NOTE: ORDER MADE IN THE COURT OF APPEAL PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF APPELLANT PURSUANT TO S 200 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360346.html

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF ANY PERSONS UNDER THE AGE OF 18 YEARS WHO APPEARED AS A WITNESS PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360352.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 36/2018
[2018] NZSC 124

BETWEEN	S (SC 36/2018) Appellant
AND	THE QUEEN Respondent

Hearing:	16 October 2018
Court:	William Young, Glazebrook, O'Regan, Ellen France and Arnold JJ
Counsel:	N Levy for Appellant B J Horsley and M J Lillico for Respondent
Judgment:	20 December 2018

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

WILLIAM YOUNG, O'REGAN AND ELLEN FRANCE JJ
(Given by Ellen France J)

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Introduction

[1] The appellant was charged with serious sexual offending in relation to two complainants. The effect of s 73 of the Criminal Procedure Act 2011 is that his trial on these charges would be before a judge alone unless he elected trial by jury. It is common ground that his lawyer at trial was unaware a Judge-alone trial was available and so elected trial by jury on the appellant's behalf without advising the appellant of the choice as to mode of trial that was available to him.

[2] The appellant was convicted following a jury trial. He subsequently learned he could have been tried before a judge alone and appealed against conviction on the basis the absence of an opportunity to elect the mode of trial gave rise to a miscarriage of justice. The Court of Appeal, by a majority, dismissed the appeal on this ground.[1]

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1 *S (CA377/2017) v R* [2018] NZCA 101 (Clifford, Dobson and Collins JJ) [*S* (CA)]. An appeal against conviction in relation to two charges which were brought out of time was allowed.

He appeals with leave to this Court.[2] The question on the appeal is whether the absence of an informed choice as to the mode of trial has given rise to a miscarriage of justice.

Background facts

[3] It is useful to begin by saying a little about the incidents giving rise to the alleged offending and about the trial.[3] These matters assume some importance because of the reliance the appellant places on the nature of the trial and the way in which that affected the advice he should have been given about the mode of trial.

[4] The first complainant, HS, was 15 years old when, late one night in January 2016, she and two male friends were offered a lift by the appellant back into town. The three were dropped outside HS's home but HS was persuaded to get back into the appellant's vehicle. He drove her to an isolated place where the alleged offending took place. The appellant was charged with abduction for the purposes of sexual connection, sexual violation by rape, unlawful sexual connection by anal penetration, assault by choking and by sucking her neck.

[5] The appellant then drove HS home. On seeing her distress, her two male friends confronted the appellant. The resulting incident gave rise to two charges of assault to which the appellant pleaded guilty.

[6] Following the complaint by HS the appellant's wife, HK, made a complaint about what the Court of Appeal described as a "course of violent and sexual offending by the appellant that had occurred throughout their relationship".[4] The complaint led to charges of sexual violation by rape on a specific occasion, assault by punching HK in the face and pushing and holding her against a wall. There were also representative charges of sexual violation by rape, unlawful sexual connection by anal penetration and a representative charge of assault (by choking during sexual activity), and a charge of indecent assault.

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2 *S (SC 36/2018) v R* [2018] NZSC 64.

3 We largely adopt the description of the circumstances of the alleged offending set out in the majority judgment in the Court of Appeal: *S* (CA), above n 1, at [5]–[7].

4 *S* (CA), above n 1, at [7].

[7] Prior to trial an application for severance/opposing joinder of the charges relating to the two complainants was unsuccessful in the District Court.[5]

[8] The appellant admitted the bulk of the conduct complained about occurred except for choking in relation to HS. He gave evidence at trial that the conduct was consensual.

[9] In summing up the trial Judge, Judge Barkle, directed the jury on a propensity basis. That was because both HS and HK made allegations of forceful anal sexual connection and vaginal rape, and of choking.

[10] The appellant was discharged under s 147 of the Criminal Procedure Act on one count involving HS. He was convicted of all of the other charges.

[11] To explain how the mistake as to the mode of trial occurred, Susan Hughes QC, who was the appellant's trial counsel, filed an affidavit in the Court of Appeal. She deposes that she did not know that a Judge-alone trial was available. She said she focused on the fact the maximum penalty faced by the appellant was a term of imprisonment of 20 years. Ms Hughes stated that she understood that a Judge-alone trial was not available except where the maximum penalty was a term of ten years' imprisonment or less. Accordingly, she said she elected a jury trial on behalf of the appellant in relation to the charges involving HS on 11 February 2016, and the charges involving HK on 5 May 2016.[6]

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5 *R v [S]* [2016] NZDC 18010 (Judge Sygrove).

6 As Clifford J observed, the circumstances in which this occurred are unclear: *S* (CA), above n 1, at [93], n 50. Under s 37(4) of the Criminal Procedure Act 2011 a defendant may enter a not guilty plea by filing a notice but it is not suggested the appellant did so. Clifford J also noted that, unlike s 66(7) of the Summary Proceedings Act 1957, there is no reference to the defendant's lawyer being able to elect trial by jury on the defendant's behalf. The authors of *Adams on Criminal Law*, however, suggest that the effect of s 11 of the Criminal Procedure Act, which allows a defendant's case to be conducted by a lawyer, means references to the "defendant" should be read as including the defendant's lawyer, unless the context otherwise requires. They suggest this can be applied to the defendant's right to elect a jury trial: Simon France (ed) *Adams on Criminal Law – Criminal Procedure* (online ed, Thomson Reuters) at [CPA11.01].

The statutory scheme

[12] The key provisions relating to the mode of trial are set out in the Criminal Procedure Act. The purpose of that Act is, relevantly, to "set out the procedure for the conduct of criminal proceedings".[7]

[13] Under the Act offences are grouped into four categories: categories 1, 2, 3 and 4.[8] Generally speaking, category 1 offences comprise offences not punishable by imprisonment.[9] Category 2 offences, generally, are offences punishable by less than two years' imprisonment.[10] Category 3 offences comprise offences punishable by a term of imprisonment of two years or more, other than a category 4 offence.[11] Category 3 is the relevant category in this case. Category 4 offences are those listed in sch 1 of the Act.[12] The list includes offences under the Crimes Act 1961 such as murder and manslaughter, treason and judicial corruption and offences under other enactments such as the Aviation Crimes Act 1972 (hijacking) and the International Crimes and International Criminal Court Act 2000 (genocide).[13]

[14] The Criminal Procedure Act makes provision for two types of trial process, namely, a trial before a judge alone and a trial before a judge and a jury (jury trial).[14] The trial process applicable is linked with the category of offence. Previously, the default position in terms of the mode of trial largely reflected the way the prosecution was commenced.[15] If the prosecution was commenced by way of an indictment (broadly, more serious offending), trial was by jury unless the defendant applied for a

