SUPREME COURT OF QUEENSLAND

CITATION:	*R v Long; ex parte A-G (Qld)* [2003] QCA 77
PARTIES:	**R** **v** **LONG, Robert Paul** (appellant/respondent) **EX PARTE ATTORNEY-GENERAL OF QUEENSLAND** (respondent/appellant)
FILE NO/S:	CA No 104 of 2002 CA No 81 of 2002 SC No 518 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction Sentence Appeal by A-G (Qld)
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	28 February 2003
DELIVERED AT:	Brisbane
HEARING DATE:	29 October 2002; 30 October 2002
JUDGES:	McMurdo P, Davies and Jerrard JJA Separate reasons for judgment of each member of the Court; each concurring as to the orders made
ORDER:	**1. The appeal by Robert Paul Long against his convictions for murder and arson dismissed** **2. The appeal by the Attorney General against the sentence imposed on Mr Long dismissed**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – ADJOURNMENT, STAY OF PROCEEDINGS OR ORDER RESTRAINING PROCEEDINGS – STAY OF PROCEEDINGS – PRE-TRIAL PUBLICITY – where publicity prejudicial to the appellant was published in the three days prior to the appellant being charged – where trial did not take place until 20 months after the last of the prejudicial publicity was published in the media – where much of this publicity was available on the internet after the charges were laid – where appellant submits that the jury would have been able to access the internet material – whether learned trial judge erred in refusing to grant a permanent stay of the indictment CRIMINAL LAW – APPEAL AND NEW TRIAL AND

INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – GENERALLY – where appellant submits that there was a substantial risk that prejudicial pre-trial publicity precluded him from a fair trial – where learned trial judge gave firm directions to the jury at the commencement of the trial to ignore any related publicity and decide on the evidence alone – where directions repeated in summing up – where no complaint made of directions – whether pre-trial publicity resulted in a miscarriage of justice

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – MISCARRIAGE OF JUSTICE – PARTICULAR CIRCUMSTANCES INVOLVING MISCARRIAGE – where trial was held in a large, ceremonial court instead of a regular criminal court – where appellant submits this led to a "show" trial and pressured the jury to deliver guilty verdicts – where appellant applied at pre-trial hearing for the use of a regular criminal court – where prosecution supported the application – where learned trial judge ascertained that the ceremonial court would function satisfactorily for the trial – whether use of the ceremonial court amounted to a miscarriage of justice when combined with the pre-trial publicity

CRIMINAL LAW – EVIDENCE – CONFESSIONS AND ADMISSIONS – STATEMENTS – VOLUNTARY STATEMENTS – VOLUNTARINESS – PARTICULAR CASES – where appellant confessed to police officers that he started the hostel fire – where appellant made this admission immediately after he had been shot at by police officers – where appellant submits that confession was not voluntary – where Crown discharged its obligation to show the confession was not induced – where learned trial judge concluded that the confession was voluntary as it was in the nature of a dying declaration – whether confession wrongly admitted

CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – POLICE INTERROGATION – DISCRETION TO EXCLUDE CONFESSIONAL STATEMENTS – PARTICULAR CASES – where confession passed common law tests of voluntariness and reliability – where appellant submits that confession was obtained in circumstances which were unacceptable with respect to prevailing community standards – whether learned trial judge should have excluded the confession on a discretionary basis

CRIMINAL LAW – APPEAL AND NEW TRIAL AND INQUIRY AFTER CONVICTION – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – APPEAL BY

ATTORNEY-GENERAL OR OTHER CROWN LAW OFFICER – APPPLICATIONS TO INCREASE SENTENCE – OFFENCES AGAINST THE PERSON – where Attorney-General appeals against the minimum term to be served before appellant can be considered for parole – where Attorney-General argues for this term to be increased because the accused's act resulted in the death of 15 people not only the death of the two with which he was charged – where learned trial judge did not sentence the accused on the basis that he had committed 15 murders – where accused was sentenced on the basis that the deaths were not intentional but caused by his intentional arson – whether learned trial judge erred in sentencing the accused

Criminal Code (Qld), s 305, s 669A
Criminal Law Amendment Act 1894 (Qld), s 10
Jury Act 1995 (Qld), s 69A
Penalties and Sentences Act 1992 (Qld), s 189
Police Powers and Responsibilities Act 2000 (Qld), s 198, s 234

Bunning v Cross (1978) 141 CLR 55, not followed
MacPherson v The Queen (1981) 147 CLR 512, considered
McDermott v The King (1948) 76 CLR 501, considered
R v D [1996] 1 Qd R 363, distinguished
R v Glennon (1992) 173 CLR 592, considered
R v Lewis [1994] 1 Qd R 613, considered
R v McLachlan [2000] VSC 215; 24 May 2000, distinguished
R v Murphy (1989) 167 CLR 94, considered
R v Swaffield; Pavic v The Queen (1998) 192 CLR 159
Ratten v R (1974) 131 CLR 510, considered

COUNSEL: T D Martin SC, with M C Chowdhury, for the appellant in CA No 104 of 2002 and for the respondent in CA No 81 of 2002
D L Meredith for the respondent in CA No 104 of 2002 and for the appellant in CA No 81 of 2002

SOLICITORS: Legal Aid Queensland for the appellant in CA No 104 of 2002 and for the respondent in CA No 81 of 2002
Director of Public Prosecutions (Queensland) for the respondent in CA No 104 of 2002 and for the appellant in CA No 81 of 2002

[1] **McMURDO P:** The facts and issues are comprehensively set out in Jerrard JA's reasons for judgment. I will only repeat or add those facts necessary to explain my reasons for dismissing both the appeals against conviction and the Attorney-General's appeal against sentence.

The appeal against conviction

Has a miscarriage of justice occurred in the refusal of the learned trial judge to grant a permanent stay of the indictment because of the substantial risk of prejudice arising from pre-trial media publicity?

[2] There was very substantial public interest, locally, nationally and internationally, in the arson of the Palace Backpacker's Hostel at Childers which caused the death of 15 residents, many of whom were healthy young people on working holidays.[1] Understandably, there was also considerable public interest in the apprehension of the person who may be responsible for such a tragedy. The media accommodated that interest at times in a way which put at risk the system of the administration of criminal justice, a fundamental bulwark of our democratic society.[2]

[3] The most objectionable and damaging pre-trial publicity is contained in articles in The Courier-Mail of 26 June 2000,[3] 27 June 2000,[4] 28 June 2000[5]; The Australian article of 26 June 2000[6] and the Today Tonight television program broadcast on Channel 7 in the Brisbane area on 27 June 2000,[7] all set out in Jerrard JA's reasons. This publicity was grossly inflammatory and contained some wrong information about the appellant, Long, then an undetained suspect, or, as the investigating police euphemistically stated, a person of interest. It strongly suggested Long's guilt and depicted him as a morally bad person who had lit fires in the past, placed lives at risk and had at least been charged with trying to strangle his partner's six year old daughter. It set out other information, some of which was wrong, linking Long with the fire and it defamed him in a general way. Fair-minded people surveying that material at the time might well question whether Long, if located and charged, could, because of such publicity, exercise his constitutional right to a fair trial by jury and obtain a verdict based only on admissible evidence.

[4] It is of added concern that an unnamed Queensland police officer[8] was instrumental in knowingly providing a journalist, not only with information as to Long's previous convictions but also with information about offences for which Long may have been charged but not convicted.[9]

[5] No doubt it was legitimate for the public to know the appearance and perhaps the name of a suspect or person of interest in such a significant police investigation, how to contact police with information and, if appropriate, knowledge that the suspect may be armed and/or dangerous. The media reports here may have been of great interest to many members of the public and of assistance in increasing circulation and viewing audiences. They were not, however, in the true public interest, which includes upholding the administration of criminal justice. It is not suggested the courts had power over those who created these reports before Long was charged. Responsible journalism, however, requires common sense and restraint to ensure media reports do not put at risk an individual's constitutional right

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1 See *R v Long* [2001] QCA 318, 30 July 2001, [20]-[22].
2 See *R v Glennon* (1992) 173 CLR 592, 612, 623.
3 See Jerrard JA reasons paras [154] and [155].
4 ibid, paras [158] and [159].
5 ibid, para [162].
6 ibid, para [157].
7 ibid, para [160].
8 See Supplementary Record Book at 73 and the appeal transcript at 11-12.
9 *R v Lewis* [1994] 1 Qd R 613, 636.

to a fair trial. Complaints to and determinations by the Australian Press Council[10] or the Australian Broadcasting Authority[11] may be of assistance in educating those working in the media and in limiting prejudicial publicity in future notorious cases but no complaints to those bodies have yet been made in this case.

[6] Although the inflammatory media reports did not continue after Long was charged on 28 June 2000, the appellant emphasises that access could be obtained to them through the internet on at least the BBC and NewsText sites. Section 69A *Jury Act* 1995 (Qld) now prohibits jurors in criminal trials from enquiring about the defendant (including by internet searches) until after verdict, but this amendment to the *Jury Act* did not become effective until July 2002, well after the conclusion of this trial. No request was made to have the offending material temporarily removed from the internet sites and no material was placed before us to establish whether such a request could or would be reasonably met.

[7] Public interest in Long after he was charged and in his committal and trial remained strong and the various court hearings to which he was a party were enthusiastically reported in the media in the Brisbane area with the consequence that Long remained in the public eye after he was charged[12] and until and during trial.

[8] To counter the prejudicial effect of these matters, the learned trial judge gave careful directions to the jury, at the beginning of the trial and at the beginning and during the summing up, to the effect that the jury must decide this case only on the evidence in court and not undertake their own enquiries.[13] The learned trial judge did not specifically refer to the use of the internet in these directions but this was at the request of the appellant's counsel who was reluctant to highlight the feasibility of internet use. Although it is possible a member or members of the jury may have searched the internet contrary to his Honour's general directions, there is absolutely no evidence that this happened. The position here is quite different from that in *R v MacLachlan*.[14] In that case, there was a significant risk that a well-publicised internet site, CrimeNet (which referred to details of MacLachlan's previous murder trial, conviction and sentence) and the debate on radio during the trial of the possible effect of CrimeNet on jurors, may have wrongly influenced the empanelled jurors; even then the remedy was the discharge of the jury, not a permanent stay of the indictment.

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10 The Australian Press Council according to its Reporting Guidelines, General Press Release no 15 (November 1977) "has a public duty to provide fair news reports of matters of public controversy; and

- … does not have the right to resort to distortion or dishonesty to advocate a cause.

These principles do not exclude a newspaper from being partisan, although they exclude it from presenting a false picture. …
The Council commends to all editors of general newspapers the scrupulous fairness which has long been an ideal of their calling; but the responsibility of applying it must rest upon them. It is all the heavier because the detailed requirements of fairness in the present context, cannot be laid down in any formula."

11 The Commercial Television Industry Code of Practice provides:
"**Section Four: News and Current Affairs Programs**
…
4.3 In broadcasting news and current affairs programs, licensees:
4.3.1 must present factual material accurately and represent viewpoints fairly, having regard to the circumstances at the time of preparing and broadcasting the program;".

12 See fn 1.

13 These are set out in Jerrard JA's reasons at [171].

14 [2000] VSC 215, 24 May 2000.

[9] There is nothing to suggest his Honour's clear and careful directions were not followed by the jury despite the inflammatory, unreliable and prejudicial early pre-trial publicity. The trial was heard, 20 months after the tragedy and early publicity, in Brisbane, a place removed from those most immediately affected by it. The evidence does not suggest that the police officer who deliberately released damaging and inadmissible information to a journalist was acting with the knowledge or acquiescence of his superiors so as to infect the fairness of the criminal justice system and the trial and verdicts.[15] In these circumstances, I am satisfied that this was not within that rare category of extreme cases requiring a permanent stay of the indictment. The passage of time between the publicity and trial, the changed venue and the careful judicial directions ensured a fair trial.[16] In the end, the appellant has not demonstrated that because of the pre-trial publicity the jurors were not true to their oaths, conscientiously following his Honour's directions and returning a true verdict on the evidence alone. The appellant has not demonstrated a miscarriage of justice through this ground of appeal.

The use of the Banco Court

[10] The appellant linked with this ground of appeal as to publicity an additional ground of appeal that the trial was held in the large, ceremonial Banco Court instead of a court purpose-built and regularly used for criminal jury trials. He contends that this, especially when combined with the pre-trial publicity, has resulted in a miscarriage of justice in that the trial became a "show" trial and the jury must have felt pressured to deliver guilty verdicts.

[11] The appellant applied to the learned primary judge in a pre-trial hearing for an order that the trial be heard in a regularly used criminal court. The respondent supported that application on the basis that the prosecution wished to do everything possible to ensure that this trial was as fair as it could be.[17] The judge conducted some pre-trial hearings in the Banco Court and ascertained that the court worked satisfactorily for the purposes of a criminal trial. Although the Banco Court had never before been used for a criminal trial, it seems its use was thought to be desirable or necessary here because it was the only court large enough to accommodate the anticipated numbers of media and members of the public expected from throughout Australia and overseas. With hindsight, it now seems the media and public could have been accommodated in a regularly used criminal court but it is difficult to see how the use of the Banco Court could have affected the jury's verdict. A judge is entitled to control the administrative arrangements for his own court and these can only be successfully scrutinised on appeal if it is established they have caused a miscarriage of justice.[18] The use of the Banco Court, either alone or when linked with the issue of pre-trial publicity, does not establish a miscarriage of justice. This ground of appeal also fails.

The confession

[12] Police officer Damro gave evidence that he and his dog, Titan, came upon the appellant, Long, seated in lantana-infested bushland in the Childers-Howard area on Tuesday, 27 June 2000. Damro said, "Police officer, stay where you are. Stay where you are." Long produced a long, wooden-handled knife with a silver eight inch blade and held it out and moved it in front of him. Damro said, "Drop the knife

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15 See *R v Lewis*, supra.
16 See *R v Glennon*, supra, 603, 623.
17 *R v Glennon*, supra, 616.
18 *R v Farr* (1994) ACrimR 405.

or I'll let the dog go." Long did not drop the knife and lunged forward at Damro. When Long was about four metres away, Damro, who could not retreat, released Titan and instructed him to "rouse". Titan was unable to get a firm grip on Long's clothing and Long seemed to be stabbing the dog. As he was worried for his dog, Damro recalled Titan, pulling him back on the lead. Long moved away, still holding the knife, so that there was some thick bush between Damro and him. Damro continued to state, "Stay where you are. Drop the knife. Drop the knife and I'll take the dog away." Long appeared to be escaping. To prevent this, Damro released Titan who chased Long down a river bank, grabbed him by the leg and knocked him over. Long was waving the knife about and Damro tried to disarm him but was stabbed in the jaw. Damro was worried for his safety and called for assistance. He heard a series of gunshots which were fired by police officer Jones, and Long stopped moving. Damro called to Jones to stop shooting. Damro checked on Long's condition and was attempting to put him into the recovery position so as to monitor his airway when Long said, "I'm dying. I started that fire." Damro was taken by surprise and responded, "What?" Jones arrived, followed by other police officers. The whole incident occurred very quickly and the gunshots were fired during the course of a violent struggle. During the incident, Long said other things on two occasions but he could not recall them.

