Supreme Court

New South Wales

Case Name:	R v Dawson
Medium Neutral Citation:	[2022] NSWSC 552
Hearing Date(s):	2 May 2022
Date of Orders:	2 May 2022
Decision Date:	9 May 2022
Jurisdiction:	Common Law - Criminal
Before:	Beech-Jones CJ at CL
Decision:	Pursuant to s 132(1) of the Criminal Procedure Act 1986, the trial of the accused proceed by way of judge alone.
Catchwords:	CRIMINAL LAW – application for a judge alone trial – accused charged with murder – long delay in investigation and charging – "egregious" pre-trial publicity – "Teacher's Pet" podcast – podcast widely distributed – podcast directed to persuading listener of accused's guilt – participation of public officials in podcast – "interests of justice" – differences between test for stay of prosecution and making of order for judge alone trial – ability to address prejudice by steps taken at time of empanelment – application granted
Legislation Cited:	Criminal Procedure Act 1986 Jury Act 1977 Legislation Amendment (Emergency Measures) Act 2020
Cases Cited:	Arthurs v State of Western Australia [2007] WASC 182 BHP Billiton Limited v Schultz (2004) 221 CLR 400; [2004] HCA 61 Dawson v R [2021] NSWCCA 117 Dupas v The Queen (2010) 241 CLR 237; [2010] HCA

	20 Murphy v The Queen (1989) 167 CLR 94; [1989] HCA 28 R v Belghar (2012) 217 A Crim R 1; [2012] NSWCCA 86; R v Dawson [2020] NSWSC 1221 R v Simmons; R v Moore (No 4) [2015] NSWSC 259 R v Villalon [2013] NSWSC 1516 The Queen v Glennon (1992) 173 CLR 592; [1992] HCA 16 TVM v State of Western Australia [2007] WASC 299
Category:	Principal judgment
Parties:	Regina (Crown/Respondent) Christopher Michael Dawson (Accused/Applicant)
Representation:	Counsel: Mr C Everson SC; Ms E Blizard (Crown) Ms P David (Accused) Mr DR Sibtain (Media Intervenors – Nationwide News, Nine Network, Fairfax Media, Network Ten, SBS, ABC, Daily Mail, Seven Network) Solicitors: Solicitor for Director of Public Prosecutions (Crown) Greg Walsh & Co (Accused)
File Number(s):	2018/372527

JUDGMENT

1 On 3 April 2020 the accused, Christopher Michael Dawson, was arraigned in this Court on a charge that on or about 8 January 1982 he murdered Lynette Joy Dawson. He pleaded not guilty.

2 Mr Dawson's trial is currently listed to commence on 9 May 2022. On 14 April 2022, he signed an election pursuant to s 132(1) of the *Criminal Procedure Act 1986* ("CPA") for trial by a judge sitting without a jury.[1] On the same day, he filed a notice of motion seeking that order.

[1] Court Book ("CB") 1117.

3 The application was listed before me on 2 May 2022. After refusing an application for adjournment, the matter proceeded. Shortly after submissions concluded, I made an order granting the application for a Judge alone trial. I stated that the reasons for that order would be published later. This judgment constitutes those reasons.

4 At the request of the parties, I delayed publication of these reasons pending the outcome of an application for a non -publication order in respect of all aspects of the trial. On 9 May 2022, Harrison J refused that application.

Order for Judge Alone Trial: Principles

5 Sections 132, 132A and 365 of the CPA provide:

> 132 Orders for trial by Judge alone
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> (1) An accused person or the prosecutor in criminal proceedings in the Supreme Court or District Court may apply to the court for an order that the accused person be tried by a Judge alone (a ***trial by judge order***).
>
> (2) The court must make a trial by judge order if both the accused person and the prosecutor agree to the accused person being tried by a Judge alone.
>
> (3) If the accused person does not agree to being tried by a Judge alone, the court must not make a trial by judge order.
>
> (4) If the prosecutor does not agree to the accused person being tried by a Judge alone, the court may make a trial by judge order if it considers it is in the interests of justice to do so.
>
> (5) Without limiting subsection (4), the court may refuse to make an order if it considers that the trial will involve a factual issue that requires the application of objective community standards, including (but not limited to) an issue of reasonableness, negligence, indecency, obscenity or dangerousness.
>
> (6) The court must not make a trial by judge order unless it is satisfied that the accused person has sought and received advice in relation to the effect of such an order from an Australian legal practitioner.
>
> (7) The court may make a trial by judge order despite any other provision of this section or section 132A if the court is of the opinion that:
>
> > (a) there is a substantial risk that acts that may constitute an offence under Division 3 of Part 7 of the *Crimes Act 1900* are likely to be committed in respect of any jury or juror, and
> >
> > (b) the risk of those acts occurring may not reasonably be mitigated by other means.
>
> **132A Applications for trial by judge alone in criminal proceedings**
>
> (1) An application for an order under section 132 that an accused person be tried by a Judge alone must be made not less than 28 days before the date fixed for the trial in the Supreme Court or District Court, except with the leave of the court.

(2) An application must not be made in a joint trial unless—

(a) all other accused person apply to be tried by a Judge alone, and

(b) each application is made in respect of all offences with which the accused persons in the trial are charged that are being proceeded with in the trial.

(3) An accused person or a prosecutor who applies for an order under section 132 may, at any time before the date fixed for the accused person's trial, subsequently apply for a trial by a jury.

(4) Rules of court may be made with respect to applications under section 132 or this section."

