

**In the St. Helena Court of Appeal**

**Citation: SHCA 1/2021**

**Criminal**

**In the matter of an appeal by the Attorney General**

**Appellant**

**Attorney General**

**On behalf of the Chief of Police**

**-v-**

**Respondent**

**Sergio Villatoro Bran**

**Judgment on appeal against ruling**

**Heard on 25<sup>th</sup> June 2021**

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

1. This is the Judgment of the Court.
2. This an Appeal under S.265(6)(a) and (b) of the Criminal Procedure Ordinance 1975 against a determination by Ekins CJ on 24 June 2021, in the Supreme Court of St Helena concerning the arrest and subsequent bail without charge of the Respondent. We are satisfied that we have jurisdiction to hear this application and no issue is taken by the Respondent as to that. The Applicant in his grounds submits that the determination made by the Supreme Court was both wrong in law and not a decision which a reasonable court, properly directing itself in law, could have reached.

## **Factual Background**

3. The Respondent is an orthopaedic surgeon and a Guatemalan national. He has practised in Guatemala, the USA and on St Helena. His contract of employment at the St Helena Hospital [SHH] has now ended after five years' tenure. His original intention was to depart the island on 26 March 2021, but the commencement of a criminal investigation has meant that this has been delayed.

4. We do not have to descend too deeply into the allegations which the Respondent faces. We are fully aware that these matters are under investigation at present and there have as yet been no charges. On 25 March, the Respondent was arrested in relation to an offence of dishonesty to which he later pleaded Guilty and was sentenced at the Magistrates Court.

## **The first arrest**

5. On 6 May 2021, the Respondent was arrested on suspicion of causing GBH [S.18 OAPA 1861] to nine former patients at the SHH. The investigation leading to this arrest included requests by the St Helena police for the opinion of an independent Consultant Orthopaedic Surgeon in the UK to conduct a review of a sample of the hospital records of sixteen of the Respondent's patients at SHH. The independent review determined that fifteen of the sixteen patients were felt to have been suitable for alternative non-surgical treatment. Complaint had been received that the Respondent had been conducting unnecessary operations in a number of cases where appropriate non-invasive treatments were available. It was also alleged that during surgical procedures, the

Respondent had undertaken additional, more invasive procedures whilst patients were under general anaesthetic, well beyond the scope of the informed patient consent. It goes without saying that these are potentially serious matters.

6. Having been arrested, the Respondent was interviewed and gave “no comment” replies to all questions. He did, however, appraise the police of the fact that he had already been questioned by the Health Directorate as part of their internal disciplinary procedure and that all his answers were contained within that interview. As of 6 May 2021, the police had no access to that recording or information relating to the Health Directorate’s internal disciplinary procedure.

7. The Respondent was then released on bail. The relevant legislation is S. 31(5) of the Police and Criminal Evidence Ordinance 2003. The police imposed conditions, namely that the Respondent should:

- a) Return to the police station on 30 July 2021
- b) Surrender his passport
- c) Not to obtain, or make representation to obtain document which would assist in leaving Saint Helena
- d) Not to leave, or attempt to leave, Saint Helena.

8. An application was made on 7 May 2021 to the Saint Helena Magistrates’ Court for the removal of the above conditions pursuant to s.93A(7) Criminal Procedure Ordinance 1975. The Chief Magistrate ruled that no power existed in Saint Helena legislation to allow the police to impose pre-charge bail conditions. He was not impressed that the bail notice was silent as to which provision the

police had used to release the Respondent but he was arrested, interviewed and released on bail. This court took it that S.31(2) of the Police and Criminal Evidence Ordinance 2003 was the relevant section and that there was no power to impose bail conditions.

9. For the purposes of this Appeal, it is not in dispute between the parties that in May 2021 there was no power to release a suspect who had not been charged in criminal proceedings with bail conditions attached.

10. The legislation governing release before charge in St Helena is now contained in Part IV of the Police & Criminal Evidence Ordinance 2003 as amended by Ordinance 3 of 2021. These provisions came into force on 1 June 2021. In brief, the provisions permit the police to release suspects on bail who have not been charged.

