TRIAL BY JUDGE V TRIAL BY JURY

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TRIAL BY JURY / TRIAL BY JUDGE EXPLANATORY NOTE

1. TRIAL BY JURY

A trial by jury is constitutionally mandated under section 80 of the *Constitution 1901* (Cth).

Legislation

Constitution 1901 (Cth)

80 Trial by Jury

> The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

2. TRIAL BY JUDGE ALONE (SOUTH AUSTRALIA)

2.1. Legislation

Juries Act 1927 (SA)

7—Trial without jury

(1) Subject to this section, where, in a criminal trial before the Supreme Court or the District Court—

(a) the accused elects, in accordance with the rules of court, to be tried by the judge alone; and

(b) the presiding judge is satisfied that the accused, before making the election, sought and received advice in relation to the election from a legal practitioner,

the trial will proceed without a jury.

(2) No election may be made under subsection (1) where the accused is charged with a minor indictable offence and has elected to be tried in the District Court.

(3) Where two or more persons are jointly charged, no election may be made under subsection (1) unless all of those persons concur in the election.

(3a) Where an information is presented to the District Court or the Supreme Court under section 103 of the Criminal Procedure Act 1921 and the information includes a charge of a serious and organised crime offence (within the meaning of the Criminal Law Consolidation Act 1935), the Director of Public Prosecutions may apply to the court for an order that the accused be tried by judge alone.

(3b) The court may make an order on an application under subsection (3a) if it considers it is in the interests of justice to do so (and may do so at any time before commencement of the trial of the matter, regardless of whether a jury has been constituted in accordance with this Act to try the issues on the trial).

(3c) Without limiting subsection (3b), the court may make an order on an application under subsection (3a) if it considers that there is a real possibility that acts that may constitute an offence under section 245 or 248 of the Criminal Law Consolidation Act 1935 would be committed in relation to a member of a jury.

(3d) An order of a court on an application under subsection (3a) may be appealed against in the same manner as a decision on an issue antecedent to trial.

(4) If a criminal trial proceeds without a jury under this section, the judge may make any decision that could have been made by a jury and such a decision will, for all purposes, have the same effect as a verdict of a jury.

2.2. Common Law

Brown v R (1986) 160 CLR 171; [1986] HCA 11 [4]

Chief Justice Gibbs held:

> [Section 80 of the Constitution] was inserted for the benefit of persons accused of offences against the law of the Commonwealth and not for any wider public interest. Nor could it be suggested that it would be contrary to public policy to allow the accused person to waive the right to trial by jury granted for their own benefit, at least in cases where the waiver was made freely, without improper pressure or influence and with full knowledge of the right that was waived.

He further held:[1]

> ‘The ability to waive a constitutional right does not ordinarily carry with it the right to insist on the opposite of that right’ (Singer v United States, at pp 34-35 (p.638 of L.Ed.)); and accused could insist on trial by judge alone only if, after the constitutional right had been waived, the law made provisions for that course. Section 7 of the Juries Act does permit the accused to elect for trial by judge alone, and for the reasons given I conclude that the provisions of s.80 [of the Constitution] do not prevent an accused person from waiving the constitutional right to trial by jury and making the election under s.7.

R v Garare [2011] SASCFC 38

At paragraph 37, Justice Gray held:

> it is evident from the terms of section 7 of the *Juries Act*, that Parliament has given a defendant the right to elect to be tried by Judge alone, an unfettered right, subject to the judge being satisfied that the defendant has received appropriate legal advice, and importantly, subject to compliance with the relevant rule of court. The extent of the restrictions that might be placed on the right conferred by section 7 is primarily to be determined by reference to the authority conferred by section 89 of the *Act* (emphasis added).

However, Commonwealth offences do not carry the same unfettered right. In *Cheng v The Queen*, Gleeson CJ, Gummow and Hayne JJ held:[2]

> Section 80 is mandatory. It is not a provision which creates a right that can be waived by an accused. Thus, if there is a trial on indictment of an offence against the law of the Commonwealth, and therefore section 80 applies, the parties cannot agree to dispense with the jury.

