**REVISED**

**THE DISTRICT COURT**
**OF NEW SOUTH WALES**
**CRIMINAL JURISDICTION**

**28 March 2017**

**Regina v Luke Andrew LAZARUS**

**District Court File Number: 2013/00242040**

**JUDGE ZAHRA SC**

**JUDGMENT**

**Judgment on the Application for an Order for Trial by Judge Alone (Section 132 of the *Criminal Procedure Act* 1986.**

**OVERVIEW OF THE APPLICATION:**

The accused Luke Lazarus faces a retrial in the Sydney District Court on the 3 April on an indictment which contains the following count:

> *On 12 May 2013 at Potts Point in the State of New South Wales, did have sexual intercourse with SM, without the consent of SM knowing she was not consenting"*

This count is laid under section 61I of the *Crimes Act* 1900

By Notice of Motion filed on 16 February 2007, the Applicant seeks an order that the trial which is listed to commence on 3 April be heard by Judge alone. Annexed to the Notice of Motion is an affidavit of Michael Blair dated 16 February 2017.

The application for an order for trial by judge alone is made under section s 132 of the *Criminal Procedure Act 1986* (NSW) (“*the Act”)*

Section 132 of the *Criminal Procedure Act* provides:

***132 Orders for trial by Judge alone***

*(1) An accused person or the prosecutor in criminal proceedings in the Supreme Court or District C0urt may apply to the court for an order that the accused person be tried by a Judge alone (a "trial by judge order").*

*(2) The court must make a trial by judge order if both the accused person and the prosecutor agree to the accused person being tried by a Judge alone.*

*(3) If the accused person does not agree to being tried by a Judge alone, the court must not make a trial by judge order.*

*(4) If the prosecutor does not agree to the accused person being tried by a Judge alone, the court may make a trial by judge order if it considers it is in the interests of justice to do so.*

*(5) Without limiting subsection (4), the court may refuse to make an order if it considers that the trial will involve a factual issue that requires the application of objective community standards, including (but not limited to) an issue of reasonableness, negligence, indecency, obscenity or dangerousness.*

*(6) The court must not make a trial by judge order unless it is satisfied that the accused person has sought and received advice in relation to the effect of such an order from an Australian legal practitioner.*

*(7) The court may make a trial by judge order despite any other provision of this section or section 132A if the court is of the opinion that:*

*(a) there is a substantial risk that acts that may constitute an offence under Division 3 of Part 7 of the Crimes Act 1900 are likely to be committed in respect of any jury or juror, and*

*(b) the risk of those acts occurring may not reasonably be mitigated by other means.*

An election to be tried by a Judge alone dated 7 October 2016 has been filed. I have been informed that the election has been filed within the twenty-eight day time limit provided by section 132A of the Act. Consequently no issue of leave under section 132A (1) arises. I am satisfied that the accused has sought and received legal advice in relation to the effect of seeking an order for a Judge alone trial from an Australian legal practitioner as required by section 132(6).

The Crown opposes the application for the trial to be heard by Judge alone and submits it is in the interests of justice that the trial be heard by a jury.

The issue therefore for determination is whether, pursuant to s132 (4) of the Act, the court considers it is in the interests of justice for the accused to be tried by Judge alone.

In overview, counsel for the Applicant, in written submission, asserts there has been a substantial amount of publicity on various forms of media that the accused was found guilty at the first trial; that the Applicant believes that the publicity about the alleged offence and about his personal circumstances has been so extensive and so negative he will not receive a fair trial before a jury; that there is a real risk that the Applicant will not receive a fair trial before a jury, "either as a result of prejudgement of the case or pressure to return a verdict of guilty (or both)" (W/S [27]). I will return to the ssubmissions of counsel for the Applicant later in these reasons for judgement

*Overview of the relevant history of proceedings against the applicant:*

The following is a brief overview of the history of significant events in the proceedings against the Applicant.

1. The Applicant was charged with the matter for which he faces trial on 4 May 2013.
2. On 9 February 2015, after a trial by jury before Huggett DCJ, the Applicant was found guilty of the charge for which he is again arraigned.
3. On 27 March 2015 the Applicant was sentenced to imprisonment for five years from that date. A non-parole period of three years was imposed also to commence on the 27 March 2015.
4. Documents relating to an appeal against conviction in the New South Wales Court of Criminal Appeal were filed on 1 September 2015.
5. On 19 February 2016 the appeal against conviction was heard in the Court of Criminal Appeal before Hoeben CJ at CL, Adams J and Fullerton J.
6. On 12 April 2016 a judgement was delivered in the Court of Criminal Appeal. The appeal was allowed and the conviction quashed and a new trial ordered (*Lazarus v R* [2016] NSWCCA 52.)

*The factual background and circumstances of the alleged offence:*

The offence for which the offender is arraigned was allegedly committed in the early hours of the morning of 12 May 2013 in a laneway behind a King's Cross nightclub owned by the accused's father.

A summary of the evidence at trial appears at [25]-[95] in the judgement of the Court of Criminal Appeal and in a Crown case statement attached to the Crown's written submissions on the Notice of Motion.

At about 3.59 am the Applicant approached the complainant while she was on the dance floor. The Applicant asked whether she had met the DJ and he informed the complainant he was part owner of the nightclub. The Applicant took the complainant towards the DJ booth and as they approached the booth the Applicant told her "No, we will go to a VIP area". The complainant and the Applicant walked through a corridor and then out of the back of the nightclub and into an alleyway. They walked about 50 metres to the end of the alleyway which was a dead end. The Crown case statement notes they commenced kissing and, after about two minutes, the complainant felt uneasy being in the alleyway and told the Applicant she wanted to return to her friend inside the nightclub. As the complainant started walking back to the nightclub the Applicant put his hands on her hip and attempted to remove her stockings. The Crown case statement notes the complainant started to feel scared and told the Applicant she had to leave. It is alleged the Applicant said "Put your fucking hands on the fence" in a tone "that had aggression in it". Further, that the Applicant told her "Just get on your hands and knees and arch your back". It is noted the complainant out of fear did what the Applicant directed. The Crown case statement notes the Applicant removed her stockings and underwear and sexually assaulted her by placing his penis in her anus. The statement of facts notes that after the sexual intercourse the Applicant told the complainant to enter her name into his mobile phone. The complainant walked back towards the nightclub however was unable to open the door. She then contacted her friend inside the nightclub and they met outside the nightclub a short time later. The complainant told her friend what had happened. The complainant attended the Chatswood Police station at about 11.30am that morning.

*Issues in the trial:*

Counsel for the applicant in written submissions notes (at [4]):

> [4] At the first trial there was no dispute that there had been sexual intercourse between the accused and the complainant in the general manner alleged. The issue for determination was whether the complainant had consented, and if not, whether the accused either knew that fact, was reckless about it, or, if he did believe there was consent, such a belief was not held on reasonable grounds.
>
> [5] It is anticipated that the same issues will be central to the retrial."

***Overview of the publicity arising from the conviction of the applicant:***

I have been informed that there was no pre-trial publicity in the trial before Huggett J or any publicity during the course of the trial. The affidavit of Mr Blair contains a number of annexures

setting out publication material in a number of media formats including social media. Annexure B is said to be the first media report which was a report in the Sydney Morning Herald dated 8 March 2015. That report notes that *"A son of a prominent Sydney nightclub owner has been convicted of sexually assaulting a young female in an alley way behind a King's Cross nightspot run by his family."* The article refers to the evidence led in the Crown case. After referring to the evidence the article goes on to report:

> *"During the trial before Judge Sarah Huggett at the Downing Centre District Court last month, Lazarus's lawyers argued that the sex was consensual. But a jury convicted Lazarus of one count of sexual intercourse without consent. The matter returns to court on March 26"*

Counsel for the applicant, in written submission asserts (at [7]):

> "Reporting about the case included that the encounter between the accused and the complainant involved anal intercourse and occurred in a laneway at the rear of a nightclub owned by the accused's father. It was also reported that the complainant was an eighteen year old virgin and that the accused had subsequently sent text messages to a friend boasting about the sexual encounter."

