

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

Not Restricted

No. 8683 of 2006

THE QUEEN (ON THE APPLICATION OF
THE DIRECTOR OF PROSECUTIONS (VIC))

Applicant

v

THE HERALD AND WEEKLY TIMES
LIMITED (ACN 004 113 937) AND PETER
BLUNDEN

Respondents

<u>JUDGE:</u>	SMITH J
<u>WHERE HELD:</u>	Melbourne
<u>DATE OF HEARING:</u>	30 and 31 July 2007
<u>DATE OF JUDGMENT:</u>	23 November 2007
<u>CASE MAY BE CITED AS:</u>	R v The Herald and Weekly Times Ltd & Another
<u>MEDIUM NEUTRAL CITATION:</u>	[2007] VSC 482

CONTEMPT OF COURT - Sub-judice publication relating to committal - Fair report -
Tendency to prejudice trial - Publicity of prior convictions over several years - Whether
proceedings pending.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Applicant	Mr S O'Bryan SC and Mr G Silbert	Solicitor for Public Prosecutions
For the first and second Respondents	Mr W Houghton QC and Ms G Schoff	Corrs Chambers Westgarth

HIS HONOUR

The Proceedings

- 1 By originating motion filed on 14 September 2006, The Queen (on the application of the Director of Public Prosecutions (VIC)) (“the applicant”), has brought proceedings against the Herald and Weekly Times Limited and Peter Blunden, (“the respondents”), alleging that they were guilty of contempt of court on two occasions in publications contained in the Herald Sun newspaper on Tuesday 7 March 2006 and Wednesday 8 March 2006. It is alleged that each of the publications had a tendency, or was calculated to interfere, with the due administration of justice in pending proceedings.
- 2 The first respondent, The Herald and Weekly Times, is the publisher of the Herald Sun and the second respondent was, at the time, the editor-in-chief of that newspaper. The originating motion seeks orders punishing the respondents by fines or sequestration or both.

Background to these proceedings

- 3 On 6 March 2006 committal proceedings began against Bandali Debs (“Debs”). He had been charged with the murder of Kristy Mary Harty (“Ms Harty”) alleged to have occurred on or about 17 June 1997 at Upper Beaconsfield.
- 4 Prior to that committal, Debs had been charged with, and convicted of, the murder of two police officers. Those murders occurred after the death of Ms Harty. The chronology of the handling of those murder charges was as follows:
 - Debs was arrested on 26 July 2000 in respect of the police murders;
 - Between 26 September 2001 and 14 November 2001, the committal proceedings in respect of these murders took place;
 - The trial for these murders commenced on 14 August 2002;

- That trial concluded on 31 December 2002 when guilty verdicts were returned;
- He was sentenced on 24 February 2003;
- His appeal to the Court of Appeal was heard on and between 10 and 13 August 2004;
- The decision in that appeal was handed down on 6 April 2005.

On 20 July 2005 he was charged with the murder of Ms Harty. His application for leave to appeal to the High Court in respect of the police murders was heard and refused on 19 November 2005. As noted above, the committal in respect of the murder of Ms Harty commenced four months later on 6 March the following year.

5 There was no direct connection between the killing of the police and the murder of Ms Harty and none was alleged at the committal. There was, however, a common element in the investigation of the murders. A police officer, Detective Senior Sergeant Kearney, who was involved in the investigation of the police murders had been involved in the investigation of Ms Harty's murder. In the course of his investigation of the murder of the police officers, he formed the view that the person who killed the police officers may also have killed Ms Harty. Some of the evidence gathered in the investigation of the police murders by the task force concerned, the Lorimer Task Force, proved to be relevant in the Harty case; they provided important links in a circumstantial case which the Crown relied upon to tie the responsibility of the killing of Ms Harty to Debs. Thus it was, that at the committal of Ms Harty, the prosecution relied upon some evidence that had been gathered in the course of the investigation of the police murders and placed that material before the magistrate conducting the committal. It is fair to say that a very large part of the hand up brief presented to the magistrate, and to which the media had access, comprised documents which came into existence in the course of the investigation by the Lorimer Task Force.

6 The connection of Debs to the death of Ms Harty was sought to be made through

- DNA samples,
- evidence that Ms Harty had been killed with a bullet fired from a .375 calibre gun,
- evidence that such guns had been stolen from the Shooter's Shop in Melbourne in 1992 prior to the killing of Ms Harty,
- evidence that, in the course of the Lorimer investigation, a number of firearms were found buried at premises interstate belonging to Debs' mother, of which Debs had revealed knowledge in a secretly recorded conversation in 2000 and that those guns included .375 calibre weapons,
- evidence that on 3 July 2004 a cache of buried .375 calibre bullets was found by the purchaser of Debs' mother's property buried on the property,
- documentary evidence,¹
- identification evidence of Ms Grech resulting from her observation of photos of Debs taken after his arrest for the police murders.

It should be noted, however, that, at the committal in respect of the death of Ms Harty, the Crown did not seek to rely upon any similarity in *modus operandi* or similar arguments to link Debs and his killing of the police officers with the killing of Ms Harty.

The publications and related events

7 The first publication complained of in these proceedings appeared on page 13 of the Herald Sun of Tuesday 7 March 2006, the morning following the first day of the

¹ A petrol receipt and ANZ Bank documents seized during the Lorimer Task Force investigation which linked Debs at the relevant time to the area where Ms Harty's body was found.

hearing of the committal. It was placed at the top left hand side of that page and consisted of three columns. The headline read "Cop killer linked to dead teen". The first paragraph read

"POLICE killer Bandali Debs was linked to the 1997 murder of a teenage hitchhiker by DNA found on her skirt, a court heard yesterday."

The article then went on to refer to evidence given by Ms Grech about her observations of Ms Harty trying to hitch hike a ride at a time that was shortly prior to when Ms Harty was killed and of Ms Grech observing an older man in a white utility swerve to the side of the road and slow down as if to pick Ms Harty up. The article then referred to Ms Grech's evidence about what she thought about it at the time - how she thought if he was going to pick Ms Harty up it would be safe and how she later had a horrible feeling about it. The article then described how Ms Harty was found dead from a gun shot wound to the head in scrub in Upper Beaconsfield two days later. The article then returned to the evidence of Ms Grech and her evidence as to how it was she came to make the connection between Debs and the man in the utility who swerved to pick up Ms Harty. The following appeared

"Ms Grech said it was not until 2002 or 2003, when Debs was arrested over the murders of police officers Gary Silk and Rodney Miller, that she recognised him as the man in the white Ute. The Court heard Ms Grech worked with Debs' daughter Nicole at the time. 'I first saw his picture in the paper after he was arrested for the police murders and that was the time when I connected him to the utility' she said.

But Ms Grech did not tell police of the connection until last year. 'My husband did not want me to be involved in the case because of the nature of the person' she said."

8 The article then noted matters including that there was no conclusive evidence that Ms Harty had been sexually assaulted but semen stains were found in her underpants and reference was made to the expert evidence that the DNA from the stain had been matched to that of Debs. The report concluded with other matters not directly relating to Debs. It noted that the committal hearing continued.

