HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

PETER NORRIS DUPAS APPELLANT

AND

THE QUEEN RESPONDENT

Dupas v The Queen [2010] HCA 20
Date of Order: 15 April 2010
Date of Publication of Reasons: 16 June 2010
M20/2010

ORDER

1. The appeal is dismissed.

2. The respondent's summons is dismissed.

On appeal from the Supreme Court of Victoria

Representation

C B Boyce with L C Carter for the appellant (instructed by Victorian Legal Aid (Criminal Law Section))

J D McArdle QC with B L Sonnet for the respondent (instructed by Solicitor for Public Prosecutions (Vic))

CATCHWORDS

Dupas v The Queen

Criminal law – Permanent stay of proceedings – Accused presented on charge of murder – Extensive pre-trial publicity about charge and accused's two previous convictions for murder – Whether irremediable prejudice to a fair trial justifying permanent stay of proceedings – Whether apprehended unfair consequences of pre-trial publicity were capable of being relieved against by trial judge, during trial, by thorough and appropriate directions to jury – Public interest consideration that an accused be brought to trial.

Words and phrases – "fair trial", "permanent stay of proceedings".

1 FRENCH CJ, GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ. At the conclusion of oral argument on behalf of the appellant the Court ordered that the appeal be dismissed and that the respondent's summons seeking an abridgement of time in respect of filing and serving a notice of contention also be dismissed. What follows are our reasons for joining in those orders.

2 The single ground of appeal to this Court is put in the alternative. First, the appellant complains that the Court of Appeal of the Supreme Court of Victoria[1] erred in rejecting the appellant's challenge to the decision on 3 July 2007 of the trial judge (Cummins J) refusing him a permanent stay of the proceedings upon his charge of the murder of Mersina Halvagis at Fawkner, Victoria, on 1 November 1997. The ground on which the stay had been sought, prior to the empanelment of the jury, was that pre-trial publicity gave rise to irremediable prejudice such as would preclude his fair trial at any time.

3 The trial proceeded before Cummins J and a jury. The case against the appellant was a circumstantial one in which the prosecution relied on three identification witnesses and an alleged confession by the appellant to one Andrew Fraser who was in gaol with him at the time. On 9 August 2007 the appellant was convicted and thereafter sentenced to life imprisonment with no minimum term. His appeal against conviction succeeded on grounds relating to the conduct of the trial which are not presently material, and a new trial was ordered. However, the appellant's challenge to the refusal by the trial judge of the stay application failed in the Court of Appeal.

4 The second way in which the ground of appeal by the appellant to this Court is put is that the Court of Appeal should not have directed a retrial and should have stayed his trial permanently, or until further order.

5 The appellant seeks orders vacating the order of the Court of Appeal for a retrial and, in its place, imposing a permanent stay or a stay until further order.

6 Before his trial for the murder of Ms Halvagis, the appellant had twice been convicted of murder. In August 2000 he had been convicted of the murder

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1 *R v Dupas (No 3)* [2009] VSCA 202.

of Nicole Patterson in April 1999[2] and in August 2004 he had been convicted of the murder in October 1997 of Margaret Maher[3]. Upon each conviction the appellant had been sentenced to life imprisonment with no minimum term. The killings of all three vulnerable women had been by knife attack and characterised by extreme violence and brutality. The appellant's applications for leave to appeal against each of the two earlier convictions for murder were refused.

7 The two convictions for murder, the refusal of each of the leave applications, and the third murder charge had received wide media publicity, adverse to the appellant, and on the stay application Cummins J received a body of evidence of that publicity. This included publicity over some seven years, on seven internet sites, in approximately 120 newspaper articles and four books, all of which related either wholly or extensively to the appellant. The appellant had also been referred to in a number of television programs, and his image had been depicted in some of those programs. The appellant was identified in the media from an early stage as a suspect in regard to the murder of Ms Halvagis.

