

In the St. Helena Court of Appeal

Citation: SHCA 3/2021

Criminal

In the matter of an appeal by the Attorney General

Appellant

Attorney General

-v-

Respondent

Sergio Villatoro Bran

Judgment on appeal against ruling

Heard on 24th September 2021

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

1. This the judgment of the Court.

Background

2. This is the third appeal before this Court against decisions of the Supreme Court concerning the conditions of bail imposed on the Respondent. The full background is set out in this Court's judgments dated 29 June and 22 August 2021. The Respondent is a consultant orthopaedic surgeon of Guatemalan nationality. He was working at St Helena Hospital until he became the subject

of a police investigation in March 2021. He was initially released by police on pre charge bail with a condition that he could not leave St Helena. The Respondent appealed against the imposition of that condition to the Supreme Court. The hearing was held by the Chief Justice at very short notice on 11 August 2021 in order to allow for the possibility that, if the condition was removed, the Respondent might catch a flight off Island in the morning of 12 August 2021. On 11 August the Chief Justice held the condition to be disproportionate. On further appeal by the Attorney General to this Court on 11 August, this Court upheld the decision of the Chief Justice and stated at paragraph 19 of its subsequent judgment:

“Given the failure to carry out a diligent investigation and the profound impact of the bail conditions on the Respondent, in our view the Chief Justice was entitled to conclude that the extension of bail on these continued conditions is no longer proportionate. This Court indicated that may well be the outcome in its judgment on 29 June. By the Applicant’s own submission there is sufficient information now available to charge the Respondent so that it is difficult to conclude that continued detention on pre-charge conditions remains necessary in any event.”

3. As was foreshadowed at the hearing before this Court on 11 August, immediately after that hearing concluded, the police charged the Respondent with an assault contrary to section 20 of the Offences Against the Person Act 1861. They had been able to do so following receipt of a further statement from one of the complainants which they considered provided sufficient evidence upon which to charge the Respondent. Post charge bail conditions were imposed on the Respondent by the police which included a prohibition from departing the Island. The matter came before

the Chief Magistrate at 9.30pm that same evening. The Chief Magistrate imposed a bail condition prohibiting the Respondent from departing St Helena and indicated that the next court hearing would be 23 September 2021.

4. The Chief Justice immediately reviewed that decision and in a short summary ruling declared:

“1. That any condition of bail imposed by the Chief Magistrate at the hearing before the chief Magistrate on 11 August 2021 which seeks to restrict the right of the Applicant to depart St Helena is hereby declared void;

2. The Chief of Police shall restore to the Applicant his passport in time to enable the Applicant to depart St Helen on the next flight from St Helena.

3. Any attempt to prevent the Applicant from departing St Helena on the next flight out of St Helena and for a reason connected to the current police investigation to which the Applicant is subject shall constitute a breach of the Applicant’s human rights under Article 12 of the Constitution.

4. Any assessment of damages for any breach of the Applicant’s right to freedom of movement is hereby adjourned generally.”

5. As a result of that ruling, the Respondent caught the morning flight from St Helena and departed the Island.
6. This is an appeal against parts 1 to 3 of the Chief Justice’s ruling by the Attorney General.

Grounds of appeal

7. The grounds of appeal are:

Ground 1

- (1) (a) In considering the imposition of post-charge bail conditions in the context of an alleged breach of Article 12, the learned Judge applied an incorrect legal test, primarily based upon considerations of proportionality, rather than asking whether the Chief Magistrate's bail condition was necessary to secure the Respondent's surrender for a trial for a criminal offence.
- (b) In considering the imposition of post-charge bail conditions in the context of an alleged breach of Article 12, the learned Judge applied an incorrect legal test, primarily based upon considerations of proportionality, rather than asking whether any bail conditions restricting the Respondent's right to leave St. Helena were necessary to secure the Respondent's obligation to attend a forthcoming court hearing.
- (c) The learned Judge failed to give any or any sufficient consideration to Article 12(3)(b), Article 12(3)(h), Section 28A of the Police & Criminal Evidence Ordinance 2003 as amended and Section 93A(5) of the Criminal Procedure Ordinance 1975.
- (d) In particular, the learned Judge fell into error in purporting to apply a test of necessity in relation to the right under Article 12, rather than the necessity of imposing a bail condition.
- (e) The learned Judge fell into error in finding that charging the Respondent with a criminal offence made no difference to the consideration of his rights under Article 12 of the Constitution.

