SUPREME COURT OF QUEENSLAND

CITATION:	*R v Dubois & O'Dempsey* [2016] QSC 176
PARTIES:	**R** (respondent) **v** **GARRY REGINALD DUBOIS and VINCENT O'DEMPSEY** (applicants)
FILE NO:	SC No 1046 of 2015
DIVISION:	Trial Division
PROCEEDING:	Pre-trial application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	11 August 2016
DELIVERED AT:	Brisbane
HEARING DATE:	20 July 2016
JUDGE:	Applegarth J
ORDER:	**The trial of each accused be heard separately.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – INFORMATION, INDICTMENT OR PRESENTMENT – JOINDER – JOINT OR SEPARATE TRIAL – EMBARRASSMENT OR PREJUDICE – where co-accused are jointly charged with counts of deprivation of liberty, murder and rape arising out of the same events – where each prosecution case largely depends on alleged confessions given to witnesses whose credibility is in issue – where some evidence which is admissible in each case is inadmissible against the co-accused – where that inadmissible evidence is highly prejudicial and tends to corroborate and bolster the evidence of the critical witnesses in each case – whether the risk of prejudice can be cured by appropriate direction to a jury – whether a jury could be expected to assess the credibility of a witness by ignoring evidence which corroborates that witness – whether there would be positive injustice caused to each accused in a joint trial – whether separate trials should be ordered

Criminal Code 1899 (Qld), s 7, s 8, s 597B
Evidence Act 1977 (Qld), s 93B

Collie v R (1991) 56 SASR 302, cited
Destanovic v The Queen [2015] VSCA 113, considered
Gilbert v The Queen (2000) 201 CLR 414, cited
Madubuko v R [2011] NSWCCA 135, cited
Mwamba v The Queen [2015] VSCA 338, cited
R v Aboud & Stanley [2003] QCA 499, cited
R v Belford & Bound [2011] QCA 43; (2011) 208 A Crim R 256, cited
R v Box & Martin [2001] QCA 272, cited
R v Crawford (1989) 2 Qd R 443, cited
R v Davidson [2000] QCA 39, cited
R v Demirok [1976] VR 244, cited
R v Gibb & McKenzie [1983] 2 VR 155, cited
R v Iria & Panozzo [2004] VSC 110, cited
R v Jones & Waghorn (1991) 55 A Crim R 159, cited
R v Lewis & Biara [1996] QCA 405, cited
R v Pham [2004] NSWCCA 190, considered
R v Roughan & Jones [2007] QCA 443; (2007) 179 A Crim R 389, cited
R v Stuart & Finch [1974] Qd R 297, cited
R v Swan [2013] QCA 217, considered
R v Vecchio & Tredrea [2016] QCA 71, cited
Webb & Hay v The Queen (1994) 181 CLR 41, cited
Winning v R [2002] WASCA 44, cited

COUNSEL: D R Lynch QC with K E McMahon for the applicant Dubois
A J Glynn QC for the applicant O'Dempsey
D L Meredith for the respondent

SOLICITORS: Howden Saggers Lawyers for the applicant Dubois
Robertson O'Gorman for the applicant O'Dempsey
Director of Public Prosecutions (Queensland) for the respondent

[1] The applicants, Garry Reginald Dubois and Vincent O'Dempsey, face trial on charges of deprivation of liberty, rape and murder arising from the disappearance in January 1974 of Mrs Barbara McCulkin and her two daughters, Vicki and Leanne. The Crown case is that the applicants jointly deprived Mrs McCulkin and her daughters of their liberty, jointly raped Vicki and Leanne and jointly murdered all three women. Both accused are alleged to have committed all of the offences, either as the actual offender or as a party to the other's offence.

[2] The Crown case against Dubois is that the two accused jointly deprived Mrs McCulkin and her daughters of their liberty, that Mrs McCulkin was murdered by O'Dempsey, that O'Dempsey raped one of the daughters, that Dubois raped the other and that O'Dempsey

then killed the two daughters. This scenario which describes the sequence in which the two daughters were raped and all three McCulkins were killed emerges from alleged admissions made by Dubois to a witness, Peter Hall. But Hall's evidence and other out of court statements allegedly made by Dubois are inadmissible against O'Dempsey.

[3] The Crown case against O'Dempsey depends largely on admissions he is alleged to have made at different times to two other witnesses, Warren McDonald and Kerri-Ann Scully. Those alleged confessions are inadmissible against Dubois.

[4] Dubois and O'Dempsey each apply for a separate trial. The essence of each applicant's argument is that the central issue in the Crown case against him is the credibility and reliability of the witness or witnesses to whom he is alleged to have confessed: in Dubois' case the key witness is Hall; in O'Dempsey's case the witnesses are Scully and McDonald. There are reasons in each case to question the witnesses' credibility and reliability, so each prosecution case cannot be said to be strong. In each case a fairly weak case is likely to be highly prejudiced by inadmissible evidence which is admitted in the other case. This inadmissible evidence corroborates and bolsters the evidence of the critical, confessional witnesses. The argument is that it is too much to expect a jury to perform the remarkable feat of assessing the credibility of a witness by ignoring evidence which corroborates that witness. This is particularly so with the chilling and detailed account given by Hall about Dubois' alleged confession concerning the circumstances of the rapes and murders. The alleged confessions made by O'Dempsey to Scully and McDonald lack any of this detail, but are likely to be bolstered by this highly prejudicial, inadmissible evidence.

[5] In each case the applicant contends that no directions to the jury can cure this high prejudice, and that, in the circumstances, he has shown that positive injustice would be caused to him in a joint trial.

[6] The Crown responds that this is not like one of the exceptional cases in which separate trials are ordered when two accused are charged with the same offences arising out of the same set of facts. The fact that certain evidence is admissible against one accused, but not against the other, is not a sufficient reason to order separate trials, and the cases show that even prejudicial evidence which is not admissible against one accused can be the subject of directions to the jury so as to ameliorate any prejudice. The Crown submits that:

- the assessment of the credibility of witnesses will not involve the jury performing any remarkable mental feats;
- the admissions which are inadmissible against each co-accused do not add much to the admissions which are admissible against him;
- any prejudice in this or any other regard does not distinguish this case from the usual case of a joint trial where appropriate directions are given about a discrete body of evidence.

Overview of prosecution case

[7] There is evidence that the two accused were the last people to see the McCulkins before they disappeared in January 1974. There is also evidence of the flight of each accused shortly after they were confronted by William McCulkin with information that two witnesses had seen them at the McCulkins' house the night the women were last seen. McCulkin told the accused that he intended to go to the police. However, this circumstantial evidence is insufficient to secure convictions. The Crown acknowledges that the alleged admissions are essential to the prosecution, but emphasises that its case against each applicant is not one which relies entirely on the alleged admissions.

[8] In January 1974, Mrs McCulkin (then aged 34) and her daughters Vicki (then aged 13) and Leanne (then aged 11) lived at Highgate Hill. Mrs McCulkin was separated from her husband, William McCulkin. Mrs McCulkin and her daughters have not been seen, with one possible exceptional sighting, since 16 January 1974.

[9] In the period leading up to the disappearance of the McCulkins, O'Dempsey was a regular visitor to the McCulkin house. The McCulkin girls attended a birthday party at a nearby house on the night of 16 January 1974. Two witnesses say they saw two men at the McCulkin house that night. These men were described by the McCulkin girls as "Vince" and "Shorty" (Dubois' nickname). One of the girls who had invited the McCulkin girls to come to the party across the street said that she saw the man "Vince" at the McCulkins' house early that evening. She associated him with a distinctive Charger motor vehicle owned by O'Dempsey and she saw the man identified as "Shorty" in the front yard. Leanne McCulkin went home from the party at about 8:00 pm and Vicki left to walk home at about 10:30 pm.

[10] The next day no-one was found at the McCulkins' home. When William McCulkin (now deceased) went there on 18 January 1974 he found the house empty, with signs that his family had left abruptly. He reported his wife and daughters missing to police the next day. He claimed to have confronted both Dubois and O'Dempsey about the whereabouts of his wife and children and that they both denied any knowledge.

[11] There is evidence of flight against both accused. The details are presently unimportant. The response to this evidence of flight is likely to be that each of them acted after McCulkin accused them of being involved in the disappearance of his family and that they were concerned that they would be falsely accused by him and by police.

[12] Evidence linking Dubois and O'Dempsey to the disappearance of the McCulkins and evidence of their flight has been available for a long time. Dubois and O'Dempsey were suspected, investigated and prosecuted over the alleged killings. But the prosecution did not proceed due to insufficient evidence.

[13] In more recent times evidence has come forward of alleged confessions by each accused. The Crown's case against each accused depends on the credibility and reliability of the accuser in each case. Confessions and other incriminating statements allegedly made by one accused cannot be used as evidence in the Crown's case against his co-accused. At a joint trial the jury will be told to use that evidence only in the case in which it is admissible, and to ignore it in assessing the other case. This will extend to not using it as

corroboration in the other case to bolster the credibility and reliability of the evidence of an accuser.

