

AUSTRALIA / JUDGMENT

R v Saliba (No 2) (Judge alone application)

[2025] NSWSC 155**COURT**

Supreme Court

DECIDED

06 March 2025

BEFORE

Hamill J

CASE / FILE NUMBER

2022/00386498

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R v Saliba (No 2) (Judge alone application) [2025] NSWSC 155

Hearing dates:

27 February and 3 March 2025

Date of orders:

6 March 2025

Decision date:

06 March 2025

Jurisdiction:

Common Law

Before:

Hamill J

Decision:

(1) In the murder trial of the accused, Dominic Saliba, I make a trial by judge order pursuant to s 132 of the Criminal Procedure Act 1986 (NSW).

(2) Confirm the trial is listed before Yehia J in Nowra on Monday 10 March 2025.

(3) Direct the Registrar and/or Supreme Court Media Liaison Officer to contact Channel 7 and the Daily Telegraph to advise them, with the Court's gratitude, that the items taken down voluntarily from their websites and social media platforms may be re-published once the trial commences before Yehia J next week.

Catchwords:

CRIMINAL LAW – application for trial by judge alone – relevant considerations – relevance of mainstream and social media items – extent to which prejudice capable of being cured by direction and vetting of jury panel – where self-defence likely to be raised – extent to which “reasonableness” and application of community standards will apply – facial tattoos – where tattooing patent – where tattoos depict knives or scythes – where death caused by stabbing – whether prejudice capable of being cured by direction – relevance of academic studies close to ten years old – where interests of justice lie

Legislation Cited:

Crimes Act 1900 (NSW), s 421
Criminal Procedure Act 1986 (NSW), s 132, 132(4), 132(5), 132(6), 132A

Cases Cited:	Arthurs v Western Australia [2007] WASC 182 Gilbert v The Queen (2000) 201 CLR 414; [2000] HCA 15 Kingswell v The Queen (1985) 159 CLR 264; [1985] HCA 72 R v Belghar [2012] NSWCCA 86; (2012) 217 A Crim R 1 R v GSR (No 3) [2011] NSWDC 17 R v Qaumi & Ors (No 14) (Judge alone application) [2016] NSWSC 274; (2016) 265 A Crim R 575 R v Qaumi & Qaumi [2016] NSWSC 1473 R v Simmons; R v Moore (No 4) [2015] NSWSC 259; (2015) 249 A Crim R 120 R v Stanley [2013] NSWCCA 124 R v White [2024] NSWSC 1369 Redman v R [2015] NSWCCA 110
Texts Cited:	F Funk and A Todorov, “Criminal Stereotypes in the Courtroom: Facial Tattoos Affect Guilt and Punishment Differently” (2013) 19(4) Psychology, Public Policy, and Law 466 K Brown, B McKimmie and T Zarkadi, “The Defendant with the Prison Tattoo: The Effect of Tattoos on Mock Jurors’ Perceptions” (2018) 25(3) Psychiatry, Psychology and Law 386 Lord Devlin, Trial by Jury (rev ed, 1966)
Category:	Procedural rulings
Parties:	Dominic Saliba (Applicant) The King (Respondent)
Representation:	
Counsel:	R Khalilizadeh (Applicant) K Ratcliffe (Respondent)
Solicitors:	Hugo Law Group (Applicant) Office of the Director of Public Prosecutions (Respondent)
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JUDGMENT

The accused, Dominic Saliba, seeks an order under s 132 of the Criminal Procedure Act 1986 (NSW) for a “trial by judge order”. That is, he seeks to be tried by a judge sitting alone and without a jury. The Prosecutor opposes the making of the order. Accordingly, it is necessary to “consider” whether it is in “the interests of justice” to make the order: s 132(4).

Mr Saliba is charged with the murder of his cousin, Bailey Jones, at Bomaderry on 9 December 2022 and his trial is listed in Nowra to commence next Monday or Tuesday. Accordingly, the present application must be resolved expeditiously.

The order was sought by notice of motion filed on 9 December 2024 but Yehia J, who is allocated to preside over the trial, was called upon to make several evidentiary rulings before the application could be determined. Those objections were also foreshadowed in the notice of motion and the outcome had the potential to impact on the present application.

