IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 36/2018

S

Appellant

v

THE QUEEN

Respondent

Hearing:	16 October 2018
Coram:	William Young J Glazebrook J O'Regan J Ellen France J Arnold J
Appearances:	N Levy for the Appellant B J Horsley and M J Lillico for the Respondent

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CRIMINAL APPEAL

MS LEVY:

May it please Your Honours, I appear for the appellant.

WILLIAM YOUNG J:

Thank you, Ms Levy.

MR HORSLEY:

Tēnā koutou, e ngā kaiwhakawā, ko Horsley me Lillico e tū nei mō te Karauna.

WILLIAM YOUNG J:

Thank you, Mr Horsley. Ms Levy.

MS LEVY:

May it please the Court, this appeal is about a man who faced serious offending for which the Criminal Procedure Act 2011 created an election right: he could choose a Judge alone trial or a jury trial; one by default, the other by positive advice. There's no significance in the default mechanism used in the legislation to explain the right to choose, and by that I mean that if the default position was a jury trial and Ms Hughes had denied S his right to elect a Judge alone trial the position on this appeal would be no different.

WILLIAM YOUNG J:

Well, that's probably the big question in the case, isn't it?

MS LEVY:

Well, with respect, Sir, in my submission it's –

WILLIAM YOUNG J:

You say it's a question easily answered?

MS LEVY:

It's a question easily answered –

GLAZEBROOK J:

But it could be either way, couldn't it?

MS LEVY:

Yes.

GLAZEBROOK J:

It could be, well, it doesn't make any difference either way as long as the trial was fair, and therefore the cases that say that if you haven't been given a chance to have a jury trial are actually wrong or distinguishable, or it could be answered to say, well, it's both ways.

WILLIAM YOUNG J:

Or it could be answered that it only matters one way –

GLAZEBROOK J:

A jury trial.

WILLIAM YOUNG J:

– because the jury trial is constitutionalised.

GLAZEBROOK J:

Yes.

WILLIAM YOUNG J:

But those are the sort of – I mean, I suppose there's more than one question.

MS LEVY:

Well, with respect, Your Honours are answering the more advanced questions than the one I was rhetorically posing.

WILLIAM YOUNG J:

Sure.

MS LEVY:

The point I'm making just by way of –

GLAZEBROOK J:

It doesn't make any difference which way the election or default position is, is that the limit?

MS LEVY:

That's correct, that's my preliminary point. The more interesting point is whether the denial of the right to choose has particular consequences depending on which way the cards fall, and on that point of course I say that the election right, the choice, is on a fundamental matter, the makeup of the fact-fining tribunal, or for shorthand I think we've called it "mode of trial". So it's a choice that a defendant has on a fundamental matter. So these are really just introductory comments so you know where I'm going.

The Crown submissions have this theme that the jury trial is a Rolls-Royce version of a trial, and in my submission that is not correct. As that expression is used, a Rolls-Royce of something is the best of its kind, the best you can expect in every way. In my submission – and the Court of Appeal accept this and I understand the Crown accept it too – in fact a jury trial is one option with some advantages in some situations, just as a Judge alone trial has some advantages in some situations, and in my submission it's possibly in today's world, rather than even 10 or 20 years ago, that maybe defendants and lawyers will be coming to appreciate some of those advantages as the concept of Judge alone trials for sex charges really takes hold.

WILLIAM YOUNG J:

Are there are statistics about this, how many people elect Judge alone trial for serious sexual offending?

MS LEVY:

Not that I'm aware of. I did do a search to see how many appeals there were on verdicts given on Judge alone trials and I found five in the High Court and I'm aware of another one in the Court of Appeal where people charged with assault with intent to commit sexual violation or sexual violation had elected Judge alone trial where previously they could not have, and received of course a reasoned verdict which was then examined on appeal.

WILLIAM YOUNG J:

So how many cases are there like that?

MS LEVY:

Well, I found five in the High Court and I'm aware of another one which really by mistake ended up in the Court of Appeal.

WILLIAM YOUNG J:

Sorry, but why are they dealt with in the High Court?

MS LEVY:

Because it's a first appeal from a District Court decision.

WILLIAM YOUNG J:

Oh, I see, sorry, yes. Okay, so it's a thing.

MS LEVY:

It's a thing. And there are no statistics of course on convicted person satisfaction with the reasoned verdict of a Judge compared to the sound bite, the sudden decision unreasoned of a jury. So we don't know the answer to that, but as Your Honour has said, it is a thing, and in my submission particularly with more and more concern particularly in the media being given to the impact on complainants of trials, the difficulties caused to everyone involved in a jury trial, in my submission there's going to be more and more analysis by defendants, or perhaps more particularly by their counsel, of the real advantages that there could be in a Judge alone trial in terms of avoiding appearances of people being put through the mill in front of a jury of strangers, that sort of thing.

WILLIAM YOUNG J:

Just one other practical question. What's the ritual that the Court goes through when an election, when a plea is taken to a category 3 offence and an election is made?

MS LEVY:

I can only advise you of that by reference to the Act.

WILLIAM YOUNG J:

Okay. I mean, I may have missed something, but it's not really apparent from the affidavits what the registrar said, what the Judge said, what counsel said, although counsel said, "Elect trial by jury," but that may have been on a form, I don't know.

MS LEVY:

No, it wasn't on a form, it was in open Court. My understanding from Ms Hughes affidavit is that what happens is that the case is announced, Ms Hughes would have stood up and said, "I appear for the defendant who pleads not guilty and elects trial by jury," that would be the form of words.

WILLIAM YOUNG J:

I see. So the Judge has probably got a check list for the plea hearing, which will have, "Judge alone, trial by jury"?

MS LEVY:

Possibly, yes, yes. Now previously of course the Judge did have a check form where there was an election…

WILLIAM YOUNG J:

You mean in section 66 of the Summary Proceedings Act 1957?

MS LEVY:

Yes, the section 66 election where the Judge would say if counsel entered the plea, "And how does your client elect?"

WILLIAM YOUNG J:

Well, the registrar used to read it out.

MS LEVY:

Yes, that's correct, and that was required. But there's not that requirement any more.

WILLIAM YOUNG J:

It's a funny form of words Ms Hughes used. I'm not challenging her evidence of course, but to elect something suggests that you are making a choice but…

MS LEVY:

Absolutely.

WILLIAM YOUNG J:

So at least by reference to the externality to the situation there was an election of trial by jury.

MS LEVY:

Yes, there was no hint to the Court that Ms Hughes was confused about that and using, on her evidence I think, the words that she was just accustomed to using, which suggests of course that she was accustomed to speaking of an election even when she didn't believe there was one.

WILLIAM YOUNG J:

Well, I mean, I can – trying to cast my mind back, but people sometimes did say, "Elects trial by jury," even though it was going to be a jury trial case because of the way information was laid.

MS LEVY:

Yes. So I –

GLAZEBROOK J:

And I guess if she didn't elect then the Judge would presumably ask, because the Judge would have to decide where it was going and what was going next. Or are you saying they don't ask and just assume it's Judge alone?

MS LEVY:

I can't answer that, Your Honour. I suspect that some Judges would ask and say, "Are you sure, Ms Hughes? I've never seen you not without a jury before." But others would –

GLAZEBROOK J:

Just assume the default position.

MS LEVY:

Assume that the default position had been selected so –

WILLIAM YOUNG J:

We don't, well, we obviously don't have whatever the formula is, because I would have thought a Judge would say, "Do you elect trial by jury?"

GLAZEBROOK J:

Well, otherwise you could get way down the track and somebody then say, "Well, actually I…

MS LEVY:

Well, with respect, that –

WILLIAM YOUNG J:

Probably easier for us to locate than you perhaps.

MS LEVY:

Yes.

WILLIAM YOUNG J:

Okay. Well, those are the two practical questions I was just – A, do we know what happened in Court and, B, to what extent is trial by Judge alone in these sort of cases a thing that happens a lot. And you can say, well it happens a bit.

MS LEVY:

I can say that the appeals that are available to be searched indicated that it happens a bit. There may be some that haven't made it to where I was looking, and of course it's impossible to say how many un-appealed convictions there are, or un-appealed acquittals. The point I do wish to make in respect of that is that it's beginning to happen a bit and in my submission it's likely to happen more because there are valid reasons for it as a choice for a defendant.

ARNOLD J:

This issue could have arisen under the old provisions as well I guess because the Court wasn't required to advise the defendant of the option if he or she was represented by counsel and counsel made an election. That was, I think, subsection (7) in section 67A, 66A. So you could have the same mistake happening under the old regime I think.

MS LEVY:

Where a trial counsel elected Judge alone and denied the defendant advice about a jury trial.

ARNOLD J:

Yes.

MS LEVY:

My understanding is that, as His Honour Justice Young indicated, the registrar would read out, "You are charged, you have the right to be tried before a jury, how do you elect." So whether or not his counsel or her counsel had made the decision for them the jury trial words came to the defendant's attention.

ARNOLD J:

But that's not the structure of the section though. That may have happened, I don't know, but it's not in fact the structure of the section.

MS LEVY:

And of course because of the structure of the previous legislation it was a much more unusual situation anyway, and it never could have arisen in respect of these charges because sexual violation charges were, anything over 10 years had to be laid indictably, so that's these charges and many others. Anything between three months and 10 years the police or the Crown could elect to lay it indictably, in which case there had to be a jury trial unless a special application was made. Or, if it was laid summarily, the right to elect jury trial arose, and the registrar's form of words would be used and counsel would indicate. So the scope for the error that's arisen in this case was much more limited.

Just finishing off on that submission about how now Judge alone trials could be considered more palatable, there were obviously previously many reasons for jury trials being considered very important and even necessary for a much greater selection of offending and that's why there was the low Bill of Rights entitlement or the Summary Proceedings Act entitlement of three months.

WILLIAM YOUNG J:
It wasn't a reason, was there, wasn't that just borrowed from the Summary Proceedings Act, without much throught, the three months?

MS LEVY:
Yes.

WILLIAM YOUNG J:
It's hard to believe the people said, let's begin a new and what's the right threshold for trial by jury.

MS LEVY:
Well with respect they had the Canadian example to look at, which said five years.

WILLIAM YOUNG J:
Yes.

MS LEVY:
So you would think that that would have triggered some discussion. It did trigger some discussion about whether in the Bill of Rights Act we simply carry over the existing position or whether because we are attempting to make some statement about minimum rights here, we give it a little bit more thought, particularly given the Canadian situation where it's five years.

ELLEN FRANCE J:

The White Paper does discuss it and it makes reference back to the Summary Proceedings Act was my recollection.

MS LEVY:

Yes it does, I didn't bring the White Paper, but it does, and it also refers to the Canadian position of five years.

WILLIAM YOUNG J:

So they knew?

MS LEVY:

They knew, they knew, and with respect Your Honour's observation leads into another point that I make about the New Zealand Bill of Rights Act 1990 which is that while in many contexts it's of obvious importance and adds something, in this particular context we have this section probably because the Canadians did but it's not doing anything that our existing law wasn't doing already and it's not entrenched in any way so that there needs to be particular attention paid before changes are made to it, and that is evidenced by exactly what happened in this case where, despite there being opposition, Parliament changed it from three months to two years just by the stroke of a pen, for administrative convenience.

WILLIAM YOUNG J:

Well, it was quite a hard-fought issue wasn't it?