Further in written submission counsel refers to what is referred to as *"a substantial amount of comment online"* which, Counsel submits was *"offensive to the accused".* Counsel lists a number of particular extracts in support of this submission (W/S [8]). Counsel further submits that online dialogue is in a similar vein.

Counsel points to a letter dated 16 March 2015 from a media consultant, Nicole Diaz, which was tendered during the sentencing proceedings where Ms Diaz estimated that over a million people had viewed this material. Counsel further asserts that the circumstances of the trial and the sentencing hearing received attention in other forms of social media and on radio and television subsequent to the jury verdict

It is submitted that the publicity continued after the accused was sentenced to a term of imprisonment. This further reporting occurred in the context of assertions made in a number of character references by prominent community members tendered in the Applicant's case on sentence. Counsel further refers to what is referred to as *"…considerable debate about the asserted leniency of the sentence and the fact that the accused had lived a life of privilege"* (W/S [12]).

The publicity post sentence also included reporting on the appeal in the Court of Criminal Appeal (at [14]). When referring to particular reporting of radio and television media outlets, reference is made to the estimated audience of the respective programs during which proceedings were reported. Counsel ultimately submits (at [15]):

> "In summary, the facts of the case were the subject of an enormous amount of media and community attention, as was the fact that the accused had been found guilty. There was also a high

> level of condemnation of the actions of the accused and of persons who had seen fit to attest to the accused's prior good character expressed by influential members of the community…"

I will return later in these reasons for judgement to detail particular extracts of the pre-trial publicity.

***Principles to be applied where an application for trial by Judge Alone under s132 of the Criminal Procedure Act 1986 and where the prosecutor does not agree to the accused person being tried by a Judge alone:***

Whilst section 132 in its present form commenced in 2011 there is a substantial body of case law relating to the application of the various provisions in sections s131- 132A. I intend to refer to the principles set out in those authorities in so far as they relate to issues that arise in the present application. Those principles have been extensively referred to by both counsel for the Applicant and counsel for the Crown.

***The importance of trial by jury in the absence of a presumption in favour of either mode of trial:***

Despite the terms of section 131 there is no presumption that a criminal trial should proceed with a jury, thereby casting a burden of proof on an applicant under section 132 to displace such a presumption. *R v Belghar* [2012] NSWCCA 86.

In *R v McNeil* [2015] NSWSC 357Johnson J emphasised the important role of the jury in the administration of criminal justice in the State. His Honour noted the reasoning of Spigelman CJ (Simpson and Price JJ agreeing) in *R v Jamal* [2008] NSWCCA 177 at [24]

> 'The central significance of the jury in the administration of criminal justice in Australia is such that the courts should be, on any view, exceptionally reluctant to insist that the system be bypassed, even when seeking to implement the principle of a fair trial. For serious crimes a fair trial in our system of criminal justice is a trial by jury, subject to statutory exception. The community has a right to participate in the administration of criminal justice, and public confidence in that system turns to a significant degree upon that participation. Furthermore, it must not be forgotten that a fair trial is not only a trial fair for the accused, it is also a trial fair to the community represented by the prosecution.'

Johnson J noted that although this statement of Spigelman CJ was made in the context of a case where section 132 in its earlier form was under consideration ( where the Crown could veto a Judge alone application by an accused person) *"the sentiments there expressed remain helpful"* (at [30])

In *AK v Western Australia* (2008) 232 CLR 438 Heydon J referred extensively to the observations of Lord Devlin of the advantages of a jury trial in "Trial by Jury" (rev ed) 1966. Heydon J set out the five advantages that Lord Devlin identified.

Heydon J also emphasised that the transparency arising from the requirement to give reasons in a Judge alone trial is also one of the perceived advantages of a trial by judge alone. In *R v Belghar* McClellan CJ at CL said at [112]:

> "To my mind the opportunity which a reasoned judgement affords to the accused and to the public to understand the steps in the reasoning process of the decision-maker, compared with the inscrutability of the jury's decision, will depending upon all the circumstances, be a factor which is relevant to the decision as to whether to order a judge alone trial. However, it is but one factor and the weight to be given to it will depend upon the nature of the issues to be determined in the trial…"

Ultimately, consistent with the reasoning of Barr AJ in *R v Stanley* [2013] NSWCCA 124 (with whom Macfarlan JA and Campbell J agreed), *"The court should not assume that either form of trial is more desirable than the other"* and that *"the interplay of ss 131 and 132 should not be regarded as creating a presumption in favour of trial by jury"*

There is no onus upon the accused person to establish that it is in the interests of justice for an order for trial by judge alone *R v Belghar* [2012] NSWCCA 86; R v Stanley [2013] NSWCCA 124. It has been acknowledged however that an accused person seeking such an order bears an evidentiary burden.

In *R v Stanley* [2013] NSWCCA 124 Barr AJ said that *"an accused cannot have a trial by judge alone for the asking".* In In R v Simmons; R v Moore (No 4) [2015] NSWSC 259 Hamill J said (at [59]):

> [59] It must be correct that the accused has no right to demand a trial by judge alone.
>
> [60] On the other hand, the fact that the accused has decided on legal advice to relinquish his right to a jury trial is a matter to be weighed in determining where the interests of justice lie. Similarly, any subjective apprehension in the accused that he will not receive a fair trial in the hands of the jury is a relevant consideration: *R v Belghar* at [99], *Arthurs v Western Australia* [2007] WASC 182 at [79]. In *R v Stanley* it was held at [42] that there must be more than a *"mere stated apprehension without supporting evidence".*

***Meaning of "The Interests of Justice":***

What is in the interests of justice in any given case does not readily lend itself to easy definition. In *Simmons and Moore* Hamill J noted, the expression "interests of justice" is an expression of very wide import and may raise an extremely diverse array of considerations

Whilst an analysis of the circumstances of other cases is useful, each case ultimately falls to be decided on its merits. The "interests of justice", at the very least, involves a consideration of the facts and circumstances giving rise to the charges, the nature of the charges, the complexity and number of issues arising from the charges and the interests of the accused and the Crown in a fair trial conducted according to law *R v Dean* [2013] NSWSC 661 at 54 per Latham J.

In *R v McNeil* [2015] NSWSC 357 Johnson J said at [38]:

> "In forming a view as to what the interests of justice require, a balancing of various interests is required, including the interests of the parties and also larger questions of legal principle, the public interest and policy considerations"

**The *Application of Community Standards:***

Section 132 (5) provides that without limiting subsection (4), the Court may refuse to make an order for a judge alone trial if it considers the trial will involve a factual issue that requires the application of objective community standards, including (but not limited to) an issue of reasonableness, negligence, indecency, obscenity or dangerousness. Apart from the issue of reasonableness, to which I will refer to further in these reasons for judgment, it is not anticipated that the case will give rise to any other question concerning or requiring the application of objective community standards.