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7 Criminal Procedure Act 2011, s 3(a).
8 Section 4(1).
9 Section 4(1)(d) and see the definitions in ss 5 and 6(1).
10 Section 4(1)(h) and see the definitions in ss 5 and 6(1).
11 Section 4(1)(k) and see the definitions in ss 5 and 6(1).
12 Section 4(1)(q) and see the definitions in ss 5 and 6(1). The explanatory note to the Criminal Procedure Bill suggested that this exception to the general rule under which a defendant may elect the mode of trial reflected the view the offences in question were of "high public or symbolic importance" or in relation to which "there would be questions of fairness and impartiality if they were tried by a Judge alone": Criminal Procedure (Reform and Modernisation) Bill 2010 (243—1) (explanatory note) at 3.
13 Not all offences for which life imprisonment may be imposed are included in sch 1, for example, serious drug offences under the Misuse of Drugs Act 1975 for which life imprisonment is available are not included in the schedule.
14 Section 4(1)(b) and see the definitions in s 5.
15 See the summary of the previous regime in Law Commission *Juries in Criminal Trials* (NZLC R69, 2001) at [24]–[27].

Judge-alone trial.[16] If the prosecution was summary (broadly, less serious offending) then trial was before a judge alone unless a jury trial was elected (an election being available where the maximum sentence exceeded three months' imprisonment). The prosecution could accordingly influence the mode of trial by filing an indictment.

[15] For categories 1 and 2 trial is by judge-alone.[17] The Act provides that for category 3 offences the procedure "generally depends on whether the defendant elects trial by jury".[18] That reflects the fact the defendant has a choice as to whether to elect a jury trial.[19] If there is no election of a jury trial, the trial will be by judge-alone.[20] The fact the Judge-alone trial is now the default mode for offences in category 1, 2 and 3 is a change from the previous statutory regime and, across the board, the number of offences that may be heard before a judge alone has expanded.[21] Further, it is no longer possible to deny a Judge-alone trial on "interests of justice" grounds as was the case under the old ss 361B and 361C of the Crimes Act.

[16] If the defendant in a category 3 proceeding elects jury trial, the trial will be before a jury unless a Judge-alone trial is ordered under s 102 (long and complex trials) or s 103 (juror intimidation). Category 4 offences are tried before a jury in the High Court unless an order is made under ss 102 or 103 for a Judge-alone trial.[22]

[17] The procedure in relation to trial by jury for category 3 offences is set out in more detail in ss 50 to 53.[23] Section 50 provides for a person charged with a category 3 offence to elect trial by jury and states:

> A defendant who is charged with a category 3 offence, and who pleads not guilty to that offence, may elect to be tried by a jury.

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16 Crimes Act 1961, s 361B (now repealed). The Judge had discretion to refuse the application if a jury trial was in "the interests of justice": s 361B(4).

17 Section 4(1)(g) and (j).

18 Section 4(1)(n).

19 Section 4(1)(l), referring to s 50.

20 Section 4(1)(o) and (p) and see s 73.

21 The explanatory note to the Criminal Procedure Bill stated that the approach to categorisation of offences recognised that "the right to a jury trial is fundamentally the right of the defence": Criminal Procedure (Reform and Modernisation) Bill 2010 (243—1) (explanatory note) at 3; and see *Adams on Criminal Law – Criminal Procedure*, above n 6, at [CPA50.01(2)].

22 Section 74. The trial procedure may vary if an offence is joined with proceedings for more serious offences: s 4(1)(s).

23 See also ss 37 and 39 dealing with the entry of a plea in relation to offences in category 1, 2 or 3.

[18] The timing of such an election is provided for in s 51 as follows:[24]

> (1) 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).
>
> (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.
>
> …

[19] Under s 52, a judicial officer[25] or Registrar may receive an election under s 50 to be tried by a jury.

[20] If a defendant wishes to withdraw the election to be tried by a jury, leave of the court to do so must be obtained under s 53(2).[26] Leave may be granted only if:[27]

> (a) the court is satisfied that there has been a change in circumstances that might reasonably affect the defendant's decision to elect a trial by jury; or
>
> (b) the court is satisfied that the withdrawal of the defendant's election is unlikely to cause a delay in the defendant's trial being concluded; or
>
> (c) in the case of a defendant who is to be tried by a jury under section 139(2)(a), [charges heard together] the defendant's co-defendant is, or co-defendants are, no longer to be tried by a jury.

[21] Section 54 provides that if the defendant pleads not guilty, relevantly, to a charge for a category 3 offence, a judicial officer must adjourn the proceeding for a case review.[28] Sections 55 to 57 then deal with the case review.

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24 Under the former s 66(1) of the Summary Proceedings Act the election must be made "before the charge is gone into".

25 Defined as a High Court Judge, a District Court Judge, a Community Magistrate or a Justice of the Peace: s 5.

26 Section 53(1).

27 Section 53(2).

28 Under s 54(2), a Registrar may exercise the power to adjourn under s 54(1).

[22] Reference should also be made to s 73 which establishes that the default position for a proceeding for a category 3 offence is a Judge-alone trial. Section 73(2) provides that:

> The applicable procedure for trial [of a category 3 offence] is—
>
> (a) the Judge-alone trial procedure if—
>
> (i) the defendant does not elect trial by jury under section 50 (or withdraws his or her election under section 53); or
>
> (ii) an order is made under section 102 or 103; or
>
> (b) the jury trial procedure in any other case.

[23] The statute no longer requires the Court to advise a defendant of his or her rights as to the election of the mode of trial. Section 66(1) of the Summary Proceedings Act 1957 provided that persons charged with offences punishable by a term of imprisonment exceeding three months were entitled, "before the charge is gone into but not afterwards" to elect trial by jury. Section 66(2) required the Court, generally speaking, before the charge was gone into, to "inform the defendant of the right" to make an election and set out the wording to be used.[29] The requirement to inform the defendant was expressed not to apply in the situations set out in ss 66(7) and 66A(1). Those sections, broadly, referred to the situation where the defendant was represented by a lawyer who advised the court as to the election or the self-represented defendant who appeared and advised the court as to his or her election.

[24] Finally, in terms of the statutory scheme, reference should also be made to the relevant provisions in the New Zealand Bill of Rights Act 1990 (the Bill of Rights), namely, ss 24(e) and 25(a). Section 24(e) states that everyone who is charged with an offence "shall have the right … to the benefit of a trial by jury when the penalty for the offence is or includes imprisonment for 2 years or more".

[25] The threshold of two years was increased from the period of three months in the Bill of Rights as originally enacted as part of the package of criminal procedure reforms in 2011.[30]

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[29] The wording was as follows: "This case is one where you have a choice of being tried here in this Court or of being tried by a Judge and jury. Do you wish to be tried by a jury or by this Court?".