9 The committal continued and concluded on 7 March. The learned magistrate came to the conclusion that there was insufficient evidence to commit Debs for trial of the murder of Ms Harty. Approximately two hours after the announcement of that decision, however, the Director of Public Prosecutions announced that he would directly present Debs for trial in the Supreme Court for the murder of Ms Harty and he issued a press release in the following terms:

“The Director of Public Prosecutions, Paul Coghlan QC, announced this afternoon that he would proceed against Bandali Debs for the murder of Kristy Mary Harty by way of direct presentment in the Supreme Court. That decision followed his discharge today on that charge at the Melbourne Magistrates’ Court. The media are asked to exercise great care in any report of the history of Debs because such publicity might adversely affect any future trial.”

10 The second article in question in these proceedings appeared on page 11 of the Herald Sun on Wednesday 8 March 2006. It appeared on the right hand side mid-section of that page immediately under a news item “Relaxed Downer knew” dealing with the AWB allegations. The news item relating to the Harty matter occupied a single column although the column was somewhat broader than the usual column. The size of the letters in the headline was approximately half that of the headline of the previous day. The headline read “Police killer to face trial despite win”. The first paragraph read

“POLICE killer Bandali Debs will be tried over the shooting murder of a teenage girl despite a magistrate’s dismissal of the charge yesterday.”

The article then referred to the ruling of the learned magistrate, and referred briefly to the history of the finding of Ms Harty’s body, the allegation that Debs had picked her up when she was hitchhiking, the allegation of the killing and of the circumstances. The article then stated

“Two hours after the convicted killer of police officers Gary Silk and Rodney Miller was discharged, the Director of Public Prosecutions announced that Debs would be directly presented for trial in the Supreme Court.”

The article then noted the reaction of Ms Harty's grandmother to the day's events. It went on to refer to some of the evidence that had been led, notably that there was one chance in 370 billion that the semen found on Ms Harty's body belonged to someone other than Debs. It stated that no match had been made in respect of car tyre and shoe marks at the scene and no gun match "was ever made" linking Debs to the killing. The article concluded with a report of the learned magistrate expressing sympathy to the family of Ms Harty and her decision that there was not enough evidence to put before a jury. In particular, she was quoted as saying that there was strong evidence that he was in the area and had sex with Ms Harty but she did not consider there was sufficient evidence to support his conviction. The article then noted that Debs was remanded to a date to be fixed.

The first article - the alleged contempt.

- 11 The originating motion stated that the alleged contempt arose out of the following matters in the first article
- a) the attribution of the epithet "Cop killer" to the accused in the headline,
 - b) the description of the accused as a police killer,
 - c) the reference in the article that Debs was also seen pulling over near where Kristy Mary Harty 18, was trying to hitch a ride just before she was killed.

The contempt was said to arise because the article had a tendency to interfere with the due administration of justice in the pending proceedings by giving rise to a real risk of prejudice of the fair trial of the accused. It was put that it did this because the matters referred to (a) and (b) above purported to reveal Debs' past criminal record and encourage in the public feelings of hostility and bias against the accused because of the unfavourable statements made about his character in those references to his criminal record. The third item mentioned above in paragraph (c) was not pressed in oral submission.

The second article – the alleged contempt

- 12 The matters complained of in respect of the second article were
- a) the description of the accused as “POLICE killer” in the headline,
 - b) the description of the accused as “police killer” in the body of the article, and
 - c) the description of the accused as the convicted killer of police officers Gary Silk and Rodney Miller.
- 13 The originating motion alleged that the second article had a tendency to interfere with the due administration of justice pending proceedings by giving rise to a real risk of prejudice to the fair trial of the accused by
- d) purporting to reveal the accused’s past criminal record,
 - e) encouraging in the public feeling of hostility against the accused by reason of the making of unfavourable statements about his character,
 - f) encouraging in the public bias against the accused on the account of the matters referred to in paragraph (d) and (e) above.

The applicant’s submissions

- 14 The applicant submitted that the alleged contempts were concerned with interference with the administration of justice through the publication of the allegedly interfering material. Counsel submitted that although material regarding alleged offences or the court proceedings relating to them may be newsworthy, where proceedings are pending concerning the person the subject of those references, any public interest in the publication of such information will normally yield to the higher interest of the due administration of justice.² Counsel emphasised the authorities which stand for the proposition that *prima facie* it is a contempt to publish evidence of prior convictions before a trial.³ Counsel conceded, however,

² *A-G (NSW) v TCN Channel 9 Pty Ltd* (1990) 20 NSWLR 368, 380, citing *R v Parke* [1903] 2 KB 432.

³ *R v Regal Press Pty Ltd* [1972] VR 67; *A-G (NSW) v Willesee* [1980] 2 NSW LR 143; *Hinch v AG (Victoria)* (1987) 164 CLR 15.

that where what was involved was the reporting of committal proceedings, fair and accurate reporting of the evidence and submissions based on the evidence was permitted even though to do so may result in the disclosure, for example, of prior convictions where they formed part of the evidence and submissions. Counsel acknowledged that reporting of such matters gave effect to the public policy that such court proceedings be reported.⁴

15 Counsel for the applicant submitted that the headlines and the references to the prior convictions for murdering two police officers in each article had the result that individually and collectively they constituted a *sub judice* contempt of court. As to the first article, the applicant argued initially in written submissions that there was a *sub judice* contempt in respect of the committal itself. That argument was not pressed. The argument that was ultimately pressed was that the contempt related to the impact of that article upon the fair trial of the accused.

16 The portions of the first article alleged to have that effect were the epithet “Cop killer” in the headline and the description in the article of him as a police killer. The article was said to have a tendency to interfere with the due administration of justice in relation to his future trial because of the real risk of prejudice to that trial following from the revelation of his past criminal record and the likelihood that it would encourage public feelings of hostility against him.

17 In relation to the second article, the basis upon which it was said to have a tendency to interfere with the due administration of justice was essentially the same – namely that it purported to reveal his past criminal record and encouraged in the public feelings of hostility against him by doing so.

18 Counsel submitted that at the time of each publication proceedings were pending against Debs in respect of the killing of Ms Harty. In relation to the second article, it was put that the Director of Public Prosecutions had made the decision to present Debs directly and had publicly announced that fact so that to all intents and

⁴ *Hinch v AG (Victoria)* (1987) 164 CLR 15, especially 25, 43; it should be noted that Wilson J (at 43) said that this “freedom is strictly circumscribed”.

purposes a criminal trial for the murder of Ms Harty was pending at the time of the publication of that article.

19 Counsel for the applicant submitted that the report in the two articles was not a fair and accurate report. Further, counsel submitted that it was not inevitable that at the trial there would be reference to the convictions, making the point that the assessment of the risk of interference with the administration of law is to be assessed at the time of publication.

20 Counsel referred in detail to several authorities in developing the argument that the publication of an accused person's criminal history while criminal proceedings are pending is a well recognised *prima facie* contempt and regarded as having a tendency to interfere with the due administration of justice because normally evidence of prior convictions is not permitted at trial.

21 The first case referred to was *R v Regal Press Pty Ltd* [1972] VR 67. This case concerned an article appearing in the "Melbourne Observer" on Sunday 11 April 1971 about charges laid against a radio announcer, John Brian Kerr, concerning driving offences allegedly committed on 9 April, including a driving under the influence charge, and a charge of attempted bribery of a police officer alleged to have been committed on the same day. Kerr had been remanded on 10 April 1971 to appear before the justices at the Prahran Magistrates' Court on 15 April 1971 to answer the informations. He was subsequently released on bail. The matter was adjourned on 15 April 1971 to 6 May 1971. Kerr was convicted at the hearing on 6 May 1971. In the course of the plea hearing, the informant made known to the court the fact that Kerr had a prior conviction for murder.

