Neutral Citation Number: [2012] EWHC 1064 (Admin)

Case No: CO/3733/2012

IN THE HIGH COURT OF JUSTICE
QUEEN S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL
23/04/2012

B e f o r e :

PRESIDENT OF THE QUEEN'S BENCH DIVISION
and
MR JUSTICE BURNETT

Between:

The Queen on the Application of Raeside	**Claimant**
- and -	
Luton Crown Court	**Defendant**
- and -	
Crown Prosecution Service	**Interested Party**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Mr Tim Forte (instructed by Gordon Young LLP) for the Claimant
The Defendant did not appear and was not represented
Ms Maryam Syed (instructed by Crown Prosecution Service Appeals Unit) for the Interested Party

Hearing date: 20 April 2012

Judgment
As Approved by the Court

President of the Queen's Bench Division :

This is the judgment of the court in a rolled up application for judicial review of the decision of the Luton Crown Court made on 3 April 2012 to extend Custody Time Limits (CTL) under s. 22(3) of the Prosecution of Offences Act 1985 until 4 May 2012. The application raised two issues of practice.

The background

1. On 24 March 2011 a member of the public saw a person being put into a van. The police were informed. The van was eventually stopped by two police officers after two persons had left the van at intervals. The driver (Wright) was still in the van. The police heard a person in the back. He was found to be bound with cable ties. A six inch drill bit had been drilled into his ankle. It is the Crown's case that this was an attempt to torture that man in a drugs related matter. The police found tights with eyeholes in them in the van. One set of tights was matched by DNA to Hughes-John and the second to the claimant. Hughes-John was arrested in April. The claimant was not arrested until 5 October 2011.

[Redacted]

3. As we have set out, the claimant was arrested on 5 October 2011. He was charged with kidnapping and an offence under s. 18 of the Offences Against the Person Act 1861.

[Redacted]

The Plea and Case Management Hearing on 9 November 2011

4. On 9 November 2011 there was a PMCH before the Resident Judge of Luton, His Honour Judge Foster.

[Redacted]

5. The judge then ordered that the kidnapping and s. 18 indictment with which this application is concerned be tried at a date to be fixed with an interval of two weeks after the conclusion of the other trial. This was to allow for that trial to overrun and for there to be a change of jury panel. It therefore was clear that the second trial should take place in late February or early March. If fixed for that time, it would have been well within its CTL which did not expire until 5 April 2012.

6. The judge then asked the listing officer to make enquiries and find the earliest date. She left court. In the evidence she gave at the hearing of the application to extend the CTL on Tuesday, 3 April 2012, she looked at her own list and made enquiries of the Crown Courts at St Albans and Cambridge, which are within the same organisational unit as Luton. Having made those enquiries she told counsel and then told the judge that the earliest the case could be tried was 30 April 2012. Judge Foster then announced in court that the earliest slot the case could be tried was 30 April 2012 and he fixed the trial for that date. This was outside the CTL, but it was the earliest date said by the listing officer to be available and so understood at the time by all present

in court, including those representing the claimant. The Crown said it would apply to extend the CTL.

The application for the extension of Custody Time Limits

7. No application to extend the CTL was made until late March 2012. The other trial overran and did not, in fact, finish until 22 February 2012;

[Redacted]

8. On 26 March 2012 the Senior Crown Prosecutor at Luton made an application in writing to the court to extend the CTL for the kidnapping and s. 18 offence. The application first set out the grounds on which it was submitted that the Crown Prosecution Service had acted with due diligence; we need not refer to those at all, as there is no doubt but that the Crown Prosecution Service had acted with due diligence. The application then set out the grounds for contending that there was good and sufficient cause to extend CTL, drawing attention to the fact that the trial could not be proceeded with any earlier, as it had to take place after the other trial **[Redacted]** had been concluded; that the court was aware, when the trial date was fixed for 30 April 2012, that that date was outside the CTL. The application made reference to the decisions of this court in *R v Manchester Crown Court ex parte McDonald* [1999] 1 Cr App R 409, *R v Central Criminal court ex parte Abu-Wardeh* [1999] 1 Cr App R 43 and *R(Gibson) v Winchester Crown Court* [2004] EWHC 361 (Admin). It was contended that the unavailability of court/time space within the time limit might satisfy the test.

9. That application was received by the claimant's lawyers on 28 March 2012. The hearing to extend the CTL took place on 3 April 2012 before His Honour Judge Farrell QC. In addition to the cases to which we have referred, the court also had before it the decision of this court in *R(Bannister) v The Crown Court at Guildford* [2004] EWHC 221 and *R(McAuley) and Crown Court at Coventry* [2012] EWHC 630 (Admin) handed down on 20 March 2012.

