

# SUPREME COURT OF QUEENSLAND

CITATION: *R v Dubois* [2016] QSC 325

PARTIES: **R**  
(respondent)  
v  
**GARRY REGINALD DUBOIS**  
(applicant)

FILE NO: SC No 1046 of 2015

DIVISION: Trial Division

PROCEEDING: Pre-trial application to exclude evidence of Robert William McCulkin

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 31 October 2016

DELIVERED AT: Brisbane

HEARING DATE: 12 October 2016

JUDGE: Applegarth J

ORDER: **The application is dismissed**

COUNSEL: D R Lynch QC and K E McMahon for the applicant  
D L Meredith for the respondent

SOLICITORS: Howden Saggars Lawyers for the applicant  
Office of Director of Public Prosecutions for the respondent

- [1] The applicant seeks the exclusion of the evidence of Robert William (Billy) McCulkin on the ground that it does not satisfy the requirements of s 93B of the *Evidence Act 1977* (Qld). Mr McCulkin died on 25 August 2011.
- [2] He gave a lengthy statement to police dated 5 February 1974 which included evidence about:
- his family's circumstances;
  - his movements in the days leading up to the time his wife and daughters disappeared;
  - his visiting their house on the night of Friday, 18 January 1974 with a view to giving his wife some money and finding no-one present;
  - his learning from neighbours that his family had not been seen for a few days;

- what he found when he broke into the house;
  - his attempts in the following days to locate his missing wife and daughters, including evidence of encounters with Mr O'Dempsey and the applicant.
- [3] Mr McCulkin also gave two short addendum statements, and gave substantial evidence at the inquest in 1980, at which he was examined by counsel assisting and cross-examined at length. The applicant acknowledges that Mr McCulkin's inquest evidence was broadly in accordance with his earlier statements. However, they note what are said to be some inconsistencies in relation to some matters which he observed in the house.
- [4] The respondent submits that Mr McCulkin's evidence, at least in the form of his 5 February 1974 witness statement, meets the requirements of s 93B. Background matters such as the dates of birth of his children, their education and where his family lived are unremarkable and are not the subject of objection. Representations which the applicant contests the admissibility of, such as those about Mr McCulkin's movements in the days immediately before and immediately after the disappearance of his family, are submitted by the respondent to fulfil the requirements of s 93B because they were made either:
- (a) shortly after the events in question happened and in circumstances making it unlikely the representation is a fabrication; or
  - (b) in circumstances making it highly probable the representation is reliable.
- [5] The applicant opposes the admission of Mr McCulkin's evidence pursuant to s 93B because his statements are submitted to be:
- (a) inconsistent with later contrary statements made at the inquest;
  - (b) inconsistent with later statements allegedly made in 2011 to Mrs Fe McCulkin by Mr McCulkin in which he is supposed to have confessed to killing his wife and two daughters and burying them in Toowong Cemetery; and
  - (c) questionable because he falsely told police on 19 January 1974 that he did not know "Shorty's" surname and did not know where "Shorty" could be contacted. Mr McCulkin in fact knew Shorty to be the applicant and supplied his name and the address at which he believed he resided to police on 22 January 1974.
- [6] The applicant submits these matters mean that the tests of reliability under s 93B have not been met and the evidence of Mr McCulkin about his movements on crucial days and his interactions with the applicant on 19 January 1974 ought to be excluded.
- [7] In response, the respondent submits:
- (a) There are no real inconsistencies between the contents of Mr McCulkin's police statement and his inquest evidence and that the minor variations can be explained or are inconsequential. In any event, his inquest evidence on these minor points of detail do not constitute the kind of inconsistent subsequent statements which call into question the reliability of the representations in his 1974 police statement to which objection is taken;

- (b) Mrs Fe McCulkin’s evidence about the alleged “confession” made to her in 2011 is hopelessly unreliable and her account of it does not withstand scrutiny, so that I would not be satisfied that Mr McCulkin made a subsequent statement which impugns the reliability of his 1974 representations;
- (c) Mr McCulkin’s failure to disclose the identity of “Shorty” over the period of a few days in January 1974 is explicable and does not cast doubt on the reliability of the evidence which he gave to police and which was incorporated in his 5 February 1974 statement.

### Relevant principles

- [8] The principles governing reception of evidence pursuant to s 93B are not in contest. The requirements of s 93B should be carefully applied, consistent with the purpose of the section, because they relax the exclusionary effect of the hearsay rule. It is no light thing to admit a hearsay statement inculcating an accused.<sup>1</sup> Section 93B allows the Court to admit evidence against an accused who is unable to cross-examine at trial the person who allegedly made the representation. Evidence which is admitted pursuant to s 93B is subject to warnings to the jury, as required by s 93C and the general law.
- [9] The provisions of s 93B direct attention to the particular representation which asserts a fact and the circumstances in which the representation was made, not a global view of the reliability of the maker of a variety of different representations.<sup>2</sup>
- [10] The term “shortly after” appears in s 93B(2)(a). In *R v Mankotia*,<sup>3</sup> Sperling J noted that where the legislature had chosen not to specify the timeframe, but instead use the indeterminate phrase “shortly after”, what is required is a normative judgment of “the actual time that has elapsed and whether that fits the ordinary usage of the expression ‘shortly after’ in the circumstances of the case”. The time elapsed refers to the time between when an asserted fact occurred and when the representation was made. The judgment to be undertaken, with a view to the policy behind the provision, may be influenced “by the subject matter of the event and by how long the memory of such an event is likely to have remained clear in the mind.” However, the Court in *Williams*<sup>4</sup> explained that it would be a mistake to over-emphasise such matters as whether the events were “fresh” in the memory of the person making the statement. The Court should instead have regard to the broader consideration of whether the evidence is unlikely to be a fabrication where, in the case of a representation made shortly after an asserted fact, it is made “under the proximate pressure” of the occurrence of the asserted fact.
- [11] The meaning of “made in circumstances making it highly probable the representation is reliable” in s 93B(2)(b) and comparable provisions of other Australian evidence statutes has also been considered in a number of cases. These cases establish that the section does not permit a wide-ranging, general inquiry into the reliability of the representation. The test is not whether, in all the circumstances, there is a high probability of reliability, but whether the circumstances in which the representation was made establish such a

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<sup>1</sup> *Sio v The Queen* (2016) 334 ALR 57 at 69 [60]; [2016] HCA 32 at [60].

