The importance of the pre-trial application and the vagaries in the subsequent appeal process.

Introduction

1. This is not meant to be a categorical treatise of all the available pre-trial applications that might be capable of challenge to the Court of Criminal Appeal. Rather it is meant as a discussion paper to stress the importance of giving careful consideration to some of those categories of unfairness that are likely to inhibit a trial being conducted in a just manner, the available applications and consequent appeal process; and also with respect to the unresolved issues in the High Court with respect to tendency and coincidence evidence.

2. Further, while such applications have a relatively low success rate at first instance and certainly upon appeal, such applications are very important in attempting to protect the rights of our clients and the general interests of justice particularly in highly public and politicized cases. The subject material will not cover those pre-trial applications that relate to the vast range of evidentiary objections that are excluded from consideration pursuant to s5F unless you are appearing for the Crown pursuant to s5F (3A). Compare the Crown appeal in R v Salami [2013] NSWCCA 96 and an appeal on behalf of an applicant wherein it was argued evidence of a witness critical to the Crown case should have been excluded pursuant to s137 Evidence Act, 1995 in JG v R [2011] NSWCCA 198. Nor will it deal with those cases involving a challenge to the indictment: Chapman v R [2013} NSWCCA 91; and Balladjam v R [2008] NSWCCA 85.

The Permanent Stay

3. This is necessarily a short topic as successful applications in this regard are very rare. Perhaps understandably so as it is no doubt a reasonable expectation of a civil society that those charged with serious offences are brought to trial, yet still the balance needs to be seen to be observed. Often the most highly publicized offences lead to the media, who have established relationships with the police (with respect to which no criticism is intended), stirring the outrage of the public. This is understandable and no doubt reasonable if balanced by a firm and well resourced

public debate with a well informed voice as to the rights of the accused, and the need in the community's general interests that the proper processes be applied in a non-biased and fair manner.

4. Other than the brief media reports of the comments of the Presidents of the Bar Association and Law Society mainly with respect to the legislative changes upon important civil rights there is unfortunately no such voice in our community. This underpins the need to carefully consider if a permanent stay application is necessary to try and protect the individual client and otherwise highlight the injustice present in such situations.

5. In any event the attitude of the High Court in respect to such applications was made very clear in Dupas v The Queen [2010] HCA 20per French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ at [30]-[39]:

> *"'Extreme" or "singular" case*
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> *30. The appellant seeks to uphold findings of Nettle and Ashley JJA that the case was an extreme, or singular[32], case. The appellant contends that the balance of authority in the High Court has approved a concept of unfairness such that it might arise irrespective of its source and whether or not it was controllable by court processes[33]. The balance of persuasion[34] in Glennon, the appellant submits, has allowed for the possibility of the grant of a stay in circumstances of prejudicial media publicity. The appellant contends that there is no reason in principle or practice why the extreme category of case warranting the imposition of a permanent stay ought not to include circumstances of prejudicial pre-trial media publicity.*
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> *31. The appellant relies upon the example given by Deane, Gaudron and McHugh JJ, the dissentients, in Glennon of the grant of a stay as follows[35]:*
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> *"[O]ne cannot exclude, as a matter of law, the possibility that an 'extreme' or 'singular' case might arise in which the effect of a sustained media campaign of vilification and prejudgment is such that, notwithstanding lapse of time and careful and thorough directions of a trial judge, any conviction would be unsafe*

and unsatisfactory by reason of a significant and unacceptable likelihood that it would be vitiated by impermissible prejudice and prejudgment."

32. *However, the reference by their Honours to impermissible prejudice and prejudgment gives insufficient effect to the policy of the common law respecting the efficacy of the jury system. No doubt that policy must give way, for example, in specific instances of apprehended jury tampering and other criminal misconduct[36]. But that is far from the present case. This is not a case of an apprehended defect at the retrial of such a nature that (to adopt what was said by Mason CJ and Toohey J in Glennon[37]) nothing that the trial judge could do in the conduct of the retrial could relieve against its unfair consequences.*

33. *In Glennon[38], in describing cases in which a permanent stay will be ordered as extreme, Mason CJ and Toohey J refer back to a passage in Jago v District Court (NSW)[39] containing a reference to R v His Honour Judge C F McLoughlin and Cooney; Ex parte The Director of Prosecutions[40]. There, the Full Court of the Supreme Court of Queensland recognised that for a court to grant a permanent stay of criminal proceedings is a rare occurrence, a drastic remedy to be applied in exceptional cases which might arise if there had been some conduct on the part of a prosecuting authority shown to result in prejudice to an accused in obtaining a fair trial[41].*

