SUPREME COURT OF QUEENSLAND

CITATION:	*R v Dubois* [2016] QSC 327
PARTIES:	**R** (respondent) **v** **GARRY REGINALD DUBOIS** (applicant)
FILE NO:	SC No 1046 of 2015
DIVISION:	Trial Division
PROCEEDING:	Application for a permanent stay
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	31 October 2016
DELIVERED AT:	Brisbane
HEARING DATE:	13 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 Saggers Lawyers for the applicant Office of Director of Public Prosecutions for the respondent

[1] The applicant seeks a permanent stay of proceedings on an indictment that charges him with three counts of murder, two counts of rape and one charge of deprivation of liberty.

[2] The application is based on the contention that he cannot now receive a fair trial because:

(a) the delay in bringing the charges has resulted in positive prejudice to him; and

(b) that prejudice cannot be overcome.

[3] The applicant accepts that it is a drastic step to permanently stay an indictment and that it will only be taken in exceptional or extreme cases. He submits, however, that this is such a case.

[4] The respondent opposes the application and submits that the delay is not so prejudicial as the applicant contends, and that any prejudice can be addressed by appropriate directions. In this context, the respondent submits:

(a) There is and always has been a strong circumstantial case linking the applicant to the disappearance and presumed murder of the McCulkins;

(b) The applicant was accused at a very early stage of being implicated in the disappearance,[1] knew he was being sought by police, was questioned by police in 1976 and, therefore, had occasion, very shortly after the disappearance of the McCulkins to consider his response to the accusations and gather alibi evidence (if any);

(c) After being arrested in 1980 and charged with the murder of the McCulkins, he had occasion to mount a defence and to consider the evidence, including police records and statements in the prosecution against him;

(d) The only significant new evidence is evidence of alleged admissions to Mr Peter Hall and Mr Thomas Hamilton;

(e) The applicant can defend himself effectively against those matters because he has been on notice since a few days after the McCulkins' disappearance of accusations that he was involved and remains able to mount a defence.

The issue and relevant principles

[5] The ultimate issue is whether the continuation of the prosecution "will culminate in an unfair trial".[2] In *Jago*, Mason CJ stated:

> "The test of fairness which must be applied involves a balancing process, for the interests of the accused cannot be considered in isolation without regard to the community's right to expect that persons charged with criminal offences are brought to trial ... . At the same time, it should not be overlooked that the community expects trials to be fair and to take place within a reasonable time after a person has been charged. The factors which need to be taken into account in deciding whether a permanent stay is needed ... will generally include such matters as the length of the delay, the reasons for the delay, the accused's responsibility for asserting his rights and, of course, the prejudice suffered by the accused ... ."[3]

[6] In *Walton v Gardiner*[4] it was held that the question as to whether a proceeding should be permanently stayed fell to be determined by a weighing process, which necessarily involved a subjective balancing of a variety of factors and considerations. Those factors and considerations included:

1. the requirements of fairness to the accused;

2. the legitimate public interest in the disposition of charges of serious offences and in the conviction of those guilty of crime; and

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1 For example, there is evidence that he was confronted by Mr Billy McCulkin on Saturday, 19 January 1974 and specifically asked about his whereabouts the previous Wednesday night, whether he had visited the McCulkin house and what he knew about the disappearance.

2 *Jago v District Court (New South Wales)* (1989) 168 CLR 23 per Mason CJ at 30 ("*Jago*").

3 At 33.

4 (1992 – 1993) 177 CLR 378.

3. the need to maintain public confidence in the administration of justice.

[7] The strong public interest in the prosecution of serious offences and the conviction of offenders is qualified by the interest in ensuring that judicial processes are not abused and that the trials of accused persons are fair.[5]

[8] In *R v Johannsen & Chambers,* Fitzgerald P stated:

> "A stay should not be granted if the prosecution can proceed, uninfluenced by improper purpose, without unfairness to the accused, with a legitimate prospect of success and, in the event of conviction, no significant risk that, because of delay or other fault on the part of the prosecution, an innocent person will have been convicted."[6]

The prosecution case

[9] The evidence against the applicant has been summarised in my 11 August 2016 decision on separate trials and in several rulings on evidence in respect of a number of applications which were heard on 12 and 13 October 2016. The stay application was the last application to be argued. The recitation of facts in relation to particular categories of evidence in my other rulings makes it unnecessary to repeat those matters in this ruling. However, it is convenient to set out parts of the respondent's submissions on the stay application, by way of background in respect of what it contends is a strong circumstantial case against the applicant. The following points are copied from those submissions:

> "• The McCulkins are last seen at 6 Dorchester St Highgate Hill on [the] night of Wednesday 16 January 1974 by Janet and Juneen Gayton;
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> • Robert William (Billy) McCulkin visits 6 Dorchester St on 18 January 1974, [and] finds his family missing;
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> • After making inquiries with various people including Vincent O'Dempsey, McCulkin makes a missing person's report at the Woolloongabba Police Station;
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> • McCulkin goes back to 6 Dorchester St on 19 January 1974 and speaks to Janet Gayton who tells him that "Vince and Shorty were there" on the night she last saw the family;
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> • Almost immediately on 19 January 1974 he goes to speak to the applicant and confronts him about the allegation that he was at the Highgate Hill house on the night his family went missing;
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> • McCulkin says that the applicant denies knowing his wife and was surprised McCulkin had asked him;
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> • McCulkin then confronts O'Dempsey who makes an equivocal reply (does not deny being there but cannot remember whether Dubois was with him)

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5 *R v Johannsen & Chambers* (1996) 87 A Crim R 126 at 131; [1996] QCA 111.
6 Ibid at 135.

but suggests that he and McCulkin go to speak to the applicant;

- O'Dempsey arrives at the applicant's home before McCulkin and then McCulkin tells them both together that his family is missing and he has had to report the matter to police;

- McCulkin then asks O'Dempsey what he was doing at the house and O'Dempsey denies being there to which McCulkin says that this is contrary to what he said a short time before and then both O'Dempsey and the applicant in the presence of one another deny being there or knowing anything about his missing family;

- Later that same day McCulkin sees the applicant in a vehicle with other people who [he] recognizes as Keith Meredith, Thomas Hamilton and Peter Hall (although he knew him by another name) so McCulkin and his companion Norman Wild follow them and have a confrontation in a street in Milton where again McCulkin tells the applicant that the girl over the road at Dorchester St is sure he was there on Wednesday night and when the applicant again denies it McCulkin says he will give the police the applicant's name and [warns] him that the police would be around to see him;

- The occurrence of this aggressive confrontation is confirmed by Keith Meredith although he says it happens on 20 January rather than 19 January in a statement he provided in June 1979 and by Peter Hall (without giving a date) in his statement of 7 May 2014 and by Norman Wild in his undated statement but apparently in 1974 who puts the events as occurring on 19 January;

- Wild also confirms the earlier confrontations with the applicant once alone, O'Dempsey once alone and then together but [he] is not present for some of the conversations or remembers little of them;

- Hall and Keith Meredith assist O'Dempsey and Dianne Pritchard to move out of a unit in Rosalie and Hall says he was asked by both O'Dempsey and the applicant to do so;

- John Osborne says that the applicant stayed with him near Fernvale during the January 1974 floods and Hall says the applicant left Brisbane about the same time as O'Dempsey telling Hall that he was not happy the police were pursuing him about the McCulkins;

- The applicant was spoken to by police officers White and Swindells on 29 February and 1 March 1976 and was questioned about his whereabouts on 16 January 1974 in relation to the disappearance of the McCulkins and he admitted he had left Brisbane to avoid police because Billy McCulkin had been blaming O'Dempsey and him for the disappearance of his family;

- White was part of the initial investigating team, gave evidence at the inquest and at the committal and is available to give evidence at the trial;

- There was an inquest investigating the suspected murders of the McCulkins in February-April 1980 and the applicant was committed for trial [for] murder in his absence and a warrant for his arrest was issued by the committing magistrate at the end of the inquest;

- During the inquest, important witnesses such as Billy McCulkin, Janet and Juneen Gayton, Peter Nisbet, Bruce White, [and] Trevor Menary gave evidence;

- The applicant was arrested on these warrants on 7 July 1980 and questioned that day about the matters having been told that it related to the murder of Mrs McCulkin and her daughters in 1974 and the applicant was extradited back to Queensland on 8 July 1980;

- An indictment was presented against the applicant and O'Dempsey in 1980 but a *nolle prosequi* was entered in 1981;

- Apart from the addition of the evidence of Trevor McGrath, Peter Hall and Douglas Meredith and Keith Meredith in relation to the Torino, essentially the brief of evidence in relation to the applicant is the same as it was in 1980;

- There were a number of investigators of the original missing person's report in 1974 of whom Bruce White and Christopher Furlong are still available to give evidence;

- The investigators who reinvestigated the matter leading up to the inquest were Trevor Menary and Alan Marshall of whom Marshall is still available to give evidence."