<sup>2</sup> *Sio v The Queen* (2016) 334 ALR 57 at 69, 72; [2016] HCA 32 at [57], [70].

<sup>3</sup> [1998] NSWSC 295; see also *R v Polkinghorne* (1999) 108 A Crim R 189.

<sup>4</sup> *Williams v The Queen* (2000) 119 A Crim R 490 at 502; [2002] FCA 1868.

probability. Evidence tending only to prove the asserted fact may not be considered in this context. Prior or later statements or conduct of the person making the alleged representation may be considered to the extent that they touch upon the circumstances of the making of the relevant representation.<sup>5</sup>

### **Mr McCulkin's police statement dated 5 February 1974**

- [12] Mr McCulkin said that he had moved out of the family home some three or four months earlier and had been living with Ms Estelle Long. His wife had cosmetic surgery on her breasts and stomach on 7 December 1973. He took her home on 14 December 1973. She had two surgical brassieres. On 15 January 1974 he left the family home and did not return again to live there.
- [13] On 16 January 1974 he saw his wife on a council bus. She waved at him. He mouthed to her that he "might come over tonight". That night after work he went drinking with a work mate and then later met Estelle Long at the Federal Hotel in Spring Hill where she worked. He did not go to his wife's house that night as he had indicated.
- [14] On Thursday 17 January 1974, he again went to work, went drinking afterwards and did not go to his wife's house, but went home with Ms Long.
- [15] On Friday 18 January 1974, he went to work. When he finished he went for drinks again. He went to his wife's house intending to give her some money he had been paid the day before. He arrived there at about 6pm.
- [16] The house was locked. He could not rouse anybody. He spoke to a nearby shopkeeper and she had not seen his wife or children. He waited on the front steps. Later he spoke to a girl, Janet Gayton, from across the street, who was a friend of his daughters. She said they were not there all day and they were not there yesterday either.
- [17] He smashed the glass on the front door to get into the house. The light was on in the lounge and the light was on in the kitchen but its bulb had blown. The house was undisturbed, two Siamese cats were locked in the house, a sewing machine in the lounge had a partially stitched dress in it, there were goods in the refrigerator including six bottles of beer and his wife's money purse was on the refrigerator with \$8 in it. All his wife's clothes appeared to be in the house, although he later noticed that a pair of pink coloured towelling scuffs with a floral design were missing. The children's clothing was all intact. The beds were made and did not appear to have been slept in.
- [18] He had previously looked in the mailbox and found a letter from Medical Benefits of Australia containing a cheque which his wife had been expecting.
- [19] He then visited a series of people looking for his wife. Because Mr McCulkin did not drive a car, he was dependent on taxis or friends to drive him around. He first went to

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<sup>5</sup> See generally *R v Ambrosoli* (2002) 55 NSWLR 603 at 616 [34] – [37]; *R v Lester* (2008) 190 A Crim R 468 at 479 [44]; [2008] QCA 354 at [44]; *R v Robertson* [2015] QCA 11 at [58] – [59]; *Sio v The Queen* (2016) 334 ALR 57 at 71 – 72; [2016] HCA 32 at [69] – [71].

see Carolyn Quiller and her husband. He went to see Mr Ron Crouch and his sister Eileen. He went back to the house at Dorchester Street with them. He went to a skating rink because he had seen a notice in the house about skating. He went to his wife's brother's house (Graham Ogden) and spoke to Margaret Ogden.

[20] He made a phone call to a massage parlor run by Vincent O'Dempsey and spoke with a woman there. He went to see Estelle Long. They went back to the Dorchester Street house together. He spoke to the neighbours at 4 Dorchester Street.

[21] He went to see some Polish people who used to employ Barbara McCulkin as a snack attendant. He was given the contact number of a person Barbara used to work for, with which he phoned.

[22] At about 9pm he went to the Woolloongabba police station and reported his wife and children missing. He made enquiries at hospitals.

[23] At 4.30am on the Saturday 19 January, he and Miss Long went to their home at Annerley. He woke at 6.30am and went back to Dorchester Street, then back to Quiller's place at Yeronga.

[24] He later went to see Norman Wild, who drove him back to Dorchester Street. He spoke to one of the girls who lived in a nearby house, Janet Gayton, who knew his daughters. She told him that Vince and Shorty had been at the McCulkin house on the Wednesday night. He immediately understood Vince to be Mr O'Dempsey and Shorty to be the applicant.

[25] He went to the applicant's mother's house and had this conversation with the applicant:

“I said to him, ‘have you seen my wife?’

He said ‘No, why.’

I said, ‘The kid across the road told me that you were there on Wednesday night.’

He said, ‘I don't know you [sic] wife, I'm surprised you asked me.’

I said ‘Alright, fair enough.’”

[26] Whilst travelling down Lutwyche Rd, he saw Vincent O'Dempsey and spoke to him. It is unnecessary to recount in full his version of what Mr O'Dempsey told him. Mr O'Dempsey denied having seen Barbara McCulkin. When Mr McCulkin told him that “the kid across the road said that you were there on Wednesday night with Dubois”, Mr O'Dempsey is said to have hesitated and also to have hesitated when asked “Was Shorty with you?” The upshot is that Mr O'Dempsey's response was less than satisfactory. He claimed to have forgotten whether the applicant was with him.

[27] Mr McCulkin and Mr O'Dempsey then drove in separate cars back to the applicant's house. He spoke to both Mr O'Dempsey and the applicant in the kitchen. During this conversation, Mr O'Dempsey denied that they had been there on the Wednesday night. They both said “we don't know anything.” O'Dempsey arranged to phone McCulkin at the Federal Hotel at two o'clock.

[28] At some stage, Mr McCulkin went to see a former neighbour, Mrs Holdsworth. He then travelled to the Federal Hotel to await a phone call from Mr O'Dempsey that never came.

[29] At around 2pm he was at the Federal Hotel when he saw the applicant drive past with three others. He and Wild pursued them in Wild's car to Milton Road where Mr McCulkin and the applicant had the following exchange:

“I said ‘that kid across the road insists that you were there Wednesday night.’  
He said, ‘Well I don’t know where they got that idea.’  
I said ‘Well I am going to tell the Bobbies your name, and they will be around to see you’, and I then told him what I would do if I found out that he had done anything to my family, and I said to him, ‘I will ring you later this afternoon.’”

