SUPREME COURT OF QUEENSLAND

CITATION:	*R v BCM* [2014] QSC 321
PARTIES:	**THE QUEEN** **v** **BCM** (applicant)
FILE NO/S:	BS 494/14
DIVISION:	Trial Division
PROCEEDING:	590AA Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 November 2014
DELIVERED AT:	Brisbane
HEARING DATE:	7 November 2014
JUDGE:	Ann Lyons J
ORDER:	**I order that, pursuant to s 615(1) of the *Criminal Code 1899* (Qld), BCM be tried by a judge sitting without a jury.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – TRIAL HAD BEFORE JUDGE WITHOUT JURY – GENERAL – where the applicant is a juvenile and has been diagnosed with a Pervasive Development Disorder – where the accused is charged with attempted murder – what consideration should be given to the principles outlined in Schedule 1 of the *Youth Justice Act 1992* (Qld) when considering an application by a juvenile for a trial by a judge sitting without a jury – whether it is in the interests of justice for the trial of the accused to be held before a judge sitting without a jury given the potential difficulties the accused will have in giving evidence and a jury will have in appropriately understanding his evidence *Criminal Code 1899* (Qld); ss 590AA, 614 and 615 *Youth Justice Act 1992* (Qld); ss 8, 95(2), Sch 1 *Arthurs v The State of Western Australia* [2007] WASC 182; considered *R v Belghar* [2012] NSWCCA 86; cited *R v Clough* (2009) 1 Qd R 197; considered *R v Fardon* [2010] QCA 317; considered *R v Kissier* [2011] QCA 223; followed

COUNSEL:	R East for the applicant
	S Farnden for the respondent
SOLICITORS:	Legal Aid Queensland for the applicant
	Director of Public Prosecutions for the respondent

The current application

[1] The applicant, BCM, is charged on Indictment 494 of 2014 with the attempted murder of a fellow student, the complainant, on 29 August 2013 in the auditorium of their high school in Brisbane. He was 14 at the time of the alleged offence. He is currently 15 years old and he will turn 16 in December 2014. The matter will shortly be listed for a trial which is expected to take place in the first half of 2015. It is estimated that a trial before a jury would take about 5 days.

[2] The trial must take place in the Supreme Court because of the requirements of the *Youth Justice Act 1992* (Qld) ("Youth Justice Act") despite the fact that the applicant was a child at the time the alleged offence occurred and will be a child at the time the trial is held. The offence of attempted murder is defined by s 8 of that Act to be a serious offence because it attracts a possible penalty of life imprisonment. Furthermore, it is an offence which is not within the jurisdiction of the District Court under s 61 of the *District Court Act 1967* (Qld). In those circumstances, s 95(2) of the Youth Justice Act requires that "the child be committed to be tried before the Supreme Court".

[3] The current application is brought pursuant to s 590AA of the *Criminal Code 1899* (Qld) ("Criminal Code") for an order pursuant to s 614(1) of the Criminal Code that the applicant be tried by a judge sitting without a jury.

[4] The relevant provisions are as follows:

> "**614 Application for order**
> (1) If an accused person is committed for trial on a charge of an offence or charged on indictment of an offence, the prosecutor or the accused person may apply to the court for an order (*no jury order*) that the accused person be tried by a judge sitting without a jury.
> (2) The application must be made under section 590AA before the trial begins.
> (3) If the identity of the trial judge is known to the parties when the application is decided, a no jury order may be made only if the court is satisfied there are special reasons for making it.
> (4) Subsection (3) does not limit section 615 or any other restriction on making a no jury order imposed by this chapter division.
> (5) The court may inform itself in any way it considers appropriate in relation to the application.
> (6) For subsection (2), the trial begins when the jury panel attends before the court.
>
> **615 Making a no jury order**
> (1) The court may make a no jury order if it considers it is in the

interests of justice to do so.

(2) However, if the prosecutor applies for the no jury order, the court may only make the no jury order if the accused person consents to it.

(3) If the accused person is not represented by a lawyer, the court must be satisfied that the accused person properly understands the nature of the application.