11. By Virtue of Section 37(4), A person who at the expiry of 24 hours after the relevant time is in police detention and has not been charged must be released at that time either on bail or without bail. Section 37(5) states: “A person released under subsection (4) must not be re-arrested without a warrant for the offence for which he or she was previously arrested unless new evidence justifying a further arrest has come to light since his or her release.” (our emphasis).

12. Part IV of the Ordinance (as amended) now sets out the law which applies to persons who have been arrested (with or without warrant, or having surrendered themselves at a police station). At the heart of the amended legislation is Section 27A:

**Bail following arrest**

27A(1) A person who attends a police station pursuant to section 27 and is arrested but not charged with an offence may be treated as a person arrested in accordance with section 28 and may be released on bail in accordance with section 28A.

(2) A person released on bail in accordance with section 31(5), 33(2), 37(4), 38(9) is considered to be released on bail in accordance with section 28A(1)(b).

The relevant provisions of Section 28A are:

28A(1) A police officer may release a person arrested in accordance with section 28(1)—

(a) without bail; or

(b) on bail if—

(i) 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; and

(ii) a police officer of the rank of sergeant or above authorises the release on bail, having considered any representations made by the person.

(2) Unless subsection (1)(b) is satisfied, a police officer must release a person arrested in accordance with section 28(1) without bail.

By virtue of S. 28A(4), where a person is released on bail pursuant to subsection (1)(b)—  
the person must be required as a condition of bail to attend a police station.

13. During the course of argument, we gave counsel the opportunity to address us on our preliminary interpretation of this subsection. Having considered the papers, our preliminary view was that the police have no discretion in this matter: where the decision is reached by police not to charge a suspect but to release them with bail conditions then they must require the suspect to attend a police station as one of the conditions of bail.

14. This is entirely appropriate as a safeguard to the suspect because when a suspect is released in accordance with S.28A(4), the police must issue the person being released with a notice in writing which specifies—

- (a) the offence for which the person was arrested;
- (b) the ground on which the person was arrested;
- (c) whether the person is being released without bail or on bail; and
- (d) where the person is released on bail, that the person is required to attend a police station; and
  - (i) if applicable, the police station which the person is required to attend;
  - (ii) the time on the bail end date when the person is required to attend the police station.

This is contained within S.28B(1) and (2) of the Ordinance.

15. Section 28D(1)(a) makes it plain that a person is not required under subsection 28B(4) to attend a police station at a time which is after the bail end date in relation to the person. The 'bail end date' is defined within S.28C as follows:

Interpretation for section 28D and 28E

28C For the purpose of section 28D and 28E—

(a) "bail end date", in relation to a person, means the last day of a person's bail period;

(b) "bail period" means, subject to section 28D and 28E, the period of 28 days beginning with a person's bail start date; and

(c) "bail start date" means the day after the day on which the person was arrested for the offence in relation to which bail is granted under section 28A.

16. We have to express our surprise that this legislation is difficult to track when attempts are made at interpretation. Having done so, our considered view is that the effect of Part IV of the Ordinance is to ensure that there remains a presumption of release without bail conditions. However, where bail conditions are considered to be necessary and proportionate, then there must be a condition to return to the police station within 28 days of the day following that suspect's arrest.

17. Counsel were both content with this interpretation of the Ordinance. It was Mr Mullen's strong contention, however, that the arrest which the Court

should focus on was that on 6 May 2021. Because there was no power to attach any bail conditions on the Respondent's release on 7 May 2021, it was argued, there was no power to add conditions 'retrospectively' when the Respondent was released from his second period under arrest on 23 June 2021.

18. However we consider it clear, from the analysis of the provisions above, that, from 1 June 2021, the police in St Helena have the power to release a suspect who has not yet been charged with bail conditions. The rider is that one of these conditions must be that the suspect return to the police station within 28 days starting on the day after the arrest of the suspect.

19. The effect of the Chief Magistrate's Ruling on 7 May that the police had no power to impose pre-charge bail conditions was that the Respondent enjoyed release from arrest without any conditions of bail. His passport was duly returned to him. According to a timeline helpfully provided to the Court by the Public Solicitor, there was a flight from the Island scheduled for 15 May 2021 – we were told by Mr Mullen that the Respondent had intended to use a flight planned to leave on 12 May to depart the Island (and therefore the Jurisdiction).