The question of whether the Constitution creates a right was raised again in *Alqudsi v The Queen* (2016) 259 CLR 203.

Alqudsi v The Queen (2016) 259 CLR 203

[1] *Brown v R* (1986) 160 CLR 171; [1986] HCA 11 [4].
[2] *Cheng v The Queen* (2000) 203 CLR 248 at [57] in citing *Brown v R* (1986) 160 CLR 171 at [4].

In *Alqudsi v The Queen*, the High Court held (6:1, French CJ dissenting)[3] that legislation providing for trial by judge could not be applied to the trial on indictment of a Commonwealth offence, because this would be inconsistent with s 80 of the *Constitution*. The majority of the court held that *Brown* was not distinguishable from *Alqudsi v The Queen*;[4] however, French CJ in dissent would have overruled it.[5] Thus, on indictment of a Commonwealth offence, the accused does not have the right to waive the constitutional constraints of s 80.

[3] [2016] HCA 24 (15 June 2016)
[4] [2016] HCA 24 (15 June 2016) at [56], [95], [216].
[5] [2016] HCA 24 (15 June 2016) at [76].

The question arose again in *Mattner v Director of Public Prosecution (Cth)*[6]. The applicant was arrested and charged with 4 counts of using a carriage service in such a way that a reasonable person would regard that use as menacing, harassing or offensive contrary to s 474.17(1) of the *Criminal Code 1995* (Cth).[7] The Director consented to the matter being heard and determined in a summary jurisdiction.[8]

In this matter, Kelly J considered the definition of the words and phrases "indictable offence" and "trial on indictment". Justice Kelly held:

> "Indictable" means capable of being tried on indictment. This is confirmed by the wording of s 4J(6) which contemplates the restrictions on sentencing should an indictable offence be determined summarily, rather than tried on indictment.

Justice Kelly followed the commentary of Gleeson CJ, Gummow and Hayne JJ in Cheng v The Queen as follows:[9]

In 1901 Quick and Garran's The Annotated Constitution of the Australian Commonwealth was published. In their commentary on s 80, the learned authors went directly to the point we are asked to re-examine. After referring to the drafting history they wrote:

> "The constitutional requirement of trial by jury only applies when the trial is 'on indictment;' and there is no provision, corresponding to the Fifth Amendment of the United States Constitution, that all capital or infamous crimes must be tried on indictment. As was pointed out by Mr Isaacs (Conv Deb, Melb, p 1894), 'it is within the powers of the Parliament to say what shall be an indictable offence and what shall not. The Parliament could, if it chose, say that murder was not an indictable offence, and therefore the right to try a person accused of murder would not necessarily be by jury.'"
>
> On 4 March 1898, immediately before Mr Isaacs made the statement quoted by Quick and Garran, Mr Barton referred to what was then cl 79, which began: "The trial of all indictable offences against any law of the Commonwealth shall be by jury ... ." He

[6] [2011] SASC 89 (25 May 2011).
[7] *Mattner v Director of Public Prosecution (Cth)* [2011] SASC 89 at [3].
[8] *Mattner v Director of Public Prosecution (Cth)* [2011] SASC 89 at [8].
[9] *Mattner v Director of Public Prosecution (Cth)* [2011] SASC 89 at [49] citing *Cheng v The Queen* (2000) 203 CLR 248 at [143].

> moved that the words "of all indictable offences" be struck out, and that the words "on indictment of any offence" be substituted. He explained the object of the amendment, which he said was "simple"[21]. It was to avoid the consequence that all offences created by any Commonwealth enactment had to be tried by jury. He referred in particular to contempt, which although indictable, was often dealt with summarily. It was then that Mr Isaacs made his comment.