(4) Without limiting subsection (1), (2) or (3), the court may make a no jury order if it considers that any of the following apply—

(a) the trial, because of its complexity or length or both, is likely to be unreasonably burdensome to a jury;

(b) there is a real possibility that acts that may constitute an offence under section 119B would be committed in relation to a member of a jury;

(c) there has been significant pre-trial publicity that may affect jury deliberations.

(5) Without limiting subsection (1), the court may refuse to make a no jury order if it considers the trial will involve a factual issue that requires the application of objective community standards including, for example, an issue of reasonableness, negligence, indecency, obscenity or dangerousness."

Background facts

[5] The applicant and the complainant were both grade ten students at the same high school at the time of the alleged offence. It would seem that the applicant had been subjected to some bullying by the complainant and they had apparently argued at school on the day before the alleged offence.[1] On the day of the incident, the applicant took a knife to school and during the morning break he told a friend ("A") that he was going to kill the complainant because he believed he was going to turn out like the applicant's abusive and violent ex-stepfather ("B"). A urged him to abandon the idea.[2] In the subsequent lunchbreak, the applicant took the complainant into the school auditorium. It is alleged that he then put his hands over the complainant's eyes in the darkened auditorium and asked him if he could see. At that point, the complainant felt a sharp pain in his neck and then saw blood. The applicant stopped his attack, threw the knife down and ran away. He then made a 000 call and later spoke to police, then to his mother and father. [3]

[6] The complainant suffered a cut to the neck which is described as "a 2cm x 1cm laceration on the left side of his lower neck the stabbing going inferiorly and obliquely across the midline and involving the anterior aspect of the right lobe of the thyroid gland."[4] He was discharged from hospital the following day.

The basis for the application

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1 Dr Harden's Report dated 16 June 2014, 13.

2 Outline of Submissions for the Applicant, 1.

3 Ibid.

4 Dr Harden's Report dated 16 June 2014, 13.

[7] Counsel for the applicant argues that the critical issue at trial will be the intent of the defendant at the time he caused the injury and it is therefore anticipated that the applicant will give evidence as to his state of mind. Counsel essentially argues that giving evidence before a jury will be very difficult for the applicant because of his youth and special vulnerabilities.

[8] Counsel for the applicant argues that in the case of all other indictable offences that are not Supreme Court offences, a child has the right to elect to be tried by a Children's Court judge sitting without a jury pursuant to s 98(2) of the Youth Justice Act. Counsel argues that apart from that provision and as matters stood prior to amendments to the Act, serious offences involving children would be heard by a judge alone. Furthermore, s 105 of the Youth Justice Act provides that any election can be revoked by the child, or if the judge decides that in the particular circumstances it is more appropriate for the child to be tried by the judge sitting with a jury, then the child must be tried before the judge sitting with a jury. Counsel for the applicant argues therefore that the legislative intent in the Youth Justice Act makes it clear that allowing a child to make an election is recognition of the fact that children can be vulnerable and overwhelmed by the court process.

[9] Counsel further argues that the concern about a child's vulnerability in Court is reflected in the *Evidence Act 1977* (Qld). Section 21AA(b) of that Act provides that the purpose of the Evidence Act provisions as they relate to children is to limit "to the greatest extent practicable the distress and trauma that might otherwise be experienced by the child when giving evidence." Counsel for the applicant argues that this concern is evidenced by the fact that the Crown can and did foreshadow an application for the other school students, who were witnesses to the incident, to be declared special witnesses so that their cross-examination can be pre-recorded in advance of the trial.

[10] Counsel also relies on the general provisions of the Youth Justice Act in support of the application. In particular, Counsel argues Principle 2 of the Act provides that the youth justice system should promote a child's mental wellbeing and that includes avoiding the distress and trauma of the trial process.

The relevant provisions of the Youth Justice Act

[11] I note that one of the stated objectives of the Youth Justice Act is to ensure that courts deal with children who have committed offences according to principles established under the Act.

[12] Those principles specifically include the following:

> **"Schedule 1**
>
> .....
>
> 2 The youth justice system should uphold the rights of children, keep them safe and promote their physical and mental wellbeing.
>
> 3 A child being dealt with under this Act should be—
>
> (a) treated with respect and dignity, including while the child is in custody; and

(b) encouraged to treat others with respect and dignity, including courts, persons administering this Act and other children being dealt with under this Act.

