IN THE SUPREME COURT OF THE FALKLAND ISLANDS

(Criminal Appellate Jurisdiction)

Case No: SC/CRIM/3/05

BRIAN JOHN WILLIAMS

Appellant

and

THE CROWN

Respondent

In this application, I am asked to determine the mode of hearing of appeals by Brian John Williams against conviction and sentence imposed by the Senior Magistrate on 28th September 2005 for three offences under the Sexual Offences Act 2003.

For the purposes of this application, I am not concerned with the merits of those appeals.

Following directions given by a judge of this court, the Appellant and Respondent have both made written submissions as to the mode of hearing, and the Respondent has made a brief reply to that of the Appellant.

The Appellant, in a submission dated 9th December 2005, says thus.

There is an automatic right of appeal (that is, without leave) against a conviction by the Senior Magistrate, and that such appeal will take the form of a rehearing. The Appellant relies on S. 38(2) of the Administration of Justice Ordinance (AJO), which provides that:

> ... the Supreme Court shall have within the Falkland Islands all the power, jurisdiction and authority vested in the High Court of Justice and the Crown Court in England.

and that as a consequence of the inclusion of the reference to the Crown Court, it is argued that the appeal should take the form of a rehearing, as would be the case in an appeal from a Magistrates' Court to a Crown Court in England and Wales.

In support, the Appellant refers me to the provisions of s.19 of the AJO, setting out rights of appeal against decisions of the Summary Court, which is effectively similar to s.108 of the Magistrates' Courts Act 1982 (MCA), which has no application in the Falkland Islands. Although the Appellant makes no reference to it, I accept that s.19 is applied to the Senior Magistrate by reason of s.31 AJO.

Following that, it is submitted that as leave to appeal is not required under either s.108 MCA or s.19 AJO, the hearing should be by way of rehearing, where all matters may be at large, rather than the arguably more restrictive alternative.

I shall address these matters, and the more general submissions of the Appellant, below.

The Respondent, in its submissions of 1st and 14th December 2005, takes the contrary view. I am referred to the fact that s.19 AJO (and s.108 MCA) does not specify the form of such an appeal, and that the relevant provision in England is s.79(3) Supreme Court Act 1981, which preserve the customary practice (of appeal by rehearing) in the Crown Court. I am further referred to the Schedule to the Interpretation and General Clauses Ordinance whereby the words "Crown Court" in any imperial enactment, insofar as the context admits, be interpreted as "Magistrate's Court", but without similar interpretative provision to cause "Crown Court" to be read as "Supreme Court" in relation to s. 79(3) above. It is argued that the context could not permit the substitution of "Crown Court" by "Magistrate's Court" in the context of an appeal from the former.

The Respondent submits that Ss. 48 and 57 AJO are applicable. S. 48(2) is particularly relevant, and for convenience, I set it out in full here.

> So far as is convenient, and practicable, the practice and procedure of the Supreme Court in the exercise of its appellate jurisdiction shall be that of the Court of Appeal in England (disregarding or modifying any provisions relating to a multiplicity of judges.

S.57 sets out the powers of the Supreme Court on criminal appeal, including the power to exercise a discretion to hear additional evidence.

The above does not represent the entirety of the submissions, but I have referred to those parts which, in terms of the legislation, cause the parties to differ.

I will say at the outset that I consider the law to be unsatisfactory. This rather unhappy state of affairs arises, in my view, from a failure of those drafting the legislation over the years to have proper regard to the differences between the structure and powers of the courts in England and Wales and those in the Falkland Islands, compounded, perhaps by the similarity of the names "Magistrates' Court" (England and Wales) and the "Magistrate's Court" (Falkland Islands).

Although increasingly presided over by a District Judge, the English Magistrates' Court is historically a lay tribunal with limited powers. The Falkland Islands Magistrates' Court, if one were to draw a parallel, is more akin to a Crown Court but without trial by jury, and having unlimited sentencing powers.

Regrettably, the confusion of principle does not end there. In England, appeals from a Magistrates' Court may go to a Crown Court, without leave, or by way of case stated to the High Court, or by way of challenge through judicial review in the Administrative Court. In the Falkland Islands, all appeals and challenges, of whatever nature, go to the Supreme Court. Appeals in the ordinary sense, by way of case stated, and applications for judicial review or by way of constitutional challenge are all heard by the Supreme Court, which also has exclusive jurisdiction on indictment for a number of the most grave offences.

