

SUPREME COURT OF QUEENSLAND

CITATION: *R v O'Dempsey* [2017] QSC 101

PARTIES: **R**
(respondent)
v
VINCENT O'DEMPSEY
(applicant)

FILE NO: SC No 1046 of 2015

DIVISION: Trial Division

PROCEEDING: Pre-trial application to exclude evidence of possible motive

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 21 March 2017

DELIVERED AT: Brisbane

HEARING DATE: 2 March 2017

JUDGE: Applegarth J

ORDER: **1. The prosecution may call evidence in relation to the first alleged motive, namely that the co-accused Dubois was involved in the arson of the Torino nightclub, and was concerned that Mrs McCulkin would implicate him in that crime, and thereby had a motive to silence Mrs McCulkin; and that Dubois' close associate, the accused, was prepared to assist Dubois by murdering her.**

2. The prosecution may not call evidence in relation to the second alleged motive, in particular the evidence of Warren McDonald that the accused was involved in the Whiskey Au Go Go arson and murders, and was therefore motivated to kill Mrs McCulkin and her daughters because they were talking about the Whiskey Au Go Go arson and murders.

CATCHWORDS: CRIMINAL LAW – EVIDENCE – ADMISSIBILITY – where the prosecution intends to call evidence relevant to two possible motives for murder – where the first suggested motive relates to the motive of the co-accused – whether the motive must be held by the accused and not the person who the accused is alleged to have assisted – where the accused submits that the case on motive is so weak as to be non-existent – whether a weak case on motive may be pursued – where the second suggested motive relies on allegations that

the accused was responsible for an arson which killed 15 people – whether the prejudicial effect of this evidence should lead to its exclusion as a matter of discretion in the circumstances

Evidence Act 1977 (Qld), s 93B, s 130

Doney v R (1990) 171 CLR 207, cited

Lai v Western Australia (2012) 225 A Crim R 218, cited

R v Carusi (1997) 92 A Crim R 52, cited

R v CBL [2014] 2 Qd R 331, cited

R v Christie [1914] AC 545, cited

R v Hasler; ex parte Attorney-General [1987] 1 Qd R 239, cited

Police v Dunstall (2015) 256 CLR 403, cited

COUNSEL: A J Glynn QC for the applicant
D L Meredith for the respondent

SOLICITORS: Robertson O’Gorman for the applicant
Office of Director of Public Prosecutions for the respondent

- [1] The accused is charged over the deprivation of liberty and murder of Mrs Barbara McCulkin and her two daughters. The prosecution proposes to call evidence relevant to motive, including the motive of a co-accused, Garry Dubois. The accused seeks a ruling that the prosecution may not open or pursue such a motive on the present state of the evidence, or that I should intimate to the prosecution that it should not pursue such a course.
- [2] The prosecution case is that the accused had one or two motives for killing Mrs McCulkin and her daughters.
- [3] The first relates to Dubois, who was involved in the arson of the Torino nightclub. Mrs McCulkin spoke to people about that arson. If implicated in the Torino fire bombing, then Dubois and his associates might be implicated, falsely or otherwise, in the Whiskey Au Go Go Nightclub arson. According to the prosecution, Dubois had a motive to silence Mrs McCulkin. Its case is that his close associate, the accused, was prepared to assist Dubois by murdering her.
- [4] The alternative, and additional motive asserted by the prosecution, arises from evidence that the accused was involved in the Whiskey Au Go Go fire. This evidence comes from a witness, Warren McDonald. The prosecution case is that Mrs McCulkin and one of her daughters were suggesting that unnamed people other than Stuart and Finch were involved in the Whiskey Au Go Go fire, and the accused was concerned that he would be implicated in that crime. As a result, he and Dubois deprived Mrs McCulkin and her daughters of their liberty and killed them. The fact that the accused allegedly was associated with the Whiskey Au Go Go fire is said to provide the motive to kill, and thereby silence, someone who might implicate him in that horrific crime.

[5] The accused submits:

- (a) The prosecution's case on motive is exceptionally weak. In particular:
 - There is no evidence that Mrs McCulkin suspected either the accused or Dubois of committing either nightclub fire;
 - Neither her nor her daughters' statements identified the accused or Dubois as suspects; and
 - There is no evidence that the accused or Dubois was aware that she was implicating either of them in either fire.
- (b) Motive is something which must be held by the particular accused, not by someone else.
- (c) Evidence from McDonald that the accused was concerned that James Richard Finch would "finger" him for the Whiskey Au Go Go fire and that the accused said that Finch would have to be "knocked" (an expression taken to mean that he would have to be killed to prevent the accused being implicated) cannot be used to reason that about 20 years earlier the accused had a motive to kill Mrs McCulkin.
- (d) The claim that the accused is responsible for the Whiskey Au Go Go fire in which 15 people were killed is highly prejudicial and will create significant unfairness to him in his trial.