4 Because a child tends to be vulnerable in dealings with a person in authority, a child should be given the special protection allowed by this Act during an investigation or proceeding in relation to an offence committed, or allegedly committed, by the child.

5 If a child commits an offence, the child should be treated in a way that diverts the child from the courts' criminal justice system, unless the nature of the offence and the child's criminal history indicate that a proceeding for the offence should be started.

6 A child being dealt with under this Act should have procedures and other matters explained to the child in a way the child understands.

7 If a proceeding is started against a child for an offence—

(a) the proceeding should be conducted in a fair, just and timely way; and

(b) the child should be given the opportunity to participate in and understand the proceeding.

8 A child who commits an offence should be—

(a) held accountable and encouraged to accept responsibility for the offending behaviour; and

(b) dealt with in a way that will give the child the opportunity to develop in responsible, beneficial and socially acceptable ways; and

(c) dealt with in a way that strengthens the child's family."[5]

[13] In addition to the fact that the applicant is a youth, he has been diagnosed with a Pervasive Developmental Disorder which is variously called Autism Spectrum Disorder or Asperger's Syndrome. Reliance is also placed on the medical reports of Dr Scott Harden and Dr Barry Steinberg which outline that diagnosis, and whilst there are no issues of unsoundness of mind, there are aspects of his condition which are relevant to the applicant's ability to undergo a trial by jury and the possibility that his condition may prejudice his fair trial.

Dr Steinberg's Report

[14] Dr Barry Steinberg is a specialist paediatrician and in his report dated 4 August 2012, he states that the applicant has a history with typical features of a Pervasive Developmental Disorder which accords with the Asperger's Syndrome category of diagnosis. Dr Steinberg states the applicant "has significant social communication issues, lack of perspective taking, issues with empathy, a strong sense of social justice and a variety of sensory sensitivities."[6] He also states that the applicant is very rigid in his thinking and is prone to "meltdown behaviours if things don't turn out the way he perceives they should be."[7] He noted that in the six to 12 months

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5 *Youth Justice Act 1992* (Qld), Schedule 1.

6 Dr Steinberg's report dated 4 August 2012, 1.

7 Ibid.

prior to his report "there has been some darkness to his moods and talk of self harm, but these have started to decrease since his involvement with the psychologist Dr Hui Lim."[8] He noted that Dr Lim undertook a full assessment which indicated, on the basis of rating scales and diagnostic interviewing, that he considered he had a diagnosis of Asperger's Syndrome. Dr Lim also noted that his psychometric assessment indicates that the applicant has high/average cognitive abilities.

Dr Harden's report

[15] Dr Scott Harden is a child, adolescent and adult forensic psychiatrist. In a report dated 6 November 2014, he stated that he considers that the applicant would meet the criteria for Pervasive Developmental Disorder not otherwise specified under the DSM IV on the basis of his impairment in peer relationships with associated issues around social and emotional reciprocity as well as his early problems with language development. Dr Harden noted that under other classification schemes that would be regarded as an Autistic Spectrum Disorder. He notes that there is no practical difference between the two diagnoses. He stated, "Effectively this young man has difficulty in decoding the non-verbal elements to communication with others and in communicating effectively with others for the same reasons. This leads to difficulty in peer relationships and secondary psychological attitudes towards other people. It is often also associated with a rather rigid concrete thinking style which tends to see things in a 'black-and-white'."[9]

[16] Dr Harden was also asked to consider whether a jury could properly appreciate his cognitive difficulties, in particular, the subtlety of communication deficits associated with his autistic spectrum disorder. Dr Harden stated:

> *"My opinion would be that the average layperson has a great deal of difficulty in appreciating the subtle interpersonal communication difficulties associate (sic) with autistic spectrum disorders that fall more towards the Aspergers end of that spectrum than the classical autism end.*
>
> The deficits in individuals with what was previously described as 'classical' autism are usually severe, gross and obvious to the layperson. The deficits in individuals previously described as Aspergers syndrome but now described as being part of the autistic spectrum are often more complex to appreciate as they have to do with problems in decoding non-verbal communication elements, particularly those to do with emotional states within other people and responding to that. These young people have otherwise intact use of expressive and receptive language leading in general to an overestimation of their ability to communicate by observers. Their difficulties in communication particular (sic) emerges with regard to subtleties of communication associated with interpreting the emotional states of others, understanding humour, understanding social rules for communication and other kinds of communication where the non-verbal and contextual information is critical to the communicative act.

