SUPREME COURT OF QUEENSLAND

CITATION:	*R v Bennetts* [2017] QSCPR 4 ; [2017] QSC 194
PARTIES:	**THE QUEEN** **v** **Brenden Jacob BENNETTS** (applicant)
FILE NO/S:	No 1432 of 2016
DIVISION:	Trial Division
PROCEEDING:	Rulings
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	7 September 2017
DELIVERED AT:	Brisbane
HEARING DATE:	6 September 2017
JUDGE:	Ann Lyons J
ORDERS:	**1. The application to exclude the evidence of the YouTube search on 13 August 2015 is refused.** **2. The Application by the Crown to re-open the ruling on 31 August 2017 in relation to the evidence of the Facebook messages between the defendant and Ms Gilmore on 13 August 2015 is granted.** **3. The Facebook messages the subject of the ruling on 31 August 2017 are admitted.**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – RELEVANCE – GENERALLY – where the applicant is charged with one count of murder and one count of interfering with a corpse – where the applicant's plea to manslaughter was not accepted by the Crown in satisfaction of the indictment – where one day before the applicant caused the death of the deceased the applicant entered the search "best way to dispose of a body" into YouTube – where the results of the search, if any, are not known – where the applicant applies to have the evidence of the search excluded on the basis of relevance – whether the

evidence is relevant – whether the evidence should be excluded

CRIMINAL LAW – EVIDENCE – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – PREJUDICIAL EVIDENCE – GENERALLY – where the applicant is charged with one count of murder and one count of interfering with a corpse – where the applicant's plea to manslaughter was not accepted by the Crown in satisfaction of the indictment – where one day before the applicant caused the death of the deceased the applicant entered the search "best way to dispose of a body" into YouTube – where the results of the search, if any, are not known – where the applicant applies to have the evidence excluded on the basis of its prejudicial effect – whether the prejudice of the evidence outweighs its probative value – whether the evidence should be excluded

CRIMINAL LAW – EVIDENCE – GENERALLY – JUDICIAL DISCRETION TO ADMIT OR EXCLUDE EVIDENCE – NATURE OF DISCRETION – OTHER PARTICULAR MATTERS – where the applicant is charged with one count of murder and one count of interfering with a corpse – where the applicant's plea to manslaughter was not accepted by the Crown in satisfaction of the indictment – where one day before the applicant caused the death of the deceased the applicant entered the search "best way to dispose of a body" into YouTube – where the Crown submits that the YouTube search contextualises evidence previously ruled to be inadmissible – where the Crown applies pursuant to s 590AA(3) of the *Criminal Code* to re-open the ruling for special reason – whether a special reason exists – whether the ruling should be re-opened

Criminal Code 1899 (Qld), s 590AA, s 590AA(3)

R v BCU [2014] QCA 292
R v Dunning; Ex parte Attorney-General (Qld) [2007] QCA 176
R v Hasler 1987] 1 Qd R 239
R v Nguyen [2002] 1 QR 246
R v Swaffield (1998) 192 CLR 159
Roach v R (2011) 242 CLR 610

COUNSEL: M J Copley QC for the applicant
V A Loury QC for the Crown

SOLICITORS: Mulcahy Ryan for the applicant
Director of Public Prosecutions (Qld) for the Crown

Background

[1] The applicant Brenden Jacob Bennetts has been charged on an indictment as follows:

> Count 1. That on 14 August 2015 at Upper Tent Hill he murdered Jayde Kendall.
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> Count 2. That on 14 August 2015 at Upper Tent Hill he improperly interfered with a dead human body.

[2] The deceased was last seen alive after she left school on Friday, 14 August 2015. Her body was not discovered until Wednesday, 27 August 2015, when she was found on rural land at Upper Tent Hill outside Gatton.

[3] The trial commenced on 4 September 2017. The defendant pleaded not guilty to Count 1, murder, but guilty to manslaughter. The defendant pleaded guilty to Count 2, interfering with a corpse. The Crown did not accept the plea to manslaughter and the trial is currently proceeding on Count 1 on the Indictment. The only issue in the trial therefore relates to the defendant's intention at time of the unlawful killing.

[4] The case against the defendant is that after sending each other text messages, the defendant and the deceased had arranged to meet up after the deceased finished school on 14 August 2015. The defendant was seen picking Ms Kendall up from school in his red car around 3.20pm that day. That was the last time she was seen.

