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Do the challenges presented by Covid-19 call for further debate on Trial by Judge Alone?

By Adrian Kayne

Until about a fortnight ago, the criminal justice system of England and Wales seemed to be emerging cautiously from the grip of a Covid-19 pandemic which put many lives on hold for far too long and contributed to an exponential growth in an already troubling backlog of Crown Court trials, many of which involve accused persons in custody. Today, it seems likely to face additional challenges presented by the Omicron variant over the next few months. In light of this, should we now be asking whether there is renewed appetite for either, judge alone trials, or judge-led panel trials, in the Crown Court? Particularly, might there be merit in legislating to give an accused person the option to request a judge alone trial in the Crown Court? An application which only an accused could make, to be heard inter-partes, and decided on its merits against a statutory framework which protects fair trial rights? Or could such legislative change carry too high a risk that some accused, particularly vulnerable defendants, might make what they may later come to regard as a poor short-term decision based on what seemed most expedient at the time? Might it also represent the thin end of a wedge in the gradual erosion of jury trial for those accused of serious offences?

Throughout this article, and save where it might otherwise be defined, the expression "judge alone" refers to both trial by a single judge sitting alone or trial by a panel comprising a single judge and two assessors.

Many criminal lawyers, and I include myself, tend to be somewhat resistant to procedural or substantive change. Changes to the status quo are often perceived as involving an unfair erosion of an accused's existing fair trial rights. Historical examples of the professions' reluctance to readily embrace change include, the resistance and suspicion which first met the introduction of the qualification to an accused's right to remain silent when interviewed under caution by investigators; the qualification to an accused's right not to give evidence in his own defence at trial; the emergence but now common-place use of special measures for child witnesses, victims of sexual offences and vulnerable

witnesses; and, in more recent years, the introduction of a current best cross-examination practice now expected of all advocates when questioning vulnerable witnesses, closely monitored by trial Judges, first at ground rules hearings, then during the trial itself.

When initially proposed, each of these changes met with varying degrees of resistance. However, it is probably fair to state that criminal lawyers and civil libertarians alike have become accustomed to the operation of these practices, and there is now widespread acceptance within the professions that none of these changes actually jeopardises the interests of an accused person or prejudices the right to a fair trial in practice, a right which we should always remind ourselves, is to be afforded to, and enjoyed by, both the prosecution and the defence. It is now recognised that many of the measures currently available to the criminal courts, some of which were wholly alien to practitioners when they were first introduced, serve to protect the interests of victims and witnesses while jealously guarding an accused's fair trial rights.

Twenty years ago, in 2001, Sir Robin Auld LJ published a report following a wide-ranging review of the criminal courts in England and Wales. Two of his key recommendations included:

(i) the establishment of a unified criminal court with three levels of jurisdiction consisting of a Crown Division, District Division and Magistrates Division together with a three-tier allocation of offences system to replace the existing and then current dual Magistrates and Crown Court system, and,

(ii) the right of a Judge in serious fraud trials to try the case himself with two expert lay assessors instead of a with a jury.

The three-tier unified criminal court would have seen the introduction of three divisions to which cases would be allocated depending on their seriousness. The recommendation contemplated that those charged with the most serious offences, then considered to be offences punishable with a sentence of 2 years imprisonment or more, would continue to be tried by a judge and jury in the Crown Division; those charged with the least serious offences, offences punishable with a maximum sentence of 6 months imprisonment, would be tried by magistrates in the Magistrates Division; and those charged with offences falling between the two would be allocated to the new District Division to be tried by a District Judge sitting with two magistrates, or if the accused with the consent of the court so opted, by a judge alone. Critically, the Magistrates Division was to be responsible for allocating the case to the division in which it was to be tried, no doubt after hearing representations as to appropriate venue from the prosecution and defence. However, controversially at the time, the accused

would have lost the right to elect trial by jury if charged with an either-way offence falling within the allocation criteria for the new District Division.

At the time, these recommendations were questioned and condemned by many in legal and civil liberties circles; they were described variously as an attack upon the fairness of the criminal justice system and an assault upon the notion of trial by jury. The measures were never implemented, some may argue unsurprisingly, but they are worthy of recall for the purposes of that which is discussed in this article and in considering how the current backlog of criminal cases which has built up in England and Wales, and which may get worse with the anticipated spread of Omicron, might best be addressed.

Before embarking upon what can only be a non-exhaustive overview and broad-based comparative analysis of the position in a selection of other common law jurisdictions, it is perhaps worth observing that in England and Wales, at least, the right of a person accused of a serious criminal offence to be tried by a jury of his peers is regarded as near sacrosanct and untouchable. Authorities are replete with high judicial observation touching and concerning it. For example, in Ward v James [1966] 1 Q.B. 273, albeit in the context of a civil case, Lord Denning had this to say:

> “Let it not be supposed that this court is in any way opposed to trial by jury. It has been the bulwark of our liberties too long for any of us to seek to alter it. Whenever a man is on trial for serious crime … then trial by jury has no equal …” (p.295 F).

