SUPREME COURT OF QUEENSLAND

CITATION:	*R v O'Dempsey* [2017] QSC 100
PARTIES:	**R** (respondent) **v** **VINCENT O'DEMPSEY** (applicant)
FILE NO:	SC No 1046 of 2015
DIVISION:	Trial Division
PROCEEDING:	Pre-trial application to exclude evidence of criminal disposition
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	3 March 2017
DELIVERED AT:	Brisbane
HEARING DATE:	13 and 14 December 2016
JUDGE:	Applegarth J
ORDER:	**Various rulings**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – PROPENSITY, TENDENCY AND CO-INCIDENCE – ADMISSIBILITY AND RELEVANCY – PROPENSITY EVIDENCE – GENERALLY – where the statements of witnesses discuss evidence relating to the applicant activities similar to that which is the subject of the counts charged on the indictment – where the statements of witnesses relate to the applicant's prior criminal conduct – where the statements of witnesses present evidence of a disposition towards unlawful conduct – whether the evidence should be excluded – whether the probative value of the evidence outweighs its prejudicial effect *DPP v Boardman* [1975] AC 421, cited *Pfennig v The Queen* (1995) 182 CLR 461, cited

Phillips v The Queen (2006) 225 CLR 303, cited
R v MAP [2006] QCA 220, cited

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

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

[1] The applicant seeks the exclusion of the evidence of various witnesses on the ground that it reveals a disposition towards criminal conduct or bad character, and its resulting prejudicial nature outweighs its probative value.

[2] The applicant seeks to exclude parts of the evidence of:

- Warren Peter McDonald, as it appears in a statement he gave on 5 March 2015;
- Kerri-Ann Scully, as it appears in a statement she gave on 14 August 2014; and
- Julie Ann Fenton, as it appears in a statement she gave on 12 September 2014.

[3] The applicant brought similar applications with respect to the evidence of Thomas Edward Martin and Deidre Ann Richards. The applications concerning Mr Martin's evidence were or are to be agreed between the parties. At the hearing of these matters, I made a ruling allowing the application concerning Ms Richards' evidence and excluding the evidence that appears in paragraph [18] of her statement dated 6 October 2014.

[4] The contested evidence includes alleged admissions made by the applicant to McDonald and to Scully on different occasions. Broadly speaking, the applicant seeks to exclude three types of evidence:

(a) evidence that the applicant has been involved in activities similar to that which is the subject of the counts charged on the indictment;

(b) evidence relating to other prior criminal conduct, including drug activity for which the applicant has been charged on a separate indictment and in respect of which a prosecution is ongoing; and

(c) evidence of a disposition towards unlawful conduct, particularly of the applicant being suspicious or wary of police, and attempting to avoid detection by police and association with criminals.

[5] The applicant submits in respect of the first category that the prosecution cannot overcome the presumption that such evidence is inadmissible because of its prejudicial

effect. This is because it cannot prove that the "similar fact evidence" has a strong degree of probative force. Generally, in respect of each of the above categories of evidence, the applicant submits that the prejudicial effect of the evidence outweighs its probative value. He submits that the prosecution cannot show a sufficiently specific connection to the charges the subject of the indictment to say that these acts and statements are probative of, or even relevant to, those offences.

[6] The respondent submits that the evidence has a sufficient connection to the charges. Its primary submission is that this evidence forms part of the narrative of the applicant forming relationships of trust with the witnesses McDonald and Scully, and later making admissions to them about his involvement in the abduction and murders of the McCulkins in 1974. In essence, the respondent seeks to lead much of the evidence at trial to explain why the applicant would have confessed to these two people.

[7] McDonald says the applicant made admissions in the course of engaging in other illegal activity, namely cannabis production. The respondent submits the circumstances of the admissions and some of the applicant's conduct directly related to that activity was because the applicant was seeking to instil fear or respect in the workers on the cannabis crop, including McDonald. The fact that they were engaged in producing a cannabis crop together, at the time the admissions were made, is said to be an inescapable part of the narrative of how the admissions came to be made.

