

CR-19-01783

DIRECTOR OF PUBLIC PROSECUTIONS

v

LIONEL COMBO

JUDGE: HIS HONOUR CHIEF JUDGE KIDD
WHERE HELD: MELBOURNE
DATE OF HEARING: ON THE PAPERS
DATE OF JUDGMENT: 2 June 2020
CASE MAY BE CITED AS: DPP v Combo (Application for trial by judge alone)
MEDIUM NEUTRAL CITATION: [2020] VCC 726

REASONS FOR RULING

Subject: Criminal Law – Application for trial by judge alone.
Catchwords: Application for trial by judge alone under COVID-19 emergency provisions – Consent by both parties - Interests of justice - The need for the administration of justice to continue – Delay - Youthful and Indigenous accused in custody awaiting trial.
Legislation Cited: *Crimes Act 1958*, ss 75A, 321M; *Criminal Procedure Act*, s 420D; *COVID-19 Omnibus (Emergency Measures) Act 2020*.
Cases Cited: *R v Belghar* (2012) 217 A Crim R 1; *R v Stanley* [2013] NSWCCA 124; *R v Simmons (No 4)* (2015) 249 A Crim R 120; *R v Rayney* (2011) WAR 383; *Western Australia v Evans* [2012] WASC 87; *R v Fardon* [2010] QCA 317; *R v IB (No 3)* [2020] ACTSC 103; *Landsman v The Queen* (2014) 88 NSWLR 534; *Western Australia v Edwards* [2018] WASC 419; *R v UD* [2020] ACTSC 90; *Coates v Western Australia* [2009] WASCA 142; *Arthurs v Western Australia* [2007] WASC 182; *R v BD* [2020] NSWDC 150; *R v Johnson* [2020] NSWDC 153; *R v Quami (No 14)* (2016) 265 A Crim R 575; *R v Homann* [2018] NSWSC 198; *R v Gittany* [2013] NSWSC 1503.
Ruling: Application for trial by judge alone granted.

APPEARANCES:

Counsel

Solicitors

For the DPP

Mr D Gray

Ms Abbey Hogan, Solicitor
for Public Prosecutions

For the Accused

Adrian Dessi Legal

HIS HONOUR:

Preliminary

- 1 An application for a trial by judge alone has been made by the accused, Lionel Combo, pursuant to s 420D of the *Criminal Procedure Act 2009* ('the CPA'), to have indictable charges tried by a judge alone.
- 2 This matter was originally listed for trial on 25 May 2020, with a Final Directions Hearing listed on 7 April 2020. The trial estimate (before a jury) was 5 days.
- 3 As a result of the COVID-19 pandemic, jury trials were suspended in March 2020. Consequently, the above trial date and Final Directions Hearing date were vacated by administrative orders. Instead, a new Final Directions Hearing date was listed for 15 June 2020 to be conducted remotely.
- 4 The applicant filed his application for trial by judge alone on 20 May 2020, along with written submissions.
- 5 The prosecution filed written submissions in response on 26 May 2020, indicating its support for a trial by judge alone order.
- 6 The parties were content for me to determine this application on the papers. Where matters can appropriately be determined on the papers in this COVID-19 environment, they should be.
- 7 Both parties agreed that the trial estimate for this matter, should it proceed by trial by judge alone, was three days.
- 8 Notwithstanding that the application is unopposed, I have examined the matter and the relevant legal principles in some detail given that it is the first application for a trial by judge alone in this State. In any event, even where both parties agree that an order for a trial by judge alone ought to be made, it still remains for the Court to determine itself that it is the interests of justice to do so.