365 Judge alone trials

(1) A court may, on its own motion, order that an accused person be tried by a Judge alone.

(2) A court may make an order under subsection (1) only if—

(a) the accused person consents to be tried by a Judge alone or, for a joint trial, all the accused persons consent to be tried by a Judge alone, and

(b) if the prosecutor does not agree to the accused person being tried by a Judge alone, the court considers it is in the interests of justice for the accused person to be tried by a Judge alone, and

(c) the court is satisfied the accused person has sought and received advice from an Australian legal practitioner in relation to the effect of an order that the person be tried by a Judge alone.

(3) This section applies despite any other provision of this Act, including sections 132 and 132A.

6 Section 365 was inserted into the CPA by the COVID-19 *Legislation Amendment (Emergency Measures) Act 2020*. While the effect of the pandemic has some relevance to this application, no specific submission was directed to s 365. This judgment is addressing the application by reference to ss 130 and 132A.

Leave Under s 132A

7 As this application was made less than 28 days prior to the listed trial date, the applicant must obtain a grant of leave under s 132A. In that context, it is necessary to note the chronology of the accused's application for a permanent stay of the proceedings. By a notice of motion filed 7 April 2020, Mr Dawson sought a permanent stay of the indictment on various grounds including the adverse effect of pre-trial publicity on his capacity to secure a fair trial. On 11 September 2020, Fullerton J dismissed that application although her

Honour ordered that the trial not commence prior to 1 June 2021 (*R v Dawson* [2020] NSWSC 1221).[2] The accused sought leave to appeal. On 11 June 2021, the Court of Criminal Appeal granted him leave to appeal but dismissed the appeal (*Dawson v R* [2021] NSWCCA 117).[3] On 8 April 2022, his application for special leave to appeal to the High Court was refused.[4] This application was foreshadowed at a directions hearing before the trial judge, Harrison J, on 12 April 2022 and filed shortly thereafter.

8 The Crown did not oppose the grant of leave under s 132A(1), although it contended that, considering the history of the matter, the "question of whether leave should be granted is live" especially given that the identity of the trial judge has been known for some time.[5] There is no doubt that the application for a Judge alone trial was made immediately upon (and no doubt in consequence of) the refusal by the High Court of the accused's last opportunity to obtain a stay. Both Fullerton J[6] and the Court of Criminal Appeal[7] accepted that the possibility of applying for a judge alone trial was irrelevant to his application for a stay. There is no basis for contending that this application was an instance of "judge shopping" (*R v Simmons; R v Moore (No 4)* [2015] NSWSC 259 at [33]; "Simmons (No 4)"). In those circumstances, and given that the application for a stay was based on reasonable grounds, it follows that there has not been any relevant delay in the making of the application. Given those matters, it was appropriate for leave to be granted.

Interests of Justice

9 On this application an affidavit was sworn by the accused explaining his reasons for seeking a trial by a judge alone. An affidavit was also sworn by his solicitor, Mr Gregory Walsh, to similar effect. I am satisfied that the accused has sought and received advice concerning the effect of such an order from an Australian legal practitioner (s 132(6)). Otherwise, sub-s 132(4) requires the Court to assess whether it is in "the interests of justice" to make an order for trial by judge alone. That said, the Court may refuse to make the order if the

[2] Paragraphs of that judgment will be referred to as "J[ ]".
[3] Paragraphs of that judgment will be referred to as "CCA[ ]".
[4] [2022] HCATrans 54.
[5] Crown Submissions at [9].
[6] J[439].
[7] CCA[196].

trial will involve factual issues that require the application of "objective community standards" (s 132(5)).

10 Generally, the phrase "interests of justice" envisages a broad assessment of a variety of matters, some concerning the interests of the parties to the litigation, but also "interests wider than those of either party" (*BHP Billiton Limited v Schultz* (2004) 221 CLR 400; [2004] HCA 61 at [15], and at [169] and [172]). In the context of s 132, in *R v Belghar* [2012] NSWCCA 86; (2012) 217 A Crim R 1 ("Belghar"), McClellan CJ at CL held that s 131 does not create a presumption that the trial should be with a jury which an accused person must discharge.[8] Instead, as each form of trial has its own characteristics, and depending on the particular case, the court may conclude that the interests of justice are best served by a trial before a judge alone rather than a trial by a jury.[9] Further, the subjective views of an accused, and his or her belief that a jury trial may not be fair, are relevant factors to consider however they are far from determinative. What is more significant is the reason for that preference, whether those reasons are rationally justified, and whether they bear upon the question of a fair trial.[10] The mere apprehension of prejudice in prospective jurors, not based on evidence or a matter of which the court may take judicial notice, is not sufficient to make such an order as it is contrary to the assumption which the common law makes that jurors will understand and obey the instructions of trial judges to bring an impartial mind to bear on their verdict.[11]

11 In *Simmons (No 4)*, Hamill J identified several considerations which may inform the assessment of whether the interests of justice warrant the making of an order for trial by judge alone. These include the potential to save court time and expense from having a matter proceed without a jury although the weight to be attached to this factor will vary from case to case.[12] One advantage of a trial by a judge alone is the enhanced community confidence in the verdict that may be

[8] Belghar at [96].
[9] id.
[10] Belghar at [99] and [102].
[11] Belhghar at [102]; see also R v Villalon [2013] NSWSC 1516 at [20] per Bellew J.
[12] Simmons (No 4) at [67] to [69].