[8] In respect of Scully, the respondent submits that the confessional statements were made in circumstances where the applicant was boasting about being involved in, and having knowledge of, criminal activity and "criminal culture". He is alleged to have directed her to buy a book that mentioned his involvement in the killing of the McCulkins and then, when reading it with Scully, to have admitted to their murders. Similarly, the applicant's admission to other criminal activity, and his conduct, is said to be inextricably linked to the circumstances of the admission of guilt.

Relevant principles

[9] The principles governing the admissibility of "similar fact evidence", and evidence of criminal conduct and disposition were considered by the High Court in *Pfennig v The Queen.*[1] Mason CJ, and Deane and Dawson JJ, distinguished between similar fact evidence and other evidence of past criminal conduct or propensity. Evidence of "mere propensity":

> "…like evidence of a general criminal disposition having no identifiable hallmark, lacks cogency yet is prejudicial. On the other hand, evidence of a

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[1] (1995) 182 CLR 461.

> particular distinctive propensity demonstrated by acts constituting particular manifestations or exemplifications of it will have greater cogency, so long as it has some specific connexion with or relation to the issues for decision in the subject case."[2]

[10] Propensity evidence will only be admissible if its probative value exceeds its prejudicial effect. However, the Court in *Pfennig* further explained that because that evidence is circumstantial in nature, its probative force will not outweigh its prejudicial nature unless there is no reasonable view of the evidence consistent with the innocence of the accused in the context of the prosecution case. Its admissibility therefore "depends upon the improbability of its having some innocent explanation".

[11] Their Honours went on to affirm, with reference to *DPP v Boardman*,[3] that propensity evidence must have a "high degree of relevance" to be admissible,[4] namely there must be a specific connection between the evidence of bad disposition and the offences alleged. Such a connection "may arise from the evidence giving significant cogency to the prosecution case or some aspect or aspects of it."[5]

[12] In respect of similar fact evidence more specifically, Keane JA (as his Honour then was) in *R v MAP*[6] applied the High Court's decision in *Phillips v The Queen*,[7] stating that "similar fact evidence is, prima facie, inadmissible". Because of this presumption against the admission of similar fact evidence, the High Court had held in *Phillips* that its admission is "exceptional and requires a strong degree of probative force".

[13] Reference to "similar fact evidence" is often misleading since the terminology is used not to refer to the special category of evidence which is admitted despite its disclosure of offences other than those charged, but to evidence which is inadmissible evidence of past criminal acts, other forms of misconduct, bad character or a discreditable disposition.

[14] Whilst "mere propensity" evidence is inadmissible, in some circumstances propensity evidence may be admitted where it establishes guilt other than via disposition. Still, even where the evidence is prima facie admissible, it will not be admitted unless it has sufficient probative force to outweigh its prejudicial effect. Consideration must be given

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2 Ibid at 483-484.

3 [1975] AC 421.

4 Ibid.

5 Ibid.

6 [2006] QCA 220.

7 (2006) 225 CLR 303.

to the risk of its impermissible use as showing the accused's propensity or disposition to commit crime.

[15] In some cases, the revelation that the accused has committed a crime is inherent to the background of the facts of the case.[8] The commission of a crime may be part and parcel of the narrative about how another crime was committed, or be the occasion upon which an admission to another unrelated crime is made. For example, evidence of a confession made during the course of the cultivation of a cannabis crop to an unrelated murder, committed years earlier, necessarily will disclose involvement in the crime of cultivating cannabis. Reference to the place and the occasion when the confession was made is an essential part of the narrative of the confession, just as if the confession had been made during the cultivation of a sugar cane crop. The reference to the production of cannabis is not made for the purpose of showing a propensity to commit murder. The discreditable conduct of the accused in being involved in cannabis production does not involve evidence being tendered for the purpose of showing that the accused had a criminal disposition or a propensity that made it likely that he was guilty of the crime charged, namely murder. The evidence is not tendered so as to encourage the jury to engage in an impermissible line of reasoning.[9]

[16] Despite this, the danger exists that the evidence will be used in a prejudicial way. Hence, if the evidence is admissible, there should be a warning against the forbidden line of reasoning and against incidental prejudice. In such cases, the court is concerned about the probative force of the evidence which is proposed to be admitted and its prejudicial effect. The risk exists that, notwithstanding a warning, a jury may too readily infer that the accused has committed crimes in the past or has a disposition to commit crimes and will not attempt conscientiously to determine the accused's guilt of the crime charged.[10] Therefore, even if the evidence is probative, a discretion exists to reject it, if its probative value is insufficient having regard to its prejudicial effect.