Ground 2

(2) No reasonable court, properly directing itself in law, could have reached the conclusion that the Chief Magistrate's bail condition and/or any other condition preventing his proximate departure from St. Helena breached the Respondent's Article 12 right of freedom of movement:

(a) The submissions pursuant to ground (1) relating to applying the incorrect legal test are repeated.

(b) It was plainly necessary in this case to impose the bail conditions ordered by the Chief Magistrate on 11th August and/or the police upon charging the Respondent. He was now charged with a serious criminal offence, he continually expressed a desire to leave St. Helena, had made no plans to return or maintain contact with the hospital or police, had committed a related offence of dishonesty and had no local ties, nor had identified funds with which to return.

The Applicant's submissions

8. The Applicant relied on Article 12(3)(b) and (3)(h) of the Constitution which provides that no breach of the right of free movement shall be found where the law provides for restrictions on movement, including the right to leave St Helena, for the purpose of ensuring that a person appears before a court for trial of a criminal offence. Article 12(3)(h) provides that there shall be no breach of Article 12 where the law provides for restrictions on the right to leave St Helena that are necessary in a democratic society in order to secure fulfilment of any obligations imposed upon a person by law.
9. Having been charged by the police with an offence, the police and the court have power to release a person on bail under section 84(1) and section 93A(5) of the Criminal Procedure Ordinance 1975. Under s93A(5) the court

has power to release a person on bail with any requirements that appear to the court to be necessary to secure that the person (a) surrenders to custody or (c) does not interfere with witnesses or otherwise obstructs the course of justice whether in relation to himself or herself or any other person. If those requirements are met, there can be no breach of Article 12 where the purpose of the conditions is to ensure the defendant appears for his criminal trial (Article 12(3)(c)) or where they are necessary to ensure fulfilment of his legal obligations (Article 12(3)(h)).

10. When the Chief Justice came to consider the matter, the Respondent was under an obligation to remain on St Helena to attend the next court hearing and his future trial. This is different to the position pre charge where in terms of s28A(1)(b)(i) the conditions of bail must not only be necessary but proportionate. However, once charged with an offence, a determination has been made as to sufficiency of evidence and the defendant is subject to the court's timetable, so that there is no need to specifically refer to proportionality of bail conditions.

11. The Respondent was clearly a flight risk, was charged with a serious offence and had previously committed an offence of dishonesty while subject to police investigation. It was therefore necessary to impose bail conditions to ensure his surrender to custody and non-interference with witnesses which included surrendering his passport, not to obtain or seek any travel documents, not to leave or attempt to leave St Helena and not to contact the complainant. The Chief Justice did not find an abuse of process and in any event it does not arise on the facts of this case.

12. In oral submission, counsel acknowledged that the Court must take into account the situation on St Helena and the circumstances that pertain, particularly the limited transport to and from the Island. It was open to a

Court to decide that such a bail condition prohibiting departure was unnecessary if there were strong reassurances that the Respondent would return or other arrangements in place. But no assurances had been given as to the return of the Respondent for trial. On the contrary, it was made plain that he intended to leave on the flight leaving the following morning. Within a decision as to whether the restriction was necessary in terms of the relevant legislation, the court would be bound to consider the proportionality of imposing the bail condition as part of that exercise. The Chief Justice had erred in failing to apply the appropriate tests and proportionality within the correct legal context. Insofar as the Chief Justice considered that the fact that the Respondent had been charged made no difference, he had erred.

