

Neutral Citation No: [2019] NIQB 65

Ref: McA10939

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 27/03/2019

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

GLENN RAINEY

McALINDEN J

[1] This is an appeal by the prosecution following the grant of bail to Mr Rainey by Deputy District Judge Holmes on 21 March 2019.

[2] The question for the court to determine is whether appropriate notice of the appeal was served on the applicant, Mr Rainey, within the time stipulated by Section 10(6) of the Justice (Northern Ireland) Act 2004 and Rule 161(a) of the Magistrates' Courts Rules 1984, as amended. I have had the benefit of written submissions provided by Mr Devine. I have also considered the contents of the affidavit of Mr Mark Austin dated 26 March 2016. The handwritten entries made by Mr McGuffin giving the time at which oral notice of appeal was given and recorded 15.44. The typed note provided by Mr McGuffin. The statement of Detective Inspector Eakin dated 25 March 2019. The statement of Prison Officer J Cairns dated 26 March 2019 and the statement of Prison Officer C Beckett dated 26 March 2019 indicating that the notice of appeal was served on Mr Rainey at 17.55. I have also been provided with a helpful chronology prepared by Mr Magee.

[3] I have also considered the relevant legal authorities. Those being the case of *Barry Thompson* a ruling given by Mr Justice Deeny in this jurisdiction on 2 August 2013 and two authorities from England and Wales are on behalf of the application of *Jeffrey v Warwick Crown Court and Her Majesty's Customs and Excise* [2002] EWHC 2469 Admin and are on the application of *Carten v Birmingham Crown Court and Birmingham Magistrates' Court* [2017] EWHC 2101 Admin.

[4] Despite the strict wording of the relevant statutory provisions in Great Britain and Northern Ireland it is clear that the courts in England and Wales and Northern Ireland have been prepared to interpret the relevant statutory provisions so as to import an element of flexibility which is somewhat surprising in the context of a criminal statutory provision dealing with the liberty of the subject. In the

context of the Northern Ireland statutory provision Mr Justice Deeny stated in his ruling in *Thompson* that:

“I would respectfully agree with Mr Justice Hooper that if the prosecution had used due diligence and the delay was not its fault but was due to circumstances outside its control, particularly there as here the delay is a modest one of about half an hour in this case even less in that case I would not feel it was in accordance with the decisions of the courts over the decades and perhaps longer to strike down the notice for that error”.

It is clear that the key matters to be considered are:

- (i) The exercise of due diligence by the prosecution.
- (ii) Delay and whether it is the fault of the prosecution.
- (iii) Whether the delay is due to circumstances outside the control of the prosecution.
- (iv) Whether the delay is of a modest nature.

[5] Having carefully considered all the material that has been provided to me in this case and having carefully listened to the oral submissions skilfully made by counsel on behalf of the prosecution and the applicant I find the following facts.

[6] The oral notice in this case was given at 15.44. The written notice in this case was served on Mr Rainey at 17.55, eleven minutes outside the two hour window. Mr McGuffin scanned and e-mailed the notice to the Central Office in the High Court and the Custody Office in Maghaberry at 16.54. At 17.03 Mr McGuffin received an acknowledgment from Maghaberry that Maghaberry had received the notice. The notice in this case states that oral notice of appeal was given at 4.00 pm. Despite the prison acknowledging receipt of the notice at 17.03 it was not served until 17.55. Mr Beckett in his statement states that he was informed by the Custody Office of the intention to appeal at 16.15. He received the relevant paperwork at 17.30. He gave the paperwork to Mr Cairns and Mr Cairns states that he was told the notice had to be signed within two hours of 16.45. He served the notice at 17.55.

[7] It is clear that for the prosecution to avail of the implied statutory dispensation it must establish:

- (i) Due diligence
- (ii) Delay was not its fault.

(iii) The delay was due to circumstances outside its control.

(iv) Delay was of a modest nature.

[8] Having regard to the context that this is a criminal matter where the liberty of the subject is at stake any implied statutory dispensation must be strictly construed and applied. It is clear that the notice was provided to the prison at the latest by 17.03. The question is whether the delay in serving this notice between 17.03 and 17.55 is a matter which occurred despite due diligence being exercised by the prosecution and due to circumstances outside the prosecution's control where no fault can be attached to the prosecution and the delay is of a modest nature. Delay is obviously of a modest nature in this case. However, that is not the decisive factor the other matters are much more important.

[9] In relation to those matters what is telling is the statement of Prison Officer Cairns who understood or was told that the notice had to be signed within two hours of 16.45. In an important matter of this nature where the prosecuting authority delegates the performance of important functions to other bodies it is vital that clear written instructions accompany the notice so there can be no mistakes of the type clearly highlighted in Mr Cairns' statement.

[10] In the circumstances the failure to provide unequivocal and clear guidance accompanying the notice, coupled with the error on the face of the notice as to when oral notice was actually given means that the court must conclude that in this instance it cannot be said that due diligence was used or that the failure to serve the notice within time was due to circumstances outside the control of the prosecution. The provision of clear written instructions emphasising the mandatory nature of the requirement to serve the notice within two hours would have demonstrated the exercise of due diligence and any failure to comply with such clear instructions would have been outside the control of the prosecution.

[11] In the circumstances I conclude that there was a failure to serve the written notice within the two hour period and in accordance with section 10(7) of the Justice (Northern Ireland) Act 2004 the appeal is therefore disposed of.