McDonald's statement dated 5 March 2015

[17] By way of overview, McDonald's statement relates to the circumstances under which he came to know the applicant, when McDonald was around 24 years old. McDonald's father and the applicant were long-term friends. McDonald's father spent a lot of time with the applicant and the applicant would get McDonald to do things for him. As McDonald described it, "I was his goffer".

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8 *Cross on Evidence*, Australian Edition [21040].

9 At [21050].

10 At [21145].

[18] The prosecution has evidence which discloses that the applicant was involved in a number of cannabis productions. However, the parties agree that McDonald will give evidence about only one of them, being one which occurred on property owned by McDonald. This evidence is led, without objection, on the basis that it provides essential background to the circumstances in which the applicant is alleged to have made admissions to McDonald about the murders of the McCulkins. The relevant admission is contained in paragraph 16 of McDonald's statement:

> "While working on that crop I recall a conversation with Vince about the murder of the McCulkins. It was my job to drive Vince places and to go and collect stuff for the crop site. I remember this day we were in my yellow XF falcon ute with Vince. We were going back into Warwick it was while the crop was on and close to harvest time. I think I was dropping Vince off at home in Warwick for his weekend off. It was close to harvest time and everyone got nervous then. Vince was talking about people giving people up or talking out of school and how we have to be careful about it and not let anybody leave the crop and that's how the conversation started. Vince said to me 'you need a notch on your gun', I asked him what he meant. He said 'you need a kill, when I was your age I had several notches on my gun'. He was talking about me getting experience killing someone. He said that he killed the McCulkins and that Shorty was nothing but a rapist. I took that to mean that Vince had killed the McCulkins and Shorty had raped them. I asked him if he was worried and he said 'they will never get me because they will never find the bodies'. At that end of that conversation he said 'If you want to live a long and healthy life never repeat anything that would get you or anyone else into trouble'. I told him I would never repeat a word of what he said. It was around about this time we got to Warwick. I knew that Vince was a suspect for the McCulkins because it had been spoken generally about the camp fire. I also believed the threat at the end of the conversation because Vince doesn't talk shit."

[19] The making of these admissions is contested and the prosecution reasonably anticipates a defence argument that it is improbable that the applicant would make such a confession. Therefore, the prosecution seeks to lead evidence of the relationship between the applicant and McDonald, including evidence that McDonald was groomed by the applicant and trusted by him.

[20] There are various parts of McDonald's, Scully's and Fenton's evidence which fall into the third category identified above, and more specifically relate to the applicant being suspicious or wary of police, and attempting to avoid detection by police. This is said to cast the defendant in a negative light.

[21] Objection is also taken to paragraphs [23] of McDonald's statement, which is submitted to contain prejudicial evidence of the applicant's use of a revolver, suggestive of criminal activity in relation to the use of a revolver, and quite possibly murders unrelated to the McCulkins, and at paragraph [28] evidence of a past association with Dubois in criminal activity.

[22] A number of the objections to McDonald's statement were resolved prior to the hearing on 13 December 2016 or in the course of it. Some of the objections relating to motive were deferred for further argument in the light of additional statements by McDonald in relation to that matter. I reserved my rulings on other paragraphs and I will address each in turn.

Rulings - McDonald

[23] In paragraph [6] of McDonald's statement, he refers to occasions when he would drive the applicant places. He says the applicant "didn't want to drive his car because he always thought it was bugged", was "constantly concerned about security and being caught by police" and would say things to the effect of "don't talk here it may be bugged". He indicates the applicant would often use the phrase "Loose lips sink ships" and would teach him things about not having cash or guns in his house. McDonald says he is aware that the applicant had guns and cash hidden in different, but readily accessible, places.

