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SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

THE HONOURABLE CHIEF JUSTICE MCCALLUM

DIRECTIONS HEARING

SCC 264 of 2021

**THE QUEEN
and
BRUCE LEHRMANN**

CANBERRA

9.01 AM, TUESDAY, 21 JUNE 2022

MR S. DRUMGOLD SC appeared on behalf of the Crown.

MR S. WHYBROW appeared on behalf of the Accused.

5 MR DRUMGOLD: Thank you ...(inaudible)..., your Honour.

HER HONOUR: Mr Crown, would you mind moving next to the microphone? You have a very gentle voice. I don't know about any other aspect of your style but the voice is very gentle.

10 MR DRUMGOLD: Your Honour, it's important, first of all, that we distinguish what this application is because we got a little bit conflated, in my submission, yesterday. This is not an application - - -

15 HER HONOUR: Everyone is moving forward, Mr Crown, which is telling me that I'm not the only person having trouble hearing you. Thank you.

20 MR DRUMGOLD: It's not an application relating to the issue of subpoenas and the seeking of the disclosure of large volumes of documents and a claim that those can't be processed before the trial starting on Monday. This is an application brought pursuant to rule 4750 of the Court Procedure Rules that the orders sought in the application of 18 March this year and declined in the decision of R v Lehrmann (No 2), it's a re-agitation of that order.

25 HER HONOUR: Except there's an important narrowing, I think. I don't understand Mr Whybrow to seek a permanent stay.

MR DRUMGOLD: No, well, order 1 was the permanent stay. Order 2 in the original application was the temporary stay. So this is a re-agitation.

30 HER HONOUR: It's a re-agitation of order 2 only.

35 MR DRUMGOLD: And that's important because it brings it within the parameters of 4750 subsection (3)(a) and (b), that there has to be a significant change, and this application is limited to the change in circumstances. So that's this application. It's based on a speech by Lisa Wilkinson at the end of the Logie Awards televised on 19 June and there are various tests but the test that is probably most apt is the test that was recited in Decision Restricted. It's a test of Gilbert. It's in Decision Restricted at 115:

40 That there is a real and substantial risk that, despite the best endeavours of the trial judge and the essential trust the courts are entitled to impose in the jury system, there will be members of the jury who will have prejudged his guilt, perhaps without being aware, that can't be remedied by any direction of the court.

45 HER HONOUR: Can I just ask you to pause there, Mr Crown?

MR DRUMGOLD: Yes, your Honour.

5 HER HONOUR: That's one way - I mean, this is a field in which one has to be cautious using the word 'test' because the ultimate test is the possibility of a fair trial on the date scheduled.

MR DRUMGOLD: Indeed, correct.

10 HER HONOUR: One way in which it was put in Glennon was that pretrial publicity has temporarily prejudiced the right to a fair trial.

MR DRUMGOLD: Yes, and of such a nature that there's nothing a trial judge can do in the conduct of the trial that can relieve against its unfair consequences. That was the end of that - - -

15

HER HONOUR: Could you give me the formulation from - - -

MR DRUMGOLD: From Glennon?

20 HER HONOUR: Yes, from Decision Restricted at 115. A real and substantial risk that members - - -

MR DRUMGOLD:

25 That despite the best endeavours of the trial judge and the essential trust that the courts are entitled to oppose in the jury system, there will be members of the jury who will have prejudged his guilt, perhaps without being aware.

30 That's at 115 of Decision Restricted. Given we are at the margin, it's inescapable that my submission is going to have to dissect three things: first of all, the actual evidence of Lisa Wilkinson; secondly, the offending elements of the speech that overstep and go beyond the evidence of Lisa Wilkinson; and the third, and importantly, is where Ms Wilkinson sits in the
35 scheme of the whole trial. That's - - -

HER HONOUR: What is your ultimate submission? Do you oppose or accede to the temporary stay of the proceedings?

40 MR DRUMGOLD: Well, we say the test is not made out. No, we accept that there is a significant change to give rise to 4750. We say that the application, limited to what it is limited to, does not give rise to a temporary stay.

45 HER HONOUR: And could you give me the three things again, please?

MR DRUMGOLD: So they are the actual evidence of Lisa Wilkinson; the offending elements of - - -

5 HER HONOUR: Sorry, you mean the evidence that she will give in the trial or - - -

MR DRUMGOLD: Correct. The offending elements of the statements of Lisa Wilkinson that go beyond the evidence; and where she sits as a witness in the scheme of the trial.

10 HER HONOUR: But we also need to look at where she sits as a public influencer.

MR DRUMGOLD: Yes, I think that's - - -

15 HER HONOUR: And that in turn raises - you won't overlook the evidence - I should actually mark the evidence now. But you won't overlook the transcript of what was said on the Jonesy & Amanda Show the next day.

20 MR DRUMGOLD: No. I should say - yes, that is a third element, and the consequential fallout from her comments, the public commentary.

HER HONOUR: Yes, yes. Just if I could ask you to pause and I'll just mark the evidence as it is so far?

25 MR DRUMGOLD: Yes, indeed.

HER HONOUR: And firstly, MFI 1 will be a copy of the email that my chambers sent to the producer of The Project.

30 **##MFI 1 - COPY OF EMAIL SENT BY HER HONOUR'S CHAMBERS TO THE PRODUCER OF 'THE PROJECT'**

35 HER HONOUR: I'm told by my staff, who took the trouble to check it, that there was nothing on the program last night.

MR DRUMGOLD: Yes, it was very - - -

40 HER HONOUR: There was an announcement, there was a - she won, but there was nothing about the - - -

45 MR DRUMGOLD: It was very circumspect. It appeared quite clear that there was some pretty drastic late-minute changes to the - - -

HER HONOUR: I see. We didn't receive any acknowledgement of the email or any response but whether or not because of the email or just good sense prevailing there was - I was told no further damage. Is that your understanding, Mr Whybrow?

5

MR WHYBROW: Yes.

HER HONOUR: Then let me just mark first, I think, the transcript of the Wilkinson speech. I don't know whether you accept that that's accurate. Where did that come from?

10

MR DRUMGOLD: I do.

HER HONOUR: Where did that come from, Mr Whybrow?

15

MR WHYBROW: Your Honour, as far as I'm aware, that came from listening to the speech replayed on the Amanda & Jonesy Show.

HER HONOUR: Someone instructing you transcribed it?

20

MR WHYBROW: Transcribed it.

HER HONOUR: And Mr Crown, you accept that it's accurate?

25

MR WHYBROW: I do accept that.

HER HONOUR: So I'll call it an agreed transcript of Lisa Wilkinson's 2022 Logies Speech. That will be Exhibit A.

30

**##EXHIBIT A - AGREED TRANSCRIPT OF LISA WILKINSON'S
2022 LOGIES SPEECH**

35

HER HONOUR: And again please forgiving me for my sheltered lifestyle, Mr Crown, when were the Logies announced?

MR DRUMGOLD: Well, the whole television show was on Sunday 19 June.

40

HER HONOUR: That was on Sunday evening?

MR DRUMGOLD: Yes, just gone, yes. Her speech came toward the end of the show.

45

HER HONOUR: Yes, all right. Presumably that's when they announced the silver – is there only one silver Logie or is silver like the second prize?

MR DRUMGOLD: There are a number of gold Logies.

HER HONOUR: I see.

5 MR DRUMGOLD: This was a gold Logie for a particular - - -

HER HONOUR: But she got a silver, I think.

10 MR DRUMGOLD: Did she? Silver, yes. This was for - - -

HER HONOUR: But it's not sort of first, second, and third?

MR DRUMGOLD: No.

15 HER HONOUR: It's a ranking.

MR DRUMGOLD: It's a whole night of awards.

20 HER HONOUR: And 'Jonesy and Amanda', Monday 20 June 2022, is there agreement as to the accuracy of the transcript?

MR DRUMGOLD: There is.

25 HER HONOUR: Is there agreement as to when and where that was broadcast? It's described as a podcast but my understanding would be – I know them to be radio presenters, so I think they would present on the radio and then what was on the radio is also available in podcast, is that your understanding?