Justice Kelly in citing McHugh J,[10] held that in this case the matter did not "proceed to trial on indictment".[11] However, Justice Kelly held that because there was no record of the defendant consenting to the matter to be heard in a summary jurisdiction, notwithstanding her conduct by proceeding with the matter in the Magistrates Court, the appeal was granted. If there was record of the defendant consenting to the matter to be dealt with by way of a summary offence, the matter would not have been a trial on indictment.[12] This also demonstrates the importance of maintaining a written record when a defendant consents to the matter being tried as a summary offence.[13]

3. SUPREME COURT OR DISTRICT COURT

Section 80 of the *Constitution* has been confirmed to exclude the ability to apply for a trial by judge alone. While a waiver is a right in South Australia, it still is applicable with some limitations. Section 7(2) of the *Juries Act 1927* (SA) will not permit an election where the accused is charged with a minor indictable offence AND the accused has elected to be tried in the District Court.

[10] *Cheng v The Queen* (2000) 203 CLR 248 at [128]-[129].
[11] *Mattner v Director of Public Prosecution (Cth)* [2011] SASC 89 at [51].
[12] *Mattner v Director of Public Prosecution (Cth)* [2011] SASC 89 at [56].
[13] *Mattner v Director of Public Prosecution (Cth)* [2011] SASC 89 at [57].

4. JOINTLY TRIED OFFENCES

Section 7(3) of the *Juries Act 1927* (SA) will not allow an accused who has been jointly tried of an offence, to elect, unless the other jointly accused party(ies) consent to the election.

5. DIRECTOR FOR PUBLIC PROSECUTION APPLICATION

In some limited circumstances the Director for Public Prosecution may apply for an order that an accused be tried by judge alone. Where an information is presented to the Court under section 103 of the *Criminal Procedures Act 1921* (SA) and the Director has been presented with evidence under s 275 of the *Criminal Law Consolidation Act 1935* (SA) which includes a charge of serious and organised crime offence. The court may make the order if it considers the order if it is in the best interests of justice.

May also be made on application of the Director if there is a real possibility of an offence being committed in relation to a member of the jury.

Appeal Alert

Where the Director has made application, the order may be appealed in the same manner as any decision that concerns an issue antecedent to trial. See *Juries Act* s 7(3)(a) and *Criminal Procedures Act 1921* (SA) s 157(1)(d).

6. DECISIONS

A jury may only assess the evidence provided in the trial under the directions of the judge in relation to judicial directions. However, 'Confirmation biases ("tunnel vision") may affect the way juries decide on their verdicts. Confirmation biases are errors in jurors' information processing and decision-making which manifest as a tendency for jurors to perceive, search for, interpret or remember information is a way that "confirms" their preconceptions, biases or pre-existing beliefs. Jurors may selectively collect new evidence (and exclude other evidence) interpret evidence in a biased way or selectively recall information from memory'.

A Judge may make any decisions that could have been made by a jury and in addition, any decisions relating to law. It has been argued that judges in criminal trials are at risk of subconsciously identifying more closely with the Crown and being more likely to be persuaded by prosecutors who more frequently appear before them and more frequently adduce the weight of evidence that secures convictions.

However, 'in the view of their discipline and experience and because they are required to provide written reasons which may be subject to appeal, the decision-making of judges sitting without a jury is likely to be thorough and robust.'

7. REASONS FOR THE DECISION

There is no legislative or common law that requires a jury to provide reasons for their decision. ‘Advocates of judge-alone trials emphasise the lack of transparency and accountability in jury deliberations and suggest that juries can be bigoted or perverse and convict upon only weak evidence.’

Conversely, a judge as the trier of fact must give reasons for a decision.

Appeal Alert

A verdict by a jury is not normally appealable by Prosecution (*Criminal Procedures Act 1921* (SA) s 157). However, a verdict by a judge or a direction to a jury to acquit is appealable and may be scrutinised (*Criminal Procedures Act 1921 (SA)* s 157(1)(b)).

8. VERDICT

A judge must generally make a decision in relation to whether the case has been proven beyond reasonable doubt. However, the decision may be appealable as per point 7.