In R v Mirza [2004] 1 A.C 1118 an appeal which was concerned with the prohibition of disclosure of jury deliberations, Lord Steyn quoted Lord Devlin’s book, “Trial by Jury” at p.164,

> "… trial by jury is more than an instrument of justice … it is the lamp that shows that freedom lives."

Lord Steyn described the jury as a “judicial tribunal" adding,

> "… the system of trial by jury is of constitutional significance. The jury is also, through its collective decision making, an excellent fact finder … the public trust juries. What public opinion would not tolerate are jury verdicts arrived at by perverse processes." (p.1131 D - p.1132 A)

In the same case, Lord Hobhouse stated that,

> "... the jury trial has been adopted in all the main common law jurisdictions. It is rightly regarded as a bastion of the criminal justice system against domination of the state and a safeguard of the liberty of its citizens. This is an affirmation of human rights principles. The detail in each country may differ in order to suit their own culture ..." (p.1171 C)

In R v B [2007] HRLR 1, a successful appeal by a number of media corporations against an order which had prohibited publication of sentencing hearings, the President, Sir Igor Judge, said this:

> "... there is a feature of our trial system which is sometimes overlooked or taken for granted. The collective experience of this constitution as well as the previous constitution of the court, both when we were in practice at the Bar and judicially, has demonstrated to us time and time again, that juries up and down the country have a passionate and profound belief in, and a commitment to, the right of a defendant to be given a fair trial. They know that it is integral to their responsibility. It is, when all is said and done, their birthright; it is shared by each one of them with the defendant. They guard it faithfully. The integrity of the jury is an essential feature of our trial process. Juries follow the directions which the Judge will give them to focus exclusively on the evidence and to ignore anything they may have heard or read out of court. No doubt in this case Butterfield J will give appropriate directions, tailor-made to the individual facts .... We cannot too strongly emphasise that the jury will follow them, not only because they will loyally abide by the directions of law which they will be given by the judge, but also because the directions themselves will appeal directly to their own instinctive and fundamental belief in the need for the trial process to be fair." (pp.8-9 para.31)

In R v T and others (No.1) [2009] EWCA Crim 1035, the Lord Chief Justice said these words:

> "In this country trial by jury is a hallowed principle of the administration of criminal justice. It is properly identified as a right, available to be exercised by a defendant unless and until the right is amended or circumscribed by express legislation." (para.10)

In R v J, S and M [2010] EWCA Crim 1755 it was observed that only where a fair trial is impossible should there be trial by judge alone and this should be a decision of last resort. The Court said this:

> "We must emphasise as unequivocally as we can that, notwithstanding the statutory arrangements introduced in the 2003 Act which permit the court to order the trial of a serious criminal offence without a jury, this remains and must remain the decision of last resort." (p.3 para.8)

When considering a challenge to what are now sections 57 - 63 of the Criminal Procedure Ordinance CAP 3.03 of the Turks and Caicos Islands (then the Trials Without a Jury Ordinance 2010 ("TWAJO")) the Judicial Committee of the Privy Council in Misick and Others v The Queen (The Turks and Caicos Islands) UKPC [2015] 31 had the following to say, Lord Hughes delivering the judgement of the Board:

> "The entrenched position of jury trial in those latter countries is attributable, rather, to the special value given to it as a system, notably by those who have most experience of its daily practice, but most of all by the general public. There is no doubt that its involvement of essentially anonymous and disinterested members of the public, chosen at random, engaged for no more than a single or a very few cases, and free from any suggested establishment or professional dependency, generates a special public confidence. In common law countries, any suggested curtailment of trial by jury is met by the greatest caution at the level of parliamentary and public debate. Lord Devlin's famous description of jury trial as "the lamp which shows that freedom lives" is not mere hyperbole: see Trial by Jury (1956) p 164." [p.20 para.49], and

> "It should be emphasised that the possibility of trial by judge alone, provided for by TWAJO, is an exceptional departure from the normal mode of trial for serious offences before the Supreme Court of the Islands which is, by section 3(1) of the Criminal Procedure Ordinance, trial by judge and jury. Just as under the differently worded English and New Zealand legislation, departure must be justified. An order for trial by judge alone can be made only where the interests of justice require it, just as in England it can be made only where it is necessary. Under both statutory tests, the evaluative exercise mandated for departure from jury trial incorporates the considerable weight of the value of such trial. They incorporate

> the proposition that trial by jury for serious offences is a valuable right of both the defendant and the public and is, in common law countries, the norm on which criminal justice is based. Departure from it must be confined to whatever classes of case or circumstance for which the legislation provides, and must be plainly justified. Neither formulation permits an order to be made simply because it is more convenient, or marginally preferable." [p.22 para.53]

In England and Wales, approximately 95% of criminal cases are tried in the Magistrates Court. Conviction rates in the Magistrates Courts and Crown Courts inevitably vary and fluctuate. While conviction rates in the Magistrates Courts have been consistently higher, they tend not to be so much higher as some might imagine, particularly when all convictions are reflected i.e., when guilty pleas and findings of guilt after trial are merged and taken together. For example, in Q2 of 2019, the conviction rate in the Magistrates Court was 84.1% as against 80.8% in the Crown Court, a difference of 3.3%. In the wider period, Q2 of 2013 to Q2 of 2019, conviction rates in the Magistrates Courts trended at around 84% to 85% whereas in the same period Crown Court conviction rates ranged from 78.3% to 80.8%. I was unable to find any statistical data which might cause a recalibration of these figures following successful appeals against conviction from the Magistrates Court to the Crown Court, but it is likely to be negligible.