[30] He and Wild then went to the races at Doomben. He spoke there to Paul Mead. He asked Mead to cash the medical benefits cheque but he could not because he was short of cash. He went to the massage parlour run by Mr O'Dempsey. He spoke with Cheryl Evans. He was with Estelle Long. He went to a phone box and rang the applicant, but he was not at home.

[31] On 21 January 1974, he received a telephone call from Mr O'Dempsey.

### **Addendum police statements**

[32] The date of McCulkin's first addendum statement is unclear. It says that he has made enquiries as to his wife and daughter's whereabouts without any results and he believes that Mr O'Dempsey and the applicant are responsible for their murder.

[33] The second addendum is dated 29 October 1979. McCulkin says that Mr O'Dempsey was a mate of his but did not offer to assist him in looking for his wife. He also says that when he had first got into the house on 18 January 1974 he had also noticed that his wife's cosmetics and engagement ring were still in the house, his daughters' money boxes containing money were still in the house, and their school books and personal jewellery were still in the house. His wife purchased a newspaper each day and he did not find one dated 17 January 1974. She always took her purse with her when she left the house.

### **Mr McCulkin's inquest evidence**

[34] Mr McCulkin gave evidence in the inquest in 1980. His evidence was broadly in accordance with his police statements. Some further details were added.

[35] He added that when he had gone in the house the cats had been in the bathroom which was where his wife would leave them if she was going on a short trip. He also said the bulb had blown in the sewing machine. His wife did not normally have beer in the fridge. There were a couple of items of the children's clothing that were missing to his knowledge. The children's bank books were in the house.

- [36] He saw his wife's engagement ring in the house, and while he was not 100 per cent sure where it was in the house, he thought it was on top of the fridge with her purse. She would take the ring off to do the housework and if she went out anywhere she would put it on. It was her mother's engagement ring which had been reset. It was of great sentimental value to her.
- [37] He clarified that he had found the cheque in the mailbox the first evening that he went there.
- [38] The notice he saw for the skating rink was a note attached to the verandah door that said "have gone skating." He was not sure if it had been there before and he had not noticed it.
- [39] He accepted that at the time he first phoned Mr O'Dempsey he had not yet been told that Mr O'Dempsey had been there on the Wednesday. He said that he had phoned Mr O'Dempsey because he thought he was his friend and he could help.
- [40] He was shown some photographs of the house. He said about some of the things that were disturbed that he had disturbed them himself. He could not find the keys to the house and had not seen them since.
- [41] Under cross-examination, he said he had forgotten to mention the engagement ring in the first statement. The police had come around to the house and he thought that had been on the Saturday.
- [42] He admitted he had hit his wife on occasions. They might have had an argument and she would have struck him and he would have struck her. He denied that he had ever had oral sex with one of his daughters or was aware of any complaints about that.
- [43] He said that the cheques in the mailbox had been there on the Friday evening. They were not in the same envelope. He said he had only cashed the \$210 cheque which he thought was drawn in his favour. He still had the other \$170 cheque in favour of St Andrews Hospital.
- [44] The notice he had seen had just said "have gone skating". He went to the Red Hill skating rink because it was the only one he knew. The note was just written in chalk on a blackboard. It looked like one of the children's writing.
- [45] He had presumed Barbara only had two surgical brassieres because she wore one and washed the other. She could have bought herself more and he would not know.
- [46] He accepted that, having been away from the house for so long, he would not really know exactly what clothes his wife or children had.
- [47] He had also found his wife's bank book but did not give it to the inquest. He said that the balance in it was \$5 or something.

### Alleged inconsistencies

[48] It is convenient to set out a table of the alleged inconsistencies relied upon by the applicant and the respondent's comments. This table is drawn from documents submitted by the parties and it is convenient to set it out in this form.

| <b>Police Statement</b>   | <b>Inquest Evidence</b>   | <b>Respondent's Comment</b>  |
|---|---|--|
| McCulkin said the bulb in the kitchen was blown (p.6).  | McCulkin said the bulb was blown in the sewing machine (p.405).   | From the transcript of the inquest, it is not clear he is saying that it is the sewing machine bulb that is blown. It is quite consistent with a reading that it was the kitchen light was blown and the sewing machine light was on. His statement was before the court. Inspector Hicks' statement says that McCulkin told him the kitchen light was on, but the bulb was blown. |
| McCulkin said the children's clothing "seemed to be all intact" (p.6).                                  | McCulkin said there were a couple of items of the children's clothing missing to his knowledge (p.406).   | The comment in the police statement relates to his first examination of the house. Hicks recounts going to the house and meeting McCulkin. During the visit he speaks to Gayton who tells him what the girls were wearing and then he and McCulkin search the house and McCulkin says that those clothes are all that is missing.  |
| The engagement ring is not mentioned in the statement.  | He thought Barbara McCulkin's engagement ring was on top of the fridge with her purse, but was not 100% sure where it was in the house (p.408).<br><br>He accepted he had not mentioned the ring in his police statement (p.440). | McCulkin agrees at the inquest that the engagement ring is not mentioned in the original statement, but it is mentioned in his statement of 29 October 1979.   |
| He had seen a notice on the front door on a blackboard with the name Red Hill Skating rink on it (p.7). | He found a note that said "have gone skating" written in chalk on a blackboard in what looked like children's writing (p.465, 511).   | McCulkin accepts that it might have said "have gone skating", and says that he went to Red Hill rink as it was the only one he knew. It is a distinction without much consequence.   |

[49] I do not consider that these matters carry much weight. Understandably, limited reliance was placed upon them by the applicant in oral submissions. It is unremarkable that a witness, in giving evidence six years after the events in question, would have slightly

different recollections on these kinds of points of detail. These differences are of no real consequence and I do not consider that they are a sound basis to find that Mr McCulkin was unreliable in his account of matters or, for present purposes, that the circumstances in which he gave his 1974 statements and, in particular, the representations which he made about significant matters, were made in circumstances which do not satisfy either of the statutory tests.

