In the St. Helena Court of Appeal

Citation: SHCA 1/2019

Criminal

In the matter of an appeal against a ruling by the Chief Justice

Appellant

Anthony Johns

Judgment on appeal

Heard on 17th January 2019

Before: Sir John Saunders, President; HHJ R Mayo, Member; and HHJ L Drummond, Member

1. This is an appeal by leave of the Court of Appeal against a decision of the Chief Justice of St. Helena made on 2.11.2018. The Chief Justice had refused leave to appeal on 19th November 2018.

2. Mr. Johns is charged with an offence which carries a maximum sentence of 14 years. He has not yet been tried and nothing in this judgment is to be interpreted as giving any indication of guilt or innocence. The case raises an issue as to the powers of the Supreme Court to direct trial by jury and that is the only issue which this court will decide.

3. The offence with which Mr. Johns is charged is triable either way, that is he can be tried for the offence either by the Magistrates or by a jury in the Supreme Court. The decision as to where the case should be tried is initially for the Attorney General to make but, where the maximum sentence for the offence is more than 5 years, as was the case here, a Defendant can apply to the Supreme Court and ask the Chief Justice to direct that the case be tried by a jury, if the Attorney General does not make that direction. That is what happened in this case.

4. The Chief Justice refused the application to remove the case to the Supreme Court to be tried by a jury. That decision is appealed on the basis that the Chief Justice has applied the wrong test in making his decision. In essence the Chief Justice limited his powers to a judicial review of the Attorney General's decision whereas the defence argue that the Chief Justice should have considered the issue of venue afresh and reached his own decision. The Solicitor General in this court has supported the reasoning of the Chief Justice.

5. The relevant legislation is contained in s. 165 of the Criminal Procedure Ordinance 1975. The material parts read as follows:
s.165 (1) *Subject to subsection (2), if an offence is triable either summarily or on indictment, the offence must be tried summarily unless the Attorney General directs, in writing, that it be tried on indictment.*
(2) If, in the case of an offence for which a person is liable to be sentenced to a term of imprisonment exceeding 5 years, or to an unlimited fine, the Attorney General does not give such a direction as is mentioned in subsection (1), the defendant may make an application to the Chief Justice that the case be removed into and tried in the Supreme Court; and the Chief Justice may make such order in respect of it as he or she considers appropriate.

6. In explaining his refusal of the application, the Chief Justice said as follows: '*this is an issue that I have considered in two previous cases. I acknowledge that there is nothing in the wording of Section 165(2) which limits the powers of the Chief Justice in deciding whether or not a case should be removed. I nevertheless reiterate what I have said before. Section 165 confers a discretion on the Attorney General. The Attorney General is generally much better placed than the Chief Justice to determine the appropriate tribunal where that discretion exists. Certainty within the law is always desirable providing that it does not descend into rigidity. It will therefore almost inevitably be the approach of this Court not to interfere with a decision of the Attorney General under s. 165(1) unless it can be shown that the Attorney General has failed to exercise the discretion conferred or has exercised that discretion improperly, for example by seeking to deny the Defendant a fair trial. That is not the case here and I agree that …….the Chief Magistrate and the Lay Magistrates are as well placed as any to judge what does and does not fall within acceptable norms of behaviour'.* As part of our preparation for this hearing we have read the judgments of the Chief Justice in the two case he referred to.

7. While we agree that certainty in the law is to be encouraged, and there is no reason why the Chief Justice should not set out those matters which he would take into account in making decisions under s.165, there do seem to us to be difficulties in adopting the approach that the Chief Justice has taken. There is no provision for representations on venue to be made to the Attorney by the defence and we are told that it has not happened in the past. The Chief Justice has indicated that he will not interfere with the Attorney's decision unless it can be demonstrated that she has exercised her discretion improperly. The Attorney General does not give any form of judgment when she makes her decision so it would be impossible in practice to demonstrate that she has exercised her discretion improperly, except by considering oral submissions made on her behalf when the matter is before the Chief Justice. The decision on venue would be made without anyone giving a reasoned judgment as to why that decision has been made. The Chief Justice says that it is not the case here that the Attorney has exercised her discretion improperly but he has reached that conclusion without seeing any written reasons from the Attorney General and has presumably relied on submissions made in the hearing before him. It seems to us that the lack of any requirement for reasons to be given by the Attorney General for her decision is a factor which weighs against the Chief Justice's powers being limited to judicial review. A Defendant has to decide whether to apply to the Chief Justice without any knowledge of why the Attorney General decided the case should be tried by the Magistrates.

