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*(subject to editorial corrections)**	

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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IN THE MATTER OF EC
an applicant for bail

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STEPHENS LJ

Introduction

[1] On 31 August 2018 the applicant, who I anonymise as **EC**, was granted bail by McAlinden J. EC is charged with three offences which are alleged to have occurred in August 2018. The first charge is in relation to an offence of causing grievous bodily harm with intent to **IP** contrary to section 18 of the Offences Against the Person Act 1861. The injuries sustained by IP included the loss of sight in one eye. The only person alleged to have assaulted IP was the applicant. The second and third charges relate to the subsequent police investigation. The second charge is of attempting to pervert the course of justice by attempting to destroy a USB containing evidence of the alleged assault on IP contrary to Article 3(1) of the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983 and common law. The third charge of criminal damage contrary to Article 3(1) of the Criminal Damage (Northern Ireland) Order 1977 is in relation to a USB stick belonging to PSNI. One condition of the applicant's bail was that

> "he does not attempt to see, speak to in any other way contact any of the alleged victims or witnesses in the case, either directly or indirectly."

The prosecution assert that the applicant has been in breach of that condition in that EC was indirectly involved in approaches to IP made by another person during which it is alleged that threats were made against IP and bribes were offered to him to withdraw his evidence. There is no direct evidence of EC's involvement in those approaches but rather the prosecution rely on an inference to that effect. On that basis the prosecution contend that bail should be revoked. The applicant EC denies any involvement in the approaches and denies any breach of his bail condition. Initially it was contended on his behalf that

the applicant should be granted bail subject to the same conditions as were originally imposed.

[2] The bail application in this court came on for hearing on Monday 29 July 2019. Issues arose as to the standard of proof and as to the quality of evidence required before bail is revoked for an alleged breach of bail conditions. The application was adjourned to Wednesday 31 July 2019. At the conclusion of the hearing on 31 July 2019 counsel on behalf of the applicant again sought to adjourn the hearing of the bail application given that the police wished to interview the applicant on Friday 2 August 2019 and counsel wished to consider whether to for instance submit a statement from the applicant in relation to this application. I granted an adjournment to Thursday 8 August 2019.

The prosecution's evidence as to the approaches made to IP

[3] Ms Murray who appeared on behalf of the prosecution relayed to the court evidence that had been obtained by the police from IP and from other sources. She stated that IP was approached on 15 July 2019 while out shopping and was also approached on 18 July 2019 outside his home by an individual whom I anonymise as **KP**. It was stated that during these two incidents, KP offered IP a sum of between £2,000 and £5,000 to withdraw his statement against the applicant, EC, to tell the police that the applicant was not involved in the alleged assault and not to tell the Police that he had been approached by KP. The court was also informed based on information from IP that during the first incident threats were made by KP to IP stating that he knew where IP lived and that this knowledge was emphasized to IP when the second incident occurred some three days later at IP's home. During the second incident it was again asserted that IP was offered money by KP.

[4] These approaches were reported to the police by IP. On 19 July 2019 the applicant was arrested without warrant under Article 6(3)(b) of the Criminal Justice (Northern Ireland) Order 2003 on the basis that the constable had reasonable grounds for suspecting that the applicant had broken a condition of his bail. In accordance with Article 6(4) the applicant was brought straight to Belfast Magistrates Court. The magistrate revoked bail and the applicant then brought this bail application before this court.

[5] On 22 July 2019 KP was arrested for witness intimidation. The court was informed that at interview KP admitted to approaching IP and gave as his reason for doing so that he wished to compensate him for the injuries sustained during the alleged attack by the applicant. It was also stated that KP confirmed that he knew the applicant, but denied that the applicant had instructed or requested he approach IP or offer him money. Rather he gave an account that he is friends with the applicant but has never discussed the matter with him, that he had heard about the matter from a third party and he happened to see IP by chance on 15 July 2019 and decided to approach him and offer compensation for being injured. He states that he has been friends with the applicant from childhood. He gave this account but then refused to answer any further questions.

[6] The court was also informed that police investigations demonstrate that the applicant and KP are associates, having various mutual activity on each other's Facebook pages.

[7] Initially the court was informed that the police were following various lines of enquiry and wished to interview the applicant in relation to witness intimidation (there being no criminal offence in this jurisdiction of breach of bail conditions) when those enquiries were complete. Then on Wednesday 31 July 2019 the police indicated that they wished to interview the applicant on Friday 2 August 2019.