MS LEVY:

I wasn't able to find the Hansard debates on the issue, but I know that submissions from the Law Society –

WILLIAM YOUNG J:

I think the Government of the day backed off because were they going to make it –

MS LEVY:

It was three, they had three in the Bill, and as a result of submissions it was changed to two years.

WILLIAM YOUNG J:

And it's funny, because it's one year, 364 days, there's no election, two years there is, so it's a sort of, it doesn't follow the model.

MS LEVY:

The point made in the submissions before the Select Committee were, I think, that assault of a child was a two-year offence. There weren't a lot of, there weren't any, I don't think, charges that really fitted between two and three years, but by making it three –

WILLIAM YOUNG J:

No, they caught up all the two years…

MS LEVY:

– you cut out assault on a child and I think it was aggravated assault. There were a couple that you cut out which Parliament was persuaded. Now I hope I've got that right, I hope they're on the right side of the line. But those were the sorts of offences that were part of the discussion which led to the changing from three years to two years. But my point is that while those discussions were held it was ultimately in response to a Bill about administrative convenience and efficiencies within the justice system that this, "Oh, so important," says the Crown right to trial by jury was slashed, and in my submission that says something about its real importance in the Bill of Rights Act, and I say of course that that importance is insignificant.

ARNOLD J:

So you're saying it's not really constitutionalised it is?

MS LEVY:

It's not constitutionalised at all. In my submission that term properly means entrenched in some way.

WILLIAM YOUNG J:

Yes, but we do talk about the Bill of Rights in constitutional terms. I mean, I don't think you'd normally be, as it were, dissing it in this way if the case was slightly different or if the case were back to front and she'd elected trial by Judge alone instead of trial by Judge and jury.

GLAZEBROOK J:

Is the point really though that it's not one of those rights, it's one of the international conventions that we're affirming in the Bill of Rights, rather it was something related to the actual practice?

WILLIAM YOUNG J:

Just in practice, yes.

GLAZEBROOK J:

Yes.

MS LEVY:

It's something we were doing anyway, and far from respecting it being put in the Bill of Rights it was just taken out or just slashed from three months to two years in a statue which, by its own admission, has the goal of administrative efficiency and making for a simple procedure for these sorts of crimes, these sorts of charges.

ELLEN FRANCE J:

Well, I don't quite understand how that submission fits with the arguments that were made, for example in the context of the old 316A and so on when a decision was made that there would be a trial by Judge alone, and that was hard-fought and opposed on the basis that that wasn't respecting the defendant's constitutional rights.

WILLIAM YOUNG J:

Was that *Wensley* [*Wenzel v R* [2009] NZCA 130, [2009] 3 NZLR 47] – is it *Wensley* is that one?

ELLEN FRANCE J:

Yes, and I'm thinking of *Iti v R* [2011] NZCA 114 and various other cases where there were appeals about the scope of the ability to order trial by Judge alone and so on, and the arguments that were made were all coming from the perspective that the right to trial by jury was of a constitutional nature.

MS LEVY:

Well I'm not saying that those arguments weren't made but, with respect, the answer to those arguments by the legislature has been the previous provisions in the Crimes Act that allowed Judge by trial alone in certain circumstances. The same provisions, or similar provisions in the Criminal Procedure Act that allow trial by Judge alone over the defendant's objection in the certain circumstances, so in my submission what those arguments really reflect is the right to choose, and while they were framed as a constitutional right to jury trial, of course if they were – I'm sorry, the decisions Your Honour was talking about, were they post-Bill of Rights?

ELLEN FRANCE J:

Yes.

MS LEVY:

Yes –

WILLIAM YOUNG J:

These were the cases where trial by Judge alone got serious, it's a long and complex case.

ELLEN FRANCE J:

That's right, that's right.

WILLIAM YOUNG J:

I think one of the cases was *Wensley*.

ELLEN FRANCE J:

It is.

MS LEVY:

I'll look at that case over the morning adjournment but I'll be surprised, with respect Your Honour, if it was a successful appeal on the basis that notwithstanding there being valid grounds for a Judge alone trial, the constitutional right prevailed.

WILLIAM YOUNG J:

I think it came into

ELLEN FRANCE J:

No, I'm not suggesting that. I'm suggesting that in the context of an order that there be a Judge alone trial, the opposing consideration was seen to be the importance of the right to trial by jury, which you seem now to be downplaying.

MS LEVY:

Well no, with respect, what I'm downplaying is the importance which Parliament attributes to the right to trial by jury.

GLAZEBROOK J:

Or downplaying that it's in the Bill of Rights as against merely a right that can nevertheless be seen as constitutional but in legislation that Parliament sees as ordinary legislation subject to ability to repeal it, or modify it.

MS LEVY:

Which is exactly the same ability as exists in respect of the Bill of Rights. I'm questioning what the Bill of Rights really adds to the arguments in this case, given the ease with which it can be –

WILLIAM YOUNG J:

All it adds is that it does provide an explanation for most of the cases you can cite, which isn't available in your case, and you're saying well it's not a very good explanation, but it does provide an explanation. Not necessarily always invoked, I agree.

MS LEVY:

Well in my submission *Abraham v District Court at Auckland* [2007] NZCA 598, [2008] 2 NZLR 352 would have been decided exactly the same way without the Bill of Rights, because there was the right to elect trial by jury in section 66 of the Summary Proceedings Act, and it's that right which the defendant was denied, and it doesn't really matter whether you're able to also point to the same right in the Bill of Rights Act and my understanding of *Abraham* is that in no way was the Bill of Rights guarantee a reason why the section 66 right was to be given such importance.

The next theme, if you like, I wish to address you on is that previous commentary such as the Law Commission report on juries that the Crown has referred to and the Law Commission report, I think it is, on the Criminal Procedure Act-type issues, that commentary is back in the early 2000s, and it's talking about the importance of jury verdicts and importance of particular serious offences having verdicts that are publicly validated by juries, and of course in those days this sort of offending, the sexual offending that S was convicted of, had to be tried by juries. So that was Parliament's decision, that you could not have a verdict by a Judge alone for this type of offending. Now the law has been changed so there isn't that requirement for verdicts publicly validated by juries, and the phrase used by the Law Commission was that the offending that required a jury was of such high public or symbolic importance that a jury verdict was required – actually that's from the explanatory note to the Criminal Procedure Bill.

WILLIAM YOUNG J:

But if your client had been, say, charged with indecent assault at the time the Summary Proceedings Act still applied and counsel elected trial by jury without

discussing Judge alone options, exactly the same argument that you've got now would be available then wouldn't it?

MS LEVY:
Yes.

WILLIAM YOUNG J:
And so has there really been that – I mean, obviously there are more Judge alone trials in serious cases, but is that really a sea change?

MS LEVY:
Well, it's not whether there are or there aren't, it's that there can be, that is the sea change.

WILLIAM YOUNG J:
Well, I'd be inclined to accept that there are far more, because it didn't used to be possible and it now is and we know that there are some serious and complex, some complex cases that are directed to be tried by a jury and you've told us there are some serious sexual offending cases tried by – sorry, tried by Judge alone.

MS LEVY:
Well, yes. But my point is that previously there couldn't be, previously Parliament had said, "Offences, charges of this type are so important that the verdicts in these cases must be given by juries," and that has changed. There's now a much more restricted list of charges which Parliament says must be heard by a jury. So there's been that change in attitude to the importance of a jury for charges like this, that's my submission on that point. And what I say that reflects is the modern, mature and appreciative approach to what today's Judges can provide by way of experience, independence and reason-based decisions. Parliament is not – just coming back to the three months to two years change – Parliament's not throwing those charged with offences between three months and two years' imprisonment to some inferior trial wilderness by denying them a jury trial option, there's a perfectly good system there.

WILLIAM YOUNG J:

I mean, I suppose you – I mean, I agree with you, I don't think it should be said that trial by Judge alone is the dunger and trial by jury is the Rolls-Royce, but I suppose against the background of Bill of Rights you can see that it's the right to a trial by jury which is the one that the law has placed greater weight on. I mean, both trials should be fair.

MS LEVY:

Yes. But my point, Your Honour, is that history has meant that the importance of the right to trial by jury is the one that's required, or received comment, and the history of course is that many hundreds of years ago you could have no faith in a Judge, and those that first got trial by jury were, of course, not the commoners, but those that were entitled to be tried by a jury of their peers. A Judge –

WILLIAM YOUNG J:

Well I think trial by jury came in in 1215 when the Pope abolished trial by ordeal and they needed some fact-finding system and called in people in the neighbourhood.

MS LEVY:

But in the beginning the people in the neighbourhood only judged the landowners. They were the first –

WILLIAM YOUNG J:

I'm not sure that's right actually.

MS LEVY:

Well, with respect, the deeper you look the more versions you uncover.

WILLIAM YOUNG J:

Sorry?

MS LEVY:

The deeper you look the more versions of this history of jury trial you can uncover, but what is clear is that while it has always been spoken of in such hallowed terms, it has not always been, in my submission, deserving of such respect and for example, and I'm branching off a bit as to where all this comes from, but in the 18th century a jury would hear several cases a day. They'd retire, they'd deliberate for two or three minutes, and there was your answer. So yes it as trial by jury but it wasn't a Rolls-Royce by any stretch of the imagination. But at the time it was perceived as being superior to a Judge alone trial for a variety of social and political reasons, because of the connections that Judges had with the State, with the Crown, that sort of thing. So that's where the historical importance of the jury trial is said to arise. But that's, we're in a very different climate now. Parliament had no qualms, and nor should they, about sending one sector of charges to a Judge alone compulsorily or by allowing these type of serious offences to be tried by a Judge alone when previously they couldn't be. So I certainly accept that historically people have seized on the right to jury as the important one, but in my submission the scheme of today's legislation doesn't allow that to continue as a common sense distinction. The law today is that people have a choice. They only have a choice if they're given the choice, whether it's by their lawyer or the Court and, with respect, Your Honour suggested that it couldn't be accepted that trial by jury was the Rolls-Royce and trial by Judge alone an old dunger, but it's not that simple. It's not that trial by Judge alone is a vehicle less appropriate for a trial, it's got different features. You wouldn't drive the Rolls-Royce to the Green Party convention, you'd drive your Leaf, because that's more appropriate, and that's the sort of choice that defendants today have been given.

ARNOLD J:

Your central point is that the defendant has to know about the choice and bearing in mind that the Criminal Procedure Act does not require the Court as a matter of legislative requirement to give any advice.

MS LEVY:

Yes.

ARNOLD J:

You're then relying in a case like the present on the lawyer to advise and there's a consequence then that you're opening up a new area of incompetence of advice, in other words, it's not simply saying you've got a choice about jury trial or Judge alone, but the lawyer would be expected to go through the advantages and disadvantages of the alternatives in such a way that the defendant could make an informed choice, and if after conviction the defendant said, well I didn't get that proper explanation, that would be a proper basis to look at competence of counsel?

MS LEVY:

It could be. It could be. I imagine that the bar for that sort of advice would probably be set pretty low.

ARNOLD J:

Why would you say that?

MS LEVY:

Well because it may or it may not be. If the advice given was appropriate to the charges faced, and reasonable in its terms, then I wouldn't expect there to be an issue of counsel competence, but if the advice was really unrelated to the issue or to the choices to be made, then the advice could be examined, yes.