[24] Paragraph [6] is relevant to the relationship between the applicant and McDonald which, in turn, is relevant to the likelihood that the applicant would make the confessional statements contained in paragraph [16] of McDonald's statement. To the extent the paragraph discloses that the applicant was suspicious towards the authorities and was concerned about coming to the attention of police, it carries the implication of his being involved in illegal conduct, or at least of being concerned about being falsely implicated. The applicant's reported concerns about security and being caught by police are not expressly stated to relate to the first cannabis crop which is to the subject of evidence. However, in circumstances in which evidence is to be given about the applicant's involvement in that crop, and of his having recruited McDonald for that purpose, if the evidence in paragraph [6] was given in that specific context it would be less prejudicial than it might otherwise be. Paragraph [6] is relevant and probative evidence of the nature of the relationship between the applicant and McDonald, and was said in argument to be the way in which the applicant groomed McDonald. I will allow paragraph [6] up to and including the words "getting his mail" if it is given in the specific context of the first crop. I consider that in such a context its probative value exceeds its prejudicial effect. The next sentence is prejudicial in its inference to guns and will be excluded. The balance of paragraph [6] is not to be led for the reasons canvassed during argument.

[25] The objection to the last two sentences of paragraph [7] was withdrawn.

[26] In paragraph [9] of his statement, McDonald recalls the applicant giving him "one of his" true crime books to read. The implication, the applicant says, is that he has multiple true crime novels and that may lead a jury to think he is of bad character.

[27] The fact that the applicant owned true crime books is not prejudicial. Most readers of true crime books, like most viewers of true crime programs on television, are likely to be law abiding citizens. The objection to paragraph [9] was not so much that this paragraph was prejudicial but that it was irrelevant. Reading true crime books does not indicate a criminal disposition. The fact that the applicant allowed McDonald to borrow his books to read is a small part of the narrative about their relationship. The fact that the applicant read true crime books also has a relevance to the circumstances under which he allegedly confessed to Ms Scully. I will allow paragraph [9].

[28] At paragraph [23] of his statement, McDonald recalls an occasion at the applicant's alpaca property. He says that the applicant showed him a gun in his office and told him that "you have got to have a revolver so you don't leave the shell behind".

[29] This last line of paragraph [23], whilst relevant to the grooming of McDonald and the climate of fear which the applicant was seeking to instil in connection with the production of the cannabis crop, is evidence of propensity or disposition to use a revolver to kill. It does not qualify as admissible similar fact evidence.

[30] There is no evidence that the McCulkins were shot with a revolver. The contested evidence reveals a criminal disposition to use a hand gun. There is no "identifiable hallmark" linking it to the McCulkin murders. It amounts to inadmissible "similar fact evidence" and evidence of prior criminal conduct. Its prejudicial effect outweighs its probative value.

[31] The exclusion of the last sentence at paragraph [23] leaves the balance of the paragraph concerned with an occasion upon which the applicant showed McDonald a gun in his office. While the balance of paragraph [23] is less prejudicial than the last sentence, the possession of a gun is at least indicative of past or future criminal activity. The relevant test is not whether the relevant sentences add much to the prosecution case about the relationship between the applicant and McDonald. The prosecution is not limited to calling only a few pieces of evidence in this regard. It can seek to lead a variety of evidence to demonstrate the relationship of trust that developed. It might also be said that this evidence does little more harm than the disclosures in paragraph [16] about the applicant having had "several notches on my gun" when he was a young man. However, the evidence in paragraph [23] relates to the applicant's possession of a gun at the relevant time, not when he was young. Its prejudicial effect outweighs its probative value and I rule that the contents of paragraph [23] should not be led at the trial.

[32] At paragraph [28], McDonald describes an occasion on which he gave around $12,000 worth of cannabis belonging to the applicant to Garry Dubois, who the Crown charged jointly with the offences on this indictment. McDonald says that when the applicant found out he "roused" on him, and said he should have checked with him first. McDonald says the applicant told him "He and Shorty did things years ago and it put him in a bad position, Shorty is nothing but a fucking rapist".

[33] This paragraph had greater potential to prejudice the applicant at a time when the applicant was facing rape charges in these proceedings. However, the rape charges against him have been stayed.

