Summary of Judgment

Tong Ying Kit v Secretary for Justice
HCAL 473/2021; [2021] HKCFI 1397

Decision	**:**	**Leave for judicial review application dismissed**
Date of Hearing	**:**	**10 May 2021**
Date of Judgment	**:**	**20 May 2021**

Background

1. The Applicant was committed for trial to the Court of First Instance ("CFI") on 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"), namely "incitement to secession" and "terrorist activities".

2. After the indictment was preferred, in the exercise of the power conferred on her by NSL 46(1), on 5 February 2021 the Secretary for Justice ("SJ") issued a Certificate directing that the Applicant's criminal case be tried without a jury ("the Decision"). The certificate was issued on the grounds of (1) protection of personal safety of jurors and their family members; and/or that (2) if the trial was to be conducted with a jury, there was a real risk that the due administration of justice might be impaired. As a result, the criminal case was listed to be tried by a panel of three CFI judges sitting without a jury.

Issues in Dispute

3. The main issues in this rolled-up hearing of the Applicant's leave application were:

   (1) whether the Applicant had a right, constitutional or otherwise, to a trial by jury once SJ has preferred an indictment; ("Issue 1")

   (2) whether the Decision was the type of a prosecutorial decision falling within the ambit of article 63 of the Basic Law ("BL") and therefore free of any interference ("Issue 2"); and

   (3) whether the grounds relied upon by the Applicant (i.e. procedural impropriety, illegality and irrationality) were reasonably arguable ("Issue 3").

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 =135853&QS=%2B&TP=JU)

4. The CFI pointed out that the Applicant was not contending that there was a general right to a jury trial in the criminal justice system in Hong Kong. Also, the challenge had nothing to do with the fairness of the trial. Further, there was and could be no challenge to the constitutionality of NSL 46(1). The present application was not about merits of the Decision either. (paragraph 7)

5. The CFI referred to the relevant legal context existing before the enactment of NSL. First, jury trial was only available in the CFI. Second, before the enactment of the NSL, trial before a judge and a jury was the only mode of trial available in the CFI because of the procedural requirement of s.41(2) of the Criminal Procedure Ordinance ("CPO"), Cap. 221. Third, even after an indictment was preferred, in case SJ applied for a transfer, the Court in considering the application may take into account, among other things, the view of the accused, but the latter was not decisive. (paragraphs 13, 16)

6. As regards the position after the enactment of the NSL, the CFI observed, amongst other things, that there are now two possible ways to deal with criminal proceedings concerning offences endangering national security in the CFI, namely either by (1) the conventional mode of trial before a judge and a jury; or (2) the new mode of having a trial before a panel of three judges. By necessary implication, the legislative intention must be that the new mode can be used if and only if SJ genuinely believes that the grounds stated in the Certificate exist. In the absence of a certificate issued under NSL 46(1), the procedural requirements contained in the local legislations are to be followed. (paragraph 23)

Issue 1

7. The CFI held that the Applicant did not have any constitutional right to a jury trial because of the following: (paragraph 26)

   (a) The existence of such a right is inconsistent with the legislative scheme introduced well before the handover in 1997 which enables transfer of cases between different levels of courts and in particular s.65F of the CPO. First, it would be an anomaly to ascribe to an accused a right which he or she cannot waive. Second, the court in deciding whether to grant the application for transfer is concerned only with what the "interest of justice"

would require but an accused can have a fair trial with or without a jury. Third, an accused could be deprived of a jury trial by the exercise of the court's discretion.

(b) Before the enactment of the NSL, once SJ decided that a case shall be tried in the CFI it would inevitably result in a trial before a judge and a jury by virtue of s.41(2) of the CPO. However, the same is no longer true after the enactment of the NSL, which caters for two possible modes of trial in the CFI as regards criminal proceedings concerning offences endangering national security.

(c) Despite the high human right content of the NSL because of NSL 4 and NSL 5, there is a notable absence of any provisions in the NSL which suggests that SJ has a general duty to hear or at least to notify an accused before she can exercise her power under NSL 46(1). Also, NSL 46 stresses the mandatory nature of SJ's direction on the mode of trial. Further, the expressed grounds contained in NSL 46(1) are matters on which SJ would reasonably be expected not to engage in discussion with the accused before trial.

8. Alternatively, the CFI held that even if a constitutional right to a jury trial exists at all as contended by the Applicant, it would have been abrogated by the combined operation of NSL 46(1) and NSL 62 as a matter of necessary implication. Such abrogation is not incompatible with BL 86, given that (1) BL 86 does not entail preservation of all the elements of which the system consists; (2) the special status of the NSL as a national law enacted with a specific purpose of safeguarding national security; and (3) the unambiguous wording of NSL 46. (paragraph 28)

Issue 2

9. The CFI held that the Decision was the type of a prosecutorial decision falling within the ambit of BL 63 and therefore was free of any interference because the express grounds given in NSL 46(1) are those that it would neither be reasonable nor appropriate for SJ to seek an accused's views on them before trial. Moreover, it would be unwise to have a mini trial (before verdict) for the parties to argue whether the case would involve state secrets; whether there are foreign factors; whether there is any attempt to interfere with jury and so forth. (paragraph 31)

10. Prosecutorial independence of SJ should not be put on the same footing as an ordinary exercise of discretion by an administrator, and thus her prosecutorial decision could not be reviewed by the court based on ordinary judicial review

grounds. Instances where it would be appropriate for the court to interfere with a prosecutorial decision are rare, and in which case the evidence must be such that it points unquestionably to the desirability of doing so. (paragraph 35)

Issue 3

11. As regards the ground of procedural impropriety or unfairness, the CFI held that in the circumstances of the present case there was no requirement for SJ to hear from or to inform the Applicant before the Decision was made. (paragraphs 37 – 41)

12. As regards the ground of illegality, absent any allegation of "bad faith" or "dishonesty", the mere absence of any or any detail reasons given in the certificate was plainly insufficient to meet the very high evidential threshold for reviewing a prosecutorial decision. (paragraphs 43 , 44)

13. As for the challenge on *Wednesbury* unreasonableness, the CFI held that there was nothing inherently unreasonable in directing a trial by a panel of three judges sitting without a jury, when there was a perceived risk of the personal safety of jurors and their family members or that due administration of justice might be impaired. (paragraph 45)

14. Lastly, the CFI held that the Decision did not constitute a restriction of any of the Applicant's rights. The 4-step proportionality test was simply not engaged. (paragraph 46)

15. On costs, noting this was one of the first few NSL cases and there was a strong public interest element in the matters raised, the Court made an order nisi that there be no order as to costs. (paragraphs 49-51)

Civil Division
Department of Justice
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