derived from the provision of reasons by a judge[13] especially if it concerns complex engineering, scientific or medical issues.[14] On the other hand, there is a "public interest in the administration of justice [being] carried out in public and in serious cases by the representatives of the public sitting as jurors".[15] Many authorities point to juries as the preferred body to make assessments of the credibility of witnesses.[16] However, in *Simmons (No 4)* Hamill J regarded this factor as neutral given that judges have the "training and experience of making difficult decisions on credibility, putting aside matters of emotion, on an almost daily basis".[17]

12 In *Simmons (No 4)* at [83] to [88], his Honour noted that applications for judge alone trials based on adverse publicity were commonly made but noted that "[o]verwhelmingly it has [been] held that the prejudice identified in the application is capable of being overcome by direction[s] to the jury" (at [84]). That said, in some cases noted by his Honour the effect of the prejudicial material was so great that an order for judge alone trial was made. This is best exemplified by the following passage from the judgment of Martin CJ in *Arthurs v State of Western Australia* [2007] WASC 182 at [87] as follows:

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

Interests of Justice and the Refusal of the Stay

13 As noted, the accused unsuccessfully applied for a permanent stay of the proceedings. The basis for his application was very similar to his application for a trial by a judge alone, including the effect of "egregious" pre-trial publicity, the substantial delay in the bringing of the charges, as well as an alleged defective police investigation and police misconduct. As explained below, various

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[13] Simmons (No 4) at [70] citing Belghar at [112].
[14] Belghar at [112].
[15] TVM v State of Western Australia [2007] WASC 299 at [32]; Belghar at [119] per Hidden J.
[16] See Simmons (No 4) at [73] to [79].
[17] Simmons (No 4) at [82].

findings were made accepting these matters but it was nevertheless held that the trial of the accused before a jury should not be stayed. So far as pre-trial publicity was concerned, the stay was refused principally because of the capacity to take various measures on the empanelment of the jury to address the prejudice that was accepted could arise including the giving of directions and exempting jurors for cause (see *Jury Act 1977*, ss 14A, 38 and 46).[18] On this application the Crown pointed to a further measure namely the potential to question jurors about their knowledge of the pretrial publicity and its effect as part of the trial of a challenge for cause (*Jury Act*, s 46; (see *Murphy v The Queen* (1988) 167 CLR 94 at 103 to 104).

14 In light of the refusal to grant a permanent stay of the accused before a jury, how then can it be determined that the accused should face a trial by judge alone? The answer lies in the different tests and rationale for the grant of a permanent stay on the one hand and the making of an order for a trial by judge alone on the other. With the former, 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" (*The Queen v Glennon* (1992) 173 CLR 592; [1992] HCA 16 at [605]-[606] per Mason CJ and Toohey J cited in *Dupas v The Queen* (2010) 241 CLR 237; [2010] HCA 20 at [18]; "Dupas"). In discussing the rationale for this approach, the High Court in *Dupas* observed as follows (at [36] to [37]):

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

[18] J[382], J[441].

15 An application for a judge alone trial, resting as it does on an assessment of whether the "interests of justice" warrant such an order, poses a much lower test than that required to grant a permanent stay in that the latter remedy is saved for an "extreme case" where there is nothing that a trial judge can do to relieve the relevant unfairness. The powerful consideration noted in *Dupas* at [37] namely that the public interest in having those charged brought to trial has no significance to an application for a judge alone trial as the entire premise of the application is that the accused will face trial. Further, *Dupas* contemplates the possibility that a Court may refuse a stay in circumstances where a trial judge can relieve, but not necessarily eliminate, the unfairness to an accused person resulting from pre-trial publicity. Following such a refusal, this still leaves the Court to consider whether the "interests of justice" warrant an order for a trial by judge alone. At a practical level, there has not been any case where a permanent stay of criminal proceedings initiated by a state prosecutor has been granted based on adverse publicity alone.[19] However, there have been numerous instances of such publicity warranting an order for a trial by judge alone.

The Crown Case and Pre-trial Publicity

16 As noted, the accused contends that it is in the interests of justice to order a trial by judge alone because of a combination of egregious prejudicial pre-trial publicity, specifically that associated with the "Teacher's Pet" podcast (the "Podcast") described below, the delay in the charging of the accused, an alleged defective police investigation and police misconduct, concerns about the assessment of the accused's credibility arising out the pre-trial publicity, the subjective views of the accused as to likely fairness of a trial before a jury, and the anticipated length of the trial.[20]

17 To address these submissions and the Crown's response, it is necessary to describe the Crown case, the delay in the charging of the accused, and the pretrial publicity. Although much, if not all, of the evidence adduced in support of the application for a stay was tendered on this application, both the accused and the Crown were content to rely on Fullerton J's and the Court of Criminal

[19] J[384].
[20] Accused Submissions dated 22 April 2022.

Appeal's description and findings concerning the Crown case, the history of the police investigation and the events leading up to the charging of the accused. The following is largely taken from those judgments.