The vast majority of civil cases, which we should not forget can lead to bankruptcy, loss of reputation and financial ruin for the losing party, or to a child being removed from its parent(s) to a place of safety, are invariably decided by a judge alone, the most notable exceptions being some defamation proceedings and civil actions against the police when a civil jury trial might be thought more appropriate.

In the Crown Court, with the exception of appeals against conviction and/or sentence from the Magistrates Court, all cases are tried by judge and jury. This is presently subject to only one exception, the jury tampering exception, in which a trial, or the continuation of a trial, by Judge alone may be permitted on an application by the prosecution pursuant to sections 44 to 50 of the Criminal Justice Act 2003 and Rr. 3.23 and 3.24 of the Criminal Procedure Rules, if there is a danger of jury tampering or where jury tampering has taken place. In R v Macmanaman [2016] EWCA Crim 3, the Court of Appeal presided over by the Lord Chief Justice held that what is required is proof of jury tampering, not proof of jury tampering by the defendant. A number of sound reasons are advanced for this construction of the legislation, but I single out one for particular mention. Plainly, with fair trial rights firmly in mind, the Lord Chief Justice said this:

> "… as it is the Judge who makes the determination of tampering who will ordinarily continue with the trial … it cannot have been intended that the judge should have had to determine whether the defendant instigated or acquiesced or was otherwise involved in the tampering. The making of that determination against the defendant might well place the judge in the position where he considered he could not fairly try the defendant." [para.24]

Most will be familiar with the cases of R v T and others (No.1) supra, R v Twomey and others [2011] EWCA Crim 8, J, S & M v R supra, and KS v R [2010] EWCA Crim 1756. In each of these decisions the Court of Appeal of England and Wales emphasised the importance of trial by jury for serious offences, taking the opportunity to remind judges and practitioners alike that trials of serious criminal offences without a jury must remain a decision of last resort. This was underscored in R v T and others (No.1) supra, when the Court held that the standard of proof to be applied by a Court faced with an allegation of jury interference is the criminal one.

Readers will recall that there were also attempts to place a serious fraud exception onto the statute books in the shape of section 43 of the 2003 Act. However, following two defeats in the House of Lords, section 43 was later repealed by sections 113, 120 and Schedule 10 part 10 of the Protection of Freedoms Act 2012.

It seems, therefore, that any suggestion, in England and Wales at least, of interfering with a defendant's hallowed and time-honoured right to trial by a jury of his peers when charged with a serious offence in the Crown Court, is likely to ignite intense debate and come under close and rigorous scrutiny, and rightly so. But what of a free choice given to an accused, and only to the accused, to opt for trial by judge alone in certain circumstances? Would it necessarily offend against the hallowed principle if the person being judged is content and willing for it to be by a judge alone? Or might there be an intrinsic risk of unfairness or danger in extending such a choice to an accused, particularly, say, to a vulnerable defendant? Might it be perceived as the thin edge of the wedge in eroding the right to trial by jury?

It is not going to be possible to review in this article the availability and use of non-jury trials in each and every jurisdiction which operates a criminal justice system founded upon the English common law. It is apposite to note, however, a few examples of instances in which judge-only trials for serious criminal offences are permitted and do take place in other jurisdictions. The reasons for this are usually, but not invariably, related to local circumstances prevailing in

each jurisdiction and to the distinct evolution and development of their respective comparative systems.

In Northern Ireland, judge alone trials began to take place in the 1970's in courts which came to be known as "Diplock courts" so named after Lord Diplock's report to the United Kingdom Parliament in 1972 and his recommendation that the suspension of trial by jury in Northern Ireland during The Troubles had become necessary in criminal cases involving allegations of paramilitary violence and terrorism. Given the obvious risk of juror and witness intimidation during this troubled period of recent history, the reason for the suspension of conventional jury trials in these cases was clear; thus, suspension of the right was necessarily required. Diplock courts habitually tried those charged with serious "scheduled offences" i.e., anyone accused of a paramilitary or terrorism related crime, during the height of The Troubles. It may be of interest and perhaps surprise that conviction rates in the Diplock Courts were said to be not significantly higher than those in conventional jury trial courts.