In *R v Stanley* [2013] NSWCCA 124 at [59] Barr AJ said *"…that the fact alone that community standards must be applied in the resolution of factual issues does not mandate trial by jury but, as subs (5) makes clear, it is a circumstance in which the jury may be considered to be the superior tribunal of fact."*

**Credibility issues:**

The determination of the credibility of the complainant is central to the outcome of the trial. There is a substantial body of authority that suggests that a jury is the better tribunal to make a determination on issues of credit. In *R v Simmons; R v Moore* (N04) [2015] NSWSC 259, Hamill J referred to the opinion of Lord Devlin that the jury was the most appropriate tribunal to determine issues of credibility (at [73]). His Honour went on however to say that *"…it is difficult to discern a clear consensus in the Australian authorities in support of a proposition that where credibility issues are central to a trial, that is a factor that militates strongly in favour of a jury trial".* Hamill J went on to extract the following passage from *Coates v Western Australia* [2009] WASCA 142 at [9]-[11] per Owen J:

> 9. The assessment of credibility is essentially a subjective matter, although some objective considerations might come into play in forming the platform from which the assessment is made. Section 118(6) is of no direct assistance to the appellant here. That was the view taken by the trial

> judge when the application was made to abort the trial (ts 3826). In my opinion his Honour was correct in coming to that conclusion.
>
> 10. It is true that a free exchange of views and ideas can be very helpful in the decision making process. Everyday experience indicates that the physical and mental process of having to articulate propositions and to listen to the reaction of others can clarify thinking. But, equally, in everyday experience important decisions are made by individuals without the benefit of interaction with others. Judges make decisions for a living and they often arise in complex circumstances and involve the expenditure of considerable intellectual effort. Assessments of credibility fall into this category. While the trial judge may be deprived of the advantage of a free interchange of ideas with peers he or she has an advantage that ordinary members may lack. Trial judges have consistent and continuing experience of fact-finding and of the making of the decisions in a situation that demands an objective and dispassionate mind.
>
> 11. I am not suggesting that juries are incapable of making objective and dispassionate decisions. A judge's charge to a jury will almost always include directions to that effect and I have no reason to believe that jury members do other than pay due and faithful regard to the instruction. But the day to day working life of a judge will often involve dealing with evidence in ways that are outside the normal experience of members of the public. For example, a judge will often be required to put to one side inadmissible evidence (of which he or she is cognisant) in assessing credibility or deciding other disputed issues. Another example is having regard to an item of evidence for one purpose and yet disregarding it in relation to another contentious issue within the same case. When matters of that nature arise in a jury trial there is a need for careful direction to guide the jury in relation to them. The experience gained by a trial judge over time in relation to a wide range of fact-finding methods can be a peculiar advantage.

In *Simmons and Moore* Justice Hamill recognised at [81] that *"there may be cases where particular issues of credibility mean that the interests of justice favour trial by jury"* His Honour however went on to say *"…for the most part, the fact that a trial involves issues of credibility is a neutral matter when it comes to determining whether it is in the interests of justice to make an order for trial by judge alone".* His Honour went on to note (at [82]):

> "[82] As it was stressed in R v Belghar and Coates v Western Australia, each mode of trial has its advantages and disadvantages, strengths and weaknesses. While a jury has the advantage of being able to discuss the issues and the requirement for unanimity provide strength to its decision, a judge has the training and experience of making difficult decisions on question of credibility, putting aside matters of emotion, on an almost daily basis."

In R v Qaumi [2016] NSWSC 1473, Hamill J expressly said, at [74]:

> "I remain of the view I have expressed in the past that the fact that credibility issues will arise in a trial is essentially a neutral factor. As was discussed by Owen and Bus JJA in *Coates v Western Australia* there are advantages to each mode of trial. Certainly, unanimity is a factor of considerable importance but this is so in any case where there is a question whether to make an order for a criminal trial to proceed before a judge without a jury."

***Principles to be applied in an application for trial by Judge alone based upon the prejudice arising from pre- trial publicity:***

In *Simmons and Moore* Hamill J noted that there were a number of cases in New South Wales where applications for trial by Judge alone *"… have been based on prejudice arising from material contained in the evidence of the case itself, from the media publicity surrounding the proceedings or from the risk that a jury may interrogate the Internet."* His Honour further noted *"Overwhelmingly, it has held that the prejudice identified in the application is capable of being overcome by direction to the jury";* see, for example, *R v Abrahams* at [54]-[60], *R v Dean* at [65], *R v King* at [60]-[65]; *R v McKnight* [2014] NSWSC 309 at [31] (Campbell J)

It is instructive to consider the reasoning applied in these cases referred to by Hamill J in this extract together with other cases where applications for Judge alone trial were considered where there was substantial pre-trial publicity.

In *Abrahams* [2013] NSWSC 729 the applicant was charged with the murder of her six-year-old daughter. The circumstances of the child's disappearance and subsequent discovery of the remains of the child in bushland attracted considerable media attention. The applicant pointed to extensive media coverage and publicity including dissemination of material on the internet and submitted that the pre-trial publicity was *"…so intense and so pervasive that no prospective juror is likely to have been uninfluenced by it and that any jurors who may be empanelled will be incapable of withstanding the temptation to refer to it.".* The applicant further argued that it was likely that a member or members of the jury would have seen and already formed an adverse view of the accused from the extensive publicity in all forms of media and particularly the discussion sites on the Internet. Harrison J, in refusing the application for a judge alone trial, noted at [61]:

> "… General directions to juries that they must disregard anything and everything that they might have read or heard could permissibly be cast in terms that unequivocally and unambiguously denounced such material as dangerous and inflammatory. In the circumstances of this particular case, there is considerable scope for the parties' assistance and input into the width and content of any such directions. That is important because too much emphasis upon the nature of the material could create a curiosity that the direction is intended to discourage. I consider that appropriate directions can be crafted to accommodate the accused's concerns, appealing directly to the jury's assumed common sense and experience of life."

Harrison J went on to note *"The interests of justice are not limited to alleviating the concerns of the accused. The interests of justice in the wider sense encompass, particularly in this case, the need to recognise the robustness of the system of trial by jury and its ability to withstand even the most irrational and suspect musings of faceless people intent on mischief"*

In *King* [2013] NSWSC 448 the applicant for a judge alone trial was charged with murder. Bellew J observed that an internet search undertaken by any potential juror would find that the accused was on bail for offences of violence at the time of the deceased's death. His Honour, in

declining the application for a judge alone trial, referred to practices adopted by judges at the commencement of any trial which would ameliorate the risk of prejudice including a direction to the jury that they are prohibited from undertaking any research, or making any enquiry through the internet in relation to any aspect of the trial, be it the identity of the accused and the identity of any person named in the course of evidence. Further that judges inform potential jurors of the provisions of 68C which renders it an offence for any juror to make any enquiry for the purposes of obtaining information about the accused or any matters relevant to the trial.

In *McNeil* [2015] NSWSC 357 the applicant was charged over a "single punch" death on a King's Cross Street in 2013. The notice of motion seeking an order for a judge alone trial annexed a substantial volume of media reporting in hard copy and electronic form. The application for a judge alone trial was based principally on the prejudice arising from the extensive media publicity. Johnson J referred to the judgement of Spigelman J in *Jamal* [2008] NSWCCA 177 which referred to the experience of the Supreme Court in assessing adverse pre-trial publicity in cases involving intense and prolonged media publicity. Spigelman J noted that applications for a permanent stay failed in the most sensational cases which he referred to in his judgement. His Honour emphasised that the courts *"have decisively rejected the previous tendency to regard jurors as exceptionally fragile and prone to prejudice".*

The Chief Justice said at [17]-[21]:

> "17 I have had occasion to summarise the relevant case law in the following manner, applicable to the present case, in John Fairfax Publications Pty Ltd v District Court of New South Wales [2004] NSWCA 324; (2004) 61 NSWLR 344:
> '[103] There are now a significant number of cases in which the issue has arisen as to whether or not an accused was able to have a fair trial in the light of substantial media publicity, indeed publicity much more sensational and sustained than anything that occurred here. Those cases have decisively rejected the previous tendency to regard jurors as exceptionally fragile and prone to prejudice. Trial judges of considerable experience have asserted, again and again, that jurors approach their task in accordance with the oath they take, that they listen to the directions that they are given and implement them. In particular that they listen to the direction that they are to determine guilt only on the evidence before them.'
> 18 There are now numerous judicial statements as to the validity of such an approach.
> 19 Going back, for example, as Gleeson CJ said in R v VPH (Court of Criminal Appeal, 4 March 1994, unreported) at 7:
> 'The jury will be given appropriate directions to confine their attention to the evidence that is put before them. Our entire system of the administration of criminal justice depends upon the assumption that jurors understand and comply with directions of that character.'