The Crown Case

18 The Crown case was summarised by Fullerton J.[21] In summary the Crown contends that the accused murdered his then wife, Lynette Dawson, sometime shortly after she was seen leaving a childcare centre at Warriewood on the afternoon of Friday 8 January 1982.[22] Ms Dawson's body has not been found and no human remains matching her have been located in the unidentified remains indexes of any Australian State or Territory.[23] The Crown case is circumstantial and thus it must exclude any reasonable hypotheses consistent with the accused's innocence including that Ms Dawson left the accused and their children and assumed a false identity.[24] Before Fullerton J, the Crown also accepted, inter alia, that it had the obligation of discounting any reasonable possibility that the various reported sightings of Lynette Dawson after 8 January 1982 are reliable.[25]

19 Justice Fullerton identified various facts and material upon which the Crown will rely to discharge its burden of proof, either as "circumstances" or perhaps tendency evidence. Although the following should not be taken as exhaustive, I note seven of those matters. First, the Crown intends to adduce evidence of the importance to Ms Dawson of her family and her children and the inherent unlikelihood that she would desert them and thereafter make no contact.[26] Second, the Crown will contend that the applicant told a lie on 9 January 1982 about receiving a call from Ms Dawson to account for her disappearance.[27] Third, the Crown intends to adduce evidence that the accused had a motive to kill Ms Dawson namely his desire to maintain a sexual relationship with a schoolgirl, JC, he met while teaching at a high school and marry her.[28] JC

[21] J[35] to [81].
[22] J[36].
[23] J[36].
[24] J[39].
[25] id.
[26] J[46].
[27] J[48] to [51].
[28] J[52] to [58].

moved into the marital home soon after 8 January 1982 and married the accused in January 1984.[29] They later separated and divorced. JC is a Crown witness. Fourth, the Crown intends to adduce evidence of marital disharmony including physical abuse between the accused and Ms Dawson.[30] Fifth, the Crown intends to adduce evidence that the accused referred to retaining a hired killer to have Ms Dawson murdered.[31] Sixth, the Crown intends to adduce evidence of the supposedly perfunctory efforts made by the accused to pursue marriage counselling with Ms Dawson shortly before 8 January 1982.[32] Seventh, the Crown intends to rely on various aspects of the accused's conduct after that date including his institution of proceedings in the Family Court of Australia in 1983 for the dissolution of his marriage and obtaining custody of his children[33] and statements he made when reporting Ms Dawson missing.[34]

20 The current estimate of the trial, assuming that it takes place before a jury, is six to eight weeks. The Crown intends to call approximately 50 witnesses and tender evidence from other witnesses who are relevantly "unavailable".[35] There will be a significant number of exhibits tendered which will be largely documentary. At the hearing of this application there was some debate about whether the hearing of the trial would be shortened if an order for a judge alone trial was made. The Crown submitted that it would not be reduced to the same extent as other trials because there are likely to be challenges to the credibility of several Crown witnesses which will necessitate their being called and providing extensive oral evidence (as opposed to merely tendering their statements). I accept that contention. However, there are other factors that are likely to lead to a significant shortening of the length of the trial if an order is made for a judge alone trial. The Court's experience to date has been that there have been very significant delays in jury trials from the impact of the pandemic upon the availability of jurors, the accused, witnesses, lawyers, and

[29] J[68].
[30] J[59].
[31] J[61].
[32] J[64].
[33] J[71].
[34] J[73] to [81].
[35] CB 1163.

court staff including judges. Trials cannot proceed unless all jurors, the accused (and the judge) are present along with the minimum personnel necessary to conduct the prosecution and defence case. There are significant health and safety protocols affecting the use of juries which is only to be expected when 12 to 15 people are compelled to attend court and sit in a room together. The absence of a jury reduces the likelihood of interruptions due to COVID and reduces the time necessary to comply with those protocols. It allows the Court greater flexibility in dealing with the absence of other Court participants. Accordingly, I am very confident that the trial of this matter before a jury would take much longer than 6 to 8 weeks and that a trial before a judge alone will take much less time than a trial before a jury. That said, the burden of producing reasons in a case such as this should not be underestimated. While the length of the trial will be reduced if the trial proceeds before a judge alone, the time to verdict is not likely to be significantly reduced. Nevertheless, the former is a matter that suggests that the interests of justice favour a judge alone trial, although it is not determinative.

21 Two further matters should be noted. First, the parties debated whether the necessity to assess the credibility of the Crown witnesses and the accused, should he give evidence, was a matter that was better undertaken by a jury or a judge sitting alone. The circumstance that the witnesses are generally lay people recalling events in their daily lives from many years ago, suggests that an assessment of their credibility is best undertaken by a jury comprised of a cross section of the community. The accused contended that was subject to considering the potential prejudicial effect of the publicity. I address that below.

22 Second, it was not suggested that any aspect of the Crown case involves an application of community standards as referred to in s 132(5) of the CPA. However, the Crown submitted that a consideration of its case as explained above is a matter that is better undertaken by a jury in that it involves an assessment of the significance of how the accused (and others) behaved as part of the assessment of whether its circumstantial case was established. The Crown submitted that a jury is best placed, and would be seen by the public as being best placed, to determine those matters compared to a judge sitting alone. I accept that there is force in that contention, but it should not be taken

too far in the context of a judge alone trial as, unlike a jury, a trial judge will produce reasons explaining why, for example, some instance of behaviour by the accused is or is not a matter pointing to his guilt.