[30] New Zealand Bill of Rights Amendment Act 2011, s 4 brought into force on 1 July 2013.

[26] Section 25 sets out the minimum standards of criminal procedure and provides that:

> Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:
>
> (a) the right to a fair and public hearing by an independent and impartial court:
>
> …

The decision of the Court of Appeal

[27] Dobson J, delivering the reasons of the majority, contrasted the right to trial by jury with its "different constitutional status" and "historical significance" with the position in relation to the election of a Judge-alone trial.[31] Dobson J concluded there was no right to the alternative mode. His Honour concluded:[32]

> What occurred was that the appellant did have a fair trial, albeit one conducted by a mode which he subsequently complains was chosen for him because of a lack of awareness of his entitlement not to exercise the right to the benefit of that mode of trial.

[28] The Court then assessed what occurred in terms of counsel error. In this respect, Dobson J said the error "was not a fundamental one in the sense identified in *Hall*".[33] By contrast, the matters identified as fundamental in the context of counsel competence in *Hall* all reflected protected rights, for example, the right to testify in one's defence. The Court accordingly turned to consider whether what occurred created a real risk that the outcome of the trial was affected.

[29] In this respect, Dobson J said there was sufficient evidence to make out the Crown case and that the evidence of both complainants was credible. Further, the propensity evidence bolstered the complainants' credibility and reliability. The Court was satisfied there was no real risk the outcome of the trial was affected.

[30] Clifford J would have allowed the appeal, quashed the appellant's convictions and ordered a retrial. Clifford J considered the error was one rendering the trial unfair.

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31 *S* (CA), above n 1, at [31].
32 At [36] (footnote omitted).
33 At [40], citing *Hall v R* [2015] NZCA 403, [2018] 2 NZLR 26.

Essentially, Clifford J saw the choice to elect as a component of the right to a fair trial. His Honour relied in this respect on the importance attached to the choice between a Judge-alone or a jury trial under the previous statutory scheme. Clifford J did not consider the position under the Criminal Procedure Act was any different.

Effect of the failure to advise of the choice as to mode of trial

[31] On this appeal, the Court must allow the appeal if satisfied the appeal should be allowed on any of the grounds specified in s 232(2) of the Criminal Procedure Act.[34] In any other case, the Court must dismiss the appeal.[35] Section 232(2) accordingly provides the framework for our consideration.

[32] Section 232(2) provides that the first appeal court, here, the Court of Appeal, must allow the appeal if satisfied, relevantly, that "a miscarriage of justice has occurred for any reason". A miscarriage of justice is defined in s 232(4) in this way:

> … 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.

[33] It is common ground that the failure of counsel to advise the appellant of his choice as to the mode of trial is an error or irregularity. The primary issue is whether that error or irregularity has led to an unfair trial, or a trial that was a nullity.

[34] It is not suggested that there was any unfairness in the trial itself.[36] Against that background we consider what it is about the absence of choice that is said to have given rise to a miscarriage of justice.

A nullity?

[35] This aspect was not pressed by Ms Levy at the hearing. The high point of the oral argument on this point is the submission that what occurred was "getting close

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34 Section 240.
35 Section 240(3).
36 In the Court of Appeal the appellant also challenged the decisions relating to joinder and propensity, but these issues are not pursued in this Court.

to" the nullity end of the spectrum. Ms Levy also referred to *Parker v New Zealand Police*.[37] In that case Clifford J allowed an appeal against conviction on a count of burglary where the appellant had not been informed, as was required by s 66(1) of the Summary Proceedings Act, of her right to elect trial by jury. Clifford J in *Parker* also made some observations about the effect of *Abraham v District Court at Auckland*, a case to which we turn next.[38]

[36] Because it was not the primary focus, we do not need to reach any concluded views as to the parameters of the concept of nullity.[39] Rather, we can deal with this aspect on the basis adopted in *Abraham*. The parties did not contend for any other approach in relation to what constitutes a nullity.

[37] Mr Abraham pleaded guilty to various charges under the Tax Administration Act 1994 concerning the filing of false tax returns. At the time of entering his pleas he was not advised under s 66(2) of the Summary Proceedings Act of the right to elect trial by jury. Before sentencing he applied unsuccessfully to withdraw his guilty pleas. He sought judicial review of the decision declining him leave to withdraw his pleas. The success or otherwise of the application for judicial review turned in large part on the effect of s 204 of the Summary Proceedings Act.

[38] Section 204 provided, relevantly, that no process or proceeding shall be held invalid "by reason only of any defect, irregularity, omission, or want of form unless the Court is satisfied that there has been a miscarriage of justice". Section 379 of the Criminal Procedure Act is in similar terms.

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37 *Parker v New Zealand Police* [2012] NZHC 1231.

38 *Abraham v District Court at Auckland* [2007] NZCA 598, [2008] 2 NZLR 352.

39 Reference to nullity was introduced in the Crimes Act 1961, s 385. Francis Adams (ed) *Criminal Law and Practice in New Zealand* (2nd ed, Sweet & Maxwell, Wellington, 1971) at [3387] suggests any conviction in a proceeding which was a nullity at common law "must always have been within the earlier paragraphs, so that the purpose of [then, s 385(d), nullity] cannot have been to give a new ground of appeal". Adams referred to the English doctrine with the "consequential common law power to order a venire de novo" as important in England because of the absence there of a power to order a new trial. The same did not apply in New Zealand but to avoid doubt the reference to nullity was added "to make it clear that a new trial may be ordered … where the first trial was a nullity". See also W S Spence *Garrow and Spence's Criminal Law* (4th ed, Butterworths, Wellington, 1962) at 366–367; and *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145 at [9].

[39] After a review of the authorities, Arnold J delivering the judgment of the Court of Appeal observed that:[40]

> … whether a particular procedural failure constitutes a nullity in the context of s 204 is a matter of degree requiring an overall assessment of the particular failure against the relevant statutory background. It is critical to understand the place of the particular requirement in the scheme of the legislation. Further, as Cooke J noted in *Police v Thomas*, the concept of nullity will frequently overlap with the concept of miscarriage of justice in s 204.