In *McNeil,* Johnson J said that the lapse of time between media publicity and the trial itself is a significant factor. The offences were committed on 31 December 2013 and the trial was listed to commence on 25 May 2015 with the vast majority of hard copy and electronic reporting occurring in January, February and March 2014. His Honour said that comments on Facebook

and Reddit social media sites did not loom large in the application before him (at [71]). His Honour was satisfied that a combination of steps could be undertaken to guard against the impact of previous adverse media publicity including directions to the jury panel and directions during the course of the trial. Further, orders could be made so that the applicant's name would not appear in the court list. His Honour was of the view that orders of this kind may operate to prevent media publicity itself becoming a trigger to electronic searching by members of the community who may be members of the jury panel.

Johnson J subsequently made orders under the *Court Suppression and Non-Publication Orders Act* 201 which included an order that there be no publication of the listing of the applicant's trial and an order that there be no publication of the name of the applicant and that the applicant be referred to by the use of a pseudonym.

In *R v Qaumi* [2016] NSWSC 1473 an application was made before his Honour Hamill J for an order for trial by judge alone largely based upon the extent of pre-trial publicity and the prejudice inherent in parts of the evidence to be adduced by the prosecution that suggested the accused were involved in violence and criminality that was not charged in the indictment. A similar application was made before Hamill J in a previous trial for murder involving the accused which was declined because the issues to be litigated in the trial gave rise to a *"factual issue that required the application of objective community standards"* (section 132(5)). His Honour considered the substantial material contained in newspaper reporting and Internet articles which included that the accused were members of an organised crime group "Brothers 4 Life"; that one of the accused had been previously acquitted of two murders and that he had boasted about this to other members of the organised crime group. Other publications referred to members of the organised crime group being involved in *"murders, shootings, drug dealing, extortions and bashings"* and that the accused were involved in an execution style killing and extensive involvement in gangland activity. Other articles referred to one of the accused being detained at the "Super Max" prison in Goulburn and that Australia's *"most notorious criminals"* were being held there. Internet searches of references to the accused produced 40-50,000 results. It was argued on behalf of the accused that the extensive media coverage of the offences and the organised crime group, to which it was said the accused were involved, made it impossible to summon a jury pool that would not be affected or influenced by the publicity. It was argued that the nature and extent of the coverage would have a damaging and prejudicial effect on a jury and that the accused would not receive a fair trial. His Honour indicated that the evidence of the extent of pre-trial publicity was such that *"it is possible that a member of the jury pool who had read that material – and who remembered it – might be pre-disposed to look unfavourably upon the accused and their case".* His Honour noted that *"the pre-trial publicity has been extensive, sensational and potentially prejudicial".* His Honour however said *"…that a jury could be selected that would judge the matter free of prejudice that might arise from such material"*

Ultimately having considered the extent of pre-trial publicity and noting that it was a significant factor, His Honour concluded that he would not have been persuaded that, of itself, the pre-trial publicity *"... constituted sufficient reason to conclude that it is in the interests of justice to order that the trial be by judge alone."* His Honour ultimately did not find that the pre-trial publicity to be a decisive factor (at [40]).

In *Simmons* Hamill J also referred to a number of what he described as notorious cases where the case was surrounded by publicity of a prejudicial kind where juries were entrusted to determine the issues. He went on to note*, "…many trials have been conducted in circumstances involving significant prejudice and juries have been capable of discernment and discretion in putting aside their emotional responses and prejudices"* (at [53]). Further, in R v Qaumi & Ors (No 14) [2016] NSWCCA 274 at [84] -87] Hamill J referred to a number of what he noted as *"high profile cases that …demonstrated the capacity of the jury … to overcome matters of prejudice".* He said the cases *"…demonstrate that, for the most part, judicial faith in the integrity and robustness of the jury system is well placed".*

*Cases where an order for Judge alone trial was made against a background of prejudicial pre-trial publicity:*

In *Simmons* Hamill J referred to two cases which he noted were examples of *"… an exception to both the body of case law that the system is predicated on the fact that juries obey the directions that they are given and also the general proposition that juries are capable of disregarding prejudicial material.*". His Honour referred to the decision of Woods DCJ in *R v GSR (3)* [2011] NSWDC 17, a case which he said was *"…best identified by reference to the nickname given to the accused by various media outlets [where the accused] became widely known as the "Butcher of Bega""*. The accused had been tried and convicted in relation to an offence of inflicting grievous bodily harm with intent. The accused was then called for trial in relation to a number of offences of indecent assault. Woods DCJ held that *"… the publicity was so great and so prejudicial that a fair trial before a jury could not be held at that time."*

Hamill J also referred to the decision in *Arthurs v Western Australia* where an order was made for a trial by judge alone largely as a consequence of pre-trial publicity. There Martin CJ described the publicity (at [86]) as *"extensive, continuous and in some respects extraordinary".* Martin CJ, in concluding that the interests of justice favoured a judge alone trial, said at [87]-[92]:

> "87. There are of course many cases dealing with the extent to which prejudice that might be occasioned by pre-trial publicity can be ameliorated by an appropriate warning and direction to the jury, and it is standard practice in Western Australia to direct juries that they should not make any access to the Internet to conduct any of their own inquiries in relation to any aspect of the case before them. However, there is, I think, room for doubt as to the efficacy of these processes, particularly in cases which have achieved the notoriety of this case. So in my opinion there is some weight in the proposition that there is a prospect that the fairness of Mr Arthurs' trial might be prejudiced by the extensive publicity to which I have referred if he is tried by a jury.

88. The second factor which I take into account is the possible effect which the evidence as to the circumstances of the offence might have upon a jury. As I mentioned earlier, it is, I think, neither necessary nor appropriate for me to detail those circumstances other than to observe that the evidence is likely to test the emotional strength and fortitude of any person required to consider it in detail, whether juror or Judge.

89. Despite their training and experience, it would, I think, be unwise to assume that Judges are any less vulnerable to human emotions and frailty than any other member of the community. However, it is in this context that an obligation to provide reasons appears to me to be of particular significance. Through the performance of that obligation, the accused person, the community and where necessary an appeal court can evaluate whether, and if so the extent to which emotion may have influenced the decision, at least to a greater extent than in the case of a jury verdict. That consideration seems to me to lend weighty support in this case to the proposition that trial by Judge without jury is in the interests of justice.

90. A third factor which I take into account is allied to the second in that it draws upon the significance of the obligation to provide reasons in the event of a trial by Judge without jury. While it could not be said that the complexity and length of this trial is such that it would be burdensome on a jury, there are more than 70 prosecution witnesses named on the indictment, although we do not yet know how many of those witnesses are to be called. The latest estimate as to the length of trial I have received is one of ten days.

91. I am, however, told by defence counsel that there are likely to be issues requiring the detailed evaluation of expert evidence, including expert pathological and psychiatric evidence. I accept though that it is difficult to be certain as to precisely the extent of that evidence at this stage.

92. I do not for one moment suggest that those are issues which are beyond the capacity of a jury and although this is not a factor upon which I would place considerable weight, from my review of the prosecution brief there do appear to be aspects of this case in respect of which the delivery of reasoned decisions for judgment would be in the interests of justice."

***The assumption that jurors are true to their oath and comply strictly with the directions given to them by trial judges:***

In *Gilbert v The Queen* (2000) 201 CLR 414, McHugh JA said at [31]:

> 'The criminal trial on indictment proceeds on the assumption that jurors are true to their oath, that, in the quaint words of the ancient oath, they hearken to the evidence and that they obey the trial judge's directions. On that assumption, which I regard as fundamental to the criminal jury trial, the Common Law countries have staked a great deal. If it was rejected or disregarded, no one - accused, trial judge or member of the public - could have any confidence in any verdict of a criminal jury or in the criminal justice system whenever it involves the jury trial. If it was rejected or disregarded, the pursuit of justice through the jury system would be as much a charade as the show trial of any totalitarian state. Put bluntly, unless we act on the assumption that criminal juries act on the evidence and in accordance with the directions of the trial judge, there is no point in having a criminal jury trial...In my respectful opinion, the fundamental assumption of the criminal jury trial requires us to proceed on the basis that the jury acted in this case on the

> evidence and in accordance with the judge's directions and that they would have done so even if manslaughter had been left as an issue, as it should have been left.'

