DISTRICT COURT OF QUEENSLAND

CITATION:	*R v Ansell & Bradbury* [2022] QDC 148
PARTIES:	**THE QUEEN** **V** **JAKE EDWARD ANSELL** (First Defendant) **COREY JOHN BRADBURY** (Second Defendant)
INDICTMENT NO:	184/2019
DIVISION:	Criminal
DELIVERED ON:	14 June 2022 (*ex tempore*)
DELIVERED AT:	Bundaberg
HEARING DATE:	10, 13, 14 June 2022
JUDGE:	Barlow QC DCJ
ORDERS:	**The proceedings on the indictment be permanently stayed**
CATCHWORDS:	CRIMINAL LAW –PROCEDURE – ADJOURNMENT, STAY OF PROCEEDINGS OR ORDER RESTRAINING PROCEEDINGS – STAY OF PROCEEDINGS – ABUSE OF PROCESS –evidence of the complainant's telephone records was downloaded by the police and subsequently deleted – the evidence likely included material relevant to defences – whether directions to the jury would be sufficient to counteract prejudice – whether the defendants would be able to receive a fair trial *Criminal Code* 1899 (Qld) s 590AB *R v Juides* (Unreported, Supreme Court of Queensland (North J), indictment 6/2021, 25 May 2022), followed *R v Edwards* [2009] HCA 20, 83 ALJR 717 distinguished *Walton v Gardiner* [1993] 177 CLR 378, applied
COUNSEL:	C Ahern for the Crown A Hoare for the first defendant E Whitton for the second defendant
SOLICITORS:	The Office of the Director of Public Prosecutions Suthers George Lawyers for the first defendant Dwyer Criminal Law for the second defendant

[1] The defendants, who are each charged with two counts of rape of the same complainant on the same occasion, have, during the course of the complainant's evidence, made an application for a permanent stay of the proceedings against them, on the ground that evidence has been lost which could have been very relevant to their defence. In fact, the loss of the evidence was a deliberate decision of the investigating officer which, the defendants submit, has caused them substantial prejudice. As well, the defendants submit that the conduct of the investigating officer in deliberately destroying forensically relevant material is an indication of some impropriety by that officer, which should weigh in favour of the court permanently staying the proceedings as being unfair to the defendants.

[2] The allegations of the prosecution are that the defendants, who were camping near where the complainant and other friends of hers were camping, engaged in sexual acts with her involving penetration both of her vagina and her mouth by each defendant, at a time when she was unconscious and, therefore, incapable of giving consent. The complainant's evidence is that she was very drunk and she had smoked some cannabis, which she had never done before and that, as a result, she was happy, she was enjoying herself in her social interaction with the defendants and others, but when she went to urinate behind the bushes near the beach where they were camping, she felt tired and dizzy and she lay down. Then she woke to find one defendant's penis in her vagina and the other's penis in her mouth. She said she has very limited recollections of the night but that's one of her clear recollections. This is alleged to have happened late in the evening on 4 August 2018.

[3] There is evidence from other witnesses, who have yet to be called but whose statements I have seen, that she was, in fact, extremely intoxicated that evening. But there is also evidence, from statements of both of the defendants and other persons, all of whom have yet to give evidence, that she did not appear to be overly intoxicated and she was able to communicate well with everyone around her.

[4] During her cross-examination after having undergone some substantial cross-examination by counsel for the first defendant, the complainant asked for a break, as she was clearly upset. She had been given breaks on earlier occasions. Shortly thereafter, the prosecutor informed me that the complainant did not wish to proceed with her evidence and the prosecutor asked for time to discuss the matter with her and for leave to do so, given that she was in cross-examination. That leave was granted. Some time later, the prosecutor informed the court that the complainant wished to consider the matter overnight, as did the prosecutor and so the matter was adjourned shortly after 4 o'clock yesterday afternoon.

[5] Today, the complainant, according to the prosecutor, indicated that she wished to proceed. But before she did so, the defendants sought to cross-examine the complainant and the investigating officer on the voir dire to ascertain a number of matters, particularly relating to a possible discussion between them yesterday afternoon while the complainant was still under cross-examination.