[34] The respondent argues that the evidence indicates that the applicant and Dubois owed one another something because they had done some disreputable acts in the past. The reference to "Shorty being nothing but a fucking rapist", when taken with the alleged admission in paragraph [16] is said to indicate that this comment related to the McCulkins. I do not agree. A reference to "Shorty being nothing but a fucking rapist" might relate to, and tend to confirm, the admission in which the applicant is alleged to have said in the context of the McCulkins, namely "Shorty had raped them". However, it is capable of relating to other rapes which Dubois committed. The disreputable acts that the applicant and Dubois allegedly did "years ago" which put the applicant in "a bad position" could be virtually anything. The evidence is suggestive of past criminal conduct. Its prejudicial effect is outweighed by its probative value. The sentences "He and Shorty did things years ago and it put him in a bad position, Shorty is nothing but a fucking rapist" will be excluded.

[35] The balance of the paragraph relates to ongoing dealings between McDonald and the applicant and the applicant's ongoing association with Dubois. I will hear the parties concerning the balance of paragraph [28] since the objection focused upon the material which I have excluded. As presently advised, the paragraph appears to relate to the relationship between the applicant and McDonald and would appear to be relevant, as well as being relevant to a subsisting relationship between the applicant and Dubois, and the $12,000 worth of cannabis appears to relate to the first crop, about which McDonald is to give evidence.

[36] McDonald refers to the applicant on a number of occasions telling him not to talk to police or that the applicant's own practice was to not say anything to police. In paragraph [34], McDonald relates that when they worked together the applicant would always tell him to be careful, to "not talk to anyone about what [they were] doing" and to not use phones. Similarly, in paragraph [43] of his statement, McDonald refers to the applicant saying that he referred to himself as "Mr. No Comment" when talking to police. More specifically, McDonald, in paragraph [38], refers to an occasion in August 2014 when the police raided his house. He says that a few days later, the applicant approached him in

the street and told him, in a "deadly serious" manner, that "the CCC is rounding everybody up and you need to keep your mouth shut or else".

[37] Consistent with my ruling in paragraph [6], I will allow the evidence in paragraph [34] as relevant to the relationship when they worked together on the crop, about which evidence is to be given. Its probative value outweighs its prejudicial effect.

[38] The material in paragraphs [38] and [39] on its face seem referable to investigations into drug production rather than the death of the McCulkins. However, the respondent submits that the CCC investigation and the notice to McDonald (referred to in [38]) related to the McCulkins.

[39] In their present form the paragraphs might be understood to refer to concern about a CCC investigation into more recent drug production or criminal activity unrelated to the McCulkins. If the matter was clarified, then the applicant's request in paragraph [38] to McDonald to keep his "mouth shut or else" might be understood as confirmatory of an admission having been made to McDonald about the McCulkins. I will defer ruling on [38] in the circumstances to enable the evidence to be clarified, if it can be.

[40] Paragraph [39] is suggestive of a police investigation into drug production, not necessarily the crop about which McDonald will give evidence. It seems that police and the CCC were investigating both drugs and the McCulkins at this time. The implication in that the applicant was involved in drug activities, and the prejudicial effect of this evidence exceeds its probative value. I will exclude it.

[41] The first sentence of paragraph [42] is innocuous and I will allow it. Paragraph [42] was the subject of an objection which was withdrawn insofar as it related to evidence about the applicant having talked about having an orange Charger car. Insofar as the objection was made to the applicant giving advice to McDonald about having a plain car which did not stand out, it falls into the same category as paragraph [6] as being probative of the grooming of McDonald and the trust which the applicant placed in him. I will allow paragraph [42].

[42] Similarly, I will allow paragraph [43]. The evidence that the applicant made "no comment" to police is not suggestive of a criminal disposition. It is consistent with the applicant having instructed McDonald to be careful about what he said and of having reinforced this lesson by his own example of making no comments to police when questioned. The prejudicial effect of the applicant adopting such an approach in his dealings with police, which amounts to no more than exercising his right to silence, is slight. The probative value of this and other evidence which illuminates the nature of the relationship between the applicant and McDonald outweighs the slight prejudicial effect of the first sentence at paragraph [43].