22 In the article published shortly prior to the hearing, on 11 April 1971, details were given about Kerr's conviction on a charge of murder in September 1950 and his being sentenced to death, but the death sentence was commuted and reference was made to the Crown's attempt in Kerr's trial on three occasions to have a "verbal" admitted, a verbal of which evidence had been given by a senior detective. The

article stated that the senior detective had been found not guilty that week in a police conspiracy trial.

23 Contempt proceedings were brought against the publisher, Regal Press Pty Ltd (Regal Press), and heard by McInerney J. The primary argument advanced on behalf of Regal Press was that the article was published in the belief that Kerr's previous conviction was so widely known as to be a matter of common knowledge and that therefore the publication of the article would not prejudice his trial on the above charges. Counsel submitted that that case was not as strong as the present case because there was no way that the prime murder conviction might be thought to have any probative value in respect of the offences with which Kerr was charged. In the present case, while the evidence of the other murders and convictions for murder would not be admissible, they were likely to have a more prejudicial effect in the sense of influencing the decision unfairly.

24 Counsel drew attention to the following passage in McInerney J's reasons:

"No doubt, the public interest aroused by Kerr's three trials, by the standard of his education and by the nature of his occupation prior to his convictions for murder, were matters which were calculated to make members of the public interested in the fact that Kerr had been arrested and charged with various offences alleged against him in the informations hereinbefore referred to. But as Sir Charles Lowe said in *R v Pacini* [1956] VLR 544, at page 548 ... 'Once a person is charged with the commission of the crime the curiosity of the public must give way to the requirements of a fair trial of the accused. He is by law entitled to a fair trial and the publication of any matter, after that stage, which tends to prejudice that fair trial either by hampering the presentation of the case by the Crown or hampering the defence is a contempt of court'.

For myself I would feel disposed to add 'or by embarrassing the mind of the tribunal of fact in determining the issues which may arise on that trial'."⁵

A little later his Honour stated:

"There was thus brought in existence (it was said) a situation which violated fundamental principles of the criminal law and constituted a

⁵ At 69.

contempt punishable criminally. The Crown suggested that the present article had the same character as those publications which have, in the reported cases, been treated as a contempt of court because their tendency and sometimes their object is to deprive the court of the power of doing that which is the end for which it exists – namely, to administer justice, duly, impartially and with reference solely to the facts judicially brought before it. Their tendency is to reduce the court which has to try the case to impotence, so far as the effectual elimination of prejudice and pre-possession is concerned. It is difficult to conceive an apter description of such conduct than is conveyed by the expression ‘contempt of court’.”⁶

After noting the principal defence raised by the defendant that Kerr’s prior conviction for murder was so widely known that the article did not constitute a contempt, his Honour turned to the issue raised as to whether there was firstly a technical contempt and whether if so he was satisfied beyond reasonable doubt that as a matter of practical reality the article had a real and definite tendency to prejudice the fair trial of the informations laid against Kerr.⁷ Counsel for the applicant drew my attention to the fact that McInerney J emphasised that those questions had to be determined at the time of publication and on a perusal of the article in the context of the pendency of the charges brought against Kerr and on the probabilities then existing⁸ and not in light of what subsequently happened at the trial.⁹

25 McInerney J stated that he entertained no doubt that the article was technically contempt because plainly it had a tendency to prejudice the fair trial of Kerr. In finding the technical contempt it should be noted that his Honour emphasised the elementary principle in the administration of criminal justice that, except for exceptional circumstances defined by statute, bad character or prior convictions of an accused person cannot be proved on his trial for an offence and that if prior convictions can be published in the press before trial that elementary rule is stultified.¹⁰ Turning to the issue of whether there was a tendency to prejudice the

⁶ At 70 citing *R v Parke* [1903] 2 KB 432.

⁷ At 71-73.

⁸ At 73 (also 80, 81), citing Jordan CJ in *Ex Parte Auld* (1936) 36 SRNSW 596-599.

⁹ Citing *R v Pacini* [1956] VLR 544 at 547.

¹⁰ Citing Fullagar J in *Davis v Bailey* [1946] VLR 486 at 496.

trial in a practical sense, his Honour considered the main argument relied upon in that case, namely, that the overwhelming probability was that the stipendiary magistrate or honorary justices hearing the matter were likely already to be acquainted with Kerr's conviction for murder. After referring to further authorities, his Honour commented:¹¹

"Accepting, however, that it was probable that the members of the Bench would be already acquainted with Kerr's history, the argument for the respondents overlooks the fact that knowledge (or memory) is not always at the forefront of a person's mind and that instant recall is not a faculty enjoyed by all magistrates and justices (or, for that matter, judges!). It overlooks the fact that the reading of an article such as this one may often serve to recall to the mind of the person some fact which he has long since forgotten, and make certain what might otherwise have been uncertain in the mind of a person constituting or assisting to constitute the Bench. Such a person might well have had some slight recollection that Kerr had been involved in the murder trial but insofar as the recollection of any such person was defective, perusal of the article here complained of must have served to repair the defect in recollection.

I think it cannot be assumed that any magistrate or justice would have recognised Kerr by sight – indeed, I would think it very improbable that they would ever have seen him before. ... it could not have been regarded as certain that all members of the Bench would have heard the name of John Brian Kerr in full or sufficiently distinctly to cause them to associate the particular accused then before them with the person who had attained such notoriety in 1950. ... I do not consider that it could, as at the time of the publication of the article, had been predicated that it was certain that any magistrate or justice would associate the accused with John Brian Kerr who had been convicted of murder in 1950, although I think the probabilities are that his name might have prompted some mental inquiry or speculation.

However, if any magistrate or justice had read the article complained of, he would have come to the hearing with the sure knowledge of Kerr's identity and with knowledge of Kerr's conviction of murder recently recalled to his mind and with his mind thus affected with knowledge of something the very nature of which was prejudicial and which it is the purpose for the law as exemplified by s.399 to exclude."

Counsel for the applicant submitted that similar arguments and issues arise in this case.

¹¹ At 76.

26 Later in his reasons, McInerney J analysed the task that would have confronted the magistrate or honorary justice in the following passage:

“No doubt a magistrate or honorary justice would endeavour to resist that temptation¹² and would strive to exclude the knowledge so gained of Kerr’s prior conviction in determining whether or not Kerr was guilty of one or other of the informations laid against him. From this point of view it may even be assumed that the Bench would have consciously put such knowledge aside. But that very process assumes that the members of the Bench have already been embarrassed in a way to which they should not have been subjected.”¹³

27 His Honour then commented that the protection of s.399 *Crimes Act 1958* was likely to be effectively denied to Kerr if the magistrate had read the article complained of and had the prior convictions brought to the forefront of his mind. He then considered and rejected an argument advanced by counsel for the defendant that the Crown had to prove beyond reasonable doubt that Kerr was more likely to be convicted of the charges brought than would have been the case had the article not been published. His Honour stated:

“... it is sufficient that the publication was likely to prejudice the mind of the tribunal by putting it in possession of information which it ought not to have had and which would embarrass it in the task of deciding the case fairly and free from prejudice.”¹⁴

His Honour then noted with approval an argument advanced for the Crown that special regard must be had to the accused’s right to a fair trial where the notoriety of the accused is such that a fair trial is difficult. Anything which infringes that right and makes a fair trial even more difficult is all the more serious.¹⁵

28 His Honour concluded that he was unable to subscribe to the view that what had occurred was merely a technical contempt. He stated:

“In my view the publication of the article tended to set at nought, and was likely to set at nought the provisions of s.399 of the *Crimes Act*. Effectively it was likely to recall to the mind of any magistrate or justice sitting to hear the charges against Kerr information as to his

¹² To reason from the conviction to guilt.

