



Summary of Judgment

Tong Ying Kit v Secretary for Justice

CACV 293/2021; [2021] HKCA 912

Decision : **Applicant's appeal dismissed**
Date of Hearing : **15 June 2021**
Date of Judgment : **22 June 2021**

Background

1. The Applicant was committed for trial to the Court of First Instance ("CFI") on, *inter alia*, two counts of offences under the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region ("NSL"). After the indictment was preferred, the Secretary for Justice ("SJ") issued a Certificate pursuant to NSL 46(1) ("the Certificate") directing that the Applicant's criminal case be tried without a jury before a panel of three judges ("the Decision").
2. The Applicant applied to the CFI for leave to apply for judicial review to challenge the Decision on grounds that SJ allegedly failed to observe the principle of legality and procedural safeguards. The CFI refused leave and held, amongst other things, that (1) the Applicant did not have a constitutional right to jury trial; (2) the Decision was a prosecutorial decision, free from any interference under article 63 of the Basic Law ("BL") and thus could not be reviewed by the court on ordinary judicial review grounds; (3) there was no requirement to hear from or to inform the Applicant before issuing the Certificate; and (4) absent any allegation of bad faith or dishonesty, there was no basis for the court to interfere.
3. This is the Applicant's appeal to the Court of Appeal ("CA") against the refusal of leave.

Issues in Dispute

4. The Applicant's two main complaints are:
 - (1) the CFI erred in ruling that there was no constitutional right to a jury trial in the CFI; and
 - (2) the CFI erred in ruling that issuing a NSL 46(1) certificate was a prosecutorial



decision protected under BL 63 from interference.

5. The CA observed that the Applicant's complaint boils down to his assertion that he has a constitutional right to a jury trial under BL 86 and that the Decision had the effect of depriving him such a right, therefore engaging the principle of legality and procedural safeguards.

Department of Justice's Summary of the Court's rulings

(Full text of the judgment at

https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=136672&QS=%2B&TP=JU)

6. The CA pointed out that the Applicant did not mount a challenge against the constitutionality of NSL 46(1) and any such challenge would have been firmly rejected. He also accepted that his asserted right to a jury trial in the CFI was not absolute and may be abrogated by NSL 46(1). Moreover, he accepted that he could have a fair trial before the panel of three judges without a jury. He did not allege that SJ was motivated by bad faith, dishonesty or other ulterior motives in issuing the Certificate. (paragraphs 26 - 29)
7. Applying a purposive construction, the CA held that NSL 46(1) has to be examined in the light of the general context and purpose of the NSL as a whole. As a national law applied to the HKSAR, the NSL has a special constitutional status focusing on preventing and suppressing acts endangering national security. Also, NSL 46(1) has to be read together with NSL 4 and NSL 5 and BL 87 and the Hong Kong Bill of Rights ("BOR") articles 10 and 11 to ensure that the Applicant's constitutional right to a fair trial is not compromised. The prosecution also has a legitimate interest in maintaining the fairness of the trial. (paragraphs 37, 42)
8. Granted jury trial is the conventional mode of trial in the Court of First Instance, it should not be assumed to be the only means of achieving fairness in the criminal process. Neither BL 87 nor BOR 10 specifies trial by jury as an indispensable element of a fair trial in the determination of a criminal charge. When the personal safety of jurors and their family members is under threat and due administration of justice might be impaired, there is a real risk that the goal of a fair trial by jury will be put in peril. The only assured means for achieving a fair trial is a non-jury trial, one conducted by a panel of three judges as mandated by NSL 46(1). Such a mode of trial serves the prosecution's legitimate interest in maintaining a fair trial and safeguards the accused's constitutional right to a fair trial. (paragraph 43)



9. The CA further held that the decision-making process undertaken by SJ under NSL 46(1) may involve classified information such as State secrets, confidential intelligence concerning involvement of foreign factors, sensitive materials on risks of personal safety of jurors or their family members or threats to the due administration of justice. The information or materials are ordinarily of such a nature that it would not be in the public interest to disclose. Or for SJ to reveal to or discuss with the Applicant before trial. (paragraph 64)

10. NSL 42(1) directs that cases concerning national security offences are to be handled in a fair and timely manner, so as to effectively prevent, suppress and impose punishment for such offences. This direction for timely disposal strongly militates against the Applicant's contention that the issuing of the Certificate is amenable to challenge by conventional judicial review. It is because such a challenge will breed elaborate and protracted satellite proceedings, thereby frustrating the directive of NSL 42(1) by delaying if not derailing the criminal process. Also, NSL 46(1) contains no express provision for an accused to mount a conventional judicial review against the issue of a certificate. Allowing such a challenge by way of construction would defeat the purpose of NSL 42(1). (paragraphs 69, 70)

11. A decision by the SJ to issue a NSL 46(1) certificate is a prosecutorial decision protected from interference under BL 63. Under common law, a prosecutorial decision can only be reviewed on limited grounds under the rubric of dishonesty, bad faith or other exceptional circumstances. It is not open to challenge on conventional judicial review grounds based on the principle of legality and procedural safeguards as contended. (paragraphs 68, 73, 74)

12. The Applicant did not allege dishonesty and bad faith in the present case. He only relied on his asserted constitutional right to a jury trial in the CFI. However, that alone does not amount to exceptional circumstances for challenging the SJ's prosecutorial decision of issuing the Certificate. (paragraph 74)

Civil Division

Department of Justice

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