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8 Ibid.

9 Dr Hardin's report dated 6 November 2014, 2.

> *In my experience lay people often misinterpret the communicative behaviour of these young people* and ascribe it to personality characteristics and such individuals can be seen as inappropriate in the expression of emotion, arrogant, detached or inappropriately over or under reacting to various matters i.e. laughing inappropriately with regard to highly serious matters or becoming inappropriately upset and angry over what appear to be trivial issues but may represent a significant issue in the mind of the sufferer due to miscommunication or idiosyncratic interpretation of communication.
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> I have significant training and experience in communicating with young people with various kinds of mental health problems and intellectual deficits and *I would personally regard assessment of and communication with individuals with higher functioning autistic spectrum disorders as one of the most challenging aspects of my practice, particularly those individuals who are in late adolescence, male and prone to anxiety and emotional overreaction.*"[10] (my emphasis)

[17] Dr Harden was also asked his opinion as to whether the applicant, as a result of his mental, intellectual or physical impairment, would be likely to be disadvantaged as a witness or be likely to suffer emotional trauma or to be intimidated or disadvantaged as a witness. He stated:

> "In my opinion [BCM] is likely to be disadvantaged as a witness and in general terms is particularly likely to have difficulty with cross examination, particularly legal cross examination in a court room. Individuals with autistic spectrum disorder are prone to *increased anxiety associated with interpersonal interactions.* As previously noted they also have difficulty in interpreting non-verbal cues such as context, tone of voice, facial expression and decoding the emotional state or other implications of the statements made. Cross examination of them should in general be undertaken in a similar fashion to a person with a significant intellectual disability regardless of the fact that it appears that they have much greater concrete verbal skills than a person with such an intellectual disability.
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> They also tend to have *unusual interpersonal non-verbal communicative behaviours, often do not make normal levels of eye contact and are avoidant, sometimes have strange facial expressions and use an odd or monotonous tone of voice. All of these things can be misinterpreted and other meanings can be ascribed by the lay observer.*
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> *His difficulties in terms of behaviour are likely to be exacerbated by his anxiety at a strange situation.*"[11] (my emphasis)

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10 Dr Hardin's report dated 6 November 2014, 2 - 3.

11 Dr Hardin's report dated 6 November 2014, 3 - 4.

[18] Whilst Dr Harden did not consider the applicant would suffer severe emotional trauma as a result of being a witness, he did consider that he might find a situation "so intimidating that he would be disadvantaged as a witness as noted above because of exacerbation of his underlying anxiety and autistic spectrum features."[12]

The applicant's mother's affidavit

[19] The applicant's mother, in an affidavit sworn on 6 November 2014, outlined the applicant's background and the fact that he was diagnosed in year 4 with a form of verbal attention deficit disorder and an auditory processing disorder and was prescribed Ritalin and Dexamphetamine. She stated that whilst he was on the medication for two years, he stopped the medication in 2008. She described the applicant as suffering from depression after she separated from his father and that he had thoughts of suicide in 2010. She stated that Dr Steinberg subsequently diagnosed him with Asperger's Syndrome with depressive symptoms. She stated that his depression became worse when she was in an abusive relationship with B, as it caused him stress and he was always unhappy.

[20] The applicant's mother stated that her son also believed that a particular teacher was picking on him. She stated that in the week preceding the incident, he had become further depressed and believed he had been humiliated in class by another teacher. She indicated that he became physically unwell and was crying a lot. She stated that after the alleged offence, the applicant was placed in detention for four months and that during that period his mood seemed to improve. She also stated that in February 2014, he was hospitalised with severe chest pains and it is believed that it was stress related. Her evidence was that he has had trouble sleeping and his general anxiety levels have increased. He is terrified of going to an adult prison and he manifests this anxiety in a number of ways. She stated he has lost all hope for the future and has essentially shut down. He has a fear of having to speak to a large group of people. She also stated he is able to follow instructions that are black and white, and where there is a set guideline however, "When situations are presented to him that he has no experience with or where he has not got the experience to understand then he does demonstrate unusual behaviour that is often misinterpreted."[13] She stated that:

> "The thought of giving evidence terrifies him. He has told me that he does not think that he can get his story across in his evidence because his communication style can be quite strange.
>
> I have noticed that he is essentially a very nervous and shy child however he overcompensates in social situations by incessantly talking, making jokes, inappropriate comments and playing the fool."[14]

[21] The applicant's mother also stated that the applicant often misinterprets what people are asking of him and that he is very literal in his thinking. She stated that what is a logical question to others can be completely misinterpreted by him and that when he is anxious this becomes even worse. She stated:

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12 Dr Hardin's report dated 6 November 2014, 4.