¹³ At 79.

¹⁴ At 80.

¹⁵ At 80.

prior conviction which should not have been brought to the knowledge of the court until the court decided to convict Kerr on one or other of those informations.”¹⁶

His Honour commented that:

“It is the probable effect at the time of publication, on the minds of probable members of the tribunal that is important.”¹⁷

29 Counsel for the applicant referred also to the case of *Attorney-General (NSW) v Willesee and Others* [1980] 2 NSWLR 143. That case concerned material published on a television channel in connection with a strike of prison warders and a lockdown that followed as a consequence of the prisoners being confined to their cells on about 20 August 1979.

30 The strike and lockdown were the consequence of a prison warder, Mewburn, being assaulted and killed while on duty on 10 August 1979. On 11 August 1979 a prisoner, Peter Schneidas, was charged with that murder.

31 The primary focus of the television programme was the strike and its consequences. In the course of the programme, an unidentified prisoner was interviewed for television using long range equipment. In the course of the interview, a number of matters were canvassed but the prisoner volunteered that

“the inmate who allegedly killed Mewburn had previously assaulted two other officers with weapons. Accordingly he was placed in the observation unit of the central industrial prison and, as that name implies, it is supposed to be a super tight maximum security part of the jail. How is any inmate in that section able to lay his hands on a hammer?”¹⁸

32 Counsel relied upon the following passage from the judgment of Moffitt P:¹⁹

“(21) Whatever ... other compromises there should be in favour of giving information on a matter of public interest (a matter not necessary here to embark upon), I think the conclusion can, and should be, arrived at that to publish on radio, television or in a newspaper that a man, then charged with a criminal offence, has

¹⁶ At 80, 81.

¹⁷ At 81.

¹⁸ At 147.

¹⁹ At 152, paragraph (21).

past convictions, or has committed past crimes, or to detail them, has a tendency to prejudice the fair trial of the man charged. I find it difficult to envisage a case where such a publication would not be contempt of court, but certainly it is contempt in any case remotely resembling the present. To decide otherwise would be to relegate to a secondary place, where it has never been placed by any authority, the fundamental principle of the general law, long accepted as basic and necessary to secure the fair trial of a person.”

Counsel submitted that this was a statement of general principle that should be accepted.

33 Counsel also referred to the following passage from the judgment of Hope JA as a statement of relevant principle:²⁰

“(45) As has already been made clear, there is no justification for the publication of matters such as that complained of in respect of a person charged with a criminal offence. It is particularly objectionable when the accused person is charged with the murder of a warder, and it is said of him that he had previously assaulted two other officers with weapons. There can be no question but that this material was published to a wide audience and it had a strong tendency to prejudice the fair trial of the accused person. The circumstance that there was publication in 1978 of reports of the trial of the accused person for an earlier offence does not, in the circumstances, have any relevant bearing upon that prejudice.²¹ The fact that the publications which have been described appeared in the newspapers after the prisoner was charged with Mr Mewburn’s murder, and must have had a wide circulation, is a material circumstance in relation to the extent of the prejudice caused by the subject publication.”

I note that his Honour went on to say that, in his opinion, a permissible description of the death of Mr Mewburn by the media would reveal that the person accused of killing him had some record and a permissible discussion of the warders’ strike would reveal that he had been an inmate of Katingal which the public would associate with intractable persons. His Honour commented that those circumstances would mitigate the seriousness of the contempt but that the specificity of the allegation that the accused had previously attacked warders with weapons and the

²⁰ At 159, paragraph (45).

²¹ This was apparently a reference to prior convictions for assault some two years earlier.

relevance of that to the issue to be decided in the trial and the fact that that resulted in a breach of the most fundamental rule, the contempt remained sufficiently serious to require the imposition of a penalty.²²

34 Counsel also relied upon the statement of principle by Mahoney JA.²³ After referring to the right to a fair and impartial trial and “the interests of the community in ensuring that he has it”, his Honour stated:

“This is the right even of a prisoner already in jail. Encroachments upon that right are carefully scrutinised, not merely because the particular person in question may merit such a trial, but because an encroachment upon the right of one is potentially an encroachment upon the right of all. There are cases in which that right may, because of particular circumstances, be qualified, but they will be special cases. They should be seen as such by those who, in the course of their activities, are required to consider such matters. ...”

35 Counsel for the applicant also referred to statements in *Hinch v Attorney-General (Vic)* 164 CLR 15. Counsel referred, in particular, to the following passage in the judgment of Mason CJ

“Where the public interest in the administration of justice does not yield to a superior public interest, the balancing approach should protect the administration of justice from any substantial risk of serious interference. The application of a test in this form would best reconcile the conflicting demands for a free press and for a fair trial. ... In this formulation the adjective ‘serious’ is essentially emphatic, so that I would be prepared to accept the test of ‘real risk of interference’ stated by Gibbs CJ”.²⁴

The learned Chief Justice went on to refer to the statement in *McRae*²⁵ which emphasised that the summary jurisdiction to punish for contempt should be exercised “only if it made quite clear to the court that the matter published has, as a matter of practical reality, a tendency to interfere with the due course of justice in a particular case”.²⁶

²² At 159-160, paragraph (45).

²³ At 164, paragraph (64).

²⁴ At 27, referring to *BLF*, (1982) 152 CLR at 60.

²⁵ *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351.

²⁶ At 27 and 28.

Counsel also referred to a later passage where Mason CJ referred specifically to publication of prior convictions and stated:

“... the courts have always taken a serious view of any published disclosure of the prior conviction of a person accused of a criminal offence when proceedings for that offence are pending.”

His Honour, after noting that this was because evidence of such a conviction was not admissible, stated:

“Yet knowledge of a prior conviction is likely to prejudice a jury against an accused person and induce a jury to conclude that he had a propensity to commit the offence charged. For this reason the acquisition by a jury of knowledge of a prior conviction of the accused is usually regarded as causing such prejudice that the trial is invalidated thereafter.”²⁷

36 Counsel also referred to a restricted judgment in the matter of *R v The Age Co Ltd and Others* [2006] VSC 479R. Counsel noted that in that case the issue of notoriety of the accused’s past did not arise. In that case, the defendant had published prior convictions and custodial history and that material had not previously been in the public domain. In that case the learned trial judge, commenting on the advice given on which the defendant had acted, stated:

“The relevant fact is that unfortunately his conclusion of law was wrong. The simple and clear beacon is that every accused is entitled to a fair trial. So too is the community. Ordinarily, publication of prior convictions and custodial history while a trial is pending is antipathetic to a fair trial thus it is contemptuous. So too here.”

An issue that had been raised in that matter by the defendant was the likely lapse of time between publication and trial – possibly more than a year. His Honour commented:²⁸

“However such lapse is of no avail with the publication of material such as was published here, that is, of relevant prior convictions and a custodial history published in a graphic and tragic context. Citizens rightly are concerned at the apparent impotence of the law in relation to repeat defendant disqualified drivers. The material here published

²⁷ At 28, citing *Willesee* [1980] 2 NSWLR 143 at 149.