The Respondent's submissions

13. The Respondent submitted that the circumstances of the case and in particular what must be considered necessary and proportionate in relation to the imposition of bail conditions which prevent a suspect or defendant from leaving the Island must be considered in the context of the unique location and circumstances of St Helena. Flights are infrequent and there are only a few passenger berths on limited occasions when the MV Helena visits. Anyone unable to leave on a flight or boat will wait weeks before the next opportunity arises. A skilled professional recruited from abroad will have little or no opportunity to obtain alternative employment on Island. The impact of bail conditions imposed on the Respondent in St Helena will therefore have greater impact than similar conditions imposed in England or Wales. The law must be interpreted accordingly.

14. It was submitted that immediately after the Court of Appeal hearing on 11 August the police requested the Respondent attend the police station to be charged. He attended at 7pm voluntarily. Without the decision to charge, the question of bail would not have been revisited. The Public Solicitor explained in oral submissions that she had only recently had disclosure of the complainant's statements. She submitted that the decision to charge was unlawful: there had been no evidential change of position since the first statement had been obtained from the complainant previously. There was no evidential basis to explain why the Respondent had not been charged earlier rather than at the eleventh hour. If the decision to charge was unlawful, there could be no lawful interference with a right. The Chief Justice in his ruling of 12 August 2021 appeared to acknowledge that there may be an abuse of process by the "conduct of this investigation and the last gasp charge" of the Respondent although he declined to make any ruling on whether there had been.

15. The Respondent has a right to freedom of movement under Article 12. It is an established principle of human rights jurisprudence that any interference with a human right must be proportionate. Reference was made to the following commentary from the UN Office of the High Commissioner of Human Rights CCPR General Comment No 27: Article 12 (Freedom of Movement) on the requirement for proportionality in relation to the freedom of movement enshrined in Article 12 of the International Covenant of Civil and Political Rights:

"13. In adopting laws providing for restrictions permitted by article 12, paragraph 3, States should always be guided by the principle that the restrictions must not impair the essence of the right (cf. article 5, paragraph 1); the relation between right and

restriction, between norm and exception, must not be reversed. The laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution.

14. Article 12, paragraph 3, clearly indicates that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.

15. The principle of proportionality has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law. States should ensure that any proceedings relating to the exercise or restriction of these rights are expeditious and that reasons for the application of restrictive measures are provided.”

16. The Respondent submitted that the concept of proportionality when applied to rights protected under Article 12 allows for a far wider consideration of issues than proportionality when considered purely in the context of the imposition of pre charge bail conditions. When considering proportionality in the context of an alleged interference with a human right the court is entitled to take account of the events which have transpired over the course of the whole investigation, and in particular any abuses.

17. The court is also entitled to consider the concept of proportionality taking into account rights arising under other provisions, for example Article 13 of

the constitution, the right to protection for private and family life. As a consequence of being required to remain in St Helena, the Respondent is prevented from joining his children resident abroad. Article 13(2) permits interference with the right to the extent that “nothing contained in or done under any law shall be held to breach this section to the extent that the law is necessary in a democratic society.” The word “proportionate” is not mentioned.

18. Interference that may be legitimate for law enforcement purposes, may become less so over the passage of time as the rights of the individual must be continually balanced against the rights of law enforcement authorities. The requirement that post charge bail conditions must be “necessary” does not preclude a consideration of whether they are also proportionate in the context of the Respondent’s rights under Articles 12 and 13. In oral submissions, the Public Solicitor accepted that proportionality is part of the necessity test under the legislation referred to by the Applicant.

19. Article 24 of the Constitution affords the Supreme Court considerable power and discretion in the enforcement of human rights under the constitution. The Supreme Court “may make such declarations and orders, issue such writs and give such directions as it considers appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of this Part.” This wide discretion is a reflection of the status of the human rights provisions as an overarching legal framework and backstop to ensure fairness and prevent abuse.