While Diplock Courts were abolished in the years following the Good Friday Agreement, non-jury, judge-alone trials still remain possible in Northern Ireland today, most notably some of the current legacy cases are being heard by judge alone. The Justice and Security (Northern Ireland) Act 2007 empowers the Northern Ireland Director of Public Prosecutions ("DPP") to certify a non-jury trial for any indictable offence if he suspects that any one of four conditions is met, and he is satisfied that in his view there is a risk that the administration of justice might be impaired if the trial were to be conducted with a jury - section 1(2). The four conditions relate to membership of a proscribed organisation, offences committed by or on behalf of a proscribed organisation, attempts to prejudice the investigation or prosecution by or on behalf of a proscribed organisation, and the offence or any of the offences was committed to any extent (whether directly or indirectly) as a result of, in connection with or in response to religious or political hostility of one person or group of persons towards another person or group of persons. Section 5(1) provides that where a certificate has been issued pursuant to section 1, "the trial … is to be conducted without a jury." Section 5(4) provides an important safeguard in that "no inference may be drawn by the court from the fact that the certificate has been issued in relation to the trial." The issue of a certificate by the DPP may not be challenged in any court except on the ground of dishonesty, bad faith or other exceptional circumstances including in particular exceptional circumstances relating to lack of jurisdiction or error of law - section 7.

Similarly, the Republic of Ireland has experience of trying those accused of paramilitary, terrorism-related and serious organised crime in its "Special Criminal Court." By Articles 38(3)(1) and (2), the Irish Constitution permits the establishment of "special courts" when the ordinary courts are "inadequate to

secure the effective administration of justice and the preservation of public peace and order;" the constitution, powers, jurisdiction and procedure of such special courts are prescribed by law. Sections 36 - 38 of the Offences Against the State Act 1939 provided for the creation of the Special Criminal Court to try certain offences, once again based upon a concept of "scheduled offences." Additionally, the DPP through a delegated power of the Attorney General, may certify that non-scheduled offences ought to be tried in the Special Criminal Court if in his or her opinion the ordinary courts are inadequate to secure the effective administration of justice in relation to the trial of the person on the charge. The Special Criminal Court continues to try persons accused of serious criminal offences today. It is a 3-judge panel court and in each case, the three judges comprise a Judge of the High Court, a Circuit Judge and a District Judge. It may deliver a majority verdict but curiously, when it does so, it is not permitted to state this. Further, where there is dissent, the dissenting member may neither express nor provide reasons for it when the court's decision is delivered - section 40(1) and (2) of the Act. Section 44 provides a right of appeal against conviction or sentence, but only with leave of the Special Criminal Court or the Court of Appeal.

In Jamaica, a judge of the "Gun Court" may try persons accused of firearms related offences without a jury. The Gun Court was established by the Gun Court Act 1974 in order to meet escalating gun crime. There are different divisions but essentially any criminal court in Jamaica may constitute itself as a gun court when hearing a firearms case. Long prison sentences are often passed on those who are convicted. Many gun court cases are heard in camera with the public and Press excluded on the grounds of witness protection and risk of intimidation. Subject to two exceptions only, an accused who is charged with a firearms-related offence in Jamaica has no choice whatsoever in relation to the trial court. The exceptions are the capital offences of murder and treason which must be tried by a jury because they carry the death penalty. A number of constitutional challenges to various aspects of Gun Court procedure and practice have been made to the Supreme Court and Court of Appeal of Jamaica, and to the Judicial Committee of the Privy Council in London, as a result of which some changes have been made. The nature of this article does not permit for a detailed examination of these challenges and any consequential changes. Suffice to say that the Gun Court has not escaped domestic and international criticism. The original and laudable objective of tackling rising gun crime and bringing those accused of it to justice more swiftly appears not to have been met because there remains a formidable backlog of cases awaiting trial and many accused spend several years remanded in custody while awaiting their trial.

In South Africa, jury trials were abolished by the Abolition of Juries Act 1969. Since that time, anyone accused of serious offences in South Africa is tried by a judge sitting with two lay assessors in the regional High Court. Since the emergence of its new democracy in the 1990's, there has been no move to re-

introduce jury trials for serious criminal offences. There may be many complex societal reasons for this which fall outside of the scope of this article.

Many will remember the Oscar Pistorius case: he shot his girlfriend four times through a closed bathroom cubicle doorway in the middle of the night causing her death, in the mistaken belief, he said, that she was an intruder. There was other circumstantial evidence indicative of murder: neighbours heard what they believed was the sound of the couple arguing and the deceased screaming before the shots were fired; there were text messages suggesting that the deceased had become frightened of Mr. Pistorius in the weeks immediately preceding her death.

Mr. Pistorius unsurprisingly found himself charged with premeditated murder. He was acquitted of murder by a judge sitting with two assessors and convicted of the lesser offence of culpable homicide and sentenced to 5 years imprisonment. His sentence was later increased to 6 years imprisonment after the Court of Appeal ruled that he was, in fact, guilty of murder and remitted his case back to the original trial judge for re-sentencing. She added one more year. There then followed further appeals by the prosecution against the leniency of the re-sentence and also by Mr. Pistorius to the country's Constitutional Court. Ultimately, Mr. Pistorius stood convicted of murder with a sentence of 15 years imprisonment, less time served. The process to arrive at this end point took several years after the trial had finished during which the accused, the deceased's immediate family, her relatives and friends must have been in a state of agonising uncertainty and confusion, if not downright torment. Mr. Pistorius was even released from prison at one point, having served his original sentence, only to then have to return after the appeals process had finally brought finality to the case. Might a jury have been better placed to use its collective common sense to arrive at the correct verdict at first instance?

