19/6 N.Z.L.Reports X

M.272/84

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

656 cited in R v Boland [1986] 2 NZLR

THE QUEEN v ANDERSON

Hearing: 13 June 1984

Counsel: D L Stevens for Accused in Support
J O Upton for Crown to Oppose

Judgment: 14/6/84

JUDGMENT OF EICHELBAUM J

The accused has been committed for trial in the District Court on charges of theft and receiving. The charges concern four stolen cars. It is alleged that the identifying features have been removed and replaced by those of four different vehicles, which by reason of age or damage had reached the end of their lives. The informations charged the accused with theft or alternatively receiving in each instance. The Crown stated that the indictment, yet to be presented, may add a further alternative of theft by conversion. The evidence as a whole will need to be presented and followed with care because of the difficulty in keeping apart matters relating to different vehicles. However, while factually the case is complex, I would not regard it as extraordinarily so. I am sure it can be presented so as to be comprehended by a jury.

The application before me, made under s 28J of the District Courts Act 1947, is for transfer of the proceedings to the High Court. It has been advanced specifically on the ground that the accused wishes

to have the opportunity to apply for Judge alone trial, pursuant to s 361B of the Crimes Act 1961. In Boland v Laing A.417/82 Wellington Registry, Judgment 17 June 1983 unreported, Greig J held that the right of application conferred by that section was not available in cases committed for trial in the District Court. Neither side has questioned the correctness of that decision.

I have deliberately said that what the accused seeks is the opportunity to apply for Judge alone trial. He has pending an application for discharge under s 347 of the Crimes Act. If the outcome of that application should be to reduce the number of charges to an extent where, in the view of the accused's advisers, there would be no risk of confusion, such as they presently envisage would occur, the accused would or might be content with a jury trial.

When the right to apply for trial by Judge alone was enacted in 1979 (by the Crimes Amendment Act No 2 of that year) the only venue for jury trials was in the then Supreme Court. Accordingly, the new right thus conferred applied to all cases where jury trial otherwise would have followed, save only those exempted by ss(5) of s 361B, being the most serious offences, those punishable by death, life imprisonment, or imprisonment for 14 years or more. The accused was entitled to apply as of right within 28 days after committal, and thereafter by leave. The fact that he might originally have elected jury trial was no bar : clearly the legislature envisaged that he might reconsider his position after ascertaining the nature of the case against him at the preliminary hearing. The facility to seek Judge alone trial was so framed as to oblige the Court to accede to the request

unless of the view that in the interests of justice, the accused should be tried by jury. In other words the onus was cast on the prosecution to demonstrate that a jury trial was preferable. However, in 1980 there was legislation (which came into effect on 1 May 1981) transferring from the High Court to the District Court jury trials for a wide range of offences, including ones punishable with up to 10 years imprisonment. In the result, having regard to the decision in Boland v Laing, the right to apply for Judge alone trial after committal has been reduced to a narrow band of serious offences.

Now to consider the position of a person placed as is the present accused. His options are restricted. He may of course elect summary jurisdiction at the outset. But then he is deprived of what in a case of any complexity would be the advantage of a depositions hearing. Having opted for a jury, he could pursuant to s 66(6) of the Summary Proceedings Act 1957 withdraw his election, but only before committal. Thus compared with the accused committed to the High Court for trial (and compared with any accused, as the legislation originally stood in 1979) he is in a less advantageous position.

I first have to decide whether the ground advanced by the accused is a sufficient reason for a transfer. Section 28 J does not specify grounds : the order, which clearly is discretionary, may be made " . . if it appears to the Judge . . . that the accused person should be tried in the High Court". Counsel did not refer me to any authority on the section and in the time available, I have been able to discover only the unreported decision of Barker J in Sumich & ors v Police 1983 BCL para 936, to which I will return. The general intent of

the legislature, as evident in the 1980 amendments, is clear enough; jury trials involving other than the most serious criminal charges are normally to take place in the District Court. In that light my view of the significance of the word "should" in s 28J(2) - "should be tried in the High Court" - is that before acceding to an application for transfer, the Judge is enjoined to reach a firm conclusion that the interests of justice require the particular case to be removed to the High Court.