34. *The decision in Tuckiar[42] is referred to in Glennon variously as unique[43], extreme[44] and bizarre[45]. In Tuckiar, unfairness to the accused at a retrial, which could not be relieved against, was, as Brennan J said, "the certain knowledge of his guilt"[46], revealed in open court by his counsel at his first trial. There is a difference between media opinion as to guilt and a public revelation of guilt by an accused's own counsel. The unfair consequences of the former can be relieved against by direction from the trial judge whereas the unfair consequences of the latter cannot be remedied.*

35. *Characterising a case as extreme or singular is to recognise the rarity of a situation in which the unfair consequences of an apprehended defect in a trial cannot be relieved against by the trial judge during the course of a trial. There is no definitive category of extreme cases in which a permanent stay of criminal*

proceedings will be ordered. In seeking to apply the relevant principle in Glennon, the question to be asked in any given case is not so much whether the case can be characterised as extreme, or singular, but rather, 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."[47]

36. *There is nothing remarkable or singular about extensive pre-trial publicity, especially in notorious cases, such as those involving heinous acts. That a trial is conducted against such a background does not of itself render a case extreme, in the sense that the unfair consequences of any prejudice thereby created can never be relieved against by the judge during the course of the trial.*

37. *A further consideration is the need to take into account the substantial public interest of the community in having those who are charged with criminal offences brought to trial[48], the "social imperative" as Nettle JA called it, as a permanent stay is tantamount to a continuing immunity from prosecution[49]. 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[50].*

38. *The apprehended defect in the appellant's trial, namely unfair consequences of prejudice or prejudgment arising out of extensive adverse pre-trial publicity, was capable of being relieved against by the trial judge, in the conduct of the trial, by thorough and appropriate directions to the jury. Because that is so, it is not necessary for the purposes of this case to undertake any broad inquiry into the full extent of the court's inherent power to grant a permanent stay of criminal proceedings in order to prevent unfairness to an accused.*

39. *There was no error of principle in the application of Glennon by Cummins J in deciding that the appellant's trial, if allowed to proceed, would be fair. The majority in the Court of Appeal was correct in rejecting ground 1 of the appeal alleging error by Cummins J in refusing the application for a permanent stay. Furthermore, in all of the circumstances of this trial, the pre-trial publicity was not such as to give rise to an unacceptable risk that it had deprived the*

appellant of a fair trial. A stay permanently or until further order was not warranted."

6. Accordingly while successful applications will be rare, fortunately the Court has at least observed the need for permanent stays to be preserved. Yet while the principles are maintained, examples of their application are not often observed. They will not stretch for instance to a re-prosecution of an offence after same has been no billed upon the express terms that the proceedings would not be re-instituted unless there came to light sufficient additional evidence. The pretext of an unrelated event which allegedly demonstrated the accused was looking for money which could be added to the financial motive for a kidnapping; and an event that was known certainly at least to the police at the time of the no bill, was adjudged to be sufficient to satisfy the discretion such that the Court would not grant a stay in Burrell v R [2004] NSWCCA 185 at paras [5]-[35]. Further the re-institution of those proceedings only came after a sustained and well resourced media campaign that suggested the accused was guilty of this offence and other crimes. Again this did not warrant judicial intervention: at paras [36]-[39].

7. Nor that after there was a hung jury in November 2005 was there found to be a proper basis for a stay when the media published the assertion that the jury numbers were 11 to 1 and was only hung because the dissenter was what was described as a rogue juror. Also see R v H [2002] NSWCCA 355.

8. It appears what would be required in this category of case is clear evidence of illegality or at least significant abuse of prosecutorial powers.

9. The High Court found that a stay was appropriate where there was an illegal deportation from the Solomon Islands in Moti v The Queen [2011] HCA 50. Similarly, where the police actually involved themselves in illegal conduct without lawful authority as part of the offence: Ridgeway v The Queen (1995) 184 CLR 19. . Also, a stay was found to be appropriate in cases where an indigent accused person was not represented: Dietrich v R (1992) 177 CLR 292.