Facts and trial issues

- 9 The accused has been charged on indictment with one charge of attempted armed robbery¹ and one charge of armed robbery², arising out of the same incident which occurred on 1 February 2019.
- 10 It is alleged that in the early hours of 1 February 2019, the two complainants, Alex Radu and Maverick Rodgers attended at a 7-11 located 28 Narre Warren-Cranbourne Road to purchase some milk.
- 11 After purchasing some milk and cigarettes, Mr Rodgers and Mr Radu exited the 7-11. Mr Rodgers sat down in the 7-11 carpark and smoked a cigarette, while Mr Radu who was feeling unwell from drinking walked a short distance away to vomit.
- 12 At this time, the accused also attended at this 7-11, arriving in a stolen green Nissan sedan with a co-offender, who is unknown. The accused was a passenger in the vehicle. The accused and co-offender parked three car spaces away from Mr Rodgers.
- 13 The accused got out of the vehicle and went inside of the 7-11. He attempted to purchase some cigarettes but his card was declined.
- 14 After exiting the 7-11, the accused went and spoke to the co-offender, who was seated in the driver's seat of the car. After some brief discussion, the accused and co-offender approached Mr Rodgers, with accused holding a metal pole. The accused and co-offender were now wearing bandanas which covered the lower halves of their faces.
- 15 Upon approaching Mr Rodgers, the accused and co-offender demanded cigarettes from Mr Rodgers. The accused hit Mr Rodgers in the ribs with the

¹ Pursuant to s 321M of the *Crimes Act 1958*.

² Pursuant to s 75A of the *Crimes Act 1958*.

metal pole. Mr Rodgers ran away towards the road, without handing over any cigarettes. These allegations are the basis for charge 1, attempted armed robbery.

16 The accused and co-offender then turned to Mr Radu. Mr Rodgers yelled out to him to run. The accused and co-offender approached and cornered Mr Radu, demanding cigarettes and money. The accused was still carrying the metal pole. The accused and co-offender said if they did not give them what they wanted, they would stab him.

17 Fearing that he would be assaulted, Mr Radu pretended to have a knife in his pocket. He told the accused and co-offender to “fuck off or I’ll stab you.” Mr Radu took the opportunity to run, leaving his satchel bag behind, when the accused and co-offender backed away. The satchel bag contained Mr Radu’s passport, wallet containing a range of cards (including bank cards and Myki card).

18 Mr Rodgers and Mr Radu fled on foot and were followed by the accused and co-offender in their vehicle. One of the offenders got out of the vehicle, armed with the metal pole and chased the complainants on foot shouting “give us ya ciggies cunt.” Eventually, the complainants escaped by running through a park.

19 Afterwards the complainants returned to the 7-11 and discovered that Mr Radu’s satchel bag was gone. The complainants entered 7-11 and requested that police be called.

20 Several days later the green Nissan sedan driven by the co-offender was located in Clayton South. Located inside the vehicle was Mr Radu’s passport and wallet containing his some of his cards, however his bank card and Myki were not located. In addition to the conduct described above, these allegations are the basis for charge 2, armed robbery.

- 21 The prosecution case is that the accused and co-offender were acting together throughout the incident and were therefore complicit in both the attempted armed robbery on Mr Rodgers and the armed robbery on Mr Radu. It is put by the prosecution that one of the offenders took Mr Radu's satchel bag containing his wallet and passport, having earlier threatened him with a metal pole.
- 22 The accused was arrested on 1 April 2019. In his record of interview, the accused admitted to being present at the 7-11 on 1 February 2019 and asking the complainants for cigarettes. He denied carrying a pole and denied taking anything from the complainants.
- 23 A defence response to the trial opening has been filed this morning. In this response, the accused admits committing the attempted armed robbery on Mr Rodgers, being charge 1 on the indictment. The accused contests charge 2 on the Indictment, being a charge of armed robbery. The accused disputes that there is sufficient evidence to support a finding that the accused took Mr Radu's satchel, or was complicit in its taking, or that there is a sufficient temporal connection between the threatened use of force on Mr Radu and the taking of the satchel.
- 24 Therefore, the issues at trial will be whether an offence of armed robbery has been committed against Mr Radu, and if so whether it can be proven the accused was complicit in this offence.

Arguments of the Accused

- 25 The accused submits that the making of a trial by judge alone order is in the interests of justice³ and that the Court should exercise its discretion to make that order.
- 26 In relation to the question of whether it is in the interests of justice, the accused

³ Pursuant to s 420D(1)(d) of the *Criminal Procedure Act 2009*.

relies on three matters in combination, as reasons why the Court should be positively satisfied.

27 First, the issues at trial are very narrow and concern only one charge of armed robbery. The only question is one of fact, namely whether an armed robbery took place and whether the accused was involved.