[13] Jones gave evidence that he came on the scene and discharged his gun when he saw Long and Damro struggling; Long was continually stabbing at Damro's head and neck; he feared that Long may kill Damro. He fired three shots and Long lay back and dropped the knife. He saw that Damro was not seriously harmed and heard Long say, "I'm dying anyway. I started that fire." Damro said, "Get someone quick." Jones went for assistance and reported what had occurred to his senior sergeant. Shortly afterwards, Jones made notes of the conversation on a $10 note, the only paper he could find.

[14] Long did not give or call evidence on the *voir dire* or during the trial although his counsel put to the police witnesses that he did not make the confession.

[15] The appellant contends the evidence of these police officers was incredible and should have been rejected. In the absence of any contrary evidence, I am not persuaded that is so. It is hardly surprising that their evidence would have some minor inconsistencies, both internally and when compared to the other, when recounting such a fast-unfolding dramatic event. The inconsistencies referred to by the appellant were not significant. The evidence was not inherently unbelievable. This contention is without merit.

[16] The appellant next contends this confession was inadmissible because it was induced by a person in authority. A confession made after a threat by a person in authority is deemed to have been induced by the threat and is inadmissible in a criminal trial unless and until it is shown not to have been induced: s 10 *Criminal Law Amendment Act* 1894 (Qld).[19] The prosecution therefore had the onus of establishing the confession was voluntarily made. The appellant contends that on the evidence the only reasonable inference is that the confession was made by him because of fear of further violence and not in the exercise of a free choice to speak or to remain silent.

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[19] See also the position at common law: *MacPherson v The Queen* (1981) 147 CLR 512, 519 and *McDermott v The King* (1948) 76 CLR 501, 511-512.

[17] It is true that Long's confession was not likely to have been made but for the gunshots, which plainly constituted a threat to Long, but was it induced by the gun shots? Was Long prepared to say anything to stop further police violence? Damro did not question him about the fire, merely demanding earlier that he stay still and drop the knife; when Long confessed to starting the fire the violence had stopped and he was being assisted by Damro. On the evidence, the most rational inference is that Long confessed, not because of any police threat, but because he (wrongly) believed he was dying as a result of the gun shots and voluntarily decided to admit to starting the fire. The judge was not required to exclude the evidence on this basis.

[18] Finally, the appellant contends that the confession should have been excluded in the exercise of the learned trial judge's discretion because it was obtained in unfair circumstances: *McDermott v The King*[20] and *MacPherson v The Queen*.[21] He emphasises what he contends was the unlawful conduct of the police officers and submits that an admission obtained in such circumstances should be excluded in the interests of public policy: *Bunning v Cross*[22] and *R v Swaffield*.[23]

[19] As Jerrard JA explains, Damro had no power on 28 June 2000, after identifying himself as a police officer, to order Long to remain where he was,[24] but that did not justify Long's production of the knife with which he threatened Damro. Damro was entitled to request Long to drop the knife and cease this assault and to threaten to release police dog Titan if Long did not comply with his request. Long did not drop the knife but, still holding the knife, advanced towards Damro who then released the dog. On the evidence, Damro's conduct to this point seems to have been a reasonable response to his apprehension of the fast-changing situation in a lonely bush setting. After Damro recalled the dog, Long was lawfully entitled to move away as he did, but so too was Damro entitled to follow and to continue to request him to drop the knife. It is not clear that Long was threatening Damro with the knife at this stage, but Damro believed he still had the knife. Because of Long's threatening behaviour immediately beforehand in an isolated bush setting, it was reasonable for Damro to pursue Long to disarm him. Damro said his intention was to stop Long escaping. Nevertheless, his earlier and continuing statements to Long indicate he also intended to disarm him. In the fast-changing circumstances here, I am not persuaded Damro acted unlawfully in instructing the dog to attack Long and in struggling with Long in order to disarm him. The evidence is that Jones then fired the gun at Long believing that Damro's life was in danger, apparently a lawful response to Jones' apprehension of the situation.

[20] The learned primary judge did not determine whether the police officers had conducted themselves unlawfully but concluded that Long had made a voluntary confession believing he was dying, unconnected with the violence earlier used by the police officers and that neither fairness nor public policy considerations dictated that it be excluded from admission into evidence.

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20 (1948) 76 CLR 501, 511-515.
21 (1981) 147 CLR 512, 519.
22 (1978) 141 CLR 55.
23 (1998) 192 CLR 159, 189-198.
24 cf ss 198 and 234, *Police Powers and Responsibilities Act* 2000 (Qld) which came into force on 1 July 2002.

[21] A conclusion, that the confession was voluntary and unconnected with the violence used and that Long confessed because he (wrongly) believed he was dying and wished to admit to starting the fire, was open on the evidence for the reasons given earlier. Neither fairness nor public policy considerations dictated that the confession be excluded from admission into evidence, first because the earlier police violence was not likely to have affected the cogency of an admission made by a man who believes he is dying[25] and, second, the appellant did not establish that the police officers' conduct was such as to require exclusion on public policy grounds. This ground of appeal fails.

[22] It follows that it is unnecessary to consider whether this Court should receive the further evidence sought to be led by the respondent from Dr Taylor-Robinson who initially examined Long at the Maryborough Hospital and which the respondent contends supports the inference that the appellant believed he was dying at the time he made this admission to Damro.

The remaining grounds of appeal against conviction

[23] I agree with Jerrard JA's reasons for dismissing the remaining grounds of the appeal against conviction and have nothing to add.

The Attorney-General's appeal against sentence

[24] I agree with Jerrard JA's reasons and wish only to make these brief additional observations.

[25] The requirements of s 305(2)(b) *Criminal Code* include that a court order a person being sentenced "on conviction of murder and another offence of murder is taken into account" to make an order that the person not be released until the person has served a minimum of 20 or more specified years of imprisonment. The expression in that section, "another offence … is taken into account", must refer only to offences taken into account in the format provided by s 189 *Penalties & Sentences Act* 1992 (Qld). The deaths of the remaining 13 victims of the arson were not offences taken into account under s 189 *Penalties and Sentences Act* 1992 (Qld) or s 305(2)(b) *Criminal Code*.

[26] Long was convicted of two murders and although the judge rightly considered the surrounding facts and circumstances, he could not and did not sentence Long on the basis that he had committed 15 murders.[26] The learned judge sentenced Long on the basis that the deaths were not intentional but caused by his intentional arson and that Long's guilt was established under s 302(1)(b) *Criminal Code*. There was no evidence that Long knew the smoke alarms were switched off when he lit the fire. As his Honour noted, the sentence does not release Long on parole after serving 20 years imprisonment but merely leaves that decision to the community correctional authorities who can then be expected to be better informed than his Honour or this Court as to the appropriateness or otherwise of releasing Long into the community on supervision. The Attorney-General has not demonstrated any wrongful exercise of discretion. The appeal against sentence should be dismissed.

[27] I agree with the orders proposed by Jerrard JA.

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25 *Bunning v Cross* and *Swaffield*

26 cf *R v D* [1996] 1 QdR 363.

[28] **DAVIES JA:** I have had the advantage of reading the reasons for judgment of Jerrard JA. I agree with him that the appeal and the cross-appeal must be dismissed. I also agree with and adopt his Honour's comprehensive analysis of the relevant facts and, subject to what I say hereunder, I agree with his Honour's reasons for rejecting the appellant's grounds of appeal and the respondent's cross-appeal.

[29] Notwithstanding the excellent submissions of Mr Martin SC for the appellant, in the end there were, it seems to me, only two substantial grounds of appeal. Because each of them does raise substantial questions, and in deference to the comprehensive arguments on both sides on each of them, I prefer to express my own reasons for rejecting them. In respect of all of the other grounds I am content to adopt in their entirety the reasons of Jerrard JA.

[30] The two grounds of substance involve:

1. the pre-trial publicity; and
2. the admissibility of the appellant's confession.

My reasons for rejecting each of those grounds are as follows.

The pre-trial publicity

Grounds: (a) The learned trial judge erred in refusing to grant a permanent stay of the indictment

(b) A miscarriage of justice has occurred as there was a substantial risk of prejudice arising from pre-trial media publication

[31] The fire occurred on 23 June 2000. All of the publicity complained of was first published between that date and 28 June 2000, the date on which the appellant was apprehended by Constables Damro and Jones. However thereafter much of it remained available, for a fee, on the internet. The trial commenced on 18 February 2002, that is about one year and eight months after the last of these matters was first published.

[32] In those circumstances the appellant submits that, primarily because of two errors made by the learned trial judge, he erred in exercising his discretion not to permanently stay the indictment. The first of those errors was a failure to advert to the possibility that members of the jury might obtain access to this publicity by means of the internet; this alone, it was submitted, gave rise to a substantial risk of prejudice. The second was a failure by his Honour to appreciate the significance of the facts that the evidence of the appellant's previous criminal history had been deliberately provided to the press by a police officer and an officer of the Department of Corrective Services. It was also submitted that other publicity, after 28 June 2000, not directly prejudicial to the appellant but nevertheless about the fire or its consequences, would have kept the events of 23 June 2000 in the minds of potential jurors, including the prejudicial publicity published between 23 and 28 June 2000.

[33] Mr Martin SC for the appellant conceded that, putting on one side the question of internet access, the relevant publications for the purpose of considering this argument were publications made in the Brisbane area between 23 and 28 June. These were in the Courier Mail, the Australian and on the Channel 7 Today Tonight programme. Mr Martin SC took us to the worst of these which were in the Courier Mail of 26 June 2000, the Australian of 26 June 2000, the Courier Mail of 27 June 2000, the Courier Mail of 28 June 2000 the relevant part of the Today Tonight programme of 27 June 2000.

[34] There is no doubt that some of this material was highly prejudicial against the appellant. It stated, falsely, that he had an extensive criminal history of violence including convictions and charges for the attempted murder of his de facto's six year old daughter. It stated that he had set fire to a caravan in which his de facto wife and children were sleeping. His de facto expressed the view that he was the sort of person who would commit this crime and that she "knew" that he had done so. The newspaper articles contained headlines such as "fugitive has violent past", "wanted drifter may have record for attempted arson" and also asserted that he had tried to strangle his former de facto wife. These and other statements referred to by Jerrard JA, all highly prejudicial and some untrue, would have made a fair trial extremely difficult and possibly even impossible had it taken place immediately after 28 June.

[35] Mr Martin SC submitted that the following features of this case together had that effect notwithstanding a lapse of a year and eight months before trial:

1. that the offence was of an horrendous kind exciting public interest and revulsion: *R v Lewis*;[27]
2. that the publicity was conclusive of guilt and that it took place at the time of greatest public interest in the fire;
3. that it was kept alive by subsequent publicity;
4. that the original publicity in the offending publications already mentioned set out the criminal history of the appellant, some of it falsely, including attempted murder; that it indicated that he had a propensity to commit a crime of this kind and indeed this crime and had acted accordingly;
5. that this publicity was thereafter readily accessible on the internet;
6. and that there had been deliberate assistance of the authorities in the dissemination of the criminal history.

[36] These features, it was said were, in combination, not in *Lewis*[28] or *Glennon*[29] or *Murphy*.[30] These together, it was submitted, gave rise to an unacceptable and substantial risk that the pre-trial publication of prejudicial material precluded a fair trial and that the risk was incapable of being removed or sufficiently minimized by the conduct of the trial by the trial judge and any directions which he might give.

[37] Although that was the submission, whether it has any weight depended, in my opinion, upon the appellant making good par 5 or possibly par 6 of that submission. That is because the risk was slight that, unaided, any member of the jury would recall any of the prejudicial statements to which I have referred by the time of trial more than a year and a half after they were published. That is why Mr Martin SC's argument concentrated primarily on the two errors to which I referred earlier.

[38] Whether there is an unacceptable and substantial risk that this prejudicial material would have been in the minds of the members of the jury by the time of trial or during it depended, it seems to me, on whether there was a substantial risk that one

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27 [1994] 1 QdR 613.

28 See fn 27.

29 (1992) 173 CLR 592.

30 (1989) 167 CLR 94.

or more of them would have obtained access to this material on the internet at or about those times. This would have needed to involve the following steps:

1. logging on to the internet and obtaining access to one of the sites where such information was stored. The most likely of these would have been news text, the site for the Courier Mail, the Australian and the Daily Telegraph; alternatively it may have involved obtaining access to some more remote site such as the BBC website or the site for some other newspapers;
2. subscribing to the service which the site offered and opening an account by means of a credit card;
3. in order to obtain access to the text of articles rather than merely the headlines, paying a minimum fee of $10 (which permitted access to 10 articles);
4. searching for and finding, or finding by accident, the offending articles among many scores of articles on the site about the fire.

[39] I do not think that there was a substantial risk that one or more of the potential jurors would have done all this at a time close to or during the trial. It assumes a level of knowledge sufficient to know of these sites and to enable access to them; a level of curiosity sufficient not to be deterred by payment of a fee for access to the articles; and a level of determination and persistence not to be deterred by the number of articles of apparent relevance on each site, many of which contained no offending material.

[40] It is true that there was other, non-prejudicial publicity continuing over the period from 28 June until the date of trial about the fire and its consequences. There was also some reporting of the appellant's committal but not in a way which was prejudicial. I do not think that there was a substantial risk that this publicity would have kept in the minds of potential jurors any of the specific prejudicial statements made between 25 and 28 June. It was not suggested that there was any way in which the jury could have obtained access, before or during the trial, to the video which we saw of the very prejudicial interview with the appellant's former de facto aired on the Today Tonight show on 27 June 2000.

[41] Mr Martin SC referred to s 69A of the *Jury Act* which was enacted shortly after this trial. It had in mind cases like *R v McLachlan*[31] by making it an offence for a juror to seek information about a trial other than that which is adduced in evidence, including by way of obtaining access to an internet site. I do not think that it in any way affects this question or assists Mr Martin SC's argument.

[42] At the commencement of the trial the learned trial judge instructed the jury that they must decide on the evidence alone, ignoring anything which they heard on the radio, saw on television or read in the newspapers. Some of those directions, which Jerrard JA has, in my opinion correctly described as "firm and persuasive", are set out in his Honour's reasons. And as his Honour pointed out, those directions were repeated in the summing up. No complaint was made about the learned trial judge's directions in this respect. Moreover when asked by his Honour whether he wanted a direction specifically to ignore anything that may have been published on the internet Mr Martin SC declined that invitation. I make no criticism of

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[31] [2000] VSC 215.

Mr Martin SC in this respect but that is the reason why no such specific direction was given.

[43] Because of the unlikelihood, in my opinion, that members of the jury would have remembered, at the time of trial, any of the specific prejudicial publicity published before 29 June 2000 and because of the unlikelihood, in my opinion, that any of those members would have obtained internet access to any of that material closer to the trial, I do not think that there was a substantial risk that this publicity would have precluded a fair trial. Whatever risk there was that, more than a year and a half after it was first published, it would be recalled by any of them, or that any of them might recently have obtained internet access to it, was sufficiently overcome, in my opinion, by his Honour's careful directions.