10. Importantly again, it should be noted, consistent with the preserved position in Dupas, that the types of injustice that may warrant a stay are not closed; see Walton

v Gardiner [1993] HCA 77; (1993) 177 CLR 378 per Mason CJ; Deane and Dawson JJ at [23]-[25]:

> **"**23. The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness. Thus, it has long been established that, regardless of the propriety of the purpose of the person responsible for their institution and maintenance, proceedings will constitute an abuse of process if they can be clearly seen to be foredoomed to fail ((22) See, e.g., Metropolitan Bank v. Pooley (1885) 10 App Cas 210, at pp 220-221; General Steel Industries Inc. v. Commissioner for Railways (N.S.W.) [1964] HCA 69; (1964) 112 CLR 125, at pp 128-130.). Again, proceedings within the jurisdiction of a court will be unjustifiably oppressive and vexatious of an objecting defendant, and will constitute an abuse of process, if that court is, in all the circumstances of the particular case, a clearly inappropriate forum to entertain them ((23) See, generally, Voth v. Manildra Flour Mills Pty. Ltd. [1990] HCA 55; (1990) 171 CLR 538.). Yet again, proceedings before a court should be stayed as an abuse of process if, notwithstanding that the circumstances do not give rise to an estoppel, their continuance would be unjustifiably vexatious and oppressive for the reason that it is sought to litigate anew a case which has already been disposed of by earlier proceedings ((24) See, e.g., Reichel v. Magrath (1889) 14 App Cas 665, at p 668; Connelly v. D.PP. (1964) AC 1254, at pp 1361-1362.). The jurisdiction of a superior court in such a case was correctly described by Lord Diplock in Hunter v. Chief Constable of the West Midlands Police ((25) [1981] UKHL 13; (1982) AC 529, at p 536.) as "the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people".
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> 24. In Jago v. District Court of New South Wales ((26) [1989] HCA 46; (1989) 168 CLR 23.) , at least three of the five members of the Court clearly rejected "the narrower view" that a court's power to protect itself from an abuse of

process in criminal proceedings "is limited to traditional notions of abuse of process" ((27) ibid, per Mason CJ at p 28.). Mason CJ considered that a court, "whose function is to dispense justice with impartiality and fairness both to the parties and to the community which it serves", possesses the necessary power to prevent its processes being employed in a manner which gives rise to unfairness ((28) ibid, at p 28.). His Honour quoted, with approval, the following remarks of Richardson J of the New Zealand Court of Appeal in Moevao v. Department of Labour ((29) (1980) 1 NZLR 464, at p 481.):

"public interest in the due administration of justice necessarily extends to ensuring that the Court's processes are used fairly by State and citizen alike. And the due administration of justice is a continuous process, not confined to the determination of the particular case. It follows that in exercising its inherent jurisdiction the Court is protecting its ability to function as a Court of law in the future as in the case before it. This leads on to the second aspect of the public interest which is in the maintenance of public confidence in the administration of justice. It is contrary to the public interest to allow that confidence to be eroded by a concern that the Court's processes may lend themselves to oppression and injustice."

Deane J expressed a similar view in his judgment in Jago ((30) (1989) 168 CLR, at p 58.):

"The power of a court to stay proceedings in a case of unreasonable delay is not confined to the case where the effect of the delay is that any subsequent trial must necessarily be an unfair one. Circumstances can arise in which such delay produces a situation in which any continuation of the proceedings would, of itself, be so unfairly and unjustifiably oppressive that it would constitute an abuse of the court's process. Multiple prosecutions arising out of the one set of events but separated by many years or a renewed charge brought years after the dismissal of earlier proceedings for want of

prosecution could, in a case where the relevant material had been available to the prosecution from the outset and depending on the particular facts, provide examples. Where such circumstances exist, the power of a court to prevent abuse of its process extends to the making of an order that proceedings be permanently stayed."

In her judgment in Jago ((31) ibid, at p 74.), Gaudron J stressed that the power of a court "to control its own process and proceedings is such that its exercise is not restricted to defined and closed categories, but may be exercised as and when the administration of justice demands." Her Honour added the comment ((32) ibid) "that, at least in civil proceedings, the power to grant a permanent stay should be seen as a power which is exercisable if the administration of justice so demands, and not one the exercise of which depends on any nice distinction between notions of unfairness or injustice, on the one hand, and abuse of process, on the other hand". Subsequently in her judgment ((33) ibid, at p 77.), her Honour made clear that, subject to some refinements which she identified, that comment was also appropriate to be adopted in relation to criminal proceedings.

