Court of Criminal Appeal
Supreme Court
New South Wales

Case Name:	**Dawson v R**
Medium Neutral Citation:	[2021] NSWCCA 117
Hearing Date(s):	14-15 April 2021
Date of Decision:	11 June 2021
Before:	Bathurst CJ at [1]; Adamson J at [33]; Bellew J at [222]
Decision:	(1) Grant leave to appeal. (2) Appeal dismissed.
Catchwords:	CRIMINAL PROCEDURE — Stay of proceedings — Application for permanent stay refused by primary judge CRIME — Significant pre-trial publicity in the form of popular podcast and associated reports, which included matters which would be inadmissible at trial and prejudicial to the accused — Whether directions would be sufficient to ameliorate prejudice — Rare circumstances in which pre-trial publicity warrants a permanent stay of criminal proceedings CRIME — Appeals — Interlocutory appeal — By accused against interlocutory judgment — Leave to appeal against refusal of a permanent stay — Further evidence admitted — Whether the primary judge's discretion miscarried — The primary judge applied the correct test, did not fail to take into account relevant considerations and it was not unreasonable for the primary judge to refuse a permanent stay — Consideration of authorities concerning the grant of a permanent stay and the question of delay — Prejudice to the accused occasioned by pre-trial publicity and delay can be remedied or sufficiently ameliorated — Trust placed by the administration of justice in the ability of jurors to abide by directions
Legislation Cited:	*Coroners Act 1980* (NSW), s 19 *Crimes Act 1958* (Vic)

Criminal Appeal Act 1912 (NSW), s 5F
Criminal Code (Cth)
Evidence Act 1995 (NSW), s 165B
Jury Act 1977 (NSW), ss 53A, 68C

Cases Cited:

Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541; [1996] HCA 25
Chamberlain v The Queen (No 2) (1984) 153 CLR 521; [1984] HCA 7
Collector of Customs v Pozzolanic Enterprises Pty Ltd (1993) 43 FCR 280; [1993] FCA 456
DAO v The Queen (2011) 81 NSWLR 568; [2011] NSWCCA 63
Dupas v The Queen (2010) 241 CLR 237; [2010] HCA 20
Eastman v Director of Public Prosecutions (ACT) (No 13) [2016] ACTCA 65
House v The King (1936) 55 CLR 499; [1936] HCA 40
Jago v District Court of New South Wales (1989) 168 CLR 23; [1989] HCA 46
Longman v The Queen (1989) 168 CLR 79; [1989] HCA 60
Macdonald v R; Maitland v R (2016) 93 NSWLR 736; [2016] NSWCCA 306
Minister for Immigration and Citizenship v Li (2013) 249 CLR 332; [2013] HCA 18
Murphy v The Queen (1989) 167 CLR 94; [1989] HCA 28
Pell v The Queen [2020] HCA 12
R v Abu Hamza [2007] QB 659
R v Basha (1989) 39 A Crim R 337
R v Dawson [2020] NSWSC 1221
R v MacDonald (Court of Appeal (NSW), 12 December 1995, unrep)
R v Sio (No 3) [2013] NSWSC 1414
R v Steffan (1993) 30 NSWLR 633
Small v K & R Fabrications (W'gong) Pty Ltd [2016] NSWCA 70
Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions (2018) 266 CLR 325; [2018] HCA 53
The Queen v Edwards [2009] HCA 20; (2009) 83 ALJR 717
The Queen v Glennon (1992) 173 CLR 592; [1992] HCA 16
Tuckiar v The King (1934) 52 CLR 335; [1934] HCA 49
Victoria International Container Terminal Limited v Lunt [2021] HCA 11; (2021) 95 ALJR 363
Williams v Spautz (1992) 174 CLR 509; [1992] HCA

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Texts Cited:	Criminal Trial Courts Bench Book
Category:	Principal judgment
Parties:	Christopher Michael Dawson (Applicant) Regina (Respondent)
Representation:	Counsel: P Boulten SC (Applicant) S Dowling SC / E Blizard (Respondent) Solicitors: Greg Walsh and Co Solicitors (Applicant) Director of Public Prosecutions (NSW) (Respondent)
File Number(s):	2018/372527

Decision under appeal

Court or Tribunal:	Supreme Court
Jurisdiction:	Criminal
Medium Neutral Citation:	*R v Dawson* [2020] NSWSC 1221
Date of Decision:	11 September 2020
Before:	Fullerton J
File Number(s):	2018/372527

JUDGMENT

1 **BATHURST CJ**: I agree with the orders proposed by Adamson J and, subject to what I have written below, with her Honour's reasons.

2 The present case is an unusual one in that it involves both pre-trial publicity of an egregious nature and an inordinate delay in the bringing of the prosecution. The applicant's complaint is that these matters in combination would render any trial necessarily unfair so that any conviction would bring the administration of justice into disrepute.

3 In the context of pre-trial publicity, the High Court in *Dupas v The Queen* (2010) 241 CLR 237; [2010] HCA 20 ("*Dupas*") at [16] referred to the two fundamental policy considerations affecting abuse of process in criminal proceedings identified by the plurality in *Williams v Spautz* (1992) 174 CLR 509; [1992] HCA 34 at 520; namely, first, "that the public interest in the administration of justice requires that the court protect its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike." Secondly, that "unless the court protects its ability so as to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court's processes may lend themselves to oppression and injustice" (*Dupas* at [16]).

4 The High Court in *Dupas* went on to state that the following statements made by Mason CJ and Toohey J in *The Queen v Glennon* (1992) 173 CLR 592; [1992] HCA 16 at [605]-[606] can be regarded as authoritative:

> "[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."

5 Similar considerations govern the question of whether a permanent stay should be granted in the case of inordinate delay. Dealing with that issue, Mason CJ in *Jago v District Court of New South Wales* (1989) 168 CLR 23; [1989] HCA 46 ("*Jago*") at 34 stated that the delay must render the trial necessarily unfair so that any conviction would bring the administration of justice into disrepute.

6 Considering the question, it must be remembered that a fair trial is not necessarily a perfect trial. As was pointed out by the plurality in *R v Edwards* [2009] HCA 20; (2009) 255 ALR 399 at [31], it happens on occasion that relevant material is not available, documents, recordings and other things may be lost or destroyed, and witnesses may die. The plurality pointed out that "[t]he fact that the tribunal of fact is called upon to determine issues of fact upon less than all the material which could relevantly bear upon the matter does not make the trial unfair" (*R v Edwards* at [31]).

7 Further, as was pointed out in *Dupas* at [37], a further consideration is the need to take into account the substantial public interest of the community in bringing those charged with serious criminal offences (of which murder is the most serious) to trial, and that because of this public interest, fairness to the accused is not the only consideration.

8 The importance of the court's responsibility to the community and the fact that a court is required, if possible, to avoid unfairness by less draconian means other than a permanent stay was recently emphasised by the High Court in *Victoria International Container Terminal Ltd v Lunt* [2021] HCA 11; (2021) 95 ALJR 363 ("*Lunt*"). The plurality made the following remarks (citations omitted):

> "[20] In cases where proceedings are brought for an improper purpose, 'no remedy is likely to be appropriate other than a stay of the proceedings' because, in such cases, the abuse of the court's processes cannot be remedied in any other way. But where a court is able, by means less draconian than summary termination, to cure any apprehended prejudice to a fair trial so as to ensure that justice is done, the court's responsibility to the parties, and to the community, requires that those other means be deployed so that the matter before the court is heard

and determined in accordance with the justice of the case. So, for example, where a party has engaged in sharp practice apt to delay the fair trial of a matter, an order for costs may be sufficient to cure the prejudice to the other party. Where a party's misconduct amounts to a contempt of court, such as the destruction of material evidence, the vindication of the court's authority may require the punishment of the miscreant. The remedy of a stay of proceedings, however, is concerned not with the punishment of the miscreant but with the protection of the integrity of the court's ability fairly and justly to determine the matter in dispute.

[21] In *Strickland*, Kiefel CJ, Bell and Nettle JJ held that a stay of proceedings was warranted in the circumstances of that case because the abuse of process on the part of the prosecution so affected the prospects of a fair hearing that 'the prejudice to a fair trial is at least to a significant extent incurable'. Edelman J, who concurred with the plurality, explained that an order for a permanent stay is 'a measure of last resort' which will be ordered 'where there is no other way to protect the integrity of the system of justice administered by the court'. His Honour went on to say:

> 'Before a permanent stay can be ordered, it is necessary to consider whether there are any other curial measures that could be taken to address any systemic incoherence that would be caused by a trial of the accused. This must be considered because the court's ability to protect its integrity is not confined to orders that grant a permanent stay of proceedings.'

[22] Gageler J, who dissented as to the result of the case, was also of the opinion that a permanent stay of proceedings cannot properly be ordered where the substantial unfairness in the conduct of proceedings is capable 'of being averted through the adoption ... of measures less drastic than ordering a permanent stay'. And Gordon J, who also dissented as to the result of the case, agreed that there is no occasion to order a permanent stay of proceedings where the prejudice resulting from an abuse of process is curable by less drastic means. Her Honour said:

> '[I]f a fair trial can be had, or if it is not possible to say now that a fair trial cannot be had, why would the administration of justice be brought into disrepute if the prosecutions were permitted to proceed?'"

9 Justice Adamson has set out the conclusion of the primary judge concerning the podcast at [77]-[78] of her judgment below. The conclusion was amply justified. I have listened to the podcast and regard its object was to incite prejudice against the applicant in a sensationalist fashion with a view to convincing listeners of his guilt and the need for him to be prosecuted. The difficulty is exacerbated by the support given to the objective by apparently reputable members of the community, Mr Hulme, Mr Linden, Mr Milovanovich and the Commissioner of Police (the Commissioner). To say the least, they

should not have participated, but irrespective their participation was designed to give the podcast greater weight. Further, the delay is extreme and has led to the loss of potential lines of inquiry which may have been of assistance to the applicant.

10 In addition, the extent of distribution of the podcast remains uncertain. Justice Adamson in her judgment at [61]-[62] below recorded the downloads of the podcast in the Sydney area up to July 2019 from which date it was not available other than through the misleading use of a Virtual Private Network. However, it is unclear how many people who downloaded the podcast retained it on their devices or have listened to it by streaming rather than by downloading it. It is thus by no means clear the extent to which the podcast remains in the public domain.

11 Notwithstanding, the primary judge declined to order a stay (*R v Dawson* [2020] NSWSC 1221 (the primary judgment)). It is accepted that to succeed on the appeal the applicant has to show error in accordance with the principles in *House v The King* (1936) 55 CLR 499; [1936] HCA 40 (see *Jago* at 31).

12 Justice Adamson at [39] in her judgment below has set out the manner in which the grounds of appeal were recast to take account of those principles. Adopting the approach of her Honour, it is convenient to deal first with grounds 3, 5, 6 and 7. Mr Boulten recast the grounds

Ground 3: Failure to take into account prejudice occasioned by the conduct by the applicant's former lawyer, the former Deputy State Coroner and the Commissioner

13 I agree with Adamson J that this ground has not been made out. In relation to the applicant's former lawyer, Mr Linden, the primary judge dealt extensively with his involvement (see [244]-[266] of the primary judgment). The primary judge noted at [262] that senior counsel for the applicant submitted that his conduct was similar to that of the barrister in *Tuckiar v The King* (1934) 52 CLR 335; [1934] HCA 49, where the applicant's barrister made a public

admission of the applicant's guilt, thereby rendering a retrial impossible. Although correctly in my view her Honour rejected that submission, it could not be said that Mr Linden's involvement was not taken into account. That is clear from the following remarks in the primary judgment (at [266]):

> "[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 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."

14 It is also clear from the reasons given by Adamson J that the primary judge took into account the effect the involvement of Mr Milovanovich in the podcast had on the possibility of a fair trial. No criticism can be made of her Honour's approach in respect of this matter. Her Honour dealt in detail with Mr Milovanovich's evidence and his opinions (at [267]-[280] of the primary judgment). Her Honour noted that Mr Milovanovich was the Coroner who presided over the second inquest. The primary judge commented (at [268]) on the lack of information of how Mr Milovanovich considered he was free to be spoken to by a journalist about his view of a case he had presided over. Her Honour also noted (at [269]) that he spoke with a journalist on the podcast immediately following the broadcast of the views of the Commissioner. It is evident these matters contributed to the primary judge's conclusion at [443] concerning the podcast, which Adamson J has set out at [78] of her judgment below. "[S]elf-appointed experts" to whom the primary judge was referring to in that passage were self-evidently Mr Linden and Mr Milovanovich.

15 So far as the Commissioner was concerned, the primary judge dealt extensively both with conversations the Commissioner had with the journalist

leading up to the podcast and his involvement in the podcast. She emphasised the danger of what occurred in the following paragraphs:

> "[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 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.
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> [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."

16 Further, in dealing with the possibility of an abuse of process arising from the involvement of the Commissioner, the primary judge reached the following conclusion:

> "[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.
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> [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."

17 The primary judge in these circumstances expressly took the Commissioner's involvement into account.

18 It was a matter for the primary judge to consider the weight she should give to the involvement of Mr Linden, Mr Milovanovich and the Commissioner in the podcast. Regardless of whether minds might differ as to its effect, the primary judge clearly took their activities into account.

Ground 5: Alleged failure to take into account the likely impact of "The Teacher's Pet" podcast on Crown witnesses

19 As Adamson J pointed out at [170] of her judgment below, the primary judge noted the submission that prospective witnesses may be influenced consciously or unconsciously by the podcast. The primary judge also noted at [230] the concerns of Ms Rebecca Hazel, who with the co-operation of the Dawson family was seeking to write a book on Ms Dawson's disappearance, that potential witnesses would be influenced consciously or unconsciously by the podcast. As Adamson J also pointed out (at [171] of her judgment below), Detective Poole gave evidence that he had no concern about contamination of witnesses who had given statements prior to the podcast, while accepting caution need be given to the reliability of witnesses who subsequently gave evidence.