[44] The reference to deliberate generation of prejudicial information by a person in authority is a reference to the judgment of Pincus JA in *R v Lewis*.[32] It was submitted that two such persons, a police officer and a Corrective Services officer deliberately generated the publication of prejudicial information namely the appellant's criminal record. An affidavit by Ms Gilmore (reporter on the Daily Telegraph, Sydney) disclosed a conversation which she had with a police officer who gave her the information which she published about the appellant's criminal record and earlier conduct. However it was not made clear whether that police officer was from the Queensland Police Force, the New South Wales Police Force or the Commonwealth Police Force, all of which were possibilities. Ms Doneman, the Courier Mail reporter responsible for the publication of offending articles on 26, 27 and 28 June, said prison sources verified the accuracy of the appellant's criminal record. Although it may be inferred that this was someone in the Queensland prison system, no person was identified.

[45] The submission went as far as to assert that the police officer had encouraged the publication which followed from his information in order to create prejudice. I would not be prepared to draw that inference; but, in any event as I have said, there was no sufficient basis for inferring that the police officer was a Queensland police officer.

[46] The circumstances in which "prison sources" conveyed to Ms Doneman information about the appellant's criminal record are also unclear. But even if it is accepted that that information was conveyed by a person employed by the Queensland Government in circumstances in which that person knew or ought to have known that it was likely to be published, it by no means followed that that person conveyed that information for the purpose of generating unfavourable publicity against the appellant. More would need to be known about those circumstances before that inference could be safely drawn.

[47] Moreover the publication of the appellant's criminal record in late June 2000 must be kept in perspective. It is even less likely, in my opinion, that, more than a year and a half later, unless their recollection had been recently refreshed, members of the jury would recall this than that they would specifically recall other more sensational, prejudicial and, in some aspects, untrue assertions published about the appellant at about the same time.

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[32] [1994] 1 Qd R 613 at 636.

[48] As the authorities referred to above make clear, it will be a rare case in which the exercise of a trial judge's discretion to refuse a stay on the basis of prejudicial pre-trial publicity will be overturned by an appellate court. What I have said shows, in my opinion, why this is not one of those rare cases.

[49] What I have said, in my opinion, also sufficiently answers the contention in ground (b) that a miscarriage occurred because of the risk of prejudice from pre-trial publicity.

The confession

Ground (c) Evidence of a confessional statement made by the appellant to Senior Constable Damro and Constable Jones on the banks of the Burrum River on 28 June 2000 was wrongly admitted, resulting in a miscarriage of justice

[50] This evidence was sought to be excluded on two bases. First it was said that it was not voluntary. And secondly and alternatively it was submitted that it should be excluded in the exercise of the trial judge's discretion.

Whether it was voluntary

[51] Under s 10 of the *Criminal Law Amendment Act* 1894 the question is whether the confession was "induced by any threat or promise by some person or authority". However that section leaves the common law exclusionary rule unaffected.[33] I am prepared to assume, as his Honour has held, that the confession was made after a threat by a person in authority, within the meaning of s 10, and that, consequently, it was for the Crown to show that it was not induced by such threat.[34] However, under the common law it was also for the Crown to show that the confession was not the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure.[35]

[52] The learned primary judge, in concluding that the confession was voluntary, described it as "rather in the nature of a dying declaration, notwithstanding that the accused subsequently recovered from the injuries he sustained". By that his Honour plainly meant that the confession was made, not because of any particular conduct of the police officers, but because the appellant then thought he was dying.

[53] That is a reasonable, indeed it seems to me correct, view of the evidence. The appellant had been shot at three times, at fairly close range, the gun being apparently aimed at his chest area. As he lapsed into unconsciousness immediately after making the confession, it is reasonable to assume that he was probably feeling faint at and immediately before the time he made it. He was also no doubt feeling pain from a number of injuries. It is not at all surprising that he thought he was dying. Constables Damro and Jones both thought that the appellant had been shot.

[54] Once it is accepted that, when he made the confession, the appellant thought he was dying, it becomes easy to draw, as the most likely inference, that that was why he

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33 *Attorney-General (NSW) v Martin* (1909) 9 CLR 713 at 722; *McDermott v The King* (1948) 76 CLR 501 at 511 - 512.

34 There was an arguable view that, the appellant having assaulted a police officer, it was not an unlawful threat for that officer to call upon him to stop and to threaten to release the dog if he did not.

35 *McDermott* fn 33.

made the confession. He had been disarmed, he was not himself in danger and he had been put in a recovery position. Nor was he asked any question. No other reasonable explanation for the spontaneous statement is open. And the inference is all the stronger when his exact words are taken into account:

> "I am dying. I started the fire."

[55] That being the case, the appellant did not make the confession because of any threat or any pressure put upon him. The Crown discharged the burden on it of showing that the confession was voluntary.

Whether it should have been excluded on a discretionary basis

[56] The first thing that should be said about this is that if, as I have concluded, the confessional statement was made because the appellant believed he was dying, that circumstance enhanced rather than detracted from its reliability. Indeed it is difficult to see how, in those circumstances any serious doubt can be thrown on its reliability.

[57] And the second thing which should be said is that, if that is the case, the confessional statement was not obtained by means of any conduct of either of the police officers. Nothing which they did induced the statement. It is true, of course, that, in an indirect way, the conduct of the police resulted in the statement being made. If Jones had not shot at him, the appellant probably would not have made the statement because he would not have believed he was dying. But the conduct did not induce the statement. What did so was a belief that he was dying.

[58] In *R v Swaffield; Pavic v The Queen*,[36] Toohey, Gaudron and Gummow JJ said:

> "When the court resumed after the first day's hearing, the Chief Justice asked counsel to consider whether the present rules in relation to the admissibility of confessions are satisfactory and whether it would be a better approach to think of admissibility as turning first on the question of voluntariness, next on exclusion based on considerations of reliability and finally on an overall discretion which might take account of all the circumstances of the case to determine whether the admission of the evidence or the obtaining of a conviction on the basis of the evidence is bought at a price which is unacceptable, having regard to contemporary community standards."

[59] Their Honours then said that, putting on one side the question of voluntariness, this approach was reflected in the sections of the *Evidence Acts* of the Commonwealth and New South Wales, and that the question was whether such a broad principle was an appropriate evolution of the common law or whether that should really be a matter for the legislature. They went on to say that, subject to one matter, an analysis of recent cases together with an understanding of the purposes served by the fairness and policy discretions and the rationale for the inadmissibility of non-voluntary confessions supported the view that the approach suggested by the Chief Justice already inhered in the common law and should now be recognized as the approach to be adopted when questions arise as to the admission or rejection of confessional evidence. The qualification which their Honours placed on this was that one aspect of the unfairness discretion was to protect against forensic

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[36] (1998) 192 CLR 159 at [69].

disadvantages which might be occasioned by the admission of confessional statements improperly obtained.[37] So their Honours accepted this approach subject to that qualification.

[60] The importance of this reassessment of the law is that the tests for admissibility of a disputed confession were thenceforth as stated in that case. It is plain from what I have said that the confession here passed the tests of voluntariness and reliability. The question in this case therefore is whether, subject to the above qualification, the admission of the evidence was bought at a price which was unacceptable having regard to contemporary community standards.

[61] It does not appear to me that that qualification, which appears to be based on fairness of the trial,[38] has any relevance here. I do not think it could be suggested that the admission of this confessional statement resulted in the appellant being disadvantaged in the conduct of his defence. Both Damro and Jones gave evidence and were cross-examined. It was put to each of them that the statement was not made but both adhered to what they had said in evidence-in-chief. The appellant did not choose to give his version of the events.

[62] The question then is whether, looking at the whole of the circumstances, the confession was obtained at a price which was unacceptable having regard to prevailing community standards.[39] For several reasons I would answer that question in the negative.

[63] In the first place, as appears from what I have already said, nothing which the police officers did or threatened to do induced the confessional statement. It is true that if the shots had not been fired the appellant would not have thought he was dying and so would not have made the statement. But the statement nevertheless was spontaneous and unexpected. In no sense was the conduct aimed at extracting a confessional statement. Nor could it realistically be said that it did so.

[64] Secondly, and in any event, I do not think that the conduct of the police officers was unreasonable. They had not even established the identity of the appellant before he drew a knife, brandished it and lunged forward at Constable Damro. It was reasonable that Damro should attempt to disarm him lest he harm one or other of the police officers or some other person. He attempted to do this first by calling upon him to drop the knife. Having failed to achieve it in that way he then caused the dog to attack the appellant in an attempt to restrain or disarm him. Damro called the dog off because of his concern for the safety of the dog as the appellant was slashing it with his knife. The appellant then commenced to escape and, when he did not stop when called on to do so, Damro again released the dog. But again this was unsuccessful. He then attempted himself to disarm the appellant but it was not until Jones came to his assistance and fired three shots that the appellant was disarmed. In the meantime the appellant had slashed at both Damro and the dog. Whether or not in the circumstances the police conduct was lawful, I do not think it was other than a reasonable and appropriate reaction to a murder suspect armed with

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37 At [70]. Brennan CJ accepted that approach, apparently without that qualification: see at [27]. Kirby J also accepted it at [119], [120].

38 At [78].

39 Supra fn 30; and at [91].

a knife he was threatening to use. But the real point is that none of this conduct induced the confession.

[65] In no sense therefore could it be said, in my opinion, that the confessional statement was obtained at a price which was unacceptable having regard to prevailing community standards. In the situation which I have described it was not even, in my opinion, "obtained", in the sense that there was neither a request for it or any effort expended in order to get it. Primarily because the confession was not, in any relevant sense, induced and because it was made in circumstances which rendered it reliable, I do not think that it should have been excluded in the exercise of a discretion to do so.

[66] **JERRARD JA:** In the very early hours of the morning of 23 June 2000 a fire burned the Palace Backpackers Hostel in Childers to the ground. Childers is a relatively small town in a farming community in Queensland, and casual work vegetable picking is available in the area. Most of the hostel residents at the time were young people doing that work, and often described as “backpackers”. Fifteen of the 85 people staying there died in that fire. On 15 March 2002 the appellant Robert Long was convicted after a trial in Brisbane before a jury of the murder of Stacey Louise Slarke and Kelly June Slarke, twin sisters whose bodies were specifically identified within those 15. The expense of strict proof of formal identification meant only those two victims of the fire were named in the indictment.

[67] Mr Long was also convicted of having wilfully and unlawfully set fire to that hostel at that time. He has appealed against his conviction, submitting both that a fair body of evidence was wrongly admitted, and that in any event his convictions were unsafe and unsatisfactory. A further ground of appeal was strongly pressed, namely that the extensive publicity surrounding the fire, the suspicion or belief he started it, his arrest, the committal hearing, and the trial, deprived him of the possibility of a fair trial.

[68] The Attorney General has appealed against the order by the primary judge that Mr Long not be considered for parole until he has served 20 years of the life sentence imposed on him for the offences of murder. The Attorney contends that the period stipulated should have been 25 years, and that Mr Long should have been sentenced as if convicted of murdering all 15.

The Appellant’s Involvement with the Hostel

[69] Mr Long had booked into the hostel on 24 March 2000. The evidence from Christian Atkinson, one of the two co-directors of the company who managed the hostel, was that the hostel then found work for Mr Long vegetable picking on a local farm, this service being provided to hostel guests. Mr Long shared Room 12 at the hostel with Vishal Tomar, and ceased living at the hostel on or about 14 June 2000, that being the same day as that on which Mr Long left a note on the counter of the bottle shop at the near-by Federal Hotel, describing in the note an intent to take his own life. Mr Long owed about $200.00 on that date to that hotel for alcohol supplied to him, and was also 15 days behind in his rent at the hostel. The note is exhibit 11. (at AR 1454).

[70] John Dobe, the other co-director and co-manager of the business of running the hostel, found a similar communication from Mr Long one morning “a few days

before"[40] the fire. It had been written on a piece of cardboard slipped under the office door and it read (AR 243):

> "To John, Sorry about the way I went but I had to get away. I'm going to take my own life due to the fact I found out last week I've got cancer to the lungs. I don't want anyone feeling sorry for me. There is a couple of things that you could do for me".

There then followed a request that Mr Dobe send money to Mr Long's father at an address supplied. That note was exhibit 10. Either the same morning or the morning after it was found, Mr Atkinson found a key to Room 12 slipped under the office door. Mr Long's debt to the hostel likewise remained unpaid.

[71] The evidence at the trial did not reveal where Mr Long had resided between 14 June 2000 and 23 June 2000. Admissions made on his behalf at the trial included that on 23 June 2000 he left the town of Childers, aware that a fire had destroyed the Palace Backpackers Hostel in Childers, and aware of rumours that he was to blame for that. It was also admitted that between 23 June 2000 and 28 June 2000 (the day he was taken into police custody), he had attempted to avoid contact with the public and the authorities. The evidence did show that on the night of 22 June 2000, Mr Long was present at the hostel, and amongst other things he did there, he spoke outside it with two hostel residents, Lisa Duffy and Martin Cockill, from about 10.45 p.m. until 11.50 p.m. He told Ms Duffy, who repeated it in his presence to Mr Cockill, that he had been diagnosed by a doctor with lung cancer and had only two months to live.

[72] He also told them he had made a copy of "his keys" before handing them back to "John and Christian"[41], that he didn't like Christian, and he didn't like the way that (Mr Atkinson and Mr Dobe) ran the hostel. Mr Cockill's evidence was that Mr Long had said that night that he had been talking to people at the Federal Hotel about "how they should start up, like, their own kind of, sort of, hostel for backpackers or put up backpackers and start mini-buses to take them to work to take business away from the Palace Backpackers"[42]. Ms Duffy recalled Mr Long having said he could run the hostel "10 times better than John and Christian"[43] did. None of the evidence of that conversation was challenged in cross examination.

Mr Long's Attitude to Backpackers

[73] Evidence was called from a Kerris Rex, a young man resident in Childers, who had met Mr Long about five weeks before the fire. Mr Long told Mr Rex that he was staying at the backpackers, but wasn't himself a backpacker; he was "virtually a local now"[44] who had made some friends in the community. Mr Rex gave evidence of a conversation occurring in the Childers Hotel which he said occurred about two and a half weeks before the fire, in which Mr Long referred to a male "backpacker" named Keith as a "cunt" and "wise guy"[45], and later that night Mr Rex went back to the Palace Hostel with Mr Long. This was between 11.30 p.m. and midnight and at Mr Long's invitation, Mr Rex watched Mr Long shut the entrance door to the hostel

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40 AR 243.
41 AR 508.
42 AR 538.
43 AR 512.
44 AR 447.
45 AR 448.

so that other backpackers returning from the hotel could not get in; and after those others had knocked for some time Mr Long let them in, advising them to "shut their fucking mouths and go straight to bed with no bullshit"[46]. One of that group was the man Keith.