- [50] I should note for completeness that the applicant also points to a difference between Mr McCulkin's statement dated 5 February 1974 about the time he went to 6 Dorchester Street, Highgate Hill on the night of 18 January 1974 and a report of Officers Cook and White erroneously dated 4 January 1974 which records the time as 9.30 am. The difference may be explained as a typographical error in the police report. Mr McCulkin's evidence about going there at around 6pm is plausible. If the police report of 9.30 am is correct he would have been required to take time off work. The report dated 4 January 1974 was not signed by him and, it seems, Mr White was not cross-examined about the accuracy of the 9.30 am time. Mr McCulkin was not cross-examined about this matter at the inquest. What seems to be a typographical error in a police report which contains another obvious typographical error does not cause me to conclude that Mr McCulkin's statement about when he went to the house at Dorchester Street on the night of 5 February 1974 is unreliable.
- [51] Subject to my consideration of the two other matters which are raised on the question of the reliability of his evidence about his movements on critical days, the circumstance that Mr McCulkin was assisting police to locate his missing wife and children strongly suggests that he would have given them reliable evidence about his movements and what he saw and observed when he went to 6 Dorchester Street.

### **The alleged August 2011 confession**

#### ***Evidence of Mrs Fe McCulkin***

- [52] Mrs Fe McCulkin met Mr Billy McCulkin in the Philippines and married him. They moved to Australia in October 2001, with Mrs McCulkin arriving on a spousal visa. She obtained permanent residency in 2002 and separated from Mr McCulkin the same year. After they separated Mrs McCulkin began living with a Mr Ditton, and then went back to the Philippines.
- [53] The McCulkins were divorced in 2005, but then remarried in 2010, and Mrs McCulkin looked after her husband for the last two years of his life.
- [54] Mr McCulkin died on 25 August 2011. On the night he died, Mr Ditton picked Mrs McCulkin up from the hospital and she spoke to him about Mr McCulkin and his life. She told Mr Ditton that Mr McCulkin knew who had killed his family and that those people would "get their own".
- [55] At some stage, Mrs McCulkin discovered that the applicant and Mr O'Dempsey had been arrested in relation to the murder of Barbara McCulkin and her daughters. She learned through the media that they were to have an appearance at court, and she attended the

court that day. She gave evidence before me that she went to the court that day because she wanted to be “supportive” of her former husband’s family. However, she did not know any of these people, had not met any of them before and was not even sure whether they would be at court. Her evidence before me was that she went there to support the family and to tell them where the bodies were, namely (if her story is to be believed) somewhere in Toowong Cemetery. What Mrs Fe McCulkin intended to achieve by telling people she did not know that Barbara McCulkin and her daughters were buried in Toowong Cemetery is unclear.

[56] What is clear, however, is that when she went to the courthouse on 20 October 2014, Mrs Fe McCulkin did not tell police, prosecutors, the legal representatives of Mr O’Dempsey, the applicant or anyone else that she knew where Barbara McCulkin’s body was buried, and that neither Mr O’Dempsey nor the applicant had murdered Barbara McCulkin and her daughters because Mr Billy McCulkin had done so, having confessed to her on his deathbed. In short, she did not reveal to anyone that day that the accused had been falsely accused.

[57] In fact, she spoke to a reporter from Channel Seven outside the court and said something quite different. She did not mention that Billy McCulkin had confessed. She gave an entirely different impression, with the result that she appeared on television and allowed the television journalist to report that Mr McCulkin had gone to his death, not knowing who had killed his wife and children.

[58] Mrs McCulkin subsequently approached a Mr Antonio Bellino, someone her late husband had told her she could trust.

[59] Subsequently, Mrs McCulkin arranged to give another interview with a different Channel Seven reporter and in this interview told a story which was quite at odds with the impression she gave to the first interviewer. She revealed the sensational news that her late husband had confessed to murdering his family.

[60] On 3 March 2015, after Mr Bellino had encouraged her to speak to the police, Mrs McCulkin was interviewed by police and the interview was recorded. She told them that on 12 or 13 August 2011, about a fortnight before he died, when he was very sick and knew he was going to die, Mr McCulkin said to her “You’ve been asking about my family, my wife and two kids. I’m going to tell you the story.” She says that Mr McCulkin said “I did it”. In the police interview she is recorded as saying:

“And he said to me, ‘That’s just what happened.’ I said ‘What happened?’  
 ‘We have little bit fight, I go down there to her house, have a chat to her, I want my kids- pick up my kids because, you know, birthday coming’, something. I don’t know which one. ...

I said all right [indistinct] little bit nag, ‘I lost my temper, struggle [indistinct].’ That’s it.

Police officer: So where - where did this happen? Whereabouts?

Mrs McCulkin: And he said to me in their unit where the woman lives, because he went down there to visit and –”

- [61] Mr McCulkin allegedly told her that they had a struggle, a fight, the kids were watching and he put them in a big black bag. He had buried them together in Toowong Cemetery just a little bit up a hill. He looked very serious when he said it. He also said he was with somebody called Terry. He said they put cement and sand on top of the body. He said they had a fight and a struggle and he lost his temper.
- [62] In her evidence-in-chief before me, Mrs Fe McCulkin gave a shorter but similar account, saying Mr McCulkin lost his temper that night and hit Barbara McCulkin in the head. He was with a friend called Terry at the house together. Things happened quickly and he and Terry took Barbara McCulkin and the children to Toowong Cemetery. On that version, that is where he hit Barbara McCulkin. However, later in her evidence-in-chief Mrs McCulkin said that he hit Barbara McCulkin at the house and then took her to Toowong Cemetery. According to this account, he put his wife and his two daughters in the one grave and then put some sand and cement on top. The occasion on 12 or 13 August 2011 was the only time that Mr McCulkin spoke to Mrs McCulkin about the matter.
- [63] Mrs McCulkin gave evidence at a CCC hearing on 30 March 2015. Different details emerged to those which she had told the police a few weeks earlier. She said that her husband, Mr O’Dempsey and the applicant were involved in the Whisky Au Go Go arson that killed 15 people, and that they were close friends. She said that Mr McCulkin had told her that Barbara McCulkin knew who was responsible for the Whisky Au Go Go bombing.
- [64] As to the killing of Barbara McCulkin, she told the CCC that it happened after Mr McCulkin went to the house and asked Barbara McCulkin if he could borrow the kids. She refused. There was screaming and he lost his temper. According to Mrs Fe McCulkin, he wanted to borrow the kids because of his daughter Leanne’s “upcoming birthday” which was to be in a couple of days.
- [65] When asked why Mr McCulkin would kill his daughters, Mrs Fe McCulkin said that the daughters had heard them talking and he just lost his temper. This version, like Mrs Fe McCulkin’s other versions of what she says she was told by her late husband, is very confusing. It seems that her version to the CCC was that Barbara McCulkin’s body was taken to the Toowong Cemetery by Mr McCulkin and his friend Terry (a person who Mrs McCulkin could not further identify) and that the daughters were taken there too, still alive. When asked what he did to the girls, Mrs McCulkin replied “I don’t remember. He said to me there’s a black bag, like a big plastic bag... and that’s what he put the kids and Barbara in”. Mrs McCulkin gave the impression that the daughters were buried alive. She adhered to the story of her husband wanting to take the girls out with him for a birthday celebration and that this led to the fight. However, when asked why he wanted to kill Barbara, Mrs McCulkin said “Because she know something. That’s what Billy said to me ... she knows most of the thing with the bombing.”