Legal principles

[8] In so far as relevant to this application Article 6 of the Criminal Justice (Northern Ireland) Order 2003 under the rubric "Arrest for absconding or breaking conditions of bail provides:-

> "6. ... (3) A constable may arrest without warrant any person who has been released on bail and is under a duty to surrender into the custody of a court:
>
> (a) if the constable has reasonable grounds for believing that that person is not likely to surrender to custody;
>
> (b) if the constable has reasonable grounds for believing that that person is likely to break any of the conditions of his bail or *has reasonable grounds for suspecting that that person has broken any of those conditions*; or
>
> (c) in a case where that person was released on bail with one or more surety or sureties, if a surety notifies a constable in writing that that person is unlikely to surrender to custody and that for that reason the surety wishes to be relieved of his obligations as a surety.
> …
>
> (4) A person who is arrested under paragraph (3) *shall be brought before a magistrates' court as soon as practicable after the arrest* and in any event not later than the next day following the day on which he is arrested.
>
> (5) Where the day next following the day on which that person is arrested is Christmas Day, Good Friday or a Sunday, he shall be brought before a magistrates' court not later than the next following day which is not one of those days.

(5A) Paragraphs (4) and (5) do not require a person to be brought before a magistrates' court at any time when he is in hospital and is not well enough.]

(6) Where a person is brought before a magistrates' court under paragraph (4) *the court*—

(a) *if of the opinion* that he—

(i) is not likely to surrender to custody, or

(ii) *has broken or is likely to break any condition of his bail*,

may remand him in custody or commit him to custody, as the case may require, or alternatively, grant him bail subject to the same or to different conditions; or

(b) if not of that opinion, shall grant him bail subject to the same conditions (if any) as were originally imposed. …" (emphasis added).

[9] From Article 6 it can be seen that the precondition for arrest without warrant is "*reasonable grounds for suspecting*" whilst the precondition for remanding in custody or committing to custody is the formation of *an opinion*, in this case the formation of an opinion that the applicant has broken or is likely to break any condition of his bail. A good starting point for the opinion may be the arresting constable's "reasonable grounds." An opinion involves an evaluation which exceeds reasonable grounds for suspecting but it is not a finding or a conclusion. Rather the definition of an opinion is "a view held about a particular subject or point; a judgement formed; a belief." What is required is that there should be an opinion formed by a judicial officer as soon as practicable. The opinion if formed can be either retrospective that there has been a breach of any condition of his bail and/or prospective that he is likely to break any condition of his bail. If the opinion is formed then it can also be seen that the court has a number of options open to it so that there is no duty to detain but rather only a power to do so. If the opinion is not formed then the court shall grant him bail subject to the same conditions (if any) as were originally imposed.

[10] In relation to the standard of proof as to an alleged breach of a bail condition there is a difference between the legal commentaries of Valentine on Criminal Procedure and O'Neill on "Criminal Practice and Procedure in the Magistrates' Court." However both authors are agreed that the strict rules of evidence do not apply. Valentine at paragraph 5.16 relying on *The Queen on the application of Royston Thomas -v- Greenwich Magistrates Court (2009) 173 JP 345* at paragraph 8 states that a "breach of bail terms needs proof only on the balance of probabilities …" O'Neill at paragraph 3.43 states that "there is no specific standard of proof." That paragraph continues that "the court can consider all material before it in reaching its opinion (including hearsay), but must assess the weight which can be ascribed to it."

[11] The Divisional Court in England and Wales in *R. (on the application of DPP) v Havering Magistrates Court* [2001] 1 W.L.R. 805 considered the application of Articles 5 and 6 ECHR to the procedure applicable to revocation of bail for an alleged breach of bail conditions. A number of principles can be taken from that authority:

(a) Revocation proceedings are by their nature emergency proceedings to determine whether or not a person, who was not considered to present the risks which would have justified remanding in custody in the first instance, none the less does now present one or other of those risks.

(b) Article 6 ECHR has no direct relevance.

(c) Article 5 ECHR has direct relevance.

(d) The principal purpose behind the provisions of Article 5 "is to ensure that persons are not subject to arbitrary deprivation of liberty."

(e) Article 5 requires "there to be in place a judicial procedure which not only meets the criterion of being in accordance with law, but which also provides the basic protection for a defendant inherent in the concept of judicial proceedings. Such proceedings must ensure equal treatment of the person liable to be detained and the authorities, it must be truly adversarial and there must be "equality of arms" between the parties. These concepts inevitably overlap. In language more familiar to common lawyers, a person liable to detention is entitled to natural justice. He must be treated fairly." Where a decision is taken to deprive somebody of his liberty, that should only be done after he has been given a fair opportunity to answer the basis upon which such an order is sought. However there is no requirement for formal evidence to be given. Rather the magistrate is simply required by the statute to come to an honest and rational opinion on the material put before him. In doing so he must bear in mind the consequences to the defendant, namely the fact that he is at risk of losing his liberty in the context of the presumption of innocence.

