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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY
NIALL MALACHY WARD FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF
THE DISTRICT JUDGE OF ARMAGH AND SOUTH DOWN
ON 22 JUNE 2010

Before Morgan LCJ and Stephens J

MORGAN LCJ

[1] The applicant seeks a declaration that the decision of the District Judge on 22 June 2010 refusing him bail and remanding him in custody was unlawful because it contravened his rights under Article 6(2) of the European Convention on Human Rights in that it failed to presume the applicant's innocence of the offence with which he was charged and upon which he sought to be released on bail. It is consequently alleged that the said decision contravened the applicant's right to be released on bail pending trial pursuant to Article 5(3) and (4) of the ECHR.

Background

[2] The prosecution case was that the applicant was walking with a Mr Wong at Niall's Crescent, Armagh on the evening of 11 March 2010 when he was stopped by police. It was alleged that Mr Wong had been carrying a plastic carrier bag that he threw away upon being approached by police. The bag was recovered and was found to contain an 18" pipe bomb containing an explosive mixture and fuse which constituted a viable explosive device.

[3] It was not alleged that the applicant had been in physical possession of the device. The prosecution case was that he was in the company of Mr Wong at a place

and time when Mr Wong had possession of the device, that he attempted to run away when approached by police and that he was wearing double clothes, namely two sweatshirts and two tee shirts together with woollen gloves which the prosecution contended was consistent with the applicant taking forensic precautions.

[4] The applicant was arrested and interviewed but upon legal advice refused to answer any questions. He made a written statement in which he denied knowledge of the device and said that he had been making his way to his brother's house when by chance he met Mr Wong whom he knows. Mr Wong decided to walk along with him. Upon the arrival of the police the applicant was startled and moved towards the inside of the footpath but claimed that he was immediately apprehended. He denied attempting to run away and denied any knowledge of the device. The applicant was subsequently charged with possession of explosives with intent to endanger life and in the alternative possession of explosives in suspicious circumstances.

[5] At the time of his arrest the applicant was a 23 year old man and had no previous convictions. He was refused bail in the High Court on 7 May 2010 and subsequently refused compassionate bail on 27 May 2010. On 22 June 2010 he reapplied for bail before the Magistrates' Court. In support of that application it was submitted that there was no evidence to refute his innocent explanation about his lack of knowledge of the offending item in Mr Wong's possession. The applicant also contended that there was no reliable evidence that he had attempted to run away given that he was arrested within 5 to 6 feet where he was first encountered. The prosecution submission in relation to his clothing had to be assessed against the fact that it was extremely cold on the evening of the incident and that provided an entirely innocent explanation for what he was wearing.

[6] The prosecution objected to bail principally on the basis of the risk that the applicant might commit further offences. It was asserted that the explosive device was viable and that the incident was part of a dissident Republican operation. There was prima facie evidence to support the charge that the applicant was in possession of the item and that was not disputed in the application before us. The prosecution contended, therefore, that this provided an evidential base for the submission that there was prima facia evidence that the applicant was connected to a dissident Republican group that was active and in the past year had engaged in 52 incidents in the Armagh area. The risk, therefore, was that the applicant if released on bail would further offend on behalf of that group.

[7] In support of its contention that the applicant was connected to a Republican paramilitary group the prosecution alleged that the applicant had been identified about one year earlier at an IRA Easter commemoration and that he had also been involved in a protest outside Stormont Buildings in respect of the incarceration and detention of Colin Duffy who, it is alleged, is a dissident Republican.

The applicant's case

[8] It was submitted on behalf of the applicant that the risk of the commission of offences if the applicant were released on bail could not be inferred or made out where the applicant had no previous convictions and where the alleged possession was in serious dispute. The applicant submitted that the prosecution's contention that there was a risk of further offences could only be substantiated by presuming the guilt of the applicant of the offences charged. It was submitted that such a presumption was wrong in law and in any event was not well founded on the particular facts of the case. The applicant contended that the reasoning underpinning the prosecution's objection on the grounds of the risk of the commission of further offences was contrary to the provisions of Article 6(2) of the ECHR because the accused must be presumed innocent at this stage of the proceedings. In light of that fact and the applicant's clear record it was submitted that there was no evidential basis for believing that the applicant would commit an offence if released on bail.

