Supreme Court

New South Wales

Case Name:	R v Dawson
Medium Neutral Citation:	[2020] NSWSC 1221
Hearing Date(s):	15-31 July 2020
Decision Date:	11 September 2020
Jurisdiction:	Common Law
Before:	Fullerton J
Decision:	1. The notice of motion seeking an order for a permanent stay of the trial is dismissed. 2. The trial is not to commence before a jury before 1 June 2021. 3. The parties are to jointly apply to the chambers of the Criminal List Judge by 5pm on 14 September 2020 for a date when the trial will be called over by his Honour.
Catchwords:	CRIMINAL LAW – application for permanent stay of indictment on individual and composite grounds – applicant charged with the murder of his wife in 1982 – ODPP's decision to prosecute in 2018 reversing earlier decisions not to prosecute – extensive pre-trial publicity and commentary, including a podcast series in 2018 in which the applicant's solicitor and Deputy State Coroner were interviewed – whether podcast caused irremediable prejudice justifying permanent stay of proceedings – whether apprehended unfair consequences of pre-trial publicity / commentary are capable of being relieved against by directions to jury and other orders – whether applicant is irremediably prejudiced by an unreasonable delay in initiating the prosecution – whether police misconduct has caused incurable prejudice – whether decision to prosecute was influenced by pre-trial publicity and commentary, including by NSW Commissioner of Police – whether

	that amounted to an abuse of process justifying a permanent stay of proceedings
Legislation Cited:	Coroners Act 1980 (NSW) (repealed) Courts Suppression and Non-publication Orders Act 2010 (NSW) Criminal Procedure Act 1986 (NSW) Director of Public Prosecutions Act 1986 (NSW) Evidence Act 1995 (NSW) Jury Act 1977 (NSW) Police Regulation (Allegations of Misconduct) Act 1978 (NSW)
Cases Cited:	Dupas v The Queen (2010) 241 CLR 237; [2010] HCA 20 Eastman v Director of Public Prosecutions (No 13) [2016] ACTCA 65 Gilbert v The Queen (2000) 201 CLR 414; [2000] HCA 15 Hinch v The Attorney-General (Vic) (1987) 164 CLR 15; [1987] HCA 56 Jago v The District Court (NSW) (1989) 168 CLR 23; [1989] HCA 46 Moti v The Queen (2011) 245 CLR 456; [2011] HCA 50 Murphy v The Queen (1989) 167 CLR 94; [1989] HCA 28 R v Davis (1995) 57 FCR 521 R v Littler (2001) 120 A Crim R 512; [2001] NSWCCA 173 Rogers v The Queen (1994) 181 CLR 251 at 286; [1994] HCA 42 Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions (2018) 272 A Crim R 69; [2018] HCA 53 The Queen v Glennon (1992) 173 CLR 592; [1992] HCA 16 Tuckiar v The King (1934) 52 CLR 355; [1934] HCA 49 Volkers v R [2020] QDC 25
Category:	Principal judgment
Parties:	Christopher Michael Dawson (Applicant/Accused) The Crown (Respondent)
Representation:	Counsel:

P Boulten SC (Applicant/Accused)
C Everson (Respondent/Crown)

Solicitors:
Greg Walsh and Co Solicitors (Applicant/Accused)
Office of the Director of Public Prosecutions NSW (Respondent/Crown)

File Number(s): 2018/372527

Publication Restriction: Nil.

JUDGMENT

The notice of motion and the evidence

1 On 3 April 2020, Christopher Dawson was arraigned on an indictment dated 30 March 2020 charging him with the murder of his then wife, Lynette Dawson, at Bayview in the State of New South Wales on or about 8 January 1982. On his arraignment he entered a plea of not guilty.

2 By a notice of motion dated 7 April 2020, Mr Dawson (the applicant) applies for an order that the indictment be permanently stayed on the following grounds:

(1) The trial of the applicant will be productive of an injustice and incurable unfairness where the allegation of murder involves events which occurred in 1982.

(2) The applicant will be severely prejudiced in his defence as a result of the contamination of evidence and/or collusion between the Crown witnesses.

(3) The combination of delay and the contamination/collusion of Crown witnesses has prejudiced the applicant's ability to defend the allegation of murder such that his trial will be so unfairly or unjustifiably oppressive that its continuation constitutes an abuse of process.

3 The evidence adduced on the application was voluminous. A supporting affidavit sworn by Mr Walsh, solicitor for the applicant, annexed five lever arch folders of material. The affidavit was read without objection. The material annexed to Mr Walsh's affidavit included the brief of evidence served on the applicant following his extradition from Queensland under warrant on 6 December 2018. It also included the Crown case statement dated 23 April 2020 which was filed in this Court in accordance with the Crown's obligations under s 142 of the *Criminal Procedure Act 1986* (NSW).

4 The annexed material also included archived records of earlier investigations by NSW police, first into the disappearance of Lynette Dawson by the Missing Persons Unit in 1982 and then three successive police investigations into her suspected murder.

5 The first police investigation commenced in May 1990 and was suspended in May 1992. The officer in charge of the investigation was Detective Senior Constable Paul Mayger. It will be referred to in this judgment as "the Mayger investigation".

6 The second police investigation commenced in July 1998 and continued from time to time until late 2014. The officer in charge of that investigation was Detective Senior Constable Damian Loone. That investigation was given the operation name "Luzon". It will be referred to in this judgment as "the Loone investigation". Detective Loone prepared a brief of evidence for the consideration of Acting Deputy State Coroner Jan Stevenson in February 2001 and a further brief of evidence for Deputy State Coroner Carl Milovanovich in February 2003.

7 Both inquests were terminated pursuant to s 19 of the *Coroners Act 1980* (NSW) (since repealed) and the matter referred to the Office of the Director of Public Prosecutions (ODPP). In November 2001, and again in July 2003, the ODPP determined that there was insufficient evidence to support a prosecution of the applicant for murder.

8 The third police investigation commenced in July 2015. The officer in charge of that investigation was Detective Senior Constable Daniel Poole of the Unsolved Homicide Team. That investigation was given the operation name "Scriven". It will be referred to in this judgment as "the Poole investigation". That investigation culminated in a further brief of evidence being forwarded to the ODPP on 9 April 2018. Detective Poole's investigation continued after that date. On or about 3 December 2018, the ODPP notified the NSW police of its decision to prosecute the applicant on indictment for the murder of Lynette Dawson. He was arrested under warrant from Queensland on 5 December 2018. A further seven statements were served as part of the brief of evidence

after the ODPP determined the evidence was sufficient to support a prosecution for murder and after the applicant was arrested on that charge.

9 A large number of audio and video files were also tendered on the application, including each of the sixteen successive episodes and an additional "Special Update Episode" of a podcast entitled *The Teacher's Pet* which was broadcast on various internet platforms between 18 May 2018 and 5 April 2019. The episodes were of varying lengths, between forty minutes and two hours. A full transcript of each podcast was also tendered, comprising a lever arch folder extending over 595 folio pages. Excerpts of an *Australian Story* episode entitled "Looking for Lyn", broadcast on the ABC in August 2003, and excerpts of both *A Current Affair* dedicated to Lynette Dawson's disappearance broadcast in October 2015 and *60 Minutes* broadcast in September 2018 were also exhibited.

10 Finally, the applicant adduced oral evidence from six witnesses (of whom four are to be called in the Crown case at the applicant's trial).1 It was agreed between the parties that Mr Boulten SC would be permitted to cross-examine the witnesses without the need for a grant of leave under s 38 of the *Evidence Act 1995* (NSW). The Crown prosecutor's cross-examination of the six witnesses followed Mr Boulten's cross-examination.

11 The Crown did not call any additional oral evidence on the application. The Crown did, however, tender a number of documents, including the proposed Crown witness list,[1] identifying each of the 41 civilian witnesses referable to their relationship with either the applicant or Lynette Dawson (or both); the date of their statement(s) and/or police interviews; whether they gave evidence at the second inquest and whether they were interviewed for the first time in the Poole investigation as a result of the broadcast of the podcast. There are five witnesses in the latter category. A further sixteen witnesses were identified as having given statements for the first time in the course of the Poole investigation.

[1] Julie Andrew, Beverly McNally, Damian Loone and Daniel Poole will be called to give evidence in the Crown case at the applicant's trial; Hedley Thomas and Rebecca Hazel will not be called.

The applicant's submissions in summary

12 In closing submissions, Mr Boulten refined and expanded the grounds upon which a permanent stay of the applicant's criminal trial is sought. Although he did not formally abandon any of the three grounds in the notice of motion, or the submissions filed by Mr Walsh in support of those grounds, in final submissions grounds 1 and 3 attracted greater prominence, each of which was the subject of elaboration and refinement. Mr Thomas, as the co-producer and presenter of the podcast, was cross-examined by Mr Boulten about audio recordings of conversations he had with various people, including people who he must have understood would be Crown witnesses at any trial of the applicant.[2] Although it appears that was done with a view to suggesting that he sought to influence them and any evidence they might ultimately give, after Mr Boulten's cross-examination of Ms Andrew and Ms McNally, any suggestion that their evidence was influenced by their developing friendship with Mr Thomas was not the subject of closing submissions. Ultimately there was no submission advanced that there was any evidence of actual collusion or contamination of witnesses because of Mr Thomas' association with any of the Crown witnesses he interviewed for the podcast.

The issue of delay

13 Mr Boulten's closing submissions and the Crown's submissions in reply were developed in the context of what the evidence revealed about the course of the criminal proceedings from May 1990, when the Mayger investigation commenced, to the applicant's arrest on 5 December 2018 during the currency of the Poole investigation and thereafter as that investigation continued. Mr Boulten submitted that the cumulative inadequacies of successive police investigations into Lynette Dawson's "disappearance", in particular, a failure to investigate reported sightings of her in Gosford and Narraweena in 1982 and in Terrigal in 1987; a failure to trace her movements via two purchases of clothing by the tender of her Bankcard at shops on 12 and 27 January 1982; a failure to trace her whereabouts via an STD phone call she allegedly placed on 9 January 1982 to Northbridge Baths (a public tidal pool in Sydney Harbour); and a failure to trace phone calls to the family home in Bayview in the weeks that

[2] Exhibit 12.

followed, are failures that cannot now be remedied, where banking and telephone records are no longer available and where material witnesses are deceased and that only a permanent stay can protect the applicant from an unfair trial: *R v Littler* (2001) 120 A Crim R 512; [2001] NSWCCA 173.

14 Mr Boulten submitted that the passage of 36 years between 8 January 1982 (the date upon which the applicant is alleged to have murdered his wife) and 5 December 2018 (when he was charged with her murder) constitutes an unacceptable delay which will, of itself, inevitably impact adversely on the fairness of his trial in ways that are incapable of practical remedy in the adversarial context of a criminal trial.

15 Mr Boulten emphasised that not only is the delay in the commencement of proceedings no fault of the applicant, but the previous decisions of the ODPP in 2001 and 2003 not to prosecute him, decisions which were confirmed in 2011 and 2012, have placed him at risk of being prosecuted for that offence at successive intervals and that, of itself, has been productive of significant oppression. Mr Boulten submitted both the length of delay per se and the oppression that it generates are factors which have a recognised and relevant bearing on the exercise of the discretion whether or not a permanent stay should be granted. Mr Boulten submitted that on this application they should be afforded preponderant weight.

Police misconduct

16 Mr Boulten also submitted that the conduct of Detective Loone, the officer in charge of the second homicide investigation, was both negligent and improper, in large part because of his fixed and tendentious view that the applicant had in fact murdered Lynette Dawson, when the proper focus of his investigation should have been into Lynette Dawson as missing or deceased. Mr Boulten submitted that Detective Loone deliberately acted in breach of his duty as a police officer to fully and fairly investigate all the circumstances bearing upon Lynette Dawson's disappearance, including, but not limited to, the reported sighting of her after 8 January 1982, the date the applicant is alleged to have murdered her. Mr Boulten submitted that Detective Loone's breach of duty has

caused incurable prejudice to the applicant in the conduct of his defence: *Littler* at [25].

Pre-trial publicity / commentary

17 Finally, Mr Boulten submitted that the nature and extent of public commentary concerning Lynette Dawson's disappearance and the nomination of the applicant as the person who killed her has caused the applicant significant unfairness. That commentary and publicity is not limited to the podcast, but also included the *60 Minutes* and *Studio 10* television programs broadcast on September and August 2018. Both programs endorsed the themes of the podcast and publicised Mr Thomas' views about the applicant. Mr Boulten submitted, however, that it is the format, journalistic style, tone and content of the podcast itself which exposes the applicant to the risk of his trial being irredeemably unfair.

18 According to the evidence tendered on the application and accepted by the parties to be the best available evidence, the podcast was "downloaded" over 1 million times by listeners in "the Sydney region" (the presumed catchment of a jury pool for a trial of the applicant in Sydney) between May 2018 and July 2019 before Nationwide News Pty Ltd "took down" the podcast from *The Australian's* website.[3]

19 The applicant submitted the broadcasting of the podcast over successive months between May 2018 and December 2018, together with a follow-up episode in April 2019, and the fact that all sixteen episodes remain available on a variety of platforms readily accessible to the public, and with its potential impact on prospective jurors so obviously destructive of the applicant's fundamental right to a fair trial, irrespective of the measures that this Court has available to protect him from its prejudicial effect, a permanent stay of his trial is the only effective remedy.

[3] A folio of these audio recordings with Mrs Jenkins were tendered in the application as Exhibits J1(5), J1(7), J1(16)-(27), J1(30).

20 It is the applicant's submission that the unqualified assumption that the applicant is guilty of murder as the dominating theme of the podcast is evident from the opening words of each episode:[4]

> HEDLEY THOMAS: This is episode … of The Teacher's Pet. Listeners are advised, this podcast contains coarse language and adult themes. This podcast series is brought to you by the Australian …
>
> NEWS PRESENTER: Lynette Dawson was reported missing by her husband, former Newtown Jets Rugby League star, Chris Dawson.
>
> JC: He said, I was going to get a hit man to kill Lyn, and he rang me and said, Lyn's gone. She isn't coming back.
>
> JULIE ANDREW: I just want justice, and I'd love her little girls to know she didn't leave them.

21 The narrative is then developed by Mr Thomas, as co-producer and presenter of the podcast, around the framework of what he pronounces as the failures and inadequacies of successive police investigations to gather evidence of the applicant's guilt and the successive failure on the part of the ODPP to prosecute him for murder.

22 Mr Boulten also submitted that there is a real risk that the podcast has influenced prospective Crown witnesses, whether consciously or unconsciously, to reconsider their memories of events long past and to do so through Mr Thomas' mindset, a mindset which Mr Thomas accepted in his evidence countenanced no scenario other than that the applicant was guilty of murder and that the applicant has told a succession of lies over many years to conceal his guilt.

23 Mr Boulten submitted that the risk of unfairness by reason of the publication of the podcast and the commentary it has generated is so pervasive, and its impact so difficult to accurately gauge, that it will be practically impossible to empanel a jury who will adhere to their obligations to determine whether the Crown has proved its case beyond reasonable doubt, and to do so strictly in accordance with the evidence adduced in the trial and in compliance with judicial directions, including the obligation of individual jurors to approach their consideration of the evidence by affording the applicant his entitlement to the presumption of innocence.

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[4] Affidavit of Angela Skocic dated 23 July 2020.

24 Mr Boulten submitted that by both the journalist and, by extension, Nationwide News as the publisher of the podcast, calling repeatedly for Lynette Dawson and her family to be afforded "the justice *they* deserve", and then by enlisting Michael Fuller, the NSW Commissioner of Police, to their cause, was in serious derogation of the applicant's right to be presumed innocent and for his trial to be conducted in a criminal court, not in the court of public opinion replete as that forum is with unqualified opinion and unregulated speculation, bias and prejudgment.

Abuse of process

25 Finally, Mr Boulten submitted that by the Commissioner of Police directing police officers under his command in August 2018, including Detective Poole, to meet with and cooperate with Mr Thomas in what had become by that date his (the journalist's) persistent call for the applicant to be prosecuted, and then by the Commissioner of Police participating in the podcast whilst the ODPP was continuing to consider the sufficiency of the brief of evidence, should be interpreted by this Court as an improper attempt by the Commissioner to apply pressure to the ODPP to reverse its former decision(s) not to prosecute the applicant in a manner which was biased, improper and unfair, amounting to an abuse of process. Mr Boulten also submitted that the conduct of the Commissioner of Police in participating in the podcast has resulted in a particular and unique pressure being applied to any putative jury to convict the applicant, thereby unfairly and irredeemably prejudicing his right to a fair trial.

The authorities in summary and the parties' reference to them in closing submissions

26 In developing his final submissions, Mr Boulten took the Court to a number of seminal High Court authorities where the principles according to which the Court's inherent power to grant a permanent stay of criminal proceedings, and the grounds upon which that relief might be granted, are discussed, restated and applied.

27 It will be necessary to give close consideration to the various statements (and restatements) of principle in the authorities which have followed and applied *Jago v The District Court (NSW)* (1989) 168 CLR 23; [1989] HCA 46 when the High Court first had occasion to consider whether delay in the prosecution of a

person charged with a serious criminal offence constituted grounds for a permanent stay of an indictment. It will also be necessary to give close consideration to *The Queen v Glennon* (1992) 173 CLR 592; [1992] HCA 16 (and, more recently, *Dupas v The Queen* (2010) 241 CLR 237; [2010] HCA 20) where the High Court considered the circumstances in which adverse pre-trial publicity might give rise to such irremediable prejudice to an accused that an order for a permanent stay of their criminal trial is the only remedy against unfairness. The Court was also taken to the various statements of principle in *Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions* (2018) 272 A Crim R 69; [2018] HCA 53 where the High Court revisited the bases upon which a permanent stay might be granted where it is said that the continuation of criminal proceedings will bring the administration of justice into disrepute such that to allow a trial to proceed would be an abuse of process.

28 It is, however, important at the outset to emphasise what is repeatedly restated in the authorities when the remedy of a permanent stay of criminal proceedings is under consideration. Although there is no definitive category of case where a permanent stay of proceedings will be ordered, a permanent stay of a criminal prosecution has been consistently treated as an extraordinary step for the Court to take, a step which at [106] in *Strickland,* Keifel CJ, Bell and Nettle JJ described as exceptional and rarely justified (see *Jago* 31, 34 per Mason CJ, 60 per Deane J, 76 per Gaudron J; *Glennon* at 605 per Mason CJ and Toohey J; *Dupas* at 250 [33]-[35]). In *Strickland*, their Honours went on to say at [106]:

> There is a powerful social imperative for those who are charged with criminal offences to be brought to trial and, for that reason, it has been said that a permanent stay of prosecution should only ever be granted where there is such a fundamental defect in the process leading to trial that nothing by way of reconstitution of the prosecutorial team or trial directions or other such arrangements can sufficiently relieve against the consequences of the defect as to afford those charged with a fair trial. But, as this Court has also stated, there is, too, a fundamental social concern to ensure that the *end* of a criminal prosecution does not justify the adoption of any and every *means* for securing a conviction and, therefore, a recognition that in rare and exceptional cases where a defect in process is so profound as to offend the integrity and functions of the court as such, it is necessary that proceedings be stayed in order to prevent the administration of justice falling into disrepute. (Emphasis added)

29 Mr Boulten submitted that this case is in that rare category of cases where a number of factors operate together such that there is nothing a trial judge could do in the conduct of the applicant's trial to relieve against the unacceptable risk of unfairness and oppression. He submitted that even if the Court were satisfied that steps can be taken to protect against the risk of unfairness, or to relieve against the impact of oppression occasioned by a delay of 38 years in prosecuting the applicant for murder, whether by judicial direction or by evidentiary rulings or both, the conduct of Detective Loone as the officer in charge of the second homicide investigation between 1998 and 2015; and the conduct of the applicant's former solicitor, Jeffrey Linden (now a Magistrate of the Local Court of NSW); and the conduct of a former judicial officer, Carl Milovanovich (now an Acting Magistrate of the Local Court of NSW), engaging in private and then public dialogue, via the podcast, with Mr Thomas about the applicant's presumed guilt and their views about that fact, is such that the applicant's trial would be an abuse of the Court's process, in part because of the combined effect of their conduct in undermining public confidence in the administration of justice.

30 In short, Mr Boulten submitted that while any one of the separate grounds relied upon in support of a grant of a permanent stay (being an unreasonable delay in the prosecution of the applicant for murder, adverse pre-trial commentary and publicity and an abuse of process, in particular by the Commissioner of Police engaging with Mr Thomas to improperly influence those responsible at law for deciding whether the applicant was to be prosecuted for murder) would be sufficient for a stay to be ordered, in the particular circumstances of this case, those factors, in combination, lead inevitably to no other result.

31 In reply, the Crown submitted that the applicant has failed to discharge the heavy burden of persuading the Court to grant a remedy which will have the effect of the applicant securing immunity from prosecution. In the Crown's submission, to grant the applicant a permanent stay of the indictment charging him with the murder of his wife would inevitably derogate from the substantial public interest in having those charged with the most serious of criminal offences being prosecuted at trial for that alleged offending.

32 The “theme” of the Crown’s submissions, as the Crown prosecutor described it, was that the various factors relied upon by the applicant as undermining his right to a fair trial, whether viewed individually or in combination, do not constitute “a fundamental defect going to the root of the trial” (*Jago* at 111), such that nothing a trial judge can do in the conduct of the trial will relieve against that unfairness. To the contrary, the Crown submitted that the legislative powers in s 68C of the *Jury Act 1977* (NSW) designed to protect against jurors undertaking any independent enquiries and providing sanctions for breach of that prohibition, together with the collected experience of criminal courts that jurors are presumed to be capable, under direction from the trial judge, of confining their considerations to the evidence adduced at trial (*Glennon* at 614-615 per Brennan CJ), even in notorious cases where there has been substantial adverse pre-trial publicity (see *Dupas* and *Eastman v Director of Public Prosecutions (No 13)* [2016] ACTCA 65), combined with the Court’s power to craft any number of procedural and evidential rulings to deal with the adverse impact of delay on the fairness of the trial, are such that the application for a permanent stay should be refused.

33 The Crown submitted that however undesirable any public commentary about an accused’s presumed guilt is, such commentary as was volunteered by Mr Linden (the applicant’s former solicitor), and Mr Milavanovich (the Deputy State Coroner who presided over the second inquest) in their interviews with Mr Thomas and then broadcast in the podcast, is not of sufficient seriousness that the continuation of the criminal proceedings, because of that commentary, is necessarily productive of an unacceptable risk of injustice or unfairness; neither would their commentary undermine public confidence in the administration of criminal justice such that a permanent stay should be granted on the basis of an abuse of the Court’s process.

34 The Crown further submitted that the limited circumstances identified in the authorities as having the potential to attract the inherent power of the Court to grant a permanent stay for abuse of process because of the conduct of the Commissioner of Police have not been shown to be present here.

The Crown case in summary

35 What follows is a summary only of the Crown case. However, in order to deal with the applicant's contention that he is prejudiced by an unreasonable delay in initiating the prosecution, a submission in part based on Mr Boulten's contention that the evidence assessed by the ODPP in 2001 and 2003, and then again in 2011 and 2012, as insufficient to support a prosecution did not change materially by 2018 when that decision was reversed, a review of the case the Crown intends to prosecute is unavoidable.

36 It is the Crown case that Lynette Dawson was murdered by the applicant, either alone or with the assistance of another person, some time after she was last seen at the Warriewood child care centre by Annette Leary on the afternoon of Friday 8 January 1982 and after she was last spoken to by her mother, Helena Simms, by telephone on the evening of 8 January 1982.

37 Lynette Dawson's body has not been recovered and no human remains matching her have been located in the unidentified remains indexes of any Australian State or Territory.[5] It is the Crown case that the applicant disposed of his wife's body, possibly with the assistance of another person or people, at an unknown location after he killed her.

38 The prosecution intends to rely upon a combination of facts and circumstances to establish beyond reasonable doubt the fact that Lynette Dawson is deceased and that the applicant murdered her.

39 The Crown acknowledges that in order to make that case it is obliged to exclude any reasonable hypothesis consistent with the applicant's innocence, inclusive of the hypothesis that is inherent in the applicant's account to various people after 9 January 1982, including to investigating police in May 1991, that he spoke to his wife after her "disappearance", ultimately accepting her unilateral decision to leave him and their children and thereafter to assume a false identity to conceal her whereabouts from them and from her friends and family. The Crown also accepts the obligation of discounting any reasonable possibility that the various reported sightings of Lynette Dawson after 8 January 1982 are reliable and, in the case of a reported sighting by the

[5] See later at [234] where Mr Thomas is invited to explain why these words are used, and used repeatedly.

applicant's brother-in-law, Ross Hutcheon, around three to six months after Lynette Dawson's "disappearance", proving his claim to be deliberately false.[6]

The marriage of the applicant and Lynette Dawson and the relationship between Lynette Dawson and her family

40 As at 8 January 1982, Lynette Dawson was married to the applicant. They were married on 26 March 1970.[7] For several years after their marriage Lynette Dawson underwent multiple medical procedures to enhance the prospects of pregnancy. At the time of the birth of their first daughter on 9 July 1977 the applicant and his wife were actively pursuing the possibility of adoption.[8] A second daughter was born on 11 July 1979.[9]

41 Lynette Dawson had previously trained as a nurse at the Sydney Children's Hospital and worked in various nursing roles between 1970 and 1977. After the birth of her second daughter, she worked at a child care centre in Warriewood, a neighbouring suburb to Bayview, where she was employed as a child care worker. Her registration with the NSW Nurses Registration Board was not current as at the date of her "disappearance". It has not since been renewed.

42 In 1979, the applicant commenced work as a physical education teacher at Cromer High School, a suburb a short drive from Bayview.

43 As at 8 January 1982, the applicant, his wife and their two children, then aged two and four years, lived at the home they built at 2 Gilwinga Drive, Bayview (the Bayview property). The applicant's twin brother, Paul Dawson, lived with his wife and children at 6 Gilwinga Drive, Bayview.

44 There is evidence from multiple sources that Lynette Dawson was directly and intimately involved in the design of the family home and its décor, and that she was a loving and attentive wife and a devoted mother to her two children. In December 1981, Lynette Dawson commissioned an artist to produce sketches of her children. The works were to be completed after Christmas that year, with payment on delivery. Around mid-January 1982, the artist, seeking to make contact with Lynette Dawson as her commissioning client, was told by

[6] Statement of Daniel Poole dated 7 April 2017, [61]-[66].
[7] T 676.29.
[8] Crown case statement, [1].
[9] Crown case statement, [14].

the applicant that “Lynette has gone away and she doesn’t want [the sketches] anymore”.[10]

45 Lynette Dawson’s eldest daughter was due to commence school at the commencement of the 1982 school year. Lynette Dawson was said to be very excited at the prospect.

46 This evidence is part of a compendium of witness statements from Lynette Dawson’s friends and family members, each of whom will give evidence at the applicant’s trial of their relationship with Lynette Dawson, and each of whom will express their disbelief that she would desert her children and make no effort to contact them or to enquire of them, either directly or through friends or family, in the weeks, months and then years after 8 January 1982.

47 Lynette Dawson was also close to her four siblings and had a particularly close relationship with her mother who was due to turn 66 years of age on 6 February 1982. In December 1981, Lynette Dawson had arranged a surprise family party at her Bayview home in celebration of her mother’s birthday.

48 Lynette Dawson has made no contact, whether by telephone or by letter or via any third party, with her mother or any other family members at any time after her mother last spoke with her on the evening of 8 January 1982, despite having made arrangements that night for her mother to travel some distance by public transport from her home in Clovelly the following day in order to meet with her daughter, her granddaughters and the applicant (her son-in-law) at Northbridge Baths where the applicant worked as a lifeguard. Lynette Dawson did not attend at the Baths in accordance with those arrangements.

The time of the murder and lies told to conceal it

49 While the Crown is unable to appoint the time of Lynette Dawson’s death, it is the Crown case that she was not alive on the afternoon of 9 January 1982. It is the Crown case that the applicant’s claim to both his mother-in-law, Mrs Simms, and a family friend, Phillip Day, who had attended the Baths that day at the applicant’s invitation, that he received a phone call at the kiosk from his wife and that she would not be attending the Baths as arranged because she

[10] Crown case statement, [15].

was with friends on the Central Coast is the first of a series of deliberate lies told by the applicant as part of a campaign of disinformation to attempt to innocently account for the sudden "disappearance" of his wife and to conceal the fact that he had killed her.[11]

50 It is the Crown case that the telephone call to the Northbridge Baths (if the call was in fact received as the applicant claims) was either opportunistically seized upon by the applicant as a ruse to conceal his wife's death or the call was deliberately placed by a third person to allow the lie to be told.

51 The Crown also proposes to adduce evidence that the applicant's claim that in the phone call his wife asked if Mr Day could drive Mrs Simms and his daughters to her home in Clovelly was also a lie, this time told to provide a basis for the children to be cared for by their grandparents, thereby allowing the applicant to pursue his desire to be with his teenage girlfriend, JC.

The motive for murder

52 It is the Crown case that the primary motive for murder was the applicant's desire to maintain a sexual relationship with JC, a schoolgirl he met in 1980 while teaching at Cromer High School, and to marry her. A secondary motive is alleged to be the applicant's desire to secure the interest in the property at Bayview, valued at $250,000 in December 1981, and to secure custody of his children. On or about 21 December 1981, the applicant retained a real estate agent to value the home at Bayview for an intended sale. The agency agreement was signed by the applicant but was not signed by Lynette Dawson.[12] It is the Crown case that the agent was retained without Lynette Dawson's knowledge. It is also the Crown case that the applicant sought legal advice from his brother, Peter Dawson, about the financial implications of a separation and, ultimately, a divorce from his wife and that he was told he would lose a significant proportion of the matrimonial property should he be the person to leave to marriage.[13]

53 It is the Crown case that on 21 December 1981, the applicant left his wife and daughters intending to drive to Queensland with JC where they would

[11] Statement of Kristin Hardiman dated 17 December 2013, [13].
[12] Crown case statement, [11].
[13] CB 2756.

commence a life together. However, after arriving in Brisbane they returned to Sydney at JC's urging as she was having "second thoughts" about continuing her relationship with the applicant.

54 The applicant returned to Sydney on Christmas Day with JC but did not return to his family home. Instead he went to the home of his twin brother and asked his brother and sister-in-law not to reveal his whereabouts to his wife and children.[14] Although the applicant returned to his family home the following day (Boxing Day 1981), he did not spend the New Year with his wife and children, apparently preferring the company of JC.[15]

The relationship between the applicant and JC

55 The sexual relationship between the applicant and JC commenced in late 1980. She was aged 16. He was aged 33. Throughout that school year the applicant would see JC each day, often leaving notes in her schoolbag declaring his love for her and expressing a desire to marry her.[16] JC was also invited by the applicant to the Bayview home on weekends, ostensibly to babysit his children. He invited her to move into the Bayview home permanently in October 1981 against his wife's wishes.

56 Although the Crown intends to adduce evidence at the applicant's trial that Lynette Dawson confided in some of her close friends that she had her concerns about the closeness of the relationship between the applicant and JC, and was very uncomfortable about JC living with them in the family home, she told them she trusted her husband.[17] It is the Crown case, however, that in about October 1981 Lynette Dawson ultimately learnt first-hand of her husband's infidelity when she found the applicant and JC in bed together at the family home. JC then left the family home at Lynette Dawson's insistence and moved in with Paul Dawson and his family a few houses away. The sexual relationship between the applicant and JC continued uninterrupted for many months after that date. Although the relationship was apparently the source of very considerable marital disharmony, Lynette Dawson did not share with her

[14] Although Peter Dawson told police in March 1999 that he had given this advice he has since retracted it. The Crown has served a notice under s 38 of the Evidence Act 1995 upon him.
[15] See transcript of Marilyn Dawson's interview with police on 16 March 1999.
[16] Statement of JC dated 18 September 2018, [77].
[17] Statement of JC dated 18 September 2018, annexures G, H, J, M and N.

mother or her siblings that her marriage was actually threatened by the applicant's refusal to terminate his relationship with his teenage girlfriend. She did confide in friends and work colleagues that the marriage was unstable but that she believed it was retrievable and that her husband would not leave her.[18]

57 It would also appear that while the relationship between the applicant and JC was not clandestine, it was not something that Lynette Dawson's siblings were aware of. The Crown asserts that the applicant was held in the highest esteem by Mrs Simms in particular and that Lynette Dawson may not have wished her mother or her siblings to think any less of the applicant, despite his obvious disregard for his marriage, in the hope that their marriage would survive.

58 The applicant's brother and his wife were, however, aware of the relationship and either tacitly or actively condoned it. On occasions throughout 1981, the applicant and JC visited as guests in their home with the two couples socialising together on occasions. JC's mother and her sisters were also aware of the relationship and it was common knowledge at Cromer High School (including amongst the teaching staff) that the applicant and JC were in a sexual relationship.

Evidence of marital discord

59 The Crown also intends to adduce evidence at the applicant's trial of disharmony in the applicant and Lynette Dawson's marriage even predating the commencement of the applicant's relationship with JC, including evidence from a number of people who witnessed the applicant being physically and verbally abusive towards his wife (invariably within the confines of the family home, including the backyard) and from other witnesses to whom Lynette Dawson complained of his physical abuse of her, some of whom saw evidence of residual bruising.[19]

60 While the fact of mounting marital discord, culminating in the applicant's sustained sexual obsession with JC from late 1980, was a matter police were aware of after JC's separation from the applicant in 1990 and the revelations she made at that time which precipitated the first police investigation into

[18] Statements of Anna Grantham dated 23 September 1998, [13]; Julie Andrew dated 15 November 2018, [14].
[19] Statements of Julie Andrew dated 2 May 1999, [7]; Anna Grantham dated 23 September 1998, [8]; Sue Strath dated 22 September 1998, [4]; Annette Leary dated 9 December 2000, [6].

Lynette Dawson's suspected homicide (the Mayger investigation), the full extent of the physical violence Lynette Dawson was subjected to, and the time over which it extended before 8 January 1982, has only become known to police in recent times. It was not something police were aware of between 1982 and 1990 when Lynette Dawson was treated by police as a missing person who did not wish to be found. One witness to domestic abuse predating Lynette Dawson's disappearance by some years gave a statement to police on 28 May 2018 during the broadcast of the podcast.[20]

The allegation that the applicant spoke of contracting a "hit man"

61 The Crown also intends to adduce other evidence of the animus the applicant felt towards his wife to the extent that in 1975[21] and then again in 1981[22] he spoke openly of contracting a "hit man" to have her killed. This evidence, from two independent sources, is the subject of very considerable contest. It is the applicant's case that both accounts are deliberate fabrications.

62 Despite the applicant's alleged musing about contracting a person to kill his wife being given considerable prominence in the podcast, it is not the Crown case that the applicant in fact contracted a person to kill his wife or that she was murdered under contract. The evidence of the applicant speaking about contracting a person to kill his wife is to be adduced at the applicant's trial as tendency evidence. A tendency notice has been served in accordance with s 97(1) of the *Evidence Act*. The evidence of the applicant musing about a "hit man" is relied upon by the Crown not as evidencing a tendency in him to be violent towards his wife but as a manifestation of his animosity towards her. The evidence of various witnesses who were told by Lynette Dawson of the applicant's mistreatment of her and others who noted frank evidence of bruising on multiple occasions is also relied upon by the Crown as tendency evidence.[23]

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[20] Statements of Roslyn Mcloughlin dated 14 May 1999; Annette Leary dated 9 December 2000; Karen Frater dated 22 March 2017.

[21] Exhibit 8. Ms McNally gave evidence that an earlier report she made to Crime Stoppers a few years after Lynette Dawson's disappearance had not been acted upon (see T 422).

[22] Statement of Robert Silkman dated 9 November 2018, [8].

[23] Statement of JC dated 17 May 1990, [5].

Where was JC when Lynette Dawson was murdered?

63 It is no part of the Crown case that JC was complicit in Lynette Dawson's murder. At the time of Lynette Dawson's "disappearance" (on the Crown case the time of her murder) JC was staying with friends and family at South West Rocks. The Crown proposes to adduce evidence from JC that she left Sydney after 1 January 1982 without the applicant in order to reflect upon her relationship with him and to give consideration to terminating it, having become increasingly concerned about the degree of control the applicant was exerting over her.[24] It is the Crown case that this caused the applicant very considerable anxiety and that he saw his wife as an impediment to pursuing his relationship with JC (to whom he had proposed marriage). As noted above, it is the Crown case that his obsession with JC, his fear of losing her and the impediment his wife posed to pursuing that obsession ultimately motivated him to murder her.

The last confirmed evidence of Lynette Dawson being alive

64 A colleague of Lynette Dawson's at the child care centre, Annette Leary, recalled Lynette Dawson telling her of her attendance with the applicant at a marriage counselling session.[25] Ms Leary believes that was the last time she saw Lynette Dawson. At the time she noticed "faint bruising on one side of [Lynette Dawson's] neck".[26] Another worker at the child care centre asked how she had sustained the bruising. Lynette Dawson said that when she and the applicant were alone in the lift en route to the marriage guidance counsellor, the applicant had put his hands around her throat, started to shake her and said, "I'm only doing this once and if it doesn't work I'm getting rid of you".[27]

65 This evidence is relied upon by the Crown as evidence of the applicant's lack of any genuine commitment to his marriage as at 8 January 1982 and evidence of his persisting determination to be "rid" of his wife to allow him unrestrained access to JC and to marry her. It is the Crown case that the applicant's account

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[24] Beverly McNally, Anna Grantham, Julie Andrew, Judith Solomon, Karen Frater, Roslyn McLoughlin, Merilyn Simms, Helena Simms, Patricia Jenkins, Coral Clarke, JC, Robert Silkman and SW.

