CO/4424/2010

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

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 6th May 2010

B e f o r e:

LORD JUSTICE ELIAS

MR JUSTICE KEITH

Between:
THE QUEEN ON THE APPLICATION OF THE CROWN PROSECUTION SERVICE

Claimant

v

IPSWICH CROWN COURT

Defendant

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Mr S Patel (instructed by CPS) appeared on behalf of the **Claimant**
Mr D Mathews appeared on behalf of the **Defendant**

J U D G M E N T
(As Approved)

1. MR JUSTICE KEITH: This is a claim for judicial review by the Crown Prosecution Service of the decision of Judge Goodin at Ipswich Crown Court on 6 April 2010 refusing to extend the custody time limit for Stephen Adams, which was due to expire on 16 April. As a result, Mr Adams was released on conditional bail, presumably on 16 April. Permission to proceed with the claim was granted by Sales J on 13 April. No application was made for the stay of Mr Adams' release pending the determination of the claim. Instead, the Crown Prosecution Service asked for the claim to be heard before 16 April. Sales J was not prepared to order that, since in his view that would not have given Mr Adams' legal team sufficient time prepare his case, but he did order that the claim for judicial review should be expedited.

2. Mr Adams faces two charges of conspiring to import drugs, which are due to be heard at Ipswich Crown Court on 1 June. The allegations are that on two occasions he was the driver of a lorry in which he knew was hidden on one occasion over 2 and a half metric tonnes of cannabis and on another over a kilo of pure cocaine, which he brought into this country from Spain in March and June 2009. His point of entry to the United Kingdom on the first occasion was either not known or has not been disclosed, but he was seen by officers from the Serious Organised Crime Agency to deliver the consignment of cannabis to a haulage company in Essex on 7 March 2009. Two days later, on 9 March, six of his co-conspirators were arrested, but Mr Adams was not. His co-conspirators were charged with various offences on 12 March, and were subsequently remanded in custody. On 13 May their trial at Ipswich Crown Court was fixed for 28 September with a time estimate of 6 weeks. Indeed, their trial took place between 28 September and 28 October.

3. Mr Adams' point of entry into the United Kingdom on the second occasion was Plymouth Ferryport. He was arrested by customs officers as he was bringing in the consignment of cocaine. He was not charged on that occasion, and the Serious Organised Crime Agency was not informed about his arrest. Officers from the Serious Organised Crime Agency arrested Mr Adams for the March conspiracy on 22 July, and after being interviewed he was released without charge. He was bailed to 19 August pending further inquiries. On 19 August he was re-interviewed, but bailed again pending further inquiries. However, on 16 October he was charged with both the March and July importations, and on the following day he was remanded in custody, his case being sent to the Crown Court.

4. The preliminary hearing at Ipswich Crown Court took place on 27 October. The prosecution was ordered to serve the evidence on which it proposed to rely by 17 November. An application for bail was refused. The prosecution served its evidence on Mr Adams' solicitors by 17 November, though the evidence included not just the evidence which the prosecution proposed to rely upon in Mr Adams' case, but also the evidence which had been relevant to the trial of Mr Adams' co-conspirators as well. We have been told, although it is apparent from the transcript of the hearing before Judge Goodin, that he was not, that that evidence consisted of 721 pages of witness statements and over 2,250 pages of documentary evidence. Again, we were told, though the judge was not, that when the bundle was served on Mr Adams' solicitors,

they were informed in a covering letter that not all the evidence was relevant to the case against Mr Adams.

5. The plea and case management hearing was due to take place on 15 December, but it was adjourned to 8 January 2010 at the request of the defence because they had not had time to consider which of the documents which had been served on them related to Mr Adams. Unfortunately the plea and case management hearing had to be further adjourned on 8 January, this time to 15 January, because bad weather had prevented Mr Adams being brought to court. In his absence a trial date for 6 April was canvassed, and we have been told, although again it looks from the transcript that Judge Goodin was not, that that was acceptable to the prosecution but not to the defence, because the defence were saying that a trial on 6 April would be "too early", even though it was noted that Mr Adams' custody time limit was due to expire on 16 April.

