CASE NOTE: *S (SC 36/2018) v R* [2018] NZSC 124

DENNIS DOW*

I. INTRODUCTION

In *S (SC 36/2018) v R,* the Supreme Court considered the importance of choice – in this context, the importance of the choice to be tried by a judge sitting alone rather than a jury.[1]

II. THE FACTS

The appellant was charged with sexual offending against two complainants. The first, HS, was a 15 year old girl who, along with two male friends, was offered a lift into town by the appellant late one night. After dropping the males off, the appellant drove the complainant to an isolated area where the alleged offending took place. The appellant was charged with abduction for the purposes of sexual connection, sexual violation by rape, unlawful sexual connection by anal penetration and assault by choking and sucking on the complainant's neck.

Following the complaint by HS, the appellant's wife also made a complaint to the police, alleging a course of violent and sexual offending by the appellant that had occurred throughout their relationship. This complaint led to a number of charges including sexual violation by rape, unlawful sexual violation by anal penetration, indecent assault and a number of violence charges, including by choking during sexual activity.

The two sets of charges were joined for trial. The defence in respect of both sets of charges was consent. The appellant was discharged on one charge relating to HS and found guilty by a jury on all remaining charges.

III. THE 'ELECTION'

On appeal, the appellant's trial counsel Susan Hughes QC filed an affidavit explaining how the appellant ended up being tried by a jury in the first place. Ms Hughes QC acknowledged that she had made an error, deposing that she had understood that given the maximum penalties for the charges faced by the appellant, a judge-alone trial (JAT) was not available. This was wrong as a defendant facing a category 3 offence (as the appellant was) *may* elect trial by jury.[2] If an election for trial by jury is not made, the presumption is that the matter will be determined as a JAT.[3]

On the basis of her misunderstanding, Ms Hughes QC had elected trial by jury on the appellant's behalf in relation to both sets of charges. It was evident from this that Ms Hughes QC did not provide advice to the appellant on the availability of a JAT, nor did she advise him on the respective risks and/or benefits associated with each mode of trial.

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[1] *S (SC 36/2018) v R* [2018] NZSC 124, [2019] 1 NZLR 408.

[2] Criminal Procedure Act 2011, ss 4(1)(l) and 50. A category 3 offence is an offence punishable by a maximum term of imprisonment of at least 2 years, other than a category 4 offence.

[3] Criminal Procedure Act 2011, s 73(2)(a).

The appellant also filed an affidavit deposing that he believed he would have chosen a JAT if he had been made aware of the choice. His reasons for this included his beliefs:

> - That a judge would be more likely to consider the evidence and apply the law without getting distracted by the emotional aspect of the allegations. The appellant gave an example of a delay during his trial during which one of the jurors was crying in the jury room.
> - That it would have been easier to convince one person of his innocence than 12 people, given his view that most people will just go with the crowd.[4]

IV. BASIS FOR APPEAL

Section 232 of the Criminal Procedure Act 2011 provides that a Court must allow an appeal if satisfied that a miscarriage of justice has occurred, which means:[5]

> … any error, irregularity, or occurrence in or in relation to of affecting the trial that-
> (a) has created a real risk that the outcome of the trial was affected; or
> (b) has resulted in an unfair trial or a trial that was a nullity.

It was common ground that the failure of counsel to advise the appellant of his choice as to the mode of trial was an error or irregularity. The issue on appeal was therefore whether that failure had created a real risk that the outcome of the trial was affected, resulted in an unfair trial, or resulted in a trial that was a nullity.

There was no suggestion that the jury trial itself was in any way unfair.[6] The unfairness relied on therefore had to arise from the mode of trial itself, that is, unfairness arising from the absence of an informed choice as to the mode of trial.

V. MAJORITY APPROACH

A. Nullity

The majority[7] dealt with the nullity argument relatively briefly on the basis adopted in *Abraham v District Court at Auckland,*[8] finding that the error did not meet the nullity threshold. The Court noted that contrary to earlier legislation, there is no statutory obligation for the Court or counsel to advise the defendant of the election between judge-alone and jury trial.[9] On that basis, the Court distinguished the case of *Parker v Police,*[10] relied on by the appellant. In *Parker,* Clifford J had allowed an appeal against

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[4] This appears to stem from a mistaken understanding of the burden of proof and the need for unanimity.
[5] Criminal Procedure Act 2011, s 232(4)(a).
[6] Issues regarding joinder of the two sets of charges and propensity directions were litigated in the Court of Appeal, but not pursued in the Supreme Court.
[7] William Young, O'Regan and Ellen France JJ.
[8] *Abraham v District Court at Auckland* [2007] NZCA 598, [2008] 2 NZLR 352. In *Abraham*, a defendant who was not aware of the right to elect trial by jury prior to entering guilty pleas subsequently applied to vacate those pleas. The Court of Appeal considered that in the absence of a clear procedural basis for arguing the pleas were a nullity, that threshold could not be reached and the real question was whether a miscarriage of justice had occurred.
[9] *S (SC 36/2018) v R*, above n 1, at [46].
[10] *Parker v New Zealand Police* [2012] NZHC 1231.

conviction where the appellant had not been informed, as was required by the now repealed s 66(1) of the Summary Proceedings Act, of the right to elect trial by jury.