The *Juries Act 1921* (SA) states that within the first 4 hours of deliberation, a jury may only return a unanimous verdict. However, after 4 hours the jury may return a majority verdict (see *Juries Act 1927* (SA) s 57(4) for combinations of a majority verdict) (excluding Murder or Treason; *Juries Act 1927* (SA) s 57(2)) Furthermore, if no verdict can be reached after 4 hours, the jury may be discharged without providing a verdict and a retrial ordered pursuant section 59 of the *Juries Act 1921* (SA).

Furthermore, it has been the common practice of the Courts, that it is 'within a trial judge's discretion to inform the jury of their right to bring in a verdict of not guilty at any time after the close of the prosecution case'[14] However, the High Court have held that *Prasad Direction* is 'unsuited to any trial of legal or factual complexity or to the trial of one or more accused'.[15] 'If there is evidence (even if tenuous or inherently weak or vague) that is capable of supporting a verdict of guilty, the matter *must* be left to the jury.[16] 'A jury is not fully equipped to make that decision until and unless they have heard all of the

[14] *R v Prasad* (1979) 23 SASR 161.
[15] *Director for Public Prosecutions Reference No 1 of 2017* [2019] HCA 9 at [51].
[16] *Director for Public Prosecutions Reference No 1 of 2017* [2019] HCA 9 at [56].

evidence, counsel addresses and the judge's summing-up. Anything less falls short of the trial according to law to which both the accused and Crown are entitled.[17]

8.1. Procedure after a jury is discharged

In *R v Pacitti*,[18] the defendant was charged with rape and in the alternative indecent assault. After the jury had retired for verdict, one of the jurors advised the Court that they had formed an opinion based on social media posts and discussed this opinion with the other jury members. A mistrial was subsequently declared, and the jury was discharged. The defendant then made an application to the Court for an extension of time to elect for a trial by jury. The extension was opposed by Prosecution. However, the extension was granted and the trial judge retired to consider a verdict.

The appeal points were as follows:[19]

The first trial of the respondent having ended upon the trial judge discharging the jury and declaring a mistrial, the trial judge erred in delivering a verdict.

The trial judge erred in extending the time for the respondent to elect for the first trial to proceed without a jury, in granting the application that the first trial proceed before her Honour without a jury, and in determining to proceed with the first trial and deliver a verdict.

President Livesey held:[20]

As the power in r 42(5) is concerned with facilitating the right of an accused to select one of two alternate modes of trial after the first arraignment, once the jury has "taken the defendant into their charge to try the issues" and the trial has begun,[21] the power to extend time under r 42(5) ceases to remain available. In effect, the "window" within which the accused may ask for an extension of time

[17] *Director for Public Prosecutions Reference No 1 of 2017* [2019] HCA 9 at [57].
[18] [2022] SASCA 108.
[19] *R v Pacitti* [2022] SASCA 108 (see headnote).
[20] *R v Pacitti* [2022] SASCA 108 at [41] (Doyle and David JJA agreed at [103]).
[21] *Attorney-General's Reference No. 1 of 1988* (1988) 49 SASR 1. 5 (King CJ with whom Millhouse J agreed) followed in *R v Pacitti* [2022] SASCA 108 at [41].

to elect for a trial by judge alone has closed: the window for seeking an extension opens the day of the accused's first arraignment and it closes when the jury take the defendant into their charge to try the issues.

Even in the circumstance where no evidence had been put forward to the jury, Livesey P held that to entertain an application would in essence create a "hybrid trial" and could not be supported by r 42(5).[22]

President Livesey further held:[23]

Whilst the trial judge and the parties were in this case appropriately concerned to minimise the extent to which time and cost were wasted, expedition and efficiency could not be permitted to trump the fair and just resolution of criminal proceedings concerning serious charges in which each of the community, complainant and the accused had a legitimate interest.

Extending further, Doyle and David JJA held:[24]

Rule 44 provides that where there has been a mistrial (or a jury has been unable to reach a verdict, or an appeal against conviction has been allowed) the accused may make an election (or revoke a previous election) within 28 days after being remanded for a new trial.