ARNOLD J:

So if the advice had been, as Ms Hughes said it would have been, this fundamental issue here is consent, I recommend a jury trial, and the defendant says, fine, is that sufficient advice?

MS LEVY:

No, it's not. Ms Hughes would have to say, "I recommend a jury trial because." This is the way in which a jury trial, I consider, would be better placed to consider your issue, whereas a Judge alone trial would have a different emphasis or possibly a different feeling about it.

ELLEN FRANCE J:

How would that work, what would the nature of the advice be then in the present case, for example?

MS LEVY:

Well the nature of the advice would be to look at the issues that the jury was going to be faced with and ways in which a jury's approach to them might vary from a Judge's approach, and the classic issue in this case would be, well, we've tried to have these two complainants give evidence at separate trials because we both understand, S and Ms Hughes, we both understand that it's not a good look to have two separate people, one of them your wife of many years, one of them a girl you picked up off the street who's only 15, telling stories with some similarities about your sexual behaviour. It would be better if that didn't happen, and the reason we think it would be better if that didn't happen is because we think that jurors might be able to not separate the fact that you've been, as a man in your 30s, having sexual activity with a young girl, they might not like you because of that, and that might spill over into the analysis that they put on everything. So there's that risk with a jury, S, that we're right about that, we're right in our reasons for trying to separate the two, whereas a Judge is, will have a lot of experience in listening to cases like this. There won't be anything that will not have crossed the Judge's path before, in terms of novelty in sexual behaviour, the age disparity, the Judge will be able to understand instantly that a girl of 15 can consent, even though the age of consent, jurors will all understand, oh, I thought it was 16, the Judge will instantly understand that that's not a problem and while, of course, a Judge would direct a jury about all these things, you definitely wouldn't have that worry that that wasn't understood if you went to a Judge alone and –

ELLEN FRANCE J:

Isn't that just undermining the efficacy of the directions. Isn't that what you're questioning then, rather than advising.

MS LEVY:

Well, with respect, you're addressing real concerns which a defendant will have shown, and we know this defendant did show, or Ms Hughes showed on his behalf by applying for the severance, or opposing the joinder, or opposing the propensity, whichever way it came about in this case, so if, I mean it cannot be, with respect it cannot be undermining the directions to take a stance on a propensity application, and then to raise –

ELLEN FRANCE J:

No, that wasn't what I was suggesting.

MS LEVY:

No, no, but a lawyer can't be expected on the one hand to say to the client, well we don't want these two charges heard together. It's not in your interest that they see your wife –

WILLIAM YOUNG J:

The lawyer would say that whether it's Judge alone or Judge and jury.

MS LEVY:

Yes, absolutely, but having lost, but the reason you and the client would agree is because it's going to be hard for the fact-finder, if it's a jury. With respect it must be apparent to the members of this Bench that Judges deal with this sort of thing all the time. You are going to, as a lawyer advising a client you are going to have more confidence in the ability of a Judge –

WILLIAM YOUNG J:

Well maybe. I suppose we're going to go around in circles about this. I suppose most lawyers would think Judges are a bit case hardened, that they're going to have a better run with a jury who are fresh to the criminal justice system and haven't heard it all before. I mean those are the sort of counterarguments, aren't they?

MS LEVY:

With respect, in some cases, but in this case where you've got a 15 year old girl.

WILLIAM YOUNG J:

To go back to the question Justice Arnold asked you, I mean there is obviously concern that this opens up another front in terms of counsel incompetence arguments.

MS LEVY:

Yes.

WILLIAM YOUNG J:

And that it's in relation to an area that's pretty intuitive where for every reason one way there's likely to be a reason another.

MS LEVY:

Well, with respect, in that case it would be relatively simple for counsel to have their formula as to the reasons that they give for one or the other, and for the client to make a choice. With respect, on that issue Ms Hughes didn't shy away from having to give that sort of advice. She was happy to give it, she just didn't understand that she had to in that case. So…

WILLIAM YOUNG J:

It's not whether a lawyer should give it, it's whether with the benefit of hindsight when we know the first trial has gone badly, it's a useful enquiry to conduct on appeal whether it's one that's worth the exercise given that by the time you get to this point it's accepted the trial was fair. But anyway that's probably an, that's a question –

MS LEVY:

Well that's a question for another case, with respect. The level of advice that is required, just as in any particular case the –

WILLIAM YOUNG J:

Because you say there's no advice here.

MS LEVY:

Well not just me, Ms Hughes says there's no advice here. It's accepted there's no advice and Ms Hughes doesn't shy away from giving some, or the proposition that she would have given some had she known that there was a choice for the defendant to make. I just want, that's a good time to look at exactly what she said and really just how far it takes us in terms of what we think she might have said. I'm looking in the Crown submissions at page 4, paragraph 9. I will take you to the case on appeal, volume 2, page 181. No, I'm sorry, that's the wrong reference. Just give me a moment.

ELLEN FRANCE J:

Ms Hughes affidavit is page 59 of volume 1.

MS LEVY:

Thank you. Now one of Your Honours has picked up on the suggestion that Ms Hughes advice would have been a jury trial in any event but just looking for a moment at Ms Hughes evidence, and keeping in mind that she doesn't know that you can elect for sexual violation, so she can only be talking about cases where the most serious charge is indecent assault.

ELLEN FRANCE J:

That wouldn't be extreme sexual offending?

MS LEVY:

Well exactly, but that's where in my submission her evidence doesn't really make sense because if she's given advice about whether or not to elect a trial for extreme sexual offending, which we would expect to include sexual violation, then she's giving advice about the right to elect, which to elect in circumstances where she's just told us that she didn't know there was such a right.

GLAZEBROOK J:

Well she does now when she's doing the affidavit and she's explaining what her advice would usually be and you can understand that advice.

MS LEVY:

I can but with respect she doesn't express it as since learning that there's this right of election, I now have the following practice. She rather puts it as if –

GLAZEBROOK J:

Well, defence counsel usually recommend, this is in line with what defence counsel here usually recommend. The Canadians would recommend quite the opposite and you might be right that defence counsel here will start changing their practice, because the Canadians that I've spoken to, Canadian Judges, can't understand why anybody would elect a jury trial for sexual offending.

MS LEVY:

And of course, I mean the reasons that, when we say well defence counsel here always recommend jury trials, we have to first factor in that there'll be ones like Ms Hughes who were very experienced and weren't aware that the law had changed so –

GLAZEBROOK J:

Well I think the practice will take a bit of time to change, as you know, in terms of what they recommend but I think in order to, there'll be some absolutely clear cases where one or the other is the best option, but anything in the middle is going to be a bit impressionistic, isn't it, and can't one usually expect that people will take the advice of their counsel, which is based on experience?

MS LEVY:

Well, with respect, it can't be because we don't have these cases where, nobody has yet come to court saying, I took my lawyer's advice but I wish I hadn't about mode of trial.

GLAZEBROOK J:
Well you usually wish you hadn't on many cases because usually, once you've been convicted you wish you hadn't done a lot of things that you make decisions about.

MS LEVY:
Well with respect –

GLAZEBROOK J:
But in many cases, not in this case, but in some cases it could have gone worse. You could have been convicted on all charges instead of half of them for instance.

MS LEVY:
Well S was convicted of all charges.

GLAZEBROOK J:
No, I understand in this case, but there's always going to be those "purchase anxiety" as a friend of mine used to call it, in these cases.

MS LEVY:
Absolutely but with respect the point that Your Honour makes is a very valuable one, that here defence counsel have the sense that a jury is going to be better, whereas in Canada there's a very different sense that a Judge is probably likely to be better, and –

GLAZEBROOK J:
Of course we have to remember that they do have appeals against acquittals there and that might skew what happens so, because you then have, well in any event I don't think you can necessarily say that one is right and one is wrong.

MS LEVY:

No, no, but what you can say, with respect Your Honour, what you can say is that it's unlikely that defence counsel in New Zealand have yet fully analysed and explored the reasons on both sides of the argument. There's more to it, with respect, than the gut reaction that Ms Hughes evidence is. There's room for far more nuanced evaluations and if, as Your Honour has predicted and I agree, there are changes, and cases indicate that there have been some uptake, it is a thing, we do have them. There's going to be perhaps a slow appreciation of the advantages of a Judge alone trial, so they're not fully understood now.

WILLIAM YOUNG J:

Well, I think we're sort of going around a bit. Where do you want to go from here?

MS LEVY:

I want to address briefly the issue that arises as to whether election of mode trial is a fundamental decision, and of course the Canadian decisions that embarrassed the Crown found and I didn't clearly support it being a fundamental decision, and because it's a fundamental decision it's a decision that must be made by a defendant, like whether or not to give evidence, like how to plead, and in the *R v Hall* decision a fundamental decision is contrasted with a tactical decision which counsel can make.

WILLIAM YOUNG J:

So what are the Canadian decisions in particular? There was the Provincial Court judgment…

MS LEVY:

R v Shilmar 2017 ABPC 213 and *R v Stark* 2017 ONCA 148, (2017) 347 CCC (3d) 73, *Stark* is the Ontario Court of Appeal decision.

WILLIAM YOUNG J:

21 and 22.

MS LEVY:

With respect, the fundamental part of it is probably clearly set out in the Crown's submissions at page 11. The Court held that, "The exercise of the right to choose the mode of trial is integral to the Court's jurisdiction over a defendant and is essential to the fairness of the proceeding."

WILLIAM YOUNG J:

Shilmar is a Provincial Court judgment.

O'REGAN J:

Alberta.

GLAZEBROOK J:

Yes, *Stark* is the Court of Appeal.

WILLIAM YOUNG J:

Yes, *Stark's* the Court of Appeal. So para 20 is right in your favour.

MS LEVY:

Yes. So I rely on *Stark* and *Shilmar*, obviously to a lesser extent, for the proposition that the right to choose the mode of trial is a fundamental right.

WILLIAM YOUNG J:

So what did *Stark* get? Did he get a jury trial or a Judge alone trial?

MS LEVY:

No, he got a Judge alone trial.

WILLIAM YOUNG J:

Okay. So it's like *Abraham's* but the language is general?

MS LEVY:

Yes. And the Crown submits that the result in *Stark* was driven by the deprivation of a constitutional right, but with respect that is not correct. It's very clear that the result in *Stark* is driven by the accused being denied the right to

choose, because it's the right to choose which is the fundamental right, a breach of which leads to an unfair trial and miscarriage of justice.

GLAZEBROOK J:
So is there a particular paragraph you rely on for that?

MS LEVY:
It's paragraph 20 again.

WILLIAM YOUNG J:
Para 20 is the statement of principle.

MS LEVY:
Yes.

GLAZEBROOK J:
Yes.

WILLIAM YOUNG J:
Part of this seems to have been that he didn't have a preliminary inquiry.

MS LEVY:
Absolutely. I can see, with respect to the Crown –

WILLIAM YOUNG J:
You can see how one can say it's different, but you just rely on the general principle?

MS LEVY:
Of course it's different, of course it's different. It could have been reasoned in a very different way to arrive at the same result but it wasn't, it was reasoned in this way, which is exactly on foot with the present facts. If it had been reasoned in the way that, well, we wouldn't be so troubled if he'd been denied, hadn't been denied a jury trial and of course the preliminary hearing was so important and this is a constitutional right to a jury trial that he was denied, it would be no

help to me at all. But it's not in those terms, it's in terms that it's the right to choose that's fundamental. And if this Court is attracted to the reasoning of the Court of Appeal in *Hall v R* [2015] NZCA 403, [2018] 2 NZLR 26 then it's those fundamental decisions, denial of the right to make those fundamental decisions, that don't require much examination at all, it cannot have been fair to deny that right.