Observations to a similar effect have also been expressed by Mason CJ and Toohey J in *R v Glennon* 173 CLR 592 (at 603):

> 'The possibility that a juror might acquire irrelevant and prejudicial information is inherent in a criminal trial. The law acknowledges the existence of that possibility but proceeds on the footing that the jury, acting in conformity with the instructions given to them by the trial judge, will render a true verdict in accordance with the evidence. As Toohey J. observed in *Hinch v Attorney General* (Vic) [1987] HCA 56; (1987) 164 CLR 15, at p 74, in the past too little weight may have been given to the capacity of jurors to assess critically what they see and hear and their ability to reach their decisions by reference to the evidence before them. In *Murphy v R* [1989] HCA 28; 167 CLR 94, we stated at p 99:
>
> > 'But it is misleading to think that, because a juror has heard something of the circumstances giving rise to the trial, the accused has lost the opportunity of an indifferent jury. The matter was put this way by the Ontario Court of Appeal in *Reg. v. Hubbert* (1975) 29 CCC (2d) 279, at p 291: 'In this era of rapid dissemination of news by the various media, it would be naive to think that in the case of a crime involving considerable notoriety, it would be possible to select 12 jurors who had not heard anything about the case. Prior information about a case, and even the holding of a tentative opinion about it, does not make partial a juror sworn to render a true verdict according to the evidence'.
>
> To conclude otherwise is to underrate the integrity of the system of trial by jury and the effect on the jury of the instructions given by the trial judge.'

I therefore must proceed on the basis that jurors are capable of, and do obey directions, including directions requiring them to disregard prejudicial material they may have been exposed to prior to trial. It does not follow however that in all cases where the sole foundation for an application for Judge alone trial is based upon prejudice arising from pre-trial publicity that the trial be heard before a jury. The Crown here concedes that this is so. Ultimately it is a question of degree and turns on a careful analysis of both the nature and extent of the prejudicial material and whether it is in the interests of justice that the trial to proceed by Judge alone.

**Submissions of counsel for the applicant:**

Counsel for the Applicant submits that the facts of the allegation are somewhat particular in that the events took place in a King's Cross nightclub, that the accused was the son of the owner and was portrayed in the media as a person consequently of *"some privilege and perceived entitlement";* that he used that position in order to engage the complainant in contact that led to sexual contact which ultimately led to sexual intercourse in an alley and that the sexual intercourse involved anal intercourse. Further that the complainant was eighteen

and indicated at the time of the event that she was a virgin. It is submitted that such is the particularity of those circumstances, which attracted the media interest, that consequently there is a likelihood that those circumstances would "stick in the minds of potential jurors, or a potential juror" (T3.1).

Counsel further submits that the material published shows *"a very significant level of vitriol expressed towards the accused in circumstances where the material has reached a very broad audience".* (T3 .22) Counsel points to the material in Annexure J which contains estimates from experts in the realm of social media as to the reach of the material.

Counsel submits that the content of the material published is such that any future jury is likely to be aware or that there is at least a significant risk that they would be aware of the fact that the accused has been previously convicted. Counsel submits that the quality of the prejudice which would flow from this knowledge is unlike the prejudice that might ordinarily arise from pre-trial publicity in a case where a particular crime might spark a level of public outrage. Counsel submits in those circumstances a direction can usually be given to the jury to put that material to one side and concentrate on the evidence in the trial. Counsel points to the line of authority that the confidence in the jury system is based upon the understanding that they will abide by directions given to them. Counsel submits however the circumstances here are different because the jury hearing the evidence is likely to be aware that a jury has heard the evidence and has arrived at a conclusion of guilt.

Counsel submits that in the face of the publicity that has been generated about his conviction that it is implicit that the accused *"does not feel that he can get a fair trial"* and that this is a very significant matter to weigh in the balance.

Counsel submits that whilst it might be argued by the Crown that there has been some delay since the publicity and the time of trial here, that upon hearing an outline of the evidence or when the detail of the evidence emerges over time in the trial, that jurors will be reminded of the pre-trial publicity to which they have been subjected. Counsel submits that the idea that a juror would be able to resist the influence of the publicity of the finding of guilt in the previous trial is "sufficiently unrealistic" such as to raise a real risk of prejudice and that it is in the interests of justice that an order for Judge alone trial be made.

Counsel submits that the prejudice arising from a juror or the jury becoming aware that a previous jury has returned a verdict of guilt cannot be cured by directions or the making of non-publication orders. Counsel submits that non-publication orders would not remove the jury's prior awareness and would not remove the material from the Internet. Counsel submits also that it would be impractical to seek to edit the recording of the complainant's evidence to anonymise reference to particular places and events.

**Submissions of the Crown:**

Counsel for the Crown submits that steps might be taken pursuant to the provisions of the *Court Suppression Act* which would prevent the triggering of Internet searching by prospective jurors prior to the commencement of the trial. Counsel however concedes that the kind of orders made by the court in *McNeil* would not prevent the triggering of the memory of pre-trial publicity. The orders would simply be directed to what the court could do pre-empanelment to minimise any further adverse publicity.

The Crown concedes that once the complainant commences giving evidence that there is a sense of inevitability that, because of the particular profile of the case in the community, their memories could be triggered by the particular circumstances of the event the subject of the trial.

The Crown accepts that there may be cases where an order for Judge alone trial is warranted in the interests of justice where the sole foundation to the application is prejudice that may arise from pre-trial publicity. The Crown however submits here that directions to the jury would minimise the risk of prejudice and that is not in the interests of justice for the trial to proceed by Judge alone.

The Crown submits that there are cases such as the decision in *Abrahams*, a case involving the murder of a six-year-old child, where notwithstanding the vitriolic nature of the substantial publicity which arose prior to trial that the application for an order that the trial proceed by judge alone was declined based on a conclusion that carefully crafted directions would alleviate the prejudice caused by adverse publicity. The Crown submits that whilst the publicity here is extensive and vitriolic that it is *"not so extensive and vitriolic that it can't be overcome by directions, notwithstanding the novel features it throws up because of the trigger for the publicity was the finding of guilt, and the finding of guilt consequent upon the particular facts..."* (T22.1)

The Crown submits further that the lapse of time between the publicity and the trial date is a significant factor. The Crown points to the material provided in the application and the fact that the last time material was published was on 13 April 2016 and that that related to the relaxation of the applicant's bail conditions in the Court of Criminal Appeal after a retrial had been ordered.

The Crown accepts that the applicant's belief that he may not get a fair trial is a relevant factor, however the Crown submits in weighing the concerns of the applicant, the court must have regard to any means available to allay them. Further that *"The Court should also bear in mind that the interests of the accused are not necessarily the interests of justice and that the community receives important collateral benefits from trial by jury by the involvement of the public in the administration of justice and in keeping the law in touch with community standards"* (W/S 13.5)

The Crown submits that the decisions of *King, Abrahams, McNight* and *McNeil* contemplate a number of mechanisms in the form of judicial direction and orders that can be put in place to ensure that the accused receives a fair trial. The Crown submits that there is *"long and sound authority"* that it is to be assumed that criminal juries act on the evidence and in accordance with the directions of trial judges and of the need to recognise the robustness of the system of trial by jury.(W/S 13.8).

The Crown submits here that the mechanisms that could be put in place to minimise the risk of prejudice include:

- Fully informing the jury panel of the nature of the case they will be required to judge and taking applications from those members who wish to be excused because they think they may be unable to bring an impartial, unemotional and dispassionate mind to the evidence.
- Direct the jury that they are prohibited from undertaking any research or making any enquiry through the Internet in relation to any aspect of the trial.
- The reference by the trial judge to s 68C of the *Jury Act* 1977 at the commencement of the trial and at appropriate stages throughout the trial including the summing up.
- General directions to the jury that they must disregard anything that they may have heard already in social media.
- Orders made under the Court Suppression Act consistent with those orders made by Justice Johnson in *McNeil.*

The Crown ultimately submits that it is not in the interests of justice for the trial to be heard by Judge alone and that the court would dismiss the application.