10. Although no evidence had been served with the application in accordance with the guidance given in *McAuley* at paragraph 35, there has, in the result, been no prejudice to the claimant. The course taken by the judge was to ask the listing officer to give oral evidence. We have briefly summarised her evidence as to the enquiries she had made at paragraph 6 above. When asked in cross examination about enquiries that had been made of other Crown Court centres including Harrow, Aylesbury, Reading, Leicester, Birmingham and elsewhere, she said that she had not made any. Nor had she contacted the Regional Listing Office. She said she had not done so because at the time of fixing on 9 November 2011 nobody had raised a concern about the date being outside the CTL. If a concern had been raised, she would have looked at contacting the Regional Listing Office.

The decision of the judge on CTL

11. The judge concluded that there was no lack of due diligence on the part of the Crown Prosecution Service. Although a point was raised in the skeleton argument before us that the service of some additional documents indicated a lack of due diligence, there

was nothing in the point. This was therefore a case concerned purely with whether the CTL should be extended due to the unavailability of a court or judge to hear the case.

12. The judge considered whether for this reason there was good and sufficient cause under s.22(3) to extend CTL. He concluded in summary as follows:

    i) This was not a routine case. It therefore did not fall within the guidance given by this court in *Bannister* or *McAuley.* A routine case was a case that did not require more than the previous night's preparation by an experienced Crown Court advocate. The listing officer did not regard this as a routine case as the defendant was in custody, another case had to be tried first and the time required for the trial was two weeks; in her view, routine cases were those put into the warned list. This was not such a case. The judge concluded that this was a serious case; it needed an experienced Circuit Judge. There was also expert evidence, including cell site evidence and possibly DNA. For all these reasons it was not routine.

    ii) The provisions of s. 22(3) expressly referred to the need to postpone a case for the ordering of separate trials in respect of two or more defendants or two or more offences. Although the specific provision was directed at a case where there was one indictment, it was illustrative of Parliament's intention to allow an extension in a case where there were consecutive trials relating to the same defendant.

    iii) There had been proper and careful consideration by the listing officer of all the factors and there had been real efforts to see if an earlier date had been available.

    The application to this court and the two issues raised

13. When the application for permission was adjourned by Ouseley J to us, he drew attention to the significance of what had happened at the PCMH on 9 November 2011 and its possible relevance to the application before this court. At this court the arguments therefore centred on two issues: (i) the categorisation of the case as not routine and the proper approach to s.22 (3) and (ii) the significance of what had happened at the PCMH.

    (i) *The categorisation of the case as not routine and the proper approach to s. 22(3)*

14. It was the well formulated submission of Mr Forte, who appeared for the claimant, that the judge had misdirected himself in considering the extension of CTL on the basis that this was not a routine case and therefore no more needed to be done than the listing officer had done. His submission was that the term routine was used to distinguish such a case from one of real complexity or one that required a specially authorised judge; in routine cases the Crown had to satisfy the court that every step had been taken to see if the case could be heard within the CTL, in particular by looking at the position in other courts where the case could conveniently be tried and contacting the Regional Listing Office and the Presiding Judges. He referred us to the decisions in *McDonald, Abu-Wardeh, Bannister, Gibson* and *McAuley.*

15. In our view this argument is well-founded. It is important to emphasise that the primary task of the court is to apply the words of the statute to the facts of each individual case in accordance with the guidance given by this court; as Lord Bingham

pointed out in *McDonald* at pages 414-415, this court cannot specify the circumstances which are capable or not capable of amounting to good and sufficient cause. It is, however, clear that the availability of resources is a factor that can be taken into account: see *Gibson* at paragraphs 29-31 and *McAuley* at paragraph 30. However, it has been made clear that the purpose of a CTL would be undermined, if the courts granted extensions in anything other than unusual circumstances. The word routine was used in the cases, starting with *Bannister*, to make clear that in the overwhelming majority of cases in the Crown Court the unavailability of a judge or court room would not generally in itself provide good and sufficient cause, absent other circumstances. It was only a case of real complexity or a case which required 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 court room might well of itself go a long way to establishing good and sufficient cause.

16. In a case which can be tried by any experienced Crown Court judge or one where authorisations are given to most Crown Court judges, the purpose of the statutory provision and the long tradition of the common law in ensuring that cases are tried speedily would be undermined if the unavailability of a judge or court room was simply treated as amounting to good and sufficient cause, absent other circumstances. Other circumstances do not arise merely from the fact that the case involves some expert evidence. For example cell site evidence and DNA evidence are a feature of many cases and absent evidence of good reason for the unavailability of the expert, would not generally be a relevant factor.

