CO/3908/2002, Neutral Citation Number: [2002] EWHC 2162 Admin

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

Royal Courts of Justice
Strand
London WC2

Wednesday 9th October, 2002

B e f o r e:

LORD JUSTICE LATHAM,
MR JUSTICE MCCOMBE

- - - - - - -

THE QUEEN ON THE APPLICATION OF
CROWN PROSECUTION SERVICE

CLAIMANT

- v -

CHORLEY JUSTICES

DEFENDANT

- - - - - - - - -

Computer-Aided Transcript of the Stenograph Notes of
Smith Bernal Wordwave Limited
190 Fleet Street London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

MR D PERRY (instructed by CPS Lancashire) appeared on behalf of the CLAIMANT
MR A MCCULLOUGH (instructed by The Treasury Solicitor) appeared on behalf of the DEFENDANT

J U D G M E N T
(As approved by the Court)

1. LORD JUSTICE LATHAM: This is an application for judicial review of a decision of the Chorley Justices given on 2nd August 2002. It involved a defendant who appeared before

them following the execution of a warrant issued on 11th July when he had previously failed to attend before the justices, and the question arose on that occasion as to whether he should be granted bail.

2. The prosecution asked that if bail be granted there should be, amongst other conditions, what is known as a curfew condition, but in addition a further condition that he be required during the hours of the curfew to present himself at the door of his home if requested to do so by a police officer.

3. The defendant himself, through his solicitor, did not oppose such a condition being made. However, the clerk to the justices drew the attention of the justices to a memorandum which had been distributed to all magistrates in Lancashire by Mr Robinson, Director of Legal Services and Justices Clerk, on 31st July 2002, in which he indicated his view that the addition of the requirement that an accused person present himself at the door of premises if requested to do so by a police officer (commonly known as a "doorstep condition") was not one which could lawfully be made within the terms of section 3 of the Bail Act 1976.

4. Having heard further submissions from the prosecution and advice from their clerk, the justices concluded that they did not have jurisdiction to impose a doorstep condition and accordingly the bail conditions under which the defendant was then released merely included, for relevant purposes, the curfew condition.

5. It is against the refusal of the justices to impose the doorstep condition that the Crown Prosecution Service has applied to this court for judicial review.

6. The matter is of some importance because there is apparently a considerable diversity of views in magistrates' courts around the country as to the lawfulness of doorstep conditions, and it is obviously important that the resulting uncertainties should be resolved.

7. The facts of the case itself are not, in one sense, of any relevance to this court, partly because the issue is one of law, but, secondly, because the case itself has become academic as a result of subsequent events which have resulted in the re-arrest of the defendant. However, the facts can usefully be used to illustrate the way this type of problem can arise before the magistrates' courts and may help to identify the various factual considerations which may be important in the courts' approach to the construction of the statute in question.

8. The defendant had been charged with a large number of offences including handling stolen goods, driving a motor vehicle while impaired through drugs and various less serious motoring offences. He was clearly facing the risk of a custodial sentence. When he first appeared before the justices he was granted bail. However, he had in fact failed to appear before the justices on two separate occasions in relation to these particular offences, namely on 18th April 2002 and on 11th July 2002. He had further failed to appear before justices on other occasions in relation to other matters. It was against that background that the question of bail fell to be dealt with on his appearing in custody on 2nd August.

9. The conditions which were imposed were a condition of residence, a reporting condition at a police station once a week, and the relevant conditions, which were the curfew between 10 pm and 8 am and the requirement that he present himself at the door of the premises upon the request of a police officer in uniform during the hours of curfew.

10. It can be appreciated against the background that I have related that there was a very real prospect of the justices concluding that he was facing charges which carried with them the

risk of imprisonment, and, accordingly, that there were circumstances which could justify the refusal of bail, and it was no doubt because of that fact that the defendant's solicitor made no objection to the proposal by the Crown Prosecution Service that those conditions should in fact be imposed.

11. The statutory provisions in question are contained in the Bail Act 1976. The general provisions as to bail are contained in section 3. By subsection (1) it is provided that a person granted bail in criminal proceedings shall be under a duty to surrender to custody, and by subsection (6) there is the power to impose conditions with which we are concerned. Subsection (6) is in the following terms:

> "He may be required to comply, before release on bail or later, with such requirements as appear to the court to be necessary to secure that -
>
> (a) he surrenders to custody,
>
> (b) he does not commit an offence while on bail,
>
> (c) he does not interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person."

12. The argument put forward by the Crown Prosecution Service before the justices was the simple argument that the curfew condition, as to which there has never been any controversy, could properly have attached to it as a further condition the doorstep condition as a condition which, in the circumstances, could properly be said to be necessary in order to secure the compliance of the defendant with the three matters set out in subsection (6) to which I have referred.