20 Importantly, the primary judge gave further consideration to this issue subsequently in her judgment. Her Honour made the following comment at [304] of the primary judgment:

> "[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. Of those six witnesses, only two are mentioned by name in the Crown statement as adding materially to the Crown case, with another two assisting the defence case."

21 The two witnesses to whom her Honour referred as adding materially to the Crown case were a Ms Beverly McNally and Mr Robert Silkman.

22 The primary judge expanded on this issue in the primary judgment at [403], [406] and [408]-[409]. Her Honour made the following comments:

> "[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:
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> - Shelley Oates-Wilding provided a statement to Detective Poole on 4 November 2018, in part responsive to *The Teacher's Pet* podcast. 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 Ms Curtis. She said that she often heard the applicant complain about his wife and call her a 'bitch'.
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> - 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'.
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> - Beverly McNally was a babysitter for the applicant and his wife prior to Ms Curtis 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 contact with Mr Thomas directly. 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.
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> …

[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'.

- 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 Ms Curtis 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 Joanne Curtis'. Mr Miller said that he stopped dating Ms Curtis because he was afraid of the applicant.

- 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 Joanne Curtis. At some point during this period he asked Ms Curtis 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[ed] 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'.

…

[408] Finally, there is evidence from a witness independent of Ms Curtis 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 Ms Curtis 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 Ms Curtis 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."

23 It was submitted by the applicant that the primary judge made no analysis of the time post-podcast when witnesses to whom her Honour referred in those paragraphs gave their statements in relation to the broadcast of the podcast, and what was described as the ability of the podcast to distort their evidence.

24 I do not think the primary judge erred in this manner. Her Honour dealt with the evidence and the time the statements were made to the police. There was no evidence of contamination or collusion, and the question of whether the evidence of the witnesses was contaminated was a matter of speculation. It was not the role of the primary judge to assess witnesses' credibility. Having referred to the evidence of Detective Poole as to the possibility of contamination, there was no reason to conclude that she did not take this into account in her overall assessment of the position (see [441] of the primary judgment).

25 For these reasons, this ground of appeal has not been made out.

Ground 6: Alleged failure to take into account the undue pressure applied to the Office of the Department of Public Prosecutions when deciding whether to prosecute the applicant

Ground 7: Failure to take into account the difficulty of framing directions or making rulings to overcome or ameliorate the prejudice occasioned to the applicant by delay and pre-trial publicity

26 For the reasons given by Adamson J, these grounds of appeal have not been made out.

Ground 4: Application of incorrect test

27 The passages the subject of this complaint are contained in [381]-[382] of the primary judgment in which her Honour referred to the reasonable possibility of empanelling and swearing-in an impartial jury. In these passages, the primary judge made the following remarks:

> '[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.
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> [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."

28 It is important to note that in the immediately preceding paragraph, the primary judge correctly stated that the question for determination was "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 have prejudged [the applicant's] guilt, perhaps without being aware of it." Senior counsel for the applicant accepted that that was the correct approach. Her Honour adopted the same approach in her concluding paragraph (see [441] of the primary judgment).

29 In these circumstances, it would be surprising if the primary judge deviated in one part of her judgment and adopted an incorrect test. I do not think her Honour did so. Rather her Honour was looking to the future and considering the prospect of empanelling an impartial jury, an essential prerequisite to a fair trial. If there was no prospect of doing so, a stay would be inevitable. Whether it could be done ultimately depends on the empanelment process. It was in this context that the primary judge was referring to reasonable

prospects of empanelling a jury not influenced by the podcast. Her Honour was not suggesting it was sufficient that there was a jury empanelled in respect of which there were reasonable prospects that it would be impartial: cf *Strickland (A Pseudonym) v Director of Public Prosecutions (Cth)* (2018) 266 CLR 325; [2018] HCA 53 at [244] per Gordon J in dissent, but cited with approval in *Lunt* at [22].

30 In these circumstances, this ground of appeal has not been made out.

Grounds 1 and 2: Alleged unreasonableness of the decision to refuse a permanent stay

31 For the reasons given by Adamson J, these grounds have not been made out.

Conclusion

32 In the result, I agree with the orders proposed by Adamson J.

33 **ADAMSON J**: On 5 December 2018 Christopher Dawson (the applicant) was charged with the murder of Lynette Dawson, his first wife, on or about 8 January 1982. On 3 April 2020 he pleaded not guilty to the single charge of murder on the indictment dated 30 March 2020.

34 Between 18 May 2018 and 5 April 2019, a 16-episode podcast, entitled "The Teacher's Pet" (the Podcast), was first broadcast on various internet platforms. The gist of the Podcast was that the applicant had killed Ms Dawson so that he could live with and marry Joanne Curtis, who had been a student in the class of which he was a teacher at Cromer High School on the Northern Beaches. The Podcast became popular, as evident from the number of downloads, and gave rise to significant publicity and speculation about the police investigation into Ms Dawson's disappearance and the eventual charge laid against the applicant.

35 By notice of motion dated 7 April 2020, the applicant applied for a permanent stay of the criminal proceedings on the basis of the cumulative effect of pre-trial publicity (associated with the Podcast), delay and abuse of process. In

support of his application for a permanent stay, Mr Boulten SC, who appeared on his behalf before the primary judge and in this Court, submitted that the cumulative effect of the following factors had caused such irreparable prejudice to the applicant that he could not have a fair trial: the delay between the events which are the subject of the indictment and the date of charging (which he contended had led to the loss of valuable evidence of sightings of Ms Dawson); the prejudicial publicity about such events generated by the Podcast; and the conduct of a various people who occupied, or had once occupied, public office and had expressed views about the applicant which had been broadcast in the Podcast. This category comprised: Jeffrey Linden, who had acted for the applicant in Family Court proceedings and had since been appointed a magistrate; Carl Milovanovich, a retired magistrate, who had been the coroner in the second coronial inquest into Ms Dawson; Paul Hulme, a retired Inspector of the NSW Police; and Michael Fuller, Commissioner of Police (the Commissioner).

36 The stay application was heard by Fullerton J (the primary judge) over the course of 11 days between 15 July 2020 and 31 July 2020. On 11 September 2020, the primary judge refused the application for a permanent stay but granted a temporary stay and directed that the trial not start before 1 June 2021: *R v Dawson* [2020] NSWSC 1221 (publication of which is presently restricted).

37 By application filed on 10 October 2020 pursuant to s 5F of the *Criminal Appeal Act 1912* (NSW), the applicant seeks leave to appeal against the primary judge's refusal of the permanent stay. It was common ground that the refusal was an interlocutory decision: *R v Steffan* (1993) 30 NSWLR 633 at 635 (Hunt CJ at CL, Grove and Sharpe JJ). It was also common ground that the applicant was required to show error of the type considered in *House v The King* (1936) 55 CLR 499; [1936] HCA 40: namely, that her Honour's discretion miscarried by reason of the application of an incorrect test, a failure to take into account a relevant consideration or legal unreasonableness in the sense described in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18.

The grounds of appeal

38 The applicant seeks leave to appeal on the following grounds:

> "1. Her Honour erred by finding that appropriate warnings or directions would cure the prejudice the applicant has suffered as a result of delay and the loss of evidence.
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> 2. Her Honour erred by failing to find that the broadcast of 'The Teacher's Pet' podcast and other pre-trial publicity was so egregious that nothing a trial judge could do in the conduct of the trial could relieve against its unfair consequences.
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> 3. Her Honour erred by failing to find that the comments of the applicant's former lawyer, the former Coroner and the Commissioner of Police which were published in 'The Teacher's Pet' podcast constituted exceptional circumstances occasioning irreparable prejudice to the applicant's fair trial which could not be relieved against by any action by the trial judge.
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> 4. Her Honour erred by failing to permanently stay the proceedings despite finding only that 'there is at least some prospect of swearing an impartial jury to try the question of the applicant's guilt'.
>
> 5. Her Honour erred by failing to find that the applicant has been and will be prejudiced as a result of the likely impact of 'The Teacher's Pet' podcast on Crown witnesses.
>
> 6. Her Honour erred in failing to find that the podcast constituted an abuse of process in that, whilst the DPP was considering whether to prosecute the applicant, undue pressure was applied to the Office of the DPP in a manner which undermined the course of justice.
>
> 7. Her Honour erred by failing to analyse the difficulties in framing directions or making rulings about the disadvantages the applicant faces as a result of the effluxion of time in the context of prejudice caused to the applicant by the pre-trial publicity."

39 In oral argument, Mr Boulten recast the grounds, in substance, as follows, to accord with the principles in *House v The King*:

> 1 & 2 The decision to refuse the stay was not one that was reasonably open to her Honour.
>
> 4. Her Honour erred in law by applying the incorrect test.
>
> 3, 5, 6 & 7. Her Honour's discretion miscarried by reason of the failure to take into account a (mandatory) relevant consideration: namely:

- the prejudice occasioned by the conduct of the applicant's former lawyer, the former Coroner and the Commissioner of Police (ground 3);

- the likely impact of 'The Teacher's Pet' podcast on Crown witnesses (ground 5);

- the undue pressure applied to the Office of the DPP when it was deciding whether to prosecute the applicant (ground 6); and

- the difficulty of framing directions or making rulings to overcome or ameliorate the prejudice occasions to the applicant by delay and pre-trial publicity (ground 7).

Further evidence sought to be adduced on appeal

40 Mr Boulten sought to adduce further evidence on appeal in the form of affidavits by Angela Skocic, who deposed to the continued accessibility of the Podcast (despite its having been taken down in mid-2019). The affidavits were intended to update the evidence which was before the primary judge as to the prevalence and availability of the Podcast. The evidence was adduced for two purposes: first, to cast light on the material before the primary judge; and, secondly, in the event that this Court is persuaded that her Honour's discretion miscarried, to provide this Court with current material on which to re-exercise the discretion. The Court rejected the evidence on the first basis but admitted it (subject to ruling on objections made to particular paragraphs) on the second basis.

Factual background

41 It is convenient to set out the background to the application for leave, in so far as it is relevant to the grounds, by reference to the primary judge's findings which were, except in respects addressed below, unchallenged. Any paragraph references in my reasons are to be read as references to paragraphs in her Honour's judgment, except where the context indicates otherwise.

The investigations into Ms Dawson's disappearance

42 The primary judge identified the following investigations into Ms Dawson's disappearance:

Shorthand term	**Period of investigation**	**Precipitant for investigation**	**Person in charge**
Missing Persons Investigation	1982-1991	Report by the applicant on 18 February 1982.	Not applicable
First Police Investigation	May 1991-May 1992 (suspended)	Approach by Ms Curtis (the applicant's second wife), who, following her separation from the applicant, was concerned about the circumstances of Ms Dawson's disappearance.	Detective Senior Constable Paul Mayger
Second Police Investigation	July 1998-late 2014	Sue Strath (nee Browett), a friend of Ms Dawson, lodged a formal complaint with the NSW Ombudsman and later approached the NSW Police.	Detective Senior Constable Damian Loone
First Inquest	February 2001	Brief of evidence submitted by Detective Loone.	Acting Deputy State Coroner, Jan Stevenson
Second Inquest	February 2003	Further brief of evidence submitted by Detective Loone.	Deputy State Coroner Carl Milovanovich
Final Police Investigation	July 2015-December 2018	No finding made by primary judge.	Detective Senior Constable Daniel Poole of the Unsolved Homicide Team

43 The First Police Investigation was precipitated by Joanne Curtis, the applicant's second wife. After Ms Curtis separated from the applicant, she spoke about the circumstances of Ms Dawson's disappearance to a friend of her father, who was a police officer ([82] of the judgment).

44 In the course of the Second Police Investigation, Detective Loone, the Officer-in-Charge, arranged for an excavation to be conducted of an area around the pool at the property in Bayview, where the applicant had lived with Ms

Dawson until her disappearance in January 1982 and where he subsequently lived with Ms Curtis (the Bayview property). A cardigan was unearthed. It was tested in the course of the Second Police Investigation and subsequently in the Final Police Investigation but nothing relevant was detected.

45 In February 2001, Detective Loone prepared a brief of evidence (the police brief) for the consideration of Acting Deputy State Coroner Stevenson. He tendered the police brief, which comprised several statements and recorded interviews (listed in [88] of the judgment), including with Ms Curtis and an interview with the applicant. The matter was considered on the papers at the First Inquest.

46 Acting Deputy State Coroner Stevenson terminated the First Inquest pursuant to s 19 of the *Coroners Act 1980* (NSW), which relevantly provided that:

> "**19 Procedure at inquest or inquiry involving indictable offence**
>
> (1) This section applies if:
>
> …
>
> (b) at any time during the course of an inquest … the coroner is of the opinion that, having regard to all the evidence given up to that time:
>
> (i) the evidence is capable of satisfying a jury beyond reasonable doubt that a known person has committed an indictable offence, and
>
> (ii) there is a reasonable prospect that a jury would convict the known person of the indictable offence,
>
> and the indictable offence is one in which the question whether the person charged or the known person caused the death or suspected death or the fire or explosion is in issue.
>
> …
>
> (1B) If this section applies to an inquest as provided by subsection (1) (b), the coroner may continue the inquest and:
>
> …
>
> (b) after taking evidence to establish the death, the identity of the deceased and the date and place of death—terminate the inquest …
>
> …

> (2) The coroner is required to forward to the Director of Public Prosecutions the depositions taken at an inquest or inquiry to which this section applies together with a statement that is signed by the coroner and specifies, in the case of an inquest … referred to in subsection (1)(b), the name of the known person, and the particulars of the offence, so referred to.
>
> …"

47 Acting Deputy State Coroner Stevenson forwarded the depositions and a statement to the Director of Public Prosecutions (DPP) pursuant to s 19(2) of the *Coroners Act*, on the basis that she was satisfied of both matters in s 19(1)(b) of the *Coroners Act*.

48 On 12 November 2001, the DPP (then Nicholas Cowdery QC) determined that there was insufficient evidence to support a prosecution of the applicant for murder ([7], [91] and [92] of the judgment).