Once the dust settled on those evidentiary skirmishes, the application under s 132(4) came before me on Thursday 27 February 2025. It was adjourned until Monday 3 March 2025 to find out whether two media items, which had some potential to impact on the fairness of the trial, would be removed from the internet until the trial was over. While both media outlets involved – Channel 7 and the Daily Telegraph – indicated a willingness to remove the items from their websites and/or Facebook pages, there remained some controversy as to whether the items may still be accessible on the internet. The parties were also invited to provide a joint statement by Wednesday 5 March 2025 (yesterday) as to whether certain social media accounts had been set to “private”. The parties complied with that request and I was able to finalise this judgment and reach my conclusion overnight.

The position taken by each party in a nutshell

The essential submission made by Ms Khalilizadeh on Mr Saliba’s behalf relates to the risk that a jury’s deliberations may be infected with prejudice arising from matters that would not impact on a judge sitting alone. The potential for prejudice fits into two general categories. First, there have been many social media posts about the murder, the grief it has caused to Bailey Jones’ family and the reprehensible conduct of Mr Saliba, as viewed from the perspective of the deceased’s family. Secondly, Mr Saliba is heavily tattooed and there is a concern that the jury, confronted with the content of some of those tattoos, may react with prejudice and more readily accept that he is aggressive or violent and more likely to have committed murder. Reliance is placed on some academic articles in support of this submission.

The Prosecutor submits that these matters can be dealt with by directions from the trial Judge which the law assumes will be followed by the jury. Further, she points to some possible practical solutions such as wearing makeup to cover the face tattoos and wearing a high collar to obscure the extent of the tattoos on Mr Saliba’s neck.

Further, the Prosecutor emphasised that the tribunal of fact will be required to determine whether Mr Saliba acted in self-defence which encompasses questions of “reasonableness” which will involve an application of community standards. She relies on sub-s 132(5) which permits the Court to refuse to make an order under the section if:

“the trial will involve a factual issue that requires the application of objective community standards, including (but not limited to) an issue of reasonableness ...”

Overview of the general principles discussed in earlier authorities

Before considering the detail of the competing submissions, I will briefly relay some relevant legal principles, most of which are uncontroversial, which must guide my determination. These principles have been discussed in many cases both at first instance and on appeal. The parties referred to a number of cases that have considered these principles and I have applied those to the specific facts of this application. The principles and issues are discussed in the following reasonably well known authorities: *R v Belghar* [2012] NSWCCA 86; (2012) 217 A Crim R 1, *R v Stanley* [2013] NSWCCA 124, *Redman v R* [2015] NSWCCA 110, *R v Simmons*; *R v Moore (No 4)* [2015] NSWSC 259; (2015) 249 A Crim R 120 (“*Simmons & Moore No 4*”), *R v Qaumi & Ors (No 14)* (Judge alone application) [2016] NSWSC 274; (2016) 265 A Crim R 575, *R v Qaumi & Qaumi* [2016] NSWSC 1473 and *R v White* [2024] NSWSC 1369. From those and other cases, and based on the words of the statute, the following propositions emerge:

The “interests of justice” is a phrase of considerably wide import. It includes the interests of the accused person but encompasses considerations going well beyond those interests.

As a corollary of that first proposition, a judge alone trial is not simply there for the asking. [1] In other words, an accused is not entitled to a judge alone trial simply because they want one or make an election not to have a jury trial.

Even so, the fact that the accused person, with the advice of their lawyers, voluntarily abandons their right to a jury trial – the “lamp that shows that freedom lives” – is a significant matter to take into account in deciding where the interests of justice lie. [2]

Similarly, a subjective apprehension in the accused that they will not receive a trial free of prejudice is a relevant consideration. [3] However, it has been held that there must be more than a “mere stated apprehension without supporting evidence”. [4]

There are advantages to both forms of trial. For example, while the jury enjoys the opportunity of robust, private and anonymous debate and the verdict has the certainty of unanimity, a judge is required to explain their conclusions and factual findings, so that there is greater transparency in the reasons for the verdict.

There is no presumption in favour of a jury trial and such a trial is not to be seen as the normal mode of trial or the default position. [5]

There is no rule that cases of particular seriousness or notoriety, or particular kinds of offences, should be determined by a jury rather than by a judge sitting alone. [6]

When considering issues of prejudice, the court must proceed on the basis that the jury will understand and comply with judicial directions. [7] However, there are limits to this fundamental proposition. [8]

A finding that a trial may involve factual issues requiring an application of community standards is a factor that militates in favour of a jury trial and a significant matter to be considered.