[6] The complainant said that she had spoken to the investigating officer, it appears, after speaking to the prosecutor, although she was not absolutely clear on whether it was after or not. She said that she told him that she couldn't

remember a lot of the matters about which she was being asked in cross-examination and he told her that he believed her and he believed that something had happened but he encouraged her to do what she thought was right.

[7] The investigating officer was then cross-examined and he agreed that he had spoken to the complainant during her cross-examination. He said that he was aware of his obligation not to discuss her evidence with her during that cross-examination and said that he told her that he believed her because he was providing support to her to decide whatever she wanted to do. He told her, according to his evidence, that he had to be careful about what he said but he believed her.

[8] He was also asked about what he did with the complainant's telephone when he first interviewed her. The complainant had given evidence that the investigating officer had taken her phone at the time of that interview and had later returned it to her. She thought it was for the purpose of downloading the information on the phone. She confirmed that that had happened during the voir dire. The officer confirmed that he had taken her phone and he had conducted what is known as a Cellebrite download from the phone, which, as I understand it, downloads all that can be downloaded from a phone, whether deleted or not, including photographs and possibly social media, although he said that it did not download social media.

[9] He said that he obtained from the complainant her social media passwords but, as I understood his evidence, he didn't look at that social media to see what exchanges there had been between the complainant and other people around the time of the alleged offences or within the days shortly after. He did not do so because she had shown him some screenshots of some Snapchat exchanges between her and the first defendant and he thought that was sufficient. The officer said that, having looked through the download, he decided that there was nothing in it that was of any relevance and he therefore deleted it. That Cellebrite download is, therefore, no longer available.

[10] Inconsistently with that evidence, that he had downloaded the Cellebrite or used Cellebrite to download the telephone's data, on 8 June 2022, in other words, Wednesday last week, he was asked by the legal support officer from the Office of the Director of Public Prosecutions whether the complainant's phone had ever been Cellebrited. His answer was, "No. Because the messages were sent via social media which at the time could not be captured by older versions of Cellebrite software. And that original phone was changed to a new phone long ago as I remember asking her shortly after the assertion of the defendants in an interview that she had nudes that she was allegedly showing them at the time. The victim told me that she did not have nudes on her phone. I did not see any evidentiary value in examining her phone due to the technical aspect and had the social media screenshots photographed by an SOC."

[11] I accept that no suggestion had been made to the investigating officer, at about the time that he interviewed the complainant or other people who were at the campsites on the relevant night, that the complainant had been showing either of the defendants nude photos of herself. That suggestion first came when the investigating officer interviewed each of the defendants, who voluntarily

attended at the police station to be interviewed and whose records of interview I have read and which were no doubt intended to be tendered by the prosecution.

[12] In those interviews, or at least in the interview by the first defendant, he said that during the evening the complainant showed him photographs of her where she was nude. The complainant, in her evidence, when that was put to her, denied that she had such photographs on her phone, did not recall whether she had showed any photographs to the first defendant, but did say that she had photographs of herself when she was not fully clothed and, as I recall, she agreed to a proposition that she at least had her breasts exposed, although I have not checked the transcript to determine whether that was in fact what she said.

[13] Clearly, it was only when the investigating officer was told those things by the first defendant that he might have first thought there might be photographs that were relevant on the complainant's phone. But by then it was too late because she had destroyed her phone, or at least she no longer had it, and he had deleted the Cellebrite download of her phone. Whether she had nude photos and whether she had shown those photographs to the first defendant are relevant in a number of respects.

[14] First, it's relevant to her credit or at least to the reliability or unreliability of her evidence. Secondly, it is relevant, it seems to me, and could give rise to a submission to the jury by the defence that, if she was prepared to take photographs or to show photographs of her naked to a person whom she had only met a few hours earlier and with whom she engaged in sexual activities within the next one to two hours, that is relevant, it seems to me, to a suggestion that might be made to the jury that, in the circumstances in which she found herself, she was not inhibited by any modesty and where she had been talking about having threesomes, because she was being pressured by her boyfriend into doing so with another woman, she might have decided voluntarily and knowingly to engage in a threesome with the defendants.