30 MR DRUMGOLD: Yes. I believe it was about 8.15 yesterday morning, your Honour.

HER HONOUR: 8.15 yesterday morning.

35 MR DRUMGOLD: Yes.

HER HONOUR: But do you - - -

40 MR DRUMGOLD: I don't quarrel - - -

HER HONOUR: Are you in a position to agree with that?

45 MR DRUMGOLD: I don't quarrel with that. I don't listen to the radio but I have heard the podcast.

##*EXHIBIT B - TRANSCRIPT OF PODCAST.

5 HER HONOUR: The Daily Mail article which largely reproduces the acceptance speech will be Exhibit C.

****EXHIBIT C - DAILY MAIL ARTICLE REPRODUCING ACCEPTANCE SPEECH.**

10 HER HONOUR: The post by the complainant on her – what's the word I'm looking for, Mr Crown? Twitter?

15 MR DRUMGOLD: Twitter.

HER HONOUR: Instagram. We need intermediaries who are under the age of 30 in this case, Mr Crown.

20 MR DRUMGOLD: I understand it was posted about midday yesterday on the complainant's Instagram page.

HER HONOUR: At what time, do you know?

25 MR DRUMGOLD: Midday yesterday, yes.

HER HONOUR: That will be Exhibit D and all the comments posted since, including what might have been a hack inviting people to invest in Bitcoin.

30 ****EXHIBIT D - INSTAGRAM POST BY COMPLAINANT AT MIDDAY 20/06/2022 AND ALL COMENTS SINCE.**

35 MR DRUMGOLD: Thank you, your Honour.

HER HONOUR: You don't rely on the bitcoin, Mr Crown.?

MR DRUMGOLD: No, no, we do not, your Honour. It's foreign.

40 HER HONOUR: Sorry. I marked the email MFI, yes.

45 MR DRUMGOLD: It is important where it sits in the scheme of things. So the subject events are alleged to have occurred between 1.40 and 2.30 am on Saturday 23 March 2019. There were a series of reports that were made in the week that followed the complaint.

HER HONOUR: Sorry, you're talking about the original allegation?

MR DRUMGOLD: Correct.

HER HONOUR: Between, what did you say, 1.30 and?

5

MR DRUMGOLD: 1.40 am and 2.30 am on Saturday 23 March 2019.

HER HONOUR: Yes.

10 MR DRUMGOLD: In the week that followed, up to and including 1 March, on the following Tuesday, on the following Wednesday, and on the following Thursday, there will be evidence of complaint that was made that culminated in a statement to police on the following Monday, 1 April 2019.

15 HER HONOUR: 1 April 2019, did you say?

MR DRUMGOLD: Yes, that's so.

20 HER HONOUR: Yes. Then it's my understanding that at that point the criminal investigation did not proceed because the complainant, for reasons I think she has since explained, did not seek to press any charges at that time.

MR DRUMGOLD: So again, that requires some dissection. That occurred on Saturday, 13 April.

25

HER HONOUR: What occurred? She went to police?

MR DRUMGOLD: An email to police.

30 HER HONOUR: So 13 April 2019?

35 MR DRUMGOLD: Correct. That she decided not to proceed any further in light of her current workplace demands. The evidence will be that those workplace demands were that two days prior to that email, the prime minister had called an election and the complainant was about to get on a plane to Perth to campaign for her boss, who was a minister in the government. And unpacking that, that a complaint was inconsistent with her role at that stage. So those are the workplace demands.

40 After the election, she shifted from this minister to another government minister where she remained for almost two years, two months shy of two years. The evidence will be that she sought assistance by way of counselling during that period.

45 However, the weight became heavy, then she decided to do two things. She decided to – she felt that making a report would render her employment untenable, so she resigned, and the evidence will be that she feared that there

would be some sort of a mudslinging campaign to discredit her, so she decided to go public at the same time.

Now, it's that second element - - -

5

HER HONOUR: You're saying this effectively by way of opening, or anticipating the opening you would make of the evidence you expect will be led at trial?

10 MR DRUMGOLD: Yes. Correct. Now, that is important, that second element, deciding to go public, because that commenced the engagement of Ms Wilkinson. The evidence will be led - - -

15 HER HONOUR: Sorry. Did the decision to resign coincide with the decision to return to police to revive the criminal investigation?

20 MR DRUMGOLD: Yes, it did. So what occurred was there was an email exchange between her then partner and Lisa Wilkinson, a number of email exchanges between 18 and 21 January 2021. That was followed by a phone conversation between the complainant and Ms Wilkinson on around 22 January, and there was a sit down meeting on 27 January that was recorded, initially unbeknownst to Ms Wilkinson but one of the producers recorded it, and that was to establish whether there was a story, whether Ms Wilkinson was interested. So that was 27 January.

25

On 29 January, there was a letter of resignation.

On 2 February 2021, the interview was recorded.

30 HER HONOUR: As published on the 15th?

MR DRUMGOLD: It was published on the 15th, yes. But after recording on the 2nd, on 4 February the complainant contacted police via email and said her work situation has changed and she's looking at pressing forward.

35

As you say, the interview aired on 15 February and the investigation was in tow at that stage and the first evidence-in-chief interview occurred on 24 February.

40 HER HONOUR: When was the accused charged? Was it October 2021?

MR DRUMGOLD: Yes. It was some – August, I think it was. I can find that date out. Excuse me, your Honour. The first mention was 16 September but there would have been an information sworn prior to that.

45

HER HONOUR: Sorry?

MR DRUMGOLD: 16 September was the return of the information.

HER HONOUR: First court date.

5 MR DRUMGOLD: It was the first court date. Now, the evidence of
Ms Wilkinson, this is not the offending part but the evidence of
Ms Wilkinson at its highest is 'on X date, the complainant told me why'. So
it's important because the credibility of Ms Wilkinson as to her substantive
10 evidence is not going to be in dispute. Everything she says the complainant
told her is going to, including the lead-up, is going to in email form or
recorded.

MR WHYBROW: It's not the same, what is going to be in dispute from our
15 point of view.

HER HONOUR: It won't be anticipated that she would be - - -

MR DRUMGOLD: Make your submission when your turn is, but stop
20 interrupting me.

HER HONOUR: No, gentlemen. Could I ask you please to attend to me
rather than each other?

MR DRUMGOLD: Yes. Thank you, your Honour.
25

HER HONOUR: Mr Crown, it might be anticipated, mightn't it, that she
would be cross-examined about conversations outside the recorded
conversation, not only as to the content of what was said which might also be
admissible as complaint evidence but as to the likely circumstances of the
30 broadcast, the likely fallout, any anxieties that the complainant might have
and so on, which may go quite properly to the complainant's credibility.

It can be apprehended that – we know that the accused denies – he has given
35 a record of interview in which he denies that any sexual activity took place,
as I understand it, or certainly denies that the offence took place. So it can be
anticipated that the defence will explore the complainant's credibility as the
central issue in the case and it can further, can't it, be anticipated that –
because it happens a lot in the experience of the courts, that the line of cross-
40 examination will be, 'You've got some other motive'.

MR WHYBROW: Correct.

HER HONOUR: Making up what can only be, on his case, characterised as a
lie. Whether it be that 'You wanted to' – 'You wanted fame or publicity or
45 money or you backed yourself into a corner that you couldn't get out of', or
whatever it is, there will be an exploration of alternative motives other than
that that is what actually happened that night.

MR DRUMGOLD: It could well be.

5 HER HONOUR: Well, the trial won't be about anything else will it, Mr Crown?

MR DRUMGOLD: But as to the direct evidence of Ms Wilkinson as to the complaint evidence, that is issue one, that is all recorded.

10 HER HONOUR: So in the trial – I imagine you will accept this. In the trial if Ms Wilkinson were asked, 'Well, she told you that then. Do you now believe her?', that would not be permissible.

15 MR DRUMGOLD: No, it would not be permissible.

HER HONOUR: Isn't that what she said on Sunday night?

MR DRUMGOLD: That is the offending part.

20 HER HONOUR: That is the bit that you accept.

MR DRUMGOLD: I was moving to that.