[6] In response, the prosecution submits:

- (a) Mrs McCulkin was talking about the Torino and Whiskey Au Go Go fires.
- (b) The accused was an associate of Mrs McCulkin's husband (who she suggested to a neighbour had some involvement in one or both of the fires) and the accused and Dubois were regular visitors to the McCulkin home.
- (c) It is reasonable to assume that they knew that she was talking about the Torino and Whiskey Au Go Go fires, even after Stuart and Finch were convicted of arson and murder over the Whiskey Au Go Go fire. This is so even if she did not mention the names of the accused and Dubois.
- (d) There is sufficient evidence to suggest to the jury that the motive for an otherwise unexplained killing was to silence Mrs McCulkin.
- (e) As to the first suggested motive, it is sufficient to point to Dubois's motive to silence Mrs McCulkin, and to argue that the accused was prepared to help him.
- (f) As to the second suggested motive, the prosecution does not rely on the accused's preparedness to kill Finch to suggest that he had a propensity to kill people who he was concerned might implicate him in the Whiskey Au Go Go fire. Mr McDonald's evidence is relied upon as evidence that the accused was implicated in the Whiskey

Au Go Go fire. It provides a basis to infer that the accused was concerned in 1974 about being implicated by Mrs McCulkin in that crime.

- (g) The evidence of the accused's involvement in the Whiskey Au Go Go fire is "prejudicial" only in the sense that it harms the defence. It is probative in explaining the motive of the accused and it is not unfairly prejudicial. The fact that the Whiskey Au Go Go fire was a horrendous crime creates a strong motive to keep quiet someone "who might implicate you in it".

The evidence

- [7] There is ample evidence that the accused and Dubois were close associates. The accused was also a close associate of Billy McCulkin, Mrs McCulkin's husband. The accused and Dubois were regular visitors to the McCulkin household.
- [8] Dubois, Thomas Hamilton, Peter Hall and Keith Meredith committed the arson on the Torino nightclub, apparently as an "insurance job". The identity of the persons who procured them to commit the crime and paid them for it is not in evidence.
- [9] Not long after the Torino fire, the Whiskey Au Go Go nightclub was firebombed. The persons involved in the Torino firebombing would have been concerned that, if implicated in the Torino bombing, they probably would be falsely implicated in the Whiskey Au Go Go bombing. This was the evidence of Peter Hall at the Dubois trial and he may be expected to give the same evidence. The fact that persons involved in the Torino fire would be concerned about being falsely implicated in the Whiskey Au Go Go fire is confirmed by evidence to be given in the trial by Ms Scully. She says that the accused told her that her uncle, Thomas Hamilton, Dubois and "his mates" were responsible for the Torino fire. According to Scully, she told the accused that her mother had told her about this and the accused responded that she was right, but that her mother "shouldn't have said that because it looks bad for the Whiskey".
- [10] According to the prosecution, the concern of those involved in the Torino firebombing that they might be falsely implicated in the Whiskey Au Go Go bombing subsided, but continued, after Stuart and Finch were charged and convicted over the Whiskey Au Go Go fire.
- [11] Mrs McCulkin and one of her daughters suggested that Stuart and Finch were not responsible for the Whiskey Au Go Go fire, or at least, that they were not the only persons who were responsible for that crime.
- [12] At the relevant time, Mrs McCulkin was estranged from her husband. He left the McCulkin household and was living with another woman. Mr Peter Nisbet was a neighbour of the McCulkins. He recounts conversations he had with Mrs McCulkin. He says that she told him that her husband was associated with criminals and she had enough on him to put him away for years with what she knew. According to Mr Nisbet's witness statement, she told him that her husband had something to do with the Whiskey Au Go Go fire and that "if the cops had asked him the right questions" they would have found out more people were involved in that fire. Mr Nisbet's evidence at the Dubois trial was

slightly different. It was that she said that if the police had asked her husband the right questions they might have gotten additional information about the Whiskey Au Go Go and the Torino fire bombings. The impression Mr Nisbet gained was that “maybe [Billy McCulkin] was involved in some way”. Mr Nisbet had “no idea” as to the level of Billy McCulkin’s involvement. According to Mr Nisbet’s witness statement, Mrs McCulkin indicated that Stuart and Finch were “not the primary movers” of the Whiskey Au Go Go fire and they were just collateral damage or an “easy get for the cops”. She thought that Stuart was “set up for the Whiskey Au Go Go fire”.

