



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2020] HCJAC 15
IND/2019-3319

Lord Justice General
Lord Brodie
Lord Woolman

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in the appeal (presented by written submissions)
against the refusal of bail

by

(First) JD and (Second) BK

Appellants

against

HER MAJESTY'S ADVOCATE

Respondent

3 April 2020

[1] The appellants were indicted to a Preliminary Hearing on 14 November 2019 charged with, amongst other things, an assault and robbery on a complainer in his own home in early 2019. They are alleged to have entered his house when he was asleep, placed a knife against his throat, demanded money and drugs, attempted to strike him with a knife and robbed him of his phone and a sum of money. They were both remanded in custody on 22 July 2019. The 110 day period (Criminal Procedure (Scotland) Act 1995, section 65(i)) had been due to expire on 18 November 2019.

[2] At the PH, both the Crown and the appellants intimated their readiness for trial. A trial was fixed for 25 March 2020, with the 140 period (1995 Act, s 65(4)(ii)) being extended unopposed to 2 April 2020. On 27 March 2020 the trial diet was postponed because it was not possible to ballot a jury in light of the Scottish Government's advice on the COVID-19 pandemic. There was no opposition to that and a new PH was fixed for 19 June 2020. The 140 day time limit was extended until 19 June 2020. The extension of time has been appealed, but that may be superseded by the Coronavirus (Scotland) Bill 2020 (Sch 4 Part 4 para 10(3)).

[3] The appellants moved for bail on the basis that both had spent a significant period of time on remand. They were willing to obtemper any special bail conditions. The Crown opposed the motion having regard to the nature of the charges, the appellants' previous convictions and the risk that they might seek to interfere with witnesses.

[4] JD is aged 36. He has a substantial criminal record, consisting of about 90 previous convictions dating back to 1999. These include theft, assault and robbery, housebreaking, misuse of drugs and road traffic offences. There are numerous bail aggravations, four breaches of probation and a conviction for attempting to pervert the course of justice. In June 2019 he was convicted of being possession of a knife in a public place. He was on deferred sentence for that crime at the time of the present alleged offences.

[5] BK, who is aged 39, also has a substantial record, consisting of some 55 convictions going back to 1997. They include theft, assault to severe injury and permanent disfigurement and misuse of drugs. In 2001 he was convicted in the High Court of assault to severe injury and permanent disfigurement, for which he received 30 months imprisonment. In 2009 he was convicted of culpable homicide which resulted in a 10 year sentence. He

continued to offend after his release. He has several convictions for breaching probation and bail orders.

[6] In relation to both appellants, the PH judge refused bail because of: the serious nature of the charges; the likelihood of a custodial disposal if convicted; and the nature of his criminal record. Their previous convictions disclosed a consistent and repeated disregard for court orders. There was a substantial risk that the appellants would fail to comply with bail conditions. The public interest would be best served by bail being refused.

[7] JD submitted that the delay in bringing his case to trial was so significant that the refusal of bail was an error in the exercise of the PH judge's discretion. There was currently no indication of when the trial is likely to proceed. The appellant retained the presumption of innocence. Bail with special conditions would have been appropriate, including a curfew and a condition not to approach the complainer and the co-accused.

[8] BK submitted that, by the time of the PH on 19 June 2020, he would have been in custody for 333 days. The delay in bringing the case to trial was exceptional. It was so significant that the refusal to grant bail was an error in the exercise of the judge's discretion. There was no indication as to when the trial is likely to proceed. The appellant retained the presumption of innocence. Although the current circumstances were exceptional, and the public interest and the administration of justice required to be weighed in light of these exceptional times, the appellant's rights as an untried prisoner had to be taken into account. Accused persons, who would not ordinarily be granted bail, required to be liberated under appropriate conditions. There was no reason why these conditions, including a curfew and a condition not to approach the complainer, witnesses and the appellant's co-accused, could not be imposed. That would protect both the public interest and the administration of justice.

[9] The Crown submitted that, in relation to JD, when the charges were considered in conjunction with his record, the PH judge had not erred in the exercise of his discretion in refusing bail. The judge had been to take the view that there was a substantial risk of re-offending and that the appellant would not obtemper conditions of bail. If bail were to be allowed, special conditions should be that the appellant does not approach or contact the complainer and does not enter a particular street.

[10] In relation to BK, the crown submitted that the nature of the charges, coupled with the schedule of previous convictions, entitled the judge to refuse bail. Section 23D of the Criminal Procedure (Scotland) Act 1995 applied to BK. Exceptional circumstances were needed before bail could be granted. The judge was entitled to take the view that there was a substantial risk of re-offending and that the appellant would not obtemper a bail order. The address offered by BK was not suitable. It had a notice from the electricity suppliers attached to its door stating that they had changed the locks and had the keys. It was the address which had been occupied by JD before he was remanded in custody. It was no longer available to JD, hence he had offered his mother's address.

[11] In the present COVID-19 crisis, it is not known when accused persons are likely to be tried. In solemn cases, it may be several months before jury trials can be resumed. Meantime there may be an increasing number of those remanded in custody. The length of time during which a person is likely to remain on remand is a factor in deciding whether to grant bail. This factor must be given greater weight than hitherto.

[12] The statutory provisions (1995 Act, s 23B) continue to apply to the refusal of bail. In the ordinary case, bail must be granted except where, having regard to the public interest, notably public safety, there is a good reason to refuse bail. The court must consider the extent to which the public interest could be protected by the use of bail conditions. A good

reason may arise if there is a substantial risk of the accused: absconding or failing to appear for trial; committing further offences; and interfering with witnesses or otherwise interfering with the course of justice (1995 Act, s 23C). Where, as here, an accused is charged with a violent offence and has a previous conviction for violence on indictment, he is only to be granted bail in exceptional circumstances (1995 Act, s 23D). The provision also applies to sexual and domestic abuse offences along with drug trafficking.

[13] As always, each case has to be judged on its own merits by the judge at first instance. In the current crisis, the emphasis must be, albeit not exclusively, on whether bail should be refused on the grounds of public safety. The primary question is whether the accused, if at liberty, will pose a substantial risk of committing further offences; particularly violent (including sexual and domestic abuse) offences. If there is no such risk, the accused ought to be granted bail in the ordinary case. In a section 23D case, exceptional circumstances will exist if there is no such risk. In assessing risk, the court must have regard to the feasibility of imposing conditions, including a curfew.

[14] In practical terms, bail ought not to be granted where: (1) the accused is charged with a serious offence which, if he were to be convicted, is likely to attract a substantial custodial term (eg one in excess of two years); and (2) the nature of his record, or other circumstances, indicate that, were he to be at liberty, he is likely to commit further violent (including sexual and domestic abuse) offences and/or is likely to attempt to obstruct justice (including approaching witnesses). These are matters primarily for the judge at first instance to assess. His or her decision should not lightly be interfered with by the appellate courts. Applying this guidance, the appeals are refused.

[15] Should the crisis continue beyond the currently predicted period, the question of bail may, of course, require to be revisited.