49 In February 2003, Detective Loone, on the basis of further evidence, referred the matter to Deputy State Coroner Milovanovich. On 28 February 2003, after hearing evidence from several witnesses, the coroner terminated the inquest and referred the matter to the DPP pursuant to s 19(2) of the *Coroners Act*. In July 2003, the DPP again determined that there was insufficient evidence to support a prosecution of the applicant for murder.

50 On 21 September 2010, the NSW Police announced a reward of $100,000 for information leading to the conviction of a person for the murder of Ms Dawson. This sum was increased to $200,000 on 23 January 2014 ([103] of the judgment).

51 In 2010 and 2011, Patricia Jenkins, Ms Dawson's sister, wrote to the DPP in attempt to persuade the DPP to prosecute the applicant ([104] of the judgment). The DPP (then Lloyd Babb SC) passed the matter to Christopher Maxwell QC, because the applicant had taught at Mr Babb's high school and been his rugby league coach. Mr Babb formally notified Greg Smith, the then NSW Attorney-General of this matter ([106] of the judgment). It was common

ground that Mr Babb had acted with propriety in so doing and throughout, as the primary judge found.

52 In the course of the Final Police Investigation, a brief of evidence was forwarded to the DPP on 9 April 2018 (prior to the broadcast of the first episode of the Podcast). Detective Superintendent Scott Cook said in a covering letter:

> "… 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."
>
> ([116] of the judgment.)

53 The Prosecution Guidelines of the Office of the DPP for NSW (the Guidelines) provided that the "general public interest is the paramount criterion". The Guidelines listed relevant factors in the decision whether to prosecute: the seriousness of the offence; whether or not the alleged offence is of considerable general public concern; the staleness of the alleged offence; and the alleged offender's degree of culpability ([122] of the judgment). The Guidelines also provided that the decision to prosecute ought not be influenced by "possible media or community reaction to the decision" ([123] of the judgment).

54 On 3 December 2018, the Office of the DPP notified the NSW Police of its decision to prosecute the applicant for murder. The primary judge found, at [118] of the judgment, that the decision to prosecute was made in accordance with the Guidelines. The applicant did not challenge this finding. It follows that this Court is to proceed on the basis that the decision to prosecute the applicant was not, in fact, influenced by the Podcast or the public reaction to it.

55 The applicant was arrested under warrant from Queensland on 5 December 2018 ([8] of the judgment). He remains subject to conditional bail.

The Crown case

56 The Crown case that the applicant murdered Ms Dawson on 8 January 1982 or before lunch on 9 January 1982 is a circumstantial case. The Crown will contend that Ms Dawson is, in fact, dead, that the applicant had a strong motive to kill her and the opportunity to do so, and that he killed her, by himself or with another or others.

57 The Crown will seek to prove the applicant's guilt on the basis of evidence which it contends is capable of establishing the following circumstances:

(1) At the time of her disappearance, Ms Dawson had two children, then aged four and two years old, who had been conceived after years of her having difficulty in becoming pregnant which had led the applicant and Ms Dawson to consider adoption ([40] of the judgment).

(2) Ms Dawson had been a registered nurse, whose registration had lapsed at the time of her disappearance. At the time of her disappearance she was employed as a child care worker at a child care centre near her home ([41] of the judgment).

(3) Ms Dawson was a loving and attentive wife, devoted to her two children (the elder of whom was due to start school in 1982, a matter about which Ms Dawson was said to be excited) and to her extended family. She was proud of the house she and the applicant had built at Bayview, where the family lived. Ms Dawson had been actively involved in the design and décor of the house ([43]-[45] of the judgment).

(4) The applicant bore long-standing animosity towards Ms Dawson and had, in 1976 and 1981, spoken openly of getting a "hit man" to have her killed, although it is not the Crown case that the applicant ever made such arrangements ([61]-[62] of the judgment).

(5) The applicant disapproved of Ms Dawson's spending habits, which led to her arranging for her Bankcard statements to be sent to the child care centre where she worked ([75] of the judgment).

(6) At the time of Ms Dawson's disappearance, the applicant was infatuated with Ms Curtis, who was then 17 years old, and who had been his student at Cromer High School where he worked as a teacher. He had been in a sexual relationship with Ms Curtis since late 1980; and she had, at his instigation and against Ms Dawson's wishes, moved into the family home in October 1981 ([55] of the judgment). It was well known to the staff and students at Cromer High School, as well as Ms Curtis's friends and family, that the applicant and Ms Curtis were in a sexual relationship ([58] of the judgment).

(7) In October 1981, Ms Dawson had learned of the applicant's sexual relationship with Ms Curtis when she found them in bed together at the family home. This led to Ms Curtis moving into the house of Paul Dawson, the applicant's twin brother, who lived a few doors away. The sexual relationship between the applicant and Ms Curtis continued. It was condoned by Paul and his wife ([56] of the judgment).

(8) At times, the applicant was physically violent and verbally abusive towards Ms Dawson within the confines of the Bayview property, as observed by neighbours and others ([59] of the judgment).

(9) Ms Dawson confided in close friends and work colleagues about her fears for her marriage, the applicant's infidelity and verbal and physical abuse but she did not confide in her mother or any member of her own family. The Crown alleges that, in the hope that the marriage would survive, Ms Dawson refrained from telling her family because she did not want to prejudice them against him ([56]-[57] of the judgment).

(10) In December 1981, Ms Dawson commissioned an artist to produce sketches of her two daughters, which were due to be completed after

Christmas in 1981, with payment on delivery. In mid-January 1982, when the artist tried to contact Ms Dawson, the applicant told her, "Lynette has gone away and she doesn't want the sketches any more" ([44] of the judgment).

(11) After 1 January 1982, Ms Curtis left Sydney with friends to consider whether to end her relationship with the applicant because she was concerned about his level of control over her. This made the applicant very anxious that he would lose her if he did not get rid of his wife ([63] of the judgment). He phoned Ms Curtis while she was in South West Rocks and told her that Ms Dawson had left him and that he believed that she had joined a religious sect ([69] of the judgment).

(12) On the afternoon of 8 January 1982, Ms Dawson told two colleagues at the child care centre, who observed bruising on her neck, that the applicant had put his hands around her throat when they were alone in a lift on the way to a marriage counselling session and said, "I'm only doing this once and if it doesn't work I'm getting rid of you" ([64] of the judgment).

(13) Ms Dawson, who was part of a loving extended family, had organised a surprise party which was to take place in early February 1982 at her home to celebrate the 66th birthday of her mother, Helena Simms ([47] of the judgment).

(14) On 8 January 1982, Ms Dawson arranged for her mother to travel on public transport from her home in Clovelly to the Northbridge Baths, where the applicant worked as a lifeguard, to meet Ms Dawson and her two children there the following day. Ms Dawson did not attend the Baths in accordance with those arrangements ([48] of the judgment).

(15) Ms Dawson has made no contact of any nature with her mother or other family members (other than, allegedly, the applicant) since the evening of 8 January 1982 ([48] of the judgment).

(16) The applicant lied about contact from Ms Dawson and others having seen her alive since her disappearance, including that she made a STD phone call to the Northbridge Baths and told him, when he was called to the phone, that she would not be there as she was with friends on the Central Coast ([49]-[50] of the judgment).

(17) On or before 14 January 1982, the applicant rang Ms Curtis to tell her that Ms Dawson had left him. He travelled to South West Rocks to collect Ms Curtis and bring her back to move into the family home at Bayview, where she lived as his de facto wife until their marriage in January 1984 ([68]-[69] of the judgment).

(18) Ms Curtis observed, when she moved into the Dawson's family home at Bayview, that Ms Dawson's clothing, jewellery and other personal effects were still there ([70] of the judgment). By 31 October 1982, these effects had been bundled up into plastic bags and delivered to Ms Simms, with the exception of Ms Dawson's rings which were eventually refashioned for Ms Curtis to wear when she married the applicant ([70] of the judgment).

(19) Some time after Ms Dawson's disappearance, a Bankcard statement was delivered to the child care centre where she had worked. Barbara Cruise, who ran the centre, and who was aware of Ms Dawson's disappearance and the matrimonial disharmony, opened the statement. Although Ms Cruise could not recall what the statement had said, she said that she *would* have recalled had it contained a relevant purchase (after 8 January 1982). She subsequently gave the Bankcard statement to the applicant when he came to collect it ([75] of the judgment).

(20) On 18 February 1982 the applicant reported to the NSW Police at Mona Vale that Ms Dawson was missing ([73] of the judgment). None of the checks conducted by the police in accordance with the protocols revealed any relevant transactions or records on her Bankcard,

medical funds, nurses registration, Department of Motor Transport or the Department of Social Security.

(21) Of the alleged sightings which were reported, the applicant was the sole source for some. No one who claimed to have seen Ms Dawson spoke with the woman to verify her identity ([78] of the judgment).

(22) When Ms Simms became aware of the claim that Ms Dawson had been seen in Terrigal in 1984, she made substantial collateral inquiries which proved to be fruitless ([78] of the judgment).

(23) The applicant lied to Ms Curtis, including by telling her that Ms Dawson had called him and told him that she was with friends, was happy and well, was not returning and that no one should worry about her ([70] of the judgment).

(24) The applicant lied to police at Mona Vale on 18 February 1982 when he reported Ms Dawson to be missing, including by saying:

(a) that he had last seen her at about 7am on 9 January 1982 when he dropped her off at a bus stop so that she could go shopping at Chatswood;

(b) that she had called him later that day when he was at the Northbridge Baths, as well as on 10 and 15 January 1982 but that he had not heard from her since; and

(c) that he had collected a Bankcard statement from Ms Dawson's employer, Ms Cruise, and that it contained two relevant entries: a purchase from Katies at Narrabeen on 12 January 1982 and a purchase from Just Jeans at Narrabeen on 27 January 1982.

(25) The applicant instructed a solicitor, Mr Linden, to commence proceedings in the Family Court against Ms Dawson in 1983 which resulted in the making of orders for substituted service on Ms Simms

and, ultimately, orders for full custody of his children and the transfer of Ms Dawson's interest in the Bayview property to him on the basis of her alleged desertion ([71] of the judgment).

(26) The applicant lied in his interview with police in January 1991, including by saying:

(a) that he was hopeful after the marriage guidance session that the marriage would work out but that his wife had been pessimistic ([65] of the judgment);

(b) that after her disappearance, he was "very anxious" for her to return so that they could "work things out" ([65] of the judgment);

(c) that Ms Dawson had contacted him several times between 9 January 1982 and 15 January 1982 and informed him that she needed extra time away to sort herself out ([66] of the judgment); and

(d) that Ian Kennedy, a friend of his who was a police officer, had tried to contact Ms Dawson in 1985 for a school reunion and had heard that she was in New Zealand (the Crown intends to call Mr Kennedy to prove that he made no such claim) ([66] of the judgment).

58 As the Crown case is circumstantial, the Crown is required to exclude any reasonable hypothesis consistent with innocence. Because of the way the Crown case has been framed as to time, the Crown must exclude (to the requisite standard) the reasonable possibility that Ms Dawson was alive after 9 January 1982. This hypothesis assumes importance because of the evidence that Ms Dawson was allegedly sighted at various times after 9 January 1982.

59 The Crown submitted to the primary judge and to this Court that the Crown case is a strong circumstantial case and there are more than reasonable prospects of conviction.

The Podcast and associated publicity

60 As referred to above, the Podcast was broadcast on various internet platforms between 18 May 2018 and 5 April 2019. It can be seen from the dates of its broadcast that it commenced before the applicant was charged and continued after he was charged. Hedley Thomas, a journalist, performed the role of interviewer on the Podcast. It comprised 16 broadcasts of various lengths, between 40 minutes and two hours. A further episode which was described as a "special update episode" was subsequently broadcast. There was also a significant amount of associated publicity, including excerpts from an episode of Australian Story (an ABC program) entitled, "Looking for Lyn", which was broadcast in August 2003; a portion of *A Current Affair*, broadcast on Channel 9 on October 2015; and a *60 Minutes* broadcast on Channel 9 in September 2018 ([9] of the judgment). The Podcast was also available through the iTunes store.

61 The evidence of the number of downloads and the indicated location of the user was presented in a table which purported to record the total downloads for each month from May 2018 (when the Podcast was first broadcast) to September 2019 (after it was taken down by *The Australian* for users in Australia). The total number of downloads was divided into an "International Total", an "Australian Total", a "New Zealand Total", a "Sydney Total" (which comprised downloads in the greater Sydney area), each of which contributed to a "Global Total".

62 The table showed that, when the Podcast began in May 2018, 12,067 people in the Greater Sydney metropolitan area downloaded it. The highest monthly figure in that column was 343,276 in August 2018. By November 2018, the figure had dropped to 66,874, but rose again in December 2018 to 309,418 (being the month of the applicant's arrest). In March 2019, the figure had

dropped to 29,010. The figure for the Greater Sydney area was 18,327 in April 2019; 3,191 in May 2019, 3,724 in June 2019 and 2,199 in July 2019. Thereafter it was accepted that it was not accessible for local users other than by the subterfuge of a Virtual Private Network (VPN) whereby users could overcome publishing restrictions in Australia by misrepresenting their location as being outside Australia.

63 These figures are indicative but not determinative. Those who downloaded the Podcast did not necessarily listen to it or the whole of each episode. Persons other than the user may have listened to the Podcast on the device of the user who downloaded it. Others may have only heard the extracts of the Podcast which were replayed on other media platforms or read comments on the Podcast which were prevalent on social media. The inference is open that the interest in the Podcast was at its height a few months before the applicant's arrest and in the month of his arrest but diminished after that date. It is possible that the "aim" of the Podcast, being to bring the applicant to justice, was thought to have been achieved by his arrest and charging and that the public was no longer particularly interested in what Mr Thomas had to say, as there was, as far as the public was concerned, to be a criminal trial of the applicant in which a jury would determine whether the Crown could prove the charge beyond reasonable doubt.

