The Queen v Murdoch [2005] NTSC 80

PARTIES:	THE QUEEN
	v
	MURDOCH, Bradley John (No 6)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	20215807
DELIVERED:	15 December 2005
HEARING DATES:	7-8 March, 21-22 & 26 April 2005, 18 October – 13 December 2005
JUDGMENT OF:	MARTIN (BR) CJ

CATCHWORDS:

CRIMINAL LAW – MURDER

Inadmissible evidence alleging prior serious criminal offending – pre-trial publicity – likely knowledge of jurors of previous charges and acquittal – direction given to jury – application for mistrial refused.

REPRESENTATION:

Counsel:

Plaintiff:	R Wild QC, A Elliott, A Barnett & J Down
Defendant:	I Barker QC, G Algie, M Twiggs & I Read

Solicitors:

Plaintiff:	Office of the Director of Public Prosecutions
Defendant:	Northern Territory Legal Aid Commission

Judgment category classification:	A
Judgment ID Number:	Mar0525
Number of pages:	22

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v Murdoch [2005] NTSC 80
No. 20215807

BETWEEN:

THE QUEEN
Plaintiff

AND:

MURDOCH, Bradley John
Defendant

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered 15 December 2005)

Introduction

[1] The accused is charged that on 14 July 2001 near Barrow Creek he murdered Peter Marco Falconio. He is also charged that on the same occasion he deprived Joanne Rachael Lees of her personal liberty and that he unlawfully assaulted Ms Lees in circumstances of aggravation.

[2] The trial before the jury commenced on 17 October 2005. On 11 November 2005 counsel for the accused applied for an order that the trial be aborted by reason of the following evidence given by Mr James Hepi (T1175):

> "Q. Just have a look at the second photograph if you will, perhaps also the third one? They show numerous items or articles in

the back of the canopy area of the pod. Is that similar to the articles that he [the accused] would keep in the canopy of the earlier 4-wheel drive?

A. No, Mr Algie. This is after Brad Murdoch got arrested in South Australia. This is when he had all his gear in the car and he was on the way back to Western Australia to have a go at me. He's packed all his gear in there just after he had abducted and raped children and the whole likes of – so that's probably all his belongings stuffed in there."

Facts

[3] Ms Lees gave evidence that early in the evening of Thursday 14 July 2001 she and Mr Falconio were travelling north in a Kombi van on the Stuart Highway approximately 10 kilometres north of Barrow Creek. Mr Falconio was driving. A vehicle pulled alongside and the driver gestured to Mr Falconio to pull over. It is the Crown case that the driver of the other vehicle was the accused.

[4] After Mr Falconio stopped the vehicle on the side of the highway, he walked to the rear of the Kombi van where he met the driver of the other vehicle. Ms Lees could hear the men talking about sparks coming from the exhaust. Mr Falconio returned to the driver's side door and asked Ms Lees to rev the engine. That was the last time that Ms Lees or anyone else saw Mr Falconio alive.

[5] While Ms Lees was revving the engine, she heard a loud bang. It is the Crown case that the accused shot Mr Falconio.

[6] Ms Lees ceased revving the engine and turned to look out the window. She observed a male person standing at the driver's side window with a gun pointed at her. Ms Lees subsequently identified a photograph of the accused as depicting that male person.

[7] It is unnecessary to canvass the details of the subsequent events described in evidence by Ms Lees. In substance it is the Crown case that the accused handcuffed Ms Lees' hands behind her back and forced her into his vehicle from where she escaped into the scrub. While Ms Lees was hiding in the scrub the accused shifted the Kombi van in an endeavour to conceal it and then drove south to Alice Springs. After refuelling at Alice Springs the accused drove north-west across the Tanami Desert and made his way to Broome in Western Australia.

[8] On the Crown case the accused had the opportunity to be in the vicinity of Barrow Creek at the relevant time. The accused arrived in Broome in the early hours of 16 July 2001. If the Crown evidence was accepted, the accused could have committed the crimes near Barrow Creek and driven to Broome via Alice Springs and the Tanami Desert in time to arrive in Broome early on 16 July 2001.