The contentious evidence which is admissible only in the case against Dubois

[14] The central issue in Dubois' trial will be whether he made the alleged statements to Hall. Dubois submits that this is the only direct evidence of his involvement in the abductions, rapes and murders of which he stands accused. He submits there are good reasons to doubt Hall's reliability and credibility because he is an indemnified witness who has previously given contrary evidence on oath. Hall's evidence is also contradicted by the evidence of Keith Meredith.

[15] Hall provided two statements in which he claimed Dubois confessed to him. One was dated 7 May 2014, the other dated 2 February 2015. Hall had earlier (on 14 March 2014) given evidence on oath before a CMC investigative hearing, at which he denied categorically that Dubois had ever confessed knowledge of or involvement in the disappearance or death of the McCulkins. However, his May 2014 statement gave a detailed account of his dealings with Dubois and events on the night in question, along with evidence about Dubois' behaviour and conduct in the days immediately after the McCulkins disappeared. According to Hall, Dubois (who is referred to in the statement as "Shorty") was not himself after that night; it was apparent that something had gone on but Dubois would not tell Hall or his other friends what it was at the time. Hall's statement continues:

> "30. A few days later [I] learned what had happened. Tom [Hamilton] and I were there when Shorty told us what had happened to the McCulkins. We were in the car for the conversation or for the first part of the conversation. I think Keith was there for this conversation. He may have not been there for that first conversation, but he knew about what had happened. He was pretty horrified by what had happened. Because of what had been said the night before we had some idea that they had been with the McCulkin (sic). He told us that they took the girls for a drive. He said he didn't know what was in O'Dempsey's head at first, but Vince tied them up. He said they drove them to the bush and that's were (sic) it happened. He said Vince took Barbara away into the dark and strangled her. He said that Barbara was not raped, he thought that's what it was going to be but he just killed her. He said he couldn't see it but he could hear the gurgling sound. He said he felt sick and it seemed to take for ever (sic). He said he knew then that the kids were going to be killed.
>
> 31. He said that O'Dempsey raped one of the girls and insisted that he rape the other. He said he didn't want to but was not game to refuse. He said that Vince then killed the girls. He said O'Dempsey asked him to kill the other one, but that he couldn't do it. He didn't say specifically how the girls were killed but he was clear that he didn't kill anyone. Vince killed them all. He made mention of Warwick but didn't say where.

> 32. He said they were buried. He said that they had been buried. He said that they had both been digging. Shorty said he felt even worse when the sun came up and he had to look at them, they were laying there."

[16] In this account Hall said he was unsure whether Keith Meredith was present for the conversation "but he knew about what had happened. He was pretty horrified by what had happened." This statement does not describe any other occasion on which Dubois confessed the details of what occurred. Instead, it says: "After the conversation when he told us what had happened, it was never mentioned again between me and Shorty."

[17] In evidence at the committal proceeding Hall initially said that Keith Meredith may have been present in the vehicle when Dubois first confessed the details of events. Hall later gave evidence that Dubois again confessed the details of events the very next day because Keith Meredith "had to be told". Hall said Dubois, Keith Meredith, Tom Hamilton and himself were present on this occasion. Hall claimed Dubois repeated much of the same detail he had given the day before.

[18] Hall claimed in evidence at the committal proceeding that he deliberately lied on oath at the CMC hearing when he denied Dubois had ever confessed. Prior to giving evidence at the committal proceedings, Hall was provided with an undertaking, signed by the Attorney-General, to the effect that any evidence he gave would not be used against him for any offence, other than in respect of the falsity of any evidence he may give.

[19] Keith Meredith signed a statement dated 7 October 2014 in which he said:

> "Dubois has never told me about any involvement that he had in the McCulkin's [sic] disappearance. If Dubois told anybody about his involvement it would have been Tom Hamilton because they were very close. Hall and Hamilton have never told me about any person's involvement in the McCulkin disappearance."

Meredith confirmed the truth of this passage on oath at the committal proceeding.

[20] Meredith also said on oath at the committal proceeding that there had never been any occasion when Dubois had confessed his knowledge of or involvement in the disappearance or deaths of the McCulkins. Meredith also specifically denied Hall's claim that he had been told by Dubois of events concerning the disappearance and deaths of the McCulkins. Meredith also denied ever learning of any such detail from Hall or Tom Hamilton.

[21] The evidence against Dubois also includes an alleged statement by Dubois to Tom Hamilton, which Hamilton recounted to Douglas Meredith (an associate of Hall and Hamilton). Dubois allegedly told Hamilton that he and O'Dempsey "had done it, they raped the two girls and Vince murdered all of them".

[22] In evidence at the committal proceeding, Douglas Meredith said the conversation with Tom Hamilton had occurred in the early hours of the morning after they had been drinking and smoking cannabis all night. He said he thought it may have been in 1975 but was unsure when. He said he was unsure of the words used by Hamilton. Douglas Meredith

also said that from what he was told by Hamilton he was unsure whether "Shorty" was relating something he had been present for or something he had been told.

[23] The Crown case against Dubois also relies upon the evidence of Trevor McGrath, who was his neighbour for a few years after 2009. According to McGrath, Dubois told him that after being charged with murder he was let out on insufficient evidence, and that although the authorities reassess the case every five years "I'll be right because I can tell you now they will never find the bodies".

[24] The Crown also relies in its case against Dubois upon the evidence of Dubois' brother, Paul Dubois. Paul Dubois' evidence relates to a conversation which he had with his brother after his brother and O'Dempsey were reported in the media to be suspects for the disappearance and murders of the McCulkins. The conversation occurred before Dubois was arrested in South Australia in 1980 and extradited to Queensland. According to Paul Dubois, he telephoned his brother after seeing a television program and the conversation went as follows:

> "33. I asked Garry 'Did you do this?'
>
> 34. Garry said 'No Vince did.'
>
> 35. I said 'Why?'
>
> 36. Garry said 'That woman was working for Vince's massage parlour and was on with Vince. She had information that could put him away for 20 years and was blackmailing him and that's the only way that he could deal with it.' He told me that Barbara McCulkin had surgery on her breasts just before this.
>
> 37. I said 'But the kids mate?'
>
> 38. Garry said 'Vince said the kids were not meant to be there' or words to that effect."

[25] Dubois' sister Gail provided a statement dated 19 March 2015 in which she described a conversation she had with her mother, Hilma Noonan, who is now deceased. She claims her mother told her "she had asked Garry about it and asked if he had done it and he had told her that he didn't do it but he was in the vicinity when it happened." In evidence at the committal proceedings Gail Dubois acknowledged that in her evidence to the CMC she said that the "vicinity" referred to Dubois being near the McCulkins' house.

[26] There is other evidence against Dubois, including alleged statements made by him to Queensland and South Australian police.

[27] The statements allegedly made by Dubois to his brother, his mother, his neighbour and others, if admitted into evidence and accepted, tend to prove his knowledge of the fate of the McCulkins, but do not identify how that knowledge was gained. This other evidence is not capable of establishing Dubois' involvement in the abductions, rapes and murders in the absence of the alleged confession to Hall.

The contentious evidence which is admissible only in the case against O'Dempsey

[28] O'Dempsey's submissions point to the fact that the Crown case against each applicant is largely circumstantial, and in his case there are "alleged vague and unparticularised claims by two witnesses" that O'Dempsey confessed that he killed the McCulkins. There are no alleged confessions to the rape allegations, nor to those of deprivation of liberty. Each of the witnesses who claim that confessions were made to him or her are submitted to have "serious question marks against their credibility". Ms Scully, at the time of the alleged confession, was a drug addict, as she was at the time of the investigation in which she made those claims. McDonald gave evidence of a confession as part of an application for an indemnity from prosecution for involvement in a significant cannabis plantation.

[29] O'Dempsey's submissions question whether any motive is evident in the Crown case against him. For reasons which are outlined in the Crown's submission, the Crown's case is that the McCulkins were killed because of fear that Mrs Barbara McCulkin would have revealed information about the firebombing of the Torino Nightclub on 25 February 1973. There is some evidence that Dubois and others were involved in this offence and that they were hired by O'Dempsey. Mrs McCulkin's estranged husband, William McCulkin, claimed to know about the Torino fire and, prior to her disappearance, Mrs McCulkin was telling people about it. About 11 days after the Torino fire, another nightclub in Fortitude Valley, the Whiskey Au Go Go, was firebombed and 15 people died. There is evidence in the case against Dubois, arising from the alleged statement he made to his brother, that Mrs McCulkin was threatening O'Dempsey about his criminal activities and that she was killed because of fear that she would reveal his connection with the Torino fire, which in turn might falsely incriminate him in respect of the Whiskey Au Go Go murders. According to this evidence, O'Dempsey decided that the only way he could deal with the problem was to kill Barbara McCulkin, and there originally was no plan to kill the children.