Thus, the Supreme Court may find itself exercising a jurisdiction similar to the Crown Court at first instance or appeal, or of the High Court in any one of a number of jurisdictions, or of its unique constitutional role. Regrettably, despite s.38(2) AJO set

out above, the legislation fails adequately to recognise this, or in some instances, to recognise it at all.

I may dismiss without undue consideration the submission of the Appellant that the provisions of the Schedule to the Interpretation and General Clauses Ordinance whereby the words "Crown Court" in any imperial enactment, insofar as the context admits, be interpreted as "Magistrate's Court", assist in determining the mode of hearing on appeal. This would, in my view, render the provision meaningless in the context of an appeal from the Magistrate's Court. Again, this is not assisted by s. 38(2).

Of rather more force is the Appellant's submission that, like the English Magistrates' Court, an appeal from the Magistrate's Court lies without leave – here to the Supreme Court. If I may paraphrase the Appellant's case as I understand it, if the Supreme Court's role is, like the Court of Appeal in England, to consider the safety of a conviction having regard principally to legal submissions, why is there no requirement for leave based upon an indication of those errors of law alleged against the lower court?

Against this may be set two particular provisions of the AJO.

S. 48(2), set out above, specifically applies what I might term the Court of Appeal procedure to the appellate role of the Supreme Court, save where it is either inconvenient or impracticable.

S.57(d) gives the Supreme Court a discretion to admit (and hence refuse to admit) "additional evidence".

Both of these provisions are inconsistent with a rehearing. I do however take the view that the procedural approach in s. 48(2) cannot be interpreted as imposing the substantive – and substantial – burden of requiring an application for leave to appeal as a prerequisite. If the legislature had wished to impose such condition, it was free so to do but it has not.

In my view, the form of notice of appeal issued by the Magistrate's Court is both unnecessary and misleading insofar as it requires grounds for appeal. Whilst this would no doubt be of assistance to the Chief Justice in exercising his function under s.58 (power to review) in the light of the lower courts' duties under s.54 AJO to give reasons, a simple letter saying nor more than "I wish to appeal" would seem to meet the minimum requirement under s. 19.

Were I to be of the opinion that the competing procedures were equally applicable, I would have no hesitation in finding that a rehearing is appropriate as being the more advantageous to the Appellant. I am, however, not satisfied that that is the position. Insofar as Falkland Islands legislation is specific, Ss.48(2) and 57(d) AJO unambiguously apply a Court of Appeal procedure. I cannot accept that the failure in s.19, when read with s.31, AJO to impose a requirement of leave can override that, in spite of the clear difficulties which may arise from there being no requirement to identify any alleged errors at first instance.

The application of imperial enactments to the Falkland Islands, either explicitly or by default, is subject to the overriding principle in s. 76 of the Interpretation and General Clauses Ordinance that, in essence, it shall be applied subject to the provisions of relevant Falkland Islands legislation. Had it been necessary for me to determine the

issue on this principle alone, I would have rejected the Appellant's submission concerning the parallel with s. 108 MCA and the English procedure of rehearing.

Where does that leave this court in the present case? From the singularly unhappy state of the law I find as follows.

First, leave to appeal is not required.
Second, the Appellant is not limited, in prosecuting his appeal, to the grounds set out in the notice of appeal.
Third, the Appellant may adduce additional evidence (including the calling of any witness whether or not having given evidence before the Senior Magistrate) only with the leave of the court.
Fourth, the procedure to be adopted shall be that of the English Court of Appeal
Fifth, the powers of the Supreme Court are as set out at Ss. 57 AJO and not at s.2 Criminal Appeal Act 1968 (expressly disapplied to the Falkland Islands).

Subject to any application to the contrary under s. 57 AJO, I direct that the evidence before the Senior Magistrate shall, to the extent it is required, be considered by the Supreme Court by way of transcript of such evidence, save that the evidence in chief of the complainant pursuant to a special measures direction by the Senior Magistrate be admissible by the videotape admitted in the lower court.

I will consider giving further directions immediately prior to the hearing of this appeal.

James Wood,
Chief Justice
21st December 2005