

# Judge Alone Trials

*ss132-133 Criminal Procedure Act (NSW) 1986*

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The right to trial by a jury of one's peers is a foundation of the English Common Law that dates back to the Magna Carta in 1215. The Australian Constitution guarantees trial by jury for Commonwealth offences.<sup>1</sup> However, statute law in NSW allows trial by judge alone in certain circumstances. This article aims to assist practitioners appearing in the District and Supreme Courts of NSW.

## Criminal Procedure Act

Section 132 provides that the Accused can apply for a 'trial by judge order' on the condition that they have had the benefit of legal advice.<sup>2</sup> All Co-Accused must join in the application and it must cover all offences proceeded with in the trial.<sup>3</sup> The application should be made not less than 28 days before the trial date subject to leave.<sup>4</sup> This is to avoid the appearance of judge shopping.

The court must make the order if the prosecutor agrees.<sup>5</sup> If the prosecutor disagrees, the court may still make the order in two circumstances:

1. If it considers that it is in the interest of justice to do so,<sup>6</sup> or
2. There is a substantial risk that jurors are likely to be threatened, bribed or influenced and risk cannot reasonably be mitigated by other means.<sup>7</sup>

## The Interests of Justice Test

The considerations for the Interests of Justice test were set out by Hamill J in *R v Simmons; R v Moore (No 4)* [2015] NSWSC 259 at [54] and following:

- There is no presumption in favour of trial by jury at [54],<sup>8</sup>
- There is no right to a trial by judge alone<sup>9</sup> but the accused's election is to be considered<sup>10</sup> at [58],
- Community standards and intention at [61],
- Efficiency and the length of the trial at [67],
- The duty of a judge to provide reasons at [70],
- Complex expert evidence at [71],
- Credibility issues at [73],
- Prejudicial material at [83].

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<sup>1</sup> s80 Commonwealth of Australian Constitution Act (63 & 64 Vict. c. 12)

<sup>2</sup> s132(6) Criminal Procedure Act (NSW) 1986

<sup>3</sup> s132A(2) Criminal Procedure Act (NSW) 1986

<sup>4</sup> s132A(1) Criminal Procedure Act (NSW) 1986

<sup>5</sup> s132(2) Criminal Procedure Act (NSW) 1986

<sup>6</sup> s132(4) Criminal Procedure Act (NSW) 1986

<sup>7</sup> s132(7)(a) & (b) Criminal Procedure Act (NSW) 1986

<sup>8</sup> *R v Belghar* [2012] NSWCCA 86 at [96] per McClellan CJ

<sup>9</sup> *R v Stanley* [2013] NSWCCA 124

<sup>10</sup> *R v Belghar* [2012] NSWCCA 86 at [99] per McClellan CJ

# Community Standards

The most important of these considerations is community standards and intention. This consideration is enshrined in section 132(5) which provides:

*. . . the court may refuse to make an order if it considers that the trial will involve a factual issue that requires the application of objective community standards, including (but not limited to) an issue of reasonableness, negligence, indecency, obscenity or dangerousness.*

In which case the Accused would have to persuade the court that this consideration is outweighed by:

The unfair prejudice of:

- The revolting nature of the allegation (eg child sex abuse),
- The unfairly prejudicial nature of the evidence (photographs of mutilated bodies),
- The difficulty for the jury to understand complex expert evidence (either because of its nature or it's volume), and
- Any pre-trial media publicity which may have affected the jury pool

And the benefit of:

- Shortening the length of the trial, and
- The advantage of transparency inherent in the requirement that a Judge give reasons for the verdict.<sup>11</sup>

## Credibility

There is an issue as to whether credibility issues favour a jury trial. Hamill J found at [82] that it was a neutral matter:

*I allow for the possibility that there are cases where such an approach may be correct. However, for the most part, the fact that a trial involves issues of credibility is a neutral matter when it comes to determining whether it is in the interests of justice to make an order for trial by judge alone. As was stressed in R v Belghar and Coates v Western Australia, each mode of trial has its advantages and disadvantages, strengths and weaknesses. While a jury has the advantage of being able to discuss the issues and the requirement for unanimity provides strength to its decision, a judge has the training and experience of making difficult decisions on question of credibility, putting aside matters of emotion, on an almost daily basis.*

In addition, the Court of Criminal Appeal has held that it was an error of law to reject an application for a judge alone trial on the basis of an assumption that a jury was a superior tribunal of fact in a word against word case.<sup>12</sup>

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<sup>11</sup> R v Belghar [2012] NSWCCA 86 at [112] per McClellan CJ

<sup>12</sup> Redman v Regina [2015] NSWCCA at [17]

# Submissions

It should be clear from the forgoing that there is no hard and fast rule and every application will turn on the facts of the particular case.

I'm available every day if you have any interesting issues.

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