[25] Statement of JC dated 17 May 1990, [3]; transcript of JC's interview with police on 27 July 1998, 19; statement of JC dated 18 September 1998, [48].

[26] It is common ground that this was on the afternoon of 8 January 1982.

[27] Statement of Annette Leary dated 9 December 2000, [7]. (Other evidence in the Crown case would tend to support this occasion as 8 January 1982.)

to police when he was interviewed in January 1991 to the effect that after the marriage guidance session he remembered "thinking that our marriage was going to be sort of, our problems were going to be resolved and things were going to work out", but that his wife was negative, saying "[t]he fellow's seeing you as the good guy and blaming it all on me 'cause my family background isn't as happy as yours" and then, earlier in the interview, that when his wife left he was "very anxious" for her to return "to work things out", were lies.[28]

66 In the course of the interview he also told police that after the initial phone call from his wife at the Northbridge Baths on 9 January 1982 and over subsequent weeks when he received a number of further phone calls from her, she said she needed extra time away to sort herself out. He said after the last phone call on 15 January 1982 she said she did not know if she would be returning at all. The applicant also claimed that Ian Kennedy, a police officer friend of his, had made enquiries as to the whereabouts of his wife and in 1985, at a Sydney Boys High School reunion, Mr Kennedy told him he had heard his wife was in New Zealand. The Crown intends to call evidence from Mr Kennedy that he made no such claim.

67 It is the Crown case that the applicant murdered his wife on the evening of 8 January 1982 following the marriage guidance counselling session (after Lynette Dawson spoke with her mother by telephone, apparently believing, or being led to believe by the applicant, that the session had been a success) or the following day, 9 January 1982, before he started work at Northbridge Baths.

JC becomes the applicant's de facto wife

68 Within days of 8 January 1982 (on the Crown case no later than 14 January 1982), at a time when the applicant was explaining his wife's absence to others on the basis of her desire to have some "time on her own", he travelled to South West Rocks to collect JC who soon thereafter moved permanently into the family home at Bayview where she lived as the applicant's de facto wife until they married in January 1984.[29]

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[28] Statement of Annette Leary dated 9 December 2000, [7].

[29] Transcript of the applicant's interview with police dated 15 January 1991, Q36, Q54, Q55.

69 The Crown intends to adduce evidence from JC that the applicant telephoned her while she was at South West Rocks and said, “Lyn’s gone, come back and stay with me, come back and be with me, I need you”. JC will give evidence that the applicant told her that he believed his wife had left him and her children to join a religious sect.

70 After moving into the Bayview home, JC saw that Lynette Dawson’s clothing, jewellery and other personal effects had been left. She will also give evidence that within a period of months (namely, by 31 October 1982) Lynette Dawson’s clothing was bundled into plastic bags and delivered to the applicant’s mother-in-law and that Lynette Dawson’s wedding rings were refashioned as wedding rings for JC to wear.[30] JC will also give evidence that on one occasion when she was together with the applicant at the Bayview property he took a phone call and, although she did not hear any of the conversation, the applicant later told her that it was Lynette on the phone and that she was with friends, she was happy and well, she was not coming back and that no one was to worry about her. The applicant did not suggest she made any enquiries of her children.[31]

The Family Court proceedings in 1983

71 In April 1983, the applicant commenced proceedings in the Family Court of Australia for the dissolution of his marriage to Lynette Dawson, an order granting him full custody of the children and for the transfer to him of his wife’s interest in the matrimonial property on the basis of her desertion. Orders for substituted service were made. The process was served upon Mrs Simms by the applicant’s solicitor, Mr Linden.

72 Mr Thomas solicited an interview with Mr Linden in 2017 in the preparation for the podcast in the course of which Mr Linden expressed his doubts about Lynette Dawson’s so-called “disappearance”. That interview was included in the podcast and broadcast as part of episode 4, entitled “Soft Soil”. It will be discussed in detail later in this judgment.

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[30] This timeline is contested by the applicant in his 1991 interview. Any reference to JC is omitted altogether from the Antecedent Report of August 1982.

[31] Mrs Simms’ diary.

The applicant reports his wife "missing"

73 On 18 February 1982, the applicant reported to NSW police stationed at Mona Vale that his wife, Lynette Dawson, was missing. A Missing Person Report was activated at that time. The applicant informed police that he had last seen his wife at about 7am on 9 January 1982 as he dropped her off at a bus stop a short distance from their home to go shopping in Chatswood. He told police that they had plans to meet at the Northbridge Baths that afternoon for lunch with their two small children and that his wife had also made arrangements for her mother to travel from her home in Clovelly to join them at the Baths. He told police that whilst he was at the Baths he was notified by somebody working in the kiosk that there was a phone call for him. He said the STD call was from his wife who informed him that she was with friends on the Central Coast and needed some time away to sort things out. He told police that his wife had telephoned him on two further occasions, 10 and 15 January 1982, but he had not heard from her since. He told police that none of her family members, including her mother, had been in contact with his wife either in person, by telephone or by letter and that none of her friends of whom he had made enquiries had any knowledge of her whereabouts. He also told police that he had collected a Bankcard statement from his wife's employer, Barbara Cruise, and that there was an entry for 12 January 1982 showing a purchase made from Katies at Narrabeen and an entry for 27 January 1982 showing a purchase from Just Jeans at Narrabeen.

74 Neither the Bankcard statement, any banking records relating to Lynette Dawson's Bankcard account held with the Commonwealth Savings Bank at Narrabeen, nor sales records from either of the retail stores nominated by the applicant as the stores from which purchases were said to have been made by his wife are currently available to be produced by the Crown at the applicant's trial.[32]

75 Insofar as concerns the Bankcard statement sent to the Warriewood child care centre (the address Lynette Dawson nominated when she opened the account to conceal it from the applicant) and collected by the applicant from Ms Cruise

[32] Statement of JC dated 17 May 1990, [9].

when she alerted him to its arrival, no statement was taken from Ms Cruise until 1998, 16 years later, during the Loone investigation.[33] At that time Ms Cruise told Detective Loone that she opened the statement and, having reflected on it before being interviewed, said if she had seen a purchase that "would alert me to where [Lynette Dawson] might have been or anything … I would have remembered that".[34]

76 The Missing Person file held at the Mona Vale police station was updated from time to time between February 1982 and June 1989 in accordance with the police protocols that applied at that time for dealing with persons reported as "missing".[35] Official enquiries were made by police of various entities with a view to determining Lynette Dawson's whereabouts without success. In the running sheet/occurrence pad maintained at the time, these included enquiries into "Bankcard, medical funds, nurses reg[istration] boards", the Department of Motor Transport, the Central Names Index, social security and "birth checks".

77 The applicant made contact with Mona Vale police for a period of months in 1982 after making the initial Missing Person report, after which Mrs Simms was the person who was in regular contact with police. Over a number of years, she reported that despite repeated efforts to contact her daughter, or to discover her whereabouts both within NSW and interstate, her daughter had made no contact with her or any member of the family either by telephone or by letter or through any third party.

78 Although there were a number of reported sightings of Lynette Dawson from some time in February 1982 at Gosford through to 1987 at Terrigal noted in the Missing Person file, it would appear that no one who claimed to have seen Lynette Dawson (or the person they thought was Lynette Dawson) spoke with the woman to verify her identity. Collateral enquiries by Mrs Simms at Terrigal in 1987 did not confirm her daughter's presence in the area.

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[33] Statement of Daniel Poole dated 7 April 2017, [47]-[56].

[34] Barbara Cruise was spoken to by Mr Mayger but he has no recall of what she said or whether a statement was taken from her (see later at [171]).

[35] Transcript of Barbara Cruise's interview with police on 12 August 1998, Q25. She was not invited to comment upon that further in her evidence at the second inquest in 2003.

79 It is the Crown case that other purported sightings of Lynette Dawson by witnesses who have been interviewed in the course of the Poole investigation are unreliable. In neither case was the person believed to have been Lynette Dawson spoken with to confirm that fact and no collateral enquiries confirmed she was or might have been alive at any relevant time.

80 In short, it is the Crown case that after successive police investigations over more than three decades into Lynette Dawson's "disappearance", commencing with an enquiry by the Missing Persons Unit in 1982 and ending in a third police investigation into her suspected homicide which culminated in the presentation of a reformulated brief of evidence to the ODPP in April 2018, all enquiries of relevant government and non-government agencies have reported no records or indications of her being alive after 8 January 1982, whether under her own name or any changed name.[36]

81 It is the Crown case that a tribunal of fact will be satisfied beyond reasonable doubt that Lynette Dawson is deceased. Further, it is the Crown case that the applicant's demonstrated motive to murder her, his opportunity to do so on the evening of 8 January 1982 and into the morning of 9 January 1982, coupled with the deliberate lies he told police in August 1982 about his relationship with JC, even if by omission, and his conduct generally after his wife's "disappearance" as evidence of a consciousness of guilt, will persuade a tribunal of fact beyond reasonable doubt that Lynette Dawson is deceased and that the applicant murdered her.

Police murder investigations and decisions of the ODPP not to prosecute the applicant for murder

The Mayger investigation

82 It was not until May 1991 when Detective Senior Sergeant Geoffrey Wright and Detective Senior Constable Paul Mayger (as they were then known) of the Major Crime Squad (North) were appointed to investigate Lynette Dawson's disappearance that police officially suspected that she was a victim of homicide. That investigation was precipitated by JC (at that time the applicant's wife from whom she had recently separated) speaking with Joe

[36] See later at [129].

Parrington, a Criminal Justice Staff Officer and a friend of JC's father, about the circumstances of Lynette Dawson's disappearance.

83 On 15 May 1990, Mr Parrington contacted the Regional Crime Squad Chatswood and provided them with the information that he had been given by JC. JC made her first statement to police two days later. The applicant was interviewed in January 1991.

84 The Mayger investigation was suspended in May 1992. No brief of evidence was submitted to the Coroner.

The Loone investigation

85 On 28 July 1998, Detective Senior Constable Loone was appointed to reinvestigate the suspected murder of Lynette Dawson and to prepare a brief for the Coroner at the direction of Acting Inspector Hulme. That investigation was initiated in response to one of Lynette Dawson's friends, Sue Strath (nee Browett), a friend of Inspector Hulme, being insistent that Lynette Dawson did not unilaterally leave her home and her children but that the applicant was implicated in her "disappearance". In February 1985, during the eight years Lynette Dawson was treated as a "missing person" by the Missing Persons Unit, Ms Strath lodged a formal complaint with the NSW Ombudsman about what she considered were the inadequacies of the investigation into Lynette Dawson's disappearance. Ms Strath was apparently undeterred by the complaint not being investigated further and ultimately persuaded Inspector Hulme to initiate a formal police investigation.[37]

86 The investigation by Detective Loone culminated in the preparation of two briefs of evidence submitted to the NSW Coroner. Two coronial inquests were convened on the basis of the Loone investigation: the first in February 2001 at the Glebe Coroners Court; the second in February 2003 at the Westmead Coroners Court.

87 At the time of both inquests, the *Coroners Act 1980* was the governing legislation. Section 13 gave the Coroner jurisdiction to investigate the death, or the suspected death, of a person. Where a person is missing and believed to

[37] Statement of Daniel Poole dated 13 January 2017, [61]-[74].

be deceased, the police officer in charge of the investigation must report the suspected death to the Coroner upon being satisfied that no further enquiries can usefully be made as to whether a missing person is alive or deceased. Section 31(a) provided that the Coroner may examine on oath all persons "who tender evidence relevant to the inquest or inquiry".

The first inquest

88 On 28 February 2001, Detective Loone gave evidence before Acting Deputy State Coroner Stevenson as the officer in charge of the investigation into the disappearance and suspected death of Lynette Dawson. The police brief of evidence was tendered through him. It comprised:

- Statement of Detective Senior Constable Loone
- Statement of JC
- ERISP – JC
- Statement of Helena Simms (mother of Lynette Dawson)
- ERISP – Patricia Jenkins (nee Simms, sister of Lynette Dawson)
- ERISP – Phillip Simms (brother of Lynette Dawson)
- ERISP – Charles Simms (brother of Lynette Dawson)
- ERISP – Merilyn Simms (sister-in-law of Lynette Dawson)
- ERISP – Father of JC
- ERISP – Nicole Graham (sister of JC)
- ERISP – Marilyn Dawson (sister-in-law of Lynette Dawson)
- ERISP – Paul Dawson (brother of the applicant)
- ERISP – Neville Johnston (previous owner of 2 Gilwinga Drive)
- ERSIP – Pamela Eckford (women's refuge)
- ERISP – Barbara Cruise (co-worker of Lynette Dawson)
- ERISP – Interview with the applicant, Det Sgt MA
- Statement of Roslyn McLoughlin (friend of Lynette Dawson)
- Statement of Craig Norris (at South West Rocks with JC)
- Statement of Robyn Warren (friend of Lynette Dawson)
- Statement of Bronwyn Boyer (school student)
- Statement of Vanessa Worrall (at South West Rocks with JC)

- Statement of Anna Grantham (co-worker of Lynette Dawson)
- Statement of Julie Andrew (neighbour of Lynette Dawson)
- Statement of Barbara Kilpatrick (women's refuge)
- Statement of Sue Strath (co-worker of Lynette Dawson)
- Statement of mother of JC
- Statement of Gregory Hall (previous owner of 2 Gilwinga Drive)
- Statement of Christine Hill (previous owner of 2 Gilwinga Drive)
- Statement of Detective Sergeant Mark Messenger
- Statement of Belinda Jane Perry (nee Curtis)

89 The matter was considered on the papers. The inquest was terminated by Magistrate Stevenson on the same day and the matter referred to the ODPP pursuant to s 19 of the *Coroners Act*.

90 Section 19 of the *Coroners Act* provided that if, at any time during the course of an inquest, the Coroner is of the opinion that the evidence is capable of satisfying a jury beyond reasonable doubt that a known person has committed an indictable offence and that there is a reasonable prospect that a jury would convict the known person of an indictable offence which includes the question whether the known person caused the death or suspected death, the Coroner must terminate the inquest. The depositions taken at the inquest (if any) together with a statement signed by the Coroner specifying the name of the known person and the particulars of the offence(s) that person is suspected of committing are forwarded to the ODPP.

The first decision of the ODPP not to prosecute the applicant for murder

91 On 12 November 2001, the then DPP, Nicholas Cowdery AM QC, formally notified his decision not to prosecute the applicant for the murder of Lynette Dawson.[38] Although there was no correspondence tendered to reflect that determination, in the ABC broadcast of *Australian Story* in 2003, Mr Cowdery was interviewed and elaborated upon the basis for his decision. In short, Mr Cowdery said:[39]

[38] Sue Strath's letter to the NSW Ombudsman received on 5 February 1985.
[39] Affidavit of Greg Walsh dated 15 May 2020, [466].

> I was looking at whether or not there was a reasonable prospect of convicting somebody of homicide. Without a body, without knowing first of all whether in fact she is dead. Without knowing secondly if she is dead, how she died, it is very hard to mount a case of a reasonable prospect of conviction just on motive, and the undefined existence of means and opportunity. That makes it very weak.

92 On 5 December 2001, Wendy Jennings, Lynette Dawson's cousin, wrote to Morris Iemma MP raising her concerns about the decision not to prosecute the applicant for murder.[40] On 14 May 2002, the Deputy DPP, Roy Ellis, wrote to Ms Jennings informing her that:[41]

> … very careful consideration was given to all the available evidence in this case but ultimately that material, in terms of its evidentiary value, proved insufficient to establish a case of murder against Mr Dawson. It was for that reason that no ex officio indictment was filed.

93 Mr Ellis also confirmed that "cost considerations" had no bearing on the decision.

The second inquest

94 On 24 February 2003, a further brief of evidence was submitted by Detective Loone to the Coroners Court. Pursuant to s 23A of the *Coroners Act,* a fresh inquest must be held into a death or suspected death if an application for a fresh inquest is made, and

> (b) on the basis of the application, the State Coroner is of the opinion that the discovery of new evidence or facts makes it necessary or desirable in the interests of justice to hold a fresh inquest …

95 An application can only be made by a police officer or a person who was granted leave to appear at a previous inquest or by a person who was represented at a previous inquest (s 23A(2)).

96 A second inquest into Lynette Dawson's presumed death was convened before the then Deputy State Coroner, Magistrate Milovanovich, at the Westmead Coroners Court. Eighteen witnesses gave evidence at the inquest. In addition to the evidence tendered at the first inquest, the following statements were tendered:

- Statement of Constable Karen Dawson from the Missing Persons Unit
- Statement of Katrina Ginns

[40] Exhibit AP.

[41] Affidavit of Greg Walsh dated 15 May 2020, [467].

- Statement of Senior Constable Gibbs
- Statement of Annette Leary

97 The following witnesses gave evidence and were cross-examined by the applicant's brother, Peter Dawson, who represented the applicant's interests at the inquest with the leave of the Coroner:

- JC
- Nicole Graham (nee Curtis)
- Belinda Perry (nee Curtis)
- Vanessa Worrall
- Craig Norrish
- Barbara Cruise
- Anna Grantham
- Sue Strath (nee Browett)
- Annette Leary
- Roslyn McLoughlin
- Robyn Warren
- Phillip Day
- Patricia Jenkins
- Gregory Simms
- Merilyn Simms
- Ray Butlin
- Leanne Butlin
- Damian Loone.

98 On 28 February 2003, the second inquest was terminated by Magistrate Milovanovich in accordance with s 19 of the *Coroners Act* and the matter referred to the ODPP.

The second decision of the ODPP not to prosecute the applicant for murder

99 On 30 July 2003, the ODPP notified Ms Jennings of the decision not to find a bill to prosecute the applicant for the murder of Lynette Dawson.[42] That

[42] Affidavit of Greg Walsh dated 15 May 2020, annexure GW1, 145.

correspondence, signed by J Wallace for the DPP, Mr Cowdery, reads as follows:

> I have been asked to inform you that, after very careful consideration of all the available information obtained by Police in the course of their investigations and of the evidence heard before the Coroner in February and March 2003, and at the earlier inquest in 2001, the Director has determined that there is insufficient evidence to support any criminal charge against any person in connection with the disappearance of Lynette Joy Dawson in 1982.
>
> In the Director's view, the second inquest has not strengthened the case against any person beyond that which existed when a charge was declined to be ordered on 12 November 2001.

100 Between July 2003 and July 2015, Detective Loone continued to investigate the suspected murder of Lynette Dawson, including in May 2009 by submitting a woman's cardigan found at the Bayview property during an excavation in 2000 (prior to the first inquest) for a DNA examination. Those enquiries did not generate any evidence probative of the applicant's guilt or the fact that Lynette Dawson was murdered or deceased.

101 On 24 April 2012, Detective Loone met with the Deputy DPP, John Pickering, the Minister of Police's Chief of Staff, Brad Cutell, and John Lehman from the Homicide Squad.[43] Detective Loone gave evidence that he believed the meeting was prompted by the family of Lynette Dawson writing a letter to their local member about the matter. That would seem to be a reference to Ms Jenning's letter to Mr Iemma.

102 On 4 May 2012, Rebecca Hazel interviewed Detective Loone for her book. According to Ms Hazel's notes of the interview, Detective Loone told her that at the meeting in April 2012, "the DPP admitted they didn't handle [the case] very well" and said they should have been more open with him. However, in his evidence Detective Loone clarified that the "apology" he received from Mr Pickering at the meeting was about the poor communication that had occurred between the DPP and the police in relation to the Lynette Dawson investigation and not an apology because a decision was made not to prosecute the applicant. In cross-examination, he said:

Q. Was there anything said at the meeting to suggest that they had changed their mind at the DPP about prosecuting the case?

[43] Affidavit of Greg Walsh dated 15 May 2020, annexure GW1, 152.

A. No.

Q. Okay, so Mr Pickering made it plain that the only shortfall really was in the messaging rather than in the substance of the decision-making?

A. That's correct.

103 According to Detective Loone, he was also told at the April 2012 meeting that the reward for information leading to the conviction of a person for the murder of Lynette Dawson would be increased. On 21 September 2010, a reward for $100,000 had been announced by NSW police. On 23 January 2014, the reward was increased to $200,000.

The DPP is invited to reconsider the decision not to prosecute the applicant for murder

104 In December 2010, in August 2011 and again in November 2011, the ODPP confirmed in correspondence with Lynette Dawson's sister, Patricia Jenkins, that in the view of the ODPP there remained insufficient evidence to prosecute the applicant for murder. In the first letter, Mr Cowdery personally responded to a letter sent by Mrs Jenkins on 16 November 2010 in which she sought clarification as to whether a suggestion that Mrs Simms (by that date deceased) had personally seen Lynette Dawson after she was "missing" was a "telling factor" in the decision not to prosecute. Mr Cowdery responded as follows:[44]

> If it was your understanding that your late mother, Mrs Helena Simms, claimed to have herself seen Lynette after her disappearance, then that understanding is erroneous according to my information.
>
> It was the case that your later mother advised police of two sightings of Lynette which had been reported to her. The first was at a fruit stall on the way to Gosford and the second was at the Narraweena shops. It was never the case that Mrs Simms claimed to have sighted Lynette herself.
>
> The above sightings were only one of a myriad of factors which were considered by me when reaching my decision that there was insufficient evidence to lay charges against Mr Dawson. It was not a "telling factor".
>
> I regret if some misunderstanding has arisen in this particular aspect of the matter.

105 Mrs Jenkins sent a further letter to the ODPP in June 2011 which was responded to by Christopher Maxwell QC, the then Acting DPP on 3 August

[44] T 299-301.

2011.[45] Lloyd Babb SC was appointed DPP in July 2011, replacing Mr Cowdery upon his retirement. The fact that Mr Maxwell responded to Mrs Jenkins' letter is significant.

106 On 14 October 2011, Mr Babb formally notified Greg Smith, the NSW Attorney General, that:

> I have found it necessary not to play any part in the consideration of this matter myself for the reason that I am acquainted with the suspect in that he was a school teacher at my high school and my rugby league coach in about 1983.
>
> For this reason this matter has been considered by Mr Chris Maxwell QC, Acting Deputy Director.

107 Episode 13 of the podcast commenced with Mr Thomas informing Mrs Jenkins that Mr Babb had been the school captain in 1984 of a school where the applicant was a teacher. Mr Thomas then told her of his resolve to confront Mr Babb with the circumstances in which, as Mr Thomas put it, "there was a question of disclosure". It will be necessary to refer further to Mr Thomas' treatment of this issue in the podcast.

108 Mr Maxwell's letter read as follows:

> I note that you have sought my advice as to why this Office has declined to have a meeting with Police in this matter.
>
> As you appear to be aware, Detective Sergeant Loone forwarded further material to this Office for consideration in March 2011. At that time this Office again carefully considered whether any charges should be laid against any person in relation to the disappearance of Lynette Dawson. At that time the Acting Director determined that, taking into account of the material received, there remained insufficient evidence to lay a charge. The view taken at that time was that it appeared all relevant material, required to assist this Office in making that decision had been provided by Detective Sergeant Loone, and therefore a conference would not assist this Office in determining whether any charges should be laid against any person. It should be noted that this Office had the benefit of full and detailed submissions by Sergeant Loone.
>
> At that time, and more recently, police were invited to submit any further material to this Office for consideration. No further material was submitted.
>
> The decision to prosecute or to decline to prosecute is also made by the Director in accordance with the Director's Guidelines and with regard to the available evidence. I refer to the test applied in this case, as in all cases, namely that:
>
> > *The question whether or not the public interest requires that a matter be prosecuted is resolved by determining:*

[45] Affidavit of Greg Walsh dated 15 May 2020, annexure GW1, 153.

> *(1) whether or not the admissible evidence available is capable of establishing each element of the offence;*
>
> *(2) whether or not it can be said that there is no reasonable prospect of conviction by a reasonable jury properly instructed as to the law.*
>
> In this case this Office has, on a number of occasions, carefully considered the evidence that has been provided. The further material recently provided by Detective Sergeant Loone has also been carefully considered. However, based on the presently available evidence, this Office is of the view that there is insufficient evidence to satisfy a jury properly instructed that a particular person was responsible for the disappearance and/or death of Mrs Lynette Dawson.
>
> That there be justice for all of the stakeholders in our system is at the forefront of any decision that is made by this Office. This matter has been extensively considered and the decision made with strict adherence to the Guidelines. If there is insufficient evidence to proceed, as is the case here, then it would be unjust and not in the public interest to commence any prosecution.
>
> I note that you have sought my advice as to why this Office has declined to have a meeting with Police in this matter.

109 On 21 November 2011, Deputy DPP Keith Alder responded to a further letter from Ms Jennings in the same terms as Mr Maxwell's correspondence.[46]

The Poole investigation

110 In July 2015, Detective Poole of the Unsolved Homicide Team was appointed officer in charge of a further investigation into Lynette Dawson's suspected murder. Detective Poole undertook a thorough review of all existing records and undertook further investigations of the Commonwealth Bank for any records relating to Lynette Dawson and enquiries of the merchants at the Warriewood shopping centre where it is said (by the applicant on the Crown case) that Lynette Dawson made purchases in January 1982.[47] Further enquiries were also made of the Forensics and Analytical Science Service in relation to any scope for further testing of the cardigan unearthed at the Bayview property in 2000. Those enquiries proved unsuccessful.[48] Enquiries were also made of people associated with the Northbridge Baths, together with a range of enquiries and searches of departmental and other agencies in what have since become known as "proof of life checks".[49]

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[46] Exhibit S; affidavit of Greg Walsh dated 15 May 2020, annexure GW1, 154.
[47] Exhibit S; affidavit of Greg Walsh dated 15 May 2020, annexure GW1, 162.
[48] Statement of Daniel Poole dated 7 April 2017, [48].
[49] Statement of Daniel Poole dated 7 April 2017, [5].

111 Detective Poole also inspected the files retained at the Coroners Court in relation to the 2001 and 2003 inquests and reviewed files held at the Missing Persons Unit. A formal request was submitted to NSW police records for any documents held in relation to other police investigations into Lynette Dawson's disappearance. The file in relation to the complaint made to the NSW Ombudsman by Ms Strath in 1985 was retrieved. It contained the applicant's "Antecedent Report". It is unclear whether it was a copy of the document Mona Vale police requested the applicant to provide as a "profile report" in August 1982.[50] Neither the original nor a copy of the document was held in the Missing Person file.

112 Enquiries were conducted by Detective Poole in January 2017 in an effort to locate the person named by the applicant in the Antecedent Report as a police officer who had been advising him on procedure. That officer died on 11 September 2015.

113 Additional records relating to the Mayger investigation were also located by Detective Poole, including a Case Management Report which indicated that Detective Mayger had apparently sought advice from the Coroner's Office in 1991. While the nature of the advice sought is not clear, it is likely to be whether, in the view of the Coroner, an inquest should be convened. Detective Poole's enquiries of the NSW Coroners Court did not locate any documents that reflect any advice was sought or provided. The only records related to the first and second coronial inquests in 2001 and 2003. The Case Management Report also indicates that enquiries were made between June 1990 and May 1992, after which the investigation was "suspended".

114 Detective Poole corresponded with Mr Mayger (then retired) and a statement was taken from him.

115 On 20 April 2017, Detective Poole forwarded a brief of evidence to the State Crime Command Legal Advice Section with a request for advice as to the sufficiency of the brief of evidence to charge the applicant with murder. On 4 April 2018, Detective Superintendent Scott Cook, Commander of the State Crime Command Homicide Squad, received advice from the State Crime

[50] Statement of Daniel Poole dated 7 April 2017, [62]-[73].

Command Legal Advice Section (a claim for legal professional privilege is made in respect of that advice).

116 On 9 April 2018, that advice, under cover of letter from Detective Superintendent Cook, was forwarded to the ODPP.[51] That letter reads as follows:

> As you would be aware, your office has previously reviewed the brief of evidence in relation to the murder of Lynette Dawson. The previous advice from your office was that police *should not* instigate proceedings. Since receiving that advice, detectives have undertaken further investigation and sought internal legal advice as to the sufficiency of evidence. The brief of evidence and internal legal advice are attached. I am of the firm view that the available evidence now justifies the institution of criminal proceedings against Christopher Michael Dawson for the murder of his wife Lynette Dawson.
>
> Given the previous involvement of your office and your advice not to prosecute, it is my view that it is prudent to seek further advice from your office, particularly as you will ultimately take carriage of any prosecution commenced by the Homicide Squad. It would be most unfortunate for the family if police were to commence proceedings and your office then declined to prosecute, particularly given the previous advice. This was a murder which attracted, and continues to attract, significant public interest. I respectfully urge you to consider the current evidence with the view of advising in favour of instituting criminal proceedings.

117 Detective Poole gave evidence that some time in the week commencing 3 December 2018, prior to the applicant's arrest in Queensland on 5 December 2018, police were notified that the DPP had determined to prosecute the applicant for murder. No correspondence between the ODPP and Detective Superintendent Cook was tendered on the application to confirm that decision or the reasons for it. It does not appear from the evidence tendered on the application that Lynette Dawson's family were formally notified of the DPP's decision or the reasons for it, although, if that be the case, nothing turns on it.

118 It was common ground on the application that the decision to prosecute was made in accordance with the Prosecution Guidelines of the ODDP for NSW. The edition of the Guidelines current at the date of the decision were published on 1 June 2007 with the authority of Mr Cowdery, the then DPP. Of relevance to this application is Guideline 4, "the decision to prosecute"; Guideline 12, "reasons for decision"; and, to a lesser extent, Guideline 14, "advice to police".

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[51] See later at [153]-[154].

119 Dealing with Guideline 14 first: it provides that, in accordance with established protocols between the ODPP and the NSW police force, advice will be provided in respect of matters that are, inter alia, strictly indictable. Additionally, it provides that a request for advice must be referred by the police to the DPP or a Deputy DPP in all cases of homicide. All requests by police for advice are to be answered in writing, responsive to a specific written request for such advice. Guideline 14 also provides the following:

> **Advice as to the sufficiency of evidence or the appropriateness of charges may be given in the following circumstances**
>
> (i) After a determination by the Local Area Commander, Crime Manager (or equivalent) or Police Legal Services that the evidence is sufficient and a Court Attendance Notice ("CAN") is appropriate, a matter may be referred by police for advice as to the sufficiency of evidence or the appropriateness of a CAN.
>
> (ii) Advice will be provided only on receipt of sufficient material in admissible form.
>
> (iii) Where insufficient material is provided to allow a decision to be made, the ODPP may request additional material before advice will be provided.
>
> (iv) Advice as to the sufficiency of evidence will generally be provided within four weeks of receipt of the material referred to in (ii) and (iii); however, where practicable and on the provision of reasons for urgency in the matter in question, a shorter period may be negotiated.
>
> (v) The advice will include reasons why charges are not recommended, the draft wording of charges recommended and requisitions for any additional material considered appropriate.
>
> **Advice during the course of an investigation**
>
> The ODPP may provide advice to police during an investigation into an indictable offence. Requests for this type of advice should be made in writing and endorsed by the Local Area Commander, Crime Manager (or equivalent) or Police Legal Services.

120 In the course of the proceedings, Peter McGrath SC, Deputy DPP, was formally asked by Mr Walsh, in a letter dated 28 July 2020, to advise the identity of the person who responded to Detective Superintendent Cook's letter of 9 April 2018, the ODPP's response to that letter and a copy of it. By letter dated 29 July 2020, Mr McGrath claimed legal professional privilege in respect of both questions. That claim was not challenged. The claim was apparently made in accordance with Guideline 12 which provides as following:

> Reasons for decisions made in the course of prosecutions or of giving advice, in appropriate circumstances, may be disclosed by the Director to persons outside the ODPP. Reasons will not be given in any case, however, where to

> do so may cause serious undue harm to a victim, a witness or an accused person, or could significantly prejudice the administration of justice.
>
> Generally the disclosure of reasons for prosecution decisions is consistent with the open and accountable operations of the ODPP; however, the terms of advice given to or by the Director may be subject to legal professional privilege and privacy considerations may arise. Reasons will only be given to an inquirer with a legitimate interest in the matter and where it is otherwise appropriate to do so.

121 Guideline 4 provides, inter alia, that the "general public interest is the paramount criterion" underlying a decision to prosecute. The Guideline goes on to provide that:

> The question whether or not the public interest requires that a matter be prosecuted is resolved by determining:
>
> (1) whether or not the admissible evidence available is capable of establishing each element of the offence;
>
> (2) whether or not it can be said that there is no reasonable prospect of conviction by a reasonable jury (or other tribunal of fact) properly instructed as to the law; and if not
>
> (3) whether or not discretionary factors nevertheless dictate that the matter should not proceed in the public interest.
>
> The first matter requires no elaboration: it is the prima facie case test.
>
> The second matter requires an exercise of judgment which will depend in part upon an evaluation of the weight of the available evidence and the persuasive strength of the prosecution case in light of the anticipated course of proceedings, including the circumstances in which they will take place. It is a test appropriate for both indictable and summary charges.

122 The third matter informing whether or not the public interest requires that a matter be prosecuted requires consideration of many factors. The published Guideline identifies 23 factors [3.1-3.23]. It is not necessary to set them out in full. The Guideline also provides that "the applicability of and weight to be given to these and other factors will vary widely and depend upon the particular circumstances of each case". Relevantly so far as this application is concerned, those factors would seem to me to include at least the following:

> 3.1 the seriousness or, conversely, the triviality of the alleged offence or that it is of a "technical" nature only;
>
> …
>
> 3.5 whether or not the alleged offence is of considerable general public concern;
>
> …
>
> 3.7 the staleness of the alleged offence;

…

3.15 the degree of culpability of the alleged offender in connection with the offence …

123 Guideline 4 also provides a range of matters which *must not* influence the decision to prosecute. They include, most materially on this application, "possible media or community reaction to the decision".

The relevance of the missing person investigation between February 1982 and 1989 on the application for a permanent stay

124 In oral submissions, Mr Boulten accepted that it would have been unlikely for the applicant to have been charged as a result of what was, from February 1982 up to at least May 1990, an investigation into Lynette Dawson's disappearance as a "missing person". For that reason, he accepted that the missing person investigation does not, of itself, factor into any assessment of the reasonableness, or otherwise, of the delay before the applicant was charged with Lynette Dawson's murder.[52]

125 That was a sensible concession. It is clear from the file created and maintained by the Missing Persons Unit from 18 February 1982 when the applicant attended Mona Vale police station and reported his wife missing, through to June 1989 when the Missing Person file records a further and final negative result from enquiries at the Department of Motor Transport and the Central Names Index, that Lynette Dawson was treated by police as "missing". It also appears that, as the years passed, her mother appeared to accept that her daughter did not want to be "found".

126 Although Detective Poole did not have any formal association with the Missing Persons Unit, he gave evidence as to its function. He gave the following evidence:[53]

> Q. Do you have an idea one way or the other as to whether that unit is charged with the responsibility of finding a person reported to be missing, that is, to undertake active investigative functions based upon the receipt of information from time to time about that person, or are they, to your understanding - and if you don't know you'll say so - really the repository of information about a person who has been reported missing, that is, recording successive reports from various agencies perhaps, and individuals perhaps, to

[52] Exhibit 2 - Letter from Scott Cook, Detective Superintendent Commander Homicide Squad, to Lloyd Babb dated 9 April 2018.
[53] T 580.33.

signify that that person is alive in the sense that they are not deceased and disappeared for that purpose - for that reason rather, but simply not contactable or findable by the person who's reported them missing, if you follow the question?

A. Yes, I do.

Q. Do you have an appreciation of that?

A. In the current - today or --

Q. No, in 82.

A. -- in 82?

Q. Yes. In the 80s.

A. My understanding is that the Missing Persons Unit were the repository for recording all of the information and were responsible for making signs-of-life checks, if I can broadly call it that.

Q. But they weren't charged necessarily with the responsibility, as part of their formal police duties, of, say, going to speak further to the person who reported the missing person having been sighted or reported by someone telling them that the missing person had been sighted; [that] was not an active line of inquiry that the police in the unit were charged with discharging?

A. Yes, correct.

127 On 15 August 2016, in the course of his investigation, Detective Poole prepared a document entitled "Investigator's Note" which formed part of the material tendered on the application and included in the material served on the applicant as part of the police brief of evidence. In it, Detective Poole extensively reviewed the Missing Person file maintained in microfilm. He noted that the documents within the various microfilm files included: the original Missing Person report; running sheets maintained at the Mona Vale police station; correspondence with members of Lynette Dawson's family; and, importantly, a chronological record of all enquiries made by both the Missing Persons Unit and Mona Vale police station with a view to locating Lynette Dawson from 1982 through to the end of that decade.

128 Detective Poole was unable to confirm whether or not the files are a comprehensive record of all enquiries that were undertaken; neither is he able to interrogate for meaning the shorthand way some enquiries are noted in both the file and the running sheets at Mona Vale police station beyond what the records state.