- [13] A co-worker of Mrs McCulkin, Ellen Gilbert, recalled an occasion after the Torino Nightclub had burnt down when Mrs McCulkin said to her “I’ll tell you something funny about that one day. It’s about the Torino Nightclub being burnt down”.
- [14] Leanne McCulkin told a school friend at her primary school, Alan Evans, that she thought her father had something to do with the Whiskey Au Go Go bombing. Leanne McCulkin appeared to be upset because Stuart had been sent to jail and she told her school friend that Stuart and Finch were innocent. No one can say the basis of Leanne McCulkin’s belief that her father had something to do with the Whiskey Au Go Go bombing.
- [15] Another witness, Janet Gayton, who was a friend of the McCulkin children, gave evidence at the Dubois trial (and might be expected to give the same evidence at the accused’s trial) that one of the McCulkin children said that Stuart had nothing to do with the Whiskey Au Go Go fire.
- [16] There is hearsay evidence, potentially admissible under s 93B of the *Evidence Act 1977* (Qld), that the morning after the Whiskey Au Go Go bombing the local storekeeper heard Mrs McCulkin say “Oh my God they’ve done it” after she read a newspaper headline about the bombing. If admissible, this evidence does not indicate who Mrs McCulkin was talking about: the “they” to whom she referred may be Stuart and Finch, her husband and his associates or other persons, unrelated to the accused and Dubois.
- [17] As noted, some of the evidence the prosecution intends to lead on motive at the accused’s trial will be evidence which was led at the trial of Dubois. However, the case against the accused and the evidence which is admissible at his trial about his possible motive is different to the evidence which was led at Dubois’ trial. Dubois’ trial included evidence from Dubois’ brother, Paul Dubois, of a conversation that occurred between them some substantial time after the disappearance of the McCulkins, and after Garry Dubois’ name appeared on a television program. According to Paul Dubois, he spoke to his brother on the telephone and Garry Dubois stated that Mrs McCulkin had been blackmailing the accused (O’Dempsey) and, with what she knew, she was able to put him in jail for 20 years. The prosecution case against Dubois was that this evidence showed that O’Dempsey was motivated to kill Mrs McCulkin and Dubois assisted him to do so. The evidence of Paul Dubois was relevant to that case. The prosecution does not contend that Paul Dubois’ evidence is admissible against the accused at his pending trial. It does not contend that the evidence is admissible as evidence of a participant in a common design and was said in the course of pursuing that plan. What was allegedly said by Garry Dubois

to his brother Paul was said, not in furtherance of the common design with the accused, but in recounting “some past transaction”.¹

- [18] The evidence I have summarised of Mr Nisbet and others will be relied upon again by the prosecution to advance the case that:
- Mrs McCulkin might implicate the accused, Dubois, her husband and others, in the Torino arson;
 - they would have been concerned about that; and
 - they also would have been concerned about being falsely implicated in the Whiskey Au Go Go bombing.
- [19] The evidence which the prosecution intends to rely upon in support of the first possible motive has the features which I have noted in summarising the accused’s submissions. There is no evidence that Mrs McCulkin suspected either the accused or Dubois in either nightclub fire (as distinct from unnamed and unidentified individuals who may have been associated with Stuart and Finch or her husband). None of the statements which witnesses recall Mrs McCulkin or her daughters making in relation to the Torino or the Whiskey Au Go Go fires identified the accused or Dubois as suspects. The prosecution concedes that she did not mention the names of either the accused or Dubois. Whilst they were associates of her husband, and there is evidence that Dubois was involved in the Torino fire, there is no admissible evidence that the accused was involved in the Torino fire, for example, by procuring Dubois, Hamilton and others to commit it. There is no evidence that Mrs McCulkin knew of Dubois’ involvement in the Torino fire.
- [20] In essence, the evidence is that she claimed to know things about the Torino and Whiskey Au Go Go fires, including that her husband knew about them and may have been involved in them in some way. Her husband’s association at the time with the accused and Dubois gives rise to a suspicion that the accused and Dubois were involved in some way in one or both of the fires.
- [21] There is no direct evidence, however, that Mrs McCulkin knew or believed the accused and Dubois were involved in either fire. There is no direct evidence that she named either of them as suspects. There is no direct evidence that either the accused or Dubois believed that she was naming or otherwise implicating them in either fire.