[10] The respondent notes that as early as 19 January 1974 the applicant was aware that he was suspected by Mr McCulkin of being involved in the disappearance of his family on 16 January 1974, knew that reports were circulating that he had been seen at the Dorchester St house on the night the McCulkins disappeared and knew that Mr McCulkin was intending to name him to the police as the person "Shorty" who had been seen at the house that night. Also, as early as 29 February 1976 the applicant had been questioned by police about his whereabouts on 16 January 1974.

[11] The respondent also points to the fact that there was an inquest at which a number of witnesses were called and cross-examined, and consequently there was a brief of evidence provided to the applicant. He had the opportunity to cross-examine witnesses at the inquest but did not do so because he was avoiding police.

The course of proceedings

[12] The applicant was indicted for murder in 1980, but a *nolle prosequi* was entered in 1981 and he did not face trial. It is reasonable to assume, and no submission to the contrary is made by the applicant, that in the course of those proceedings the applicant and his then legal advisers had access to evidence and the opportunity to consider the contents of

police notebooks, witness statements and other documents which had formed part of the inquest or which formed part of the prosecution case against him.

[13] Investigations continued and in 2014 investigators interviewed potential witnesses including Mr Peter Hall (who was an associate of the applicant in the 1970s) and Mr Douglas Meredith (who also associated with the applicant and Thomas Hamilton during that period). In the light of additional evidence, including the evidence of Mr Hall and Mr Meredith, the applicant and Mr O'Dempsey were charged with the current offences in October 2014. A committal proceeding took place between 23 November and 1 December 2015. An indictment was presented on 11 December 2015. The matter was listed for trial on 7 April 2016 and trial dates commencing 7 November 2016 were allocated.

[14] An application for separate trials was heard on 20 July 2016 and an order for separate trials made on 11 August 2016. The applicant's pre-trial applications in relation to evidence were heard in respect of an issue of statutory interpretation on 11 October 2016 and principally on 12 and 13 October 2016. These applications have been the subject of separate rulings and the rulings which have admitted evidence to which objection was taken anticipate that the evidence will be subject to various directions and warnings. Importantly for present purposes, these include the rulings admitting the evidence of Mr Peter Hall and Mr Douglas Meredith. However, the directions and warnings extend to other evidence of which the applicant has been aware for decades.

Asserted prejudice

[15] The applicant's written submissions on the stay application deal with the evidence of various witnesses and reiterate certain contentions made in separate applications in respect of that evidence. In separate rulings, I have not accepted some of these submissions. For example, the applicant submits that Mr Hall's evidence is "highly questionable because of the methods employed by police to obtain it". I did not find the methods employed by police to obtain it improper and concluded that challenges to the reliability of Mr Hall's evidence, including any as to the methods by which it was obtained, could be the subject of effective cross-examination of Mr Hall and police witnesses and directions at trial.

[16] Although it is appropriate in these reasons to respond to each category of evidence which the applicant's written submissions contend is prejudicial, such an approach should not detract from the critical submission that the proposed directions about this evidence will not be sufficient in the end to allow the applicant to have a fair trial and that, as a result, the proceeding should be stayed.

The evidence of Mr Hall

[17] I do not accept the applicant's submission that he suffers "incurable prejudice" because of the delay in the evidence of Mr Peter Hall coming to light. Although Mr Hall's evidence has recently come to light, I am not persuaded that the applicant has been denied the opportunity to challenge, and in that sense "disprove", Mr Hall's account of the applicant's whereabouts at the time of the disappearance of the McCulkins. As noted, the applicant's presence at the McCulkins' house the night before they disappeared was the subject of reports by the Gayton sisters. Mr McCulkin heard about this on 19 January 1974 when he spoke to one of those girls and he almost immediately confronted the

applicant. This confrontation was the subject of Mr McCulkin's 5 February 1974 witness statement and Mr McCulkin was cross-examined at an inquest in 1980. The evidence indicates that the applicant left his usual residence soon after being confronted by Mr McCulkin, presumably out of a concern that the police wished to speak to him about the disappearance of the McCulkins and whether he was at the McCulkins' residence. Therefore, the applicant had every reason to consider his movements on the critical dates, including to whom he had spoken about what he had done and where he had been. He was therefore able to assemble evidence to support an alibi at a very early stage and to consider which of his associates (including Mr Hamilton, Mr Hall, Mr Meredith and others) might support his story.