In Canada, the combined effect of various provisions of the Canadian Criminal Code and the Canadian Charter of Rights and Freedoms is that an accused person, facing trial on a criminal charge which carries a prison sentence of 5 years or more, may elect trial by judge alone. In the case of murder, however, the Attorney General is required to consent to a judge alone trial if it is requested by an accused - section 473(1) of the Code.

The Canadian Charter of Rights and Freedoms contained in Part 1 of the Canadian Constitution Act 1982, which was enacted as Schedule B to the Canada Act 1982, provides for a number of fair trial rights at section 11, e.g., to be informed promptly of the specific charge, to trial within a reasonable time etc. These rights include at section 11(f), the right

> "... to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;"

Section 536(2) of the Criminal Code provides that if an accused is before a justice, charged with an indictable offence that is punishable by 14 years or more of imprisonment ... the justice shall, after the information has been read to the accused, put the accused to an election in the following words:

> "You have the option to elect to be tried by a provincial court judge without a jury and without having had a preliminary inquiry; or you may elect to be tried by a judge without a jury; or you may elect to be tried by a court composed of a judge and jury. If you do not elect now, you are deemed to have elected to be tried by a court composed of a judge and jury. If you elect to be tried by a judge without a jury or by a court composed of a judge and jury or if you are deemed to have elected to be tried by a court composed of a judge and jury, you will have a preliminary inquiry only if you or the prosecutor requests one. How do you elect to be tried?""

And section 536(2.1) provides that if an accused is before a justice, charged with an indictable offence, other than an offence that is punishable by 14 years or more of imprisonment ... the justice shall, after the information has been read to the accused, put the accused to an election in the following words:

> "You have the option to elect to be tried by a provincial court judge without a jury; or you may elect to be tried by a judge without a jury; or you may elect to be tried by a court composed of a judge and jury. If you do not elect now, you are deemed to have elected to be tried by a court composed of a judge and jury. How do you elect to be tried?""

There is also a right on the part of an accused person to make a re-election. Section 561(2) of the Code provides that an accused who elects to be tried by a provincial court judge may, not later than 60 days before the day first appointed for the trial, re-elect as of right another mode of trial, and may do so after that time with the written consent of the prosecutor.

In relation to the Canadian model, and to some of the others to follow, where it is the defendant alone who is given the choice, one may ask, what would be the harm in legislating to like effect in England and Wales?

In the Cayman Islands the default position is for Grand Court jury trial in relation to indictable offences. However, as in Canada, an accused has the option, no doubt with the benefit of sound legal advice, to waive his right to trial by jury and opt for trial by judge alone instead.

Section 129 of the Cayman Islands Criminal Procedure Code (2019 Revision) permits an accused person to elect trial on indictment by judge alone if the

> "person is of the opinion that, due to the nature of the case or of the surrounding circumstances, a fair trial with a jury may not be possible…"

Critically, this election may only be made by an accused. There is a procedural requirement that it must be made and notified in writing at least 21 days before the date of the trial or the date of arraignment, whichever is earlier. Failure to comply with the procedural requirement, however, is not fatal to a defendant's election. A judge may still permit an accused to make an oral or written election at any time before a jury is empanelled where the person has proved that, because of "exigent circumstances" it was not possible for him to make an election within the specified time - section 129(2).

In multi-defendant cases, the election must be made by each defendant in order for it to take effect. An individual defendant's request for trial by judge alone in a multi-handed case cannot trump the rights of his co-accused to trial by jury - section 129(5). This is also the position in Canada - section 567 of the Criminal Code - and elsewhere as we shall see.

In Australia, various states and territories have made provision for judge alone trials. For example, in South Australia, section 7(1) of the Juries Act 1927 provides that a trial in the District Court or Supreme Court "will proceed without a jury" at the election of the accused provided the judge is satisfied he took and received legal advice before so electing. Subsection (3) provides that where two or more persons are jointly charged, no election may be made under subsection (1) unless all of those persons concur in the election. Under section 3(a) the DPP may apply for a judge alone trial upon an information that includes a charge of a serious and organised crime offence. The test in section 3(b) is an "interests of justice" test.

In Queensland, sections 590AA and 614 to 615E of the Queensland Criminal Code make provision for judge alone trials at the behest of an accused person or prosecutor. An application for what is called a "no jury order" may be made in accordance with case management procedural rules before the trial begins. If the identity of the trial judge is known before the application is decided, and no doubt

to avoid a risk of “judge shopping” a no jury order may only be made if there are “special reasons” for so ordering - section 614(3).

