REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPLICATION NO. 180 OF 1980

JOHN BROWN SHILENJE.....APPLICANT

VERSUS

REPUBLIC.....DEFENDANT

JUDGMENT.

John Brown Shilenje moves the Court pursuant to section 81(1) (a) and (e) and section 81(3) of the Criminal Procedure Code to transfer the hearing of Criminal Case 1480 of 1980 (in which he is one of two persons charged with corruption) "from the Court of ... the Chief Magistrate to any other Court subordinate to the High Court which has jurisdiction".

The Criminal Procedure Code is silent as to the procedure to be followed where one only of two or more accused persons applies for a transfer under the section. For this reason, when the papers were put before, I directed the registry to notify counsel for the applicant's co-accused that the notice had been received (which was done). Counsel said that he did not wish to intervene but that he would see if he could arrange for his client to be represented at the hearing; but no one appeared.

The main grounds for the application, contained in the applicant's affidavit in support told the Chief Magistrate (whom henceforth I shall refer to simply as "the magistrate") that he did not oppose the application for his release on his own bond, the magistrate said, "You mean his own bond and at least one surety"; that the magistrate had been the Senior Resident Magistrate in one of the provinces in 1973 and 1974 when he (ie the applicant) "covered" it, as he puts it, together with another province and got to know him socially; that he (again the applicant) had conducted several prosecutions before the magistrate with whom he had, from time to time "agreed to disagree" on points of law and practice; and that on 14th July 1980 an advocate whom he wished to instruct to act for him, telephoned the magistrate and, after a discussion in a language which he did not understand, said that he could not undertake the defence because of his health.

The advocate has sworn to the contrary. He says that it is true that the applicant went to his home and discussed his case with him, but that:

> It is untrue that I spoke to [the magistrate] on [the] telephone or otherwise. I have never discussed the [applicant's] case with [him]. I assessed that the case was going to be a lengthy and worrisome case and that my health would not permit me to take it. I informed [the applicant] accordingly. I suffer from hypertension.

On the authority of such cases as *Re M S Patel's Application* (1913) 5 KLR 66 and *The Republic v Hashimu* [1968] EA 656 (a Tanganyika case), I am asked to say that the application should be granted if I am satisfied that a clear case has been made out that the applicant has a reasonable apprehension in his

mind that he will not have a fair and impartial trial before the magistrate; and, save that I would rather use my expression "a real apprehension, honestly held and reasonably based" for "a reasonable apprehension", I would not quarrel with that. But I am asked, also, on the authority of later English decisions such as *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577 and *Hannam v Bradford City Council* [1970] 2 All ER 690 to hold (if I understood counsel correctly) that the question falls (in the end) to be resolved on the basis that, if rightminded people would have a suspicion that a fair trial was not to be had, that is enough to require the application to be granted. I would like to go into the question a little more closely than that; and I derive much help from commentaries upon section 526 of the Indian Code of Criminal Procedure 1908 made by two eminent writers, both former judges, Sir H T Prinsep and Sir John Woodroffe, ie the former's *Commentary and Notes* (14th Edn) (1906) and the latter's *Criminal-Procedure in British India* (1926).

On page 646 of Prinsep we find:

> The High Court will always require some very strong grounds for transferring a case from one judicial officer to another, if it is stated that a fair and impartial inquiry or trial cannot be held by him, especially when the statement implies a personal censure on such officer.

and that I endorse entirely. It would be thoroughly unfair to such officers were it otherwise. At page 647 we have:

> What the Court has to consider is not merely the question whether there has been any real bias in the mind of the presiding judge against the accused, but also whether incidents have not happened which, though they may be susceptible of explanation and have happened without there being any real bias in the mind of the judge, are nevertheless such as are calculated to create in the mind of the accused a reasonable apprehension that he may not have a fair and impartial trial. It is not every apprehension of this sort which would be taken into consideration, but when it is of reasonable character, and notwithstanding that there was to be no real bias on the matter, the fact that incidents have taken place calculated to raise such reasonable apprehension ought to be a ground for ordering a transfer.

Again I agree; it is, as it were, the objective approach to the problem supplementing the subjective approach which I just previously set out.

Then we have:

> Whether such apprehension is reasonable must be determined with reference to the mind of the court rather than to the mind of the accused. The Court cannot accept as reasonable grounds what the judges know to be insufficient and unreasonable, simply because the litigants were foolish enough to entertain them. To do so would be to encourage a distrust in the integrity and independence of the courts which would amount to a serious evil.

which also must be so, or so I think. Then it is said:

> But although each of several grounds imputing bias may not be sufficient in itself for ordering the transfer of a case to another Court, they may taken together form reasonable grounds for the accused apprehending that he may not have a fair trial

which again, as I think, must be so. And, finally, on page 648 we have:

> It is the duty of the court to have regard to the importance of securing the confidence of the public generally, of every section of the community, in the fairness and impartiality of the trial that is to be held, and it is equally its duty to see that no undue regard is shown to the abnormal susceptibilities of any section of the public from an apprehension of ulterior consequences.

which I am prepared to accept; but this does not relieve the Court from resolving the question on the

evidence before it in the light of what the section under discussion provides, which is what, as I understood it, counsel for the respondent urged upon me.

