter could not be commenced earlier than in fact listed, it is extremely doubtful that the narrow band of flexibility would ever extend to permitting the continued detention of the Claimant until 2nd January 2024, some 4 full days beyond the prescribed 48 hours (here, as extended legitimately by a further 3 days for Sunday, Christmas Day and Boxing Day).

35. In the circumstances, the fact that no appeal was commenced within 48 hours of the oral notice as required by section 1(8) of the Act, and the failure on the part of the Defendant to provide any basis upon which to apply some narrow flexibility to that mandatory requirement, the appeal should be deemed disposed of.

36. For these reasons, I ordered the immediate release of the Claimant (subject to the bail conditions imposed by the magistrates).