Prominent Pre-Trial Publicity Cases in Western Australia

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This paper gives an account of the law surrounding pre-trial publicity in major criminal cases in Western Australia within the past decade. Particular focus is given to the line of cases following the trials of high profile Western Australian businessmen, bikie gang members,underworld figures of notoriety and other prominent cases in Western Australia. Consideration of two examples of future sources of publicity are also given, being the growing public interest of Western Australians in finding wrongful convictions and sources of external international media prejudice for ethnic accused.

1. Introduction

Pre-trial media publicity can see a range of problems arise in a criminal trial capable of occasioning a substantial miscarriage of justice for an accused person. The law has developed to combat these problems. Specific procedures can be called upon by counsel and the trial judge to curb media influence. In Western Australia, there are a number of particularly prominent cases that provide for a helpful understanding of this range of procedures. There are also new issues regarding pre-trial publicity which will require close attention and new judicial remedies in the future.

This paper will, in Part 2, look to the law surrounding pre-trial publicity, including applications for stays of prosecutions, relocation of trials to other venues, seeking trial by judge alone, jury directions, special orders against media outlets and taking forensic advantage of pre-trial publicity. Part 3 will look at the prominent Western Australian cases, notably the infamous trials of various 1980s 'Corporate High Fliers' and various bikie gang members and underworld figures. Part 4 discusses the mood of the Western Australian public tempered by extensive media coverage of recent wrongful convictions and issues for ethnic groups in light of international political developments, before conclusions are made in Part 5.

2. The Law Surrounding Pre-Trial Publicity

An Application for a Stay of the Prosecution

The power of a criminal court to prevent an abuse of its processes empowers the court, in appropriate circumstances, to stay a prosecution if there is extensive pre-trial publicity. In the most extreme circumstances, a complete and permanent stay of a prosecution may be required.[1] In lesser cases, an adjournment or temporary stay may be granted until media activity settles or court orders prohibiting further coverage of the matter take effect and the prejudice passes with time.[2] Although, in the recent case of Rodney Adler for corporate

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[1] *Murphy v R* (1989) 167 CLR 94; *R v Glennon* (1992) 173 CLR 592.

[2] The Queensland Court of Appeal has extensively restated the law in this regard in *R v Long; Ex parte Attorney General (Qld)* (2003) 138 A Crim R 103.

offences, following the collapse of Insurer HIH, both were sought in the one application.[3] It is unnecessary to go into detail about the specific legal tests.

Seeking a Trial by Judge Alone

The specific provisions that provide for a trial by judge without a jury in the *Criminal Procedure Act 2004* (WA)[4] may be used with evidence of pre-trial publicity. The new sections providing an accused with the ability to apply for trial by judge alone were invoked, albeit unsuccessfully in the recent retrial of *State of Western Australia v Martinez*.[5] The case, through its history, had become extremely news worthy in Western Australia. An application by counsel for the accused prior to their retrial for a trial by judge alone sought to rely on the excessive publicity the matter received prior to and after the first trial.

EM Heenan J undertook an extensive analysis of the provisions, discussing the factors relevant to the discretion to order a trial by judge alone. His Honour accepted that the accused had received publicity, even commenting that it "…has been extensive and sustained and some of the remarks encouraged from members of the public or resulting from letters to the editors of various newspapers have been quite one-sided, even unbalanced and prejudiced".[6] However, His Honour held that due to the time that had passed since the publicity it is likely that little or no prejudice would be caused to the accused. In an appropriate case however, it seems the application for trial by judge alone could succeed.

Relocation of the Trial to another Venue

The sitting of Western Australian Courts in country towns also has implications for accused in criminal cases. Many major Western Australian towns have their own local newspapers and receive transmission of country television stations. The media is localized for these communities in an effort to provide local and relevant news. This has the effect of creating prejudice for the accused in his or her trial as the jury composed of local people becomes affected by media coverage.[7] Put simply, a big trial in a small town becomes a big deal for all of the residents of that town.

For this reason there have been applications for the changing of venues of criminal trials in Western Australian towns. As most of these cases concern members of bikie gangs in country towns these cases are dealt with below under the examination of bikie gang and underworld identity cases in Western Australia.

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[3] *R v Adler* (2005) 52 ACSR 154.