25 HER HONOUR: You accept that the endorsement 'Not only do I believe her, but she is brave and extraordinary and she is the most important thing that has ever happened to me and I am proud of bringing forward' – not her allegation, 'I am proud of bringing forward her story'. What concerns me most about this recent round is that the distinction between an allegation and a finding of guilt has been completely obliterated in the discussion on Sunday and Monday.

30

MR DRUMGOLD: In the Jonesy & Amanda they made a positive assertion as to guilt.

35 HER HONOUR: There can't be any doubt about it in the Jonesy & Amanda interview. But even in the Lisa Wilkinson interview the implicit premise of her speech is to celebrate the truthfulness of the story she exposed. It is a sort of a crowing of the success of good investigative journalism which resulted in this important truthful story being told as it should have been. And another aspect of it that – I am just giving you - - -

40

MR DRUMGOLD: Yes, indeed. Yes.

45 HER HONOUR: - - - all of these things to respond to. Another aspect of that is there has been in the reporting a seamless elision between two very different women and their experiences, Grace Tame and Brittany Higgins, their stories: et her speak, let Brittany speak, let Grace speak, let Brittany

5 speak, the difference of course being that Grace Tame was talking about her experience after the man had been convicted and served a sentence. That is right isn't it?

5 MR DRUMGOLD: That is right. I think the let her speak - - -

10 HER HONOUR: He had served a sentence of imprisonment. Her important contribution to the legal landscape was to say, 'The jury knows what he did, the public knows what he did, but I can't talk about it because of the law that prohibits, ostensibly for my protection, me outing myself'. So she says, 'I want to tell my' – 'I don't want other people to tell my story, I want to tell my story', her story then being one which had been established in accordance with the constitutionally accepted process for establishing guilt of a serious criminal offence.

15 MR DRUMGOLD: Yes.

20 HER HONOUR: Ms Higgins is treated as being in the same category and she is not. She might be, it might be just a temporary difference.

MR DRUMGOLD: That is accepted.

25 HER HONOUR: The time may come when the accused is convicted and she can speak with all the freedom that Grace Tame can speak with. At the moment she is not in that category.

MR DRUMGOLD: Agreed.

30 HER HONOUR: Sorry, I shouldn't say 'she'. What I should say is her allegation is not in that category.

MR DRUMGOLD: All of that is agreed.

35 HER HONOUR: And that is what really troubles me about this last round, leaving aside the irritation of it having come in the face of stern warnings and you would be entitled to get to your feet this morning, Mr Crown, and say, 'I told you so, your Honour' because you asked me to prohibit publication of these matters and I refused because I trusted the press and I trusted the law of contempt.

40 MR DRUMGOLD: Yes, but - - -

45 HER HONOUR: That trust, so it would seem, was misplaced and you were right and I was wrong.

MR DRUMGOLD: I take no joy in any of that, your Honour.

HER HONOUR: I know. I am sure you don't. That is what troubles me.

5 MR DRUMGOLD: But one needs to dissect what I refer to as the gratuitous opinion of Ms Wilkinson, which is that over and above her evidence, and I have been able to – I think it can be broken into a number of categories. Her first is 'I believe her', probably extended to 'You should also believe her'.

10 HER HONOUR: And almost everyone believes her. Everyone knows who she is, everyone knows her name.

15 MR DRUMGOLD: Yes. And the second element of her gratuitous opinion is that 'In my view' – or in her view in light of her asserted pressure not to report, her assertion that it came at the cost of a job that she appeared to like and her assertion that it resulted in some residual risk of some sort of political mud throwing that she was brave. They are essentially the offending opinions of Ms Wilkinson and it is accepted that Ms Wilkinson has a profile – whether it is right or wrong, has a profile of credibility. It is important to note, however, that those gratuitous - - -

20 HER HONOUR: Sorry, did you mean the complainant in that last submission?

MR DRUMGOLD: The – Ms - - -

25 HER HONOUR: The complainant - - -

MR DRUMGOLD: Ms Wilkinson.

30 HER HONOUR: Ms Wilkinson has a profile? You mean a public profile - - -

MR DRUMGOLD: Has a public profile.

35 HER HONOUR: - - - of being a credible serious journalist?

MR DRUMGOLD: Yes.

HER HONOUR: And so those statements are taken with that endorsement.

40 MR DRUMGOLD: Which carries the weight - - -

HER HONOUR: Yes. No, I understand. Thank you.

45 MR DRUMGOLD: - - - of those statements.

HER HONOUR: Yes.

MR DRUMGOLD: Given the ambit of this application, it is important to note that both her opinions and the fact that she expresses them publicly has not changed. It occurred in the interview, it occurred in the media, of the grab surrounding it, it occurred probably most directly in speeches made on
5

HER HONOUR: Did Ms Wilkinson speak at the March4Justice?

MR DRUMGOLD: Yes. I think she referred to Ms Higgins as the bravest woman she had ever met. I think that was her introduction. The significant change advanced in this application with regards to Ms Wilkinson – and I will deal with the fallout momentarily – is that it was those views, those opinions that she held and the fact that she appeared intent on expressing them publicly. She expressed them publicly again on 19 June.
10
15

HER HONOUR: With the endorsement of an award.

MR DRUMGOLD: With the endorsement of award.

HER HONOUR: A glittering award for good journalism.
20

MR DRUMGOLD: Indeed. And, as I say, the associated media, some of which was probably – well, not probably, was more insidious than the comments that were made.
25

HER HONOUR: And so again, Mr Crown, I am just testing your argument and giving you an opportunity to respond.

MR DRUMGOLD: Indeed.
30

HER HONOUR: But couldn't it be concluded that her – the change is that her opinion has been expressed with higher endorsement, greater intensity and more proximate to the trial?

MR DRUMGOLD: The latter part, yes. I think one thing that is being conflated here is the award as a question of practicality was not given for a truth of the story, it was given for journalistic skill, or what was perceived to be journalistic skill. I accept that that is a vehicle that carries the credibility of the story, but the award was not for – the award essentially was a journalism award for journalistic skill.
35
40

HER HONOUR: Mightn't good journalism include being mindful of the impact of your reporting on criminal proceedings?

MR DRUMGOLD: Yes.
45

HER HONOUR: And remembering to insert the magic word 'alleged'?

MR DRUMGOLD: Alleged. And, indeed, prior to this – it is not the first award that has been given out in relation to this, there have been Walkley Awards that have been awarded in relation to this. But I am just – pardon my term 'at the margin', but I am just trying to isolate at the margin the significant change that is being advanced because that under 4750(3)(b) is what is in – is the question here. It is what has changed and how has it changed?

10 The opinion has not changed. The insistence on expressing it publicly has not changed. The two things that your Honour has just mentioned have changed. One is the proximity and the second is that it was attached to a vehicle of an award for the quality of the journalism attached to it. So that's the margin that we're dealing with that it's said there is a real and substantial risk that can't be addressed. And more importantly, that there is no remedy other than a temporary stay.

And I'll get to those in a minute. But I think it's just important to have a whistle-stop tour through the other juris prudence on this issue and how this circumstance differs from the other juris prudence. McDonald No 8 v Glenning were two of the cases cited. They both amounted to propensity evidence by stealth.

25 They were based on previous convictions, both of them. So, they were a different – they focused on the accused in that matter and it was propensity evidence by stealth as to their behaviour in the case of McDonald it was a prior conviction for similar behaviour that was discussed at ICAC that was subject to publicity. And with Glenning it was a prior conviction as your Honour's aware that was broadcast on the radio by Derryn Hinch.

30 McDonald is further distinguished because the comments were made in that case about ICAC proceedings and findings in ICAC proceedings made by both the Prime Minister of Australia at the time and the Premier of New South Wales. In relation to Hughes v Decision Restricted they were both contained and inaccurate treaties of the substantive evidence that would ultimately be led at trial. Decision Restricted was essentially a rehearsal of the entire trial including evidence that could not be led at trial.

40 Hughes, again, was the ventilation of – an accumulation, I think of bad character, propensity evidence relating to other people and the credibility of the complainant in that case. In Mokbel, again, it was propensity evidence by stealth in addition to bad character by association from previous conduct. There was also that element of a treaties of the substantive evidence that was to be led.