[40] Arnold J also noted that in some situations the application of the concept of nullity will be "straightforward".[41] For example, where the Court has no jurisdiction to deal with the matter. The Court referred to the similar approach taken to the application of the miscarriage proviso in trials which were nullities under s 385(1)(d) of the Crimes Act (the predecessor to s 232 of the Criminal Procedure Act). The examples cited in this context were *R v Blows*[42] and *R v O (No 2)*.[43] In *Blows* the appellant was convicted after trial in the District Court. However, the effect of s 28A(e) of the District Courts Act 1947 was that a District Court only had jurisdiction over the relevant indictable offence (sexual violation) where the proceedings had been transferred to the District Court under s 168AA of the Summary Proceedings Act. No order had been made under s 168AA so it was common ground that hearing the sexual violation charges was outside the jurisdiction of the District Court. In *R v O (No 2)* the District Court had no jurisdiction to try the appellant on the particular count in issue. The other example given in *Abraham* of nullity arising from the absence of jurisdiction was that where a statutory process which confers jurisdiction has not been followed (such as a consent to prosecute).[44]

[41] The Court in *Abraham* did not consider the effect of the failure to advise of the rights under s 66(2) was to create a nullity. Arnold J emphasised that s 66 "does not impose an absolute obligation on the court to advise of the right to elect".[45] Further, the section allowed of some flexibility in terms of the timing of the advice. That was

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40 At [48].
41 At [49].
42 *R v Blows* CA103/95, 31 August 1995 at 5–7.
43 *R v O (No 2)* [1999] 1 NZLR 326 (CA) at 329.
44 Reference can also be made to *R v Fonotia* [2007] NZCA 188, [2007] 3 NZLR 338 (nullity where charge did not disclose a criminal offence); and *Jackson v Police* [2018] NZCA 194 (High Court appeal a nullity because it was dealt with on the papers contrary to s 330 of the Criminal Procedure Act).
45 At [52].

because, as we have noted, s 66(2) stated that the advice was to be given "before the charge is gone into".

[42] The Court drew support for the proposition the failure to advise was to be dealt with by means of the miscarriage proviso and not as a nullity from two other considerations. First, applying *R v Condon* the Court said an appeal against conviction after an unfair trial under s 385(1) of the Crimes Act is to be treated under the miscarriage of justice ground, not nullity.[46] The same approach applied equally to s 204.

[43] Second, Arnold J said that the English law had "undergone what has been described as a 'sea change' in this area, moving from a rigid position where a procedural failure was likely to be fatal to an approach which focuses on whether the failure has caused prejudice".[47]

[44] On this basis, the Court concluded that the failure to comply with s 66(2) did not make the guilty pleas a nullity. Rather, the question was whether the District Court Judge was entitled to decide that there was no miscarriage of justice. The Court concluded that decision was unlawful. That was essentially because the Judge did not address the appellant's evidence which was to the effect that if he had been aware of his right to elect a jury trial, he would not have maintained his guilty pleas.[48]

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46 At [55], citing *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 at [77]. In a much earlier New Zealand case, *Kennedy v Rankin* (1908) 11 GLR 317 (SC) non-compliance with the equivalent to s 66 was treated as rendering the proceedings a nullity although the reasoning for this is unclear. Denniston J applied *R v Cockshott* [1898] 1 QB 582 (DC) (conviction quashed where defendant not informed of the right to be tried by jury).

47 At [56], relying on *R v Ashton* [2006] EWCA Crim 794, [2007] 1 WLR 181. See also the discussion in D C Ormerod "Procedure: procedural failures – jurisdiction" [2006] Crim LR 1004 at 1006–1007. There have been shifts in the approach to nullity subsequently but the focus on the legislative scheme has been a constant: see, for example, *R v Clarke* [2008] UKHL 8, [2008] 2 All ER 665; *R v Gul* [2012] EWCA Crim 1761, [2013] 1 WLR 1136; and *R v White* [2014] EWCA Crim 714.

48 There have been a number of cases in the High Court in which the failure to advise of the right to elect a jury trial on the facts has been seen as giving rise to a miscarriage of justice: see, for example, *Lose v New Zealand Police* HC Auckland CRI-2010-404-500, 4 July 2011; *Byrt v New Zealand Police* [2012] NZHC 340; and *Khan v Police* [2012] NZHC 2884; compare *Holley v Police* [2012] NZHC 3431 (no miscarriage because no need for credibility findings).

[45] For completeness, in terms of the approach to s 204, we note that in the context of a search warrant case this Court in *Dotcom v Attorney-General* discussed the authorities on s 204.[49] The majority in that case said:[50]

> [129] … The authorities accept that some defects are so serious that the document or process concerned must be treated as a nullity and outside the scope of s 204, this conclusion is one which courts should be slow to reach. The court's approach should not be a technical or mechanical one, and even relatively serious defects may receive the protection of s 204. Where a court concludes that the relevant document or process is not a nullity on account of the particular defect(s), the question whether s 204's protective effect is available depends on whether that will involve a miscarriage of justice. That will be determined by whether or not the particular defect has caused significant prejudice to the person affected. …
>
> [130] Clearly there is room for dispute about how far the concept of miscarriage of justice should be taken in the context of s 204. … Whatever else [the concept] does, we think it is clear that the concept goes far enough to enable a court to take relevant surrounding circumstances into account when considering whether the subject of a search warrant has suffered any prejudice for the purposes of s 204 as a result of defects on the face of the warrant of the type alleged in this case (assuming they do not reach the nullity threshold). We see this approach as being consistent with s 21 of the Bill of Rights.

[46] In assessing whether the error in the present case has caused a nullity, the importance of the election should not be underplayed. But it is not a decision which affects the jurisdiction of the Court. And, given the statutory context, it does not meet the nullity threshold. There is now no statutory obligation for the Court or counsel to advise the defendant of the election. In light of that context we see no force in the suggestion in *Parker*, the judgment relied on by Ms Levy, that on the question of a nullity *Abraham* might be limited in its effect to the situation where a guilty plea is entered. We conclude that what occurred here has not given rise to a nullity.

[47] We turn then to the primary issue, that is, whether the trial was unfair.

An unfair trial?

[48] In developing the submission the error here has led to an unfair trial, Ms Levy emphasises the importance of the choice as to the mode of trial in the statutory scheme. She says *Abraham* should apply given this is the "other side of the coin" from that in

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[49] *Dotcom v Attorney-General* [2014] NZSC 199, [2015] 1 NZLR 745.

[50] Per McGrath and Arnold JJ delivering the judgment of McGrath, William Young, Glazebrook and Arnold JJ. Elias CJ dissented: compare at [44]–[45].

issue in *Abraham*. Ms Levy relies also on recent Canadian authorities as supporting the importance of the choice.[51] The appellant also submits that the right to a jury trial is not accorded constitutional status as is apparent from the change to the threshold for jury trial implemented as part of the criminal procedure reforms. We address these points in turn.

An important choice

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

[50] As we have noted, there is now no provision in the Criminal Procedure Act addressing the provision of information to the defendant of the right to make an election. The absence of any statutory requirement to provide such advice was a matter discussed by the Law Commission in its report *Juries in Criminal Trials*.[52]

[51] The Commission referred to the provision in some Australian states making the right to elect a Judge-alone trial subject to the court being satisfied the defendant had received legal advice before making the election.[53] The Commission considered that if the proposal for a "proposed simplification procedure"[54] (including the proposal for the current default Judge-alone procedure) was introduced, it was unnecessary to include a requirement as to advice to the defendant. "On balance" the Commission said:[55]

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51 The emphasis on the Canadian authorities reflects the fact that in the United Kingdom and, largely, in Australia, there is no unilateral right on the part of the defendant to determine that there will be a Judge-alone trial.