In Western Australia, the Criminal Procedure Act 2004 provides for trial by judge alone on indictment in the Superior Court upon an application being made by either the accused or the prosecutor - section 118(1). In the case of an application by the prosecutor, the court must not make such an order unless the accused consents - section 118(4). Thus, the accused has a veto. The application must be made before the identity of the trial judge is known to the parties - section 118(2). On such an application the Court “may inform itself in any way it sees fit” - section 118(3). The test is an interests of justice test and in considering this, the court may make an order if it considers, inter alia, “that the trial, due to its complexity or length or both, is likely to be unreasonably burdensome to a jury” - section 118(5(a). As in New South Wales below, the court may refuse to make an order “if it considers the trial will involve a factual issue that requires the application of “objective community standards” such as an issue of reasonableness, negligence, indecency, obscenity or dangerousness” - section 118(6). If two or more defendants are jointly charged, the Court can only make an order if both consent. Finally, section 118(9) rather ominously provides that once an order has been made, it cannot be cancelled when the identity of the trial judge is known to the parties!

In New South Wales, the Criminal Procedure Act 1986 initially permitted judge alone trial in respect of state offences provided the accused requested it and the prosecution consented.

This Act was amended in 2011 to allow an accused to apply for a judge alone trial in circumstances where the prosecution may not agree. The current provisions of the section are worthy of note not only because of the safeguards and protections afforded to the accused in subsections (3) and (6) but also having regard to the non-exhaustive list of circumstances in subsection (5) in which a Court may consider that trial by jury is the better course in the event that the prosecutor does not agree to a judge alone application by an accused.

> (1) An accused person or the prosecutor in criminal proceedings in the Supreme Court or District Court may apply to the court for an order that the accused person be tried by a Judge alone (a "trial by judge order").
>
> (2) The court must make a trial by judge order if both the accused person and the prosecutor agree to the accused person being tried by a Judge alone.

(3) If the accused person does not agree to being tried by a Judge alone, the court must not make a trial by judge order.

(4) If the prosecutor does not agree to the accused person being tried by a Judge alone, the court may make a trial by judge order if it considers it is in the interests of justice to do so.

(5) Without limiting subsection (4), 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.

(6) The court must not make a trial by judge order unless it is satisfied that the accused person has sought and received advice in relation to the effect of such an order from an Australian legal practitioner.

(7) The court may make a trial by judge order despite any other provision of this section or section 132A if the court is of the opinion that--

(a) there is a substantial risk that acts that may constitute an offence under Division 3 of Part 7 of the Crimes Act 1900 are likely to be committed in respect of any jury or juror, and

(b) the risk of those acts occurring may not reasonably be mitigated by other means."

For an informative discussion of the meaning of "objective community standards" in subsection (5) and as it applies in the Western Australia Criminal Procedure Act, see the High Court of Australia decision in AK v State of Western Australia [2008] HCA 8 (26 March 2008) wherein Heydon J said this at para.95:

> "Examples of factual issues requiring the application of "objective community standards" include whether behaviour was "threatening, abusive or insulting"; whether conduct was "dishonest" … whether an assault is "indecent"; and whether an accused person had a particular intention."

As in the Cayman Islands, Canada and other parts of Australia, an application for a trial by judge alone cannot be made in a multi-handed trial unless all

defendants are in agreement and each applies to be tried by a judge alone - section 132A of the Act.

There is also provision for a change of mind by either party to the proceedings: section 132A(3) provides that an accused person or a prosecutor, who applies for an order under section 132, may, at any time before the date fixed for trial, subsequently apply for trial by jury.

Finally, in rendering the verdict in a judge alone trial, section 133 of the Act provides that the "judgement … must include the principles of law applied by the judge and the findings of fact on which the judge relied."

In New Zealand, sections 102 to 106 of the Criminal Procedure Act 2011 provide for judge alone trials in respect of trials that are likely to be long and complex for offences that are not offences for which the maximum penalty on conviction is life imprisonment or 14 years or more. In contrast to what we have seen above, the court may, on the application of the prosecutor, or of its own motion, order that the defendant be tried for the offence before a judge without a jury - s.102(2). An application must be made before trial in accordance with timescales provided by rules of court. In a multi-defendant trial, the order can only be made in respect of all defendants or none. In the event of a conviction or an acquittal, the Court must give its reasons - section 106(2). Section 105 curtails opening statements made by the prosecution and defence to "a short outline of the charge or charges the defendant faces" and "a short outline of the issue or issue at trial" respectively. Thus, the only protection afforded to an accused in such cases is a right to be heard before the court decides whether an order is to be made.

Sections 102(4) and (5) merit setting out in full:

> "(4) The court must not make an order … unless the prosecutor and the defendant have been given an opportunity to be heard in relation to the application and, following such hearing, the court is satisfied—
>
> (a) that all reasonable procedural orders (if any), and all other reasonable arrangements (if any), to facilitate the shortening of the trial have been made, but the duration of the trial still seems likely to exceed 20 sitting days; and
>
> (b) that, in the circumstances of the case, the defendant's right to trial by jury is outweighed by the likelihood that potential jurors will not be able to perform their duties effectively.

(5) For the purposes of subsection (4)(b) the court must consider the following matters:

(a) the number and nature of the offences with which the defendant is charged:

(b) the nature of the issues likely to be involved:

(c) the volume of evidence likely to be presented;

(d) the imposition on potential jurors of sitting for the likely duration of the trial:

(e) any other matters the court considers relevant."

