

AUSTRALIA / JUDGMENT

R v XY [2024] NSWSC 1472

Source: caselaw.nsw.gov.au · Research copy typeset by Esheria. Not court-issued or certified.

Supreme Court

New South Wales

Medium Neutral Citation: R v XY [2024] NSWSC 1472

Hearing dates: 22 November 2024

Date of orders: 22 November 2024

Decision date: 22 November 2024

Jurisdiction: Common Law - Criminal

Before: Davies J

Decision: 1. Grant leave pursuant to s 132A Criminal Procedure Act 1986 (NSW) to make the application within 28 days of the date fixed for trial.

2. Application for trial by judge alone is refused.

Catchwords: CRIMINAL PROCEDURE – application for trial by judge alone – where earlier jury was hung – whether trial by judge alone is in the interests of justice – complainant suffering from an intellectual disability – where expert report on the condition of the complainant served after trial – where Crown indicated not all of report would be relied upon – evidence not complex – report does not require complex jury directions – finality not a sufficient reason for finding that a judge alone trial is in the interests of justice – credibility of witness being a central issue favours a jury trial – application for trial by judge alone refused

Legislation Cited: Crimes Act 1900 (NSW) s 66DB

Criminal Procedure Act 1986 (NSW) ss 132, 132A

Evidence Act 1995 (NSW) ss 135, 165A

Cases Cited: Alameddine v R [2022] NSWCCA 219

Liberato v The Queen (1985) 159 CLR 507; [1985] HCA 66

R v Belghar [2012] NSWCCA 86; (2012) 217 A Crim R 1

R v Dawson [2022] NSWSC 552

R v McNeil [2015] NSWSC 357; (2015) 250 A Crim R 12

R v Mackie (No 2) [2018] NSWSC 1654

R v Mapp [2024] NSWSC 1267

R v Niguidula [2023] NSWSC 290

R v Simmons; R v Moore (No 4) [2015] NSWSC 259; (2015) A Crim R 120

R v White [2022] NSWSC 1060

Texts Cited: Nil

Category: Procedural rulings

Parties: Crown

XY (Accused)

Representation: Counsel:

N Keay (Crown)

I Todd (Accused)

Solicitors:

Office of the Director of Public Prosecutions (Crown)

Dillon-Smith Lawyers (Accused)

File Number(s): 2022/354613 & 2022/14569

Publication restriction: Nil

judgment

1. The accused stood trial before Yehia J and a jury on 30 September 2024 on two counts of sexually touching a person over the age of ten years and under 16 years contrary to s 66DB(a) of the Crimes Act 1900 (NSW).
2. On 3 October 2024 Yehia J discharged the jury because they were unable to agree on a verdict in respect of each of the counts.
3. The matter has been fixed for a further trial in Bega to commence on 2 December 2024 with a one week estimate.
4. An application has now been made by the accused for leave under s 132A of the Criminal Procedure Act 1986 (NSW) to make a judge alone application within 28 days before the date fixed for the trial, and pursuant to s 132(4) of the Criminal Procedure Act for the accused to be tried by judge alone. The application is supported by an affidavit of the accused's solicitor, Adam Sumbak, sworn 18 November 2024. The only two matters of substance in that affidavit

are a statement that the accused's solicitors are currently appearing for the accused on a pro bono basis, and that the Crown served a report of Dr Sally McSwiggan on 6 November 2024.

