

# TRANSCRIPT OF PROCEEDINGS



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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**

**9.37 AM, THURSDAY, 23 JUNE 2022**

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

MR S. WHYBROW appeared on behalf of the Accused.

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HER HONOUR: Yes, Mr Crown?

5 MR DRUMGOLD: Yes, Drumgold for the Crown. Your Honour, it would perhaps be best if we – if your Honour is minded, just to start with the trial date and then I will address your Honour on issues of publicity, et cetera.

10 HER HONOUR: The court could list the matter in the week commencing 4 August. That is – 4 August, 4 October. That is a Tuesday because it is a long weekend. That is as a result of some pinching and robbing Peter to pay Paul. I mean, to be more precise, it is – the only way we can accommodate dates is by my sacrificing some time out of court and leave and that is what we have done.

15 MR DRUMGOLD: Well then, of course, that is suitable to the Crown, your Honour.

HER HONOUR: Is that - - -

20 MR DRUMGOLD: Yes, it is.

HER HONOUR: Can the DPP accommodate that?

MR DRUMGOLD: Yes, we can, your Honour.

25 HER HONOUR: Can you accommodate that, Mr Crown?

MR DRUMGOLD: Yes, we can.

30 HER HONOUR: Mr Whybrow.

35 MR WHYBROW: To the extent – yes, your Honour. To the extent that it has – may have an effect, what my application would be, because the bushfire is still burning, in effect, that the trial be listed to start at the commencement of the year next year because there are a number of matters that we – well, we would like there to be no further issues and delays. I certainly can foresee a possibility that there may be collateral matters that need to be investigated relating to the circumstances that have led to the trial being vacated and - - -'

40 HER HONOUR: Sorry, I do not understand what you are saying. The first thing is you are saying the bushfires of this week will still be burning.

MR WHYBROW: Well they still are at the moment.

45 HER HONOUR: I understand that but in a way that I regard to be ameliorative, if I could put it that way.

MR WHYBROW: Yes, certainly your Honour's judgment is - - -

5 HER HONOUR: That is that there – that as to the extent that I have followed it, the publicity this week has focussed sharply on the very fact that was being overlooked which is that a man is facing trial for a serious offence and that he is entitled to the presumption of innocence. That has been the – in what I have read, the message.

10 MR WHYBROW: Yes, well it is – there is various messages but I do acknowledge that your Honour's quite precise and clear judgment has, it appears to be, widely disseminated and has had some cut through on this issue which has been a problem. Nonetheless, my application is that we would start the trial early next year. If I had one matter that would fall in the middle of that period, I can probably re-brief it.

15 HER HONOUR: I am not going to – I am sorry, but I am not going to accommodate counsel's availability in this listing. I certainly will obviously hear you on the question of the fires still burning but in my assessment, and I said it the other day, a period of three months is a significant period during which attention to prejudicial issues fades in the minds of potential jurors.  
20 That is the concern. The real concern on Tuesday was the immediacy of empanelling a jury with a list of witnesses that included Ms Wilkinson in a week where no-one could fail to – well perhaps not no-one but a few people could fail to have connected her name with success in publishing a true story.

25 MR WHYBROW: Yes.

30 HER HONOUR: My assessment is that three months, coupled with what I anticipate will be a dampening of the debate as a result of the judgment and a communication I have received since, that that will permit the trial to be conducted fairly. If you are telling me you are not available, I am sorry, but that is unfortunate.

35 MR WHYBROW: No, no, there was – there is a week period in there where I may have some difficulty.

HER HONOUR: If you are telling me you do not think the matter can be ready, I can't see how that can possibly be the case with the time between now and October.

40 MR WHYBROW: Well, your Honour, I am not – yes, I am not in a position to say that. There is a whole lot of material that is about to be produced and I am not going to say to you that we can't be ready then. The only concern is whether the prejudice has ameliorated. It may be – your Honour might recall when I first appeared in this matter that I told you that I would not expect that  
45 it would take the entire six weeks and that I would endeavour to be efficient. I would ask that the matter though be listed for six weeks for safety because there is - - -

HER HONOUR: Six weeks?