[9] The Crown led evidence that the accused regularly travelled between South Australia and Broome along various routes, including the Tanami Desert, for the purposes of transporting cannabis. Evidence was given as to the times and distances that the accused was capable of travelling without a

significant break or rest. In this context the Crown adduced evidence that the accused consumed amphetamines to assist him in driving long distances without rest.

[10] Evidence was also led that the accused was in the practice of carrying a handgun in the vehicle while transporting drugs. This evidence related to the accused's capacity to carry out the crime of murder in the circumstances alleged by the Crown.

Pre-trial publicity

[11] The application falls to be considered in the context of the circumstances of the trial and the allegations by the Crown in their entirety. In addition, it is necessary to refer in some detail to publicity in the Northern Territory that occurred before the accused was extradited from South Australia to the Northern Territory. The publicity concerned abduction and sexual assault charges against the accused in South Australia.

[12] In October 2002 and November 2003 extensive and prominent publicity occurred in the Northern Territory about the proceedings in South Australia. In October 2002 the accused had been identified publicly as a suspect for the murder of Peter Falconio. A number of prominent articles were printed in the daily Northern Territory newspaper ("the NT News") which discussed the nature of the proceedings in South Australia and whether those proceedings would take place before any proceedings in the Northern Territory should the accused be charged with the murder of Mr Falconio.

[13] Early in October 2002 a prominent article in the NT News stated that the accused was "charged with a double rape and abduction in South Australia". The article included a report of the South Australian proceedings which was in the following terms:

> "Murdoch – an earlier suspect in the Falconio disappearance and the abduction of his girlfriend, Joanne Lees – is accused by South Australian police of first abducting and then raping a young girl and her mother at a Riverland property about August 22.
>
> He has been charged with two counts of rape, two counts of false imprisonment, common assault and a loaded firearm."

[14] In a prominent article of 7 October 2002, the NT News reported that the accused was on trial in South Australia "over the abduction and rape of a mother and her daughter near Port Augusta in August." The article also stated that the accused had been charged "with two counts of rape, two counts of false imprisonment, common assault and carrying a loaded firearm in connection with SA rapes."

[15] On 9 October 2002 the NT News reported that the accused had dropped an appeal against a decision relating to the taking of a sample in South Australia for DNA purposes. The article stated:

> "Murdoch, a former WA cattle station hand, was arrested after allegedly abducting and raping a young girl and her mother in a Riverland property about August 22. He was charged with rape, two counts of false imprisonment, common assault and carrying a loaded firearm."

[16] On 10 October 2002 the front page of the NT News carried an article under a very large headline "MURDER CHARGE". A readily identifiable picture of the accused accompanied by his full name appeared under the headline. The article reported that police were expected to charge the accused with the murder of Peter Falconio. The continuation of the article on p 2 stated:

> "Murdoch has been in custody in South Australia since August when he was arrested by Port Augusta police over the abduction and rape of a mother and her teenage daughter."

[17] The Weekend Australian of 12 – 13 October 2002 carried a prominent article which included a reference to charges in South Australia of "rape, abduction and other offences involving a 12 year old girl and her mother."

[18] On 25 October 2002 the NT News reported that the accused would be "tried for a double rape in South Australia" before facing the murder charge in the Northern Territory. The South Australian Director of Public Prosecutions was quoted as saying that he had determined to press ahead with the South Australian charges first because the 12 year old victim wanted the case finalised as soon as possible.

[19] On Saturday 19 July 2003 the NT News reported in a prominent article that the "Falconio trial" would start the following year. The article stated that the accused was "currently on remand in South Australia pending his trial for the double rape of a Port Augusta woman and her daughter".

[20] On 17 October 2003 the front page of the NT News contained an article under a large headline “Push for NT Falconio trial”. The report concerned pre-trial argument in South Australia and referred to a ruling of the trial Judge that the prosecution “could use evidence implicating Bradley John Murdoch, 45, in the backpacker murder to prosecute him for the abduction and rape of a 13 year old girl …”. The article reported that the accused had pleaded not guilty to abducting and raping the 13 year old girl and abducting and assaulting her mother. These statements appeared on the front page.