The Court further held:[25]

Whilst there is no express temporal limit upon the discretionary power under r 42(5), it nevertheless seems to us that it ought no longer be exercisable after the point at which the trial has commenced in the sense that the accused has unequivocally embarked upon, or at lease acquiesced in, a jury trial. By this point in time, the accused has irrevocably proceeded with a mode of trial that is inconsistent with the alternative mode of trial, namely trial by judge alone.

…

To permit this to occur would be contrary to the notion that once an accused person has been placed in the charge of the jury, the outcome of the trial lies in

[22] *R v Pacitti* [2022] SASCA 108 at [42]-[43] (Doyle and David JJA agreed at [94]).
[23] *R v Pacitti* [2022] SASCA 108 at [46].
[24] *R v Pacitti* [2022] SASCA 108 at [75].
[25] *R v Pacitti* [2022] SASCA 108 at [128].

the hands of the jury and must end in a verdict from the jury (subject only to there being some basis for declaring a mistrial and discharging the jury).[26]

In summarising, the right to make application for an extension of time to elect for trial by jury will be enlivened after the first arraignment and will be extinguished once the accused is arraigned in the presence of the jury. Furthermore, once the trial has concluded (by a verdict or declaration of a mistrial) the power of the judge to make any further orders or deliver a verdict would not be permissible. However, once the matter has been relisted for a subsequent trial, the accused right to elect would again be enlivened.

In *R v Scott*,[27] Sulan J heard an application for an extension of time to make an application for trial by judge on the first day of re-trial and apparently after arraignment on the day of trial. In this matter, his Honour held that given the nature of the evidence that would be provided to the court, it would be unjust to refuse the application for abridgment. However, in light of the more recent decision of *R v Pacitti,*[28]given the accused had been placed in the charge of the jury, this application would not have likely succeeded.

9. INFLAMMATORY PUBLICITY

The Courts have recognised that jurors may have been influenced by inflammatory publicity.[29] This may result in preconceived biases that will undoubtedly influence their decision, irrespective of judicial warnings. Furthermore, this has been exacerbated by the presence of social media.

In *R v GSR (No.1)*[30] the presiding judge held, as an alternative to a stay on proceedings, a judge may make an order on the grounds of inflammatory

[26] *R v Pacitti* [2022] SASCA 108 at [132].
[27] [2013] SASC 29 (7 March 2013).
[28] [2022] SASCA 108.
[29] *R v GSR (1)* [2011] NSWDC 14 at [11].
[30] [2011] NSWDC 14.

publicity. Courts in other jurisdictions have recognised that while a juror may forget things over time, the internet does not.

'Mock-jury studies have … demonstrated the powerful effect of pre-trial publicity on jury verdicts particularly by the influence of interpretation and discussion of trial evidence during deliberations. Jurors exposed to negative pre-trial publicity have been shown to be significantly more likely than their non-exposed counterparts to discuss ambiguous trial facts in a manner that supported the prosecution.'[31]

'Jurors exposed to pre-trial publicity were also found to be either unwilling or unable to adhere to instructions admonishing them not to discuss pre-trial publicity' [32]

Consequently, this may provide support to a trial by judge alone, when there has been inflammatory publicity surrounding the preceding events to the trial.

10. OBJECTIVE COMMUNITY STANDARDS

In other jurisdictions, it is thought to be unlikely the court will make an order of trial by judge alone (*R v GSR (3)* [2011] NSWDC 17). However, research has demonstrated that this may not be indicative of the actual refused applications.[33] Notwithstanding, while this matter has been approached in South Australia

[31] Russ Scott, 'Trial by Judge without Jury – Some Contemporary Reflections' (2017) 26 *Journal of Judicial Administration* 157, 173 in citing M B Kovera, 'The Effects of General Pre-trial Publicity on Juror Decisions: An Examination of Moderators and Mediating Mechanisms' (2002) 26 *Law and Human Behaviour* 43-72; C L Ruva, C McEvoy and J B Bryant, 'Effects of Pre-trial Publicity and Collaboration on Juror Biases and Source Monitoring Errors' (2007) 21 *Applied Cognitive Psychology* 45–67; S M Fulero, 'Empirical and Legal Perspectives on the Impact of Pre-trial Publicity: Effects and Remedies' (2002) 26 *Law Human Behavior* 1–2; C L Ruva and M A LeVasseur, 'Behind Closed Doors: The Effect of Pre-trial Publicity on Jury Deliberations' (2012) 18 *Psychology Crime & Law* 431–452.