MR WHYBROW: Yes, your Honour.

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HER HONOUR: Can't – do not have six weeks and I can't see how a single incident - - -

MR WHYBROW: I know.

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HER HONOUR: A trial involving a single incident with a single complainant could take – possibly take six weeks.

MR WHYBROW: This is not a normal case, your Honour.

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HER HONOUR: I have conducted complex murder trials in less than that.

MR WHYBROW: Indeed.

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HER HONOUR: The events take a very short period of time. I appreciate there is aftermath and likely to be lengthy cross-examination about inconsistencies between statements made on different occasions but I cannot see how it could possibly take six weeks. The six - - -

25

MR WHYBROW: How long is your Honour proposing to list the trial for?

HER HONOUR: The sixth week of the period that we have listed it is – what is the first week of Court of Appeal? It could be six weeks. Well, I am duly forewarned of your estimate. I propose to list it for four weeks but the fifth - it is starting on a Tuesday - - -

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MR WHYBROW: 4 October.

HER HONOUR: - - - and what I was going to say before was the Tuesday the 4th I may, depending on my ability to hurry people, I may still be doing - there is a trial with an estimate of 10 to 12 days which starts the fortnight before.

35

MR WHYBROW: Yes.

40

HER HONOUR: I was proposing to list this matter on the 4th with a forewarning to the parties that if that trial has not concluded we may not be able to empanel until the Wednesday or the Thursday and then – so that is four and a half weeks or five.

45

MR WHYBROW: Yes, your Honour.

HER HONOUR: The sixth week, it would not be a disaster if I was still going then, so.

5 MR WHYBROW: I am not saying it will. That is just there is a lot of material.

HER HONOUR: Yes, no, no. I understand what – you are just wanting to set a reliable or responsible estimate.

10 MR WHYBROW: Yes. That is all I can say in the matter, your Honour, on the trial date matter.

15 HER HONOUR: All right, well I will list the matter for hearing commencing on 4 October with the caveat that if the trial that I will be doing before that is still running we may not be able to empanel until the Wednesday or the Thursday.

20 MR DRUMGOLD: Please the court. That is 102 days. That is consistent with all of the other authority on delayed start due to publicity so it far exceeds decision restricted, it far exceeds McDonald (No 8) by way of timing, so.

25 HER HONOUR: Yes, yes, thank you, Mr Crown. You did address me on that the other day and that is – we had regard to that.

30 MR DRUMGOLD: On the injunctive relief, it is somewhat more complicated than would appear. I know there has been discussions around the test in Media v Ibrahim. That test dealt with the court's suppression and non-publication order at 2010 in New South Wales and we do not have a similar test. There is a common law power but the test is also quite high. The test is that there has to be a real and serious risk of interference with the administration of justice as an exception to what the court won't do. It will only do it to avoid a risk of serious – a serious risk of interference.

35 Your Honour may have received a letter. It – so I have engaged in - - -

HER HONOUR: Yes, you are referring to the letter on behalf of Channel 10 and Ms Wilkinson?

40 MR DRUMGOLD: Correct.

HER HONOUR: I – that was sent to me I assumed with your consent because you were copied in and you had also received it.

45 MR DRUMGOLD: Yes. I have engaged with chief – the Chief Legal Officer of the Australian Radio Network who are the owners of WSFM which is the offending cast. I have been in contact with Thomson Geer, the

lawyers for Network Ten. That letter is useful. I have sought written undertakings in a number of regards that I understand will be provided.

5 HER HONOUR: The letter certainly gave me to believe that an undertaking would be forthcoming.

MR DRUMGOLD: Yes, and that undertaking - - -

10 HER HONOUR: If undertakings are proffered, I won't make an injunction, Mr Crown.

15 MR DRUMGOLD: No, and I do not think the legal grounds are there to injunct and, of course, there can't be an injunction at large, that is quite clear, it has to be quite specific, but what I will say is that the drafting of those undertakings are very specific. They make reference to commentary surrounding the allegation including commentary on the complainants and accused. They involved acknowledgment of that issues of a trial are sub judice and they involve acknowledgment that interfering with the due administration of law or a deliberate breach of the sub judice could amount to contempt proceedings, so they are quite specific. If, as I expect, those  
20 undertakings are given, there is no ground for me to seek an injunction.

