SUPREME COURT OF QUEENSLAND

CITATION:	*R v Stoten* [2010] QSC 136
PARTIES:	**R** **v** **DANIEL ARAN STOTEN** (applicant)
FILE NO/S:	Indictment No 13 of 2010
DIVISION:	Trial
PROCEEDING:	Criminal Application
COURT:	Supreme Court at Brisbane
DELIVERED ON:	27 January 2010
DELIVERED AT:	Brisbane
HEARING DATE:	27 January 2010
JUDGE:	Fryberg J
ORDER:	
CATCHWORDS:	Criminal Law – Evidence – Miscellaneous matters – Application to exclude evidence – Desirability of pre-trial application – Impropriety of ambush *Criminal Code Act* 1899 (Qld), s 590AA
COUNSEL:	J Hunter SC for the applicant A MacSporran SC with C Toweel for the respondent
SOLICITORS:	Peter Shields Lawyers for the applicant Director of Public Prosecutions (Commonwealth) for the respondent

HIS HONOUR: Application has now been made to me in the course of the trial for the defence to lead evidence by way of cross-examination of a police officer of the transcripts of a number of telephone intercepts.

In this case, the Crown has led a number of other telephone intercepts involving conversations between the accused Stoten and various people. It was known well before the trial that this evidence would be led by the Crown.

Over 16,000 telephone intercepts were made, although I do not know how many of these involve the accused Stoten. Presumably many thousands did so. The defence wishes to lead evidence of seven of them which have not been led by the Crown. It submits that it should be able to do so on the basis that although containing hearsay, they are relevant hearsay and ought to be admitted out of fairness to the accused.

No reason has been advanced to me as to why this matter could not have been made the subject of an application under s 590AA before the trial commenced. Senior Counsel for the defence has quite candidly admitted that the intention to tender these intercepts was deliberately withheld from the Crown on the principal ground that to have disclosed it would have only encouraged the Crown to go searching for other intercepts which it had not otherwise intended to tender by

way of some sort of tit for tat principle. Section 590AA has been inserted in the Code to prevent this kind of situation arising.

The application made before me will require some considerable argument. I have been furnished with an outline of submissions on behalf of Mr Stoten, as well as a number of cases by both sides. In consequence, I have sent the jury away until after lunch today and it remains to be seen whether the matter will be concluded by then.

Section 590AA was, as I have said, intended to prevent this sort of situation developing. It is incumbent on the parties to litigation, including criminal litigation, to do their best to make that litigation run smoothly and to minimise the disruption to the jury.

In my judgment, it is not proper for defence to withhold material from the prosecution which it is intended to put to witnesses and which it is known will be controversial in the sense that its admissibility will be arguable. The days of trial by ambush are over. A fair trial for the accused does not involve the notion that matters of admissibility, which are matters of law, can be kept up one's sleeve. They must be resolved in accordance with the purpose for which s 590AA of the Criminal Code was enacted.

There is nothing I can do about the fact that no pre-trial application was made. However, I wish to make it quite clear

that by undertaking the ruling now, which I feel I must do, I do not give any approbation to the course which has been followed.