The complainant's intellectual disability

1. The complainant is the daughter of the accused. The complainant was born on 9 December 2006. They live at Batemans Bay in a home with the complainant's mother and two brothers. The sexual touching is alleged to have occurred on two occasions between 9 December 2021 and 8 September 2022. The allegation in the Crown case statement is that the accused touched the complainant on her chest area over a dress she was wearing and on her vagina under the dress and inside her underwear.
2. The Crown Case Statement disclosed that the complainant had a moderate intellectual disability and receives daily learning support at school. She has limited expressive language and difficulty with written comprehension. She was assessed by her learning support worker as working at the academic level of a seven year old child.
3. Prior to the trial which resulted in the hung jury, a court communication report had been provided to the Court by a speech pathologist, Lenore Scali, dated 14 September 2024. That report highlighted the intellectual difficulties suffered by the complainant. Ms Scali did not give evidence at the trial. Evidence was given by the Head Teacher of Special Education at the complainant's school that the complainant was not coping in the mainstream classes at school; that language was too quick, and that the content was too hard for her. The teacher said that the complainant did attend mainstream classes in art, food technology and hospitality, but she has a teacher's aide with her in those classes. The teacher said that the complainant suffered from hygiene issues.
4. The jury was told in the Crown opening that the complainant had an intellectual difficulty. The jury saw the complainant's interviews with the police where, when asked, she said she did not know what the truth was or what a lie was.
5. By reason of what appeared in Ms Scali's report concerning the approach to asking questions of the complainant, defence counsel was somewhat restricted in his ability to challenge the complainant's evidence.

Dr McSwiggan's report

1. Dr McSwiggan interviewed the complainant in the presence of her mother who did not contribute to the evaluation. Dr McSwiggan administered the Wechsler Adult Intelligence Scale- Fourth Edition (WAIS-IV) selected sub-tests; Wechsler Memory Scales – Fourth Edition. The WAIS-IV comprises core sub-tests which provide composite scores that represent intellectual functioning in specified cognitive areas (verbal comprehension comprised of three sub-tests; perceptual reasoning comprised of three sub-tests; working memory comprised of two sub-tests).

2. Dr McSwiggan assessed the complainant's general intellectual ability as being in the extremely low range, falling at the 0.4 percentile compared to age matched peers. Her verbal comprehension index score was within the extremely low range and fell at the first percentile, the working memory index score was within the extremely low range and fell at the 0.4 percentile, and her perceptual reasoning index was within the extremely low range and fell at the first percentile.
3. Dr McSwiggan reviewed a number of documents including a letter from a paediatric registrar dated 5 December 2012, NSW Education records, a speech pathology report dated June 2016 and Ms Scali's court communication report dated 14 September 2024.
4. Dr McSwiggan diagnosed the complainant as suffering from intellectual development disorder (mild on the cusp of moderate). She said that the complainant operates intellectually in the lowest percentile of her peer group, below 99% of her peers.
5. Dr McSwiggan was asked, what was the impact, if any, of that disability on her ability to accurately recount to people experiences that have happened to her? Dr McSwiggan answered:
 41. There would be a substantial lack of detail and abstract thought. Her capacity to provide estimations would be impacted such as time, dates, distances, number of events, full name of persons. Her recall of details such as conversations or places would be impoverished. Her capacity to provide her perspectives (such as her inner thoughts) and others perspectives (such as what she thought was in others minds) would be very limited.
 1. Dr McSwiggan was then asked, what was the impact, if any, of that disability on her ability to accurately recall and report detail of past events over time? Dr McSwiggan answered:
 43. 'Events' is a broad term which I am taking as an experience Ms Parker has personally encountered. Memory is made up of multiple systems. Most commonly in humans, declarative memory is expressed through conscious, effortful recollection versus implicit memory (things you do, like riding a bike. more procedural).
 44. Declarative memory is divided into episodic memory (memory of specific personal events that occurred in a particular time or place) and semantic memory (knowledge of things/ concepts). Declarative memories are acquired through everyday personal experiences.
 45. The stages of memory processing are traditionally divided into acquisition (also known as encoding), storage and retrieval. The stimuli, the form, amount, and content of information determines the neurobiological pathways how the stimuli can be encoded, stored, and retrieved. For example, encoding new auditory verbal information in the form of listening to a detailed story requires a proficient 'phonological loop', also known as auditory working memory in order to be able to encode detailed verbal information beyond the level of immediate attention. Ms Parker's auditory working memory was deficient, consistent with her developmental intellectual disability. This impacts on her capacity to encode auditory material that goes substantially beyond her immediate attention such as a detailed story.