8 In response to questions from the trial judge as to the currency of the pre-trial publicity and as to how easy it was to access, the appellant's counsel referred to three periods of intense media publicity – late 2000 (relating to the murder of Ms Patterson), late 2004 (relating to the murder trial where the victim was Ms Maher), and early 2005 (where the appellant was named as a suspect in the murder of Ms Halvagis); counsel referred also to material currently available on the internet and to the use of the Google search engine to access articles electronically stored on the World Wide Web. A summary of the pre-trial publicity can be found in the reasons of Ashley JA[4]. The essence of the appellant's submission before Cummins J was that "the ubiquity and pervasiveness of the accused's reputation as a serial killer, is such that no fair trial can now be had." It was contended that, if a permanent stay were not granted, any subsequent conviction would necessarily constitute a miscarriage of justice.

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2 *R v Dupas* [2000] VSC 356.

3 *R v Dupas* [2004] VSC 281.

4 *R v Dupas (No 3)* [2009] VSCA 202 at [77].

9 Cummins J considered that, if acted upon by a jury, the pre-trial publicity would have precluded a fair trial upon the third murder charge. Nevertheless, his Honour concluded that he had "very responsible confidence that the jury, appropriately directed, will firewall its deliberations and verdict from extraneous considerations and from prejudice in this case."

10 His Honour so concluded for the following reasons:

> "First, each juror will swear or affirm to give a true verdict according to the evidence. Second, the jury will be directed, with reasons therefore, to give a true verdict according to the evidence. Third, the jury operationally will observe and will inevitably be influenced by the care with which evidence is received and tested during the trial. Fourth, the jury will be assisted in its task by the nature of a jury trial, its methods of testing and of consideration and of analysis, its valuing of care and of scrupulousness and its conscientious commitment to fairness. Fifth, citizens in this community selected to act as jurors show, and historically have shown, a robust capacity and conscientious capacity to act on evidence and to put aside extraneous data and considerations and demonstrate an honourable commitment to fairness."

His Honour also said he considered that the jurors would comply with his directions not to do their own research, not to have access to the internet, and to have regard only to the evidence led in court, that they would not know or be able to recall much of the detail of the historical material referred to in the data placed before him and that none of the panel would prospectively know that the case for which they were summoned involved the particular accused.

11 Something more should be said respecting the outcome in the Court of Appeal. Grounds of appeal numbered 5 and 6 concerned alleged errors in the charge of the trial judge to the jury. Weinberg JA would have dismissed all grounds on which leave was sought and dissented from the result. Nettle and Ashley JJA agreed that the conviction should be quashed on grounds 5 and 6 but, unlike Nettle JA, the grounds upon which Ashley JA allowed the appeal included ground 1 alleging error by the trial judge in refusing the stay application. Ashley JA went on to favour a stay until further order, but not a permanent stay, of a retrial. The upshot was an order of the Court of Appeal directing a retrial, but no stay order of any description.

Abuse of process

12 The stay application made to the trial judge and the appeal to the Court of Appeal invoked the power of the Supreme Court to prevent abuse of its processes and in particular to prevent the prosecution of a criminal proceeding which would result in an unfair trial.

13 In this Court, the appellant contends that pervasive pre-trial publicity attributed guilt to the appellant in respect of the crime with which he is charged and that evidence in the trial revived that pre-trial publicity with the effect that the pre-trial publicity, particularly as to the appellant's guilt in respect of other crimes and the crime charged, could not be dismissed from the jury's consideration when deciding the guilt or innocence of the appellant. The appellant submits that an accused's right not to be tried unfairly[5] includes a right to be tried without a significant likelihood that the jury will be affected by substantial prejudice and prejudgment as a consequence of pre-trial publicity.

14 From the joint reasons of Gleeson CJ, Gummow, Hayne and Crennan JJ in *Batistatos v Roads and Traffic Authority (NSW)*[6] there appear, or are foreshadowed, several propositions which bear upon the appeal now brought to this Court. In *Batistatos* their Honours referred[7], with approval, to the statements of Lord Blackburn in *Metropolitan Bank Ltd v Pooley*[8] that from "early times" the courts had inherent power to see that their processes were not abused, and that the power existed to enable the courts to protect themselves and thereby safeguard the administration of justice.

