

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 considerations that are relevant in determining whether to grant an application for such a trial.

It consists of the following sections:

1. Legislation
2. Precedents
3. Consent
4. Interests of justice
5. Legislative indicators
6. Timing

LEGISLATION

New provisions have recently been added to the CPA, that for the first time, and for a brief six-month period,¹ allow a Victorian court to make an order directing that certain criminal trials be held before a judge alone without a jury.

A trial by judge alone may be ordered, on one or more charges, at any time during the trial, if:

- each charge is for a Victorian offence;² and
- each accused has consented to making the order; and
- the court is satisfied that each accused has obtained legal advice on whether to give consent, including advice on the effect of a judge alone trial order being made; and
- the court considers that it is in the interest of justice to make the order.³

Once these 'essential preconditions...are met, the Court's discretion to make an order for trial by judge alone is enlivened'.⁴

The court may make a judge alone trial order on its own motion or on the motion of the accused or the defence.⁵ In determining whether to make a judge alone trial order the court must consider the submissions of the prosecution, but its consent is not required for the order to be made.⁶

¹ *Criminal Procedure Act 2009* (Vic) s 420ZN ('CPA').

² There can be no such trial for Commonwealth offences tried on indictment. *DPP (Vic) v Truong* [2020] VCC 806, [24] ('*Truong*').

³ CPA s 420D(1). See also *DPP (Vic) v Combo* [2020] VCC 726, [39] ('*Combo*'); *Truong* [24].

⁴ *Combo* [41]; *Truong* [25].

⁵ CPA s 420D(2).

⁶ *Ibid* ss 420D(3)–(4); *Combo* [40].

PRECEDENTS

Although the Victorian legislation is new, the ACT, South Australia, New South Wales, Queensland, and Western Australia have similar provisions allowing for trial by judge alone.⁷ They have been in place for varying periods of time and have been subject to consideration by the courts of those jurisdictions. These authorities, and the different Acts, help identify the considerations likely to be relevant to a Victorian court in deciding whether to grant an application for judge alone trial.⁸

CONSENT

It is important to note at the outset that with the exception of the ACT, the legislation in each jurisdiction requires the accused to consent before a judge alone trial may be ordered.⁹ Recent decisions from the ACT Supreme Court are therefore not of any precedential value when considering whether to order a judge alone trial in the absence of the accused's consent.¹⁰ That is not permissible under the Victorian legislation.¹¹ But these decisions may be significant in deciding whether ordering a judge alone trial is in the interests of justice during the extraordinary times in which the courts must now operate.¹²

INTERESTS OF JUSTICE

A court's jurisdiction to order trial by judge alone is not enlivened unless it is affirmatively satisfied that it is "in the interests of justice" to do so.¹³ This applies irrespective of whether the parties have agreed to the making of an order for a judge alone trial, it remains for the court to determine if it is in the interests of justice to do so.¹⁴ That phrase has broad connotations and includes both the interests of the accused and the public.¹⁵ The public interest is concerned both with the integrity and proper functioning of the criminal justice

⁷ See, eg, *Supreme Court Act 1933* (ACT) ss 68B–68C ('ACT Act'); *Juries Act 1927* (SA) s 7 ('SA Act'); *Criminal Procedure Act 1986* (NSW) ss 132–133, 365 ('NSW Act'); *Criminal Code Act 1899* (Qld) ss 614–615E ('Qld Act'); *Criminal Procedure Act 2004* (WA) ss 117–120 ('WA Act').

⁸ *Combo* [42]–[44].

⁹ Cf ACT Act s 68BA; *CPA* s 420D(1)(b); SA Act s 7(1); NSW Act ss 132(3), 132A(2)(a), 365(2)(a); Qld Act ss 614(1), 615(2); WA Act ss 118(1), (4).

¹⁰ See, eg, *R v UD* [2020] ACTSC 88; *R v UD (No 2)* [2020] ACTSC 90 ('*UD (No 2)*'); *R v Coleman* [2020] ACTSC 97.