64 Mr Boulten also relied on the circumstance that, even though the Podcast itself was no longer available to Australian users, except those prepared to use the VPN mechanism, the "reviews" in the iTunes store were still available. Many of the reviews not only referred to the contents of the Podcast but also directed readers to a method for accessing the Podcast by using a VPN

65 The primary judge made findings about the Podcast in the course of addressing Mr Boulten's submissions. Her Honour accepted Ms Skocic's evidence that: "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" ([18] of

the judgment). This finding is to be contrasted with her Honour's finding at [209] that "[o]n 5 April 2019, the podcast was removed by Nationwide News from all online platforms in Australia."

66 I understood it to be common ground that, although Podcast was taken down in April 2019, it remained accessible to local users in some fashion until the end of July 2019 (as evident from the figures in the table of downloads referred to above). The evidence established that the Podcast remained (and continues to be) accessible through various platforms to users who employ a VPN.

67 It was common ground that there was no evidence before the primary judge or this Court which would enable the court to determine which of the people who had downloaded the Podcast had listened to any of the episodes and how many had listened to all of the episodes.

68 It is not necessary to recount or summarise in any detail the gist or gravamen of the Podcast which is highly repetitive, deliberately sensationalist and designed to induce the listener to continue to download the episodes on the premise that further revelations would be forthcoming. The tone of the Podcast is evident from the trailer to each of the 16 episodes, which opened with four voices.

69 The first, a male voice, said, "This podcast series is brought to you by *The Australian*." The second, also a male voice, said:

> "Lynette Dawson was reported missing by her husband, former Newtown Jets Rugby League star, Chris Dawson."

70 The third voice is that of a female actor who said the following words, which the contents of the Podcast revealed to be those of Ms Curtis:

> "He said he was going to get a hitman to kill Lyn then he rang me and said 'Lyn's gone, she isn't coming back'."

71 The fourth voice is the actual voice of Julie Andrew, a neighbour who lived next to the Bayview property, and who witnessed an argument between the applicant and Ms Dawson. Ms Andrew said:

> "I just want justice and I'd love her little girls to know she didn't leave them."

72 Her Honour found, at [234], that the trailer was "not only designed to attract a wide listening audience but … to sway the listening audience to the point of view … that the applicant killed his wife."

73 Her Honour made several findings which were critical of Mr Thomas, whose conduct she found, at [328], was "eloquent of a lack of ethical responsibility as a journalist". Her Honour also found, at [326], in terms expressed generally but which were plainly intended to describe Mr Thomas:

> "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."

74 The Podcast gave rise to further publicity, referred to above. When asked by a reporter for *60 Minutes* to express his view of the applicant, Mr Thomas responded:

> "I think he 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."

75 Mr Boulten submitted to the primary judge and to this Court that the Podcast contained the following themes and imputations which were adverse to the applicant:

(1) The applicant is guilty and, to the extent to which he denies the offence, he is lying;

(2) The applicant was well-connected with corrupt police who had turned a blind eye to evidence pointing towards his guilt and that any attempt by him to maintain his innocence was a charade;

(3) The applicant knew underworld criminals, who could have arranged for Ms Dawson to be killed;

(4) Evidence that might have supported the applicant at the trial which has disappeared as a result of delay was not credible anyway; and

(5) The applicant was part of a ring of perverted school teachers at schools on the Northern Beaches who had sex with their students.

76 Mr Boulten submitted that the Podcast created irreparable prejudice to the applicant because of its tendency to influence potential jurors and also contaminate the evidence of Crown witnesses. He contended that the effect of the Podcast was so insidious that those who heard it might not appreciate the extent to which they had been influenced by it.

77 Her Honour found that the Podcast portrayed the applicant as a "cunning murderer" and a "sexual predator … with underage girls" ([282] of the judgment), who was affiliated with underworld figures who "could have had his wife killed under contract at his bidding" ([286] of the judgment).

78 Her Honour's conclusion about the adverse publicity constituted by the Podcast appears from [443] of the judgment, as follows:

> "… 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."
>
> [Emphasis added.]

The conduct of public officials relied upon by the applicant in support of his application for a permanent stay

79 As referred to above, Mr Boulten relied on the conduct of Mr Hulme, Mr Linden, Mr Milovanovich and the Commissioner in support of the application. Her Honour's findings about the conduct of each will be examined in turn.

Mr Hulme

80 Her Honour addressed the conduct of Paul Hulme (a retired Inspector of the NSW Police) at [239]-[243] of the judgment. She extracted his answer to Mr Thomas's question "what does it take to catch a killer in this case":

> "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."

81 At [241], her Honour said of the effect of Mr Hulme's remarks in the Podcast:

> "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."

82 Mr Boulten highlighted opinions proffered by Mr Hulme (after his retirement) on the Podcast, including that the applicant and his brother were well known from playing rugby union and league and were "well respected in the community". Mr Hulme was critical of the First and Second Police Investigations but described Detective Loone as "very professional", "very thorough" and said, "I couldn't have got a better bloke on the job". Mr Hulme expressed his view of the applicant several times on the Podcast, including in the following extract:

> "I just think it was obvious that you're looking at the husband, plus the fact of his character, plus from the start you might find out the way he was using his position, looks, and whatever else at schools with girls, uh, especially with the babysitter moving in, marrying her. I mean, I think anybody picks up the book

> and goes, Oh, you've got to be kiddin'. If it's not him, well if it's not him who is it?"

Mr Linden

83 The primary judge at [71]-[72] noted that in April 1983, the applicant commenced proceedings in the Family Court for the dissolution of his marriage to Ms Dawson, an order for full custody of the children and for the transfer to him of his wife's interest in the Bayview property on the basis of her desertion. Orders for substituted service on Ms Simms were made. Mr Linden, the applicant's solicitor, served the process. By 2017, Mr Linden had become a magistrate. In 2017, Mr Thomas solicited an interview with Mr Linden in the course of which Mr Linden expressed his doubts about whether Ms Dawson had actually disappeared. The interview was included in the fourth episode of the Podcast, entitled "Soft Soil", which was based on the assumption that if the Bayview property was properly excavated, Ms Dawson's remains might be found.

84 At [244]-[266] of her judgment, the primary judge set out the role played by Mr Linden (as the applicant's solicitor in the Family Court proceedings); his present role (as magistrate); the circumstance that he had conducted the interview from his chambers in Lismore; and the fact that he would not be called as a Crown witness as he had no admissible evidence to give. Her Honour noted at [260] that Mr Linden had made a statement to police in October 2018 in which he said:

> "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."

85 Based on Mr Thomas' evidence at the hearing, her Honour, at [246], made the following findings about Mr Thomas' motive for interviewing Mr Linden:

> "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."

86 Her Honour addressed in detail Mr Boulten's submission that Mr Linden's conduct was analogous to that of defence counsel in *Tuckiar v The King* (1934) 52 CLR 335; [1934] HCA 49 (*Tuckiar*), addressed further below, and concluded, at [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 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

87 As set out above, Mr Milovanovich, as Deputy State Coroner, conducted the Second Inquest. By the time he was interviewed for the Podcast, he had retired. Her Honour addressed Mr Milovanovich's participation in the Podcast at [267]-[281]. Her Honour noted that Mr Milovanovich spoke at length to Mr Thomas in the course of episode 14 (entitled "Decision Time"), which began with Mr Thomas' commentary, as follows:

> "… Carl's [Mr Milovanovich'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?"

88 Her Honour also extracted, at [271], Mr Milovanovich's response to Mr Thomas asking him why this case, amongst the many hundreds of cases he dealt with, had an impact on him, as follows:

> "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."

89 Her Honour found, at [281], that no one who listened to the Podcast would be left in any doubt as to Mr Thomas's views, or those of the people he interviewed. These views included that the applicant physically and emotionally abused both Ms Dawson, before killing her, and Ms Curtis, after he was "free to marry [Ms Curtis] having murdered [Ms Dawson]."

90 Mr Boulten submitted that her Honour did not make a finding about the significance and effect of Mr Milovanovich's commentary on the Podcast and that this caused her discretion to miscarry (this is the subject of ground 3, addressed below).

The Commissioner

91 Her Honour made findings about the conduct of the Commissioner, who was interviewed by Mr Thomas on the Podcast. Her Honour found that Mr Thomas had endeavoured to obtain a response from NSW Police to the matters he was canvassing in the Podcast. Detective Poole and other investigating officers had resisted Mr Thomas's approaches to them. However, as her Honour found, the Commissioner agreed not only to meet with Mr Thomas but also directed his officers (including Detective Poole) to attend a lunch at Surry Hills with Mr Thomas on 13 July 2018 to discuss the matter.

92 Her Honour set out in considerable detail Mr Thomas's success not only in obtaining a meeting with the Commissioner but also in persuading him to be interviewed on the Podcast (at [288]-[325]). The Commissioner appeared to share none of the scruples of his officers and was prepared to engage with Mr

Thomas to a significant degree, although he accepted, as was recorded at [302] of the primary judge's judgment:

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

93 Her Honour concluded:

> "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."

94 Mr Boulten did not challenge these findings in this Court.

Evidence which has been lost because of destruction of documents or the death or loss of memory of witnesses

95 The primary judge made the following findings that evidence had been lost due to the passage of time, as well as findings as to the first time such evidence had been sought by the NSW Police or the DPP.

Type of evidence	**When first sought**	**Paragraph in judgment**
Documents created in the First Police Investigation	By Detective Poole in the Final Police Investigation. He was unable to locate documents created in the First Police Investigation, which had apparently been lost.	[113]
Ms Dawson's banking records	Not revealed by the evidence, although notation on Missing Persons File indicates that periodic checks were made with Bankcard, medical funds, nurses registration, Department of Motor Transport recorded nil result.	[74]
Secondary evidence of Bankcard statements	Detective Loone interviewed Ms Cruise and Ms Curtis (both of whom had some recollection of seeing Ms Dawson's Bankcard statements in 1982) in 1998.	[75]
"Antecedent report" referred to in the file of the Missing Persons Unit	By Detective Poole in the Final Police Investigation, by which time relevant officer in Missing Persons Unit had died (on 11 September 2015).	[111]-[112]

Evidence of alleged sightings of Ms Dawson since 9 January 1982

96 Mr Boulten submitted to the primary judge and to this Court that evidence of post-9 January 1982 sightings of Ms Dawson had significant probative value since the Crown case depended on proof beyond reasonable doubt that the only reasonable explanation for Ms Dawson's disappearance on or around 9 January 1982 was that the applicant had murdered her. If there was a reasonable possibility that she was alive after that date, the Crown could not prove its case.

97 Mr Boulten identified five sightings of Ms Dawson, as follows:

(1) the alleged sighting by Ms Butlin;

(2) the alleged sighting by an unidentified person who thought she had seen Ms Dawson at the Narraweena shops in May 1982 and who had identified her by reference to a photograph which Ms Cruise had shown her;

(3) an alleged sighting at Terrigal in 1984 by a friend of Ms Simms who lived in Terrigal;

(4) an alleged sighting by Peter Breese (referred to as Bresse in the judgment), who was a patient at Rockcastle Hospital in mid-1984, who gave a statement to police in June 2019; and

(5) an alleged sighting by Mr Breese's wife, Jill, who also thought she saw Ms Dawson at the Rockcastle Hospital at around the same time.

98 Her Honour's findings about the sightings are referred to below in the context of her Honour's findings about delay.

The significance of the Bankcard statements

99 Mr Boulten submitted that the loss of the Bankcard statements was particularly prejudicial to the applicant since any transaction indicating that Ms Dawson had used the Bankcard after 9 January 1982 would be fatal to the Crown case. He contended that in the absence of the Bankcard statements, it would be difficult for the jury to determine whether Ms Cruise's recollection (that there had been no transaction after 8 January 1982 since if there had been one, she would have remembered it) was reliable. He pointed to the circumstance that Ms Curtis, in a statement given to the NSW Police on 18 September 1998, said that she recalled seeing a Bankcard statement at the Bayview property in 1982 which indicated a transaction connected to an optical purchase which she recalled "seemed to be an indication that Lyn was still around. Lyn used to wear contact lenses and spectacles". Mr Boulten highlighted these aspects of the evidence to establish the prejudicial effect of delay.

The primary judge's decision to refuse the permanent stay

100 The primary judge found that by careful directions, as outlined by the High Court in *The Queen v Glennon* (1992) 173 CLR 592; [1992] HCA 16 (*Glennon*) and *Dupas v The Queen* (2010) 241 CLR 237; [2010] HCA 20 (*Dupas*), any prejudice to the applicant could be ameliorated such that he could have a fair trial.

The primary judge's appreciation of the submissions made by the parties

101 The primary judge addressed Mr Boulten's submissions in detail in her judgment. Her Honour noted his submission about the risk that the Podcast had contaminated witnesses and his acceptance that there was no evidence of actual contamination ([12] of the judgment). Her Honour addressed his submissions about the deleterious effects of delay on the fairness of the applicant's trial and the oppression which has been occasioned by the decisions made by the DPP in 2001 and 2003 not to prosecute him ([15] of the judgment). Her Honour noted Mr Boulten's submission that the Second Police Investigation was "negligent and improper" and had occasioned irreparable prejudice to the applicant in the conduct of his defence ([18] of the judgment).

102 Her Honour summarised Mr Boulten's submissions as follows:

> "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."

103 At [31] of the judgment, the primary judge summarised the Crown's response to the application:

> "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."

The primary judge's findings

The findings about alleged sightings

Alleged sighting by Ms Butlin

104 Her Honour addressed the evidence about the alleged sighting by Ms Butlin at [177]-[186] of the judgment. Her Honour referred to the evidence of a letter which Ms Simms sent in August 1982 to the Missing Persons Unit, informing them of an alleged sighting of Ms Dawson in 1982 by Ms Butlin, who, with her husband, Ray, was a close friend of the applicant and Ms Dawson. Her Honour also referred to Ms Simms' diary which noted on 18 May 1982:

> "Bumped into Sue and Leanne at Quay. Chris rang. Sue thought she saw Lyn five to six weeks earlier at Gosford".

105 An entry against the date 20 May 1982 recorded:

> "Rang Chris [the applicant]. Rang Sue at Gosford. Saw Lyn 5 weeks ago there".