### **The Civil Proceedings**

20. Events then took a further turn when the Respondent was served with a Civil Injunction on the evening of 13 May 2021. We rely on the Timeline and what we were told by counsel in the course of the Appeal hearing. We have seen no pleadings, evidence, documents or copies of any judgments or rulings in the matter. What is germane to this Appeal is that there had been a medical negligence claim by a patient ["P"] who had received treatment at SHH. P commenced proceedings against the Attorney General. P's complaint was that



the Respondent had failed to take an X-ray at some juncture during P's treatment at SHH. This we know and no more. Mr Mullen made it plain that the Respondent had 'co-operated in relation to this allegation'. He went on to tell us that those representing the Defendant in those civil proceedings had identified 'substantial errors' made by experts instructed by P and that there were moves being made to strike out those proceedings. We repeat that we know nothing of the substance or strength of P's case. It is common ground that P is not involved in the police investigation under which the Respondent has been arrested and bailed. The civil and potential criminal proceedings are separate and distinct from one another. Equally, P's claim was not, as far as we are aware, included in the internal investigation by Health Directorate to which we shall return in a moment.

21. We accept, if anything later turns on it, that the Respondent co-operated with the Defendant in the civil proceedings and observe that it would be astonishing if he had not.

22. The relevance of the Injunction is that its terms prevented the Respondent from leaving the Island. Hearings before the Chief Justice on 14 May and 14 June did not result in the Injunction being lifted or otherwise discharged. According to the Timeline, the Injunction was discharged on 21 June 2021. We anticipate that arrangements were thereafter made for the Respondent to leave the Island on 25 June.

### **The second arrest**

23. On 22 June, the Respondent was arrested. In between his release on 6 May, we were told by Mr Brown that considerable progress had been made in the investigation. Significantly, the police had access to the record of what the Respondent had said to the internal investigation by Health Directorate. Moreover, a team of officers had arrived from the UK on 27 May which – we were told – accelerated the process. This second arrest was on suspicion of causing grievous bodily harm to complainants separate and in addition to those whose complaints gave rise to the 6 May 2021 arrest. In contrast to the Respondent's 'no comment' replies in May, detailed answers were given over many hours of questioning. Mr Mullen quoted eight hours of interview at this juncture. His submission to us was that if there was evidence of criminal behaviour after this session, the Respondent ought to have been charged. What Mr Mullen clearly wished to make plain was that if there was no evidence now, there never would be and that this investigation was unlikely to meet the threshold for charge, let alone conviction. Such representations had also been made to the Attorney General in a letter dated 27 May 2021 from Ruth Barber of the Public Solicitor's Office. She requested "...a review of the criminal investigation, by a specialist practitioner as a matter of urgency so if the conclusion is that the criminal evidence is not sufficient to support a prosecution Dr Villatoro Bran has at least the possibility of leaving on the next flight".

24. The letter also contains this comment, upon which counsel for the Attorney General places some emphasis now:

Dr Villatoro Bran had made no secret of his plan to depart the island on the last two flights and had made all arrangements to do so *eg* advising

his family of his imminent return, sending goods home, cancelling contracts on the island and concluding matters with his employer since February; Dr Bran had fully co-operated from the earliest stage in respect of the peer review of his practice. It therefore came as something of a shock when the injunction was served upon him late on the evening of the 13th May 2021”.

25. On 22 June 2021, the Respondent was released from the police station. A ‘Bail Sheet’ (which we have seen) was prepared indicating that his release would be on bail because conditions appeared necessary to prevent the Respondent from failing to surrender. The Sheet indicated that it was believed that the Respondent would not answer bail if he was permitted to leave St Helena. There were three conditions:

- (a) Surrender passport
- (b) Not to obtain or make representation to obtain documentation which would assist in leaving Saint Helena
- (c) Not to leave or attempt to leave St Helena.

26. A ‘Surrender Date’ of 21 July 2021 was given. We apply our reasoning as set out at Paragraph 18 of this Judgment and conclude that this bail end date was a safeguard for the Respondent to prevent any investigation from becoming open ended whilst he remained subject to bail conditions. The Respondent refused to sign the sheet which was endorsed by Sgt Cooper at 18:50 hours.