13. It was submitted to the justices and is submitted to us that the only relevant considerations for the court, as described by Lord Lane in the case of R v Mansfield Justices, ex parte Sharkey [1985] 1 QB 613, page 625, were the following matters:

> "In the present circumstances the question the justices should ask themselves is a simple one: 'Is this condition necessary for the prevention of the commission of an offence by a defendant when on bail?' They are not obliged to have substantial grounds. It is enough if they perceive a real and not a fanciful risk of an offence being committed. Thus section 3(6) and paragraph 8 give the court a wider discretion to inquire whether the condition is necessary."

14. The submission on behalf of the Crown Prosecution Service is, therefore, that if it can properly be said that the condition, in the circumstances of the case, is necessary for the prevention of the commission of an offence by this defendant, then it is one which can properly be imposed, and that that is the only criterion which has to be applied by the justices in determining whether or not they have power to impose a particular condition that is being requested.

15. It is submitted on behalf of the Crown Prosecution Service that in the circumstances of this particular case it was a perfectly proper condition to request, and that the justices should have considered that they had power to impose the condition, the only question being whether or not it was necessary to impose it in the circumstances of the case.

16. Accordingly, it is submitted, that the justices, by acceding to the argument of Mr Robinson,

were wrong in law in that they concluded that they had no jurisdiction to impose such a condition.

17. The submissions on behalf of the justices have been equally succinct. They accept that the appropriate question is that posed by Lord Lane in the case of Sharkey, and they also accept that, for the purposes of determining the question before us, it is not helpful to categorise a proposed condition as ancillary or primary. At the end of the day the question will always remain the question of whether or not it is a condition which is necessary in the circumstances of the case for the purpose of avoiding a risk of one of the eventualities identified in (a), (b) and (c) of subsection (6).

18. It is submitted that in applying that approach it is clear that there can, in truth, be no justification for the imposition of a doorstep condition; it in no way adds to any protection of the public than that which has been achieved by the imposition of a curfew condition. It is submitted that one can test that by saying that if a defendant who is properly obeying the curfew nonetheless fails to attend at the door when the police officer asks him to, what additional benefit has been achieved? He is and still remains obeying the curfew.

19. Secondly, it is submitted that there is an indication in the Act itself that the ambit of subsection (6) is not as wide as would justify the imposition of a doorstep condition. It is pointed out that section 3 contains the following additional provisions, subsection (6ZAA):

> "Subject to section 3AA below, if he is a child or young person he may be required to comply with requirements imposed for the purpose of securing the electronic monitoring of his compliance with any other requirement imposed on him as a condition of bail.
>
> (6ZA) Where he is required under subsection (6) above to reside in a bail hostel or probation hostel, he may also be required to comply with the rules of the hostel."

20. It is submitted that those two subsections, added by amendment, would have been wholly unnecessary if the wide construction contended for by the Crown Prosecution Service were the appropriate construction of the Act.

21. Finally, it is submitted that a wide power to impose conditions is one which the court should look at with some care because there must be some certainty where there is an intention to restrict the liberty of an individual, and that certainty can only be achieved if there is a restrictive approach to the scope of the conditions which can be imposed pursuant to the Act.

22. I have no doubt that the arguments of the Crown Prosecution Service are correct in relation to the interpretation of the powers of the court under section 3(6). It seems to me that none of the arguments, put forward so persuasively on behalf of the justices, can detract from the straightforward meaning of the words of section 3(6) for which the Crown Prosecution Service contends. It is to be noted that the submission of the Crown Prosecution Service involved the careful statement that in each case the question that had to be asked was whether in relation to the particular defendant the additional condition was one which was necessary to secure one of the objectives of (a), (b) or (c).

23. The arguments on behalf of the justices do not seem to me to detract in any way from the

generality of the words of subsection (6).

24. The first submission, as to the extent to which the condition in effect in any way adds to the protection of the public, which is the object of subsection (6), seems to me to be a question of fact to be determined in each case and does not help to define the power of the magistrates.

25. The second argument is one which has some force, in the sense that one could see arguments for saying that both those additional subsections were not strictly necessary. However, subsection (6ZAA) involves interference with either the person of the defendant or intrusion into the home of the defendant or his place of residence in ways in which it may well have been felt by Parliament were more appropriately dealt with by a specific provision than by relying upon the generality of subsection (6) itself.

26. As far as subsection (6ZA) is concerned, the requirement to reside in a bail hostel or probation hostel is the requirement which is subject to the need to have established the matters in (a), (b) or (c). The requirement to comply with the rules of the hostel is, it seems to me, a matter which was intended to ensure that there were no difficulties arising out of the defendant's residence in such a hostel which could cause problems to the bail hostel itself, and in those circumstances one can see why Parliament may have considered it appropriate to add a specific provision to that effect.