[5] At 5.45 pm and 5.47 pm that day the defendant was captured on Closed Circuit Television making withdrawals from the deceased's bank account using her bankcard and her PIN at the Commonwealth Bank, Gatton. No further withdrawals were made from that bank account. The deceased's purse was found on the Warrego Highway outside Gatton by a walker on 18 August 2015.

[6] The defendant was interviewed by police on 18, 19 and 21 August 2015 and by 19 August 2015 he was clearly a suspect for the murder of Jayde Kendall. During those interviews he denied any involvement in her death. The defendant was arrested on 21 August 2015 but later released. On 27 August 2015 the defendant was charged and arrested for the murder of Jayde Kendall.

[7] A four day 590AA pre-trial hearing took place from 21 – 24 August 2017 to exclude certain evidence from the trial including the police interviews and certain Facebook messages, including those sent by the defendant to a teenage girl called Dillan Gilmore between 13 – 15 August 2015. On 30 August 2017 I handed down my ruling in relation to that 590AA pre-trial hearing and relevantly for this application, I ruled that the messages sent between the defendant and Ms Gilmore on 13 August 2015 were not relevant and were therefore excluded from evidence in the trial.

The current application

[8] A 'voir dire' was held in the absence of the jury on the afternoon of 6 September 2017, so that the Crown could outline further evidence which had become available since the commencement of the trial which the Crown intended to rely on. Neil Cameron Robertson, a forensic expert employed by Queensland police, gave evidence about data which had been retrieved from the defendant's mobile phone on 7 September 2015. That data was on a disc which was attached to a technical report by Mr Robertson which was provided to the investigating officer on 28 May 2016. Whilst the report was provided to the Director of Public Prosecutions and the defendant's legal representatives, the disc was not. The relevance of portions of this data did not become clear to the Director's office until Monday, 4 September 2017 after the trial had commenced.

[9] The nature of the evidence sought to be led by the Crown consists of evidence which reveals an extract from a search of the stored data on the defendant's phone. That extract shows that at 12.19 pm on Thursday 13 August 2015, which was the day before Ms Kendall went missing, the defendant had entered a search request into YouTube titled "best way to dispose of a body".

[10] Mr Robertson gave evidence as to how the information was accessed and the programs and forensic tools that were used to retrieve the information, including programs called 'UFED Physical Analyser' and 'Internet Evidence Finder'. It is not necessary for the purpose of the present application to outline in any detail the methods or search tools and programs employed.

[11] Mr Robertson's evidence was that the date and time of the YouTube search was accurate and was based on Brisbane time, which is GMT plus 10 hours. He indicated however that whilst the title of the YouTube search has been revealed, the actual results of the search cannot be ascertained. Mr Robertson gave evidence that not only is it not known what the search query revealed, which I understand him to mean the number of options the defendant was offered after entering the search query, but it is not known whether he actually viewed anything on YouTube at all after undertaking the search.

[12] Mr Robertson stated that 39 searches were revealed on the extract and that many of them related to searches for games and music. He also agreed that the extract showed that the defendant had an interest in games. He also indicated that a search query entered today (in 2017) using the same terms would not give an accurate indication of the information which the defendant endeavoured to access, given the dynamic nature of the YouTube application and the fact that many more videos have been added to the application since 2015.

[13] There is therefore an application by the defence to exclude that evidence on the basis that it is not relevant. Alternatively, defence argues that the evidence should be excluded on the basis that its prejudicial effect outweighs its probative value.

Defence submissions to exclude evidence: Relevance

[14] Counsel for the defendant argues that the first requirement of admissibility is relevance and relies on the statement of principle in *Roach v R*[1] that a fact can only be relevant if on the basis it is accepted, it could rationally affect a jury's assessment of the probability of a fact in issue. Here, the only fact in issue is intent. Counsel argues that there is no fact in issue as to whether the defendant killed the deceased or disposed of her body. The search query therefore about the disposal of a body is not relevant to a fact still in issue in this trial.

[15] Furthermore it is argued that the entry of a search query "best way to dispose of a body" cannot rationally affect the assessment by a jury of the probability of the existence of the necessary intent at the time of the unlawful killing, in circumstances where:

(i) the entry of search query is made 24 hrs before the death;
(ii) it cannot be shown what if anything the search query revealed;
(iii) it cannot be shown what the defendant actually looked at of the things the search revealed; and
(iv) the context in which accused asked question/made search is unknown.