[18] Police spoke to the applicant in South Australia in 1976 and it was clear that he was a suspect. This again gave him an opportunity to consider his position and assemble available evidence. The same is true in respect of the period after his arrest for murder.

[19] The delay in Mr Hall's evidence coming to light has not occasioned incurable prejudice, and the consequences of that delay can be the subject of directions that are adapted to achieving a fair trial.

The unavailability of Thomas Hamilton

[20] Thomas Hamilton died early in 1975 and the prosecution seeks to rely upon evidence of statements allegedly made by the applicant to Mr Hamilton, as reported by Mr Hamilton to Mr Meredith. I have allowed this evidence.

[21] Mr Hamilton's death means that he is not available to give any potentially exculpatory evidence. I should add that the applicant does not suggest that, if he had been alive, Mr Hamilton would have given such exculpatory evidence, based upon what he told the applicant or others. For example, the applicant does not contend that Mr Hamilton was an alibi witness or was likely to give evidence which contradicts Mr Hall's evidence. Still, the possibility that Mr Hamilton might have given exculpatory evidence is a potential source of prejudice, as is the inability to now test, by cross-examination of Mr Hamilton, the accuracy of his recollection of statements allegedly made to him. Warnings about the prejudice that the applicant encounters in this regard should be the subject of directions at trial. It would be erroneous to assume that those directions completely ameliorate the identified prejudice. However, the reception of Mr Meredith's evidence does not deprive the applicant of a fair trial.

Statements to police

[22] The availability of notes and other records in relation to statements the applicant allegedly made to Queensland and South Australian police has been the subject of separate rulings by me. Some contemporaneous notes, such as Mr White's original notebook, seemingly are not now available. Those notes and other material presumably were accessible in 1980 – 1981 and it is not said that the applicant did not or was not able to get copies of those documents in the course of his original prosecution.

[23] The records that do exist permit the applicant to cross-examine the police. The two relevant South Australian police officers, Mr Munro and Mr Attwood, are alive and able to give evidence. They gave evidence before me on 13 October 2016. Mr White, a retired Queensland police officer who interviewed the applicant in the company of Mr Swindells,

is alive and able to give evidence. He was cross-examined at the committal. Mr Swindells has died. However, I do not consider that his death or the absence of some contemporaneous notes is a sufficient prejudice to justify a stay. I was not persuaded that these matters justified the exclusion of evidence about the statements the applicant allegedly made.

[24] I should add that three other police officers who were involved in early investigations, Detectives Sullivan, Cook and Hicks are now dead and cannot now be cross-examined about aspects of the early investigation. However, statements and reports made by them and witness statements are available. I do not consider the fact that these police officers are not now available for cross-examination is a significant source of prejudice to the applicant. One reason for this is that there is a detailed running sheet (albeit one which is difficult to read in parts) which records early investigations and a running sheet of Mr Hicks' involvement. Another is that one of the original investigators, Mr White, is available for cross-examination.

Evidence placing the applicant at the McCulkin residence

[25] Juneen and Janet Gayton gave statements at an early stage, were cross-examined at the inquest and are available for cross-examination. Their evidence has always formed part of the case against the applicant and I am not persuaded that the applicant is particularly disadvantaged by the prosecution continuing to rely upon their evidence.

[26] Mr McCulkin is not available for cross-examination. If the jury is persuaded by evidence, such as the evidence of one or both of the Gayton sisters or the evidence of Mr Hall, that the applicant was at the McCulkin house on the relevant night, then the Crown will rely upon the evidence of Mr McCulkin's dealings with the applicant on 19 January 1974 when he denied having been there, as a lie. The evidence of Mr McCulkin cannot now be tested by cross-examination. However, Mr McCulkin was available to be cross-examined by the applicant at the inquest and he was in fact cross-examined by other counsel at the inquest. I do not consider that the applicant's present inability to cross-examine Mr McCulkin unfairly prejudices him.