15 Having regard both to the antiquity of the power and its institutional importance, there is much to be said for the view that in Australia the inherent power to control abuse of process should be seen, along with the contempt power, as an attribute of the judicial power provided for in Ch III of the

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5 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 57 per Deane J; [1989] HCA 46.

6 (2006) 226 CLR 256; [2006] HCA 27.

7 (2006) 226 CLR 256 at 265-266 [10].

8 (1885) 10 App Cas 210 at 220-221.

Constitution. However, on the trial of the appellant the Supreme Court did not exercise federal jurisdiction and no question arises respecting the validity of any State legislation denying or limiting the inherent power of State courts to control abuse of their processes in matters not arising in federal jurisdiction[9]. The power of the Supreme Court was that identified by Lord Blackburn as inherent.

16 The joint reasons in *Batistatos* also observe that the inherent power applies to both civil and criminal proceedings, adding[10]:

> "However, the power does so with somewhat different emphases attending its exercise. In *Williams v Spautz*, Mason CJ, Dawson, Toohey and McHugh JJ identified two fundamental policy considerations affecting abuse of process in criminal proceedings. Their Honours said[11]:
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> > 'The first is that the public interest in the administration of justice requires that the court protect its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike. The second is that, unless the court protects its ability so to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court's processes may lend themselves to oppression and injustice.'
>
> These considerations are not present with the same force in civil litigation where the moving party is not the State enforcing the criminal law."

The processes spoken of in this passage include those for trial by jury of indictable offences. The institution of trial by jury is maintained and protected at the federal level by s 80 of the Constitution and in Victoria by the law of contempt, by such common law offences as perversion of the course of justice

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9 But see *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 549-550 [1] per Gleeson CJ, 552-553 [10] per Gummow, Hayne, Heydon and Kiefel JJ, 591 [159]-[162] per Crennan J; [2008] HCA 4.

10 (2006) 226 CLR 256 at 264-265 [8].

11 (1992) 174 CLR 509 at 520; [1992] HCA 34.

and embracery[12], and by provisions including ss 78 and 78A of the *Juries Act* 2000 (Vic).

17 The constitutional dimension, in the broad sense of the term, was considered in two important decisions of the New Zealand Court of Appeal. The reasons of Richardson J in *Moevao v Department of Labour*[13] were drawn upon for the passage in *Williams v Spautz*[14] which has been set out above. More recently, in *Fox v Attorney-General*[15] McGrath J, when giving the reasons of a bench also including Gault P, Keith, Blanchard and Anderson JJ, in a passage headed "The constitutional position", said[16]:

> "In our system of government, the discretion to prosecute on behalf of the state and to determine the particular charges a defendant is to face is part of the function of Executive Government rather than the Courts. That allocation of the function recognises the governmental interest in seeing that justice is done and community expectations that criminal offenders are brought to justice are met"

and, after noting that the decision by a public official to prosecute involves the exercise of a public power, continued[17]:

> "The Courts traditionally have been reluctant to interfere with decisions to initiate and continue prosecutions. In part this is because of the high content of judgment and discretion in the decisions that must be reached. But perhaps even more so it also reflects constitutional sensitivities in light of the Court's own function of responsibility for conduct of criminal trials."

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12 See *Crimes Act* 1958 (Vic), s 320.

13 [1980] 1 NZLR 464 at 481.

14 (1992) 174 CLR 509 at 520; see above at [16].

15 [2002] 3 NZLR 62.

16 [2002] 3 NZLR 62 at 69 [28].

17 [2002] 3 NZLR 62 at 69-70 [30]-[31].