[74] Mr Long then invited Mr Rex up to his room, after Mr Long had said he would not go into the TV and lounge room because those "cunts are in there", referring to the man Keith and another. When Mr Rex went to Mr Long's room, Mr Long woke up the other resident of Room 12 (Mr Tomar), described him to Mr Rex as "the guy who had stolen $1,000" from Mr Long, and asked Mr Tomar "do you know what you've done?[47]"

[75] None of this evidence was challenged. Mr Rex swore he and Mr Long then went out onto a veranda at the rear of the building, where they had a further conversation. Mr Rex recalled that during that, Mr Long said that all but three backpackers, whom Mr Long named, could "go to hell" and that if:

> "locals don't start bashing some of these backpackers to get them out of town then he was going to have to get together $300.00 to put on their limbs." (sic). (AR 454).

Mr Long said to Mr Rex that he was not afraid to go to jail (apparently for organising this intended indiscriminate assault), and his manner in this conversation was that of a person quite upset. Mr Rex said he was reassuring to Mr Long. It was suggested in cross examination that Mr Rex was mistaken about that conversation on the veranda, but Mr Rex was adamant it had occurred as he described. The indiscriminate hostility to backpackers generally revealed in the challenged evidence of Mr Rex seems consistent with the tone and content of the unchallenged evidence he gave.

[76] Around the same general period, namely about two weeks before 23 June 2000, Mr Long exhibited specific and considerable hostility towards Mr Tomar to two other hostel residents called as witnesses. A Moffat Ngatai, who had been staying at the hostel since 9 May 2000, recalled Mr Long joining him and two others in a downstairs area of the hostel, and when Mr Long was very angry about "something said about him in the local pub by someone"[48]. Mr Long described this person as a "Pakistani bastard", whom Mr Long wanted to bash up, and to "do him in". The prosecution also called Darren Cameron, present for the same conversation, who thought it had occurred between a week and two weeks before 23 June 2000. Mr Cameron's recollection was that Mr Long said he wanted to kill "Vishal", who Mr Long called a "fucking Pakistani cunt"[49]. His anger was expressed by Mr Long to be at something Mr Tomar had said.

[77] It was unchallenged that those statements were made at that time. More contentious evidence was called from a John Lundgren, who arrived in Childers in late April 2000. His evidence was that in the first or second week after that arrival he had a conversation in the room downstairs which was the combined lounge/TV room in the hostel, and Mr Lundgren's description in evidence was that Mr Long had said words to the effect that:

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46 AR 450.
47 AR 453.
48 AR 700.
49 AR 728.

> "Those backpackers better watch it up there[50]"

and Mr Lundgren swore:

> "He told me that he was pretty angry with them and stuff like that and something couldn't (sic) happen and stuff like that if they don't watch it."…..and.. "He talked about fire safety of the building and he also talked about – he mentioned about there could be – there is a fire bug getting around town so look out for them"[51].

[78] Mr Lundgren also recalled that Mr Long had said:

> "something about some people would die if a fire did happen you know, that there wasn't proper precautions here and stuff like that - yeah.[52]"

He also gave evidence of having been told by Mr Long that night that Mr Long had helped to make sure that backpackers got up on time to get on the work bus, by "waving a burning bit of paper at the fire alarm"[53]. Mr Lundgren's evidence was that, in the first week in which he stayed there, a fire alarm **had** gone off twice one morning.

[79] Mr Lundgren's evidence was challenged in cross examination on those and other matters. It appeared that he had first described in a statement made on 8 February 2002 that Mr Long had said he sometimes waved a burning bit of paper at the fire alarm to wake up the other hostel residents. He had also claimed for the first time in the witness box that Mr Long had said in that conversation that:

> "Those backpackers up there better watch it".

It was suggested in cross examination to Mr Lundgren that he was telling the jury a pack of lies. However, it did appear from the cross examination that Mr Lundgren had stated as long ago as 29 December 2000, in a statement provided to the investigating police, that Mr Long had complained in that conversation that Mr Long did not feel he was fitting in (at the hostel), and that "something could happen and that he should be taken seriously"[54]. The cross examination also revealed that Mr Lundgren had said at the committal hearing when cross examined about that statement, that his recollection then was of Mr Long saying that he wanted "a bit of respect", and that "something could happen". Mr Lundgren had also sworn in that cross examination in the committal hearing that Mr Long was very angry at the time of that conversation.

[80] The appeal record (at 943) makes it clear that a general challenge was issued to all of Mr Lundgren's evidence, including the consistently given description of Mr Long's wish to be taken seriously and warning that something could happen. Nothing particular emerges from that cross examination to demonstrate why the jury could not accept at least that portion of Mr Lundgren's evidence.

Statements Made on 22 June 2000

[81] The Crown called evidence of conduct and statements of Mr Long, observed and heard on the night of 22 June 2000 and not challenged in cross examination, and

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50 AR 905.
51 AR 905.
52 AR 905.
53 AR 906.
54 AR 934.

indicating continuing asserted hostility to Vishal Tomar. Although Mr Tomar and Mr Long shared Room 12, Mr Long had apparently slept most nights in the TV/lounge, despite requests from the management that he not do so. On 22 June 2000 Mr Tomar saw Mr Long in the upstairs part of the hostel and Mr Long told Mr Tomar to "fuck off"[55]. This occurred somewhere between 10.30 p.m. and 11.00 p.m. that night. An Amy Baker called as a witness also gave unchallenged evidence of seeing Mr Long in the upstairs part of the hostel that night at about 10.45 p.m.

[82] The next unchallenged evidence of Mr Long's statements and movements that night is that of the witnesses Duffy and Cockill, whose conversations with Mr Long for the hour ending around 11.50 p.m. have already been largely described. Ms Duffy had been surprised that night about 10.45 p.m. to find Mr Long in the boot shed of the hostel, and their long conversation occurred at the picnic bench outside. Towards its end Ms Duffy recalled Mr Long saying that he did not like Vishal and that he was going to "have him", "beat him up"[56] before Mr Long went. This was after Mr Long revealed that he considered he had only two months to live. He also had said, while smoking a cigarette, that "it's these that killed me".[57] He asked Ms Duffy and Mr Cockill to leave the back door open, so that "I can get in to beat (up) Vishal".[58] They declined to do that. Nothing was suggested in cross examination which would explain why Mr Long was in and about those premises that night.

Mr Long's Appearance and Descriptions of Him

[83] It was formally admitted on his behalf that he was born on 30 May 1963 (making him 38 at the date of trial) and that his height is 163 cm (a shade over five feet four inches). The evidence of Jacqueline Nelson, who was working as the receptionist at the hostel from 5 April 2000 until the time of the fire, was that the general age of the residents then staying at the hostel was "in their 20s", and that Mr Long was considerably older than the other residents except for two. One of those died in the fire, and neither of those two older residents looked at all like Mr Long, whom she knew from her work at the hostel. She had seen Mr Long in Childers "a couple of days" after he left the hostel, and again two or three days after that, that latter occasion being some two days before the fire.[59]

[84] At all relevant times Mr Long had a beard, moustache and head hair. Descriptions given in evidence of the length of his beard and head hair on 22 June 2000, on those occasions when his identity was unquestioned, were contrasted by his senior counsel with descriptions given by witnesses on the occasions when identity is in question and critical. The like contrast was made of descriptions of his clothing that night, on occasions when his identity was unquestioned, with those of clothing when the identity of a bearded male person is a critical issue.

[85] Darrin Hill, the hostel resident who called the fire brigade on 000 that night, had last seen Mr Long the night the "suicide" note was left at the Federal Hotel (14 June 2000), and described him as being "short, scruffy, big bushy beard, very short hair cut, but he always wore a (baseball cap)".[60]

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55 AR 530.
56 AR 512.
57 AR 521.
58 AR 514.
59 AR 386.
60 AR 686 and 687.

[86] Vishal Tomar, who had shared a room with Mr Long for "five to six weeks"[61] and who did not recall Mr Long ever making any threats to him, described Mr Long as being five foot two inches, with a "pot belly", otherwise normal build, and a beard and moustache.[62] Mr Tomar's description of Mr Long's clothing on the occasion when Mr Long told Mr Tomar to "fuck off" on the night of 22 June 2000, was that Mr Long was wearing a black T-shirt with a dark coat over it, and no hat.[63] Amy Baker, who saw Mr Long at about the same time that night (about 10.45 p.m.), described him wearing a dark green polo T-shirt.[64] Her description of his general appearance that night was that he had short hair "close to the scalp" and a "full beard but it was short".[65]

[87] Lisa Duffy, who spoke with Mr Long that night for some time until about 11.45 p.m., described him generally as being five foot five inches, "maybe five foot six maximum", as being "rather small but he was kind of stocky", with a ruffled beard and a shaved head (AR 503). That night he "wasn't wearing his cap", had a dark jacket on and a dark pair of trousers. He normally wore a cap (AR 507). She said he had a brown bottle of beer and a cask of white wine.

[88] Mr Cockill, present at the same time, gave a general description of Mr Long as being "about five five bushy beard, cropped hair, not well built but stockyish, not skinny" (AR 535). He recalled Mr Long having said he was about 37, as did Ms Duffy. Mr Cockill recalls Mr Long having a black jacket that night, a T-shirt underneath it, and long trousers. (AR 542). He also said Mr Long had a cask of wine and was drinking beer from "like a stubby". (AR 538).

[89] Those identifications and descriptions were not challenged. The critical evidence which **was** challenged were the propositions advanced by the prosecution that an unidentified male, seen at about 12.15 a.m. by the witness Neil Griffith, was the same unidentified male seen at about 12.30 a.m. by the witnesses Alyson Crichton and Frederick Beddows, and that he was Mr Long. Acceptance of those propositions is crucial to the prosecution case based on circumstantial evidence. That case in turn depends upon accepting the evidence now described of events occurring between 12.15 a.m. and 12.30 a.m. on 23 June 2000.

Events Immediately before the Fire(s)

[90] The critical sequential events began when the witnesses Minsoeska Teeuwen and Catharina Berendsen, both from Holland and respectively an occupational therapist and a social worker, returned to the hostel from the Childers Hotel. Ms Teeuwen thought they left that nearby hotel at 11.45 p.m. and Ms Berendsen's evidence was that they arrived at the hostel at about 11.50 p.m. Ms Berendsen had had only one glass of beer all evening.[66] That was all the alcohol she said she had. Ms Teeuwen particularly noticed that there was no light on in the combined lounge and TV room, which was quite dark. Each of these two witnesses described some short conversations with other young persons upon their return and their actions getting ready for bed, and each described the clock in their separate rooms when each went

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61 AR 537.
62 AR 526.
63 AR 533.
64 AR 548.
65 AR 551.
66 AR 613.

to bed as showing 12.20 a.m. Each clock was always a little fast, between one and five minutes. Neither witness was challenged in cross examination on their evidence of the time showing when each actually got into bed, or their descriptions of the respective clocks being a little fast.

[91] Neither had noticed any fire in the TV/lounge room or smoke on their return to the hostel, or before finally going to bed upstairs. Catharina Berendsen's evidence begins the chain of crucial circumstances in its description of how upon her return to her room immediately prior to going to bed, her room mate Lauren Morris got out of bed and left the room. Ms Morris recalls being so awoken by Ms Berendsen, getting up, and going downstairs to the toilet. On her return journey after using that downstairs toilet she "ran into Neil Griffiths at the bottom of the stairs" (AR 815), and she noticed a male person sitting at the email or internet machine, underneath the atrium stairs in the middle of the downstairs part of the hostel, and adjacent to the TV/lounge room, which was downstairs. She and Mr Griffiths briefly spoke and she returned to her room. On the evidence of the witnesses Teeuwen and Berendsen as to time, this would have occurred between 12.15 a.m. and 12.20 a.m.

What Mr Griffiths Saw

[92] Neil Griffiths had arrived in Childers on 18 June 2000 and did not know Mr Long. He did know Lauren Morris, and he recalled having woken up that night and having also gone downstairs to use the toilet. He recalls meeting Ms Morris as she was returning from the toilets, and that there was someone present "on the internet machine just to my right under the stairs." (AR 625). He did not check the time when he awoke and he thought it was around 11.30 p.m. The Crown case is that that estimate or opinion was in error.

[93] Mr Griffiths used the toilet, and then when walking back towards his room noticed that the contents of a bin in the TV/lounge room were on fire. His recollection too was that the lights were off in that room at that time. (AR 625). There were at least two of those varieties of bins in that room, made of black PVC, and standing between 70 to 90 cm high. Each had a hole in the centre of the lid. He described what he saw in these terms:

> "I walked into the TV/lounge room and I noticed that there was a lot of paper sort of towels around the bin and on top of the bin. The lid was sort of partly off and there was a cushion from a settee sort of on top of the bin and bridging the arm of the sofa. So I picked up the cushion off the top of the bin, sort of turned it over, and there was like a semi circle of black on it and I started batting out the paper that was on the floor surrounding the bin, but as I was doing that the sort of bin appeared to be sort of - fanning the blaze."[67]

[94] He described then stepping out immediately into the corridor looking for a fire extinguisher, and "shouting across to the guy that was on the internet machine".[68] That person appeared first not to respond, and Mr Griffiths re-entered the lounge. By that time the fire in the bin had "sort of burnt down a bit" and the male who had been at the internet joined Mr Griffiths, said words like "I'll get that", took the bin and walked out of the TV/lounge room towards the door, and out along a walkway towards the fire exit. Sergeant Graham of the Queensland Police Scientific Section

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67 AR 626.

68 AR 626.

located the remains of a burnt plastic bin outside the rear entrance to the hostel; adjacent to the ablutions block. He inspected the scene at 9.00 a.m. on 23 June 2000. The bin contained 2 aluminium cans, and what appeared to be a cigarette packet and remains of wooden matches. (AR 1001). There was no remnant of a bin found in the remains of the TV/lounge room; and it seems to have been common ground that the burnt bin outside the rear door was the one given to the bearded man by Griffiths, which was not returned the TV/lounge room. Mr Griffiths, who is five foot ten inches tall, described this other male coming up to about Mr Griffiths' chin, being about forty, with a "paunch in his belly", and with "brown sort of like bushy hair with a big beard and sort of quite – quite sort of scraggy looking". (AR 628). His evidence in chief was that he did not take any special notice of the clothes that man was wearing.

[95] Mr Griffiths then went back to bed. His evidence was that he did **not** think it was "reasonably possible" that there was something else burning within the room when he left it, (AR 639) but he agreed that a statement provided on 24 June 2000 by him to the police had read:

> "I don't think anything else was burning in the room at that time although it is possible. There was certainly no other flames in that room. When I went back to bed I was satisfied that there was no other fire."[69]

He also said in cross examination that it was not possible that the cushion was still smouldering when he put it back on the sofa, as he apparently did; but he conceded that when cross examined at the committal hearing he had accepted there was a "miniscule" possibility that it was still smouldering "but not really" (AR 641). He also agreed he was very tired at that time, and had described himself in one statement he provided as almost drifting off to sleep while he waited to see if the bearded man returned with the bin. The man did not (AR 630).

[96] The point was also made in cross examination that Mr Griffiths had described in his statement of 24 June 2000 that the man at the internet machine who took possession of the burning bin was wearing a "chequered shirt, the pattern was a big check like a work shirt" (AR 645). His evidence in cross examination in the trial was that his impression that it was a work shirt, and possibly an assumption that it was chequered. He neither identified nor excluded Mr Long as the man he saw, but did say that that man was older than most backpackers in the hostel.