28 Second, the narrow scope of the contest at trial means that the trial will be short. As mentioned above, both parties agree as a trial by judge alone, the trial estimate is, at most, 3 days. There would only be three witnesses to be called, the two complainants and the police Informant. The defence indicates that it may be possible to admit their statements, by agreement, instead of calling them.

29 Third, the current circumstances of the accused weigh in favour of resolving this contested matter without further delay. They are as follows:

- a) The accused is a 21-year old Koori man;
- b) The accused is currently serving a sentence of imprisonment with a non-parole period. I shall return to the details of this later;
- c) These are the only charges currently outstanding (not resolved) for the accused;
- d) Not knowing what his fate will be in respect of these charges and therefore what sentence he may receive, and when he will ultimately be released from prison, weighs heavily on the accused; and
- e) The possibility that there will be a delay until this trial could be heard by a jury weighs heavily on the accused.

Position of the Prosecution

30 As I said, the prosecution supports the application.

31 In addition to the points relied upon by the defence, the prosecution further submits that there are other reasons why it is in the interests of justice to order a judge alone trial. They are as follows:

- a) The facts in issue in this case do not enliven the application of an objective community standard, which may have tended in favour of a jury trial; and
- b) The complainants are eager to also have this matter finalised expeditiously.

Legislative framework

32 On 25 April 2020, the Victorian Parliament passed the *COVID-19 Omnibus (Emergency Measures) Act 2020*. The purpose of this Act was to modify Victorian laws in order to respond to the COVID-19 pandemic.⁴

33 The *COVID-19 Omnibus (Emergency Measures) Act 2020* amended the CPA to, inter alia, provide for trial by judge alone as a mode of trial for indictable criminal matters in particular circumstances.

34 The new provisions concerning trial by judge alone were inserted in the CPA, by way of a new Chapter – Chapter 9. The purpose and effect of Chapter 9 was to ‘temporarily change the operation of [the] Act in response to the COVID-19 pandemic’.⁵

35 The operative provision is section 420D of the CPA which is in the following terms:

⁴ Section 1 of the *COVID-19 Omnibus (Emergency Measures) Act 2020*.

⁵ Section 420A of the *Criminal Procedure Act 2009*.

Section 420D – Court may order trial by judge alone

- (1) At any time except during trial, the court may order that one or more charges in an indictment be tried by the trial judge alone, without a jury, if—
 - (a) each charge is for an offence under the law of Victoria; and
 - (b) each accused consents to the making of the order; and
 - (c) the court is satisfied that each accused has obtained legal advice on whether to give that consent, including legal advice on the effect of the order; and
 - (d) the court considers that it is in the interests of justice to make the order.
- (2) The court may make an order under subsection (1)—
 - (a) on its own motion; or
 - (b) on application by the prosecution or an accused.
- (3) In determining whether to make an order under subsection (1), the court must have regard to the submissions, if any, of the prosecution.
- (4) However, the court may make an order under subsection (1) whether or not the prosecution consents to the making of the order.

36 The provisions in the CPA which concern trial by judge alone (including s 420D) will be repealed 6 months after their commencement date.⁶ This means that the Court may only make an order for trial by judge alone on or before 24 October 2020.

Some preliminary observations about s 420D

37 Section 420D of the CPA is the first provision of its kind in Victoria. Presently, indictable charges under Victorian law are tried by juries in the Supreme and County Courts.⁷ Section 420D empowers these Courts to make an order that an indictable charge (or charges) be tried without a jury, before a judge alone, in certain circumstances.⁸

38 This is the first occasion that the trial by judge alone provisions contained in the CPA are being judicially considered.

⁶ Section 420ZN of the *Criminal Procedure Act 2009*.

⁷ See also Explanatory Memorandum, *COVID-19 Omnibus (Emergency Measures) Act 2020* [57]. For the purpose of this judgment, references throughout to ‘the Court’ should be taken to mean the County Court.

⁸ See Explanatory Memorandum, *COVID-19 Omnibus (Emergency Measures) Act 2020* [57].