Permanent stay

18 Cummins J noted that while no permanent stay on the ground of irremediable prejudice to a fair trial had ever been ordered by the Supreme Court, the existence of the power to make such an order had been accepted by statements made in *R v Glennon*[18]. In that case, Mason CJ and Toohey J[19] said:

> "[A] permanent stay will only be ordered in an extreme case[20] and there must be a fundamental defect 'of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences'[21]. And a court of criminal appeal, before it will set aside a conviction on the ground of a miscarriage of justice, requires to be satisfied that there is a serious risk that the pre-trial publicity has deprived the accused of a fair trial. It will determine that question in the light of the evidence as it stands at the time of the trial and in the light of the way in which the trial was conducted, including the steps taken by the trial judge with a view to ensuring a fair trial."

That statement should be regarded as an authoritative statement of principle.

19 The passage indicates a distinction of present relevance. The Court of Appeal was not considering, in advance of the trial, an interlocutory appeal from the order of Cummins J dismissing the stay application. The majority of the Court of Appeal decided that the conviction was to be quashed on other grounds relating to the conduct of the trial, and the immediate issue then was whether there should be an order for a new trial. The question of irremediable prejudice at a retrial was now to be decided not purely prospectively, as it had been by Cummins J, but with the assistance provided by the evidence against the appellant, which had been properly admitted at the first trial, and the steps taken by the judge to ensure a fair trial.

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18 (1992) 173 CLR 592; [1992] HCA 16.

19 (1992) 173 CLR 592 at 605-606.

20 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 34.

21 *Barton v The Queen* (1980) 147 CLR 75 at 111 per Wilson J; [1980] HCA 48.

20 It is of particular importance to note that certain prejudicial material was admissible in the trial because the Crown case, as presented through Andrew Fraser, meant that the jury would inevitably learn of the appellant's history including at least one of his prior convictions for murder. The appellant's counsel met the forensic challenge posed by such circumstances by having the jury told at the outset that the appellant had previously been convicted of the murder of two other women. Moreover the identification evidence involved some reference back to the pre-trial publicity.

21 It also needs to be noted that prior to the empanelment of the jury, at the outset of the trial, and in his charge to the jury, Cummins J directed jurors repeatedly about the need to act fairly, calmly, without prejudice and solely on the evidence led in court and to exclude from their considerations anything that they may have read or seen outside the court. Such directions were designed to ensure that the jurors would not be affected by the pre-trial publicity in bringing in their verdict. The terms in which the repeated directions were given are exemplified by what was said by Cummins J at the outset of the trial:

> "Because I am the judge of the law, ladies and gentlemen, any legal directions I give you, you must comply with. But I am not a judge of the facts and only you are the judges of the facts. So, as you are the judges of the facts, how do you act as a judge? … [Y]ou act as you would wish and expect a judge to act, fairly, calmly, without prejudice and solely on the evidence. Each of you has sworn or affirmed to give a true verdict according to the evidence. The evidence is what you hear in the four walls of this courtroom from the witnesses who will give their evidence in the witness box and the exhibits which attended as part of the evidence. [T]hat is what you judge the case on and that alone. The evidence from the witnesses here in court in front of you and the exhibits tendered as part of the evidence. During the trial, witnesses are called to give evidence and they will be questioned and tested by questions, that's the proper process of the court, ladies and gentlemen. You see that happening and you judge the case on the evidence led here in front of you in court …
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> A very important thing follows from that and it's this: you must not decide the case on anything outside the court …
>
> The next thing is this, and this is very important in this case as in every case. Do not go and do your own homework or do your own research, don't go and look up old newspapers, don't go down to the local

> library, do not go and look at the internet, do not do any electronic searches about anyone connected with this case, that's very important ladies and gentlemen. You have sworn or affirmed to give a true verdict on the evidence led here in court, therefore looking at anything else cannot help you because that's not the evidence …
>
> Your function is to decide the case solely [on] the evidence and I will give you various directions during the case to assist you in that regard but they are the first ones that I give you so that you know the limitations of what you should be looking at, just the evidence here in court and nothing else."

22 These proper directions demonstrate the capacity of the trial judge to relieve against the unfair consequences of the pre-trial publicity without staying the criminal proceedings.