Scully's statement dated 14 August 2014

[43] By way of overview, the witness Kerri-Ann Scully was born in 1981 and is the youngest child of Carolyn Scully, who was a friend of the applicant when Kerri-Ann Scully was a child. Carolyn Scully was in a relationship with the applicant when Kerri-Ann Scully was about 10. Ms Scully's witness statement outlines the history of her relationship with the applicant and how, many years later, they formed a relationship and came to live together. The importance of Ms Scully's evidence is that she alleges that during that relationship, and in the course of reading a book called "Shotguns and Standover" which included reference to the murder of the McCulkins, the applicant confessed to her and said "I'm good for it … but they'll never get me on these murders".

[44] As with the issues in relation to the evidence of McDonald, the alleged confession is disputed and the nature of the relationship between the applicant and Scully assumes importance.

Rulings - Scully

[45] In paragraph [7] Scully recalls that as a child the applicant would buy things for her family and he "always had a lot of money". I doubt whether this statement is prejudicial. It relates to a childhood recollection of an adult having lots of money. What a lot of money is to a child is anyone's guess. It is fairly meaningless and, in any case, would not mean that the money was obtained from criminal activities. However, as the reference to "he always had lots of money" adds nothing, I adhere to the view I expressed during oral argument that it does not really prove anything. Although I do not think that it will cause any real prejudice, this statement should not be led.

[46] In paragraph [20] Scully refers to the applicant being cautious and being "very careful about phones, and not really using them". According to Scully, the applicant "thought that cars were bugged and even sometimes the house". As with the evidence of McDonald in relation to the applicant's caution and suspicion, this evidence is relevant to the probability that the applicant would make the confession which he is alleged to have made, and would only have done so to someone who he trusted. It is in a similar category to paragraph [6] of McDonald's statement. The evidence has a relevance. However, unlike McDonald paragraph [6] which will be allowed on the basis that it is referrable to the cannabis production in which McDonald was involved and the grooming of McDonald for that purpose, the contents of Scully paragraph [20] are not concerned with such a recruitment. The evidence is prejudicial in that the applicant's caution shows a general criminal disposition. Its prejudicial effect outweighs its probative value. I will exclude the evidence.

[47] Parts of paragraph [27] are contentious. The applicant does not object to its first four sentences. The relevance of the balance is that it proves that the applicant and Scully spoke about allegations that the applicant was a murderer. The paragraph concerns a discussion in relation to an article in "The Port News". The applicant was dismissive of the publisher of the article, Stokes. One article alleged that the applicant had murdered 15 or 18 people. The applicant is said to have laughed and said "He doesn't even have a clue, he doesn't know anything, I'm good for this many". The applicant is then said to have held three fingers on one hand and repeated it so as to make out the number 33. Ms Scully says that she said "What, thirty-three? Really?" To which the applicant replied "Yep".

[48] The alleged confession to having murdered 33 people is highly prejudicial. Its prejudicial effect outweighs the probative value of the evidence. It will be excluded.

[49] The first two sentences of paragraph [28] relate to the applicant having stated that he had killed 33 people and these two sentences should be excluded along with the highly prejudicial reference to those 33 alleged murders that appear at the conclusion of paragraph [27]. The only remnant of paragraph [28] which would be admissible would be the statement "We had lots of conversations about crime and criminals". If it went any further it would suggest he consorted with criminals. Paragraph [28] falls with [27] and should be excluded.

[50] The fourth sentence of paragraph [29] has been excluded by agreement.

[51] Paragraph [30] relates to how the applicant and Scully came to read the book "Shotgun Standover". This paragraph provides a context for the circumstances in which they came to discuss the part of the book about the McCulkins. I consider that Scully should be able to give evidence about how they went through the book generally over the day with the applicant showing her bits of it and that she was not very interested in it because she did not know the people. I apprehend that the objection is to the evidence of the applicant telling Scully about people he knew, with the possible prejudice of revealing that he knew criminals. I would not regard the sentences in paragraph [30] in which the applicant reveals having known people referred to in the book as highly prejudicial. Nevertheless, these few sentences or parts of the long second sentence add very little and I am inclined to exclude them. The second sentence should simply read "During the day he was going through the book". The words up until "he's still alive" should be excluded.