[30] It is difficult to define the extent to which there is admissible evidence against O'Dempsey of a motive to abduct and kill at least Mrs McCulkin, and I should not assume that Dubois' brother's evidence is admissible against O'Dempsey.

[31] I should note in this context that the Crown case against each applicant has only been particularised in the most general terms, essentially in the form of the few sentences which appear in the first paragraph of these reasons. The Crown has not further particularised its case and O'Dempsey's legal representatives have not asked it to do so. I have not been told that part of the Crown case is based upon an alleged common plan by Dubois and O'Dempsey to do something unlawful together, with liability for some or all of the offences resting on s 8 of the *Criminal Code*. I am dealing with each application on the basis that each applicant is either a principal offender or aided the other so as to be liable under s 7.

[32] As noted, the critical confessional evidence which is admissible against O'Dempsey, but not against Dubois, is the evidence to be given by Warren McDonald and Kerri-Ann Scully.

Warren McDonald

[33] Warren McDonald has provided a number of statements. His statement dated 5 March 2015 details an alleged confession made to him by O'Dempsey.

[34] McDonald explains that he met O'Dempsey through McDonald's father. He says he was aware that his father grew cannabis over the years and suspects that is how his father and O'Dempsey knew each other. He says that he knew O'Dempsey to be involved in criminal activity, including drugs, and that he was a violent man.

[35] McDonald also says that during the time he was working with O'Dempsey he met Dubois, or "Shorty", several times.

[36] McDonald says he came to know O'Dempsey well over the years and that O'Dempsey started to trust him. He says he would drive O'Dempsey places because O'Dempsey believed his car was "bugged" and was always concerned about being caught by police. McDonald also says that O'Dempsey would talk about people from his past including the "Clockwork Orange" group and a man named Stokes who wrote about O'Dempsey and "Shorty". He says O'Dempsey referred to Hamilton as a member of the "Clockwork Orange" group.

[37] McDonald says that at O'Dempsey's suggestion he bought a property for the purpose of raising alpacas and exporting them to China. He says that afterwards, O'Dempsey, McDonald's father and others would come to the property and camp there. He says it was decided they would grow a cannabis crop. McDonald describes the first crop that was grown at his property involving O'Dempsey.

[38] According to McDonald, O'Dempsey eventually spoke to him about the McCulkins. McDonald says he was driving O'Dempsey home for his weekend off from working at the crop. They were in McDonald's Falcon utility. It was getting close to the time to harvest the crop and O'Dempsey was talking about the need to not let anyone leave. McDonald says O'Dempsey said "you need a notch on your gun … you need a kill, when I was your age I had several notches on my gun."

[39] McDonald says O'Dempsey then said that he killed the McCulkins and that Shorty was nothing but a rapist. The relevant part of the police interview with McDonald on 5 March 2015 reads:

> "McDonald: Umm. He told me that he killed the McCulkins, and Shorty raped them …
>
> Police officer: Yep.
>
> McDonald: … Shorty was nothing but a rapist. And, if I wanted to live a long and healthy life, never repeat anything that I knew that would get myself or anyone else into trouble."

[40] In the interview McDonald says O'Dempsey went on to say "they will never get me because they will never find the bodies."

[41] McDonald says that he later had a number of short conversations with O'Dempsey about the McCulkins including that O'Dempsey had written a letter to Billy McCulkin which was threatening.

[42] McDonald says he saw O'Dempsey with a handgun at O'Dempsey's place and O'Dempsey told him "you have got to have a revolver so you don't leave the shell behind."

[43] According to McDonald, O'Dempsey also told him he and Dubois had been very close, "had done some things in the past and they were tight". McDonald also says that once, after seeing a news story about the McCulkins, O'Dempsey asked him to ring Dubois and get him to come down. He says he called Dubois and told him "the old fella wants to see you, could you come down to Warwick". He says he later went with O'Dempsey to Queens Park in Warwick where O'Dempsey met with Dubois.

[44] McDonald also says that on one occasion he was asked by O'Dempsey to take another man named Shane up to Dubois' place until Shane's police trouble blew over. He says he took Shane to Dubois' place at Burpengary but that Dubois was not prepared to have Shane stay. He says he returned with Shane, and when he explained what happened to O'Dempsey he said "he is a fucking arse hole, we did all those things years ago, he could do me a personal favour."

[45] McDonald also says that once he was contacted by Dubois who was asking him to help his wife Jan in the event that Dubois went to jail for a drug charge. McDonald says he took about six pounds of O'Dempsey's cannabis worth about $12,000 from the shed where it was stored and gave it to Dubois at Burpengary. He says he later told O'Dempsey what he had done and O'Dempsey "roused" on him. He says O'Dempsey said he should have checked with O'Dempsey first, and said he and Shorty "did things years ago and it put him in a bad position, Shorty is nothing but a fucking rapist."

[46] McDonald also says that at some later time he passed a message on to O'Dempsey that "Finch" was supposedly returning to Australia to give evidence against O'Dempsey about his involvement in the Whiskey Au Go Go. He says O'Dempsey became upset about that information.

[47] McDonald also says that in 2014 police came to his residence with a search warrant. He saw O'Dempsey in the street in Warwick a few days later and O'Dempsey asked if it was true they had searched his house. He says he told O'Dempsey "Yes" and O'Dempsey then said "The CCC is rounding everybody up and you need to keep your mouth shut or else."

[48] McDonald says he later spoke to O'Dempsey a number of times prior to O'Dempsey's arrest. He says that in one of those conversations O'Dempsey told him he believed Matthew Ide had "started it all" and that he was a police informer, and that O'Dempsey said he had "put a $50,000 contract on his life."

Kerri-Ann Scully

[49] Ms Scully was born in 1981 and for a time was in a relationship with O'Dempsey. Ms Scully is the niece of Thomas Hamilton. She says she knew O'Dempsey from when she was a child.

[50] Scully says that she contacted O'Dempsey when her family needed money to help with her sister. She says she later met O'Dempsey at Chermside shops and O'Dempsey asked her to work on his drug crop and said she could make about $20,000 for six months' work. She says they went to the Gold Coast casino and struck up a relationship.

[51] Scully describes how her relationship with O'Dempsey developed and how he paid for her drug treatments. She says he was also paying her to stay with him at Warwick, that his money came from crime and that he had lots of cash.

[52] Scully says O'Dempsey spoke about Bill Stokes writing things in *The Port News* alleging O'Dempsey was guilty of 15 or 18 murders. She says O'Dempsey said "he doesn't even have a clue, he doesn't know anything. I'm good for this many" and held up three fingers on one hand, then repeated it and made out the number 33. She says she then asked "What thirty-three? Really?" and O'Dempsey replied "yep".

[53] Scully recounts another occasion O'Dempsey spoke about a book titled *Shotgun Standover* which referred to him. She says he said he would show her what was written about him, and that he referred to a part of the book about the McCulkins. It claimed O'Dempsey and Dubois were responsible for the murders.

[54] She says O'Dempsey told her Barbara McCulkin was going to dob in her husband for involvement in the Torino Nightclub fire. She says O'Dempsey told her Tom Hamilton, "Shorty" and his mates were responsible for the Torino fire, but had nothing to do with the Whiskey Au Go Go.

[55] According to Scully, she told O'Dempsey that the book gave details of where the bodies might be buried and O'Dempsey laughed about the reference to Leslie Dam. She says O'Dempsey told her Billy McCulkin had interfered with his children and O'Dempsey admitted to having slept with Barbara McCulkin.

[56] The book referred to Stokes refusing to give evidence at the inquest and O'Dempsey claimed that was because he was scared of O'Dempsey. She says the book also referred to O'Dempsey claiming privilege and the charges being dropped. She says O'Dempsey said "I'm good for it, but they'll never get me on these murders".

[57] Ms Scully says that when O'Dempsey said these things, he was not joking, was not drunk or on drugs and was serious.

Dubois' submissions

[58] Dubois' application is made on the basis that:

1. there is evidence admissible against O'Dempsey which is not admissible against Dubois;

2. the inadmissible evidence concerns a central issue in the Crown case against Dubois and therefore, while not admissible against Dubois, is highly prejudicial to his defence;

3. the inadmissible evidence also goes to show Dubois in a bad light, or as having committed other offences, and is therefore highly prejudicial to him;

4. no directions to the jury can ensure him a fair trial if he is tried jointly with O'Dempsey.

[59] The prejudice occasioned to Dubois by a joint trial arises from the risk that, despite directions to the jury, inadmissible evidence from McDonald and Scully will corroborate in a general way the account given by Hall of O'Dempsey's role in the offences and of O'Dempsey's character as a hardened criminal and cold-blooded murderer. The alleged confession by Dubois to Hall paints O'Dempsey in this light.