[15] Of course, we will never know now and the jury could never know whether or not she had such photos and had shown them to the first defendant. In the defendants' submissions, the deletion of the Cellebrite download was a deliberate deletion of forensically relevant material which has irrevocably prejudiced the fair trial in a way that cannot be overcome by any directions that I give to the jury.

[16] As I've said, the defendants, or at least Mr Whitton for the second defendant, also submitted that that deliberateness tends to indicate impropriety on the part of the investigating officer which not only leads to unfairness but, if the trial were allowed to proceed and the defendants were convicted, would lead to the process of the court being brought into disrepute and public confidence in the court system being reduced.

[17] It also leads to the possibility of the entire prosecution in the circumstances, and I say this without any criticism of the prosecutor or the DPP, being an abuse of the process of the court.

[18] The parties agree - and it's clear on the authorities - that for a prosecution to be permanently stayed is an exceptional remedy. But it is exceptional in the way described by Justice North in the course of determining an application for a

permanent stay of a charge in *R v Juides*:[1] it occurs on occasions that would be so highly unusual that they can be regarded as exceptional.

[19] The circumstances in which criminal proceedings will be granted a permanent stay were described by the plurality in the High Court in *Walton v Gardiner* [1993] 177 CLR 378 at pages 393 to 395. Among other things, their Honours the Chief Justice and Justices Deane and Dawson noted at 393, that proceedings will constitute an abuse of process if they can be clearly seen to be foredoomed to fail.

[20] I will come later to why I have referred to that. But they also refer to decisions of other courts in which, for example, the New Zealand Court of Appeal stated (and the plurality agreed at 394) that it is contrary to the public interest to allow public confidence in the administration of justice to be eroded by a concern that the court's processes may lend themselves to oppression and injustice.

[21] The circumstances in which that may be the case, or in which a permanent stay may be granted, are of course not closed and it may be that the power to grant a permanent stay may be exercised as and when the administration of justice demands, as their Honours referred to at page 394 in quoting from an earlier decision of the High Court. The question is whether, in all the circumstances, the continuation of the proceeding would involve unacceptable injustice or unfairness or whether the continuation of the proceedings would be so unfairly and unjustifiably oppressive as to constitute an abuse of process. Those tests come from *Walton v Gardner* at page 392 and they were repeated by the High Court in *R v Edwards* [2009] HCA 20, 83 ALJR 717 at paragraph [23]. For clarity, I'll observe that, as their Honours found, the test is not whether the continuation of the proceedings *could* constitute unacceptable injustice or unfairness but whether it *would* do so.

[22] In that case, the High Court also noted that the mere fact that relevant data or evidence has been lost would not ordinarily justify a stay of proceedings. Their Honours said at paragraph 31 trials involve the reconstruction of events and it happens on occasions that relevant material is not available. Documents, recordings and other things may be lost or destroyed. Witnesses may die. The fact that the tribunal of fact is called upon to determine issues of fact upon less than all of the material which could relevantly bear upon the matter does not make the trial unfair.

[23] In *Juides*, the investigating officer had made a conscious decision to withhold from the defendant's legal advisors evidence of the download of an electronic locking system, which contradicted, in an important respect, the account of the complainant of the events in question. Justice North noted that that deliberate decision and a decision not to obtain important evidence at the consequence that the defendant was, therefore, there denied forever of the opportunity to draw upon the evidence, rely upon it and rely upon it by undermining the credibility or the reliability of the complainant's account and the loss of that evidence could not be remedied. His Honour went on at page 18 of the transcript:

---

1 Indictment No 6 of 2021, unreported, 25 May 2022. His Honour's reasons appear within the transcript of day 3 of the proceeding before him. The passage to which I refer is at T3-17:41-43.

> But in circumstances where a conscious decision is to be made not to investigate and to withhold evidence important to the defence to the potential prejudice of the defence undermines in a rather pernicious way the fundamental foundations of a fair trial, as it is understood in this country. Nothing that I can do in the context of the trial can undo what has been done and remedied what would be unfair so that what would be unfair could be rendered as fair. The applicant is permanently deprived of evidence that, in the circumstances, it is likely would've assisted him in the defence of the charge against him because the investigator made a conscious decision at relevant times to conceal evidence.