45 This case entails implied positive character on behalf of the complainant. Again, dealing with it at the margin it deals with just the positive aspect that a

person of high profile that carries a credibility believes the complainant, therefore people in the street should believe the complainant. That's with regard to the Wilkinson gratuitous opinion with regard to – of course, it's all difficult. It's all undesirable.

5

It's all unsavoury but the most unsavoury is the Jonesy and Amanda comment. Is a direct statement of guilt that they've extrapolated in the context from the opinion by Ms Wilkinson that she believes her. That's what we're dealing with at the margin. And the question is whether or not beyond a temporary stay those can be addressed. Can the court do anything to address those? The first thing that we're doing is we're speculating as to who, in the jury, may have seen the Logies and/or associated media.

10

Who in the jury will have heard the Jonesy and Amanda, the more insidious comments and we're inferring that and we're - - -

15

HER HONOUR: Do I know that as a fact in this application?

MR DRUMGOLD: You don't. No, we don't.

20

HER HONOUR: I'm just not sure whether – that might be broadcast in areas of the ACT.

MR DRUMGOLD: If it's not broadcast in areas of the ACT I'm sure the consequential media will have sufficiently regurgitated the speech of Wilkinson - - -

25

HER HONOUR: Well, the podcast is available on the internet so it's just a question of who downloads it.

30

MR DRUMGOLD: Correct. So, the first question is whether or not a poll and an exclusion can address this application at its margin. And this application at its margin again, is not a regurgitation of all the material that was before the court. It's the repeating of the clearly previously stated opinion more proximate to it carried by the credibility vehicle of an award.

35

We say that that's speculation. We say we don't know (a) who, in the jury pool will have been exposed to that and be influenced by it. So, there are two steps. The first step is can we ascertain that through jury poll. And the second step is if we can ascertain that can it be corrected by direction. They're really the heart of this case.

40

The heart of this case it seems to have been moved in a direction where it focusses on the undesirability of the media. We all speak with one voice that the media, the report, the opinion, the whole lot is completely undesirable. But the test at the margin, the test under 4750(3) is whether or not the speech and the Amanda and Jonesy offending comment and the speech I include the

45

media on the speech and the republications of the speech that will expose people to it perhaps without the passion that it was delivered.

5 Whether or not (a) a jury have been exposed to it at all. And secondly, (b) whether or not unwittingly, whether they know it or not they cannot have their view corrected by direction. Now, implicit in Lehrmann No. 2 is that the bulk of media that was dealt with in that case could be addressed by way of direction.

10 HER HONOUR: Two months from the time of the application.

MR DRUMGOLD: Two months, indeed.

15 HER HONOUR: Or determination of the application.

MR DRUMGOLD: Indeed. And that's a freshness question. The question now is can one element of all of that being the offending gratuitous opinion of Lisa Wilkinson about those things that I expressed, moved proximate. Whether or not that has tipped - - -

20 HER HONOUR: Well, what is said to the panel before empanelment about the witnesses the Crown proposes to call. If any of you have – are familiar with any of these witnesses. For example, members of the jury panel one of the witnesses will be Lisa Wilkinson. You might've seen her speech last Sunday.

MR DRUMGOLD: Yes. Well, it could be phrased in a different way.

30 HER HONOUR: I would hope to phrase it better than I just did Mr Crown.

MR DRUMGOLD: Yes.

HER HONOUR: But I'm just exploring the idea.

35 MR DRUMGOLD: Yes. And first of all, seeking whether or not they have been exposed to that material either the speech or the reporting of the material. And secondly, the effects - - -

40 HER HONOUR: Then to search their cognitive processes and attempt to interrogate them without receiving any answer from them. I think you might've unwittingly been influenced by the general public conception that this trial has already occurred. Perhaps not in the usual way.

45 MR DRUMGOLD: Yes.

HER HONOUR: But in the media rather than with a jury.

MR DRUMGOLD: Complicated as it is, that's the test before your Honour as to whether or not - - -

5 HER HONOUR: Well, what if the answer is I just can't know. Isn't the safer course to defer the trial until some of this dies down? Again, calling on my experience in another field of juris prudence that today's defamatory article is tomorrow's fish and chips wrapper. But these things do dissipate with time.

10 MR DRUMGOLD: They do. However, I would simply reflect, your Honour, that the test is not an abundance of caution.

HER HONOUR: Yes.

15 MR DRUMGOLD: The test is - - -

HER HONOUR: No, I understand what you're doing. I'm very concerned as you will have gleaned by now.

20 MR DRUMGOLD: Yes. As I say, we all speak with one voice about the propriety of this media.

HER HONOUR: And I am concerned when I, in my mind, start to rehearse how I am going to empanel a jury.

25 MR DRUMGOLD: Yes.

HER HONOUR: Well, what am I going to say to them about Lisa Wilkinson? You read the list of witnesses and you say if you have heard of any of these people, if you're familiar with them, well you might undoubtedly will have heard something of them. You might have watched her program. Well, if she's going to be called as a witness in this case I must ask you to put out of your mind the fact that she regards this woman as the bravest woman she's ever met.

35 MR DRUMGOLD: Well - - -

HER HONOUR: And said so last Sunday. Perhaps you can say that. Perhaps you can just say everything you have just said which is this is to tell the panel what doesn't seem to be appreciated in some parts of the media about the distinction between an allegation and proved guilt. It's very troubling.

45 MR DRUMGOLD: It can be done with force. And with respect it comes from your Honour's mouth with force. You can put - 'You should put out of your mind everything that you think you may know about this case.'

HER HONOUR: You 12 are the best placed to – or the jury in this trial will be the best placed. Only the jury will have heard all of the evidence, and so on.

5 MR DRUMGOLD: You can go further and say, ‘The reporting in this matter, without exception, is either contrary to the law or as you will see during the course of this trial, contrary to the facts.’

10 HER HONOUR: Mr Crown, I used to use the example of Lindy Chamberlain but I think everyone is – all the potential jurors are too young for that example to be effective any more. I need to come up with some new material. But the argument is when something becomes the subject of intense media attention everyone thinks they know what happened but nobody really knows what happened except the people who hear all of the
15 evidence under Rubrik of a properly conducted trial.

MR DRUMGOLD: Yes. I know we’re adopting a credibility attached to Lisa Wilkinson’s opinion and the vaccine to that is empowerment of a jury that you don’t simply outsource to some media person because they think
20 they know better than you. Only you will hear all of this evidence.

The reporting in this matter, factually, is almost without exception wrong. And the evidence that’s from the role of people in Parliament House to the timing of events that’s been reported, to who knew what, to Gaetjens reports
25 are without exception contrary to the evidence that will be led in the courtroom. That can be pointed out to the jury.

So the question before your Honour, really, is as I said at the margin whether or not, not in an abundance of caution, but whether or not a temporary stay is
30 the only way to overcome a real and substantial risk that the jury will have prejudged guilt, perhaps without being aware.

HER HONOUR: Could I just ask you about – I don’t think I marked – I haven’t marked your conference note. Sorry, that’s Exhibit E. That was
35 tendered by Mr Whybrow yesterday.

MR DRUMGOLD: Yes.

HER HONOUR: It seems to be admissible as to whether or not you’d call it
40 a business record but on the present application may, I take it that you don’t take issue with the accuracy of the document?

MR DRUMGOLD: No.

45 HER HONOUR: And can I infer that there was a conference on the 15 June between the people named, including yourself, and Lisa Wilkinson in the afternoon?

MR DRUMGOLD: Correct.

5 HER HONOUR: Does Mr Whybrow know who made the note and when?
And if not are you able to provide that information?

MR DRUMGOLD: Yes. The note was made by my instructor and forwarded from my instructor.

10 HER HONOUR: Contemporaneously?

MR DRUMGOLD: Contemporaneously.

15 HER HONOUR: Effectively. Is that Mr Gregg who made the note?

MR DRUMGOLD: Yes. Correct. Those are our submissions, your Honour.

HER HONOUR: Thank you, Mr Crown. That will be Exhibit E.