[9] In her written ruling the District Judge concluded that there was prima facia evidence that the applicant was in possession of the explosive device and that the possession was on behalf of or in connection with the activities of a group involved in the continued use of violence in Northern Ireland. Taking all the circumstances into account she concluded that there was a real risk of reoffending if bail were granted. She examined whether there were conditions which could meet the risk but concluded that conditions either individually or in combination would not be sufficient to reduce the risk sufficiently. She concluded that the prosecution had shown relevant and sufficient reasons for the continued detention of the applicant in custody.

[10] The principal argument advanced on behalf of the applicant was that Article 6(2) of the ECHR requires that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. The applicant relied on paragraph 51 of Kazmierczak v. Poland [2009] ECHR 34317/04 where the court stated:

> " The Court reiterates that the presumption of innocence under Article 6 § 2 will be violated if a judicial decision or, indeed, a statement by a public official concerning a person charged with a criminal offence, reflects an opinion that he is guilty before his guilt has been proved according to law. It suffices, in the absence of a formal finding, that there is some reasoning suggesting that the court or the official in question regards the accused as guilty, while a premature expression of such an opinion by the

> tribunal itself will inevitably run foul of the said presumption."

It was submitted that because of the presumption of innocence it was not open to the court to derive any assistance on the issue of the risk of the commission of further offences from the circumstances or allegations surrounding the offence as charged. It was further submitted that the District Judge breached Article 6(2) by referring to the risk of "reoffending" because that wording assumed that the applicant has been guilty of an earlier offence.

[11] Finally it was submitted on behalf of the applicant that his participation in the IRA Easter commemoration in April 2009 and the protest at Stormont in relation to Mr Duffy's detention constituted the lawful expression of the applicant's political views. This was the exercise by him of entitlements protected by Articles 10 and 11 of the ECHR. The applicant argued that any adverse consequence as a result of his participation in these matters constituted an interference with those rights. There was nothing criminal about the applicant's participation on either occasion and his participation could not be characterised as misconduct.

Discussion

[12] Article 5(1)(c) of the ECHR establishes the basis upon which the State may interfere with the liberty of the subject by way of arrest and detention.

> " Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> …(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; "

Article 5(3) requires that the person arrested be brought before a judge or other officer authorised by law to exercise judicial power and Article 5(4) requires that the arrest or detention of the citizen should be subject to review. The applicant contended that the test for detention was more stringent than reasonable suspicion and that the test should be equated with the test for prosecution which is that it was more likely than not that the applicant would be convicted.

[13] We consider that it is well established that the test is that of reasonable suspicion. That can be derived directly from Article 5(1)(c) itself but has also been expressly addressed by the European Court in Erdagoz v Turkey (Application 127/1996) where at paragraph 51 the court said:

> "The Court reiterates that the fact that an applicant has not been charged or brought before a court does not necessarily mean that the purpose of his detention was not in accordance with Article 5 § 1 (c). The existence of such a purpose must be considered independently of its achievement and sub-paragraph (c) of Article 5 § 1 does not presuppose that the police should have obtained sufficient evidence to bring charges, either at the point of arrest or while the applicant was in custody (see the Brogan and Others v. the United Kingdom judgment of 29 November 1988, Series A no. 145-B, p. 29, § 53). The object of questioning during detention under sub-paragraph (c) of Article 5 § 1 is to further the criminal investigation by way of confirming or dispelling the concrete suspicion grounding the arrest. Thus, facts which raise a suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge, which comes at the next stage of the process of criminal investigation (see the Murray v. the United Kingdom judgment of 28 October 1994, Series A no. 300-A, p. 27, § 55). However, for there to be reasonable suspicion there must be facts or information which would satisfy an objective observer that the person concerned may have committed an offence "

It is important to recognise that the existence of facts or information that would satisfy an objective observer that the person concerned may have committed an offence does not in any way contradict the presumption of innocence in Article 6(2). The existence of reasonable suspicion merely raises the possibility that the offender has committed the offence.

