**Neutral Citation No. [2014] NIQB 107** | *Ref:* **DEE9374**

*Judgment: approved by the Court for handing down* | *Delivered:* **11/09/2014**
*(subject to editorial corrections)**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION (CROWN SIDE)**

**REGINA**

**v**

**CATHAL FEENEY**

**MR JUSTICE DEENY**

[1] This is an application for High Court bail brought by Cathal Feeney, of Omagh, Co Tyrone. It raises a novel point of law.

[2] Mr Feeney was returned for trial on 15 charges of harassment and doing acts intended to pervert the course of justice following a preliminary enquiry on 10 June 2014. He was committed in custody to HM Prison Maghaberry.

[3] On 23 July 2014 he applied to HHJ Fowler QC for bail awaiting trial but his application was refused. He then applied to the High Court for bail, in effect appealing from the decision of HHJ Fowler sitting as a Crown Court judge. This was a novel application, contrary to existing practice.

[4] The matter came before Maguire J on 1 August who dismissed the application without adjudication ordering that written arguments should be prepared in relation to the jurisdiction issue before any subsequent application to the High Court. It came before Weatherup J on 22 August who adjourned the matter until 29 August when it was heard by me as vacation judge. Three questions arise from the application. Firstly, is it legally possible for Mr Feeney to ask the High Court to overturn, in effect, a Crown Court judge's refusal of bail pending trial? Secondly, if that is legally possible in what circumstances might that be done? Thirdly, do the circumstances here justify the High Court in hearing and determining this application?

[5] The court had the benefit of written submissions from Mrs Fiona O'Kane, for the prosecution, and from Mr Joseph McCann for Mr Feeney and of further submissions from the latter and from Mrs Catherine McKay for the prosecution at a hearing on 29 August and afterwards in response to an inquiry from the court..

[6] Counsel for Mr Feeney relied on two principal authorities for his submission that the decision of the Crown Court judge was reviewable by the High Court. In Re BG [2012] NIQB 13 McCloskey J at [7] pointed out that the jurisdiction of the High Court in bail matters is not statutory but fundamentally inherent in nature. He found the inherent jurisdiction to be conveniently summarised in the Northern Ireland Law Commission's Consultation Paper "Bail in Criminal Proceedings" at paragraph 3.25, which reads as follows:

> "The jurisdiction of the High Court to grant bail falls within the inherent jurisdiction of the court and the procedures to be followed are found in Order 79 of the Rules of the Court of Judicature (NI) 1980. The High Court does not act as an appellate court in relation to refusals of bail, but … persons who are refused bail by the Magistrates' Court or the Crown Court can apply for bail afresh in the High Court, although the High Court will normally refuse to entertain an application which should properly be brought to the Crown Court. The jurisdiction of the High Court to grant bail ceases once a person has been sentenced."

[7] When one turns to the consultation paper, NILC 7 (2010), one finds the authority for the reference to the Crown Court in that paragraph at footnote 51. It is R v Reading Crown Court, ex parte Malik [1981] QB 451. While that was a case about a Crown Court judge declining to consider bail, there having been an earlier application to the High Court following magistrate's refusal of bail, one does nevertheless find the following statement by Donaldson LJ at page 457:

> "Third, a judge of the High Court may, under the inherent jurisdiction, hear an application for bail after an application by the same person has been refused by a judge of the Crown Court and Order 79, r.9 (12) is no bar."

[8] I observe that on page 455 one finds there was a statutory provision in force in England and Wales at the time which is of relevance:

> "Where an inferior court withholds bail in criminal proceedings or imposes conditions in granting bail in criminal proceedings, the High Court may grant bail or

vary the conditions." S.22 (1), Criminal Justice Act 1967 as amended by Schedule 2 para 37 Bail Act 1976.

[9] It does not appear that there is an equivalent provision here expressly giving the High Court such jurisdiction over inferior courts. Counsel also relied on the decision of Hart J in In Re McHugh [2011] NIQB 90 at [7].

[10] I observe that Order 79 of the Rules of the Court of Judicature dealing with bail applications to the High Court and the Court of Appeal neither precludes nor expressly envisages an application following a refusal in the Crown Court.

[11] In the face of these persuasive authorities Mrs McKay was not minded to argue this point before the court. Given the finding that I am about to make and the fact that the issue was not argued before me I shall say nothing more on the first question of the court's jurisdiction but proceed on the basis that it does exist.

[12] Passing to the second question posed by the application of Mr Feeney, it is undoubtedly the case that it has not been the practice for judges of the High Court to be invited to hear applications for bail after refusals by High Court judges. One would be slow to initiate any such practice for a variety of reasons. Firstly, it would seem inappropriate to do so without statutory intervention or, at least, a change in Order 79 of the Rules of the Court of Judicature or appellate decision.

[13] Secondly, judges of the High Court sit as judges of the Crown Court not infrequently. While the application for bail is by nature of an original application under Order 79 rather than an appeal in the strict sense of that word, it would, nevertheless, be inappropriate for one High Court judge to be invited to overrule the decision of his colleague. This situation is to be distinguished from the practice which does exist i.e. that an applicant for bail, who has been refused bail, may nevertheless bring a fresh application either because there has been a change in relevant circumstances or because there has been a reasonable passage of time, normally taken as 3 months at least, to justify him in having his remand in custody further reviewed. Those are different situations from someone seeking to challenge one High Court judge's decision the next day or the next week on the same facts but in the jurisdiction of the High Court rather than the Crown Court.