***The analysis of pre-trial publicity the subject of the present application:***

I have examined the material provided in annexures (B) to (S) in the affidavit of Michael Blair. A summary of the documents contained in each of the annexures is summarised in that affidavit at [11]-[28].

A number of observations may be made of the material annexed to the affidavit:

- The reporting and commentary of the proceedings post conviction was disseminated across a wide array of reporting mediums. The material annexed contain copies of newspaper articles, online news reports, Facebook websites connected to mainstream newspapers and other social media sites and television and radio reports.
- There is extensive reference to social media interchanges. There are many exchanges that vilify the applicant. The circumstances of the alleged sexual assault are described in detail in a number of reports and social commentary. Many of the social interchanges refer to what is described as the applicant's life of privilege and many invite retribution.

- A number of reports, commentary and social media interchanges refer to the conviction of the applicant and the issue of consent. There are numerous references to the applicant being found guilty by a jury of rape. I will refer to a number of these extracts further in these reasons for judgment.
- A number of reports refer to the proceedings on sentence and the sentencing judge's reasons for sentence. The reporting refers to the sentencing judge's observations of the gravity of the offending and her Honour's findings of fact as to the applicant's knowledge that the complainant was not consenting to the sexual intercourse. A number of extracts of this kind are also extracted further in these reasons for judgment.
- I have referred to some extracts which are contained in articles which are likely to have a small reader base. There are a number of such publications and are largely copies of mainstream media articles. They are referred to here as they represent the diverse number of publications and the reach of media reporting of the conviction and sentencing proceedings through the various media domains.
- The extracts to which I refer will concentrate on the reporting of the conviction, the defence at trial that the complainant consented to the intercourse, the rejection of that defence by the jury and the reasons for sentence which refer to the findings of fact made by the sentencing judge, the assessment of the objective gravity of the offending and the sentencing judge's rejection of the case presented by the accused at trial that the complainant was consenting. I have not extracted all the articles and reports which have referred to the conviction, sentencing and the appeal outcome.
- The extracts to which I have referred are repeated numerous times in many publications particularly at times of significant events including the proceedings on sentence, the handing down of the sentence and the proceedings in the Court of Criminal Appeal. These events appear to trigger the republication of material containing detail of the Crown case concerning the alleged sexual assault, particulars of the conviction, the defence at trial that the complainant consented to sexual intercourse and the rejection of that defence by the jury.
- There are many other layers to the reporting, particularly in social media. I do not propose to refer to these here. This material includes a number of opinion pieces which discuss at length issues of consent to sexual intercourse in the context of the trial and the defence raised at trial.

***Particular entries at Social media sites:***

*The Sydney Morning Facebook site:*

- *' …the court has settled the case. Rape cases are notoriously difficult to prove to "beyond reasonable doubt" standard. But that has happened here. Time to stop telling people they are jumping on bandwagons or that the man is the victim here* (annexure E page 3 of 47)

- *"… As has been mentioned several times. The man was found guilty!! Why are you so invested in insinuating that the accusations were false? Are you privy to information that they jury didn't have? Or are you just a troll?* (Annexure E page 8 of 47)

- *"… a jury found him guilty and I am sure they had been presented with both sides of story and in more detail than would be put in a newspaper article. I doubt very much "but I was a virgin" would be enough to convince a jury. Just because she didn't struggle does not imply consent"* (annexure B page 47)

- *"… Submission is not the same as consent. In New South Wales you can be found guilty of rape if the accused is reckless to, or doesn't give any thought to, whether the person consents. Clearly her request to return back inside because she was uneasy indicates she wasn't comfortable with the situation, but he didn't think twice about it, i.e. a verdict rape or sexual assault is completely plausible"* (annexure E page 9 of 47)

- *"… Think before you open that mouth of yours and be respectful to the victim of a rape crime. This would not have gone to the criminal court nor would he have been found guilty unless there was clear evidence of rape"* (annexure E page 16 of 47)

- *"… I'm astounded by the sheer number who didn't even read the article. Trial is over. Jury found him guilty. Sexual assault relies on LACK of consent or RECKLESSNESS to consent. Next step is sentencing…"* (Annexure E page 21 of 47)

- *"… A court of law has heard the evidence and THEY are calling it a rape. What part could be misinterpreted? It is no longer an alleged crime, it is a proven crime. Quite a difference."* (Annexure E page 40 of 47).

- *"… The fact that he was convicted proves "beyond reasonable doubt"* (annexure H page 3)

- *"… Did you miss the part that said he HAS been convicted… Therefore he has been judged and found GUILTY"* (annexure H at page 7)

- *"… Your mate Laz is a RAPIST and a SEX OFFENDER-the facts were presented in a court of law and he is guilty!!!! And very capable! ... He has no respect for woman and thinks he can have whatever he wants whenever he wants."* (Annexure H at page 8).

- *"…obviously not ALL information about the case is given in this article however the fact that he was found GUILTY of rape clearly should be all you need to see she obviously said NO and he did NOT stop!!!! It has been proven in a court of law that she did not consent to sex and without proving otherwise a conviction is very difficult"* (exhibit H March 8 at 1:03 PM).

Similar content and debate appears at annexure P which is a printout of comments made on Twitter under "#lukelazarus" and annexure Q being the social media site "reddit.com".

***News media reporting:***

1. Article- Sydney Morning Herald March 8, 2015: a photograph of the accused contained a caption *"convicted of sexually assaulting an eighteen-year-old girl".* An extract in the article reads *"during the trial… Lazarus's lawyers argued that the sex was consensual. But a jury convicted Lazarus of one count of sexual intercourse without consent".*

2. Article- Sydney Morning Herald March 27, 2015: An extract of the article reads: *"Sydney District Court Judge Sarah Huggett described the attack as the "spontaneous and opportunistic" actions a young man who felt a sense of "power and entitlement" by virtue of his family's ownership of the Soho club".*
   Further *"Lazarus had pleaded not guilty to sexual intercourse without consent. He claimed the eighteen-year-old woman was a willing participant because she didn't physically resist, scream or say no. On March 8, a jury found him guilty. The next day the former Cranbrook student resigned from his marketing job…"*
   Further *"in sentencing, Judge Huggett said she was satisfied Lazarus didn't "care one way or the other" as to whether the young woman was consenting."*

3. Another article in the Sydney Morning Herald that day contained an extract from Judge Huggett's reasons for sentence addressing a testimonial which read *"the possibility of imprisonment is completely undeserved for this promising young man".* The article notes: *"but the judge said a full-time jail sentence was the only option as she was satisfied Lazarus didn't "care one way or the* other" as to whether the young woman was consenting."