17. We must emphasise again the necessity in every case that the court in an application to extend a CTL gives detailed scrutiny to the evidence to see if the Crown has proved that there is good and sufficient cause. As the court said in *McAuley*, such evidence must be served in advance of the hearing so that the defendant has the opportunity of examining it and then testing it in cross examination, if necessary.

18. In our view the judge for these reasons approached the issue on the wrong basis and misdirected himself. We must therefore consider the decision afresh. Although the case against the claimant is a very serious case, involving as it does on the Crown's case an allegation of a kidnapping and torturing the victim, nonetheless this case is not remotely within that category of case of real complexity where it can more easily be established that the unavailability of a court room or judge provides good and sufficient cause for extending the CTL. There was no evidence that the experts on DNA and cell cite evidence or any other witnesses were unavailable in March 2012. The case can be tried by any experienced Circuit Judge and its length is a very long way within that sort of length that the Crown Court must as a matter of course accommodate.

19. The Resident Judge prudently allowed a two week period after the conclusion of the first trial; therefore this case should have been heard in early March. The evidence before this court is the same as the evidence before the judge. Enquiries were only made of St Albans and Cambridge. There was no reference to the Regional Listing Officer and no enquiries of courts such as Harrow or Wood Green where the case could conveniently have been tried.

20. We were somewhat surprised that it appears no consideration had been given by HMCTS to it being represented or to it putting in further evidence. No-one from HMCTS was even present to assist Ms Syed who ably represented the Crown, but could not answer some of our questions. Our attention was drawn by Mr Forte to what he said at court after Judge Farrell had given his judgment. He made clear he would seek a review of the decision and drew attention to the difficulties that had been caused in *McAuley* because of the insufficiency of evidence. In the light of the fact that the decision in *McAuley* had been given only shortly before the hearing in this case before the judge, we would have paid close attention to an application on the part of HMCTS to put forward further evidence to explain more fully the position and whether there were for exceptional reasons no courts or judges were available at centres such as Wood Green, Harrow or elsewhere within reasonable proximity of Luton or other circumstances which might provide good and sufficient cause to extend the CTL.

21. In the absence of such evidence from HMCTS and given the limited evidence before the judge, we are inevitably driven to conclude that the necessary enquiry that is required if a CTL is to be extended was not made of courts where the case could have been conveniently heard; no attempt was made to involve the Regional Listing Office or the Presiding Judges to get the case heard within the CTL. We must again emphasise in this case that this is not the fault in any way of the listing officer. As we shall explain the correct procedure was not followed and the responsibility rests elsewhere. Unless therefore what happened at the PCMH on 9 November 2011 provides good and sufficient cause, there is no basis on which we could properly extend the CTL.

(ii) *The position taken at the PCMH*

22. The Crown contended before us that the failure of those acting for the claimant to object to the date of 30 April 2012 and raise the issue at the PCMH (after the judge had announced that date) gave good and sufficient cause on 3 April 2012 to extend CTL; by then it was too late and if objection was to be taken it should have been taken at a time when it would have been possible to take action. As is evident this was not a point made by the Crown before the judge, but we will consider it, making the realistic assumption for reasons we shall explain and consistent with the inference we have drawn in relation to the first issue that in November 2011 it would have been possible to find a trial date in March 2012.

23. It is necessary to begin by considering on whom the duties lay. In *R (Norman) v Worcester Crown Court* [2000] 2 Cr App R 33, this court made very clear what was to happen in relation to the fixing of trial dates and the relationship to CTL. Smith J said:

> "In my judgment, there is a joint duty upon the prosecution and the court to recognise that fact of life, and to make early arrangements for the fixing of a trial date within the custody time limits. Ideally, the date of trial should be fixed at the plea and directions hearing. The directions will then be tailored to ensure readiness by that date. If, as will sometimes happen, it is not possible to fix the trial date on that occasion, the directions judge should direct that the trial date be fixed

> within a window of time before the custody time limit expires, and should give directions which will require the parties to come back before him, if for any reason that is not achieved. If it proves impossible to list the case within the custody time limit, that situation will be appreciated at an early stage, the case should then be fixed as soon as possible after the expiry of the limit and the application to extend can be made immediately, when the reasons for the extension are clear to all and there should then be no need for a separate, costly, hearing.
>
> (Emphasis added.)
>
> If the court fails to take the initiative, in my judgment the duty should fall on the Crown to press for a hearing date within the time limit allowed by the custody time limit. The duty of the defence is to provide the names of witnesses required in good time, so that dates of availability can be obtained."

Rose LJ, the then Vice-President of the Court of Appeal Criminal Division, added:

> "All too often custody time limits are not being considered as soon as they should be at plea and directions hearings. I specifically endorse what Smith J. has said in relation to what should happen with regard to custody time limits at such hearings."