The Investigation(s) and the Delay

23 From the time the accused reported Ms Dawson missing until the early 1990's, her disappearance was treated as a missing person investigation. As a result of JC separating from the accused in early 1990,[36] two Detectives were appointed to investigate her disappearance as a suspected homicide (the "Mayger investigation"). As part of this investigation, the accused was interviewed in January 1991. The investigation was suspended in May 1992.[37] A further investigation commenced in July 1998 (the "Loone investigation") It resulted into two Coronial inquests, one in February 2001 before Acting Deputy State Coroner Stephenson[38] and another in February 2003 before Deputy State Coroner Milovanovich (the "second inquest"). Both Coronial inquests resulted in referrals to the Director of Public Prosecutions ("DPP")[39] and on both occasions the DPP declined to prosecute the accused.[40] In correspondence sent in December 2010, August 2011 and November 2011 the DPP confirmed the decision not to prosecute the accused.[41]

24 In July 2015, Detective Poole of the Unsolved Homicide Team was appointed as the officer in charge of a further investigation.[42] In April 2018, further material gather by Detective Poole and internal police legal advice was provided to the DPP.[43] In early December 2018, the police were advised that the DPP intended to prosecute the accused for the murder of Ms Dawson.[44] The accused was arrested on 5 December 2018 at his home in Queensland.[45]

25 The accused's submissions contended that the delay in charging him occasioned him prejudice in that the police did not investigate various matters

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[36] J[156].
[37] J[84].
[38] J[88].
[39] J[89] and J[98].
[40] J[91] and J[99].
[41] J[104].
[42] J[110].
[43] J[116].
[44] J[117].
[45] Crown Case Statement at [272].

concerning Ms Dawson's alleged disappearance in 1982 that might have supported his case.[46] It was also submitted that the officer in charge of the Loone investigation had a "fixed and tendentious view that the [accused] had murdered Lynette Dawson" which was said to be demonstrated by his (alleged) deliberate failure to pursue various lines of inquiry that were potentially supportive of the accused's case.[47] Of itself, this potential prejudice does not bear upon whether the interests of justice warrant a judge alone trial. A jury can be directed as to the effect of delay on the evaluation of their evidence as well as the effect of any deliberate failure to investigate some matter. However, the accused submitted that the effect of any such direction was undermined by the adverse publicity from the Podcast which set out to undermine his version of events.[48] The effect of that publicity is considered next.

Prejudicial Publicity

26 Before Fullerton J, there was tendered excerpts of an *Australian Story* episode entitled "Looking for Lyn", broadcast on the ABC in August 2003, and excerpts of an episode of *A Current Affair* dedicated to Lynette Dawson's disappearance broadcast in October 2015. It was not submitted that the publication of these stories warranted an order for trial by judge alone. Her Honour also received evidence concerning the contents of a television program known as "Studio 10" which was broadcast in August 2018[49] and a *60 Minutes* broadcast in September 2018[50] that was found to have endorsed the themes of the Podcast.[51] The prejudicial effect of that Podcast was the principal focus of this application.

27 The Teacher's Pet Podcast was broadcast or published in sixteen episodes and one "Special Update Episode". Successive episodes were available to be downloaded from various online platforms between 18 May 2018 and 5 April 2019, including Apple Podcasts, Google Podcasts, Spotify and *The Australian* website, free of charge, as they became available. This period coincided with the DPP's consideration of charging the accused and his arrest. Ultimately, the

[46] Accused Submissions at [42] to [43].
[47] Accused Submissions at [45] and [46].
[48] Accused Submissions at [44].
[49] J[17].
[50] J[9].
[51] J[17].

entire Podcast was available to be downloaded, also without charge, from Apple Podcasts, Google Podcasts, Spotify and *The Australian* website.[52]

28 As at the time of the stay application before Fullerton J, the podcasts were no longer available to be downloaded, although it was possible to obtain online a "short bio about the broadcast and a list of episodes".[53] Those "short bios" included prejudicial references to the accused and his likely guilt such as an assertion that in one episode "former Coroner Carl Milovanovich explains why he believes a jury would convict [the applicant] over the probable murder of Lyn [Dawson]".[54] Further, even though downloads of the Podcast were not available in Australia, the Podcast was still available to those who had already downloaded it and could be downloaded in this country from overseas websites using a Virtual Private Network application.[55]

29 Justice Fullerton accepted that the Podcast was downloaded over 1 million times by listeners in "the Sydney region" (being the presumed catchment of a jury pool for a trial of the applicant in Sydney) between May 2018 and July 2019 before it was taken down from the website of *The Australian* newspaper.[56] Her Honour found that the Podcast was the subject of commentary across all media platforms and was "resoundingly endorsed and promoted" by a prominent talk back radio host.[57]

30 Her Honour set out the following precis of each episode of the Podcast:[58]

> "Episode 1: Bayview: Lyn was a devoted wife and mother. She adored her husband, but he betrayed and humiliated her in the most callous way. Now she's gone – missing, a likely victim of murder.
>
> Episode 2: Cromer High: Cromer High School's pin-up sports teacher Chris Dawson pursued year 11 student [JC] with the sort of relentless determination he showed as a star of rugby league. Chris had model good looks, an easy charm, and students looked up to him. Other teachers followed his lead, seducing vulnerable school girls as those in charge looked away.
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> Episode 3: Bruised: As Chris brazenly moved his teenage lover into the family home, Lyn saw the cracks in her marriage widen. It was crumbling all around her. Unable to believe the worst of her husband, she responded with denial,

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[52] J[208].
[53] J[210].
[54] J[211].
[55] J[212].
[56] J[18].
[57] J[206].
[58] J[232].

but to her family and friends Lyn's suffering was clear. And the toll was not just emotional. In this episode, a former babysitter for the Dawsons speaks for the first time about the violence she witnessed in the home.

Episode 4: Soft Soil: Humiliated and broken by her husband's affair, Lyn finally asked [JC] to leave the Bayview home. The teenager walked out, and into the home of Chris's twin brother, Paul, a few hundred metres down the same street. Tensions continued to rise. And then suddenly, Lyn vanished. In this episode, a surprise new witness speaks publicly for the first time about something he was told in 1987, indicating the possible whereabouts of a body.