[21] In the continuation of the article, on p 2 the Crown allegations were reported in the following terms:

> “The prosecution claims Mr Murdoch was driven into a frenzy by the media attention and police manhunt, and committed the rapes and abductions while in this ‘extreme’ state of mind.”

[22] On Saturday 18 October 2003 an article appeared on the front page of the NT News under a large heading “Falconio trial on knife edge”. The article was primarily concerned with a decision in South Australia as to whether the South Australian proceedings should take place before the trial in the Northern Territory. In the continuation of the article on p 2 it was reported that the accused was due to stand trial in Adelaide “on two counts of rape, two counts of indecent assault, two counts of false imprisonment and one count of common assault”. After stating that the accused had pleaded not guilty, the article continued:

> "It is alleged he abducted a 13 year old girl and her mother from Swan Reach, in the SA's Riverland in August 2002 and sexually abused them."

[23] Subsequently on the first day of the South Australian trial, under a significant heading "Rape trial first for Falconio suspect", an article in the NT News reported that the trial of the accused would begin that day in Adelaide after an application that the accused first be charged and tried in Darwin was refused. The article included a statement that counsel for the accused, the same counsel who appeared in the proceedings before me, alleged that the rape charges were false and told the court that the accused "was the victim of a three-state conspiracy to frame him for the Falconio murder". Later in the article details of the charges were reported as follows:

> "Last week Mr Murdoch, 45, pleaded not guilty to two counts of rape, two counts of indecent assault, two counts of false imprisonment and one count of common assault.
>
> It is alleged he abducted the girl and her mother at Swan Reach, in the SA's Riverland, in August 2002 and sexually abused them over a 20 hour period.
>
> Mr Murdoch is also wanted by Northern Territory police in connection with the disappearance of Peter Falconio in July 2001.
>
> SA prosecutors allege Mr Murdoch abducted the women – whom he had known for 18 months – while 'in an extreme frenzy', because he believed he was the centre of the manhunt for Mr Falconio's killer."

[24] The article later referred to one of the victims as a 13 year old girl.

[25] The accused was acquitted of the South Australian charges. On 11 November 2003 the front page of the NT News contained a very large

heading “Falconio arrest” under which was a large picture of the accused being arrested. The caption for the picture was “Bradley John Murdoch outside Adelaide Supreme Court yesterday after he was cleared of rape charges”.

[26] Immediately under the photograph appeared a smaller headline “NT police seek extradition” and the commencement of an article which stated that the accused was expected to appear in a Darwin court that week. The article reported the result of the South Australian proceedings in the following terms:

> “Murdoch was arrested by police yesterday after he earlier appeared in the Adelaide Supreme Court where he was acquitted of charges of raping a 12 year old girl and her mother. The jury took less than four hours to find Murdoch not guilty.”

[27] On p 2 the article stated:

> “Prosecutors in the SA trial said he raped and abducted the mother and daughter as ‘insurance’ because he was on the run and believed police were trying to frame him for Mr Falconio’s murder.
>
> But the jury returned majority verdicts of not guilty on two charges of rape, two charges of false imprisonment, two counts of indecent assault and one count of common assault.
>
> Led from the dock after the verdicts, Murdoch told the media:
>
> ‘Make sure you write the truth’”.

[28] After reference to the arrest, the article reported a statement by counsel for the accused that the verdict “had vindicated his client”.

[29] On 12 November 2003 a photograph of the accused appeared on the front page of the NT News adjacent to a very large headline "Accused killer's hide-out". A picture of a farmhouse appeared under the headline and adjacent to a smaller headline: "Where Falconio suspect lived during manhunt". The article asserted that the accused "spent six months hiding out at a dilapidated farmhouse while police searched for him across Australia". Later in the front page section of the article it was reported that the accused was expected to be extradited following his arrest after "a SA jury acquitted him of charges of raping a 12 year old girl before abducting her and her mother at gunpoint". In a continuation of the article on p 2 it was stated that the accused was arrested in the cells of the District Court and that "minutes before, a jury acquitted him of raping a 12-year-old girl, sexual (sic) assaulting her mother and abducting both of them for more than 19 hours."