¹ *Cross on Evidence*, Australian ed. [33565]

The first motive

- [22] I do not accept the accused's submission that "motive is something which must be held by the particular accused, not by someone else". In principle, it seems open to a prosecution to establish that A had a motive to kill X or to have X killed, and that A's associate, B, was prepared to assist A to achieve his purpose.
- [23] The issue then is whether there is a case that A (in this case, Dubois) had a motive to kill X (in this case, Mrs McCulkin). The evidence in that regard is weak. The theory that Dubois was motivated to kill Mrs McCulkin, or to have her killed, rests upon the evidence that he was involved in the Torino fire. Mrs McCulkin was talking about the Torino fire, but there is no direct evidence that she was naming names (save for a suggestion to Mr Nisbet that Billy McCulkin was somehow involved). There is no direct evidence that:
- Mrs McCulkin knew that Dubois was involved in the Torino fire;
 - She told anyone that he was, or that she suspected that he was;
 - Dubois knew that she was accusing him of being involved in the Torino fire; or
 - Dubois knew that she was speaking even in general terms about the Torino fire (or the Whiskey Au Go Go fire) to her neighbour, to a friend at work or to anyone else.
- [24] The prosecution case about Dubois' motive relies on inference. However, this does not mean that the prosecution should be precluded from advancing such a case. It is not necessarily unreasonable to infer:
- (a) Mrs McCulkin knew from her husband or some other source that Dubois was involved in the Torino fire;
 - (b) If she was prepared to speak to her neighbour about the Torino fire, she was prepared to speak to others about that subject;
 - (c) The fact that she was speaking about the Torino fire (and quite possibly Dubois' involvement in it) might come to the attention of Dubois;
 - (d) Dubois would have been concerned about being implicated in the Torino fire.
- [25] Unlike the prosecution case in respect of the second motive, which raises arguments about highly prejudicial evidence which is said to outweigh its probative value, the essential issue in respect of the first motive is the weakness of the prosecution case. Counsel for the accused accepted that the fact that a prosecution has a weak case on motive does not mean that it cannot present its weak case. His argument was that the prosecution case was so weak as to be non-existent. The prosecution case on the first motive, depending as it does on inferences rather than direct evidence, may be a weak one. It is not non-existent.
- [26] The present issue is not concerned with the sufficiency of a prosecution case on an element of the offence. It is concerned with the strength or weakness of the prosecution case on the issue of motive.

[27] It is not for the trial judge to determine whether the jury will accept the evidence and the inferences which the prosecution invites it to draw in relation to Dubois' motive, or even if the jury is likely to do so. Once there is evidence capable of supporting the inference contended for by the prosecution, it must go to the jury unless it is so prejudicial that the jury is likely to give the evidence and the inference drawn from the evidence "more weight than it deserves or when the nature or content of the evidence may inflame the jury or divert the jurors from their task".² Such a conclusion is consistent with the principles expressed by the High Court in *Doney v R* to the effect that evidence capable of supporting a guilty verdict, even if tenuous or inherently vague or weak, must be left to the jury.³

[28] If the prosecution advances what I regard as a weak case in support of the first motive, then the jury will be directed that:

- The motive by which a person is induced to do an act or form an intent is immaterial to the question of responsibility;
- If, in fact, the jury decides there is no reliable evidence of Dubois having the alleged motive, and that such a motive did not exist, that does not necessarily mean that the prosecution has failed to prove guilt because of the lack of motive; and
- The presence or absence of motive may be taken into account when considering whether the prosecution has proved guilt.

It will be for the jury to assess whether the evidence and inferences support the first motive.

[29] I am not persuaded that I can or should rule that the prosecution may not open or pursue the first suggested motive, despite its case on that motive being weak.

The second motive

[30] The prosecution does not submit that McDonald's evidence relating to the accused's concerns about Finch is admissible "similar fact evidence" of a disposition to kill anyone who might implicate him in the Whiskey Au Go Go fire. In any case, there is no direct evidence, as distinct from inferences, that Mrs McCulkin implicated him in the Whiskey Au Go Go fire.