27. The Respondent applied on 23 June 2021, pursuant to S.28H of the Police and Criminal Evidence Ordinance 2003, to vary those bail conditions. The Chief Magistrate focussed on the bail granted on 6 May and considered that it was:

“also relevant as his bail started more than 28 days ago, which is the maximum period anyone can be subject to pre-charge bail without it being extended by a senior officer. As S.27A(2) deemed Dr Villatoro to be released on bail pursuant to S.28(1)(b) more than 28 days has passed since he was initially released on bail and as such I need to consider if that bail can be extended”.

The Chief Magistrate also concluded the bail start date as provided by S.28C. He decided that this was 7 May with a ‘bail expiry date’ of 4 June 2021.

He said this:

“In the absence of transitional provisions, I need to consider if [The Respondent’s] release on bail was in fact lawful or whether the police had no power to release him on bail at all. It would seem to me wrong in law that he could retrospectively be deemed to have been released on bail pursuant to s.28A when that provision was not in force. As he was not released on bail pursuant to s.28A, although deemed to be so from 1st June 2021, the bail start date was not the 7th May 2021 but is 23rd June 2021. I find [The Respondent] is lawfully on bail.”

He then went on to consider what conditions should attach to the Respondent’s bail, having found that it was lawful to maintain bail conditions. The Chief

Magistrate was clearly not helped by the police as to the status of their investigation. He said:

“I have asked the Public Solicitor what the new evidence was which justified the arrest and it transpires that it is new statements, why that required an earlier arrest is not clear especially as the investigation is still ongoing and not complete. Unfortunately, no officer involved in the investigation initially attended court to assist. Officers must attend these types of hearings, not doing so it a discourtesy to the advocates involved who are required to ensure all the facts are available to the court

“[The Respondent] has complied with the requirement to seek a variation from the police of his bail conditions before making this application, this was refused. This investigation has been ongoing for 3 months now and [The Respondent] has been interviewed twice. I take into account that [The Respondent] has been on bail for 46 days. The primary evidence the police need is on the island and I have not been given a reason why the investigation has not been concluded by now. I understand his computers were seized yesterday to look at his search history, no explanation has been given for this delay. I have been provided with no information as to the likely end date of this investigation.

“I am left with no alternative but to find that the investigation has moved at a pace that is not consistent with such an allegation against a man who is from a different country, who has no means of support, who is stranded on an isolated island, whose mental health is fragile and whose family is

awaiting him in Guatemala. It may be that matters are now moving apace but they clearly did not start off that way”.

28. The Chief Magistrate then held that it was mandatory that anyone released on bail has as a condition of that bail a requirement to attend at a police station. He was therefore required to apply such a condition by virtue of S.28H(3)(a). He did so and imposed a condition that the Respondent attend at the Coleman House police station on 21st July 2021 at 10am.

29. Of course, with such a requirement in place, the logistics of leaving Saint Helena and the available flights and sailings in and out of Saint Helena mean that the Respondent cannot leave the island until after 21 July at the earliest. During the course of the Appeal, it was mooted that the next available flight was not until September.

### **The Decision of the Chief Justice - Discussion**

30. We were not asked to reach any conclusion as to the Chief Magistrate’s ruling because it is the subsequent Review conducted by the Chief Justice which is said to be wrong in law and it is this decision which is the subject of this Appeal. On reflection, however, we consider that it is worth reflecting on the structure of the Chief Magistrate’s reasoning. He focussed upon the arrest in May and the conditions imposed then. It is perhaps because of this focus that the Chief Justice subsequently placed emphasis on the second arrest, declaring it to be unlawful because of the re-arrest provision at S.28F of the Police and Criminal Evidence Ordinance 2003 as amended on 1 June 2021. Having given the matter consideration, our Judgment is that the Chief Magistrate erred in holding that the bail end date determined by reference to the 6 May arrest was decisive. It

may well be that the material before the Chief Magistrate was scant as to why there had been a further arrest on 22 June, but we are satisfied that it is the decision by the police to allow the Respondent to leave the police station on 22 June subject to the bail conditions set out on the Bail Sheet which ought to have been his sole focus.