129 The liaison between the Missing Persons Unit and Mona Vale police was maintained through the currency of the enquiry into Lynette Dawson as a

missing person in accordance with directions issued by NSW police current as at that date.[54] The relevant instruction provides that reports of missing persons are to be dealt with at the station at which the report is made and "the inquirer" (the nomenclature for the person who reports a person "missing") should never be directed to personally contact the Missing Persons Unit, a subsection of the Technical Support Branch. All correspondence with that Unit was to be via a designated GPO Box in Sydney, with all correspondence from metropolitan police stations forwarded to the Unit via the interdivisional mail system.[55]

130 It is not necessary to set out verbatim the results of the enquiries into Lynette Dawson's "disappearance" as reflected in the Missing Person file. Suffice to note that the running sheet records monthly enquiries were made of the applicant (until at least August 1982) following the initial filing of the Missing Person report by him on 24 February 1982. (I note that it is the Crown case that the applicant only officially reported his wife missing under pressure from Mrs Simms who approached him at a football match with a photograph of his wife, demanding that he contact police.[56])

131 The initial handwritten Missing Person report on 24 February 1982 states that the applicant "dropped [his wife] to shops at Mona Vale at 7am on 9/1/1982"; that he spoke to her on 9 January 1982 at the Northbridge Baths and she again telephoned on 15 January 1982, but has not been heard from since. The report also states, "[m]ay have gone to a religious organisation on the North coast". The report refers to Lynette Dawson's use of a Bankcard in the following terms, "bankcard indicated she was at Warriewood on 12 January".

132 Two days later, on 26 February 1982, there is a file note that the applicant was again contacted by police and that, although he reported his wife had not made contact with him, he was "making enquiries to locate her on the Central Coast where he had heard she was staying". (It would appear this is a reference to the applicant having spoken to Ray and Sue Butlin since in his 1991 interview with Detective Mayger, at Q108, he told police that it was his "guess" that "Lyn

[54] T 468.
[55] Instruction no 37; Missing Persons and Broadcast Enquiries, p 395-400 of the NSW Police Rules and Instructions Booklet as at 31/7/1980 and as further amended 20/5/1982.
[56] ibid.

probably would have been on the Central Coast … I think I rang the Butlins to see if Lyn had gone to stay with them".)

133 Over successive weeks in March 1982, the applicant was contacted by police following up on his report that his wife was "missing". In each instance he is recorded as saying, he had "no further knowledge" of his wife's whereabouts.

134 On 29 April 1982, there is a further report of the police making contact with the applicant where he informs police that he and his wife have:

> … had marriage problems for 18 months. Attended psychiatrist day prior to leaving to try and resolve. In possession of $500 when last seen.

135 It would appear from the materials accessed by Detective Poole from the Missing Person file in 2015 that after April 1982 the applicant did not initiate any enquiries of police or ask to be informed of the result of ongoing enquiries by police into his wife's whereabouts.

136 On 27 April 1982, when police were unable to make contact with the applicant they spoke with Mrs Simms who also told police she had no information about her daughter's whereabouts. It would appear that police made contact with Mrs Simms after they contacted her husband (Lynette Dawson's father) on 3 April 1982 to enquire whether he had any knowledge of his daughter's whereabouts.

137 On 15 May 1982, Mrs Simms was contacted and informed police that "MP [missing person] has been seen by a friend in the Narraweena shopping centre". There is nothing in the file to indicate whether further enquiries were made of Mrs Simms about this sighting or the identity of the "friend" who made it. In Mrs Simms' letter to police of August 1982 (see later at [147]), she records the following:

> I put an ad in the Manly Daily for a week as a lady whose child she minded in the centre said she saw her standing in the Narraweena shop centre near a car. Barbara showed her a snap shot & she pointed Lyn out. Around about that same time or earlier another friend of Lyn's and Chris's thought she saw her in a car outside a fruit stall she worked at on the way into Gosford. So I put an ad, four times in the central coast paper.

138 On the basis that the "Barbara" referred to in this entry is Ms Cruise, there is nothing in the Missing Person file to suggest she was spoken to by police, although her business card is on file. It is not clear who supplied the card or the reason it was supplied.

139 The applicant also referred to the reported sighting of his wife at Narraweena in the Antecedent Report supplied by him to police at their request in August 1982. In that report he also referred to his wife as having:

> … opened her own bank account and bankcard. Statements for January show she made purchases at Katies - Narrabeen on 12.1.82 and on February's statement 27.1.82 Just Jeans Narrabeen. No further statement or payments were made on that account [ind] arrived here.

140 The applicant did not supply the Bankcard statements to police and neither, it would appear, did police seek the documents from him. It is also apparent that no enquiries of any kind were made by police of the stores from which clothing items were purchased on the tender of the Bankcard during the missing person investigation.

141 It would appear that the first official enquiries of Lynette Dawson's whereabouts through government departments or other agencies operating at a national and state level were conducted by police at Mona Vale, the results of which were noted on the Missing Persons Unit card on 21 October 1982. That notation reads:

> All departments. Neg, inquirer [on my understanding a reference to the applicant] and Mona Vale police seen, no fur. info. available.

142 It would also appear that a full description of Lynette Dawson with her photograph was issued and forwarded to all police stations in NSW at this time.

143 In late 1982, Mrs Simms made her own enquiries of a range of organisations by letters sent to the following: the Salvation Army; the police departments of Queensland, Tasmania, the Northern Territory, South Australia, Western Australia, Victoria and New Zealand; the Nurses' Board of WA and allied organisations in Victoria, South Australia and Queensland. Mrs Simms' letter provided information to the effect that Lynette Dawson (her daughter) had been "out of contact with her family since January 1982". Mrs Simms gave a physical description of her daughter with a request for any information the recipient of the letter may have about her whereabouts. It would also appear that police made their own independent enquiries of the various state nursing registration boards without success. A note within the Missing Person file records that on 28 October 1982 "inquiries of all departments open to the missing persons unit

were unsuccessful", similarly with what were described as "birth checks", and that Mrs Simms was informed of those results.

144 Mrs Simms also arranged for advertisements to be placed in *The Daily Mirror*, *The Australian*, *The Daily Telegraph* and *Cumberland Newspaper* in 1982, 1983 and 1984 and in *The Daily Telegraph* with a photograph in 1989 seeking information about her daughter's whereabouts.

145 In February 1983, Senior Constable Cush of the Missing Persons Unit spoke with Mrs Simms who confirmed she had no contact with her daughter and "no sightings since last seen in Gosford area in 1982". The notation further records that "Mrs Simms believes [Lynette Dawson] was making new life for herself after leaving husband".

146 Mrs Simms was contacted by police in December 1987 in accordance with the system for updating the Missing Persons Unit records. Police informed Mrs Simms of their enquiries to date, to the net effect that her daughter's whereabouts remained unknown despite repeated enquiries of various agencies throughout 1985 and 1986. It was at that time that Mrs Simms informed police she had been contacted by a friend from Terrigal who thought she had seen her daughter (that person was not named). Mrs Simms informed police that in response to that information she travelled to Terrigal where she made a search of doctors' surgeries and medical centres to see if her daughter was employed, without success. Whilst at Terrigal she also spoke to police at the Terrigal police station where she noted that the Missing Persons list displayed at the station wrongly appointed her daughter's birth date as October 1948 when it should have read September 1948. Mrs Simms informed police that she would like enquiries to continue into early in the following year (1988), which she noted would be a number of years since the date of her daughter's reported disappearance.

147 The Missing Person file also contained a letter forwarded to the Missing Persons Unit in May 1990 via email from Gregory Simms, Lynette Dawson's brother, who at that time held the rank of Senior Constable in the NSW police service. It was one of a number of documents Mr Simms forwarded to the Unit when he became aware that JC had spoken with the NSW police at the

instigation of her father because of her concerns about the circumstances in which Lynette Dawson "disappeared". The email included Mrs Simms' letter to Mona Vale police of August 1982 and a note, in Mrs Simms' handwriting, of what is described as "Lyn's bankcard number 496.62.205.014.186" and her account with the Commonwealth Savings Bank at Narrabeen. That same information was also included in Mrs Simms' letter of August 1982. In the letter, Mrs Simms informed police that the Bankcard associated with that number was addressed to what she described as "the child minding centre Warriewood". It would also appear that she made her own enquiries to see whether another Bankcard had been issued to her daughter with a new forwarding address, but was advised that no information would be provided as she was not the card holder.

148 On Missing Persons Unit letterhead dated 14 February 1983, the following is noted, "all enquiries, all departments. Neg. Bankcard, medical funds, nurses registration boards all states neg. S/Security neg. Under all names Dawson, Simms and Hewitt-Simms".[57] Police also record the following, "mother has also written to all states for assistance which proved negative". A handwritten notation on that document records "no trace all departments 5/12/83".

149 Although the nature and extent of enquiries of "Bankcard" such that those enquiries proved "neg" is not known, any enquiries made by Homicide Squad investigators, whether in the Mayger investigation or the Loone investigation, would not, in any event, have produced records either from Lynette Dawson's Commonwealth Bank account or the retail merchants at which her Bankcard was said to have been used, as records were not retained by either entity after seven years (that is, after 1989). No primary or secondary records of the Bankcard being in fact used by Lynette Dawson at either of the retail outlets are available.[58]

150 A letter from Mrs Simms of August 1982 and the applicant's handwritten Antecedent Report from the same month appear to have been furnished at the request of police by what is described in the Missing Person file as "profile reports". They were to be "in depth" and to include "all sources of information,

[57] Statement of Patricia Jenkins dated 9 October 2018, [36].
[58] Correspondence from interstate agencies, including police (CB 252-260).

friends, associates, relatives etc" for the information of the Missing Persons Unit. In September 1982, the receipt of both documents was noted in the Missing Person file. It was also noted that what were described as "normal follow up reports" would be initiated at the instigation of the Missing Persons Unit.

151 In his statement to Detective Poole of 21 August 2019, Mr Mayger (formerly Detective Mayger) refers to attending upon the Missing Persons Unit in the early stages of his investigation into Lynette Dawson's suspected homicide. However, he has no recall of what was in the file or whether any of the entries in it were followed up by him in 1991 or 1992. Mr Mayger makes no reference to having read Mrs Simms' letter of 21 August 1982 or having considered its contents. In particular, he makes no reference to having read the applicant's handwritten Antecedent Report dated 16 August 1982. Furthermore, it does not appear from the structure of his interview with the applicant in January 1991 that the Antecedent Report was used as a framework for that interview. The applicant was certainly not invited to comment upon why he makes no reference in it to JC as his lover before his wife's disappearance, or to confirm that the relationship was the source of "marital problems" which he attributes in the Antecedent Report to his wife's "spending and financial matters in general". He was neither invited to explain why, given that JC was living with him as his de facto wife at the time of making the report in August 1982, he makes no reference to her; nor was he questioned as to why he told police in his Antecedent Report that he "travelled north" over Christmas to be "by myself", but returned home on Boxing Day "having missed my wife and daughters and hoping to resolve our differences".

152 Detective Loone also gave evidence of contacting the Missing Persons Unit in the course of his further investigation into Lynette Dawson's suspected homicide in 1998. In contrast to Mr Mayger, Detective Loone did consider the contents of Mrs Simms' letter of August 1982. He gave evidence, however, that he did not know of the existence of the applicant's Antecedent Report until it appeared on the website of *The Australian* as an adjunct to the podcast.

153 Although it is not entirely clear why the Antecedent Report (or at least a copy of it) was not held within the file maintained by the Missing Persons Unit when it was accessed by Mr Mayger in 1990-1992 and by Detective Loone at any time after 1998, it would appear that the document was forwarded to the Office of the Ombudsman, either by the Missing Persons Unit or by Inspector Shattles who might have obtained it in preparation of a report he was asked to prepare and furnish on behalf of the NSW police by the then Commissioner of Police, Mr John Avery, in response to the enquiry the Ombudsman was undertaking into the adequacy of the treatment of Lynette Dawson as a missing person, responsive to the complaint launched by Ms Strath in February 1985.[59] The Ombudsman's investigation, which was conducted by an investigations officer within the Ombudsman's office, sought information from the Commissioner of Police in order to determine whether Ms Strath's complaint should be investigated in accordance with Part IV of the *Police Regulation (Allegations of Misconduct) Act 1978* (NSW).

154 It is clear from the Missing Person file that there was no suggestion from any of Lynette Dawson's family that she may have been murdered. However, in the complaint to the Ombudsman by Ms Strath in February 1985, the applicant's sexual relationship with JC and the marital discord was (in Ms Strath's firm belief) linked to Lynette Dawson's disappearance. The tone of the letter of complaint is, at the very least, strongly suggestive that in Ms Strath's view a line of enquiry into that state of affairs should be pursued. Ms Strath complains that police failed to investigate Lynette Dawson's disappearance despite the applicant having by that date married JC (who Ms Strath describes as his "school girl lover") while "his wife, who wasn't up to his standard, vanished from the face of the earth, having no further contact with any family or friends". Ms Strath raises a number of questions including why, since she was one of the last people to see Lynette Dawson, she was never spoken to by police and why Lynette Dawson's other friends and colleagues were not spoken to by police. Ms Strath asserts "[Lynette Dawson] loved her home and was a very materialistic person. Why would she walk out on a home worth over $250,000?".

[59] Statement of Daniel Poole dated 7 April 2017, [48].

155 Following receipt of the complaint by the Ombudsman's Office, and responsive to a request from the Ombudsman for a police report on the enquiries which had been undertaken and the furnishing of the Antecedent Report by Inspector Shattles, there is nothing in the materials tendered on the application to indicate whether Ms Strath was informed of the outcome of her complaint to the Ombudsman. It would appear, however, from the Ombudsman's file (retrieved by Detective Poole in an archived folder from the Parramatta Records Repository in September 2015), that the Ombudsman was satisfied from Inspector Shattles' report that police action was adequate and that all avenues of investigation had been pursued into Lynette Dawson's "disappearance".

The relevance of the Mayger investigation to the issues raised on the application

156 As noted above, the Mayger investigation was "triggered" by JC separating from the applicant in early 1990 and returning to NSW from Queensland where she had been residing since December 1984 with him and his two daughters and their daughter. (JC's daughter with the applicant was born in January 1985.)

157 According to enquiries made by Detective Poole between September 2015 and March 2017, the vast majority of records of the Mayger investigation are now missing or have been "archived in such an obscure fashion that it is not possible to locate them using the systems in place at this time".[60] The only primary records of the investigation available to Detective Poole were the ERISP conducted with the applicant on 15 January 1991; JC's statement to police of 17 May 1990; a report to Major Crime Squad North about the missing person Lynette Dawson, dated May 1990; a briefing paper entitled "DAWSON Suspicious Disappearance"; a Case Management Report from Major Crime Squad North dated September 1992; and investigators' duty books.

158 The Case Management Report contains the following entries:

> 28.6.90 – Joanne Dawson interviewed and statement obtained. Brother and sister in law of missing person interviewed during June, 1990.

[60] Inspector Shattles was first spoken to by Detective Poole in 2018. He declined to cooperate with Detective Poole's enquiries of him.

> 25.7.90 – A number of friends and associates of the M.P interviewed during July, 1990. Social service, taxation and other checks being carried out.
>
> 27.8.90 – Inquiries being conducted into bank accounts and possible sightings of M.P.
>
> 31.8.90-25.9.90 – Inquiries continuing.
>
> 22.10.90 – Awaiting result of inquiries also investigating the possibility of using ground penetrating radar device to search property owned by M.P's husband.
>
> 31.10.90-30.11.90-21.12.90 – Inquiries continuing.
>
> 31.01.91 – Chris Dawson (husband of missing person) interviewed
>
> 15.01.91 – Further information obtained which requires investigation. INQUIRY CURRENT.
>
> …
>
> 28.2.91. Inquiry current.
>
> 25.3.91 Missing Persons file relative to this inquiry located for perusal. Inquiry current.
>
> 25.4.91. Prosecutors at Coroner's Court being consulted for advice as to whether Inquest to be held and nature of evidence to be called. CURRENT.
>
> 30.5.91. Resume before Coroner for direction.
>
> 30.6.91. Inquiry as above. Current.
>
> 31.7.91. Inquiry current – awaiting direction.
>
> 30.8.91. Inquiry current – some further inquiries now to be made.
>
> 30.9.91. Inquiry current (status same as at 30.8.91) Those inquiries will re-commence as current workload permits.

159 When Mr Wright (formerly Detective Wright) was spoken to by Detective Poole in January 2019, he could not remember anything of the work he did as an investigating officer beyond what was recorded in his duty book.

160 Mr Mayger provided a statement dated 21 August 2019 in the course of the Poole investigation. Neither officer was approached by Detective Loone when he commenced his investigation into Lynette Dawson's suspected murder in July 1998.

161 In his statement, Mr Mayger stated that he had reviewed the available records and confirmed that the investigation under his command involved "extensive enquiries and the preparation of a number of witness statements". He stated that there would also have been "a substantial case file and brief".[61] He was, however, unable to recall the information provided to police by various

[61] Statement of Daniel Poole dated 7 April 2017, [26].

witnesses interviewed either by him or Detective Wright, and without reference to the statements he was unable to recall the contents of the statements or who made them. Additionally, it must be assumed that he has no recall of the results of "inquiries into bank accounts and possible sightings of MP [missing person]" on 27 August 1990 as recorded in the Case Management Report.

162 There is no explanation for the disappearance of the full complement of materials from the Mayger investigation. Mr Boulten submitted that an analysis of the available records, such as they are, and of Mr Mayger's statement to Detective Poole in 2019 allows for a reasonably accurate reconstructed picture of what the brief of evidence would have comprised in 1992. In his submission, the Court would safely conclude the evidence assembled in the Mayger investigation between 1990 and 1992 is not materially different from either the brief of evidence ultimately submitted by Detective Poole to the DPP in April 2018 or from the brief submitted by Detective Loone to the Coroner which was then referred to the ODPP under s 19 of the *Coroners Act* in 2001 and 2003 and considered for its sufficiency under the Prosecution Guidelines at that time.

163 In Mr Boulten's submission, that being the case, there has been an unaccountable or inexplicable delay of 26 years before the prosecuting authorities resolved to charge the applicant with his wife's murder. In his submission, that is both unreasonable and oppressive in itself and has caused substantial actual prejudice to the applicant by the effluxion of time and the opportunity he has lost to undertake his own enquiries into his wife's whereabouts after 9 January 1982, including the opportunity to obtain records that would support his claim that she was alive after 8 January 1982. In order to assess the weight of that argument, it is necessary to attempt the reconstructive exercise foundational to Mr Boulten's submission.

The "reconstruction" of the course of the Mayger investigation

164 Mr Mayger recalled taking a statement from JC. Since that time, JC has provided an additional four statements. She also gave extensive evidence at the second coronial inquest in February 2003.

165 On 23 July 1990, police attended the Bayview property with Mr Wright where they spoke with the then owner of the property, Neville Johnston. Mr Mayger

recalled Mr Johnston telling him that the applicant had been back to the property at some point and shown interest in the landscaping work that had been done since the property was sold in late 1984. Mr Johnston is not to be called by the Crown at the applicant's trial.

166 On 24 July 1990, Mr Wright and Mr Mayger attended Sydney Boys High School and spoke with Phillip Day. Mr Mayger has no recollection of what information Mr Day provided and there is no statement from him taken at that time. Mr Day did, however, provide a statement to Detective Loone on 21 February 2001, eleven years later. Mr Day also gave oral evidence at the second coronial inquest on 27 February 2003. Mr Boulten submitted that it is highly likely that the information Mr Day gave to Mr Mayger in July 1990 was consistent with the information he provided to Detective Loone and later in his evidence before the Coroner. Mr Day is now deceased.

167 Mr Day knew the applicant since they started school together in 1961 and had known Lynette Dawson since 1964. Mr Day stated that in early January 1982 he received a telephone call from the applicant who apologised for not sending him a Christmas card and explained that he and Lynette Dawson were having marital difficulties. The applicant said that he wanted to talk to Mr Day about his problems and they arranged to meet at Northbridge Baths on 9 January 1982.

168 Mr Day said that on 8 January 1982 he rang the telephone at the Bayview property to confirm that he was to meet the applicant at the Baths the following day. He spoke to Lynette Dawson who told him that she and the applicant had attended marriage counselling earlier that day. She confirmed that she would tell the applicant Mr Day had telephoned.

169 Mr Day said that on 9 January 1982 he drove to Northbridge Baths, arriving there some time between 2 and 3pm. When Mr Day arrived at the Baths, Mrs Simms, the applicant and his two daughters were already present. Some time later, Mr Day said the applicant was summoned to "the pool office" to answer a telephone call. Mr Day said that when the applicant returned he said that the call was from his wife and she was going away for a few days to "sort herself out".

170 According to Mr Day, the applicant said that Lynette had asked if Mr Day would drive Mrs Simms and his two daughters back to Mrs Simms' home. Mr Day said that he did this and the applicant stayed at the Baths to finish his shift.

171 On 27 July 1990, Mr Wright and Mr Mayger spoke with Ms Cruise, Lynette Dawson's employer at the Warriewood child care centre. Mr Mayger has no recollection of what information Ms Cruise provided and there is no statement from her taken at that time. Ms Cruise was, however, interviewed on 12 August 1998, eight years later, by Detective Loone. On 27 September 1998, she made a statement adopting the contents of that interview. She gave evidence at the second coronial inquest on 25 February 2003. She is to be called by the Crown at the applicant's trial. Although she was not asked any questions at the inquest about her recall of opening the Bankcard statement, she does give an account of doing so when interviewed by Detective Poole (as already discussed at [75]).

172 On 28 July 1990, Mr Mayger spoke to Ms Leary, another co-worker of Lynette Dawson. He has no recollection of what information Ms Leary provided. While there is no statement from Ms Leary taken at that time, Ms Leary also gave a statement on 9 December 2000 in the course of the Loone investigation and gave evidence at the second coronial inquest on 25 February 2003. She is to be called by the Crown at the applicant's trial.

173 In her statement of 9 December 2000, Ms Leary states that Lynette Dawson disclosed to her that she was having problems in her marriage and that she had walked in on the applicant and "a young girl" in bed together (on any view, JC).[62] Ms Leary also recalls Lynette Dawson telling her of her attendance with the applicant at marriage counselling. She believes that the last time she saw Lynette Dawson was only a few days prior to her disappearance at which time she noticed that Lynette Dawson had "faint bruising on one side of her neck".[63] Another worker at the child care centre asked Lynette Dawson how she had sustained the bruising and she said that when they had gone to see the marriage counsellor, and once they were alone in the lift, the applicant had put his hands around her throat and started to shake her. He said, "I'm only doing

[62] Statement of Paul Mayger dated 21 August 2019, [30].
[63] Statement of Annette Leary dated 9 December 2000, [6].

this once and if it doesn't work I'm getting rid of you".[64] Mr Boulten submitted that "[t]here is no reason to believe that evidence was not available to investigating police in 1990"[65] and that enquiries then of the identity of the marriage guidance counsellor (including from the applicant) might have been successful in identifying that practitioner, thereby permitting the applicant access to notes and other clinical records supporting his claim to police in his ERISP that his marriage was essentially sound and the last evening with his wife before her disappearance was convivial and amorous and that his conduct towards his wife in the lift (if it happened at all) has been misinterpreted.

174 On 31 July 1990, Mr Mayger spoke with Patricia Hartley but has no recollection of what information she provided. Mrs Hartley provided a statement to police on 29 July 2016. Mrs Hartley was a close friend of Lynette Dawson and was a bridesmaid at her wedding to the applicant. In her statement to police, Mrs Hartley said she telephoned the Bayview property around Christmas 1981 and was told by the applicant that "[s]he's gone away to think about things like I had".[66]

175 On 15 September 1990, Mr Mayger spoke with Anna Grantham. He does not have any recollection of what information Ms Grantham provided. Ms Grantham provided a statement to Detective Loone dated 23 September 1998 and gave oral evidence at the second coronial inquest on 25 February 2003. In her statement, Ms Grantham states that Lynette Dawson told her the applicant was a "very aggressive person" and that one day during an argument he grabbed her by the hair and forcibly pushed her face into some mud around the swimming pool. Lynette Dawson also told Ms Grantham that she had been gasping for air and that her two youngest children had witnessed this incident and that there was another incident where "violence of some sort" was involved.[67] Mr Boulten submitted that it is likely Ms Grantham would have provided the same information to Mr Mayger and therefore there was "probably in the original brief evidence suggesting that [the applicant] was violent towards

[64] Statement of Annette Leary dated 9 December 2000, [7].
[65] Statement of Annette Leary dated 9 December 2000, [7].
[66] T 588.11.
[67] Statement of Patricia Hartley dated 29 July 2016, [8].

[Lynette Dawson]".[68] I accept that is a rational inference, despite the fact that she did not refer to the incident in her evidence at the second inquest, with the prosecutor's questions focusing on Ms Grantham's involvement with Lynette Dawson as a co-worker and close friend and the concerns Lynette Dawson had regarding her husband's increasing closeness to JC and the upset and hurt that was causing her, in a sense fortifying her resolve to work to save her marriage and her family.

176 On 16 September 1990, Mr Mayger spoke with Ms Strath and took possession of some documents. He could not recall what these documents were. An available and, it would seem to me, a compelling inference is that the documents related to her complaint to the Ombudsman. In addition to Ms Strath's letter to the NSW Ombudsmen in February 1985 complaining about the investigation of the Missing Persons Unit into the disappearance of Lynette Dawson, Ms Strath also provided a statement to police on 22 September 1998 and gave oral evidence at the second coronial inquest on 25 February 2003, the effect of which was, consistent with the evidence from Lynette Dawson's other close friends, that despite her marriage problems (including discovering the applicant and JC naked in the swimming pool at the Bayview home) she would never leave him or her children.

The alleged sighting of Lynette Dawson by Sue Butlin

177 On 30 July 1990, Mr Mayger spoke with Mr and Mrs Simms, Lynette Dawson's parents. He has no recollection of what information they provided. Mr Boulten submitted that it is likely Mrs Simms would have said something very similar to what she wrote in the letter to the Missing Persons Unit in August 1982 and, as a consequence, the police then investigating a suspected homicide would have become aware of the alleged sighting of Lynette Dawson by Sue Butlin and also the alleged sighting of her by "a friend" at Narraweena shops who, according to Mrs Simms, had identified her from a photograph shown to her by Ms Cruise. Insofar as concerns that alleged sighting, Mr Boulten submitted that since that identification cannot now be tested, given Detective Loone's failure to follow up the issue with Mrs Simms and to take a statement from her in

[68] Statement of Anna Grantham dated 23 September 1998, [8].

1998, the applicant is severely prejudiced by Ms Cruise having no memory of this incident by 1998. He also complains of successive failures of police to investigate the alleged sighting of Lynette Dawson by Mrs Butlin.

178 Mrs Butlin died in May 1998, two months before the Loone investigation commenced. No statement has ever been taken from her. Her husband, Ray Butlin, is to be called by the Crown at the applicant's trial. He will give evidence of what his wife reported to him.

179 Mr Butlin was first interviewed by Detective Loone on 15 February 2001. Mr Butlin also provided a statement to the first coronial inquest on 27 February 2001 and gave oral evidence at the second inquest on 26 February 2003. Mr and Mrs Butlin were good friends of the applicant and Lynette Dawson. They first met the applicant and Paul Dawson when they were appointed as coaches of the Gosford Rugby League first grade team. Mr Butlin was the team manager. Mr and Mrs Butlin spent several weekends at the Bayview property and the applicant and Lynette Dawson visited them on the Central Coast several times. Mr Butlin described his relationship with the applicant and Lynette Dawson as "close personal friends". In his interview with Detective Loone, Mr Butlin stated that he recalled that his wife had mentioned to him at some time in early 1982 that she had seen Lynette Dawson at a fruit shop in Kulnura on the Pacific Highway and that she was "positive" it was "Lynette". Mr Butlin stated that his wife had said that she had attempted to approach Lynette Dawson but she had hurried away from her. Mr Butlin confirmed that his wife had said she had seen Lynette Dawson "front on".

180 Mrs Butlin's sighting of Lynette Dawson is first recorded in Mrs Simms' diary against the date 18 May 1982. It records, "Bumped into Sue and Leanne at Quay. Chris rang. Sue thought she saw Lyn five to six weeks earlier at Gosford". A second entry against the date 20 May 1982 records, "Rang Chris. Rang Sue at Gosford. Saw Lyn 5 weeks ago there".

181 There are two possible interpretations of these entries. The first is that Mrs Butlin reported having seen Lynette Dawson directly to Mrs Simms. The second is that the applicant reported Mrs Butlin's sighting of Lynette Dawson to Mrs Simms when he rang her, the applicant having "bumped" into her (Mrs

Butlin) at “Quay”. In oral submissions, the Crown contended that the latter interpretation is to be preferred, particularly when regard is had to the letter Mrs Simms sent to the Missing Persons Unit in August 1982 where she does not name Mrs Butlin as the woman who sighted Lynette Dawson near Gosford and where there is no evidence from Mr Butlin, or from any other source, that Mrs Butlin was known to Mrs Simms or that Mrs Butlin would have occasion to contact her about her daughter as distinct from contacting the applicant, as Lynette Dawson’s husband and their friend. That analysis is, in my view, supported by the reference to the “sighting” by Mrs Butlin in the applicant’s Antecedent Report, supplied by him at the request of police in August 1982. It records as follows:

> Lyn was reportedly seen at Narraweena – reported to her mother and also at Gosford by Mrs Sue Butlin.

182 It is also supported by Mrs Simms’ reference to the sighting of Lynette Dawson in her letter of 21 August 1982 when she stated, under the heading “end of April-May [1982]”:

> Around about that same time or earlier another friend of Lyn’s or Chris’s thought she saw [Lynette Dawson] in a car outside a fruit stall she worked at on the way into Gosford.

183 Further, in his 1991 ERISP, the applicant told Mr Mayger of the reported sighting of his wife at Gosford and provided the names of Sue and Ray Butlin and their phone number. There is no record of a statement being taken from Mrs Butlin during the Mayger investigation. As noted above, in Mr Mayger’s statement to Detective Poole of 21 August 2019 he does not refer to a statement being taken from Mrs Butlin or any reference at all to contact with her personally (by that name) or attempting to do so. This is in contrast to Mr Mayger’s reference to a number of other witnesses who were contacted and spoken to as reflected in his duty book, despite his inability to recall what information they provided and/or whether formal statements were taken.

184 The Crown submitted that because Mr Mayger did not explicitly say that he had taken a statement from Mrs Butlin, it should be inferred he did not contact her. The Crown submitted that it was more likely that Mr Mayger simply proceeded on the basis of the information the applicant provided in his ERISP about Mrs Butlin’s sighting. In my view, that submission needs to be contrasted with Mr

Mayger recalling that he was given advice "in relation to the *evidence of Sue Butlin*" informing Detective Poole that "the advice was at that time that *due to this evidence* it was unlikely that any prosecution would be successful unless that evidence was refuted" (emphasis added). Mr Mayger was apparently able to recall this information without reference to his duty book, highlighting in my assessment that it is highly likely the evidence of Mrs Butlin was considered of such importance to his investigation that he was able to remember the details of her evidence (or an acceptance of what she would have said if she was spoken to), in contrast to others he had spoken to of whom he had no recollection or recall of the information they might have provided.

185 While the applicant has been denied the opportunity of being able to rely on direct evidence from Mrs Butlin and the circumstances of her "sighting" of Lynette Dawson, including, it might be assumed, an expanded account of her sighting, including the distance over which she saw Lynette Dawson, whether there were others in her line of sight, the time of day and other contextual information tending to support the reliability of her evidence, Mr Butlin will be called by the Crown to permit cross-examination of him by the applicant's trial counsel. The applicant can also rely upon the reports of the sighting he provided in his ERISP and in his Antecedent Report and the apparent weight afforded to it in the advice Mr Mayger was given in 1992 that the matter would not be referred to the Coroner or an inquest convened "unless that evidence was refuted".[69] Mr Mayger is also to be called by the Crown at the applicant's trial where he might be in a position to give evidence elaborating upon the circumstances in which Mrs Butlin's "evidence" was thought to be of such significance.

186 In his statement, Mr Mayger states that it is likely that during the course of the investigation, the police would have gone to the Missing Persons Unit and Mona Vale police station to search for "records or other information that they had which could have assisted our inquiries".[70] This is confirmed by the Major Crime Squad North Case Management Report that states that on 25 March

[69] T 584.34.
[70] Statement of Paul Mayger dated 21 August 2019, [29].

1991, “Missing Persons file relative to this inquiry located for perusal”.[71] Mr Boulten submitted that it is very likely Mr Mayger would have had access to Mrs Simms’ letter of August 1982 and as a result would have been aware of the alleged sighting at the Narraweena shops and the alleged sighting by Mrs Butlin. As noted above, it is not known whether he had access to the applicant’s Antecedent Report, although this would appear doubtful.

The applicant’s 1991 interview

187 On 15 January 1991, Messrs Mayger, Wright and Wilkins travelled to Queensland and electronically interviewed the applicant in the presence of his solicitor. A copy of that interview will be tendered by the Crown at the applicant’s trial. It is the Crown case that the applicant told significant and deliberate lies in his interview with police, including denying he spoke with JC about contracting a hit man to kill his wife, and denying he rang JC and asked her to return from holidays and live with him because his wife had left him for good. It is also the Crown case that the applicant lied when he told police he was “constantly in touch” with various people for twelve months after his wife’s disappearance, “trying to locate her”.

188 On 25 April 1991, the prosecutors at the Coroners Court were consulted (probably by Mr Mayger) for advice as to whether an inquest into the disappearance of Lynette Dawson was to be held and the nature of the evidence to be called. On 30 May 1991, the Major Crime Squad North Case Management Report records, “Resume before Coroner for direction”.[72] There is no further information about the case having been considered by the Coroner for his or her direction as to what next (if anything) should occur in the Case Management Report.

189 On 29 May 1992, the report records “inquiries suspended”. In his statement, Mr Mayger recalled that the advice provided (presumably from the Coroner) at the time was that due to the “evidence” of the alleged sighting by Mrs Butlin, it was unlikely that any prosecution would be successful.

[71] Statement of Paul Mayger dated 21 August 2019, [29].
[72] Report to Major Crime Squad North of Missing person Lynette Dawson.

The relevance of the Loone investigation to the application for a permanent stay

190 Before turning to consider Mr Boulten's submission that Detective Loone acted improperly, to the detriment of the applicant, by deliberately failing to fully investigate lines of enquiry that conflicted with his (Detective Loone's) view of the applicant's guilt, Mr Boulten also submitted that, as with the Mayger investigation (as reconstructed), two briefs of evidence prepared as a result of the investigation by Detective Loone, commenced eight years after the Mayger investigation was suspended and submitted to successive Deputy State Coroners in 2001 to 2003, has not changed in any material respect from the brief of evidence upon which the applicant was charged in December 2018. In those circumstances, Mr Boulten submitted that the "delay" of a further 15 years (that is, from the decision of the ODPP in July 2003 not to prosecute the applicant to December 2018 when the ODPP came to the contrary view) is "unreasonable" and a further basis upon which a permanent stay should be ordered.

191 On 21 July 1998, Detective Loone was allocated as the officer in charge of the investigation. According to Detective Loone, when he was allocated the investigation he only received "a piece of paper" from Inspector Hulme, which he believed was a photocopy of a Missing Person report taken at Mona Vale police station from around 1982 with the name "Lynette Dawson" on it.[73] After being allocated the investigation, Detective Loone said he then rang Mr Mayger and left messages requesting all relevant material from the Mayger investigation but his phone calls were never returned.[74]

192 Apart from leaving telephone messages for Mr Mayger, Detective Loone also approached Inspector Hulme and asked him if he could call Mr Mayger and request any records Mr Mayger had about his investigation into Lynette Dawson's disappearance.[75] As a result of the enquiries by Inspector Hulme, Detective Loone said he received a box, the size of a standard archive box, which contained two audio tapes and one VCR tape. The VCR tape was a record of interview which had been conducted with the applicant on 15 January

[73] Report to Major Crime Squad North of Missing person Lynette Dawson.
[74] T 30.
[75] T 33.

1991 in Queensland.[76] The audio tapes were interviews with JC. When asked by Mr Boulten whether he had done anything further to locate records relating to the Mayger investigation, Detective Loone admitted that he did not attend on the detectives personally; he did not request Inspector Hulme do so and he did not search NSW State Archives. He did, however, check police computerised records on the Computerised Operational Police System, but could only locate one event created in 1982 that recorded Lynette Dawson as a missing person, after which he did not make any further enquiries of that system at any time between 1998 and 2015.[77]

193 Mr Boulten submitted that Detective Loone should have attended upon the detectives in 1998 and accessed their duty book entries in order to ascertain what investigations they had undertaken and to follow up those investigations with a view to having them (or either of them) recall any witness statements they may have obtained, the content of those statements and where secondary records of them might be found.