As noted, it is not possible to look at each and every jurisdiction in which trial by judge alone is permitted, so I turn finally to the Turks and Caicos Islands. I will not be discussing the proceedings in which I am currently involved here.

Section 58(1) of the Criminal Procedure Ordinance CAP. 3.03 provides that "a judge may order that a trial be conducted without a jury if he is satisfied that the interests of justice so require." Such an order may be made by the judge of his own motion or on an application of any party to the trial - section 58(2). There is no express statutory provision setting out how a court should approach an application by one, or more than one, of several defendants in a multi-handed trial where all defendants are not all agreed. Sections 59(2) and 60 taken together envisage the court balancing the conflicting arguments and once it has considered the written and oral representations of the parties, making a determination. There is a right of appeal to the Court of Appeal whose decision shall be final but only on a point of law - section 61(1) and (2). Section 62(3) provides that in the event of a conviction following a trial without a jury, the court shall give a judgement which states the reason for the conviction at, or as soon as is reasonably practicable thereafter, the time of the conviction. There is no statutory requirement for a judge sitting without a jury to provide reasons for an acquittal, most probably because the prosecution has no right of appeal against an acquittal in this jurisdiction.

As in several of the other jurisdictions considered above, in determining whether to order a trial without a jury, the test to be applied is a straight "interests of justice" test.

Section 58(3) provides that:

> "... in making [this] determination ... the judge shall have regard to all the circumstances prevailing, including any or all of the following:
>
> (a) the nature of the charges;
>
> (b) the complexity of the issues or matter to be determined, and any steps which might reasonably be taken to reduce the complexity of the trial;
>
> (c) the length of the trial and any steps which might reasonably be taken to reduce the length of the trial;
>
> (d) the likelihood that, if a jury were selected, pre-trial publicity may influence its decision;
>
> (e) any information tending to suggest that a jury tampering may arise."

While sparingly used, there has been at least two applications by the defence in this jurisdiction for a trial without a jury, both of which were opposed by the prosecution. These applications may be readily appreciated on their own facts given the size of the jurisdiction.

In R v Fuller Nathaniel (Phillip) Smith (CR 27/20) [2021] TCASC 4 (22nd February 2021), the defendant was charged with murder. He argued that adverse pre-trial publicity surrounding his arrest and charge in such a small jurisdiction, coupled with the popularity of the deceased combined to create a real risk that the jury would favour the Crown's case and he would not receive a fair trial if tried by a jury. Additionally, at the time of his application, jury trials had been temporarily suspended because of Covid-19. Local Practice Directions then in force permitted him to apply for a judge-alone trial in accordance with the provisions of section 58 of the Ordinance. Counsel argued that his client's constitutional right to a fair trial within a reasonable time was in jeopardy because of the suspension of jury trials but that it could be safeguarded by allowing him to be tried without a jury. The prosecution, in opposing the application, submitted that proper warnings to the jury would be capable of curing any risks occasioned by such adverse pre-trial publicity as may have existed. The Hon. Lobban-Jackson J. agreed with the principal defence submissions and directed trial by judge alone. Mr. Smith was tried in May 2021 by the Hon. Shiraz Aziz J. He was acquitted of murder and discharged from the dock after a trial lasting several days. The issue was self-defence.

A further example of a serious case in which the accused requested trial by judge alone is to be found in R v Cortez Simmons (CR 41/2013). The defendant was convicted of murder in March 2015 but successfully appealed against his conviction to the Court of Appeal. His conviction was quashed, and a re-trial ordered. He applied for a judge alone re-trial on the basis that it would not be easy to find jurors who had not heard of the first trial, its outcome and the appeal, which had been widely publicised locally. At first, the Crown opposed his application but later reflected on the matter and informed the defence that there would be no objection to a non-jury trial.

See also R v Clarence Williams (CR 54/2019)[2020] TCASC 8 (5th June 2020) for a prosecution application for a trial without a jury which was made out of time and was strongly opposed by the defence. The Court held that, notwithstanding the delay in making the application, as the temporal requirements of section 59(1) of the Ordinance were directory only, it would consider the application on its merits. Having done so, the Court concluded that the matters complained of did not provide any insurmountable obstacles to a fair trial by judge and jury and the application was refused.

As we have seen, many, but by no means all, of these jurisdictions leave it entirely to the accused to decide whether he is content to be tried by a judge alone. Why then, should such an approach, if suitably tailored to meet the criminal justice system in England and Wales, be objectionable?

The principal objections seem to be those identified in the English cases examined in the early part of this article. The public does indeed have a special confidence in the jury system. It accepts the collective wisdom and judgement of 12 ordinary citizens drawn at random from local communities. Persons charged with serious crimes who plead not guilty share this confidence; they exhibit a unique sense of trust that their jury will be balanced, objective and fair. Members of the public selected for jury service come to it with none or very few pre-conceptions. They give of their time and take their duty extremely seriously. And this is how we have been trying serious cases in England and Wales for a long time; it is a good system which tends to work well, so why interfere with it unless truly exceptional circumstances demand it.