¹¹ However, this is slightly confusing as the *CPA* ostensibly allows a court to order a judge alone trial on its own motion: at 420D(2)(1)(a), but it cannot do so without the permission of the accused: at 420D(1)(b).

¹² See, eg, *R v BD (No 1)* [2020] NSWDC 150 ('*BD*').

¹³ ACT Act s 65BA(3)(b); *CPA* ss 420D(1)(d), 420D(3)–(4); NSW Act ss 132(4), 365(2)(b); Qld Act ss 615(1)–(2); WA Act s 118(4); *Marotta v Western Australia* [2018] WASC 141, [14] ('*Marotta*').

¹⁴ *Combo* [8]; *Truong* [6].

¹⁵ *R v Simmons (No 4)* [2015] NSWSC 259, [54] ('*Simmons*'); *Combo* [48].

system within the courts, and with ensuring that the accused receives a fair trial according to law.¹⁶

Accordingly, what is in the interests of justice should not be narrowly defined and will vary from case to case. The courts have discussed a number of factors in considering where the interests of justice lie in a given case. Unfortunately, general statements of principle are few – some courts have found certain factors indicative of the interest, where others have been less convinced and no single factor itself is dispositive.¹⁷ With those caveats noted, the considerations most frequently discussed include:

- The subjective views of the accused. Do they believe they will receive a fair trial or do they think a jury will be unable to set aside prejudice for some reason? However, there must be a real and substantial doubt whether the accused will receive a fair trial before a jury, not just a remote concern, and some evidence must be adduced.¹⁸ There is no presumption in favour of a trial by jury, but some of jurisdictions have found the applicant for a judge alone trial bears the onus of proof.¹⁹ However, there is no such burden on an applicant in Victoria.²⁰
- The legislative obligation imposed on the judge to provide reasons for their decision.²¹
- The length of the trial and specifically, whether one of great length will prove burdensome to jurors or risk their being discharged without reaching a verdict.²²
- Is the prosecution case based on circumstantial evidence?²³ It is an open question whether a judge alone or a jury is the better trier of fact.²⁴

¹⁶ *Western Australia v Edwards* [2018] WASC 419, [9] ('*Edwards*'); *UD* [12].

¹⁷ *Western Australia v Raney* [2011] WASC 326, [11], [18] ('*Raney*'); *Marotta* [16]; *Combo* [48]–[49]; *Truong* [28].

¹⁸ *Arthurs v Western Australia* [2007] WASC 182, [79]–[80] ('*Arthurs*'); *Raney* [26], [35]; *R v Belghar* [2012] NSWCCA 86, [99]–[102] ('*Belghar*'); *R v Stanley* [2013] NSWCCA 124, [42] ('*Stanley*'); *Simmons* [60], [113]; *R v Quami (No 14)* [2016] NSWSC 274, [22]–[23] ('*Quami*'); *R v Homann* [2018] NSWSC 198, [33] ('*Homann*'); *Marotta* [15], [17]; *Edwards* [9].

¹⁹ *Raney* [17]; *Belghar* [15], [96]; *Stanley* [42]; *R v Gittany* [2013] NSWSC 1503, [8]–[9] ('*Gittany*'); *Simmons* [55]–[57], [108]; *Quami* [20]; *R v Adams (No 2)* [2016] NSWSC 1359, [33]–[34] ('*Adams*'); *R v Spiteri-Ahern* [2017] NSWSC 1275, [28], [67] ('*Spiteri-Ahern*'); *Homann* [10]. But see *BD* [3]; *R v Swain* [2020] NSWDC 198, [15] ('*Swain*') (questioning whether this onus has been dispensed with by emergency legislation during the COVID-19 pandemic).

²⁰ *Combo* [45]–[46]; *Truong* [26].

²¹ *Arthurs* [75]–[76], [89]–[92]; *Belghar* [112]–[113]; *Simmons* [70]; *Quami* [28]; *R v Droudis (No 13)* [2016] NSWSC 1350, [91]–[94] ('*Droudis*'); *Adams* [38]; *Homann* [26]; *Marotta* [18].