²⁸ At paragraph [16].

is unlikely to fade in persons' minds (even though the defendant apparently was licensed to drive at the time of the events)."

His Honour also took the view that the fact that the trial might not occur in the location where the events occurred would not assist.²⁹

37 Relying on these authorities, counsel for the applicant submitted that notwithstanding the notoriety of Debs and the previous media publications, the conclusion should be drawn that there was, as a matter of practical reality, a real tendency to prejudice the fair trial of Debs by the publication of the fact of the prior convictions for the murders of the two police officers.

The submission on behalf of the respondents

38 After introducing a number of issues, counsel for the respondents focussed on the issue of the right of the media to publish a fair and accurate report of court proceedings even though it might prejudice the trial of an accused. It was put that this right to publish was an adjunct to the right to attend proceedings in accordance with the principles of open justice. Counsel submitted that it had been long established that proceedings for contempt may not be maintained in respect of a fair and accurate report of a proceeding published in good faith, notwithstanding that it may be likely to create prejudice against a party pending civil or criminal proceedings. Counsel submitted that this proposition applied particularly to committal proceedings. Reference was made to *Ex Parte Terrill; re Consolidated Press Ltd* (1937).³⁰ Counsel also relied upon the following statement by Mason CJ in *Hinch v Attorney-General (Vic)*:³¹

"It has never been suggested that a fair and accurate report of committal proceedings made in good faith would amount to a contempt, notwithstanding daily reports in the news media of elements in a Crown case which might have a strong tendency to induce readers and viewers to conclude that the accused is guilty of the offence charged. A report of committal proceedings has a special capacity to influence the minds of potential jurors because the evidence is directed to the very issues which will arise at the trial and

²⁹ At paragraph [16].

³⁰ 37 SR (NSW) 255 at 257-258 per Jordan CJ.

³¹ (1987) 164 CLR 15 at 25; Wilson J, at 43.

the evidence led may include evidence not admissible at the subsequent trial. On the other hand, a fair and accurate report will necessarily be confined to a summary of evidence and submissions based on the evidence. Nevertheless, it would be a mistake to draw too much from the fact that reports of committal proceedings do not constitute contempt because these reports gave effect to another public policy, namely that such proceedings should be reported.”

Counsel submitted that it was not necessary that the account be a completely verbatim account to constitute a fair and accurate report. Counsel submitted that a fair summary was acceptable³² and that the test was whether the report was

“one which a person of ordinary intelligence using reasonable care might reasonably regard as giving a fair summary of the proceedings”.³³

39 Counsel also submitted that while each of the articles identified Debs as a convicted killer they did so in the course of reporting the evidence at the committal proceedings and central to that report was the evidence of Ms Grech and how she came to identify Debs because of the pictures that were published in the paper following his arrest on charges relating to the murders of Silk and Miller. Secondly, counsel referred to the DNA match using a sample obtained in the police murder enquiry. Counsel also relied heavily upon the substantial quantity of material that had been contained in the hand up brief relating solely to the killing of Silk and Miller and the investigation of that killing (Operation Lorimer), all of which was placed before the learned magistrate³⁴ and which linked Debs to those killings although at no time did the prosecution expressly refer to him as having murdered the two officers. Counsel also relied, however, on the fact that counsel for Debs at the committal referred to the conviction for the murders of the police officers on three occasions in the course of cross-examining witnesses.

40 Thus the primary defence taken by the respondents was that the two articles constituted a fair and accurate report of the committal proceedings and their outcome and that it was published in good faith.

³² Relying upon Mason CJ in *Hinch* at 25.

³³ *Ex parte Terrill*, above, 255 and 259.

³⁴ The media was given access.

41 Counsel for the respondents raised a further issue in relation to both articles. They submitted that the articles did not in any event have the requisite tendency to interfere with the due administration of justice. It was put that the applicant had to prove, “as a matter of practical reality”, that there was a real and definite tendency to prejudice the pending proceedings against Debs.³⁵ I note that Mason CJ in *Hinch v Attorney-General (Vic)*³⁶ referred to the various formulations and stated that they were “synonymous or virtually synonymous with ‘substantial risk of serious interference’ with a fair trial”.

42 Counsel submitted that in determining whether the material had the required tendency it was relevant in the circumstances of this particular case to consider

- the nature of the evidence that was presented at the committal and which would be presented by the prosecution at the trial which it was said would inevitably lead the jury to learn of his prior convictions,
- the notoriety of Debs as a convicted police killer.

43 It also relied upon the likely period between publication and trial – in this instance probably at least 12 months after publication of the articles. It was put that the probable delay was accordingly so great that the article posed no practical risk at the trial.

44 In elaboration of these points counsel submitted that the affidavit material filed demonstrated that evidence of the fact of Debs’ convictions for the police murders was relevant to his identification as a suspect and to the other forensic evidence that had been gathered. In addition, the prosecution had relied at the committal on statements obtained during the investigation of those murders and prepared for the trial of Debs for those murders. It was argued that, therefore, it was inevitable that, in any criminal trial hearing in respect of the death of Ms Harty, the jury would learn

³⁵ Reference was made to *John Fairfax and Son Pty Ltd v McRae* (1955) 93 CLR 351, 370-372; *Victoria v Australian Building Construction Employees and Builders Labourers Federation* (“The BLF case”) (1982) 152 CLR 25 per Gibbs J at 56, Mason J at 99, and Wilson J at 133 and Brennan J at 166; *Hinch v Attorney General (Vic)* (1987) 164 CLR 15 per Mason CJ at 27,28 and Wilson J at 34.

³⁶ Above at 27-28.

of his convictions for the police murders. In those circumstances it could not be said that the articles had the relevant tendency as a matter of practical reality to prejudice the jury.

45 In support of the argument that effective disclosure of the convictions was inevitable, counsel also relied upon what occurred at the actual trial. Counsel referred to the concession made at trial by counsel for Debs that the evidence he proposed to lead meant that it would be patent to the jury that Debs had been convicted in relation to the police murders. Counsel argued that it was for that reason that Debs' counsel supported the Judge informing the jury panel prior to selecting the jury of the fact of Debs' convictions for the police murders, asking members of the panel to seek to be excused if their knowledge of such matters might adversely affect their capacity to discharge their duty.

46 On this issue, counsel for the applicant referred to the well established proposition³⁷ that the tendency of the alleged publication to affect a pending trial must be assessed at the time it is made. On that basis, counsel for the applicant submitted that what transpired at the trial should not be considered. Accepting the above proposition, it seems to me that if the situation as at the date of the publication was that it had emerged that the defence of the accused at the future trial would inevitably involve disclosure of the convictions it would be relevant to consider that prospect in determining whether the fair trial of the accused might be prejudiced. Even in such a situation, it must be remembered that it would not necessarily follow that relevant prejudice could not be shown.

47 But a fair reading of the conduct of the proceedings at the committal does not support the conclusion that the defence at the future trial would have led to the disclosure of the convictions. It is true that questions were asked by counsel for Debs at the committal about the investigation of the murders and the sequences in which various items of evidence were gathered and the timing of the sequences. As noted above, in the course of that cross-examination there was reference on three

³⁷ *R v Regal Press Pty Ltd* [1972] VR 67, 73 and cases there cited.

occasions to the fact that Debs was convicted. That appeared to be done by his counsel as the means of pinpointing time – that is the time of the event in question as being before or after conviction. But it was not necessary to refer to the convictions for that purpose. Alternative expressions could have been used. At the committal, there was cross-examination testing the evidence allegedly linking Debs to the murder, but it is not apparent from that cross-examination that there was likely to be a line of defence that would reveal the link to the police murders.