52 Law Commission, above n 15, at [70]–[71].

53 This is the case in s 7(1)(b) of the Juries Act 1927 (SA) which provides an election right similar to s 50. In *R v Haydon* [2000] SASC 125, (2000) 76 SASR 265 the Full Court of the Supreme Court concluded by a majority that the failure of the Judge to satisfy himself in terms of s 7(1)(b) had not given rise to a miscarriage. The case is not very helpful because it was complicated by reason of the trial being a second trial. There was no issue as to election in the first trial. The dissenting Judge considered the trial Judge had satisfied himself in terms of s 7(1)(b). The majority did note there was no evidence the defendant had suffered any disadvantage: at [71].

54 Law Commission, above n 15, at [70]; and see Law Commission *Simplification of Criminal Procedure Legislation* (NZLC SP7, 2001).

55 Law Commission, above n 15, at [71]; and see at 200, recommendation A6.

> … we do not consider that there is a need for a statutory provision that the defendant receive legal advice. While legal advice is always desirable, the practice is to remind defendants that they have the right to that advice, and that is sufficient.

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

[53] But, in terms of our present inquiry, the point is that there is no reliable basis on which it can be said that one mode of trial for the present case is fairer than another. The provisions in the Criminal Procedure Act relating to the ability to withdraw an election suggest some assessment of the reasonableness of the defendant's decision is possible. But in the present case, there will necessarily be a degree of speculation about whether a jury or a judge alone as the fact-finders may adopt differing approaches. We can say that the absence of any reliable basis for a conclusion on this point in this case is apparent on considering the advice Ms Hughes now says she would have given if she had been aware of the availability of the choice as to the mode of trial.

[54] Ms Hughes in her affidavit said that her usual advice in a case (such as the present) where the defence was consent was to recommend a jury trial. In particular, she described her usual advice as follows:

> 4.1 If the client's defence was 'technical' or involved complex law, I would recommend a JAT [Judge-alone trial].
>
> 4.2 If the allegations involved particularly upsetting or objectionable allegations – for example, sexual offending involving children, animals or "extreme" sexual offending – I might recommend a JAT.
>
> 4.3 If the trial is about consent, I would usually recommend a jury trial. Where the fact-finder comprises 12 people rather than a single Judge, their decision will be based on a larger pool of sexual experiences. In [the appellant's] case he largely admitted the sexual conduct alleged; his defence was that both victims had consented.

[55] In response to questions from the bench during the hearing, Ms Levy suggested by way of example that the advice on the election faced by the appellant might canvas matters such as the issues the jury would be faced with and the ways in which a jury's approach to those issues might vary from a judge's approach. To illustrate, it was suggested that attention could be given to the difficulties jurors might have in separating the fact that the appellant, as a man in his 30s, was engaging in sexual activity with a young girl from the other issues before the jury. Ms Levy also placed some emphasis on the impact of the ruling that the charges relating to the two complainants be heard together and as to the admissibility of evidence on a propensity basis.

[56] As is apparent, however, these matters encompass areas on which it is difficult to review the reasons for making these types of distinctions.[56] Accordingly, while the appellant was entitled to an informed choice it has to be recognised in considering the importance of the absence of that choice in this case that the advice that can be given about why one mode of trial may be preferred over another is based on experience and impression. A contrast can be made in this respect with other trial decisions, such as the election to give evidence, on which it is possible to be more concrete about the impact of not making the choice on an informed basis. (The latter decision was one identified as fundamental in the sense of the impact on a challenge to a conviction based on the failure of trial counsel to follow specific instructions in *Hall*.)[57]

The application of Abraham

[57] As we have noted, the Court in *Abraham* ruled the decision in issue was unlawful. In our view *Abraham* is distinguishable on this point from the present case. We note first that the Court in that case was dealing with an application for judicial review of the decision not to allow the withdrawal of a guilty plea. The District Court Judge, in refusing to allow the plea to be withdrawn, said that the choice as to the mode of trial was a matter of form only because the appellant was pleading guilty. However, the evidence of the appellant was that he would not have maintained his guilty plea if he had known that a jury trial was an option. In those circumstances, the

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[56] Compare *Liu v R* [2017] NZCA 573, [2018] 2 NZLR 697 (provision of advice as to personal right to challenge juror without cause).

[57] *Hall v R*, above n 33.

fact he said he would have made a different choice was a relevant consideration for the Judge to consider. Second, the Court attached some weight to the fact the right to elect trial by jury, a protected right, was in issue. Finally, at that point a jury trial would have been preceded by the committal or depositions process so the election had that additional consequence.[58]

The Canadian authorities

[58] The high point of the appellant's case is provided by the Canadian authorities but, as we shall now discuss, they are largely explicable on the basis the election in those cases was linked to other processes and/or that the cases reflect a recognition of the importance of the right to a jury trial.

[59] The appellant in *R v Stark* appealed against conviction on the basis of ineffective assistance of counsel.[59] The question of counsel's assistance arose when, on the day of trial, Crown counsel advised he would be proceeding by indictment and not summarily. When asked how he elected to be tried, Mr Stark's counsel responded that the accused elected to be tried that day, in the Ontario Court of Justice.

[60] The Ontario Court of Appeal found that the appellant had not been given an adequate opportunity to consider his election as provided for by s 536 of the Canadian Criminal Code.[60] In Mr Stark's case, the election was whether to be tried in the Superior Court by judge-alone or with a jury, have a preliminary inquiry, or to be tried then and there in the Ontario Court of Justice, as occurred.

[61] In delivering the judgment of the Court, P Lauwers JA described the right to elect the mode of trial under s 536 as "one of those fundamental rights that counsel cannot take from a client and on which the client" was entitled to be adequately advised.[61] The Court observed:

> 19 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

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58 Summary Proceedings Act, s 168. This provision was amended after *Abraham,* but prior to the statute's repeal, to allow much of this to take place on the papers.
59 *R v Stark* 2017 ONCA 148, (2017) 347 CCC (3d) 73.
60 Criminal Code RSC 1985 c C-46.
61 At [18].

> constitutionalized in s 11(f) of the Charter, which guarantees a right to trial by jury for offences punishable by a sentence of five years or more. 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.
>
> 20 If an accused receives no advice from counsel as to his options, or the advantages and disadvantages of the respective options, then the accused has effectively been denied his right to choose his mode of trial under s 536 of the *Criminal Code*. The miscarriage of justice lies in proceeding against the accused without allowing him to make an informed election, and the accused need not establish further prejudice. What the accused might or might not have done had he been aware of his options is not relevant.