Detective Loone's incomplete interview with Mrs Simms

194 Mr Boulten submitted that Detective Loone, as an experienced detective, should also have sought all records relating to the investigation into the disappearance of Lynette Dawson, not limited to those generated by the Mayger investigation, and that a failure to make those investigations suggests an approach that was based on the assumption that the applicant was guilty of the murder of Lynette Dawson and, as there was no other rational explanation for her disappearance, it was unnecessary to pursue any other hypothesis, including, but not limited to, exploring with a focused and open mind the alleged sighting of her by the woman at the Narraweena shops, by taking a statement from Mrs Simms about what Ms Cruise had told her and a more detailed account of Mrs Simms' "Terrigal sighting".[78]

195 Detective Loone confirmed that by 30 September 1998 he had been sent a file in relation to the missing person investigation, which included the letter written

[76] T 34.
[77] T 30.
[78] T 35.

by Mrs Simms to the Missing Persons Unit in August 1982.[79] As noted above, in this letter Mrs Simms referred to the alleged sighting of her daughter at Narraweena shops some time in early 1982 and the alleged sighting of her daughter at a fruit store on the way to Gosford by Mrs Butlin at around the same time. On 31 July 1998, Detective Loone and Constable Gill interviewed Mrs Simms. Detective Loone prepared typed notes from the interview but no formal statement was taken from her. Based on the typed notes, it appears that Detective Loone did not ask Mrs Simms to elaborate on the content of her August 1982 letter, including the Bankcard transactions she had made mention of, including, importantly, whether she had the Bankcard statements available to her from which she quoted the Bankcard number, or whether that was information the applicant gave her and which she accepted unquestioningly and simply recited or repeated in her letter to police. When asked to explain why he did not ask these questions, Detective Loone stated "All I can think is that I may have seen Mrs Simms prior to having these notes".[80] In cross-examination Detective Loone accepted that he should have returned and taken a statement from Mrs Simms after he became aware of her August 1982 letter.[81]

Detective Loone's interview of Mr Butlin

196 Detective Loone also agreed it was not until 15 February 2001 that he interviewed Mr Butlin about his wife's report of having seen Lynette Dawson near Gosford in early 1982. Detective Loone agreed that by that time he had formed the firm view that Lynette Dawson was deceased. He said he formed that view almost immediately after being allocated responsibility for the investigation into her suspected murder in July 1998. In his witness statement at the first coronial inquest, Detective Loone stated categorically that:[82]

> There had been no recorded sightings of Lynette Joy Dawson since that time [8 or 9 January 1982]. The only alleged contacts by her have been made to her husband Christopher Dawson.

197 It is clear that is either incomplete or deliberately inaccurate. Detective Loone accepted in cross-examination that the focus of his investigation was on finding

[79] Applicant's submissions, [128], [133].
[80] T 378.
[81] T 378.
[82] T 380.

who had killed Lynette Dawson, rather than investigating whether or not she was still alive. In cross-examination, the following exchange occurred between Detective Loone and Mr Boulten:[83]

> Q. Even then [in February 2001], you would admit, wouldn't you, when you were interviewing Mr Butlin, you were doing so, as it were, to tidy up a loose end rather than to achieve a breakthrough in the investigation that would show that she was alive?
>
> A. Yes.

198 Mr Boulten submitted that Detective Loone undertook his investigation without regard to the possibility that his theory that the applicant had murdered Lynette Dawson might be wrong. The applicant submitted that, as a consequence of that approach, there are many instances where witnesses' memories of important incidents may have been compromised by significant delay. Mr Boulten was especially critical of Detective Loone's complete failure to interview Catherine Berglund.

Detective Loone's failure to interview Ms Berglund and make other enquiries at Northbridge Baths

199 Ms Berglund worked at the kiosk at the Northbridge Baths in the summer of 1982. She was then aged 17. She was not interviewed by any police officer until she was interviewed by Detective Poole on 13 January 2016.

200 On 22 December 2015, Detective Poole and Detective Clancy attended the Northbridge Baths. While there they spoke with Toby Coates who worked for Willoughby Council and, at the request of Detective Poole, Mr Coates made enquiries as to the previous owners of the Baths. Mr Coates informed Detective Poole that Colin Stubbs, since deceased, had operated the Baths from 1968 until 20 September 1982. Mr Coates also provided Detective Poole with the contact information for a Bruce Wilson who coordinates a community group called "Friends of Northbridge Baths". On 5 January 2016, Detective Poole contacted Mr Wilson and informed him that he was seeking information from any person who had worked in the kiosk at the Northbridge Baths during the summer of 1981-1982. Mr Wilson indicated that he would send an email with Detective Poole's request to the members of the group "Friends of

[83] Statement of Damian Loone dated 17 October 1999, [7].

Northbridge Baths". As a result, Detective Poole was contacted by both Ms Berglund and Jane Morgan from whom he then obtained statements.

201 In her statement of 13 January 2016, taken during Detective Poole's reinvestigation, Ms Berglund recalled that in the early 2000s she was working at the University of New South Wales for Professor Peter Baume when a fax was received at the office addressed to Professor Baume from Detective Loone which attached an article about Lynette Dawson's "disappearance". Detective Loone was making enquiries of Professor Baume as Lynette Dawson had worked for Professor Baume at some stage when he was a physician. Ms Berglund said that seeing the article jogged her memory about working at the Baths during the summer of 1982 and taking a call for either the applicant or his brother around that time. Ms Berglund recalled speaking with Detective Loone over the phone, possibly twice or three times. She remembered Detective Loone saying that he might be ready to take a statement from her but she never heard back from him. A note in Detective Loone's duty book of 15 March 2001 records that he spoke with Ms Berglund. In cross-examination Detective Loone could not recall the conversation. He gave evidence that if it was recorded in his duty book he would have had a conversation with Ms Berglund, but he could not recall any information she provided or why he did not take a statement from her.[84]

202 Ms Berglund recalls that on one of the days that she worked at the Baths during that summer she took a long distance phone call from a female for either the applicant or Paul Dawson. Both the applicant and his brother worked as lifeguards at the Baths. There was one telephone located at the kiosk within the grounds of the Baths. That number was publicly listed in the phone book. There are no phone records available from 1982. According to police investigations, Telstra only holds phone records for seven years.

203 Ms Morgan also worked at the Northbridge Baths during the summer of 1982. She kept a diary which records that she was working on 9 January 1982 from 8am-5:30pm. The diary also records that the applicant was working on that day. There is no reference in the diary to whether she worked with another

[84] T 383.

person, relevantly Ms Berglund. Ms Morgan said that generally only one person was working at the kiosk, however sometimes a second person assisted in the kiosk and around the pool. Ms Morgan was not interviewed by police until 23 February 2016.

204 Mr Boulten complains of the failure of investigating police, particularly Detective Loone, to make any enquiries of Mr Stubbs, the former owner of the Northbridge Baths, to ascertain the identity of who was working on 9 January 1982, in particular whether both Ms Morgan and Ms Berglund were working on that occasion. He submitted if proper enquiries had been made by Detective Loone and had Ms Berglund been spoken to in the early 2000s her memory of the date she was working when she took the STD call from a female would likely have been forthcoming given her untainted memory many years later. Similarly, Ms Morgan's memory may have enabled her to recall the identity of any second person she may have been working with or whether she took a phone call for the applicant on 9 January 1982.

The Teacher's Pet podcast, the evidence of Hedley Thomas and the impact of both on the issues raised on the application

205 The application for a permanent stay of the applicant's trial on the basis of prejudicial pre-trial publicity was not exclusively based upon what has been eponymously entitled *The Teacher's Pet* podcast. In closing submissions, however, it was common ground between the parties that it was that form of media, and the commentary that it has generated in the radio, television and news media generally in a concentrated period of months between May 2018 and April 2019 that was the focus of the application.

206 Hedley Thomas is a journalist with *The Australian* newspaper. He is employed by Nationwide News, the publisher of *The Australian*.[85] He was co-producer and the presenter of *The Teacher's Pet* podcast. The podcast was published by *The Australian* and produced by Slade Gibson. The podcast was promoted heavily by articles in *The Australian* and other online publications.[86] It was the subject of commentary across all media platforms, being resoundingly

[85] T 391.

[86] Statement of Hedley Thomas dated 3 February 2019, [1].

endorsed and promoted by Ben Fordham, a talkback radio host on 2GB, and a number of television presenters.[87]

207 Mr Thomas gave evidence on the application. The subpoena requiring his attendance was issued by the applicant and served upon Mr Thomas with the cooperation of the ODPP.

The "popularity" of the podcast and its ubiquity

208 The podcast was broadcast in sixteen episodes and one "Special Update Episode". Successive episodes were available to be downloaded from various online platforms between 18 May 2018 and 5 April 2019, including Apple Podcasts, Google Podcasts, Spotify and *The Australian* website, free of charge, as they became available. Ultimately, the entire podcast was available to be downloaded, also without charge, from Apple Podcasts, Google Podcasts, Spotify and *The Australian* website.

209 On 5 April 2019, the podcast was removed by Nationwide News from all online platforms in Australia. In the course of the proceedings the Court was informed that despite an earlier indication of a lack of cooperation from Channel 9 and Channel 10, broadcasts of the *60 Minutes*, *A Current Affair* and *Studio 10* programs were no longer available to be viewed. The Court was also informed during the course of the hearing that various Facebook groups and Facebook pages linked to Lynette Dawson's disappearance have been either taken down or are no longer accessable.[88]

210 In Detective Poole's statement of 22 July 2020, a comprehensive series of searches undertaken by him across a wide variety of internet platforms for access to the podcast were detailed.[89] He reported that links to a wide range of podcast hosting websites (22 in total) were "blocked", preventing him from listening to the podcast or from downloading it. All he was able to access was what was described as "a short bio about the podcast and a list of episodes".

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[87] http://www.theaustralian.com.au/The Teachers Pet. This website included links to each episode of the podcast, media articles, additional documents, including interviews with a large number of Crown witnesses and photographs. The full complement of this material is identified by Detective Poole in his statement of 29 April 2019 at Annexures A-Z.

[88] 60 Minutes broadcast on 9 September 2018 (Exhibit J1(2) and J1(3)); Studio 10 broadcast on 12 or 13 August 2018 (Exhibit J1(4)); A Current Affair broadcast on 20 August 2018 and 10 September 2018.

[89] T 370.

That synopsis, set out later at [232], remains accessible. Detective Poole also confirmed he was unable to access any of the podcast episodes on the dedicated webpage for *The Teacher's Pet* published by *The Australian*. He also confirmed that webpages in relation to the *Australian Story* episodes entitled "Looking for Lyn" and "The Teacher's Wife", published at the time on ABC iView, indicated the programs were no longer available.

211 In the affidavit of Angela Skocic, solicitor, of 23 July 2020, she identifies within each of so-called "bios" or the brief synopsis of each episode, specific details which remain available on *The Australian* website and which are prejudicial to the applicant. The following phrases are identified:[90]

> … but [the applicant] betrayed and humiliated [Lynette Dawson] in the most callous way … (episode 1)
>
> … Other teachers followed [the applicant's] lead, seducing vulnerable school girls as those in charge looked away … (episode 2)
>
> … [JC] felt she had become 'disposable', as Lyn had been years before, and feared for her life. She fled back to Sydney, telling friends she was convinced Chris had murdered his first wife … (episode 10)
>
> … The inquests are bad for [the applicant] … (episode 13)
>
> … former Coroner Carl Milovanovich explains why he believes a jury would convict [the applicant] over the probable murder of Lyn – and why the case still troubles him today, 15 years after his inquest in a Sydney courtroom …
>
> … new witnesses come forth with compelling stories of encounters with [the applicant] and his explosive temper …
>
> … The timing may have been a surprise, but he'd known for a long time that this day may come. Calling the matter 'a cold case murder', the magistrate denied [the applicant's] application for bail citing a high flight risk, and said the Crown alleged domestic violence allegations against [the applicant] would be raised in evidence… (episode 16)

212 While Ms Skocic confirms the results of Detective Poole's internet searches, she gave evidence that were a listener to have accessed and downloaded the podcast to a mobile telephone or tablet prior to it being "taken down", that episode would still be available to that person and presumably anyone with whom that product might be shared. Ms Skocic also gave evidence that by the simple mechanism of downloading a readily accessible and legally available Virtual Private Network (VPN) application to a listener's personal device (whether it be a mobile phone or a tablet, desktop or laptop computer) the

[90] Exhibit 5.

"geo-block" preventing access to the podcast in Australia can be readily circumvented by a person wanting to access the podcast because the podcast has not been "taken down" internationally.

The genesis of The Teacher's Pet podcast

213 Mr Thomas' evidence generally is informed by the circumstances in which he came to assume the role of co-producer and presenter of the podcast. He gave evidence that he first became aware of the disappearance of Lynette Dawson in February 2001 when he followed media reports of the first coronial inquest.

214 On 10 May 2001, an article written by Mr Thomas, entitled "Looking for Lyn", was published by his then employer, *The Courier Mail*, Brisbane. It would appear that while working as a print journalist for that Brisbane-based newspaper, Mr Thomas' interest in Lynette Dawson's "disappearance" continued, although in articles written by him in July 2001 and then later in February 2003 it is clear from that his focus was on the applicant as a teacher at a Catholic girls school who was involved in an Education Queensland Investigation mounted as a result of what Mr Thomas said was revealed to be the applicant's involvement, 20 years earlier, in "student sex allegations" while teaching at a NSW high school.

215 A series of articles reflecting this same journalistic focus were tendered on the application, although not as part of any compendium of adverse pre-trial publicity upon which the applicant relied for a permanent stay, but as part of the material Mr Thomas provided to Rebecca Hazel when she made an enquiry of him by email in 2012 after reading one or more of his articles, part of what she described in her statement as an attempt to review all media coverage of the coronial inquests in preparation for writing a book.[91]

216 Ms Hazel met JC in about 2007 when she was working as a solicitor at a women's refuge and JC was working as a refuge case worker.[92] In 2011-2012, Ms Hazel was no longer working as a solicitor and decided to write a book about Lynette Dawson's disappearance. She contacted JC who agreed to tell

[91] Affidavit of Angela Skocic dated 23 July 2020, [9].
[92] CB 893-898.

her what she knew of the disappearance for the purpose of including that information in her book, *The Schoolgirl, Her Teacher and his Wife.*[93]

217 Ms Hazel also gave evidence on the application at the request of the applicant. She gave what I regard as insightful and measured evidence. She explained that her initial research was essentially for what she thought would be a "springboard" for a work of fiction but, as her collaboration with JC progressed, she formulated her manuscript as a work of non-fiction. She said while writing the manuscript as a work of non-fiction she thought that "on balance" the applicant had killed his wife but, as she described it, she was "also cognisant that there was a difference between what I thought and what was in law provable".[94]

218 Ms Hazel continued research for her book, apparently for some years, with the active cooperation of JC with whom she had developed a close relationship, both as friends and collaborators. Ms Hazel described that relationship in her evidence as "a very warm relationship … I was very caring of her. I was mindful that these events were traumatic for her".[95]

219 She also gave evidence of reading and listening to as much media coverage as she was able to locate (including Mr Thomas' articles for *The Courier Mail*). She also obtained access to the transcript of the second inquest and considered relevant legislation, case law and family law documents and documents relating to the Bayview property. Ms Hazel also secured interviews with a number of people, some, but not all, of whom had given evidence at the second inquest. She also spoke with Mr Linden, the applicant's former solicitor, and Mr Milovanovich, the Deputy State Coroner who presided over the second inquest.

220 In an email of 1 May 2012, Mr Thomas wrote to Ms Hazel in response to her enquiry of him remarking that:

> I think your book is a very worthwhile exercise as well as a likely cracking read. Lyn, and her family, deserve a result and perhaps the book will be the breakthrough.

[93] Statement of Rebecca Hazel dated 26 March 2019, [3].
[94] Statement of Rebecca Hazel dated 26 March 2019, [4].
[95] T 394.5.

> I found these articles on the old Courier-Mail data base - they might be of interest.
>
> When you know you've got a book I'll dig out the file – it's hard to reach in a part of the roof that gives me vertigo and shortens my life expectancy.[96]

221 By October 2017, Mr Thomas commenced gathering information for what he proposed would be a serialised podcast into the disappearance of Lynette Dawson. Until that time Mr Thomas had not produced a podcast but was aware of journalists who had embraced the medium. He acknowledged that a podcast associated with the killing of young Aboriginal people in Bowraville was a fine example of the podcast he would like to produce.[97] Mr Thomas also agreed that in preparation for the podcast it was his view that the ODPP had repeatedly made a wrong decision by refusing to prosecute the applicant for murder[98] and that it was his view that police, over many decades, had inadequately investigated the circumstances of Lynette Dawson's disappearance, such that by the time of publication of the first episode of the podcast he believed the ODPP should reverse its earlier decisions and prosecute the applicant for murder.[99] He also agreed that he willingly joined with Lynette Dawson's family and friends in publicly announcing his views that the applicant had murdered his wife and calling for the applicant to be prosecuted. In a conversation with Mrs Jenkins by telephone some time after September 2018, he described Mr Cowdery as a "knucklehead" for believing that Lynette Dawson might still be alive.[100] He gave evidence that it was that attitude that motivated him to broadcast the podcast to ensure that the applicant was charged and prosecuted for murder.

222 His attitude at that time (and I am prepared to find throughout publication of the podcast) was that he did not trust the ODPP to make an informed decision to prosecute the applicant based upon the resubmission of a further brief of evidence, this time compiled by the Unsolved Homicide Team.

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[96] T393.26.
[97] ibid.
[98] T 88.25.
[99] T88.
[100] T 93.

223 Mr Thomas gave the following evidence as to his attitude when co-producing the podcast at a time when he knew the ODPP was giving fresh consideration to whether a prosecution should be initiated against the applicant for murder:[101]

> HER HONOUR
>
> Q. Can I just have your evidence on this, please. In the preparations for the podcast, inclusive of your interviews with family members and witnesses - that is, those who you understood had given statements to police or might give statements to police – there's two questions. One, did you believe the police investigation into Mrs Dawson's disappearance and/or the homicide that Mr Dawson was suspected of having committed, was ongoing?
>
> A. Yes.
>
> Q. Did you, during that time frame, at any point in that time frame, have an understanding that the police were assembling, for resubmission to the Director, a brief of evidence in order that the decision to prosecute or not prosecute be reviewed?
>
> A. Yes.
>
> Q. So at the time that you were conducting - and I'll grace with you the description – "investigation as a journalist", you knew that the agents appointed by the State to investigate criminal conduct, and ultimately a member of the executive who would decide whether criminal charges would be laid, were current and continuing?
>
> A. Yes.
>
> Q. Did you take any advice from anybody as to (1) the utility or (2) the proprietary of undertaking the investigation that you were undertaking and broadcasting it publicly?
>
> A. Yes.

224 Mr Sibtain of counsel, who appeared with leave on the application for Nationwide News, raised legal professional privilege when Mr Boulten asked from whom the advice was sought. In the result, the nature of the advice sought was not pressed. The following exchange then took place:[102]

> HER HONOUR
>
> I'll be assisted by some further questions if they're questions to which no objection is taken, so that I can get an appreciation, given what the witness has told me about what he knew was going on formally, why his broadcast views, and the podcast comprehending those views, was appropriate to publish publicly.
>
> BOULTEN
>
> Q. So you said you sought advice about one or more of those topics. Right?

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[101] Exhibit J1(22).

[102] T 115.

A. I sought advice. I gave a lot of material to my advisers. I can't remember exactly what questions were asked, but I believe that this would have been part of that ambit.

Q. So your advisers were lawyers?

A. Yes.

Q. All lawyers?

A. Yes, but I also answered to editors.

Q. So did you get advice from editors about the propriety of your reinvestigation running at the same time as the police were investigating and at the same time as the DPP was considering or were about to consider whether to prosecute?

A. I don't recall whether I got formal advice from editors. They knew the circumstances.

Q. Did you get advice about the propriety of conducting an investigation parallel to the police investigation, from a lawyer?

A. I must have, yes, but I can't recall the exact questions asked. All murders unsolved are always ongoing. Journalists wouldn't write about any or research any unsolved murders if that caveat was applied --

HER HONOUR

Q. Do you know of any journalist who would publicly venture a view about the guilt of a person suspected of a homicide whilst that person was under investigation by police and whilst a member of the executive government, under a piece of legislation, was determining whether or not that person should be prosecuted?

A. I don't believe many journalists that I know would not go forward on that basis.

225 The first episode of the podcast was broadcast 18 May 2018, at time when Mr Thomas was well aware that a brief of evidence prepared and compiled by the Unsolved Murder Team in the course of the Poole investigation was under consideration by the ODPP. He confirmed that each successive episode was published at a time when he knew the ODDP was giving its consideration to the sufficiency of the evidence to support a prosecution of the applicant for murder. The fact that the ODPP was considering the brief of evidence was the subject of episode 13 and was discussed at length in telephone conversations Mr Thomas was having with witnesses, including family members, as the podcast was being produced and broadcast. This is significant and will be addressed later.

226 In preparation for the podcast, Mr Thomas was in contact with Lynette Dawson's family to seek their endorsement and cooperation in the production

of the podcast. Following an initial email to Mr Simms, Lynette Dawson's brother, Mr Thomas met with him and his wife at their home. They told him they were committed to a reinvestigation into Lynette Dawson's disappearance. They also informed him that they had been cooperating and talking with Ms Hazel and they hoped her book would be published.[103] After meeting with Mr and Mrs Simms, Mr Thomas visited Lynette Dawson's sister, Mrs Jenkins. She also offered her full support for the podcast series and was also hopeful that Ms Hazel's book would be published.[104]

227 There was nothing in the evidence before me that Lynette Dawson's family sought any independent advice as to the potential for their endorsement of Mr Thomas' proposal for a podcast to interfere with the course of justice. It would seem to me that Lynette Dawson's family and friends were persuaded, or seduced, to cooperate with Mr Thomas, including by publicly airing their views about the applicant's guilt, in the misguided belief that it would result in the successful prosecution of the applicant and that Mr Thomas' motivations and theirs were the same. The following extract of a conversation between Mr Thomas and Mrs Jenkins is revealing. By its context, it is clear it was a conversation before the complete brief of evidence was furnished to the ODPP in April 2018:[105]

> PJ: … I feel I should ring her to thank her for her interest. I won't do an interview because as I said, I'll save it, there have been so many interviews, there's been no new evidence or anything and I won't mention the DPP because –
>
> HT: No, don't mention that. Don't mention that.
>
> PJ: No, because I know Daniel Poole – because I said to Daniel, 'do you have to notify Dawson about it?' and he said, 'no, we're keeping it quiet'. So, um –
>
> HT: When did you last talk to Daniel Poole?
>
> PJ: Oh, this is ages ago. This was when – oh, no ages ago – two months ago, maybe. When he told me that they'd finished reviewing it, it had to be signed off by the legal people and then it would go to the DPP. That was just before I spoke to you and mentioned that to you.
>
> HT: Yeah.

[103] T 116-117.
[104] Statement of Hedley Thomas dated 3 February 2019, [12].
[105] Statement of Hedley Thomas dated 3 February 2019, [13].

> PJ: Because you were a bit alarmed that it might go to the DPP and then they might do something – charge him – and then all your work would be, you know, for nothing.
>
> HT: Well, I wanted also that if we've got new evidence that really should be out there that could make the case stronger, you know?

228 Around this time, Mr Thomas also met with Ms Hazel for the first time and they discussed the possibility of working together.[106] Ms Hazel gave evidence that she assumed that Mr Thomas wanted access to her contacts, including Mr Linden and Mr Milovanovich, but most importantly, access to JC. By the time that Mr Thomas made his approach to Ms Hazel, Harper Collins ("sister publishers" to Nationwide News) had agreed to publish Ms Hazel's book offering a $30,000 advance plus royalties although there was, as she explained in her evidence, a concern about the book being defamatory. That proposed contractual arrangement did not come to fruition, in large part, so far as I can discern, due to the intervention of Mr Thomas and his plans for the podcast, and his suggestion that there would be what Mr Boulten described as a "symbiotic publishing arrangement" whereby the podcast would extract parts of Ms Hazel's completed and published book, such that the publication of the book would work in unison with the podcast.[107] That relationship, in both commercial and contractual terms, broke down essentially because of JC's determination by 2018 that she wanted no part in the podcast and wanted no involvement with Mr Thomas as its producer or presenter. The relationship between JC and Ms Hazel suffered as a consequence.

229 Ms Hazel described it in the following way:[108]

> So in hindsight, I think - my trump card was that I had [JC] in my corner, and she spoke freely and extensively to me, and it was certainly true that if the book had been published, it would have sold an enormous amount of, you know, copies and HarperCollins would have done well out of that. From Hedley's perspective, he hoped that I would bring [JC] to the podcast table and he could interview her, and when that fell apart, I was less important.

230 Although Ms Hazel was present at some of the interviews of a large number of people, they were conducted by Mr Thomas.[109] As she described in her

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[106] Exhibit J1(17). PJ denotes Patricia Jenkins; HT denotes Hedley Thomas.
[107] Statement of Hedley Thomas dated 3 February 2019, [14].
[108] T 400.43.
[109] T 401

evidence, it was “Hedley’s podcast”.[110] The significance of her evidence about that process is that, as Ms Hazel described it, when Mr Thomas spoke to the people interviewed he did so in a manner which was frank, making it known to each of them that he thought the applicant was guilty.[111] When asked whether she sought to counterbalance that approach, or to participate in a way that might bring balance to the interview, she said she did not feel she could do that as she was not the journalist or a co-producer of the podcast. She gave evidence that she felt like a “passenger” and as she became progressively sidelined she became alive to the risk “that a potential witness would be influenced, consciously, or unconsciously” by Mr Thomas and by the way in which the podcast was produced, including its format and unfolding narrative.[112]

231 Detective Poole gave evidence to the same effect from his perspective as the senior investigating officer:[113]

> Q. Okay. Did you form an opinion about the appropriateness of the manner in which Mr Thomas was communicating with people who were potential prosecution witnesses?
>
> A. Like a personal opinion you’re asking?
>
> Q. Yes?
>
> A. I didn’t think it was appropriate.
>
> Q. Based on your training as a police officer?
>
> A. Yes, and I think more generally just as a citizen.
>
> Q. Why?
>
> A. Well, a person who is a witness in a proceedings, they need to be giving evidence in a courtroom, not in a public forum such as a podcast.
>
> Q. You recognised the potential that witnesses might be influenced by the way in which they are questioned?
>
> A. Are you saying you’re obtaining a certain response of someone by the way you pose a question?
>
> Q. Yes.
>
> A. Of course, that’s possible.
>
> Q. And they might be influenced by hearing what other people say about the issues?

[110] Statement of Rebecca Hazel dated 26 March 2019, [12].
[111] T 403.5.
[112] T 402.30.
[113] T 414-415.

A. Specifically in relation to podcast, I think we formed a fairly strong view that any person who'd spoken to the police prior to the podcast, I had no concern over those people being influenced or having their evidence contaminated because their evidence had already been given. Anyone who appeared on the podcast and we spoke to subsequently, obviously we were cautious in relation to the reliability of their evidence but you have to take what people say as what they saw.

Q. You recognised the potential for, as it were, unconscious contamination of witnesses who heard the podcast?

A. Yes.

Q. Of course, the difficulty with unconscious contamination is that the person believes what they are saying as accurate but it might have been influenced without their knowledge?

A. Potentially, yes.

232 It is simply not feasible to reproduce the text of each podcast for the purposes of this judgment or to quote at any length from them. The content of each episode is, however, fairly encapsulated by what was published on the dedicated *The Teacher's Pet* website hosted by *The Australian* as a synopsis of each episode:[114]

> Episode 1: Bayview: Lyn was a devoted wife and mother. She adored her husband, but he betrayed and humiliated her in the most callous way. Now she's gone – missing, a likely victim of murder.
>
> Episode 2: Cromer High: Cromer High School's pin-up sports teacher Chris Dawson pursued year 11 student [JC] with the sort of relentless determination he showed as a star of rugby league. Chris had model good looks, an easy charm, and students looked up to him. Other teachers followed his lead, seducing vulnerable school girls as those in charge looked away.
>
> Episode 3: Bruised: As Chris brazenly moved his teenage lover into the family home, Lyn saw the cracks in her marriage widen. It was crumbling all around her. Unable to believe the worst of her husband, she responded with denial, but to her family and friends Lyn's suffering was clear. And the toll was not just emotional. In this episode, a former babysitter for the Dawsons speaks for the first time about the violence she witnessed in the home.
>
> Episode 4: Soft Soil: Humiliated and broken by her husband's affair, Lyn finally asked [JC] to leave the Bayview home. The teenager walked out, and into the home of Chris's twin brother, Paul, a few hundred metres down the same street. Tensions continued to rise. And then suddenly, Lyn vanished. In this episode, a surprise new witness speaks publicly for the first time about something he was told in 1987, indicating the possible whereabouts of a body.
>
> Episode 5: A Lovely Drink: In January 1982, as most Australians enjoyed a carefree holiday season, Lyn Dawson was trying to pick up the tattered threads of her marriage. [JC] was taking tentative steps to extricate herself from her affair with Lyn's husband. And Chris Dawson was desperately seeking solutions. In this episode, a damning piece of evidence – once though

[114] T 482.

lost – is recovered, and it is something that should be vitally important to the Director of Public Prosecutions.

Episode 6: Gone: In the days and months following Lyn's disappearance, Chris Dawson put forth a range of suggestions as to her possible whereabouts. Perhaps she had gone north to think about their marriage. Maybe she'd joined a cult, or a religious group. But whatever he said, he clearly believed she was never going to return, as he promptly moved [JC] back into the family home where she became the new mother to his two children.

Episode 7: The Rings: On 15 January 1984, Chris and [JC] wed at Bayview. With no veil, and in a non-traditional dress, the young bride looked like a flower girl. On her hand, she wore Lyn's rings. Chris's brother Paul and his wife Marilyn were witnesses, but there was something Marilyn didn't know. A secret existed between the brothers and [JC].

Episode 8: Hopeless: Lyn Dawson had been missing for three years when he worried friend Sue wrote to the Office of the Ombudsman – an independent government watchdog – about the lack of police action in the case. We go looking and recover a long-forgotten file after decades in storage, and the contents highlight the hopeless responses of police to a probable murder – and raise more questions, as public anger grows.

Episode 9: Dreamworld: Leaving the dark shadow of Lyn's disappearance behind, Chris moved his young new wife and children north to Queensland, into a home on acreage near the newly-opened theme park, Dreamworld. Isolated behind high fences, [JC] lived the life of a 'Stepford wife', and was expected to meet all of her husband's demands … including continuing to look like a school girl.

Episode 10: Damaged: After six difficult years, the volatile marriage was over. [JC] felt she had become 'disposable', as Lyn had been years before, and feared for her life. She fled back to Sydney, telling her friends she was convinced Chris had murdered his first wife. In this episode, you'll hear what Chris Dawson told detectives when he was interviewed in 1991.

Episode 11: Loyalty: Chris Dawson was interviewed by police in 1991, and then never again. But Sue Strath, Lyn's loyal friend, kept agitating for further investigation, and in 1998 Detective Damian Loone was assigned to the case. Curiously, the earlier investigation notes had vanished.

Episode 12: Momentum: Some of them hadn't seen each other since Cromer High days more than 30 years ago but they came together in a show of force, determined to hold to account teachers who had preyed on students for sex. Meanwhile, the detective Damian Loone escalates his murder investigations, interviewing many witnesses in a quest for the truth. And the area of 'soft soil' comes back into focus.

Episode 13: The System: Before the first coronial inquest, police tap phones in the lead-up to digging in a relatively small area around the swimming pool at Bayview, where they find a woman's cardigan. The crime scene officer on that dig describes what he believed where stab marks in the garment. He suspects Lyn's remains are still on the block – and may have been narrowly missed because the dig was restricted for budgetary reasons. As the coronial inquests get under way, a student becomes concerned that Chris is trying to groom many of her friends at an all-girls school. The inquests are bad for Chris – but the system fails Lyn and her family again.

> Episode 14: Decision Time: After 36 long years, failed police investigations, two coronial inquest, and countless appeals from Lyn's family, the case is stronger now – and once again it's in the hands of the office of the DPP. Regardless of their decision, the NSW police commissioner pledges to keep investigations going, and he plans to order a much more significant dig at the Bayview property. In this episode, former coroner Carl Milovanovich explains why he believes a jury would covict Chris over the probable murder of Lyn – and why the case still troubles him today, 15 years after his inquest in a Sydney courtroom. And Lyn's daughter Shanelle has final words in honour of her mother.
>
> Episode 15: Digging: Following an incredible groundswell of community interest ignited by this podcast, September saw a stunning development in the case with police returning to the Bayview house to conduct a new and more thorough search for the remains of Lyn Dawson. This dig was a necessity - not just to try to uncover new evidence, but also to restore public confidence and to prove to Lyn's family that the police, this time, would do their jobs properly. Meanwhile, new witnesses come forth with compelling stories of encounters with Chris Dawson and his explosive temper.
>
> Episode 16: Arrest: Nearly 37 years after Lyn Dawson disappeared, police have arrested Chris Dawson over the alleged murder of his wife, taking him into custody and preparing his extradition to Sydney where he will face court. When the knock on the door came, the 70-year-old was calm. The timing may have been a surprise, but he'd known for a long time that this day may come. Calling the matter "a cold case murder", the magistrate denied Dawson's application for bail citing a high flight risk, and said the crown alleged domestic violence allegations against Chris Dawson would be raised in evidence, as well as testimony from [JC]. But Dawson's family believe he will be cleared, releasing a statement saying that he is innocent and that there is clear and uncontested evidence that Lyn Dawson was alive long after she left her husband and daughters.
>
> Special Update Episode: As Chris Dawson's defence team, police and prosecutors work hard to prepare for a murder trial which may be heard some time next year, 2020, the team behind The Teacher's Pet podcast series discloses a new development - taking down the first 16 episodes in Australia, to help ensure Chris gets a fair trial. And Greg Walsh, Chris's experienced lawyer, flags some of the issues and claims which are important to him and the accused.

233 Mr Thomas was asked questions about a series of, in effect, "sound grabs" or a "trailer" (or what Mr Boulten described as "emblematic introductions" to set the scene for each episode) which were played at the beginning of the sixteen episodes. I have set them out already at [20] above.

> HEDLEY THOMAS: This is episode … of The Teacher's Pet. Listeners are advised, this podcast contains coarse language and adult themes. This podcast series is brought to you by the Australian. (CONTINUOUS SOUND OF MUSIC)
>
> NEWS PRESENTER: Lynette Dawson was reported missing by her husband, former Newtown Jets Rugby League star, Chris Dawson.

> JC: He said, I was going to get a hit man to kill Lyn, and he rang me and said, Lyn's gone. She isn't coming back.
>
> JULIE ANDREW: I just want justice, and I'd love her little girls to know she didn't leave them.

234 In my view, Mr Thomas was unable to give any acceptable explanation for the inclusion of that combination of concepts other than that it appealed to both him and the audio producer as "an interesting grab".[115] That explanation is disingenuous. The trailer, taken from a series of sources, including edited segments of JC's interviews with investigating police and from Mr Thomas' interviews with Julie Andrew, was not only designed to attract a wide listening audience but, in my view, to sway the listening audience to the point of view Mr Thomas and the broadcaster were seeking to promote, namely that the applicant killed his wife. Editing together two extracts from JC's interviews with police such that they sound as one statement can bear no other meaning.

235 One of the central themes in Mr Boulten's cross-examination of Mr Thomas was to challenge his ethics as an investigative journalist in promoting a narrative that Lynette Dawson is dead and that the applicant murdered her.

236 By way of example, in episode 1, after Mr Thomas dismisses the applicant's letter written to his daughter in which he said that her mother was still alive in August 2010, having been "sighted" in England as a spectator at a filming of the *Antiques Roadshow* television program, and offers his prayers "that her [Lynette Dawson's] life choices, like yours [his daughter's], could then be acknowledged and her safety and wellbeing confirmed". Mr Thomas says the following:[116]

> The evidence, old and new, keeps leading me back up those winding roads to Bayview where Chris and Lyn lived. Where Lyn vanished. It's where I am confident she is buried. I've heard something which has narrowed the possible location but let's be devil's advocate. Is it possible that Lyn is still alive? If so, she has not recognised any of her daughter's birthdays for 36 years. Or the births of their own children or anyone else's special occasions. The death and funeral of her father, Len, and then her mother, Helena, came and went without a word from Lyn. If Lyn is alive, she has got by without a bank account in her name. She has not filed a tax return in her name or travelled overseas or visited a doctor or worked or received welfare or been positively identified by anyone. I believe that Lyn is dead and that she died in January 1982.

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[115] Statement of Daniel Poole dated 22 November 2018, [35]. These extracts are still available online.
[116] T 99.39.

237 At the invitation of the parties I listened to each of the sixteen episodes in advance of the hearing of the application. The following extracts are a few amongst many scattered throughout the podcast where the applicant's guilt is discussed. Notably, whenever the applicant's guilt is discussed and whenever Mr Thomas invites others to comment upon it, he only ever pays passing lip service to the applicant's denials and the presumption of innocence and then, only rarely. In the first episode of the podcast Mr Thomas says:[117]

> There has been no trace of Lyn Dawson since she disappeared. There is no credible information to suggest she is alive but … as her body has never been found and nobody has been charged with a crime, … the case remains unsolved. I believe Lyn is up here, in the ground with the cicadas, near her old home. Her family and friends want her remains recovered so she may be properly buried and allowed to rest in peace. They want those responsible for her death prosecuted for murder.

Julie Andrew

238 Ms Andrew was interviewed in episode 1 of the podcast at very considerable length. On multiple occasions she was invited by Mr Thomas to volunteer her views about how the applicant killed his wife and why he killed her. The following is one example amongst many:[118]

> HT: Julie held a clear eyed view about what she believed were Chris's motivations.
>
> JA: He was in love with [JC], he wanted [JC]. I think that was that, the Lolita thing, you know? He just wanted, and then to get [JC], he had to get rid of his wife. I'd say that there would have, he would have come to a point through that last week where he realised the only way out, for him to achieve what he wanted was to kill Lyn.
>
> HT; And Julie, you talk about him as if you were absolutely certain that he has done this.
>
> JA: I'm positive, yeah, I'm positive.
>
> HT: Eh, in our legal system, you know there's a fundamental human right being a, you know, a pre, a presumption of innocence until proven guilty and in this case, so many of Lyn's former colleagues, friends, family members speak of Chris Dawson as a, as a murderer. And you do too - - -
>
> JA: Mmm, and that's a word I don't take lightly and I've never used it for another human being in my life. We all, obviously, there would be some prejudice. There'd be some misrecollections but all in all, we're all solid, intelligent people who could think clearly and logically and laterally and knew the guy and, knew what, what he wanted. He wanted [JC]. To get [JC], he had to get rid of Lyn. And then Lyn's gone, where she's gone? Oh, she just

[117] CB 2025.
[118] CB 2010.