B. Unfair Trial

The Court then turned to the primary issue on appeal – whether the absence of a choice as to mode of trial meant that the ensuing trial was unfair. The Court began by commenting:[11]

> It is important that defendants have an informed choice in relation to the making of an election. There are two elements to that choice. The first goes to knowledge, that is, the defendant must know that he or she has a choice as to the mode of trial. The second element goes to the advice a defendant should receive, that is, the right to take advice about the reasons for choosing one mode over another.

The question was how important.

The Court began by observing that there is no statutory obligation requiring a defendant to be informed of the right to make an election.[12] This point had been considered by the Law Commission in its report *Juries in Criminal Trials.*[13] On balance, the Commission considered that such a requirement was not necessary as the right to legal advice was sufficient. The Court commented:[14]

> As to desirability of advice, it seems to us that it would be preferable for the courts to include, as part of their procedures at the time a plea is taken where it is relevant, the advice that there is a choice as to the mode of trial. For example, any relevant forms should contain a prompt as to the need to check advice has been provided. Further, trial counsel should see it as part of their role to provide some advice on this aspect.

It is not clear what "forms" the Court is referring to. It is relatively uncommon for not guilty pleas to be entered by notice,[15] the vast majority being entered through counsel in open court. It is also not clear how, in practice, the courts would include this requirement as part of their procedures. Given the usual means of a not guilty plea being entered, all this could realistically involve is an enquiry of counsel as to whether advice regarding election has been provided, raising questions regarding both legal privilege and the pragmatic sensitivity of a court essentially being required to routinely ask counsel if he or she has provided advice in a competent manner.

Having made this recommendation, the Court returned to the proposition that there is no reliable basis upon which it can be said that one mode of trial is fairer than another, and there is a degree of speculation about whether a jury or a judge alone as fact-finder might adopt differing approaches.[16] The Court commented:[17]

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[11] *S (SC 36/2018) v R*, above n 1, at [49].
[12] At [50].
[13] Law Commission *Juries in Criminal Trials* (NZLC R69, 2001) at [70]-[71].
[14] *S (SC 36/2018) v R*, above n 1, at [52].
[15] As permitted by s 37(4) of the Criminal Procedure Act 2011 where a defendant is represented by a lawyer.
[16] *S (SC 36/2018) v R*, above n 1, at [53].
[17] At [53].

> Accordingly, while the appellant was entitled to an informed choice it has to be recognised in considering the importance of the absence of that choice in this case that the advice that can be given about why one mode of trial may be preferred over another is based on experience and impression.

The Court drew a contrast with other trial decisions, such as the election to give evidence, for which advice involves less speculation.[18]

The Court analysed a number of Canadian authorities, which appeared to provide support for the appellant's position.[19] However, the Court distinguished these authorities on the basis that those cases reflected a different procedural approach and/or recognition of the importance of the right to a jury trial, as opposed to a JAT.[20] In particular, s 536 of the Canadian Criminal Code makes it mandatory for a justice, upon an information[21] being put to an accused, to advise the accused of the right to elect either JAT or trial by jury. The default position, if no election is offered by the accused, is trial by jury.[22]

Having distinguished the Canadian authorities, the Court made a number of comments about the constitutional place of the jury trial in New Zealand.[23] The unstated but available inference from these comments is a view that in New Zealand, a jury trial is held in higher constitutional regard than a JAT.[24]

C. Real Risk the Outcome of the Trial Was Affected

Before reaching a conclusion on whether the error had resulted in an unfair trial, the Court considered whether there was a real risk that the outcome of the trial was affected, noting the comments made in the appellant's affidavit regarding his view on the mode of trial. The Court concluded that there was not, commenting:[25]

> - The limited data available to the Court indicated that most defendants charged with sexual violence elect to be tried by jury.[26]
> - The appellant was given a trial under one of two processes for which the CPA provides, as a result of which he had the benefit of both rights protected by the Bill of Rights, namely a trial by jury[27] and a fair and public hearing by an impartial court.[28]
> - Nothing in the appellant's affidavit suggested a tangible impact on the outcome, particularly as his view regarding the emotional aspect appeared to be coloured by hindsight, in light of the incident during his trial.