[4] Sections 117-120.

[5] [2006] WASC 25. Collectively known as the 'Walsham Trio', Salvatore Fazzari, Jose Martinez and Carlos Perreras waited around six years in jail before being charged for the murder of Phillip Walsham by throwing him off a foot bridge, causing him serious harm, onto a freeway below where he was run over by traffic. A hung jury saw a retrial at which they were convicted in April 2006. An appeal is pending.

[6] [2006] WASC 25 at [31].

[7] There is also the concern that smaller towns will see witnesses and jurors coming into closer than normal contact with the litigants and other witnesses or relatives or associates of the litigants. This may result in a whole host of other problems.

Special Directions for the Jury

There are standard directions that trial judges will give to juries in an effort to stop media influence. There is a direction that may be given prior to the jury pool which asks that any of the potential jurors who come to the court with particular knowledge of the case to make it known to the court and disclose any possible biases.[8] In a sense, this can disclose pre-trial publicity prejudice. The standard direction, that the jury 'harken to the evidence' and ignore external influences, is given after the jury is empanelled and probably has a more direct effect.

The usual direction given on the first occasion that the jury separates, that they not discuss the case with anyone outside of the jury assists in downplaying the role of media influence.[9] There is also the more complete and substantive direction given in the trial judge's summing up which is a strong warning about prejudicial media reports which can be sought by counsel and is given quite regularly. Of course, there are still doubts as to whether these directions are capable of remedying prejudice.[10]

Orders Against Media Outlets

There are a range of orders that counsel may seek from the trial judge as to suppression of details of the case by media outlets seeking to report on it.[11] These do, however, face the general rule that justice should be open and transparent.[12] Some types of cases involve suppression as of course, like those involving children and juvenile offenders, and media outlets will try to lift the suppression orders for a story.[13]

Of course, once these orders have been made a media outlet which contravenes them is liable for contempt of court.[14] A number of major cases have seen the major local newspapers and television stations fined for commission of these contempt offences. There are also situations where a media house can provide coverage which is an offence, even without contravening a court order.[15] The contempt laws, while at the extreme end of the spectrum of protections, provide a level of protection against the prejudice of pre-trial and during-trial publicity.

Indeed, Western Australia's experience with the interplay between free speech and openness of courts on the one hand and contempt laws guarding the administration of justice on the

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[8] *R v Glennon* (1992) 173 CLR 592 at 601; *R v Bellino & Conte* [1993] 1 Qd R 521.

[9] As to this warning, see generally *R v Prime* (1973) 57 Cr App R 632; *R v Yuill* (1993) 69 A Crim R 450.

[10] See the literature collected in Allan Ardill "Prejudicial pre-trial media publicity" [2000] *Alternative Law Journal* 1 at fn 12.

[11] Suppression of personal health information of the litigant in *Skerritt v The Legal Practice Board of Western Australia* [2004] WASCA 28(S) is an example. See also the application for suppression of the accused's name pending trial for corporate offences: *R v Pearce* [2003] WASC 105.

[12] *Russell v Russell* (1976) 134 CLR 495; *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47 at 50-60; *Hinch v A-G (Vic)* (1987) 164 CLR 15 at 82-3 per Gaudron J.

[13] *H (A Child)* (1995) 83 A Crim R 350; *R v MJM* (2000) 24 SR (WA) 253.

[14] A discussion of the many authorities from this jurisdiction was undertaken by the Court of Appeal in *Western Australia v Western Australian Newspapers Ltd; Ex parte Attorney General for WA* (2005) 30 WAR 434.

[15] Conduct that interferes with the administration of justice. An example would be publishing information regarding discussions in the jury room: *Attorney-General v New Statesman and Nation Publishing Co Ltd* [1981] QB 1 at 10.

other, is so great that the seminal consideration of the constitutionality of contempt laws was undertaken by this jurisdiction's Supreme Court.[16]

Taking Forensic Advantage of Publicity

It is quite proper and open for counsel to advance a case theory that in cases where there has been extensive publicity this has tainted the evidence against the accused. Such publicity, primarily in the form of newspaper articles and television coverage, may have the effect of prejudicing the minds of witnesses in that they have been told of things they did not themselves see or hear, or have adopted inferences from given information that were theories advanced by the police or the media.