[14] We note, however, that the existence of reasonable suspicion alone may not be sufficient. Labita v Italy [2000] ECHR 161 was a case of which the applicant had been detained on the basis of reasonable suspicion generated by the statements of a pentito whose incriminating account was obtained from a deceased fellow mafia member who in turn had obtained his information from another deceased fellow mafia member. The court noted at paragraph 153 that the existence of reasonable suspicion was a sine qua non of lawful detention but that after a lapse of time it no longer sufficed. The court recognised that the co-operation of pentiti was a very important weapon in the authorities fight against the Mafia but that such statements were open to manipulation and therefore had to be corroborated by other evidence. In that case the applicant had been detained for a period of two years and seven months without any corroborating evidence being established and the court held in those circumstances that very compelling reasons would be required for such a period of detention to be justified. The authorities were not able to establish such a justification.

[15] The applicant placed considerable reliance on Kazmierczak v Poland [2009] ECHR 4317/04 and in particular paragraph 51 which we have set out above. It is material, however, that even in that case at paragraph 36 the court accepted that the

reasonable suspicion that the applicant had committed serious offences could initially have warranted his detention. This is a further authority demonstrating the distinction between facts and circumstances examined and relied upon by a judicial officer to continue detention suggesting that a person may have committed an offence and the judicial decision or statement by a public official reflecting the opinion that he is guilty before his guilt has been proved according to law.

[16] The applicant has placed considerable reliance on the District Judge's acceptance of the prosecution proposition that there would be a real risk of re-offending if bail were granted. It is submitted that this necessarily imports the conclusion that the applicant has been guilty of earlier offending and therefore constitutes a breach of the presumption of innocence. We accept that taken on its own there is at least an ambiguity about whether it reflects a conclusion that the applicant had committed an earlier offence but we do not accept that the ruling as a whole leads to that conclusion. This was a case in which the evidence demonstrated that a pipe bomb had been found and there was in reality no issue that some sort of offence had been committed. The issue in the case was whether the applicant or Mr Wong had committed offences in relation to the pipe bomb. At paragraph 11 of her ruling the District Judge expressly warned against the court making presumptions about the applicant's guilt because that was clearly a matter for the trial. In our view against that context the reference to re-offending could not arguably be construed as constituting either an opinion or finding that the applicant had committed any earlier offence. It was simply a reflection of the fact that some offence had previously been committed.

[17] We turn finally to the issues in relation to Articles 10 and 11 of the ECHR. The relevance of the matters introduced on behalf of the prosecution was that they supported the submission made on behalf of the prosecution that there was evidence of political motivation on the part of the applicant which was consistent with the motivation of those who constructed and were connected with the pipe bomb. In our view the District Judge was entitled to take that material into account as being relevant to the prosecution case against the applicant. We do not accept the proposition that because these activities represented an expression of rights protected by Articles 10 and 11 of the ECHR they cannot be introduced in evidence even though they are relevant. No authority was called to support such a bold conclusion. If the proposition is correct it must also apply to the trial itself. It would be extraordinary if the publicly expressed views of an accused which helped to establish motive or other connection with the offence could not be introduced because the expression of the view was made in exercise of a convention right. We are satisfied that the argument is entirely without foundation.

Conclusion

[18] We have concluded that none of the grounds advanced on behalf of the applicant are arguable. The District Judge was entitled to take into account the

matters upon which she relied to determine whether there were relevant and sufficient reasons for the continuation of the applicant's detention. Accordingly we refuse leave to apply for judicial review of her decision.