39 It is evident from the plain language of the text and structure of s 420D(1) that for the Court to make an order for a charge to be determined by trial by judge alone, the Court must be positively satisfied that a number of essential pre-conditions are met:

- First, the charges are offences are under Victorian law and that these offences are being tried on indictment.⁹ No Commonwealth offences tried on indictment can be tried by judge alone¹⁰; and
- Second, that each accused has given their consent to the making of an order for trial by judge alone; and
- Third, that each accused has received legal advice on whether to give that consent, including advice as to the effect of the Court making an order under s 420D; and
- Fourth, that it is in the interests of justice to make the order.

40 In making a determination under s 420D(1), s 420D(3) requires the Court to have regard to any submissions made by the prosecution, if any are made. However, the plain meaning of s 420D(2) is that consent of the prosecution is not a pre-condition to making an order for trial by judge alone.

41 Once the essential pre-conditions in s 420D(1) are met, the Court's discretion to make an order for trial by judge alone is enlivened.¹¹

⁹ See also s 420B of the CPA, which provides that an order can be made where the accused has been committed for trial under Part 4 of the CPA regarding the charge, or where the Director of Public Prosecutions has directly indicted the accused to stand trial for the charge.

¹⁰ See Explanatory Memorandum, *COVID-19 Omnibus (Emergency Measures) Act 2020* [57], which confirms that 'These new provisions will not apply to charges for Commonwealth offences.' Section 80 of the Commonwealth Constitution requires that Commonwealth offences when tried on indictment must be tried by jury.

¹¹ Parliament has chosen to use the word 'may', as distinct from the word 'must'. See s 45 of the *Interpretation of Legislation Act 1984*. Section 45(1) deems that where the word 'may' is used to confer power in an Act, the word may 'is to be construed as meaning that the power so conferred may be exercised, or not, at discretion.'

Guidance from other jurisdictions

- 42 Multiple Australian jurisdictions provide for the possibility of trial by judge alone. Each jurisdiction has its own statutory framework.¹² In some jurisdictions there is the trial by judge alone legislation which pre-dates COVID-19, as well as modified COVID-19 emergency legislation.¹³
- 43 The statutory regimes are broadly similar to each other, and to Victoria's regime, though they are not identical.¹⁴ What they each have in common is the requirement (or potential requirement) for the court to consider whether it is in the interests of justice to order a trial by judge alone. In this specific context, the expression 'interests of justice' has been considered extensively, as have other aspects of the approach to be taken by a Court when considering trial by judge alone applications.
- 44 It follows that the authorities from these jurisdictions provide a source of guidance as to how the Court might approach a trial by judge alone application under Victoria's new legislation (always being mindful of the differences in the respective statutory regimes).

The question of presumption in favour of jury trial and legal onus

- 45 There is nothing explicit in the plain meaning of the text of s 420D which suggests that there is a presumption in favour of a jury trial or that there is any legal onus on the parties to rebut such a presumption. In describing how s 420D will function, the Explanatory Memorandum states it will give courts 'the option' of hearing charges by judge alone, which they currently do not have.¹⁵ Such

¹² *Supreme Court Act 1933* (ACT) ss 68B-68C; *Juries Act 1927* (SA) s 7; *Criminal Procedure Act 1986* (NSW) ss 132-133, 365; *Criminal Code Act 1899* (Qld) ss 614-615E; *Criminal Procedure Act 2004* (WA) ss 117-120.

¹³ See the modified provisions in the ACT and NSW - s 68BA of the *Supreme Court Act 1933* (ACT) and s 365 of the *Criminal Procedure Act 1986* (NSW).

¹⁴ For example, some of the regimes identify some non-exhaustive factors relevant to the question of the interests of justice, whereas others – such as the Victorian legislation - is silent on this issue.

¹⁵ See also Explanatory Memorandum, *COVID-19 Omnibus (Emergency Measures) Act 2020* [57].

language, in the Explanatory Memorandum, appears neutral and does not indicate any preference of one mode of trial over another. Section 420D is intended to be facilitative, not proscriptive.

46 For these reasons, I do not construe s 420D of the CPA as creating any presumption in favour of jury trials or a corresponding legal onus on either party to rebut any such presumption.¹⁶

47 The default position is there will be a jury trial unless and until the Court's discretion is enlivened (that is, it is in the interests of justice to make the s 420D(1) order) to make the order for a trial by judge alone.¹⁷ At a practical level, where an application is brought by a party for a judge alone trial (as is the case here), the party bringing the application effectively bears an evidential onus to persuade the Court that the discretion to order is enlivened and should be exercised.