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[18] At [56].
[19] At [58]-[73]. See *R v Stark* 2017 ONCA 148, (2017) 347 CCC (3d) 73; *R v Shilmar* 2017 ABPC 213; (2017) Alta LR (6th) 151; *R v DGM* 2018 MBCA 88, (2018) 366 CCC (3d) 436; *R v Turpin* [1989] 1 SCR 1296.
[20] At [58].
[21] The Canadian equivalent of a charging document.
[22] In contrast to New Zealand, where the default for a category 3 offence is a JAT.
[23] *S (SC 36/2018) v R*, above n 1 , at [74]-[78].
[24] This is consistent with s 24(e) of the New Zealand Bill of Rights Act 1990, which secured the right to the benefit of a trial by jury for a category 3 offence.
[25] At [79]-[82].
[26] In practice, it is common for counsel to advise electing trial by jury in cases involving allegations of sexual offending, particularly where a defence of consent is advanced, one rationale being the jury's larger pool of sexual experiences.
[27] New Zealand Bill of Rights Act 1990, s 24(e).
[28] New Zealand Bill of Rights Act 1990, s 25(a).

D. Conclusion

Having made these observations, the Court returned to the fundamental question under s 232(4) of the Criminal Procedure Act 2011. Despite repeatedly noting the importance of the ability to make an informed election, the Court reached the view that "the absence of an informed choice in this case was not so important that the resulting trial was necessarily unfair".[29] In reaching this conclusion, the Court also made two observations which whilst not determinative, supported the conclusion:[30]

> - If a retrial were ordered, the appellant would not be committed to a JAT, which would create the risk of the appellant obtaining a re-trial by jury. Whilst not stated, an associated underlying policy consideration would also be the undesirability of the complainants having to go through the process of giving evidence a second time.
> - There was concern that allowing the appeal would open up a new area of challenge to the competency of counsel on a matter which would be difficult for the Court to supervise (essentially a floodgates concern).

VI. THE MINORITY APPROACH

The minority[31] reached the same conclusion as the majority. However, with regard to whether the error created a real risk that the outcome of the trial was affected, the minority commented "we do not rule out the possibility that an error of the kind that occurred in this case [or indeed a failure to advise on the availability of a jury trial] could create a real risk that the outcome of a trial was affected but this would be rare".[32]

In considering whether the resulting trial was unfair, the minority observed:[33]

> The important point … is that the choice as to mode of trial is given to the accused. It is not a choice that can be made by the accused person's lawyer, although of course the lawyer should advise of the existence of that election.

This led the minority to conclude that being deprived of that choice is a procedural irregularity that could cause a trial to be characterised as unfair, emphasising that it is not necessary for establishing an unfair trial to show that the result of the trial might have been different.[34] However, the minority considered that, on the facts of this appeal, that threshold was not reached due to the degree of hindsight involved in the appellant's affidavit, and the deposition by Ms Hughes QC that had she given advice, it would have been to elect trial by jury.

The minority also added an obiter comment that the right to a jury trial has sufficient constitutional significance that not being advised of the right to elect trial by jury, and therefore being confined to a JAT, may be a serious procedural error that on its own

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[29] *S (SC 36/2018) v R*, above n 1, at [83].
[30] At [84].
[31] Glazebrook and Arnold JJ.
[32] At [90].
[33] At [93]. In this case Ms Hughes QC did make the choice for the appellant when she elected trial by jury on his behalf.
[34] At [95]-[96]. See *Wiley v R* [2016] NZCA 28, [2016] 3 NZLR 1 at [37]; *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 at [77].

could cause an unfair trial, without any added requirements.[35] As with the majority comment noted above, this indicates a view that a jury trial is held in higher constitutional regard than a JAT.

VII. AUTHOR'S COMMENT

As any criminal defence counsel will know, providing advice to a defendant about the merits and risks of a JAT versus a jury trial is not straightforward. As the Supreme Court observed, there is no reliable basis on which it can be said that one mode of trial is fairer than another, and there will necessarily be a degree of speculation about whether a jury or a judge as fact-finder may adopt differing approaches.

However, this observation illustrates the tension between the fundamental issue in this appeal, and the legislative regime constraining the Court on appeal. One might understandably consider, as the minority appeared to and as Clifford J did in the dissenting judgment in the Court of Appeal, that it does not really matter whether the appellant did in fact receive a fair trial.[36] What matters is that before the trial even started, he was deprived of a choice. That is what was unfair.

Some might therefore find it difficult to reconcile the Court's comments that choice matters, with its finding that really, in this context at least, it does not.

[35] At [99].
[36] *S (CA377/2017) v R* [2018] NZCA 101.