



Case No: T20207009, T20207067, T20207073 and T20207085

IN THE CROWN COURT AT BOLTON

Date: 04/09/2020

Before :

His Honour Judge Graeme Smith

Between :

The Queen

- v -

**ANDREW WILLHELM AGNOR JOHANNESSEN
LEWIS SINCLAIR
SHAWN O'MALLEY
ANDREW POTTER
LEE STEADMAN
STUART SHAW
ANNIE WEBSTER**

Mr A Smith for the Prosecution
Miss K. Pierpoint for Johannessen and Sinclair
Miss Herzog for O'Malley
Mr Morgan for Potter

Hearing dates: 1st September 2020

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HIS HONOUR JUDGE SMITH

HHJ Smith :

Overview:

1. I am dealing with applications by the prosecution to extend the custody time limits in respect of the defendants Andrew Johannessen, Lewis Sinclair, Shawn O'Malley and Andrew Potter. For brevity, I shall refer to them by their surnames only. The applications are opposed.
2. The consolidated indictment contains 11 counts, which can be divided as follows:
 - i) Counts one and two – conspiracy to burgle and commit theft; count nine – aggravated vehicle taking; count 10 – driving whilst disqualified. Acceptable pleas have been entered to these counts by Johannessen, Sinclair and Lee Steadman. Steadman has been sentenced.
 - ii) Count three – conspiracy to possess a firearm with intent to endanger life; counts five, six, seven and eight – possessing a firearm when prohibited. These counts relate to Johannessen, Sinclair, O'Malley and Potter.
 - iii) Count four – conspiracy to pervert the course of justice. This count relates to Johannessen, Sinclair, O'Malley, Potter, Stuart Shaw and Annie Webster.
 - iv) Count 11 – concealing, possessing, converting or transferring criminal property. This count relates to Webster.
3. The conspiracies charged in counts three and four are closely connected in that they relate to the use (count three) and disposal (count four) of the same firearm – a Czech P-09 9mm Parabellum pistol. The prosecution contend that a shooting took place at 75 Hilden Street in Bolton on 9th September 2019, and that on 4th October 2019 the pistol was planted in a vehicle belonging to Craig Millington. The prosecution further contend that these actions arise from the activities of an Organised Crime Group headed by Leon Cullen who resides in the United Arab Emirates.

Procedural History

4. The matter was initially listed for trial on 16th July with a time estimate of 15 days. When it was listed, only Johannessen and Sinclair had been charged, although it was known that other defendants were to be charged. In any event, an application to vacate the trial was made on the basis that some of the prosecution witnesses required by the defence were not available. On 16th March, the trial was re-fixed for 14th September with a time estimate of five weeks on the basis that all seven defendants would have been brought before the court in good time. Applications were made by the prosecution to extend Johannessen's and Sinclair's custody time limits, and these were granted on 9th April. Their custody time limits now expire on 18th September.
5. Numerous further hearings have taken place to deal with the position of the further defendants as they were brought before the court and with case management issues.

O'Malley's custody time limit was initially 11th September, and was extended to 18th September when the trial was re-fixed for 14th September. Potter was charged somewhat later, and so his custody time limit is 30th October.

6. Given the complexity of the evidence and the amount of work necessary to prepare for the trial, I was asked by all counsel to seek from court listing a definitive answer as to whether the trial on 14th September would be able to proceed in light of the restrictions on trials due to Covid-19. I was informed by court listing that there was no prospect of the trial proceeding on that date, and was given a new date of 4th January 2021, albeit that there was no certainty that this date would be effective either. I informed the parties of this at the hearing on 13th August, vacated the trial on 14th September, and re-fixed it on 4th January. The prosecution indicated that they would apply to extend the custody time limits of the four defendants in custody and the defendants' counsel indicated that these applications would be opposed.
7. Following the hearing on 13th August I requested from HMCTS further information concerning the arrangements to be made for trials in Bolton involving multiple defendants. Having received some further information, I caused an email to be sent to the parties on 28th August in the following terms:

“To ensure that all parties have the benefit of all information which is currently available about the listing of this trial, I have made enquiries with local and regional HMCTS management, the Recorder of Bolton (HHJ Walsh) and the Presiding Judge of the Northern Circuit (Dove J). In summary, the position is as follows:

1. At present, there are no courts on the Northern Circuit which are able to accommodate trials involving more than 4 defendants, and only one court able to deal with trials involving 3 or 4 defendants;
2. HMCTS are considering a number of options with a view to enabling such trials to commence, and a Circuit working party has recently been set up which includes members of the Judiciary;
3. Whichever options are adopted are likely to result, at least initially, in a small number of courts dealing with such trials;
4. Courts which cannot accommodate such trials will transfer them to the courts which are able to deal with them. This will result in the need to prioritise which cases are tried. There are, as yet, no established criteria for such prioritisation;
5. It is very unlikely, at least initially, that there will be any courts able to deal with trials involving more than 5 defendants;
6. There is at present no specific indication of when trials involving multiple defendants will be able to proceed;

7. The trial in this matter will not be able to proceed at Bolton Crown Court on 4th January 2021 as there is no prospect of this court being able to accommodate a trial with 6 defendants by then. However, it has been listed on that date because of the possibility that the steps mentioned in paragraphs 2 and 3 may enable the trial to proceed at another venue. However, this is subject to the comments in paragraphs 4, 5 and 6.”