[30] No attempt has been made to research all the print media reports which referred to the South Australian proceedings. Nor has any attempt been made to research radio or television reports. There is no doubt that significant publicity about the South Australian proceedings also occurred in the Northern Territory through those forms of media.

Directions to the jury

[31] Prior to the commencement of the trial before the jury I raised with counsel the issue of the publicity about the South Australian proceedings and

whether a direction should be given to the jury. On 12 October 2005 counsel expressed a common view that I should give the jury an appropriate direction. In the course of the discussion about that question, counsel for the accused expressed the view that it was "stretching believability to think the jury will not know about the South Australian cases".

[32] At the commencement of the trial before the jury, and before the opening remarks of the Director of Public Prosecutions, I gave the jury the following direction:

> "The importance of your role means that it is absolutely critical that you give full attention to the evidence and that your decisions are based upon only what you hear in this court. You must ignore anything that you have already seen or heard or anything you might see or hear outside the court as the trial progresses.
>
> In this particular trial this aspect is very important. As I am sure you will appreciate, there has been an enormous amount of publicity about this matter and about the accused. No doubt the nature of the case and the intense media interest has resulted in much discussion within the community. I cannot emphasise enough that whatever you might have seen or heard in the past outside this courtroom or whatever you might hear in the future outside the courtroom must be put aside and ignored.
>
> In particular, you may have read or heard of the accused being involved in previous court proceedings outside of the Northern Territory. Whatever you may have seen or heard about such proceedings must be put aside and totally ignored. It would be quite unfair to the accused for you to have regard to previous proceedings in anyway whatsoever. Even more so in the caser of this accused because in connection with the previous proceedings about which you may have heard, the accused was acquitted. You will quickly appreciate how unfair it would be to have regard in any way to a previous matter in respect of which the accused was acquitted.

> Your oath as jurors requires that you put aside and ignore anything you have seen or heard outside this courtroom and that your decisions be based only on the evidence that you hear in this court.

[33] Mr Hepi gave evidence that in July 2001 he and the accused had been engaged in the business of selling cannabis as a significant commercial enterprise. Before the conclusion of Mr Hepi's evidence, I gave the jury the following direction (T1122):

> "The second thing is this, that you've heard that the accused was involved, on Mr Hepi's evidence as he described it, in the running of drugs, that is the cannabis. You will appreciate that this is also part of the setting, if you like, for the travel that occurred between South Australia and Broome and the Crown case that the accused drove from Alice Springs across the Tanami to Broome in a particular time. So it provides the background, the context in which you hear that evidence which is relevant eventually to your decision as to whether the Crown has proved that the accused was the person involved at Barrow Creek.
>
> However that is all it is, you must not look at the evidence and say, 'well, this man was committing offences with respect to drugs, therefore he's not a person of good character and he's likely to have committed the crime charge.' That would be quite an unfair and inappropriate way of reasoning. You reason from the evidence which bears upon whether he was the man at Barrow Creek, but not from any view about his character by reason of his involvement with drugs, so it's the setting, the context for all of this, but you must not use that impermissible line of reasoning. It would be quite unfair and inappropriate."

[34] Evidence was led from Mr Hepi in examination that on the trips between South Australia and Broome it was the practice of the accused to carry a handgun in the side pocket of the door of his vehicle or in a camping table in the tray (T1125). During cross-examination it emerged that Mr Hepi was aware the accused owned two handguns, a 357 magnum and a .22 weapon.

Mr Hepi described both weapons as dark in colour. He said the .22 was small, but he could not remember whether it had a magazine or a revolving chamber (T1177).

[35] It was also during cross-examination that Mr Hepi gave the evidence earlier cited which has led to this application. At the time the evidence was given, no comment was made about it.