[52] Paragraph [32] relates to evidence about the applicant telling Scully about the inquest and how he just answered "No comment". I do not regard the evidence that the applicant had exercised his right to not answer questions as highly prejudicial or, indeed, prejudicial at all. It does not reveal a criminal disposition. It should be allowed as part of Scully's

recollection of an important conversation. To exclude it might distort the flow of her evidence about the conversation and its contents.

[53] The objection to paragraph [33] was withdrawn. Paragraph [33] relates to the question of motive which is to be the subject of further submissions. It suggests that the motive was to silence Barbara McCulkin who was threatening to implicate her husband (and others) for the Torino's Nightclub fire.

[54] Finally, objection is taken to paragraph [38] and, as I understand it, the admissibility of this paragraph depends upon the calling of evidence from a witnessed named Hansen**.** I will await advice as to whether the Crown intends to lead this evidence.

Statement of Fenton dated 12 September 2014

[55] Ms Fenton, who was previously married to the applicant, makes a number of statements in her evidence about the applicant's suspicion and wariness. At paragraph [49], she describes the applicant storing cash on a farming property. She says he did not use banks and that he had $30,000 to $50,000 of "ready cash" buried under shipping containers at his farm. She says he had told her she could access the money if necessary, but that he did not want her to have it at the house because "with his reputation someone like him having wads of cash would be suspicious." She said he would hide money and other things under the animal's salt licks as well.

[56] She gives further evidence that the applicant would rarely take his own vehicle anywhere because he believed it could be bugged and that he preferred others to drive him in their vehicles.

[57] Ms Fenton is in a different position to that of Ms Scully and Mr McDonald in that her evidence does not form part of a narrative of forming a relationship of trust. The applicant is not alleged to have made admissions to her of the kind he is said to have made to Scully and McDonald. However, her evidence corroborates both of their evidence concerning the applicant's caution.

[58] The evidence in paragraph [49] is potentially linked to earlier evidence of Ms Fenton who at paragraph [18] recounts how the applicant lived quite comfortably, owned an alpaca farm and did not have a job or other business. She says there never seemed to be any shortage of money. The parties agreed at the hearing on 13 December 2016 that a ruling on paragraph [18] should await the trial, including whether the evidence of cannabis production generating money will fall away as an issue. This may depend upon whether there is a temporal tie between the evidence of the plantation about which evidence is to be given and the appearance of money. The same applies to paragraphs [19] and [20].

Unless the applicant's reported conduct is tied to the cannabis plantation, about which McDonald is to give evidence, it should be excluded.

[59] As for paragraph [49], the evidence that the applicant hid money adds very little. The evidence that the applicant had between $30,000 and $50,000 of "ready cash" may suggest that he was involved in drug production at other times than the first plantation about which evidence is to be given. I will defer ruling on paragraph [49] until greater clarity emerges concerning the evidence at paragraph [18] of Ms Fenton's statement. However, my present view is that its prejudicial effect outweighs its probative value, and it should be excluded.

[60] In addition, the reference to the applicant's "reputation" arousing suspicion is prejudicial since it suggests a reputation for criminality. It should not be led.

[61] Paragraph [53] of her statement simply corroborates the evidence of McDonald, which I found to be admissible, concerning the applicant's caution (at least in relation to the drug plantation in which McDonald was involved). If McDonald is challenged about this then it would appear to be open to the respondent to call this evidence from Ms Fenton. I did not understand Senior Counsel for the respondent to argue otherwise if I ruled that McDonald's evidence could be given.

Miscellaneous objections re McDonald

[62] Paragraph [25] of McDonald's statement is only relevant to the extent it establishes that he knew Dubois, and thereby sets the scene for [26], which was to be the subject of checking between the parties.