> wandered off. Wandered off with some God botherers and never to be seen again. Didn't take anything. Didn't have any money. You said she took $500.00. She'd, she didn't have five, she didn't have two, she didn't have $2.00 to rub together. She worked part-time and he gave her this little tiny bit of money, again, control. She had nothing.
>
> …
>
> HT: Julie, if you're right and that, her remains were buried on one of those blocks, either hers or your father-in-law's or perhaps even yours - - -
>
> JA: It wouldn't have been mine, ours was all, um, landscaped.
>
> HT: Why do you think that she would have been subsequently removed?
>
> JA: Because she, she was killed on the Friday night, after he, I'm sure he drugged her, um, I reckon he rolled her up in a carpet and he took her out the back. Out his back, up the back. Into a prepared grave. So where's he gunna take her? He's not gunna take her anywhere when he's got plenty of areas around and he could have prepared something months in advance. No-one would ever have known. My kids used to disappear into the bush, like, cooee, you'd never see them. They, it was solid bush and there's all these, you know, they weren't allowed to but they would, with, with the dogs. Um, you know, and like, ah, stomping up there and you could not see through. It was dense. But I think that he'd probably left her for a bit and then went and moved her. And she's, I don't know, she's. But that was the problem because they never found her remains.

Inspector Hulme

239 In episode 13, Mr Thomas interviewed Inspector Hulme, the officer who appointed Detective Loone to investigate Lynette Dawson's disappearance as a suspected homicide in 1998. Whether the Inspector knew he was being interviewed for a public broadcast is unclear. What is clear is that the journalist was seeking to add weight to his theory of the applicant's guilt, by that time welded to the narrative of the podcast, from the expert perspective of a senior police officer. Inspector Hulme volunteered the following:[119]

> I remember on one occasion we had their phones tapped, Paul [Dawson] and [the applicant]. And Damian [Loone] stirred the, the possum again and got it put in the papers, on, on the upcoming inquest again and this that and what we'd done and we'd found a cardigan that we thought belonged to her with a penetrating radar when, when we dug up his old pool. And all that was in the news and we listened intently. And they did not even discuss the matter. Now, is that normal behaviour of a husband, who may not have loved his wife anymore, but she went missing. He knew exactly what had happened to her, in my book. But they did not even discuss it. Not even to say, oh, did you see all that crap in the papers about so and so. No. Not to even discuss it. I can't believe it.

[119] CB 2021 and CB 2023.

240 After quoting Inspector Hulme saying that behaviour indicated the applicant was "guilty as sin", Mr Thomas continued:[120]

> HEDLEY THOMAS: Paul Hulme also addressed the criticisms levelled at Damian by Chris and Paul's brother, the lawyer Peter Dawson, who would accuse the Detective of having tunnel vision, of being out to get the former star footballer.
>
> INSPECTOR HULME: No, I couldn't have got a better bloke on the job. And certainly no, ah, there was no vendetta. He just, ah, was of the same opinion I was, that we knew who'd done it.
>
> HEDLEY THOMAS: Paul, almost, ah, 36 years later, what does it take to catch a killer in this case?
>
> INSPECTOR HULME: Confession would be handy from, ah, Chris, that, you know, he's approaching old age and maybe if he gets sick or something, he wants to clear his chest.

241 The implication from a senior police officer is stark. The applicant should confess to having murdered his wife and if he pleads not guilty to her murder he is concealing his guilt.

242 In episode 14, Mr Thomas comments in a way that is again erosive of the applicant's unqualified legal right to silence and, in any view, does so intentionally:[121]

> Chris just will not say anything. He won't defend himself, at least not in a court of public opinion. It's tempting to think that somebody who had done nothing wrong would be using every available media platform to try to clear his name, while angrily denouncing his accusers. An innocent person accused of murder might go to the Supreme Court to sue for defamation, not curl up and refuse to say anything. But on the other hand, a good lawyer will always tell an accused such as Chris what his brother Peter had told him before the inquest, Shut up, do not talk, do not cooperate. Because anything Chris does say now, any inconsistency in a version of events, for example, might be used in a future prosecution.

243 The implication of the applicant's guilt by his former solicitor, Mr Linden, is more subtle, but the publicised views of Mr Milovanovich, the Coroner who presided over the second inquest, are, as with Inspector Hulme, simply declaratory of the applicant's guilt.

Jeff Linden

244 Mr Linden was retained by the applicant in 1983 to represent him in divorce and property settlement proceedings in the Family Court. Although various

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[120] CB 2413.
[121] CB 2413.

documents related to those proceedings were tendered as part of the police brief at the second inquest, Mr Linden did not provide a statement to investigating police for the purposes of either the first or second coronial inquests. That is hardly surprising. It was not suggested Mr Linden could give evidence of any relevance to the enquiry into Lynette Dawson's disappearance. He will not be called in the Crown case at the applicant's trial.

245 It would appear that Mr Thomas sought and obtained access to the files held at the Coroners Court, including access to the materials relating to the Family Court proceedings as they involved Lynette Dawson in 1983-1984 and the Family Court proceedings as they involved JC, who by 2003 had sought orders for the dissolution of her marriage from the applicant and related orders for the custody of the child of that marriage and a property settlement.

246 Mr Thomas confirmed in his evidence that he wanted to make contact with Mr Linden in part because Mr Linden had played football with the applicant but also because he had been the applicant's solicitor in the Family Court proceedings in 1983-1984 and, at the time Mr Thomas spoke to him, he was a Magistrate of the Local Court whose views Mr Thomas believed would, for that reason, carry added weight.

247 Mr Thomas gave evidence that his interview with Mr Linden was conducted at Mr Linden's chambers in the Local Court at Lismore (as he informed listeners). He confirmed with Mr Linden that he had acted for the applicant in his application for the dissolution of his marriage with Lynette Dawson and, because of his friendship with the applicant and his brother and, it would seem, their respective wives, he told Mr Thomas (according to Mr Thomas) about "the discomfort" he (Mr Linden) felt about Lynette Dawson's disappearance.

248 Mr Thomas also confirmed that he was eager to know what Mr Linden's impressions were concerning what he was told by the applicant when he acted for him in the family law proceedings.[122] Mr Thomas also confirmed that in raising those matters, Mr Linden did not suggest there was anything untoward

[122] CB 2490.

about disclosing either what he was told by the applicant or his impressions of what he was told by the applicant about his wife's disappearance.[123]

249 Mr Thomas went on to confirm that amongst the documents to which he had access when speaking with Mr Linden was a letter from Mrs Simms of 24 July 1984 in which she responded to a letter Mr Linden had sent to her seeking to effect substituted service on her of the Family Court process (it would appear that letter was provided to Mr Thomas by Mr Simms, that is, it was not part of the documents Mr Thomas retrieved from the Coroners Court).[124]

250 After the issue of a certificate under s 128 of the *Evidence Act*, Mr Thomas gave the following evidence about that correspondence:[125]

> Q. … So did you produce that letter to Mr Linden or talk to him about it?
>
> A. I don't remember, but I believe that it was raised with him.
>
> Q. It was?
>
> A. Well, I think it would have been raised with him, yes, because he told me he felt awkward acting in the whole matter.
>
> Q. He told you, did he, about the fact that the accused, Chris Dawson, was claiming that his wife had walked out and disappeared and he was awkward about acting for someone in those circumstances. Is that what he said?
>
> A. He told me that he knew Lyn and he'd always struggled or had struggled for some time with the notion that she would have left her children.
>
> Q. It's a question for others, perhaps, but did you think it was appropriate to be having this discussion with Mr Dawson's solicitor, ex or former solicitor?
>
> A. Yes. I believed it was appropriate for me to inform myself as much as I could and if he believed it was inappropriate he would have cut it off.

251 Later in his evidence Mr Thomas confirmed that he interviewed Mr Linden with the intention of being able to include in the podcast the applicant's former solicitor's views about what Mr Boulten described as "the very litigation which concerned her disappearance". Mr Thomas gave the following evidence:[126]

> Q. So far as the narrative of the podcast is concerned, it was quite useful to be able to have Mr Dawson's ex lawyer speaking about the very litigation which concerned her disappearance, right?
>
> A. Yes.

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[123] T 244.
[124] T 266.
[125] Exhibit 17.
[126] T 246.

Q. Especially given that Mr Linden had subsequently become a judicial officer, right?

A. Well, whatever he was, he had knowledge of it.

Q. He had undoubted gravitas given that he was a judicial officer, didn't he?

A. Yes.

Q. And you did include material in episode seven that related to the very litigation about which I'm questioning you, right?

A. Yes.

Q. Including material that was sourced from Mr Linden?

A. I didn't source any material from Mr Linden. Are you talking about

Q. You interviewed him, right?

A. Yes, apart from that, yes.

Q. So, did you think about how Mr Linden's expressions of opinion on your podcast might reflect on his former client, Chris Dawson. Did you think it would be helpful or unhelpful to Mr Dawson?

A. Well, I didn't know what it would be until I'd spoken to him. You mean after I'd spoken to him what did I think?

Q. Yes?

A. Well, after I spoke to him, I thought giving me a candid assessment about his ongoing concerns and that was helpful to the podcast.

Q. And helpful to the narrative you were trying to pitch in the podcast, wasn't it?

A. Well, if he had told me something different I still would have used that.

Q. That's another thing. Maybe so, maybe not. But the bottom line is, you used the fact that Chris Dawson's own lawyer had concerns to underscore your own concerns, right?

A. Yes.

252 Mr Thomas incorporated the interview with Mr Linden in episode 4 of the podcast, entitled "Soft Soil". There were, however, repeated references to the information that Mr Linden provided in subsequent episodes (episodes 7, 9 and 12).

253 The context in which Mr Linden volunteered what he described in the podcast as "my personal views that she [Lynette Dawson] didn't walk out" was an encounter Mr Linden had with subsequent owners of the Bayview property, Mr and Mrs Johnston. Mr Linden was apparently acting for them in an unrelated legal matter when he mentioned to the Johnstons that he knew the applicant as a previous owner of the property. It was in that context that Mr Linden told Mr

Thomas that when Mr Johnston asked him what he knew about the applicant, he volunteered information about Lynette Dawson as the applicant's "missing wife", repeating his personal views that she "didn't walk out". Mr Johnston apparently then volunteered that the applicant had called in at the Bayview property unannounced some time earlier and asked where Mr Johnston was "digging" when some landscaping was being undertaken at the property.

254 After Mr Thomas introduces Mr Linden to the listeners of the podcast, he invites Mr Linden to repeat the conversation he had with Mr Johnston. Mr Thomas describes Mr Linden as "an experienced magistrate … a highly credible source" and that Mr Linden "isn't relating this conversation lightly. It's been on his mind for a long time".[127]

255 Mr Thomas then volunteers for the listening audience his own view as to why the applicant would be returning to his previous home and enquiring, even if casually, of new owners about landscaping improvements. He said:[128]

> For nostalgic reasons, many people do drive past their old homes, but I believe that Chris's special interest in the land around his old home went beyond a casual trip down memory lane. And those four words which Magistrate Jeff Linden has related, 'where are you digging', convey so much. Why would a former owner ask the brand new owner such a direct question. Jeff is certain of the phrasing, he vividly remembers the conversation with Neville Johnston, but it is a hearsay comment because Jeff didn't actually hear his old rugby team mate utter those words. I still believe these are remarkable disclosures, and a possible clue to Chris Dawson's concern about whatever lies beneath the ground up there.

256 Another extract from Mr Thomas' interview with Mr Linden is included in episode 7 of the podcast, entitled "The Rings", where Mr Thomas reviews and recaps on his unfolding narrative that Lynette Dawson is dead, that the applicant has, in all probability, murdered her and that she may be buried at the Bayview property. In the context of telling the listening audience that in late April 1983 the applicant wanted a "straightforward divorce. He wanted it speedily with a minimum of fuss and expense. He turned to Jeff Linden … a solicitor friend from their days playing rugby with Eastern Suburbs for legal advice", he then quotes Mr Linden:

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[127] T 271-272.

[128] CB 2099.

> Chris came and saw me about, A, that he was getting a divorce and, B, a, a property settlement and I was told that she'd [Lynette Dawson] gone missing, … no-one had heard from her.[129]

257 Mr Thomas then went on to say Mr Linden had spoken publicly for the first time in an earlier episode (episode 4) about a conversation that had "given him chills" (namely, the chance conversation with Mr Johnston). Mr Thomas repeats:[130]

> When I spoke to Jeff about this, he told me that by 1987, he had formed a personal view that Lyn, whom he had known socially and liked a lot, would not have walked out on her family and she would never have abandoned her two daughters. But in 1983, Jeff wasn't suspecting foul pay. As a solicitor, he was given clear instructions by Chris to handle his divorce.

258 Mr Thomas then informed the listening audience that he had obtained "legal documents" tendered as exhibits in the two coronial inquests in which the applicant asserts that he and his wife, "Were not getting on well prior to January 1982 and that in January 1982, Lyn left the former matrimonial home and has not returned since" and that he has had full care and control of the children since that date. Mr Thomas then reports that the documents claim that the applicant commenced a de facto relationship with JC in April 1982. Mr Thomas openly declares the date is a lie and he suggests it was a lie told to "put just a little distance between Lyn having vanished and her replacement coming in".[131]

259 Another excerpt of Mr Thomas' interview with Mr Linden was included in episode 12, entitled "Momentum". In that episode, Mr Linden was pressed by Mr Thomas to interpret the applicant's questions about where the owners of the Bayview property were "digging" as a revelation that he was concerned that his wife's remains would be discovered. Mr Thomas and Mr Linden then engage in a discussion about the fact that when Detective Loone interviewed Mr and Mrs Johnston in 1998, no reference was made by the Johnstons to the applicant expressing any interest in where they were digging. In Mr Thomas' view, the fault likely lay with the police officer. Mr Linden expressed the view that Mr Johnston had either forgotten what the applicant had said or did not want his wife to know about it.

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[129] CB 2100.
[130] CB 2198.
[131] CB 2198.

260 It would appear that Detective Poole took a statement from Mr Linden in October 2018, likely under direction from Commissioner Fuller after Mr Thomas had claimed Mr Linden's account of his conversations with Mr Thomas were "highly significant". In his police statement Mr Linden is considerably more temperate in expressing his personal views about Lynette Dawson's "disappearance". He told Detective Poole that he did not have an independent memory of what the applicant had said regarding the circumstances in which his wife had left, but that he did prepare affidavits based upon the information he was given by the applicant. He also vividly recalled speaking to Mrs Simms in the context of seeking to affect substituted service of Family Court documents on her. In his October 2018 statement to police he said:[132]

> As I was being instructed by Chris at the time I don't remember being suspicious of Lyn's disappearance, however it was definitely unusual, but his instructions were definite and he was prepared to swear an affidavit that what he was saying was true, so I didn't have any reason to doubt what he was saying.

261 Mr Linden did, however, confirm his memory of what Mr Johnston had told him of his encounter with the applicant.

262 Neither Mr Johnston nor Mr Linden is to be called in the Crown case. Mr Boulten submitted that while Mr Linden's publicised views as the applicant's former solicitor may not strictly have been in breach of solicitor-client privilege, for Mr Linden to publicly express doubts about the truth of the applicant's evidence in the Family Court proceedings that his wife had deserted him was an egregious breach of his relationship with the applicant as a former client. Mr Boulten submitted that Mr Linden's public commentary should attract not only the opprobrium of this Court as a matter of principle, but that the added weight of his opinion because of the fact that at the time of the broadcast Mr Linden was a judicial officer, provides additional grounds for a permanent stay of the applicant's trial. Mr Boulten submitted that the prejudice that flows from a solicitor expressing a view about a former client's state of mind at a time intrinsic to the case that he will seek to advance in defence of a charge of murder, and the inevitable indelibility of those remarks, or the risk that they will be remembered, cannot be remedied by judicial direction: *Tuckiar v The King*

[132] CB 2199

(1934) 52 CLR 355; [1934] HCA 49. Mr Boulten submitted that the conduct of Mr Linden in volunteering his views about the disappearance of Lynette Dawson, in the context of having prepared and witnessed the applicant's supporting affidavit in the Family Court proceedings, is analogous to the conduct of Mr Tuckiar's counsel, accepting that Mr Linden's revelations were made in a public broadcast as distinct from being revealed in open court.

263 In *Glennon*[133], the Court described the decision in *Tuckiar* as "unique", "extreme" and" bizarre", emphasising the difference between media opinion as to guilt and a public revelation of guilt by an accused's own counsel, characterising the unfair consequences of the former as capable of being relieved by trial judicial direction where the unfair consequences of the latter cannot be remedied.

264 Mr Boulten submitted that Mr Linden's public expression in 2018 of his doubts about the "disappearance" of Lynette Dawson (after having prepared and witnessed the applicant's supporting affidavit in the Family Court proceedings in 1984 in which the applicant attested to the fact that his wife had left him and their children in January 1982) is analogous to the gravity of the conduct of Mr Tuckiar's counsel in publicly announcing that the accused's confession to a witness led by the Crown in proof of guilt was in fact true and correct. It was that conduct which satisfied the High Court that Mr Tuckiar's verdict should be set aside and no retrial ordered, it being, in the view of the Court, "practically impossible" for a new jury to put out of their minds the accused's confession of guilt to his own counsel.

265 Mr Boulten submitted that the fact that Mr Linden's grave doubts as to whether Lynette Dawson left her husband and children were expressed in a public broadcast as distinct from being revealed in open court is a point of factual distinction, but the gravity of conduct and the breach of confidence entailed in both disclosures is the same.

266 For Mr Linden to agree to speak to a journalist when he must have been alert to the possibility that he would be invited to publicly volunteer his views about the circumstances in which Lynette Dawson "disappeared" is surprising, to say

[133] Statement of Jeffrey Linden dated 16 October 2018, [14].

the very least. The potential for anything he might divulge in the course of that interview to erode the applicant's entitlement to retain the privilege of his communications with his former lawyer is obvious. However, there is in my view a difference, in significant degree, between what Mr Linden did and the conduct of Mr Tuckiar's counsel: Mr Tuckiar's guilt is put beyond question by reason of his counsel's communication to the trial judge of the privileged conversation with the accused where the truth of the confession is confirmed while Mr Linden's opinion, taken at its highest, is limited to him having residual doubts as to whether Lynette Dawson had left her husband and children in the circumstances deposed to by the applicant in the affidavit sworn for the Family Court proceedings.

Carl Milovanovich

267 In February 2003, Mr Milovanovich, the then Deputy State Coroner, presided over the second inquest at the Coroners Court in Westmead. Ms Hazel gave evidence that she spoke with Mr Milovanovich in researching her book, although, as with Mr Linden, no interview or notes of a conversation were tendered on the application.

268 There is no statement from Mr Milovanovich tendered on the application to explain the circumstances in which he considered he was at liberty to speak to either Ms Hazel or Mr Thomas, or to reveal to either of them his views about the brief of evidence tendered at the second inquest, or his views about the evidence given by various witnesses at that inquest. Neither is there a statement explaining the basis on which Mr Milovanovich considered he was free to speak to a journalist about his views of a case he had presided over as Deputy State Coroner, knowing those views would be broadcast publicly.

269 In episode 14 of the podcast, entitled "Decision Time", Mr Milovanovich speaks at length with Mr Thomas, immediately following the broadcast of the views of Mr Fuller, the Commissioner of Police.

270 Mr Milovanovich is introduced by Mr Thomas with the observation that it is rare for judicial officers in Australia to talk on the record about their findings. That observation was obviously made to highlight the importance of Mr Milovanovich's insights and Mr Thomas' exclusive access to him. Mr Thomas

introduces Mr Milovanovich as newly retired and willing to talk openly about the decision he reached in 2003 to refer the matter to the ODPP. (I note that at the time of the broadcast Mr Milovanovich was an Acting Magistrate.) Mr Thomas attributes to Mr Milovanovich the following:[134]

> [Mr Milovanovich] believes Lyn was already dead when her husband Chris took their two daughters to the Northbridge Baths, then excused himself briefly from Lyn's mother, Helena, and Chris's friend, Phil Day, to take an unexpected phone call. This is the call that Chris claimed was from Lyn when she … purportedly reassured Chris that she wouldn't be meeting him and the children and her mother at the pool that day. Because, according to Chris, she had said she needed a few days on the Central Coast by herself to think things over. Carl's firm view is that this purported telephone call from Lyn was a complete fabrication designed by Chris to buy some time and throw blame on Lyn. Over the entire period of turmoil in her personal life and her marriage, it was Lyn who had always stayed solid. It was Lyn who remained at home looking after the kids, who waited for Chris to sort himself out. It was Lyn who talked to her mother often. Why would Lyn suddenly take off about 12 hours after telling her mother that the marriage counselling went well, that everything was going to be OK, and then only disclose her intentions to stay away to the man who had made her life a misery?

271 Mr Thomas then asks Mr Milovanovich directly why this case, amongst the many hundreds of cases he dealt with as the Deputy State Coroner, had an impact on him whereas other cases had not. Mr Milovanovich said:[135]

> I think the circumstances, all the circumstances when you put them together, um, are just so remarkable that I just could not accept that Lyn Dawson would just disappear off the face of the earth without there being some human intervention. It just defies all logic that a mother would leave a 4 year old, a 2 year old, um, a family, a job and friends and just disappear. Um, the lies that I think are quite clearly being told by people, ah, in relation to purported phone calls to purported sightings. They were all thrown out there to muddy the water. And I was very disappointed that the police investigation was so poor initially, um, that Lynette Dawson was just treated as another missing person, um, and it wasn't prioritised.

272 Mr Thomas then went on to describe the applicant going to South West Rocks to collect JC very soon after what Mr Thomas described as "Lyn's probable death" as the applicant's "Achilles heel". Mr Milovanovich says:[136]

> And [the applicant] became aware, as I recall it, he, he, he had a feeling that maybe [JC] might have been wanting to perhaps walk away from this relationship. And, eh, I think she communicates this to him. And, um, all of a sudden the door is open for her to come back because Lyn Dawson's not there anymore. It's just too convenient. I think if you, if you put all this evidence

[134] The Queen v Glennon (1992) 173 CLR 592; [1992] HCA 16.
[135] CB 2471.
[136] CB 2471-2472.

> before a jury of normal people they would come back with a, with a guilty verdict. He knew she wasn't coming back. Ah, that's so evident, that's circumstantially so strong and that's, that's probably one of the reasons why I felt so strongly about the case to refer it to the DPP. I thought that circumstantial evidence was overwhelming that he probably knew that she was never coming back. It strengthens the, the, the case for the, for the prosecution of Chris Dawson that by bringing [JC] back so quickly after his wife disappeared, on his explanation that she said that she needed some time away. Or, that just defies logic, that you wouldn't at least wait a few weeks if you were serious about that. [B]ut, nuh, he goes all the way up there, brings her straight back, straight into the house.

273 In the same episode, in a preamble to the next extract of the interview with Mr Milovanovich, Mr Thomas says:[137]

> HT: In his findings in 2003 the coroner, Carl Milovanovich, uses the word, confident, to describe his view that with the evidence placed before them jurors would be capable of convicting Chris Dawson.
>
> CM: When you terminate, you indicate that you are satisfied that the evidence is capable of satisfying a jury beyond reasonable doubt that a known person has committed the indictable offence of murder. So you acting as a hypothetical jury, you're assessing all the evidence, and you are coming to the view that a jury would convict on this evidence. That's the highest bar.
>
> HT: When you made that referral, did you have a high level of confidence that there would be a prosecution?
>
> CM: I thought, out of all the cases that I had referred to the DPP, and I had referred a number, and there was a couple where I was hoping they would run with it, but this was one where I thought that they would. I was optimistic, and no doubt the DPP would've been thinking, one hypothesis is that she's just gone away and started a new life. Um, when you hadn't got a body that's a hypothesis that can be raised. I don't think it's a reasonable one, not when you got two children, ah, and you got a, a family, a community, a job … and all those things.

274 Again in the same episode, Mr Thomas attributes to Mr Milovanovich confidence:[138]

> … that a jury would find [JC] a credible witness, but he's in no doubt that a strong defence lawyer would launch a powerful attack on parts of her story, particularly the allegation of Chris seeing a hit man.

275 Mr Milovanovich then goes on to discuss how a jury should asses JC's credibility in the context of his assessment of her as a witness of truth.

276 Finally, Mr Thomas invites Mr Milovanovich to comment upon the possible culpability of Paul Dawson in the murder, as to which Mr Milovanovich says:[139]

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[137] CB 2472-2473.
[138] CB 2473-2474.
[139] CB 2475.

> Well, I can only, one can only speculate. There's no evidence. There's no evidence about that. But, um, one might speculate that if, if the circumstantial evidence is so strong to suggest that [the applicant], ah, murdered Lyn, ah, and disposed of her body, he, he may have needed some help. And if he needed some help there's only one person he would've turned to, and it would be his brother.

277 Mr Milovanovich also comments at length upon what he considers to be the failure on the part of police to look at the reality of what he considered was a "homicide" as distinct from Lynette Dawson voluntarily leaving her husband and children without disclosing her whereabouts. In the context of making those remarks, Mr Milovanovich attributes naivety to Lynette Dawson's family in not realising the ramifications of what had happened to her and thereafter living with the hope that she would walk back through the door, "[p]erhaps not believing that this person [clearly a reference to the applicant] could do this [clearly a reference to killing her]".[140]

278 At the end of episode 14, Mr Milovanovich is reintroduced into the narrative by Mr Thomas who invites his commentary on what Mr Thomas believed (wrongly, as the evidence before me reveals) was a "long lost antecedent report" written by the applicant in August 1982. It would appear Mr Thomas believed the document was "long lost" because it did not form part of the materials in the brief of evidence tendered before Mr Milovanovich in the second inquest. This document was referred to repeatedly throughout the podcast as important "new evidence".[141]

279 It is clear from Detective Poole's evidence that the centrepiece of Mr Thomas' sustained personal attack on the applicant as a liar and dissembler, revealed in what Mr Thomas repeatedly claimed in the podcast to be a "long-lost" handwritten statement supplied to him by an "unlikely source", was in fact the Antecedent Report identified by Detective Poole as part of his reinvestigation in 2015 and included as part of the brief of evidence, which at the time of the podcast was under consideration by the ODPP.[142]

280 In that state of ignorance, Mr Thomas invited Mr Milovanovich's views on what he (Mr Thomas) described as "the discovery of a handwritten statement [the

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[140] CB 2477.
[141] CB 2478.
[142] CB 2015, 2119, 2224, 2309, 2310, 2410, 2478, 2490, 2522, 2570, 2584.

applicant] gave to police in which he, he lied about certain events at the time of Lyn's disappearance and left out really key things, such as his relationship with [JC]".[143] Of the Antecedent Report, Mr Milovanovich said, were that in evidence before him, it would have only strengthened his views that there was sufficient evidence for the matter to go before a jury on the applicant's trial for his wife's murder. Mr Milovanovich went on to volunteer the opinion that the making of a "false statement" (clearly a reference to the Antecedent Report) is a matter that goes to the applicant's credit, as it does to the question of his character and credibility. He said:[144]

> … it's just another, ah, stitch in the overall fabric of this particular case, circumstance case, that tends to get stronger and stronger as more additional pieces of evidence are put together.

281 No one who listened to the podcast would be left in any doubt of Mr Thomas' view as the presenter, and the views of those he interviewed (with varying degrees of emphasis), that the applicant both physically and emotionally abused Lynette Dawson before killing her and then physically and emotionally abused JC (the eponymous "teacher's pet") after he was free to marry her having murdered his first wife. As I have already observed, rarely, if ever, does Mr Thomas qualify his claim that the applicant murdered Lynette Dawson by use of the word "allegedly". To the extent that there are occasions when Mr Thomas refers to the "probable" murder of Lynette Dawson, that is muted by his unwavering claim that the applicant killed his wife, that he knows the truth which he shares with Lynette Dawson's friends and family and senior police and then, with what I regard as false humility, that from a position of journalistic objectivity the podcast will reveal that truth. I am left in no doubt that the narrative underlying the podcast was deliberately crafted by Mr Thomas to garner the attention of the listening audience and to stimulate their appetite to download each successive episode (at no cost) in the expectation that in the end "all will be revealed".

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[143] The document was the applicant's Antecedent Report provided at the request of Mona Vale police in August 1982 and located by Detective Poole in 2015 in the Ombudsman's archived files.
[144] CB 2522.

Mr Thomas' attack on the applicant's character

282 Mr Thomas' personal attack on the applicant, embedded in both the unfurling narrative of the podcast and in the opinions he solicited from people willing to offer their views about the applicant (including from witnesses the Crown intends to call at the applicant's trial), were not limited to developing his profile as a cunning murderer. At repeated intervals in the podcast Mr Thomas also paints the applicant as a sexual predator with accompanying lurid accounts of his and his twin brother's sexual misconduct with underage girls and their membership in a "sex ring".

283 He was also cross-examined about the interview he gave to *Studio 10*. He agreed that in the interview he wanted viewers to understand not only that he disbelieved the applicant's claims that his wife had "disappeared",[145] but that he also intended viewers of the program to believe that the applicant was a member of a "sex ring".[146] He gave the following evidence:[147]

> Q. Did you intend the viewer to understand that Chris Dawson was a member of a sex ring of teachers preying on schoolgirls?
>
> A. I don't know what I intended, but I believe that he was part of that sex ring.
>
> Q. So by "sex ring" do you mean people, on an organised basis, engaging in that conduct to each other's knowledge and approval?
>
> A. No, I don't – didn't see it as like some organised conspiracy or some shared knowledge of it all. It was like - it was termed a "sex ring" but I didn't mean it to seem like a syndicate of people who were aware of each other's activities; more that there was a concentration.
>
> Q. Well, you've said further down, "There was a very unhealthy culture at that time. It's almost impossible to understand how it can have been allowed to continue for so long as it did, with so many teachers aware."
>
> A. Yes.
>
> Q. You wanted the viewers to think that Chris Dawson was a knowing member of a sex ring. Right?
>
> A. Yes.

284 Mr Boulten also questioned Mr Thomas about his motivations in agreeing to an interview for *60 Minutes*[148] in which he volunteered his views about the applicant. He said:[149]

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[145] CB 2522.
[146] T 108.22
[147] T 110.20.
[148] T 110.20-110.40.

> [The applicant is] a despicable person; I think he's severely narcissistic. I think that he's dangerous. I think that he is lying to himself, lying to his daughters, his friends, his family and has been for a long time.

285 When questioned further, he agreed that although he did not have editorial control over the content of what went to air, he "wanted that bit broadcast". He went on to say:[150]

> Q. So as you were at this stage desirous that the DPP charge Mr Dawson with murder, were you alive to the possibility that potential jurors might pay attention to your opinions?
>
> A. Yes.
>
> Q. Were you alive to the possibility that potential witnesses would pay attention to your opinions?
>
> A. Ah yes.
>
> Q. Did you think it was appropriate for you to express such opinions in this way on national television in those circumstances?
>
> A. I had no idea whether there would ever be a charge.
>
> Q. You were intending to do whatever you could to bring about a charge, weren't you?
>
> A. Whatever I could?
>
> Q. Through your podcast, through your media statements?
>
> A. I was trying to tell a story.
>
> Q. Not just for the sake of the story, there was a purpose you had in telling the story and I suggest that included pressing people who could influence the decision to charge Mr Dawson to do so?
>
> A. Pressing people. No, I didn't press anybody.
>
> Q. You intended to put pressure on the DPP, didn't you?
>
> A. No, I intended to expose inadequacies and if that caused them to look at it in a more forensic way, then that would be a good thing.
>
> Q. You wanted them to look at it in the way that you were looking at it?
>
> A. Yes.
>
> Q. That was one of the reasons why you broadcast the podcast?
>
> A. Yes.
>
> Q. And why you said what you said on 60 Minutes?
>
> A. I don't know what motivated me to say that particular grab you just played, whether it was relating to the DPP or not, I can't recall what was in my head then. I just--
>
> HER HONOUR

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[149] Exhibit J1(2)-(3).

[150] Exhibit J1(2).

Q. At the time you volunteered your opinions of Mr Dawson, were you then at that time alive to the possibility that potential jurors and witnesses would pay attention to what you said were your views about the type of person he was?

A. Your Honour, because I didn't know whether there would ever be a trial I don't know how to answer that.

Q. Well, you have agreed with Mr Boulten that you were alive to the possibility that potential jurors would pay attention and potential witnesses would pay attention to your opinion that in your view he was, as you described him in unflattering terms, a despicable, severely narcissistic and dangerous person?

A. Hmm.

Q. You have agreed you were alive to that possibility?

A. Yes.

Q. Were you alive to the possibility when you said it knowing that 60 Minutes were interviewing you with a view to broadcasting their segment publicly?

A. I can't recall.

286 At various points in the podcast Mr Thomas also appointed the applicant as a person who likely has affiliations with notorious underworld criminal, Arthur "Neddy" Smith, and Paul Heywood, a convicted drug smuggler, including at the Newtown Jets Rugby League Club, and that by those affiliations he could have had his wife killed under contract at his bidding. Mr Boulten played a segment from the first episode of the podcast:[151]

> When Broughton mentions the Paul Hayward saga, he is talking about the Dawson brothers' team mate and the gangsters behind him … The Newtown club stood out at the time for its connections to serious crime figures. Some were deadly dangerous. Hayward was caught in Bangkok in 1978 while attempting to import a suitcase of heroin to Australia. The heroin was organised by his friend and brother-in-law, Arthur Neddy Smith, a notorious contract killer, rapist, drugs importer and armed robber. Hayward is long dead from a drug overdose, he became a heroin addict during his prison sentence in Thailand. Smith is an old man with Parkinson's disease and he is serving life sentences in Sydney for the couple of murders police pinned on him. Veteran detectives are adamant that Arthur Neddy Smith shot, stabbed, and strangled many more victims of slayings which will never be resolved but it's hard to run a prosecution for murder when you can't point to human remains.

287 Mr Thomas was then asked the following:[152]

> Q. This was the opening broadcast of the podcast. What you were doing was suggesting that Mr Dawson had criminal connections, including Paul Heywood and Neddy Smith, who were capable of murdering his wife, right?
>
> A. Because I was aware that the Newtown Leagues Club had been part of a police investigation.

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[151] T 103.

[152] CB 2018.

HER HONOUR

Q. Can you answer that question--

A. I am sorry, your Honour.

Q. [Were you intending] to suggest that Christopher Dawson was criminally connected with people associated with the Newtown football club and that that was somehow connected to the disappearance of his wife?

A. I wasn't meaning to suggest that Paul Dawson - or Chris Dawson, rather - was criminally connected; just that he was team mates with a criminal.

Q. And the significance of that is, so far as you were concerned, in structuring the podcast as you did, including the intro with [JC], referring to a "hitman", were those two things to be aligned for the listener's consideration?

A. Your Honour, I don't know if they were meant to be aligned. I just believed that it was part of the historical colour and context of that period and that club.

BOULTEN

Q. That's dissembling, I suggest. You are not prepared to open up to what you were doing here, are you?

A. Yes.

Q. Well, own up then: You were trying to get everybody to understand that Mr Dawson had criminal contacts, like Neddy Smith and Paul Heywood; do you agree with that much?

A. Yes.

Q. And that he was in a position to contract his wife's murder because of those connections, right?

A. I think that inference could be drawn, yes.

Q. And you intended it to be drawn, didn't you?

A. I don't know if I intended it, Mr Boulten.

Mr Thomas' claims about "new evidence" and the involvement of the Police Commissioner in the podcast

288 In the first episode, Mr Thomas proclaimed the following:[153]

> I've often wondered, hypothetically, how would someone like Lyn start a completely new life in 1982 without leaving a trace? How would she stay in the shadows all these years, not wanting her girls or anyone else to know where she was living, that she was even alive and why? Could a mother, one as devoted as Lyn clearly was, inflict such pain on her flesh and blood for the rest of their lives? She was committed to her family and there was no history of running away, nowhere obvious to go, and she had no independent savings. There were no signs of mental illness or depression. Stress and sadness in her life, yes, her marriage was under great strain. She was sharing it with a beautiful and athletic schoolgirl half Lyn's age. But Lyn Dawson was not a quitter. The idea that she would voluntarily abandon her children and leave behind her valuables, her rings, clothing, and nursing badges that would help

[153] T 151.

> her get a job elsewhere makes no sense to everyone who knew her. *I've discovered new evidence in this podcast investigation. It has helped me see clues that were missed by New South Wales Police when they finally started suspecting a murder and began asking hard questions years after Lyn vanished. Key witnesses who did not go to police at the first opportunity have divulged important facts.* If these lead to the recovery of Lyn's body from the ground at Bayview where I think she lies, it is likely that murder charges would be levelled against the suspect police have circled for a quarter of a century, Lyn's husband, Chris Dawson who taught [JC] at Cromer high. Chris has always strongly denied murdering his wife. He has never been arrested, let alone prosecuted … (Emphasis added)

289 Mr Thomas agreed with the Crown prosecutor that when he broadcast the assertions italicised in the extract above, he had no idea what was in the brief of evidence that has been assembled by Detective Poole and submitted for the consideration of NSW Police legal branch on 20 April 2017, and no idea of the evidence that comprised the brief of evidence which was under consideration by the ODPP from 9 April 2018. After giving Mr Thomas the opportunity of making his position clear as to the totality of the "new evidence" that had been discovered by him and "the key witnesses who had divulged important facts [to him]" by allowing him to furnish an additional statement through his solicitors, I am satisfied that there was little by way of "new" or reliable "fresh" information, or "new" material of which Detective Poole was not already aware. Neither was there new or fresh evidence of which the ODPP was unaware when consideration was being given to the sufficiency of the brief of evidence to support a prosecution for murder.