[16] Counsel argues that the search query could have been prompted by something the defendant heard or saw on radio, TV or another device. Neither is it known what motivated the defendant to search: was it poor taste, curiosity, something sinister, something to do with games or was he looking for something humorous? Counsel argues that all of those things are unknown and the prosecution is seeking to take refuge in the unknown by saying "but he entered that search term, therefore an inference can be drawn".

[17] Counsel for the defendant also argues that if it could be known what was found - and it may well have been about games - then the admission of the evidence would be not pressed because it would not be relevant. It is argued that the Crown wishes to rely on evidence which has no probative value because there is nothing known about what it was that he found, if anything, and what motivated him to search it.

[18] To the extent that it is argued that the Facebook messages between 13 and 15 August 2015 between the defendant and Ms Gilmore provide a context, Counsel for the defendant argues that they provide an innocent context and there is no known link between the messages on Facebook and the search entered into the YouTube application.

Is the evidence relevant?

[19] In *Roach v R*[2] the majority of the High Court held that matter had to be relevant before it could be admissible and that "The question as to relevance is whether the evidence, if accepted, *could* rationally affect the assessment by the jury of the probability of the

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1 (2011) 242 CLR 610 at [12].

2 (2011) 242 CLR 610 at [12].

existence of a fact in issue." In the present case the circumstances of the deceased's death are unknown as the cause of death has not been able to be determined due to the level of decomposition. The degree of violence done to deceased is therefore completely unknown. By his pleas the defendant accepts that he killed the deceased and that it was unlawful, but argues that he had no intention to kill her or to cause her grievous bodily harm. It is in that context that the jury needs to determine intent. It is a matter still in issue. The determination of the question of intention at the time of the killing is necessarily a matter of inference. An inference as to intention can only be drawn from facts the jury find established by the evidence, and they include the things that the defendant did or said at the time of the killing as well as before and after the killing.

[20] In my view the fact that the defendant, just 24 hours before the death of the deceased was entering a search query into YouTube asking "best way to dispose of a body" is highly relevant to his intention. I consider that it is not the results of the search that are significant because in theory, such a search may not have revealed anything on YouTube. In my view the fact that he actually typed those words into a search engine irrespective of the result is the significant fact, given it was done at a time which was proximate to the defendant killing the deceased and in circumstances where her body was concealed and left in the open in a relatively isolated farming area. Those actions resulted in her not being discovered for two weeks and her cause of death has not been able to be determined.

[21] Ultimately it is a matter for the jury as to the weight they give to that evidence, given the factors Counsel for the defendant has already outlined. In my view the evidence is relevant and admissible.

Should the evidence be excluded in the exercise of the discretion?

[22] Counsel for the defendant argues that should the evidence be held to be relevant, it should nonetheless be excluded in the exercise of the discretion to exclude evidence because the prejudicial effect outweighs its probative value. In this regard Counsel relies on the decision of *R v Swaffield*[3] and argues that the evidence is of low probative value and there is a danger that a jury could rely on it in circumstances where it is highly prejudicial and could be misconstrued. It is essentially argued that it is necessary to reject the evidence because it would be dangerous for a jury to act on it and that there is a risk of a miscarriage of justice. It is argued that given it is not known what the defendant actually accessed and given the wide variety of information that could be accessed, the danger is that the jury will give this evidence unfair weight. In particular it is argued that the jury is being asked to speculate on the content of the search results in circumstances where it cannot be shown that anything was actually accessed.

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[3] (1998) 192 CLR 159 at [62] – [64].

[23] In *R v BCU*[4] Fraser JA discussed the term "prejudice" and indicated that the term comprehends a danger that the jury may use the evidence improperly or in a way which goes beyond its probative value or gives it more weight that it deserves, which may inflame the jury or divert them from their task.

[24] In *R v Hasler*[5] Connolly J discussed the relevant principles as follows;

> "In my judgment a proper application of rules governing the admissibility of the evidence which was rejected in this case shows that it was of substantial probative value and relevance. I am conscious that two judges of this court of considerable experience in this area have rejected this evidence and it is therefore with diffidence that I express the view that there was no basis in law on which the confessional statements could properly have been excluded. What is, it seems to me, occurring is that attention is being focused on the question of prejudice to the accused person as if that were the dominant consideration. In truth it is not. The discretion falls to be exercised and the prejudicial effect on the accused becomes relevant only if the evidence tendered is of small probative value. It follows that there was in my respectful judgment, no occasion for the exercise of the general discretion to exclude the confessional evidence in this case."