[27] Other potential witnesses who are alive, such as Mr Keith Meredith, are available to give evidence about an alleged confrontation between Mr McCulkin and the applicant on 19 January 1974. As I understand it, the applicant will explain his leaving Brisbane shortly afterwards on the basis that Mr McCulkin had accused him of being involved in the disappearance of McCulkin's family, a matter which he denied then and still denies. It seems improbable that if Mr McCulkin was still alive, his evidence of the applicant's denial of involvement and denial of having been at the Dorchester St address, as Ms Gayton claimed he was, would be any different. In short, if Mr McCulkin was still alive it is unlikely that the applicant would now be challenging Mr McCulkin over the assertion that the applicant denied being at the house.

[28] The applicant also points to his inability to cross-examine Mr McCulkin about an alleged confession which Mr McCulkin is said by one person to have made in August 2011. For the reasons given in my separate ruling in relation to Mr McCulkin's evidence, the evidence from this witness is simply unbelievable. In my view, the witness is so discredited that the prosecution is acting appropriately in not calling her as a witness. Of course, the defence is at liberty to call her.

The evidence of Estelle Long and Mr McCulkin's work records

[29] Ms Long is available to give evidence. It seems that she was not interviewed until early 2015. Her association with Mr McCulkin was known to police at an early stage. She is able to give evidence, consistent with other evidence including the running sheets, about Mr McCulkin's attempts to find his family. She recalls events. It is not as if she is being asked to recall, for the first time, some matter which was unimportant to her in early 1974. Her evidence tends to corroborate that of Mr McCulkin.

[30] Mr McCulkin gives an account of having worked on a building site and there is no reason to doubt that he did. The absence of employment records is not, in my view, a significant source of prejudice. The fact that he was working on that site is supported by the evidence of William Dwyer and Ms Long, as is his habit of drinking after work and meeting Ms Long at the Federal Hotel, from where they would go home.

The evidence of Paul Dubois

[31] This is the subject of a separate ruling. Mr Dubois is available to give evidence and can be cross-examined about his recollection of a conversation which occurred many years ago, including its timing. The applicant is not unfairly prejudiced by his evidence.

Photographic evidence

[32] The points raised in the applicant's submissions are responded to in the respondent's submissions, which I accept. These matters were not raised further in oral submissions. In short, the evidence suggests that the Dorchester St house was secured from 16 January 1974 until examined by police and that photographs were taken on 4 February 1974. This makes it likely that the photographs show the house as it was on 16 January 1974, save for some items which Mr McCulkin admits he moved after breaking in to find his family missing on 19 January. The photographs accord with the descriptions of the house given by witnesses.

Running sheets

[33] The running sheet is available. Although part of it is hard to read, the original is available for inspection. There also is material about the investigation which Inspector Basil Hicks conducted and this is detailed in his 37 page running sheet. In my view, the applicant is able to gain an understanding of the nature of the initial police investigation.

Fingerprint evidence

[34] A statement was obtained dated 4 June 1979 from Mr Howard, who went to the McCulkin residence at 6 Dorchester St, Highgate Hill on 4 February 1979, made an examination for fingerprints and developed numerous latent fingerprint "fragments". At the time he made his statement he said that he had "not been able to identify any of these latent prints".

[35] Mr Howard is alive and able to give evidence, if required. However, he was not on the prosecution's list of witnesses because it seemed that the fingerprint fragments could not be identified and did not assist either way.

[36] I take Mr Howard's statement to possibly indicate that the "fragments" did not permit a proper comparison. It is also open to the interpretation that any comparison which was

possible with fingerprints of the applicant, Mr O'Dempsey and other individuals was inconclusive. The matter is capable of being explored with Mr Howard, if required. I am uncertain whether any photographs of the fingerprints are still available. They have not been disclosed and so they may have been lost.

[37] This is not new evidence which has recently come to light. Mr Howard was capable of being examined at the inquest and is still available to be examined, if required.

Will continuation of the prosecution result in an unfair trial?