Interests of justice

48 The expression 'the interests of justice' is 'broad and derives substance from the context in which it is used.'¹⁸ The interests of justice will, of course, 'include the interests of the parties, [but] the concept will invariably be wider than that and include larger questions of legal principle, the public interest and policy considerations.'¹⁹ The public interest concerns ensuring the integrity and proper functioning of the criminal justice system within the courts, as well as ensuring that the accused receives a fair trial according to law.²⁰ Just where the interests of justice lie will be ascertained by reference to the facts and circumstances of

¹⁶ This construction is also consistent with the authority in other Australian jurisdictions. See, for example, *R v Belghar* (2012) 217 A Crim R 1, 25 [96]; *R v Stanley* [2013] NSWCCA 124 [42]; *R v Simmons (No 4)* (2015) 249 A Crim R 120, 132 [57]; *R v Rayney* (2011) WAR 383, 387-388 [17]; *Western Australia v Evans* [2012] WASC 87 [4]. Compare: *R v Fardon* [2010] QCA 317 [81] in which it was stated (in respect of Queensland legislation) that an onus did exist on the applicant to prove that their case was 'exceptional' such as to justify a trial by judge alone, not by trial by jury.

¹⁷ *Ibid.*

¹⁸ *R v IB (No 3)* [2020] ACTSC 103 [94].

¹⁹ *Landsman v The Queen* (2014) 88 NSWLR 534, 550 [69].

²⁰ See *Western Australia v Edwards* [2018] WASC 419 [9](c); *R v UD* [2020] ACTSC 90 [12].

the particular case.²¹

49 A determination about where the interests of justice lie involves a balancing of these various and sometimes competing interests, as they arise in an individual case. No single factor will be determinative.²²

Mode of trial

50 Generally, the mode of trial – trial by jury or trial by judge alone – has been treated as a neutral consideration. That is, neither trial by jury nor trial by judge alone is to be preferred over the other, with each mode of trial having its own advantages and disadvantages, and strengths and weaknesses.²³

51 Juries have the strength of unanimity of decision, arrived at by a process of collective discussion and refinement of thinking. In a democratic society, the jury is a representative body of 12 randomly selected members of the community – bringing the community into the criminal justice system and giving its decisions legitimacy.

52 On the other hand, unlike juries, decisions by judges are utterly transparent, with full written reasons given.²⁴ Judges are trained to bring an objective and dispassionate mind to frequently emotional subject matter, putting aside any prejudice.

53 I detect nothing in the Victorian legislation which would suggest that one mode of trial *per se* is to be preferred over the other. In this sense, it is generally a neutral consideration. As I am about to explain, in this COVID-19 environment, one cannot consider the mode of trial in isolation from the issue of timing.

²¹ *R v Stanley* [2013] NSWCCA 124 [42]

²² *Landsman v The Queen* (2014) 88 NSWLR 534, 550 [69]-[70].

²³ *R v Belghar* (2012) 217 A Crim R 1, 6-15 [24]-[38]; *R v Simmons (No 4)* (2015) 249 A Crim R 120, 132, 138-139 [82]; *Coates v Western Australia* [2009] WASCA 142 [9]-[12].

²⁴ *Arthurs v Western Australia* [2007] WASC 182 [75]-[76], [89]-[92]; *R v Belghar* (2012) 217 A Crim R 1, 29 [112]-[113].

The need for administration of justice to continue

54 An assessment of where the interests of justice lie will need to include a consideration of the COVID-19 pandemic and prevailing situation within the community.²⁵ I infer that it was the intention of parliament, in enacting the trial by judge alone provisions, that justice must continue to be administered by the courts, even during the current public health emergency of COVID-19. As I have already noted above, the purpose of s 420D was to provide the courts with ‘the option’ to conduct trials by judge alone. This legislation was enacted at a time when jury trials were suspended. The facilitative nature of these provisions is illustrative of parliament’s intention that courts continue their work, albeit in a modified way.²⁶

Delay

55 As a result of the COVID-19 pandemic, jury trials have been suspended in Victoria and that has been the case since March 2020. Jury trials which were listed between March and the beginning of October this year have been or will be vacated²⁷ and will be delayed in the order of 9 months or more.²⁸ The courts are currently engaged in planning for the resumption of jury trials this year. However, accepting that jury trials will resume this year, the vast majority of trials set down prior to October 2020 will still be significantly delayed.²⁹

56 In determining where the interests of justice lie, delay may have relevance in a number of respects.

57 It is not in the interests of justice that accused persons, particularly those in

²⁵ *R v BD* [2020] NSWDC 150 [3].