[25] In this regard the Crown also relies on the decision of *R v BCU*[6] to argue that the evidence is not of slight probative value but rather is significant, in circumstances where the cause of death unknown and the degree of violence used unknown. Prejudice arises in ability of evidence to assist in proving offence of murder and any possible prejudice could be alleviated via directions. The Court held:[7]

> "Whatever term is used to describe the weight of the evidence, the discretion to
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> exclude it was available for consideration only if the evidence was prejudicial. The appellant's outline of argument did not articulate what it was that made the evidence prejudicial. In oral argument senior counsel for the appellant relied upon the circumstances already mentioned, which demonstrated that the evidence was not strong. But the weakness of evidence does not of itself constitute relevant prejudice. For the purposes of this ground of discretionary refusal to admit evidence the term "prejudice" comprehends a danger that the jury may use the evidence improperly or in a way which goes beyond its probative value, or give it "more weight than it deserves or when the nature or content of the evidence may inflame the jury or divert the jurors from their task". It is not necessary here to

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4 [2014] QCA 292.

5 1987] 1 Qd R 239.

6 [2014] QCA 292.

7 Ibid at [22].

> attempt to describe all of the circumstances in which admissible evidence may operate unfairly such as to constitute prejudice, but it is necessary to bear in mind that "prejudice does not arise simply from the tendency of admissible evidence to inculpate an accused" and that it is "unfair prejudice that is in question". The discretion to exclude evidence may be exercised only where the evidence has relatively slight probative value and a substantial prejudicial effect other than its effect in proving the offence."

[26] In my view the evidence is not of slight probative value but rather is significant because of the actual words that were used, the timing of the search query as well as the circumstances in which the deceased was found abandoned in the open in an isolated area.

[27] In *R v BCU* Fraser JA held that the nature of the evidence in that case was not inherently likely to fan the flames of prejudice or divert the jury from their task. In the circumstances of this case I also do not consider that arguments as to the possible limited weight of the evidence would be obscure or difficult for the jury to understand. Clear directions will necessarily be given to the jury in this regard.

[28] The application to exclude the evidence on the basis of the discretion is refused.

[29] Therefore, the application by Brenden Bennetts to exclude the evidence of the YouTube search on 13 August 2015 is refused.

The application pursuant to s 590AA(3)

[30] The Crown submitted that if the evidence was not excluded then it sought to revisit the ruling made on 31 August 2017 to exclude the evidence of Facebook messages sent between the defendant and Ms Gilmore on 13 August 2015, on the basis that they were not relevant.

[31] Counsel for the defendant argues however that there is no basis to revisit the ruling and that no special reason pursuant to s 590AA(3) of the Code has been shown. It is argued that paragraphs [90] - [93] of the Ruling handed down last week was correct. The decision applied the correct test at paragraph [90] to determine relevance. The conclusion that was reached was that the evidence was not relevant and should be excluded. It is argued that late disclosure due to incompetence of police does not officiate the ruling made in relation to the Facebook evidence. The relevant paragraphs of the Ruling handed down last week are as follows:

> "[90] Whether those Facebook messages are relevant depends on the relationship between those messages and the issues being tried. Generally, relevant evidence is evidence which, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue. In this case one of the issues the Crown must prove on a charge of murder is an intention to kill or cause grievous bodily harm. True it is that the messages refer to death, but they do not refer to an intention to kill or any fascination with death or an

intention to seriously harm someone. In my view, an acceptance of the fact that the applicant might *know* about death soon enough says nothing about an *intention* to kill or cause grievous bodily harm.

[91] I also do not consider that the words "Guess I'll know soon" are a clear reference to a premeditation to kill in general or to kill Jayde Kendall in particular. Indeed while there is evidence that the applicant and Jayde Kendall were using the application 'Snap Chat' to communicate with each other, there is no evidence before me that at that point in time on 13 August the applicant and Jayde Kendall had even agreed to meet. A reference to 'knowing soon enough' about death could be a reference to any number of other things particularly given that they had been referring in their previous conversations to song lyrics with relatively depressing overtones.[8] In my view a reference to death in general is not relevant to the issue of an intention to kill or cause grievous bodily harm.