- [66] Mrs McCulkin told the CCC hearing that he threw the three bodies in a big hole that was already there and then put cement in. When asked how he would have obtained wet cement she replied “That’s what I was thinking”. She came back to saying that the plan was to take Barbara McCulkin there, not the two children.
- [67] According to Mrs McCulkin, she did not tell anyone about this alleged confession between 2011 and 2015, but she told Mr Bellino about it when she saw that people had been charged in relation to the offence. She says she did not go to the police because her late husband did not trust the police. She did not even say anything for some time between the arrest of the accused and her first statement, and she was prompted to talk when Mr Bellino told her that innocent people would go to jail.
- [68] This evidence is unconvincing. If Mr McCulkin’s alleged confession was true, then Mrs Fe McCulkin knew, as soon as she learned that Mr O’Dempsey and the applicant had been charged, that innocent people would go to jail, accused of killing Barbara McCulkin and her daughters when they had not done so.
- [69] As for the alleged Whisky Au Go Go connection, this was not mentioned to the police on 3 March 2015 as the reason Barbara McCulkin was killed. At the CCC hearing, Mrs McCulkin said that all she wanted to come out was where the bodies were buried. She accepted that she did not care enough about the 15 people who died in the Whisky Au Go Go bombing to tell anyone about what her late husband had allegedly told her about it.
- [70] She also told the CCC that the person named Terry and her husband had previously dug the hole at Toowong Cemetery before they took Barbara McCulkin there. At the conclusion of the CCC hearing and when asked how her husband allegedly killed Barbara McCulkin, Mrs Fe McCulkin says that her husband said that he hit her in the cemetery. When asked how he killed the children, she added “I don’t think they are already dead when they throw way in the hole”, and that they were all thrown in the same hole.
- [71] Under cross-examination before me, Mrs McCulkin adhered to the account that her husband had told her that he fought with his wife that night after he had an argument with her over her not letting him take the children away for a short time to celebrate a daughter’s upcoming birthday. This story does not withstand scrutiny. The McCulkins disappeared on or about 16 January 1974. Neither of the McCulkin children had a birthday anywhere near this date. Vicki McCulkin was born on 9 November and Leanne McCulkin was born on 26 June.
- [72] Misinformation that Mr McCulkin planned a visit to the McCulkin house because of his daughter’s birthday at about that time has appeared in the media in 2012 and in 2014. A 2012 article recounted a version of events whereby Mrs Barbara McCulkin put off meeting an individual because she planned to see her husband who was going to celebrate his daughter’s upcoming birthday. An August 2014 article reported that Mr McCulkin had gone to the house at a time when Vicki McCulkin had days earlier celebrated her thirteenth birthday. It is distinctly possible that Mrs Fe McCulkin read these articles, or was told about them, and reconstructed a version of what her husband had told her about going to the house to celebrate a daughter’s birthday. This could not have been true. It

is possible, of course, that Mr Billy McCulkin in 2011 had forgotten the date of his daughter's birthday and told Mrs Fe McCulkin that he went to the house at Highgate Hill in January 1974 to celebrate a daughter's birthday. However, it is more likely that he was not mistaken about his daughter's birthday and that Mrs Fe McCulkin has relied on information which she sourced in the media or from some other informant.

***Assessment of Mrs Fe McCulkin's evidence***

- [73] Mrs Fe McCulkin was very unimpressive in the evidence which she gave before me and the manner in which she gave it. My impression was that she was making things up as she went along.
- [74] The different versions which she has told police, the CCC and the Court on the hearing of this application are full of inconsistencies and contradictions. The version she gave to police on 3 March 2015 has Mr McCulkin losing his temper, and does not refer to any Whisky Au Go Go motivation. This motivation emerges later. On one version, there is an impulsive killing, not only of Mrs Barbara McCulkin, but of the two daughters who Mr McCulkin apparently loved. On one version there is a hasty and unplanned burial in the Toowong Cemetery with, it seems, the daughters being buried alive. On another version, the hole in the cemetery had already been dug before they took Barbara McCulkin there.
- [75] Either story confronts difficulties. Toowong Cemetery was full at the time and only available for family burials. The ground was too hard to dig a grave manually in under a day, and so a grave could not have been dug on the night Barbara McCulkin was murdered. Records are kept of burials at the cemetery, and there is no record of an unexplained burial. A concrete covering to a new, unauthorised grave would have been noticed.
- [76] The idea that a grave hole had previously been dug at the Toowong Cemetery is unbelievable. It would have been detected and, if the killing of Mrs McCulkin was a spontaneous act when Billy McCulkin lost his temper over not being able to take his daughters out that night, then he would not have dug a hole the day before in order to bury his wife.
- [77] Mrs Fe McCulkin's stories are simply unbelievable. After she was cross-examined, counsel for the applicant indicated that the applicant did not abandon the submissions made in writing about the alleged confession in the light of the oral evidence which I had heard. The applicant proposed to simply rely upon his written submissions.

***The effect of the alleged confession of Billy McCulkin's evidence under s 93B***

- [78] The evidence of Mrs Fe McCulkin is relevant because later statements of the person making the previous representation may be considered to the extent they touch upon the reliability of the circumstances of the making of the previous representation.<sup>6</sup> For example, if the person in question has made a later, inconsistent statement then it may be

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<sup>6</sup> *R v Lester* (2008) 190 A Crim R 468 at 479 [44]; [2008] QCA 354 at [44].

considered because it touches upon the circumstances of the making of the previous representation, and calls its reliability into doubt. The present issue is whether Mr McCulkin made the later statement which Mrs Fe McCulkin alleges, namely a confession of having murdered his wife and two daughters and buried them in Toowong Cemetery.