[97] Mr Griffiths did not describe seeing anyone else at that time in that downstairs part of the hostel. It was established by formal admission that a connection was made at 12.18.40 a.m. on 23 June 2000 from the hostel telephone number to Internet World Publishing Systems. The Internet connection had been unavailable for use that night since before 10.00 p.m. The evidence did not establish the message or purpose of that internet connection at that time, or person or entity contacted.

The Fire in the Bin

[98] The prosecution case is that the fire in that bin was deliberately lit. The prosecution led evidence from Carmel McLachlan, who worked as a cleaner at the hostel, that she emptied the bins, apparently daily, (AR 340), and had never noticed any paper towels in the bins in that room. She conceded that paper towels in the bin covered

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[69] AR 626.

by other rubbish would not be seen by her. Further, Mr Hill agreed in cross examination that he had seen hostel residents when eating in the TV room use paper towels as serviettes or napkins. He had also on a couple of occasions seen people smoking in that room, although it was formally forbidden.

[99] One of the underlying themes of Mr Long's defence is that that fire seen by Mr Griffiths may have resulted from a cigarette butt accidentally igniting the material seen burning. On Mr Griffiths' description, that appears to have been paper towels at the top of the contents of the bin, the lid of which was partly off; and he described the bin itself having "sort of plastic melting around sort of like half way down the bin" (AR 626). It appears that his evidence is it was only the internal contents of the bin which were on fire, rather than paper towels on the floor surrounding it as well, when first seen by him; this point was not entirely clarified.

[100] The prosecution rely upon the opinion evidence of the common place observation, given without objection from experts called in the trial and whose qualifications were not challenged, that it is difficult, although possible, to light paper from a dropped match or cigarette.[70] The possibility increases if the paper is crumpled (AR 1030 and 1131). The difficulty occurs because a cigarette end is basically a very small fire and very weak source of heat (AR 1080 and 1082).

[101] The prosecution rely on that unchallenged difficulty in combination with the described apparent oddity in those premises of there even being paper towels in that bin, as two of the circumstances leading to the inference that that fire was deliberately and not accidentally caused; as well as the circumstance of the position of the blackened settee cushion partly on top of burning paper and capable of providing a potential bridge for a fire to move from the bin to the adjacent sofa. The prosecution case then relies upon the evidence of Mr Griffiths that he saw nothing burning in that room when he left it, after he gave the bin to the short bearded man between what must have been 12.15 a.m. and 12.20 a.m., for the conclusion that a fire burning fiercely in that same room by 12.30 a.m. was a second fire, and also deliberately lit.

The Second Fire

[102] Mr Hill, who slept in the main downstairs dormitory, described being awoken by fire when the clock beside his bed showed 12.20 a.m. That was a very cheap clock and never completely accurate. He saw that the TV/lounge room was completely engulfed in flame, with flames coming through the side widows into a corridor beside the kitchen (the building, being old, had internal widows opening into passage ways). After taking steps to alert other people he ran across the road and dialled 000, in a call timed at 12.31.55 a.m. on 23 June 2000. The Childers Fire Brigade arrived within ten minutes of that time, but too late to prevent fire engulfing the building and killing 15 residents upstairs.

[103] Mr Dobe and Mr Atkinson had been responsible for turning off the smoke alarms within that building,[71] which had been done "probably about two weeks – two and a half weeks" before the fire.[72] Those alarms were turned off because of what was described as "false alarming", said to have occurred in November 1999, March

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70 AR 1129 (evidence of T Casey) and 1082 (evidence of J DeHaan).

71 AR 255 and 324.

72 Evidence of Mr Atkinson.

2000, April 2000 and again in May 2000. There is no evidence that Mr Long knew on 23 June 2000 that the smoke alarms were no longer operating.

[104] Mr Long's defence concentrated upon the proposition that the prosecution could not exclude the possibility that a fire had started accidentally in the TV/lounge room, caused perhaps by glowing remnants of paper towels being e.g. blown onto newspaper and igniting it and then one sofa and thereafter others; or else a lit cigarette having ultimately ignited a cushion, then a sofa. Alternatively, the cushion seen charred by Mr Griffiths may have set fire to a sofa.

The Expert Opinions

[105] The Crown relied upon the opinion evidence of the witnesses John De Haan and Terence Casey to establish that the fire which killed the hostel residents was deliberately lit.[73] Mr Casey attended at the scene of the fire from 23 June until 30 June 2000, and apart from his own investigation had read the evidence of a number of other witnesses. Mr De Haan had likewise read those and been provided with photographs of the fire, plans of the hostel, and the like. He did not actually see the fire scene himself. No challenge was made to the expertise of either witness or the admissions of their opinions.

[106] Those opinions were expressed to depend upon certain assumed facts, as well as upon the examination of the scene by Mr Casey, and of photographs by Mr De Haan; and their background knowledge and expertise. There appeared no disagreement with a basic opinion each expressed, which was that the fire which ultimately consumed the hostel had started in the TV/lounge room and that shortly prior to the hostel as a whole being consumed by flames, there was a flash over effect in that room. This was described as occurring when the air was heated to ignition point, so that anything combustible in that room in contact with air caught fire at approximately the same time.[74]

[107] The critical matters those two witnesses were asked to accept were put to each in slightly different terms. Mr De Haan was asked:

> "If we accept that there was no visible fire for some little time after 20 past twelve, but that the fire was (noticeably well) developed by half past twelve, what do you say about the speed of development of that fire and the number of different seats that are necessary?"[75]

His answer, which also depended upon the accuracy of the sketches and statements describing the furniture in that room before the fire, was that for a fire to be developed by 12.30 a.m., there would have to be two (and quite probably more than two) "seats" from open flame ignition sources. To develop the fire to the extent it had reached by "12.25/12.30" (AR 1079), given the very large size of that room, he would expect it would take 30 minutes from a single flame source "if I picked the right piece of furniture" (AR 1079).

[108] The assumption Mr Casey was asked to accept was composed of slightly different observed times. The question he was asked was:

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73 Mr De Haan's qualifications appear at AR 1054 – 1058 and Mr Casey's at AR 1123.

74 This description of "flash over" is taken from the summing up by the learned trial judge and the evidence of Mr De Haan on the point is at AR 1062 and that of Mr Casey at AR 1127. Both experts said flash over had occurred in the TV room.

75 AR 1078. The record has "noticeable when"; I think it likely the questioner said "noticeably well".

> "If you accept that there is evidence that there was no visible fire at a time some few minutes after 12.15 a.m., and that the fire was visible and extensive as described by some of the witnesses some time around 12.25 a.m."…… "were you able to form any conclusions as to whether or the fire whose consequences you saw……could have been initiated by a smouldering combustion?"[76]

Mr Casey's answer was that:

> "Given the scenario and the time frame we have involved, I have excluded smouldering as a possibility"
> as to the source of the fire, and further that for the fire to develop in "the time frame available…..would require more than one" open flame seats of fire (AR 1128).

[109] Although the starting and concluding times of the assumed facts differ by up to five minutes in each case, the central proposition was that the fire in the TV/lounge room was "visible and extensive" or "noticeable" ten minutes after there had been no visible fire. Neither witness was explicitly asked to comment on an extensive fire seen 15 minutes after no fire was visible. The time of 25 minutes past 12.00 a.m. possibly comes from the evidence of a witness John Pillans, who shared what appears to have been a ground floor room "under the stairs" (AR 462) with his partner Lisa Martin, and who was woken by her to find black smoke coming into their bedroom. He opened a door, saw thick black smoke, could not see through to the walls of the TV room, and quickly followed Lisa Martin out a window. His watch then showed "the big hand either 20 or 25 past" (AR 469). There was then a lot of orange light coming from the TV room (AR 466). The time of 12.25 may also come from the evidence of Mr Hill.

[110] Mr Casey described smouldering as a process which generated a large amount of smoke and odour, and that a cigarette dropping into a gap between two cushions might take 15 to 30 minutes to actually result in flaming combustion of the cushion fabric material. He swore that he could not "think of any scenario" consistent with accidental ignition of the (final) fire which had "any real prospects of being a valid situation in this case" (AR 1133), an opinion about the basis for which he was asked few questions in cross examination. Mr De Haan was asked much more in cross examination, and he had likewise sworn that he could not "think of a scenario" consistent with accidental ignition of the fire described to him. (AR 1087). He also expressed the opinion that a fire, created from one piece of furniture which ignited other pieces of furniture and which would take perhaps 30 minutes to develop, would produce both a great deal of smoke and be a "kind of intermediate size fire that would be detectable by people outside the room". (AR 1080).

[111] Mr De Haan agreed in cross examination that a modern sofa achieves maximum heat release rate approximately three to five minutes after the start of a fire in it, produces a large fire very quickly, which lasts typically around a minute, and then goes into decay; and has a maximum heat release rate of two to three megawatts (AR 1088-1090). He also expressed the opinion that to achieve "flash over" needs 4 to 5 megawatts of heat, and that it would need at least two sofas achieving maximum heat release rate at the same time or thereabouts, to enable a fire to achieve the flash over heat release rate of 4 to 5 megawatts. Based on those

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[76] AR 1128.

answers, he was invited to agree that that level of heat could be achieved by two abutting sofas upon which a fire had accidentally started on one only. His answers appeared to insist that there needed to be two identical sofas as a starting condition, (AR 1093) which condition did not exist. He also rejected an accidental cause of the (final) fire because, on the information supplied to him as to the furniture in the room, it was synthetic and unlikely to ignite "by any kind of accidental mechanism" (AR 1101).

[112] Sergeant Graham, who holds a Bachelor of Applied Science, described (AR 1006 – 1009) experiments he had performed with both burning cushions and scorched and smouldering cushions placed on a sofa, and in which he was unable to cause the cushion to burn the sofa. These tests of course could not reproduce the actual circumstances of 23 June 2000 in the TV room. When he actually set fire to a sofa with a blow torch, it took 10 to 11 minutes to achieve its greatest heat intensity, and after 15 to 16 minutes was "basically burnt out" (AR 1007).

[113] As to other possibilities, although apparently unattracted to the suggestion, he agreed he could not exclude the possibility that if there was a sufficient draught of air throughout the building, paper towels still aglow might have been blown on to newspaper and been a source of ignition to that newspaper. Likewise a burning cigarette butt amongst crumpled newspaper was a possible source of ignition that could provide a possible source of ignition for a sofa (AR 1030).

[114] As against that Mr De Haan, who claimed considerable expertise and described extensive experience, excluded electrical fault as a cause of the fire (AR 1080), eliminated a dropped cigarette as a possibility (AR 1081), excluded growing embers of paper towel as a source of ignition (those also being a very small and weak fire source) (AR 1082), and did not consider that glowing embers falling onto newspaper could ignite the newspaper (AR 1082). He considered a sustained smoulder of newspapers was not sufficient to explain the fire which ultimately occurred (AR 1084).

[115] Similar opinions to those of Mr De Haan were expressed by Mr Casey. He considered it highly unlikely that embers associated with the initial bin fire could ignite something else in the room (AR 1129), and that it required quite unusual circumstances for embers to cause fires. In part, this was because once ember stage was reached, the heat being produced in the very small particle of paper, or whatever is smouldering, is balanced by the heat being lost, and thus not raising the temperature of any adjacent material sufficiently to accelerate the process to flaming combustion. The proposition that an ember barely maintaining its own ignition transfers enough energy (to start burning) "to a second substrate is very low" (AR 1130). Neither Mr Casey nor Mr De Haan were expressly invited in cross examination to admit or acknowledge any qualification of the opinion each had given, that there was no "valid scenario" consistent with accidental ignition of the destructive fire.

The Man who Left

[116] In addition to that opinion evidence and the other evidence already described herein, the jury had the further circumstantial evidence of the witnesses Frederick Beddows and Alison Crichton. Mr Beddows was then employed as a truck driver delivering magazines from Brisbane to various newsagents between Gympie and Bundaberg.

He passed through Childers on 23 June 2000 in the early morning, at a time he estimated at being "approximately half past 12, it was"; and "roughly half past, 12 it was" (AR 774 and 775). He was idling his truck down hill in neutral about 10 to 15 kilometres per hour with his lights on low beam when a male "quickly walked out of the Palace off the footpath and in front of me" (AR 777). He did not think that that male person became aware of him as the man crossed the road, as that man was looking back behind him to his left side and down the street a bit. The hostel would have been within that male person's line of vision. Mr Beddows did agree in cross examination that he first saw the male adjacent to the front door of the hostel rather than emerging from it, and saw him step off the footpath in front of the truck. Neither Mr Beddows or his companion Alyson Crichton noticed a fire at the hostel; but the TV room was some distance inside the hostel from the front door.

[117] In his evidence in chief Mr Beddows described that male as being about five foot six inches high, wearing a "chequered coloured" light shirt, dark track pants, and a beanie or cap, with a beard and carrying what looked like an amber bottle in one hand, and a wine cask under the other arm (AR 777). Mr Beddows thought the man would have been "around the early 30's" (AR 708) and was walking at a fairly quick walk. In cross examination he agreed that his description given later that day, 23 June 2000 was that the man was about five foot eight inches tall, of medium build, in approximately his early 30's, and with "a big bushy dark beard and black cap or beanie" and with about shoulder length hair (AR 785).

[118] Alyson Crichton was more emphatic about the time the truck passed through Childers, which she said was at 12.30; but less explicit in her description of the male whom she also saw walk across in front of the truck. She said the man was "taller than me" and that she is "five foot something", and the man was "shorter than Fred" and therefore his height was "between five foot and six foot". He was wearing dark clothing, and had a beard and a "pretty hairy kind of profile" (AR 791). He was carrying an amber bottle in his right hand and what looked like a wine cask with his left (AR 792). He had stepped off the footpath onto the street right in front of the hostel. She assisted the police later that day preparing what was called a COMFIT of the man she had seen, which became Exhibit "D" before the jury. She estimated the man's age as in his mid 30's, and her assessment of his height when preparing that COMFIT on 23 June 2000 was that he was between five foot eight inches and five foot nine inches. Her opinion in the witness box was that the COMFIT prepared that day on her guidance had a "bit too much beard" (AR 795).

[119] The prosecution led opinion evidence from Ms Nelson (the hostel receptionist) that at the time of the fire there was no one living at the hostel "that looked anything like" the COMFIT prepared by Ms Crichton. In response, the defence extracted the opinion from Ms Nelson that it did not look like Mr Long. With due respect to Ms Nelson, I consider it was open to the jury to find there was a good degree of similarity between the COMFIT and Mr Long, as photographed in Exhibits 16, 17, and 25.