This would contrast with her capacity to recall short and simple verbal exchanges without much detail that have not required a lot of information to be encoded. While living an event would provide a richer array of stimuli, with contributions from recall of episodic and semantic memory of previously experienced events or places or people to match, visual encoding with time and place stamping, auditory encoding that may not be going beyond immediate attention, and emotional traces that can impact on memory. Generally, with richer encoding from multiple sources the memory consolidation should be stronger. But semantic knowledge of the type of event, emotional experience of the event, and the level of attention a person had at the time of living the event would add to the variability of memory, in some cases, substantially so.

(emphasis added)

Submissions

1. The accused submitted that the major issues in the trial are the Crown's reliance on the unsworn evidence of the complainant, (unsworn as she cannot understand truth or lies), on whether and in what manner, she was sexually touched. The accused submitted that at the first trial there were significant issues with concerns expressed by the defence that the questioning of the complainant was leading, said to be in the presence of adults that she felt compelled to agree with, and replete with variations as to acts, uncertainty over dates and times, and completed in a manner in which she was displaying marked cognitive difficulties, particularly delay in responding.
2. The accused submitted further that cross-examination was severely curtailed due to the incapacity of the complainant to understand concepts in questions that contained a negative. That problem, despite directions, it was submitted, could lead to misapprehensions by a jury of the forcefulness of the accused's defence and the deficiencies in the complainant's account.
3. The accused submitted that the report of Dr McSwiggan was a very intellectually challenging expert report. It delves into complex analytical systems that the human brain uses for functions such as declarative memory, memory processing and the encoding of new auditory verbal information.
4. The accused focused particularly on the highlighted section in para 45 of the report, first, to submit that this would be difficult for the jury to understand; secondly, to express concern about how it would affect the jury's perception of the complainant's evidence; and thirdly, how this evidence relating to the complainant's capacity to form or encode memory sits with the directions ordinarily given concerning the variability in accounts of the incidents recounted by the complainant. The accused submitted that it is difficult to envisage how such material will be presented to the jury in a manner that would make it comprehensible to the issues in the trial.

5. The accused submitted that the medical evidence in the trial is so complex and has such material ramifications for both the Crown and the accused, that it ought to be dealt with by a judge alone trial. It could be dealt with more efficiently and effectively by the warning the judge can give to herself about the reception and limitations of the evidence.
6. The accused submitted that at the earlier trial, directions were given in relation to the use of complaint evidence as truth of the facts asserted, directions limiting the use of evidence under s 136 of the Evidence Act 1995 (NSW), warnings under s 165A of the Evidence Act and a Liberato direction. The accused submitted that the medical evidence adds to the complexity of directions, particularly how such material is to be taken into account on questions of leading and reliability.
7. The accused submitted that a judge alone trial would permit the public to have confidence that all relevant material was taken into account, and that sympathy, which would be likely in a trial such as this, was not influential in the fact finding analysis. Further, the complex medical evidence needed to be evaluated, and a judge alone trial could properly accommodate that by a reasoned decision.
8. The accused submitted that there were no community standards that required a jury. The issue is whether the accused touched the areas alleged, which were clearly breast and genitals.
9. The accused submitted that, as this is a re-trial, there is no guarantee that the new jury would be able to reach a verdict, whereas a judge alone trial would guarantee resolution of the matter. The accused submitted that both he and the complainant have an interest in the resolution of the proceedings. He pointed out that by the start of the new trial, the accused will have been on bail since 9 September 2022, a period of almost 2 years and 3 months.
10. The Crown submitted that the issues raised by the accused do not support a conclusion that a trial by judge alone is in the interests of justice.
11. In relation to the report from the neuropsychologist, the Crown indicated that it did not propose to lead all of the evidence in that report. Rather, it proposed to lead limited evidence by agreed fact or limited oral evidence of the nature of the complainant's impairment. The Crown submitted that the nature of the evidence is not complex and could readily be explained to a jury.
12. The Crown submitted that the central issue in the trial is the consistency, credibility and reliability of the complainant's account of the offences. The Crown submitted that it is not a case where there are matters that might persuade to a jury to act on emotion or sympathy rather than reason, and the matter is well within the capacity of the jury to determine.
13. The Crown submitted that the directions given in the earlier trial were not onerous or difficult for a jury to comprehend. The Crown pointed to the fact that the jury in the earlier trial sought no clarification of the legal directions.