- [79] I am not required to be convinced by Mrs Fe McCulkin's evidence in order to find that Mr McCulkin probably made such a confession. However, Mrs Fe McCulkin's evidence would need to carry some force in order to persuade me that Mr McCulkin made a later, inconsistent statement. Something substantial is required. It would be odd if a previous representation failed the statutory test because someone advanced a story, however unbelievable, that the maker of the previous representation had said something inconsistent at a later time.
- [80] If I simply had some reservations about the evidence of Mrs Fe McCulkin, but found her story plausible, then the position would be different. In such a case there might be acceptable, reliable evidence of a subsequent inconsistent statement by Mr McCulkin. However, Mrs Fe McCulkin's evidence is not of that character. It is totally unbelievable. She gave no satisfactory explanation as to why she kept the matter a secret for four years, then, when prompted to tell the surviving family of Barbara McCulkin about where she and her daughters were buried, did not communicate with them and spoke to a television reporter instead. Having spoken to a television reporter, she told the reporter (and the world) what was on her current version a false account that Mr McCulkin was not involved in the murders. The current version is inconsistent with what Mrs Fe McCulkin told Mr Ditton the night after Mr McCulkin died, namely that he knew who killed his family and that those people would pay.
- [81] If Mr McCulkin had told Mrs Fe McCulkin that he and "Terry" were responsible for the murders and that the bodies were buried in Toowong Cemetery, then once Mrs McCulkin knew that Mr O'Dempsey and the applicant had been charged over the murders, she should have told the police, prosecutors, the legal representatives of the accused or a solicitor who her late husband told her she could trust, about the deathbed confession. Depending upon which version of Mrs McCulkin's story is to be believed, her late husband had supplied information about why his family had been killed. One version was the risk of Barbara McCulkin revealing what she knew about the Whisky Au Go Go bombing such that her revelations would have implicated Mr McCulkin, Mr O'Dempsey and the applicant in the Whisky Au Go Go arson that killed 15 people. Alternatively, Barbara McCulkin was killed when Mr McCulkin lost his temper after being refused the chance to celebrate his daughter's birthday. On either version, Mr O'Dempsey and the applicant were being falsely accused of murders which they did not commit.
- [82] If Mrs McCulkin's evidence is to be believed, she was prepared to lie to Mr Ditton and lie to the world in her first interview with Channel Seven. The reasons for her Damascus Road conversion were not adequately explained. She did not require Mr Bellino to tell her that there was a risk that innocent people could be convicted if she did not come forward with her story. That must have been obvious to her by no later than the day she went to court and told the world that her husband died not knowing who had killed his family.

- [83] In summary, Mrs Fe McCulkin's evidence is unbelievable. It has been demonstrated to be incorrect in a key respect whereby she links the death to an argument about a request by Mr McCulkin to take the children away to celebrate a daughter's birthday. She has given a variety of versions of what she was told about where Barbara McCulkin and the daughters were killed. The story about the hole in the cemetery having previously been dug seems to have been advanced to cover the improbability that Mr McCulkin and "Terry" dug a grave manually that night. In any event, the idea that a recently-dug grave would go unnoticed is unbelievable, as is Mrs McCulkin's story about pouring cement into a new, unauthorised grave. Mrs McCulkin's incredible and unreliable evidence does not lead me to conclude that Mr McCulkin gave a later, inconsistent statement in which he confessed to murdering his family and burying them in Toowong Cemetery.
- [84] At best for Mrs Fe McCulkin, she has embellished something that Mr McCulkin said, drawn on misinformation appearing in the media in 2012 and 2014 about a McCulkin daughter celebrating a birthday in January, and reconstructed a completely unreliable story about a burial in Toowong Cemetery. If Mr McCulkin said anything about being involved in the murder of his daughters and burying them in Toowong Cemetery, then he must have been delusional in the final few weeks of his life when he was suffering from a serious illness. On any reasonable view of Mrs McCulkin's evidence, there is no reliable evidence upon which to base a conclusion that Mr McCulkin made the confession which she alleges or that, if he did, the confession was an accurate one.
- [85] It is sufficient for present purposes to conclude that I am not satisfied that Mr McCulkin made a later inconsistent statement which could be safely acted upon to impugn the reliability of the representations he made in 1974. Because I am not persuaded that he confessed to Mrs Fe McCulkin that he murdered his family and buried them in Toowong Cemetery, or that any such confession would be a reliable one, there is no later statement by him which impugns the reliability of his 1974 representations. Therefore, I do not have reason to conclude that his 1974 representations, as recorded in his 5 February 1974 police statement, about his movements and his interactions with the applicant were fabricated so as to cover his tracks. Mrs Fe McCulkin's evidence does not persuade me that his representations lack reliability.
- [86] Her evidence does not satisfy me that Mr McCulkin made a later inconsistent statement which undermines the reliability of his 1974 representations.

### **The police running sheet – knowledge of "Shorty's" name**

- [87] The applicant points to a police running sheet concerning the disappearance of the McCulkins and an entry in respect of interactions between detectives and Mr McCulkin on the morning of Saturday, 19 January 1974. Mr McCulkin told police at that stage that he did not know Shorty's surname. This was untrue. He supplied Shorty's actual name to police on the morning of 22 January 1974.
- [88] The context of Mr McCulkin initially withholding Shorty's name appears to be as follows. As outlined above, on the night of Friday, 18 January 1974 and during the morning of Saturday, 19 January 1974 Mr McCulkin made inquiries and searched for his wife and daughters. According to his witness statement, on Friday night he was told by the girls

across the street that the McCulkin girls had not been seen for a couple of days and there were other suspicious circumstances. He enlisted the assistance of his sister, Eileen and her boyfriend, and they conducted searches at the Red Hill skating rink and elsewhere. He reported his wife missing to the Woolloongabba police station at around 9pm and then checked at hospitals. On the morning of Saturday, 19 January 1974 he returned to 6 Dorchester Street, Highgate Hill where he saw that his wife and two daughters were still not home. His sister and her boyfriend joined him and he went over and spoke to Janet Gayton and asked her about whether anyone else had been there, to which she replied “Yes, Vincent and Shorty were here”. Mr McCulkin’s witness statement records that he knew that she was referring to Vincent O’Dempsey and Garry Dubois. The girl, Janet Gayton, told him that they had been there on the Wednesday night.