Episode 5: A Lovely Drink: In January 1982, as most Australians enjoyed a carefree holiday season, Lyn Dawson was trying to pick up the tattered threads of her marriage. [JC] was taking tentative steps to extricate herself from her affair with Lyn's husband. And Chris Dawson was desperately seeking solutions. In this episode, a damning piece of evidence – once though lost – is recovered, and it is something that should be vitally important to the Director of Public Prosecutions.

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

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

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

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

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

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

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

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

Episode 14: Decision Time: After 36 long years, failed police investigations, two coronial inquest, and countless appeals from Lyn's family, the case is stronger now – and once again it's in the hands of the office of the DPP. Regardless of their decision, the NSW police commissioner pledges to keep investigations going, and he plans to order a much more significant dig at the Bayview property. In this episode, former coroner Carl Milovanovich explains why he believes a jury would convict Chris over the probable murder of Lyn – and why the case still troubles him today, 15 years after his inquest in a Sydney courtroom. And Lyn's daughter Shanelle has final words in honour of her mother.

Episode 15: Digging: Following an incredible groundswell of community interest ignited by this podcast, September saw a stunning development in the case with police returning to the Bayview house to conduct a new and more thorough search for the remains of Lyn Dawson. This dig was a necessity - not just to try to uncover new evidence, but also to restore public confidence and to prove to Lyn's family that the police, this time, would do their jobs properly. Meanwhile, new witnesses come forth with compelling stories of encounters with Chris Dawson and his explosive temper.

Episode 16: Arrest: Nearly 37 years after Lyn Dawson disappeared, police have arrested Chris Dawson over the alleged murder of his wife, taking him into custody and preparing his extradition to Sydney where he will face court. When the knock on the door came, the 70-year-old was calm. The timing may have been a surprise, but he'd known for a long time that this day may come. Calling the matter "a cold case murder", the magistrate denied Dawson's application for bail citing a high flight risk, and said the crown alleged domestic violence allegations against Chris Dawson would be raised in evidence, as well as testimony from [JC]. But Dawson's family believe he will be cleared, releasing a statement saying that he is innocent and that there is clear and uncontested evidence that Lyn Dawson was alive long after she left her husband and daughters.

Special Update Episode: As Chris Dawson's defence team, police and prosecutors work hard to prepare for a murder trial which may be heard some time next year, 2020, the team behind The Teacher's Pet podcast series discloses a new development - taking down the first 16 episodes in Australia, to help ensure Chris gets a fair trial. And Greg Walsh, Chris's experienced lawyer, flags some of the issues and claims which are important to him and the accused."

31 From this summary, it is apparent that the Podcast contains a discussion of the accused's guilt with several persons, some of whom are to be called as witnesses in the Crown case and some who are not. In terms of its overall effect, it suffices to note that, in the Court of Criminal Appeal, Bathurst CJ, summarised the "object" of the Podcast as to "incite prejudice against the accused in a sensationalist fashion with a view to convincing listeners of his guilt and the need for him to be prosecuted".[59] The findings of Fullerton J at first instance[60] and Adamson J (with whom Bellew J agreed) in the Court of Criminal Appeal[61] were to similar effect.

32 Episode 13 of the Podcast included an interview from the Inspector of Police who appointed the officer in charge of the second investigation, Inspector Hulme.[62] The interview contains various observations by Inspector Hulme concerning the accused's behaviour which Fullerton J found implied that that the accused "should confess to having murdered his wife and if he pleads not guilty to her murder, he is concealing his guilt".[63]

33 One extraordinary feature of the Podcast is the expression of opinions on the accused's guilt by three former public officials with important roles in the criminal justice system and who were not part of any of the police investigative teams.

34 Mr Jeff Linden was the accused's solicitor. He acted for the accused in the proceedings in the Family Court noted above (at [18]). He was interviewed for the podcast by which time he had been appointed as a magistrate. During various episodes Mr Linden either expresses scepticism about the proposition that Ms Dawson left her family ("my personal view is that she didn't walk out")[64] or is referred to as having expressed that opinion.[65] Mr Linden also recounts a conversation with the subsequent owners of the accused and Ms Dawson's home[66] which becomes the foundation for a suggestion, or at least an

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[59] CCA [9].
[60] J[328].
[61] J[68].
[62] J[239].
[63] J[241].
[64] J[253].
[65] J[257].
[66] J[253].

insinuation, that her remains were buried there.[67] This takes place in a context where Mr Linden is described in the broadcast as "an experienced magistrate … a highly credible source".[68]

35 As noted, in 2003 the then Deputy State Coroner Mr Milovanovich presided over the second inquest. Mr Milanovich was interviewed for the Podcast. Parts of the interview were broadcast in episode 14. He was introduced as recently retired.[69] During that episode he stated, amongst other matters, that "I just could not accept that Lyn Dawson would just disappear off the face of the earth without there being some human intervention"[70] and "the lies that I think are quite clearly being told by people … in relation to purported phone calls"[71] which appears to at least include the accused. Mr Milanovich discussed the credibility of JC who is to be called as a Crown witness,[72] the potential involvement of the accused's brother in the murder of Ms Dawson and the disposal of her body[73] and the relative strength of a circumstantial case against the accused.[74] The assessment of those matters is the sole function of the trier of fact. So far as the accused's trial is concerned, Mr Milanovich's opinions are irrelevant.