HER HONOUR: I agree, Mr Crown.

25 MR DRUMGOLD: That is what I am proposing to do. If those undertakings are not given, that will affect the test of whether or not there is a real and substantial test, of course, if a refusal - - -

30 HER HONOUR: Have you, in your correspondence with those entities, requested a response within a particular time?

MR DRUMGOLD: Yes, today.

35 HER HONOUR: Today, all right.

MR DRUMGOLD: Today.

HER HONOUR: So that by close of business today.

40 MR DRUMGOLD: Correct. While - - -

HER HONOUR: Well I think what I will do is just – if this is appropriate, direct that any application be filed by close of business tomorrow - - -

45 MR DRUMGOLD: Thank you.

HER HONOUR: - - - and if you determine that you are not going to file an application, if you could please let my chambers know.

MR DRUMGOLD: Yes. While I am on my - - -

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HER HONOUR: And – sorry, and if you do file an application you can communicate with the registrar about a return date.

MR DRUMGOLD: Thank you. While - - -

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HER HONOUR: But it will have to be relatively urgent. Sorry, I keep speaking over you, Mr Crown.

MR DRUMGOLD: No, that – no, not at all, your Honour. While I am on my feet, I – my research has indicated that there are a number of books on foot. I will extend - - -

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HER HONOUR: When you say on foot, you mean in preparation?

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MR DRUMGOLD: Yes. I have identified four potentials, five potentials, and I am - - -

HER HONOUR: Five potential books?

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MR DRUMGOLD: Yes. On – I do not know the substance of it.

HER HONOUR: Who are the authors?

MR DRUMGOLD: Samantha Maiden, Niki Savva.

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HER HONOUR: Sorry, who was the second person?

MR DRUMGOLD: Niki Savva, I understand she is a reporter, and these – I should pause to say these are unsubstantiated, this is – I have not heard directly from these people.

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HER HONOUR: I see.

MR DRUMGOLD: I have heard indirectly that there may be books afoot.

40

HER HONOUR: I see.

MR DRUMGOLD: And Peter van Onselen. What I propose doing is making contact with the authors and first of all asking whether there is a book and getting undertakings (a) that the book either does not address any issues that could be sub judice or if they do address issues that could be sub judice that their publication date will not precede the trial proceedings.

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5 HER HONOUR: Well as long as it is understood because I am not confident that it was until this week that – what is meant by the term sub judice is effectively what I said in my judgment, that an allegation that has been made remains untested at law so that any commentary about the maker of the allegation, the circumstances in which she made it, her credibility, the number of times on which she has said it and the terms in which she has said, all of those are matters that are before the court. Because what is before the court is the allegation that remains to be tested.

10 MR DRUMGOLD: Indeed, my mind extends beyond that to issues of workplace culture in a single workplace. That there have been a number - - -

15 HER HONOUR: But even the discussion of workplace culture has to dance a delicate dance around – if the issue is the treatment of an allegation it is very difficult to have that debate without commenting on inappropriate treatment on the assumed premise that the allegation is true, or - - -

20 MR DRUMGOLD: Yes.

HER HONOUR: I mean, I suppose you could talk about how you should deal with an allegation and how politicians should react to such an allegation. It would be a pretty thin book if you took out everything that was sub judice. That is, everything that was before this court which is the untested allegation.

25 MR DRUMGOLD: Yes.

HER HONOUR: It would be – I think you would – it would be a masterpiece of rhetoric and subtlety to avoid breaching the rule.

30 MR DRUMGOLD: It would indeed. I think the events of this week - - -

HER HONOUR: But then – yes, well that is the point of your communication and I think you are not making any application about that the moment.

35 MR DRUMGOLD: I am simply - - -

40 HER HONOUR: You are letting me know and if there is any separate application about that you will have to bring it forward at the appropriate time.

MR DRUMGOLD: That – indeed. That is my point in raising it, your Honour.