8. In his judgment, when he refused the Defendant leave to appeal, the Chief Justice said this: '*For offences triable either way a defendant is given no right at all to determine mode of trial. That, as a matter of statute, is a matter entirely within the Attorney General's discretion. Had the legislature intended that a defendant should be granted a preference I have no doubt that provision would have been made to that end. It would, in my view, be wholly wrong for the Chief Justice in those circumstances to disregard a proper exercise of discretion by the Attorney General by substituting his/her view of the appropriate mode of trial according to a defendant's preference. To do so would be to usurp the role of the Legislature in my view. I repeat, providing the defendant's right to a fair trial is maintained, and providing that the Attorney General's discretion has been exercised properly, then in my view, it should only be in exceptional circumstances that the Chief Justice exercises the power conferred under Section 165(2).'*

9. With respect, we do not consider that the Chief Justice has correctly analysed the effect of s.165. S.165 provides that there is a presumption that either way offences should be tried summarily unless the Attorney General directs that the matter should be tried on indictment. For offences where the maximum sentence is less than 5 years the Attorney's decision whether to give a direction is final. Where the maximum sentence is greater than 5 years the Defendant is entitled to apply to the Chief Justice to remove the case to the Supreme Court and the Chief Justice may make such order as he or she considers appropriate.

10. As the Chief Justice accepts there is nothing in the legislation that suggests that the powers of the Chief Justice to make whatever decision he considers appropriate should be restricted in any way. It seems to us that the submissions made on behalf of the Defendant are more consistent with the terms of the legislation than the ruling of the Chief Justice. It is not that the Chief Justice would substitute his view for the Attorney General's depending on the preference of the Defendant, the Defendant has no right to a jury trial but neither should there be any presumption that the Attorney General's decision can only be interfered with on limited grounds. The legislation does not provide such a test. It is for the Chief Justice to decide, having heard arguments from both the prosecution and the defence, whether it is appropriate to remove the case to the Supreme Court.

11. In the course of his judgment giving reasons for his decision on the original application, the Chief Justice said '*Section 165 confers a discretion on the Attorney General. The Attorney General is generally much better place than the Chief Justice to determine the appropriate tribunal where that discretion exists.'* The Chief Justice does not go on to give any explanation for that observation but it is difficult to see on what it is based. One of the main factors in the Attorney General's mind, and we have been told by the Solicitor General normally the only one, will be the likely length of any sentence on conviction and we would have thought that the Chief Justice was in just as good a position to decide that as the Attorney General.

12. There may be other considerations apart from the likely sentence for making the decision where the matter should be tried. What are proper considerations will be a matter for the Chief Justice to decide and will depend on what submissions, if any, the Attorney General makes as well as the defendant. What we are satisfied about is that it will be for the Chief Justice to

decide what matters can properly be considered and to reach his decision after weighing those matters which he considers relevant. It is not, in our judgment, for the Defendant to demonstrate that the Attorney General has not properly reached his decision or to demonstrate that there are exceptional circumstances. That is a gloss to the legislation which in our judgment is not sustainable.

13. In our judgment when an application is made to the Chief Justice to remove a case into the Supreme Court it is for him to consider the representations which are made and make the order which he regards as appropriate. The Chief Justice has interpreted the section as limiting his powers to a judicial review of the decision of the Attorney General and not including the power of re-consideration. The terms of the section are clear that when application is made it is for the Chief Justice to re-consider whether to transfer the case to the Supreme Court. He is in as good a position as the Attorney General to make that decision and he does so from a position of complete neutrality. When he has made his decision he will give his reasons so that the parties can understand why the decision has been made.

14. It is argued that the result of this decision will be to delay cases because the Chief Justice is only on island for short periods during the year. We see no reason why the matter should not be considered on paper by the Chief Justice. The benefit of emails is that these sort of decisions can be made rapidly and it will be seldom, if at all, that the Chief Justice would need to hear oral submissions. If it does transpire that delay does occur as a result of this ruling, and we see no reason why it should, then consideration may need to be given to amending the legislation.

15. The Solicitor General argues in the alternative that if we reach the decision that the Chief Justice has misinterpreted the section, we should nevertheless dismiss the appeal because the Chief Justice has in effect dealt in his reasons with the only argument that was raised by the defence. The defence had argued that as the case depended in part on whether admitted conduct was properly described as sexual, it was more appropriate case to be tried by a jury rather than by the Chief Magistrate or Lay Magistrates. The Defence argued that that sort of judgment should be left to randomly selected people who live on the island. The Chief Justice took the view that the Magistrates were as well placed as anyone to decide what was within acceptable norms of behaviour.

16. While we accept that there is force in this argument and not for a moment suggesting that the Chief Justice was wrong in the conclusion that he reached and the same decision might well be reached again, we are concerned that, having said that he was simply reviewing the Attorney General's decision, it may appear that he did not carry out a proper re-consideration exercise.

17. Accordingly this appeal is allowed and the decision of the Chief Justice is set aside. The application to the Chief Justice must be heard afresh. We do think it is preferable for the appearance of justice that the matter is remitted to a different Judge to make the decision as to venue in accordance with our directions. We think that is preferable simply for the appearance of justice and without suggesting that there is any risk that the Chief Justice would not be able to make an independent and impartial decision applying the test that we have said is the correct test.

18. We know that there is another Judge sitting in the Supreme Court in February who could deal with this application expeditiously and we consider that it is preferable if he dealt with it. Neither the Solicitor General or the defence thought that there was any legal difficulty with that but we give liberty to them to bring the matter back before us if, having given the matter thought, they consider there is a problem