   The article also contained extracts from the Victim Impact Statement and extracts from her Honour's reasons for sentence which included: *"Judge Huggett said she was satisfied the victim was scared and intimidated by the power imbalance between Lazarus and her".*

4. Article- Daily Telegraph March 27, 2015. The article contains an extract: *"The son of a King's Cross nightclub owner has been jailed for at least three years for the brutal rape of a young girl in an alleyway behind his father's club… Lazarus pleaded not guilty and was last month convicted by a jury of sexual intercourse without consent".* In a further reference to her Honour's reasons for sentence, the article notes *"Judge Huggett said non-consensual anal sex was a "particularly degrading" form of rape. He then asked her to put her name on the list that contained the names of other women he had sex with on the notes section of his phone. Lazarus said this was the point the girl's "sweet smile" changed because she felt she had been used during the consensual sex. But Judge Huggett said she rejected this and told the court that the girl had "every right" to be in King's Cross, to drink and to kiss someone and then go back to her friends."*

5. Article-The Guardian March 27, 2015. The article contains an extract *"The son of a Sydney nightclub owner who raped a woman in a King's Cross alleyway and then bragged about taking her virginity has been jailed for at least three years… In sentencing him, Judge Sarah Huggett found the offence was not premeditated but said he had been reckless. "I am satisfied beyond reasonable doubt he must have realised there was a possibility she wasn't consenting," she told Sydney's District Court. But she said he was "not caring in one way or another whether she was consenting".*

6. Article-myGC.com. March 27, 2015. The article contains an extract *"Throughout the trial Lazarus has claimed that he believes "everything that occurred in the alleyway was consensual.". However, the young victim said she spent "days sitting in a bath and the two years since crying until she couldn't breathe".*

7. Article – Sydney Criminal Defence Lawyers Blog March 31, 2015. The article notes *"[Mr Lazarus] was found guilty after a jury trial which heard that Lazarus met the victim… Lazarus took her out the back and the pair commenced kissing. The victim declared an intention to go back inside, whereupon Lazarus demanded her to "put your f***ing hands on the wall, get on the floor and arch your back". He proceeded to anally rape her for ten minutes. At sentencing on Friday, District Court Judge Huggett found Lazarus was reckless as to the fact of whether or not the victim was consenting, stating that he was: "not caring in one way or another whether she was consenting".* The article then contains a commentary on proof of the mental element in a case of sexual assault including the definition of consent.

8. Article –Neoskosmos.com/news 7 April 2015. The article refers to evidence given by the applicant in the proceedings on sentence noting the applicant told the court *"I still 100 per cent state I believe everything that happened on that night was consensual", he told the court, claiming the girl was a willing participant because "she didn't physically resist, scream or say no". The victim, as well as Sydney District Court Judge Sarah Huggett firmly disagree, describing the attack as the "spontaneous and opportunistic actions of a young man who felt a sense of power and entitlement".*

9. Article- Women's Agenda 7 April 2015. The article contains the following extract: *"District Court Judge Sarah Huggett described the attack as "spontaneous and opportunistic". Opportunistic I can begin to understand, but spontaneous? I find it difficult to fathom rape as a spontaneous act; it strikes me as a very deliberate, calculated and debased assault. It is an act that reeks of power, entitlement and callous indifference. Lazarus claimed the woman was a willing participant because she didn't physically resist or scream. "I still 100% state that I believe everything that happened on that night was consensual." The traditional defence: she wanted it. Judge Huggett dealt*

*forcefully with that canard: "she [the victim] had the right to go to King's Cross, to be intoxicated, to kiss a man. She also the right to say she wanted to return to her friend. The offender ignore that.". The article goes on to state that the sentence imposed upon Mr Lazarus "underlines that sentences imposed on convicted rapists – or available to judges – are too lenient and wholly at odds with the horror of this vicious crime."*

*10.* Article Sydney Morning Herald April 7: The article contains the extract *"Women's campaigners are urging the Director of Public Prosecutions to review the sentence given to a nightclub rapist as controversy deepens over "glowing" character references provided by some of Sydney's most powerful figures."* And *"Luke Andrew Lazarus, twenty-three, was last month sentenced to a maximum jail term of five years for raping a young woman on the first night out in King's Cross, then bragging about taking her virginity."*

*11.* Article- Sydney morning Herald April 15, 2015 contained an extract *"When sentencing Lazarus, District Court Judge Sarah Huggett said his eighteen year old victim had the right to go out, to get drunk and to not be raped. Lazarus assaulted her in an alley behind his father's nightclub, when she was on her first night out in King's Cross. "She had the right to go to King's Cross, to be intoxicated, to kiss a man. She also had the right to say she wanted to return to her friend. The offender ignored that, Judge Huggett said".*

*12.* Article- news.com February 19, 2016. The article contains a reference to the reasons for sentence noting that judge Huggett *"… said the victim was subjected to "a particularly degrading" assault.*

*References to the appeal lodged in the Court of Criminal Appeal:*

*13.* Article- Sydney Morning Herald April 19, 2015 contained in extract *"a man found guilty of sexually assaulting a young woman in an alleyway behind a King's Cross nightclub owned by his family is said to appeal his conviction".* The article refers to extracts of her Honour judge Huggett's reasons for sentence to which I have already referred where her Honour had described the attack as "spontaneous and opportunistic". The article then goes on: *"His victim told the court, via a victim impact statement read on her behalf, that she would never be the person she was before the attack. "I thought that once I left the alleyway the pain would go away… but it didn't," the woman's statement said. "Everything that made me who I was stayed in that alleyway." Lazarus said he had sex with the woman but that it had been consensual. Lazarus said the fact he had "done this unknowingly" made him "absolutely sick to my stomach". "What happened on that evening I honestly believe it was consensual" Lazarus told the court."*

14. Article- Sydney Morning Herald February 19, 2016: *"The rape conviction of Sydney man Luke Lazarus is said to be overturned and a retrial ordered after the state's highest court upheld his claim that the judge in his trial misdirected the jury.".* A further extract in the same article notes *"The court upheld Lazarus' argument, made by Tim Game, SC, that District Court Judge Sarah Huggett misdirected the jury before they retired to consider their verdict on the issue of whether Lazarus believed the woman had consented to sex or not. Judge Huggett had told the jury that it needed to decide whether there were reasonable grounds to believe that the woman had consented to having sex with Lazarus. This direction was inconsistent with the law, Mr Game said. Instead, the jury should have been told that they needed to decide whether the accused in fact had a "reasonable belief" that the time of the incident that the young woman had consented to sex."*

*Further television and radio reporting:*

Annexure S contains a schedule of television and radio reporting between 26 March 2015 and 13 April 2016 over three discrete periods. The schedule simply contains the first sentence of the report and the news item headline. There is little detail the content of the report. The schedule however indicates that there was extensive news and radio reporting during this period.

**Determination:**

Much of the material disseminated through the various media outlets, including social media, contain descriptions of the conduct alleged by the Crown which is material which will be led again in the retrial. The circumstances of the commission of the offence alleged by the Crown are likely to invoke emotional responses. The allegations involve violent and demeaning conduct towards the complainant. The evidence led in the first trial by the Crown was that the complainant was particularly vulnerable. All these circumstances will be confronting and disturbing to jurors when the evidence is led in the trial.

I have referred to a number of decisions where an application for a Judge alone trial based upon prejudicial pre-trial publicity has been refused. The potential prejudice arising from the type of crime said to have been committed in those cases was likely to have been significant, taking into account that the crimes committed in many of the cases were particularly heinous. It is not a matter of here embarking upon an exercise of considering previous cases where there has been prejudicial pre-trial publicity and the outcome of applications for trial by Judge alone and placing the circumstances of the present case at some point in a notional continuum. The principles must be applied to the particular circumstances of the case.

Generally in the cases I have considered, the prejudice arises because of the subject matter of the evidence and the confronting nature of the evidence of the crime that is alleged to have been committed by the accused or that the publicity relates to evidence of bad character (for example, an accused's propensity to be involved in violent crime) or relates to material which would not be led in the trial.

As I have indicated, counsel for the Applicant submits that such is the particularity of the factual circumstances surrounding the evidence in the trial, that attracted substantial media interest, there is a likelihood that those circumstances would *"stick in the minds of potential jurors, or a potential juror"* (T3.1). It is argued in this application, that once the circumstances are recalled, that those jurors who have been exposed to the pre- trial publicity are likely to also recall those parts of reporting which included the issues in the trial and the jury verdict.

In my view, the repeated description of the disturbing and confronting nature of the allegations in the reporting, the inflammatory comment, particularly on social media sites, and the vilification of the applicant are not such that, standing alone, a trial by Judge alone is warranted in the interests of justice. Generally it is accepted that prejudice of this kind can be cured by direction where jurors are directed to recognise and to put to one side any emotional responses they may have. Further, robust and repeated instructions to the jury panel that invite any prospective juror to disqualify himself or herself from the panel, if unable to put prejudice aside, are capable of markedly reducing the risk of bias or prejudice.