I have delayed delivery of judgment overnight so that I could obtain a copy of Barker J's decision. There, the background was similar to the point that the accused had originally elected trial by jury. However, after committal they had given notice of desire to seek Judge alone trial, and had applied concurrently for such mode of trial and transfer to the High Court. These applications were not opposed by the Crown, the facts being such that it was beyond argument that Judge alone trial was preferable. In the circumstances it was unnecessary for Barker J to consider the grounds on which an order for transfer might be made. Although the case can be regarded as a precedent for the present application, clearly it is of limited assistance to the applicant, given the absence of opposition to the orders sought. I accept however that given the right circumstances, the accused's desire for Judge alone trial may be the foundation of an application for transfer of the proceedings to the High Court.

It may be argued that the legislature did not intend an accused in the position of the present applicant to have the right to apply for Judge alone trial. Even if it was by accident that parliament, having con-

ferred such benefit on him in 1979, excluded him from it in 1980, that must (so the argument would have it) be deemed to be the intention of the legislature. But it may equally be said that in 1980 the legislature left the door open for the accused (albeit perhaps the back door) by enacting the provisions for transfer under which the present application is brought.

I am further of the opinion however that it is not sufficient that the applicant should seek Judge alone trial. There must be some sufficient basis for it. In putting it in that way I do not overlook that as already noted, s 361 places the onus on the prosecution of showing that the accused should be tried before a jury, see ss(4). What is presently under consideration is the application for transfer where the onus lies firmly on the applicant.

In the present case, not without hesitation, I have reached the conclusion that the applicant has sufficiently discharged that burden. It is true that he has not yet unequivocally stated that he wishes to seek Judge alone trial. However, that is because his s 347 application has not been disposed of and in the circumstances outlined to me by counsel, I do not think that should be held against him. If in the end the case is tried by jury, in this instance it will make little difference whether it is tried in the one Court or the other. If however the outcome of the s 347 application is that all or substantially all the charges remain, there are I think some solid grounds on which it can be argued that Judge alone trial is preferable. It would be inappropriate for me to put it higher than that, because in the event that a transfer is granted, the accused will have to make a further application, which may come before

another Judge; and the grant of an order will not be automatic. However, perusal of the depositions indicates that the case has some complexities, there being potential problems regarding separation of the evidence relating to the different vehicles, and the relevance of evidence on the charges relating to any one vehicle, to those concerning others.

Accordingly, in my opinion there is a substantial prospect that transfer of the proceedings will be in the interests of justice, and will confer on the accused an advantage of which he would otherwise be deprived.

It is unfortunate that the application has come before the Court at a stage when the fixture for the District Court trial is imminent; I appreciate that an order for transfer will cause inconvenience and this is regretted. I accept that the accused's advisers delayed the application in the expectation that the s 347 motion would be disposed of sooner. I do not think it is necessary to go into this aspect in greater detail : having concluded, as I have, that in other respects the application should succeed, the circumstances in regard to delay are not such as to lead me to refuse it. Accordingly I make an order for transfer as moved.

I wish to revert to the unsatisfactory state of the legislation, which I doubt represents the real intention. Although, as this case and Sumich show, it is still possible for an accused such as the present to take advantage of s 361B indirectly, there seems no reason why the legislation should not allow him to do so directly, that is, seek trial before a District Court

Judge without a jury. I cannot think of any ground why this jurisdiction should be confined to the High Court, since District Court Judges constantly conduct Judge alone trials anyway. Further, the cases where Judge alone trial will be preferable are likely to be determined by the nature and number of the charges, the evidence to be adduced, and the scope of the trial, rather than the gravity of the offences. The situation appears to merit further consideration by parliament.

Solicitors :

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