(f) The procedure in England and Wales was then set out by the court at paragraph [41] as follows:

> "What undoubtedly is necessary is that the justice, when forming his opinion, takes proper account of the quality of the material upon which he is asked to adjudicate. This material is likely to range from mere assertion at the one end of the spectrum which is unlikely to have any probative effect, to documentary proof at the other end of the spectrum. The procedural task of the justice is to ensure that the defendant has a full and fair opportunity

> to comment on and answer that material. If that material includes evidence from a witness who gives oral testimony clearly the defendant must be given an opportunity to cross-examine. Likewise, if he wishes to give oral evidence he should be entitled to. The ultimate obligation of the justice is to evaluate that material in the light of the serious potential consequences to the defendant, having regard to the matters to which I have referred, and the particular nature of the material, that is to say taking into account, if hearsay is relied upon by either side, the fact that it is hearsay and has not been the subject of cross-examination, and form an honest and rational opinion. If his opinion is that the defendant has broken a condition of his bail, he must then go on to consider whether or not, in view of that opinion, and in all the circumstances of the case, he should commit the defendant in custody or grant bail on the same or other conditions, …."

[12] Ms Murray submits that the standard of proof for a breach of bail is on the balance of probabilities. I agree that it is not the criminal standard of proof. I also consider that it is not inappropriate to apply the civil standard of proof see the judgment of Hickinbottom J at paragraph [16] in *R. (on the Application of Royston Thomas) v Greenwich Magistrates' Court* [2009] EWHC 1180 (Admin), 2009 WL 1246888. However I consider that it is appropriate to combine that standard with the formulation in *DPP v Havering*. On that basis the ultimate obligation is to evaluate all the material in the light of the serious potential consequences to the defendant in the context of the presumption of innocence and *to form an honest and rational opinion on the balance of probabilities*.

Discussion

[13] There was no request by or on behalf of the applicant that he be provided with an opportunity to give evidence before the magistrate and he did not do so. In this court on 31 July 2019 the applicant was expressly provided with the opportunity of doing so and was also provided with the opportunity to put in a written statement but as will become apparent he has not availed of either of those opportunities.

[14] The provisional view that I had formed subject to anything contained in any statement from the applicant or contained in any evidence from the applicant was that the most likely inference from the primary facts was that the applicant was indirectly involved in the approaches made by KP to IP. The primary facts include that the only person accused of the assault on IP is the applicant. He is the only person who benefits from any withdrawal of the criminal charges. He is a close friend of the KP and is in contact with him. In arriving at that provisional inference from those primary facts I had taken into account and dismissed as irrational the explanation given by KP to the police that he wished to compensate IP for his injuries. I considered that explanation to be irrational given that KP bears no responsibility for the injuries to IP and has no other apparent

reason for providing for him or for compensating him. There is no evidence that KP knows, likes or prior to these encounters would recognize IP and indeed the material before the court suggests that it was a matter of alarm to IP that KP did know where he lived. It was suggested that another potential inference from the primary facts was that KP acted on his own initiative out of a misguided desire to help his friend the applicant by both offering to compensate IP and by threatening IP. I was prepared to agree on the material presented to me that such an inference is presently possible but my provisional view was that the most likely inference on the balance of probabilities was that KP acted at the instigation of the applicant. On that basis I had provisionally formed the opinion that the applicant *had broken and was likely to break the condition of his bail* set out in paragraph [1]. That provisional opinion was based on what I have described as the most likely inference from the primary facts.

[15] I had arrived at that provisional opinion irrespective of the allegations in relation to the two charges of attempting to pervert the course of justice and criminal damage which had been made against the applicant. However I considered that those allegations were further support for the provisional inference which I had drawn and the provisional opinion that I had formed.

[16] In arriving at that provisional opinion I had evaluated all the material in the light of the serious potential consequences to the applicant and in the context of the presumption of innocence. It is a matter of regret that now nearly one year later a preliminary enquiry has not yet occurred and accordingly the consequence of forming the provisional opinion was that the applicant may be deprived of his liberty for a significant period of time prior to trial.

[17] The formation of that provisional opinion would have led on to the second stage which would have involved consideration as to whether or not the applicant could be admitted again to bail or must be remanded in custody. Again the views that I had formed were provisional. It had been submitted that IP is an individual of some fortitude who refuses to be influenced and that KP who did try to influence him is now in custody potentially facing severe sanction. It had also been submitted that the applicant has a limited criminal record and has complied with all his other bail conditions. Against that there was material that this was not the first occasion on which the applicant had attempted to interfere with the course of justice and this was a most determined attempt to threaten and to bribe IP. Provisionally I considered that the appropriate response was to revoke bail.

Further developments since 31 July 2019

[18] The applicant was interviewed by the police on Monday 5 August 2019. He made an admission in relation to the incident that occurred on 15 July 2019 stating that he had instructed KP to approach IP. He made no further admissions. He has been charged with Witness Intimidation and Attempting to Pervert the Course of Justice arising out of the events involving KP.

[19] On Tuesday 6 August 2019 the applicant's solicitor sent an e mail to the court office formally withdrawing the application for bail which was listed for Thursday 8 August 2019.

Conclusion

[20] Bail is revoked.