Western Australia's 'most expensive homicide investigation', resulting in the prosecution of Rory Christie, is a prime example. It was said the investigation cost the Western Australian Police Service around one million dollars. The case received extensive pre-trial publicity. Mr Christie was convicted at his first trial, but the conviction was quashed on appeal and a retrial saw no case to answer. While the publicity was not itself causal of any kind of error, the appellate court noted the putting of media prejudice to witnesses to test their independent recollection.[17]

This has a forensic allure for defence counsel. It permits counsel to put to witnesses that they saw newspaper articles and television broadcasts surrounding the incident prior to them coming forward to give evidence and thus, naturally, the witness's recollection is not entirely independent. A good use of this has been made in a recent Magistrates' Court trial for dangerous driving, where witnesses traveling in their vehicles along a highway observed two cars speeding in a line past them. Having seen a good deal of newspaper clippings put to them in cross examination it was recognised that the only notion of 'drag racing' came from a police report to the media and newspaper articles titled 'Drag Race Death' and the like. Two cars speeding in convoy does not automatically disclose drag racing. That idea came to the witnesses from the media. It was, hence, possible to explain away any proposed possibility of drag racing which went to showing the dangerous driving.

3. Prominent Western Australian Cases

Corporate High Fliers

Western Australia has had its fair share of 'corporate cowboys'. There was an era of high profile business men, concerned with the creation of enormous conglomerates of enterprises fuelled by big business egos. Cutting corners was a fact of business life in the 1980s. The fallout of this was a decade[18] of litigation, much of it criminal.

The late Laurie Connell was charged with conspiracy to defraud the public in his portrayal of the true financial position of Rothwells Ltd. In *R v Connell (No 2)*,[19] an application was made to stay the prosecution on account of severe prejudice alleged to be caused by publicity. The trial judge refused the application. An appeal to a single Justice of the Supreme Court was

[16] *Hamersley Iron Pty Ltd v Lovell* (1998) 19 WAR 316.
[17] *Christie v The Queen* [2005] WASCA 55 at [2], [166]-[168] and [170].
[18] And in some related civil cases, the matters are still on foot.
[19] (1993) 9 SR (WA) 357.

dismissed in *R v Connell (No 3)*.[20] A further appeal to the Full Court in *R v Connell (No 5)*[21] saw that appeal dismissed also. The types of warnings to be given to juries were later addressed in *R v Connell (No 6)*.[22] One of Connell's co-accused, also claimed that his trial was subject to extensive publicity following the death of Connell.[23]

The failure of Alan Bond's Bondcorp saw a range of prosecutions for directors and officers involved. Alan Bond himself appealed against his conviction on pre-trial publicity grounds.[24] His fellow director, Peter Mitchell sought an adjournment on account of the publicity that his fellow directors received.[25] Both were, however, unsuccessful. Yet the widespread losses of shareholder spread resentment through Western Australian investors. This would have been further fuelled by famous scenes of current affairs programs' reporters chasing the directors down streets to their luxury vehicles, as they attempted to scramble away from the 'public good' that the media asserted that it represented. It was as if these directors showed a 'consciousness of guilt'. Naturally, they all would find it difficult to find a jury unaffected by such pre-trial prejudice.

The case of Christopher Skase was an example of national significance, and led to serious questions as whether such a high profile corporate accused could ever get a fair trial.[26]

These accused have involved themselves in unsuccessful corporate activities of such a magnitude that most people in the state know of them. Many people in the community have themselves lost money in these ventures or know someone who has. It seems there is a common mood of anger, resentment or jealousy procured by media coverage at the exorbitant lifestyles of these accused and the apparent disinterest they have shown for shareholders and creditors' losses, which are directly attributed and blamed to such accused. Despite the provision of remedial directions to juries to ameliorate the effect of the prejudice caused by pre-trial publicity, it seems much of the prejudice would go beyond mere sympathy or dislike contemplated by the case law.

Bikie Gang Member and Underworld Identity Trials

There have been in recent times a number of prominent bikie gang and underworld identity trials in Western Australia. Each has invoked its own array of procedures in an effort to curb the prejudice of pre-trial publicity.