45 HER HONOUR: Yes, all right. Mr - - -



MR WHYBROW: Whybrow.

5 HER HONOUR: - - - Whybrow, she said looking down at her Post-it note. I do apologise, Mr Whybrow. I think the reason was explained that I used to do a lot of work with a – the late Mr Wyburn and I keep confusing - - -

MR WHYBROW: Yes, his Honour said the same thing.

10 HER HONOUR: Norrish J has the same problem.

MR WHYBROW: Yes.

15 HER HONOUR: We both did considerable work with that lovely gentleman and it is a compliment to you that we confuse - - -

MR WHYBROW: No, I understand.

HER HONOUR: That we confuse you with him.

20 MR WHYBROW: Yes, anonymity is not to be overrated or underrated. Your Honour, could I seek access to the communications that have passed from - - -

25 HER HONOUR: I think you should have that. Do you disagree, Mr Crown?

MR DRUMGOLD: They have been forwarded to my friend's instructor.

30 HER HONOUR: It was sent to me on the premise that it would be, I think, tendered and there was an even offer that it be read to the court, I do not think that is necessary, but I think it should be marked for identification, Mr Crown, or even tendered.

35 MR DRUMGOLD: Well I will tender it. I would have forwarded it but it says that it is copied to my friend's instructing lawyers. If that is not correct, I will tender it.

MR WHYBROW: We have not seen it.

40 HER HONOUR: Let Mr Whybrow have a copy.

MR DRUMGOLD: Yes.

45 MR WHYBROW: It is not something I need urgently, your Honour, it is just in due course.

HER HONOUR: No, okay.

MR WHYBROW: I am grateful for the director raising the issue of pending books. I raised last week before this and the events of Sunday and following, that a book was published last week.

5 HER HONOUR: Was published last week?

MR WHYBROW: Was published last week which - - -

10 HER HONOUR: I did not – I might have misheard you about that and I did not - - -

15 MR WHYBROW: No, no, a book has been published last week. I raised concerns because it has an entire chapter which is about the complainant and in the index her name is referenced only more frequently than the subject of the book itself and it is described as 'Reveals stories behind government scandals from shocking allegations against Christian Porter to the scandalous treatment of women inside the Liberal Party'.

20 It is clearly a matter that is – I do not want to publicise that by speaking of it but it should be – I am going to speak to the director about having – seeing if the publishers will voluntarily withdraw that.

25 HER HONOUR: Well, probably the less said at this stage the better, Mr Whybrow, but I think you can raise that with the director and I will leave it to you both to bring forward any further application.

MR WHYBROW: Yes.

30 MR DRUMGOLD: Yes, I agree.

HER HONOUR: Which may well be a joint application in the circumstances.

35 MR WHYBROW: Thank you, your Honour.

40 HER HONOUR: Mr Crown, all I – the only order I have made today is to fix the matter for hearing. You foreshadowed an application. I think what I will do is mark this letter for identification rather than accepting it as an exhibit because there is no matter before me as to which you tender it.

MR DRUMGOLD: I think that is correct, your Honour.

45 HER HONOUR: I will just mark it MFI 1.

**##MFI 1 - LETTER ON BEHALF OF CHANNEL 10 AND MS WILKINSON**

MR DRUMGOLD: The court pleases.

5 HER HONOUR: Thank you. All right. Anything else?

MR DRUMGOLD: Nothing from the Crown, your Honour.

10 MR WHYBROW: Your Honour, could we just – there is going to be a lot more preparation and things will inevitably, hopefully not inevitably, but likely arise that may need some involvement from your Honour.

15 Could the parties have liberty to apply on – we do not need the urgency now, of three days notice for any matter?

HER HONOUR: You have standing leave to approach my chambers when needed, Mr Whybrow.

20 MR WHYBROW: Thank you, your Honour.

MR DRUMGOLD: Court pleases.

25 HER HONOUR: I will just go off the Bench to re-convene for the 10 o'clock matter.

**ADJOURNED UNTIL 4 OCTOBER 2022**

**[9.57 am]**

**EXHIBIT LIST**

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