Summary

This is a short summary of amendments to the *Criminal Procedure Act 2009* (Vic) ('*CPA*') that allow some criminal trials to proceed without a jury and an assessment of case-law from other jurisdictions identifying the concerns and issues that arise in running such a trial.

It consists of the following sections:

- Legislation and procedure
- Adequacy of reasons
- Directions and warnings
- Judicial commentary

For information on the power to order a judge alone trial, see the College's Judge Alone Trial Applications.

Legislation and procedure

The new legislation gives a judge the power to make any decision which a jury could have made and it gives their decision the same effect as a jury's verdict.[1]

If the judge delivers a verdict of guilty, then the accused is found guilty at that moment.[2] If the judge finds the accused not guilty and there is admissible evidence that raises the question of mental impairment, the verdict must specify whether or not the judge found the accused not guilty because of mental impairment.[3]

A trial court must adjourn the trial if the Court of Appeal grants leave to appeal against a decision regarding trial by judge alone.[4]

A trial by judge alone commences when the accused pleads not guilty on arraignment before the trial judge.[5] Naturally, in the absence of a jury, the prosecutor's opening address, the accused's response, the accused's opening address (if giving evidence or calling witnesses), and closing addresses are presented to the trial judge.[6] And, logically, it also follows that the many provisions requiring a judge to discharge a jury, consider an impact upon a jury, or placing certain decisions before a jury do not apply in a judge alone trial.[7]

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[1] *Criminal Procedure Act 2009* (Vic) s 420F ('*CPA*'), as inserted by *Justice Legislation Amendment (Trial by Judge Alone and Other Matters) Act 2022* (Vic) s 3. See also *DPP (Vic) v Bui* [2020] VCC 1063, [7] ('*Bui*'); *DPP (Vic) v Wang* [2020] VSC 701, [7] ('*Wang*'); *DPP (Vic) v Tiba* [2020] VSC 717, [5] ('*Tiba*').
[2] *CPA* s 420X.
[3] Ibid s 420ZD(6).
[4] Ibid s 420L(1).
[5] Ibid s 420T(1). See also *Tiba* [5].
[6] *CPA* s 420U.
[7] See, eg, ibid ss 420U-420W, 420Z-420ZA, 420ZC(2)-(3).

In addition, several of the powers specifically reserved to a jury are similarly reserved to the judge in a judge alone trial. These include, but are not limited to, the power:

- to return a verdict to a statutory alternative offence;[8] and
- direct that a verdict of not guilty because of mental impairment be recorded when appropriate;[9]

Adequacy of reasons

A judgment in a judge alone trial must state the principles of law and the facts upon which the judge relied in reaching their verdict.[10]

The following principles regarding the adequacy of reasons in a judge alone trial judgment are well established:

- Reasons in a criminal trial by judge alone should at least be of the quality expected of their colleagues in the civil division.[11]
- The trial judge must do more than give a bare statement of the relevant principles of law and the findings of fact. The judge must expose the reasoning process which links the principles and findings.[12]
- The reasons must identify and record the elements of the offences in question, and which of those elements were in issue.[13]
- In a circumstantial evidence case, the judge must address any defence hypotheses consistent with innocence.[14]
- The reasons must resolve material disputed factual questions, address the parties' submissions and explain (albeit not necessarily at any length) the process of reasoning by which the judge arrived at the verdict.[15]
- Not every failure to resolve a dispute will render reasons inadequate. The adequacy of reasons depends on an assessment of the issues in the case, including the extent to which issues were relied on by counsel, bore upon the elements of the offence and were significant in the course of the trial.[16]

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[8] See ibid ss 420ZD(1)-(3), 420ZE(2); *Crimes Act 1958* (Vic) ss 6B(1)–(2), 49J(1), (5), (7), 77C, 88A, 93(2), 325(2), 422(1)-(2), 422A(1)-(1A), 426, 427(1)-(2), 428, 429, 435.
[9] *CPA* s 420ZD(4). See also *R v Munze* [2020] VSC 272, [22]-[27].
[10] *CPA* s 420G. See also *Wang* [7]; *Tiba* [5].
[11] *DL v The Queen* (2018) 356 ALR 197, [132] ('*DL*').
[12] *Fleming v The Queen* (1998) 197 CLR 250, 261-64 [28] ('*Fleming*').
[13] *AK v Western Australia* (2008) 232 CLR 438, [44] ('*AK*').
[14] *R v Becirovic* [2017] SASCFC 156, [271].
[15] *DL* [82] (Bell J dissenting).
[16] Ibid [32]-[33].

- Reasons must be adequate to show the parties and appeal court the basis on which the trial judge reached their verdict. Failure to do so may make it impossible for an appellate court to determine whether the verdict was based on an error of law or other error.[17]
- A failure to identify an applicable principle of law (such as a warning about potentially unreliable evidence) will, unless the judgment shows by implication that it was applied, be taken as a sign that the principle was not applied.[18]
- Exchanges with counsel during the course of addresses do not form part of the reasons. Even where a judge presents substantial reasons for rejecting an argument to counsel for comment during the course of addresses, the judge must address that argument in the formal reasons, if the argument is 'seriously put and … not entirely lacking in substance'.[19]

Directions and warnings

Section 4A of the *Jury Directions Act 2015* (Vic) ('*Jury Directions Act*') applies to a trial by judge alone[20] and states that a court's reasoning with respect to any matter covered by Parts 4–7 of that Act must:

- be consistent with how a jury would be directed; and
- not accept, rely on or adopt any statements or suggestions the *Jury Directions Act* prohibits trial judges from making, or any directions that it prohibits trial judges from giving.[21]

Despite some divergence,[22] it is generally accepted that directions on the following need to be given and included in the reasons for judgment.