[38] I accept the statement of principle of Fitzgerald P in *Johannsen* that the "paramount public interest in the exercise of the court's criminal jurisdiction is the avoidance of injustice".[7] The prosecution should be permanently stayed if its continuation will result in the holding of an unfair trial. Also, as Fitzgerald P observed, there is a strong predisposition towards permitting prosecutions to proceed, with procedural and other rulings and directions moulded to achieve a fair trial.[8]

[39] Tests for determining whether the continuation of a prosecution will constitute an abuse of process have been formulated in different ways. A broad test, endorsed by Mason CJ, Deane and Dawson JJ in *Walton v Gardiner* is to ask whether the Court is satisfied that the continuation of the proceedings would be "so unfairly and unjustifiably oppressive" as to constitute an abuse of process.[9] In the present case, there is no suggestion that the prosecution is influenced by an improper purpose. The prosecution case cannot be said to be a weak one. The critical issue is whether the delay in charging the applicant has resulted in such unfair prejudice that the prospect of his now having a fair trial has been diminished to such an extent that the prosecution should be regarded as an abuse of process. In deciding the ultimate issue of whether the continuation of the prosecution will culminate in an unfair trial, or there is an unacceptably high risk that it will do so, the factors referred to in [6] above need to be considered and weighed.

[40] The applicant placed particular reliance on *R v Johannsen & Chambers*. I do not consider that it is particularly productive to compare the facts of that case to this. Shortly stated, the *Johannsen* case concerned:

(a) a 20 year delay in commencing a prosecution, being a delay for which the prosecution was entirely responsible;

(b) new evidence in the form of a witness who corroborated some aspects of another prosecution witness' evidence;

(c) a weak prosecution case against Johannsen.[10] Even with that new evidence. Fitzgerald P described the information still available as "limited and superficial", with the prosecution case being critically dependent upon the two witnesses I have mentioned, and virtually no evidence against Johannsen beyond his presence, if those witnesses were believed.[11] Thomas J described the prosecution case at its

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7 *R v Johannsen & Chambers* (1996) 87 A Crim R 126 at 134; [1996] QCA 111.
8 Ibid at 135 cited with approval in *R v Ferguson; Ex parte Attorney-General (Qld)* (2008) 186 A Crim R 483 at 491 [24]; [2008] QCA 227.
9 *Walton v Gardiner* (1992-1993) 177 CLR 378 at 392.
10 The alleged principal offender Chambers had died by the time of the appeal.
11 At 135.

best as "a marginal circumstantial case afflicted by numerous inconsistencies and competing hypotheses".[12]

[41] In this case, a previous prosecution for murder was brought, but not continued because of the absence of the kind of evidence which Mr Hall is now prepared to give. Mr Hall has explained his reluctance, until recently, to give evidence incriminating the applicant. As a result, this is not a case in which the delay is the fault of the prosecution in not prosecuting on the basis of evidence which was always available to it. The prosecution has always had a strong case implicating the applicant in the disappearance of the McCulkins and a circumstantial case implicating him in their murders. With the addition of Mr Hall's evidence in particular, it now has a stronger case implicating the applicant in their murders. It is unlike the weak case which always existed in *Johannsen* and which was not much improved in that case by a witness giving new evidence that simply corroborated, to some extent, an existing witness.

[42] Ultimately, the applicant submits that his trial is positively prejudiced by:

> "a. The delay in the evidence of Hall coming to light such that he can do little but attack the credit of the witness.
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> b. Now deceased witnesses whose evidence cannot be tested by cross-examination or whose potentially exculpatory evidence cannot be put before the jury.
>
> c. Contemporaneous statements that were not taken from witnesses who are still alive.
>
> d. Notes that are no longer available of conversations said to contain admissions against interest.
>
> e. The incompleteness of the initial police investigation and records of it.
>
> f. Ambiguity in the fingerprint and photographic evidence."

I have addressed these matters and, for the reasons given, I do not consider that the prejudice to the applicant, either individually or collectively, is as significant as the applicant contends.

[43] In summary:

(a) If Mr Hall had come forward sooner (and there is no evidence that he would have done so if approached by police to assist even decades ago), then the applicant would still have been compelled to attack his credit and reliability. However, the applicant was accused at a very early stage of being implicated in the disappearance of the McCulkins and therefore had occasion to consider his whereabouts on the night they disappeared and in the days following. He was on friendly terms with Mr Hall and others at the time, and well-placed to enlist their support and evidence in respect of his movements and what he had told them about his movements. I have found that the delay in Mr Hall's evidence coming to light has not occasioned

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[12] At 142.

incurable prejudice. The consequences of that delay can be the subject of directions that are adapted to achieving a fair trial.