[60] According to Dubois, the jury will not be able to easily disentangle the evidence about O'Dempsey and his character which is admissible against Dubois and evidence about the same subject which is inadmissible against him. There is submitted to be a real risk that inadmissible evidence, particularly the evidence of McDonald, will impermissibly bolster the reliability of the statements made to Hall. This feature is said to bring the case within a category of cases in which appellate courts have decided that separate trials should have been ordered.[1] According to Dubois, this case crosses the line discussed by Jackson J in *Swan*[2] because of the tendency of inadmissible, prejudicial evidence to bolster the credibility of an important witness against the accused in the context of an otherwise weak Crown case.[3]

[61] The prejudicial evidence which is admissible in the case against O'Dempsey, but inadmissible in the case against Dubois, is said to depict O'Dempsey as the type of character described in the alleged confession to Hall, making it difficult, if not impossible, for the jury to disentangle those issues.

[62] There is also the highly prejudicial evidence of McDonald that O'Dempsey told him on two occasions that Dubois was "nothing but a rapist", and there is other discreditable conduct by Dubois which appears in McDonald's evidence. Some of this prejudicial evidence will not be led by the Crown at a joint trial. However, even if it is not, there remains a substantial body of prejudicial evidence which is inadmissible in the Crown case against Dubois, which, if accepted, will bolster the credibility and reliability of the statements made to Hall about Dubois and the commission of the offences.

[63] Dubois submits that the considerations which generally favour joint trials do not outweigh the prejudice which he faces from a joint trial.

[64] Dubois' submissions, like those of O'Dempsey, emphasise that neither applicant will seek to run a "cut-throat" defence at trial. Neither will seek to blame the other. Instead, each will defend the charges by putting the Crown to proof and challenging the strength of the Crown's case in relation to their alleged association with the disappearance of the McCulkins. Each will challenge the credibility and the reliability of alleged confessional statements.

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1 See *R v Swan* [2013] QCA 217, *R v Pham* [2004] NSWCCA 190, *R v Crawford* (1989) 2 Qd R 443 and *R v Demirok* [1976] VR 244.

2 *Swan* at [52].

3 *Swan* at [64].

[65] There are "strong reasons of principle and policy" why persons charged with committing an offence jointly ought to be tried together, and that is particularly so where each seeks to cast the blame on the other.[4] However, this is not a case in which it appears that either defendant seeks to cast the blame on the other or to allege "that he was coerced or otherwise influenced by the other".[5] In the circumstances, Dubois submits that this is not a case where there is a real issue as to inconsistent verdicts if there are separate trials. It is not a case where the jury will be asked to decide between the criminal liability of each accused, or where each accused's account differs such that the conflict should be resolved by the same jury at the same trial.[6] The considerations of principle or policy which generally favour a joint trial where one accused seeks to cast the blame on the other or each accused gives a different account of events do not apply.

[66] Other considerations which are relevant in determining whether there should be a joint or separate trial, such as administrative considerations, delay occasioned by separate trials and the inconvenience of witnesses, are submitted to not be particularly strong.

[67] Ultimately, each applicant submits that the considerations which favour a joint trial are outweighed by the high prejudice which will be occasioned to each of them if there is a joint trial, being prejudice which cannot be cured by direction. In Dubois' case, he submits that Hall's evidence is such that it will inevitably attract a warning to the jury about acting upon it. This is because he is an indemnified witness, there was a great delay (decades) in making his statement and he gave a prior inconsistent account on oath.

[68] In addition to the extensive warnings that will need to be given to the jury about the dangers of acting on Hall's evidence, in a joint trial, a jury will be directed to ignore any corroboration of Hall's evidence in the evidence which is admissible only against O'Dempsey.

[69] In essence, the jury will be told about the central importance of Hall's evidence to the Crown case against Dubois and the dangers of acting upon it in the absence of corroboration, and then told to ignore evidence which corroborates it. Dubois submits that even a carefully directed jury is not capable of such a "remarkable mental feat".[7]

O'Dempsey's submissions

[70] O'Dempsey points to the significant body of evidence to be led against Dubois which is not admissible against him, but which is submitted to be "highly prejudicial" to him. This prejudice is said to be unable to be cured by direction to the jury in a summing up or at the time the evidence is given. The inadmissible evidence includes the evidence of Peter Hall which I have quoted above.

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4 *Webb & Hay v The Queen* (1994) 181 CLR 41.

5 *R v Iria & Panozzo* [2004] VSC 110 at [6].

6 *Swan* at [39].

7 *Winning v R* [2002] WASCA 44 at [42] cited in *R v Roughan & Jones* [2007] QCA 443 at [56] and [59]; (2007) 179 A Crim R 389 at 400 – 401.

[71] Counsel for O'Dempsey highlights the chilling and detailed description of the rapes and murders contained in this evidence, which is inadmissible against O'Dempsey. It contrasts with the alleged confessions to McDonald and Scully which contain no details about the killing of the McCulkins and say nothing about any rape. Those confessions were allegedly made to persons whose credibility is open to strong challenge for the reasons noted above. Whilst O'Dempsey acknowledges the circumstantial evidence associating him with the McCulkins on the night they disappeared and the evidence of his flight, this circumstantial evidence was not enough to found a prosecution and so the prosecution case rests on questionable evidence of confessions. In short, according to O'Dempsey, the prosecution case against him is not a particularly strong one and depends upon alleged confessions to McDonald and Scully, which are unparticularised and made to witnesses of questionable credibility.

[72] O'Dempsey's submissions engage the principle that separate trials should be ordered where it is impossible or at least extremely difficult to disentangle the evidence against each accused, or the evidence against one is highly prejudicial against the other, and where directions by a trial judge to avoid prejudice require "remarkable mental feats that the jury could not be expected to perform", or where "the prejudice may be such as to 'cause a jury even to ignore the directions of a trial judge'."[8] A number of cases indicate that a separate trial will usually be ordered where one case is significantly weaker than the other, where there is "a real risk that the weaker prosecution case will be made immeasurably stronger by reason of prejudicial material in the case of the other accused and where the degree of prejudice from evidence admissible only in the case of one accused to the case of the other is so great as to make it unfair to try the accused together".[9]

[73] Based on these principles, O'Dempsey submits that the evidence referred to above has the effect of making the Crown case against him "immeasurably stronger by reason of the prejudicial effect of the evidence led against Mr Dubois". Those features, together with the impossibility of the jury performing remarkable mental feats, including disregarding the chilling and detailed description given by Hall and the inadmissible evidence given by others, are submitted to justify a separate trial.

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[8] *R v Belford & Bound* [2011] QCA 43 at [104]; (2011) 208 A Crim R 256 at 287 [104] citing *R v Davidson* [2000] QCA 39 at [13].

[9] *R v Aboud & Stanley* [2003] QCA 499 at [35].

The Crown's submissions

[74] The Crown's submissions have been previewed in [6] above, in general terms. According to the Crown, this is a case like *R v Box & Martin*[10] in which there is nothing in the case to take it out of the usual, and in which there is a discrete body of evidence about which appropriate directions can be given.

[75] The Crown submits that there is a strong circumstantial case that the McCulkins are dead and that the two accused were the last people to see them before they disappeared. There is also evidence, independent of the alleged admissions, that the two accused had cause to fear that Mrs McCulkin might incriminate them for the Torino fire and, in doing so, unintentionally incriminate them for the Whiskey Au Go Go arson murders.[11] There is submitted to be a cogent case against each applicant based on circumstantial evidence and confessional evidence which is admissible against that applicant.

[76] This case does not fall within an exceptional category, such as when evidence is admissible only against one accused and is highly prejudicial to the other accused, and it is either impossible or extremely difficult for the jury to disentangle the admissible and inadmissible evidence or to observe directions by a trial judge. In some cases directions may require a jury to perform "remarkable mental feats", or the inadmissible evidence may be so highly prejudicial that it is impossible for the jury to ignore it. However, the Crown submits that this is not such a case.

[77] In each case the evidence which is admissible against one, but not against the other, is submitted to be "easy for a jury to disentangle".

[78] The alleged admissions by O'Dempsey to Scully do not implicate Dubois at all. Those allegedly made by O'Dempsey to McDonald do, but in little detail and go no further than the alleged admissions by Dubois to Hall. The alleged admissions by Dubois to Hall (and Hamilton) are in greater detail than any admission allegedly made by O'Dempsey about the murder of the McCulkins. The alleged admissions by O'Dempsey to McDonald and Scully respectively contain no detail about the murders at all. However, the Crown submits that the greater detail contained in the alleged admissions made by Dubois to Hall (and Hamilton) does not present a problem. According to the Crown, this is not a case where the admissions by one co-accused add something which is absent in the case admissible against the other.

Crown response to Dubois' submissions

[79] In response to Dubois' application, the Crown submits that the alleged admissions by O'Dempsey are less detailed than the admissions allegedly made by Dubois and which are admissible against him. The admissions by O'Dempsey are submitted to not add anything to the case against Dubois. In any event, the alleged confessions to O'Dempsey

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[10] [2001] QCA 272 at [71]

[11] The public record shows that John Andrew Stuart and James Richard Finch were found guilty of those murders (*R v Stuart & Finch* [1974] Qd R 297) and that, after his release from prison, Finch publicly confessed to having committed the arson at the Whiskey Au Go Go nightclub.

are a discrete category of evidence which the Crown submits can be the subject of appropriate and specific directions to the jury.