8. In light of this information, Mr Smith has indicated today that the prosecution will seek to proceed only against these four defendants at the trial listed on 4th January 2021, with the two defendants currently on bail to be tried at a later date.

Law

9. The statutory basis for extending custody time limits is to be found in s.22(3) of the Prosecution of Offences Act 1985. This provides that the court may not grant an extension unless satisfied of conditions. In the present case the relevant questions on which the court must be satisfied are:

- i) That there is some good and sufficient cause; and
- ii) That the prosecution has acted with all due diligence and expedition.

The burden lies on the prosecution on the balance of probabilities to justify the extension and thus to show a good and sufficient cause.

10. In *R (McDonald) v Manchester Crown Court* [1999] 1 WLR 841, Lord Bingham CJ said:

“The Act of 1985 and the Regulations of 1987, as amended, have three overriding purposes: (1) to ensure that the periods for which un-convicted defendants are held in custody awaiting trial are as short as reasonably and practically possible; (2) to oblige the prosecution to prepare cases for trial with all due diligence and expedition; and (3) to invest the court with a power and duty to control any extension of the maximum period under the regulations for which any person may be held in custody awaiting trial. These are all very important objectives. Any judge making a decision on the extension of custody time limits must be careful to give full weight to all three.”

“In any application to the court for an order extending custody time limits beyond the maximum period laid down in the regulations it is for the prosecution to satisfy the court on the balance of probabilities that both the statutory conditions in section 22(3) are met. If, but only if, the court is so satisfied does the court have a discretion to extend the custody time limit. If it is not satisfied it may not do so. If it is satisfied it may, but need not, do so.”

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“... there is an almost infinite variety of matters which may, depending on the facts of a particular case, be capable of amounting to good and sufficient cause. It is neither possible nor desirable to attempt to define what may or may not amount to good and sufficient cause in any given case, and it would be facile to propose any test which would be applicable in all cases. All must depend on the judgment of the court called upon to make a decision, which will be made on the peculiar facts and circumstances of the case in question, always having regard to the overriding purposes to which we have made reference above”

11. In written and oral submissions, I have been referred to a number of other authorities. *R (Gibson) v Crown Court at Winchester (CPS)* 2004 1WLR 1623 is authority for the proposition that resources are not unlimited and that other cases awaiting trial had to be taken into account. In *R. (Raeside) v Crown Court at Luton* [2012] 1 W.L.R. 2777 it was stated that, in the overwhelming majority of cases (“routine cases”), the unavailability of a judge or a court room will not provide a good and sufficient cause, absent other circumstances; it will only be in a case of real complexity or one that requires a particular judge, such as a High Court judge or a judge authorised to try murder or attempted murder, that the unavailability of a judge or a court room might well, of itself, go a long way to establishing good and sufficient cause. In *Kalonji v Wood Green Crown Court* [2007]; [2008] AC 11 it was held that if the delays which are being experienced by the court are not being alleviated by any steps that are being taken, then the judge may be forced to conclude that there is a systemic failure, in which event listing difficulties in a routine case will not be a good and sufficient cause for an extension.
12. I was also referred to the very recent, but unreported, decision of HHJ Raynor sitting at Woolwich Crown Court, in which he refused to extend custody time limits. That is only a first instance decision, is fact-specific, and does not establish any matters of principle.

Due diligence and expedition

13. In this case, only O’Malley has raised a detailed argument that the prosecution has not acted with all due diligence and expedition. The other defendants have either taken no issue for the purpose of this application or have relied simply on the “multiple applications to extend time for service of the evidence” by the prosecution. For O’Malley, Miss Hertzog submits that the call data records and gait analysis were served late, and the full handset downloads have still not been served. In response, Mr Smith relies upon the very detailed chronology which has been uploaded to the DCS. He submits that in relation to the call data records and the gait analysis, even if they were served late, they would not have prevented the trial from proceeding on 14th September, as Miss Hertzog accepts that they could have been dealt with in time. In relation to the full handset downloads, he submits that these are unused material rather than evidence, and they cannot be served until undertakings are provided by the owner of each handset, because of data protection considerations. Miss Hertzog disputes this, and says that in any event no draft undertakings have been submitted to any defendant for signature despite orders made for this to be done.