6. When the plea and case management hearing took place on 15 January, Mr Adams pleaded not guilty to both charges, and on this occasion his trial was fixed for 1 June. That was by then the first available date at Ipswich Crown Court for a trial of the length that Mr Adams' trial was expected to last. The question of an extension of Mr Adams' custody time limit was raised, but since the prosecution was going to be asking the Regional Listing Officer to see if Mr Adams could be tried before 16 April at another Crown Court, it was decided that if an application for an extension of the custody time limit was going to be necessary, it should be made on 6 April. As it was, an earlier date could not be found elsewhere.

7. Those, then, were the material facts which the chronology with which Judge Goodin was provided had shown, and he had to consider those facts in the light of section 22(3) of the Prosecution of Offences Act 1985, which provides:

> "The appropriate court may, at any time before the expiry of a [custody] time limit..., extend or further extend, that limit; but the court shall not do so unless it is satisfied -
>
> (a) that the need for the extension is due to -
>
> (i) the illness or absence of the accused, a necessary witness, a judge or a magistrate;
>
> (ii) a postponement which is occasioned by the ordering by the court of separate trials in the case of two or more accused or of two or more offences; or
>
> (iii) some other good and sufficient cause; and
>
> (b) that the prosecution has acted with all due diligence and expedition."

The use of the word "may" shows that even if the prosecution satisfies the court that both sections 22(3)(a) and 22(3)(b) are satisfied, the court still has a discretion whether to extend the time limit or not: see R v Manchester Crown Court ex p McDonald [1999] 1

Cr.App.R 409 at p 413F *per* Lord Bingham. The relevant limb of section 22(3)(a) for present purposes is (iii), and at the hearing on 6 April the defence did not contend that the court should not be satisfied that the need for the extension was due to some good and sufficient cause, namely the inability of Ipswich Crown Court to list Mr Adams' case before June, and the unavailability of any other Crown Court in the region at which he could be tried in the meantime.

8. The defence instead contended that in two respects the prosecution had not acted with all due diligence and expedition. First, had Mr Adams been arrested in respect of the March offence along with his co-conspirators, he could have been tried with them at their trial which began on 28 September 2009. Secondly, although the evidence against Mr Adams had been served on his solicitors by 17 November, it was only on 14 December, the day before the plea and case management hearing was due to take place, that the prosecution served on the defence a summary of the allegations against Mr Adams, which referred to those pages in the witness statements which were relevant to Mr Adams' case. The defence contended that had that summary been served earlier the plea and case management hearing on 15 December could have been effective, and it would have presumably been possible then to fix a date for Mr Adams' trial before 16 April when the custody time limit expired.

9. On the first issue, the judge was told by the prosecution that Mr Adams had not been arrested on 9 March when his co-conspirators had been arrested because he could not be traced then, and in any event there was said to be uncertainty about the strength of the evidence that Mr Adams had known the true nature of the consignment. On the second issue, the prosecution acknowledged that the summary had only been served on the day before the plea and case management hearing had been due to take place, but it asked the court not to ignore the four weeks or so which the defence had had the evidence for.

10. Judge Goodin was not satisfied that the prosecution had acted with all due diligence and expedition. In his ruling he explained his conclusion by reference to three considerations. First, Mr Adams had been arrested and charged later than might have been expected. Secondly, what Judge Goodin described as the "helpful service of the evidence as distinct from serving serviceable material" had "perhaps" been served a little later than might be expected. Thirdly, the outcome of the application might have been different if Mr Adams had had to remain in custody after the expiry of the custody time limit for only a week or 10 days rather than for a month and a half.

11. The third consideration which the judge referred to was not one which was relevant to whether the prosecution had acted with all due diligence and expedition. It went to whether in the exercise of his discretion he should extend the time limit if he was satisfied that the prosecution had indeed acted with all due diligence and expedition. Moreover, I think that the first consideration which the judge had in mind was also relevant only to the exercise of that discretion. In R v Birmingham Crown Court ex p Bell [1997] 2 C.App.R 363, the Divisional Court considered whether events prior to the preferring of a voluntary bill of indictment were relevant to whether the prosecution had acted with all due diligence and expedition for the purposes of section 22(3)(b). In concluding that they were not relevant, Rose LJ, with whom Laws J (as he then was) agreed, said at p 370E-F:

> "...the matter has to be considered by reference to the presence or want of all due expedition at the stage to which the custody time limit relates. That is, in the present case, the period following the preferment of the voluntary bill."