290 It would appear that it was Mr Thomas' repeated public pronouncements of the "new" and "fresh" evidence that he claimed to have uncovered, coupled with the public appeal of the podcast and the attention other media platforms were giving it, which precipitated the involvement of Mr Fuller, the NSW Commissioner of Police. His involvement is best understood in the context of what was revealed by the evidence adduced at the hearing as to when and why he became involved with Mr Thomas and the podcast, and the extent of his involvement.

291 Both in preparation for the podcast and, as Mr Thomas made clear in his evidence, when the podcast was in production, he was aware there was a current police investigation or reinvestigation into Lynette Dawson's suspected murder. Mr Thomas gave evidence that he did not want to work in conjunction

with police but he sought their assistance in his journalistic endeavours, believing also he could assist police with their investigation. He was somewhat more hubristic in a conversation with Mrs Jenkins, some time prior to August 2018, when he said:

> And like I've been working on this for six months as you know – I reckon my interviews with a lot of these witnesses have been much, much more extensive and deeper than the Police did. Because I've read the transcripts of their interviews and my interviews are much deeper.

292 Prior to the personal involvement of the Commissioner of Police in July 2018, Mr Thomas' request for assistance from the NSW police and his offer to provide them with assistance had been refused not only by Detective Poole,[154] but refused after Mr Thomas contacted the Communications Manager of the NSW police requesting a "briefing … or a sit-down"[155] with an investigating officer. Mr Thomas said his request was met with a "stonewalled" response.

293 It would seem that because of that response Mr Thomas raised the issue of involvement with the police with his then editor-in-chief, Paul Whittaker, who said that he would raise it with the Commissioner of Police. Mr Whittaker invited Mr Thomas to set out a written request identifying the information he sought from the NSW police. An email dated 29 January 2018 requesting that information was tendered in the proceedings.[156] That email was in turn forwarded by Mr Whittaker to the Commissioner. In his email, Mr Thomas sought, inter alia, an "on the record interview" with Detective Loone and Detective Poole; copies of all audio cassettes of interviews by police with the applicant in his 1991 interview with Mr Mayger, his interview with JC is, and with the applicant's brother and his sister-in-law. Mr Thomas concluded his email request with the somewhat arrogant assertion that:

> Commissioner Fuller and NSW Police should view The Australian's forthcoming podcast series and associated publicity as an overdue opportunity to solve this case, which has troubled many people for 36 years.

294 It would appear that between January 2018 and July 2018, Mr Thomas had what he described as "some limited contact with [Detective] Loone",[157] largely

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[154] CB 2015.
[155] T 456.
[156] T 118.
[157] Exhibit K.

as a result of Detective Loone's request for Ms McNally's details, a woman who was interviewed by Mr Thomas when she made contact with him after the airing of the first or second episode of the podcast.[158] Other than providing Ms McNally's details, it was Mr Thomas' belief that the request made of the Commissioner of Police via Mr Whittaker was rejected or was not acted upon.[159] What Mr Thomas described in his evidence as a "breakthrough" in his desire to assist police and for police to assist him occurred in July 2018 when Ben Fordham, a talkback radio host on 2GB, arranged for a lunch meeting with the Commissioner of Police (Mr Fordham apparently has a relationship of some kind with the Commissioner).

295 In a recorded telephone conversation with Mrs Jenkins, Mr Thomas described Mr Fordham as: [160]

> … the guy who effectively brokered a bit of a truce with the police. I mean I wasn't at loggerheads with the police but I think they were with me … and Ben … because … he knows the police commissioner … he thought the police strategy was stupid and that they should be, you know, talking to me, at least having a channel open because I was getting information that I wanted them to look at that I didn't think I could use in the podcast so I've, you know that channel's now been opened and it's been good.

296 On 13 July 2018, a lunch was convened at a Surry Hills restaurant by the Commissioner of Police, which was attended by Mr Thomas, Detective Superintendent Scott Cook, Detective Poole as the officer in charge of the investigation, the Commissioner's media adviser, Grant Williams, and NSW State Crime Commander, Mal Lanyon.

297 That lunch was preceded by a week of email correspondence between David Murray, a co-producer of the podcast series, and Ainslie Blackstone, media supervisor with the NSW State Crime Command, in which Mr Murray requested a response from her by 4 July 2018 (his email was sent that day at 10:18am) to a series of questions, including why the NSW police force had not permitted interviews with police for the podcast series and why they had not contacted Mr Thomas concerning information raised by him during the podcast series; why Ms McNally was told by Detective Poole not to speak publicly; what

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[158] T 120.

[159] Ms McNally gave evidence on the application. Her evidence will be considered later in this judgment.

[160] T 120.

was the "current police position on whether Lynnette Dawson was sighted alive after 9 January 1982" and whether the sightings had played a role in the past and were currently playing a role in what was said to be the failure to prosecute the applicant and finally, how Detective Poole obtained the applicant's handwritten Antecedent Report dated 16 August 1982.[161]

298 Despite what appears to me as the impertinence of that series of requests/demands, Ms Blackstone responded with a statement which she authorised could be attributed to Detective Superintendent Cook. It reads as follows:[162]

> I reject any comment [that] infers any detective involved in the current re-investigation into the murder of Lynette Dawson has expressed disinterest in the case or lacked professionalism at any time.
>
> In fact, this team has been working tirelessly since 2015 to bring the matter to a successful conclusion.
>
> Should criminal proceedings be commenced in relation to this matter, it is vital that any prosecution can proceed in the proper way.
>
> It is not in the interests of the victim, her family, or justice, for the NSW Police Force to make further comment at this time.

299 The lunch with the Commissioner of Police on 13 July 2018 had the effect of unilaterally reversing the position taken by Detective Superintendent Cook on 4 July 2018. According to the evidence Detective Poole gave in these proceedings, he was "directed" by the Commissioner of Police to meet with Mr Thomas, from which I infer Detective Superintendent Cook was also "directed" to reverse his position. Detective Poole gave the following evidence:[163]

> Q. What was your position as the lead investigator in terms of interacting with the podcast and Hedley Thomas from the moment that you started the investigation and became aware of the podcast?
>
> A. It was our position that we weren't engaging or having any involvement with Mr Thomas or the podcast.
>
> Q. Did that change?
>
> A. Yes.
>
> Q. When?
>
> A. About the end of July 2018.

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[161] Exhibit J(1)-(7).
[162] Exhibit L.
[163] Exhibit L.

> Q. Why did it change?
>
> A. We were asked to have a meeting with him.
>
> Q. Who is the "we" you are referring to?
>
> A. Detective Superintendent Scott Cook, who was the commander of the Homicide Squad, Assistant Commissioner Mal Lanyon, who was the Assistant Commissioner in charge of the State Crime Command, along with Mr Grant Williams, who is the head of the Media Unit.
>
> Q. Who asked you to do that?
>
> A. The Commissioner.

300 In his evidence on the application, Detective Poole also stated:[164]

> Q. Did you have any contact with Hedley Thomas prior to the direction from the Commissioner?
>
> A. No.
>
> Q. Well, could you tell the Court how you came to receive the direction, the circumstances in which you received it, please.
>
> A. I attended a meeting where the Commissioner was present with a number of other police officers, including Mr Cook, and as a part of that meeting we were asked to go and or directed to go and meet with Mr Thomas.

301 The exchange of emails following the lunch at the Surry Hills restaurant between Mr Thomas and the Commissioner of Police is enlightening. In his email at 1:49pm on 13 July 2018, Mr Thomas thanked the Commissioner for the "catch up" that day. He went on to say:[165]

> I think it was helpful and I appreciate the sensitives given that the Dawson brief of evidence has been submitted to the DPP some months ago[166].
>
> However, I feel evidence recently obtained by me and in my possession could potentially assist the brief of evidence and I suspect it is more valuable in investigators' hands.
>
> I think we are all on the same page in seeking to ensur[e] justice for the family.

302 It would seem the Commissioner's response to Mr Thomas' email the following morning at 9:40am, that he was "keen" for investigating police to make contact with Mr Thomas in light of what the Commissioner described as "the enormous interest your story has generated and the potential for new evidence to be obtained" was a reference to what he had been given to understand, or perhaps naively thought would be "information" Mr Thomas had in his possession that was "new" information, that is, not known to investigating

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[164] T 456.
[165] T 477.
[166] Exhibit M.

police in his command. The Commissioner did go on to say, and this should be emphasised:[167]

> It's very difficult for NSW Police to run commentary on a brief under investigation and particularly as it makes its journey through the justice system.

303 Mr Thomas was asked by Mr Boulten, and by me, to identify the information "in his possession" in the email with the Commissioner. He suggested that Ms McNally might have been the source. I note, however, that by the date of the lunch meeting Ms McNally had already spoken to police and provided her statement.

304 Further, as the evidence of Detective Poole makes clear, save for the evidence of six or seven of the fifty witnesses to be called in the Crown case, it is simply not the case that their evidence was given responsive to the podcast.[168] Of those six witnesses, only two are mentioned by name in the Crown statement as adding materially to the Crown case,[169] with another two assisting the defence case.[170]

305 Whilst journalistic strategies, or even what might be described as journalistic tactics, to obtain access to sources of information believed to be of utility to a developing story are not unheard of, a journalist might nonetheless be expected not to overstate sources of information they might have to offer. That might be thought to have occurred in this case where Mr Thomas entreated the Commissioner of Police, as the senior investigating officer in NSW, to either reveal his information or to give his official imprimatur to the podcast.

306 In Commissioner Fuller's interviews with Mr Thomas, broadcast as part of the podcast (as distinct from their private telephone conversations exhibited as Exhibit J1) it would appear from the time that they first met at lunch in July 2018 at least up to the date of the applicant's arrest on 5 December 2018, when the Commissioner said to the journalist, "you must be pretty happy mate?" (no doubt a reference to the fact that the applicant had been arrested),

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[167] It was furnished under cover of a letter from Detective Superintendent Cook on 9 April 2018.
[168] Exhibit M.
[169] Exhibit 12.
[170] Beverly McNally and Robert Silkman.

the Commissioner's public views were measured. His engagement with Mr Thomas by telephone was far less so[171].

307 When referring to the ODPP's pending decision in one of the private telephone conversations, the Commissioner said:[172]

> I understand, mate. I haven't leant on Lloyd [Babb] for time frames yet because it's such a long … complex brief and … we want the same outcome as the community wants. But I guess as that gets closer, mate, I'll feel confident in letting you know so you can put yourself in a position – where do we go from here?

308 In the same private conversation with Mr Thomas[173], the Commissioner of Police said:

> HT: You might have to lean [on] his Deputy given he went to school with him.
>
> MF: Do you believe that? You talk about it – I mean, the way you told the story, I mean I actually just found it real interesting just as a punter. But every day you sort of think to yourself, you couldn't write this in a book, people would think this was just a, you know, it's a fiction.
>
> HT: I know, I know. It's just extraordinary. And there's another angle which, you know, I don't think it's suggesting any corruption again but it's just another bizarre angle – so, the Police minister in 1982 was a guy called peter Anderson.
>
> MF: Yes.
>
> HT: And he went to school with Chris and Paul and Peter and was in their car all the time, going to footy training. And I spoke to him and he hadn't seen them since school days, and he said that they never approached him and so on. And, you know, I probably accept that but, you know, it's just another –
>
> MF: It's another part of the story. The good news is I went to Engadine High School, mate, for the record. I didn't visit Northern Suburbs or play Rugby League in and stand that would have got me close, mate. So, the good news is that I have a clean set of heels. But, again, you know, you say to yourself – what are the absolute chances of all this lining up, you know, with so many players? It's, you know, when you started, you wouldn't have imagined that you would have gone down this journey.
>
> HT: No, no way. And I mean, imagine if Bobby Gibbs is right and she is still there?
>
> MF: I said that to … today, I said, you know, I mean it was always my mind that we needed to go back and dig and I've spoken to [Fordo] about that, you know, saying that we, from a public perception, from a credibility perspective, we have to do more. Like, it just has to be done and you and I spoke about that; there's a reality of why we need to do more and there's a perception

[171] Peter and Jill Bresse claim to have seen Lynette Dawson working as a nurse at Rockcastle Private Hospital some time in mid-1984.

[172] See extracted conversations later in this judgment.

[173] Exhibit J1(8). MF denotes Michael Fuller, the Commissioner of Police; HT denotes Hedley Thomas.

> piece as well, that if we don't dig again and don't dig in the areas of concern then there will be an open wound for lots of people. So, that, no doubt, will happen in time. Um, and if we don't find the body – you know, it won't make me any happier in the sense, there's no victory in this for me, if you know what I mean. Other than, we get a conviction.
>
> HT: Yeah, yeah for sure. Well, Mick, I'm really glad we got back on the track and, you know, thanks to you and Ben [Fordham].
>
> MF: I don't think you and I were ever off track.
>
> HT: You and I were fine, and I was fine with your guys – they just didn't want to talk to me.

309 It would seem that the Commissioner was contemplating, even at that time, a further excavation of the Bayview property. It is not clear whether he did so on the advice or recommendation of specialist police or merely at the suggestion of Mr Thomas as part of his obsession with Lynette Dawson's body being buried at the Bayview property, or both.

310 The net result was that between 12 September 2018 and 17 September 2018, NSW police conducted a forensic dig at the Bayview property. No evidence which would indicate Lynette Dawson had been murdered and buried on the property was recovered.

The role of Lloyd Babb SC – the Director of Public Prosecutions

311 Mr Boulten challenged Mr Thomas' motivations in the questions he raised publicly in the podcast and privately with Lynette Dawson's family concerning Lloyd Babb SC's independence and whether, by raising those questions, he was intending to apply pressure to Mr Babb personally as the DPP, or to the Deputy DPP as his delegate, to reverse decisions taken at successive intervals between 2001 and 2013 not to prosecute the applicant for murder.

312 The focus Mr Thomas gave to the fact that Mr Babb was the school captain of a high school at which the applicant was employed as sports master in 1984, coupled with his repeated reference to that association both in the podcast,[174] and in his ongoing dialogue with members of Lynette Dawson's family, at times insinuating that Mr Babb might have been motivated to act improperly or may have in fact done so, makes it difficult to accept Mr Thomas' evidence that he did not intend, as Mr Boulten suggested, to "stir that pot".

[174] Exhibit J1(8).

313 After sustained questioning from both Mr Boulten and the Crown prosecutor, I am satisfied that Mr Thomas deliberately raised the false spectre of impropriety on the part of Mr Babb to raise questions in the minds of the listening public (and perhaps the Commissioner of Police) as to why the ODPP in 2011 and 2013, then under the directorship of Mr Babb, did not reverse the earlier decisions made by Mr Cowdery in 2001 and 2003, and that by the suggestion of nepotism, he sought to add some journalistic spice to the podcast series. I am also satisfied his motivations in referring repeatedly to Mr Babb's historic association with the applicant when Mr Babb was a school boy, he intended to apply pressure to the decision-makers within the ODPP, in his misguided belief that the ODDP would wish to avoid the public perception that the applicant had received preferential treatment in the past or to avoid the public perception of corrupt conduct on the part of previous decision-makers.

314 If there is any lingering suggestion that Mr Babb discharged his responsibilities as the DPP improperly at any time between July 2011 (when he was appointed to that role) and in December 2018 (when the NSW police received advice allowing for the applicant to be arrested and charged with murder), let me dispel it. I am satisfied, beyond any question, both on the evidence tendered on the application and having regard to the legislative powers and responsibilities of the ODPP under the *Director of Public Prosecutions Act 1986* (NSW) and the ODPP Prosecution Guidelines, that from July 2011 Mr Babb has acted at all times with absolute propriety in the Office of Director of Public Prosecutions, as did those within his office to whom he delegated the responsibility of both responding to queries and questions from members of Lynette Dawson's family in 2011 and 2013 and, ultimately, in responding to a request for advice from Detective Superintendent Cook in 2018 as to whether the applicant would be prosecuted for the murder.

The Commissioner of Police joins the podcast

315 Mr Thomas introduces the Commissioner on the basis that he (the Commissioner) has "been surprised by the many revelations, the sexual assaults against girls, and the lack of action by the police in the '80s. He's

determined there'll be no cover-up on his watch".[175] Mr Thomas then invites the Commissioner of Police to tell podcast listeners "where we're up to with the investigations involving both the sexual assaults and the, ah, alleged murder of Lyn Dawson?".[176]

316 What needs to be made clear for the purposes of this application is that while the primary focus of the podcast was Lynette Dawson's disappearance and Mr Thomas' determination that the applicant be prosecuted for her murder, the podcast also stimulated, or generated, the disclosure of the allegedly systemic and organised predatory sexual behaviour of a number of high school teachers working on the Northern Beaches.

317 It appears that the naming of the applicant and his brother as part of what Mr Thomas came to describe as a "sex ring", and Mr Thomas' emphasis on the applicant's relationship with JC whilst he was a teacher at Cromer High School as his motive for murdering his wife, prompted revelations of sexual misconduct by both the applicant and his brother, and by other school teachers in the 1980s. The revelations in the podcast about that behaviour, the extent to which it was apparently known and condoned by school authorities and the fact that it had never been the subject of a formal police investigation (apparently because none of the school children had come forward and complained) ultimately resulted in the Commissioner of Police appointing a specialist strike force (Strike Force Southwood) to investigate historic sexual assault complaints in the Northern Beaches area. Although it appears that Strike Force Southwood was operating concurrently with Detective Poole's ongoing investigation, "solving" the suspected homicide of Lynette Dawson remained the unremitting focus of the podcast.

318 When the Commissioner of Police refers to the work by the Unsolved Homicide Squad, he comments that "we are eagerly awaiting the outcome of … [the DPP's] … review of that brief of evidence". The Commissioner went on to say that the officers are looking into "potential new opportunities … of gaining evidence that we've identified through the podcast", which he went on to describe as something that has "enormous interest" and has "generated some

[175] Episode 13 of the podcast focused almost exclusively on that matter.
[176] CB 2467.

potential, fresh leads".[177] The so-called "fresh leads" would appear to be what Mr Thomas had generated through a series of anecdotal, highly impressionistic and at times purely speculative suggestions that there would likely be the human remains of Lynette Dawson revealed on a further excavation of the Bayview property, among them Mr Thomas' repeated references to Mr Linden's conversation with Mr Johnston.

319 In the podcast, the Commissioner also adds his commentary to the commentary from the Deputy State Coroner, Mr Milovanovich, that, as the Commissioner described it, "In this day and age that story [Lynette Dawson having left her husband and children] wouldn't wash as a missing person … we wouldn't've accepted the information that was given to police".[178]

320 Again in what appears to be an attempt to retain the attention of his listening audience, Mr Thomas asks the Commissioner to comment upon "possible police corruption in the '80s that led to this case just being swept under the carpet for a number of years".[179] The Commissioner wrested with the proposition that methods of policing in the modern era mean that people (he must be taken to mean people who "disappear") invariably leave an "electronic footprint". He went on to say, "there are plenty of good Detectives in the last 50 years of policing that did take reports of missing person [sic] and did solve a homicide".[180] He then added his imprimatur to Mr Thomas' sustained theme of the podcast when he said:

> … there's something not right about this case, but the problem is it took 10 years for us to get on that front foot around that something's wrong. And, and obviously in 10 years so much evidence was lost.[181]

321 The clear implication is that the "lost" evidence is evidence which would further implicate the applicant is his wife's murder.

322 While it is not for this Court to question the wisdom of the Commissioner of Police's decision to direct his officers to engage with Mr Thomas, or the wisdom of the Commissioner's public endorsement of the podcast, in my

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[177] CB 2466.
[178] CB 2467.
[179] CB 2469.
[180] CB 2469.
[181] CB 2470

assessment of the evidence adduced on the application (including after giving close consideration to a full compendium of Mr Thomas' files, including his work files) there remain serious questions as to whether the Commissioner of Police was misled into believing that Mr Thomas had information that would be of great significance to police.

323 The risk that a fully resourced and professional police investigation into suspected criminal activity might be compromised by interference from an investigative journalist is self-evident. Unsurprisingly, Detective Poole, as the officer in charge of the reinvestigation into Lynette Dawson's disappearance, resolved to have no engagement at all with Mr Thomas despite being aware of the podcast and the contentions Mr Thomas was advancing as part of the narrative he was seeking to exploit for the public's presumed appetite for "cold case murders" and his own journalistic ambitions. Detective Poole gave evidence that:[182]

> … in relation to this investigation, significant media interest would not be of any assistance to us or the investigation as we were, you know, submitting the matter to the DPP to consider it and it would - I was of the view that it may just further complicate things in an investigation where there's already been significant media attention in the past, and generally my advice to the family was, "I can't tell you what to do obviously, but refraining from speaking to the media is probably a more preferable thing for us rather than the large amount of publicity that it attracts.

324 Prior to the broadcasting of the podcast, Detective Poole was unaware that Lynette Dawson's family were developing or had developed a strong connection with Mr Thomas or that Mr Thomas was interviewing people who had information relevant to Detective Poole's investigation.[183]

325 As noted above, the same position was taken at a senior level within the NSW police media unit, at least until the intervention of the Commissioner of Police in August 2018 when Detective Poole was directed by the Commissioner to meet with Mr Thomas.

The impact of the podcast and the role of the journalist

326 There can be no doubt that skilled investigative journalists have, for many years, been responsible for the public exposure of incompetent or corrupt

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[182] CB 2470

[183] T 476.16.

behaviour of public officials and private entrepreneurs, as they have the public exposure of serious sexual and other misconduct within institutions of church and state. In many cases, that work has led to criminal charges being laid against those suspected of serious criminal offending and the successful prosecution of many of them. That contribution is both acknowledged and appropriately lauded by the accolades awarded by professional bodies, and by the interest of publishing houses and other print and electronic media, no less than the well earned respect of the general public. However, the risk that an overzealous and uncensored investigative journalist poses to a fair trial of a person who might ultimately be charged with an historic murder (or another historic offence or offences) is self-evident. It is also self-evident that an investigative journalist who lacks the discipline or insight to discriminate between a narrative based upon meticulous fieldwork and solid research, and a narrative that depends for the telling, in large part, on innuendo and speculation, or a journalist who is so imbued with hubris that they are unable or unwilling to see the difference, poses a risk to a fair trial at a time when courts have become accustomed to developing and maintaining a sound working relationship with the media.

327 It is not the Crown's intention to call Mr Thomas at the applicant's trial. That is not surprising. Mr Thomas can give neither relevant nor admissible evidence in proof of the applicant's guilt. That said, it is unmistakable that the narrative that links each of the successive episodes of the podcast is one which was, at all times, firmly tethered to Mr Thomas' personal belief that the applicant murdered Lynette Dawson; that he has succeeded in avoiding being tried for her murder, either because of corrupt or incompetent police, and that those failures were in turn reinforced by the timidity (at one point he describes it as "the wilful blindness") of the ODPP as the prosecuting authority.

328 Mr Thomas is, of course, entitled to his views about the guilt of the applicant and about the type of person the applicant is, or was, when he was employed as a high school teacher on the Northern Beaches in the 1980s when he engaged in a sexual relationship with a student. However, what Mr Thomas has done as the co-producer and presenter of the podcast, apparently with the sanction of his employers from whom he received legal advice, and with the

implied imprimatur of the Commissioner of Police, is to deliberately and repeatedly publicise his views, not only about the applicant's bad character, but how that informs his motive for murder. That Mr Thomas has taken that approach throughout the podcast, and that he has done so solely, as he would have me accept, of him simply "telling a story", shows a grave lack of judgment. It is, in my view, eloquent of a lack of ethical responsibility as a journalist.

329 The new genre of podcasting and the popularity of the so-called "true crime" podcast, providing as it does a new platform for the investigative journalist to attract a wide and diverse listening audience and for the broadcaster to benefit financially, highlights the need for the journalist and the broadcaster to apply restraint if the "true crime" podcast is to coexist with the fundamental right of a person accused of a serious crime to be tried in a court of law, not in a court of public opinion.

330 The fact that episode 16 was broadcast on the day of the applicant's arrest (including an interview with the Commissioner of Police broadcast as part of that episode, extracted from a longer phone call which was tendered by the Crown in full)[184] apparently did not cause either Mr Thomas or Nationwide News to exercise any restraint, although Mr Thomas gave evidence before me that he did give it "thought". He gave the following evidence:[185]

> Q. Can I just have assistance with this, please. Where you say to the Police Commissioner, following Mr Dawson's arrest, that you'll need, consequent upon his arrest, to change plans, at least so far as including these unnamed babysitters in any forthcoming podcast, is there any reason why you continued going to air at all after his arrest?
>
> A. Well, your Honour, it was that day and so that episode was effectively wrapping up the events of that day, that final--
>
> Q. Episode 15 went to air that day. Episode 16 went to air on 5 April. Is there any reason why the last two episodes went to air notwithstanding, or in the face of, Mr Dawson's arrest?
>
> A. Your Honour, I think your dates are out. Episode 16 went to air on the night of his arrest, and then there was this so-called update episode announcing that the podcasts were coming down that went to air in I think March of 2019.

[184] T 476.

[185] Exhibit J1(8).

> Q. All right. I may have those out, but is there any reason why, again, I say, consequent upon his arrest, you resolved to go to air to continue discussing the matters discussed in those broadcasts at all?
>
> A. Yes, your Honour.
>
> Q. What was that?
>
> A. Well, it was the final episode to--
>
> Q. No, I understand that journalistically you might have wanted to wrap up and take the accolades if they were to come your way. But a man was now charged with murder and subject to extradition to this State to be dealt with in accordance with the criminal justice system that applies in this jurisdiction. Did you give any thought - I'll put it to you this way - to withholding from broadcast your further commentary on the case?
>
> A. Yes, I gave thought, your Honour.
>
> Q. Yes, and tell me what struck you as being a balanced resolve in that regard.
>
> A. The newspaper received advice that because Mr Dawson - and forgive me if I've got this wrong - had been arrested but not charged, he had not been extradited to New South Wales; that it was perfectly fine, in the view of advice …

331 From the text, tone and tenor of *The Teacher's Pet* podcast, it seems to me that neither Mr Thomas nor Nationwide News applied that essential restraint. That is not only regrettable but extremely disturbing, the more so where, after giving evidence over some days, and at times under intense questioning by the Court, Mr Thomas gave no indication that he had gained any insight into the damage he has done to the fundamental right of the applicant to the presumption of innocence and his right to silence, and no obvious awakening of his ethical role as a journalist to respect and preserve those rights.

332 I have listened to each of the sixteen episodes which comprise the podcast in its entirety. I am well satisfied that the podcast, which has attracted in excess of 1 million "hits" within the Sydney Region alone between May 2018 and April 2019 before it was "taken down", but which remains available to be downloaded and is capable of being retained as a series of audio files by any listener determined to listen to it, has the potential, in the absence of judicial direction, to put the applicant's fair trial at risk were any members of a jury panel called for the applicant's trial or ultimately empanelled as a juror to have already downloaded it or who may be inclined to do so.

333 In that connection, in the course of final submissions the Court was referred to a new "cold case murder" podcast co-produced and presented by Mr Thomas entitled *The Night Driver*. The promotional material for that podcast refers to *The Teacher's Pet* and its "award-winning journalist". In Mr Boulten's submission, the promotional material has all the hallmarks of attracting a wide listening audience and, for that reason, has the very real potential of reigniting interest in *The Teacher's Pet*.

334 The following is an example of the promotional material currently available:[186]

> The journalist behind award-wining podcast The Teacher's Pet has a new project on the way.
>
> Journalist at The Australian, Hedley Thomas will launch a new podcast called The Night Driver, a story following the murder of a young woman from Bathurst and how the town turned on a former top detective and deputy mayor as the suspect.
>
> Janine Vaughan disappeared almost 20 years ago, and her younger sister has spent that time tracking down suspects, leads, and more.
>
> "Hedley Thomas is a master storyteller. He is a pioneer of podcasting in Australia, using his exceptional skills as an investigative journalist with 30 years' experience in print to bring to life gripping tales for a new audience," said *The Australian* editor-in-chief Christopher Dore.
>
> "I defy anyone to tune in for episode one and not be immediately obsessed with *The Night Driver*. Hedley's podcasts have already been downloaded 50 million times around the world.
>
> "Get ready to be mesmerised by this shocking story, which will also unfold in the pages of *The Australian*, and on our app and website."
>
> The Teacher's Pet swept the 2018 Walkley Awards, and following its production, the subject of the podcast Chris Dawson was arrested.
>
> "The disappearance of Janine Vaughan has been a baffling mystery after investigations spanning almost 20 years by dozens of detectives, an anti-corruption inquiry and a coroner. The grief of Janine's family is made worse because they do not have a body and they cannot lay her to rest," said Thomas of his new project.
>
> "They have seen serious suspects come and go without charge. They have placed their faith in *The Night Driver* to sort the facts from town gossip and renew public interest to try to shed new light on what happened to Janine."

335 No doubt with a view to determining for itself just how damaging another podcast in a cold case murder might be, the Crown sought leave to issue a subpoena directed to Nationwide News Pty Ltd seeking production of "[a]ll transcripts of the completed episodes of *The Night Driver* podcast produced by

[186] T 145-146.

Hedley Thomas". Mr Sibtain was invited to take instructions from his client as to whether they were prepared to remove any reference to *The Teacher's Pet* in the promotional material. After taking instructions his client declined to take that approach. The matter rested with the Crown resolving not to call on the subpoena or to make any application for a "take down order" at this time.[187]

The submissions of the parties on the impact of the podcast

336 The Crown did not contend that the application for a stay because of the adverse influence of the podcast on the fairness of the applicant's trial was without foundation. The Crown prosecutor in his cross-examination of Mr Thomas, and in final submissions, made that plain. Rather, the Crown advanced the submission that the risk that the podcast poses to the administration of justice generally, and to the applicant's trial in particular, can be remedied in the trial process despite the podcast remaining accessible for download by members of the public.

The Crown's submissions

337 In closing submissions, the Crown also acknowledged that the evidence adduced on the application exposes a number of "defects" that have the capacity to put the applicant's fair trial at risk, additional to the stridency and pervasiveness of the commentary on the applicant's guilt in *The Teacher's Pet* podcast. The Crown referred to the "gonzo journalism" indulged in by the journalist with *A Current Affair*, and the delay in proceedings being initiated against the applicant for murder with the associated lost opportunity to fully explore avenues of enquiry that might have supported his claim that his wife was alive after 8 January 1982. The Crown submitted, however, that neither individually nor in combination do those defects go to the "root of the trial". The Crown submitted they are each capable of being dealt with by either judicial direction or other rulings in the course of the trial which will alleviate the risk of the applicant being tried unfairly. The Crown also maintained the submission that the applicant had failed to make out a case for a permanent stay on the basis that either the alleged improper conduct of Detective Loone, or the Police

[187] Exhibit AT.

Commissioner's engagement with Mr Thomas and the podcast, constituted an abuse of process.

338 The Crown also advanced the argument that despite the prejudicial impact of the podcast as a serialised commentary on Lynette Dawson's "disappearance" and the probable guilt of the applicant as the person who murdered her, at least in episode 14 another view to that advanced and maintained by Mr Thomas was introduced when the written views of a retired judge were read by an actor.

339 Those views were limited to three subject matters:

(a) The reliability of JC's claim that the applicant spoke to her about hiring a "hit man" to kill his wife and told her that "Lyn was never coming back", claims made for the first time after her acrimonious separation from the applicant. I note, however, that Mr Thomas immediately sought to counter any suggestion of JC's unreliability by quoting the police prosecutor's closing submissions at the second inquest. An actor, quoting from the transcript of the inquest, said:

> When you consider the fact that [JC] has absolutely nothing to gain from assisting the police investigating Lyn's disappearance and nothing to gain from coming to court, both in February 2001 as well as this week, and when you take into account the fact that on both occasions she has had to endure a bright public spotlight of the media as refocused upon the most intimate and personal aspects of her formative years, it beggars belief that she'd be making up or embellishing her evidence.

(b) Whether there might be an innocent explanation for the lies told directly and by omission by the applicant in the Antecedent Report, in the sense that informing police about his relationship with JC would not assist police to find his wife who he claimed had disappeared.

(c) The delay of 16 years before Ms Andrew informed police that she had witnessed Lynette Dawson being physically and verbally assaulted by the applicant and the adverse impact on her credibility both by the delay and her vehement pronouncements of the applicant's guilt.

340 Having listened to the podcast in its entirety, in my view that voice is soundly drowned out by the chorus of detractors (including Ms Andrew) who were introduced by Mr Thomas in the episodes which preceded episode 14 and those which followed it.

341 The Crown also invited the Court to consider the question whether a potential juror who had listened to the podcast at the time it was broadcast in 2018 would be likely to remember the views volunteered by Mr Linden and/or Mr Milovanovich given that they comprised, in total, only 23 of 580 pages of the entire podcast series, as transcribed[188]. The Crown submitted that even lawyers who have been engaged with the case since the applicant's arrest, and perhaps earlier, would have little recall of what was actually said by either Mr Linden or Mr Milovanovich without a close review of the podcast transcript or the audio recordings. The Crown submitted that despite it being "unfortunate" that the applicant's former solicitor and a former Deputy State Coroner agreed to be interviewed by a journalist, and "unfortunate" that either of them publicly volunteered their views about the case, with Mr Milovanovich volunteering his views about the applicant's guilt, any juror who acknowledged having a memory of the particular contributions of those commentators would be directed by the trial judge to disregard what they had heard, in the context of a more general direction that they should disregard any recall they might have of the views expressed either by Mr Thomas or those who were interviewed by him and any other media commentary about the case.

342 It was at that point in the course of submissions that I proposed, for the consideration of the parties, what a trial judge might say in the empanelment process in order to engender in the panel the fundamental importance of the jury ultimately sworn to try the question of the applicant's guilt, bringing an impartial mind to bear on the evidence to be adduced in the trial, including the importance of disregarding any conclusions they may have already reached about the applicant's guilt from what they may have read or heard about the case, in particular by reference to the podcast:[189]

> Can the judge do more than this: in the empanelment process or preliminary to it, rather, invite any member of the jury [panel] - or indeed encourage any member of the jury [panel] who has listened to the podcast at any time or discussed with anybody the content of the podcast at any time, to approach the judge and ask to be discharged? That's, I would have thought, the first step. I think the second step has to be that the judge encourages any person, nameless or faceless or named and identified, on any social media platform who might have joined in discussions about the case at any time … to

[188] T 659.

[189] The Crown did not address the commentary by Inspector Hulme.

> approach and ask to be discharged. And the judge, I think, might go further and say, "In the event that anyone on the jury panel has retained or thinks they might have retained any episodes of the podcast in its serialised format on a device, phone, tablet or computer, to also come forward and inform the Court of that fact", and because the Court hasn't got the power to direct a juror to delete it, … ask the juror who may have retained a copy, knowingly or unknowingly, to make that clear and to come forward and to seek to be discharged.

343 The Crown declared itself to be in "furious agreement" with that approach citing a number of authorities which have, consistently with repeated statements from the High Court, emphasised the Court's obligation, when considering an application to stay a criminal trial on the basis of adverse publicity, to give appropriate weight to the capacity and willingness of a jury to refuse to act on information not otherwise proved by the evidence.

344 The Crown acknowledged that it will require the commitment of the parties and the trial judge to ensure that there are sufficient numbers in a potential jury pool (perhaps numbering many hundreds and perhaps requiring an empanelment process that extends over many days) to ensure that a jury of twelve or fifteen can be empanelled, where none of the individual jurors has either heard the podcast or heard of it through the multiple media outlets which have commented upon it at length or, if potential jurors have heard it or heard of it and they are not willing to seek to be excused, that they understand their obligation to deliver a verdict strictly in accordance with the evidence if they are sworn as jurors.

345 The podcast is so ubiquitous and so damaging to the applicant's right to a fair trial, in the absence of a legislative basis in the *Jury Act* to "poll" a jury, it is clear that nothing short of a considerable degree of judicial intervention in the empanelling process will insure against the risk of unfairness. The pressure on the already strained resources involved in the administration of criminal justice in this state by the need to empanel a jury willing and capable of bringing an impartial mind to bear on the issues in a trial of some length and factual complexity is enormous. It would appear that neither the producer nor the publishers of the podcast gave even scant regard to those realities in their mutual determination to pursue their own personal, professional and financial interests.

346 Mr Boulten submitted that even the most conscientious juror, if invited to consider whether they have been influenced, or might have been influenced, by what they have heard about the case or what they have discussed with others at a time when the media bonanza set alight by the podcast was in full blaze, are more likely to believe in their capacity to put their thoughts and pre-judgment to one side rather than to declare to the other members of the jury panel, and to the trial judge, that they are incapable of doing so. Mr Boulten submitted that the mere process of a trial judge interrogating jurors to the extent proposed in discussion with the Crown will highlight the podcast and its damaging effects to the jury pool, thereby stimulating interest in the podcast or reigniting interest in it.