On pages 612 and 613 of Woodroffe we have:

> ... This clause deals with the case in which the High Court is satisfied that a fair and impartial inquiry cannot in fact be had; but such cases are rare, for to move a case from one magistrate to another on grounds personal to him is tantamount to a severe censure of such officer and the very clearest grounds must exist before the High Court will interfere ... A more ordinary class of case is that in which, although the High Court is not itself of opinion that a fair and impartial inquiry cannot be had yet a party has reasonable grounds for the apprehension that he will not have fair trial which is another matter. It is not sufficient that justice is done; but it must also appear to have been done. The law in such a case has regard not so much to the motive which might be supposed to bias a judge as to susceptibilities of the litigant parties. One important object is to clear away everything which might engender suspicion or distrust of the tribunal and thus to promote the feeling of confidence in the administration of justice which is essential to social order and security ... The transfer of a case will therefore be granted not on the ground that the judicial officer is incapable of performing his duty, but simply to allay the apprehension of the applicant for transfer .... The question in such cases is not whether there is actual bias ... but whether there is reasonable ... ground for suspecting bias ... and whether incidents may not have happened which, though they might be susceptible of an explanation and may have happened without there being any real bias in the mind of the judge, are nevertheless such as are calculated to create in the mind of the accused reasonable apprehension that he may not have a fair and impartial trial ... The necessary condition, however, for the transfer in such a case is that the apprehension to justify a transfer must be reasonable, that is, the Court ought not to be guided by the impressions produced in his own mind as to the impartiality of the magistrate, but must look to the effect likely to be produced in the mind of the parties to the action of the magistrate ... Abstract reasonableness, however, ought not to be the standard ...

which, if not precisely the same as Prinsep, is in line with it.

Having said so much let me apply it to the facts of this case, but first let us see what section 81 of the Criminal Procedure Code (so far, that is, as it concerns us) says. It states that whenever it is made to appear to the High Court that a fair and impartial trial cannot be had in any criminal court subordinate to it, or that such an order is expedient for the ends of justice, it may order the transfer of a case from a subordinate court to another such criminal court of equal or superior jurisdiction.

Let us now go to the evidence, observing that counsel for the applicant's main thrust was in regard to the telephone call. That the magistrate thought that to release the applicant on his own bond was unacceptable to him reveals or suggests no bias. His was the duty to fix the amount of bail with due regard to the circumstances of the case, for that is what section 123(2) of the Criminal Procedure Code enjoins him to do. Corruption is a serious offence, and one can well understand a magistrate not being prepared, on what is before him, to release a person charged with it simply on his own bond. There is no complaint that the terms for bail which the magistrate set were excessive or oppressive; the applicant was released from custody, and the case was fixed for hearing before another magistrate, who later denied himself jurisdiction returning the case to the magistrate for re-allocation. It would not otherwise have been before him again. How can one hold on that evidence that there was bias or a fear of partiality or unfairness on the magistrate's part? As for the magistrate having exercised jurisdiction in territory covered by the applicant some six or seven years before as a result of which the two of them got to know each other socially, judicial officers inevitably meet State Counsel during if not also outside the actual performance of their duties and no doubt both meet all sorts of people socially; but that, of itself, does not mean that the one ought not to prosecute and the other would find it impossible to try fairly and impartially those whom they so meet. The fact that the applicant and the magistrate agreed from time to time to disagree on points of law and practice can, of itself, raise no spectre of apprehension either. Lawyers, as counsel pointed out, are constantly agreeing to disagree; and the fact that the two men did so may be thought to speak well rather than ill of their relationship. How can the fact that they did, support reasonable

apprehension of partiality or unfairness on anyone's part?

As for the allegation about the telephone call, it would have been a dangerous and rather foolish thing for the advocate to have done, and he denied that he made the call as soon as he learned of the allegation; but, in any event, it would be more dangerous yet if, simply because an accused person claims to have telephoned or that someone else has telephoned a magistrate for him that is enough to say that there should be a transfer. But then, on the evidence it has not been proved that the call was made; although it does not matter if it was, for the allegation is self-defeating. Let us assume that the telephone conversation took place as the applicant alleges. According to him, when it was finished he spoke to the advocate about it but:

> Despite my plea with him that may be he could ask the Court to accommodate him on such days that his illhealth rendered him unable to conduct my case ...

makes it clear, beyond all measure as I think, that the applicant had no apprehension of partiality or unfairness whatever on the magistrate's part; all he hoped was that the magistrate would be accommodating to the advocate so that the latter would act for him. I am constrained to add that I experience some slight surprise that the applicant's advisers did not see fit, as a matter of courtesy, if no more, first to get in touch with the advocate. Apart from all else, were he on their side, an affidavit from him would have been most useful to them.

The incidents relied on cannot be said to be calculated to create any reasonable apprehension in the applicant's or any right-thinking person's mind that a fair and impartial trial might not be had before the magistrate (it has certainly not been shown that he is in any way partial or unfair) whether one takes the incidents individually or collectively. Nor is there anything before me to make it appear that it is expedient for the ends of justice that an order for transfer ought to be made.

Application dismissed.

Dated and delivered at Nairobi this 4th September 1980.

E. TREVELYAN

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JUDGE