106 Ms Butlin died in May 1998, two months before the Second Police Investigation commenced. No statement was taken from her. Mr Butlin is to be called by the Crown at the applicant's trial to give evidence of what his wife reported to him, namely that his wife had mentioned to him at some time in early 1982 that she had seen Ms 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 Ms Dawson but she had hurried away from her. Mr Butlin confirmed that his wife had said she had seen Ms Dawson "front on". Her Honour noted that the applicant's trial counsel would be able to cross-examine Mr Butlin on what he knew of the sighting made by his wife. The Crown undertook not to cross-examine Mr Butlin.

Alleged sighting in Terrigal in 1984

107 Her Honour found, at [146] of the judgment, that Ms Simms was contacted by police in the Missing Persons Unit in December 1987 (sic, the document is dated 22 November 1984) in accordance with the system for updating records. Ms Simms told police she had been contacted by an unnamed friend from Terrigal who thought she had seen Ms Dawson. Ms Simms told police that she travelled to Terrigal where she searched doctors' surgeries and medical centres to see if Ms Dawson was employed, to no avail. The record noted that Ms Simms told police that she had spoken to police at the Terrigal police station and corrected her daughter's birth date (which had been incorrectly noted as October 1948 when it should have been September 1948).

Alleged sighting by Mr and Mrs Breese at the Rockcastle Hospital in 1984

108 The evidence before her Honour included the following statements. Mr Breese made a statement to police dated 5 June 2019 in which he said:

> "Post operation, toward evening Lynette DAWSON (who used to live near me), came to the door of my room, looked at me turned around and quickly left. I did not speak to her. I knew it was Lynette DAWSON I had seen because of her height, physique, hair colour and style of glasses.

> The next day Jill came and saw me at Rockcastle Hospital located in Harbord Beach and commented to me that she had seen Lynette DAWSON at the Nurse's station, which was outside my room. I commented to Jill that I saw her the night before."

109 Ms Breese's statement, which was also made on 5 June 2019, contained the following:

> "12 I remember visiting Peter in the hospital in the early evening after he had the operation. I was sitting in his hospital room. I was on a chair next to the bed. The angle that I was sitting at meant that I could see directly out the door and had a direct view of the nurse's station. The nurse's station was about 12 paces or so from where I was sitting. The nurse's desk was a long desk. It was a well-lit area. I remember seeing a person standing behind the desk. I could see the top half from about the waist up of this person. When I saw the person I immediately thought it was Lyn DAWSON. What made me think it was Lyn DAWSON was her glasses, she wore these big glasses, and that her hair was similar. She just looked familiar. At the time I didn't think too much about it. This was the only time I saw her whilst I was at the hospital.
>
> 13. I remember the next day Peter said to me that he thought he saw Lyn DAWSON at the hospital. I remember saying to him that I thought I saw her too. And after I really didn't think any more about it."

110 Her Honour noted in footnote 171 of the judgment that "Peter and Jill Bresse claim to have seen Lynette Dawson working as a nurse at Rockcastle Private Hospital some time in mid-1984". Her Honour also noted that they will be called in the Crown case. Mr Breese made his own inquiries of Rockcastle Hospital but could not locate any records that indicated that Ms Dawson had worked there.

The test to be applied when determining whether to grant a permanent stay of the trial

111 Her Honour found, at [332], that the pre-trial publicity had "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."

112 The primary judge referred, at [342] of the judgment, to the process of empanelment which she had put to the parties in the course of submissions, which involved three stages. First, the trial judge would ask the members of the panel to identify themselves and ask to be excused if they had listened to the Podcast or spoken to others about it. Second, the judge would ask anyone who had come to know about the Podcast from others or from social media, to ask to be excused. Third, the judge would ask anyone who had downloaded the Podcast or otherwise retained any part of the Podcast, to seek to be excused.

113 Her Honour then said:

> "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 …"

114 The primary judge posed a question, which was accepted by Mr Boulten to be apposite, in the following passage at [380]:

> "… 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."

115 Her Honour continued as follows:

> "[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."

[Emphasis added to highlight the correct test (in [380] and the particular passages in [381]-[382] on which Mr Boulten placed particular reliance in support of ground 4.]

116 The highlighted portions of [381]-[382] are relied on by Mr Boulten in support of ground 4. The Crown relied on the last sentence of [382] to establish that her Honour was persuaded that a direction could be given which would

ameliorate the prejudice (together with her Honour's suggested protocol for polling the panel).

The finding about the decision to prosecute the applicant

117 The primary judge addressed the evidence about the conduct of the DPP throughout the relevant period. As referred to above, her Honour accepted that the decision to prosecute the applicant was made in accordance with the Guidelines and independently of any external pressure. Although her Honour found that the "fundamentals" of the case against the applicant had not changed, there was significant additional evidence available to the DPP in 2018 that had not been available when the DPP had decided not to prosecute. Her Honour instanced the evidence concerning discord in the marriage between the applicant and Ms Dawson which manifested itself in his verbal and physical abuse towards her ([403]-[409] of the judgment). Her Honour also referred to the continuing "proof of life checks" (none of which had produced any indication that Ms Dawson was still alive) which were made throughout the period, thereby fortifying the inference that Ms Dawson was dead ([410] of the judgment).

The conclusion about delay

118 At [395], her Honour accepted that the applicant had, by reason of the passage of time, been denied the opportunity to explore the evidence of at least some of the alleged sightings of Ms Dawson. However, her Honour noted that the banking records were not available to the Officers-in-Charge of either the First or Second Police Investigations. Her Honour continued:

> "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 properly investigate the alleged sighting of Lynette Dawson at the Narraweena shops in 1982 or the alleged sighting of her at Terrigal in 1987 [sic 1984] 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."

119 The primary judge's ultimate conclusion that a permanent stay is not warranted is expressed in [441] of the judgment as follows:

> "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."

Consideration

The relevant authorities concerning the grant of a permanent stay

120 Before turning to the grounds, I propose to summarise the relevant principles.

121 The applicant bore the onus of establishing the factual basis for an order for a stay, which, in the case of a permanent stay (that the prejudice to a fair trial is so great that it cannot be remedied), is necessarily a heavy one: *Williams v*

Spautz (1992) 174 CLR 509 at 529 (Mason CJ, Dawson, Toohey and McHugh JJ); [1992] HCA 34.

122 The principles relating to the grant of a permanent stay largely derive from four decisions of the High Court: *Tuckiar*, *Glennon*, *Dupas* and *Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions* (2018) 266 CLR 325; [2018] HCA 53 (*Strickland*).

123 It is convenient to start with a consideration of *Tuckiar* and *Strickland*, where the High Court found there had been irremediable prejudice to the accused's right to a fair trial.

Tuckiar

124 In *Tuckiar*, after the verdict of guilty had been returned by the jury, the accused's barrister announced in open court that his client had confessed to a version that was consistent only with his guilt of a murder. The barrister's comments were widely reported in the Darwin press. The accused's conviction was quashed on appeal for other reasons. The question arose whether an order for a retrial would be made. It was accepted that the trial could not be heard anywhere but Darwin and that the publicity given to his barrister's statement was such that he could not get a fair trial in Darwin. This led to an order for his acquittal.

125 The Crown's submission that *Tuckiar* continues to stand as the sole reported instance of the quashing of a conviction and a verdict of acquittal being entered on the basis of the potential prejudicial effect of pre-trial publicity (that is publicity before the putative re-trial) was not controverted.

Strickland

126 In *Strickland*, as part of its investigation of the appellants, the Australian Federal Police (AFP) approached the Australian Crime Commission (ACC) and requested that it use its compulsory powers to examine the appellants in circumstances where each appellant was told that he could not refuse to

answer questions on the grounds that the answer might incriminate him. AFP officers watched the examinations from a nearby room. The appellants, and others, were subsequently charged with conspiring with others to bribe a foreign official (contrary to the *Criminal Code* (Cth)) and dishonestly falsifying a document made for an accounting purpose (contrary to the *Crimes Act 1958* (Vic)).

127 The High Court by majority held that, as there was no special ACC investigation which would have authorised the use of compulsory powers, the examination was "profoundly unlawful". The Court (at [100]) found that the prosecution had, by reason of the illegality of the ACC and the AFP, obtained the forensic advantage of locking the appellants into a version from which they could not, as a practical matter, depart during the trial and that this was a matter that went "to the very root of the administration of justice". The Court granted a permanent stay of the criminal proceedings on the basis that "[t]o condone such grossly negligent disregard of statutory protections and fundamental rights as occurred in these cases would be to encourage further negligent infractions of the strict statutory requirements of Div 2 of Pt II of the *ACC Act* and thus of the common law right to silence" (at [107]).

128 There is, as the High Court said in *Strickland* at [106], "a powerful social imperative for those who are charged with criminal offences to be brought to trial". Thus, the grant of a permanent stay was described in *Strickland*, at [106], as an extreme measure which is reserved for rare and exceptional cases where to proceed would bring the administration of justice into disrepute.

129 The reasons for this are obvious. If the courts do not permit an accused person to be tried, institutionalised justice is thereby halted, leaving the potential for its alternative, vigilantism. The potential for vigilantism to flourish is particularly acute in the context of an allegation of murder. The seriousness of such a crime is indicated by the maximum penalty of life imprisonment. In the context of sentencing, this Court (Gleeson CJ, Hunt CJ at CL and Kirby P) said in *R v MacDonald* (Court of Appeal (NSW), 12 December 1995, unrep):

> "… unlawful homicide, whatever form it takes, has always been recognised by the law as a most serious crime … The protection of human life and personal safety is a primary objective of the system of criminal justice. The value which the community places upon human life is reflected in its expectations of that system."
>
> [Citations omitted.]

130 I propose to turn now to *Glennon* and *Dupas*, in which convictions following trials in which applications for a permanent stay had been refused by the trial judges were overturned by intermediate appellate courts but reinstated on appeal to the High Court.

Glennon

131 In *Glennon*, the respondent was a Catholic priest who had, before his trial for 17 child sex offences, a substantial criminal history of child sex offences. Derryn Hinch, a radio broadcaster, engaged in a persistent campaign on the radio and in the print media against the respondent, in the course of which he broadcast the respondent's criminal history, the revelation of which was (assuming that it was not otherwise admitted as tendency evidence) prejudicial to the fair trial of the respondent.

132 Glennon applied to the trial judge for a permanent stay. The Crown tendered, in opposition to the application, a poll conducted of a random sample of 301 people in the Melbourne area. The results of the poll were that 33-43% of people of the adult population of Melbourne had heard of Glennon's case in some form or other but no respondent to the survey volunteered knowledge of any of Glennon's prior convictions. His application for a permanent stay was refused by the trial judge.

133 Glennon was convicted of five of the charges and acquitted of the remaining 12. His appeal against conviction was successful and resulted in the Victorian Court of Criminal Appeal ordering that the convictions be quashed and verdicts of acquittal entered. The Crown appealed to the High Court, which allowed the appeal on the bases that the Court of Appeal was in error in departing from the discretionary judgment of the trial judge to refuse the

permanent stay and in holding that the verdicts were unsafe and unsatisfactory.

134 At 601 of *Glennon*, Mason CJ and Toohey J considered and endorsed the techniques used by Crockett J, the trial judge, to ameliorate the effects of pre-trial publicity. These included asking the members of the jury panel to identify themselves by raising a hand if they believed that they knew or had heard anything about the circumstances of the case. A member of the panel who said that he had read an article was excused. Their Honours referred to the poll tendered at first instance and said, at 602:

> "[T]he inconclusive results of the random poll provided no evidence whatsoever to justify the conclusion that prospective jurors did not respond honestly and accurately to questions put by the trial judge. As already mentioned, the random poll did not record even one respondent out of the 301 persons interviewed who recalled a conviction. 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 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."

135 Further, their Honours considered that it was insufficient to show that it was possible that the jury might have acquired some knowledge of publicity during the trial and said, at 603:

> "The possibility that a juror might acquire irrelevant and prejudicial information is inherent in a criminal trial. The law acknowledges the existence of that possibility but proceeds on the footing that the jury, acting in conformity with the instructions given to them by the trial judge, will render a true verdict in accordance with the evidence."

136 At 604, their Honours said that it was not, in the absence of evidence, legitimate to infer that the jury did not comply with the trial judge's direction to decide the case only on the evidence. They said:

> "The majority's reasoning was also based on materials which could not support the inferences drawn, took little, if any, account of the effect of the trial judge's instructions and disregarded the community's right to expect that a person accused of a serious criminal offence will be brought to trial."

137 Thus, a fair trial does not depend on all members of the jury being entirely ignorant of the pre-trial publicity. Indeed, in cases of widespread publicity such as the trials of Lindy Chamberlain (considered in another context in *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521; [1984] HCA 7), those who killed Anita Cobby (*Murphy v The Queen* (1989) 167 CLR 94; [1989] HCA 28); George Pell (*Pell v The Queen* [2020] HCA 12; (2020) 94 ALJR 394), or Ian Macdonald (whose appeal against the refusal of a permanent stay was dismissed by this Court: *Macdonald v R; Maitland v R* (2016) 93 NSWLR 736; [2016] NSWCCA 306), it may be almost impossible to find a person who, at the relevant time, had not heard anything about the accused or the victim.

138 Mason CJ and Toohey J posited the following test, at 605-605:

> "[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."

139 Brennan J, who wrote separately, referred, at 611, to two developing phenomena: first, the holding of press conferences by law enforcement agencies after a person has been charged which "[wear] the appearance of corporate advertising of the work of the agency in solving a crime". His Honour considered such advertising to be "inconsistent with the impartial performance of the functions of a law enforcement agency in conducting or assisting to conduct a criminal prosecution". Brennan J identified the second of the phenomena as "the promotion of personalities who affect to convey the moral conscience of the community and to possess information, insights and expertise in exceptional measure". His Honour observed that "[t]he image of some media personalities as informers of the public and moulders of public opinion is assiduously cultivated".