[80] The Crown also responds to Dubois' argument that O'Dempsey's alleged statement to McDonald on more than one occasion that Dubois was "nothing but a rapist" are highly prejudicial. As previewed above, Dubois' argument is that if those statements were made and if O'Dempsey's words are taken as describing Dubois' participation in the charged offences, then they are "striking corroboration" of Hall's evidence, and serve to further impermissibly corroborate Hall's account.

[81] If, on the other hand, the statements are taken to refer to some other rape committed by Dubois at some other time, there is a very real risk that the jury will engage in impermissible propensity reasoning. The inadmissible evidence is still highly prejudicial, but in a different way. According to Dubois, it is a "virtual impossibility" that the jury could be expected to ignore evidence that he had previously committed an offence of rape when considering the question of whether he participated in the rapes and murders which are charged. Evidence of his having previously committed a rape would bring the case within the category of cases discussed in *R v Roughan & Jones*.[12] In that case, Roughan had been charged with an offence for stabbing someone with a knife and this evidence was given, to his prejudice, in a murder trial in which he was alleged to have stabbed a person to death. That and other prejudicial evidence led to his conviction being set aside on appeal on the basis that there should have been a separate trial.

[82] In short, Dubois submits that the evidence which the Crown intends to lead from McDonald in which O'Dempsey is alleged to have twice described Dubois as "nothing but a rapist" is highly prejudicial because it either impermissibly corroborates Hall's account of the rapes with which Dubois is jointly charged or portrays him as having raped someone else on a previous occasion. It is highly prejudicial, and cannot be cured by directions.

[83] In response, the Crown submits that the only logical meaning of O'Dempsey's alleged statement to McDonald in which he said words to the effect "[I] killed the McCulkins, and Shorty raped them … Shorty [is] nothing but a rapist" is that it relates to the murders and rapes with which O'Dempsey and Dubois are jointly charged.

[84] As to evidence of other discreditable conduct by Dubois which O'Dempsey allegedly told McDonald about, such as Dubois' involvement in supplying cannabis, the Crown concedes that it is irrelevant to the case against Dubois and can be excised. Other evidence which Dubois submits is prejudicial to his defence, such as evidence about a refusal to allow Shane O'Dempsey to stay at his house when Vincent O'Dempsey requested this is capable of being addressed, according to the Crown, by being edited to reveal simply that O'Dempsey was annoyed with Dubois for failing to do him a favour.

[85] As to the more prejudicial evidence upon which Dubois' application is centred, the Crown submits that this case does not fall within one of the recognised exceptions to the general rule that co-offenders should be tried together. There is a cogent case against Dubois without the alleged admissions by O'Dempsey, and the alleged admissions by

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[12] [2007] QCA 443; (2007) 179 A Crim R 389.

O'Dempsey "do not fill in holes" in the prosecution case against Dubois. According to the Crown, the assessment of the credibility of Hall and Douglas Meredith does not involve the jury performing any "remarkable mental feats". The Crown's case does not involve leading evidence in a case against O'Dempsey of disreputable conduct by Dubois which is not already part of the Crown's case against Dubois. The Crown contends that the alleged admissions by O'Dempsey "say no more than the alleged admissions by Dubois against himself".

Crown's response to O'Dempsey's submissions

[86] As noted, the Crown concedes that the alleged admission by Dubois to Hall is more detailed than any admission allegedly made by O'Dempsey, but submits that it is consistent with his admissions. The Crown submits that there is a strong circumstantial case that O'Dempsey and Dubois were the last people to see the McCulkins before their disappearance. There is evidence of flight shortly after the confrontation with William McCulkin. According to the Crown, neither case is weak and the case against O'Dempsey is not weaker than the one against Dubois. There is said to be a cogent case against O'Dempsey based upon the circumstantial evidence and the evidence of alleged confessions by O'Dempsey.

[87] The alleged admissions by Dubois are said to not fill holes in the prosecution case against O'Dempsey. An assessment by the jury of the credibility and reliability of Scully and McDonald, disregarding alleged admissions by Dubois and other evidence which is not admissible against O'Dempsey, is submitted to not require the jury to perform any remarkable mental feats. Again, this is not a case of one accused seeking to shift the blame to the other, and does not involve leading evidence in the case against Dubois of disreputable conduct by O'Dempsey which is not already part of the Crown's case against O'Dempsey. Finally, the Crown submits that the alleged admissions by Dubois "say no more than the alleged admissions by O'Dempsey against himself".

Relevant principles

[88] The principles governing the discretion to order separate trials under s 597B of the *Criminal Code 1899* (Qld) are not in contention. Generally there are strong reasons of principle and public policy why joint offences should be tried jointly. The mere fact that one result of joinder will be that evidence admissible against one but inadmissible against the other accused will be before the jury is not a reason for ordering separate trials.[13] In *Webb & Hay v The Queen*,[14] Toohey J (with whom Mason CJ and McHugh J agreed) stated:

> "King CJ dealt with this ground by pointing out that there are 'strong reasons of principle and policy why persons charged with committing an offence jointly ought to be tried together. That is particularly so where each seeks

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[13] *R v Davidson* [2000] QCA 39 at [12]; *R v Roughan & Jones* [2007] QCA 443 at [49]; (2007) 179 A Crim R 389 at 398–399 [49].

[14] (1994) 181 CLR 41 at 88-89 (citations omitted).

> to cast the blame on the other.' What King CJ referred to as 'strong reasons of principle and policy' were discussed by his Honour in *Reg v Collie*. I respectfully agree with that discussion which emphasizes that when accused are charged with committing a crime jointly, prima facie there should be a joint trial. There are administrative factors pointing in that direction but, more importantly, consideration by the same jury at the same trial is likely to avoid inconsistent verdicts, particularly when each accused tries to cast the blame on the other or others. There are of course dangers for an accused in a joint trial by reason of the admission of evidence which would not be admitted at the trial of one accused. That risk must be obviated by express and careful directions to the jury as to the use they may make of the evidence so far as it concerns each accused."

[89] In *R v Davidson*,[15] de Jersey CJ and Davies JA, following *Gilbert v The Queen*,[16] referred to the assumption that as a general rule juries understand and follow the directions they are given by trial judges, and stated:

> "Accepting as we do that there may be some cases in which it is appropriate to order separate trials, even in a case involving joint offences, where the evidence admissible against each accused is impossible or at least extremely difficult to disentangle and the evidence against one is highly prejudicial against the other, and accepting also that there may be cases in which prejudice may cause a jury even to ignore the directions of a trial judge, we do not think that this is such a case."

[90] The Court of Appeal in *R v Roughan & Jones*[17] restated that generally there are strong reasons of principle and public policy why joint offences should be tried jointly, and the mere fact that one result of joinder will be that evidence admissible against one but inadmissible against the other accused will be before the jury is not a reason for ordering separate trials. The "strong reasons" for a joint trial were said to be strengthened rather than weakened where each of the accused deploys the "cut throat" defence.[18]

[91] In *Webb & Hay v The Queen*,[19] Deane J stated that:

> "... general comments by appellate judges about the desirability of placing the whole picture before the jury should not be misconstrued as an implicit endorsement of the notion that a consideration favouring a joint trial is that it will enable evidence which is inadmissible against a particular accused to

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15 [2000] QCA 39 at [13].

16 (2000) 201 CLR 414.

17 Supra at 398–399 [49].

18 Ibid at 399 [50].

19 Supra at 79.

be placed before the jury charged with the determination of the guilt or innocence of that accused."

[92] The authorities establish that the "mere fact" that one result of joint offences being tried jointly will be that evidence admissible against one accused but inadmissible against the other accused will be before the jury is not a "sufficient reason for ordering separate trials".[20]

[93] The considerations noted above in cases where each of the accused deploys a "cut throat" defence of seeking to incriminate the other, and other considerations which favour joint offences being tried jointly "must be weighed against the risk that evidence that would not be admitted at the trial of one accused may prejudice the fair trial of that accused".[21]

[94] The risk of prejudice from inadmissible evidence "must be obviated by express and careful directions to the jury as to the use they may make of the evidence so far as it concerns each accused".[22]

[95] Whilst the starting position is that co-accused should be jointly tried, the authorities recognise that express and careful directions to the jury may not be capable in some circumstances of avoiding substantial prejudice to the fair trial of an accused arising from a joint trial. In such a case, separate trials will be ordered.