Summary of the Circumstantial Case

[120] To that circumstantial case one can add the fact of Mr Long's admitted flight after the fire. He was taken into custody on 28 June 2000 when found apparently hiding

in lantana growth in bushland abutting the banks of the Burrum River. The significant features of the circumstantial case are:

- The degree of improbability of the fire seen in the bin at about 12.15 a.m. being accidentally lit, when considered alone.
- The degree of improbability of the fire burning fiercely in that room by 12.30 a.m. being accidentally lit, when considered alone.
- The degree of improbability of there being two accidental fires a few minutes apart in the same room; or of an accidentally lit fire occurring in that room so soon after a deliberately lit one.
- The unchallenged fact of Mr Long's presence inside and immediately outside that hostel for no apparent legitimate purpose from around 10.30 p.m. until about 11.45 p.m. that night.
- The similarity between Mr Long's physical appearance and that of the man at the internet machine who took possession of the burning bin, and the lack of similarity of that appearance with any resident of the hostel at that time.
- The similarity of Mr Long's general appearance and that of the man seen walking away from the front of the hostel at 12.30 a.m., at which time the TV/room was in fact well ablaze, from a second fire.
- The absence of any evidence of any steps taken by that man walking away from the hostel to raise the alarm.
- The fact that that man carried a wine cask and what appeared to be a beer bottle, two objects Mr Long definitely possessed less than an hour earlier at the hostel.
- The evidence of Mr Long's express antipathy to at least two hostel residents, threats made that same night to "get one" of those, hostility to "backpackers" generally, and to the management of the hostel.
- Mr Long's general state of mind, as evidenced by his declarations that his own death was impending, either from his own hand or from lung cancer.

[121] The presence of a bearded man of short stature in his 30's at the hostel at and about the times of each of two fires burning within 15 minutes, and when no other non residents were then observed at the hostel, makes a striking connection between that male and those fires. The presence of the beer bottle and wine cask, and the resemblance between the COMFIT "photograph" and photographs of Mr Long, make irresistible the identification of Mr Long as being that bearded man of short stature. That identification and the evidence demonstrating that Mr Long was angry and hostile to the hostel management and residents, and a very disturbed man at that time, makes a strong circumstantial case. Mr Long neither gave nor called evidence of any additional facts which might have challenged the inference that Mr Long was that man, and had started both fires.

The Other Evidence

[122] There was other circumstantial evidence which was subject to considerable challenge in cross examination, together with evidence of a confession likewise strongly challenged. The admission of that further evidence consistutes several separate grounds of appeal to which I now turn, and to the grounds of appeal generally.

Ground of Appeal (d)

The Confession

[123] The Crown led evidence of a confession allegedly made by Mr Long soon after he was apprehended by officers of the Queensland Police Service. That evidence was challenged in cross examination, and it is argued that it was involuntary, and ought to have been excluded in any event. The circumstances in which it was made are as follows.

[124] The Queensland Police were searching for Mr Long during the period in which he was admittedly attempting to avoid them. On 27 June 2000, police Sergeant Glen Damro was helping search in the Childers/Howard area with Police Dog Titan. The searchers were supported by a helicopter. The next day in the afternoon Sergeant Damro and Titan were searching a paddock area, with the assistance of Senior Constable Glen Jones, when the dog identified a track. This was followed into an area of thick lantana bush on an embankment above the Burrum River, where Sergeant Damro located Mr Long sitting down. Damro said he was a Police Officer, and that Mr Long was to stay where he was; and in response Mr Long produced a knife. He was told by Sergeant Damro to drop it, and that if he did not Damro would release the Police Dog. Mr Long advanced towards Damro and the dog was released. It seized Mr Long by the arm and Mr Long then attempted to stab it. The dog was called off.

[125] After this brief fracas Long began moving away. He was again told to stay where he was, to drop his knife, and warned if he did not the dog would be released again. Long continued his attempt at departure, the dog was released and again attacked him, knocking him over. Mr Long again attempted to stab it, and this time Sergeant Damro intervened, attempting to disarm Mr Long. Long tried to stab Sergeant Damro and struck him on the chin with the knife. Sergeant Damro yelled to his partner for assistance, and Senior Constable Jones, by then at the scene, fired three shots from his service revolver at Mr Long's upper body.

[126] Sergeant Damro had been wrestling with Mr Long when those three shots were fired, and Mr Long immediately stopped moving and lay back. Both those Police Officers gave evidence at the committal hearing of a belief at that moment that the shots had actually hit Mr Long, and Police Officer Jones thought then that it was possible Long had received a fatal wound. In any event, Sergeant Damro put Mr Long in what the Sergeant described as the "recovery" position, and as that was being done Mr Long said:

> "I am dying. I started that fire."

Sergeant Damro's recollection is that he replied "what?", and Senior Constable Jones went to get assistance. Mr Long appeared to lapse into unconsciousness and other police arrived very quickly. Long was immediately removed from the area by helicopter and taken to hospital. It transpired that in the opinion of the treating Doctor in the Accident and Emergency Department of the Maryborough Hospital,

Dr Khursandi, it was in fact unlikely that any of the injuries observed on Mr Long were gunshot wounds. Mr Long was dehydrated, very dirty, with multiple lacerations, mainly on the right arm, right wrist, right forearm, right knee, and the anterior aspect of his right knee. He also had small fractures of the (right) ulna; and the injuries to his arm were jagged lacerations with no single entry and outlet wound, such as the Doctor would expect to find from bullet wounds.

[127] The evidence led at the trial does not seem to have included evidence of when Mr Long was actually arrested or by whom. It was common ground that neither Sergeant Damro nor Senior Constable Jones had attempted or purported to place Mr Long under arrest at any time for any offence. Neither of them uttered any words of arrest, and Sergeant Damro's evidence was that his instructions were to "tell someone if I had located him", and that he had no instructions to detain or arrest Mr Long. Mr Long's removal from Burrum Creek to Maryborough Hospital by helicopter appears to have been treatment of Mr Long which would have been extended to any person found injured in that area, and in his condition.

Voluntariness

[128] On that date, 28 June 2000, officers of the Queensland Police Service did not have any statutory authority to arrest a person so that they could detain that person for either investigation of, or questioning about, any indictable offence that person was reasonably suspected of having committed. That power, now granted by s 198 and s 234 of the *Police Powers and Responsibilities Act* 2000 (Qld), only became available on 1 July 2000. Accordingly, since Mr Long was not under arrest, and no attempt was being made to arrest him, he was not obliged to obey Sergeant Damro's direction to remain where he was, and was entitled to leave that area of lantana if he chose. These observations are not intended to be critical of Sergeant Damro or Senior Constable Jones. No one could realistically expect them to stand by idly and allow Mr Long to depart in the prevailing circumstances; as was recognised by the enactment of the *Police Powers and Responsibilities Act* 2000. However, the fact must be faced that detaining Mr Long for a morally justifiable reason was not legally authorised. In those circumstances Mr Long was presented with a partly express and partly implied, but clear, threat that (unlawful) force would be used to prevent him leaving, and it was.

[129] The *Criminal Law Amendment Act* 1894 s 10 provides:

> "No confession which is tendered in evidence on any criminal proceeding shall be received which has been induced by any threat or promise by some person in authority and every confession made after any such threat or promise shall be deemed to have been induced thereby unless the contrary be shown."

In this matter there was a threat by a person in authority as described, and confession made after that threat. The issue then becomes whether the other evidence demonstrates to the contrary of the proposition that that confession was induced by that threat. If not, it is inadmissible.

[130] The only point on which the evidence of Police Officers Damro and Jones was actually challenged in cross examination was their assertion of the confession was made. It was not suggested that they had asked Mr Long any questions at all, or that events had not occurred in accordance with the general description given

herein. There was no challenge given to the description of Mr Long becoming still when the shots were fired, being placed in a recovery position as Sergeant Damro attempted to help the man he then believed was injured, and no challenge to the description that Mr Long then lapsed into unconsciousness.

[131] On that description of events, Mr Long may have ceased struggling with Sergeant Damro because of all or any of the matters in combination of his submission to the authority of the Police, the pointlessness of opposition because of his own physical condition, the greater physical force opposing him, and as a consequence of the use of that force. But he was not required by either police officer to answer any questions or do anything except to stay there. If he believed he was dying, he need not have said anything; but chose to when his own impending death meant his being taken into custody was a meaningless exercise which would not result in any conviction. In fact he was alive for his trial, and there was no evidence led at that trial nearly two years later as to his actual medical condition in either June 2000 or March 2002.

[132] If he did not believe on 28 June 2000 that he was dying, he may have said he was to gain sympathy. Seeking sympathy would not explain his confessing to starting the fire, but that confession would relieve him from facing questioning by other police. Irrespective of whether he was told to stay where he was, he had been found; and it must have been obvious to him there was to be no more hiding. There appears no basis for thinking that had those police officers uttered words of arrest immediately upon finding him, rather than telling him to stay where he was, that the identical confession might not have been made.[77]

[133] Whether Mr Long believed he was dying or merely claimed it, he was volunteering when dehydrated and apparently exhausted an admission which was independently established to be accurate by the circumstantial evidence led at his later trial. In the exercise of a free choice, and not in response to any questioning, he confessed. The dramatic circumstances in which the choice was made do not make it any less of a voluntary response by him to those circumstances. Accordingly, the prosecution did establish that the confession was not induced by the implied, or any, threat from those persons in authority.

[134] The learned trial judge held the confession admissible upon the entirely adequate grounds that it could not be described as other than a voluntary statement, had not been made in response to any questioning of Mr Long by the police, and instead appeared to be in rather the nature of a dying declaration. The learned judge correctly held that there were no grounds for excluding the confession as being involuntary. The material before the learned judge was effectively the same as the evidence at the trial.

Discretionary Grounds for Excluding the Confession

[135] In addition to the complaint that the appellant's will had been overborne[78], the appellant also complained that the confession should have been excluded by the learned trial judge in the exercise of the judge's discretion, and that its admission led to a miscarriage of justice. Senior Counsel for the appellant quite properly

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77 See *R v Swaffield* (supra) at para [71], citing from *Duke v The Queen* (1989) 180 CLR 508 at 513.

78 *McPherson v R* (1980-1981) 147 CLR 512 at 519 and *McDermott v The King* (1947-1948) 76 CLR 501 at 511, 512.

raised the unlawful conduct of the police officers, and what counsel submitted was their deliberate disregard of the appellant's rights and safety; and the public policy considerations emphasised in the judgments of the High Court in *Bunning v Cross* (1978) 141 CLR 54 and in *R v Swaffield* (1997-1998) 192 CLR 159, and the matters raised in the joint judgment therein.

[136] The learned trial judge referred to both the general principles repeated in *R v Swaffield,* and to the remarks in *Foster v R* (1993) 67 ALJR 550 at 554. The learned judge considered the application to exclude the confession in the exercise of the judge's discretion on the assumption that the conduct of the police officers was unlawful. The judge declined to exclude the confession, having considered the relevant authorities and principles, being satisfied in the circumstances that the confessional statement as a form of dying declaration gained a reliability it might not otherwise have had, had Mr Long simply been unsure of whether any further assault would or would not take place. His Honour also thought it important that the statement was neither sought nor encouraged by the police officers. He held that the connection between the assault by the police and the confession was not the sort of connection which necessarily had an impact on the reliability of the evidence sought to be led, and declined to exclude it.

[137] That ruling was very much one open to the judge in the exercise of the admitted discretion, and in any event I respectfully consider it was correct. Nothing in the circumstances identified in the police evidence would suggest that the confession was unreliable, or that for any other reason it was unfair to Mr Long to admit it. Accepting that the police officers were then acting unlawfully in detaining Mr Long, I agree with the learned trial judge that there appears to be a break in the chain of causation between that conduct and the confession, such that no broader questions of high public policy would justify excluding the confession in those circumstances.

Ground of Appeal (e)

The Evidence of Keith O'Brien

[138] The appellant complains that evidence from that witness of a fragment of a conversation allegedly overheard between the appellant and an unknown person was wrongly admitted, resulting in a miscarriage of justice. The evidence (given at AR 473) was that Mr O'Brien, who had been staying in room 15 at the hostel, and who knew the appellant, had been coming down the stairs from his room and had heard the appellant say to some other unidentified person words to the effect of:

> "I'm going to burn this place down".

This was said "around the week prior to the fire" and before the appellant left the hostel. Objection was taken to the admission of that evidence both at trial and on this appeal, principally upon the ground of the unreliability of the evidence when the jury could not discern the context in which the words were said. The learned judge's ruling appears at AR 436-441, in which the judge considered authorities cited to him including *R v Abul Khalil* (1987) 32 A Crim R 126, *R v Bercolli & Ioannou* (CA No 22 & 23 of 1990; judgment delivered 18 May 1990), and *R v Mendon* [2001] QCA 402.

[139] The learned judge admitted the evidence, principally it would seem, on the basis that the statement, if the jury found it was made, was capable of being a relevant

circumstance in a circumstantial case. I agree with the learned judge. The words are capable of being understood as a declaration of intent, but even if spoken by the appellant without that intent, the fact of his uttering those words about one week before the fire is a circumstance properly proved. So would the circumstance of any other person having uttered those words in that hostel shortly prior to 23 June 2000, had that person been shown to have remained thereafter in Childers.

[140] The challenge mounted in cross examination to Mr O'Brien's evidence about that conversation or assertion focused upon the fact that Mr O'Brien first told the police about this asserted event on Sunday 24 February 2002, after the trial was underway. He had given a statement to the police on Saturday 24 June 2000, in which he had volunteered information adverse to the appellant and implying his guilt, and then given a second statement on 27 June 2000 in which he said nothing about this event and said:

> "I cannot provide police with any further information to assist in their investigation".

At the end of a cross examination that appeared very effectively to challenge his credibility, it was put to him that he had not overhead any such statement made by the appellant. This means that no other conversation was suggested in which these words might have been innocently uttered.

[141] The learned judge was correct in admitting the evidence and the subsequent cross examination fully identified the reasons which might cause the jury hesitation about accepting Mr O'Brien's account. If the words were said, then they are prima facie significant. The directions given by the learned trial judge to the jury particularly reminded the jury of the matters adverse to O'Brien's credibility.

Ground of Appeal (g)

Unreasonable, cannot be supported having regard to the evidence, and unsafe and unsatisfactory.

[142] The appellant advances a ground of appeal pleading the terms of s 668E of the Code and as well that his convictions are unsafe and unsatisfactory[79]. Under this ground of appeal the appellant collects together a number of complaints, and puts a different complexion on some matters already raised.

[143] The first discrete matter relied on to make this argument good is that the prosecution did not exclude by evidence the possibility that fire which consumed the hostel was accidentally started. The arguments are collected in paragraphs 51-56 of the appellant's outline of argument. The evidence already extensively described made it very unlikely that the fire in the bin was accidentally lit, and even more unlikely that the second fire in that room was. It was open to the jury to find arson.

[144] The next matter of possible substance was that the prosecution had called evidence, from five witnesses, which evidence the appellant contended simply could not be believed. This was the evidence of Keith O'Brien already described, some further evidence from the witness Lundgren, evidence of one Anthony Gora, and evidence of the confession. No more need be said here about Mr O'Brien's evidence. As to

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79 The observations in *MFA v R* [2002] HCA 53 at paras [58] and [59] make it unnecessary to specifically plead that the verdicts were "unsafe and unsatisfactory".

the witness Gora, his evidence was that he saw Mr Long, whom he knew, apparently using the internet facility adjacent to the TV/lounge room at about 9.50 p.m. on 22 June 2000. Mr Gora described Mr Long as:

> "……hitting the keys of the internet machine as if they weren't working properly, quite hard. He was sort of looking at the screen but not, not as if he was paying attention to it perhaps; staring through it slightly, or you know, not really concerned with what was going on on the screen". (Record 565).