And if you turn to page 6 line 9 – sorry, I'll need to find the electronic copy now because it's the electronic page 6. I'll tell you which one it is in a second.

GLAZEBROOK J:
Of what, sorry?

MS LEVY:
I'm still in *Stark*.

GLAZEBROOK J:
Okay.

MS LEVY:
Yes, I'm sorry, it's paragraph 19, so it's just above the 20. "Parliament has chosen to give accused who are charged with the more serious crimes a choice as to the mode of trial. That right is partly constitutionalised in section 11(f) of the Charter." That right is partly constitutionalised, so the Court is accepting that despite the constitutionalisation only applying to the jury trial part, it's the entire right that the defendant has. So in my submission far from relying on the way in which the facts lay, the *Abraham* version, the Court was at pains to indicate that the right was as to the choice, it didn't matter which way it went, it didn't matter that one half of it was partly constitutionalised.

ELLEN FRANCE J:
Under section 536 of the Criminal Code that had a provision equating to the old 66 too didn't it? So it required the Court to advise of the option.

MS LEVY:

I can't tell you that off the top of my head. I think that will be in *R v Turpin* [1989] 1 SCR 1296 probably. No, I'm sorry, Your Honour, I can't answer that. What was the…

ELLEN FRANCE J:

It's 536.

MS LEVY:

It's clear, with respect, that it's not about whether the Court had an obligation –

ELLEN FRANCE J:

No, no, it was just an enquiry. I thought there was an equivalent provision to section 66(2) in section 536 of the Criminal Code. So you would be in the *Abraham*-type situation. But that's all right, I can check that.

MS LEVY:

With, with respect, I suspect that the answer to that appears on the record of *Stark* at paragraph 7 where the clerk then asks in relation to the appellant's election of the mode of trial required by section 536, "Mr Stark, do you waive reading of the election?" trial counsel, not the appellant, responded, "Yes." "And on this charge how do you elect to be tried?" and trial counsel again asks. So it is a situation where the election appears in open Court. But of course it's no – we can tell from the way that that's put that unlike a breach of the section 66 procedure possibly it's firmly on counsel in *Stark*. The defendant, if you like, through what the Court said was alerted to the election issue but got either no or inadequate advice about what that all meant for him. And of course there's clearly no reason to believe that the Ontario Court of Appeal believed that a jury trial was the inevitable choice for any defendant on any sort of Rolls-Royce basis, the required advice from counsel is of the advantages and disadvantages of each mode. So with respect, Justice Arnold, that perhaps answers your question about what would be required from counsel?

ARNOLD J:

Yes. Yes, it did seem to me that what was required was a reasonably detailed analysis of the pros and cons in the particular circumstances of the charges faced.

MS LEVY:

Yes. And it may be that that is a slightly new concept for counsel in New Zealand to understand but, with respect, just as doctors have come to learn that it's not their decision as to what operation people have, there's this consent idea, and lawyers have come to realise that they don't make the decision as to whether the defendant gives evidence. It's just another development which, and developments of course are occurring all the time, of ways in which accuseds' rights to participate in their trials are noted and respected. And *Hall* of course attempts to draw some lines there, saying there are tactical decisions that counsel makes, but there are fundamental decisions that clients make.

ARNOLD J:

I mean, the issue, the interesting thing about this case is that it doesn't require any, the notion of having a fair trial, if the trial that you ultimately had was fair is treated as irrelevant the fairness issue is simply whether you made and had the opportunity to make an informed choice.

MS LEVY:

Yes, that's right, it's a process, it's a fair trial process issue.

WILLIAM YOUNG J:

You're not saying the trial was a nullity?

MS LEVY:

Well, Justice Clifford would.

WILLIAM YOUNG J:

Okay, what would he have said if your client had been acquitted?

MS LEVY:

Yes. Well, the thing about *Abraham* is that it refers to this continuum of irregularities, and there comes a point at which something is, either something minor is so irregular or something slightly irregular is so important that you have to say it's a nullity, like the wrong Court, and all Justice Clifford is saying is that the more fundamental the problem the closer you are to a nullity, and in my submission it's possible to say that this breach of this fundamental right to choose is getting close to that end. I don't expect you to accept that submission and find this trial was a nullity but, with respect, the mere fact that you can talk like that, Justice Clifford can talk like that, President Cooke in the decision quoted in *Abraham* can talk about that continuum, the fact that you're at the end of that continuum where we're talking about nullity demonstrates, in my submission, just how important this right is.

Now I've been jumping around a little bit. I do want to address you just in a little more detail on the sorts of factors that might have occurred to Ms Hughes had she addressed S on this issue and the sorts of factors that counsel might think about in years to come in giving advice…

WILLIAM YOUNG J:

Is this is set out in your written submissions?

MS LEVY:

No, I don't think it is.

WILLIAM YOUNG J:

Okay, that's all right. Carry on.

MS LEVY:

This is more thinking about the sorts of things that trial counsel could have said to S. Now I'm not saying that the failure of counsel to talk about these things will mean that they've been incompetent, I'm just saying that it's very easy to say, "Oh, well, of course counsel in New Zealand recognise that juries are sensible and that's usually the best way for someone to go," which is very easy

to say and easy to believe is true because that is what happens in New Zealand, we do, counsel have seen the jury trial as the best bet for the defendant.

WILLIAM YOUNG J:
I think we have a very substantial number of jury trials per head of population. Is that referred to in any of the reports? Perhaps it might be in something preceding the Criminal Procedure Act.

MS LEVY:
I can't put my finger on a reference like that, but we certainly must, particularly on offences of this type we must have many, many more jury trials than Judge alone trials. But my submission really is that there's perhaps an untapped pool of things to think about really to do with today's political climate about complainants of sexual abuse, how they fit into the trial process, how the trial treats them and the way that juries are going to think about the usually men that put the complainant through that, they'll say. S is charged with sex offences and is effectively saying in respect of two women that they like it rough while they deny that, the two of them are giving evidence in the same trial. It's very easy to see how you might want a cool head dealing with that problem and a fact-finder with an ability to understand and deal with inherent prejudices and difficult concepts that are still developing like demeanour. How many years ago was it that juries were told, "Demeanour's great, use it all you want"? But we're learning about that sort of thing and it's not intuitive, and Judges, the ones that give those directions all the time, must be in a position of being better able to recognise and follow and understand those directions and that that's not undermining juries doing their best with what their told, it's just recognising that some concepts are difficult, concepts like prejudice, illegitimate prejudice, that sort of thing, and Judges that deal with it day-in, day-out, may be better placed in a particular case such as this one to see that.

A Judge will also usually have considerable experience in listening to evidence about the sexual affairs of adults in the 21st century which vary significantly from expectations and many experiences even 15 or 20 years ago. Some jurors may not be familiar or comfortable with the concept that a woman could

reasonably be expected to consent to anal sex or light choking in any circumstances. Now Judges are not going to be repulsed by that idea to any extent that interferes with their ability to consider the evidence dispassionately and a jury delivers a verdict that requires no explanation and none is able to be given. With a Judge you have the requirement of a reasoned decision. If you have got a complainant that you can point at and say, "Well, she admits she lied about this particular thing on this particular day. How can you be satisfied that she's telling the truth about this?" Well, a Judge has to write down why that is so if the decision is that the complainant can be believed. There are more practical reasons like delay, you normally get a Judge alone trial much more quickly than a jury trial, is a wish for relative privacy or embarrassment, even concern for the complainant's privacy or embarrassment. A defendant could feel that a jury might penalise him for putting a complainant through such a public event and that a Judge would be able to concentrate on the issues without the drama of a jury event.

That's brainstorming really, but it's just designed to challenge the concept that defence counsel in saying, "Well, my default position is that consent is better dealt with by a jury," have necessarily considered all the available angles, or even their own vanity in wishing to present, perform, whatever the appropriate term is, to a jury rather than a Judge that might have convicted their client the week before.

ARNOLD J:
So the logic really is, on your argument, that if the convictions were quashed and a retrial ordered and your client got proper advice, having received proper advice he may well elect to be tried by jury?

MS LEVY:
Yes – I'm sorry, by Judge alone.

WILLIAM YOUNG J:
But say he –

ARNOLD J:

No, no, he may well elect, he's free to elect.

MS LEVY:

Oh, he's free to elect, yes.

ARNOLD J:

So he listens to the advice and says, "No, I think I will have the trial by jury."

WILLIAM YOUNG J:

It would be a bit annoying if we allowed the appeal on the basis he didn't get a fair choice and then he elected to be tried by a jury second time.

GLAZEBROOK J:

Well, the Canadian cases would say the choice is the thing and it doesn't matter what you would have done and that's irrelevant, which presumably is what you say, it's the choice that's important?

MS LEVY:

Yes, that's right. And with respect he's had no advice, he has had no advice. It's not as if he'd be hearing the same advice again and choosing differently.

WILLIAM YOUNG J:

But he hasn't said – I mean, he probably commit himself anyway, but he hasn't committed himself to trial by Judge alone.

MS LEVY:

Well, as Your Honour says, I don't think he could, but he certainly, he's told you what he thinks about it from where he is now.

WILLIAM YOUNG J:

Yes, but if the appeal's allowed he'd been in a different position. Isn't this mentioned somewhere in one of the cases, isn't there a case where there's a possibly of the appellant securing a retrial on the basis of a mode of election and then is it possible, and then what happens if the same election is made?

MS LEVY:

Well, I suppose you could argue it was an abuse of process. I'm not sure.

WILLIAM YOUNG J:

Yes. I don't think there would be a mechanism by which he could be made to have a trial by Judge alone.

GLAZEBROOK J:

Well, as I say, the Canadian cases say what he might or might not have done is actually irrelevant.

MS LEVY:

Yes.

WILLIAM YOUNG J:

Yes.

GLAZEBROOK J:

And then so presumably what he does do afterwards is also irrelevant.

MS LEVY:

Yes.

WILLIAM YOUNG J:

Yes. It's just it's not a great look for the criminal justice system.

ARNOLD J:

That's right, from the systemic point of view it's not particularly…

ELLEN FRANCE J:

But also the appeal is presumably premised on the basis that he would have made a different choice, at least at the time.

MS LEVY:

Well, that's what he says, but that is without proper advice. I mean, with respect, if it happens it'll only happen once, because with respect while it might not be a good look for the criminal justice system it's a far worse look for counsel.

WILLIAM YOUNG J:

He doesn't actually say, does he…

GLAZEBROOK J:

He says, "I believe I would have chosen a Judge alone trial."

WILLIAM YOUNG J:

Sorry, where's that?

GLAZEBROOK J:

Paragraph 4.

WILLIAM YOUNG J:

Oh, sorry.

GLAZEBROOK J:

"This is because it would have," but nothing of the emotional stuff.

WILLIAM YOUNG J:

Okay, sorry, yes.

MS LEVY:

Now I suppose on that issue if you wanted to you could be critical of appeal counsel as well because it would have been possible for him to have been more committed on the basis of fuller advice.

WILLIAM YOUNG J:

I don't think it would be actually. I don't think you need to criticise yourself on that. Because the statute gives a right of election –

MS LEVY:

Yes.