[31] Even assuming for the purposes of argument that there was, the accused had much more to be concerned about by allegations made by Finch than by anything Mrs McCulkin might have said about him. Finch was directly involved in the Whiskey Au Go Go firebombing and therefore would be in a position to give admissible evidence about who else was involved. There is no evidence that Mrs McCulkin was involved in the Whiskey Au Go Go bombing or could give admissible evidence against those who were. At its highest, the evidence suggests that she believed her husband had some involvement and that, if pressed, he could tell police about others who were involved. In short, the accused

² *Cross on Evidence*, Australian ed. [11125](a), citing *Festa v R* (2001) 208 CLR 593 at [51].

³ *Doney v R* (1990) 171 CLR 207.

would have greater concerns about being accused by Finch than being accused by Mrs McCulkin (assuming for the purpose of the argument and, in the absence of direct evidence, that she accused him of being involved in the Whiskey Au Go Go fire and that he knew of her accusation).

- [32] The evidence about the accused's concern in the early 1990s about Finch giving evidence that the accused also was involved in the Whiskey Au Go Go fire and having Finch "knocked" cannot be used by a jury to reason that the accused had a certain criminal disposition and therefore must have had a motive to kill Mrs McCulkin.
- [33] McDonald's evidence is evidence that the accused was responsible for the Whiskey Au Go Go fire. It explains why he might have been motivated to kill Finch if, as he feared, Finch was about to speak to the police and implicate him in that horrendous crime.
- [34] By itself, McDonald's evidence does not establish that the accused would be motivated to kill Mrs McCulkin some 20 years earlier. The accused's assumed responsibility for the Whiskey Au Go Go fire (on the strength of McDonald's evidence) might help supply a motive, but only if Mrs McCulkin was accusing him of the Whiskey Au Go Go fire and if her accusations were made in circumstances that made it likely that the accused would find out about them and be sufficiently concerned to kill her. For the reasons given in the context of the first alleged motive, the case that Mrs McCulkin was accusing either Dubois or the accused of being involved in either nightclub fire is built on inference, rather than direct evidence.
- [35] The theory that a McCulkin child was identifying the accused as being responsible for the Whiskey Au Go Go fire and that the accused knew of this and was therefore motivated to murder the child is even weaker.
- [36] The McDonald evidence supports the reasonable inference that the accused would have been concerned at all times, including 1974, about being accused of involvement in the Whiskey Au Go Go fire. It is reasonable to conclude that his concerns would have extended beyond persons like Finch, who might have personal knowledge of his involvement, to persons who might implicate him by alerting police to witnesses who could, in turn, give admissible evidence against him. Therefore, if Billy McCulkin was involved in the Whiskey Au Go Go fire in some way (as Mrs McCulkin hinted to Mr Nisbet) and could tell police things if they asked him the right questions, then the accused would be concerned about Mrs McCulkin telling people, and possibly the police, about these things. However, there is no direct evidence that he was aware of Mrs McCulkin's conversation with Mr Nisbet. There is no direct evidence that she had similar conversations with anyone else and that her doing so came to the accused's attention. There is no evidence of the kind given by Paul Dubois in his brother's trial. For example, there is no evidence that the accused told anyone (or that Dubois said in the accused's presence) that Mrs McCulkin had evidence that could put the accused in jail for 20 years.
- [37] In the result, the prosecution has evidence that the accused was responsible for the Whiskey Au Go Go fire, but only a weak inferential case that Mrs McCulkin was accusing him of that horrendous crime and that he became aware of that fact.