However, it does not necessarily follow that there should be a jury trial in a case involving the application of community standards and other matters may outweigh that consideration in a particular case. [9]

Cases involving complex expert evidence which may be difficult for lay jurors to understand are sometimes better suited to a judge alone trial, where reasons explaining conclusions based on such evidence are required. [10]

Perceptions that judge alone trials are more “efficient” may form “part of the mix” but have a very small role to play and are generally “not relevant to the interests of justice in the particular case”. [11]

The issue as to whether questions relating to the credibility of witnesses are better determined by a jury is controversial. I discussed several authorities on this issue in *Simmons & Moore No 4* at [73]-[74] and concluded:

“for the most part, the fact that a trial involves issues of credibility is a neutral matter when it comes to determining whether it is in the interests of justice to make an order for trial by judge alone.”

This approach was accepted by Adams J in *Redman v R* [2015] NSWCCA 110 at [13]-[14]. His Honour held at [17] that the primary judge fell into “significant error” by acting “on the basis that a jury is a superior tribunal of fact [for the purpose of judging credibility]”.

On the present application, the learned Prosecutor pointed to authorities on both sides but did not attempt to dissuade me from the approach I took in earlier cases.

There is also some controversy as to whether cases involving intention are better suited to being resolved by a jury: see the discussion in *Simmons & Moore No 4* at [63]-[65] and the cases collected there. I maintain the conclusion I stated at [65]:

“There is a qualitative difference between the application of community standards to questions such as whether an act is obscene, indecent, reasonable or negligent and a factual inquiry as to whether a particular accused formed the necessary intention to constitute a specified criminal offence. Further, if the Parliament was of the view that the issue of intention was one that involved the application of community standards, it would have been very easy to include that issue within the non-exhaustive list of matters identified in sub-s 132(5).”

There are various pre-requisites set out in the Criminal Procedure Act, each of which are satisfied on the present application. I record the following:

The application for a trial by judge order was made on 9 December 2024 which is more than 28 days before the trial date (10 March 2025): cf Criminal Procedure Act, s 132A.

I am satisfied the accused sought and received legal advice as to the effect of a trial by judge order from an eminent and highly respected firm of criminal lawyers and experienced and very capable counsel: Criminal Procedure Act, s 132(6).

The prosecution case, the evidence and likely issues to be ventilated at trial and an overview of matters relevant to the application for a trial by judge order

What follows is a pithy summary of the material tendered on the application. The urgency of the matter and the need for a prompt resolution prevents me from going into greater detail.

The prosecution case and anticipated issues at the trial

Bailey Jones was 18 years old on 9 December 2022. Mr Saliba was his cousin and approaching 21 years of age. The two young men had intermittent contact over the years as part of the same extended family group. In the months leading up to 9 December 2022, they had more contact. Around three weeks before the alleged murder, one witness saw the accused wave a knife around in front of the deceased. This incident caused a small cut to the deceased's finger. Around the same time, Bailey Jones complained to his mother that the accused was putting pressure on him in relation to a debt of \$300 which was owed by another man (Dylan Thornton).

On the evening of 9 December 2022, the accused, the deceased and a number of other men were at the Saliba family home in Bomaderry. During the day the deceased spoke to Dylan Thornton and told him that Mr Saliba was "pissed off" and wanted to talk to him. There was a series of messages between the accused and Thornton about the "1.3" debt.

At some stage, the accused and the deceased were "slapboxing" with each other and witnesses saw each of them holding containers that held cannabis or money and some are expected to give evidence that the accused said words like "this is mine". The accused left the garage and went to the kitchen and the deceased followed him.

After a few minutes, the deceased returned to the garage bleeding and holding his chest. He had suffered two stab wounds to the chest or abdomen. One witness heard the accused say, "he fell on the knife". Emergency services were called and Bailey Jones received medical treatment but died of the stab wounds a short time later.

When police asked about the knife, Mr Saliba told them "I got rid of it bro" (a statement relied on as consciousness of guilt evidence). He later showed the police a knife that was lying on the kitchen floor and said "there it is." In a recorded interview with police, the accused told police that his "little cousin" was playing around with the knife, that "one thing led to another", and that he tripped and landed on the knife. This was a lie and, again, will be relied on in support of the proposition that the accused was demonstrating a consciousness of guilt.