When weighing the concern of the Applicant that his right to a fair trial had been compromised by prejudicial pre-trial publicity the court must have regard to any means available to allay such prejudice. The court should also bear in mind that the interests of the accused are not necessarily the interests of justice.

I have referred earlier in these reasons for judgment that the authorities have recognised that there are a number of procedures and safeguards that could be adopted to reduce the potential for pre-trial publicity to influence prospective jurors. Those procedures would include that the name of the accused would not appear in the court lists prior to the commencement of the trial, which would have the effect that any potential juror who received a jury summons would be unable to make any enquiry or Internet search about the accused or the case between the time of the summons and the time of empanelment. Secondly, that a large jury panel could be summoned and the members the panel would be informed in some detail of the nature of the allegations and the identity of the witnesses and to make repeated calls on the panel to indicate if they might not be able to consider the case impartially. Thirdly, to reduce the risk that a juror might access such material during the trial, the jury would be given strong and repeated directions, including reference to the provisions of s68 of the *Jury Act* that making any enquiry including Internet searches for the purposes of obtaining information about the accused or other matters relevant to the trial was a criminal offence carrying a possible penalty of imprisonment.

There has now been a significant period between the reporting of the descriptions of the conduct alleged and the trial which will take place. The prejudice caused by the reporting of the descriptions of events and the nature of the conduct alleged and references to the applicant's background could be ameliorated by directions, if that was the extent of the prejudicial material.

Here however, there is a further substantial body of material relating to the reporting of the conviction and post-conviction proceedings that is now prejudicial to the accused in his retrial. Putting the social media commentary to one side, it could not be said that the mainstream media reporting was irresponsible. The media were entitled to report on the proceedings, report on the finding of guilt and the issue of consent raised in the trial. Further, they were entitled to report that the jury, by their verdict, had rejected the accused's assertion that the complainant was consenting. Further, the media were entitled to report on the assessment made by the sentencing judge of matters which touched upon the objective serious the offence and to refer to her Honour's findings of fact that the applicant was aware that the complainant was not consenting. However, the position remains that potential jurors, who have been exposed to this material, would have been made aware that the jury rejected the accused's case that he believed the complainant to be consenting and that the trial judge made findings, consistent with the jury verdict, that the applicant was aware she was not consenting.

It will become apparent to the jury that the trial before them is a retrial. The Crown has filed a notice of intention to tender the record of original evidence of the complainant pursuant to section 306I (2) of the *Criminal Procedure Act* 1986. The description of the record of original evidence of the complainant referred to in the notice includes *"an audio visual recording, and audio recording and a transcript of the evidence given by the complainant SM in the [first trial in the District Court]".* Counsel for the applicant submits in written submission (at [26]) that in the retrial:

> "… it will be clear to any jury that might hear the trial that the matter is a retrial. The facts of the case are distinctive. In the circumstances there is a significant risk a jury (or at least one or more jurors) on hearing the facts, (and aware the matter is a retrial), will connect the matter with the extensive adverse publicity referred to above"

I have referred to extracts of the reporting which touch upon the verdict of the jury and which report that, in the light of the jury verdict, the jury rejected the applicant's case that the complainant consented to the sexual intercourse. There is a significant danger that a juror, whose memory is triggered by the evidence in the trial, will recall aspects of the reporting they have been exposed to. There is a significant danger that that recollection will include a recollection that the jury in the previous trial found the applicant guilty of the sexual assault and, in doing so, the jury found that the complainant did not consent and that the jury rejected the applicant's case that he believed the complainant was consenting. It would be difficult for a juror to put the knowledge that the jury in the previous trial made such findings out of their mind even if directed to do so.

Ordinarily in retrials, when it becomes apparent to the jury that the trial is a retrial, the jury are directed in neutral terms that the previous trial did not proceed to finality, that the reason it did not do so is irrelevant and that they should not speculate why. Whilst such a direction can be given in the present trial, there remains a possibility that a juror or jurors would be aware that the applicant was previously convicted by a jury. In the absence of any other explanation for the retrial the potential for prejudice would remain as the jury would not be given assistance and directed that they should exclude such knowledge from their mind.

I am unable to formulate a direction to minimise such potential for prejudice. Any direction would either operate to otherwise remind jurors, who have been exposed to the reporting, of the history of the jury verdict or reveal to a juror, who may not be aware of the history, that a jury has previously found the applicant guilty of the charge before them. Whilst a direction to the jury that they are not to undertake any enquiry on the internet or from other sources will be effective in ensuring they do not further access material, such a direction would not avoid the possibility that a juror or jurors retain a body of information they have previously accessed about the jury verdict within their memory.

The knowledge that the jury in the previous trial concluded that the complainant did not consent and that the applicant was aware she was not consenting would be difficult, as a human exercise, to quarantine from one's mind. Should a juror or jurors have been exposed to reporting of the trial judge's findings on sentence, that the applicant was aware that the complainant was not consenting, then that would operate as a powerful reinforcement of the jury's findings. It is the possibility that a juror's reasoning might be contaminated by the exposure to that material that carries with it a significant risk that the applicant will not receive a fair trial. That danger cannot be minimised by direction or the implementing of other procedural safeguards.

Given the breadth of the reporting, the period over which the reporting occurred, the repetition of the reporting and the evidence of the reach of the reporting, a strong possibility remains that a juror or jurors were exposed to reporting of the jury verdict and the proceedings on sentence. Because of the extent and profile of the reporting of the previous trial, at the time of conviction and post-conviction, the memory of a juror, previously exposed to that reporting, is likely to be triggered by the evidence led in the Crown case. In reaching this conclusion I have taken into account that there has been a lengthy period since the last reporting. Because the particular nature of the alleged conduct, and circumstances surrounding the trial and post-trial proceedings, it is likely that the reporting will be fresh in the memory of a juror or jurors who have been exposed to the pre-trial publicity.

I am of the view that it is in the interest of justice that the trial proceed by Judge alone. As I have indicated, in coming to this conclusion I have considered procedural safeguards that might be implemented to reduce the risk of prejudice. I have considered the principles relevant to the decision to order a trial by Judge alone which I have referred to in these reasons which include:

- That the trial will involve a factual issue that requires the application of community standards. The jury will be called upon to consider the issue of reasonableness. Section 132(5) refers to an issue of 'reasonableness' as an issue requiring the application of community standards. I accept the Crown submission that *"In directing the jury on s61HA (3)(c) the jury is to proceed on the assumption that if the accused honestly believed the complainant consented, they are required to ask whether there were reasonable grounds for that belief".* Further, consistent with the submission of the Crown, *"…the credibility of the accused is inexorably connected to the reasonableness of his belief that the complainant was consenting to the sexual intercourse"* (Crown W/S 15.3).

- That the trial here will be substantially concerned with issues of credit and reliability of the evidence of witnesses. I have referred previously in these reasons for judgment and to the principles to be applied when issues of credit will arise in a trial, and that this is a significant matter in favour of a trial by jury.

Having considered the importance of trial by jury as a means of allowing the community to participate in the criminal justice system, and having regard to the particular circumstances of the present case, I am of the view that it is in the interests of justice to make a trial by judge alone order under section 132 of the *Criminal Procedure Act*. The community has an interest and concern in the prosecution of matters of the present kind. The community also has a concern that any trial conducted by any mode is conducted fairly and according to law. The material tendered on the application contains a vast amount of material touching upon the conviction and post-conviction proceedings which, if a prospective juror has been exposed to that material, would give rise to significant prejudice and would substantially impact upon to the accused's right and capacity to receive a fair trial.

For these reasons I make a trial by Judge alone order pursuant to s132 of the *Criminal Procedure Act* 1986 (NSW).

Judge Zahra

District Court of

New South Wales

at Sydney

28 March 2017.