WILLIAM YOUNG J:

– and at a particular time. So if the appeal's allowed it really has to be, the case has to be transported back to where he makes an election.

MS LEVY:

On the basis of proper advice.

Now are Your Honours familiar with *Hall* or shall I take you there before…

WILLIAM YOUNG J:

Generally familiar, but take us to what you say is – I mean, it's obviously the leading Court of Appeal decision.

MS LEVY:

Well, Justice France will be familiar with it.

WILLIAM YOUNG J:

What volume's it in? Yours, tab 7.

MS LEVY:

It's everywhere. Could I just make a brief plea for the trees in respect of the casebooks of this, that have been prepared for this matter?

WILLIAM YOUNG J:

Yes.

MS LEVY:

The Crown have provided decisions that nobody is every going to look at, they've provided full juries in criminal trial. I mean, how many copies of that have you got? It's online, it's there –

WILLIAM YOUNG J:

Well, we are reasonably familiar with it, I agree.

MS LEVY:

But even if you weren't, they refer to one page of it.

WILLIAM YOUNG J:

Yes, I noticed that. I'd wondered if there were going to be some more references, but I did think there was a big chunk of paper in there for what was a fairly limited reference.

MS LEVY:

The whole point, as I understand it, the advantage of electronic casebooks, is we can give you so much more stuff so if you need to look further than the page we refer to you can, it's there, but we don't need to print it out. Now I referred to the –

WILLIAM YOUNG J:

You're probably preaching to the converted on this one.

MS LEVY:

Well, for the trees I submit that there should be a dialogue between the Court and the registrar.

WILLIAM YOUNG J:

But this isn't really the registrar's responsibly, this is counsel's responsibly isn't it?

MS LEVY:

Well, with respect, I prepared my electronic casebook with the entire Criminal Procedure Act –

WILLIAM YOUNG J:

Oh, I see, sorry.

MS LEVY:

– because I felt it was useful to have it available electronically in a form where you could find more in it if you needed it, even though I was only referring to three or four different sections in it. The registrar insisted that the entire Criminal Procedure Act be in the volume, which I refused to do, so my book is slimmer than the Crown's.

WILLIAM YOUNG J:

Right, okay. Well, that's something we'll have to look at. I agree there's a lot of paper in here. And there are some, I think there are some duplicates, aren't there?

MS LEVY:

There are some duplicates, and there are some cases for historical propositions that nobody could possibly ever want to look at.

WILLIAM YOUNG J:

Well, I had a look at them, for old time's sake.

ELLEN FRANCE J:

I was going to say I did look at them.

ARNOLD J:

Yes, I actually…

WILLIAM YOUNG J:

I agree, it was a limited utility, because I think we know what the position was under section 66 of the Summary Proceedings Act and its precursors.

MS LEVY:

But I'm not even objecting to you looking at them for old time's sake, there could be no objection to that at all, but look at them on the screen. Reminiscences don't have to involve trees is my submission.

So, if I take you to *Hall,* tab 7. Now there's a correction needed to my submissions, if I can find *Hall* in them – so in my submissions at page 27 – I'm sorry, my submissions aren't numbered. Paragraph 109. I tell you that *Hall* is about the duties of trial counsel and the extent to which they are obliged to follow client instructions on matters of substance always, in matters of style or detail seldom, but I'm wrong about that because of course *Hall* was about I've had *R v Clode* [2008] NZCA 421, [2009] 1 NZLR 312 and the procedures to be followed when a complaint was made about trial counsel, that's what *Hall* was about. But the Crown took the opportunity to give their views of the duties of trial counsel and the fundamental matters contrasted with the tactical matters, and the Court of Appeal largely uplifted what the Crown said about that into the decision and the list occurs beginning at tab 7 page 146, paragraph 61 of *Hall.*

WILLIAM YOUNG J:
It was obviously a major case when you look at all the Interveners.

MS LEVY:
Yes, that's right, but it wasn't major on this issue.

WILLIAM YOUNG J:
Okay.

MS LEVY:
And that's why I'm wrong…

WILLIAM YOUNG J:
Oh, I see.

MS LEVY:
I'm wrong to tell you that it was about this issue, because –

WILLIAM YOUNG J:
All right, so just take – so what paragraph?

ELLEN FRANCE J:

I'm not quite sure what your submission is, Ms Levy.

MS LEVY:

No, I know, and that's because my written submissions are confusing. *Hall* was about the procedure to be followed when trial counsel was being criticised and the *Clode* procedure where trial counsel was written to but the rules required affidavits after you'd filed the notice of appeal, and the notice of appeal was supposed to record the grounds of complaint against trial counsel but trial counsel hadn't responded to a letter that had been written yet, and Legal Aid wouldn't pay for the file to be copied and there were enormous difficulties in getting complaints about trial counsel appeals heard in an efficient way because the same problems kept popping up all the time and the issue was did trial counsel have to talk, did they have to respond in writing, were they allowed to see their own file, what if the client called trial counsel a liar but there were written instructions, all those sorts of things. The procedure was what was an issue in *Hall* in my submission but the Crown took the opportunity to make submissions about the possible merits grounds against, of complaints against counsel that could arise and they divided them into categories which are set out, the submissions are set out at page 43 of *Hall* which is page 146 of the bundle. So the Crown submission was twofold. Mr Horsley submitted, "There were three fundamental matters on which the failure to follow instructions would almost inevitably result in an unfair trial and so a miscarriage. Instructions as to plea, the election as to whether or not to give evidence and third, counsel must not deprive an accused person of the opportunity to advance a defence based on his or her account of the facts." Then the Crown said, and it's recorded at 62, in relation to other trial decisions, "A miscarriage will not necessarily follow… Rather, in this category the focus will be on the effect." And the Crown set out, and we're now at paragraph 63, decisions upon which trial counsel's tactics will bind an accused person, and there's the little list.

And the Court of Appeal accepted that it was helpful to identify the three fundamental decisions but largely found that other matters would need to be dealt with on a fact by fact basis, and that's at paragraph 77. "We agree

with Mr Eaton QC for the New Zealand Bar Association that whether a decision is a significant one in the context of a trial cannot meaningfully be defined in advance without a factual context… the ultimate test is whether there has been a miscarriage of justice."

Now my submission of course is that when listing fundamental decisions this one should have been there and that, with respect, is clear from the Crown's acceptance that *Abraham* is good law. So your client's right to choose a jury trial is fundamental and my submission, drawn on the Canadian authorities and the other submissions I have made, is that it's the choice that's the fundamental decision. So the choice of mode of trial should be there in that list of fundamental decisions. Fundamental matters.

Now I haven't reviewed the transcript of the Court of Appeal hearing but I have looked at other counsel's written submissions in reply to the Crown submissions, well, I'm not sure whether they were in reply to be fair, but it's not, nobody attempted a different list that I can see. So –

GLAZEBROOK J:
Paragraph 68 does say that there may be cases where it doesn't give rise to a miscarriage.

MS LEVY:
That's correct.

GLAZEBROOK J:
Although it's sort of becomes a bit difficult if you say it's a fundamental right even to put up something that would invite incredulity from the jury, in terms of Mr Chin.

MS LEVY:
Well, yes, I mean in my submission you could say that as a matter of principle *R v Chin* CA 34/04, 10 June 2004 is incorrectly decided. Or you could look at it more from a *Matenga* point of view, that if there was just no room on any

approach to the facts for an alternative verdict, then there hadn't been a miscarriage, but as soon as there was room for reasonable minds to look at matters in a different way, such as in a credibility case, then you couldn't take a proviso approach or a no miscarriage of justice approach.

WILLIAM YOUNG J:
We're at 11.30, how far are you through your submissions? Do you want to talk about the *Turpin* and the *Singer v United States* 30 US 24 (1965) cases or not?

MS LEVY:
Not particularly.

WILLIAM YOUNG J:
No, well I think we understand. I mean I understand them I think, and the Australian High Court case. Well they're sort of on the periphery of this case.

MS LEVY:
Very much so and they're just examples of how much importance other jurisdictions have given to the right to choose a jury trial, but they're of no assistance to –

WILLIAM YOUNG J:
Well only here because the Bill of Rights does say that everyone has a right to choose jury trial and it is, for that reason, quite an easy argument to say, well, not being given the opportunity to exercise that is of moment, but there are logical arguments that go the other way I understand.

MS LEVY:
Yes, it's a –

WILLIAM YOUNG J:
Where do you want to go to after the adjournment?

MS LEVY:
Can I decide that over the adjournment?

WILLIAM YOUNG J:
Sure.

COURT ADJOURNS: 11.32 AM

COURT RESUMES: 11.47 AM

MS LEVY:
Just dealing with a couple of matters that arose. Your Honour Justice France, clause 536 of the Criminal Code doesn't appear to assist us, it's not the source of the wording that's used in *Stark*, which the registrar put to the defendant, and I haven't had a chance to see where that wording comes from but it's not section 536, that's about a preliminary hearing and the arrangements that are to be made for that, which is plainly the old depositions in old money.

Now on the issue of a nullity meaning that an acquittal could be appealed, I'm indebted to Mr Lithgow, I wouldn't let him appear but I'm happy to accept his experience and that there is a case *R v Blows* (1995) CA103/95, 31 August 1995, a decision of the Court of Appeal, where a person in error was not middle-banded so they were tried by the District Court when they should have been tried by the High Court, and it was a nullity and the concession –

WILLIAM YOUNG J:
I wonder if it would have been a nullity if they'd been acquitted.

MS LEVY:
Well, that is what I'm getting to, because the concession for the Crown was that if there was an acquittal that's just one of those things and the Court accepted that. That's just a blip in the system that is to be tolerated as part of the price of the system operating efficiently and due respect being held to the importance of some provisions.

WILLIAM YOUNG J:

I guess in the *Turpin* case, the Canadian case, the acquittal by a Judge alone was set aside wasn't it?

MS LEVY:

Yes, that was pursuant to a statutory code allowance is my understanding.

WILLIAM YOUNG J:

Yes.

ARNOLD J:

So what was the name of that case? I'm sorry, I didn't catch it.

MS LEVY:

R v Blows.

ARNOLD J:

Blows, thanks.

ELLEN FRANCE J:

In *Blows* what they say is it's so fundamental a deficiency as to make it inappropriate to apply the proviso.

MS LEVY:

Yes. I'm sorry, I haven't had a chance to look up *Blows* but Mr Lithgow's understanding was that hidden in that case –

WILLIAM YOUNG J:

There's another case to the same effect, *R v O* (No 2) [1999] 1 NZLR 326 (CA) isn't there?

ELLEN FRANCE J:

O is the other…

WILLIAM YOUNG J:

Was this *Blow* or are there two cases?

ELLEN FRANCE J:

No, there are two of them, both referred to in *Abraham, Blows* and *O*, and they are similar.

WILLIAM YOUNG J:

These were pre-1986 rape cases I think, weren't they, that weren't middle-bandable because of an error in the drafting of the middle band provisions?

ELLEN FRANCE J:

It's 1994/95 for *Blows…*

WILLIAM YOUNG J:

Yes, but I think they were historical sexual offending.

ELLEN FRANCE J:

Oh, they're under the old – yes, that's right.