20

****EXHIBIT E - NOTE FROM INSTRUCTOR MR GREGG**

25 HER HONOUR: Yes, Mr Whybrow? I know – I'm sorry to put you under pressure. I know you have to be at another place at 10.00 am.

30 MR WHYBROW: No. Not at all, your Honour. I am sure his Honour will be able to be modified. Your Honour, can I just say at the outset that this is an application, in my submission, that should be brought by the Director, not opposed by the Director. In these circumstances there's a Minister of Justice in the course of these proceedings who also has an interest in a fair trial and where the application is not for a permanent stay.

35 It is, as your Honour's indicated, to allow there to be some dying down of what is an extraordinary – it's been characterised as some narrow emotional regurgitation – but that in and of itself is part of the problem. The learned Director said in setting out the context of Lisa Wilkinson's evidence in this case and, effectively saying she's not really that important, that there was some statement to police on the 27th or 28 March. That is the first I have
40 heard of that from the Crown.

The Crown's case statement says that the first time the police spoke to Ms Higgins was on Monday 1 April. Part of the material I source - - -

45 HER HONOUR: Sorry. Can you go back? I have missed something in my notes. Can you say that again? The Crown said this morning - - -

MR WHYBROW: The Crown case statement asserts that the first report to police was on Monday 1 April.

5 HER HONOUR: That's the note I have of what the Crown has said this morning but I must have missed something.

MR WHYBROW: I heard there being a reference to some contact with police on 27 or 28 March. In any event - - -

10 HER HONOUR: Mr Crown, did you want to - - -

MR DRUMGOLD: No.

15 HER HONOUR: I just need to be clear because I do want to make sure my notes are accurate.

MR DRUMGOLD: I said that it culminated in a report to the police on the 1 April.

20 HER HONOUR: By the complainant?

MR DRUMGOLD: By the complainant to police.

25 HER HONOUR: Was there any earlier communication by the complainant to police?

MR DRUMGOLD: No. Not to police. There were complaint – there were complaint - - -

30 HER HONOUR: With an internal complaint?

MR DRUMGOLD: The first contact was to two Federal police officers on the 1 April who took an account of what occurred.

35 HER HONOUR: Who took an account of what - - -

MR DRUMGOLD: An account of what occurred.

40 HER HONOUR: And has that been disclosed?

MR DRUMGOLD: It's two statements.

45 HER HONOUR: Two statements. And have they been disclosed in the police brief, Mr Whybrow?

MR WHYBROW: The ones on the 1 April, the difficulty is – as I had raised yesterday – there's a disclosure statement that there are a couple of police

officers permanently stationed at Parliament House. And there's some indication that those police officers commenced an investigation into a security incident, being the fact that two staffers came in at 1.00 or 2.00 in the morning on a Friday night, Saturday morning. In reviewing the – I will call it the unedited footage that we have to date from Ms Wilkinson's interview with the complainant, the complainant clearly asserts that she spoke to police on Wednesday 27 March 2021 – sorry 2019. There are, from the material that has been disclosed a text message from her to a journalist who had published a report making some apparent criticism of various things, saying she had spoken to police before the 1 April 2019.

HER HONOUR: Well, these are matters to be explored at the trial.

MR WHYBROW: But it is a matter of material. The two police officers who were stationed there, who would be the only ones that could be referred to, we sought their notebook entries, their PROMIS reports - - -

HIS HONOUR: Well, why do you say they are the only ones who could be referred to?

MR WHYBROW: Well, they are the ones that seem to be the ones that she was referred to in the evidence. I accept and I agree with - - -

HIS HONOUR: She might have rung Belconnen police station. I mean - - -

MR WHYBROW: No, no, no, no. It is not – she indicates police officers at Parliament House.

HIS HONOUR: At Parliament House?

MR WHYBROW: Yes. And obviously if that is correct, that is important. If it is incorrect, that is important. If it didn't happen, that is important.

HIS HONOUR: The point of this submission is that Ms Wilkinson's evidence will be not unimportant and you can't accept that it is just only the recorded complaint evidence?

MR WHYBROW: Exactly, your Honour. But more fundamentally than that is the chronology is – and I accept and I endorse the director's indication that, almost without exception, factual assertions about matters in the media will be shown to be inaccurate in many respects. The fundamental issue in this case, as it is in a lot of cases of this nature, is the credibility of the allegation brought by the complainant.

Now, in this case the complainant was working at the time as a trained media advisor. The original police statement of facts, just to put the context of the Lisa Wilkinson, the media and the fact that Ms Wilkinson has continuously

5 from the time she met Ms Higgins to the March4Justice to in her own
autobiography that was published not that long ago to last Sunday continually
been offering this opinion, which is only consistent with she accepts she is
believable – or not only believable, there is no doubt, she is brave, she is
courageous, it is all true.

10 The context that that needs to be heard – taken into account, your Honour, is
just simply two sentences from the original police statement of facts when
my client was charged:

On 5 February 2021 Ms Higgins attended Belconnen police station
and stated she wished the investigation to be recommenced. On 6
February members of SACAT - - -

15 The Sexual Assault Team:

20 - - - conducted a meet and greet information session with Ms
Higgins. During this meeting they were informed that she had been
in contact with members of the media and she had participated in an
interview for the television show The Project. She further stated that
she did not wish to participate in an evidence-in-chief interview until
the media interview had aired on commercial television.

25 Now, your Honour, if it had been done the other way, if the quaint Latin term
of sub judice carries any weight anymore, none of this pre-trial publicity
would have been able to have been engaged in. The interview could not have
been aired, and things of that nature. Credibility of what may be put as a
campaign from Ms Higgins and others to, in effect, control the narrative. The
evidence will be that she resigned from Senator Cash's office on 29 January.

30 The evidence - - -

HIS HONOUR: But that doesn't mean – that doesn't in itself endorse her
credibility or prejudice the accused.

35 MR WHYBROW: No.

HIS HONOUR: I mean the word 'campaign' is used pejoratively, but it
doesn't have to be used pejoratively. There are good campaigns and - - -

40 MR WHYBROW: No, no.

HIS HONOUR: - - - mischievous campaigns.

45 MR WHYBROW: And - - -

HIS HONOUR: And one of the things – I mean, one of the things that is part of this debate is the national shift in the conversation and in many respects that is a good thing, just - - -

5 MR WHYBROW: And I will be addressing that elephant in the room with the jury, saying that that is a good thing of course and it does not – it is not dependent on acceptance or otherwise of this allegation, that conversation and the validity and appropriateness and the overdue nature of it. But
10 Ms Wilkinson and Ms Higgins – it is not just she came in and did an interview and she has then had an ongoing affection or admiration of her. Within a few weeks of that interview going to air it would appear that Ms Wilkinson's husband has assisted the complainant to get a book deal worth quite a lot of money.

15 HIS HONOUR: Is that the subject of the subpoena to Mr FitzSimons? Has that material been produced yet? Or you are just going on public reports?

MR WHYBROW: No, we only just – there is material been disclosed showing that Ms Higgins was a welcome visitor to the Wilkinson and
20 FitzSimons house, went out. He helped being a go-between with - - -

HIS HONOUR: Again, there is not necessarily mischief in that.

MR WHYBROW: No, no, no.
25

HIS HONOUR: But I appreciate that these are matters - - -

MR WHYBROW: There is context.

30 HIS HONOUR: - - - you will want to explore at trial.

MR WHYBROW: Yes. But it is not just as it is being stated. An opinion by somebody with no other interest here coming to as a – perhaps a culmination that the most important part that has been left out of the director's
35 submissions about this opinion is it was endorsed and tweeted back, or there was comments back by Ms Higgins. She posted back. She endorses her, I endorse her back.

HIS HONOUR: What she endorsed was Ms Wilkinson's endorsement of her.
40

MR WHYBROW: That's right. A week out from the trial where her credibility is the fundamental issue.