On 12 December 2022, Mr Saliba was recorded on a surveillance device saying to a friend with respect to this version of events, that "I had to come up with a story". He also said:

“And then, and then he shaped up to me and I walked back with Layla in the room and grabbed my (IND) Layla goes what do you need that for and I never answer her when, like I’m angry and then I went back and he shaped up to me and I just went boom (slap sound) but pulled him into it and I didn’t realise bra like (slap sound) I jabbed him three times bra he had three stab wounds, he had one here, two dots here and then, but the one stab wound was the one that killed him. And then after I did it he’s like ‘you got me’, I was like ‘no I didn’t no I didn’t’. And then when I looked at it (IND) the whole thing must have, to hit his heart and then like.”

Intention and self-defence

On the hearing of the application for a judge alone trial and in the pre-trial hearings before Yehia J, Ms Khalilizadeh made it clear that it was not the accused’s case that Bailey Jones was holding the knife:

“KHALILIZADEH: Yes. Can I acknowledge what I acknowledged before her Honour Justice Yehia in the pre-trial submissions even if this works against me. That is, the applicant’s case at trial will not be that the deceased was holding the knife and fell on the knife or tripped and fell on the knife. The applicant’s case at trial will mean, or the result of the applicant’s case at trial will mean that there will not be a dispute that the accused was holding the knife when the injury was inflicted.

HIS HONOUR: He gave the first version, the version you’re saying is not being run in the electronically recorded interview, but then said something to somebody which was recorded by surveillance device. And it is that latter version that will be substance of his case at trial?

KHALILIZADEH: It won’t be the substance of his case at trial, your Honour.”

A report prepared by the forensic pathologist, Professor Duflou, was tendered as Ex 3 on the application. It sets out what is anticipated to be the defence case:

“I have been informed that it is the Defence case that the following events transpired: When the deceased came into the kitchen from the garage, the accused was holding a knife. The deceased ran towards the accused and tried to throw a closed fist punch towards the accused’s head which did not connect. The accused was still holding the knife, and the knife penetrated the deceased’s body.”

From the material tendered on the application, it seems that there will be no issue that Mr Saliba’s act caused the stab wound that led to Bailey Jones’ death. However, there may be an issue whether the stabbing was a “voluntary” act and there will almost certainly be an issue whether that act was accompanied by a specific intention to kill or inflict really serious injury.

There will also be an issue as to whether the accused acted in self-defence and this will involve consideration of whether:

Bailey Jones threw a punch at the accused’s head.

The accused believed his conduct was necessary to defend himself.

The accused's conduct was a reasonable response to the circumstances as he perceived them to be.

The tribunal of fact will also have to resolve issues as to the honesty and reliability of various witnesses as well as that of the accused himself (if he gives evidence in the trial). It may also need to resolve any conflict in the opinions provided by the expert pathologists and engage in circumstantial reasoning on that issue and more generally.

The tribunal of fact will also be called upon to resolve the extent to which Mr Saliba's post offence conduct establishes that he acted with a consciousness of guilt in the aftermath of the stabbing. This conduct includes the suggestion of hiding the weapon and telling material lies about who brandished the knife and how it came to penetrate the deceased's chest.

The publicity and social media postings

The affidavits read in support of the notice of motion included reams of material that was published online by large media organisations and/or available online through social media applications or websites. Much of that material was quite tendentious, assumed the guilt of the accused and was apt to engender great (and entirely appropriate) sympathy for Bailey Jones' family, especially his mother, Caroline Micallef. She is enduring unfathomable grief and shock. Ms Micallef has been very active on social media and has used these posts and these forums as an outlet to attempt to deal with her loss.

Ms Micallef is expected to be a witness at the trial and her statements to police were part of the material annexed to one of the affidavits.

In terms of the mainstream media, it seems the two most significant postings have been taken down by Channel 7 and the Daily Telegraph. There was some controversy about whether the items might still be accessible online, but I am satisfied based on statements from the bar table that, while the links may appear to be active, the articles themselves are no longer available and will remain offline until the conclusion of the trial. The Court is grateful to the media organisations for their prompt cooperation in facilitating this.

The social media postings are far more extensive and there is considerable difficulty working out whether the posts remain available, accepting for present purposes, that Ms Micallef has done what she can to take them down or make them private. Without descending into the detail, I am satisfied that any juror, or potential juror, who was aware of this material, would have difficulty bringing an unemotional and impartial mind to bear upon the issues.