MS LEVY:

There are examples which some members of the Court will be familiar with of cases where appeals were allowed, and the case I'm thinking of is *R v McNaughton* [2012] NZHC 815, which was a joint trial of several men for a shooting of another man in Nelson, and on a first appeal Mr McNaughton had not given evidence of self-defence and the Court of Appeal, Justice O'Regan, held that him giving that evidence was really essential to his defence being put in a proper way and so the appeal was allowed. As it happened, the way the retrial developed the case came out differently and the Court indicated that whether or not he gave evidence self-defence would be put. So the law accommodates proper decisions being made but the follow-through not necessarily being as anticipated. And of course S in this case cannot know

what he would choose until he's given the proper advice in the circumstances that might then confront him.

Now in my submission it's not undermining the jury process to suggest that it can be more difficult for juries to follow complicated directions than a Judge, and there's plenty of research about studies done, particularly under the heading of "unconscious bias", which show just what difficulties people have in following directions without unconscious biases leading them places they weren't even aware they were being led, and in my submission a trial such as this one where there are two complainants and all the joys of a propensity direction, this is the very type of trial where counsel could responsibly and without undermining anything advise a defendant that a Judge may have less difficulty with the illegitimate prejudice idea than a jury.

WILLIAM YOUNG J:
The trouble is the illegitimate prejudice here really is almost sort of overcome by the legitimate prejudice, it is pretty weighty, and it's difficult to see how much scope there is for real illegitimate prejudice, given the logical probativeness of the evidence.

MS LEVY:
Well, with respect, the illegitimate prejudice in my submission arises from the –

WILLIAM YOUNG J:
Because he's a bad guy who's got a bad attitude to women.

MS LEVY:
Yes, and not just women that he's married to, but a girl aged half his age that he picks up on the street late one night.

WILLIAM YOUNG J:
Right.

MS LEVY:

If he'd had two wives, married to each of them for 10 years, and they came along and said, "It was the same for me," and that was the basis of the propensity direction, well, that would be a very different scenario. The illegitimate prejudice arises because of the differences in the evidence, the significant differences between the wife of 13 years and the girl from the street. That's where the illegitimate prejudice lies, in my submission.

Now obviously I rely on the whole of the written submissions, and there are some aspects of the Crown submissions that I can address in reply if required.

WILLIAM YOUNG J:

Thank you. Mr Horsley.

MR HORSLEY:

Your Honours, can I just start with perhaps a novel starting point which is to actually go to the Act itself because in my submission this really does need some careful focus and attention on section 232 of the Criminal Procedure Act, and that is, of course, the section which provides for determination of appeals in the first instance.

In this case, Your Honours, we're looking at section 232(2)(c) whether in any case a miscarriage of justice has occurred for any reason. Miscarriage of justice is further defined under subsection (4) as, "Any error, irregularity, or occurrence in or in relation to or 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."

In this case it's accepted there was an error or irregularity. Ms Hughes, a senior QC, assumed that because her client faced serious charges of sexual violation, that in fact there was no right of election and that the trial must proceed by way of jury trial. That is the error. It led her to not advise her client about the process that is to be followed under the Criminal Procedure Act, which is that absent an election to proceed by way of jury trial, the default position will be that you will

go Judge alone, including now under the Criminal Procedure Act in cases of sexual violation. A situation that was different under the previous Summary Proceedings Act.

The result of that is that, yes, S was not aware of his election right, but a trial was held that was a jury trial, that was in all respects a fair trial. There is no suggestion whatsoever that S did not get a fair trial or, in fact, that any aspect of that trial would have been presented in any way differently before a different fact-finder. There is no suggestion that any of his rights were breached, such as the right to give an effective defence, and so in the Crown's submission this error or irregularity comes to be considered under subsection (4)(a), which is, is there a real risk that the outcome –

GLAZEBROOK J:
What's say he just had the default position not knowing that he was allowed to elect trial by jury. On that argument exactly the same things would arise, wouldn't they?

MR HORSLEY:
They absolutely would, there'd be no –

GLAZEBROOK J:
So how do you accept *Abraham* then as being good law now.

MR HORSLEY:
I will come to that and explain that or if you'd like me to explain it now?

GLAZEBROOK J:
Well if you're saying you're just looking at miscarriage of justice, how does *Abraham* still remain good law?

MR HORSLEY:
Sure, the critical thing about *Abraham*, and I think it gets overlooked a lot, is that *Abraham* was a situation where Mr Abraham had received advice post him

actually pleading not guilty at first, and then receiving legal advice in fact he had no defence, and him being unhappy but entering a plea of guilty. He subsequently found out that he could have a trial before a jury, and wanted to vacate his plea. The big and critical difference in *Abraham*, which is mentioned in the Court there, is that at a time this was basically judicial review, it's not an appeal against a conviction at all, it was an appeal against a decision to not allow Mr Abraham to vacate his plea. The right to jury trial, and the fact that that may have influenced Mr Abrahams decision as to whether to plead guilty or not, was a factor that should have been taken into account by the Court in considering whether he should be allowed to change his plea, and it's as simple as that. In a situation where the merits of the case –

GLAZEBROOK J:

So you don't actually accept that – so your acceptance of *Abraham* is just on the basis of a change of plea, it's not on the basis that if he'd had the default position not having had it explained to him that he was able to have a jury trial, that that would also have led to a miscarriage of justice?

MR HORSLEY:

Well it was the impact of not having that –

GLAZEBROOK J:

No, sorry. You're accepting *Abraham* only in the context of changing a plea, not in the context of having had a Judge alone trial, not knowing there's a right for the jury trial.

MR HORSLEY:

Yes, yes, only to the extent that when you talk about miscarriage in that loose sense, in the *Abraham* case, it's basically that for somebody who wishes to plead not guilty, and they haven't been told about their ability to go by way of jury trial, in that limited situation of being able to change your plea, that is a valid factor that should have been taken into account by the Court.

WILLIAM YOUNG J:

Okay, but there's a whole raft of cases, some of them antique, to the effect that a failure to give a defendant notice of their right to elect trial by jury, warranted the allowing of an appeal against a subsequent conviction before a Judge alone? If section 66 had not –

MR HORSLEY:

In terms of breaches of section 66(2) I think it was.

WILLIAM YOUNG J:

Yes, well of course the one's pre-90 would only be in relation to section 66 and its predecessors in the Justices of the Peace legislation, but there's a series of those cases isn't there?

MR HORSLEY:

Well there are a series of cases that are really around the procedural error of the section 66 advice.

WILLIAM YOUNG J:

But on your – if you were transposing them to here you would say, okay, there's been an error or irregularity, but you'd say those cases are wrongly decided because a defendant's got a fair trial, a Judge alone.

MR HORSLEY:

If the merits of the case have been gone into then the error or irregularity becomes one of looking at whether there was a real risk that the outcome of the trial was affected and most of those cases I would argue that is exactly the case, that there would have been a fair trial, absent any evidence to show that there's been an effect on it, then there is no miscarriage of justice.

WILLIAM YOUNG J:

But it's sort of hard to apply, it would have created a real risk that the outcome of the trial was affected where the counterfactual is not what would have

happened to this trial without the error but rather how would a completely different trial have gone.

MR HORSLEY:
Why do you say a completely different trial Your Honour?

WILLIAM YOUNG J:
Well, here S's argument is that there was a real risk that the outcome of the trial was affected because I might have got a better verdict from a Judge alone than I did from a jury.

MR HORSLEY:
His supposition is that there was a possibility of that, there's no evidential foundation for it and –

WILLIAM YOUNG J:
Well it's not something of which there could be an evidential foundation really.

MR HORSLEY:
But there can be a miscarriage enquiry Sir, so that is exactly the point is that –

WILLIAM YOUNG J:
But often that enquiry is impressionistic. Is the error significant enough to have made a difference to the jury's verdict, but although it's impressionistic it's in the context of a reasonably defined situation.

MR HORSLEY:
Well, this is why, if I come back to the very basic proposition that I make, this is a decision around a somewhat, in a funny way, unimportant, in terms of outcome of trial, tactical decision, and my learned friend's submissions actually emphasise that point, that this is solely a matter of tactics in terms of outcome of trial.

WILLIAM YOUNG J:
And it's likely to be a hunch.

MR HORSLEY:

And it is, it's very much a hunch, in fact you've heard that today.

WILLIAM YOUNG J:

But sort of that's going away from the point. Might it not be the case that a trial in respect to which a defendant was entitled to be tried by a jury is unfair if the defendant wasn't given the practical option of being tried by a jury because that reflects section 25 of the New Zealand Bill of Rights Act?

MR HORSLEY:

I think there's some appeal to that argument, because of course that follows the constitutional route and some of the analysis that was done in both *Singer* and to a certain extent *Turpin* in Canada, and that is to suggest that your enquiry around miscarriage will be much more focused if in fact what you have done is deprive somebody of their constitutional right, and that might get closer to giving rise to a miscarriage.

WILLIAM YOUNG J:

I guess the point you're probably making is that some of the early cases on this do proceed on a sort of ultra vires nullity basis, seem to, that the magistrate didn't have jurisdiction to try the defendant unless and until there'd been an election for summary trial.

MR HORSLEY:

And certainly since *Abraham*, I think that type of analysis has been rejected, so, and there's no doubt there has been a complete sea change in that idea that things were a nullity, in fact I think most section 66 cases would now be looked at on the basis of whether in fact there was a miscarriage and in fact, with the greatest of respect, probably with a better BORA analysis put over those as to whether in fact they'd been deprived of their right to a jury trial. And often with the impact that that might have it's difficult to translate those cases into the present environment because of course our right to a jury trial is a little bit like *Stark*, the Canadian decision that we've referred to, it gave you the ability to have a preliminary hearing, a deposition hearing, you could test the evidence

against you with no consequences whatsoever, you could cross-examine witnesses, you could in fact have a free run at the prosecution case before you were required to put anything of substance in your own case. So in fact you could see that there were real benefits to taking that path.

WILLIAM YOUNG J:
Particularly when there wasn't an Official Information Act.

MR HORSLEY:
Well, exactly, Sir. So that's pre-OIA and Thompson, is it?

WILLIAM YOUNG J:
Thompson, yes.

MR HORSLEY:
It's so old now, but exactly. And so disclosure was very much explored through that deposition process as well. So I regret the analogy of the Rolls-Royce, but previously of course the Rolls-Royce approach was in fact the jury trial approach because it gave you all of those abilities of disclosure, testing the Crown case before you actually had to go to trial, whereas the summary jurisdiction did not enable you to do that. Nowadays, I suggest, a better analysis or a better analogy for the jury trial is that it is the poster boy or girl for our criminal justice system, and there's a good reason why when they brought in the Criminal Procedure Act they didn't change the ability to elect Judge alone trial for all offences, in fact what they kept was anything that was of life imprisonment, the murders, manslaughters, the trafficking in certain drugs, have, still have to be tried before a jury, and I think that that reflects exactly what we have always thought about the jury trial, and that is that it engages the community, it means that there is real community interest in seeing justice done and judged by our community for those most serious cases. It also gives validity to those verdicts as well, rather than just one Judge who can be picked off and criticised.

Then the rest of it is really about criminal simplification, which is exactly what the Criminal Procedure Act started off as, and I don't think that there is any diminishment in the value of the jury trial because the Bill of Rights Act was actually amended. It reflected, yes, a somewhat administrative approach in the sense that there were too many people electing our expensive and, again I'll use the expression Rolls-Royce approach, but only because of the amount of money that gets spent on it, for cases which in Parliament's view did not warrant it. Hence the raising of the limit to two years, and allowing Judge alone trials as being the default position with an ability to elect trial and in category 3 offences.