[62] It is clear, however, that the fact the election affected the appellant's ability to have a trial in a Superior Court preceded by a preliminary inquiry[62] was relevant to the importance to which the Court attached to advice as to the election.[63] It is also apparent that the Court attached some significance to the fact the choice involved the option of a jury trial. Mr Stark's trial was before a judge alone. Finally, as in *Abraham*, there was a statutory requirement the Court advise the defendant of the right to trial by jury and in accordance with the prescribed wording in s 536.[64]

[63] In *R v Shilmar* the Provincial Court of Alberta considered the ability of Mr Shilmar to re-elect a jury trial after having previously elected to be tried by a Provincial Court Judge.[65] One of the issues was whether Mr Shilmar had proven he was not provided with effective assistance by his previous counsel in respect of his right to elect and/or re-elect the mode of trial.

[64] The Court in *Shilmar* saw the facts of the case as quite different from those in *Stark*. That was because, amongst other things, Mr Shilmar had been advised in Court of the full election and had received "competent legal advice about the advantages and disadvantages of each mode of trial before he was called upon to make his election".[66]

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62 The preliminary inquiry determines whether there is sufficient evidence to commit the accused to trial. It permits the accused to "explore to some extent the Crown's case": *R v Barbeau* [1992] 2 SCR 845 at 853–854.

63 It is reasonably well established in Canada that a failure to give the advice under s 536(2) goes to the jurisdiction of the Court: *Varcoe v R* 2007 ONCA 194, (2007) 219 CCC (3d) 397. The concern in *Varcoe* was that, as a result of the failure, the appellant did not know a preliminary inquiry was available.

64 Criminal Code, s 536(2).

65 *R v Shilmar* 2017 ABPC 213, (2017) 70 Alta LR (6th) 151.

66 At [116] (emphasis in original).

[65] The Court noted the importance of those "enjoying the right to trial by judge and jury" being advised of that right and that "the accused personally decide on the mode of trial (s)he considers to be in his or her subjective best interests".[67]

[66] In that case, the appellant's claim failed on the facts. Again the observations made, while providing some support for the present appellant's position as to the importance of the choice, reflect at least in part the importance seen to be attached to the jury trial.

[67] For completeness, reference should also be made to the recent decision of the Court of Appeal of Manitoba in *R v DGM* although this was not referred to in argument.[68] The appellant in that case appealed his convictions on the basis he did not receive effective assistance of counsel resulting in a miscarriage of justice. There were various aspects to the failures in advice relied on including the failure to give proper advice about the decision to re-elect from a jury trial to a Judge-alone trial and about the decision not to testify.

[68] The Court accepted the factual component of these allegations (and others). The Court then assessed whether these errors affected the fairness of the trial process. In that context, Beard JA for the Court referred to *Stark*. In concluding there was a miscarriage of justice, the Court treated the failure to provide advice as to the election together with the question whether or not to testify and said this:

> [32] While the Court in *Stark* was dealing with the right to elect the mode of trial, these comments apply equally to the decision of whether to testify, which was identified in *Stark* as another fundamental right of an accused and about which he was entitled to receive advice from his trial counsel before making a decision as to how to proceed.
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> [33] We are of the view, based on the evidence of both the accused and the trial lawyer, that the trial lawyer did not give the accused any advice about the advantages and disadvantages related to the crucial decisions of re-electing to a judge-alone trial and of testifying in his own defence. Thus, we are of the view that these facts are sufficient to fatally undermine the fairness of the trial and constitute a miscarriage of justice.

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67 At [124].

68 *R v DGM* 2018 MBCA 88, (2018) 366 CCC (3d) 436.

[69] The other relevant Canadian authority, which was relied on by the majority in the Court of Appeal in this case, is the decision of the Supreme Court of Canada in *R v Turpin*.[69] That case dealt with whether the provisions of the Canadian Criminal Code which require a murder trial to be conducted before a jury were inconsistent with the appellant's right to waive a trial by jury under s 11(f) of the Canadian Charter of Rights and Freedoms. Section 11(f) is in similar terms to s 24(e) of the Bill of Rights in that it provides for a person charged with an offence to have "the benefit of trial by jury" when a specified threshold is met. In the Charter, the threshold is those offences where the maximum punishment is imprisonment for five years "or a more severe punishment".

[70] The appellants in *Turpin*, although charged with murder, sought and were granted a Judge-alone trial. The Court of Appeal allowed the Crown's appeal on the ground the trial Judge had conducted the trial without jurisdiction and ordered a new trial for all three appellants. That order included the appellant who had been acquitted at trial.

[71] The relevant part of the decision of the Supreme Court of Canada is the Court's conclusion that the Criminal Code provisions in issue did not breach s 11(f) of the Charter. In that context, the Court did not accept s 11(f) conferred on an accused a choice between trial by jury and a Judge-alone trial. Rather, the Court said that the "purpose of s 11(f) is to give an accused the right to a jury trial and to ensure that, if a jury trial is not a benefit to the accused, the accused may waive the right to a jury trial".[70] Once waived, the position was governed by the Criminal Code. Wilson J for the Court continued:[71]

> There is, … nothing in s 11(f) to give the appellants a constitutional right to elect their mode of trial or a constitutional right to be tried by judge alone so as to make s 11(f) inconsistent with the mandatory jury trial provisions of the *Criminal Code*.

[72] Similarly, in *Singer v United States*, referred to in *Turpin*, the United States Supreme Court said that the "only constitutional right concerning the method of trial

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69 *R v Turpin* [1989] 1 SCR 1296.
70 At 1322 per Wilson J.
71 At 1323.

is to an impartial trial by jury".[72] That right could be waived but conditions could be attached to the waiver such as requiring consent of the prosecuting attorney and the trial judge.

[73] Clifford J in the present case did not find *Turpin* or *Singer* helpful because the focus for the appellant is on the absence of choice. That is true but both cases are nonetheless of some assistance in assessing how much importance should be attached to that choice.

The constitutional place of the jury trial

[74] We do not have to decide in this case how the absence of advice about the ability to choose a jury trial should be treated under the Criminal Procedure Act. That said, we can say that the change to the Bill of Rights and the associated approach to Judge-alone trials reflected in the Criminal Procedure Act do not downplay the importance of the right to a jury trial or affect its status in constitutional terms. A number of points can be made about this.

[75] First, as the White Paper on a Bill of Rights for New Zealand indicated, the decision to set the threshold at offences carrying a maximum term of imprisonment of three months simply reflected the then statutory regime.[73] There was therefore no additional significance attached to the threshold adopted. As we have noted, the equivalent provision in the Canadian Charter sets a higher threshold (five years). Further, other equivalent international instruments contain no similar protection for a jury trial. The International Covenant on Civil and Political Rights, for example, refers only to the right to trial within a reasonable time.[74] The European Convention on Human Rights protects the right to a fair trial but does not mention the mode by which that trial is achieved.[75] Nor does the Human Rights Act 1998 (UK) protect the right to a jury trial.