In the guidance given by the CPS on CTL, specific attention is drawn to this decision.

24. It is clear from what Smith J (as she then was) said and from what May LJ said in *Bannister* at paragraph 17 that the court should have taken the initiative. When on 9 November 2011 a date was fixed outside the CTL, the court should have directed the making of an application to extend CTL and fixed a date for the hearing of that application as soon as possible after the date of the PCMH as would allow for the service of evidence.

25. It is obvious that, if there is an issue in relation to the justification for extending CTL, the sooner that that is resolved the better. Unless perchance the unexpected availability of a court arises within a month before a trial date, it is much easier to try and find a trial date some months earlier. We have little doubt, bearing in mind our own experience as Presiding Judges, and on the evidence before the court which demonstrates that no enquiry was made beyond Cambridge and St Albans, there are ample grounds for the inevitable inference we have drawn that a court and judge could have been found in March 2012 prior to the expiry of CTL. That would have happened if the necessary steps had been taken prior to the serving of the evidence for the application to extend CTL (which should have been made in November 2011) or on the hearing of that application in November 2011.

26. As set out in *Norman*, it is the responsibility of the State through the judicial and executive branches to try defendants within CTL or to show good and sufficient cause why they cannot be so tried. There are cases where, because of the availability of defence counsel, a defendant does not want a case tried until after the expiry of CTL.

There will be other cases for other reasons where the defendant is expressly content to wait. However in the absence of the express consent of the defendant given in open court or otherwise, the State cannot escape from its obligation to make an application and a court be satisfied that there is good and sufficient cause to extend a CTL; Lord Bingham made that clear in *McDonald* at pages 413-4.

27. Despite this clear obligation, it is contended that the actions or inactions of those acting for the claimant at or shortly after the PCMH in November 2011 provided good and sufficient cause when the hearing took place on 3 April 2012 for the judge to extend the CTL. We cannot accept this contention.

28. First, no decision that could be challenged in this court was made in November 2011. None was made until the decision on 3 April 2012 after the application made on 26 March 2012. There was no remedy that could have been sought in this court.

29. Second, we accept that those acting for the claimant were under an obligation under Part 1.2(l)(c) of the Criminal Procedure Rules 2011. That paragraph provides that each participant in a criminal case must inform the court and all parties of any significant failure (whether or not that participant is responsible for that failure) to take any procedural step required by the rules, any practice direction or any direction of the court. Although the Rule should be given a broad construction, it would, we think, take the rule too far to have required defence counsel in the circumstances of this case to point out to the court its own subsequent failure and the failure of the Crown Prosecution Service to see that an application for the extension of CTL was made immediately.

30. Third, it would place defence advocates in an invidious position and make the task of a listing officer even more difficult than it is, if defence advocates could not simply accept what was said as to the availability of court rooms or judges and await the application to extend the CTL. The advocate would otherwise have to cross-question the listing officer informally as to such matters. That would be a practice inimical to the good administration of justice which necessitates advocates and lawyers acting on what they are told by the listing officer as to available dates. The good administration of justice requires that in cases where there is no express consent to the fixing of a case outside its CTL that the defence advocate awaits the service of the evidence setting out the explanation for the unavailability of a court or judge or other matters that would provide good and sufficient cause to extend the CTL. In the absence of express consent to the extension of the CTL, the court must therefore direct the making of an immediate application and rigorously scrutinise the evidence to see if it is satisfied there is good and sufficient cause to extend the CTL.

31. We must emphasise that it is essential that where a case is fixed outside its CTL, the guidance given by this court in 1999 is followed. If a case is fixed outside the CTL and there is no express consent to this, it is for the court itself to take the initiative in seeing that an immediate application by the Crown is made and heard as soon as is practicable.

Conclusion

32. We have concluded the decision of the judge to extend CTL must be quashed. We therefore grant permission and quash the decision. On the evidence before us, we cannot discern any basis on which there is good and sufficient cause to extend the CTL. This is a conclusion to which we have been driven with the utmost regret and deepest concern for reasons that are obvious.

33. This case demonstrates again the necessity of treating the CTL in each case and any application to extend it in the very serious manner required of the statutory provisions which Parliament, consistent with the long tradition of the common law, has enacted to ensure cases are tried speedily and those who have not been convicted are not deprived of their liberty beyond the time specified without good reason. A person should not to be deprived of his liberty where the State cannot meet the duty to try him speedily and within the time limit specified without detailed evidence that is then subject to vigorous and stringent examination to see if the State has established good and sufficient cause to deprive him of his liberty beyond that time limit.