²⁶ *R v UD (No 2)* [2020] ACTSC 90 [29]-[30]; [54]; *R v Johnson* [2020] NSWDC 153 [19]-[21]; *R v Coleman* [2020] ACTSC 97 [41].

²⁷ See the County Court’s COVID-19 Emergency Protocol Re-Listing of Melbourne Criminal Trials.

²⁸ See the County Court’s COVID-19 Emergency Protocol Re-Listing of Melbourne Criminal Trials.

²⁹ See the County Court’s COVID-19 Emergency Protocol Re-Listing of Melbourne Criminal Trials.

custody, must wait for excessively long periods to come to trial.³⁰

58 For any accused, if no order for trial by judge alone is made, they will have to endure serious criminal charges hanging over their head for a longer period than they would expect in ordinary times. This may be even more acute if the accused is in custody while awaiting trial.

59 Delay may also affect the quality of evidence and ultimately result in prejudice to the accused in conducting their defence. For example, witness' memories will continue deteriorate over time, and generally be more compromised the further from the time of the events in question, or a key witness could die. Either of these events could also result in prejudice to the prosecution case.

60 Where the case involves complainants, expeditious justice will also be of high importance.

61 In truth, the balancing exercise here does not involve merely weighing the benefits of a jury trial against those of a trial by judge alone for the case in question. Rather, it concerns weighing the advantages of a judge alone trial *now* against those of a significantly *delayed* trial by jury (with all the disadvantages this delay entails).

62 It seems to me that within the context of this legislation, the advantages of continuing with the business of the court, and mitigating the serious issues of delay, are powerful factors in favour of ordering a trial by judge alone.

Community standards

63 Where a fact in issue involves an application of a community standard, this tends in favour of a jury trial.³¹ That is because an 'assessment of objective community standards is best undertaken by a group of members of the

³⁰ *R v UD (No 2)* [2020] ACTSC 90 [23].

³¹ *R v Quami (No 14)* (2016) 265 A Crim R 575, 584 [32].

community.³² In some jurisdictions, this preference is legislated.³³

64 The application of a standard may be raised as an element of the offence, or as part of a defence, such as reasonableness, negligence, indecency, obscenity or dangerousness.

Subjective views of the accused

65 An accused does not have right to demand a trial by judge alone, but the subjective views of the accused are a relevant consideration in determining where the interests of justice lie in a particular case. The fact that an accused person has acted on legal advice to forego their right to a later trial by jury and seek an order for an earlier trial by judge alone is a relevant matter.³⁴

66 Most of the authorities are concerned with the situation where the accused has a real and substantial doubt as to whether they will receive a fair trial.³⁵ Within the COVID-19 context, while not determinative,³⁶ I think weight ought to also be given to the subjective preference of the accused to be tried expeditiously by a judge alone, rather than enduring a substantial wait for a trial by jury.

Analysis and conclusions

67 I am satisfied that the essential pre-conditions contained in s 420D(1)(a)-(c) of the CPA are made out.

68 I am also satisfied that it is in the interests of justice that an order that the accused be tried by a judge alone be made, pursuant to s 420D(1)(d) of the CPA.

69 In this case there are a number of factors which favour the making of such an

³² *R v Homann* [2018] NSWSC 198 [36]-[37]; *R v Stanley* [2013] NSWCCA 124 [43].

³³ See for example, s 132(5) of the *Criminal Procedure Act 1986* (NSW) *R v Quami (No 14)* (2016) 265 A Crim R 575, 584 [32].

³⁴ *R v Quami (No 14)* (2016) A Crim R 575, 582 [22].

³⁵ *Arthurs v Western Australia* [2007] WASC 182, [79]-[80]; *Western Australia v Raney* (2011) WAR 383, 389 [26] 391 [35]; *R v Belghar* (2012) 217 A Crim R 1, 26-27 [99]-[102]; *R v Stanley* [2013] NSWCCA 124 [42]; *R v Quami (No 14)* (2016) A Crim R 575, 582 [22].