[145] Mr Gora's credibility was attacked in cross examination on the ground that he had given a statement to the police on 24 June 2000, in which he had not said he had seen Mr Long apparently using the internet connection at that time, and saying instead that he had not seen Mr Long for about seven days. He had given a further statement on 26 June 2000, and not mentioned it; but had said on 27 June 2000 for the first time that he had seen the appellant sitting at the internet machine on either the Wednesday 21 June or Thursday 22 June 2000. He was not sure of the time but it was after 8.00 p.m. However, on 28 November 2000, he gave a further statement in which he said he was "99.99%" sure he had seen Mr Long at the internet machine on Thursday night at about 10.00 p.m. By the time he gave evidence, he was 100% sure.

[146] It was also established in evidence that the machine was not connected after 9.38 p.m. that night for some hours thereafter, and in those circumstance if Mr Gora's evidence was not capable of belief, that was a circumstance made plain to the jury. The same applies to the evidence of Mr O'Brien, and to some further evidence of the witness Lundgren. The learned trial judge gave the jury specific reminders of the matters going to the credibility of all three witnesses (at record 1385, 1404 and 1386-88).

[147] The further evidence from Mr Lundgren was that some time during the evening of 22 June 2000, after having gone to bed which he usually did between 10.00 p.m. and 11.00 p.m., he had woken for some reason, and after opening a window had seen Mr Long standing at the top of the stairs and beside a small plastic bin which had a flame coming out of it. Mr Long poured what seemed to be a clear liquid from a yellow bottle or a XXXX can into the bin, saw Mr Lundgren looking at him, "actually growled at me" (AR 907), said "shut your window", and then said "I'm coming to get you". Some unknown number of minutes later Mr Lundgren opened the window again and saw the bin with what appeared to be smoke coming from it. Whatever fire had been in it appeared to have been put out.

[148] This evidence was the subject of a sustained attack in cross examination, presumably because of the direct connection it made between Mr Long and a burning bin. No remnants of any bin were found at or near the top of those stairs, and Mr Lundgren first told the police of recalling seeing Mr Long with that burning bin and that liquid on 28 December 2000. This was despite his being interviewed on 24 June 2000 when he said nothing about it, and his having given a statement on 27 June 2000 in which he completed a questionnaire as to whether he had seen anything unusual that night by answering "nil". (AR 933).

[149] If the jurors accepted the evidence it had prima facie force and relevance. The witness did not give a time for the incident, and if the evidence is accepted, it might assist Mr Long by demonstrating that he was actually putting out the fire which had

been in the bin. However, it was challenged; and whether believed or not was admissible. I do not consider that its admission together with the other evidence said to be incapable of credit supports the argument that the convictions are unreasonable or cannot be supported.

[150] The other evidence said to be incapable of belief was the evidence of police officers Damro and Jones concerning the confession. The appellant's written argument included the submission that the confession attributed to the appellant "reeked of fabrication". This submission particularly depended upon the proposition that while the police mistakenly both believed the appellant had been shot by police officer Jones and might be dying, the appellant himself would have known he was not. Accordingly, he would not have said that he was, or confessed because of a belief he was. The difficulty with this submission is that the appellant certainly said on 22 June 2000 and in the preceding weeks that he was dying. The question of belief or disbelief in the confession was a matter properly left to the jury, and the trial judge gave the jury careful directions (at AR 1353-4 and AR 1408-9) on the matters relevant to the credibility of the claim the confession was made. There is no complaint about any inadequacy in those, or in any of the directions of the trial judge.

Pre Trial Publicity

Grounds of Appeal (a) and (b)

[151] The appellant's grounds of appeal with the greatest substance were those complaining about the pre trial publication adverse to him in both the print and electronic media. He complained that the learned trial judge erred in refusing to grant a permanent stay of the indictment sought because of the nature and effect of that pre trial publicity (ground (a)); and he also contended that a miscarriage of justice had occurred because there was a substantial risk of prejudice to him in his trial arising from pre trial media publication (ground (b)).

[152] The applicant relies upon the same material for both those grounds of appeal. He supplied a supplementary record book three, which at pages 1-89 records the argument and addresses on the application for a stay heard over 11, 12, and 13 February 2002. The remainder of supplementary book three largely records the judgment given on 18 February 2002 by the learned trial judge on a different application, that being one to have the judge by order remove the trial to another court room from that in which it was listed to take place. That application was refused, and ground of appeal (c) complains that the refusal has resulted in a miscarriage of justice. The applicant's supplementary book one records at pages one to eight thereof the argument on that application.

[153] The vast bulk of supplementary book one comprises, at pages 14-289, photocopies of the print media articles about the fire, the applicant, the surviving and the dead backpackers and their families, the police search for the applicant, his arrest, the committal hearing, the appellant's application for a change of venue for his trial from Bundaberg to Brisbane, applications to by the appellant that the Magistrate hearing the committal proceedings disqualify himself, and articles demonstrating that the whole matter remained one of generally abiding public interest between June 2000 and the trial. The publication critical to the appellant's grounds of appeal

were those made in the days after the fire and before the appellant's arrest. The publications after that date demonstrate only the continuing public interest.

[154] On Monday 26 June 2000, the Courier Mail, a daily newspaper circulating throughout Queensland and certainly in the area of Brisbane from which the jury panel was drawn, published a photograph of the appellant describing him as "Australia's Most Wanted", and describing how two days before the fatal fire the hostel operators had both pursued Mr Long on foot down the Bruce Highway, after having challenged him to pay outstanding rent of about $200.00. Evidence at the trial did not support that statement, nor establish the truth of the further statement that Mr Long was "also believed to have threatened the pair".

[155] More importantly that article also advised that:

> "It also emerged yesterday that Long had an extensive criminal history of violence including convictions and charges for the attempted murder of a former de facto's six year old daughter, serious assault, assault occasioning bodily harm, burglary, and fraud. He also is alleged to have torched a caravan while his de facto was asleep inside."

For good measure the article informed readers of Mr Long having weeks earlier left a suicide note with the local barman at the Federal Hotel, and that:

> "Meanwhile witnesses have reported seeing Long near a burning bin just before the fire broke out, and standing in the crowd watching across the road as the blaze engulfed the two story wooden structure."

[156] The Crown led no evidence at the trial of Mr Long having been seen watching the blaze, nor any direct identification of Mr Long being seen with a burning bin "just before" the fire broke out; and while Mr Long may have been charged with attempted murder in the past, he had not been convicted of that offence. In any event, publication of the fact of his having been charged with that offence would work an irreversible prejudice against him, particularly accompanied by the report of the allegation of his having "torched" the caravan. The Crown did not lead any evidence of Mr Long's record of convictions at the trial; it was not admissible.

[157] The Australian, a newspaper also circulating daily in the Brisbane area, reported the same day of the emergence of the picture of Mr Long as a "bourbon and coke drinking bludger". The article in that paper described his having a habit of trying to "chat up" female backpackers while borrowing money from all and sundry, his being said to be nursing a grudge against the hostel, and that he alerted two English backpackers to expect a fire in the building hours before one began. This was accompanied by a description from "one neighbour from his childhood," which described Mr Long as a "very wild sort of a boy" who was "always sneaking around peoples' houses looking through their windows". The article further declared that a Sydney newspaper reported Long having served six months in a Grafton Jail in Northern New South Wales in 1992 for assault and malicious damage, and that he had a previous conviction for sexual assault.

[158] There was no evidence led of Mr Long alerting any backpackers to expect a fire in the building hours before one began, and the quoted portions of that article provided more grounds for potential jurors feeling irreversible prejudice against Mr Long.

Next day Tuesday 27 June 2000 the Courier Mail featured a front page article on the experiences of his former de facto Christine Campbell with Mr Long, and a further story on that topic on page four. The headline article recounted Ms Campbell's description of Mr Long as a sadist who had tried to murder her and her children, when he "torched a caravan in which she was sleeping with their five year daughter and two young daughters from a previous relationship. He had silently watched". The article described Ms Campbell claiming that Mr Long had attempted to strangle her and her children, and that she had no doubt he was capable of "torching the Childers Palace Backpackers' Hostel and that he would feel no remorse."

[159] The page four article describes Mr Long, in Ms Campbell's opinion, as a loner who wanted people to feel sorry for him and who needed to be put away. That article enlarged upon the occasion when Mr Long had allegedly attempted to kill her when her eldest daughter was sick, and described how he had broken into a house on the Gold Coast, knocked her unconscious and taken the child.

> "Police caught him some time later in the front yard of the church. He was found on top of her trying to strangle her. She was in hospital with a fractured nose and bruising to her body. He went to court, pleaded it out, and went to jail."

On the same page a Brisbane criminologist was quoted as saying that the suspected Childers Hostel arsonist Robert Long could have stayed around to watch as the building erupted in flames; and that pyromaniacs often enjoyed staying back to watch the fire.

[160] That night an interview with Christine Campbell was broadcast on the Today Tonight television program, in which Mr Long was described by the interviewer as "the man who once tried to kill her", and in which Ms Campbell expressed the opinion that when she heard about the fire, and that Mr Long was actually there and had been seen running away from the place, (which was not the evidence later led) "I knew instantly that Robert had done it". A little later in the interview she described why it was, as the interviewer asserted, that "she was certain Robby started the fire that claimed so many lives because he once set alight her caravan while she and her children slept." The circumstances of that were that she had felt extremely hot, woke up, put the light on, the caravan was full of smoke, and when looking under it she saw there was "like a camp fire sort of thing set up under the van and there were three or four AA batteries sitting within the fire". She removed the children from the caravan and described how she "knew he was probably watching the fire to see whether I went up or not". The interviewer provided the further information that in 1993 Mr Long had been charged with the attempted murder of Ms Campbell's six year old daughter and that:

> "Although those charges were later dropped Long pleaded guilty to a number of others relating to her abduction, to assaulting a police officer, and to burglary. He was sentenced to four years jail and the presiding judge ordered him to undergo psychiatric and psychological treatment."

[161] Mr Long was sentenced, as his criminal record at AR 1459 reveals, to four years imprisonment in the Southport District Court on 18 April 1994 for the offences of breaking and entering a dwelling house on 15 May 1993 with intent in the night time, and further offences committed that same day of assault occasioning bodily harm, wilful and unlawful damage to property, child stealing, disabling with intent

to facilitate an indictable offence, and the serious assault of a police officer. He was recommended for consideration on parole after serving 18 months, and it was recommended that he receive psychiatric and psychological assessment and treatment during his imprisonment.

[162] On Wednesday 28 June 2000 the Courier Mail published a further substantial article which described Ms Campbell saying that Mr Long had both tried to strangle her in the past and attacked her with scissors, and that in February 1997 a Darwin Fire Services Official said Ms Campbell and her three children were lucky to escape from a caravan fire which police believed was deliberately lit. Presumably that is the occasion of the incident much described in the publicity in the proceeding two days, which incident did not lead to the appellant being convicted of any offence. That fact is established simply by examining his criminal record. That Courier-Mail article also quoted a former landlady of Mr Long, who said she had been afraid to ask for $1,700.00 unpaid rent for fear Mr Long would "shoot her or burn the place down."

[163] The account actually given by Ms Campbell in the interview broadcast on TV does not demonstrate with certainty that Mr Long did attempt to set fire to that caravan, or that he was even there. Nevertheless the allegation was published both as an allegation and as a positive fact. It would be readily understood by the audience at which it was aimed as the equivalent of evidence, of an overwhelmingly prejudicial nature, of a demonstrated past propensity to endanger by arson the lives of others when asleep; although the general ill will expressed by Ms Campbell might have weakened the impact of her accusations.

[164] However one should describe this material, and the term frenzy of defamation may be accurate, it was not the product of any particular journalistic skill or endeavour. The material placed before the learned trial judge establishes that an unidentified police officer, from either the Queensland, New South Wales, or Federal, Police supplied a journalist from the Sydney Daily Telegraph on 25 June 2000 in Childers with "some dirt on Long" (supplementary book one at page 312). That "dirt" included the information that Mr Long had been charged with attempted murder, child stealing, and serious assault and burglary. Likewise a formal admission (exhibit five at supplementary book three page 95 and read into the record at supplementary book three page 39) was made on behalf of journalist Paula Doneman, whose name appeared above the relevant Courier Mail articles for 26, 27 and 28 June 2000. It was that the part of the story dealing with Mr Long's previous convictions and/or charges was obtained first substantially from news text articles on 18 May 1993, and 9 July 1995, and from prison (Corrective Services) sources. The individual was never identified.

[165] All experienced and even inexperienced police officers, journalists, and editors know that the common law concern in Australia, to ensure that a person accused of a crime before a jury has a fair trial, has the consequence that courts go to great lengths to ensure that jurors decide cases on the basis only of admissible evidence. This rarely includes evidence of prior criminal convictions. The fact that the rampant speculation in the media about the extent of Mr Long's past criminal, anti social, or unadmirable conduct stopped on 28 June 2000, the day he was taken into custody, demonstrates that those responsible for the prior publications must have been aware of the effect that what was published would be judged likely to have on a jury likely to hear the almost inevitable charges. It would be difficult, if

challenged, to conceive of publicity more prejudicial, and the material was supplied and published in that knowledge. In those circumstances the appellant's complaints in these grounds of appeal have real force.

[166] Senior counsel for the appellant referred the court to the decisions of the High Court in *Murphy v R* (1988-1989) 167 CLR 94, *Glennon v R* (1992) 173 CLR 592, and *Gilbert v R* (2000) 74 ALJR 676; and those of the Queensland Court of Appeal in *R v Lewis* (1994) 1 Qd R 613, in *Johannsen & Chambers v R* (1996) 87 A Crim R 126, and in *R v Davidson* [2000] QCA 300, judgment delivered 28 July 2000. Those decisions establish that considerations which are relevant on an application for a stay based on pre trial publicity include:

1. the extent and nature of the publicity, when it occurred, and the nature of the offence charged:
2. the legitimate public interest, and legitimate private interest(s) of a person charged with a crime, the witnesses, the victim of the alleged crime and their relatives, in the ordinary and expeditious process of prosecution to verdict of those charges:[80]
3. that in this era of intense commercial publication of information about immediately current events, and easy electronic access to that, there can be no guarantee an individual juror may not have been influenced by pre trial publicity:[81]
4. that recognition of that possibility[82] requires judges to do what can be done to protect the integrity of the criminal process, including but not limited to punishment for contempt, adjourning a trial until the influence of prejudicial publicity subsides, ordering a change of venue for the hearing of the trial, ordering separate trials for different accused persons, and giving express directions to jurors that their verdict must be based on the evidence given before them on the trial and that in reaching that verdict they must disregard knowledge otherwise acquired:[83]
5. that of necessity the law places much reliance on the integrity and sense of duty of jurors to comply with such directions and give a verdict based on the evidence led.[84] Accordingly, it is necessary to show more than the possibility that a juror or jurors would have gained knowledge of prior convictions to support the argument that it was likely those jurors would or did ignore or disobey directions given:[85]
6. that the necessary assumption that jurors understand and follow directions given by trial judges can give way to recognition that jurors' decision making is affected by matters of possible prejudice[86], where more is shown than the mere possibility a juror would have gained knowledge of inadmissible and prejudicial matters. It is in these cases that the discretionary exercise of the powers of the trial judge is critical, including the power of ajournment for a lengthy period:

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80 See *Murphy v R* at CLR 98, *Glennon v R* at CLR 598, and *Johansen* & *Chambers* at page 131.