347 Mr Boulten also submitted that, in addition to many of those voices who freely expressed their opinions about the applicant's guilt, prejudicing the applicant's right to a fair trial, much of what was said by people Mr Thomas invited to comment on the case is either irrelevant or inadmissible as evidence in the trial, creating a different form of prejudice for that reason. Leaving to one side the question whether the Crown will be entitled to seek to prove a connection between the applicant and Arthur "Neddy" Smith as the putative "hit man" because of their relationship to the Newtown Jets Rugby League Club (a matter which I am told is very much in contest), Mr Boulten identified the commentary by a barrister, Mr Lavac, about the significance of lies told by an accused and commentary from a retired Family Court Judge explaining the intricacies of the Family Court proceedings where allegations of child sexual abuse are made as irrelevant to any issue in the trial.[190]

The relevant law on the impact of adverse publicity

The Queen v Glennon (1992) 173 CLR 592; [1992] HCA 16

348 The primary authority relied upon by the Crown in meeting the applicant's case that the adverse publicity and commentary about this case dictates that his trial must be stayed because of the overwhelming prejudice he faces was the decision of the High Court in *Glennon*.

[190] T 665.

349 In *Glennon*, special leave to appeal was sought from a judgment of the Full Court of the Supreme Court of Victoria where the Court, sitting as a Court of Criminal Appeal, upheld the conviction appeal of the respondent on the basis that the verdicts were unsafe and unsatisfactory on account of what the majority concluded must have been the prejudicial effect on the jury's verdict of pre-trial publicity about the respondent, broadcast by a Melbourne radio commentator on three separate occasions. The Court of Criminal Appeal, by majority (McGarvie and Nathan JJ, Southwell J dissenting), quashed the verdicts of guilty and entered verdicts of acquittal. The critical finding of fact made by McGarvie and Nathan JJ was that the cumulative effect of the pre-trial publicity made the case "an extreme and exceptional" or "singular" case in which neither the lapse of time between the broadcasts and the trial nor directions of the trial judge obviated an "unacceptable" (in the sense of "significant or substantial") risk that the trial was unfair by reason of illegitimate prejudice and prejudgement on the part of the jury (at 616 per Brennan J).

350 In the High Court, Mason CJ, Brennan, Dawson and Toohey JJ granted special leave (Deane, Gaudron and McHugh JJ dissenting) on the basis that the decision of the Court of Criminal Appeal which had, in effect, granted the respondent immunity from prosecution, had far reaching consequences for the administration of justice where, in contemporary society, "sensational media publicity presents very serious problems in ensuring that persons accused of criminal offences receive a fair trial" (at 598-599 per Mason CJ and Toohey J). The majority went on to hold the Court of Criminal Appeal was in error in concluding that the verdicts were unsafe and unsatisfactory because of the effects of the pre-trial publicity.

351 In the judgment of Mason CJ and Toohey J (at 596) there was a brief rendition of the circumstances in which the respondent's criminal history as a sex offender had come to public attention. Those facts do not need to be recited here. Suffice to note that the attack launched by the radio commentator, Mr Hinch, included allegations of the respondent's criminal conduct and sexual impropriety, referring specifically to his previous conviction for sexual offending.

352 Mr Hinch was charged and convicted of contempt of court. Their Honours set out in full (at 596-597) a summary of the nature and effect of the broadcast in the view of the judge who heard the contempt charges, the terms of which were accepted on the appeal from that conviction by both the Full Court of the Victorian Supreme Court and the High Court: *Hinch v The Attorney-General (Vic)* (1987) 164 CLR 15; [1987] HCA 56.

353 It is helpful to set out that summary in full:

> In my opinion the broadcasts, and each of them, would have influenced most listeners to conclude that [the respondent] was a despicable man, a dissembling priest, who corrupted young people after using his pseudo-clerical position to gain their trust.
>
> A strong feeling of hostility towards [the respondent] must, in my opinion, have been created. Reference is made, as I said, to his prior conviction and gaoling, to his prior acquittals on similar charges, and to at least the possibility that many other offences had been committed but never seen the light of day and it might be implied that such offences perhaps could involve Aboriginal children.
>
> These statements were all extremely prejudicial and improper and unfair considerations to put before witnesses and potential jurors. Our system of justice, as Mr. Hinch knew, would not have allowed them to be led in evidence and a jury which heard them would be discharged.
>
> Even those trained in the criminal law find that this sensitive subject of paederasty (or child molestation as Mr. Hinch calls it), is one in which it is necessary to be extremely careful not automatically to argue from prior conviction of one offence to guilt on pending charges. Those not so trained in the law would generally feel no such constraint. But to determine the guilt or innocence of a person charged by taking into account any such considerations would be foreign to the basic principles of justice according to our law.
>
> I am of the opinion that such statements concerning a Catholic priest in Victoria will be likely to make a lasting impression upon the minds of those listening to the broadcasts, who are ordinary reasonable members of the community, and perhaps especially upon the minds of those with strong religious beliefs, whether of Catholic or of some other persuasion.

354 The respondent's trial eventually proceeded before a judge and jury more than five years after the last of the three broadcasts and three and a half years after the contempt proceedings were covered widely in the Melbourne media. There were two unsuccessful applications for a permanent stay of the trial on the basis that the accused would be unable to receive a fair trial by virtue of the prejudicial effect of the pre-trial publicity.

355 Although the High Court was not strictly concerned with the circumstances in which a discretionary judgment refusing a permanent stay on the basis of

adverse pre-trial publicity might be made, as Mason CJ and Toohey J understood the approach taken by the majority in the Court of Criminal Appeal, in order for the respondent to have succeeded before that Court, equally in order for the respondent to succeed before the High Court, it was necessary to show that the decision of Crockett J, the judge who refused the permanent stay applying the principles in *Jago*[191], was erroneous in accordance with established principles governing an appeal from a discretionary judgment (*Glennon* at 600).

356 Mason CJ and Toohey J considered that the reasoning in the judgments of the majority in the Court of Criminal Appeal not only disregarded what they considered as the principled decision of Crockett J, but that McGarvie J relied upon two factors which their Honours described as "mere conjecture and speculation" (at 602). The first was a poll conducted at the request of the respondent's solicitors using a random sample of 301 people who were asked a series of questions, the results of which were said to support the proposition that 33-45% of the adult population of Melbourne had heard of the respondent's case in some form or another, although, significantly, no one volunteered knowledge that they knew the respondent was previously convicted of a sexual offence.

357 Their Honours determined that the results of the random poll were not only inconclusive, but they provided no evidence whatsoever to justify the conclusion that prospective jurors did not respond honestly and accurately to questions put to them by the trial judge at the commencement of the trial where, after background facts had been summarised and principal witnesses identified, the jury panel were invited to indicate whether any of the persons named were known to the panel or whether any member of the panel knew anything about the circumstances of the case or had heard anything about the circumstances of the case (at 601). Their Honours went onto to say (at 602):

> The evidence of the poll indicated that people knew about the case in a general, vague way but did not have knowledge of the prior conviction. This is hardly surprising given the passage of over four years between Hinch's final broadcast and the poll. And, in any event, even if the poll had recorded that one or more respondents recalled a conviction, we would have difficulty in

[191] T 559.

> accepting that that provided a basis for concluding that prospective jurors concealed their knowledge of a conviction from the trial judge when he asked them a direct question about that knowledge. As Street C.J. stated in *Murdoch* (14) (1987) 37 A Crim R 118, at p 126:
>
> > "There must be a sound basis made out on a prima facie footing to anticipate the probability (of) prejudice on the part of an individual juror."

358 Their Honours were also of the view that too little weight was 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 The Queen* (1989) 167 CLR 94; [1989] HCA 28, at 99, Mason CJ and Toohey J said:

> 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 C.C.C. (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 twelve 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.'

359 Of those observations, their Honours said (at 603):

> 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.

360 Mason CJ and Toohey J were equally as critical of the approach taken by Nathan J in drawing an alignment between what the members of the High Court had said in *Hinch* about the possibility of the respondent obtaining a fair trial and the matters with which Crockett J was concern when determining whether, in the exercise of discretion, the respondent's trial should be permanently stayed, a distinction which their Honours thought Nathan J had overlooked. That point of distinction was made in *Glennon* (at 605-606):

> The question whether a contempt has been committed has "to be determined at the time of publication and not by reference to subsequent events", as Toohey J. observed in *Hinch*. That time may be well in advance of the actual trial and even before the date for trial is known. Thus a conviction for contempt depends upon findings of fact and inferences drawn at that time on the basis of evidence then available.
>
> On the other hand, a permanent stay will only be ordered in an extreme case and there must be a fundamental defect "of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences". And a court of criminal appeal, before it will set aside a

> conviction on the ground of a miscarriage of justice, requires to be satisfied that there is a serious risk that the pre-trial publicity has deprived the accused of a fair trial. It will determine that question in the light of the evidence as it stands at the time of the trial and in the light of the way in which the trial was conducted, including the steps taken by the trial judge with a view to ensuring a fair trial.

361 At 612-613, Brennan J was also concerned to identify the boundary between legitimate public discussion of topics of public interest, including a degree of freedom of public expression when it is exercised in relation to a crime that is a topic of public interest, even if it appears that some degree of risk (although, as his Honour emphasised, "not a substantial risk") is posed to the integrity of the administration of criminal justice, and a discussion which amounts to a punishable contempt of court in the context of criminal proceedings. As his Honour noted, however, it does not follow that even where a punishable contempt of court has been committed, the trial of the person the subject of that contempt must be aborted. Were it otherwise, his Honour said, a flagrant contempt attracting "public obloquy would be substituted for jury verdict and trial by media would supersede trial according to law" (at 614).

362 His Honour went on to say (at 614-615):

> The law does what it can to protect the integrity of the criminal trial. In the forefront is the law relating to criminal contempt. If the protection given by that law should fail, the trial judge is given powers to adjourn the trial until the influence of prejudicial publicity subsides and is required to direct the jury that their verdict must be based on the evidence given before them on the trial and that, in reaching their verdict, they must disregard knowledge otherwise acquired and any revulsion against or sympathy for the accused. The trial judge may conduct the trial in whatever manner is appropriate (within the ordinary procedural constraints) to counter the effect of pre-trial publicity prejudicial to an accused. However, these protective mechanisms cannot guarantee perfect impartiality, as Mason C.J. and Toohey J. recognized in *Murphy v. The Queen* [at 101]:
>
> > "It may be said that there can be no guarantee that directions given by a trial judge in an effort to counter the effect upon a jury of media publicity will be successful. That is true just as it is true that there can be no guarantee that a juror may not have been influenced by other matters of which he or she has heard before the trial."
>
> Of necessity, the law must place much reliance on the integrity and sense of duty of the jurors. The experience of the courts [*R v Vaitos* (1981) 4 A Crim R 238; *R v Gallagher* (1987) 29 A Crim R 33 at p 41] is that the reliance is not misplaced. In *Munday* [(1984) 14 A Crim R 456 at pp 457-458], Street C.J. repeated an unreported passage from one of his Honour's earlier judgments:
>
> > "'.. it is relevant to note that the system of jury trial is geared to enable juries to be assisted in every possible way to put out of mind

> statements made outside the court, whether in the media or elsewhere. There is every reason to have confidence in the capacity of juries to do this. Judges do not have a monopoly on the ability to adjudicate fairly and impartially. Every Australian worthy of citizenship can be relied upon to discharge properly and responsibly his duty as a juror. Particularly is this so in the context of being one of a number or group of others all similarly charged with this responsible duty. I have great faith in the multiple wisdom and balance reflected in the verdict of a jury'."
>
> If the courts were not able to place reliance on the integrity and sense of duty of jurors, not only would notorious criminals or heinous crimes be beyond the reach of criminal justice but there would have to be a change in venue for many trials now held in circuit cities or towns where knowledge of the crime and of the alleged criminal easily acquires a wide currency outside the courtroom. Our system of protecting jurors from external influences may not be perfect, but a trial conducted with all the safeguards that the court can provide is a trial according to law and there is no miscarriage of justice in a conviction after such a trial.

363 Brennan J concluded that the decision of Crockett J in refusing a permanent stay of the respondent's trial was clearly right, either because it was not "an extreme case" or on the ground, as his Honour described it, "better founded on principle and more realistic in practice" - that the trial of the respondent, provided it was as fair as the Court could make it, would be productive of no miscarriage of justice. In the result, his Honour concluded that the risk of a juror's knowledge of the respondent's criminal conviction was outweighed by the interests of the community in ensuring that the prosecution should proceed with the trial judge taking all appropriate steps available to him to secure a fair trial.

364 Although Deane, Gaudron and McHugh JJ would not have granted special leave, their observations about central principles of criminal justice remain worthy of emphasis (at 623-624):

> The central prescript of our criminal law that no person shall be convicted of a crime otherwise than after a fair trial according to law dictates that an accused is entitled to be protected from an unacceptable and significant risk that the effect of prejudicial pretrial publicity will preclude a fair trial. Ordinarily, that risk will be obviated by appropriate and thorough directions and, if the circumstances also require it, a temporary stay for the minimum period adjudged necessary for the pre-trial publicity to abate. The balancing of the legitimate interests of the accused and the prosecution will, in almost every case, mean that if the proceedings are to be stayed at all, they should only be stayed temporarily and for the minimum period necessary. Nonetheless, one cannot exclude, as a matter of law, the possibility that an "extreme" or "singular" case might arise in which the effect of a sustained media campaign of vilification and prejudgment is such that, notwithstanding lapse of time and

> careful and thorough directions of a trial judge, any conviction would be unsafe and unsatisfactory by reason of a significant and unacceptable likelihood that it would be vitiated by impermissible prejudice and prejudgment. In such a case, a permanent stay may be granted.

Dupas v The Queen (2010) 241 CLR 237; [2010] HCA 20

365 Perhaps unsurprisingly, with the advent of new media platforms disseminating news and commentary in repeated news cycles, stored electronically and therefore readily recoverable by the use of search engines, in recent times there have been, both in this jurisdiction and in other jurisdictions, a large number of cases where a permanent stay of an accused's trial has been sought on the basis of prejudicial pre-trial publicity. Save for the decision of the Australian Capital Territory Court of Appeal in *Eastman v Director of Public Prosecutions (No 13)* [2016] ACTCA 65, the parties to the application did not refer me to the decisions of other state Courts of Appeal where the issue of pre-trial publicity was relied upon either in support of an application for a permanent stay or, more usually, where it was relied upon by an accused in support of an application for a trial by judge sitting without a jury where the Crown opposed that order.[192]

366 In *Dupas*, a case which included adverse publicity in a variety of forms, the High Court had occasion to consider again the circumstances in which a permanent stay might be ordered on the basis of what an accused contends is a real risk that pre-trial publicity will give rise to irremediable prejudice such as to preclude their entitlement to a fair trial. That decision is important for a range of reasons, not least that the statements of principle in the joint judgment of Mason CJ and Toohey J in *Glennon* extracted above at [360] were treated by the Full Court of the High Court in *Dupas* as an authoritative statement of principle. The Court also treated the same passage as indicating a distinction which was of relevance to the case they were considering. That point of distinction is best understood in the context of the circumstances in which the appellant sought a permanent stay of his trial.

367 The appellant's trial concerned a charge that he murdered a woman at Faulkner, Victoria on 1 November 1997. The case against him relied upon

[192] (1989) 168 CLR 23; [1989] HCA 46 - The critical part of his Honour's reasons are set out in the judgment of Brennan J at 615.

three identification witnesses and an alleged jail confession. Before his trial for the murder of the woman at Faulkner, the appellant had twice been convicted of the murder of two other women (one in 1997 and the second in 1999). Both convictions attracted a sentence of life imprisonment. All three women had been killed by a knife attack involving extreme violence and brutality.

368 The High Court also observed that the two previous convictions for murder, the refusal of each of the applications for special leave and the murder of the woman at Faulkner received wide media publicity adverse to the appellant. The compendium of what was relied upon as adverse pre-trial publicity tendered before the trial judge extended over seven years on seven internet sites; was covered in approximately 120 newspaper articles; and was the subject of four books, all of which related either wholly or extensively to the appellant. He had also been referred to in a number of television programs with his image depicted in some of them. In respect of the murder of the woman at Faulkner, the appellant was identified in the media from an early stage as a suspect.

369 The appellant's trial commenced some short time after July 2007. The trial judge was informed that although there were concentrated periods of media attention in the seven years preceding the trial, he accepted that there remained electronically stored information available on the internet.

370 In refusing the application for a permanent stay, Cummins J concluded as follows:

> First, each juror will swear or affirm to give a true verdict according to the evidence. Second, the jury will be directed, with reasons therefore, to give a true verdict according to the evidence. Third, the jury operationally will observe and will inevitably be influenced by the care with which evidence is received and tested during the trial. Fourth, the jury will be assisted in its task by the nature of a jury trial, its methods of testing and of consideration and of analysis, its valuing of care and of scrupulousness and its conscientious commitment to fairness. Fifth, citizens in this community selected to act as jurors show, and historically have shown, a robust capacity and conscientious capacity to act on evidence and to put aside extraneous data and considerations and demonstrate an honourable commitment to fairness.

371 Later in their judgment, when ultimately concluding that in all the circumstances of the trial the pre-trial publicity was not such as to give rise to an unacceptable risk that it had deprived the appellant of a fair trial, the High Court regarded the

approach taken by Cummins J as correct and in accordance with the application of principle in *Glennon.*

372 As the majority of the Court of Appeal concluded that the appellant's conviction should be quashed on grounds unrelated to the pre-trial publicity, the question for the High Court was not whether there was irremediable prejudice to the appellant by reason of the adverse publicity viewed purely prospectively (the situation that presented for decision by Cummins J) but whether, in light of the evidence which was properly admitted at his trial and the steps taken by the trial judge in light of that evidence to ensure a fair trial, there remained irremediable prejudice.

373 In that context, the High Court described as a matter of particular importance the fact that some of the prejudicial material in the compendium of materials tendered before Cummins J was, in any event, admissible in proof of the appellant's guilt since the Crown case, as presented through the evidence of the prison informer, meant that the jury would inevitably learn of the appellant's criminal history, including at least one of his prior convictions for the murder of a woman (*Dupas* at [19]). Additionally, the identification evidence included some necessary reference to the pre-trial publicity. Further, as the Court noted, it was with the active engagement of trial counsel that the jury were informed of that state of affairs at the outset of the trial.

374 Finally, the High Court emphasised the significance of the fact that the trial judge, both in the process of empanelment and in his charge to the jury, emphasised the need for prospective (and, it may be assumed, sworn jurors) to act in a way described by the High Court as "fairly, calmly, without prejudice and solely on the evidence led in court and to exclude from their considerations anything that they may have read or seen outside the court" (at [21]). The High Court then cited in full what they described as "proper directions" which, in the view of the Court, demonstrated the capacity of the trial judge to relieve against the unfair consequences of the pre-trial publicity without staying the applicant's trial.

375 In addressing the question which presented for their Honour's consideration, namely whether the Court of Appeal erred by failing to treat the case before it

as an “extreme” or “singular” case such that the applicant should not be retried for the offence of murder, the High Court reconsidered the function of a jury. Although not expressly endorsing the approach of Nettle JA that, after upholding the appeal on grounds other than pre-trial publicity, a retrial should be ordered because to grant him an indefinite stay “would be to recognise that the media has the capacity to render an accused unable to be tried”, thereby denying the “social imperative” that an accused be brought to trial to answer the charge made against them, they treated what his Honour said as raising a matter of importance (at [25]). Their Honours said at [26]:

> There is an important point here. It is often said that the experience and wisdom of the law is that, almost universally, jurors approach their tasks conscientiously. The point was made as follows by Hughes J, with the endorsement of the English Court of Appeal, in *R v Abu Hamza*:
>
> > “Extensive publicity and campaigns against potential defendants are by no means unknown in cases of notoriety. Whilst the law of contempt operates to minimise it, it is not always avoidable, especially where intense public concern arises about a particular crime and a particular defendant before any charge is brought. Jurors are in such cases capable of understanding that comment in the media might or might not be justified and that it is to find out whether it is that is one of their tasks. They are capable of understanding that allegations which have been made may be true or may not be and that they, the jury, are to have the opportunity and responsibility of hearing all the evidence which commentators in the media have not and of deciding whether in fact the allegations are true or not. They are not surprised to be warned not to take at face value what appears in the media, nor are they these days so deferential to politicians as to be incapable of understanding that they should make no assumptions about whether any statements made by such people are justified or not. They are also capable of understanding and habitually apply the direction that they are given about the standard of proof.”
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> In his reasons for dismissing the stay application, which are extracted in part and described above, Cummins J used similar terms with respect to the conduct of jury trials in Victoria.

376 The Court then went on to say at [29]:

> Whilst the criminal justice system assumes the efficacy of juries, that "does not involve the assumption that their decision-making is unaffected by matters of possible prejudice.” In *Glennon*, Mason CJ and Toohey J recognised that "[t]he possibility that a juror might acquire irrelevant and prejudicial information is inherent in a criminal trial." What, however, is vital to the criminal justice system is the capacity of jurors, when properly directed by trial judges, to decide cases in accordance with the law, that is, by reference only to admissible evidence led in court and relevant submissions, uninfluenced by extraneous considerations. That capacity is critical to ensuring that criminal proceedings are fair to an accused.

377 The Court, at [35], acknowledged that where there was no definitive category of extreme cases in which a permanent stay of criminal proceedings will be ordered, the utilisation of the characterisation of a case as "extreme" or "singular" is to recognise, in accordance with the principles in *Glennon*, the rarity of a situation in which an apprehended defect in a trial cannot be relieved against by the trial judge. In that context, their Honours had the following to say about extensive pre-trial publicity and the unfair consequence of prejudice or pre-judgement resulting from it:

> [36] There is nothing remarkable or singular about extensive pre-trial publicity, especially in notorious cases, such as those involving heinous acts. That a trial is conducted against such a background does not of itself render a case extreme, in the sense that the unfair consequences of any prejudice thereby created can never be relieved against by the judge during the course of the trial.
>
> [37] A further consideration is the need to take into account the substantial public interest of the community in having those who are charged with criminal offences brought to trial, the "social imperative" as Nettle JA called it, as a permanent stay is tantamount to a continuing immunity from prosecution. Because of this public interest, fairness to the accused is not the only consideration bearing on a court's decision as to whether a trial should proceed.

Mr Boulten's submissions

378 Mr Boulten submitted this is an "extreme" or "singular" case, not solely because of the extensive public commentary on the applicant's guilt, including its impact in eroding the presumption of innocence and the applicant's right to silence, but because of the compounding effect of other defects in the trial which are not capable of being relieved against by the directions of the trial judge or the conduct of the trial.

379 Mr Boulten submitted that the fact that there has been such wide and pervasive public commentary about the applicant's guilt and the evidence which is said to prove it, the Court would be satisfied that, in a practical sense, it will be impossible to empanel a jury who had not heard of the case and who had not already formed a settled view about the primary fact in issue, namely, whether Lynette Dawson left her family or was murdered by her husband. Mr Boulten submitted that the range of people who were promoted by Mr Thomas as having valuable and reliable insights into the applicant's state of mind, some of whom were introduced by Mr Thomas as having particular expertise (including

the applicant's former lawyer, now a magistrate; the former Deputy State Coroner; and an Inspector of police) and each of whom, with varying degrees of emphasis, expressed a belief that the applicant is guilty, are such that a prospective juror would likely regard those collective insights as carrying such weight that they must be right. He submitted that if the applicant is to stand trial, he has already been tried by media and not according to law.

380 I accept Mr Boulten's submission (and the Crown did not submit to the contrary) that to permanently stay the applicant's trial I do not need to be satisfied that it will be "impossible" to empanel a jury who are capable of giving their impartial consideration to the evidence adduced by the Crown and what it is capable of proving about the facts in issue. Doubtless that submission was made in recognition of what Mason CJ and Toohey J recognised in *Glennon* and what the High Court noted with approval in *Dupas*, namely, there is the risk that irrelevant and prejudicial information may infiltrate a criminal trial without it attracting a permanent stay. Equally, a jury may ultimately fail to perform their sworn duty to determine the case before them according to the evidence whether from compassion or prejudice or some other alternative ulterior motive (see *Dupas* at [27] where the High Court noted the comments of Callinan J in *Gilbert v The Queen* (2000) 201 CLR 414; [2000] HCA 15 at [96]). The question for determination is whether there is a "real or substantial risk" that, despite the best endeavours of the trial judge and the essential trust that courts are entitled to repose in the jury system, there will be members of the jury who will have prejudged his guilt, perhaps without being aware of it.

381 In addressing that question, the subsidiary and practical question is whether, from what will inevitably need to be a very large pool of prospective jurors, I am satisfied there is at least a reasonable prospect that in the process of empanelment there will be in residue twelve or fifteen people who have not only survived challenge by the parties, but who will have already responded honestly and willingly to the trial judge's entreaty to declare if they have a fixed view about the case (whether because of what they have read or heard or discussed about it, or because they have aligned themselves with the "Justice for Lyn" cause in other ways because of the podcast or other media, including talkback radio or social media platforms which promoted that cause) and who

did not seek to be excused, either because they have not heard of the case or, even if they had, because they considered themselves capable of bringing their own judgment to bear upon the evidence.

382 Since the Court has no knowledge of the composition of the jury panel and no power to "poll" a jury, I cannot do more than find (as I do) that there is at least some prospect of swearing an impartial jury to try the question of the applicant's guilt, however difficult or ultimately impossible that might prove to be. The related question whether I am satisfied that, once empanelled, the twelve or fifteen jurors sworn to try the applicant's guilt will also abide by a direction under s 68C of the *Jury Act* not to seek to access the podcast again (or indeed for the first time) and to abide by a judicial direction that they not discuss the case with anyone, must be answered in the affirmative.

The issue of delay

383 The application for a permanent stay is not based solely upon adverse publicity. It is also based upon the compounding effect of a temporal delay of 38 years before the applicant was prosecuted for murder, and the unreasonable length of that delay where it is submitted that nothing has materially changed between at least 2003 and 2018 in the probative weight of the available evidence to prove beyond reasonable doubt both the fact that Lynette Dawson is deceased and that the applicant murdered her on 8 January 1982. The applicant also complains about the opportunity he has lost, by reason of the delay, to obtain evidence either that his wife was in fact alive when he is alleged to have killed her, or for at least some years thereafter she might possibly have been alive. The applicant also submitted that he is irremediably prejudiced by the failure of police to fully and properly record and investigate the reported sightings of his wife in 1982 and 1984[193] at a time when corroborative records of those sightings might have been available.

384 While applications for a permanent stay of proceedings on the basis of adverse pre-publicity are not infrequently made, there are no cases where a permanent stay of criminal proceedings initiated by a state prosecutor have been granted upon that basis alone: *Volkers v R* [2020] QDC 25. In addition, and leaving to

[193] See, for example, R v Obeid [2015] NSWSC 897; R v Obeid (No 4) [2015] NSWSC 1442; Hughes v R [2015] NSWCCA 330 at [9]-[86]; R v Qaumi & Ors (No 14) [2016] NSWSC 274.

one side historic sexual assault cases in which, because of the very nature of that offending, the memories of witnesses to significant events may have faded and documents potentially available to an accused may have been lost, there are very few cases where a permanent stay has been granted because a crime is charged many years after its alleged commission. The Crown submitted that the two cases to which the Court was referred in argument where that occurred were readily distinguishable from this case. I accept that submission.

385 In *R v Littler* (2001) 120 A Crim R 512; [2001] NSWCCA 173, the primary judge permanently stayed a large number of counts on the indictment where those offences were alleged to have occurred between 38 and 46 years prior to trial.

386 Adams J (with whom Hodgson JA and Greg James J agreed) identified the prejudice the accused was exposed to by reason of the delay as falling into three main classes: first, the unavailability of numerous potential witnesses who were deceased or unable to be identified or who had no recollection of the events in question; second, the effect of delay on the appellant's ability to remember, with reasonable reliability, facts contextual to the alleged offending including, inter alia, the possible presence of significant witnesses, his own activities and responsibilities at the time of the alleged offending and his relationship with the complainants; third, the appellant's psychological and physical health.

387 His Honour went on to say, at [25]:

> In cases of this kind, where allegations are made and charges brought after such a lengthy delay, the investigating police have the duty, in my view, to search out contemporaneous witnesses who might be able to shed light on the relevant circumstances. It is not appropriate to leave this investigation to the defence or, of course, to the complainants. Although in a sense, therefore, it is for the applicant to establish such prejudice as would justify a stay of proceedings, this should be in the context of a full and adequate investigation by the prosecuting authorities which provides a context that enables the court to evaluate in a sensible way the extent of the prejudice affecting the accused. In light of the material tendered in the District Court in this case, it is impossible to avoid the conclusion either that little more has been done than the reduction of the complainants' allegations to a statement in the conventional form or that there are no witnesses now available and able to provide relevant and significant evidence.

388 Adams J considered that the delay in those circumstances was "so extreme" that it was difficult to construct a jury direction which would remedy the

resulting unfairness to the appellant. The health and psychological condition of the appellant, who at the time of the appeal was aged 74 years and had almost no memory of the complainants, was also regarded as a unique factor which his Honour treated as "of considerable significance" in the conclusion he reached that the primary judge's discretion had miscarried in declining to grant a stay (at [39]).

389 In *R v Davis* (1995) 57 FCR 521, the Court confirmed that as a general proposition delay alone would not justify a permanent stay but that it was unnecessary to determine whether delay in the case under consideration was so extreme as to justify a stay of proceedings because there was a "special prejudice occasioned by the destruction" of material medical records.

390 Dr Davis was a medical practitioner who was charged with fourteen offences alleging acts of sexual indecency committed against thirteen complainants between 1960 and 1974.

391 The Court approached the case on the basis that the medical records had been "destroyed, by someone acting independently of Dr Davis and for reasons that had nothing to do with [the] case" (at 517). The Court concluded that without access to those records, Dr Davis was unable to recall the consultations where the acts of indecency were alleged to have occurred and therefore unable to confirm how many times he saw a complainant, the reason for the consultation, whether an internal examination was performed, or the treatment he provided. Having regard to the circumstances of that "unusual case", the Court considered there was "nothing a trial judge could do that would overcome the unfairness caused to Dr Davis by the delay that has occurred, with the regrettable consequence of the loss of the medical records" (at 521).

392 In the context of considering the issue of delay I am assisted by the Court's analysis of a number of authorities in *Eastman* when considering a submission advanced by Mr Eastman that, in facing a retrial in 2016 for the murder of the Commissioner of the Australian Federal Police in 1989, he had lost the opportunity to undertake investigations which might have incriminated the

person the subject of the alternate hypothesis Mr Eastman proposed to advance in his defence.

393 In dealing with that submission the Court said:

> [264] The significance of the inadequacies complained of with hindsight is a matter which will be capable of evaluation by a properly instructed jury having regard to the evidence as a whole and keeping in mind the onus and burden of proof which the Crown bears. It will also be open to the trial judge to give a forensic disadvantage direction appropriate to the facts of the case.
>
> [265] In *R v Smith [No 1]*, Buddin J carefully analysed a series of authorities relating to cases of this kind. These reveal a consistent approach to the significance of lost opportunities to pursue further investigation of aspects of a circumstantial case. They are supplemented by the further Victorian authorities to which Ashley AJ referred. Amongst the cases to which Buddin J referred, some deserve specific mention. In *R v Helmling*, the prosecution lost a blood sample taken from the body of a deceased driver with whose motor vehicle the vehicle of the accused had collided. Hunt CJ at CL (with whom the other members of the Court agreed) said:
>
> > What the applicant has lost therefore is the chance that he may have been able to do better; he has not lost the certainty that he would have done better. He had been permanently deprived of an opportunity simply to explore an avenue of inquiry which might have led to his acquittal. That may in some cases be sufficient, but they would in my view be rare. They would not usually produce the extreme situation which the authorities require …
>
> [266] In *R v Hatfield*, the accused was charged in 1997 with the murder of her husband in 1985. A number of items had been lost by police including clothes worn by both the accused and the deceased, and other items associated with the deceased, the firearm which may have been used to kill the deceased, and notes of counselling sessions in which the accused was alleged to have made admissions. Hulme J, with whom the other members of the Court agreed, said:
>
> > Remarks of Gleeson CJ in *R v McCarthy* are also apposite:
> >
> > Time and time again it happens in criminal proceedings that for any one of a variety of reasons witnesses who may be regarded as important by one side or the other die, or become ill, or lose their memory, or lose documents. If the result of that were that nobody could obtain a fair trial, and the proceedings had to be permanently stayed, it would go a long way towards solving the problems of delay in the criminal lists in this State. However, the position is that it is well recognised that an occurrence of that kind does not of itself mean that a person cannot obtain a fair trial or that proceedings need to be stayed. In this connection I refer to what was said in *R v Adler* and *R v Goldburg*.
> >
> > …
> >
> > Although I have recognised that prejudice to the applicant may have occurred in consequence of the loss of at least some material, it does not follow that any trial will be unfair. This is not a perfect world. Sometimes crimes are not discovered until long after they have

> occurred; and as the passages quoted from *R v Tolmie* and *R v McCarthy* make clear, not infrequently some items of evidence or witnesses will not be available. Some assessment of the significance of not only the unavailable, but also of the available, evidence is required.
>
> …
>
> The circumstances that a stay will only be granted where there exists a fundamental defect which goes to the root of the trial 'of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences'; and that the remedy is discretionary, mean that account must also be taken of the powers available to a trial judge to eliminate or reduce the risk of unfairness …
>
> The use of these powers is likely to ensure that the Crown gains no unfair advantage from evidence relating to the missing firearm, clothing etc. Of course, the powers are unlikely to cure the absence of any evidence which would tend to exculpate the applicant. I have largely dealt with that latter topic; but it must not be forgotten that the lateness of complaint in many sexual assault matters is calculated to preclude the possibility of any alibi evidence being available to an accused and yet the approach of the Courts has not been to stay all such actions.

[267] …

[268] To like effect, in *R v Edwards*, the High Court observed:

> The respondents do not contend that the loss of objective evidence, such as electronically recorded data or the like, would ordinarily justify a stay of proceedings on indictment. In the course of argument the respondents conceded that the loss of film recorded by a closed-circuit television camera at the scene of an alleged offence would not afford a basis for a stay. They seek to distinguish their case on the basis that the loss here is of the independent record of the event giving rise to the charge. This is said to be productive of unfairness of the kind that informs the power to stay since the trial will necessarily involve an incomplete reconstruction of the event.
>
> The distinction between an independent record forming a constituent part of an event and an independent record of an event is without substance. *Trials involve the reconstruction of events and it happens on occasions that relevant material is not available; documents, recordings and other things may be lost or destroyed. Witnesses may die. The fact that the tribunal of fact is called upon to determine issues of fact upon less than all of the material which could relevantly bear upon the matter does not make the trial unfair.* (emphasis added)

[269] In our view, the matters complained of with respect to inadequate police investigation of the alternative hypothesis could not support the conclusion that they create a fundamental defect in the trial. As we have said, their evidentiary significance will be capable of evaluation by a jury in the light of appropriate directions. (footnotes omitted)

394 This application has the signifying feature of having been the subject of successive police investigations into a suspected homicide over a period of 18 years, with successive briefs of evidence being compiled and reviewed by a

range of decision-makers within the ODPP for the sufficiency of the evidence to support a case of murder over the same time period. Regrettably, even if understandably, over the course of that extensive period of time there have been documents lost or misfiled, including the composite brief of materials that comprise the Mayger investigation, and the failure of memory on the part of senior investigating officers (and some witnesses) such that a full reconstruction of that investigation is not now possible. However, and conversely, the intensive reinvestigation by Detective Poole from 2015 has not only recovered a significant misplaced or misfiled document in the form of the 1982 Antecedent Report but evidence of significant assistance to the applicant's case has also come to light[194].

395 I accept, as does the Crown in written submissions filed in advance of the hearing of the application, that the applicant has, by the effluxion of time, been denied the opportunity to explore a variety of avenues of enquiry which might have supported his case that his wife was alive for many months, perhaps years, after she "disappeared" in January 1982. However, it does need to be emphasised, as I noted above, that the banking records and telephone records that might have indicated she was alive in the early months of 1982 were not available to investigating officers involved in the Mayger investigation in 1990-1992 or the Loone investigation from 1998. It follows that, even if the applicant were prosecuted at either of those times, those documents would have been unavailable such that their "unavailability" now cannot attract any additional unfairness. Further, and whatever might be said now, with the advantage of hindsight, about police treating a devoted wife and mother as a "missing person" instead of initiating a thorough and wide-ranging enquiry into the "disappearance" of that person, it should also be emphasised that from 1982 until 1990, when JC first spoke to police, Lynette Dawson was not only treated by police as "missing", but her family and many of her friends accepted she was a person who did not want to be "found".

396 I have already dealt with the alleged sighting of Lynette Dawson by Mrs Butlin (now deceased). In addition, and despite Detective Loone's failure to fairly and

[194] The sighting by Mrs Butlin at the Narraweena shops in 1982 and the sighting by Mr and Mrs Bresse at Rockcastle Hospital in 1984.

properly investigate the alleged sighting of Lynette Dawson at the Narraweena shops in 1982 or the alleged sighting of her at Terrigal in 1987 and, in particular, his failure to take a statement from Mrs Simms before she died which may have led to direct evidence both of the fact of those sightings and the circumstances in which they were made, Mr Butlin will be called by the Crown at the applicant's trial in discharge of the Crown's duty of fairness. Additionally, I have been given to understand that no objection will be taken by the Crown to the tender of various hearsay accounts of the alleged sightings at Narraweena and Terrigal in either the Missing Person file or Mrs Simms' report to police in 1982, including entries in her diary. Mr and Mrs Bresse will be called in the Crown case as will other witnesses who claim to have seen Lynette Dawson after January 1982.