14. The Crown submitted, as to the question of finality, that it cannot be assumed that a second jury will be divided in the same way as the first jury was. The Crown pointed to statistics showing hung verdicts account only 1.9% of trials in the District Court.

Legal principles

1. Section 132 of the Criminal Procedure Act relevantly provides:

...

- (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.

...

1. Section 132A relevantly provides:

132A Applications for trial by judge alone in criminal proceedings

- (1) An application for an order under section 132 that an accused person be tried by a Judge alone must be made not less than 28 days before the date fixed for the trial in the Supreme Court or District Court, except with the leave of the court.

1. In R v Dawson [2022] NSWSC 552, Beech-Jones CJ at CL said:

- [10] Generally, the phrase "interests of justice" envisages a broad assessment of a variety of matters, some concerning the interests of the parties to the litigation, but also "interests wider than those of either party" (BHP Billiton Limited v Schultz (2004) 221 CLR 400; [2004] HCA 61 at [15], and at [169] and [172]). In the context of s 132, in R v Belghar [2012] NSWCCA 86; (2012) 217 A Crim R 1 ("Belghar"), McClellan CJ at CL held that s 131 does not create a presumption that the trial should be with a jury which an accused person must discharge. Instead, as each form of trial has its own characteristics, and depending on the particular case, the court may conclude that the interests of justice are best served by a trial before a judge alone rather than a trial by a jury. Further, the subjective views of an accused, and his or her belief that a jury trial may not be fair, are relevant factors to consider however they are far from determinative. What is more significant is the reason for that preference, whether those reasons are rationally justified, and whether they bear upon the question of a fair trial. The mere apprehension of prejudice in prospective jurors, not based on evidence or a matter of which the court may take judicial notice, is not sufficient to make such an

order as it is contrary to the assumption which the common law makes that jurors will understand and obey the instructions of trial judges to bring an impartial mind to bear on their verdict.

- [11] In *Simmons* (No 4), Hamill J identified several considerations which may inform the assessment of whether the interests of justice warrant the making of an order for trial by judge alone. These include the potential to save court time and expense from having a matter proceed without a jury although the weight to be attached to this factor will vary from case to case. One advantage of a trial by a judge alone is the enhanced community confidence in the verdict that may be derived from the provision of reasons by a judge especially if it concerns complex engineering, scientific or medical issues. On the other hand, there is a "public interest in the administration of justice [being] carried out in public and in serious cases by the representatives of the public sitting as jurors". Many authorities point to juries as the preferred body to make assessments of the credibility of witnesses. However, in *Simmons* (No 4) Hamill J regarded this factor as neutral given that judges have the "training and experience of making difficult decisions on credibility, putting aside matters of emotion, on an almost daily basis".

1. In *R v Belghar* [2012] NSWCCA 86; (2012) 217 A Crim R 1, McClellan CJ at CL said at [112]:

As the reasons of Martin CJ in *Arthurs* make plain, the Chief Justice considered the requirement for a judge to give reasons to be a significant factor when considering where the interests of justice lie. To my mind the opportunity which a reasoned judgment affords to the accused and to the public to understand the steps in the reasoning process of the decision-maker, compared with the inscrutability of the jury's decision, will depending upon all the circumstances, be a factor which is relevant to the decision as to whether to order a judge-alone trial. However, it is but one factor and the weight to be given to it will depend upon the nature of the issues to be determined in the trial. If the trial will involve complex engineering, scientific or medical issues it may be more readily concluded that a verdict accompanied by the reasons of the trial judge will enhance the interests of justice, both in relation to the accused and the maintenance of confidence in the criminal justice system. It would inevitably facilitate an appeal if the trial judge has erred.