[32] Russ Scott, above n 24, 173.

[33] See for further discussion Jodie O'Leary, 'Twelve Angry Peers or One Angry Judge: An Analysis of Judge Alone Trials in Australia' (2011) 35 Crim LJ 154, 159-160.

previously, it remains that the accused has an unfettered right to elect for trial by judge alone.[34]

11. TECHNICAL OR COMPLEX EVIDENCE

If the evidence being presented by the defence is beyond the aptitude of an average person to comprehend, a jury may be a disadvantage. 'It can be argued that jury pools are not, in any meaningful way, "representative of the community". Prospective jurors from management or business as well as accountants and other professionals may avoid jury duty or are challenged during jury selection.' This results in the limited jury pool possibly struggling with sophisticated or complex forensic evidence.[35] While is cannot be excluded that a judge may even grapple with highly technical concepts, given they are generally of a high aptitude, their unique skill set may reduce the risks associated with a technical case. Simply, a judge will have a better ability to understand highly technical or legal concepts than a juror.

12. PRESENTATION OF THE ACCUSED

Depending on the offence, the way the accused presents may bear upon preconceptions and biases that the jury may hold. It is established that people will generally have preconceptions and biases based on the appearance of a person. Trial judges are academically trained with a high aptitude. A judge will likely have a better ability to detach from biases and perceptions. (Also see point 13)

[34] Jodie O'Leary, 'Twelve Angry Peers or One Angry Judge: An Analysis of Judge Alone Trials in Australia' (2011) 35 Crim LJ 154, 166.
[35] Russ Scott, above n 24, 170-171 citing C Davies and C Edwards, ''A Jury of Peers': A Comparative Analysis' (2004) 68 *Journal of Criminal Law* 150; A Gray and E Barnett, 'Sustainable Juries: Thinking Outside Peer Jury Criminal Trials' (2010) 20 *Journal of Judicial Administration* 18.

13. ISSUES OF CREDIBILITY

'While the trial judge may be deprived of the advantage of free interchanges of ideas with peers he or she has the advantage that ordinary members may lack. Trial judges have consistent and continuing experience of fact-finding and of the making of decisions in a situation that demands an objective and dispassionate mind.'[36] However, jury members may be affected by confirmation biases. 'Confirmation biases ("tunnel vision") may affect the way juries decide on their verdicts. Confirmation biases are errors in jurors' information processing and decision-making which manifest as a tendency for jurors to perceive, search for, interpret or remember information is a way that "confirms" their preconceptions, biases or pre-existing beliefs. Jurors may selectively collect new evidence (and exclude other evidence) interpret evidence in a biased way or selectively recall information from memory'.[37]

14. GROUNDS FOR EXTENSION OF TIME

The *Joint Criminal Rules* stipulate that an election for trial by judge must be made prior to the first arraignment.[38] However, "the Court may extend the time for making or revoking an election (under the rules) if satisfied that there are special reasons for doing so or that it would be unjust not to do so notwithstanding the prescribed period has expired".[39]

In *R v Scott*, Sulan J held:[40]

A Judge may dispense with compliance with all or any of the requirements of these Rules, if the Judge is satisfied that there are special reasons for so doing or that it would be unjust not to do so.

[36] *Coates v Western Australia* [2009] WASCA 142.
[37] Russ Scott, Above n 24, 172.
[38] *Joint Criminal Rules 2022* (SA) r 94.5.
[39] *Joint Criminal Rules 2022* (SA) r 94.1(2).
[40] [2013] SASC 29 at [16].