13 Affidavit of the applicant's mother sworn 6 November 2014, [47].

14 Affidavit of the applicant's mother sworn 6 November 2014, [48] – [49].

> "Often when [BCM] misunderstands he goes off on a different tangent of conversation and others misinterpret this as avoiding the topic or that he is rude and not interested in the conversation they were trying to have."[15]

Crown submissions

[22] The Crown submits that it follows from the reasoning in *R v Kissier* that it would be incorrect to adopt a starting point that if this matter was in a different jurisdiction the applicant would have a right to a trial by judge alone. The Crown submits that it would be incorrect to adopt a starting point that ordinarily a trial should be before a jury. Conversely then, it is argued the same principle applies in the current context that it would be incorrect to take into consideration the fact that if the trial were to be for a different offence in a different jurisdiction then the applicant would have a right to elect for a trial without a jury. The Crown submits that the question for the court is simply to determine whether the applicant has satisfied the court that it is in the interests of justice in this case to allow the application:

> "11. The issue in the trial is intent. Intent is to be inferred from the facts surrounding the offence which it's understood are largely undisputed. These include:
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> - The location of a 'soul list' found at the applicant's home with the complainant's name struck off.
> - Comments made by the applicant to other children in the weeks leading up to the offence to the effect that he want (sic) to kill someone at school.
> - The fact that the knife used was a 20cm long knife that the applicant brought to school with him from home for the purpose of committing the offence.
> - In the morning break the applicant told A that 'this might be (sic) last time that you want to talk to me' and that he said he was going to kill the complainant.
> - The day prior to the offence the applicant was nice to the complainant and spoke to him which was new behaviour.
> - He lured the complainant to a dark, quiet part of the school to commit the offence by telling him he had candy he was going to give him. A torch was required to see.
> - The applicant instructed the complainant to close his eyes; he took the torch away from the complainant and put his hands over the complainant's eyes. He asked if the complainant could see and then stabbed him in the neck.
> - The applicant called "000" and said 'I just killed someone ... I brought a knife to school because um I was going to threaten someone with it because he

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15 Affidavit of the applicant's mother sworn 6 November 2014, [53].

kept saying he was going to bash up my friend .... I didn't want him hurting anyone else ... I stabbed him in the throat, the second I started to stab him I instantly realised and I pulled it back out before it got too far.' 'I thought about doing it so many times but today he just harassed me and harassed another girl I just couldn't think properly.'

- When police arrived he said he had just killed his mate and that he knew what he was doing.
- After the incident he was overheard by police (who were recording) to tell (sic) his father that he had planned it, that he went to kill him, that he remembered what A said (the friend he had told that morning he was going to do it that tried to talk him out of it) so he stopped a millisecond too late and he stabbed him a bit."

12. The facts and evidence in this matter are not complex and the issue is one that it is submitted is something that should properly be considered by a jury.

13. It is not contended by the applicant that s 615(a), (b) or (c) are engaged. The applicant therefore relies on matters not set out within the section to support the application."[16]

[23] The Crown also argues that the fact that the Crown could make an application for the Crown witnesses to be treated as special witnesses should not be used to bolster an application for a no jury order for the applicant, and it should not be used to address some kind of perceived imbalance. The Crown also submits that the extent to which the Court can take into account matters which are personal to the applicant is not clear. The Crown argues that the test under s 615 is expressed in terms of a jury not being able to be appraised of the matter or deal with the issues, and not in relation to personal matters which are relevant to the applicant. The Crown argues that the section is not concerned with the ability of a child to undergo the trial, but the ability of the jury to properly assess the matter. The Crown, in particular, relies on the New South Wales decision of *R v Belghar*:[17]