27. Accordingly, I do not consider that any of the arguments put forward on behalf of the justices can in fact justify, as a matter of statutory construction, the conclusion that the justices came to that they had no jurisdiction or power under section 3(6) to impose the condition requested by the Crown Prosecution Service.

28. The matter does not end there, because clearly this court must take into account the provisions of the European Convention on Human Rights. Both Article 5 and Article 8 are undoubtedly engaged in this particular case. Article 5 is the article which deals with the question of the individual's right to liberty and security. The relevant provision is as follows, paragraph 1:

> "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 the procedure prescribed by law ...
>
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law."

29. That provision is engaged because any breach of a lawfully imposed condition of bail is a matter which renders the defendant in question liable to arrest under section 7 of the Bail Act 1976. Accordingly, the requirement of the Convention is that the law under which any such arrest occurs should be sufficiently precise and accessible to meet the requirements of the Convention and that it is a provision which strikes an appropriate balance and is proportionate to the aim it pursues.

30. Article 8 is also engaged as the imposition of the condition is clearly one which is capable of interfering with the private and family life of a defendant or indeed his home. Article 8(2) makes it clear that there should be no interference with the exercise of that right, again save in accordance with a law which is sufficiently precise and accessible and in circumstances

which can justifiably be considered to be in the interests of society and for the prevention of disorder or crime.

31. It should be said that in the present case it has not been submitted on behalf of the justices that if we conclude, as I have, that the condition was lawful under section 3(6) of the Bail Act 1976, there was any breach of those provisions of the European Convention. That concession was, in my judgment, properly made. I have no doubt that the provisions of the law in question are indeed sufficiently clear, they are accessible, and, in particular in the context of the imposition of any condition of bail, the defendant in question will undoubtedly have no doubt about what he has to do or not do in order to ensure that he is not exposed to the risk of being deprived of his liberty.

32. I have no doubt that the law generally, as I consider it to be, in empowering the justices to impose such a condition is appropriate and strikes a proper balance in the interests of both the individual and society.

33. It has to be remembered that, in particular in a case such as the present, there was the real risk that the defendant would be deprived of his liberty; in other words, the justices would have been entitled to have remanded him in custody. The ability of the justices, therefore, to impose conditions appropriate to avoid the risks to the public identified in subsections 6(a), (b) and (c), is one which is beneficial not only to the community, but also to the individual defendant in question, who thereby has the opportunity to avoid the alternative consequence, which will be that the justices might consider that the only way of securing those matters is to remand him in custody.

34. However, the question will always arise in every case as to whether or not it is a proportionate and appropriate response to the problem presented by the particular defendant in the particular case. Section 3(6) of the Act, in my judgment, provides a proper indication of when it could be proportionate as a response by requiring the magistrates to impose a condition only when it is necessary in that case to do so.

35. For all those reasons, it seems to me that the justices were wrong to determine that they had no power to impose the condition in question. Accordingly, I would, in the circumstances of this case, grant a declaration in the following terms:

> "Where an accused in criminal proceedings is remanded on bail subject to conditions, namely, that he reside at a particular address and remain at the address between specified times (that is, subject to a curfew), the court may impose a further condition requiring the accused during the hours of the curfew to present himself at the door of the premises if requested to do so by a police officer."

36. It is to be noted that the declaration is only intended to indicate that the justices have the power to do so. It will always remain a question, as I have already emphasised, as to whether or not that power should be exercised in the particular case. Although this case does not directly affect the powers of the police to grant bail, the construction of the statute which I favour leads to the same result in the case of police bail, namely that a police officer can, if he considers it necessary to do so, impose a doorstep condition. The relevant statutory provisions are identical in effect.

37. MR JUSTICE MCCOMBE: I agree, and I only add a few words of my own out of deference to the able and thought provoking paper by Mr Robinson that led to the justices' decision in this case as supported by the argument presented to us this morning by Mr McCullough. It seems to me that in many cases it will often be the package of measures that are put together by way of conditions that enables the court to be satisfied that they have done what is necessary to secure the matters set out in section 3(6) of the Act, and that over-analysis of the precise effect of individual conditions may only serve to cloud what is a simple statutory test, and may over-complicate the essentially simple question that was identified by Lord Lane in the passage from the decision in the Sharkey case which my Lord has already quoted.

38. For those reasons too I would grant the declaration that my Lord has mentioned.

LORD JUSTICE LATHAM: Are there any other matters that we need to deal with?

MR PERRY: My Lord, no. There are no ancillary applications. My Lord, just in case a problem arises in future, it is not part of the judgment, of course, but if anyone should look at the after judgment discussions I wonder if your Lordship would confirm that the reasoning that applies to the court would also apply to police officers.

LORD JUSTICE LATHAM: I am so sorry. As you appreciate, a judgment is not set in stone until it emerges from the correction exercise, and I think you may find that that issue will have been resolved during the course of that exercise.

MR PERRY: Thank you very much.