48 At the trial, however, it became clear that the Crown case would be attacked on the basis that the police had come to a conclusion and wanted to make the evidence fit it. The view of defence counsel at the trial was that that line of defence would lead to the convictions being revealed. I also note that the concern that was aired by the learned trial judge was as to how to ensure that an impartial jury was selected without alerting the panel to the convictions for the police murders. His Honour discussed the issue with counsel, and in particular counsel for the defence. The problem might have been addressed with the jury panel in different ways in his Honour's preliminary remarks to the panel about the accused and the case. The Crown had prepared for trial on the basis that the convictions would not be mentioned. It was only once defence counsel agreed that it would be necessary in the trial to refer to the prior convictions for the murder of the police that his Honour proceeded to do so. For these reasons, it seems to me that what occurred at the subsequent trial does not relevantly assist the respondents.

49 It appears to me that the matters that need to be considered in determining whether the articles had a real and definite tendency to prejudice the fair trial of the accused are the others matters raised by the respondents. The first is the notoriety of Debs as a convicted police killer and the question of the impact of the publicity in the past, in particular up to and including 7 March 2006, in both the print and electronic media about his role in, and conviction for, the police murders. Counsel for the respondents, in particular, relied upon the statement of McHugh JA in *Attorney-*

*General (NSW) v John Fairfax and Sons and Bacon*³⁸ that in determining the practical tendency of the publication it is relevant to consider that prejudicial material had been published before the date of the publication the subject of the contempt allegation.³⁹ Counsel submitted that, having regard to the extent of publication of material relating to the police murders and its prejudicial impact, it cannot be demonstrated to the required level of satisfaction that the publications in question carried a greater risk of prejudice than already existed. Counsel went further to submit that it was inevitable, having regard to the publicity that Debs had received in relation to the police killings, that members of the jury would be aware of his prior convictions in any event.

50 Counsel for the respondents also submitted that it is relevant, as noted above, to consider the length of time that was likely to elapse between the publications and the hearing of the charges at a trial.

51 In relation to the second article, counsel for the respondents also submitted that there could be no interference with the due administration of justice because there were no curial proceedings pending at the time of its publication. Counsel argued that that could not occur until formal steps had been taken to set the proceedings in motion. Reliance was placed on the High Court decision of *James v Robinson*.⁴⁰ In that case articles were published about a manhunt being conducted by the police in respect of the murder of two persons. The articles identified the fugitive and contained eye witness accounts of the murders. The High Court accepted the submission that there was no contempt of court involved because while proceedings were imminent they were not pending. Reliance was placed on the following passage from the majority judgment:⁴¹

“If a publication is to constitute contempt at all it must be a contempt at the time it is made, and the person aggrieved must be aggrieved in his capacity of a party to proceedings; therefore he must be a party at that time. It would be an astonishing state of affairs if a person responsible

³⁸ (1985) 6 NSW LR 695.

³⁹ At 711; *John Fairfax and Sons v McRae*, above 372, BLF case, above at 136.

⁴⁰ (1963) 109 CLR 593.

⁴¹ At 607.

for a publication were to be held guilty or not guilty of contempt according as proceedings should or should not be commenced thereafter.”

52 Counsel for the respondents submitted that the Director of Public Prosecutions had merely announced that he intended to directly present Debs but had not yet formally done so. Counsel submitted that in that situation proceedings were merely imminent and not pending.

Submissions in reply for the applicant

53 In reply, on the prejudice issue, counsel for the applicant took up a number of issues including the question of whether the publications would have had the requisite tendency bearing in mind other publications at about the time and at earlier times.

54 Counsel submitted first that, as to publications contemporaneous with the relevant articles, the evidence placed before the court by the respondent did not include any other newsprint publications at the time – they were confined to radio and television. Counsel submitted that the newsprint is a more serious publication because the reader has the opportunity to mull over it and absorb it as compared to the “quick grab” by a broadcaster. At the same time the applicant accepted that, as Hope JA commented in the *Willesee* case,⁴² the fact of contemporaneous publications is a material circumstance that is to be considered in determining the extent of the prejudice caused by the relevant publications. Counsel also noted his Honour’s statement that they did not, however, mitigate the offence as such. Asked whether in an appropriate case it would be relevant to determining whether there was a tendency to prejudice at all, counsel submitted that if they were all what might be described as contemporaneous then the fact that others had infringed on the day or on the day before would not be a defence – all who published would be guilty of contempt. I note that the respondents did not expressly rely on concurrent publication but rather relied upon all of the publicity, including the contemporaneous publicity, in support of its argument that there was no real tendency to prejudice.

⁴² See above at paragraph (45).

55 In relation to publicity in the past, counsel for the applicant conceded that it was relevant to consider the prior publications in determining whether the article had the requisite tendency to prejudice. Counsel conceded that theoretically other publication could reduce the prejudice to zero or to the point where a court was not satisfied there was a sufficient tendency to prejudice. If, for example, there was so much prejudice caused by past publicity that the judge were to conclude that it was so overwhelming that the publication in question did not make a scrap of difference, or the judge was not so satisfied, then there might be a point.

56 Counsel then went on to canvass the issue of fair and accurate report and the time at which the tendency to prejudice the fair trial is to be considered. It was submitted that the hand-up brief had no reference to convictions and the references to the Lorimer Task Force were guarded. The references to convictions were in defence counsel's questions and not in evidence. Counsel also referred to counsel's final submissions at the committal which did not refer to the convictions. The convictions were not relied upon by the Crown at any time during the committal.

The issues to be determined

57 Referring to the authorities cited, the following propositions may be advanced:

1. Publication of material in circumstances where it has a real tendency, as a matter of practical reality, to interfere with the due course of justice in a particular case will constitute the crime of contempt of court.⁴³
2. The publication of a person's prior convictions when that person is facing criminal proceedings constitutes a *prima facie* case of contempt.
3. Those propositions must be qualified where there is a competing public interest which outweighs the detriment arising from the possibility of prejudice to the administration of justice in a particular case,⁴⁴ an example

⁴³ *AG for New South Wales v TCN Channel 9 Pty Ltd*, above, at 379 and *Hinch v Attorney General for State of Victoria* (1984) 164 CLR 15, at 27, 46-47.

⁴⁴ *Hinch*, above and *Ex Parte Bread Manufacturers Limited; re Truth and Sportsmens Limited* (1937) 37 SR(NSW) 242.

being the qualification for fair and accurate reporting of committal proceedings.⁴⁵

58 As to the first two propositions, the judicial statements cited refer to the importance of ensuring that an accused person has a fair trial and that the interest in ensuring a fair trial is not confined to the accused but is a public interest, being a matter of community concern.⁴⁶ As Jordan CJ⁴⁷ said

“It is of extreme public interest that no conduct should be permitted which is likely to prevent a litigant in a Court of justice from having his case tried free from all matter of prejudice.”

Reference has also been made to the fact that publication of convictions may render impotent the provisions of the law which are directed to excluding such evidence at the trial.