[92] Furthermore, the topic of cutting off contact with each other immediately after that conversation is not new and is referred to by both the applicant and Ms Gilmore in a number of Facebook conversations before 13 August 2015. It is not clear that the applicant's messages about doing so on 13 August 2015 are any different in nature.

[93] I consider that the Facebook messages exchanged between the applicant and Ms Gilmore on 13 August 2015 are not relevant and should be excluded."

[32] Section 590AA (3) of the Code is in the following terms:

"**590AA Pre-trial directions and rulings**

(3) A direction or ruling is binding unless the judge presiding at the trial or pre-trial hearing, for special reason, gives leave to reopen the direction or ruling."

[33] It is clear therefore that special reason needs to be shown. There can be no doubt that the discovery of the YouTube search changes the complexion of the Facebook evidence which was excluded. It clearly puts the Facebook messages in a context. In my ruling I held that those messages which referred to death were not relevant to a fact in issue in the trial because it was a reference to death and said nothing about an *intention* to kill. The Crown argues that the YouTube search was done around the time of the conversation and therefore provides a context to the search and the conversations. The Crown argues that the two items necessarily go together.

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8 T4-125 ll 10-45.

[34] Does the further analysis of evidence, which was available but not known to the DPP at the time of the 590AA application constitute special reason? In *R v Dunning*,[9] Williams JA considered what could constitute special reasons:

> "It would be contrary to all notions of justice and fairness to say that a pre-trial ruling remained binding even though in the light of circumstances which emerged during the first trial doubts were raised as to the correctness of the ruling. Where, after the first trial, either the prosecution or defence sought to have a pre-trial ruling re-opened, a judge would have to give consideration to whether or not the change in circumstances warranted a re-opening. If the change in circumstances warranted a re-opening then "special reason" would exist for so doing. If a consideration of the evidence at the first trial did not disclose any reasonable basis for re-considering the ruling (as happened in *Sheehy*) there would be no "special reason" warranting the re-opening and the application would be refused on that basis. Adopting that approach does not conflict with anything said in *R v Nguyen* [2002] 1 Qd R 426, *R v Steindl* [2002] 2 Qd R 542 or *Sheehy* as to what constitutes "special reason". It is not desirable for there to be any attempt to further define what in a particular case may constitute "special reason". That is something which will have to be determined in the circumstances of each case in which the question arises."

[35] In *R v Nguyen*[10] a special reason pursuant to s 590AA(3) was additional evidence becoming available. In that case a question of degree was involved. Here it is clear that the evidence in question was always available, just not disclosed. There can be no doubt that the forensic expert had to consider a great deal of embedded data and that any late disclosure was clearly due to the fact that a comprehensive analysis had not been done at that point in time. I accept that it was not deliberate.

[36] There is therefore no hard and fast rule as to what constitutes a special reason. In my view special reason has been shown. As Mackenzie J stated in *R v Nguyen*, "it cannot be overlooked that the offence of murder is a most serious offence. There is a substantial public interest in the prosecution of persons who are alleged to be guilty of it if there is evidence available which may establish the offence." There is evidence which is now available which places those Facebook messages in a context. It would seem to me that having considered the search extracts now available, the Facebook messages between the defendant and Ms Gilmore on 13 August 2015 seem to link the search terms the defendant used to things he was talking about. I note that the search "Perfect by my darkest days" is reference to a song and the search "bullet" is reference to a song referred to in a conversation with Ms Gilmore. I also note that "wrong direction by passenger" was also referenced by Ms Gilmore and the defendant around the time the defendant was undertaking those searches.

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9 *R v Dunning; Ex parte Attorney-General (Qld)* [2007] QCA 176 at [23].

10 [2002] 1 QR 246.

[37] In relation to the timing of the YouTube search it cannot be ignored that the defendant entered the search "best way to dispose of a body" at 12.19 pm on 13 August 2015 and he had the discussion about death with Ms Gilmore within the hour at 12.54 pm.

[38] In the circumstances I am satisfied that the Crown has shown special reason as to why the ruling should be revisited. I am satisfied that the evidence of the Facebook messages between Ms Gilmore and the defendant should be admitted into evidence.

[39] The Application by the Crown to re-open the ruling on 31 August 2017 in relation to the evidence of the Facebook messages between the defendant and Ms Gilmore on 13 August 2015 is therefore granted.

[40] The Facebook messages the subject of the ruling on 31 August 2017 are admitted.