- [38] Inferences that Dubois was concerned that Mrs McCulkin was implicating him in the Torino fire might be available as proof of his motivation to have her killed, and might be considered by the jury in the context of the first motive without unfairly prejudicing the accused. The second motive raises very different considerations.
- [39] McDonald's evidence is highly prejudicial in that it implicates the accused in an arson and mass murder. The jury might be warned about the legitimate use that could be made of such evidence on the issue of motive, and warned not to engage in impermissible reasoning. The jury might be warned not to reason that:
- (a) Because the accused and others killed 15 people in a nightclub fire, he had a disposition to kill, or was more likely to be the kind of person who would kill Mrs McCulkin; or
 - (b) Because he was prepared to kill Finch, lest Finch implicate him, he was likely to have been similarly motivated to kill Mrs McCulkin.
- [40] The evidence of McDonald is relevant to motive in that fear of being implicated in the horrendous Whiskey Au Go Go crimes would be a powerful motivation to silence someone alleging that the accused committed those crimes. The problem for the prosecution case on the second motive is that there is only a weak inferential case against the accused that Mrs McCulkin was accusing him of those crimes and that he probably knew of that fact. Even with appropriate warnings about the limited and legitimate use that could be made of McDonald's evidence in the context of motive, the risk of unfair prejudice to the accused by the admission of McDonald's evidence, including the threat to kill Finch is high. Evidence that the accused had escaped conviction for the killing of 15 people in the Whiskey Au Go Go bombing and was prepared to have Finch killed carries the real risk that a jury would conclude that he is a murderer and therefore should be convicted of the murder of Mrs McCulkin and her daughters.
- [41] In the circumstances, a discretion to exclude the evidence of McDonald in relation to motive arises both at common law and under statute. At common law, what is often referred to as the *Christie* discretion provides for the discretionary exclusion of non-confessional evidence, including "real" and circumstantial evidence, where the probative value of the evidence is outweighed by the risk of prejudice to an accused.⁴ A trial judge may only exclude evidence if, taken at its highest, the probative value of that evidence is outweighed by its prejudicial effect.⁵ Section 130 of the *Evidence Act* 1977 (Qld) preserves the power of a court in a criminal proceeding to exclude evidence if the court is satisfied that it would be unfair to the person charged to admit the evidence. Under this provision, evidence may be excluded where its probative value is relatively slight but its prejudicial effect is substantial.⁶
- [42] As noted earlier, a judge may exercise a discretion to not allow evidence to go to the jury if it is so prejudicial that the jury is likely to give the evidence and an inference drawn

⁴ *R v Christie* [1914] AC 545 at 560, 564-565; *Police v Dunstall* (2015) 256 CLR 403 at 416.

⁵ *R v Carusi* (1997) 92 A Crim R 52 at 65-66; *Lai v Western Australia* (2012) 225 A Crim R 218 at 223.

⁶ *R v Hasler; ex parte Attorney-General* [1987] 1 Qd R 239 at 251; *R v CBL* [2014] 2 Qd R 331.

from the evidence “more weight than it deserves or when the nature or content of the evidence may inflame the jury or divert the jurors from their task”.⁷

- [43] The balancing exercise between the risk of unfair prejudice to the accused and the legitimate use of evidence to support an alleged motive to kill Mrs McCulkin is different to any balancing exercise in respect of the first alleged motive, where there is no similar highly prejudicial evidence concerning the accused’s responsibility for the Whiskey Au Go Go bombing. In the case of the first alleged motive, there is a weak circumstantial case that Dubois had a motive to kill Mrs McCulkin and that he enlisted the accused to achieve that objective. There is no countervailing prejudicial evidence that the accused was involved in either the Torino fire or the Whiskey Au Go Go fire.
- [44] In the case of the second alleged motive, there is a similar weak case that Mrs McCulkin told others that the accused was responsible for one or both fires and that he probably was aware that she was telling these things to others or was speaking in more general terms about who was responsible for those fires.
- [45] McDonald’s evidence may be probative of the accused’s involvement in the Whiskey Au Go Go fire, and therefore a potentially powerful link in a possible chain of evidence that connects the Whiskey Au Go Go fire with the murder of Mrs McCulkin. However, the remaining links in the chain on motive are weak. As a result, the alternative case on motive is weak.
- [46] As against the weak probative force of evidence that the accused had the second alleged motive to kill Mrs McCulkin is the highly prejudicial evidence of McDonald that the accused was responsible for the Whiskey Au Go Go fire and was prepared to have Finch killed to escape being charged with arson and the murder of 15 people.
- [47] The prejudicial effect of McDonald’s evidence about what the accused said about Finch and the Whiskey Au Go Go fire is high. The evidence is prejudicial in the sense that the jury is likely to make unfair use of it, it will inflame the jurors and divert them from their task. The admission of McDonald’s evidence in that regard would not complete a chain of evidence that included evidence that Mrs McCulkin was telling people that the accused was involved in the Whiskey Au Go Go fire and evidence that the accused probably knew that she was doing so. In the circumstances, the legitimate use which might be made of McDonald’s evidence in support of a weak case on motive is greatly outweighed by its prejudicial effect. The admission of McDonald’s evidence in connection with the alleged second motive would unfairly prejudice the accused. I rule that the evidence be excluded from the accused’s trial.

⁷ *Cross on Evidence*, Australian ed. [11125](a), citing *Festa v R* (2001) 208 CLR 593 at [51].