81 As observed by Mason CJ and Toohey J in *Murphy v R* at CLR 101, cited by Brennan J in *R v Glennon* CLR at 614; and see *Lewis* at p 636.

82 Mason CJ and Toohey J in *Glennon* at CLR 603.

83 See *Glennon* at CLR 614 per Brennan J, and *Murphy* at 99 per Mason CJ and Toohey J.

84 See *Glennon* at 614/615 per Brennan J*, Gilbert* at [13] and [31], *Davidson* at [13], and *Lewis* at p 637.

85 *Davidson* at 14, adapted to the facts of this case.

86 *Gilbert* at [13].

7. that a permanent stay will be ordered only in an extreme case where there has been adverse pre trial publicity of such a nature that nothing a trial judge can do in the conduct of the trial could relieve against its unfair consequences.[87] The need to maintain public confidence in the administration of justice, and the public interest in ensuring that the judicial processes are not abused and that trials are fair to the people charged, means that a permanent stay should be ordered when it is impossible to ensure that a fair trial could take place:[88]
8. that the fact that adverse publicity is deliberately generated by those for whom the Crown should properly be held responsible may have the result that justice requires a permanent stay be granted.[89]

[167] The reference by Brennan and Dawson JJ in *Glennon* to a trial as fair as the court could make it (see footnote 48) is more apposite to describe a trial which has taken place than one yet to occur. It is then that an appellate court can examine the record with the assistance of hindsight from counsel. In this matter the learned trial judge referred with some care to the authorities and to the evidence placed before him. He held, as is the law, that there is a power to stay permanently, to be exercised only in extreme circumstances, and concluded that those were not established by the evidence in the application before him. The judge made particular reference to the decision of this Court in *Lewis,* and to the observations of Pincus JA at Qd R 639. Pincus JA had suggested there that an extreme case would be one in which the crime alleged was one of a horrendous kind, and where the published material was such as to be virtually conclusive of guilt.

[168] In the instant case the learned trial judge placed weight upon the legitimate public interest in the ordinary processes of prosecution, the fact that 20 months had passed since the publication the subject of particular complaint, and that careful warnings would be given by him to the jury. He also held, correctly in my view, that the evidence did not support a finding that the supplying of information about the applicant from within government sources was sufficiently condoned or authorised by those with authority in the investigation, such that the publicity could be said to have been deliberately engineered, and thus to warrant a stay. In the result he considered that the risk of prejudice was not so great as to amount to a "significant and unacceptable likelihood that the trial would be vitiated by inadmissible prejudice and pre judgment".[90]

[169] The appellant's argument that the learned judge erred in refusing to grant a permanent stay only attempts to identify one matter that the learned judge is said to have over looked, and that is the possibility of internet access by a juror to the pre trial publication during the actual trial itself. The appellant established by evidence on the appeal that a BBC website contained extracts from the media about the fire and surrounding events, and therefore some matters about Mr Long. This included that:

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87 Glennon at 605 per Mason JC and Toohey J, adapted to the present case. Brennan J (with whom Dawson J agreed) accepted that principle without enthusiasm at CLR 615-616; preferring the view that a trial as fair as the court could make it would produce no miscarriage of justice.

88 *Johannsen* & *Chambers* at pages 131 and 142.

89 *Lewis* at 636 per Pincus JA.

90 The trial judge quite correctly cited this as the relevant requirement for a permanent stay, suggested in the joint judgment of Deane, Gaudron and McHugh JJ in *Glennon* at CLR 623-624.

> "Witnesses described the 37 year old itinerant fruit picker as a heavy drinking loner with a long criminal record. Reports said he bore a grudge against the hostel";

information that as at 29 June 2000, Mr Long was regarded both as a witness and a suspect but was yet to be interviewed and had not been arrested; information that in 1993 he appeared in court in Queensland after abducting Ms Campbell's six year old daughter and attempting to strangle her; and had later been sentenced to four years imprisonment for attempted murder, assault and burglary; and information that his former lover Christine Campbell said he had once tried to set fire a to a caravan she was staying in with three children, and that she also claimed Mr Long once attacked her with a pair of scissors.

[170] The judgment of the learned trial judge on the application for a permanent stay did not make any specific reference to the then applicant's contention that the jurors might learn this prejudicial and inadmissible information about Mr Long by internet access. The possibility of such access is a difficulty facing trial judges, and the *Criminal Law Amendment Act* 2002 (Qld), not in force as at the date of trial, has inserted s 69A into the *Jury Act* 1995 (Qld), prohibiting thereby a person who has been sworn as a juror in a criminal trial from inquiring about the defendant in the trial until the jury has given its verdict or the person has been discharged by the judge. That legislative recognition of the possibility of internet access by jury members, and the fact that information was available about Mr Long before and during the trial, still leaves the possibility that one or more jurors had access to that information as a mere possibility. The authorities earlier described require the appellant to show more than that.

[171] The learned trial judge did give the jury specific directions about acting only on the evidence both at the start of the trial (AR 15-16) and at the beginning and end of his summing up (at AR 1341-43 and 1423-24). The firm and persuasive directions at the start of the trial included:

> "Evidence is what you see and hear in this court room. It includes any exhibits I admit into evidence during the course of the trial. It does not include anything you heard on radio, see on television, or read in the newspapers. It does not include anything you might have been told by friends, relatives or acquaintances.
>
> All we know of the facts at this time is that the Palace Backpackers Hostel in Childers burnt down in the early hours of the 23rd June 2000, and that a number of young residents died. That was a tragedy but it doesn't justify determining the case against Mr Long on anything but the evidence. Justice is not served by finding scape goats.
>
> We don't know at this time, nor is there yet before you anything to suggest, that Mr Long was in any way involved. More importantly we don't know if he was involved in any way which makes him guilty of any charge on the indictment. That's what you will be called upon to decide at the conclusion of this trial.
>
> Before Mr Meredith opens the case for the prosecution you should clear your mind of any preconceptions you have about the case.

> Listen to the evidence and decide the case on that and that alone. It is critically important to remember in a trial like this which will attract a lot of publicity that Mr Long is presumed to be innocent."

[172] His Honour said a few moments later:

> "Don't take the risk of being influenced by anything outside this room, so don't discuss with anyone matters concerning the case outside other members of the jury. Certainly don't attempt any private investigation of the matter. You will have enough to deal with over the course of this trial, which is currently estimated as lasting six weeks, without doing anything else."

[173] The judgment of Pincus JA in *Lewis* (supra) makes clear (at page 639) that even in a case where the extreme circumstances necessary to justify a stay on the basis of pre-trial publicity are established, a stay is not automatic and remains a matter of discretionary judgment. In this case the learned trial judge correctly directed himself as to the law and took into account all relevant matters, save that he did not specifically mention the possibility of internet access. He gave directions at the appropriate times in terms which could not be misunderstood. He was not asked to give any others. The judgments of Mason CJ and Toohey in *Murphy* (at CLR 101) and in *Glennon* (at CLR 600) stress the importance in appeals such as this one of recognising that it is an appeal from a discretionary decision of a trial judge. As the correct principles were applied by the learned judge to the relevant facts, which included that more than a year and a half had passed since that adverse publicity and that the judge intended to give firm directions to the jury, the trial judge is not shown to have erred in law in the exercise of his discretion. By the time of the trial, the judge was entitled to hold that this was not a case in which there was nothing the judge could do in the conduct of the trial to relieve against the consequences of that earlier publicity; and that was the critical question, rather than whether or not it was an extreme case.

Miscarriage of Justice

[174] This leaves for consideration the appellant's argument that a miscarriage of justice has occurred because of the substantial risk of prejudice arising from that publicity. The appellant relies upon the same material for the arguments that a substantial risk of prejudice was unavoidable. I would put it that a risk of substantial prejudice was possible by the time of trial, but that three matters are relevant when assessing whether a miscarriage of justice has occurred. The first is that no judge would want to preside over a trial which was unfair, and the directions the trial judge actually gave show him trying very hard to prevent that. Secondly, the remark last quoted from his directions at the very start of the trial reflect the important reality that in a trial of serious charges of any length, the uniform experience of counsel, solicitors, and judges supplies the observation that jurors, like lawyers, become wholly occupied with the evidence that they see and hear in the absorbing, engaging, and dramatic process that is a criminal trial.

[175] Thirdly, the evidence in this trial both made a strong circumstantial case, and was presented in a way that made that case interesting and would have held attention. The order in which the witnesses were called provided an almost chronological account of the events before, during, and after the fire as they sequentially occurred, and as relevant to the evidence of each witness. The evidence opened with a

description of the hostel from its managers and staff, and closed with evidence of the confession. In those circumstances, as the trial judge told the jury and as is the common experience in such criminal trials, the jurors had more than "enough to deal with" from the admissible evidence they heard. They also heard an opening address about it, occasional objections taken to portions of it during the trial, submissions from counsel about it, and a summary of it in the final observations to them by the trial judge. In those circumstances there is not an unacceptable risk that one or more jurors relied upon any information not established in evidence. Where that evidence establishes a strong circumstantial case, quite apart from the hotly contested evidence about which the appellant has particularly complained, the appellant's complaint that the pre trial publicity has caused a miscarriage of justice must be dismissed.

Ground of Appeal (c)

[176] The appellant complains that the refusal of the learned trial judge to hold the trial in a "normal trial court" rather than in the ceremonial Banco Court has resulted in a miscarriage of justice. The trial was held in the court room normally used for ceremonial occasions such as the admission of solicitors and counsel, swearing in and valedictory ceremonies for judges, and the like. But that court room is not used solely for that purpose. Juries have been selected in that court in trials in which large numbers of jurors have been summonsed; and civil trials involving a large number of counsel and/or exhibits are held there.

[177] This trial may have been the first criminal trial conducted in that court. The necessary facilities were constructed. The argument of the appellant's counsel, namely that the jurors may have realised that the trial was taking place in a room not commonly or ordinarily used for holding criminal trials, may be accurate. The trial was held there because of the expectation that it would attract public attention, as it did, and that there might therefore be a demand for seating in excess of the public gallery seating provided in the courts more commonly used for holding criminal trials. The appellant argues that this made his a "show" trial, and that holding the trial in another court room would have avoided this impression. The Banco Court does have a large area for public seating, but public and media interest in the trial would have been the same irrespective of the particular court room. The jurors could all be expected to have understood from the start of the trial that it involved the most serious possible charges, involving proof if true of Mr Long having caused the death of a number of young people visiting this country from overseas. The appellant's arguments are entirely unpersuasive that holding that trial in a court room with a large public gallery would have affected the jurors in any way in their approach to their duty clearly outlined to them at all relevant times by the trial judge; and there is simply no basis for the view that the appellant thereby lost any chance of acquittal otherwise open to him.

The Prosecution's Non Fresh Evidence

[178] That concludes the appellant's grounds of appeal which were argued. The Crown sought leave to read affidavit evidence in support of the conviction on the hearing of the appeal, which evidence was not fresh. The documentary portion was the medical records kept by the Maryborough Base Hospital relating to the appellant and his admission at or about 6.00 p.m. on 28 June 2000. Those written records, made by Dr Katherine Taylor-Robinson, record the appellant having gunshot

wounds to his right wrist and the upper part of his right arm, and that the appellant "states he wants to be left to die". Those hospital records had been made an exhibit by Mr Long's counsel during the committal hearing, and whether because of that or not, the Crown did not examine them until after the verdict. A statement from Dr Taylor-Robinson who now resides in the United Kingdom was obtained, five days before the appeal hearing. That statement repeats her opinion that she believed, at the time of her examination of Mr Long in casualty, that the wound to his right wrist and two wounds to his upper right arm were gun shot wounds; and that Mr Long certainly said at least once that he wanted to be left to die.

[179] The prosecution did not apply to call this witness by telephone on the hearing of the appeal, and senior counsel for Mr Long objected to the court receiving this further material without his first having the opportunity to cross examine the Doctor. If admitted, that evidence would increase the probability of Mr Long have told Police Officers Damro and Jones that same day that he was dying, and arguably that he then confessed to them. It does not overwhelmingly prove that he made either statement.

[180] The observations of Barwick CJ in *Ratten v R* (1974) 131 CLR 510 at 517-519 certainly confirm that Courts of Appeal in criminal matters cannot resist the tender of non fresh evidence capable, if true, of demonstrating that a verdict of guilty cannot stand. There seems no reason in principle why the same should not apply to the receipt of evidence capable of demonstrating that a verdict of guilty was entirely justified. In this case the respondent falls some way short in my judgment of that high standard in respect of this further material; and in event the appellant's counsel is quite correct in his insistence upon a right to test it by cross examination. Leave to read those affidavits should be refused.

The Attorney's Appeal

[181] The Attorney General has appealed pursuant to s 669A(1) of the Criminal Code against that portion of the sentence imposed on the appellant in which the learned sentencing judge ordered pursuant to s 305(2)(a) that the appellant must not be released from imprisonment until he has served a minimum of 20 years. That was not an order that the appellant be released from imprisonment after he has served that term. The effect of the order is simply that Mr Long is not eligible for post prison community based release until 2022. Whether he is ever released will depend upon assessments made by the relevant authority.

[182] The Attorney General contends that as the evidence establishes Mr Long killed 15 people, the minimum ordered period in custody should reflect that fact, rather than be set at what is actually the minimum period of 20 years imprisonment where there has been more than one conviction of murder. The Attorney argues that 25 years is the appropriate minimum period Mr Long should serve.

[183] There are three difficulties with this submission. The first is that there were only the two convictions for murder, and not 15. Section 305(2) provides sentencing powers in respect of convictions for more than one murder, and not in respect of the commission of more than one murder. Secondly, this court in *R v D* [1996] 1 Qd R 363 at 403 summarised sentencing principles where the circumstances established the commission of offences other than that for which the person was being sentenced. It is not at all clear that those principles would make it proper to

sentence a person convicted of two offences of murder upon the basis of having committed 15.

[184] Thirdly, and most important of all, the judge sentenced Mr Long on the basis that the judge was prepared to accept that Mr Long probably had no actual intention to kill anyone when starting the fire. The Attorney General has not argued that the judge was wrong in that approach, and the judge might well have added that Mr Long may have fully expected that the fire he lit would cause the fire alarms to go off. In those circumstances no error is shown in the sentence imposed by the learned judge. Accordingly, I would dismiss the Attorney's appeal.

[185] The orders of the court should be:

- That the appeal by Robert Paul Long against his convictions for murder and arson be dismissed.

- The appeal by the Attorney General against the sentence imposed on Mr Long be dismissed.