HIS HONOUR: The central question.
45

MR WHYBROW: And, your Honour, this speech did not need to be made. If the award was – and the poor timing of the award ceremony, et cetera - - -

HIS HONOUR: Well, a speech could have been made. It just could have been made in a way that didn't - - -

5 MR WHYBROW: No. She could have said, 'Look, it's the' - - -

HIS HONOUR: I mean, one only needs to take the example of possibly the most powerful speech by a woman, certainly in my memory, of Julie Gillard, the celebrated misogyny speech in which she – I am trying to think of a
10 different expression than the one I usually use outside the courtroom – was strongly critical of the then prime minister, but deliberately refrained from commenting on the proceedings before the court.

MR WHYBROW: Yes.
15

HIS HONOUR: As to the texts, 'I'm offended because I'm always offended by sexism and misogyny. However, there is a process in place. The judge is reserve and I respect his decision'.

20 MR WHYBROW: Yes.

HIS HONOUR: I can actually recite the whole speech, Mr Whybrow, but you probably only need that part for present purposes.

25 MR WHYBROW: Yes. Could I at this stage, just as I come to perhaps concluding why there needs to be a temporary stay, hand up some examples of material that has been posted to Twitter today, this morning. And consistent with - - -

30 HIS HONOUR: By?

MR WHYBROW: Beg your pardon?

HIS HONOUR: By?
35

MR WHYBROW: By various people. It is just – but this is – the fact that I am seeking a temporary stay so that the adverse publicity can dissipate so that Mr Lehrmann can be a fair trial is in and of itself, as I foreshadowed
40 yesterday, part of the conversation. It was not assisted by the fact that the reporting yesterday was of lawyers yet again seek another delay and that is why in my submission this is an application that should have been brought by the director rather than opposed by the director.

Your Honour will see comments about the fact that this application is brought
45 of 'Pathetic'. I won't read them all out because they are only going to further cause the problem. But your Honour will see that the conversation is intense at this stage. Ms Wilkinson was trending on Twitter last night. Ms Higgins

was trending on Twitter last night. Your Honour, it has been said elsewhere – and you might recall perhaps saying it yourself:

5 Since the time the accused was charged, by far the most intense aspect of the publicity has been the discussion and criticism of the way in which the complaint was treated within Parliament House. The most damaging aspect of that discussion is the implicit acceptance of the complainant's truthfulness. Allied with that is criticism - - -

10

HIS HONOUR: Sorry, where are you reading from now?

MR WHYBROW: From words you have said elsewhere.

15

HIS HONOUR: Sorry, Mr Whybrow, I was distracting myself by reading.

MR WHYBROW: No. No, that is okay.

20

HIS HONOUR: But you are in the document you just handed up?

MR WHYBROW: No, no.

HIS HONOUR: I'm sorry.

25

MR WHYBROW: It is just some observations in Lehrmann (No 2).

HIS HONOUR: Sorry. Which paragraph?

30

MR WHYBROW: Thirty-one:

The most damaging aspect of that discussion is the implicit acceptance of the complainant's truthfulness. Allied with that is criticism implicit at least of any person who questions her account.

35

Now, at the moment that is going to include the jury at this point in time. They are going to be called upon to - - -

40

HER HONOUR: But that was an argument put by Mr Campbell in the previous application and I think the answer is that put by the Crown that firstly, the jury is powerful because they're anonymous and they're anonymity is protected. Their deliberations are protected by law. But secondly, the judge can emphasise that power and empower them by explaining that they really are factually, legally and constitutionally better placed than anyone to determine the guilty or - - -

45

MR WHYBROW: I don't disagree with that, your Honour. And that is why it is well recognised that a temporary stay will best serve the interests

because there is greater likelihood that those sorts of directions will be acceded to. When we have a trial starting next week where, your Honour, the context appears to be Ms Wilkinson was warned on 15 June, beware for this might be the consequence.

5

She, not only says something which is, in my submission, clearly a contempt of court, it is endorsed by the complainant. It is picked up in the conversation reagitated. There is now criticism of the accused because he's seeking to avoid his day in court when the opposite may be the case as to who is driving this. We do not - - -

10

HER HONOUR: Well, a number of these comments say, you know, when will this poor woman get her day in court but - - -

15

MR WHYBROW: Yes, well - - -

HER HONOUR: I thought I had made it tolerably clear on an earlier occasion that it would be preferable in the interests of getting the trial on for her to resist the temptation to discuss the allegation in the media.

20

MR WHYBROW: No. No, the relationship between Ms Higgins and Ms Wilkinson is not an irrelevant consideration. The chronology of that interview with The Project, how it predates an interview with police. The terms, the contents, what were said to be a number of things said in it which may be shown to be factually inaccurate are all against, effectively the highest profile reporter in the country in relation to this case publicly endorsing as truthful, believable, brave, courageous one week out from trial the complainant in this case – and it's untenable in my submission for a trial to be held at this time in these circumstances.

25

30

HER HONOUR: The document you've handed up this morning which is – sorry these are all posts on Lisa Wilkinson's Instagram - - -

35

MR WHYBROW: No, these are all posts - - -

HER HONOUR: No?

MR WHYBROW: - - - on the topic Lisa Wilkinson which was, you'll see trending at least - - -

40

HER HONOUR: Are they from a variety of – sorry, Mr Whybrow - - -

MR WHYBROW: Yes.

45

HER HONOUR: Someone's going to have to explain to me how social media works.

MR WHYBROW: Yes.

HER HONOUR: Are they drawn from a variety of sources or - - -

5 MR WHYBROW: No, they're drawn from – if you turn to, I think it's the
fourth page – fifth page – a screenshot of a page, 'Trending In Australia' at
6.22 this morning, 'Lisa Wilkinson' 1,565 tweets. And it's a selection when
one goes to 'The Latest' and that's topic – various comments, iterations
10 - - -

HER HONOUR: Does that page you've just drawn my attention to tell me
that Lisa Wilkinson is trending at a higher rate than the War on Ukraine?

15 MR WHYBROW: At that moment. Yes. As I understand it.

HER HONOUR: As at 6.22 am this morning.

20 MR WHYBROW: At 6.22. These things are very fluid. And as of this
morning, as I understand it, the Logies 2022 was still trending highly. But
that's not necessarily just Britney Higgins and this award but various other
things that may have occurred during that night.

25 HER HONOUR: That will be Exhibit F on your application.

##*EXHIBIT F - SCREENSHOT 'TRENDING IN AUSTRALIA

30 HER HONOUR: Anything else Mr Whybrow?

MR WHYBROW: No, they're my submissions, your Honour.

35 HER HONOUR: Please convey my apologies to Norrish J for detaining you.

MR WHYBROW: I will, your Honour.

40 HER HONOUR: Mr Whybrow, I'm going to give my decision some time
today at a time when I know you can't be here and you're - - -

MR WHYBROW: If I could be excused, yes.

HER HONOUR: Yes. I think Mr Crown, I'll say 2 pm.

45 MR DRUMGOLD: May it please the court.

HER HONOUR: And if that's not convenient to you, you're also excused so

long as someone from your office attends.

MR DRUMGOLD: Yes, I'll be here, your Honour.

5 HER HONOUR: Thank you Mr Crown. I'll adjourn until 2 pm.

ADJOURNED

[10.04 pm]

10

RESUMED

[2.02 pm]

15 HER HONOUR: The accused in these proceedings is charged with an offence of engaging in sexual intercourse without consent contrary to section 54(1) of the Crimes Act 1900 ACT. The allegation is of a kind not unfamiliar to the courts, save for the fact that the place where the offence is alleged to have occurred was on the couch in the office of a Senator in Australian Parliament House.

20

The case has, accordingly, attracted a level of attention in the media and among prominent Australian personalities that, while not unprecedented, even within my own judicial experience, is certainly extreme. Extensive media reporting of allegations of criminal conduct is not a mischief in itself. On the contrary, it is appropriate to recognise that the media play an important role in drawing attention to allegations of criminal or other misconduct and any shortcomings in the treatment of such allegations.

25

30 What is a potential mischief is the capacity for media reporting of such issues to spread in such a way as to interfere with the fair and proper determination of any related matter before the court. That danger is particularly acute in the case of pending criminal proceedings. It is trite, but apparently requires restatement at this point in this case, that the constitutional process for determining whether a person is guilty or not guilty of a serious criminal offence is for the allegation to be tested in a trial conducted in open court according to law.