This is not, in any way, a criticism of Ms Micallef whose anger, pain and bewilderment are palpable when one reads the material. Rather it is simply an objective assessment of the posts that have come to the attention of the accused's lawyers and which are annexed to the affidavits of his solicitors read on this application. While there is evidence that not all of the material has been taken down, I do not accept that this is the result of Ms Micallef's deliberate acts or omissions. However, even as I write days before the trial, it is not clear which parts of the

material remain accessible through various social media apps and groups within those apps.

On Wednesday 5 March 2025, the parties emailed my Associate indicating the agreed position as to the privacy settings on relevant social media accounts:

Facebook profile 'Carol N Lawrence Micallef' (1100 followers) is on private settings, requiring you to be a friend or follower to view the profile contents.

Facebook Group 'Proof of my life experiences' (214 members) is on private settings, requiring someone to join the group to view the profile contents.

Facebook Group 'Grieving Loss of a Child ups and downs In honour of my son Bailey Jones' (268 members) is on private settings, requiring someone to join the group to view the profile contents.

TikTok account 'Bailey Jones In your Eyes Son' @in.your.eyes.forever18 (187 followers) is on private settings, requiring you to follow the account to view the contents and associated videos if searched on google are said to be "currently unavailable".

Tattoos

The accused is a quite heavily tattooed man. The tattoos on his face and neck are conspicuous and will be visible, at least in a general way, from the jury box when he is seated in the dock. As the Prosecutor submitted, it may be possible to mask the tattoos to some extent, by him wearing a high-necked shirt or by applying makeup, but I cannot accept that it would be possible to hide them altogether.

One of the issues litigated before Yehia J on the pre-trial hearing concerned an objection to the video component of the electronically recorded interview. As I understand it, this was pressed by the prosecution and admitted by her Honour on the basis of certain gestures made in answering some of the questions. Furthermore, the tribunal of fact will need to assess the accused's body language when he provided answers that the prosecution says were false, and which are now conceded to be false.

The video of the ERISP was tendered and I have watched the first ten or so minutes which the parties said was all that was necessary for present purposes. I have watched that part of the video around three times and paused the video to study Mr Saliba's appearance more closely.

The applicant is shirtless in the video (why that is so is unclear). Both of his arms are covered with tattoos including from the back of his hands and fingers to the right shoulder and just below the left shoulder. He has tattoos in the form of what appears to be three lines of writing or calligraphy on the left side of his chest at around nipple level. His chest is otherwise mostly devoid of tattoos. On his face there are tattoos under his left eye, what I understand to be "teardrop" tattoos under his right eye, and some tattoos above his right eye and ear.

His solicitor, Mr Mahon, described the face tattoos that are visible when one meets Mr Saliba in person. He says there are “two images depicting knives” tattooed on his face and a “scythe” under his left eye and on his cheek with the word “HUSTLE” in calligraphy next to or near the scythe. On the other side of his face, he has the words “blessed” and “fear” next to a “teardrop” tattoo in the shape of a rabbit’s head. There is another tattoo nearby in the shape of an anchor.

Part of the accused’s material included a 2018 academic article entitled “The Defendant with the Prison Tattoo: The Effect of Tattoos on Mock Jurors’ Perceptions.” [12] In the course of argument the Prosecutor handed up a 2013 article referred to in that study: “Criminal Stereotypes in the Courtroom: Facial Tattoos Affect Guilt and Punishment Differently.” [13]

The 2018 study suggests that “participants perceived tattooed defendant’s more negatively” and that “physical assault is stereotypically associated with individuals who have a tattoo especially when that tattoo is of the prison style on the face.” The study suggests “there was a significant indirect pathway predicting guilt likelihood through perceived dangerousness, as well as an effect of tattoo presence on guilt likelihood”. The latter – where (as I follow it) participants found the defendant less likely to be guilty – “possibly reflects concerns about appearing prejudiced by basing estimates of guilt likelihood on an avert social cue such as tattoos”. In short, and at the risk of repeating myself as often as the authors of the article do, the study found “the presence of a tattoo led to participants evaluating the defendant as more dangerous, and that this dangerousness was then associated with higher likelihood of guilt” but this was balanced by participants not wanting to appear to be prejudiced. In conclusion, the study found that:

“[N]egative stereotypes about defendants with highly visible prison-style tattoos can indirectly negatively bias mock juror decision-making.”