In *R v Crawford*,[27] the Crown sought a change of venue. The Magistrate had committed the accused to trial in Perth, even though of the 31 witnesses that would be called by the Crown 24 were from the Bunbury area. Yet on account of negative publicity directed to the accused and their membership of bikie gangs and their activities, a local Magistrate directing attention to remarks she had overheard from passers by emphasizing these issues and the publication of

[20] (1993) 8 WAR 542.
[21] (1993) 10 WAR 424.
[22] (1994) 12 WAR 133.
[23] *Carter v The Queen* (1997) 19 WAR 8.
[24] *Bond* (1992) 62 A Crim R 383.
[25] *Mitchell v The Queen* (Unreported, Supreme Court of Western Australia, Murray J, CRI 67 of 1996, 14 February 1997, Library No 970047).
[26] Jeff Giddings "Would Christopher Skase Receive a Fair Trial?" (2000) 24 *Criminal Law Journal* 281.
[27] (1998) 21 SR (WA) 70.

photos of the accused, Judge Blaxell refused the application. In this case, it seems His Honour was concerned for negative publicity being prejudicial to the accused.

A Mr Johnson received extensive coverage as being a leader of the Southwestern Australia Chapter of the Rebels Motorcycle Club. A member of State parliament even swore an affidavit speaking of his electorate's concerns about the accused. In *Johnson v The Queen*[28] the Court of Criminal Appeal set aside his conviction and ordered a retrial. While the trial judge did not accede to a change in venue application, the trial judge's direction against prejudicial publicity was deficient. The Crown also made a successful application for a change of venue in *R v Slater*,[29] involving the trial of members of the Gypsy Jokers Motorcycle Club.

Most recently in April 2006, a trial took place in the District Court of Western Australia surrounding a shooting and knifing incident that took place at a large Perth nightclub. The co-accused included a number of Perth so called 'underworld identities' and bikie gang members. After a trial that spanned some weeks, with the media continually reporting the case put by the defence to the effect that the police were targeting the accused in an effort to find charges against some of them, they were all acquitted. Speaking against the result of a fair trial, members of the Western Australian Police blamed the acquittals on the publicity and possible juror intimidation.

There is often an aura that surrounds high profile accused in criminal cases such as these. There is a likelihood that juries may be swayed by publicity, which can represent the accused as very dangerous characters capable of seeking reprisal against a jury that convicts them or very questionable characters necessitating a guilty verdict, irrespective of the evidence. These extreme examples of pre-trial publicity put to test combative measures like remedial directions by judges to juries. Like the situation for corporate high fliers, there is from a Western Australian perspective, a real need for further investigation of the effects of pre-trial publicity in such high profile cases. But perhaps these cases differ from the corporate accused cases in that the corporate accused cases do not have the significant possibility that jurors fear for their safety. While jury directions are said to be able to cure 'prejudice and sympathy', it would be of interest to see if they can cure fear and trepidation.

4. Future Publicity Issues for Western Australian Criminal Proceedings

Cases Setting the Mood for Further Public Interest in Later Cases

In Western Australia, where a string of cases have high-lighted serious misgivings about the local criminal justice system, the public has become particularly interested in the administration of justice. Cases like those of *John Button*,[30] *Clark Easterday, Leonard Ireland and Dean Ireland*,[31] *The Mickelbergs*,[32] *Darryl Beamish*,[33] *Andrew Mallard*[34] and *Rory*

[28] [2002] WASCA 78. There was discussion of the earlier biker trial application for venue change in *Grieves v The Queen* (Unreported, Full Court of the Supreme Court of Western Australia, 18 February 1991, Library No 8724).
[29] [2004] WADC 17.
[30] *Button v R* (2002) 25 WAR 382.
[31] *Easterday v R* (2003) 143 A Crim R 154.
[32] *Mickelberg v The Queen* (2004) 29 WAR 13.
[33] *Beamish v The Queen* [2005] WASCA 62.

Christie[35] are of significance. These cases have mandated enormous reform in prosecutorial disclosure laws, the laws on confessions and admissions, new and fresh evidence and other important areas. In many of them, the ultimately successful litigants have served the entirety of their jail sentences. It seems that there is public support for further review of other cases,[36] calls for reform[37] and for further public interest in the criminal justice system.[38]

This kind of active public interest in the administration of justice in criminal cases certainly has implications for later cases. If one were allowed to speculate, and in a simplified way, it is possible to perceive a polarization of lay-community views. On the one hand persons who have taken publicity surrounding these cases for face value and accepted criticisms of police investigations and prosecution conduct. On the other hand persons who see these cases as examples of 'defence lawyer tricks' and 'guilty people getting off because of legal technicalities'. Whatever, view may be taken by juries, now more than ever there is a real and live issue that juries will come to undertake their duties with far more prejudices and sympathies from such a speight of media activity.