Miscellaneous objections re Scully

[63] Apart from objections based upon alleged disclosure of criminal disposition, a number of other objections were made to the evidence of Ms Scully. The Crown concedes that the second-last sentence in paragraph [31] is hearsay and will not be led. The last sentence of paragraph [31] is not an expression of opinion, however, the objection can be addressed by evidence from Ms Scully that the book discussed the McCulkin murders and indicated that the applicant and Dubois were responsible for them. This would not make the author's opinion admissible as an expression of opinion. The contents of the book would not be led to prove the truth of its contents, only to provide the context in which alleged confessions were made. The jury would be directed accordingly. The substance of what is said in the last sentence of paragraph [31] provides a context in relation to the alleged confession and the other things which the applicant is alleged to have said about the McCulkins. The same applies to paragraph [36], first sentence.

[64] Objection is taken to paragraph [59] that evidence of contact with Dubois after a long passage of time is irrelevant. The respondent argues that this evidence is consistent with the behaviour of someone who committed an unsolved murder with Dubois staying in contact with him. I accept that the evidence may have relevance on that basis. The evidence is not prejudicial and I will allow paragraph [59].

Miscellaneous points

[65] There were some minor matters addressed in the December hearing about which I should clarify my oral rulings, or record my rulings

Ms Gilbert

[66] The last sentence on page 4 was objected to on the grounds that it is an inadmissible opinion. Earlier in the statement Ms Gilbert outlines the nature of her relationship with Mrs McCulkin. She says that the last time saw Mrs McCulkin was the day after she left work and that she had not seen or heard from Mrs McCulkin since. The last sentence in her statement reads: "I'm quite sure that if she were alive Barbara McCulkin would have made contact with me at some time over the past five years". This sentence is objected to on the grounds that it is an opinion. I consider that the objection is correct and I will disallow this sentence.

Gray

[67] Paragraph [26] relates to locating copies of "The Port News". The contents of those articles was not to be led in evidence. I apprehend that the purpose of the evidence was to support Ms Scully's evidence about the applicant reading those journals and one in particular. I have excluded evidence from Ms Scully in relation to that matter and I apprehend that this means that the evidence in paragraph [26] of Detective Sergeant Gray's evidence will not be led.

[68] Paragraph [74] relates to the applicant's appearance at difference times. The objection is that it amounts to an expression of opinion. I do not agree, and so paragraph [74] is allowed.

Hicks

[69] Page 5 of the late Inspector Hicks' statement dated 4 September 1979 includes the paragraph:

> "I then made a search of the McCulkin house with Bill McCulkin and he found that the only children's clothes missing from the house were the

> clothes that Janet Gayton had seen them wearing on the night of 16 January 1974."

[70] The objection is that this amounts to an expression of opinion formed by McCulkin. I do not agree in circumstances in which it appears that McCulkin and Hicks conducted the search together. Of course, neither Mr McCulkin nor Inspector Hicks could give evidence of what clothes Janet Gayton had seen the McCulkin girls wearing on the night of 16 January 1974. However, Hicks does not purport to give evidence of that. The evidence is not different in substance to a witness who says:

> "The boss asked me to see if there was a number 12 spanner in the shed. I went to the shed with my mate and we searched for the spanner, but could not find it. We found that all the other spanners were there, but the number 12 spanner was missing."

That hypothetical example seems to me to be admissible evidence given by someone who was present when a search was jointly conducted, and of the fact that the number 12 spanner could not be found. It is admissible for that limited purpose. It does not prove that the number 12 spanner existed. That fact would need to be proved. It does not prove when it went missing, or how it went missing.

[71] I will allow the evidence on that basis.

[72] Hicks' evidence is only evidence that, having been told what the girls were wearing on the night of 16 January 1974, the clothes so described could not be found when he and McCulkin searched for them. It is not admissible evidence of what the girls were wearing on the night of 16 January 1974.

Formal rulings and their recording

[73] Other rulings were made in the course of the hearing or had to await checks by the Crown in relation to certain matters. If these matters require clarification then they should be raised at the next pre-trial review.

[74] As previewed with the parties, these reasons have been published without the need for a further appearance. It will be necessary in due course to record more formally (and ideally in a single document) the rulings which I made or previewed on 13 and 14 December 2016, the rulings that appear in these reasons, the resolution of matters which are to be the subject of agreement between the parties and the matters which have been adjourned for further argument about motive.