In this case it was held, because of the appeal, the nature of the evidence that would be tendered because of the re-trial was a special reason.

In *R v Jeisman*,[41] it was held that delay by Prosecution in providing crucial evidence in order for the accused to make the election was a special reason. In this matter, Judge Slattery held:[42]

The meaning of the expression "special reasons" has been considered in a number of cases and in a number of contexts. In summary, it may be said that what may or may not constitute "special reasons" is a question of fact.[43] In his decision in *Acre Development Pty Ltd v National Companies and Securities Commission and Anor*[44] O'Loughlin J canvassed the relevant authorities and preferred the narrower interpretation as enunciated by Cox J in *Barwick v Crichton* at [44] as follows:-

The meaning of the words "special reasons" has been considered in a large number of cases. In *Gassner v Frost* [1940] SAStRp 38; [1940] SASR 295, Napier J said that the words "must refer to some facts or circumstances which justify the Court in treating the case as one which falls outside the ordinary purview of the section, and referred to a contravention that was clearly distinguishable from the general run of the cases that Parliament had in mind when it provided for the penalty of disqualification. That interpretation was adopted by Bray CJ in *Baskerville v Martin* where his Honour added: "nothing which is common or usual factor in the ordinary typical case can constitute a special reason. There must be something extraordinary, unusual or atypical.

[41] [2014] SADC 11.
[42] [2014] SADC 11 at [15].
[43] *Motor Vehicles Act 1959* s102(2); *Baskerville v Martin* [1967] SASR 142; *Saturno v Dunsmore* (1981) 28 SASR 4; *Barwick v Crichton* (1983) 36 SASR 142; *Jurowshi v Sallis* (1984) 36 SASR 261 at 263; *Jess v Scott* (1986) 12 FCR 187; *R v Von Einem* (1985) 38 SASR 207 at 271 cited in *R v Jeisman* [2014] SADC 11 at [15].
[44] (1987) 46 SASR 238 at 243-245 cited in *R v Jeisman* [2014] SADC 11 at [15].

In *Fairclough v Stewart-Rattray* (2012) 278 LSJS 435 at [6] Judge Millsteed said the following:-

First, factors which may constitute special reasons cannot be exhaustively determined and all that can be said is the "special" is the antithesis of "general"; second, nothing which is a common or usual factor in the ordinary typical case can constitute a special reason; and third, there must be something extraordinary, unusual or atypical. It is clear that special reasons may exist in a particular case as a result of the existence of single factor or combination of factors though, in the latter case, none of them in isolation would be sufficient.

The test as to whether "special reasons" exist appears to be interpreted as two primary considerations:[45]

1. To avoid abuse of court processes, there must be a genuine explanation as to why the right was not exercised earlier; or
2. Whether as a matter of fact, it may be shown that it would be unjust not to grant the extension of time.

However, it is not within the power of a judge to grant an extension of time after the accused has been arraigned on the day of trial, before the jury, and been placed in the charge of the jury.[46]

15. FAILURE TO ADVISE

Failure to adequately advise a client could result in a miscarriage of justice. In citing various authorities, Kourakis CJ cited with approval:[47]

[A] miscarriage of justice has two aspects, process and outcome. If the conduct of counsel has deprived the accused of a fair trial according to law, that will give rise to a miscarriage of justice without regard to whether counsel's conduct might have affected the outcome.[48]

[45] *R v Jeisman* [2014] SADC 11 at [22].
[46] *R v Pacitti* [2022] SASCA 108.
[47] *R v Kennedy* [2017] SASCFC 170 [64] per Kourakis CJ.
[48] *TKWJ v The Queen* (2002) 212 CLR 124 [76] (McHugh J); *Nudd v The Queen* [2006] HCA 9 [3] – [7] (Gleeson CJ)

There are two principles that give rise to a miscarriage of justice:[49]

The *first* is the general rule that a party is bound by the conduct of their counsel who have a wide discretion as to the manner in which proceedings are conducted. The second is the great breadth of the jurisdiction of an Australian Court of Criminal Appeal to set aside a conviction on the basis of "miscarriage of justice".