Decision

20. In our view there appears to be substantial agreement between the parties as to the legal framework within which this appeal should be decided. When the court was considering, post charge, whether to release the Respondent on bail and, if so, on what conditions, the court was required to apply the tests set out in section 93A(5) of the 1975 Ordinance and section 12 of the Schedule to the Constitution (referred to by parties as Article 12). A Court must also apply the presumption in favour of granting bail contained within Section 93B of the Ordinance. In terms of s93A(5), before releasing on bail on conditions, a court must be satisfied that the requirements of bail are necessary to secure various outcomes. These include that the person (a) surrenders to custody or (c) does not interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or herself or any other person. The test is different to that which pertains when police are considering whether to release a person on bail pre charge which is governed by section s28A of the Police and Criminal Evidence Ordinance 2003. The police under s28A(1)(b)(i) have power to release an arrested person on bail if the police officer is satisfied that the release of the person on bail is necessary and proportionate in all the circumstances, having regard, in particular, to any conditions of bail which would be imposed.

21. Section 12 of the Schedule to the Constitution of St Helena prohibits interference with a person's freedom of movement. That freedom of movement includes the right to leave St Helena. However section 12(3) expressly provides that some restrictions on that right are permissible. Section 12(3) provides:

“Nothing contained in or done under the authority of any law shall be held to breach this section to the extent that the law in question provides—

(c) **for the imposition of restrictions, by order of a court**, on the movement or residence within St Helena of any person or **on any person's right to leave St Helena** either in consequence of his or her having been found guilty of a criminal offence or **for the purpose of ensuring that he or she appears before a court at a later date for trial for a criminal offence** or for proceedings relating to his or her extradition or lawful removal from St Helena;

(h) **for the imposition of restrictions on the right of any person to leave St Helena that are necessary in a democratic society in order to secure the fulfilment of any obligations imposed on that person by law.** (emphasis added)

22. Unlike s28A, s93A and s12 do not refer expressly to proportionality. However, the parties to this appeal were agreed that when a court is considering questions of necessity of a condition and whether a condition will ensure a particular outcome, that exercise will inevitably include consideration of the proportionality of the bail condition. We agree with that analysis. When considering whether a bail condition is necessary to achieve a certain legislative outcome, a court is bound to consider the various arguments for and against particular conditions and whether the conditions are necessary to achieve that outcome. These arguments may well refer to the particular impact of the condition in the particular circumstances of St Helena including limited transport and employment opportunities. The court would potentially consider the impact of any prohibition on departure on the Respondent, the interference with his right to family life under s13 of the constitution, his inability to work on St Helena and to be with his family pending trial, as well as any assurances or proposed arrangements provided

by him that he will return for trial. The court would weigh in the balance the importance of ensuring prosecution of serious offences, in the proper administration of justice, the risk of other offences being committed by the Respondent and the significance of any flight risk or failing to appear. Arguments could lawfully be made to the court that it should bear in mind in reaching its decision, as the UN Commissioner comments, that restrictions on freedom must be the least restrictive amongst those that achieve the desired result and must be proportionate to the interests to be protected. Whilst in this way proportionality is relevant and part of addressing the question of the necessity of the conditions, it is important to note that the exercise is not one at large of considering the proportionality of requiring the Respondent to remain on Island. Proportionality must be considered within the proper legal context and applied to the question of whether the bail condition is necessary to achieve the outcome prescribed by the legislative provision.