59 Much is at stake. What is involved is the protection of a long recognised fundamental human right – the right to a fair hearing before an impartial court or tribunal.⁴⁸ In addition, there is the preservation of community acceptance and support of the criminal justice system. It must be remembered that the courts are the “least dangerous” of the three branches of government⁴⁹ and their power and authority depends on community acceptance and support.⁵⁰ Unfair trials will diminish acceptance by the litigants concerned and the community of

- the trials and their outcomes and
- the criminal justice system itself.

It must also be remembered that community acceptance and support of the criminal justice system is profoundly shaken whenever wrongful convictions occur. The

⁴⁵ *Ex Parte Tyrrel* (above) and *Hinch* (above).

⁴⁶ Mahoney JA in *A-G (NSW) v Willesee*, above [64].

⁴⁷ *Ex Parte Bread Manufacturers Ltd*, at 249-50.

⁴⁸ In Victoria see *Charter of Human Rights and Responsibilities Act 2006*, s.24(1).

⁴⁹ Hamilton, *The Federalist Papers*.

⁵⁰ Sir Ninian Stephen, “Judicial Independence – A Fragile Bastion”, (1982) 13 *Melbourne University Law Review* 339; *City of St Kilda v Evinden Pty Ltd* [1990] VR 771, 777 – “Confidence in those who constitute its courts and tribunals is a basic necessity for a successful civilised society”.

publication of highly prejudicial information such as prior convictions carries a grave risk of causing wrongful convictions.⁵¹

60 There are, therefore, very powerful public interest concerns that underlie the first two propositions and, in particular, the proposition that the publication of an accused's prior conviction pending the trial of that accused *prima facie* constitutes a contempt of court.⁵²

61 By raising the defence of fair and accurate reporting of court proceedings, the respondents seek to rely upon "the wider interests of the administration of justice".⁵³ As Mason CJ explained, the defence of fair and accurate report of committal proceedings made in good faith gives "effect to another public policy, namely, that committal proceedings should be reported".⁵⁴ His Honour commented that the publicity dispels inaccurate rumour and speculation and may induce citizens who are able to give relevant evidence to come forward. To that may be added considerations of transparency and accountability.

62 After the hearing had concluded, I invited counsel to make further submissions on the question of whether there could be identified any other public interest supporting the publication of the actual convictions in this case. The respondents, while noting that the convictions were matters of interest to the community⁵⁵ did not identify any additional public interest. Certainly at the time of the publication, the information about the convictions would have been a matter of interest to the public but it did not serve the public interest unless it formed part of a fair and accurate report of the committal given in good faith.⁵⁶

⁵¹ For a recent discussion of the impact of evidence of prior misconduct see Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission, Uniform Evidence Law, Report (2006) paragraphs 3.4 to 3.25.

⁵² *Hinch*, at 28.

⁵³ *Hinch*, per Mason CJ at 26.

⁵⁴ *Hinch*, at 25.

⁵⁵ Citing *London Artists Ltd v Littler* [1969] QB 375 at 391 per Lord Denning. Note the distinction in s.5 *Contempt of Court Act* 1981 between matters of interest to the public and matters of public interest; Miller, *Contempt of Court*, 3rd edition at 360. See also, Australian Defamation Law and Practice, 8560 FF.

⁵⁶ It may be that the fact of the convictions would become a matter of public interest in the reporting of any sentencing proceedings.

63 Thus the first issue to determine is whether, in respect of both articles, the disclosure of the convictions was part of a fair and accurate report of committal proceedings made in good faith. If not, the issue that remains is whether having regard to the facts and circumstances and, in particular, the publicity and consequent notoriety prior to the committal of Debs as the person who had killed two police officers, the Crown has proved beyond reasonable doubt that the publications carried with them a real tendency, as a matter of practical reality, to interfere with the fair trial of Debs.

Issue – Fair and Accurate Report

64 I proceed on the basis that the onus of proof is borne by the applicant to satisfy me beyond reasonable doubt that the article in question was not a fair and accurate report of the committal proceedings.

65 The defence was described by Jordan CJ in *Ex Parte Terrill; Consolidated Press Ltd.*⁵⁷ After referring to the importance of the court sitting in public, and the right of those present to communicate to other members of the public an account of the proceedings they had witnessed, Jordan CJ continued in these terms:

“so long as any account so published is fair and accurate and is published in good faith and without malice, no one can complain that its publication is defamatory of him, notwithstanding that it may in fact have injured his reputation, and no one can in general be heard to say that it is a contempt of court, notwithstanding that it may in fact be likely to create prejudice against the party to civil or criminal litigation. This applies to preliminary inquiries by a magistrate where such inquiries are held in open court: *Lewis v Levy* (1858), E.B. 5C7.”

66 In submissions in reply, counsel for the applicant conceded, properly so in my view, that the nub of the argument was whether the article was a fair publication. Counsel rightly conceded that there was material before the learned magistrate which identified Debs as a person who had killed the two police officers – namely the three occasions counsel for Debs had referred to the fact of the conviction. Counsel submitted, however, that having regard to the way that fact was headlined and to the language that was used, there was not a fair report of the committal proceedings

⁵⁷ (1937) 37 SR (NSW) 255 at 257.

because the fact of the convictions was not a fact which was relevant to the committal proceedings. It was not relied upon as part of the prosecution case, was barely mentioned, and yet it dominated the report of the committal proceedings.

67 The question of what is a fair report in the context of criminal contempt was also discussed in *Minister for Justice v West Australian Newspapers Ltd*.⁵⁸ Jackson CJ⁵⁹ stated the following propositions

“The authorities show that one essential requirement to avoid a finding of contempt is that the report should be a fair one. A report may be accurate as far as it goes, but unfair either in its mode of presentation or in stressing unfavourable aspects of the proceedings or in accurately reporting some parts but omitting other parts of the proceedings.”

68 In *Minister for Justice v WA Newspapers* the complaint made was that the fair trial of the accused, Virtyo, on a charge of murder had been prejudiced by articles that had appeared in the media relating to proceedings in the Court of Petty Sessions when he was remanded on a murder charge and several other charges. The Daily News referred to him as being charged with murder and stated that he had been convicted and jailed for offences relating to motor cars and that his arrest for murder occurred when in a motor vehicle used unlawfully. It also focused on a charge against him of stealing a rifle and ammunition and linked that fact to the murder.

69 Jackson CJ commented in relation to that article that

“although it was largely a reported proceedings it was neither fair nor uncoloured and it had a real and practical tendency to prejudice Virtyo on his trial for wilful murder.”⁶⁰

His Honour commented that⁶¹

“It is an irresistible conclusion to any ordinary reader not only that the accused is a criminal but that the shooting probably was linked with the offence of stealing the rifle and ammunition. It was likely to be gravely prejudicial to a fair trial.”

58 [1970] WAR 202.

59 At 207.

60 At 208.

61 Ibid.

70 Plainly consideration of whether a report is a fair report of proceedings is one on which people will often hold different views.⁶² In the present case, however, I hold the strong view that a fair report of the committal proceedings did not warrant any reference to the fact of conviction for the murders of the police officers. It is true that the convictions happened to be mentioned in the course of the hearing but they had no bearing on the case or its outcome and received only passing reference in the hearing. It did emerge that the investigation of Debs in respect of the police murders had thrown up evidence which connected him with the killing of Ms Harty. At the most, for a fair and accurate report, reference could have been made to those latter facts - as was done by other media outlets.