140 Brennan J said further, at 613:

> "Administration of the criminal law cannot be made hostage to conduct amounting to contempt of court, even if the contempt be flagrant. If it were otherwise, the perpetrators of crimes which shock the public conscience, such as those charged in *Murphy v. The Queen* [the brutal sexual assault and murder of Anita Cobby], would oftentimes go untried and unpunished, for pre-trial publicity prejudicial to an accused is stimulated by the notoriety of the accused and the heinousness of the crime. Yet it would undermine the criminal law's protection of society and its members to refuse to allow the law to take its ordinary course in these cases. The administration of criminal justice by the courts, which proceeds inexorably to its conclusion in each case, would be adventitious if trials could be halted by a punishable contempt."
>
> [Footnotes omitted.]

141 In *Glennon*, Deane, Gaudron and McHugh JJ said, at 623-624, that ordinarily the risks posed by pre-trial publicity to a fair trial could be obviated by directions but there was still a possibility that there would be an "extreme" or "singular case" which would warrant a permanent stay.

Dupas

142 In *Dupas,* the appellant was charged with murdering a woman in Faulkner, Victoria on 1 November 1997. The case against the appellant depended on three identification witnesses and a confession alleged to have been made in custody. The appellant had twice been convicted of the murder of two other women (in 1997 and 1999 respectively) for which, in each case, a sentence of life imprisonment had been imposed. All three women had been killed by a knife attack involving extreme violence and brutality. The appellant applied for a permanent stay on the basis of pre-trial publicity which was constituted by 120 newspaper articles published over seven years, seven internet sites and four books, all of which related either wholly or substantially to the appellant. The stay was refused, the trial proceeded and the appellant was convicted. The Court of Appeal, by majority (Nettle and Ashley JJA, Weinberg JA dissenting), allowed the appeal on other grounds and ordered a new trial. The High Court granted special leave limited to the question whether a stay of the trial or a retrial ought to have been ordered. The High

Court dismissed the appeal and held that a stay, whether permanent or until further order, was not warranted.

143 In *Dupas*, the High Court (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) adopted as authoritative the statement extracted above from the reasons of Mason CJ and Toohey J in *Glennon* at 605-606.

144 Their Honours said, further, at [26]:

> "… 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.'"

145 The Court, at [32], considered that the alleged "impermissible prejudice and prejudgment gives insufficient effect to the policy of the common law respecting the efficacy of the jury system".

146 The Court, at [34], referred to *Tuckiar* and drew the distinction between a case (of which *Tuckiar* was the sole example) where the "certain knowledge" of guilt had been revealed by his own counsel and a case where "media opinion" about guilt was expressed, before concluding:

> "The unfair consequences of the former can be relieved against by a direction from the trial judge whereas the unfair consequences of the latter cannot be remedied."

147 The Court, at [35], identified the relevant question as whether an apprehended defect in a trial is "of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences".

Victoria International Container Terminal Limited v Lunt

148 These cases were considered recently by the High Court in *Victoria International Container Terminal Limited v Lunt* [2021] HCA 11; (2021) 95 ALJR 363 (*Lunt*). The plurality (Kiefel CJ, Gageler, Keane and Gordon JJ) said at [20]:

> "In cases where proceedings are brought for an improper purpose, 'no remedy is likely to be appropriate other than a stay of the proceedings' because, in such cases, the abuse of the court's processes cannot be remedied in any other way. But where a court is able, by means less draconian than summary termination, to cure any apprehended prejudice to a fair trial so as to ensure that justice is done, the court's responsibility to the parties, and to the community, requires that those other means be deployed so that the matter before the court is heard and determined in accordance with the justice of the case … The remedy of a stay of proceedings, however, is concerned not with the punishment of the miscreant but with the protection of the integrity of the court's ability fairly and justly to determine the matter in dispute."

Authorities on the question of delay

149 Several cases were referred to on the topic of delay. It is sufficient for present purposes to cite the following passage from *The Queen v Edwards* [2009] HCA 20 at [31] (Hayne, Heydon, Crennan, Kiefel and Bell JJ); (2009) 83 ALJR 717, which cites *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 34 (Mason CJ), 47 (Brennan J); [1989] HCA 46 and *Williams v Spautz* at 519 (Mason CJ, Dawson, Toohey and McHugh JJ):

> "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."
>
> [Footnote omitted.]

The context in which the authorities are to be applied

150 It is a necessary consequence of freedom of speech on the one hand and the laws of evidence on the other that potential jurors may learn of information which may relate to participants or the accused in a criminal trial which would not be admissible in that trial.

151 The laws of evidence are designed to remove from the consideration of a tribunal of fact (particularly where it is a jury) all but what is relevant and all opinions, save those of lay witnesses which are of a particular character and those of duly qualified experts within an area of the expert's expertise. Hearsay evidence is admissible only in certain well-defined exceptional cases. Witnesses are cross-examined and confronted with inconsistencies and contradictory material. The decision-maker, whether judge or jury, is required to be impartial and to decide the matter according to the evidence. Such inferences as are available are to be drawn by the tribunal of fact and not by others on its behalf. Matters of speculation or argument do not constitute evidence on which a jury can base its verdict. The weight to be given to evidence is a matter for the jury. Jurors are permitted to take exhibits with them into the jury room. However, they are not entitled to have oral evidence replayed to them, although they may resort to the transcript to remind themselves of the oral evidence. Members of a jury are directed only to confer among themselves and only when all twelve (or reduced number if one or more has been discharged) are present.

152 The press and other media outlets use vastly different techniques from those which are used in a criminal trial: their publications and broadcasts may be replete with speculation, guesswork, gossip, supposition, prejudice, primary and secondary hearsay and unqualified opinion, based on unstated, uncertain or unproved assumptions. In some cases, the larger the market, the less rigorous the reporting. Participants may be invited to debate matters among themselves and are at liberty to confer with anyone they chose about what they have said and what they are about to say. Ratings and airtime may depend on the profile of the speaker rather than the gravamen of what is said.

Such outlets may encourage listeners or viewers to form judgments based on prejudice and innuendo rather than on the basis of inferences drawn from primary facts. Poetic licence may be used to make a "better" (more dramatic or compelling) story. Some matters may be repeated for emphasis while others may be disregarded entirely. The objective of the producers may be to increase ratings rather than to engage in fair reporting. Rigorous investigative journalism is expensive and time-consuming. Soliciting views from those keen to express them is relatively cheap.

153 Thus, pre-trial publicity is potentially harmful to the trial process because it puts before potential jurors matters which are not properly germane to their decision and which may influence them, or those around them. It constitutes a threat to the administration of justice because it breaks many of the rules which apply in the course of criminal proceedings, including the presumption of innocence and the rules of evidence. It can also influence witnesses.

154 However, as *Glennon* and *Dupas* make clear, these differences between pre-trial publicity and what is permitted in a criminal trial do not, of themselves, lead to the administration of justice withdrawing or relinquishing its responsibility to try those whom the prosecuting authorities bring to trial. Rather, these differences lead to instructions being given to jury panels, and directions being given to juries, as to how trials are conducted and how to fulfil the oath or affirmation required to be given by each juror. The trust placed by the administration of justice in the willingness and ability of jurors to abide by directions is evident from the passage from *R v Abu Hamza* [2007] QB 659 at 685-686, which was cited with approval in *Dupas* at [26] (set out above).

155 It is tempting to imagine that one's own age is unique and that what is new is relevantly unprecedented. While the Podcast involves different technology to that used by the media to disseminate their message in *Glennon* and *Dupas*, the differences are ones of type and degree, not of substance. In the past, print media was heavily subscribed, radio stations fewer, television broadcasts viewed by a wider audience and the internet was not available. This led to the broader society becoming aware of particular matters, such as

the prior convictions of an accused person (as in *Glennon* and *Dupas*), in circumstances where the source of the information could not readily be retrieved (newspapers would be discarded, except by libraries, and broadcasts would typically be played once and not repeated or available for replay), although it remained accessible to those who were sufficiently determined or diligent to retrieve the material from public libraries or other archival sources.

156 However, the internet gives rise to different issues: audiences tend to be more diffuse and bespoke but communication between people who do not know each other can be widespread. Those who did not listen to the Podcast when it began may have learned of it since because of the publicity associated with it. Determined listeners may choose to use a VPN to continue to access the Podcast notwithstanding that it was taken down by *The Australian* throughout Australia. This is not to say that pre-trial publicity is of a different variety in the present case than previously. Although her Honour said that it was "the most egregious example of media interference with a criminal trial process which this Court has had to consider", I take this description to relate to the Podcast's content rather than its means of dissemination.

157 The authorities establish that the question whether a permanent stay ought be granted requires the consideration of two related matters:

(1) what prejudice will, or might, be suffered by the accused in the course of the trial by the identified factors; and

(2) whether the prejudice can be remedied or sufficiently ameliorated.

158 Each of the four authorities referred to above can be analysed in these terms. In *Tuckiar*, the prejudice was occasioned by the circumstance that the accused's counsel had purported to reveal an admission of guilt made in the course of privileged communications in circumstances where there was little or no prospect of empanelling a jury which was not aware of the admission. The High Court found that the prejudice to the fair trial of the accused and to

his right to silence could not be remedied or ameliorated because there was no other venue in which to conduct the trial.

159 In *Glennon* and *Dupas*, the prejudice to the accused was that the potential pool of jurors would be aware of the accused's prior convictions, which would be inadmissible at his trial. The High Court found that the prejudice was remediable and had been remedied by the steps taken by the trial judges in the course of each trial, including by polling the jury panel and giving directions to the juries.

160 In *Strickland*, the High Court found that the unlawfulness of the conduct of the AFP and the ACC was such as to permanently derogate from the accused's right to silence and right to a fair trial and that the prejudice could not be remedied.

161 As referred to above, it was common ground that the applicant needed to show an error of the *House v The King* variety. In *DAO v The Queen* (2011) 81 NSWLR 568; [2011] NSWCCA 63, Allsop P summarised the errors which would fall into this category, at [78], as follows:

> "There must be error shown in exercising the discretion: acting on a wrong principle; allowing extraneous or irrelevant matters to guide or affect the decision-maker; mistaking the relevant facts; failing to take into account some material consideration; or, in circumstances where no specific error of such kind can be demonstrated, where the result is, upon the facts, unreasonable or plainly unjust such that it can be inferred that there has been some error or miscarriage in the exercise of the power."

Grounds 3, 5, 6 and 7: alleged failure to take into account relevant considerations

162 It is convenient to deal with grounds 3, 5, 6 and 7 first, followed by ground 4 and concluding with grounds 1 and 2.

Ground 3: alleged failure to take into account the prejudice occasioned by the conduct of the applicant's former lawyer, the former Deputy State Coroner and the Commissioner

163 I have summarised above the primary judge's findings about the conduct of Mr Linden, Mr Milovanovich and the Commissioner and the potential effect of their conduct on the trial of the applicant.

164 Mr Boulten submitted that her Honour did not address the gravamen of the applicant's complaint: that persons holding public positions had expressed views about his guilt in a way which was designed to persuade listeners of the Podcast of his guilt. He submitted that the conduct of these three public officers was in an entirely separate category from the conduct of Mr Thomas, a journalist, who at no time occupied public office.

165 It is evident from the primary judge's detailed judgment that her Honour considered the conduct of the three persons referred to in ground 3 and the potential of such conduct to prejudice the applicant's trial. There is no express finding that any particular prejudice occasioned by that conduct could be ameliorated by a particular direction. However, this is understandable given that the applicant put his application cumulatively on the basis of all the factors relied on (abuse of process, pre-trial publicity and delay).

166 Mr Boulten was censorious of the conduct of Mr Linden, Mr Milovanovich and the Commissioner and endeavoured to equate it with the conduct of defence counsel in *Tuckiar*. While it is generally, if not always, undesirable, for judicial officers (or those judicial officers who are engaged in administrative functions, such as a coroner) to express a public view about any particular exercise of such functions, it is not unprecedented. Her Honour, who was plainly aware of the phenomenon, was, however, careful not to make adverse findings against those individuals (who had not been given an opportunity to be heard). Any such findings might have a salutary effect in future cases, but they would not particularly bear on the question for her Honour, which was whether a permanent stay ought be granted on the basis that there was nothing a trial judge could do to ameliorate the prejudice to the applicant. The

plurality of the High Court in *Lunt* made it clear, at [20], that the remedy of a permanent stay "is concerned not with the punishment of the miscreant but with the protection of the integrity of the court's ability fairly and justly to determine the matter in dispute."

167 It was pre-eminently a matter for the primary judge what weight to give to the matters raised on behalf of the applicant. I am not persuaded that her Honour failed to take into account any of the matters identified in ground 3. To the contrary, her Honour's detailed judgment indicated that each factor was addressed and taken into account in refusing the permanent stay.

Ground 5: alleged failure to take into account the likely impact of 'The Teacher's Pet' podcast on Crown witnesses

168 Her Honour, at [2], set out the grounds in the notice of motion:

> "(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."

169 The primary judge found, at [12] of the judgment, that there was no evidence of "actual collusion" between witnesses as a result of the Podcast. Her Honour also found that the additional evidence obtained after the publication of the Podcast was relatively unimportant to the investigation. Her Honour said, at [304]:

> "[A]s 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. Of those six witnesses, only two are mentioned by name in the Crown statement as adding materially to the Crown case [Beverley McNally and Robert Silkman], with another two assisting the defence case [Peter and Jill Bresse]."

170 At [22], her Honour summarised Mr Boulten's submission regarding the potential for the Podcast to have influenced Crown witnesses against the applicant as follows:

> "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."

171 At [231], her Honour extracted Detective Poole's evidence as to the risk of contamination, which included the following:

> "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."

172 I consider that her Honour's judgment is sufficient to indicate that her Honour was aware of the submission that the Podcast and associated publicity had given rise to a risk that Crown witnesses had been influenced. Her Honour's reference to Detective Poole's evidence as to those prospective witnesses who had been identified as a result of the Podcast demonstrates an appreciation that the vast majority of witnesses had already been interviewed and given statements before the Podcast and that Detective Poole was not concerned about contamination of these witnesses. In these circumstances, such witnesses could, if they deviated from their statements, be cross-examined as to such deviation. It is a matter of mere conjecture and speculation (to use the language in *Glennon*) whether these witnesses have listened to the Podcast (even if they were interviewed for it).