14. It is difficult to reach a definitive view on this issue in the absence of detailed legal argument upon the status of the handset downloads. Certainly there seems to have been an unexplained delay by the prosecution in providing draft undertakings to the defendants. My note of the hearing on 7th July confirms “No objections to service of handset reports on other defendants”, and the chronology produced by the prosecution indicates that draft undertakings were to be sent to the defendants’ solicitors. The chronology further records that on 15th July I ordered the disclosure of the handset downloads, but that the prosecution still considered that signed undertakings were required and so asked for the case to be mentioned so that the issue could be further discussed. This does not seem to have happened. In the meantime, undertakings do not appear to have been sent to the defendants. Given the orders previously made, the onus was clearly upon the prosecution to raise the issue. However, the reality of the situation is that the trial was vacated because of the unavailability of a court which could accommodate it. Had this not happened, I am sure that the issue would have been raised and addressed on or shortly after 13th August, whereas it appears to have been left in abeyance now that the trial has been vacated. I therefore do not consider that any lack of diligence or expedition by the prosecution is in any way causative of the adjournment of the trial.

Good and sufficient cause

15. The real issue in this application is the impact of the Coronavirus pandemic. The defendants accept that the pandemic was an exceptional situation which amounted to a proper reason to extend Custody Time Limits. They do not accept that, nearly 6 months later, it still is.
16. On 27th March 2020 the Coronavirus Crisis Protocol for the Effective Handling of Custody Time Limit Cases in the Magistrates and the Crown Court (the “Protocol”) was issued. It was signed by the President of the Queen’s Bench Division, the Chief Executive and the Deputy Chief Executive of HMCTS, and the Director of Public Prosecutions, and provided, inter alia, as follows:

“2. The purpose of this Protocol is to set a temporary framework during the Coronavirus pandemic for the efficient and expeditious handling of cases that involve a Custody Time Limit (CTL). It does not create legal obligations or restrictions on (any) party. Unless stated otherwise this Protocol applies to both magistrates’ courts and Crown Court cases. The Protocol will be reviewed monthly by the SPJ [Senior Presiding Judge] who will determine when it will cease.”

“5. This Protocol does not override independent judicial discretion and every case must be decided on its own merits. The Protocol contains rules of practice only and the relevant law is unaffected. The judge responsible for deciding each application will apply the law.”

“15. The Coronavirus pandemic is an exceptional situation and the adjournment of CTL trials as a consequence of government health advice and of directions made by the Lord

Chief Justice amounts to good and sufficient cause to extend the custody time limit. ..”

17. The lawfulness of the protocol was challenged on the basis that it subverted the statutory scheme. This was rejected by the Divisional Court in *R (on the application of McKenzie) -v- Crown Court at Leeds* [2020] EWHC 1867 (Admin). The Protocol was withdrawn yesterday, after I had drafted this judgment. Its withdrawal does not affect my decision.
18. The defendants say that it is now almost 6 months since restrictions were put in place as a result of the coronavirus pandemic and that HMCTS have had sufficient time to make arrangements for trials involving multiple defendants to recommence. In these circumstances, the adjournment of CTL trials as a result of restrictions imposed due to the coronavirus pandemic can no longer be considered a good and sufficient cause to extend the custody time limit.
19. The defendants (particularly Mr Morgan for Potter) also say that insufficient investment has been made by the government to provide places capable of housing jury trials. I am aware, from information publicly available on the Courts and Tribunals Judiciary website, that a new court has been created in the Civic Centre in Swansea, which it is said is capable of dealing with multiple defendant trials, possibly with up to 10 defendants, from 17th August. It is therefore clear that significant investment is being provided. However, I have no information about the level of investment which is being provided overall, or about the basis upon which it is being allocated between regions or individual courts.
20. Jury trials recommenced in Bolton Crown Court in early July, following a very extensive inspection to ensure that Government guidance as to social distancing was followed. The steps taken to follow that guidance required the use of three courtrooms to accommodate a single trial. Court one, the largest court room in the building, accommodates the Judge, the Jury, the Defendant, Counsel and the witnesses. Court two is used for the jury during breaks and in retirement. Court six, which is normally used by the Magistrates, is used by the public and the press and is linked to court one by a video link. Because of the necessary restrictions on use of the dock and counsel’s benches, only trials with a maximum of two defendants can currently be accommodated. There are two further courts used by the Crown Court, courts three and four. At present they are both used for list work every day, including appeals in court three. Therefore every Crown Court courtroom at Bolton is in use every day.
21. Further work, including structural work, is to be undertaken later this month, with a view to enabling court 3 to also be used for trials. This will enable two trials to proceed simultaneously. Consideration is also being given to the possibility of increasing the number of defendants who can be accommodated in the dock in court 1, for example by installing Perspex screens. However, the capacity of the dock is not the sole consideration. Other considerations include the need to be able to accommodate multiple counsel (and potentially also solicitors) in the courtroom, the capacity of the cells (taking into consideration other cases also progressing each day, including cases in the Magistrates’ Court), and the increased footfall in the building resulting from increasing the number of trials being heard and the number of defendants in a trial. Bolton is a tight court building with no large open foyer spaces. The stairwells are narrow and the building is made up of many small rooms. Public toilet facilities are