²² *Raney* [37]; *Belghar* [110]–[111]; *Simmons* [67]–[69]; *Quami* [24]–[25]; *Edwards* [22]–[25]; *Marotta* [19]. Limits are also imposed by legislation in this regard. See, eg, Qld Act s 615(4)(a); WA Act s 118(5)(a).

²³ *Marotta* [20].

²⁴ *Quami* [38]–[42].

- The nature of the evidence to be submitted at trial. For example, is it of a disturbing and graphic nature, or is it intricate, expert and disputed? Will it be difficult to apply in complicated factual situations? Does it involve uncharged acts and/or other purported criminal conduct, or does it overlap and intertwine between co-accused?²⁵
 - By virtue of training and experience, judges are deemed more capable of putting aside prejudicial material and determining a matter on its merits.²⁶ However, this does not automatically call for a judge alone trial. A significant question is whether safeguards can be put in place, typically by means of jury directions, to mitigate any possible prejudice.²⁷
 - Complex evidence in trials, particularly where there are disputes between experts may favour a trial by judge alone in some circumstances,²⁸ however juries may also be assumed to understand complex evidence.²⁹
 - Jurors are also presumed to follow directions they are given by the court,³⁰ but there may be exceptions where the evidence is so abhorrent that prejudice becomes a certainty.³¹ It is a question of degree and turns on an analysis of the nature and extent of the prejudicial material, and the manner it will be introduced at trial.³²
- The nature and extent of any pre-trial publicity and whether it can be ameliorated by detailed warnings to an empanelled jury,³³ and/or the passage of time between publication and trial.³⁴
- Whether the mental capacity of the accused is at issue.³⁵

²⁵ *Simmons* [71]–[72]; *Quami* [26]–[27], [29]–[30], [88]–[98]; *Adams* [37], [46]–[58]; *Spiteri–Ahern* [68]–[73]; *Homann* [24]; *Marotta* [21], [35]; *Edwards* [26]–[30].

²⁶ *Droudis* [83]–[91]; *Truong* [38].

²⁷ *Belghar* [106]–[108]; *Quami* [43]–[49].

²⁸ *DPP (NSW) v Farrugia* [2017] NSWCCA 197, [11].

²⁹ *Gittany*, [20]; *Adams*, [43]; *Quami* [29]–[30].

³⁰ *Simmons* [86], [114].

³¹ *Belghar* [55]–[58].

³² *Simmons* [88].

³³ *Quami* [26]–[27], [61]–[87]; *Edwards* [12]–[21]; *Marotta* [22]–[24].

³⁴ *R v McNeil* [2015] NSWSC 357, [72]–[77] (*McNeil*). See also *R v Obeid* [2015] NSWSC 897.

³⁵ *Marotta* [25]–[28].

- The impecuniosity of the accused and the possibility of them being left unrepresented.³⁶
- The credibility of Crown witnesses may be a factor weighing in favour of a trial by jury,³⁷ but may be considered a ‘neutral’ consideration.³⁸
- The fact the accused has been advised to forego the protections normally afforded by a jury trial,³⁹ which legal advice is required in Victoria and New South Wales⁴⁰ but is not in the ACT or Queensland.⁴¹

Recently, courts have stated that determining what is in the interests of justice requires consideration of the COVID-19 pandemic and the situation prevailing within the community.⁴² The New South Wales District Court has said it is fairly plain that the provisions enacted by emergency legislation in that state were passed in order to enable a court to more easily make an order for a judge alone trial, and that existing provisions for this process are subordinate to the emergency provisions so long as they are in force.⁴³ Additional considerations in determining where the interests of justice lie now include the fact that jury trials cannot occur during the pandemic, and the court’s ability to order a trial on its own motion, which is a new oversight power it has been given in order to ensure that justice continues to be administered.⁴⁴

There is an assumption in the emergency legislation that the business of the courts should continue during the emergency period:⁴⁵

In these extraordinary times, it is incumbent that the judges of this court attend to whatever work is able to be done. That includes noting the clear intention of Parliament...ordering more trials be conducted by judge alone.⁴⁶

Given the COVID-19 pandemic, the interests of justice must incorporate prejudice to an accused from delay and the ability of the courts to continue working.⁴⁷ If it is in the interests of justice that trials continue during the pandemic, then they must do so within the constraints

³⁶ *Gittany* [41]–[44]; *Adams* [36].