[36] Mr Hepi's evidence finished within a few minutes of him giving the evidence under consideration. At the conclusion of Mr Hepi's evidence, in view of the reference to the accused owning two weapons, I gave the jury an additional direction (T1179):

> "Ladies and gentlemen, you will recall yesterday I gave you a direction about the use of evidence related to cannabis and the dealings in cannabis and I warned you against reasoning that because Mr Murdoch was involved in dealing with cannabis, he was a person of poor character and therefore a person who was likely to commit the type of crime charged. The same warning applies to the evidence you've just heard about the weapons.
>
> You will appreciate that as Ms Lees' said, that a weapon was pointed at her. Evidence that the accused had access to a weapon or weapons is a material matter for you to consider. It becomes a question or whether it is linked to Ms Lees' evidence or not.
>
> You will recall of course, that Ms Lees described the gun as a silver weapon and we've heard at the moment from Mr Hepi that the weapons he saw were two dark coloured weapons. Now whether you find the evidence of assistance in due course, will be a matter for you. But again I warn you that you must not, because Mr Murdoch, as you've heard, if you accept it, was in the habit of carrying weapons or possessed weapons of that nature, you must not draw some sort of conclusion that he is a person of poor character and therefore likely to have committed the crimes charged.

> You all know yourselves, again, that's a very unfair line or reasoning, you must not adopt it. You will appreciate that there are lots of people in our community who, for one reason or another, carry weapons or possess them and you have heard from Mr Hepi of course, that at least on one occasion, he borrowed one of the weapons because he was worried about being - if you like - ripped off with the drugs. So it would not be surprising if someone was carrying drugs from South Australia to Western Australia and travelling in that sort of country with a load of drugs that they might carry a weapon with them for that sort of protection.
>
> So it's all part of the evidence before, it relates back to the evidence before, it relates back to the evidence of Ms Lees, but you must not engage in that impermissible line of reasoning. Thank you.

[37] Immediately following the weapons direction, another witness gave evidence. That evidence had not been completed when the morning break was taken. Upon resumption after the break, and in a closed court in the absence of the jury, counsel for the accused applied for an order that the trial be aborted. After a short discussion I adjourned the application and opened the court. I then made a suppression order covering the evidence given by Mr Hepi that led to the application for a mistrial. The jury returned to court and I gave a further direction (T1201):

> "Ladies and gentlemen, before the next witness is called, I need to give you another direction.
>
> Unfortunately during the evidence given by Mr Hepi, he made reference to proceedings relating to the accused in South Australia. You will recall that I spoke to you about proceedings in South Australia earlier and I told you that you would hear that the accused had been charged in South Australia and that it was a matter that was totally irrelevant to you. I also mentioned that he'd been acquitted and that that was another reason why it was utterly irrelevant.

> It is a pity indeed that Mr Hepi made mention of the South Australian matters and I repeat my direction to your earlier. You must completely and utterly ignore what he said about South Australia. It is of no consequence to you whatsoever, Mr Murdoch, as I told you earlier, was acquitted. It would be, as you would appreciate, totally unfair to take that matter into account in any way whatsoever in your dealings with the evidence in this matter in whether the evidence is sufficient or not to prove guilt of the charges."

[38] It was readily apparent to me as I gave the direction that at least some members of the jury had heard what Mr Hepi said. It was also readily apparent that the jury understood the direction and the reasons for it and treated it seriously.

[39] Approximately an hour later after the conclusion of the evidence of two witnesses, and immediately before adjourning for the weekend, I gave the jury a further direction in the following terms (T1217):

> "Ladies and gentlemen, we are about to adjourn until Monday. Before we do I just want to emphasise what I said to you earlier, on more than one occasion, about the need for absolute fairness in the assessment of the evidence.
>
> Sometimes, as you know and you've heard in this case, evidence comes out which might suggest to a jury that an accused person is not a person of good character and the drug selling is obviously in that type of evidence. Sometimes evidence comes out in front of juries about things that have happened in the past and juries are required to ignore that sort of evidence. That is things that have happened in the past of an accused person.
>
> There are times when material that you should not have heard comes before you and some of the material from Mr Hepi this morning was material that should not - evidence that should not have been given about South Australia.