23 In *Glennon*, Brennan J discussed the significance of the course taken by this Court (as the first and final appellate court) in *Tuckiar v The King*[22]. The public misconduct of counsel in *Tuckiar* was of decisive importance. Brennan J said of *Tuckiar* that, the conviction having been quashed, the question in that "extreme case" had been whether a new trial should be ordered, and continued[23]:

> "This Court, in exercising that discretion, declined to order a retrial. The discretion to order a retrial is affected by factors that have no relevance to an application to stay a trial, particularly because an adverse exercise of the discretion subjects an accused to the burden of a second trial. A second trial of Tuckiar would have been affected by the certain knowledge of his guilt that counsel at his first trial had indefensibly revealed to any future jury empanelled in Darwin, and no other venue was practicable."

24 Did the Court of Appeal err in the present case by failing to treat it as an extreme or singular case in which there should be no retrial?

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22 (1934) 52 CLR 335; [1934] HCA 49.

23 (1992) 173 CLR 592 at 617.

The function of the jury

25 Nettle JA[24] based his decision upon the footing that to grant an indefinite stay "would be to recognise that the media has the capacity to render an accused unable to be tried" and this would deny the "social imperative" that an accused be brought to trial.

26 There is an important point here. It is often said that the experience and wisdom of the law is that, almost universally, jurors approach their tasks conscientiously. The point was made as follows by Hughes J, with the endorsement of the English Court of Appeal, in *R v Abu Hamza*[25]:

> "Extensive publicity and campaigns against potential defendants are by no means unknown in cases of notoriety. Whilst the law of contempt operates to minimise it, it is not always avoidable, especially where intense public concern arises about a particular crime and a particular defendant before any charge is brought. Jurors are in such cases capable of understanding that comment in the media might or might not be justified and that it is to find out whether it is that is one of their tasks. They are capable of understanding that allegations which have been made may be true or may not be and that they, the jury, are to have the opportunity and responsibility of hearing all the evidence which commentators in the media have not and of deciding whether in fact the allegations are true or not. They are not surprised to be warned not to take at face value what appears in the media, nor are they these days so deferential to politicians as to be incapable of understanding that they should make no assumptions about whether any statements made by such people are justified or not. They are also capable of understanding and habitually apply the direction that they are given about the standard of proof."

In his reasons for dismissing the stay application, which are extracted in part and described above, Cummins J used similar terms with respect to the conduct of jury trials in Victoria.

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24 *R v Dupas (No 3)* [2009] VSCA 202 at [62]-[63].

25 See [2007] QB 659 at 685-686.

27 Earlier, in *Gammage v The Queen*[26] Windeyer J expressed the governing principle in terms which acknowledged that the jury room might not be a place of undeviating intellectual and logical rigour (a point made by Callinan J in *Gilbert v The Queen*[27]) by saying:

> "A jury in a criminal case may sometimes, from compassion or prejudice or other ulterior motive, fail to perform their sworn duty to determine the case before them according to the evidence. If they do so in favour of the prisoner, and not of the Crown, the law is powerless to correct their dereliction. They must be assumed to have been faithful to their duty. Their verdict must be accepted."

28 Conclusions of this kind are not examples of the "ordinary" questions of fact which regularly arise for determination[28]. The assumed efficacy of the jury system of which Windeyer J spoke, whereby the law proceeds on the basis that the jury acts on the evidence and in accordance with the directions of the judge, represents the policy of the common law and is more akin to a species of "constitutional fact", in the sense of that term explained by Heydon J in *Thomas v Mowbray*[29].

29 Whilst the criminal justice system assumes the efficacy of juries, that "does not involve the assumption that their decision-making is unaffected by matters of possible prejudice."[30] In *Glennon*, Mason CJ and Toohey J recognised that "[t]he possibility that a juror might acquire irrelevant and prejudicial information is inherent in a criminal trial."[31] What, however, is vital to the

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26 (1969) 122 CLR 444 at 463; [1969] HCA 68.

27 (2000) 201 CLR 414 at 440 [96]; [2000] HCA 15.

28 See *Thomas v Mowbray* (2007) 233 CLR 307 at 512 [614]; [2007] HCA 33.

29 (2007) 233 CLR 307 at 514-520 [620]-[635].