³⁷ *McNeil*, [102]–[104].

³⁸ *Qaumi*, [38]–[39]; *Simmons*, [73]–[82]; *Redman v R* [2015] NSWCCA 110 at [14]–[15].

³⁹ *Belghar* [99]; *Stanley* [42]; *Simmons* [60]; *Adams* [39]; *R v Johnson* [2020] NSWDC 153, [22] (*‘Johnson’*); *Combo* [65]; *Truong* [35], [45].

⁴⁰ *CPA* s 420D(1)(c); NSW Act ss 132(6), 365(2)(c).

⁴¹ Qld Act s 615(3).

⁴² *BD* [3]; *Combo* [54].

⁴³ *BD* [17]–[18]; *Johnson* [9]; *Swain* [24].

⁴⁴ *R v MPW* [2020] NSWDC 170, [4]–[6], [9].

⁴⁵ *UD (No 2)* [18]; *Combo* [54] (*‘albeit in a modified way’*).

⁴⁶ *BD* [40]; *Johnson* [3], [7]; *Swain* [24].

⁴⁷ *Johnson* [19]–[22]; *Combo* [55]–[62]; *Truong* [32]–[33], [42]–[43].

it imposes and if that requires judge alone trials, then those trials must be ordered, subject to unique factors in a given case and the ability of the accused to have a fair trial.⁴⁸

LEGISLATIVE INDICATORS

Some legislation identifies areas where a jury trial may be preferred.⁴⁹ Such as in cases that involve a factual issue that requires the application of objective community standards such as negligence, reasonableness, indecency, obscenity, or dangerousness.⁵⁰

These examples are not exhaustive,⁵¹ and neither does the possibility of a factual dispute mean a judge alone trial may not be ordered. It merely enlivens the court's discretion to refuse the order. The question again turns on where the interests of justice lie as considered in the context of the particular case before the court.⁵²

Moreover, it is disputed as to whether a question about the accused's intention raises a factual issue that requires an application of objective community standards.⁵³

TIMING

Although not present in the Victorian legislation, the timing requirements found elsewhere are instructive in two respects.⁵⁴ First, they exist to avoid the appearance (or reality) of judge shopping by negating the possibility of the judge hearing the application also being the trial judge. Second, for this same reason, an application for a judge alone trial should be made before other pre-trial issues are considered.⁵⁵

⁴⁸ *UD (No 2)* [30]. See also *CFK v The Queen* [2020] QDC 92, [7]; *RTM v The Queen* [2020] QDC 93, [6].

⁴⁹ This is because 'assessment of objective community standards is best undertaken by a group of members of the community' and is a factor pointing in favour of a jury trial. *Homann* [36]–[37]. See also *Stanley* [4]; *R v Obeid* [2015] NSWSC 897.

⁵⁰ NSW Act s 132(5); Qld Act s 615(5). See also *Combo* [63]–[64].

⁵¹ *Raney* [12]; *McNeil* [35].

⁵² *McNeil* [35]–[37]; *Quami* [32]; *Edwards* [10].

⁵³ *Simmons* [63]–[65], [109]; *Quami* [34]–[37]; *Adams* [35].

⁵⁴ See ACT Act s 68B(1)(c); NSW Act s 132A(1); Qld Act ss 614(2)–(3); WA Act s 118(2).

⁵⁵ *Simmons* [19]–[41]. See also *Arthurs* [51]–[52]; *McNeil* [7]–[11].