35

40 The requirement to conduct a trial according to law is one of rich and variable content according to the circumstances of the case. But the overriding principle, one that is fundamental to the very notion of a criminal trial, and so cannot be dispensed with is the requirement that the trial be fair. The entitlement to a fair trial is one enjoyed by the Crown and the accused alike.

45

However, because the consequence of a finding of guilt is to enliven the authority of the State to punish, including by detaining a person in prison, it is rightly recognised that a trial that was unfair to the accused was no trial at

all and must be held again. Earlier this year, the accused in the present matter applied to have his trial either permanently or temporarily stayed because he said he could not possibly have a fair trial in light of the extensive media reporting and public commentary by prominent personalities about the complainant's allegations.

At that time, and in light of the evidence then brought forward, I was not persuaded of the impossibility of a fair trial then some two months hence. Yesterday, the accused brought forward a further application made orally outside normal sitting hours for a temporary stay of his trial which is currently due to commence next Monday. His right to bring the application is circumscribed by rule 4750(3) of the Court Procedures Rules 2006 ACT which provides that:

The previous application having been dismissed a further application may be made only if;

- (a) There has been a significant change of circumstances, and
- (b) The application is limited to that change of circumstances.

That limitation does not, however, require the court to disregard what has gone before. The first application was determined in a written judgment made publicly available only in redacted form. I limited the publication of my reasons in that way because recent jurisprudence, including decision of the High Court, commends a cautious approach to the publication of the matters alleged to have compromised the court's capacity to ensure that the trial of an accused person will be fair lest a court's judgment, itself, should contribute to the prejudice.

In light of the events that have given rise to the present application, and the circumstances in which it is brought, I consider it appropriate to give an unexpurgated version of the basis for the accused's contention that recent publicity has temporarily prejudiced his right to a fair trial. It is appropriate to place the relevant facts in their chronological context.

The events with which the accused is charged is alleged to have been committed in the early hours of 23 March 2019. The complainant made a statement to police shortly thereafter on 1 April 2019. However, following the announcement of a federal election the complainant informed police that in light of her workplace demands she did not wish to proceed further with the complaint.

The Crown case, at trial, will be that the decision not to proceed with the complaint at that time was prompted by the complainant's consideration of her duties to her employer in the delicate period leading up to the federal election. In early January 2021, almost two years having passed, the complainant decided that she wished to proceed with the complaint.

To that end she considered it appropriate to resign from her then employment by Michaelia Cash and she proffered her resignation. The Crown case will be that with a view to forestalling the mudslinging she anticipated would flow from that decision she also decided to go public with her allegation against the accused. And, separately, with her concerns as to the manner in which her initial complaint had been handled within Parliament House.

As to going public, the complainant participated in a preliminary interview with Ms Lisa Wilkinson, a well-known journalist on 27 January 2021. On 2 February 2021 Ms Wilkinson recorded an interview with the complainant which, in due course, became the basis for a program hosted by her. On 4 February 2021, the complainant contacted police indicating her resumed interest in proceeding with a criminal complaint. On 15 February 2021 the program prepared by Ms Wilkinson was broadcast.

Some days after that the complainant participated in a recorded interview with police. That is, after the airing of the program on The Project. As noted by Mr Whybrow, who appears for the accused, had those events occurred in reverse order, it is possible that the commencement of criminal proceedings would have intervened with the result that the interview could not have been published without attracting the risk of contempt proceedings against the journalists.

In any event, in due course, on 5 August 2021 the accused was summonsed to appear, in court, in September 2021 to face the present charge. The circumstances which gave rise to the first stay application intervened and the reasons for refusing that application are published in RV Lehrmann No. 2 [2022] ACTSC 92. As already indicated, that judgment is presently available only in redacted form.

The changed circumstances, giving rise to the further application are as follows; last Sunday, 19 June 2022 the Australian Television industry held, what until the interference of the Covid 19 pandemic were its annual awards for excellence in Australian television, known as The Logie Awards. The name of those awards evidently comes from the name of John Logie Baird, a Scottish electrical engineer and inventor credited with demonstrating the world's first live working television.

That is not a matter in evidence in the proceedings, but comes from my own research. Ms Wilkinson received a silver Logie for her interview broadcast on The Project. This was not entirely unexpected by Ms Wilkinson, nor did the award come at a time when she was unaware of the pending trial of the accused. Indeed, Ms Wilkinson may be taken to be aware that she is to be called as a Crown witness in the trial.

That is the inference that can be drawn from the content of a file note in evidence before me which records that, on 15 June 2020 some days before

the Logie awards, Ms Wilkinson participated in a conference with the Director of Public Prosecutions and those appearing with him and instructing him in the trial to discuss the evidence she would give.

5 Ms Wilkinson's evidence concerns her interviews with the complainant and may be admissible in the trial as evidence of complaint. A note of the meeting tendered by the accused, without objection on the present application, concludes as follows:

10 At conclusion Lisa was asked if she had any questions: - I am nominated for a Gold Logie for the Brittany Higgins interview – I don't think I will get it because it is managed by a rival network – I have, however, prepared a speech in case – Lisa read the first line and stopped by the director who said
 15 We are not speech editors.
 We have no power to approve or prohibit any public comment that is the role of the court.
 Can advise, however, that defence can reinstitute a stay application in the event of publicity.

20 Notwithstanding that clear and appropriate warning upon receiving the award Ms Wilkinson gave a speech in which she openly referred to and praised the complainant in the present trial. Unsurprisingly, the award and the content of the speech have been the subject of further commentary including on the
 25 popular morning radio program, Jonesy and Amanda.

The relevant segment from that program in evidence on the present application open as follows:

30 Amanda: But there were some really lovely moments last night. One of which was the award that Lisa Wilkinson and The Project picked up for the story they did on Brittany Higgins. They just – it was a phone call that came to Lisa. She answered Brittany Higgins' phone call. Brittany had – the back story here, I'm sure you
 35 remember, was raped in Parliament House.

The transcript attributes to Jonesy assent to that recollection. He later refers to the fact that, '...the whole story was dreadful. Absolutely dreadful.' Adding, 'Just the very fact that she had to have a meeting in the very room
 40 that she was raped with her superiors and then her career was virtually finished.' And so on.

In case it is not clear, my purpose in quoting those remarks is the fact that
 45 each of the radio presenters assumed the guilt of the accused in those remarks. The evidence before me on the present application also includes other social commentary including a copy of the complainant's own post effectively repeating remarks made by Ms Wilkinson in her speech. In other

words, as was put in argument before me this morning the posts amounted to – the combination of the speech and the posts amounted to Ms Wilkinson endorsing the credibility of the complainant who, in turn, celebrated Ms Wilkinson’s endorsement of the complainant’s credibility.

5

Then, this morning, there was a further spate of comments on social media reacting to the fact of the application made yesterday, two anodyne, one under the assumed tag ‘the socialist’ remarks that; ‘People in the public sphere need to refrain from making comments about this case’. I can only agree and thought I had made that tolerably clear to a broader audience on a number of occasions during these proceedings.

10

Another, operating under what I understand to be his real name, ‘Jeremy Ganes’ sensibly confines himself to a bland but accurate specification of the circumstance in which the present application is brought. But today’s comments, otherwise almost universally assume the guilt of the accused and speculate without any foundation that his motives for bringing the application are improper.

15

20

I do not, of course, make the mistake of assuming that individual comments on social media reflect the views or mindset of the broader public. Still, less that of the likely pool of ACT jurors. But they do exemplify possible responses to recent publicity. When the same assumption of guilt, as is being made widely on social media, is made and widely broadcast by popular breakfast radio hosts such as Amanda Keller and Brendan Jones it may be inferred that the impact of the recent publicity is large and that its full impact cannot be known.

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What can be known is that somewhere in this debate the distinction between an untested allegation and the fact of guilt has been lost. The Crown accepted that the Logie awards acceptance speech was unfortunate for that reason. He also accepted that Ms Wilkinson’s status as a respected journalist is such as to lend credence to the representation of the complainant as a woman of courage whose story must be believed.