1. In *R v Simmons*; *R v Moore* (No 4) [2015] NSWSC 259; (2015) 249 A Crim R 120, Hamill J said:

- [71] Cases involving complex evidence that could be difficult for a jury to understand may lend themselves to orders for a trial by judge alone: *R v Belghar* at [112]; *R v Dean* at [60-62]. In *Kingswell v R* [1985] HCA 72; 159 CLR 264 Deane J said at 302-303:

"There is, for example, obvious force in the argument that a jury of ordinary men and women selected at random from the community lacks the knowledge and experience necessary to sit in responsible judgment upon the type of scientific dispute between specialists that may arise in the course of a criminal trial or upon the detailed technical questions which may be involved in the trial of white collar and computer crime."

[72] Further, it may often be in the interests of justice for the reasoning process of the tribunal of fact to be exposed in cases involving an assessment of competing and complicated expert evidence: *Arthurs v Western Australia* at [90].

1. In *R v Niguidula* [2023] NSWSC 290, Wilson J said:

[23] Much has been written in the jurisprudence, including in *AK v Western Australia* (2008) 232 CLR 438; [2008] HCA 8, and in *R v Belghar* (2012) 217 A Crim R 1; [2012] NSWCCA 86 at [23] - [38] about the historical background to the default position that criminal proceedings should be tried by jury. Although it is not necessary to add to the jurisprudence here, it is important to note that a jury trial is ordinarily seen as one that provides a greater likelihood of an accused securing an acquittal than is the case for a trial by judge alone, whilst involving the community in criminal proceedings.

[24] Jury trials bring that great advantage to the administration of the criminal justice system, involving the community through its members bearing responsibility for the most significant decisions required to be made, in determining questions of guilt. To reserve decisions concerning guilt to a judge sitting alone heightens the likelihood of the community coming to regard the criminal justice system as the preserve of an unrepresentative minority, and thus outside the community's scrutiny or input. The ultimate risk in that scenario is that the administration of the criminal justice system will lose the support of the community.

The application under s 132A

1. The Crown does not oppose leave being granted. Nevertheless, it is for the Court to determine if leave should be given.
2. In *Alameddine v R* [2022] NSWCCA 219, the Court of Criminal Appeal (Beech-Jones CJ at CL, Hamill and N Adams JJ) said this in relation to the time for an application under s 132 and the concept of judge shopping:

[17] The first matter concerns the significance of an explanation for a late application under s 132A to dispelling the appearance of judge shopping. As noted by Hamill J in *Simmons* (No 4) at [21], in the second reading speech for the Bill introducing s 132A the Attorney General stated:

"The new section 132A sets out procedural matters regarding trial by judge orders, including that applications are to be made no less than 28 days before the trial date, except by leave of the court. This is designed to minimise the risk of a party applying for a judge-alone trial on the basis of knowing the identity of the trial judge." (emphasis added)

[18] This statement reflects the observation by Gleeson CJ in *R v Perry* (1993) 29 NSWLR 589 at 594 about the rationale for the predecessor to s 132A:

"One of the reasons why the legislation provides that an election for trial without a jury must be made before the date fixed for trial is that if an election could be made on the date fixed for trial, it might appear that accused persons were making such elections in the light of a knowledge of the identity of the trial judge. It is, of course, impossible to eliminate altogether appearances of that kind, and there may well be circumstances in which elections will in fact be made in the light of some knowledge of the identity of a trial judge. However, it clearly goes some way towards eliminating such appearances if elections have to be made before the trial date." (emphasis added)

[19] In *Director of Public Prosecutions (NSW) v Farrugia* [2017] NSWCCA 197 Basten JA cited this passage (at [12]). His Honour added (at [13]) that:

"Modern case management procedures will often mean, as Hamill J noted [in *Simmons* (No 4) at [19]-[22]] that the identity of the trial judge will be known well before the commencement of the 28 day period. Nevertheless, where the matter is left to the last moment, it may be inappropriate for the prosecutor simply to consent to a grant of leave in circumstances where, as in the present case, no explanation was proffered as to why the matter could not have been raised earlier." (emphasis added)