397 Accordingly, and despite a lengthy and almost unprecedented delay of 38 years before the applicant was charged with the murder of his wife, I am not of the view that the forensic disadvantages he has suffered by that effluxion of time, and the consequential impact upon the fairness of his trial, including the lost opportunity to undertake his own enquiries to support his contention that he spoke with his wife over the telephone on multiple occasions after 8 January 1982, cannot be adequately addressed by judicial direction or rulings given in the course of the trial and in the trial judge's summing up to the jury.

Has the brief of evidence changed significantly over time?

398 In developing the further submission that the delay of 38 years has been productive of unfairness and oppression because there has been no material change in the evidence available to successive decision-makers in the ODPP, Mr Boulten accepted that this Court neither has jurisdiction to judicially review the decision to prosecute nor to undertake a review of the "correctness" of the 2018 advice where legal professional privilege is claimed by the ODPP and no challenge has been mounted to that claim. It is uncontroversial that the fact that legal professional privilege was claimed does not allow for the drawing of any inference as to the reasoning underpinning that advice[195].

[195] Statements of Catherine Berglund dated 13 January 2016; Jane Morgan dated 23 February 2016.

399 As the Crown submitted, and in my view correctly, the only available inference from the evidence adduced on the application is that the advice of the ODPP to police in December 2018 was rendered strictly in accordance with the Prosecution Guidelines as read, interpreted, understood and correctly applied by the decision-maker(s). The Crown also submitted that upon the ODPP receiving the brief of evidence from Detective Poole in April 2017, it needed to be deconstructed and reassembled to allow the decision-maker(s) to make a reasoned assessment as to whether a case on murder can be fairly advanced based on that evidence.[196]

400 Were I persuaded that notwithstanding the obvious entitlement of a new decision-maker or decision-makers in 2018 to come to a different view from decisions taken by their predecessors, there is, as a matter rational analysis, no significant or material change in the evidence available to prove the applicant's guilt, the delay in bringing a prosecution within a reasonable time after either 1992 or 2003 would have been a factor worthy of significant weight in the balancing process that is engaged when application for a permanent stay is based upon unreasonable delay and resulting unfairness. However, after taking into account the Crown's submissions and undertaking my own independent review of the evidence, Mr Boulten's submission that there has been no material change is not made out.

401 I accept that fundamental aspects of the Crown case have not changed: the evidence that the applicant had both motive and opportunity to murder Lynette Dawson on 8 January 1982 was fundamental to the case advanced at both the first and second inquests in 2001 and 2003. In addition, I accept that evidence of the Dawson's fractious marriage and episodic instances of domestic violence, together with the applicant's record of interview with police in January 1991 which the Crown submits contains demonstrable lies, was also available to both Coroners and the ODPP.

402 Additionally, the fact that by 2003 (almost 20 years after her "disappearance") Lynette Dawson had not made contact with any member of her family and had made no enquiries about her children, coupled with the fact that no family

[196] See Bailey v Director General, Department of Natural Resources [2014] NSWSC 1012.

member has heard from her on the date of any significant family event (including the death of her parents), despite the closeness of their family connection, must also be taken to have been a matter that influenced successive decisions to refer the matter to the ODPP pursuant to s 19 of the *Coroners Act*. I also accept that successive decisions made by the ODPP after 2003 up to and including 2012 not to prosecute the applicant for murder were likely to have been influenced by the absence of any scientific or other evidence to establish the manner or cause of death or the place where Lynette Dawson was killed, and that was the position in December 2018.

403 In my view, however, there was significant additional evidence available to be considered by the decision-maker(s) in 2018 going to proof of the duration and extent of discord in the applicant's marriage as at 8 January 1982 in further support of the Crown case that the applicant had a sustained and prolonged attitude of animus towards his wife, culminating in his determination to kill her. That evidence includes the following witnesses, each of whom have been named in a tendency notice served by the Crown in May 2020. The evidence that is sought to be adduced as tendency evidence is identified in the notice by reference to the statements of those witnesses. They include the following:

- SW provided a statement to Detective Poole on 4 November 2018, in part responsive to *The Teacher's Pet* podcast.[197] She was in a relationship with the applicant's brother, Paul Dawson, from 1980 until early 1982, when she was aged 14 to 16, and often spent time with Paul Dawson, the applicant and JC. She said that she often heard the applicant complain about his wife and call her a "bitch".
- Julie Andrew provided an additional statement to police on 15 November 2018 in which she described, in greater detail, the incident she described witnessing in her first police statement. In her further statement, Ms Andrew stated that the applicant was "towering" over Lynette Dawson and had hold of her by the shoulders. She also stated that she remembered seeing Lynette Dawson with marks around her wrists "like someone had grabbed them tightly".
- Beverly McNally was a babysitter for the applicant and his wife prior to JC being invited by the applicant to assume that role in the course of his sexual relationship with her. On 5 July 2018, Ms McNally provided a statement to police in which she described two episodes of domestic violence that she had observed, either in 1978 or 1979. Ms McNally gave evidence that she contacted *Crime Stoppers* a few years after Lynette Dawson's "disappearance" but heard nothing from police and, upon hearing the podcast, she made

[197] T 643.

contact with Mr Thomas directly.[198] Her details were later provided to Detective Poole. Ms McNally told police that on one occasion she observed the applicant whip his wife's back with a tea towel which caused her to cry and, on another occasion, he took hold of her left arm and pushed her into a door frame.

404 There was also further evidence included in the police brief of evidence in 2018 that the applicant was physically violent to his wife several years before 1982. Judith Solomon had previously worked with Lynette Dawson at a bank and ran into her by chance in 1977. She provided a statement to police on 10 October 2018 in which she stated that during this chance meeting Lynette Dawson took off her sunglasses and Ms Solomon observed a black eye. Ms Solomon said that the applicant tried to stop his wife removing her glasses. Ms Solomon heard him say "What did you do that for?" as they were walking away. Ms Solomon said that she met Lynette Dawson a few weeks later but there was no discussion of the bruising or how it was sustained.

405 Karen Frater was a student at Cromer High School. She provided a statement to police on 22 March 2017. In her police statement she said that in early 1980 she observed Lynette Dawson with a black eye which appeared to be "fresh".

406 Statements were also taken from other witnesses and included in the brief of evidence prepared by Detective Poole and submitted to the ODPP in 2018 which the Crown intends to adduce for other than tendency purposes. They include the following:

- Kay Sinclair provided a statement to police on 10 August 2018. Ms Sinclair is married to a person who went to school with the applicant and attended a wake for Phillip Day in 2007. In her statement, Ms Sinclair said that she was having a casual conversation with the applicant and asked him whether he had previously been married. She said the applicant responded, "I have been married before and that she had joined a cult/commune in the Blue Mountains".[199]
- Gavin Miller was a student at Cromer High School. He provided a statement to police on 17 October 2018. Mr Miller stated that he dated JC for a few weeks in 1980 or 1981 and kissed her at a party. Mr Miller said that two weeks later he was approached by the applicant at school who pointed at him and said words like, "Stay the fuck away from [JC]".[200] Mr Miller said that he stopped dating JC because he was afraid of the applicant.

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[198] Exhibit 12.

[199] T 422.

[200] Statement of Kay Sinclair dated 10 August 2018, [7]-[8].

- Mr Miller's evidence is consistent with a statement given by Peter Schubert on 20 March 2014. Mr Schubert worked at a Coles store in Dee Why between 1978 and 1982 with JC. At some point during this period he asked JC on a date. Mr Schubert provided a statement to police on 20 March 2014 in which he said that some time later the applicant approach him near the Coles store, pushed him against a wall and said words like, "Stay away from her, don't go near her, or else".[201]

407 Additionally, the applicant's handwritten Antecedent Report, located within the Ombudsman's file when Detective Poole accessed that file as part of his investigation in 2015, was not a document Detective Loone was aware of during the course of his investigation. It would appear that consideration was given to the content of that document by Detective Poole (and, it might be inferred, by the State Crime Command Legal Advice Section in April 2017 and then later by the ODPP upon its receipt of that advice in April 2018) since emphasis is placed on what the Crown will contend at the applicant's trial are lies he told police in that Report as evidence of a consciousness of guilt.

408 Finally, there is evidence from a witness independent of JC that the applicant was contemplating or desirous of having someone kill his wife on his behalf, and that he had been apparently ruminating upon that for some years prior to her "disappearance". Robert Silkman provided a statement to police on 9 November 2018. Mr Silkman played rugby with the Newtown Jets with the applicant and claimed to have some criminal connections. Mr Silkman said that in 1975 the applicant approached him and asked him whether he knew anyone who could "get rid" of his wife. When Mr Silkman asked the applicant what he meant, the applicant said, "You know get rid of her for good, get rid of her".

409 In circumstances where it is obvious that JC is going to be the subject of a sustained attack upon her credibility, Mr Silkman's evidence is significant. In expressing that view, I should not be taken to have determined the admissibility of that evidence or, for that matter, the admissibility of such evidence as the Crown may seek to adduce to appoint the Newtown Jets Rugby League Club as the place the applicant went with JC to speak to a "hit man" or that Arthur "Neddy" Smith was affiliated with those premises in the 1980s. I was not invited to take questions of admissibility into account.

[201] Statement of Gavin Miller dated 17 October 2018.

410 It also follows that in the interregnum of six years before the last decision of the ODPP not to prosecute the applicant, “proof of life checks” have been ongoing and, as the researches of Detective Poole bear out, nothing has been revealed to indicate that Lynette Dawson was alive after 8 January 1982. While it is not necessary to recite the nature of those checks, their currency adds further weight to the case the Crown proposes to present at the applicant’s trial in proof of the fact that Lynette Dawson is deceased.

Abuse of process

411 In addition to what the High Court said in *Dupas* about the rarity of a situation where a permanent stay would be justified in the context of adverse pre-trial publicity, *Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions* (2018) 272 A Crim R 69; [2018] HCA 53, the most recent pronouncement of the High Court where the Court was considering whether a permanent stay should be granted, puts that proposition beyond any doubt.

412 *Strickland* is authority for the proposition that the power to grant a permanent stay to prevent the court’s processes being used in a way that is inconsistent with the administration of criminal justice and its recognised purposes is available, but may only be granted in an extreme and rare case.

413 Mr Boulten submitted that the conduct of the Commissioner of Police and his involvement with Mr Thomas, including in the podcast, amounts to an abuse of process and his trial should be permanently stayed for that additional reason.

414 *Strickland* concerned appeals by four appellants who were facing trial in Victoria for offences laid contrary to the *Commonwealth Criminal Code Act 1995* (Cth) and, in respect of some of the appellants, for offences contrary to s 83(1)(a) of the *Crimes Act 1958* (Vic). Each was compulsorily examined by the Australian Crime Commission (ACC) prior to being charged with those offences. A decision of the Court of Appeal of Victoria allowed appeals from orders of the primary judge permanently staying the prosecution of each of the appellants. The High Court allowed the appeals with the majority (Kiefel CJ, Bell, Gordon and Edelman JJ; Gageler and Keane JJ in dissent) affirming the correctness of the decision of the primary judge. Each of Gageler, Keane,

Gordon and Edelman JJ published separate judgments. Kiefel CJ, Bell and Nettle JJ published a joint judgment.

415 The principal issue with which the High Court was concerned (the same issue with which both the primary judge and the Court of Appeal were concerned) was whether the ACC acted in such disregard of the requirements of Div 2 Part 2 of the *Australian Crime Commission Act 2002* (Cth) (ACC Act), in violation of the appellants' common law right to silence, that the prosecutions should be permanently stayed as an abuse of process.

416 In the joint judgment of Kiefel CJ, Bell and Nettle JJ, their Honours distinguished the circumstances arising for consideration on the appeal from previous decisions, principally of this Court, where the only circumstances in which it has been held necessary to permanently stay a prosecution to prevent the administration of justice from falling into disrepute is where there have been demonstrated deliberate unlawful acts on the part of prosecuting authorities, or at least reckless disregard for the requirements of the law. Their Honours were satisfied that in this case there was an:

> [98] … indeterminate element of incurable prejudice as a consequence of the ACC's widespread, uncontrolled dissemination of the examination product to and within the AFP and the Office of the CDPP. More fundamentally and more significantly, far from there being no suggestion that the ACC acted otherwise than in the bona fide belief that what was done was lawful, in each of these cases the ACC through Sage acted in disregard of the stringent statutory requirements mandated by the Parliament for the protection of the liberty of the subject and to prevent prejudice to the subject's fair trial.

417 Their Honours were well satisfied that there were, what they described as, "abjectly insouciant, wide-ranging disregard of the requirements of the ACC Act" (at [99]). Their Honours observed as follows (at [100]):

> No doubt, society and therefore the law ordinarily looks more askance on instances of deliberate or advertent reckless disregard of a duty or obligation than upon the accidents of incompetence. As a rule, the former are conceived of as entailing greater moral culpability and for that reason their condonation is conceived of as more likely to bring the administration of justice into disrepute. But ultimately it is a question of degree which substantially depends upon the nature of the duty or obligation. If a duty or obligation is of no more than peripheral significance, condonation of its breach, even of an intentional breach, may appear justified in the interests of relatively more pressing considerations of justice. The power to stay proceedings is not available to cure venial irregularities [*Truong v The Queen* (2004) 223 CLR 122 at 172 per Kirby J]. But if, as here, the duty or obligation is of a kind that goes to the very root of the administration of justice, condonation of its breach will bring the

> administration of justice into disrepute regardless of the culprit's mentality. Ultimately, these appeals turn on that distinction. (footnotes omitted)

418 After observing the statements of the Court to the effect that a permanent stay is an extraordinary step which will very rarely be justified (citing *Glennon* and *Dupas*), in the joint judgment their Honours also emphasised, at [106], the powerful social imperative for those charged with criminal offences to be prosecuted, such that a permanent stay "should only be ever granted where there is such a fundamental defect in the process leading to trial that nothing by way of … trial directions or other such arrangements can sufficiently relieve against the consequences of the defect as to afford those charged with a fair trial". Their Honours then concluded that to condone such grossly negligent disregard of statutory protections and fundamental rights as occurred in the way the appellants were treated by the ACC would be to encourage further negligent infractions of the strict statutory requirements in the ACC Act. Their Honours ultimately resolved, at [107], that to allow the prosecution of the appellants to proceed would "bring the administration of justice into disrepute".

419 Keane J agreed with the orders proposed by Kiefel CJ, Bell and Nettle JJ, being satisfied that the extraordinary step in staying the prosecution of the appellants was warranted in what his Honour described as the "extraordinary circumstances" of the case where, to allow the trials to proceed, would bring the administration of justice into disrepute, irrespective of whether the illegality of the ACC "enured to the forensic disadvantage of the appellants". Significantly, for present purposes, his Honour regarded the decision of *Moti v The Queen* (2011) 245 CLR 456; [2011] HCA 50 where, at [10], French CJ, Gummow, Hayne, Crennnan, Kiefel and Bell JJ adopted the statement of McHugh J in *Rogers v The Queen* (1994) 181 CLR 251 at 286; [1994] HCA 42 as instructive:

> [170] In *Moti v The Queen*, French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ adopted the statement of McHugh J in *Rogers v The Queen* that:
>
> > "although the categories of abuse of process are not closed, many such cases can be identified as falling into one of three categories: '(1) the court's procedures are invoked for an illegitimate purpose; (2) the use of the court's procedures is unjustifiably oppressive to one of the parties; or (3) the use of the court's procedures would bring the administration of justice into disrepute.'"

420 Edelman J considered at length the rationale for the power to stay proceedings as an abuse of process. It is useful to set out his Honour's analysis in full. After citing the passage in *Moti* extracted above, his Honour said:

> [257] These categories are not exhaustive, although each captures a wide range of different circumstances. The reference to "repute" in the final category, which echoes the language of "public confidence", is not concerned with the actual reputation of the court among members of the public, or with their actual perception of the court. The notion of repute, or public confidence, is a construct that is concerned with the systemic protection of the integrity of the court within an integrated system of justice. It represents "the trust reposed constitutionally in the courts". The close association of that construct with matters at the core of judicial power may be the reason why it has been suggested that the inherent power to prevent an abuse of process may be an attribute of the judicial power provided for in Ch III of the Constitution.
>
> [258] The three categories described by McHugh J are not independent. If the use of the court's procedures is unjustifiably oppressive to one of the parties (category (ii)), imperilling the fairness of a trial, this can contribute to the conclusion that the administration of justice would be brought into disrepute. There may even be circumstances where oppression of one of the parties is sufficient to bring the administration of justice into disrepute, even if the trial would be fair. Further, the underlying rationale of category (iii), namely, protection of the integrity of the court and its processes, might also encompass category (i) where a trial is instituted or maintained with an immediate, predominant purpose that is improper. Therefore, at a higher level of generality, it may be that the three categories are really only two, which overlap: (i) cases where a defendant cannot receive a fair trial; and (ii) cases where a trial would bring the administration of justice into disrepute
>
> [259] Although there was considerable argument on these appeals about the potential fairness of a trial of the appellants, unfairness to the appellants is a relevant, but not necessary, factor for a conclusion on the central issue in this case: whether the use of the court's procedures would bring the administration of justice into disrepute. Since the rationale for a stay in cases in this category is the protection of the integrity of the court rather than the fairness of the court's processes, the label "abuse of process" may not be entirely apt. But the use of that label is well-established and will be used here for convenience. (footnotes omitted)

421 His Honour went on to give close consideration to the concept of the integrity of the court, which his Honour described (at [261]) as a "loose principle which is not easily applied to a particular case" and should not be understood as charting the boundaries of abuse of process. His Honour identified the question to be asked on the appeals as whether, despite the legitimate and substantial public interest in a person reasonably suspected of having committed a crime, and against whom there is a prima facie case with reasonable prospects of success, a trial must be stayed due to what his Honour described as "the threat to the integrity of the court arising from the *systemic incoherence* that would

result if the trial be allowed to proceed". His Honour used that term to describe what results from a case where the manner in which the case was developed and brought by the prosecution was contrary to basic tenets of the Australian criminal justice system, as embodied in a statute.

422 In *Strickland* those basic tenets were embodied in the ACC Act where there is a statutory compromise between the interests of an individual (namely the liberty to maintain silence when questioned by persons in authority about an offence and, building upon that liberty, the deeply ingrained privilege against self-incrimination) and public interest considerations, including the conviction of offenders. His Honour was satisfied that the examinations of each of the appellants were unlawful, not merely because there was no special investigation which authorised the examinations but also because they were improperly conducted.

423 Although Gageler J dissented in the ultimate outcome in *Strickland*, his Honour's consideration of the principles that must inform the discretion whether a permanent stay will be granted are consistent with the views of the majority.

424 After remarking that the researches of counsel had not discovered any cases where a permanent stay has been ordered on the basis of the unlawful conduct on the part of law enforcement agencies in investigating criminal conduct which has not resulted in irremediable forensic unfairness or an undermining of public confidence in the administration of justice, even if that conduct occasioned some prejudice to a criminal defendant, and while not discounting the possibility of a permanent stay being ordered in combination with other considerations which might give rise to the misuse of the court's processes in a way which amounts to an abuse of process, his Honour concluded that such circumstances, if they did exist, must have been "exceedingly rare". In his Honour's view, it was important that they should remain so. His Honour went on to say:

> [166] Ordering a permanent stay of criminal proceedings as an abuse of process, even on the ground of irremediable unfairness, has repeatedly been described as a "drastic remedy" to be confined to a case that is "exceptional" or "extreme". If the ordering of a permanent stay of criminal proceedings were ever to become other than exceptional, "it would not be long before courts would forfeit public confidence".

> [167] Fundamental amongst the considerations to be weighed in determining whether criminal proceedings should be permanently stayed as an abuse of process is "the legitimate public interest in the disposition of charges of serious offences and in the conviction of those guilty of crime". That is because a permanent stay order has the practical effect of providing immunity from prosecution to a criminal defendant, leaving that criminal defendant under an "irremovable cloud of suspicion" and leaving the potential if not the likelihood of engendering within the community "a festering sense of injustice", if not cynicism. (footnotes omitted)

Mr Boulten's submissions on the issue of abuse of process

425 In closing submissions, Mr Boulten acknowledged and accepted there was nothing in the evidence to suggest that the decision-maker(s) in the ODPP had regard to the tone or content of the podcast (or for that matter that they had even listened to it). Neither was there any evidence that the decision-maker(s) was aware of the public clamouring through other arms of the media for the applicant to be prosecuted for murder or of other interest groups seeking the same result.[202] Neither did Mr Boulten submit that the decision-maker(s) was in fact influenced by what was happening in the public domain more generally at the time when the decision to prosecute was made (on or about 3 December 2018) or over a concerted period of months before that date when the brief of evidence was under consideration and an advice on the sufficiency of the evidence was pending, where there were repeated calls that there be "Justice for Lyn".

426 Mr Boulten did submit, however, that what remains as one of what he described as "the real evils" of the podcast, and the way it was promoted throughout the media, was what he invited the Court to find was the concerted effort on the part of the producers and publishers of the podcast, members of the electronic media and others, including, in particular, the Commissioner of Police who endorsed and promoted the podcast, to seek to pressure or manipulate the decision-maker(s) in the ODPP in contravention of the specific prohibition in Prosecution Guideline 4. It was in that way that Mr Boulten maintained the submission in reply to the Crown's closing submissions that this Court should find established, even if only by inference, that the Commissioner of Police, as one arm of the State, in conjunction with Mr Thomas and the corporate media interests that employ him, shared a common objective that the

[202] Statement of Peter Schubert dated 20 March 2014.

ODPP should be persuaded to furnish an advice that proceedings against the applicant for murder should be initiated and that they pursued that common objective, knowing that if a decision were based on their concerted efforts, even if only in part, it would be contrary to the prohibition in Prosecution Guideline 4 and that the use of the Guideline's process to try the applicant for murder in those circumstances would bring the administration of criminal justice into disrepute.

427 Mr Boulten also submitted the relationship that was forged from July 2018 between the Commissioner of Police and organs of the media (initially, it would seem, by his friendship with the 2GB talkback radio host, Mr Fordham, who in turn brokered an introduction for Mr Thomas) was a relationship that I would be satisfied was also designed to improperly influence the decision-maker(s) within the ODPP and that public confidence in the administration of justice is diminished for that reason.

428 Mr Boulten submitted that the process of a fair trial begins at the point of accusation and that the Commissioner's involvement in the podcast at a time when the decision by the ODPP was pending was inappropriate, ill-judged and damaging both to the applicant's right to a fair trial (by the Commissioner apparently endorsing the right of the media to judge his guilt) and to the administration of justice generally (by giving the members of the public the impression not only that Mr Thomas has succeeded in winning the support of the Commissioner of Police, but that the two of them were doing the "right thing" and in tandem, by seeking to have the applicant tried for murder).[203]

429 It seems to me that were the public to know of the relationship between Mr Thomas and the Commissioner as revealed in their private telephone communications, the potential for an erosion of public confidence in the administration of criminal justice would be deepened. The following are extracts from their various telephone calls.

430 First:[204]

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[203] See T 440 (Facebook Groups) and T 445-446 (Justice for Lyn Walk). These commemorative walks apparently were convened in Newcastle, Perth, Port Macquarie and on the Gold Coast as discussed at some length in episode 16 of the podcast.

[204] T 547.

MF: Nah, thanks mate and have a good break if that's where you're going. I'll probably reach out to the DPP in about 4-6 weeks to get a timeframe. So, if I get some information that a decision is coming, do you want me to give you a heads up?

HT: That'd be great. That'd be fantastic, yeah. Appreciate that. And I think with Dan Poole – he and I have been exchanging – well, I've been giving him everything that I think –

MF: Yeah, good.

HT: He's been grateful and we're good so.

MF: Yeah, no and I think that gives you a really sound position if there's any criticism, even if it's in two years' time. From your perspective is that we can say hand on heart that your interest was only ever what mine was, which is justice for Lyn. You know, you gave us everything, you know what I mean? So, I think that, for a whole range of reasons, that puts you and I in a much better position.

HT: Totally, totally. No, it's working out the best possible way without compromising stuff so that's in our interest. Alright, mate –

MF: Well, have a good break and, um, thanks for that and I guess we'll just sort out loosely keep in contact and as soon as I get wind, mate, 'something's happening' – I'll certainly give you an off-the-record heads up, yeah?

HT: Great, alright – thanks Mick –

MF: Thanks, Hedley. Take care, mate.

431 Second (the day of the applicant's arrest):[205]

MF: G'day mate, you must be – I mean, I don't mean this in a selfish way – but you must be pretty happy, mate?

HT: Oh, look – I am, um, I think it's yeah – you know how I feel – long overdue. I was just talking to David Murray and I was recording the call – David's my colleague. And so I just wanted to give you a heads up – it's still on record but I can turn it off now or we can do an interview, whatever you're comfortable with. But just didn't want you to feel, you know, I just wanted to let you know straight away. That was all.

MF: No, no, no – I obviously am more than happy to be interviewed. It's just a matter of timing, mate. I've got about 8 minutes for you now.

HT: Great.

MF: Or I can wait this afternoon and give you as much time as you want.

HT: Mate, I'll grab the 8 minutes now and then, hopefully, we might be able, if I need more, to talk to you late today. Um, is that alright?

MF: Yeah, of course.

…

MF: … It's a wonderful thing and I think what we ended up with was a good partnership, mate, and that's good news for everyone.

[205] Exhibit J1(6). MF denotes Michael Fuller, the Commissioner of Police; HT denotes Hedley Thomas.

> HT: Yeah. Terrific. Okay. Well, um, Mick – thank you – and congratulations and – to you –
>
> MF: Same to you, mate. It's been good working with you and obviously I know is been recording but – off the record, hopefully we can catch up in the New Year and have a little lunch or something.
>
> HT: That's great – alright mate ...

432 Mr Boulten submitted that members of the public who both listened to the podcast or listened to the Commissioner of Police being interviewed on talkback radio about the podcast, and about the police investigation that was current and continuing at that time, would be entitled to think that the Police Commissioner, as the senior investigating officer in the NSW police force, was entitled to seek to influence the outcome of the deliberations of the Deputy DPP, even if there is no evidence that he did so directly. Mr Boulten submitted that the true course of justice has been severely and irreparably damaged by the conduct of the Commissioner of Police such that it would be an abuse of process to put the applicant to trial.

433 I am left in no doubt that Mr Thomas intended to apply pressure on the ODPP to prosecute the applicant. He was asked the following questions by Mr Boulten which were then the subject of further questions by the Crown prosecutor:[206]

> Q. You intended to put pressure on the DPP, didn't you?
>
> A. No, I intended to expose inaccuracies and if that caused them to look at it in a more forensic way then that would be a good thing.
>
> …
>
> Q. What effect did you think that any public pressure from you or the family of Lynette Dawson would have on the decision makers at the DPP?
>
> A. That it might cause the DPP to look at something properly. I was well aware the DPP had publicly apologised for failing to prosecute Lynette Daley just a short time before my podcast started. It's not unusual for officers of the DPP to be fallible.[207]

[206] Exhibit J1(11).
[207] T 281 and 283.

434 For Mr Thomas to suggest that he felt public pressure might cause the DPP "to look at something properly" is breathtaking. I had the following exchange with Mr Thomas:[208]

> Q. And you really thought that your way of looking at things was going to be the overwhelming source of influencing the director's decision, did you?
>
> A. No, your Honour, I haven't said that.
>
> Q. I just remind you of the evidence that the Crown Prosecutor has just taken you to. It's a question put by Mr Boulten:
>
> > "Q. You intended to put pressure on the DPP, didn't you?
> >
> > A. No, I intended to expose inadequacies, and if that caused them to look at it in a more forensic way then that would be a good thing.
> >
> > Q. You wanted them to look at it the way you were looking at?
> >
> > A. Yes.
> >
> > Q. That was one of the reasons why you'd broadcast the podcast?
> >
> > A. Yes."
>
> Q. So there's a number of things one might draw from that, leaving your journalistic hubris to one side for a moment, and that is that you have a more forensic eye or power of analysis than those within the director's office who are charged both professionally and by statute to discharge their professional duties forensically, and that you thought your way of looking at it was better than the way they were looking at it, and you wanted them to look at it the way you were looking at it. Now, why wouldn't I divine from what you have said there in evidence, again leaving journalistic hubris to one side, that you thought you knew better than anyone?
>
> A. Well, your Honour, I think that's not - it was not my position. My - my view and my answer was that if the publication of the podcast caused people in the DPP to hear things they hadn't heard or to look at it more forensically, then well and good. I was very aware that Lyn's family had completely lost confidence and trust in the Office of the DPP because of the communications they had had from DPP officers which strongly indicated to them the DPP had a view about some of the evidence that was just wrong. And you can refer to my journalistic hubris, I think that some practitioners also have legal hubris and believe that their view is the view that should be accepted and--
>
> Q. Let me interrupt you, Mr Thomas. The difference between your views as a journalist of evidence sufficient to put somebody on their trial for murder is a wayside different, and if you'd read the director's guidelines you might know the reason why it's a wayside different to the obligations statutorily imposed on the director's office to look, consider carefully, evaluate forensically, and make a legal decision about the sufficiency of evidence to prosecute a person for murder.

[208] There was no evidence adduced on the application to support that proposition. If it is a reference to the meeting with Mr Pickering in 2012 - Mr Thomas has misunderstood the course of the meeting (see [101]-[102]).

435 Were I to accept that the evidence on the application admits of no conclusion other than that the NSW Commissioner of Police also deliberately set out to influence the decision of either the Director of Public Prosecution (or a Deputy Director to whom the power to authorise the bringing of proceedings was delegated) by publicly engaging with the media generally, and with Mr Thomas in the podcast in particular, I would have no hesitation in finding that conduct grossly improper. However, in circumstances where the Commissioner was not called in the proceedings to provide an explanation as to whether, and if so to what extent, he considered that his public endorsement of the podcast was, or might be, interpreted as an attempt by him to influence the content of the legal advice that had been formally sought from the ODPP in conformity with established protocols, I am not prepared to make a finding of impropriety. Further, having not heard from the Commissioner, I am unable to find that he deliberately, or even recklessly, joined forces with Mr Thomas to ensure that the applicant was tried for murder, in disregard of the applicant's fundamental right to the presumption of innocence and his right to silence. Were I to have made that finding, it would follow that the conduct of the Commissioner would offend the integrity and functions of the Court and its procedures and processes in administering criminal justice within the structure of a criminal trial such that a permanent stay of the applicant's trial would be an available remedy.

436 However, I am of the opinion that the Commissioner's conduct in participating in the podcast in August 2018 was ill-advised, if for no other reason than it gives rise to the spectre of an attempt by him to bring public pressure to bear on the decision-maker(s) within the ODPP when the independence of that office is paramount to the administration of criminal justice in this state.

437 In my resolve not to grant the extreme remedy of staying the applicant's prosecution for an abuse of process, I took into account the fact that there is no evidence before me to suggest that the deliberate efforts of Mr Thomas to ensure the applicant was tried and convicted for murder, with or without the imprimatur of the Commissioner, influenced the decision-maker(s) within the ODPP.

Conclusions

438 The variety and combination of the intersecting factors which are said to operate in this case so as to put the fair trial of the applicant at risk, warranting a permanent stay, calls for the exercise of a discretionary judgment. The question whether this is an “extreme” or “singular” case because there is a real and substantial risk of unfairness to the applicant that cannot be remedied by judicial direction involves a weighing and balancing of countervailing considerations with a focus which is necessarily prospective. As at date of this judgment the applicant has not been given a trial date for a jury trial. That presents an added complication. While on the one hand any further delay in the commencement of his trial intensifies the risk of memories fading or, worse still, witnesses dying, the Court is aware that the applicant will not receive a date for a trial by jury in 2020 and will be unlikely to receive a date for a jury trial before June 2021 in any event because of the significant reduction in the number of courts available for a jury trial responsive to the health pandemic and where other criminal trials that have been called over since the filing of the notice of motion in March 2020 have priority.

439 I should make it clear that in the exercise of the discretion whether or not to grant the applicant a permanent stay, the applicant’s entitlement to apply under s 132 of the *Criminal Procedure Act* for a trial without a jury (a trial which could be convened much earlier than June 2021, perhaps even this year) is irrelevant both to the discrete question whether the impacts of adverse pre-trial commentary can be securely cauterised by the Court making an order that the applicant be tried without a jury, as it is to the wider question whether, in the balancing exercise underpinning the exercise of the discretion, issues of delay and the loss of an opportunity to obtain evidence supportive of his case can be appropriately managed by direction or evidential rulings. I simply note the power in the *Criminal Procedure Act* for the Court to order a judge alone trial to make it clear that I have ignored it.

440 Ironically, however, the delay in the appointment of a trial date will also very likely have the effect that the adverse impact of the podcast will progressively subside as memories of it recede, assuming there is nothing in the public domain in the short or medium term to reignite it. In that context, as I have

already noted, it is regrettable that the promotional material for another true crime podcast produced and presented by Mr Thomas includes a reference to *The Teacher's Pet*, and that Nationwide News has taken the view that it should remain part of the promotional material, and that the synopsis of *The Teacher's Pet* should remain accessible on *The Australian* website[209].

441 Despite the combined weight of the impact of a delay of 38 years before the decision was made to prosecute the applicant, including the inadequacies of aspects of the investigation conducted by Detective Poole between 1998 and 2015 and the loss of material documents in the Mayger investigation which preceded it, and the very substantial prejudice occasioned by the broadcast of *The Teacher's Pet* podcast over a period of months before the applicant was arrested and charged on 3 December 2018, including its capacity to erode the applicant's right to silence and the presumption of innocence, after undertaking the balancing exercise inherent in the exercise of the discretion to order a permanent stay of the applicant's trial, and after taking into consideration and applying the principled approach in the authorities to which I have referred, I am not persuaded that, either individually or in combination, those factors outweigh the considerable public interest in the continuation of a trial of a man who is alleged to have murdered his wife. Neither am I persuaded those "defects" cannot be satisfactorily addressed by the trial process, including by a range of measures available to the trial judge, so as to ensure the applicant's trial is conducted in accordance with fundamental principles of fairness.

442 I do, however, wish to have something further to say about the podcast since it is that factor alone that has persuaded me that the applicant is entitled to a temporary stay of his jury trial, an order which will have the effect that his trial will not commence before a jury before 1 June 2021. That order is made in the expectation that the adverse impact of the podcast in the commentary surrounding it will abate over the next nine months.

443 The proliferation of cases in this state where a permanent or temporary stay of proceedings has been sought, or where an application for a trial by judge alone has been made to alleviate the risk of adverse pre-trial publicity is well

[209] T 283-284.

documented. However, no application for a permanent stay of a criminal trial, either in this jurisdiction or in any other state jurisdiction, has been based upon a serialised podcast and the media storm which it generated of the kind under consideration here, and none where the opinions from self-appointed experts and prospective Crown witnesses that an accused is a liar, a reprobate and a murderer, or very probably a murderer, have been widely publicised. I am in no doubt that the adverse publicity in this case, or more accurately, the unrestrained and uncensored public commentary about the applicant's guilt, is the most egregious example of media interference with a criminal trial process which this Court has had to consider in deciding whether to take the extraordinary step of permanently staying a criminal prosecution. Were the podcast published at a time after the applicant had been charged with the murder of his wife, a number of individuals and publishers would inevitably have been liable and likely convicted of a criminal contempt.

444 Although the Court is not privy to the legal advice which Mr Thomas sought and obtained from his employers, and unaware as to whether and what advice might have been obtained by other broadcasters who promoted and endorsed the podcast, the compelling inference is that they all considered they were at liberty to publish what can only be described as scandalous material about the applicant (including, in effect, calling him a murderer) because at the time of the publication he had not been charged with murder, despite the fact (and I am prepared to find it as a fact) that all media interests were well aware that question was under active consideration by the ODPP.

445 The particular, perhaps even novel, challenge presented by podcasters and broadcasters of podcasts, who in the legitimate pursuit of their journalistic and commercial endeavours undertake research, conduct "investigations" and comment upon so-called "cold case murders" needs to be the subject of considered reflection. In the future, a journalist ignores at their peril the potential impact of their commentary on the currency of a police investigation and on a future trial in a case where a person may ultimately be charged with murder. Accepting that reality carries with it the obligation to accept and acknowledge the fundamental principles of criminal justice which it is the responsibility of the courts to uphold in the public interest. The fact that no

orders were sought prohibiting the publication of the podcast while the decision of the ODPP was pending is now a matter of history. I have already noted that no application for orders has, since that date, been made. Where necessary, the courts are called upon to mediate between the interests of the media and the principles of open justice, including orders restricting or prohibiting publication of information to protect the proper administration of criminal justice and any threatened interference with a pending criminal trial (see *Courts Suppression and Non-publication Orders Act 2010* (NSW), ss 7 and 8).

Orders

446 I make the following orders.

(1) The notice of motion seeking an order for a permanent stay of the jury trial of Christopher Dawson on the charge that he murdered Lynette Dawson is dismissed.

(2) The jury trial of Christopher Dawson is not to commence before 1 June 2021. (That order is not intended to interfere with any case management orders might be made by this court in the interim. In particular, the order for a temporary stay of the applicant's jury trial is not intended to prohibit the making of any pre-trial orders that may be applied for by the Crown or the accused.)

(3) The parties are to jointly apply to the chambers of the Criminal List Judge, R A Hulme J, by 5pm on 14 September 2020 for a date when the trial will be called over by his Honour.

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Amendments

09 May 2022 - Non-publication order lifted by Fullerton J.

10 May 2022 - Names of JC and SW anonymised.