[14] Thirdly, even where the Crown Court judge is a judge of the County Court he is the judge responsible for his own court when the matter comes to hearing, and his own list in the arrangements being made for dealing with Crown Court business allocated to him. Without disrespect to the District Judges (Magistrates' Courts) there is already a distinction in law and in bail practice between those two ranks of the judiciary. The normal practice has been to grant bail to those who seek it, if and when they are appealing from a custodial sentence in the Magistrates' Court to the County Court. It is the usual practice not to grant bail to a person who has been given a custodial sentence in the Crown Court; indeed it is necessary for them to apply to HM Court of Appeal for bail. I remind myself that the Magistrates' Court is

a court of summary jurisdiction and drawing this distinction is a logical step from that recognition.

[15] Fourthly, a Crown Court judge will be dealing with the application for bail after return for trial, although perhaps before arraignment. He will have access, therefore, to the papers which were deemed sufficient to return the prisoner for trial and be well placed to consider whether or not there is, as implicitly there will be, a prima facia case against the applicant for bail, which is an important factor in any decision about bail. He can be provided with all the other materials given to a High Court judge at a bail application.

[16] Fifthly, one's reticence at hearing an application for bail which has already been determined by a judge of the Crown Court is reinforced by the provisions of the Judicature (Northern Ireland) Act 1978. Section 46(1) provides that the Crown Court shall be a superior court of record. Section 47(4) reads as follows:

> "Subject to any provision contained in or having effect under this Act, the Crown Court shall in relation to the attendance and examination of witnesses, any contempt of court, the enforcement of its orders and all other matters incidental to its jurisdiction have the like powers, rights and authority as the High Court or the County Court."

Section 47(6), as amended, provides that the Police Service "shall give effect to any orders or directions which may be given to it by the Crown Court." These provisions emphasise the authority of the Crown Court.

[17] Sixthly, in Re Strojwas [2012] NIQB 53 McCloskey J was dealing with a Polish national who had been refused bail in the Crown Court pending his extradition hearing. He reviewed the relevant statutory proceedings and his previous judgment in Chaos v Spain [2010] NIQB 68 and went on at [9]:

> "I further consider that in circumstances where statute has expressly conferred on another court powers to grant, refuse and reconsider bail, the invocation of the inherent jurisdiction of the High Court will normally be inappropriate."

He then cited his previous judgment in Re BG op. cit. and concluded as follows:

> "The correct analysis, in my view, is that in matters of bail recourse to the inherent jurisdiction of the High Court should be a measure of last resort. This step is plainly unnecessary in circumstances where another court

> possesses jurisdiction to grant bail to the person concerned.
>
> [10] Self-evidently, it is unnecessary to invoke the inherent jurisdiction of the High Court to review the legality of the detention of the citizen in circumstances where statute has made express provision for another court having jurisdiction to do so. This may also be viewed as a reflection of another well recognised principle, which is to the effect that resort to the inherent jurisdiction of the High Court is generally inappropriate where the relevant "field" is occupied by statutory intervention, whether in the form of primary or secondary legislation, including Rules of Court."

Much of that is obviously applicable here and consonant with my own observations.

[18] Seventhly, in R v Bothwell [2006] NICA 35 the Court of Appeal in Northern Ireland (Kerr LCJ, Nicholson and Campbell LJJ) was considering an application by solicitor advocates to appear on a criminal appeal either under the court's inherent jurisdiction or pursuant to Section 106 of the Judicature Act 1978. The Court declined to grant such representation. Delivering the judgment of the court the then Lord Chief Justice said this.

> "[23] The only basis on which we could have acceded to the application which has been made was by invoking our inherent jurisdiction. If we had been prepared to do so, it would have had the effect of bringing about a substantial change in the legal position about rights of audience in the Court of Appeal for we are satisfied that solicitor advocates who appear in future cases in the Crown Court will make similar applications. It is clear that legislation was required to bring about this change in England and Wales. It is not for us to say whether similar legislative provisions should be introduced in Northern Ireland.
>
> [24] If we had been satisfied that the interests of justice required the conferring of rights of audience in these particular solicitor advocates we would not have shirked from doing so, notwithstanding that this may have heralded the change that we have referred to in the previous paragraph. In the event, however, for the reasons that we have given we concluded that there was no such imperative."

[19] Drawing these threads together I am of the view that, even if the inherent jurisdiction of the High Court does extend to hearing an application for bail from a prisoner who has just been refused bail in the Crown Court, it is a jurisdiction that should only be exercised in wholly exceptional circumstances where the interests of justice require it. Counsel suggested that that could be where the decision of the Crown Court judge was perverse. That may be a proper submission but one must be careful not to extend the court's role to subjecting decisions of Crown Court judges as to bail to an examination analogous to that conducted by the High Court hearing a judicial review of the decision of an inferior tribunal. In my view that would not be an appropriate step.

[20] Applying that to this case I have been shown nothing to suggest that the decision of the Crown Court judge was perverse. Mr Feeney has a substantial criminal record. Relevant to the issue of bail, there is a substantial domestic violence record. Counsel for Mr Feeney was unable to advert to any exceptional aspect of the judge's decision. He expressly eschewed any criticism of the learned judge for deciding on the issue of bail before the prisoner had been arraigned before him, in the light of Re BG [2012] NIQB 13 at [6]. In the absence of any wholly exceptional circumstances requiring a hearing in this court in this particular case I decline to hear the application.