The 2013 study referred to “babyfaced or attractive offenders” being “judged more leniently than mature-looking or unattractive offenders”. It also noted that “longer exposure to the face does not lead to a change in judgment but only to increased confidence about it.” The conclusion referred to “the effects of facial tattoos on guilt judgments” and stated:

“people with facial tattoos might already be at a greater risk to be judged guilty and to go to prison in the first place when the defendant’s guilt is ambiguous.”

Before moving to consider the parties’ submissions, I should say that the amount of weight that can be placed on studies such as these – each of which was more than or close to ten years old – is questionable.

Submissions and consideration

On my overall assessment, the application is closely balanced with each party making persuasive submissions in relation to factors that pull in either direction. I am satisfied that Mr Saliba has met the “evidentiary burden” to raise matters capable of establishing that it is in the interests of justice that he be tried by a judge sitting without a jury. The question whether – taking all relevant matters into consideration – it is in the interests of justice is more difficult. This is not a case

where there is a single strong factor, or a combination of factors, that tip the scales decisively either way.

As to the adverse publicity in the mainstream media, while some of that material is clearly capable of creating prejudice against the accused, it is not a case where there has been an abundance of such material. Comparison can be made to the Qaumi or “Brothers for Life” trials, or the case of *Arthurs v Western Australia* (see footnote 3 above) where Martin CJ referred to the “extensive, continuous and in some respects extraordinary” pre-trial publicity. Any prejudice will most likely be eradicated by careful vetting of the jury panel and by firm directions to the jury once it is empanelled. Further, two particular items of concern have been taken down by the media organisations involved.

The social media posts are more concerning. I accept that, as at the time of delivering this judgment, Ms Micallef (and perhaps others) have switched the settings on each of the accounts to “private” but that does not, as I understand it, mean that the items may not have some potential to impact the fairness of the trial. Ms Khalilizadeh expressed concerns both as to the possible impact on members of the jury panel who may be aware of the material before they come to court as well as the risk that jurors may disobey directions and go searching for the material. The first of those matters is exacerbated by the fact that all of the relevant people are (or were) local to the area from which the jury will be drawn and by the fact that the author of many of the posts is both the mother of the deceased and expected to be a witness at the trial. Mr Mahon’s affidavit notes that “the deceased, Mr Saliba and their respective families lived and resided in the Nowra area at the time of the deceased’s death”.

However, while I have considered these matters in the mix of relevant considerations, I am generally required to (and will) act on the assumptions that (i) the jury panel can be vetted in an appropriate way and (ii) the jury will follow the (no doubt) firm and clear directions provided by Yehia J upon it being empanelled.

Even so, there remains some residual risk and the nature of the posts – both in terms of content and quantity – are such as to heighten Mr Saliba’s subjective view that he may face judgment by a jury which is influenced by emotion and possible prejudice.

I accept the Prosecutor’s submission that the accused’s expected reliance on self-defence raises a matter of reasonableness that, by reference to sub-s 132(5), militates in favour of a trial by jury. Ms Khalilizadeh concedes, quite properly, that this is so. However, she submits that the other matters upon which Mr Saliba relies outweigh that issue.

On a close analysis, this is not a case where the issue of reasonableness, in the context of self-defence, looms large. It seems that the critical issues for the tribunal of fact will be precisely what Mr Saliba did, what Bailey Jones did, and what Mr Saliba’s intention and belief was at the time the knife penetrated the deceased’s chest. If the jury has a reasonable doubt about his intention, and/or if the jury cannot eliminate the reasonable possibility that he believed his conduct was necessary to defend himself, the accused would be not guilty of the primary charge of murder: Crimes Act 1900 (NSW), s 421. The issue of reasonableness would arise on the

alternative form of homicide, namely manslaughter, but only if the jury or judge is first satisfied beyond reasonable doubt that the accused intended to kill or inflict grievous bodily harm. While the issue is important to the decision I am called upon to make, the most significant issues in the case do not require the application of community standards.

In light of the critical issues in the trial, the nature of the accused's facial tattoos assumes some greater prominence. It may be accepted that the details of his facial tattoos are not immediately obvious from viewing the video recording of the interview or even from across the courtroom. However, as Ms Khalilizadeh submits, they may be apparent if the accused gives evidence. If a single member of the jury notices a tattoo of a knife or a scythe on Mr Saliba's face, there is a genuine risk that they will, even sub-consciously (and despite directions against acting with prejudice based on his appearance, lies and the nature of the charge), be inclined to accept the prosecution case more readily for reasons of emotion rather than logic or rational thought.