30 *Gilbert v The Queen* (2000) 201 CLR 414 at 420 [13] per Gleeson CJ and Gummow J.

31 (1992) 173 CLR 592 at 603. See also *Murphy v The Queen* (1989) 167 CLR 94 at 99; [1989] HCA 28.

criminal justice system is the capacity of jurors, when properly directed by trial judges, to decide cases in accordance with the law, that is, by reference only to admissible evidence led in court and relevant submissions, uninfluenced by extraneous considerations. That capacity is critical to ensuring that criminal proceedings are fair to an accused.

"Extreme" or "singular" case

30 The appellant seeks to uphold findings of Nettle and Ashley JJA that the case was an extreme, or singular[32], case. The appellant contends that the balance of authority in the High Court has approved a concept of unfairness such that it might arise irrespective of its source and whether or not it was controllable by court processes[33]. The balance of persuasion[34] in *Glennon*, the appellant submits, has allowed for the possibility of the grant of a stay in circumstances of prejudicial media publicity. The appellant contends that there is no reason in principle or practice why the extreme category of case warranting the imposition of a permanent stay ought not to include circumstances of prejudicial pre-trial media publicity.

31 The appellant relies upon the example given by Deane, Gaudron and McHugh JJ, the dissentients, in *Glennon* of the grant of a stay as follows[35]:

> "[O]ne cannot exclude, as a matter of law, the possibility that an 'extreme' or 'singular' case might arise in which the effect of a sustained media

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32 These epithets were used by members of the Court of Criminal Appeal of Victoria in *Glennon*: see *R v Glennon* (1992) 173 CLR 592 at 623 and footnotes 69 and 70.

33 Authorities relied on were *Jago v District Court (NSW)* (1989) 168 CLR 23 at 27-31, 33-34 per Mason CJ, 56-58 per Deane J, 71-72 per Toohey J, 75-78 per Gaudron J; *Williams v Spautz* (1992) 174 CLR 509 at 518-520 per Mason CJ, Dawson, Toohey and McHugh JJ; *Dietrich v The Queen* (1992) 177 CLR 292 at 298-299 per Mason CJ and McHugh J, 326-329, 332 per Deane J, 357-358 per Toohey J, 362-365 per Gaudron J; [1992] HCA 57.

34 As to which see *Federation Insurance Ltd v Wasson* (1987) 163 CLR 303 at 314; [1987] HCA 34.

35 (1992) 173 CLR 592 at 623-624.

campaign of vilification and prejudgment is such that, notwithstanding lapse of time and careful and thorough directions of a trial judge, any conviction would be unsafe and unsatisfactory by reason of a significant and unacceptable likelihood that it would be vitiated by impermissible prejudice and prejudgment."

32 However, the reference by their Honours to impermissible prejudice and prejudgment gives insufficient effect to the policy of the common law respecting the efficacy of the jury system. No doubt that policy must give way, for example, in specific instances of apprehended jury tampering and other criminal misconduct[36]. But that is far from the present case. This is not a case of an apprehended defect at the retrial of such a nature that (to adopt what was said by Mason CJ and Toohey J in *Glennon*[37]) nothing that the trial judge could do in the conduct of the retrial could relieve against its unfair consequences.

33 In *Glennon*[38], in describing cases in which a permanent stay will be ordered as extreme, Mason CJ and Toohey J refer back to a passage in *Jago v District Court (NSW)*[39] containing a reference to *R v His Honour Judge C F McLoughlin and Cooney; Ex parte The Director of Prosecutions*[40]. There, the Full Court of the Supreme Court of Queensland recognised that for a court to grant a permanent stay of criminal proceedings is a rare occurrence, a drastic remedy to be applied in exceptional cases which might arise if there had been some conduct on the part of a prosecuting authority shown to result in prejudice to an accused in obtaining a fair trial[41].