[20] The form of explanation to which Basten JA was referring is an explanation that, at the very least, addresses the "appearance" of judge shopping. Implicit in both of the above passages is that such an appearance can be dispelled by the provision (and acceptance) of an explanation for the delay being an explanation that discloses some reason(s) for making the application, other than "knowing the identity of the trial judge"; i.e., the appearance of judge shopping does not survive the acceptance of the explanation. Hence, in *R v Dawson* [2022] NSWSC 552 leave was granted to an accused under s 132A to apply for a judge alone trial within 28 days of the trial date. The identity of the trial judge had been known to both the Crown and the accused for a substantial period of time, however it was clear that the fact and timing of the application was dictated by the outcome of an application for a permanent stay (at [8]). The explanation that was given and accepted dispelled the suggestion of judge shopping (see also *R v Quami & Ors* (No 14) [2016] NSWSC 274 at [8] to [18]).

[21] In *Simmons* (No 4) Hamill J heard and granted an application for a judge alone trial after his Honour commenced hearing and deciding pre-trial issues. His Honour noted that the fact that he was the trial judge had been known to the parties for months so there was no suggestion that the parties made the application as a result of discovering the identity of the trial judge (at [22]). Further, his Honour considered but rejected the possibility that the parties had nevertheless based their decision to seek a judge alone trial because of decisions that he had already made, which, if it had been, would be tantamount to judge shopping (at [23] to [31]). Again, implicit in his Honour's approach is that an acceptance of an explanation for the fact and timing of the application which does not involve any form of judge shopping was sufficient to dispel the "appearance" of judge shopping.

1. The present matter falls within the category of cases discussed in *Dawson and Simmons* (No 4). The identity of the trial judge for the retrial has been known to the parties since 11 October 2024 when the Criminal List Judge, Hamill J, fixed the matter for retrial before Yehia J. Further, it seems tolerably clear that the occasion for the making of the application under s 132A was the service by the Crown of the report of Dr McSwiggan on 6 November 2024. In my opinion, the evidence is sufficient to address the "appearance" of judge shopping by virtue of the late application. Leave should be granted under s 132A(1).

Should a judge alone trial be ordered?

1. Since the accused stood trial on 30 September 2024 only two things have changed. The first is that the jury in the first trial was hung. The second is that the report of Dr McSwiggan has been served. Apart from the accused's submission that a judge alone trial would bring about finality, whereas a further jury trial might also result in a hung jury, the accused's submissions derived from the service of Dr McSwiggan's report.
2. The submissions rely on what is said to be the complexity of the report and how that will affect the trial in a number of respects. First, it is said that the report is so complex that it would be difficult for a jury to understand it. Secondly, the complexity of the report adds to the complexity of the directions the trial judge would need to give to the jury. Thirdly, the public would have confidence that all relevant material in the report is taken into account by a reasoned decision of a judge, rather than a verdict only from a jury.
3. I do not agree that what is contained in the report is of any particular complexity in the assessment being made, in the report of the tests administered, in the diagnosis of the psychologist, and in the psychologist's explanation of memory. The report does not significantly differ from reports prepared by psychiatrists and psychologists that result in those persons giving evidence before a jury in criminal cases, particularly, for example, where some form of mental impairment is relied on as a defence: for recent examples see *R v White* [2022] NSWSC 1060; *R v Mapp* [2024] NSWSC 1267.
4. Further, pathologists frequently give evidence in murder and manslaughter cases where it is necessary to explain to a jury the anatomical cause of death. Evidence in all of these types of cases is given in a way that avoids jargon or technical terms that would not be readily understandable to a jury. There is no reason to think that the position the present case would not be the same. In any event, the Crown has indicated that not all of the report is to be relied upon, but that limited oral evidence or agreed facts would be put before the jury.
5. It is difficult to see how reliance on evidence from Dr McSwiggan would result in additional complex directions to the jury. In the ordinary course, the trial judge would simply summarise Dr McSwiggan's evidence, if that was thought appropriate, and any submissions made by the parties in reliance upon it. Some of the accused's submissions seemed to be made on the assumption that the trial judge would need to explain to the jury how they should apply the learning in the report to the evidence the complainant gave. That is not the role of the judge. It is for the parties to address the jury on how it should use the evidence of

Dr McSwiggan.

