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Delivered: 22/09/00

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (CROWN SIDE)

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IN THE MATTER OF PAUL ROBERT DINELY AN APPLICANT FOR BAIL

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CAMPBELL LJ

The applicant is charged with unlawfully having in his possession, on 13 September 2000, a controlled drug of Class B, namely cannabis resin, contrary to section 5(2) of the Misuse of Drugs Act 1971. He is also charged with having, on the same date, in his possession approximately 20 kilos of cannabis resin with intent unlawfully to supply it to another, contrary to section 5(3) of the Misuse of Drugs Act 1971.

Mr J Mallon, who appears for the applicant, asks the court to rule on two preliminary issues with arguments based on the European Convention for the Protection of Human Rights and Fundamental Freedoms and the enactment of the Human Rights Act. The Act is currently in force to a limited extent and it is intended that the main provisions will come into force on 2 October 2000.

In *R v Director of Public Prosecutions ex parte Kebeline and others {1999] 4 All ER 801*, where the House of Lords held that a ruling of a judge in the Crown Court was not open to judicial review by the High Court, the speeches make it clear that

courts should not have regard to the Act when it is not yet in force. In the Divisional Court Lord Bingham of Cornhill C.J said at page 812:

> "If, at the time of the appeal hearing, the central provisions of the 1998 Act had been brought into force, the applicants would on appeal be entitled to rely on ss7(1) and 22(4) of the 1998 Act and the convictions (on the hypothesis of inconsistency between s16A and the convention) would in all probability be quashed, at some not inconsiderable cost to the public purse and no obvious advantage to the public weal."

A decision whether or not to release a defendant on bail is unlikely to have any bearing on whether a subsequent conviction should be quashed. Having regard to this and to the observations of the House of Lords in *Kebelin* it is, in my judgment, premature for counsel to invoke the Human Rights Act.

As the date for commencement of the Act is imminent I propose to express an opinion on the submissions that have been made by Mr Mallon though I do so without the benefit of a full argument from the prosecution. Since the hearing I have read, and derived considerable assistance from, *Bail and the Human Rights Act 1998, Law Commission Consultation Paper No. 157*.

Mr Mallon's first submission concerns the mode of hearing a bail application. Article 5 of the Criminal Justice (NI) Order 1998 gives the court power, after hearing representations from the parties, to direct that an accused shall be treated as being present in the court for any particular hearing before the start of a trial if, during the hearing he is held in a prison or other institution and whether by means of a live television link or otherwise, he is able to see and hear the court and to be seen and heard by it.

The applicant is being held in HM Prison Maghaberry and it is proposed that his application should be heard with him appearing on a live video link. At the outset of

application the applicant confirmed that he could see and hear the court and I was able to both to see and hear him.

It is argued on behalf of the applicant that it would be a breach of his Convention rights, and in particular of his rights under Article 5(3), for the court to proceed with the hearing by this method and that an applicant must in all cases be physically present in the court room

Article 5(3) states:

> "5(3) Everyone arrested or detained in accordance with paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

Mr Mallon relied on a passage in the judgment of the European Court of Human Rights in *Schiesser v Switzerland(1979) 2EHHR 242,* at paragraph 31, where the Court said:

> "The procedural requirement places the 'officer' under the obligation of hearing himself the individual brought before him…"

Article 5(3) requires one appearance before a judge and it is a defendant's first remand appearance before a magistrate, provided it is sufficiently prompt, that fulfils this requirement.

An application for bail is brought in exercise of rights under Article 5(4). This entitles a defendant to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful. He may do so at the same time as he appears before the magistrate under Article 5(3), on his first remand, or by making a later challenge or challenges to the legality of his detention.

It is well established that Article 5(4) gives an applicant a right to participate in the hearing – *see Winterwerp v Netherlands A33 (1979)2EHRR* 387- as the court said "either in person or, where necessary, through some form of representation".

This applicant is represented both by counsel and solicitor and he can participate in the hearing and make representations himself, if he wishes, over the live video link.

It is open to the Court to require the presence of the applicant in Court after hearing representations. A decision to do so must depend upon the circumstances of the particular case.

No such representations have been made in this case as Mr Mallon is relying upon presence as of right.

In my opinion the submission that the applicant is *entitled* to be present in court has no basis in the wording of Article 5(4) and I do not accept that such a right exists.

The second submission made on behalf of the applicant is that he, or his counsel, is entitled to see all the police files which are available to the prosecution as there should be equality of arms and that once they are produced reasonable time should be given for consideration of the contents of the files.

Mr Mallon founds this submission on a passage in the judgment of the European Court of Human Rights in *Lamy v Belgium 11EHRR 529* at paragraph 31 where the Court said:

> "Like the Commission, the Court notes that during the first 30 days of custody the applicant's counsel was, in accordance with the law as judicially interpreted, unable to inspect anything in the file, and in particular the reports made by the investigating officer and the Verviers police. This applied especially on the occasion of the applicant's first appearance before the *chamber du conseil*, which had to rule on the confirmation of the arrest warrant. The applicant's counsel did not have an opportunity of effectively challenging the statements or views which the prosecution based on these documents.

> Access to these documents was essential for the applicant at this crucial stage in the proceedings, when the court had to decide whether to remand him in custody or to release him. Such access would in particular, have enabled counsel for Mr Lamy to address the court on the matter of the co-defendants' statements and attitude. In the Court's view, it was therefore essential to inspect the documents in question in order to challenge the lawfulness of the arrest warrant effectively.
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> The appraisal of the need for a remand in custody and the subsequent assessment of guilt are too closely linked for access to documents to be refused in the former case when the law requires it in the latter case.
>
> Whereas Crown Counsel was familiar with the whole file, the procedure did not afford the applicant an opportunity of challenging appropriately the reasons relied upon to justify a remand in custody. Since it failed to ensure equality of arms, the procedure was not truly adversarial. Therefore there was a breach of Article 5(4)."

In the more recent case of *Nikolova v Bulgaria 25 March 1999(Application No. 31195/96)*, not referred to in the course of the argument, the Court said (at para. 58):

> "A court examining an appeal against detention must provide guarantees of a judicial procedure. The proceedings must be adversarial, and must always ensure equality of arms between the parties, the prosecutor and the detained person. Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client's detention."

There are four general grounds on which bail may be opposed by the prosecution. Where there is a well -founded risk: that the accused will fail to appear, that, if released, he would interfere with the course of justice, that he would be likely to commit offences or his release may give rise to public disorder.

If there are any documents which may assist the applicant to answer opposition to bail on all or any of these grounds provided his counsel is given access to them it

will normally provide equality of arms between the parties. In practice this is usually done by, for example, handing over a copy of the police record if the risk of commission of offences is relied upon as a ground for opposing bail. Generally these are the documents "which are essential in order effectively to challenge the lawfulness of … detention". Therefore I do not accept that an applicant is entitled, as of right, to any general disclosure such as is claimed here or to such disclosure as is given before trial. While this is generally the position I would add that cases decided under the Convention show that it is necessary to examine each case on its merits and it may be necessary to depart from this in particular cases. Where, for example, as in *Nikolova*, the charge is based on an auditor's report and the applicant is asserting that the evidence is weak, it may be necessary for the applicant to inspect the evidence on which the charges are based. The usual practice of counsel outlining the prosecution case may in particular cases be insufficient to provide equality of arms.

The applicant would therefore in the present case be entitled, through his counsel, to disclosure of those documents, if any, upon which the prosecution intends to rely as providing grounds to oppose bail unless there is good reason for not doing so, such as the protection of a witness.

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