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72 At 1312, citing *Singer v United States* 380 US 24 (1965) at 36.

73 Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" [1984–1985] I AJHR A6 at [10.135].

74 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 9(3).

75 Convention for the Protection of Human Rights and Fundamental Freedoms ETS 5 (opened for signature 4 November 1950, entered into force 3 September 1953), art 6.

[76] Second, as the majority of the Court of Appeal noted, the jury trial has historical significance.[76] The right to jury trial has also generally been seen as "a safeguard against the arbitrary or oppressive enforcement of the law by the government".[77] Further, in *B (SC 12/2013) v R*, the majority of the Court acknowledged that juries sometimes apply "their innate sense of justice" by convicting on one count and acquitting on another count although the evidence would support both.[78] The Court described the jury in this way "acting as the conscience of the community".[79] Finally, the Law Commission referred to the public interest involved, "in the sense that jury trials enable the community, as represented by a randomly selected jury, to make decisions about … guilt".[80]

[77] Further, it seems reasonably clear that the Criminal Procedure Act was intended to simplify procedures and, in particular, to avoid the problems created by the previous distinctions between the summary and the indictable jurisdictions.[81]

[78] Finally, on the importance of the jury trial, there remain aspects of the statutory scheme which treat a jury trial differently. For example, a Judge-alone trial for a long and complex case is not available where the maximum penalty for the offence is life imprisonment or a term of imprisonment of 14 years or more.[82] Further, the Criminal Procedure Act makes provision for the filing of formal statements[83] and the possibility of taking oral evidence from potential witnesses in jury trials.[84] These procedures may be applied to Judge-alone trials but there is a discretion as to whether or not that occurs.[85] Finally, the effect of s 139(1)(a) of the Act is that where, under s 138, two or more charges are to be heard together and one charge is to be heard by a jury then all charges must be tried by jury. The same position generally applies, by virtue of

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76 At [31]; see also Law Commission, above n 15, at [37]–[64].

77 *Siemer v Solicitor-General* [2010] NZSC 54, [2010] 3 NZLR 767 at [20] per McGrath J on behalf of himself and Elias CJ.

78 *B (SC 12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [99] per Arnold J.

79 At [99].

80 Law Commission, above n 54, at [20].

81 See for example Criminal Procedure (Reform and Modernisation) Bill 2010 (243—1) (explanatory note) at 3.

82 Section 102(1)(a). The prohibition also applies to attempts or conspiracy to commit these offences or to charges based on party or accessory liability to these offences: s 102(1)(b).

83 Section 82.

84 Section 90.

85 See for example ss 4(1)(u), 80, 85 and 101.

s 139(2)(a), where there are charges against multiple defendants which are to be heard together and one of the defendants elects a jury trial.

Real risk outcome affected?

[79] The appellant also puts in issue s 232(4)(a) of the Criminal Procedure Act which refers to an error or irregularity that "has created a real risk that the outcome of the trial was affected". The appellant in his affidavit described his concerns about what had occurred in this way:

> 4. I believe I would have chosen a judge-alone trial if I had been given a choice. This is because I think that a judge would have been more likely to consider the evidence and apply the law to it without having a lot of emotional stuff going on. For example, at one stage in my trial there was a delay of about half an hour because one of the jurors was crying in the jury room.
>
> 5. I also think that it would have been easier to convince one person that I was not guilty, than 12 people. I know that the idea with juries is that 12 people have to believe you are guilty beyond reasonable doubt, but I think the reality is that most people will go with the crowd rather than take the hard road of having a different view.

[80] We were not provided with much in the way of statistics about the extent to which those charged with sexual offending elect trial by judge-alone. The figures for 2014/2015 cited in the Law Commission report *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* suggest "most defendants charged with offences of sexual violence elect to be tried by jury".[86] In any event, the appellant was given a trial under one of the two possible trial processes for which the Act provides. He has had both of the rights protected in the Bill of Rights, namely, a trial by jury and "a fair and public hearing by an independent and impartial court".[87]

[81] Further, nothing in the reasons the appellant gives for the preference for a Judge-alone trial suggests a tangible impact on the outcome that might give rise to the real risk referred to in s 232(4)(a). As the majority of the Court of Appeal observed,

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86 Ministry of Justice data for 2014/2015 shows that 222 of the 293 people charged with sexual offending tried in the District Court who could make the election elected trial by jury: Law Commission *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (Law Commission R136, 2015) at [3.24]. We do not know whether these matters all proceeded to trial.

87 Section 25(a).

the "emotional response [the appellant] cites from one juror during the course of the trial may not have been perceived by him as relevant" prior to trial in discussion with counsel.[88] And, as the majority also noted, the ideas about the ease of convincing one person rather than 12 "reflects a misconception of the role of either a jury or a judge as finders of fact in a criminal trial".[89]

Conclusion

[82] In drawing these threads together, we can return to the various limbs of s 232(4). We agree that it is important that a defendant in the appellant's position can make an informed election. But, for the reasons given, we are satisfied the trial was not a nullity. Nor is this a case where the appellant, as a result of the absence of an informed choice, obtained some sort of inferior process. There is nothing to support the conclusion the absence of choice or of advice about which mode was to be preferred has created a real risk that the outcome of the trial was affected.

[83] It is not suggested that the trial was unfair except for the absence of an informed choice as to the mode of trial. As we have said, the appellant has been given the rights which are protected in the Bill of Rights. Under the statutory scheme, a jury trial still maintains a constitutional significance. In contrast the current regime, under which a judge-alone position is the default position, is relatively new. And, under s 53(2)(b) of the Criminal Procedure Act, the right to change election on the basis of a change of mind is constrained and plainly not able to be applied by analogy in this case where what is sought is a second trial. In all the circumstances, the absence of an informed choice in this case was not so important that the resulting trial was necessarily unfair.

[84] We add that, if a retrial was ordered in this case, the appellant could not of course be committed to the choice he says he would have made. He may choose a jury trial again. In the context where there is no criticism of the conduct of the trial other than the lack of choice as to mode of trial and where Ms Hughes would have advised him to elect a jury trial, to treat what occurred here as a miscarriage would not be a proportionate response. We have some concerns in this respect about opening up

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88 *S* (CA), above n 1, at [16].
89 At [17].

what would be a new area for challenge to the competency of counsel which it would be difficult for the courts to supervise. These latter points alone would not be determinative, but, are matters to be weighed in the mix.

[85] When the matter is viewed overall, we are satisfied that no facet of the absence of informed choice elevates what occurred here to mean the trial the appellant had has given rise to a miscarriage of justice.

