Submission
No 6

INQUIRY INTO JUDGE ALONE TRIALS UNDER S. 132 OF THE CRIMINAL PROCEDURE ACT 1986

Organisation: NSW Public Defenders Office

Name: Mr Mark Ierace SC

Position: Senior Public Defender

Date received: 28/06/2010

PUBLIC DEFENDERS

28 June 2010

The Honourable Christine Robertson MLC,
Committee Chair,
NSW Legislative Council Standing Committee on Law and Justice,
NSW Parliament,
SYDNEY NSW 2000

Dear Ms Robertson,

Re: Inquiry into Judge Alone Trials

I refer to your letter dated 20 May 2010 in which you invited a submission in relation to your Committee's current inquiry into "Judge alone" trials. On behalf of the Public Defenders, I make the following submission. In essence, I am in agreement with the Committee's proposed model, with one qualification, concerning point 6.

Background

It has been the experience of counsel for the defence over many years that when consent is sought of the DPP for trial by judge alone, it has rarely been forthcoming. When the section was first introduced, applications by the Defence for trial by judge alone often resulted in agreement between the parties that a particular trial was suitable. There was a marked change of DPP policy in the early 1990's, after which it became increasingly clear to Defence counsel that there was little point in seeking agreement, unless the case was exceptional. For this reason, the frequency with which applications for trial by judge alone are presently sought by the Defence from the DPP is of little assistance in understanding whether it is a procedure that the Defence would prefer to use more often. In my view, a legislative amendment that permitted the Court to override a DPP refusal of consent would lead to a significant increase in applications by the Defence.

Problems with the Proposed Model

Point 6: The risk of jury tampering

"Jury tampering" constitutes a direct challenge to the impartiality that lies at the heart of the jury system. It is trite to observe that the reason that the right to trial by jury for a

serious offence is a fundamental cornerstone of our justice system is that it is a demonstrable guarantee that the verdict has been arrived at impartially, and that it is based on a broad and common-sense evaluation of the evidence by persons with a range of life experiences. Where there are well-founded concerns of jury tampering by or at the accused's direction, he or she may reasonably be considered to have forfeited their right to trial by jury by their own attack on the jury's independence. Usually, however, the risk (or fact of) jury tampering cannot be attributed to the accused, although the effect of it may be in his or her interest. However, it is not inconceivable that there may be occasions when jury tampering is undertaken by those interested in a conviction in the misguided interests of securing a successful prosecution.

I am unaware of any solid data as to whether the incidence of jury tampering has increased in recent years, and if so, whether there is any reasonable basis for concern that court orders have been unable to overcome the anticipated threat. Nevertheless, it may be appropriate for there to be a legislative provision for trial by judge alone in circumstances where, for whatever reason, court orders were thought to be unable to meet the threat. I refer to two recently enacted common law examples of such legislation.

The New Zealand *Crimes Act 1961* provides that the Court may proceed by judge alone where it is satisfied that: "*there are reasonable grounds to believe (a) that intimidation of any person or persons who may be selected as a juror or jurors has occurred, is occurring, or may occur, and (b) that the effects of intimidation can be avoided effectively only be making (such) an order ...*" (s.361E).

In the United Kingdom, the *Criminal Justice Act 2003* provides that the prosecution may make an application for a trial without a jury where: *"there is evidence of a real and present danger that jury tampering would take place"* and also: *"notwithstanding any steps (including the provision of police protection) which might reasonably be taken to prevent jury tampering, the likelihood that it would take place would be so substantial as to make it necessary in the interests of justice for the trial to be conducted without a jury."*(s.44) A provision in the same Act also permits a trial judge who is at a point of discharging a jury because he or she is satisfied that jury tampering has occurred, to continue the trial without the jury; ie, as a trial by judge alone, subject to certain considerations of fairness to the accused (s.46).

Both of these provisions provide that resort to trial by judge alone in circumstances of suspected jury tampering is only to apply where (1) there is more than an opportunity, motive or suspicion of jury tampering, and (2) where all other means available to the Court of thwarting any such attempt are deemed to be incapable of removing that real risk.

I have personal experience of prosecuting a trial in which there were reasonable grounds to anticipate jury tampering, which was remedied by certain orders made by the trial judge, that were tested in the CCA; *R v Warren Richards and Roy Bijkerk* [1999] NSWCCA 114. Although it was an egregious instance of anticipated jury tampering, the orders were adequate to overcome the concerns in that case. Shortly stated, the orders

were made on a re-trial, where a number of earlier trials had aborted in circumstances, with hindsight, suggesting jury-tampering. The trial immediately preceding the trial which was the subject of the orders aborted when the jury, having retired after some six weeks of evidence to consider their verdict, were approached as they left the court complex for lunch by a woman wearing a disguise. She handed each juror an envelope containing material highly prejudicial to one of the two co-accused, with the inevitable effect of the jury having to be discharged. Federal police had anticipated there would be such an attempt and had undertaken surveillance of the jury, but nevertheless were too late to intervene to stop the tampering. On the re-trial, orders were made by the trial judge, in response to an application by the Prosecution, for the Sheriff to provide transport to and from the Court complex for each juror during the trial, and for the jury to be sequestered for so long as they took to consider their verdict. There were no further incidents, and in due course the accused were convicted.