31. The decision of the Chief Magistrate was referred for Review to the Chief Justice because of the practical consequences of it. In his written Judgment, the Chief Justice said this:

“If Mr Bran’s bail is subject to the condition imposed on 22<sup>nd</sup> June and he boards the flight tomorrow he renders it impossible for him to surrender to his bail in July, since there is no further flight into St Helena until September and therefore would be liable to arrest for breach of bail. At the time he was bailed in May that position could not arise. The question is whether Mr Bran is, in reality, subject to the bail regime that existed pre-June or whether his arrest/rearrest and subsequent ‘bail’ renders him subject to the new bail provisions”.

The Judge shared the conclusion of the Chief Magistrate that the Respondent’s conclusion that the initial bail period commenced on 7<sup>th</sup> May 2021.

He said:

“It is submitted by the Public Solicitor that on 1<sup>st</sup> June his bail became subject to the new bail regime and that his bail period would have expired

on 4<sup>th</sup> June. It would therefore have been open to the police to apply for an extension of his bail but they failed to do so”.

“The arrest and re-arrest on 22<sup>nd</sup> June 2021, as the Chief Magistrate found, clearly all formed part of the same investigation which had resulted in the original arrest on 7<sup>th</sup> May 2021. I accept the Public Solicitor’s submission that in this context it is the investigation which is pertinent, rather than whether arrests are made in respect of individual complainants whose identities are apparent from the outset. Otherwise, the protection afforded by PACE in respect of bail could simply be by-passed in the manner identified by the Public Solicitor. The Public Solicitor submits that having therefore failed to apply for an extension, the bail period had expired. Under Section 28F of the new provisions of PACE an arrest can be made without a warrant where new evidence has come to light or where an analysis has taken place which could not reasonably have been done before”.

Our emphasis.

For the sake of completeness, S.28F reads as follows:

#### Re-arrest

28F Nothing in section 28A or 28B prevents the re-arrest without a warrant of a person released under section 28A if, since the person’s release, new evidence has come to light or an examination or analysis of existing evidence has been made which could not reasonably have been made before the person’s release.



32. The Attorney General's contention before the Chief Justice (and which was repeated in written and oral submissions before us) was that with the fresh evidence and the need to search and seize property under Section 28F validated the arrest on 22<sup>nd</sup> June. The Chief Justice rejected that by concluding that the Respondent had not been released in May 'under Section 28A' because it was not then in force. The Chief Justice therefore concluded that the 22 June arrest was 'not valid' and that consequently any bail conditions attaching to the Respondent on release were of no effect.

The Judge went on:

"Even if I were wrong about that; even if Section 28F does apply; the submissions advanced by Mr Brown seem to me to be an entirely unsatisfactory attempt to invoke the entitlement to arrest/rearrest without a warrant. I agree with the Public Solicitor that the Court should be jealous to guard the protection afforded by Section 28F. It is not sufficient simply to assert the existence of new statements as fresh evidence. A new statement may provide no fresh evidence at all. Where then the entitlement to rely on Section 28F is challenged, the police must be careful to be able to demonstrate to the Court the precise nature of that evidence and the respects in which it is "fresh" evidence."

33. The Judge dealt with the civil injunction and indicated that he ought to have been informed that new evidence was available, justifying the Respondent's rearrest and therefore negating the need for the injunction he had

issued and could see no reason why the Respondent was only arrested on discharge of the injunction.

34. It appears to us very unfortunate that the Judge conflated the issues raised in the civil proceedings (where it appears he had been involved in at least three hearings) and the information now available to the police in support of potential further criminal charges. As we have indicated earlier in this Judgment, they are distinct and separate: the only similarity is that each set of litigation is concerned with allegations of malpractice (in the broader sense) by the Respondent at SHH. The Judge ought, in our view, to have focussed on the reason for the 21 June arrest. Whilst Section 28F on its terms does not prevent the re-arrest on a warrant of a person released under Section 28A, it is not and cannot be the only power of arrest available to the police.