[24] I do not go so far in this case as to say that the investigating officer made a conscious decision to conceal evidence but he did make a conscious decision to delete a download from a telephone which may or may not have contained evidence relevant to the investigation and to the defendants' defences. In particular, it is astonishing, in my view, that an investigating officer would delete that sort of information very early in the investigation and well before any of the witnesses other than the complainant had been interviewed. What may not seem to be relevant when one first hears from the complainant about what she says has happened may well become relevant when other evidence is located or found or other people give statements. How anyone could consider that that there was nothing of relevance in that material at such an early stage of the investigation astounds me, especially someone of such experience as this investigating officer.

[25] As Mr Hoare for the first defendant submitted, in this case, as soon as that information was downloaded from the phone, it became disclosable under section 590AB of the Criminal Code because it is material that would assist in the fair conduct of criminal proceedings with the single aim of determining and establishing the truth. Whether or not it was known at that stage that the information would contain evidence relevant to the prosecution's case or that of the defence.

[26] In this case, the complainant's evidence, so far, is clear that she has very little memory of what occurred that night. It appears that she was definitely very drunk and she was subject to cannabis. The prosecution intends to call evidence from a senior forensic physician whose statement made on 1 June 2022 has been tendered in the course of this application. The evidence of that doctor, in a nutshell, is that:

> *An individual who is acutely intoxicated with alcohol and cannabis may experience fragmentary or on-block memory loss and a distortion of time perception. Such a person may be conscious, may be interacting with their environment, may be performing complicated actions, interactions and behaviours and to all intends and purposes, may engage in conversations and have other interpersonal interactions and appear to other persons to be perfectly capable of understanding what she was doing, even though, in fact, she was only functioning automatically and later be unable to recall the events.*

[27] This is relevant to the defendants' defence that although they did engage in the sexual acts that the complainant alleges they engaged in, they did so with her

consent. It is clearly also a case in which even if she was incapable of consenting because of the effect of alcohol and cannabis on her, there is a real possibility of the jury accepting a defence that the defendants had an honest and reasonable belief that she was consenting to the acts that they performed on her. Those facts are not directly relevant to the application before me except that they do have a bearing on the strength of the general principle that it is in the public interest to allow a prosecution to proceed to a decision by the jury. In that regard, it is relevant that counsel for the second defendant, Mr Whitton, submitted that not only would I grant a permanent stay under the usual principles for the grant of a permanent stay of criminal proceedings; but this court has an inherent power to prevent misuse of its procedure in a way that would prejudice the defendant.

[28] It's also relevant that if it appears, even at this early stage of the trial, that the prosecution's case is almost doomed to fail, that would be relevant to whether or not a permanent stay should be granted. It does seem to me, at this stage, that there is a very substantial likelihood that a jury would find the defendants not guilty. However, I do not take that into account substantially in my determination

[29] Even disregarding that, it seems to me that in the circumstances where the investigating officer deliberately destroyed substantial material which could well have included material that was relevant and, himself, made the decision that there was nothing relevant on it at a very early stage of the investigation, particularly where it appears likely that there was relevant material on the telephone – and there may even have been some other material – not just the photographs, but full exchanges of communications between the complainant, the defendants and other persons about the circumstances of that evening and what occurred.

[30] Finally, there was evidence on the voir dire that the investigating officer had spoken to the complainant yesterday afternoon while she was under cross-examination. I don't find that it was improper or, in any way, unfair to the defendants. Although, I must say, I consider it unwise that an investigating officer should talk to a complainant about whether or not she should proceed with her complaint and her evidence, particularly in the absence of the prosecutor. But I don't find that that's a reason why this proceeding should be stayed.

[31] In all those circumstances, it does seem to me that to proceed with this prosecution would be so grossly unfair to the defendants that it would bring the administration of justice into disrepute. And therefore, I should grant a permanent stay of these charges and I will do so.

[32] So the formal orders of the court will be that the proceeding be stayed as against both defendants, permanently. Secondly, that the evidence be preserved until the expiration of the appeal period from my decision or, if an appeal is commenced, the final resolution of that appeal. And three, at the appropriate time the exhibits be returned to the Crown.