25. It should be mentioned that there was considerable discussion in the course of argument about the effect of some comments in the judgment of the majority of the Court in Williams v. Spautz ((34) [1992] HCA 34; (1992) 174 CLR 509, at pp 519-520.). When those comments are properly understood in context, however, there is nothing in them which supports the proposition that a permanent stay of proceedings can only be ordered on the ground of either improper purpose or no possibility of a fair hearing. Indeed, careful examination of them discloses that they lend some support to a denial of that proposition ((35) ibid, at p 520, see, in particular, the approving reference to the judgment of Richardson J in Moevao v. Department of Labour (1980) 1 NZLR 464, at p 482.).

11. Further, while in relevant cases there is a need to carefully consider lost evidence that maybe critical to a defence, this is unlikely at this time to constitute grounds for a successful stay application. While the High Court in Jago v The District Court of NSW [1989] HCA 46; (1989) 168 CLR 23 found there was no right to a speedy trial in

Australia based on presumptive prejudice it did not exclude a class of case that may require a stay on the basis of actual prejudice . Yet, with the developments of the Longman direction and now s165B of the Evidence Act 1995 it would be a rare case indeed that a forensic disadvantage would be considered sufficient to grant a stay.

12. In any event consideration in this regard should not be dismissed; refer to R v Littler [2001] NSWCCA 173. Also see the successful 5F appeal in R v Frederick Westley [2004] NSWCCA 192 upon a doomed to failure point; and R v Hakim (1989) 41 A Crim R 372; contra R v Austin (1995) 84 A Crim R 374.

13. There is also that class of case involving consistency of judicial decision making (in the nature of issue estoppel) as dealt with in Rogers v The Queen (1994) 181 CLR 251.

14. In any event, as noted above, the classes of cases that may lead to a permanent stay being ordered is as observed in Jago and cases thereafter are not closed. In any situation where unfairness exists that goes to the root of a trial careful consideration should be given to a stay application, while at the same time weighing up what other remedies might be available to militate against the ramifications of the injustice present in the subject circumstances.

The Temporary Stay

15. More success has been observed in the application of a temporary stay because of adverse publicity or other types of injustice that maybe remedied after a period of time (for instance an absent witness or computer/documentary evidence expected to be recovered in certain circumstances).

16. That an adjournment application constitutes an interlocutory judgment for the purposes of 5F and the relevant principles refer Slotboom v R [2013] NSWCCA 18 per Johnson J adopting what was said in R v Alexandroaia (1995) 81 A Crim R 286 at para [7]:

> "The principles to be applied by this Court where an appeal is brought against the discretionary decision of a trial Judge refusing to adjourn a criminal trial were expressed in the following way in *R v Alexandroaia* (1995) 81 A Crim R

286 at 290 (footnotes omitted):

> *"Whether or not an adjournment should be granted is a matter which lies within the discretion of the trial judge. An appeal based upon the judge's refusal to grant an adjournment is thus one against the exercise of a discretion, and it will be allowed only where it has been established that the judge has erred in the proper exercise of that discretion. There is a strong presumption in favour of the correctness of the decision, but that presumption will be overcome where it is shown that the judge has acted on some wrong principle, or has given weight to extraneous or irrelevant matters, or has failed to give weight or sufficient weight to relevant considerations, or has made a mistake as to the facts. Even if the precise nature of the error may not be discoverable, it is sufficient that the result was so unreasonable or plainly unjust that the appellate court may infer that there has been a failure properly to exercise that discretion. An appellate court may not, however, substitute its own findings of fact for those of the primary judge unless there was no evidence to support a particular finding, or the evidence is all one way or the judge has misdirected himself in relation to those facts. If the appellate court is satisfied that there has been an injustice to one of the parties as a result of the judge's exercise of discretion, it is under a duty to review the order made.""*

17. Slotboom involved an application for an adjournment to await the determination of an appeal to the CCA regarding another murder conviction involving a co offender. It was argued that if the co-offender was acquitted upon his appeal then given the manner in which the Crown mounted it's case at the first trial the applicant could not be found guilty of the murder. The 5F application was unsuccessful.

18. For an example of a successful application refer to Rv Gilfillian [2003] NSWCCA 102 where the applicant withdrew the instructions of his instructing solicitor because of a likely conflict that became apparent because during the course of the trial the Crown decided to call additional witnesses. In this regard also consider BK [2000] NSWCCA 4; (2000) 110 A Crim R 218.