While general directions could be fashioned to implore the jury against acting with prejudice because of Mr Saliba's appearance and specifically his tattoos, any direction of greater specificity is likely to draw attention to the singular nature of some of his tattoos. Directing the jury may do more harm than good given the depiction of sharp weapons and the issues to be determined at the trial; did the accused deliberately stab the victim and what was his intention and belief at that time?

Notwithstanding my gratitude to the parties for their diligence in providing them, I have not been greatly influenced by the academic articles. Some of the findings are unsurprising. I accept the Prosecutor's submissions that the survey of mock jurors is of marginal significance and am prepared to act on an understanding that, in the ten or so years since the studies were undertaken, tattoos are far more common in the community, or at least in the younger population. It is the nature of the tattoos that is of more concern particularly the facial tattoos which are not so common and the depiction of a knife and a scythe which has some resonance in a case involving a stabbing.

I am unable to find that the accused's grief as depicted at the opening of the interview, the family relationship between the parties, and the possibility that his family will attend court, will alleviate any prejudice that arises from his appearance. I am satisfied that the correlation between the items depicted in the tattoos when considered against the nature of the killing and the issues to be ventilated at trial, is a matter of some significance in the mixture of relevant considerations which inform the question of whether it is in the interests of justice to order a judge alone trial.

Most of the remaining matters of relevance – such as issues about the credibility of witnesses, factual conclusions as to the accused's intentions, findings about what actually happened – are essentially neutral to the decision under s 132(4). Neither party suggested that the expert evidence to be adduced in the trial was so complex that a jury would be unable to understand it. Obviously enough it is relevant that the accused has made an election, with the benefit of legal advice and based on his genuine subjective concern that he will not receive a trial free of

prejudice and emotion if the case is determined by a jury. His concern is more than a “mere stated apprehension” but is rationally based on the evidence. Having said that, he is not entitled to a trial by judge alone simply because he asked for it.

Conclusion and orders

Taking those matters into account, I consider that it is in the interests of justice to make an order that the accused be tried by judge alone.

Accordingly, I make the following orders and directions:

In the murder trial of the accused, Dominic Saliba, I make a trial by judge order pursuant to s 132 of the Criminal Procedure Act 1986 (NSW).

Confirm the trial is listed before Yehia J in Nowra on Monday 10 March 2025.

Direct the Registrar and/or Supreme Court Media Liaison Officer to contact Channel 7 and the Daily Telegraph to advise them, with the Courts gratitude, that the items taken down voluntarily from their websites and social media platforms may be re-published once the trial commences before Yehia J next week.

Endnotes

1.

R v Stanley [2013] NSWCCA 124 (Barr J) but note my comments in R v Simmons; R v Moore (No 4) [2015] NSWSC 259 at [58]-[60].

2.

R v Belghar [2012] NSWCCA 86; 217 A Crim R 1 at [99], Lord Devlin, Trial by Jury (rev ed, 1966).

3.

Ibid. See also Arthurs v Western Australia [2007] WASC 182 at [79].

4.

R v Stanley [2013] NSWCCA 124 at [42].

5.

R v Belghar [2012] NSWCCA 86; 217 A Crim R 1 at [69].

6.

Arthurs v Western Australia [2007] WASC 182 at [82].

7.

Gilbert v The Queen (2000) 201 CLR 414; [2000] HCA 15 at 425.

8.

R v GSR (No 3) [2011] NSWDC 17, Arthurs v Western Australia [2007] WASC 182 at [87]-[92], R v Simmons; R v Moore (No 4) [2015] NSWSC 259.

9.

R v White [2024] NSWSC 1369 at [32].

10.

Kingswell v The Queen (1985) 159 CLR 264; [1985] HCA 72 at 302-303, Arthurs v Western Australia [2007] WASC 182 at [90].

11.

Cf R v Belghar [2012] NSWCCA 86; (2012) 217 A Crim R 1 at [110]-[111].

12.

K Brown, B McKimmie and T Zarkadi, “The Defendant with the Prison Tattoo: The Effect of Tattoos on Mock Jurors’ Perceptions” (2018) 25(3) Psychiatry, Psychology and Law 386.

13.

F Funk and A Todorov, “Criminal Stereotypes in the Courtroom: Facial Tattoos Affect Guilt and Punishment Differently” (2013) 19(4) Psychology, Public Policy, and Law 466.

Amendments

06 March 2025

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Coversheet addition: Lord Devlin, Trial by Jury (rev ed, 1966)

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