"[102] The granting of an application on the mere apprehension of prejudice in prospective jurors, not based on evidence or a matter of which the court may take judicial notice (*Evidence Act* 1995 s 144), is at odds with the assumption which the common law makes that jurors will understand and obey the instructions of trial judges to bring an impartial mind to bear on their verdict: *Gilbert v The Queen* [2000] HCA 15; (2000) 201 CLR 414 at [13] (Gleeson CJ and Gummow J). The fact that an accused person desires a trial by judge alone, although relevant, is not as significant as the reasons for that preference and whether those reasons are rationally

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16 Outline of Submissions for the Respondent (Crown), 3.

17 [2012] NSWCA 86 at [102].

justified and bear upon whether he or she will receive a fair trial."

The relevant principles to be applied

[24] There is no doubt that what is in the interests of justice will turn on the facts in an individual case. I consider that there are a number of matters outlined in the reports of Dr Harden and Dr Steinberg and the affidavit of the applicant's mother which are highly relevant to the determination of the application. I consider those critical issues to be as follows:

(i) The applicant is currently 15 and will be 16 when the trial commences. He was 14 at the time of the alleged offence.

(ii) The major issue in the trial will be the applicant's intention at the time he did the act which wounded the complainant.

(iii) It is anticipated that the applicant will give evidence.

(iv) The applicant has a longstanding diagnosis of Pervasive Developmental Disorder with depressive symptoms which is also termed Autism Spectrum Disorder or Asperger's Syndrome under other classification systems.

(v) That diagnosis means that the applicant has great difficulty in communicating and he has particular difficulty in decoding the non-verbal elements of communication with others.

(vi) The applicant has difficulty in paying sustained attention and concentrating.

(vii) Dr Harden's opinion is that the average layperson has a great deal of difficulty in appreciating the subtle communication difficulties that fall towards the Asperger's end of the spectrum.

(viii) Dr Harden considers that lay people often misinterpret the communicative behaviour of young people with Asperger's and they can be seen as inappropriate in the expression of emotion, as well as appearing to be arrogant, detached and inappropriate in over or under reacting to various matters i.e. laughing inappropriately with regard to serious matters.

(ix) Dr Harden considers that the applicant is likely to be disadvantaged as a witness and will have particular difficulty with cross examination given his increased anxiety.

(x) Dr Harden considers that the applicant's difficulties in terms of behaviour are likely to be exacerbated by his anxiety in a strange situation.

(xi) Dr Harden's view is that the applicant is not likely to suffer severe emotional trauma as a result of being a witness but he may be disadvantaged because of an exacerbation of his underlying anxiety and autism spectrum features.

[25] The principles relevant to an exercise of the discretion in s 615 were discussed by the Court of Appeal in 2011 in *R v Kisser*.[18] In that case, there was an application for a judge alone trial on the basis of adverse pre-trial publicity and the Court considered the approach that should be taken by a judge on an application for a no jury order. In Justice Mullins' decision, with whom Fraser JA and White JA agreed,

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18 [2011] QCA 223.

noted that the provision for judge alone trials was introduced into the Criminal Code pursuant to an amendment in 2008. In particular, the explanatory memorandum noted that while a defendant's right to a trial by jury was a key feature of the common law criminal justice system and the jury system is an effective institution for ensuring community participation, judge alone criminal trials may be appropriate in some cases. It was noted that the overriding discretion to make the order was premised on it being in the interests of justice to do so.

[26] Justice Mullins examined the earlier decision of Mackenzie J in *R v Clough*,[19] as well as the series of Western Australian Supreme Court decisions where different views had emerged as to whether the court should treat the provision permitting the making of a no jury order as expressing a neutral position as to the preferred mode of trial. In particular, Mullins J noted that Mackenzie J's view in *Clough* was that the opening words of s 615(4) made it clear that the circumstances in which a no jury order could be made were not limited to the categories of examples listed in the section and that the starting assumption, once the indictment is presented, is that there will be a trial by jury absent a no jury order based on a finding that it is in the interests of justice to do so. Justice Mackenzie stated that the fact that a trial by jury is a default position is not inconsistent with "considering an application under s 614 without any preconception or presumption about the appropriate mode of trial in that particular case."[20]