35. In our judgment, to constitute a re-arrest, any step taken by the police must be in relation to the same charges as those for which the suspect was earlier arrested and subsequently re-arrested. If evidence came to light of offences committed against different persons (even of the same category), then arrest on suspicion of committing those offences (even of the same kind) could not constitute re-arrest because there has been no previous arrest on suspicion of committing that offence. This remains so even if the later arrest is part of the same investigation.

36. By Section 22(2) of the 2003 Ordinance as amended, if a police officer has reasonable grounds for suspecting that an offence has been committed, he or

she may arrest without a warrant anyone whom he or she has reasonable grounds to suspect of being guilty of it. Having heard submissions and read with care the Judgment of the Chief Justice, we are satisfied that he erred in deciding that the investigation was pertinent "...rather than whether arrests are made in respect of individual complainants whose identities are apparent from the outset". In our Judgment, nothing in the 2003 Ordinance prevents the police from arresting any suspect on suspicion of committing an offence against Z where they have previously arrested him for a separate offence against Y and had chosen to release him on bail. A suspect may have recourse to a Magistrates Court if he is advised that consequential arrests are an abuse of process or where conditions of bail are onerous, unnecessary or unworkable.

37. But this was not the issue here. Standing back from all of the facts as they have been presented to us in this Appeal, our conclusion is that there were two separate arrests and releases which bridged the coming into force of Part IV of the Ordinance. It was *ultra vires* of the police to add any conditions to the Respondent's bail on 6 May. Nothing occurred which would have changed that situation, so there is no question of there being any 'bail end date' after the Respondent's release in May.

38. Subsequently, and contrary to the submissions made to the Chief Justice on the Review of bail granted on 22 June, the police were entitled to arrest the Respondent on suspicion of committing other offences under Section 22(2). The power of 're-arrest' contained within S.28F could not apply in any event because

the Respondent had not been released under S.28A which was not in force on 6 May 2021.

## **Decision**

39. We therefore quash the decision of the Chief Justice of 24 June and hold that the arrest of the Respondent on 22 June was lawful. Accordingly, we rule that the Respondent had to be released on bail or without bail under S.28A. Our next step is to consider, having heard submissions for the Attorney General and detailed submissions on behalf of the Respondent, whether (and if so what) bail conditions ought to attach.

40. We are satisfied that:

- (a) There is an ongoing investigation into potentially serious and complex matters arising out of the Respondent's employment as a consultant at SHH.
- (b) He has expressed his desire to leave Saint Helena and has made no plans to return or to maintain contact with the SHH or the police. He has no ties whatsoever on Saint Helena and has shown no evidence of having funds with which to return later this year.
- (c) He is therefore a flight risk.
- (d) We conclude that there are substantial grounds for believing that if released on unconditional bail, he would fail to surrender.

- (e) We are satisfied that it is necessary and proportionate that the Respondent be released on bail on the three conditions as those contained on the Bail Sheet dated 22 June.
- (f) The requirement for the Respondent to surrender to Police Headquarters at 10am on 21 July 2021 remains in force for the reasons we have set out in this Judgment.
- (g) We are satisfied that the police obtained fresh evidence from 18 June onwards from new complainants and from the material provided by the Health Directorate. It was therefore appropriate to arrest him on 22 June to allow for prompt and effective investigation of the offences (Section 18 GBH) for which he had been arrested.
- (h) We accept the submission that the Attorney General is seeking an independent opinion from Leading Counsel as to prospects of conviction and that the letter of instruction and supporting material (medical records and reports) will be despatched to counsel within 14 days. We are told that a preliminary advice from counsel will be expected 14 days thereafter. A decision whether or not to charge can therefore be made before August.

41. All parties should focus on the bail end date (21 July 2021). This is a safeguard for all suspects released without charge. But in the case of this Respondent, away from his family, no longer in receipt of his salary from SHH and unable to obtain passage from Saint Helena until September, even if the decision was not to charge. We were given assurances that a decision could be

made by August 2021. If it is not, the Respondent's bail conditions may no longer be considered proportionate.

42. We are grateful to the parties for the focussed and helpful submissions which were made to us at a hearing of some urgency which had to be arranged between England, Scotland and Saint Helena at very short notice.