6. In the same way, it is difficult to see how any issue of public confidence arises as a result of any evidence that Dr McSwiggan would give. The submission seems to be dependent on a finding that the medical evidence is complex and would need to be dealt with in detail by any judge conducting a judge alone trial. As I have indicated, I do not consider that the evidence is unduly complex.
7. The fact that a judge alone trial would bring finality where an earlier trial resulted in a hung jury is not a sufficient reason for finding that a judge alone trial is in the interests of justice. It would mean that in every case where there is a hung jury, there would be a justification for a judge alone trial the second time around.
8. The fact that the credibility of witnesses is a central issue in the trial may operate in favour of a jury trial. In *R v McNeil* [2015] NSWSC 357; (2015) A Crim R 12, Johnson J said:

[102] Where the credibility of witnesses arises as an issue in the trial, in my view this factor may operate in favour of a jury trial. This is so whether an assessment of credibility involves application of objective community standards or not. Such a trial will involve 12 members of the public (as opposed to one Judge) bringing their experience to bear in determining if the witnesses are giving credible and reliable evidence.

[103] Like Latham J in *R v Dean* at [59], I would call in aid the statement of Lord Devlin in *Trial by Jury* (1966), page 140, cited by Heydon J in *AK v Western Australia* at 472 [94]:

"Secondly, Lord Devlin also saw juries as being superior to judges in assessing credibility [78]:

'[T]he jury is the best instrument for deciding upon the credibility or reliability of a witness and so for determining the primary facts. Whether a person is telling the truth, when it has to be judged, as so often it has, simply from the demeanour of the witness and his manner of telling it, is a matter about which it is easy for a single mind to be fallible. The impression that a witness makes depends upon reception as well as transmission and may be affected by the idiosyncrasies of the receiving mind; the impression made upon a mind of twelve is more reliable. Moreover, the judge, who naturally by his training regards so much as simple that to the ordinary man may be difficult, may fail to make enough allowance for the behaviour of the stupid. The jury hear the witness as one who is as ignorant as they are of lawyers' ways of thought; that is the great advantage to a man of judgment by his peers'."

[104] Insofar as it would seem that there are issues as to the credibility on the part of witnesses to be called in the Applicant's trial, in my view this factor may be taken into account in support of retaining the s.131 procedure of trial by jury.

1. A similar point was made by Lonergan J in *R v Mackie (No 2)* [2018] NSWSC 1654 at [25].
2. The Crown accepts that the issues in the trial do not require the application of community standards and that there is no presumption that the trial should proceed by jury. Nevertheless, it is significant that the first trial was conducted before a jury as efficiently as

the complainant's condition would allow. The only additional evidence would appear to be that of Dr McSwiggan, and I have considered her evidence earlier on the assumption, perhaps not justified in the light of what the Crown has said, that everything in her report would be given in evidence.

3. It would have been of assistance to the Court and, no doubt, to the accused if the Crown had been in a position at the hearing of this application to indicate which portions of the report were to be led in evidence at the trial. However, in the absence of the Crown's final position being known, I have determined this application on the basis that the whole of Dr McSwiggan's evidence will be led.
4. In my opinion, there is nothing to suggest that it is in the interests of justice to order a judge alone trial.

Conclusion

1. Accordingly, the orders I make are these:
 1. Grant leave pursuant to s 132A Criminal Procedure Act 1986 (NSW) to make the application within 28 days of the date fixed for trial.
 2. Application for trial by judge alone refused.

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.

Decision last updated: 04 February 2025

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.caselaw.nsw.gov.au/decision/19346af934bba1f8e5bce38d>

CASE PAGE <https://chat.esheria.ai/case-law/australia/r-v-xy-2024-nswsc-1472-2024>

Prepared on 28 October 2026 · Esheria