19. Very helpful regarding adverse publicity was the case of Re K [2002] NSWCCA 374 at paras [1]-[12]:

“1 **THE COURT**: This is an application for leave to appeal, which is being heard concurrently with the appeal, from the refusal by Finanne DCJ to vacate the hearing date of trial of `K' which was listed to commence on Monday 2 September 2002 and to stay those proceedings temporarily. For convenience we will refer to the applicant for leave to appeal as the appellant.

2 The appellant is aged 17, is of Lebanese origin and is a member of the Muslim religion. He has been committed for trial on two charges, one under s 90A of the *Crimes Act* 1900 (NSW) and one under s 61J of the *Crimes Act*. The second of these charges involves a charge of sexual assault.

3 Prior to the jury being empanelled, the appellant made an application that the trial be vacated and that the proceedings be stayed temporarily. The basis of the application was that the appellant contended that because of the recent unprecedented publicity which has attended a series of trials and subsequent sentencing of a number of youths of Lebanese origin for sexual assaults upon young Anglo-Saxon females, there was a risk of prejudice to him, such that he may not have a fair trial. Three such trials have been held and are connected in that some of the accused were in two or more of the trials. It followed, on the appellant's submission, that it would not be in the interests of justice for his trial to proceed at this time: see *R v Compston* (unreported, NSWCCA, 22 April 1993); *R v Brewer* [2000] NSWCCA 488; *R v LMW* [1999] NSWSC 1109.

4 It was common ground that the allegations against the appellant are quite unrelated to the series of allegations which arose in the previous trials. However, the appellant identified a number of features that could, superficially at least, convey the impression that this trial was part of that series of connected trials.

5 It was submitted that his Honour, in refusing the application, erred in three ways which would attract appellate intervention. First, it was said that he did not explain why he refused to temporarily stay the proceedings and in particular did not say what test it was that he applied. Secondly, it was submitted that if, as may have been the case, his Honour applied the principle enunciated in *R v Glennon* [1992] HCA 16; (1992) 173 CLR 592, especially at 603, his Honour applied the wrong test. Thirdly, it was submitted that in coming to his conclusion

his Honour took into account an irrelevant matter in that he stated that *"it would be wrong to grant a stay of even a temporary nature which is based not on some matter of prejudice directed to the accused, but on something that is said to have arisen in other trials that do not concern him at all"*.

6 It is appropriate to deal with the first and second of these grounds together. His Honour, in his reasons for judgment at page 6, stated that in considering the question of staying the proceedings he was required to act in accordance with the principles laid down by the courts. His Honour then went on to cite passages from Mason CJ and Toohey J respectively in *R v Glennon* at 603 in which their Honours reiterated the faith which the justice system has in the capacity of jurors to hear and determine trials fairly, and without regard to extra-curial irrelevant or prejudicial information which may come to them.

7 Senior counsel for the appellant pointed out that *R v Glennon* involved a consideration of whether the accused had in fact received a fair trial. It was submitted that in this case, where the trial was pending the correct test was what the interests of justice required in that context. That test has been enunciated by the Court time and time again including in the cases to which we have referred above. Each of those cases involved different instances where it was said that the interests of justice had not been met. For example, *R v Compston* involved a case where a stay was granted until particulars of the offence were provided. *R v Brewer* involved an application for change of venue.

8 Insofar as it was relevant to this case, it was said that the interests of justice required that the Court had to be astute to ensure that the appellant's right to a fair trial might not be affected by a risk of prejudice flowing from the extensive media coverage of recent trials and sentencing of youths of Lebanese origin convicted of sexual assaulting young females of Anglo-Saxon origin.

9 It was submitted that unlike the position after conviction, as was the position in *R v Glennon*, it was not necessary for the appellant to demonstrate that he would not have a fair trial. It was sufficient if there was such a risk.

10 The Court agrees that this is the correct test to be applied in the circumstances of this case. However, because his Honour's reasons were given

briefly and by incorporation of an earlier judgment of his, we are not satisfied that his Honour did err by applying the wrong principle as alleged.