71 It is important that subtle distinctions be avoided in this area. It seems to me that the distinction I have drawn in this instance is clear, reasonably simple and realistic. This is supported by the fact that it was drawn in a significant number of instances by a number of journalists and a number of media outlets. To adopt the analysis put forward for the respondents, however, would create great uncertainty in the application of this important defence of fair and accurate report.

72 In my view the analysis advanced for the applicant is correct and I am satisfied to the requisite degree for the above reasons that the report was not a fair report of the committal proceedings. I turn to the issue of prejudice.

Issue - Prejudice

73 The applicant must demonstrate to my satisfaction beyond reasonable doubt that the report of the committal carried with it, as a matter of practical reality, a real tendency to prejudice the trial of Bandali Debs for the murder of Ms Harty.

74 Those representing the respondents gathered together and tendered a large amount of material from all media sources relating to the publicity given to Debs over several years about the killing of the police. They also presented charts setting out details of items of media publicity. The publicity was extensive and because it

⁶² Note the different analyses and emphasis of Jackson CJ, Virtue SPJ and Burt J in *Minister for Justice v West Australian Newspapers Ltd*, above.

concerned the murder of police officers was likely to have stood out from other reporting of criminal events and trials. Often Debs was described in that coverage as “police killer” or “convicted police killer”. The coverage occurred frequently each year from his remand on the police murder charges in 2000 to the final unsuccessful appeal in the High Court in 2005. In July 2004, publicity of the arrest of “police killer” Debs for the murder of Ms Harty occurred between the Court of Appeal and High Court appeals relating to the police murders. The coverage of the committal relating to the murder of Ms Harty began only months after the coverage of the last appeal in respect of the police murders.⁶³ But the publicity related to Debs, the “police killer” was not confined to matters concerning the committal, trial and appeals of Debs in relation to the police killings. A number of other events occurred which would have helped to keep in the public mind the knowledge and memory of his involvement in the police killings including the following:

- Two books were published about the police killings in May and September 2003.
- In the period between late December 2003 and early January 2004 there was publicity about
 - Debs being involved in a bomb plot while in prison,
 - the death of his youngest son at 19 years,
 - another son being charged with driving while his licence was suspended.

Usually he was referred to in that publicity as “police killer” or words to similar effect.

- In early 2004 the Police Association called for Debs and Roberts to be split up behind bars.

⁶³ The extent and continuity of the coverage over a period of years in close proximity are features that distinguish the present case from cases such as *R v Regal Press* [1972] VR 67.

- In January 2004 and May 2004 there was publicity about his son being charged with stealing fuel and his daughter being charged with deception – he being referred to as “police killer”.
- In late August 2004 Debs was again referred to in articles commenting on the fact that the wife of one of the police officers he killed, Carmel Miller, had been appointed to the State Government Sentencing Advisory Council.
- In July 2005 there were several articles published about the fact that the police killer Debs had been charged with the murder of a teenage prostitute. There was also an article about “police killer” Debs having been caught plotting to escape from prison.
- In November 2005 there was an article published about the wedding of Carmel Miller and the brother of Gary Silk, Peter, in the course of which reference was made to Debs and his conviction for the murder of Miller and Silk.
- On 19 November 2005 there was publicity given to the fact that the police killers, Debs and Roberts, had lost their last avenue of appeal.

75 In addition, there was other publicity at the time of the committal proceedings in fair and accurate reports which made the link between Debs as the person charged with the murder of Ms Harty and as a person connected whether by charge or arrest to the murder of the two police officers. There was a high probability that those who read such reports would have had their memories jogged about Debs being one of the people convicted of murdering the two policemen.

76 It may be said that there is a big difference between a statement that a person was convicted of killing a police officer and an allegation that a person had been arrested on a charge of killing a police officer⁶⁴ but the past extensive publicity had contained

⁶⁴ *Hinch*, above, at 28 and 37; see also on this issue in defamation law the case of *Lewis v Daily Telegraph Limited* [1963] 1 QB 340 and [1964] AC 234, 247.

both allegations. Thus it seems to me that that the use of the epithet “cop killer” and the prominence given it by the articles in question, while plainly making the connection in an eye catching and memorable manner, made an express connection in circumstances where it was likely that many readers would have made the same connection from the properly restrained and cautious fair and accurate reports in other reports.

77 Publication of prior convictions of an accused person prior to trial is *prima facie* a contempt. This applies to all accused persons including the most notorious. All accused persons are entitled to a fair trial. As Mahoney JA said⁶⁵

“The encroachment of the right of one is potentially an encroachment of the rights of all.”

Accordingly, those who publish prior convictions of persons facing trials do so at their peril. Where the defence of fair and accurate report is not available, a conviction for contempt will normally follow because the requisite prejudice will be established.

78 The circumstances of this case, however, appear to me to be quite exceptional for a variety of reasons. They include the fact that the prior convictions were for murder and were unusual, being for the murder of two police officers. Further, there had been continued legitimate and lawful publicity and repetition of the description of Debs as the “cop killer” over several years prior to his arrest for the murder of Ms Harty. The connection with the police killings had also been reinforced in people’s memory by it being reported in the context of dramatic events, such as a bomb plot in prison and an attempted escape from prison. Further, as noted above, these features were combined with the reality that there was lawful publicity at about the time of the committal which linked Debs to the police murder investigation and was likely to jog people’s memories about his role in their killing.

⁶⁵ See footnote 23 above.

79 Having regard to the exceptional circumstances of this case, I have come to the conclusion that the applicant has not established beyond reasonable doubt that the description of Debs as “cop killer” in the articles had, as a matter of practical reality, a real tendency to prejudice the trial of Debs for the murder of Ms Harty at the time it was published.

80 In light of this conclusion, it is not necessary to consider the further questions raised by the respondents as to the effect of the passage of time between publication and the trial on any prejudice that may have been caused at the time of publication or the effect of any other similar contemporaneous publication.

Issue – whether proceedings were pending at the time of the second article

81 In view of the conclusions I have reached, it is not strictly necessary to reach a conclusion on the issue raised by the respondents as to whether there was a proceeding pending at the time of the second article. The matter was argued, however, and, having considered the matter, I will briefly set out my conclusions.

82 In my view, there was a proceeding pending in the relevant sense at the time of that article. Adopting the analysis of Windeyer J in *James v Robinson*,⁶⁶ the question to be asked is whether the criminal law had been set in motion at the time of the publication in the newspapers. Windeyer J had suggested this description in place of the traditional requirement that there be a trial pending because the law on contempt encompassed publications in newspapers after arrest but before indictment or committal for trial.

83 In the present case, there was no arrest but there would have been if Debs had been released after the committal. Instead, the DPP had publicly stated that he intended to proceed against Debs by exercising his own powers for that purpose. It may be said that such a situation is a clearer one than the situation where a person has been arrested and a committal proceeding is yet to occur. In that situation, it cannot be assumed that the person arrested will inevitably be presented for trial. In the present

⁶⁶ Above, cited with approval by the New South Wales Court of Appeal in *Attorney General for New South Wales v TCN Channel 9 Pty Ltd*, at 377.

case, however, the DPP who had been seized of the matter for some time, had plainly decided to serve a presentment upon Debs and in a real sense the criminal law had been set in motion.

Conclusion

84 For the foregoing reasons, however, the proceeding should be dismissed.