36 As at 2018 and 2019, Michael Fuller was the Commissioner of Police. An interview with him was broadcast as part of episode 14. The interview immediately preceded the interview with Mr Milanovich. At the time that download was first made available, the DPP had been requested by the police to consider charging the accused, but he had not been arrested. Fullerton J described Mr Fuller's participation in that podcast as follows:

> "315 Mr Thomas introduces the Commissioner on the basis that he (the Commissioner) has "been surprised by the many revelations, the sexual assaults against girls, and the lack of action by the police in the '80s. He's determined there'll be no cover-up on his watch".[75] Mr Thomas then invites the Commissioner of Police to tell podcast listeners "where we're up to with the

[67] J[256].
[68] J[254].
[69] J[270].
[70] J[271].
[71] J[271].
[72] J[275].
[73] J[276].
[74] J[280].
[75] CB 2467.

investigations involving both the sexual assaults and the, ah, alleged murder of Lyn Dawson?".[76]

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

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

318 When the Commissioner of Police refers to the work by the Unsolved Homicide Squad, he comments that "we are eagerly awaiting the outcome of … [the DPP's] … review of that brief of evidence". The Commissioner went on to say that the officers are looking into "potential new opportunities … of gaining evidence that we've identified through the podcast", which he went on to describe as something that has "enormous interest" and has "generated some potential, fresh leads".[77] The so-called "fresh leads" would appear to be what Mr Thomas had generated through a series of anecdotal, highly impressionistic and at times purely speculative suggestions that there would likely be the human remains of Lynette Dawson revealed on a further excavation of the Bayview property, among them Mr Thomas' repeated references to Mr Linden's conversation with Mr Johnston.

319 In the podcast, the Commissioner also adds his commentary to the commentary from the Deputy State Coroner, Mr Milovanovich, that, as the Commissioner described it, "In this day and age that story [Lynette Dawson having left her husband and children] wouldn't wash as a missing person … we wouldn't've accepted the information that was given to police".[78]

37 All these interviews were conducted and broadcast at a time when the prosecution of the accused for murder was either under active consideration or had commenced. The broadcast of these statements by such senior public officials which endorsed the object of the Podcast raises problems for the conduct of a fair trial for the accused before a jury. Each of these three

[76] CB 2466.
[77] CB 2467.
[78] CB 2469.

individuals had significant roles in the criminal justice system. A juror could reasonably assume that they all possessed particular expertise in the assessment of the guilt or innocence of accused persons or suspects even though, in the context of the accused's trial, their opinions are completely irrelevant. The propriety of each of these persons participating in this manner in the Podcast (and other aspects of their conduct) was to some extent discussed by Fullerton J[79] and then by Bathurst CJ in the Court of Criminal Appeal.[80] I will not add to that discussion. It suffices to state that, of all the features of the podcast, the manner of the participation in the Podcast of these persons who occupied such important positions in the criminal justice system was the most important feature that warranted the making of an order for a trial by judge alone.

38 Ultimately, Fullerton J found as follows in relation to the podcast:[81]

> "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."

A similar finding was made by Bathurst CJ in the Court of Criminal Appeal.[82]

Parties' Submissions about Pre-trial Publicity

39 In her written submissions, counsel for the accused, Ms David, referred to Fullerton J's finding that there was "very substantial prejudice occasioned by the broadcast" and that it had the "capacity to erode the applicant's right to silence and the presumption of innocence".[83] Ms David also noted that the Podcast included interviews with many Crown witnesses which it was contended may have affected their evidence. The submissions also note that some Crown witnesses who only emerged because of their participation in the Podcast.[84] It was submitted that if the matter was to proceed before a jury, then that the accused would be unfairly hampered in legitimately challenging their evidence by reason of their involvement in the Podcast because to do so

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[79] J[322] to [323], J[435] to [437].
[80] J[9].
[81] J[443].
[82] CCA [2].
[83] Accused Submissions at [19]; J[441] and J[443].
[84] Accused Submissions at [22] to [24].

"would invariably draw attention to the existence of the prejudicial material and result in jurors seeking out the Podcast and other media".[85] It was submitted that:[86]

> … the media publicity in this case has been of such currency and intensity as to cast doubt upon the capacity of jurors, properly directed, not to allow media publicity to distract them from their task of impartially assessing the evidence. Specifically, the exceptional nature of the pre-trial publicity and consequent notoriety which the case has attracted is likely to create a degree of prejudice in the minds of the jury which a judicial direction is unlikely to correct. This is especially so given that much of the publicity also related to matters that will not be adduced as evidence in the trial.[87]

40 The balance of the submissions on this topic address the various measures that might be available at the time of empanelment to address the risk of prejudice such as the use of an expanded jury pool and urging jurors to seek to be excused if they listened to the Podcast. It was submitted that the more the jury were reminded of the Podcast the more likely that its prejudicial effect would be reiterated rather than negated.[88]

41 In his careful submissions, the Crown Prosecutor did not dispute the "egregious content of the prejudicial pre-trial publicity"[89] but pointed to the findings of Fullerton J and Adamson J in the Court of Criminal Appeal as to how that could be addressed. In particular, the Crown Prosecutor noted that Fullerton J had ordered the trial not occur before 1 June 2021 and pointed to passages in the judgment of Adamson J to the effect that the pre-trial publicity will fade over time.[90] The Crown Prosecutor pointed to the various measures noted by Fullerton J that could take place at the time of empanelment (and throughout the trial) and that generally the law assumes that jurors will comply with their oaths and perform their duty. As for the prejudice that might be said to arise from the accused referring to the Podcast when cross-examining jurors, it was submitted that contention assumes that jurors would commit an offence under s 68C of the *Jury Act* by making inquiries about the Podcast.