173 For these reasons, I am not persuaded that ground 5 has been made out.

Ground 6: alleged failure to take into account the undue pressure applied to the Office of the DPP when it was deciding whether to prosecute the applicant

174 As set out above, her Honour found that, although it was Mr Thomas's admitted intention to use the Podcast and associated publicity to impose pressure on the DPP to prosecute the applicant, the DPP's decision to prosecute was made in accordance with the Guidelines and was not affected by the pressure which Mr Thomas brought to bear on him.

175 In these circumstances, I am not persuaded that the "undue pressure" was relevant since it had no operative effect. To the extent to which it *was* relevant, it was relevant on a different basis: it formed part of the adverse pre-trial publicity which included the apparent endorsement of the Podcast by the Commissioner, which is the subject of ground 3 addressed above.

176 In so far as her Honour was entitled to take into account the "undue pressure" applied to the Office of the DPP, her Honour did take it into account as is evident from her findings as to Mr Thomas's motivation for broadcasting the Podcast. But, having found that the undue pressure had no material effect on the Office of the DPP (which made the decision to prosecute in accordance with the Guidelines), her Honour was not obliged to give any further weight to the motivation of Mr Thomas, which was only relevant in so far as it produced an effect. Although, as was plain, her Honour accepted that the Podcast could be assumed to have had an effect on listeners, her Honour found that it did not have an effect on the Office of the DPP. Accordingly, this ground has not been made out.

Ground 7: alleged failure to take into account the difficulty of framing directions or making rulings to overcome or ameliorate the prejudice occasioned to the applicant by delay and pre-trial publicity

177 Ground 7 is related to grounds 1 and 2 since, if there are directions which can be given and rulings which can be made which will relieve against the unfair consequences of delay and pre-trial publicity, then, according to the test

posited by Mason CJ and Toohey J in *Glennon*, which was adopted by the Court in *Dupas* as authoritative, a permanent stay ought not be granted.

178 The primary judge found that appropriate judicial intervention would be sufficient to safeguard the fairness of the applicant's trial. As referred to above, at [342], her Honour extracted the portion of the transcript where she proposed, in the course of the hearing, techniques to ameliorate the prejudicial effect of the Podcast. Her Honour addressed the means by which the prejudice to the applicant could be remedied or ameliorated by directions at [378]-[397]. With respect to pre-trial publicity, her Honour found, at [381]-[382], that the jury *panel* could be polled (as in *Glennon*) and that, after the jury was empanelled and sworn, a direction could be given that the jury not access the Podcast (or any other material) or discuss the case with anyone. Her Honour adverted to the potential size of the panel required to ensure that there will be a sufficient pool once potential jurors who had listened to the Podcast had identified themselves and been excused.

179 With respect to the potential prejudice occasioned by delay, her Honour referred to cases where a long delay had resulted in an accused person losing the opportunity to undertake investigations which might have exculpated him or her (or incriminated someone else). Her Honour referred, at [392], to *Eastman v Director of Public Prosecutions (ACT) (No 13)* [2016] ACTCA 65 (*Eastman*), where the applicant, who was facing a retrial in 2016 for the murder of the Commissioner of the AFP in 1989, sought leave to appeal against the refusal of a permanent stay. His application for leave was refused by the ACT Court of Appeal. The primary judge extracted passages from *Eastman* in which the Court said, at [264], that the "significance of the inadequacies [in the evidence] will be capable of evaluation by a properly instructed jury" and that the trial judge could give "a forensic disadvantage direction appropriate to the facts of the case". Her Honour also referred to the approval by the Court of Appeal in *Eastman* (at [265] of *Eastman*) of the proposition that an applicant had lost the *chance* (rather than the certainty) that he might have been able to do better. Her Honour also extracted the conclusion of the Court of Appeal in *Eastman* (at [269] of *Eastman*):

> "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."

180 It is noteworthy that, in the cases which address applications for a permanent stay, the court refers to the capacity of directions to overcome prejudice without spelling out the precise directions to be given. This is understandable since the process of giving directions is one which is usually accompanied by some degree of procedural fairness and discussion between the parties. A court is unlikely to be prescriptive about the form of a direction to cure or ameliorate prejudice without engaging in this process. It does not follow from the fact that the primary judge did not set out all the directions that would, or could, be given by the trial judge to ameliorate the prejudice arising from the delay or pre-trial publicity that her Honour did not have regard to the difficulty of framing such directions. Rather, it is plain from her Honour's judgment that she considered that directions could be given on these matters which would ameliorate the prejudice.

181 The directions and warnings to be given to ameliorate the effects of delay are, in any event, relatively orthodox. Many are contained in the Criminal Trial Courts Bench Book. For example, s 165B of the *Evidence Act 1995* (NSW) provides that a judge in criminal proceedings where there is a jury must, in certain circumstances, if satisfied that the defendant has suffered a significant forensic disadvantage as a consequence of delay, inform the jury of the nature of the disadvantage and the need to take it into account when considering the evidence. The factors which may amount to "significant forensic disadvantage" include the fact that a potential witness has died or is unable to be located or the fact that any potential evidence has been lost or is otherwise unavailable: s 165B(7). Section 165B was inserted into the *Evidence Act* in 2001 and later amended in 2007 to refine the directions authorised by the High Court in *Longman v The Queen* (1989) 168 CLR 79; [1989] HCA 60 to ameliorate the prejudice occasioned by delay: see, generally, *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 551–553 (McHugh J); [1996] HCA 25.

182 Accordingly, I am not persuaded that ground 7 has been made out.

Ground 4: alleged application of incorrect test

183 Mr Boulten submitted that, although her Honour had stated the test correctly at [380], she had "overlooked that [test]" when she posited a less demanding, and incorrect, test at [381]-[382] (extracted above) of whether there was a "reasonable prospect" of swearing an impartial jury.

184 The principle that "reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error" has been described as "canonical" and as apt to appellate review of a judge's reasons as to judicial review of an administrator's reasons: *Small v K & R Fabrications (W'gong) Pty Ltd* [2016] NSWCA 70 at [54] (Basten JA, McColl and Simpson JJA agreeing), citing *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287 (Neaves, French and Cooper JJ); [1993] FCA 456.

185 The primary judge's reasons are lengthy and contain a detailed and unchallenged analysis of relevant authority. The parts of [381]-[382] which are the basis for ground 4, if read on their own, would appear to contain the (erroneous) proposition that a permanent stay will not be warranted as long as there is *some* prospect of empanelling an impartial jury. The effect of Mr Boulten's submission in support of ground 4 is that, notwithstanding her Honour's detailed analysis of the relevant authorities, and her correct statement of the test authoritatively established in *Dupas*, her Honour substituted an entirely unauthorised and incorrect test in [381]-[382]: namely, whether there was a reasonable prospect of obtaining, by the process of empanelment described by her Honour, a residue of 12 or 15 impartial people to serve on a jury to try the applicant.

186 This conclusion would be a surprising one, given that, as was common ground, the correct test had elsewhere been identified in the judgment: namely, whether there was 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. The test was plainly applied and formed the basis for her Honour's ultimate conclusion, as expressed in [441], which has been extracted in full above. Mr Boulten also accepted that the final sentence of [380] of the judgment (immediately before the passage sought to be impugned) was a correct statement.

187 It is necessary to read [381]-[382] both carefully and in context. The correct test was stated and applied at [441] of the judgment (and elsewhere in the course of the analysis of authority) and follows from her Honour's acceptance of the formulation by Mason CJ and Toohey J in *Glennon*, which was adopted as authoritative by the whole High Court in *Dupas*, that a permanent stay will only be warranted when there is *nothing* a trial judge can do to remedy the prejudice to the applicant (from pre-trial publicity, delay, or other identified factors).

188 At the beginning of [381], her Honour described the need, when addressing *that* question (being the substantive question), also to address the "subsidiary and practical question": namely, what size of jury panel is required ("a very large pool") to ensure that there will be an adequate residue once members have been invited to seek to be excused (for example, if they have a fixed view about the case) and what the members of the panel ought be asked in the process of empanelment. Her Honour accepted that members of the panel who have heard the Podcast would not need to be excused as long as those persons "considered themselves capable of bringing their own judgment to bear upon the evidence". In finding, at [381], that there was "at least a reasonable prospect" that there "will be in residue twelve or fifteen" people who can be on the jury, her Honour is saying no more than, if the panel is large enough, then even if many people seek to be excused, there will still be enough left to constitute a jury. I do not understand the reference to "twelve or fifteen" to mean "only twelve or at best fifteen" but rather a reference to the usual numbers of jurors who are empanelled. For a trial which is expected to last no more than three months, 12 jurors are empanelled; for a longer trial, up to 15 jurors can be empanelled (only 12 of whom are entitled to participate in the deliberations, following a selection process determined by ballot).

189 In [382] her Honour acknowledged the fact that the Court does not know who will be on the panel (and, accordingly, what proportion of its members will seek to be excused on the ground that they have a fixed view, or, indeed, for any other reason) and therefore found, on that basis, that there was a prospect of swearing a jury (that is, 12 or 15 people who had not sought to be excused). The reason for her Honour's addition of the words, "however difficult or ultimately impossible that might prove to be" is less obvious. In the context of what her Honour said in [381] and the balance of the first sentence of [382], it would appear that the difficulty or potential impossibility relates to the numbers required to be in the jury panel to make sufficient allowance for those who might seek to be excused. This interpretation is consistent with the correct test having been applied by her Honour and what was said in [381]-[382] amounting to an excursion into the practicalities of empanelment rather than an application of the substantive test.

190 In the second sentence of [382], her Honour simply restated the assumption that jurors abide by directions from the trial judge, including a direction in terms of the statutory prohibition in s 68C(1) of the *Jury Act 1977* (NSW), which provides that "[a] juror for the trial of any criminal proceedings must not make an inquiry for the purpose of obtaining information about the accused, or any matters relevant to the trial, except in the proper exercise of his or her functions as a juror."

191 Indeed, [381]-[382] of the judgment would appear to be a response to Mr Boulten's oral submission that it would be "next to impossible to empanel on the jury 12 people or more who don't know about the podcast, hadn't heard of the case and haven't already formed a view that a lot of people know if not believe that he's guilty". Read in this way, this portion of her Honour's judgment constituted an assurance to the applicant that her Honour acknowledged the difficulty and potential prejudice posed by the Podcast and was contemplating, in a concrete way (as was done by the trial judge in *Glennon*), how the process of empanelment would be conducted.

192 In my view, when [381] and [382] are read in the context of her Honour's judgment as a whole, it is apparent that her Honour did *not* apply the incorrect test. These paragraphs amount to no more than an exploration of how the process of empanelling a jury will operate in the present case. This exploration is consistent with other passages in her Honour's judgment where she has set out questions that could be asked of the panel or posited directions that could be given to the jury once sworn to safeguard the fairness of the trial.

193 Even if [381]-[382] were regarded as amounting to an infelicitous use of language or even as posing *an* incorrect question, I am not persuaded that they are sufficient to cause the discretion to miscarry. The correct test was stated and applied in the judgment, most evidently in the conclusion in [441].

194 For these reasons, I am not persuaded that ground 4 has been made out.

Grounds 1 and 2: alleged unreasonableness of the decision to refuse a permanent stay

195 As set out above, Mr Boulten recast grounds 1 and 2 as amounting, in substance, to an allegation that it was not reasonably open to the primary judge to refuse a permanent stay. This ground raises the principles which determine whether a permanent stay is warranted in a particular case, which have been summarised above.

196 I note for completeness that it was common ground that, because the accused has a right to be tried by a jury, the primary judge did not, and ought not, take into account the availability of a trial by judge alone when exercising the discretion. It was also common ground that, in the event that this Court were to re-exercise the discretion, this factor would be irrelevant.

197 I propose, for convenience, to address the submissions made by the applicant by reference to the topics raised by Mr Boulten. However, it is plain that the question whether a permanent stay is required (and whether it was open to

her Honour to refuse one) depends on the cumulative effect of all the factors identified.

The effect of the Podcast generally

198 Mr Boulten took this Court through some of the particularly inflammatory and prejudicial passages in the Podcast and associated reporting which ranged over topics which included the following:

(1) The insinuation that the police corruption was the reason the matter had not been properly investigated at the outset;

(2) The suggestion that the applicant had an unhealthy relationship with his twin brother, who had helped him dispose of Ms Dawson's body because "he may have needed some help";

(3) Cromer High School was the site of a sex ring whereby teachers had sexual relationships with their students;

(4) The present case was similar to the case of Scott Volkers, the swimming coach who was charged with sexually assaulting a number of young swimmers, in which the DPP also declined to prosecute;

(5) The applicant moved in circles which included Neddy Smith and Mr Hayward, notorious hitmen;

(6) The Commissioner believed that the previous investigations had been flawed but that he endorsed the Podcast and had worked collaboratively with Mr Thomas to achieve "justice for Lynette Dawson and her family";

(7) Following episode 4 (the "Soft Soil" episode), the police had conducted further excavations of the Bayview property, thereby emphasising the symbiotic relationship between the police investigation and the Podcast;

(8) The Commissioner and Mr Thomas were on close terms and prepared to lunch with each other and exchange text messages (thereby giving credence to the allegations made in the Podcast);

(9) The applicant was exercising his right to silence because his brother, Peter, was a lawyer who would have advised him not to talk and not to defend himself by giving his side of the story;

(10) Mr Linden's emotive language that he had "shivers" down his spine, when he heard of the applicant's interest in excavation work done on the Bayview property by subsequent owners, Mr and Mrs Johnston.