- [89] Mr McCulkin and his sister made contact with an Inspector Ryan at around 10 am on the Saturday morning. With the assistance of Norman Wild as a driver, Mr McCulkin then went to the applicant’s residence at Kedron and asked whether the applicant had seen his wife. The applicant denied having done so, and McCulkin then stated “The kid across the road told me that you were there on Wednesday night”, to which the applicant replied “I don’t know you [sic] wife, I’m surprised you asked me”.
- [90] He later spoke to Mr O’Dempsey, who was evasive and hesitant, and implausibly claimed not to remember if the applicant was with him on the Wednesday.
- [91] He then spoke to Mr O’Dempsey and the applicant together, who claimed to know nothing.
- [92] Later that day, at around 2pm, Mr McCulkin says that he saw the applicant driving by and confronted him with other people who were in the applicant’s car. He said “That kid across the road insists that you were there Wednesday night”. Mr McCulkin says that the applicant said “Well I don’t know where they got that idea”. Mr McCulkin’s evidence is that he responded “Well, I’m going to tell the Bobbies your name and they will be around to see you.” Mr McCulkin then told the applicant what he would do if he found out that the applicant had done anything to his family.
- [93] The police running sheet records that on 22 January 1974, Mr McCulkin contacted police and informed them that he was in a position to supply the surname of “Shorty”. The running sheet also records Mr McCulkin asking Detective Sullivan would it be probable that if the man “Shorty” was located and interviewed and no evidence was found to connect him with the disappearance of his wife and children, that Shorty would be arrested for any other offence for which he was wanted. After police further interviewed Mr McCulkin (the details of which are not in the running sheet), he then supplied the name of the applicant and what he believed to be the applicant’s address.
- [94] The applicant submits that Mr McCulkin’s withholding his surname from police and falsely telling police on 19 January 1974 that he did not know Shorty’s surname reflects upon the circumstances under which the representations contained in the witness statement were made, such that certain representations do not satisfy the statutory test. Counsel for the applicant submitted that the falsity appearing on the running sheet about his knowledge of the applicant’s name would result in the Court not being satisfied that

certain parts of the statement were reliable. In particular, the consequence would be the exclusion of the parts of the statement which recount Mr McCulkin's interactions with the applicant. The prosecution seeks to rely upon evidence of Mr McCulkin's interactions with the applicant on Saturday, 19 January 1974.

- [95] The evidence before me indicates that Mr McCulkin falsely told police on the morning of 19 January 1974 that he did not know "Shorty's" surname. The present issue is what implications this has for the reliability of certain representations which he made to police and which were recorded in the written statement dated 5 February 1974 (some of which were also recorded in the running sheet).
- [96] The applicant's submissions concern the falsity of an earlier inconsistent statement which is said to touch upon the circumstances under which the relevant representations were made. I should clarify that the representations contained in the witness statement dated 5 February 1974 do not include the false statement appearing in the running sheet to the effect that as at 19 January 1974 Mr McCulkin did not know Shorty's name. On the contrary, the witness statement records that he knew Shorty's name at the time Janet Gayton referred to Shorty. The statement in the running sheet is false and the witness statement in this regard is true.
- [97] The running sheet is evidence that Mr McCulkin initially was reluctant to provide police with Shorty's surname. It appears that Mr McCulkin wished to find the applicant first and ascertain what he had to say, if anything, about the whereabouts of Mr McCulkin's wife and daughters. The running sheet also indicates that Mr McCulkin suspected that police may wish to speak to the applicant about other matters, and that may explain Mr McCulkin's initial reluctance to disclose the applicant's surname and where he understood the applicant could be contacted.
- [98] The respondent submits that the running sheet entry and the inconsistency between it and the witness statement does not show that Mr McCulkin was unreliable in what he told the police, as recorded in the 5 February 1974 statement. Instead, it shows that he was reluctant to give the name of the applicant to the police at an early stage. His reluctance to give the applicant's name to police is explained on the basis that they were part of a "criminal milieu" and that someone in Mr McCulkin's position in that environment would be reluctant to inform on the applicant and to give up the applicant's name at a time when he did not know whether the applicant was in fact responsible for the disappearances. After the confrontations and further reflection, he gave up the applicant's name. His earlier failure to name the applicant was at a time when he had not determined for himself whether Mr O'Dempsey or the applicant might know things about his family's disappearance.
- [99] Mr McCulkin's reluctance to give the applicant's name to police initially is submitted to not flow on to a conclusion that his various representations to the police, including those about his confrontations with the applicant, are unreliable. There certainly is no reason to doubt the reliability of what he told police about his movements in general because he withheld the applicant's name. In addition, the initial withholding of the applicant's name tends to support Mr McCulkin's account of having confronted the applicant late that morning and also at around 2pm on Saturday, 19 January 1974. It was because Mr McCulkin wished to confront the applicant and to ascertain what he knew about his

missing family (and not inform upon an associate) that Mr McCulkin initially withheld the applicant's name. Having obtained what he sensed to be unsatisfactory responses from the applicant (and Mr O'Dempsey), he named the applicant, but only after first seeking an indication as to whether the police intended to interview the applicant about other matters. This last aspect tends to suggest that Mr McCulkin believed that police might want to speak to the applicant about other unrelated matters and was concerned that, if they did, Mr McCulkin's disclosure of the applicant's name and whereabouts might be interpreted in a certain way by the applicant and others in the criminal milieu in which the applicant moved. They might interpret it as "dobbing in" the applicant to police so they could speak to him about matters unrelated to the disappearance. This might have repercussions for Mr McCulkin.

- [100] In my view, Mr McCulkin's conduct on the morning on 19 January 1974, in falsely telling police that he did not know Shorty's name, does not reflect adversely upon the reliability of the representations contained in his statement in general (the applicant does not contend otherwise), and it does not reflect adversely upon the reliability of his evidence about his interactions with the applicant. It is consistent with a reluctance to supply the name and address of an associate who may have been wanted by police for unrelated matters, before at least speaking to that associate about his knowledge, if any, of the matter which concerned Mr McCulkin: the disappearance of his family.
- [101] Mr McCulkin's evidence about his interactions with the applicant was disclosed to the police in the course of their investigations in late January and early February for the purpose of preparing his 5 February 1974 statement. This was not a very substantial period after the relevant interactions and the nature of the interactions was such that Mr McCulkin was likely to remember them. In my view, they were made "shortly after the asserted fact happened" and in circumstances making it unlikely each representation is a fabrication. At the time the representations were made, Mr McCulkin had a strong incentive to assist police in investigating the whereabouts of his family. No reason is advanced as to why Mr McCulkin would fabricate matters against the applicant.
- [102] I am not persuaded that Mr McCulkin's initial withholding of the applicant's name and the falsity of his claim on 19 January 1974 to not know Shorty's name mean that the requirements of the statute are not satisfied. Each representation about their interactions was made in circumstances making it unlikely to be a fabrication.
- [103] If, however, the representations were not made "shortly after the asserted fact happened" within the meaning of s 93B(2)(a), then each representation about Mr McCulkin's interactions with the applicant was made in circumstances making it highly probable the representation is reliable.