The stage to which the custody time limit related in the present case was from when Mr Adams was charged.

12. That is borne out by section 22(1) of the 1985 Act, which is the section which empowers the Secretary of State to make regulations for the length of custody time limits. That provides:

> "The Secretary of State may by regulations make provision, with respect to any specified preliminary stage of proceedings for an offence, as to the maximum period-
>
> (a) to be allowed to the prosecution to complete that stage;
>
> (b) during which the accused may, while awaiting completion of that stage, be
>
> (i) in the custody of a magistrates' court; or
>
> (ii) in the custody of the Crown Court;
>
> in relation to that offence."

The words "preliminary stage" are defined in section 22(11) as not including any stage after the start of the trial, and section 22(11ZA) provides that "proceedings for an offence shall be taken to begin when the accused is charged with the offence". So if the Secretary of State was to fix the custody time limit by reference to the time which should be allowed to the prosecution to complete what has to be done between charge and trial, it would hardly be logical if the period before the date on which the defendant is charged could be taken into account for the purposes of deciding whether the prosecution had acted with all due diligence and expedition.

13. That leaves the judge's second consideration only, which as I have said was what the judge described as "the helpful service of the evidence as distinct from serving serviceable material", which had "perhaps" been served a little later than might be expected. It is important to remember what Lord Bingham said in McDonald at p 414C-D about the condition in section 22(3)(b):

> "To satisfy the court that this condition is met the prosecution need not show that every stage of preparation of the case has been accomplished as quickly and efficiently as humanly possible. That would be an impossible standard to meet, particularly when the court which reviews the history of the case enjoys the immeasurable benefit of hindsight. Nor should the history be approached on the unreal assumption that all involved on the prosecution side have been able to give the case in question their

> undivided attention. What the court must require is such diligence and expedition as would be shown by a competent prosecutor conscious of his duty to bring the case to trial as quickly as reasonably and fairly possible."

In that context, what needs to be noted is that there was no obligation on the prosecution to serve on the defence a summary of the evidence it proposed to adduce against Mr Adams, having already served that evidence amongst the evidence it had previously served. Moreover, the defence did not suggest to Judge Goodin either that the prosecution had offered to provide one, or that the defence had asked for one. I do not doubt, though, that it would have been very helpful for the prosecution to provide such a summary, and it may be that it would have been open to the judge to decide that the prosecution had not acted with all due diligence and expedition for that reason alone.

14. Having said that, two points might legitimately be said. First, it may not have been all that time-consuming for Mr Adams' solicitors to go through the 721 pages of witness statements to identify which were relevant to Mr Adams' case. Secondly, the defence would at some stage probably have had to trawl through the rest of the evidence to see whether there was anything in that evidence upon which the defence wished to rely, even if the prosecution did not. However, those are matters to be properly addressed when the court is addressing whether or not the late service of the summary was sufficient alone to justify the conclusion that the prosecution had not acted with all due diligence and expedition. The one thing we cannot say is that the judge would have reached a different conclusion on whether the prosecution had acted with all due diligence and expedition if he had ignored the two irrelevant considerations which he considered.

15. It follows that this claim for judicial review must succeed, because the judge reached his decision by a process which involved him taking into account considerations which were not relevant. I would quash the judge's decision of 6 April not to extend the custody time limit, but that is not to say that the judge could not lawfully refuse to extend the custody time limit when he reconsiders the matter. The judge has to consider the issue of whether the prosecution acted with all due diligence and expedition on the basis only of the failure by the prosecution to serve the summary earlier than it did, and of course on any other material grounds which are then advanced to the judge. It will then be necessary for him to consider, even if he decides that the prosecution has acted with all due diligence and expedition, whether he should nevertheless exercise his discretion not to extend the custody time limit. I would therefore direct that those issues be considered by him as soon as possible.

16. LORD JUSTICE ELIAS: I agree. As Rose LJ's judgment in the Birmingham Crown Court case makes clear, the question under section 22(3)(b) of the 1985 Act is whether the prosecution has acted with all due expedition with respect to the period to which the custody time limit relates. Delays in arrest and charge are quite immaterial to that question. It follows that the decision of the judge was flawed and has to be quashed, and he will have to reconsider the matter again for the reasons given by my Lord. Thank you both very much.