[96] The categories of cases where separate trials should be ordered are not closed.[23] A common example is where "one case is significantly weaker than the other, where there is a real risk that the weaker prosecution case will be made immeasurably stronger by reason of prejudicial material in the case of the other accused and where the degree of prejudice from evidence admissible only in the case of one accused to the case of the other is so great as to make it unfair to try the accused together."[24] The expression "immeasurably stronger", which has been used in many authorities, was discussed by Adams J (with whom Spigelman CJ agreed and with whom Hulme J expressed no disagreement) in *R v Pham*.[25] Whilst the word "immeasurably" usually connotes something of such an enormous degree that it is beyond measurement, Adams J thought that in the present context it means "significant, though incommensurable".[26] Adams J also thought that the weakness of the applicant's case as compared with that of the co-accused against whom it is proposed to tender the prejudicial evidence was an irrelevant consideration. His Honour stated that if there was "a significant risk that the prejudicial evidence could be used by the jury adversely to the applicant and that evidence was itself significantly prejudicial", it was hard to see why the mere fact that it was

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[20] *R v Belford & Bound* [2011] QCA 43 at [104]; (2011) 208 A Crim R 256 at 287 [104].

[21] Ibid.

[22] *R v Swan* [2013] QCA 217 at [39].

[23] *R v Aboud & Stanley* [2003] QCA 499 at [35].

[24] Ibid.

[25] [2004] NSWCCA 190 at [38]-[40].

[26] At [39].

adduced in a weaker co-offender's case was material.[27] According to Adams J in *Pham*, "the crucial issue is the potential effect of the inadmissible evidence on the jury's consideration of the applicant's case".[28]

[97] The views expressed by Adams J were subsequently adopted by Hodgson JA (with whom Hoeben J and Grove AJ agreed) in *Madubuko v R*.[29] I agree, with respect, that the crucial issue is the potential effect of the inadmissible evidence on the jury's consideration of the applicant's case. I would add that the potential effect is assessed having regard to whether directions are able to be given so as to avoid significant prejudice to the applicant at trial. These aspects are recognised in the authorities, including decisions of the Court of Appeal of this State which establish that:

- substantial prejudice will not be avoided where directions given by the trial judge to avoid it require "remarkable mental feats" that the jury could not be expected to perform; or

- the prejudice may be such as to "cause a jury even to ignore the directions of a trial judge".[30]

[98] Our criminal justice system must operate on the assumption that, as a general rule, a jury will understand and follow directions given to them by trial judges.[31] However, in a passage recently cited with approval by the Court of Appeal in *R v Vecchio & Tredrea*,[32] the Court of Appeal of the Supreme Court of Victoria stated:

> "It would be naive, however, blindly to assume that a jury's decision-making will always be immune from improper prejudice, or that in every case improper prejudice will be capable of cure by judicial direction. In cases where the effective amelioration of prejudice cannot be achieved by direction, it will be proper to sever an indictment."[33]

[99] The same passage confirmed that in joint trials of co-accused "it frequently occurs that the admissions made against interest of one - whether in or out of court - have the potential to prejudice the case of another or others". That fact alone does not justify a separate trial. It is only where the relevant prejudice "is incapable of effective nullification by direction" that an appeal court will reach the conclusion that there has been a substantial miscarriage of justice.[34] The leading authorities accept that even in cases involving the

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[27] At [40].

[28] Ibid.

[29] [2011] NSWCCA 135 at [29].

[30] *R v Belford & Bound* [2011] QCA 43 at [104]; (2011) 208 A Crim R 256 at 287 [104].

[31] *Mwamba v The Queen* [2015] VSCA 338 at [44] and the cases cited therein.

[32] [2016] QCA 71 at [73].

[33] *Mwamba v The Queen* [2015] VSCA 338 at [45].

[34] Ibid.

joint commission of offences there will be cases in which it is appropriate to order separate trials of co-accused, for example, where:

- the evidence admissible against each of the accused is impossible (or, at the least, extremely difficult) to disentangle; or

- the evidence admissible against one accused is highly prejudicial to the other and is such that it may cause a jury to disregard the directions of a trial judge; or

- directions by a trial judge about the impermissible use of certain evidence require jurors to perform mental feats which they could not be expected to perform.

[100] A number of cases can be cited in which separate trials should have been ordered on one of these grounds. It is neither necessary nor appropriate to survey the facts of those cases, which include *Demirok*;[35] *Collie*;[36] *Webb & Hay*;[37] *Gibb & McKenzie*[38] and *Jones & Waghorn*.[39] Nor is it necessary or appropriate to survey the facts of cases in which separate trials have been refused and convictions upheld on the grounds that there was no substantial miscarriage of justice that resulted from the refusal. Such cases include the cases cited by the Crown on these applications of *R v Lewis & Biara*[40] and *R v Box & Martin*[41] and the recent decision of the Court of Appeal in *R v Vecchio & Tredrea*.[42]

[101] In *R v Swan*,[43] Jackson J (with whom I agreed) expressed a concern about the difficulty of formulating "a practicable articulation of the distinction to be drawn between a case where the line has been crossed and one where it has not." Jackson J observed that some of the problems in this area are intractable, and that where defendants are tried together there will often be evidence of admissions receivable against one but not the other. Also, the "credibility" of the evidence of a witness against one defendant can be affected if regard is had to evidence which is inadmissible against that defendant but which is admissible against the other.[44] The problems presented in such cases are not resolved in favour of separate trials simply because those risks exist, in general.

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35 *Demirok v R* [1976] VR 244.

36 *Collie v R* (1991) 56 SASR 302.

37 *Webb & Hay v The Queen* (1994) 181 CLR 41.

38 *R v Gibb & McKenzie* [1983] 2 VR 155.

39 *R v Jones & Waghorn* (1991) 55 A Crim R 159.

40 [1996] QCA 405.

41 [2001] QCA 272.

42 [2016] QCA 71.

43 [2013] QCA 217 at [52].

44 At [53].

[102] After analysing various authorities, Jackson J considered that the problem which the cases dealt with is one which arises where the Crown case against the relevant defendant "is weak and turns on the credibility of an important witness or witnesses about whom there is an apparent real question of credibility".[45] Jackson J concluded that a separate trial may be called for where the apparent evidence admissible against another defendant but not against the relevant defendant "would have the effect of bolstering the important witnesses' credibility against the relevant defendant".[46]

[103] The problem of credibility enhancement of an important witness and the question of credibility enhancement in general were discussed by the Court of Appeal of the Supreme Court of Victoria in *Destanovic v The Queen*.[47] That decision involved an issue about how jurors assess the credibility of a common witness at a joint trial. An appeal by the applicant Destanovic was allowed (by majority) on the grounds that, in the unusual circumstances of that case, the judge's directions to the jury were erroneous and resulted in a miscarriage of justice. Maxwell P, who reached a different conclusion on Destanovic's application for leave to appeal against conviction, stated that the authorities establish the following propositions:

> "(a) there are powerful public interest considerations which favour the joint trial of joint offenders;
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> (b) the likelihood of credibility enhancement is an inescapable feature of a joint trial, as jurors cannot be expected to compartmentalise their assessment of a witness's credibility;
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> (c) this is a consequence of joint trials that must be accepted in order to avoid inconsistent verdicts;
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> (d) the likelihood that credibility enhancement has occurred is never sufficient *by itself* to establish that there was a miscarriage of justice; and
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> (e) for the ground of appeal to succeed, the appellant accused must show that the evidence admissible only against the co-accused caused him/her some substantive prejudice (for example, because it directly implicated the appellant in the offence charged or because it showed the appellant to be a person of bad character)."[48]

[104] Maxwell P did not regard the formation by the jury of a "global view" about a particular witness's credibility as an impermissible use of additional evidence which was admissible only against other co-accused. His Honour drew a distinction between:

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[45] At [64].

[46] Ibid.

[47] [2015] VSCA 113.

[48] At [8] (emphasis in original, footnotes omitted).

"(a) misusing evidence admissible only against a particular accused, by treating it as having probative value (whether independently or in combination with other evidence) in the case against another accused; and

(b) making a global assessment of the credibility of a common witness."[49]

[105] Maxwell P, who analysed a number of Victorian and interstate authorities, concluded that "credibility enhancement" standing alone does not render a joint trial unfair.

[106] Weinberg and Beach JJA also analysed the authorities and stated the following principles which governed the case:

"100. First, the general rule is that crimes alleged to have been committed jointly should be tried jointly. Nothing that we say is intended to diminish the importance of that proposition.

101. Secondly, an accused who is tried jointly with other co-offenders is entitled to have his or her guilt determined solely on the basis of the evidence admissible in his or her trial. That is the basis for the separate consideration direction invariably given in such cases.

102. Thirdly, a jury considering the credibility of a key witness in the trial of a particular accused may have to be told, in clear terms, that some matters that bear positively upon that credibility can only be taken into account in the case of one accused, and not another. That is the logical product of the rule that an accused is to be tried solely upon the basis of the evidence admissible against him or her in his or her case.

103. Fourthly, in the vast majority of cases no issue as to divisibility of the credibility of a single witness will arise. Character will, in that sense, be regarded as indivisible. The task of assessing the witness's credibility will be undertaken by having regard to the entirety of that witness's evidence. The jury will not be left in a situation where they may have to conclude that the witness is truthful insofar as he gives an account that implicates one accused, but not truthful insofar as that same account implicates the other.