### **Summary and conclusion**

- [104] The applicant's challenge to the admissibility of parts of Mr McCulkin's initial witness statement is based upon what is submitted to be the failure of representations about his movements and his interactions with the applicant to fulfil the reliability requirements of s 93B. The applicant did not submit that if I was satisfied that the representations were made in circumstances making it unlikely each representation is a fabrication, then I

would find that the representation was not made “shortly after the asserted fact happened”.

- [105] Three matters were advanced as to why I would not be satisfied that the reliability test under s 93B was met. I am unpersuaded by each argument.
- [106] First, the alleged inconsistencies with Mr McCulkin’s inquest evidence are either not inconsistencies at all or not matters of any consequence. For example, possible differences about which light bulb had blown between the February 1974 police statement and the 1980 inquest evidence are unremarkable. Infelicitous wording about the Red Hill skating rink was explained. Each of the representations in Mr McCulkin’s 1974 police statement about what he had recently observed at his family’s home are unlikely to have been fabricated.
- [107] Second, for Mrs Fe McCulkin’s evidence to undermine the reliability of Mr McCulkin’s representations to police about his movements and interactions with the applicant, I would need some level of belief that Mr McCulkin made later, inconsistent statements. However, Mrs Fe McCulkin’s evidence about a deathbed confession is completely unbelievable. It provides me with no sound basis to suppose that Mr McCulkin made such a confession (or, if he did, that it was true), and that therefore his 1974 statements to police about his movements were made to cover his tracks and are unreliable.
- [108] As to the third matter, by the time he spoke to the police on 22 January 1974, Mr McCulkin’s interest in telling the police what he knew extended to the applicant’s surname and where he could be found. The initial reluctance to provide the police with the applicant’s name and whereabouts, lest he be accused of dobbing in an associate to police who may have wanted to speak to the applicant about other matters, had disappeared. His initial withholding of the applicant’s name gave him an opportunity to confront the applicant, to see and hear his reaction to Janet Gayton’s claim that he had been at the house on Wednesday and to ascertain if the applicant had any information about where Mr McCulkin’s family might be. Having received unsatisfactory responses from the applicant (and Mr O’Dempsey), Mr McCulkin told the applicant that he was going to give police his name. He did so.
- [109] The circumstance that Mr McCulkin did not tell police the applicant’s name and address on the Saturday morning, preferring to first confront the applicant and to learn what he knew, does not render the representations contained in the 5 February 1974 statement unreliable. Instead, having confronted the applicant and obtained an unsatisfactory response, it is likely that Mr McCulkin gave a reliable account to police about his movements, including his interactions with the applicant on the Saturday.
- [110] In general, I am required to consider representations made in circumstances in which an individual whose wife and daughters have disappeared is assisting police to find his family and those who may be responsible for their disappearance. Representations about where he went, what he observed when he went to the house on the Friday night and the inquiries he made are unlikely to have been fabricated and were made in circumstances making them highly likely to be reliable. This was a very serious subject matter and, subject to the delay in giving up the applicant’s name for reasons which have been

explained, Mr McCulkin had every reason to tell police what he knew. Mr McCulkin had a strong motivation to give police accurate information about his family's circumstances, his movements, what he saw at the house, what Janet Gayton had told him and his searches and interactions with others. These circumstances and the proximity between the occurrence of the matters about which Mr McCulkin told police and when he told them make it unlikely the representations were fabricated. They also enhance their reliability.

- [111] By Saturday afternoon, any reluctance about disclosing the applicant's name to police, lest the applicant be approached by police unnecessarily about a matter in respect of which he had no information, had disappeared. Mr McCulkin says that he told the applicant he was going to give his name to the police. His reluctance that morning to give police the applicant's name is explicable. It is not a circumstance which leads me to conclude that each of the representations in the witness statement which Mr McCulkin gave police about his movements and interactions with the applicant was likely to be fabricated, or not likely to be reliable.
- [112] In summary, I am satisfied that the witness statement is unlikely to be fabricated. In particular, I am satisfied that each of the challenged representations in it about Mr McCulkin's movements and interactions with the applicant is unlikely to have been fabricated. In addition, each was made in circumstances making it highly likely it is reliable.
- [113] I am satisfied that the first statement satisfies the requirements of s 93B(2)(a), or alternatively s 93B(2)(b). If I had not been, the parts which would have been excluded would have related only to Mr McCulkin's movements on or about the day his family disappeared and his interactions with the applicant.
- [114] I will hear from the parties about which parts of his addendum statements and inquest evidence are to be relied upon, and whether, in the light of my ruling on the first witness statement, the later statements satisfy s 93B(2)(b).
- [115] There was no separate argument that if Mr McCulkin's first witness statement met the requirements for admissibility pursuant to s 93B, I should exercise my discretion under s 98 or my discretion under s 130 to exclude it. In the absence of submissions on that matter I am not minded to exclude the evidence in that statement on discretionary grounds. The inability to cross-examine Mr McCulkin is not, in itself, a reason to exclude evidence which fulfils the demanding requirements of s 93B(2). However, I take that matter into account, along with the function of the jury directions required in such cases. I should add that there is independent evidence which corroborates some aspects of Mr McCulkin's evidence about his movements on the days in question, including his interaction with the applicant on or about 19 January 1974. That evidence cannot be relied upon to satisfy the requirements of s 93B, but seems to be relevant to my discretion to exclude under s 98 and s 130. I have addressed evidence about Mr McCulkin's movements, his presence at the McCulkin residence and one of his encounters with the applicant on 19 January 1974 in a separate ruling on an application for a stay.

- [116] In summary, the parts of the evidence of Mr McCulkin to which objection has been taken fulfil the requirements of s 93B, and the applicant has not advanced reasons for their discretionary exclusion under s 98 or s 130. Therefore, I will allow the evidence to be given at the trial.