11 The third error of which the appellant complained was that his Honour had taken into account an irrelevant consideration, namely, that it would only be appropriate to stay the proceedings if the matter of which complaint was made was directly prejudicial to the appellant. Whilst we would not have considered his Honour's statement as involving the taking into account of an irrelevant consideration, we do consider that his Honour erred in finding that it would be wrong to grant a stay unless the matter of prejudice was directed specifically at the accused. We are of the opinion that in circumstances where there has been extensive ventilation in the media of the backgrounds of a number of persons convicted for gang rapes in Sydney's west, a person of the same country of origin and the same religion charged with committing a like offence might, in the minds of a jury, be prejudiced.

12 Accordingly, we are satisfied that the appellant has established that his Honour erred in accordance with the principles in *House v R* [1936] HCA 40; (1936) 55 CLR 499 such that it is appropriate for this Court to exercise its own discretion in determining whether or not a stay ought to be granted."

Also see paras [18]-[19]:

"18 Although we have not found this matter to be without difficulty, we consider that the media coverage and the interest which has been exhibited by members of the public, both as to the trials to which we have referred and as to the sentences which have been imposed upon the convicted persons, has demonstrated such a degree of outrage in respect of the commission of such crimes, that there are unacceptable risks to the holding of a fair trial that a person from the same country of origin, charged with having committed a like offence in the same part of Sydney might be branded, or seen by reason of his racial origin and the nature of the offence to be connected with those other offences.

19 One matter, however, which has caused us considerable concern is whether a stay would serve any purpose given that it is understood that appeals have

been lodged in the cases to which we have referred and, in the normal course, it is likely that those appeals will be heard sometime in the first part of next year. We would not be speculating to think that there will be further intense media scrutiny surrounding those appeals. It is arguable that it might be preferable to allow the trial to proceed now, in effect, trusting that there is already a hiatus in the media interest in these matters. Whilst we consider that is a possibility, we have reached the conclusion that there would remain a real risk of prejudice to the appellant if the trial was to proceed this week. We have decided that the better view is that a stay for a short period of time, without these matters being so intensely a matter of media focus, would serve to minimise that risk.

20. Also refer to the successful Crown appeal against an order by Sweeney DCJ ordering that the proceedings be stayed "until the crown consents to Mr Jamal's trial proceeding by judge alone". Importantly the Court noted that pursuant to the then s132 of the Criminal Procedure Act regarding subs (3) wherein an election for a judge only trial could be made with the consent of the DPP (which is no longer the case) that a refusal to grant such consent was not subject to judicial review (at para 7). The Court went onto say per Spigelman CJ at paras [11]-[15]:

> **"**11 Several aspects of her Honour's reasoning have been highlighted in the Crown's submissions in this Court. In particular, it was submitted that her Honour's reference to "the *only* course available to me is to stay the trial temporarily until the Crown consents" was an error of principle because her Honour had an alternative available, namely an adjournment. This Crown submission is only partially accurate. Her Honour stated earlier in her judgment that she did not believe that "a further *short* adjournment would change" the position with respect to a fair trial.
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> 12 It is not clear what her Honour had in mind by a "short adjournment". However, it does appear that her Honour did not have regard to the possibility of a longer adjournment. In this regard, the Crown submission, that her Honour erred by characterising her conditional stay as "the only course available", should be upheld. As the Crown submitted, she could have ordered a stay for a "limited period", being a period that was not "short".
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> 13 There were good reasons for considering a longer adjournment in the

present case.

14 First, the respondent had been convicted of an unrelated shooting and had been sentenced to nine years imprisonment with a non-parole period of five years and six months commencing on 17 August 2007. The recent publicity was directed to this trial or occurred in the context of this trial. A stay for a lengthy period will often raise questions about unfairness to the accused particularly, when he could not be released on bail. This is not such a case. The respondent will remain in gaol for a lengthy period in any event.

15 Secondly, the attack on Lakemba Police Station occurred on 1 November 1998. The case has been delayed for a number of reasons including a trial being aborted because of the respondent's ill health and, then, by the respondent absconding overseas. He was not extradited until September 2006. The adverse effects of lengthy delay on a criminal trial have already occurred. A further delay would not significantly add to those effects. "

21. In this regard it seems the best prospect of relief to limit the damage of adverse media publicity lies in the temporary stay application. Ultimately though more has to be done to provide an independent voice to appraise the public of the merits of the trial process to a just society, the need to avoid pre-judgment, to balance the media reporting of the police and/or prosecution perspective in particular cases and to agitate for contempt proceedings where appropriate.

The Vexed Questions of The Correct Approach to Tendency and Coincidence Evidence Pursuant to s97, 98 and 101 of the Evidence Act, 1995.