Further, a change of the kind under discussion could represent the thin edge of the wedge in what might become a gradual and, some would argue, wholly unacceptable erosion of the right to trial by jury. If we allow trial by jury to be dispensed with at the option of a defendant, how long might it be before persuasive arguments are put forward to justify yet another departure from the norm? For example, why should trial by judge alone not also be made available to victims of particular crimes? If a defendant can have it, why can't victims have a similar option too?

Some defendants might feel unduly pressurised by their immediate circumstances into requesting a judge alone trial. Then, if convicted, they may regret their decision and go on to suggest that it had not been in their best interests to take such a course. They will have access to legal advice and there is no doubt that care would be taken by solicitors and counsel to ensure that any application for a judge alone trial would only be made after a fully informed decision by the accused. Additionally, it would be open to a judge in appropriate cases to refuse such an application on the basis that a particular defendant's case is better suited to jury trial. There may be little, or no difficulty provided adequate safeguards and protections for vulnerable defendants are built into the legislation, perhaps bolstered by a cooling off / change of mind period.

A further question to consider is whether our Crown Court judges would necessarily want to sit as triers of fact in particularly serious cases? We often assume that they would, but Judges in England and Wales have been trained to respect their boundary as judge of the law and to keep it separate and distinct from the role of the jury as judges of the facts. Many judges, particularly judges sitting alone, may not actually welcome being tasked with deciding whether a defendant is guilty of a serious crime, especially in cases where a very long prison sentence would inevitably follow on from their decision. On the other hand, our judges are there to apply the law so if new legislation were to permit trial by judge alone, they would have little option but to embrace and apply it.

Why might a person accused of a serious criminal offence opt for trial by judge alone? There may be many answers to this, including:

(i) trial by judge alone invariably requires a reasoned judgement in the event of a conviction; thus, a convicted accused would know with certainty why he was convicted rather than being left to guess at why the jury preferred the prosecution case;

(ii) a reasoned judgement may give rise to grounds of appeal on the facts which would not otherwise be available following a conventional jury trial if the judge were to reach what a defendant considers to be unreasonable or irrational inferences of guilt based upon the direct evidence in the case. In jury trials, we never learn anything of their reasoning or the decision-making process to reach a verdict; nor is anyone permitted to enquire into their deliberations. Might the provision of reasoned judgements be more aligned to this era of increased openness and transparency?

(iii) pre-trial publicity may be so adverse and unrelenting that securing a fair and impartial jury presents insurmountable challenges; however, in practice, this probably only really ever arises in a tiny minority of cases; most crown

court trials attract no publicity whatsoever. The current means of mitigating the effect of pre-trial publicity to secure a fair trial tends to be judicial direction, a change of venue, if necessary, and a recognition that the impact of publicity will diminish with the passage of time; therefore, fix the trial in the long grass. This accepted wisdom could mean, however, that for some accused of crimes attracting adverse headlines, they may be denied knowing the outcome of their case and if convicted, their fate, for a longer than usual period. Given the choice, they may prefer to choose trial by judge alone if it would lead to a speedier conclusion and outcome.

(iv) rarely, the nature of the alleged crime or the manner of its commission might provoke such strong feelings of revulsion that the accused may harbour grave concerns about whether jurors will be able to act upon judicial direction to put such feelings to one side while they consider harrowing evidence dispassionately and objectively, without fear or favour to one party or the other; might a judge alone trial be better suited to try such cases?

(v) legal and factual complexity, particularly in complex fraud cases, is an argument which is often presented to support the case for judge alone trials. However, does this unconvincing argument not vastly underestimate and overlook the innate ability and proven track record of juries to try difficult, serious and complex cases? In any event, it is the responsibility of advocates and trial Judges in all such cases to make sure that jurors receive all the assistance they need on issues of law so that they may apply it to the facts as they find them.

(vi) cases in which defendants may wish to rely upon a technical or unattractive defence, or in which they bear an evidential burden or reverse burden of proof; an accused or his legal advisers might feel more comfortable with a judge alone trial in such circumstances. Taken in isolation, however, this is not a terribly compelling argument for such a fundamental change of the kind under discussion.

(vi) time and cost; while non-jury trials ought to take less time and result in considerable savings to the public purse and to privately paying clients, one could ask whether this argument passes the threshold set by Lord Hughes? Or would change for this reason amount to change which is more convenient or marginally preferable, rather than necessarily required in the interests of justice?

It seems clear that, notwithstanding the position in many other common law jurisdictions whose criminal justice systems have evolved and developed to meet particular local needs and circumstances, there are a great many questions to be asked and answered before trial by judge alone could be introduced in

England and Wales, even as a short-term temporary measure in the midst of Covid-19. I do not propose to express a concluded view of my own on whether giving an accused person the right to opt for trial by judge alone would be a reasonable and acceptable encroachment on the right to trial by jury or if it might cause more difficulty in the long run than it may seek to address in the short term. I will leave others to continue this discussion, and to consider the many other thought-provoking and difficult questions which time has not permitted me to incorporate into this article.

Adrian Kayne

16th December 2021