104. Fifthly, there will be some cases where that relatively straightforward approach requires modification. A witness whose testimony is suspect, but who is amply corroborated by evidence admissible only against one accused, and not the other, may be accepted by the jury where there is corroboration, and rejected where there is not. A good example is where the witness's account is supported by a series of

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[49] At [14].

> admissions made by one accused which, self-evidently, are not admissible against the other.
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> 105. Sixthly, the fact that the evidence against each accused differs, and may be far stronger in the case of one than in the case of the other, is not of itself determinative as to whether a separate trial should be ordered. It is, however, a factor to be taken into account in the exercise of judicial discretion."

Their Honours also observed that the ultimate question for an appellate court is whether the trial itself was fair, and whether any error on the part of the judge gave rise to a substantial miscarriage of justice.[50]

[107] Weinberg and Beach JJA noted that in the vast majority of cases no issue of the kind raised by Destanovic's application arose. If a joint trial proceeds, the jury will be warned to give separate consideration of the evidence admissible against each accused. A judge deciding whether to order a separate trial will have to determine whether, notwithstanding the separate consideration direction that will inevitably be given, there is "a real risk that the jury may find the task of compartmentalising the evidence altogether too difficult".[51]

[108] Weinberg and Beach JJA stated that, in most cases, the jury will understand that their task is to consider the evidence against each accused separately. They observed there will "always be a problem where the prosecution case is based largely upon the credibility of a key witness, and that witness's testimony is supported by evidence admissible against one accused, but not the other."[52] Cases such as *Pham* and *Swan* illustrate the difficulties that can arise in joint trials where matters of credibility are in issue. Weinberg and Beach JJA stated the following important principle:

> "An accused is entitled to be tried on the evidence admissible against him or her, and solely on that evidence. The accused is not to be convicted by a 'side wind', through evidence that bolsters the credibility of a key prosecution witness, but forms no part of the Crown case against that accused."[53]

[109] This important authority highlights the importance of identifying whether, notwithstanding the giving of appropriate directions about the separate consideration of each case and that an accused is entitled to be tried on the evidence admissible against him or her, and solely on that evidence, there is "a real risk that the jury may find the task of compartmentalising the evidence altogether too difficult".[54] If this is the case, then

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[50] Ibid at [106].

[51] Ibid at [134].

[52] Ibid at [135].

[53] At [130].

[54] At [134].

considerations which favour joint offences being tried at a joint trial must give way in order to avoid substantial prejudice to an accused.

[110] Something should be said at this point about the important considerations which mean the "starting position" is that co-accused should be jointly tried.[55] One consideration has been described in terms of "administrative matters of court time spent and public expense incurred if more than one trial is to be conducted".[56] Those matters have been said to be of not very great weight in many cases but in others to assume real significance.[57] Another consideration is that it is against the interests of justice that there should be inconsistent verdicts and this is said to require that "where the accounts of accused persons differ or conflict their differences should be resolved by the same jury at the same trial".[58] An allied consideration is the policy of the law to reach finality as expeditiously as possible, and "no system could function if it permitted the repeated retrial of the same issues except in situations where the concept of justice so required".[59] A further consideration has been stated to be "the convenience of witnesses".[60]

[111] More than lip service should be paid to these considerations which favour co-accused being jointly tried. If separate trials are ordered without justification then backlogs in the disposition of criminal cases grow and injustice is caused to those who suffer from such delays. The "convenience of witnesses" is not concerned simply with the inconvenience of having to attend at more than one trial. The requirement to give evidence at any criminal trial is likely to prove distressing for most witnesses, particularly lay witnesses. It may be more appropriate to refer to "the trauma and inconvenience to witnesses"[61] in having to give evidence at more than one trial. Injustices to parties in other cases and unnecessary distress to witnesses should not be imposed by ordering separate trials where, out of an abundance of caution, some risk of prejudice, even substantial prejudice is identified.

[112] Our criminal justice system recognises that joint trials carry certain risks, including credibility enhancement through inadmissible evidence. Those risks are accepted provided they can be removed or reduced to an acceptable level by appropriate directions. The system also operates on the assumption that directions, including the usual direction about the separate consideration of each case and that an accused should be tried solely on the evidence which is admissible against him or her, will be understood and will be observed by a jury. However, the assumption that juries will understand and follow directions given to them by trial judges is a general rule. As noted above, on occasions courts recognise that, despite directions, a jury will find it impossible or extremely difficult to be immune from improper prejudice. Certain directions may require a jury to

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55 *R v Swan* [2013] QCA 217 at [39].

56 Ibid citing *R v Demirok* [1976] VR 244 at 254.

57 Ibid.

58 Ibid.

59 Ibid.

60 Ibid.

61 *R v Jones & Waghorn* (1991) 55 A Crim R 159 at 185.

perform remarkable mental feats in order to avoid misuse of prejudicial evidence which is inadmissible in the case against one accused, but admissible against a co-accused. In some cases the degree of prejudice from evidence that is admissible only in the case of one accused to the case of a co-accused may be so great as to make it unfair to conduct a joint trial. This will be so where, despite direction, a jury is unable to ignore the prejudicial evidence. One particular respect in which the risk of substantial injustice to a co-accused will arise is where, despite directions, there is a real risk that the jury may find the task of compartmentalising the evidence altogether too difficult.

[113] In some cases the "dividing line" will be crossed because one or a combination of considerations favour a separate trial. A separate trial should be ordered if, despite anticipated directions to the jury, an accused faces substantial prejudice from inadmissible evidence. For example, the highly prejudicial nature of inadmissible evidence may make it impossible for jurors to ignore it in assessing the credibility of an important prosecution witness, whose evidence is critical to the prosecution of an accused and whose credibility is subject to real question. The prejudicial evidence will have the effect of bolstering the credibility of an important witness against an accused when the evidence is not admissible against that accused.

Application of these principles

[114] The fact that neither applicant seeks to run a "cut-throat" defence at trial, to seek to blame the other or to conduct his defence so as to suggest that he was coerced or influenced by the other, makes the case for a joint trial not as strong as it would have been had these circumstances been present. Still, other factors favour a joint trial. These include:

1. The duplication of evidence which is admissible against each defendant at separate trials, causing:

    - inconvenience and distress to some witnesses who have to give the same evidence twice; and

    - more court time to be spent and public expense incurred which, due to finite judicial resources, will delay other trials.

2. Delay to the defendant whose trial awaits the outcome of the first trial. However, this consideration should not assume great significance when each applicant seeks a separate trial, and when the outcome of the first trial (presumably being the trial in which the prosecution believes it has the better prospects of securing a conviction) may affect the decision by the prosecuting authorities to proceed with a second, separate trial.

[115] Whilst much of the evidence in the prosecution case relies upon s 93B of the *Evidence Act* for its admissibility, meaning that the convenience of witnesses has less weight than it would if all or most of the evidence was given orally, there will remain a number of witnesses who will be required to give evidence twice if an order for separate trials is made. Sparing them the inconvenience, distress and delay associated with giving evidence at two trials is an important consideration in favour of there being a joint trial.

[116] Each separate trial will take less time than a joint trial. By how much cannot be precisely determined. The combined length of two separate trials is likely to exceed the length of

a joint trial, but by how much cannot be precisely stated. Additional public expense is a factor, but not a decisive one.

[117] Taken together, the additional costs and delay associated with separate trials, and the inconvenience caused to witnesses who are required to give evidence at both trials, are significant considerations which favour a joint trial. However, a competing consideration is the risk that a joint trial which results in the conviction of one or both applicants may lead to an appeal in which convictions are set aside on the ground that there should have been separate trials, with a new trial or trials being ordered. The end result may be three trials, instead of two.

[118] The ultimate issue is whether the considerations which favour a joint trial are outweighed by the risk that evidence which would not be admitted at the trial of one accused may prejudice his right to a fair trial.

[119] The evidence which is admissible against a co-accused, but not admissible against the accused, is capable of being identified to the jury in general terms and by reference to the witnesses by whom particular evidence is to be given. This is a case in which directions are able to be given about a discrete body of evidence.

[120] The problem of fashioning intelligible directions is not as acute as in other cases in which a jury is required to undertake a separate assessment of the credibility of a common witness whose credibility could be regarded differently depending upon which set of evidence – that admissible against A or that admissible against B – it is assessed against.[62] Instead, there is a different problem of credibility enhancement – directing the jury to assess the credibility and reliability of certain confessional witnesses whose credibility or reliability is highly questionable, and whose evidence is admissible only in the case against one accused. The jury will be directed to disregard evidence which is admissible only against a co-accused and which bolsters the evidence of the confessional witness.

[121] Assuming that a jury could be expected to comprehend the necessary directions, the issue is whether there is an unacceptable risk that the jury will not be able to disregard the inadmissible evidence and will, perhaps subconsciously, make impermissible use of it. Understanding the necessary directions may not require the jury at a joint trial of these charges to perform the same remarkable mental feats which appellate courts in other cases considered warranted separate trials. But that is not the test, and in each case of this kind a fact-specific assessment is required about the risk that a jury will not be able to ignore prejudicial evidence, despite the directions of a trial judge to do so.