22. This section attempts to deal with the relative uncertainty to the correct approach to these areas in code jurisdictions given the divergent approaches apparent between NSW and Victoria and the fact these matters have not been dealt with in the High Court. For prior discussions regarding the subject please refer to the earlier papers on the subject by John Stratton SC, Dina Yehia SC and Craig Smith available through the Public Defender's office.

23. Presently the correct approach to s5F appeals in the context of separate trial applications based upon the question of tendency is contained in the Judgment of the five judge bench in DAO v R [2011] NSWCCA 63. Also see BJJ v R [2013] NSWCCA 123 where there exists the related consideration of concoction. DAO is actually the subject of a present appeal against conviction in the Court of Criminal Appeal with a technical submission being made on the points otherwise determined upon the earlier 5F application. For the purpose of at least analyzing where the debate lies, the special leave questions and reasons why special leave should be granted as argued upon the unsuccessful special leave application are included herein as follows:

"PART I: SPECIAL LEAVE QUESTIONS

1. This matter raises the following questions:

ii. Whether the nature and scope of an appeal under s 5F of the *Criminal Appeal Act 1912* (NSW) ("the Act") against an interlocutory judgment or order is "*by way of rehearing*" (***Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission*** [2000] HCA 47; (2000) 203 CLR 194).

iii. Whether a separate trial decision is a matter of procedure for the trial judge's determination in the exercise of absolute discretion, or is it a decision of fundamental importance to the structure of trial such that upon appeal under s 5F of the Act the decision should be reviewed by the New South Wales Court of Criminal Appeal ("NSWCCA") deciding for itself the questions that the particular decision raises.

iv. What is the character of a decision to admit evidence of character, reputation or conduct of a person, or a tendency that a person has or had under s 97(1) of the *Evidence Act 1995* (NSW), *Evidence Act 2008* (VIC), *Evidence Act 2011* (ACT) and *Evidence Act 1995* (Cth)) ("the uniform evidence acts").

v. While the tendency legislation enacted in NSW and elsewhere has to a degree abrogated the common law (***Stubley v Western Australia*** [2011] HCA 7 at [11] per Gummow, Crennan, Kiefel and Bell JJ), has it altogether removed this Court's interpretation of *"significant probative value"* and the application

of the *"stringent rule"* as a barrier for the admissibility of tendency evidence (***Phillips v The Queen*** [2006] HCA; (2006) 225 CLR 303 at 327-328, [78]-[80] per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).

vi. What is the meaning of *"substantially outweighs"* in context of the further restriction that applies to tendency evidence about a defendant that is adduced by the prosecution under s 101(2) of the uniform evidence Acts."

"PART IV: REASONS WHY SPECIAL LEAVE SHOULD BE GRANTED

39. Appeals against interlocutory decisions are a radical and emerging criminal law practice, but they are only exceptionally heard by this Court; see, eg, ***Rogers v R*** [1994] HCA 42; (1994) 181 CLR 251. There a number of factors that weigh in favour of a grant special leave in this case:

a. There are differences of opinion between members of the Court below as to both the nature and scope of appeals under s 5F, and the character of s 97(1) decisions.

b. There is a divergence of approach between NSW and Victoria as to the nature and scope of appellate review of interlocutory judgments or orders, particularly so in the context of decisions with respect to tendency and/or coincidence evidence. Separate trial decisions and related rulings on the admissibility of intended tendency (and coincidence) evidence contentiously arise in the course of multiple complainant sexual offence trials, which are now commonplace in the District Court of NSW and County Court of Victoria. Resolution of the issues raised in this application will have consequences for the evenness of approach in both jurisdictions. This is desirable given that the same tendency rule and relevantly similar interlocutory appeal provisions apply in both states.

c. The presentation of multiple counts upon an indictment, particularly with respect to multiple complainants, goes to the core of trial proceedings. As enunciated by this Court in ***Phillips v The Queen*** [2006] HCA 4; (2006) 225 CLR 303 at 327 [79]:

> *Criminal trials in this country are ordinarily focused with high particularity upon specific offences. They are not, as such, a trial of the accused's character or propensity towards criminal conduct. Accordingly, various states have enacted legislation to permit review of separate trial decisions made by trial judges. this is to avoid trials proceeding from inception on an improper basis. If confusion is permitted to continue in the appropriate determination of these principles this would lead to fundamentally flawed trials, miscarriage of justice, improper incarceration of persons for lengthy periods and great expense. Most importantly it will undermine the public confidence in the administration of justice particularly with respect to highly sensitive cases often involving teachers, the clergy and children.*
>
> Separate trial decisions are best reviewed by appellate courts on the basis of the intended evidence, not after the evidence has been led before the jury. The criminal process in unnecessarily frustrated if trials are permitted to proceed on an erroneous basis. And Juries cannot be expected to ignore evidence of a highly prejudicial nature once it has been led and then subsequently determined to be inadmissible as tendency evidence. This necessitates either a discharge of the jury or reversal of conviction upon appeal, having the adverse consequences identified above.

d. This case raises for consideration the application of ss 97(1) and 101(2) of the uniform evidence Acts. It is the correct vehicle to resolve the "*doubts and difficulties*" surrounding the Pt 3.4 of the uniform evidence Acts (***Zhang v The Queen*** [2006] HCATrans 423 at 7 per Gummow J). See also ***Stubley v Western Australia*** at [12].

e. It is submitted the NSWCCA erred in identifying an impermissible process of reasoning with respect to the assessment of probative value of the intended tendency evidence (***Hoch v The Queen*** [1988] HCA 50; (1988) 165 CLR 292 at 301-302 [8] per Brennan and Dawson JJ). The pending trial will proceed on a fundamentally flawed basis. This is a real, and not a prospective risk. The Applicant is entitled as a matter of fairness to be tried according to correct principles.

f. The Applicant's prospects of successfully appealing against conviction, in that event, are no reduced given the influence of ***DAO*** is likely to have on a differently constituted NSWCCA. It is likely this will follow given the

principles of judicial comity; and more strictly so according to the comments by members of the Court below that the "*issue is foreclosed*" (Simpson J at [207]) and as to "*issue estoppel*" (Schmidt H at [213]). (See also comments by Neave JA, Weinberg JA and T Forrest AJA in ***DPP v BCR*** [2010] VSCA 229 at [43].) If correct, this would effectively preclude this ground from consideration upon a post conviction appeal. A grant of special leave at this interlocutory stage would resolve this important conflict and guard against this possible loss of the Applicant's appeal rights.

40. Whilst an appeal will create some fragmentation, this consideration does not overwhelm the desirability of deciding these important questions of law at this stage. Interlocutory appeal avenues have been introduced for this very purpose, and any consequential delay is "*a price worth paying*": ***R v DG; DG v The Queen*** [2010] VSCA 173 at [29] per Buchanan, Weinberg and Bongiorno JJA."

24. Leave was refused given the High Court's practice not to hear (with limited exceptions) interlocutory matters in criminal cases.

25. I note that the leave application in DAO has not been the only attempt in this regard. Regarding tendency in the like category as DAO see Fletcher v The Queen [2006] HCA Trans 127 and PWD v The Queen [201] HCA Trans 32. Also refer to leave application regarding tendency and coincidence evidence from the decision in BP v R, R v BP [2010] NSWCCA 303 in BP v The Queen [2011] HCA Trans 281; and upon the question of concoction being a relevant matter to be considered upon an assessment of probative value with respect to the like section in Victoria in BJS v The Queen [2013] HCT Trans 322. It should be noted that the Victorian Supreme Court in BJS said that concoction was a matter which could be considered in that assessment, contrary to the stated approach in this state in DSJ v R; NS v R [2012] NSWCCA 9.

26. This also brings into focus the divergent approach in Victoria to the assessment of probative value in Dupas v R [2012] VSCA 328 as opposed to the approach adopted in NSW in R v Shamouil (2006) 66 NSWLR 228; [2006] NSWCCA 112 (although the

majority approach in R v XY [2013] needs to be understood when mounting arguments in relation to these considerations)

Conclusion

27. We can only hope that the High Court will give a determination in respect to these issues in the near future. There did not appear to have been much hope of a tempering of the broad interpretation to admissibility that has generally been given to evidence of this type in NSW particularly given the comments of the then Chief Justice, Gleeson CJ, in his final remarks in Ellis v The Queen [2004] HCA Trans 488. Yet perhaps the decision of the majority in Stubley, albeit with respect to the quite differently worded legislation in Western Australia, might help in part to act as a catalyst to a successful appeal in the near future.

Dated this the 19th of February 2014

DAVID DALTON SC