³⁶ *R v Gittany* [2013] NSWSC 1503 [7].

order. In short compass, they are as follows.

70 First, as I have indicated above, the legislation clearly contemplates that there is a need for trials to continue, and be seen to continue, despite the suspension of jury trials. This is an important factor.

71 Second, insofar as the accused is concerned, the question of delay strongly militates in favour of a judge alone trial. There are a number of strands to this:

- I have already touched upon the general delay issues above and I will not repeat them. They arise in this case. The accused's trial was originally set down for 25 May 2020. On the current listing approach, the accused's trial is now unlikely to be heard or conducted before March or April next year.³⁷ This amounts to a minimum delay in the order of 9 to 11 months.
- The accused is currently serving a term of imprisonment (2 years and 10 months) with a 20-month non-parole period. I am told that, with time already served, he will become eligible for parole by 1 March next year. The fact that the accused will remain in custody in any event, at one level, weakens a case for judge alone trial in this matter. However, there is no certainty that a jury trial in this matter would be held and determined before he becomes eligible for parole. His lawyers have noted that the accused man will at least fall to be sentenced for the attempted armed robbery charge (charge 1) to which he intends to plead guilty. If convicted of the armed robbery charge (charge 2) he would also fall to be sentenced for that offence. If he is to be further sentenced, it is desirable that he be sentenced before the expiration of his current non-parole period. The sooner he has some clarity around this the better for him. The accused would also get the benefit of any concurrency between the

³⁷ See the County Court's COVID-19 Emergency Protocol Re-Listing of Melbourne Criminal Trials.

sentence he is serving and any sentence to be imposed for this matter.

- Given that the accused is a relatively young man of 21 years, the desirability for expeditious justice is even greater. Timely finalisation of any criminal matter is important but that is especially so with respect to younger persons. The law broadly recognises the public interest that the justice system hear and determine cases involving young persons quickly so that, if acquitted, they can re-focus on resuming their lives or, if convicted, they can be sentenced with a key purpose being that of rehabilitation and reintegration back into the community at the earliest reasonable opportunity. I accept also that delay can weigh more heavily on younger people than more mature people. The delay represents a greater part of their lives. Reliance is placed on the fact that the accused is a young Koori man in support of the proposition that these uncertainties are likely to weigh heavily upon him. I have had regard to this in a general way.³⁸ For these reasons I accept that the delay weighs heavily upon the accused.
- In short, if no order is made for a trial by judge alone, the further delay of this trial would likely be very substantial, and clearly out of the ordinary.

72 Third, I am required to take into account the prosecution submissions, which support the making of the order. The prosecution has indicated that the complainants are eager to have the matter finalised. This too favours an immediate trial by judge alone.

73 Fourth, the issues in this trial concern whether or not the prosecution can prove an armed robbery, and whether or not the prosecution can prove the accused was complicit in any such armed robbery. These issues are plainly factual issues and do not involve the application of any objective community standards.

³⁸ See *Re Kennedy* [2020] VSC 187 [6(4)(b)].

- 74 Fifth, neither party has raised any compelling matter which would tend against a trial by judge alone, and I can see none.
- 75 Sixth, I have had regard to the wish of the accused (after having received legal advice) to be tried expeditiously by a judge alone, rather than enduring a substantial wait for a trial by jury.
- 76 The short duration of the trial and the limited matters in issue would not ordinarily favour a judge alone trial, over a jury trial. However, within this COVID-19 environment, I am comforted by the fact that this case can be practically and fairly conducted. The defence has already foreshadowed in their application that at least some of the witness evidence may be admitted through their statements. In any event, there are only three witnesses who may be called. No matter how the case is conducted or presented (remotely, face to face, or a mixture of the two), it seems clear that it is sufficiently manageable so that justice can be done. Of course, the manner of the conduct of the trial will be a matter for the trial judge.

Orders

- 77 Pursuant to s 420D(1) of the CPA, I order that the charges of attempted armed robbery and armed robbery alleged against the accused by Indictment K11854402.1 be heard and determined by a judge alone, without a jury.