In citing Birks, Kourakis CJ held:[50]

We consider that there is an important distinction between two classes of cases to which the above principles in Birks may be applied. The first, and much more common, class is that of a defendant complaining about inadequate legal representation in court or inadequate legal advice, such as how to make a choice between available options. As to this first type of case, matters concerning forensic choices by lawyers and forensic advantages and disadvantages will be of importance in this area. There are many authoritative discussions of how such complaints on appeal are to be resolved.[51]

However, the second, and much less common, class of case, is that of a defendant complaining about not having received any advice from his lawyer informing him of the very existence of a choice between options (or of positively erroneous advice in that regard). This second type of case generally has the potential to give rise to a much greater risk of miscarriage of justice in that the lack of an informed choice by a defendant concerning an important matter may well not be excused by reference to forensic choices by legal representatives.

However, simply advising will not alleviate an allegation that the legal practitioner has failed to advise their client.

[49] *R v Birks* (1990) 19 NSWLR 677 (Gleeson CJ, McInerneyJ and Lusher JA).
[50] *R v Kennedy* [2017] SASCFC 170 [61]-[62] per Kourakis CJ.
[51] High Court and South Australian decisions, in chronological order, include: *R v Birks* (1990) 19 NSWLR 677; *R v Oliverio* (1993) 61 SASR 354; *R v Scott* (1996) 131 FLR 137; *R v Kyriacou* [2000] SASC 312; *TKWJ v The Queen* (2002) 212 CLR 124; *Ali v The Queen* (2005) 214 ALR 1; *Nudd v The Queen* (2006) 80 ALJR 614.

16. OBTAINING SIGNED INSTRUCTIONS

In *R v Kennedy*,[52] the Full Court of the Supreme Court of South Australia held that failure to obtain signed instructions could amount to a miscarriage of justice.

Halsbury's Laws of Australia concerning duties specific to criminal defence lawyers are very well known: "Written instructions from the client prove invaluable to guard against clients who allege that they have not been informed of their options"[53]

Chief Justice Kourakis held in citing Lawyers' Professional Responsibility:

> It is prudent, especially where the client may have difficulties in deciding on a plea or on whether to give evidence, for the lawyer to take written instructions. Erroneous advice by defence counsel as to the effect of a guilty plea may provide grounds for an appeal for a miscarriage of justice, although this is unlikely to succeed if the evidence shows that the decision to plead guilty was freely and voluntarily made, and that the erroneous advice was no more than one contributing factor amongst others in making that decision, especially where the case against the client is overwhelming. [54]

Whether to provide an audit trail,[55] avoiding subsequent costs and investigation,[56] adhere to appropriate standards of professional conduct,[57] or ensuring contemporaneous note taking,[58] signed written instruction should remain a standard practice. The complications created in failing to obtain signed instructions was clearly evident in *Mattner v Director for Public Prosecution (Cth)*[59] where there was no record of the defendant electing to be tried in a summary jurisdiction.

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[52] [2017] SASCFC 170.
[53] *R v Kennedy* [2017] SASCFC 170 at [40] per Kourakis CJ.
[54] Dal Pont, Lexis Nexis Butterworths, 15,161, [2080].
[55] *R v Kennedy* [2017] SASCFC 170 [42] per Kourakis CJ in citing *Solicitors Manual*.
[56] *R v Allison* (2003) 138 A Crim R 378, [2] cited in *R v Kennedy* [2017] SASCFC 170 [43] per Kourakis CJ.
[57] *Colley v R* [2015] WASCA 79, [14] (McLure P and Mazza JA substantially agreed) cited in *R v Kennedy* [2017] SASCFC 170 [44] per Kourakis CJ.
[58] *Colley v R* [2015] WASCA 79, [14] (McLure P and Mazza JA substantially agreed) cited in *R v Kennedy* [2017] SASCFC 170 [44] per Kourakis CJ.
[59] [2011] SASC 89 at [57].

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