Particular Ethnic Groups During times of Publicity of International Events

R v M [39] is a particularly interesting and unique case. The accused, being a muslim man, was set to stand trial very shortly after the outbreak of the war in Iraq. At this time the news media was also reporting on a regular basis on related terrorist attacks by Islamic extremists around the world. He argued that in the current political climate, it would be impossible for him to get a fair trial with the possibility that members of the jury may be conditioned for prejudice against an Islamic accused.

Hammond CJDC vehemently rejected the idea that members of a jury could be prejudiced and a stay might be required because "Such a concept attacks the very basis and integrity of the jury system".[40] His Honour commenting:[41]

> I have in the past 21 years presided over many jury trials and it is my firm belief that juries take very seriously the task of adjudicating as to the guilt of the person before them. I believe juries heed the advice and instruction given to them by trial judges warning them against being swayed by either prejudice or sympathy, neither of which has any place in a jury trial.

His Honour went on to cite passages from cases as to jury prejudice, including Brennan J in *Glennon*, before concluding that any prejudice could be remedied by a proper instruction. This kind of case receives mixed responses from different audiences who hear about it. Some

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[34] *Mallard v R* (2005) 222 ALR 236.
[35] *Christie v R* [2005] WASCA 55. On a retrial, the no case to answer was upheld: *Western Australia v Christie* [2005] WASC 262.
[36] Estelle Blackburn "200 rally for Walsham trio" *Sunday Times* (21 May 2006). Investigative journalists review many convictions in Western Australia with defendants' families, often at no cost.
[37] John Flint, "State of Injustice" *Sunday Times* (26 February 2006).
[38] Mr Button has a busy lecture schedule as he goes on circuit to schools around Western Australia, at their request, and talks about his case: John Flint "Innocent victims hit back" *Sunday Times* (26 February 2006).
[39] [2003] WADC 67.
[40] [2003] WADC 67 at [14].
[41] [2003] WADC 67 at [15].

would maintain it is impossible to pick 12 Australians who would be absolutely without racial prejudice. It is also possible to question His Honour's reliance on experience as a trial judge which, with respect, is experience in directing a jury having never entered the jury room to hear deliberations, where such prejudice may materialize into a miscarriage of justice. The ultimate conclusion is that more research into the field is required.

5. Conclusion

This paper has detailed a range of procedures that may be employed by counsel to combat prejudicial pre-trial publicity. The ability to seek a temporary or permanent stay, a trial by judge alone, a change of venue of the trial, remedial jury directions, suppression orders against media outlets and to take forensic advantage of such publicity are all combative measures.

Extremely prominent cases in Western Australia have been numerous. They generally fall into the two categories of high profile corporate defendants and for infamous bikie and underworld accused. There are also newer issues of views of the public affected by long media campaigns about the 'state of justice' in Western Australia and trials for Muslim people in a tense international political environment. These cases have exhibited possible short comings: publicity causing prejudice in the form of extreme dislike or resentment, even fear for safety or strong underlying political and racial tensions, above mere suspicion or sympathy. The armaments to combat pre-trial publicity may be numerous and strong, but may not be strong and diverse enough to deal with the prejudice.

In light of increased media and community interest in major criminal cases, there are strong arguments to be made calling for more research and studies to be undertaken as to the impact of publicity on jurors. This ultimately goes to the efficacy of the entire jury system. There may also be a need for an inquiry into the possibilities of mandatory media influence warnings for juries at multiple points in trials. An investigation into the desirability of other measures capable of reducing the possibility of pre-trial media prejudice would be worthwhile. Of course, all of these inquiries would need to confront the fundamental theories underlying our system of trial by jury. There is an assumption that a jury is a diverse and generally representative cross section of the community, capable in a group of putting aside individual prejudices but relying on deductive skill and experience to produce correct results according to law and evidence.