Result

[86] In accordance with the views of the Court, the appeal is dismissed.

GLAZEBROOK AND ARNOLD JJ
(Given by Glazebrook J)

[87] Mr S was convicted of serious sexual offending against two complainants. Mr S's counsel at trial, Ms Hughes QC, purportedly on Mr S's behalf, had elected trial by jury. Mr S was not told that he could decide not to elect a jury trial and therefore be tried by a judge alone.[90]

[88] Mr S claims that the absence of advice on his ability to have a Judge-alone trial has led to a miscarriage of justice. He claims that he would have chosen a Judge-alone trial because a judge would have been more likely to have considered the case dispassionately. He referred to the fact that there was a delay at one point in his trial because one of the jurors was crying in the jury room. He also said it would be easier to convince one person rather than 12 and said that, although each juror has to be satisfied beyond reasonable doubt, in his opinion most people would go with the crowd rather than taking a different view.

[89] We agree with Ellen France J that the issue is governed by s 232(2) of the Criminal Procedure Act 2011 and that the Court can only allow the appeal in this case

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[90] As noted by Ellen France J, this was because Ms Hughes mistakenly thought a Judge-alone trial was not available for the offences: see above at [11].

if a "miscarriage of justice has occurred for any reason".[91] The definition of miscarriage in s 232(4) is in two parts.

[90] The first is where "any error, irregularity, or occurrence in or in relation to or affecting the trial" has created a "real risk that the outcome of the trial was affected".[92] We do not rule out the possibility that an error of the kind that occurred in this case[93] could create a real risk that the outcome of a trial was affected but this would be rare. Something tangible would have to be shown and there is nothing to suggest that the threshold of "real risk" has been met in this case.

[91] The second part of the definition of miscarriage of justice is where the error, irregularity or occurrence "has resulted in an unfair trial or a trial that was a nullity".[94] We agree with Ellen France J that the trial was not a nullity.[95] The issue therefore is whether there has been an unfair trial. It is not now alleged that there was anything, apart from not being advised of the possibility of trial before a judge alone, that caused the trial to be unfair.[96] We also agree with Ellen France J[97] that Mr S has had the benefit of both of the rights protected by the New Zealand Bill of Rights Act 1990 (the Bill of Rights): a trial by jury and a "fair and public hearing by an independent and impartial court".[98]

[92] Accused persons in Mr S's position are given the right to elect trial by jury. If the election is not made, then the default position of a Judge-alone trial prevails. It was not suggested that there are any relevant procedural or process differences between a jury trial and that before a judge alone.[99] Nevertheless, it is possible that a trial might be conducted differently, depending on whether it was before a judge or a jury. For example, it might be thought unnecessary to call counter-intuitive

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91 Above at [31].
92 Criminal Procedure Act 2011, s 232(4)(a).
93 Or indeed a failure to advise on the availability of a jury trial.
94 Criminal Procedure Act, s 232(4)(b).
95 Above at [46].
96 See above at [34].
97 See above at [80].
98 New Zealand Bill of Rights Act 1990, s 25(a).
99 Unlike some of the cases in Canada discussed by Ellen France J. There are some procedural differences between the two modes of trial (see, for example Subparts 7–8 of Part 3 of the Criminal Procedure Act) but in this case, as indicated, it was not suggested any of these were of any relevance or significance to the mode of trial decision.

evidence[100] in a Judge-alone trial. We do not rule out that it might also affect the decision whether or not an accused would elect to give evidence.

[93] The important point to our minds, however, is that the choice as to mode of trial is given to the accused. It is not a choice that can be made by the accused person's lawyer, although of course the lawyer should advise of the existence of the election (which did not occur in this case). We agree with Ellen France J that, despite the requirement no longer being in the statute, trial courts should also build advice on the existence of the election into their procedures.[101]

[94] An accused's lawyer would often also give the accused his or her opinion on how the election should be exercised or on the factors to take into account in deciding whether or not to elect a jury trial. We agree with Ellen France J that any such advice given by counsel would be based on impression and experience.[102] It would thus be very unlikely to be amenable to review.

[95] Being deprived of the choice provided under the Criminal Procedure Act between electing a jury trial and the default position of Judge-alone trial is, however, a procedural irregularity. The fact an accused is constrained in the ability to change the election[103] seems to us to emphasise the importance placed on the election.

[96] We consider that such an error could cause a trial to be characterised as unfair.[104] A trial would not be designated unfair, however, if being advised of the election would have made no difference to the accused's decision. In other words, the trial in this case would not be unfair unless Mr S can show that he would, had he been advised that he did not have to elect a jury trial, have chosen the default position of a Judge-alone trial.

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100 Of a type at issue in *DH v R* [2015] NZSC 35, [2015] 1 NZLR 625.

101 Above at [52].

102 See above at [56].

103 See above at [20]. We note that not having been told of the ability to make the election may constitute a relevant change in circumstance in terms of s 53(2).

104 It is not necessary for an unfair trial to show that the result of the trial might have been different, that in any event being the inquiry under the first limb of the definition of miscarriage: *Wiley v R* [2016] NZCA 28, [2016] 3 NZLR 1 at [37]; see also *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 at [77]. A failure in process can suffice to make a trial unfair.

[97] There is an obvious element of hindsight in Mr S's reasons for saying he would have opted for the default position of a Judge-alone trial: the fact a particular juror was emotional in the course of the trial would not have been known at the time he would have been called to make the election.[105] Aside from this, Mr S knows that a jury found him guilty. There is a natural human tendency for him to think that a judge may not have and to think, with the benefit of hindsight, of reasons he would have chosen that option.

[98] In this case, however, we know that Ms Hughes would have advised trial by jury. This is because the trial largely rested on the issue of consent.[106] Mr S has not given any reason why he would not have accepted that advice (without the benefit of hindsight). In this case, therefore, the deprivation of choice has not meant that his trial was unfair. We would dismiss the appeal.

[99] A final comment. We agree that the right to a jury trial has constitutional significance in the sense that it is a right contained in the Bill of Rights. Not being advised of the right to elect trial by jury (and therefore being tried by a judge alone) may be a serious procedural error that on its own could cause an unfair trial, without any added requirements.[107]

Solicitors:
Crown Law Office, Wellington for Respondent

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105 We note that Ms Hughes does recall a juror crying but cannot recall when this occurred. Nor does she recall why the juror was crying. Contrary to the recollection of Mr S, she does not recall this delaying the trial.

106 See above at [54], citing Ms Hughes' affidavit at [4.3]. We did not understand her to suggest that the offending was of the "extreme" variety where she might have recommended a Judge-alone trial. See also at [4.2] of Ms Hughes' affidavit.

107 It is not necessary to be definitive as that is not the situation that arose in this case.