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[85] Accused Submissions at [24].
[86] Accused Submissions at [28]
[87] Accused Submissions at [28].
[88] Accused Submissions at [30].
[89] Crown Submissions at [11].
[90] CCA [215]; Crown Submissions at [16].

Pre-trial Publicity and Interests of Justice

42 I have set out at [39_Ref102991117] the accused's principal submission in relation to the effect of the Teacher's Pet Podcast above. I accept this submission save that I would find that there is unacceptable risk that a judicial direction would not be able to correct the prejudice in the minds of the jury as opposed to it being "unlikely". I have also referred to the differences between the test for the grant of a permanent stay and a consideration of the interests of justice. I accept that some and perhaps much of the prejudice occasioned by the Podcast can be mitigated by the various measures noted by Fullerton J and the Crown Prosecutor. However, I do not accept that it can be eliminated. As the content of the Podcast is so pernicious in terms of prejudice, and as it was so widely distributed, the risk that the prejudice cannot be eliminated is difficult to quantify and, if it materialised in the jury, a fair trial would be seriously imperilled. This strongly suggests that it is in the interests of justice to order that the accused be tried by a judge alone. This position is made that much stronger by the potential for the accused to be placed in a position of forensic unfairness if he sought to challenge the credibility of any Crown witness because of their participation in the Podcast. The more often the Podcast is referred to then the greater potential for its prejudicial aspects to spill over into the courtroom, the jury room or both.

43 In oral submission, the Crown Prosecutor referred to the following passage from my judgment in *R v Obeid (No 4)* [2015] NSWSC 1442 at [71] to [73] in which I refused to order a Judge alone trial for a politician charged with wilful misconduct in public office:

> "71 In considering the effect of this material upon the determination of whether the "interests of justice" favour a judge-alone trial, regard must be had to the means to allay their effect on a fair trial: *R v Stanley* [2013] NSWCCA 124 at [43] per Barr AJ.
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> 72 Those means include, but are not restricted to, advising members of the jury panel to apply to be excused if they consider there is a matter affecting their capacity to decide the matter impartially, especially any prejudicial view they hold concerning the accused, and repeatedly directing the jury that they must solely restrict themselves in their deliberations to the evidence and the submissions advanced in the courtroom and put aside anything they have heard outside it.
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> 73 It is to be remembered that this is not a trial in which the Crown would lead material that, although highly relevant by its subject matter, is likely to

> prejudice a jury against the accused. Nor is it a matter where the alleged crime itself has achieved any notoriety such that a juror may believe they already know the supposedly salient or even sensational facts, and something about the accused's connection with them. Instead, the concern raised by the material is knowledge or suspicion of a prejudicial tendency or characteristic of the accused, namely, to be corrupt. In my view that is precisely the type of concern which the measures I have identified will be effective against…."

44 The Crown specifically relied on the statement in [71] and [72] concerning the various means available to the Court to address the effect on the fairness of that trial from prejudicial publicity. That can be accepted but as the Crown acknowledged, there is an important distinction between the circumstances addressed in *Obeid (No 4)* and this case. In *Obeid (No 4)*, the "material" referred to in [71] was a considerable amount of publicity over several years portraying the accused in that case as corrupt (at [32] to [64]). As the passage in [73] indicates, that material did not (generally) concern the specific crime of which that accused was charged. Instead, the publicity suggested that the accused had a tendency to be corrupt and that concern could be addressed by the means specified in [72]. By contrast, this case involves the extensive publication of material which was specifically directed to persuading the listener of the accused's guilt of the crime for which he is to now face trial. Amongst this material was the deployment of the legally irrelevant but highly prejudicial opinions of the three senior public officials noted above. The capacity of the various measures described in [72] to alleviate the risk to a fair trial in these circumstances is far more open to question than it was in *Obeid*. In addition, two of the five elements of the offence charged in *Obeid* involved the application of "community standards" within the meaning of s 132(5) (at [87]). Leaving aside the evidentiary assessments noted above (at [22_ Ref102987461]), there is no counterpart here.

Conclusion

45 I have canvassed the various factors that inform an assessment of whether the "interests of justice" warrant the making of an order for trial by Judge alone. Such an order is likely to significantly reduce the length of the hearing although the time to verdict is unlikely to be reduced much, if at all. Many of the issues in the trial are suggestive of it being more appropriate for jury determination but the production of reasons is a significant advantage. There can be no doubt

that the accused's subjective opinion is that he is unlikely to receive a fair trial before a jury. More importantly the reasons for that opinion being the effect of the Teacher's Pet podcast point strongly, if not overwhelmingly, in favour of a trial by judge alone.

46 Much of this area of discourse is directed to an assessment of whether the community can have confidence in the conduct and outcome of a trial conducted before a jury made of 12 randomly chosen citizens exercising their collective wisdom and common sense, compared to a hearing before a professionally trained judge. In this case, the nature of the Podcast and its extremely wide distribution raises real concerns about the fairness of a trial before a jury that might include persons who had heard, or at least heard of, the Podcast or the associated publicity. The relevant interest of the community is not in ensuring the accused is convicted but that he face a trial where the prosecution and defence cases are put fairly and firmly and the right result is reached impartially, for the right reasons and according to law. In the end result, fairness to the accused and the necessity to ensure community confidence in the process of the criminal law compels the conclusion that the interests of justice require he face trial before a Judge sitting alone who will produce considered reasons for whatever verdict ensues.

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