23. The difficulty that we have with the decision of the Chief Justice is that he does not appear to have reviewed the decision of the Chief Magistrate within the correct legal context and has not applied proportionality within the framework of the legislative tests. The Chief Justice's reasoning for declaring the bail condition void is as follows:

"The Court of Appeal have not interfered with my finding that, having failed to meet the bail end date, having failed indeed to charge or otherwise Dr Bran even by this morning, any condition preventing Dr Bran from leaving St Helena was disproportionate. Can the disproportionality of that condition be rendered proportionate or fair, in Dr Bran's particular circumstances, by taking one statement and by deciding that that statement renders it proper to charge in

circumstances when this morning Mr Johnson quite clearly stated that there was insufficient evidence properly to charge Dr Bran. In my judgment the answer to that is categorically no. The statement taken ...seems only to go to the issue of consent.If it is indeed the case that this was the only element of the circumstances involving the complainant which required clarification pending charge then the investigation has proceeded in such a dilatory fashion that it is now, in my view, no longer proportionate to require Dr Bran to remain on St Helena pending the trial of this charge. If what I have been told is indeed the case then Dr Bran will, I am satisfied, have to remain on St Helena a disproportionate and unreasonable length of time before any trial is heard; and disproportionate and unreasonable to the extent, I am satisfied, that infringes his right to freedom of movement. It is necessary, in my view therefore, in the particular circumstances of this case, to override any requirement that Dr Bran be made subject to a condition of bail requiring him to remain on St Helena.”

24. It seems plain from this passage that the Chief Justice is asking whether the decision to charge has affected the proportionality of the decision to prohibit the Respondent from leaving the Island. However, in our view, that is not the correct legal test. The relevant question on review was whether the bail condition was lawfully imposed ie was it necessary to release the Respondent on bail with conditions prohibiting his departure from the Island, to secure his attendance at court for trial? In determining that question the court would require to take into account the various interests and the balancing exercise explained above. We recognise the Chief Justice was reviewing the Magistrate’s decision in the early hours of the morning and within moments of that decision having been made. He was in the difficult position of having

very limited time to review the Magistrate's decision. However, we consider that he fell into error by failing to apply the correct legal test as we have explained above. Nowhere does the Chief Justice address the necessity of the condition, nor the various arguments and balancing exercise which we consider is inevitably and properly part of such a decision. Since the Chief Justice has not adopted that approach, we therefore conclude that he has erred in law.

25. We would add that it is obvious from the Chief Justice's reasoning that he took a dim view of what he described as "the last gasp charging" of the Respondent. However, he did not make any ruling on whether there was any abuse of process and there is no appeal against any such finding before this Court. We have not been asked to consider nor have we reached any view as to whether the police could have charged earlier. Even on the assumption that the police could have done so, we do not understand how that in itself would make their decision to charge unlawful. There is, as far as we are aware, no legal obligation upon police to charge at the first possible opportunity. We do not therefore consider the timing of the charge or any alleged abuse of process to be of relevance to this appeal.

26. For completeness, we should also explain that we do not consider it appropriate for the Chief Justice to have made an order that any condition of bail purporting to prohibit departure from the Island is "void" or that "any attempt to prevent the Respondent leaving for a reason connected to the police investigation" is a breach of section 12. Although section 24 of the Constitution affords the Supreme Court a wide power to enforce or secure the provisions of the Constitution, s12 and s93A already provide for protection of the Respondent's rights before the courts. On a review of the Chief Magistrate's decision the Chief Justice ought to have confined himself

to deciding whether the appropriate legislative tests were met. We do not consider that the Chief Justice had the power to declare the condition void or to purport to make a ruling which restricted another court from ever considering the matter again.

27. Accordingly, we uphold the grounds of appeal and conclude that the Chief Justice erred in law in failing to apply the correct legal tests post charge. We quash parts 1 to 3 of the orders made by the Chief Justice on 12 August 2021 and remit to a court to consider the bail conditions anew at a subsequent hearing. We understand that a hearing is fixed for 7 October 2021.

28. We would once again like to record our sincere thanks to parties for their very helpful and full submissions and to Ms Williams for enabling this appeal to be heard so efficiently.