WILLIAM YOUNG J:
Are there any statistics you're aware of, of the number of jury trials in New Zealand compared to other jurisdictions of like size?

MR HORSLEY:
I'm not. I'm sure there are, but I'm not aware of them, as in I don't have those to hand.

WILLIAM YOUNG J:
And no statistics as to the number of people charged with this sort of offending electing trial by Judge alone.

MR HORSLEY:
I think we can get those sort of statistics, and again it was anticipated of course that there wouldn't be a significant change in the rate of election for those serious offences. It was more around the lower level, but I'm not sure, and I can't tell you off the top of my head exactly whether there has been a significant diminishment in the trial by jury for offences of sexual violation. But again I'm sure we can provide those statistics if necessary.

So I think having started from that proposition, and I'll be a little bit guided by Your Honours as to where you would value my assistance the most, but I think it's important to talk about *Hall* because that has been raised, and it is an

important decision. It's important not just for the fact that it clarified the *Clode* type procedure when competency of counsel was being raised as an issue on appeal, but much more important than that, and in fact it was a big part of the submissions that were made, was what sort of errors made by counsel will lead you down a particular miscarriage track, and that's why I say it's important to come back to section 232 of the Criminal Procedure Act because those fundamental errors, the three that are in *Hall* and stated, that should not, and it's almost unimaginable when it will happen and not result in a miscarriage, are in fact those that are captured by subsection (4)(b). They will be said to result in an unfair trial without much more enquiry than that. So if somebody is forced into a position of pleading guilty when they did not want to, and it was not their choice, that will be an unfair trial. If somebody wants to give evidence, and they are not permitted to do so, that will be an unfair trial. Those sorts of fundamental errors are fundamentally, to thrash the word, different from the scenario that we have before us today, and that is that there has been a mere tactical error, or oversight in the advice around choice of jurisdiction, and that is it. In my submission it's really analogous to perhaps a failure to advise that you could also apply for a change of venue. So perhaps –

WILLIAM YOUNG J:
That could be quite important.

MR HORSLEY:
It can be quite important, but is it a fundamental right such that it will automatically lead to a miscarriage, no. What you will have a look at though is, yes, if it was an error, or irregularity, it should be analysed under subsection (4)(a) and has it created a real risk that the outcome of the trial was affected, and that's the position we have here. This hypothetical talk about what sort of advice should be given, could be given, just shows how difficult it is to say that this is something that would have an impact on the trial. It also shows how difficult it is to say that this is something that will fundamentally lead to an unfair trial. In my submission it's very rare for it to be much more than, "I have a theory in this district that you will be better served by either a Judge alone, because we have some very lenient Judges, or a jury, because in my experience juries

seem to acquit more than Judges. I've got nothing more than that to add to it. What would you like to do? My advice, jury trial," or, "My advice, Judge alone." That absence of advice cannot possibly lead, in my submission, to a miscarriage. It's not a fundamental part of the criminal process such that it affects the ability of a defendant to give an effective defence, it doesn't give rise to any of those other BORA rights such as the right to a fair trial or the right to present an effective defence.

ELLEN FRANCE J:

Would you accept that there might be some cases where the lack of advice might give rise to a miscarriage? I mean, I might – this may not be a good example – but, for example, if you had a particularly complex fraud trial?

MR HORSLEY:

To be frank, Your Honour, we've been bashing this around a little bit to see whether anyone could come up with a hypothetical that actually, you could say, look, here's an obvious case where the election is just so obvious, they should have been advised about it, and it would be a situation where we have, the *R v Sungsuwan* [2005] NZSC 730, [2006] 1 NZLR 730 situation, where no competent counsel could have actually proceeded down that route. And I think the closest we got to it was a complex fraud trial where it did not fit within section 102, which enables you to proceed by way of Judge alone trial anyway, but where you should have made that election right at the start and run it that way. But again I wouldn't even say that that automatically means there's a miscarriage, I think it might mean that there's a closer scrutiny as to what the impact was and an analysis of perhaps how the jury verdicts played out against, you know, a 50-count indictment or something like that. That seems to me to be about the closest where you could say it's more than just a feeling or a vibe or your experience about which option would be better, and that is it. And interestingly enough that is a case where you would go by way of Judge alone, not in the constitutional sort of position of the jury trial.

WILLIAM YOUNG J:

Have there ever been any cases about errors made in challenging jurors?

MR HORSLEY:

Yes, Sir, and in fact I think there's a recent one where – I think Mr Barr may have even been involved in it – where a defendant – and I hope I get this right – defendant was unhappy that a particular juror got on who was either smirking at him or looking at him in a way that he was uncomfortable with, and he wished he could have challenged at the time. That was not said to lead to a miscarriage. I'm not aware of any case where the failure to involve the defendant in the jury selection process has led to a miscarriage, I'm not aware of any of those. And in fact the normal process, quite frankly, is for the defendant to be sitting some way behind counsel, usually with two prison guards either side of them, while counsel carefully watches and applies their well-known assessment of human nature by looking at a face coming on before they can sit down to pick that jury. If we had an American system I could imagine it would be different.

ARNOLD J:

So the structure of section 66 was that the Court had to advise the defendant of the right to elect.

MR HORSLEY:

Yes.

ARNOLD J:

Except where the election was made by counsel and that could be made before the Court or to the registrar. Now what exactly was the thinking behind the removal of the obligation of the Court to inform the defendant of the election at the relevant time?

MR HORSLEY:

I think it was, well, Mr Lillico might be able to assist me, but my understanding was it was just simply about simplification of the entire proceedings because of course previously we had purely indictable, summary/indictable offences, and you actually had to be able to work out what route you were taking in the

particular case. So you needed to be advised that this was one of those cases where, in fact, you had an ability to elect trial by jury.

ARNOLD J:

I mean if there's no obligation to tell you, how do you know. How does a defendant know. I mean what's the assumption underlying the Act about how the defendant gets to know that there's this right?

MR HORSLEY:

Under the Criminal Procedure Act there is no assumption, and that's the interesting thing, because of course in the unrepresented defendant on their second call is usually required to enter a plea unless they're indicating they do want to get counsel, and there is no form of advice. There is no requirement that they are told about the different way the category 3 offence could proceed.

ARNOLD J:

Is there any requirement in the Act that before that happens they have to be formally advised of the right to counsel?

MR HORSLEY:

No, no not at all.

WILLIAM YOUNG J:

In fact it was addressed, wasn't it, in one of the Law Commission reports.

MR HORSLEY:

The ability –

GLAZEBROOK J:

I think they said they should have advised, didn't they –

WILLIAM YOUNG J:

They said it wasn't a formal requirement though, didn't they?

GLAZEBROOK J:

No, no, I think the initial, wasn't that the initial recommendation and then that was changed?

ARNOLD J:

Changed, yes, I think that's right.

GLAZEBROOK J:

Yes.

ARNOLD J:

So looking at the Act there is no mechanism for advising so that, for example, an unrepresented person could effectively make an election in the sense that doesn't choose the jury trial so goes into the Judge alone track, without ever knowing that he or she has the right to make the other choice.

MR HORSLEY:

Yes, I think they can, and I'm quite sure that does happen.

WILLIAM YOUNG J:

Can you change?

MR HORSLEY:

You can apply to change. The rules of procedure allow for, or basically say that that should not be happening after a certain point, so you follow a process I think after a plea is entered. You would normally be adjourned to a case review hearing under section 54 and then adjourned out to, from that case review hearing to a Judge alone trial under section 57. If you've elected trial you have the case review hearing and issues such as pre-trial applications are dealt with at that stage. If a lawyer gets engaged at an earlier stage you can revisit, up to a certain point at least, by the case review hearing I think, your election. So again – thank you Mr Lillico, who is an expert on the Criminal Procedure Act, the timing of election is section 51 Your Honours, "An election under section 50 must be made at the time of entering a not guilty plea, unless the defendant

obtains the leave of the court under subsection (2), and (2), "The court may grant leave to make an election at a later time, but only if the court is satisfied that there has been a change in circumstances that might reasonably affect the defendant's decision whether to elect a trial by jury." Presumably, if an unrepresented defendant subsequently becomes represented and the advice is to change their election, that would be a case that would fit.

Your Honours, there's one case which has arisen and I think is worth commenting on, and that is the *Stark* case. Whilst we have put it into our submissions –

WILLIAM YOUNG J:
You don't adopt it?

MR HORSLEY:
Not at all. And in fact it's quite clear that other influences were at play in that *Stark* decision. The *Stark* decision itself, in my submission, is in no way persuasive on this Court in any event, but the critical factor there was that advice was purported to have been given, it couldn't possibly have been given in the sort of 60 to 90 second timeframe that it allegedly was, and as I mentioned to you before *Stark* is that situation where the indictable process, if it had been followed in Ontario, would have enabled them to go down a preliminary hearing process and the Court thought that that was quite an important aspect of it. That doesn't arise here, and to the extent that they say it's fundamental it's not fundamental in the way that we use the word now under the *Hall* decision which is, in my submission I would say it's still an issue of tactics but you've heard me on that, as opposed to being a fundamental issue which is critical to whether you can get a fair trial or whether your trial is seen as fair by an independent observer.

ARNOLD J:
Another interesting thing about *Stark*, I guess, is that they do treat it as an issue of jurisdiction. The exercise of the right to choose the mode of trial is integral

to the Court's jurisdiction over an accused and is essential to the fairness of the proceeding, which is the –

MR HORSLEY:
Which again, it's the old section 66…

ARNOLD J:
It's the old – well, and it's the early New Zealand cases that Justice Young was talking about, they do treat it as an issue of jurisdiction but we don't really now.

MR HORSLEY:
No, and that's right. And in fact I think again, just to correct something that my learned friend raised, section 536 of the Criminal Code, subsection 2 of that, does actually have a very similar wording to section 66(2) of our previous Summary Proceedings Act which does state that if an accused is before a Justice charged with an indictable offence other than a specific offence, et cetera, et cetera, "The Justice shall, after the information has been read to the accused, put the accused to an election in the following words, 'You have the option to elect to be tried by a provincial Court Judge without a jury and without having had a preliminary inquiry, or you may elect to be tried by a Judge without a jury or you may elect to be tried by a Court comprised of a Judge and jury," et cetera." And so that makes it very clear that it is a matter of jurisdiction for them, it's a matter of their core process in terms of that advice.

WILLIAM YOUNG J:
But the jurisdiction was satisfied there because counsel did actually elect trial before the provincial Court.

MR HORSLEY:
Yes, but in a way that they said was incompetent effectively –

WILLIAM YOUNG J:
In a rather useless sort of way.

MR HORSLEY:

– and, A, should not have been done but, B, his evidence about the sort of advice that he gave was that actually he didn't really give that advice.

WILLIAM YOUNG J:

Well, there wasn't time for it on the transcript was there?

MR HORSLEY:

No, I think it was 60 to 90 seconds, Sir.

Your Honours, I'm happy to assist you further by answering any particular questions you may have of me, particularly if it is around those overseas authorities, but I think the Crown's position is fairly clear on this that it is a situation not of unfair trial but one of effect or impact on the trial and the submission is that this cannot have had, and there is no evidence, that it would have had an effect or impact on the trial.