[27] Justice Mullins then noted the different views that had been expressed in the Western Australian cases as to the weight that should be given to the subjective views of the defendant. Her Honour noted Mackenzie J's view in *Clough* that the subjective views of the defendant are one factor to be considered and are not decisive. Consideration was also given to the remarks of the Court of Appeal in *R v Fardon*[21] in relation to the failure of a pre-trial judge to make a no jury order. In particular, her Honour noted the extensive observations of Chesterman JA in relation to the refusal by the primary judge to make a no jury order. Justice Chesterman considered that appeals from no jury orders are likely to be rare because any challenge to such an order is against a judicial discretion exercised by reference to undefined and indeterminate parameters. His Honour considered that the width of the discretion conferred by s 615(1) would make challenges to it very difficult.

[28] I also note Chesterman JA's observations that the section provides that the court can make such an order if it considers it is in the interests of justice to do so. His Honour concluded "the only indication of when it may be in the interests of justice to make a no jury order appears in s 615(4) but the circumstances in which an order may be made are not confined to those examples." Justice Chesterman then relied on the discussion of McKechnie J in *TVM v Western Australia.*[22] His Honour stated:

> "I would endorse the remark that the phrase 'the interests of justice' is so general and, indeed, abstract, that it takes on meaning only by a consideration of the particular facts relevant to an application for a no jury order."[23]

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19 [2009] 1 Qd R 197.
20 [2009]1 Qd R 197 [14].
21 [2010] QCA 317.
22 (2007) 180 A Crim Rep 183.
23 [2010] QCA 317 [74].

[29] Whilst noting that Chesterman JA preferred the opinion expressed in *TVM* by McKechnie J that on an application for a no jury order a judge exercises a discretion whether to make the order for a judge alone trial and does not start from a neutral position as to the referred mode of trial, and whilst agreeing with the views of Chesterman JA in *Fardon*, in *Kissier* Mullins J considered that the process for the determination of the application that is reflected in the terms of s 615 does not require expression of a starting point on the application for a no jury order that both methods of trial are equally valid. Her Honour considered that it was not strictly necessary to contribute to the debate on whether there is any starting presumption about the appropriate mode of trial when an application for a no jury order is made.

[30] I agree with the views expressed by the court in *R v Kissier* that the expressed intention of the legislature was to make the interests of justice the overriding consideration. Justice Mullins also considered that the submission that the mere fact that an accused person applies for a no jury trial should not be decisive of the application when s 615(5) does not apply. Her Honour considered that that did not give effect to s 615(1) and that: "As a matter of statutory interpretation, the appellant's contention that the making of the application for a no jury order determined the outcome of the application in his favour cannot be sustained."[24] Ultimately, it was considered that the conclusion reached by the pre-trial judge that the threshold issue of whether it was in the interests of justice to make a no jury order was not satisfied, as it was open on the evidence before the judge and, therefore, there was no error.

Should a 'no jury' order be made in the circumstances of this case?

[31] It is clear that the trial has not as yet been listed and that the identity of the trial judge is not known. The relevant sections of the Criminal Code make it clear that the Court may inform itself in any way it considers appropriate and that the prevailing consideration is whether it is in the interests of justice to make a no jury order.

[32] It is also clear, and this has been conceded by counsel for the applicant, that there has not been any undue publicity in this case to date. It is also accepted that the trial will not be unduly burdensome for the jury because of its complexity or length. It is also uncontroversial that this is not a case where any of the factors in s 615(5) are engaged, as there are no factual issues in this case which will require the application of objective community standards such as issues of reasonableness, negligence, indecency, obscenity or dangerousness.

[33] I consider that an examination of the relevant authorities makes it clear that I should focus on the question as to whether it is 'in the interests of justice' that a no jury order be made. I also consider that the views of the defendant are just one factor which must be taken into account in considering the application. Clearly, the applicant wishes to have a no jury order and counsel for the applicant argues that it is essentially in the applicant's best interests that the trial should proceed as a judge alone trial. In *Arthurs v The State of Western Australia,*[25] Martin CJ stated that it was relevant to take into account the subjective view of the accused as to whether or not he or she would receive a fair trial from a jury. Martin CJ held (at [79]):

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24 [2011] QCA 223 [31].

25 [2007] WASC 182.