1. *Presumption of innocence*: it must be made clear that the accused is presumed innocent unless and until guilt is proved on evidence presented to the court.[23]
2. *Standard of proof*: the guilt of an accused must be established beyond a reasonable doubt on each element of an offence charged. If the court is not satisfied to this standard the accused must be found not guilty.[24]

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[17] *R v Y* [2015] SASCFC 94, [39]; *Resource Pacific Pty Ltd v Wilkinson* [2013] NSWCA 33, [48]; *DL* 651 [81] (Bell J dissenting). See also *Fleming* 260 [22], citing *Pettitt v Dunkley* [1971] 1 NSWLR 376, 381–2, 385, 388.
[18] *Fleming* 263 [30].
[19] *AK* 444-45 [14]-[16].
[20] *CPA* s 420ZG. See also *Wang* [8].
[21] *Jury Directions Act 2015* (Vic) s 4A(2); *Bui* [8]-[9]; *Wang* [8].
[22] For example: in the ACT, there are general directions trial judges sitting alone must take into account and which should be expressed in their reasons. See *Nguyen v The Queen* (2012) 267 FLR 344, [62]; *R v DM* [2010] ACTSC 137; *R v Mulcahy* [2010] ACTSC 98. In South Australia, the Court of Criminal Appeal has said that it is not necessary for the court to detail every obvious and basic direction which might be given to a jury. See, eg, *Keyte* 75 [32]; *Douglass*; *AK*. In the first Victorian judge alone trial, Judge Gaynor directed herself: 'I must apply all directions of law to myself that would have been given to a jury in this case': *Bui* [10].
[23] *Bui* [10]; *Wang* [10]; *R v Whyms* [2012] ACTSC 7, [17] ('*Whyms*'); *R v Tennant* [2019] SASC 150, [10] ('*Tennant*'); *R v Finau* [2020] ACTSC 155, [7] ('*Finau*'); *Tiba* [6].
[24] *Bui* [11], [13]; *Wang* [10]; *Whyms* [16], [18]-[19]; *Tennant* [10]; *Finau* [7]-[8]; *Tiba* [6].

3. *Burden of proof*: the burden is entirely on the prosecution to establish guilt beyond a reasonable doubt. The defendant has no obligation to give evidence or disprove guilt.[25] Nor can their failure to do so be the subject of an adverse inference against them.[26]
4. *Evidence*:
    a. The verdict must be based on the evidence before the court and be free of partiality or prejudice.[27]
    b. The court must determine whether each witness is reliable and credible; whether their evidence can be relied upon, in whole or in part.[28]
    c. May be circumstantial in nature, and if so then care must be taken in assessing its reliability before drawing any conclusion. Moreover, any conclusion so drawn must be the only one that could have been reached beyond a reasonable doubt. If there is more than one conclusion that could be drawn, and any are inconsistent with the accused's guilt or are consistent with their innocence, then the prosecution has not carried its burden.[29]
    d. A court must have a very good reason not to accept undisputed expert evidence; this would include cases where the facts underlying the opinion are not present, the process of reasoning leading to the opinion is unsound, or a factor that casts doubt on the validity of the opinion.[30]
    e. If co-accused are being tried together then each charge and its evidence must be considered separately. A court must not reason as if the verdict it reaches in one case therefore applies to the other.[31]
    f. If witnesses give evidence via audio-visual link, the court should bear in mind that it is more difficult to conduct a cross-examination of them via that medium than if they were present in court.[32]

Judicial commentary

In, Justice Lucy McCallum, 'Judge Alone Trials: A NSW Judge's Reflections' (Webinar, Judicial College of Victoria, 13 May 2020), her Honour discussed her experiences presiding over judge alone trials and made the following observations:

1. Formality — it is important to maintain the same atmosphere in court as if a jury were present. Relaxing the normal sense of decorum may lead to a laxness in the performance of proper procedure. The importance of this may be doubled in cases that proceed electronically as the institutional authority of the court will need to be conveyed to distant participants.
2. Publicity — the media reporting, particularly in electronic trials, will be intensive and tend to emphasise the salacious. For that reason, care should be taken with the release of exhibits and

[25] *Bui* [12]-[13]; *Wang* [10]; *Whyms* [14]; *Tennant* [10]; *Finau* [7]; *Tiba* [6], [108].
[26] *Bui* [93]-[96]; *Wang* [14]; *Whyms* [14]-[15]; *Finau* [15]; *Tiba* [108].
[27] *Bui* [14], [96]; *Whyms* [13], [21]; *Finau* [9];*Tiba* [7].
[28] *Bui* [15]; *Wang* [12]; *Whyms* [20]; *Finau* [10].
[29] *Bui* [105]-[110], [154]-[164]; *Wang* [20]; *Whyms* [22]-[23].
[30] *Wang* [15].
[31] *Bui* [16]; *Finau* [6].
[32] *Tiba* [8].

it might be worth considering having the media enter into an undertaking regarding the materials released.

3. Judgment writing — start from the beginning with the very first witness and ruling. Being disciplined from the outset will allow a judicial officer to create the chronological bare bones of a judgment and serve as a memory prompt. Be certain to state enough to demonstrate a knowledge of the principles that apply. Try to carve out time after trial to go "on verdict" and take a few days to prepare the reasons for judgment, this should be prioritised and a judicial officer should not proceed directly to the next case.
4. Addressing counsel should be done with care during their final address. It should be done respectfully, fairly, openly and without arguing about the submission being put.
5. It is important to be mindful of the heavy burden that being both the judge and the jury will entail, reach out to colleagues for support.