O'REGAN J:

Can I just ask you about the constitutionalisation, if that's a word, of the jury trial right. I mean are you, you are maintaining that it is at least partly constitutionalised in New Zealand through the Bill of Rights.

MR HORSLEY:

Yes Sir.

O'REGAN J:

And what's your response to Ms Levy's submission that in fact that jury trial right existed in exactly the same form before the Bill of Rights, so that there isn't really any reason to consider it as different pre-1990 and post-1990?

MR HORSLEY:

There's some merit in that, but only to the extent, Your Honour, that most of the rights that appear in our New Zealand Bill of Rights Act existed pre the coming into force of that statute. It was really just the documenting of it formally and

then enshrining it in the New Zealand Bill of Rights Act that makes it an easy access point, I suppose, for the statement of the very rights that we had mostly always accepted did exist.

O'REGAN J:
But did the constitutionalisation of it impact on the decision we're making now, or if the decision had been a failure to elect in the other direction?

MR HORSLEY:
Mmm, and I think that's a good point Sir, and by way of analogy perhaps section 30 of the Evidence Act 2006 is the best analogy because when we talk about the admissibility of evidence we talk about whether it's been unfairly obtained, or obtained in breach of part of the New Zealand Bill of Rights Act, and so it just gives us a touchpoint to say, actually, this is a warning sign that something could have gone wrong here, because it's been obtained in breach of a Bill of Rights Act right. It's not the end of the enquiry, and of course we then go through the section 30(5) exercise of balancing that breach against all of the other factors in the Act.

WILLIAM YOUNG J:
Not necessarily section 30, that's about evidence.

MR HORSLEY:
Well that's why I use it in terms of how a Bill of Rights breach might be brought in and in a similar way here you may say –

WILLIAM YOUNG J:
Would it be a proportionate response to set aside the trial because it was conducted in front of a Judge alone and the defendant didn't get a fair go at having a jury trial.

MR HORSLEY:
That's right Your Honour, as opposed to the almost presumptive approach that we've taken here, which is to say if the failure to tell you about a right of election

resulted in a jury trial, as in *Singer*, you have no cause for complaint. None. You have received the best that we can possibly do for you in terms of trial.

ELLEN FRANCE J:

Could I just ask, in the context of looking at section 296 of the Criminal Procedure Act, so that's appeals on questions of law, the first appeal, you may remember there'd been issues about whether the question, what it means when it says the question of law in a first appeal must arise in a determination of a charge.

MR HORSLEY:

Mhm.

ELLEN FRANCE J:

And the issue arose in *Anderson* as to whether the ability to change an election constituted a determination for those purposes, and the Court of Appeal said that it did, and part of the reasoning was that there was then limited ability absent bias or nullity to challenge the decision post-trial, and I suppose my question is, well, if that's right, don't you end up potentially with the situation where there's no remedy, if you like, for the error here?

MR HORSLEY:

I think it's hard to see where there will be a case, which perhaps ties into the question you asked earlier, Your Honour, where in fact this failure to address section 70, I think it is, of the Criminal Procedure Act, counsel's obligation to talk about the mode of trial will, in fact, result in an unfair trial, or a miscarriage, I agree. So there will not often be a remedy in the sense of the remedy that the defendant is looking for, which is to have his trial declared a miscarriage and to have another go, irrespective of whether he elects to go the same way or a different way. But that's comprehensible, it's a bit like falling short of professional standards, that doesn't always mean that there has been a miscarriage, and I'll never say never but I can't see a situation where counsel's failure to advise of the right to election or otherwise will necessarily mean that there has been a miscarriage, I think it will be a very rare occurrence, if at all.

And I know sometimes that doesn't sound palatable because what we're saying is that counsel's representation fell short in some way, but that does happen and it often isn't followed with by remedy. I'm not sure if that answers Your Honour's question?

ELLEN FRANCE J:
Thank you.

WILLIAM YOUNG J:
Thank you, Mr Horsley.

MR HORSLEY:
Thank you, Your Honours.

WILLIAM YOUNG J:
Ms Levy.

MS LEVY:
Yes, Your Honour, first of all perhaps correcting the homework, and I'm grateful to Mr Horsley for finding a more complete statement of 236 of the Criminal Code than I did and I apologise for that. But in return, drug offences are not in Schedule 1, so that's an example of a life imprisonment offence where you can have a Judge alone trial. The Schedule 1 offences where you must have a jury trial are much more limited than they were previously.

WILLIAM YOUNG J:
So where is Schedule 1?

GLAZEBROOK J:
I don't think we've got it, have we?

MS LEVY:
Well, I didn't include the entire Criminal Justice Act, but if you have the electronic version it's Schedule 1 to the Criminal Procedure Act and it lists

Crimes Act offences and then other Acts that don't include the Misuse of Drugs Act 1975.

ELLEN FRANCE J:
Where's the Misuse of Drugs Act?

MS LEVY:
Well, it's not there, Your Honour.

ELLEN FRANCE J:
Oh, I see, it's not there is your point, sorry.

MS LEVY:
No, it's not there. There's a curious selection of charges: murder, treason, judicial corruption, dealing in slaves, corruption and bribery, that sort of thing, using an anti-personnel mine, hijacking, various aviation crimes, chemical weapon crimes, internationally protected persons crimes, torture, Geneva Convention crimes, curiously enough under the Maritime Crimes Act 1999 offences relating to fixed platforms. So there's a selection of very infrequent offences and its really only murder, manslaughter, infanticide, of the common offences that have found their way into Schedule 1.

Now my learned friend made the submission that the issue of tribunal or mode of trial is an unimportant tactical decision and it's likely to be a hunch. Well, first of all the Court of Appeal said that there would be times when a defendant could reasonably perceive his interests to be best dealt with by a Judge alone trial, and I support that view. It's often the case that things that a defendant has a right to decide will result in a hunch or a feeling, and perhaps the most obvious one is the giving of evidence. The lawyer may say, well look, you made a really good statement to the police, the cross-examination of the complainant has gone well, I can say everything I need to in closing, and the defendant will say, look, I've just got a hunch they want to hear from me. The important thing is that it's the defendant's right to have a choice. It's the defendant's right to choose, to choose to have a hunch if that's what he wants, and it doesn't

diminish the importance of that choice by calling it a tactic. Often it will be a tactic but that's the tactic that is given to defendants. It's their right to choose.

So hearing my learned friend Mr Horsley recite how basic the advice could be really brought home to me that the submission is that this case is not about what the advice needs to contain. This case is about the right of the defendant to know that he has a choice.

Now the question was raised about the ability of defendants to challenge jurors, and Mr Horsley was right in remembering that there was a recent decision in which Mr Barr had been involved, and the decision is *Liu v R* [2017] NZCA 573, [2018] 2 NZLR 697, and Justices Harrison and Brown found that, "Counsel must advise clients on the personal right to challenge. 'The right is of fundamental constitutional importance to a defendant, and he or she can hardly be expected to know of its nature and extent without legal advice'." Counsel had erred by not advising his client that despite a delegation the defendant remained able to exercise the right of challenge himself, and by not arranging a process for communication to that effect. However, the Court did not accept in the end on the evidence that the appellant had, in fact, wanted to challenge the three jurors he talked about. So on the facts that case failed for the appellant but on the principle of it being the client's right to challenge, the defendant's right to challenge, he succeeded.

WILLIAM YOUNG J:
Well it must be a defendant's right of challenge but in practical terms, other than being shown a jury list, there's not a great deal that counsel can – assistance that the defendant can get from counsel.

MS LEVY:
I think you mean the other way around.

WILLIAM YOUNG J:
Well the defendant might expect counsel to produce the jury list to give the defendant a chance to look for familiar names.

MS LEVY:

Yes.

WILLIAM YOUNG J:

But beyond that there's not a lot, the layout of the court and the practicalities of the process would permit counsel to do in conjunction with a defendant to challenge jurors

MS LEVY:

Well, with respect, the Court of Appeal didn't agree with that. Their judgment is that there should have been a process for Mr Dai to communicate his approval or disapproval of specific jurors.

WILLIAM YOUNG J:

But that may just be showing him the jury list. I mean if it's the counsel has to stand by the dock and liaise with the defendant over jury challenges, that's certainly not my understanding of the practice in New Zealand, although I have seen it in other jurisdictions.

GLAZEBROOK J:

I suppose their point was if the accused said I really do want to have an input into that, and something should have been done to allow it.

MS LEVY:

Yes.

WILLIAM YOUNG J:

Yes, I suppose that's right, yes.

GLAZEBROOK J:

Whereas if the accused said, okay, fine, go for it…

WILLIAM YOUNG J:

Yes, go for it, yes, I agree.

MS LEVY:
I'm in your hands, that's one thing, and that was this case where that's exactly what the appellant was complaining, that whatever methods were there were not effective.

Turning then to section 51 of the Criminal Procedure Act, it's very clear in my submission that that section anticipates the defendant being aware of his right to choose at the time of the election, and I say that because of section 2, subsection (2), "The Court may grant leave to make an election at a later time but only if the Court is satisfied that there has been a change in circumstances that might reasonably affect the defendant's decision whether to elect a trial by jury." So the section plainly contemplates the defendant being in a position at the time of entering the plea to make a positive decision.

Just returning briefly to *Stark*, I certainly accept that on the facts there were other matters at play, but in my submission that's what makes it so remarkable that the decision was written in such straightforward terms…

WILLIAM YOUNG J:
Capable terms.

MS LEVY:
Making it very clear that it was the fundamental right to choose, whether partly or not at all constitutionalised, it was that right to choose that was the important part. And my learned friend made the submission that in *Stark* they didn't use the term "fundamental" as we use that word. In my submission they clearly do, they have their own three fundamental questions. I'm sorry, I've got it highlighted on the screen but can't find it here. It's at paragraph 17, the elements of the defence that an accused person is entitled to control were discussed by an author in an article in 1969. He mentioned three defence decisions that only the client can make. How to plead, whether to waive a trial by jury where that is permissible, and whether to testify on his own behalf. There are doubtless others. In my view a right to elect the mode of trial is one of those fundamental rights that counsel cannot take from a client and on which

the client is entitled to be adequately advised by counsel. So it would be hard to find a use of the word "fundamental" more close to that, the way in which that word is used by the Court of Appeal in *Hall* and the way in which I've been using it in submissions today.

GLAZEBROOK J:
So in terms of the miscarriage of justice you say it's, well your first submission is it's a nullity and the second submission is that it's an unfair trial just by its nature of having been deprived of the choice, not that it was unfair in any other substantive way?

MS LEVY:
No, because as Justice Clifford points out, if it was unfair in any other substantive way, well, we'll grab that branch.

GLAZEBROOK J:
Yes.

MS LEVY:
Now having disclaimed at the beginning of his submissions the use of the term "Rolls-Royce" my learned friend came up with the best we can do for you description of a jury trial at the end of his submissions. Now in my submission if nothing else this case has explored the ways in which a jury trial may not be seen by every defendant as the best for his or her situation. There are valid reasons, as the Court of Appeal said, why a defendant may wish to not be tried by a jury of his peers, and that's his choice to make. Those are my submissions.

WILLIAM YOUNG J:
Thank you. We'll take time to consider our judgment and deliver it in writing in due course.

COURT ADJOURNS: 12.51 PM