> "It is, I think, entirely consistent with the interests of justice for weight to be given to the subjective views of an accused person, provided of course that they are not fanciful or irrational. Thus, in my opinion an apprehension by an accused person, which is not fanciful or irrational, that he or she may not get a fair trial by jury because, for example, of pre-trial publicity or because of their ethnic, religious, cultural or other peculiar circumstances, may be entitled to significant weight."[26]

[34] I note however, as did McKechnie J in *TVM*, that the interests of justice are not necessarily coterminous with the interests of an accused.

[35] In the circumstances of this case, however, I am satisfied that the onus on the applicant has been satisfied and that it is in the interests of justice that a no jury order be made. In coming to that decision, I have taken into account the principles outlined in the Youth Justice Act and recognise that a child should be given the special protection allowed by that Act during any proceeding in relation to an offence allegedly committed by a child, and that a child should also have procedures and other matters explained to the child in a way the child understands. A trial before a judge and jury may well be adapted to ensure that those principles are observed.

[36] The critical issue, however, has been my very real concern that the jury may misconstrue evidence which the applicant may give due to his communication difficulties. I am satisfied that because of the operation of the applicant's Pervasive Developmental Disorder, he would have difficulties in appropriately giving his evidence before a jury. I am concerned that they may misconstrue his evidence given his unusual communication style. Ultimately, I have been persuaded by Dr Harden's view that lay people often misinterpret the communicative behaviour of young people with Asperger's particularly as it is likely the applicant will act inappropriately in the expression of emotion. There is a real danger in my view that a jury may consider that he is arrogant and detached from the proceedings. I also consider that it is highly likely that in giving his evidence he will act inappropriately by over or under reacting to various matters. In particular, it would seem that he has a tendency to laugh inappropriately in relation to highly serious matters, or become inappropriately upset and angry over what appear to be trivial issues. Those reactions are all due to his developmental disorder. I am satisfied that a jury may have great difficulty in interpreting his evidence because of his behavioural difficulties.

[37] I also consider that the applicant is likely to be disadvantaged as a witness and would have difficulty with cross-examination particularly in a court room given that the applicant would be prone to increased anxiety associated with interpersonal interactions. Whilst that anxiety will exist whether the trial is conducted before a judge and jury or a judge alone, it would seem to me that the anxiety would necessarily be greater before a jury.

[38] There is also a concern that the jury may inappropriately take into account the applicant's demeanour or behaviour whilst giving evidence or during the trial.

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26 [2007] WASC 182 [79].

Because of those factors, there is a possibility that the applicant may not receive a fair trial.

[39] The Youth Justice Act principles also make it clear that in a proceeding against a child for an offence, the proceeding should be conducted in a fair, just and timely way; and the child should be given the opportunity to participate in and understand the proceeding. I am also concerned that given factors which are personal to the applicant, there is a risk that a trial before a judge and jury may mean that the applicant is prevented from participating and understanding the proceeding because of the stress of a trial in that format.

[40] I also consider that a trial before a judge alone will mean that the judge will have greater flexibility in relation to putting strategies in place to allow the applicant to give evidence in a way which reduces the stress to him in giving evidence due to his recognised communication difficulties. I also consider that a trial before a judge alone can proceed at a more leisurely pace with frequent breaks to allow the applicant to confer with his counsel.

[41] For all those reasons, I am satisfied that the applicant may not get a fair trial if those issues are misunderstood or misconstrued by a jury. A judge, on the other hand, will be well aware of those particular factors which will affect the applicant in the way he gives his evidence, and the requirement that the judge must give reasons for the decision will mean that all of those factors will specifically be taken into account in a consideration of the evidence before the court. In this regard, I note that in *Arthurs v The State of Western Australia*, Martin CJ considered that the requirement that a judge sitting without a jury must give detailed reasons may indeed be a relevant factor in the circumstances of a particular case. I consider that this may be such a case where the requirement of detailed reasons may well ensure that the factors personal to the applicant will be given appropriate weight in an assessment of the evidence which he ultimately gives at trial.

[42] I am satisfied that it is in the interests of justice that a no jury order be made in this case.

ORDER

[43] I order that, pursuant to s 615(1) of the Criminal Code, BCM be tried by a judge sitting without a jury.