(b) Both the prosecution and the defence may be said to be prejudiced by the death of witnesses whose evidence cannot be tested by cross-examination. However, and so far as prejudice to the applicant is concerned, some witnesses were cross-examined at the inquest and there are available witnesses who can give evidence about matters which are the subject of evidence from deceased witnesses, such as William McCulkin. For example, other witnesses can give evidence about his movements on critical days, the state of the McCulkins' house, his searches for his family and his dealings with the applicant. I do not make light of the inability to test evidence by cross-examination. However, not every disadvantage to an accused (for example, the death of a favourable witness or statutory provisions for the admissibility of evidence from a deceased witness which incriminates the accused) can be said to be unfair such as to make a continuing prosecution an abuse of process.[13] The justice system does not treat a trial as unfair because a witness who might have been called and who might have assisted the defendant has died, or because a witness who gave a witness statement has died and representations contained in that witness statement are able to be admitted pursuant to the provisions of the *Evidence Act*. The possibility exists that Thomas Hamilton may have given exculpatory evidence if he was alive, just as the possibility exists that he may have, like Mr Hall, implicated the applicant. In circumstances in which Mr Hamilton died in January 1975, his death and the loss of possibly exculpatory evidence cannot be attributed to a delay in the prosecution. If Douglas Meredith's evidence is accepted, then Mr Hamilton may have given incriminating evidence. Alternatively, he may not have been prepared to give evidence implicating the applicant and this may have been to the applicant's advantage in seeking to disprove Mr Hall's account. I take account of the possibility that Mr Hamilton may have provided exculpatory evidence. It is far from clear that he would have and so I cannot conclude whether his death has been a disadvantage to the prosecution or to the applicant.

(c) The fact that contemporaneous statements were not taken from Ms Long is not a significant source of prejudice.

(d) For the reasons given, the fact that certain notes are no longer available is not a sufficient prejudice to justify a stay.

(e) The state of the investigation is recorded in running sheets along with police statements, including statements from some police officers who are available as witnesses. The investigation was open to examination at an inquest. In addition, the applicant has not explained why any incompleteness in the initial investigation would disadvantage him, rather than the prosecution.

(f) The fingerprint and photographic evidence is not critical and any ambiguity can be addressed in the cross-examination, if necessary, of an available witness.

[44] The kinds of prejudice pointed to by the applicant can be addressed by directions and warnings that ameliorate it in the interests of ensuring the applicant a fair trial.

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[13] See the observations of Fitzgerald P in *Johannsen* at 133.

[45] I am not persuaded that the continuation of the proceeding would be so unfair or unjustifiably oppressive to the applicant as to constitute an abuse of process. Any prejudice occasioned to him by the delay in bringing the charges must take account of the fact that the respondent was alerted at a very early stage to the accusation that he was involved in the disappearance of the McCulkins. He was in a position to muster evidence, including alibi evidence from associates, about his movements. The applicant also had the opportunity to cross-examine witnesses at the inquest, but chose not to do so. Still, important witnesses were cross-examined. Therefore, the prejudice to the applicant is not as great as it would have been had he been confronted, for the first time, decades after the event, with allegations that he was involved in the disappearance and murder of the McCulkins in 1974.

[46] In assessing the requirements of fairness to the accused, I am not persuaded that any prejudice from delay has significantly reduced his prospect of now having a fair trial. The risk of injustice is not such that the further prosecution of the proceeding should be regarded as an abuse of process.

[47] The prosecution case cannot be described as a weak one and there is a legitimate public interest in the disposition of a charge of murder. Public confidence in the administration of justice would not be maintained if such a prosecution was stayed merely on the basis of a possibility that the applicant will be prejudiced by the continuation of the prosecution.

[48] Ultimately, the issue is whether the continuation of the prosecution will culminate in an unfair trial. I am not persuaded that it will. In balancing the requirements of fairness to the accused and other important public interests, I am not satisfied that the continuation of the proceeding will be so unfair as to constitute an abuse of process. A permanent stay of the prosecution is not required to avoid injustice to the applicant. Having regard to the delay in the prosecution, the reasons for it, the consequences of that delay and the factors identified in leading authorities such as *Walton v Gardiner*, I decline to exercise the discretion to order a permanent stay of the prosecution.