[122] Courts proceed on the general assumption that a jury will understand and follow directions given to them by trial judges. However, courts do not naïvely assume that this is always possible. The risk of a jury disregarding a direction, including a jury engaging in impermissible credibility enhancement by reference to evidence which is inadmissible against an accused, is not in itself enough to justify separate trials. Otherwise separate trials would be ordered in any case in which such a risk, however moderate, existed. The risk must be assessed in the specific circumstances of the case.

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[62] c.f. *R v Swan* [2013] QCA 217 at [56]-[58].

[123] In this case one is not concerned with credibility enhancement of an eye witness whose reliability is under challenge, but whose credibility is not. Even in those circumstances a decision may be reached in a particular case that there is too high a risk of significant prejudicial evidence which is inadmissible against an accused being impermissibly used to enhance the reliability of a witness.

[124] In this case one is concerned with the credibility of certain confessional witnesses, whose credibility is central to a prosecution case. The credibility of each witness is open to serious challenge. In that context, a jury at a joint trial will face the difficult task of not allowing evidence which is admissible in the case against B, but not in the case against A, to bolster the credibility of an important witness in the case against A.

[125] The difficulty of all jurors performing that task is acute in respect of Hall's evidence, which is inadmissible against O'Dempsey, but fills in the picture left incomplete by the statements allegedly made by O'Dempsey to McDonald and to Scully about the McCulkin murders. The inadmissible evidence is prejudicial because of the detail which it provides and its shocking content. This inadmissible evidence tends to bolster the case against O'Dempsey that he confessed to murdering the McCulkins and confirms the evidence of McDonald and Scully about O'Dempsey's character: that of a cold-blooded murderer who had committed a number of murders. This inadmissible evidence, if acted upon, significantly bolsters the credibility of witnesses whose credibility is problematic.

[126] It would be naïve to assume that the jury's decision-making will be immune from the prejudicial influence of that evidence, which the jury must consider in the case against Dubois. It would be naïve to assume that all members of the jury will be immune from the prejudicial influence that such evidence will have on their assessment of the case against O'Dempsey. At least some of them are likely to make impermissible use of it in assessing the credibility of McDonald and Scully. The jury is likely to experience real difficulty in disregarding the detailed and chilling description given by Hall of how the murders were perpetrated and what that account implies about O'Dempsey's character. I cannot be confident that all members of the jury will be able to ignore such chilling evidence which adds detail to otherwise vague and unparticularised evidence from McDonald and Scully about the circumstances in which O'Dempsey allegedly killed the McCulkins. Directions at trial are unlikely to be effective to ameliorate this prejudice.

[127] Directions may be disregarded because the evidence is so highly prejudicial. Some, perhaps many, members of the jury will find it virtually impossible to ignore inadmissible and prejudicial evidence from Hall and other witnesses whose evidence is admissible only against Dubois, when assessing the case against O'Dempsey. Hall's evidence, and other evidence, will have the effect of bolstering the important witnesses' credibility against O'Dempsey in a case which turns on the credibility of those witnesses. There are significant questions concerning the credibility of those witnesses. Ultimately, the highly prejudicial and inadmissible evidence against O'Dempsey is a source of significant prejudice and that prejudice cannot be adequately ameliorated by directions at trial. The considerations which favour a joint trial are outweighed by the risk that evidence which is inadmissible against O'Dempsey, but which is admissible against Dubois, will prejudice O'Dempsey's right to a fair trial. In the circumstances, there should be an order for separate trials.

[128] As for Dubois' application, the alleged admissions by O'Dempsey to the effect that he was responsible for murdering the McCulkins, which are inadmissible against Dubois, may have less detail than the admissions which Dubois allegedly made to Hall and Hamilton. In one sense, the Crown is correct in contending that the alleged admissions by O'Dempsey "say no more than the alleged admissions by Dubois against himself". They may say no more by way of detail, but this does not mean that they do not add something of substance. To submit, as the Crown does, that the alleged admissions by O'Dempsey do not really add anything to the case which already exists against Dubois is to ignore the corroborative effect of this inadmissible evidence. O'Dempsey's vague and unparticularised admissions of responsibility for the murder of the McCulkins are still highly prejudicial, despite their lack of detail in relation to the circumstances of the murders. Evidence which is admissible only against O'Dempsey bolsters Hall's account of what Dubois allegedly said, which depicts O'Dempsey as a hardened and cold-blooded killer who murdered the McCulkins.

[129] In addition, O'Dempsey's twice-repeated statement that "Shorty is nothing but a rapist" is highly prejudicial to Dubois for the reasons submitted by him. It either confirms Dubois' role in the rape of one of the McCulkin daughters or suggests that he raped another victim on another occasion. Either way, the evidence is highly prejudicial. It bolsters the chance of Hall's evidence being accepted since it corroborates the allegation that Dubois raped one of the McCulkin daughters, but did not personally murder any of the McCulkins.

[130] The central issue in Dubois' trial will be whether he made the alleged statements to Hall. There are substantial reasons to question Hall's credibility and reliability. In a case in which Hall's evidence is crucial in securing a conviction against Dubois, any enhancement of his credibility is likely to have a significant effect on the prosecution case against him. The jury will be told that the case against Dubois depends largely upon Hall's credibility, which should be carefully scrutinised. The understandable inclination of the jury in response to the warnings which will be given about Hall's evidence will be to consider whether there is other evidence which corroborates it. The jury will be told that it must ignore the evidence which is admissible only against O'Dempsey as a source of corroboration. Assuming that a jury will understand those directions, the issue is whether at least some members of the jury will find it impossible to ignore evidence which corroborates Hall. I consider that there is a significant risk of improper use being made of evidence which is admissible only against O'Dempsey in the case against Dubois, and of the jury impermissibly using that evidence to enhance the credibility of witnesses against Dubois, particularly Hall.

[131] The risk of improper use of inadmissible evidence by way of credibility enhancement is a risk which is encountered in many cases in which joint trials are conducted. That risk alone does not necessitate an order for a separate trial or persuade appellate courts to conclude that the conduct of a joint trial led to a miscarriage of justice. The nature of the evidence and the assumed effect of appropriate directions to the jury may ameliorate the risk of substantial prejudice and injustice. In this case, the successful prosecution of Dubois depends largely upon acceptance of the credibility and reliability of Hall in relation to alleged admissions and there are significant grounds to question Hall's credibility. The assumption that the jury's decision-making at a joint trial will be immune from improper prejudice by way of credibility enhancement of Hall is challenged. Jurors are likely to experience great difficulty in ignoring evidence which is inadmissible in the

case against Dubois and which bolsters Hall's credibility. In addition to bolstering the allegation that O'Dempsey carried out the actual murders, the inadmissible evidence that "Shorty is nothing but a rapist" corroborates the story which Dubois allegedly told about his raping one of the McCulkin daughters. Evidence which is inadmissible against Dubois, if accepted, will be hard for jurors to ignore in their assessment of the case against Dubois, particularly in their assessment of Hall's credibility, despite directions to ignore it in that context. Directions at trial are unlikely to be effective to avoid significant prejudice to Dubois. Considerations which favour a joint trial are outweighed by the risk that evidence which is not admissible in the trial of Dubois will prejudice his right to a fair trial if he and O'Dempsey are jointly tried. In the circumstances, there should be an order for a separate trial.

Conclusion

[132] Each applicant faces substantial prejudice from evidence which is inadmissible against him and which is proposed to be given against his co-accused at a joint trial. The substantial prejudice cannot be effectively ameliorated by directions to the jury. Considerations which favour a joint trial are outweighed by the risk that inadmissible evidence will prejudice each applicant's right to a fair trial. In the circumstances, there will be an order for each applicant to be tried separately.

[133] Finally, I should add that my ruling has been based upon submissions which assume the admissibility or inadmissibility of certain categories of evidence. Despite the absence of particulars, the criminal responsibility of each defendant appears to be founded on his being either a principal offender or someone who aided the other's offence and who is responsible as a party pursuant to s 7 of the *Criminal Code*. I have not had to consider arguments that evidence which I have assumed to be inadmissible would be admissible in a prosecution which was founded, in part, upon a case based on s 8. Also, I have yet to deal with foreshadowed applications to exclude certain evidence. The parties considered that the applications for separate trials should be decided first, and I acceded to that approach on the assumption that the outcome of other pending applications concerning admissibility would not affect the principal issues which have arisen for determination on the applications for a separate trial. I simply record those matters in case the assumptions upon which the submissions were made and the basis upon which the applications for separate trials were determined change. I do not expect them to do so. However, if they do it is possible that future developments may require a reconsideration of the order which I intend to make for a separate trial.

[134] I will hear from the parties about appropriate directions for the hearing and determination of further pre-trial applications and the preparation for separate trials.