199 Mr Boulten submitted orally as to the effect of the Podcast on the potential jury panel:

> "Thousands and thousands of people probably formed that view, if not tens of thousands, and in those circumstances the jury pool is highly likely to have people who are resistant to persuasion in the courtroom. They will start with a predetermined view of the accused's guilt.
>
> This is no theoretical construct. The accused and his lawyers know that as soon as they stand up in that courtroom and he says, 'Not guilty,' that there would be people in that courtroom who know about him and know what people have said about him and these people who have made these comments will have persuaded some at least that there's some substance already in the prosecution's allegations."

200 Mr Boulten further submitted that any instruction given to, or question asked of, the jury panel and any direction given to the jury which referred to the Podcast would inevitably put the jury on notice of its existence and its prejudicial capacity and any attack advanced by the applicant on the credibility of a witness on the basis of their contribution to, or role in, the Podcast would have the same effect. He contended on that basis that elimination of the influence of the Podcast on the trial was impossible.

201 A statement to the panel that they may have become aware of "publicity" concerning the accused is commonly made before applications to be excused are entertained, including on the basis that a panel member might, by reason of publicity or some other matter, not feel able to bring an unbiased mind to

the trial of the accused. It is sufficient to identify publicity in a generic way without descending to the detail of what it is or where it might be found (which would be self-defeating). Further, it is not uncommon that cross-examination of a witness on the basis of a prior inconsistent statement is conducted in such a way as to conceal the circumstances of the prior inconsistent statement from the jury. Examples include where evidence has been given at a previous trial which has resulted in a hung jury or where a conviction has been quashed and a new trial ordered. The convention is that the cross-examiner asks whether the witness recalls giving evidence (or making a statement) "on another occasion". This course is generally followed by a direction given by the trial judge to the jury that it is not to speculate about the occasion and that there are interlocutory steps in proceedings such as these where a witness might be required to give evidence.

202 If there is a concern about what might come out in a trial, there is always the possibility of a *voir dire* or a *Basha* inquiry (named after *R v Basha* (1989) 39 A Crim R 337 (Hunt J, Carruthers and Grove JJ agreeing)), which permits defence counsel to cross-examine a Crown witness in the absence of the jury, or some other procedure which is conducted in the absence of the jury, where such difficulties can be explored without compromising the jury as the tribunal of fact.

203 The primary judge's findings, as set out above, demonstrate that her Honour was plainly aware of the prejudicial nature of the Podcast and its ubiquity (at least in certain circles). It was open to her Honour to find that the measures she outlined would be sufficient to overcome the prejudice, as they were held to be in *Glennon* and *Dupas*.

204 Mr Boulten also raised the spectre of potential (or actual) jurors downloading the Podcast and thereby becoming privy to highly prejudicial material. This is a risk in any trial which has been attended by substantial pre-trial publicity, including *Glennon* and *Dupas* where the sources which contained the damaging material was still available (except in the case of radio broadcasts which would have been unlikely to be accessible) in the form of past editions

of newspapers, books or websites. This risk, as the authorities referred to above have established, can be remedied by steps taken in the course of empanelment and the trial proper.

205 There is the additional safeguard of directions given to the jury about misconduct and the obligation of each juror not only to abide by judicial directions, but also to inform the trial judge (by note) or the Sheriff's officer, of any suspected misconduct by another juror so that the question of discharge can be addressed by the parties and determined by the trial judge: see, for example, *R v Sio (No 3)* [2013] NSWSC 1414, where a juror who had conducted internet research was identified by the foreperson and discharged pursuant to s 53A of the *Jury Act*, following an investigation into her misconduct by the trial judge who had been alerted to the conduct by the Sheriff's Officer, following a report from the foreperson.

The effect of the conduct of serving or retired public officials in connection with the Podcast

206 Mr Boulten sought to place the present case into the *Tuckiar* category by relying on what Mr Linden, Mr Milovanovich and the Commissioner had said on the Podcast, which he submitted was not mere "media opinion" but, in the case of Mr Linden, was a statement by someone who had actually acted for him (as Tuckiar's counsel had when making the statement in open court as to his client's guilt). Mr Boulten accepted that there was no direct analogy between the revelation of guilt based on privileged communications (as in *Tuckiar*) and speculation about guilt by two magistrates and the Commissioner in the present case but contended that the differences were ones of degree. He submitted that the conduct of the two magistrates and the Commissioner amounted to "perfidy going to the root of the trial" which was analogous to the conduct of the ACC in *Strickland*.

207 I am not persuaded that the conduct of Mr Linden, Mr Milovanovich or the Commissioner, either separately or cumulatively, is sufficient to bring the present case into the rare category to which *Tuckiar* and *Strickland* belong. The readiness of present or former public officers to venture their views about

the applicant's guilt in the present case was, at best, unfortunate, and, at worst, inappropriate. While the expression of their views is prejudicial to the applicant's trial, the prejudice can be ameliorated by appropriate directions to the jury, as her Honour found. The present case is to be contrasted with *Tuckiar* and *Strickland*, where there was substantial illegality associated with the relevant conduct. In *Tuckiar*, there was a fundamental breach of legal professional privilege which irremediably compromised the accused's right to silence by disclosing an alleged confession made to his counsel. In *Strickland*, the "profoundly unlawful" investigation involved an unauthorised compulsory examination, which also irremediably compromised the appellant's right to silence because it locked him into a version from which he could not depart in the trial.

The risk that witnesses will be contaminated by the Podcast

208 Mr Boulten also submitted that witnesses could have been contaminated by listening to the Podcast or otherwise becoming aware of it, without necessarily appreciating the effect the Podcast was having on their recollection. In oral argument, he instanced a witness, Beverley McNally, who had been a babysitter for the Dawson children in 1979 when she was a Year 11 student at Cromer High School, before Ms Curtis took over that role. Ms McNally's evidence as to the violence inflicted by the applicant on his wife is to be relied on by the Crown as evidence of his animosity towards Ms Dawson.

209 In her police statement made on 5 July 2018, Ms McNally said that she had become aware of the Podcast and had listened to the first episode. She contacted Mr Thomas and was interviewed by him for the Podcast at some time after April 2018 (when the first episode was broadcast) and before 5 July 2018 when she made her statement to police. In the course of the interview (the transcript of which was tendered at first instance), Ms McNally told Mr Thomas that she had seen the applicant "hit" Ms Dawson with a tea towel. Mr Thomas then asked her to clarify what she meant in the following exchange:

> "[Mr Thomas]: So the tea towel incident? What do you mean? Like, **he flicked it at her or he whipped her with it, or wha**t?

> [Ms McNally]: Yeah, he **whipped** her with it, so, in, in the kitchen, but then they tried to cover it up because they didn't realise I was actually walking in."
>
> [Emphasis added.]

210 In her statement to police, Ms McNally described seeing the applicant "whip" Ms Dawson with a tea towel, as a result of finding a lipstick mark on a glass in the kitchen. Mr Boulten contended that the use of "whip" rather than "flick" indicated unconscious contamination and was evidence of the prejudice occasioned by the Podcast and by the way in which Mr Thomas interviewed Ms McNally.

211 I accept that "whip" connotes punishment and that this word appears to have been suggested by Mr Thomas. However, before this exchange, Ms McNally had already volunteered that she had seen the applicant "hit" Ms Dawson if something was "out of place".

212 It is a matter of common experience in a criminal trial that a witness who has (necessarily, having regard to the disclosure requirements) made a statement will not give evidence word-for-word in accordance with the statement. Sometimes the changes are neutral but, on other occasions, they reflect a difference in tone. Crown witnesses, particularly in a murder trial, are rarely truly independent in that each is likely to have a view as to whether the accused is guilty. This view, which is almost certainly inadmissible, may percolate into the vocabulary which a witness uses when giving evidence, whether the witness is aware of it or not. Matters such as the words used by witnesses, their demeanour and their relationship with the accused or the deceased are all matters which are within the province of the jury and are to be weighed in the balance with all the other evidence. Whether the use of the word "whip" was as a result of Mr Thomas's leading question is a matter of conjecture. I do not regard it as tending to establish a risk of unconscious bias. Further, as set out above, Ms McNally was one of very few Crown witnesses who were identified as a result of the Podcast. As Detective Poole said, the risk of contamination is much less for the vast majority of Crown witnesses who had already given statements before the Podcast was broadcast.

The significance of the grant of a temporary stay

213 Mr Boulten further submitted that there was a material inconsistency between, on the one hand, her Honour's finding that the prejudice to the applicant could be remedied or ameliorated by polling the jury panel and giving directions to the jury once selected and, on the other, her Honour's preparedness to grant a temporary stay until June 2021. He contended that the grant of the temporary stay was consistent only with an acceptance that the applicant's trial would be unfair if conducted prior to June 2021. Mr Boulten submitted that if it was *unfair* prior to June 2021 (since, on that basis, directions would be insufficient to cure the prejudice) it could hardly be *fair* after that date, since there would be no basis for any confidence that directions would be sufficient to cure the prejudice. He relied on this alleged inconsistency in support of his argument that the decision to refuse a stay was legally unreasonable.

214 I regard this alleged inconsistency as more apparent than real. Her Honour observed at [440] that "delay in the appointment of a trial date will also have the likely effect that the adverse impact of the podcast will progressively deteriorate as memories of it recede". Thus, there is no particular significance to be attached to June 2021 (which was in the order of 9 months after delivery of her Honour's judgment), since the jury panel's members' recollections of the Podcast can be expected to fade over time rather than disappear on a particular date. The delay in the trial until a date after June 2021 (assuming this to have been a choice rather than an inevitable consequence of the demands of the criminal list in the Common Law Division) ought, in my view, to be regarded as another safeguard imposed by the Court for the benefit of the applicant.

215 The Podcast can be expected to suffer the same fate as the media articles, books and websites in *Glennon*, where, although 33-43% of the sample of the adult population polled had heard of Glennon in some form or other, no respondent to the survey volunteered knowledge of any of his prior convictions. For all the Podcast's popularity, it can hardly be expected that

interest and recollection will be sustained indefinitely, particularly having regard to the ubiquity of so-called "True Crime" as a means of popular entertainment as well as supervening news stories which have dominated the media in New South Wales since, which include the 2020 bushfire season; the COVID-19 pandemic and the 2021 floods. The Crown Case Statement could be regarded as being at least as incriminating as the Podcast, although the Podcast contained material which was presented in a highly repetitive, prejudicial, sensationalist and inflammatory way, and the Crown Case Statement is confined to evidence which is either admissible or arguably admissible.

The effect of delay

216 Although it is not appropriate for a person to be charged when the available evidence is adjudged by the DPP to be insufficient to entitle a jury to convict on a reasonable basis (since the result will be either an acquittal or an unreasonable verdict of guilty), experience indicates that further evidence might come to hand which strengthens the evidence of guilt and makes it proper to prosecute. As Mr Boulten acknowledged, the police should never "comprehensively close a file into a murder" and that it should always be available and ready to reopen to continue the investigation. The reasons for this are plain. Murder is a serious crime. Allowing a suspected homicide to go unprosecuted where there is a suspect tends to diminish confidence in the administration of justice and may leave open the way for vigilantism. As Madam Crown said at the outset of her submissions, the charge in the present case is one of murder and, as such, is "the most serious offence in the criminal calendar". That the alleged victim was the applicant's wife makes it, if proved, "the most extreme act of domestic violence".

217 The passage of time is not, of itself, an indication of police ineptitude or lack of concern for putting together a brief of evidence for the DPP. Although criticisms were made of the earlier investigations, the police continued to investigate, not one but two coroners referred the matter to the DPP and the DPP twice refused to prosecute, for the reason that the evidence was thought

to be insufficient to support a conviction. The additional evidence identified by her Honour was what, as her Honour found, made the difference to the DPP and caused the charging of the applicant.

218 Because of the inappropriateness of charging an accused on indictment before there is sufficient material on which the person could properly be convicted, there is not uncommonly a delay between the incident which is the subject of the charge and the eventual charging of an accused. In the present case, the delay was occasioned by difficulties of proof and the undesirability and inappropriateness of proceeding without sufficient evidence. The delay did not reflect any lack of interest on the part of police. Indeed, the doubling of the reward from 2010 to 2014 was an indication that the police were still hopeful of obtaining further evidence to implicate either the applicant or someone else in the homicide of Ms Dawson. It was open to her Honour to find that any prejudice arising from delay, together with the other matters of potential prejudice to the applicant, could be sufficiently ameliorated by the giving of directions, as commonly occurs in criminal trials where the trial takes place, for whatever reasons, years after the events which are the subject of the charge.

Conclusion

219 Ultimately the question whether legal unreasonableness has been established is a matter of conclusion since it does not depend on the establishment of patent error. Having regard to the matters set out above, it was open to her Honour to refuse the permanent stay. The occasions on which a permanent stay of criminal proceeding on the basis of pre-trial publicity and delay will be warranted are very few. I do not regard the conduct of the public officers referred to above as sufficient to put the present case into the rare category exemplified by *Tuckiar* and *Strickland* where there is nothing a trial judge could do to remedy the prejudice to the accused. It was open to her Honour to be satisfied that steps could be taken by the trial judge, both in the course of empanelment and in the course of the trial, to remedy the prejudice that would otherwise be suffered by the applicant by reason of the individual and

cumulative effect of the factors relied on by Mr Boulten. For these reasons, neither ground 1 nor ground 2 has been made out.

Further evidence sought to be adduced on appeal

220 As referred to above, this Court ruled that the further evidence was admissible only in the event that this Court found error and was required to re-exercise the discretion whether to order a permanent stay. As I am not persuaded that the applicant has established error, it is not necessary to address the Crown's further objections to particular paragraphs of the affidavits of Ms Skocic on which the applicant relied.

Proposed orders

221 For the reasons given above, I propose the following orders:

(1) Grant leave to appeal.

(2) Appeal dismissed.

222 **BELLEW J**: I have had the benefit of reading in draft the judgment of Adamson J.

223 I agree with the orders proposed by her Honour, and with her Honour's reasons.

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I certify that this and the 79 preceding pages are a true copy of the reasons for judgment herein of the Honourable Justice Adamson and of the Court.

DATED: 11 June 2021 Associate