> Let me say to you that there are times when it is said that because jurors have heard that sort of prejudicial material, material that is adverse to an accused, that jurors are not capable - or the suggestion is made that jurors are not capable of putting aside that sort of material and of remaining totally impartial and objective in their consideration of the evidence.
>
> Sometimes it is suggested that jurors cannot avoid that impermissible line of reasoning that says, 'Well, the accused is not a person of good character therefore he is likely to have committed the crimes charged'.
>
> Now, ladies and gentlemen, I tell you these things because I am trying to emphasize the importance of your putting aside that sort of information and that putting aside that impermissible line of reasoning and in your giving the accused the ultimate fairness of considering only the evidence that you are supposed to take into account, of using the evidence properly in the way I have told you and of not engaging in that impermissible line of reasoning.
>
> Judges have learnt over the years to trust jurors and I'm sure that you understand these directions and the importance of them and the importance of your approaching this evidence completely in an impartial and objective fashion, and in not taking into account material that should not have been given and also, in not engaging in that impermissible line of reasoning.
>
> I wanted to emphasise that because you're going away for the weekend and it is something that you should carry with you throughout this trial. So thank you, we will adjourn now until Monday morning at 10 o'clock, you'll be back then."

[40] It was again obvious that the jury understood and appreciated the significance of the directions. Throughout the trial the jury has demonstrated a good grasp of the evidence and a conscientious approach to their task. The response during my direction was demonstrative of a jury who not only understood the directions and their significance, but

understood the importance of complying with the directions and of not engaging in the impermissible line of reasoning.

Principles

[41] The principles are not in doubt. The touchstone is the requirement that the accused receive a fair trial which necessarily requires a careful evaluation of the extent of the prejudice and a determination as to whether I can safely conclude that appropriate directions will dispel that prejudice.

[42] In *Crofts v The Queen* (1996) 186 CLR 427 the High Court was concerned with the reception of inadmissible evidence of uncharged acts of sexual misconduct against a child complainant in the context of a trial on charges of committing sexual offences against the same complainant. The general considerations were addressed in the joint judgment of Toohey, Gaudron, Gummow and Kirby JJ in the following passage (440):

> "No rigid rule can be adopted to govern decisions on an application to discharge a jury for an inadvertent and potentially prejudicial event that occurs during a trial. The possibilities of slips occurring are inescapable. Much depends upon the seriousness of the occurrence in the context of the contested issues; the stage at which the mishap occurs; the deliberateness of the conduct; and the likely effectiveness of a judicial direction designed to overcome its apprehended impact. As the court below acknowledged, much leeway must be allowed to the trial judge to evaluate these and other considerations relevant to the fairness of the trial, bearing in mind that the judge will usually have a better appreciation of the significance of the event complained of, seen in context, than can be discerned from reading transcript."

Competing considerations

[43] There can be no doubt that the evidence was prejudicial to the accused. It was an allegation of particularly abhorrent conduct. Furthermore, it was an allegation of abduction and sexual assault in the context of a trial where the Crown alleges that the accused attempted to abduct Ms Lees after murdering her boyfriend.

[44] As to motive, a friend of the accused gave evidence that when the accused returned to Broome he told her there had been a few dramas on the trip. The accused said he suspected that somebody had been following him and he had had to deal with it. That evidence was not challenged. Although the Crown advanced that evidence as suggestive of a motive, the possibility of a sexual motive may well occur to members of the jury.