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The prejudice of such representations so widely reported so close to the date of empanelment of the jury cannot be overstated. The trial of the allegation against the accused has occurred not in the constitutionally established forum in which it must, as a matter of law, but in the media. The law of contempt which has, as its object, the protection of the integrity of the court, but which, incidentally, operates to protect freedom of speech and freedom of the press has proved ineffective in this case.

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The public, at large, has been given to believe that guilt is established. The importance of the rule of law has been set at nil. The Crown submitted that the backscene for the vice of pre-judgment is to empower the jury with appropriate directions reminding them that they are uniquely placed to

determine the case and to disregard the views of others who will not have heard all of the evidence.

5 No doubt that can be done in many cases. The present case is different because the author of the impugned remarks will be a key witness in the trial. The central issue in the trial, it is now clear, will be the credibility of the complainant and whether her allegation of sexual assault can be believed. It is not uncommon and indeed, is frequently the case in such matters, for the defence to explore in cross-examination the way in which a complaint unfolded as a critical basis for making submissions to the jury as to whether the complaint should be believed.

10 The irony in all of this is that the important debate as to whether there are short comings in the way in which the courts are able to deliver justice in sexual assault cases to complainants and accused persons alike, has evolved into a form of discussion which, at this moment in time, is the single biggest impediment to achieving just that.

15 The delay of the present trial will not serve the interests of anyone. Contrary to popular assumption, it does not serve the interests of the accused for whom the prospect of conviction and sentence must weigh heavily as an immobilising force in his life. He has said through his lawyer in the present application that he has no interest in delaying the trial but he wants it to be a fair trial.

20 And I accept that that is the case. Nor does delay serve the interests of the Crown or the complainant. Delay has a corrosive effect on evidence. It is expensive. No doubt significant costs funded both publicly and privately have been incurred in preparation to date in the present trial including in the bringing of the present application.

25 Delay of the trial at this stage wastes the valuable resources of the court. Not least among which in the horrifying prospect that a judge of the court should find herself idle for four weeks during the time set aside for this trial at the expense of other accused persons. A further jury panel would have to be summoned if the trial is delayed.

35 Unfortunately, however, the recent publicity does, in my view, change the landscape because of its immediacy, its intensity and its capacity to obliterate the important distinction between an allegation that remains untested at law and one that has been accepted by a jury giving a true verdict according to the evidence in accordance with their respective oaths or affirmations.

40 I am not satisfied that any directions to the jury panel, prior to empanelment or, in due course to the jury, can adequately address that prejudice. For those reasons regrettably and with gritted teeth, I have concluded that the trial date

of 27 June, towards which the parties have been carefully steering must be vacated. I'm not in a position to say at this stage how long that should be for. I do want this matter to be heard this year if it can be.

5 But in the meantime, Mr Crown, I don't know whether you make any application or renew your application for injunctions, but I consider it appropriate to afford at least Ms Wilkinson and arguably some others, an opportunity to be heard as to whether I should restrain them from making further remarks about the case.

10 That would not be necessary if appropriate undertakings were forthcoming. I know in respect of the previous application that it was a matter which came from the office of those representing the accused, but I wondered whether you might now wish to bring forward an application for an injunction of, as I say, Ms Wilkinson, perhaps The Project, perhaps the complainant and perhaps Jonesy and Amanda. It will depend, in part, on their response to the present decision.

20 MR DRUMGOLD: I now have the luxury of the - - -

HER HONOUR: Sorry?

25 MR DRUMGOLD: I now have the luxury of an opportunity to reflect on that.

HER HONOUR: Over the next four weeks?

30 MR DRUMGOLD: Yes. I think what we would be assisted by – and certainly has been provided in cases such as McDonald No. 8 is a minimum period of time and my submission is that the substantive trial can then simply go back into the directions list.

35 HER HONOUR: So, what's the minimum? Is it three months? Two or three months.

40 MR DRUMGOLD: It's difficult. So, McDonald No. 8, the trial was due to start in either October or November and it went over to February. But one gets the impression that it was not a specific period. It was a aligning with the trial period and that happened to be the next trial period. I think, understanding New South Wales as I do - - -

HER HONOUR: I had in mind that somewhere around October would be a sufficient period. Perhaps if coupled with either undertakings or injunctions.

45 MR DRUMGOLD: I'm strongly minded to make such an application but as your Honour alluded to it would be appropriate for me to file that application, name defendants, respondents and give them an opportunity to be heard. I

think realistically it's going to depend on the court's availability and the trial listing period.

5 HER HONOUR: Well, that is also a significant difficulty. Although I will say that the steps leading up to the deferral of the present date had the result of eating up some out of court time and leave of mine which can perhaps be – which has since been reallocated and can be eaten up again.

10 MR DRUMGOLD: Yes. So, if prima facie, I hear your Honour add as adjunct to your judgment that you're minded around about October - - -

HER HONOUR: I'm plucking that date from the air.

15 MR DRUMGOLD: Yes.

HER HONOUR: Well not from the air. That date is a date in my mind. That is an appropriate period of dissipation of the prejudice but I know nothing about the listings or the availability. I do know, as I say, through sort of rejigging my own allocations that some time may be able to be made
20 available before Christmas.

MR DRUMGOLD: That would be very useful. I understand the list proper is not this year. I had made some enquiries - - -

25 HER HONOUR: Sorry, could you say that again?

MR DRUMGOLD: The list proper, if it goes to the directions list and the Registrar tries to find a date, I understand that - - -

30 HER HONOUR: We've gone public on the fact that we have no dates but - - -

MR DRUMGOLD: Correct.

35 HER HONOUR: But things do change. And there are other matters in the court that may change so - - -

MR DRUMGOLD: In that case, rather than putting it in the Registrar's list -
40 - -

HER HONOUR: I'll list it before me.

MR DRUMGOLD: List it before your Honour and we'll - - -

45 HER HONOUR: But I'll bring the Registrar - - -

MR DRUMGOLD: - - - simply await a date that we can work to – await

advice on a date that – that would be my preference. Because if it were to go to the Registrar’s list it would not be in 2022.

5 HER HONOUR: No. So, Mr Crown, the date should be sooner rather than later but long enough from now for you to consider any further application?

MR DRUMGOLD: Well, I can say from the bar table there will certainly be a further application.

10 HER HONOUR: Yes, all right.

MR DRUMGOLD: We’ll - - -

15 HER HONOUR: Well, I think that should be brought on sooner rather than later.

MR DRUMGOLD: Yes. Yes. We will just draft and serve, I think.

20 HER HONOUR: I think we can list it at some point tomorrow or Thursday, Mr Crown.

MR DRUMGOLD: I think the problem there, your Honour is this is for an order under 111 - - -

25 HER HONOUR: Well, I’m in your hands, so I’ll give it two listings if that’s easier.

30 MR DRUMGOLD: Yes, well I think I would need two listings because we would have to draft those documents, we would have to serve them and we would have to identify - - -

HER HONOUR: And obtain some sort of response.

35 MR DRUMGOLD: Indeed. So, if we have listing one to allocate a date or to look for a date and allocate a potential date. At that listing I can advise the court of how – the time required for a listing for the second date. I think that’s probably the best way.

40 HER HONOUR: Well, why not I stand it over before me before 10 on tomorrow or Thursday? Thursday is probably better or Friday.

MR DRUMGOLD: May it please the court. And that’s for a proposed date?

45 HER HONOUR: That’s just for a mention.

MR DRUMGOLD: Thank you, your Honour.

HER HONOUR: 9.30 on Thursday convenient to you, Mr Crown?

MR DRUMGOLD: Thank you, your Honour.

5 HER HONOUR: Is that convenient to you, Ms Musgrove?

MS MUSGROVE: Yes, it's suitable, thank you.

10 HER HONOUR: All right, I'll stand the matter over for mention only at 9.30 on Thursday. But Mr Crown if you do have an application if you file it before then then I'll have it before me and we can allocate a date for that as well.

15 MR DRUMGOLD: Will do. Thank you, your Honour.

HER HONOUR: Thank you.

20 **ADJOURNED**

[2.33 pm]