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36 Sections 44 and 46 of the *Criminal Justice Act* 2003 (UK) confer the power to order a trial or retrial by judge alone where the likelihood of jury tampering is so substantial as to make the order necessary in the interests of justice: *R v Twomey* [2010] 1 WLR 630; [2009] 3 All ER 1002.

37 (1992) 173 CLR 592 at 605.

38 (1992) 173 CLR 592 at 605.

39 (1989) 168 CLR 23 at 34.

40 [1988] 1 Qd R 464.

41 [1988] 1 Qd R 464 at 470-471.

34 The decision in *Tuckiar*[42] is referred to in *Glennon* variously as unique[43], extreme[44] and bizarre[45]. In *Tuckiar*, unfairness to the accused at a retrial, which could not be relieved against, was, as Brennan J said, "the certain knowledge of his guilt"[46], revealed in open court by his counsel at his first trial. There is a difference between media opinion as to guilt and a public revelation of guilt by an accused's own counsel. The unfair consequences of the former can be relieved against by direction from the trial judge whereas the unfair consequences of the latter cannot be remedied.

35 Characterising a case as extreme or singular is to recognise the rarity of a situation in which the unfair consequences of an apprehended defect in a trial cannot be relieved against by the trial judge during the course of a trial. There is no definitive category of extreme cases in which a permanent stay of criminal proceedings will be ordered. In seeking to apply the relevant principle in *Glennon*, the question to be asked in any given case is not so much whether the case can be characterised as extreme, or singular, but rather, whether an apprehended defect in a trial is "of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences."[47]

36 There is nothing remarkable or singular about extensive pre-trial publicity, especially in notorious cases, such as those involving heinous acts. That a trial is conducted against such a background does not of itself render a case extreme, in

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42 (1934) 52 CLR 335.

43 (1992) 173 CLR 592 at 598 per Mason CJ and Toohey J.

44 (1992) 173 CLR 592 at 617 per Brennan J.

45 (1992) 173 CLR 592 at 624 per Deane, Gaudron and McHugh JJ possibly quoting counsel who appeared for the Crown.

46 *R v Glennon* (1992) 173 CLR 592 at 617.

47 *Barton v The Queen* (1980) 147 CLR 75 at 111 per Wilson J quoted in *Jago v District Court (NSW)* (1989) 168 CLR 23 at 34 per Mason CJ and in *R v Glennon* (1992) 173 CLR 592 at 605 per Mason CJ and Toohey J.

the sense that the unfair consequences of any prejudice thereby created can never be relieved against by the judge during the course of the trial.

37 A further consideration is the need to take into account the substantial public interest of the community in having those who are charged with criminal offences brought to trial[48], the "social imperative" as Nettle JA called it, as a permanent stay is tantamount to a continuing immunity from prosecution[49]. Because of this public interest, fairness to the accused is not the only consideration bearing on a court's decision as to whether a trial should proceed[50].

38 The apprehended defect in the appellant's trial, namely unfair consequences of prejudice or prejudgment arising out of extensive adverse pre-trial publicity, was capable of being relieved against by the trial judge, in the conduct of the trial, by thorough and appropriate directions to the jury. Because that is so, it is not necessary for the purposes of this case to undertake any broad inquiry into the full extent of the court's inherent power to grant a permanent stay of criminal proceedings in order to prevent unfairness to an accused.

39 There was no error of principle in the application of *Glennon* by Cummins J in deciding that the appellant's trial, if allowed to proceed, would be fair. The majority in the Court of Appeal was correct in rejecting ground 1 of the appeal alleging error by Cummins J in refusing the application for a permanent stay. Furthermore, in all of the circumstances of this trial, the pre-trial publicity was not such as to give rise to an unacceptable risk that it had deprived the appellant of a fair trial. A stay permanently or until further order was not warranted.

40 For these reasons we joined in the orders made at the conclusion of the hearing.

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48 *R v Glennon* (1992) 173 CLR 592 at 598 per Mason CJ and Toohey J.

49 *R v Glennon* (1992) 173 CLR 592 at 599 per Mason CJ and Toohey J.

50 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 33 per Mason CJ.