This case demonstrates that even where concerted attempts to tamper with a jury are anticipated, court orders can overcome that threat. Accordingly, I submit that point 6 be re-drafted along the lines of the counterpart legislative provision in either the New Zealand *Crimes Act, 1961* or the UK *Criminal Justice Act 2003*. My preference is for the latter as to this aspect.

It is also appropriate to consider an amendment that permits a jury trial to *continue* as a trial by the judge alone without the accused's consent, where the jury is to be discharged because of jury tampering, although this is not as straightforward as an order made before the trial's commencement. The UK legislation has such a provision. I do not necessarily support this aspect, since careful consideration would need to be given to issues of perceived bias, given the obvious difficulties with the same judge continuing to verdict, where a view may have been formed as to where responsibility for the tampering lay. The UK provision sets out a protocol that the trial judge must follow, before a trial by judge alone could proceed. In this regard it would be helpful to research any application of the UK legislation that has permitted judge alone trials in such circumstances. Again, given that court orders are likely to overcome such threats and the complex difficulties of maintaining the appearance of the absence of bias, it may be preferable to not pursue this option.

Response to an Anticipated Argument to Vary the Model

I note that in both Western Australia and Queensland the consent of the accused is required in order for a trial to be by judge alone. I submit that this should remain the case in this state, as well.

I understand that the NSW DPP has recently submitted to the Attorney General that in some circumstances it should be open to the trial judge to override the accused's opposition to a trial by judge alone, where the Prosecution seeks this course. Accordingly, I suppose that a similar submission may be made to the Committee. These observations are made in anticipation of an argument that may be put to vary the model in this way, in certain respects.

Where Jurors may be Traumatised

One such circumstance that has been advanced by the DPP is where (presumably the trial judge is so satisfied, on the balance of probabilities) jurors of ordinary fortitude could be "traumatised".

Some of the evidence in many, if not most, trials for murder causes distress to jurors and other participants in the trial process, such as witnesses; probably more than in any other category of case. Co-incidentally, this is the category where accused persons are most interested in a trial by judge alone, but where it is not readily available pursuant to DPP policy or guidelines ("the guidelines"). The guidelines state that "ordinarily" the defences to murder of provocation and substantial impairment are excluded. As well, the guidelines mitigate against trial by judge alone where the evidence is circumstantial, which tends to exclude many, if not most, murder cases where the issue is whether the accused caused the deceased's death. Indeed, it is so rare for murder trials to be agreed by the DPP as suitable for trial by judge alone, that routinely the defence does not waste time seeking consent.

Point 8 of the model permits the Court to refuse an order where a fact in issue involved "reasonableness", which is relevant to the defence of self-defence, as well. However, whereas the guidelines exclude such trials, the Committee's model retains a discretion for the Court to permit them.

For those trials with highly distressing evidence where the accused wishes to exercise his or her right to trial by jury, the Courts have at their disposal a range of measures to assist. There are sometimes objective signs of extreme distress or trauma (such as jurors becoming teary or agitated) observable to others in the courtroom. Often during such testing evidence, the trial judge directs the jury that they may take a break when they feel the need to, or simply requires the jury to take short breaks. When such evidence is anticipated in advance of the empanelling of the jury, the trial judge may inform the panel of this, and advise that an application to be excused will be sympathetically considered, if a member does not feel up to the task. Similar observations may be made about the current practice of judges in manslaughter and serious assault trials in the District Court, and trials of charges involving sexual assault, particularly of children.

Common between these categories of cases that typically involve distressing evidence is that they concern charges with maximum penalties at or towards the top of the range; life, or 25 years imprisonment. Where the interests of the accused in this sense are most at stake, the right to trial by jury is the more deserving of retention. If, however, an accused person freely chooses to waive that right following legal advice, this principle is not disrespected.

Where the Trial is Lengthy or Concerns Evidence of a Complex Nature

It may be suggested to the Committee that the right of the accused to trial by jury should be overridden where the anticipated evidence is of such a lengthy and complex technical nature that it is suggested a lay jury could not be expected to comprehend it adequately for their task.

Although lengthy trials of complex technical evidence can be challenging to jurors (and also judges and trial counsel), the jury system has demonstrated a capacity to overcome such obstacles. The recent Commonwealth so-called "terrorism" prosecution at Parramatta involved lengthy and complex evidence, on a scale that might reasonably be regarded as extreme; there is not likely to be a state trial that would be as complex or technically challenging as that trial. It was completed successfully, partly because counsel deployed appropriate technology and aids such as charts to present evidence, and because additional jurors were sworn in at the outset, so that by the trial's completion, there remained a full complement of 12 jurors, although three had been discharged for various reasons along the way.