limited, as are the facilities available for advocates. Moving to two trials each day will double the number of jurors required in the building, in addition to defendants, advocates, witnesses and members of the public wishing to observe the trials. It therefore remains unclear what the trial capacity will be.

22. The defendants have referred to the changing nature of the Government's health advice in relation to Coronavirus, which has resulted in a gradual easing of the "lockdown" imposed in March, including the re-opening this week of schools. They suggest if it is possible for so many other activities to resume safely, then it must be possible for multiple defendant trials to resume. The only reason they have not resumed, they suggest, is that the Government has failed to provide the necessary resources. In response, Mr Smith submits that a trial such as this would involve at least 25 adults being present in a restricted space for upwards of 5 hours per day. This is not comparable to other activities, such as dining in restaurants or visiting the gym. In addition, juries are comprised of members of public giving up their time to fulfil a civic duty, which is very different to other activities voluntarily undertaken by members of the public. Safety considerations must be paramount.
23. It has also been suggested by the defendants that, if existing courts cannot be adapted so as to accommodate multiple defendant trials, then HMCTS should take steps to create "Nightingale" courts to accommodate such cases. Doing so would clearly involve many logistical challenges. The most obvious are the necessity for secure docks and cells in custody cases, for installation of the IT systems required, and for the provision of trained court staff to operate them. However, the fact that a new court has been created in Swansea shows that such challenges are not insurmountable, although I am not aware of whether that court will try custody cases or only bail cases. I also understand that a venue for a "Nightingale" court has been identified in the Greater Manchester area, and will begin operating later this month. However, I am not aware how many defendants can be accommodated, and I understand that custody cases cannot be accommodated there.
24. The Coronavirus pandemic is clearly an unprecedented and largely unforeseen event, and as such clearly constituted a good and sufficient reason to extend custody time limits. However, it cannot continue to do so for an indefinite period. As Mr Smith submits, the safety of all court users must be the paramount consideration. However, it is not the only consideration, nor can it be considered in isolation because the Act requires the periods for which un-convicted defendants are held in custody awaiting trial to be as short as reasonably and practically possible.
25. In this case, I have reached the conclusion that the prosecution have not satisfied me, on the balance of probabilities, that there is a good and sufficient reason to extend the custody time limits. I have reached this conclusion for the following reasons:
 - i) When the case was listed for trial on 14th September, all parties assumed that it would be effective on that date. That date was allocated on 16th March. At that stage, although it was increasingly evident that some form of lockdown might be required, no-one could realistically have envisaged the extent of the disruption which would be caused to the work of the Crown Court. However, at no stage thereafter was any indication given that the trial would not be effective, until I made specific enquiries in August;

- ii) The new trial listing on 4th January 2021 is, as submitted by Miss Hertzog, a listing of “hope rather than expectation”. From the information I have been given, there was nothing known to HMCTS on 13th August which could have given them any confidence that a trial on 4th January was likely to be effective. Indeed, the Circuit working party only appears to begun work after that date;
 - iii) Even now, it is not clear what measures can be taken in what courts or other buildings to enable custody trials involving multiple defendants to re-commence. It is not clear how many defendants will be able to be accommodated in a trial, or how such trials are to be prioritised given the limited resources likely to be available;
 - iv) The steps taken by HMCTS in Swansea demonstrate that it is possible to devise relatively rapid solutions to this problem. From the limited information which has been provided to me, it appears that HMCTS has only very recently begun addressing the problem in Bolton and on the Northern Circuit generally, despite it having been apparent for several months. I am not privy to the reasons for this apparent discrepancy in approach, but defendants should not be prejudiced by their geographic location unless there is a particular circumstance leading to a courtroom being unavailable. I am not aware of any such circumstance.
26. Had I reached the contrary conclusion, namely that there is a good and sufficient reason to extend the custody time limits, I would nonetheless have declined to exercise my discretion to do so because, for the reasons I have given, it is impossible to ensure that the periods for which these un-convicted defendants are held in custody awaiting trial are as short as reasonably and practically possible .