[45] In assessing the possible extent of the prejudice, the source of the information must be considered. It was an entirely gratuitous assertion by a witness who was overtly aggressive and antagonistic towards the accused and counsel for the accused. It is plain from the evidence that Mr Hepi is not a person of integrity or good character. Mr Hepi and the accused were partners in an illegal commercial enterprise selling cannabis. They fell out. Mr Hepi acknowledged in evidence that he believes he was ripped off by the accused in connection with cannabis and a large sum of money from the sale of cannabis. Mr Hepi asserted that the accused had been involved in stealing a large quantity of Mr Hepi's property while Mr Hepi was absent from his home. Further, it emerged in Mr Hepi's evidence that he had been

arrested and charged with a very serious drug offence and was facing the prospect of going to gaol. He recognised that he might be in a position to obtain a "get out of gaol free card" by giving the authorities information implicating the accused in connection with the disappearance of Mr Falconio. Mr Hepi agreed that as a result of the assistance he gave or was about to give the authorities he managed to stay out of gaol. Finally, Mr Hepi acknowledged that he intended to seek a reward should the accused be convicted.

[46] The jury will be given an appropriate warning about the dangers of acting on the evidence of Mr Hepi. During Mr Hepi's evidence it was blatantly obvious that Mr Hepi was very antagonistic towards the accused. This antagonism was well demonstrated during cross-examination when the accused said audibly "you're a f……n liar" to which Mr Hepi immediately responded by staring at the accused and saying "get f…d".

[47] In my view the jury will have no difficulty in understanding that the evidence under consideration was a gratuitous remark by a witness who was seeking to harm the prospects of the accused. The jury will undoubtedly regard the outburst with great scepticism and as coming from a tainted source who was seeking to get even with the accused and who was, to use a colloquial expression, shooting from the mouth.

[48] It is also significant that the assertion by Mr Hepi related to events in South Australia. In this context the significance of the pre-trial publicity about the proceedings in South Australia must be considered.

[49] Prior to the commencement of the trial with the jury, it was common ground between counsel that almost inevitably a member or members of the jury would recall the publicity about the South Australian proceedings. The extent and prominence of that publicity should not be underestimated. Nor should the high degree of public interest in the accused and events in South Australia involving the accused be underestimated. The disappearance of Peter Falconio generated an enormous amount of publicity in the Northern Territory and excited a degree of public interest rarely seen in Australia.

[50] It is in this context that counsel agreed it was highly likely that prior to Mr Hepi's evidence the jury would have recalled the South Australian proceedings and, for that reason, a direction was required. Counsel for the accused suggested it is unlikely that prior to the evidence any member of the jury would have remembered that the proceedings in South Australia concerned abduction and sexual assault charges involving a child. I do not agree. I am satisfied that, at the least, prior to my directions members of the jury would have remembered that the proceedings in South Australia involved sexual assault charges. Further, in my view it is highly likely that one or more members would have recalled that the charges concerned a young girl and an allegation of abduction. Following the directions about the South Australian proceedings to which I have referred, which directions

necessarily brought the South Australian matters to the attention of the jury, the likelihood that a member or members of the jury recalled some of the details of those proceedings was increased.

[51] I am satisfied the jury would relate Mr Hepi's allegations to the South Australian proceedings. In my directions I spoke of Mr Hepi making reference to those proceedings. Further, I reminded the jury that in connection with those proceedings the accused had been acquitted.

[52] I am satisfied that the evidence given by Mr Hepi did not materially add to the jury's collective knowledge of the South Australian proceedings. In these circumstances, and in the context of the firm directions given at the outset of the trial and after the evidence had been given, in my opinion the evidence did not excite prejudice that did not already exist. Further, in my view the potential prejudice has been met and dispelled by the directions to which I have referred.

[53] If, contrary to my view, it is assumed that no member of the jury had previously recalled that the South Australian proceedings involved sexual assault allegations involving a child, given the jury's knowledge that the accused was charged in South Australia and acquitted, and in view of the directions and my assessment of the jury's response to those directions, I am satisfied that the prejudice has been dispelled and that the jury will comply with the directions.

[54] Counsel for the accused also submitted that the allegation by Mr Hepi that the accused was on his way back to Western Australia “to have a go at me” was so prejudicial either in itself, or in conjunction with the other evidence, as to require that the jury be discharged. In the circumstances to which I have referred, I reject that contention.

[55] For these reasons I rejected the application. The subsequent evidence and conduct of the trial did not give rise to any material or reason to cause me to alter my ruling.