I do not think that in NSW we need to remove the option of trial by jury from the accused against his or her consent, in order to deal with lengthy trials of a complex nature. The amendments to the Jury Act permitting the empanelling of additional jurors in long trials, the recent legislative amendments that pick up the recommendations of the NSW Law Reform Commission Report No 117 ("Jury Selection"), which will enhance the education level of jury panels, and perhaps most importantly the "case management" amendments to the Criminal Procedure Act, will all have a positive impact on the ability of the jury system to even better deal with long, complex trials. There is also likely to be fewer occasions of technical forensic evidence being unnecessarily challenged by defence counsel, consequent to the current review of "briefing out" procedures by NSW Legal Aid.

No Judge Alone Order Where Trial Judge's Identity is Publicly Known in Advance

It may be argued that a provision is needed that will have the effect of excluding the option of trial by judge alone where the identity of the judge is publicly known in advance; that is, in order to avoid the Defence engaging in "judge shopping", by engineering adjournments until the trial comes before a judge regarded as "pro-Defence", then seeking a trial by judge alone before that judge.

Such a provision would have the effect of precluding applications for judge alone orders in regional and some metropolitan District Courts, since the identity of the rostered judge is usually publicly known well in advance. At present there are trials by judge alone in these courts where the judge's identity is known in advance, where both parties are in agreement, but this practice could not continue with such a legislative provision. The flexibility of the option of trial by judge alone is particularly effective in country sittings, since the judge may adjourn the trial from time to time to interpose short matters, and even adjourn the trial from one week to the next to facilitate the availability of witnesses

travelling from other towns, or elsewhere. I am unaware of any professional or public criticism of this current practice.

As to whether there should be trials by judge alone where there is disagreement between the parties, but the court is satisfied it is in "the interests of justice" to have such a trial, I wonder whether fore-knowledge of the judge's identity would reasonably leave open an allegation of "judge-shopping", since the applicant, be it the DPP or accused, does not have the option of an alternative judge; matters are set down for a particular sitting in a particular single-judge court, so that there is no possibility of choosing between one judge or another, but rather, a particular judge for such a trial, or a jury trial before the same judge. Again, the absence of criticism of the current practice would suggest that amending it only so as to enable the judge to overrule the DPP in appropriate circumstances would not attract professional or public criticism.

The policy imperatives for including such courts are compelling. It is desirable that there be equality of options for the parties, regardless of whether they appear in a country or city court. Longer (jury) trials have a greater adverse impact on the resources of country courts that city multiple-court complexes, for example in the marshalling of jury panels and the inability to quickly "fill the list" if a long trial or special sitting collapses. Further, many busy courts such as Lismore (where there is a permanent judge), Gosford, and perhaps Newcastle, Wollongong and Penrith as well, may be precluded by such a prerequisite.

Further, there are proper concerns of the defence and prosecution that are peculiar to regional and country courts that may be remedied by the application of the model without exception. If a serious offence attracts considerable local publicity that is adverse to the accused or a key prosecution witness, or either is otherwise well-known locally in an unfavourable light, so that at least some members of the jury panel drawn from that same area would inevitably have this adverse local knowledge, the availability of this option may be especially attractive to the relevant party, and more convenient to the court and witnesses for both sides than the current alternative, of seeking a change in venue. The DPP guidelines presently recognise that such concerns may be a proper basis for trial by judge alone.[1]

Issues peculiar to country and metropolitan courts aside, I have some further policy concerns with a prohibition where the judge's identity is known in advance. Occasionally there are trials heard in the District and Supreme Courts where the jury has been discharged (because it cannot agree, or for other reasons at a stage when much of the evidence has been given), and the prosecution and defence jointly submit that the trial judge (who has already heard all the evidence) immediately proceed to a re-trial on the basis of judge alone. The transcript and exhibits from the earlier trial are then tendered, and with a minimum of additional court time the trial proceeds to finality with the judge rendering a verdict (see for example Regina v Ham [2009] NSWSC 296). This practice

---

[1] "Cases which may be better suited to trial by judge alone include cases where: ... there is a real and substantial risk that directions by the trial judge or other measures will not be sufficient to overcome prejudice arising from pre-trial publicity or other cause".

saves significant judicial and other resources, but would necessarily be prohibited if advance public knowledge of the judge's identity precluded an application.

It would also be incompatible with the current practice in the Supreme Court of the arraignments judge indicating the name of the trial judge when fixing the trial date so as to facilitate pre-trial applications, unless the question was resolved at that early stage, which is unlikely in many instances.

If I can be of any further assistance, please do not hesitate to contact me.

Yours faithfully,

Mark Ierace SC
Senior Public Defender