DISTRICT COURT OF QUEENSLAND

CITATION:	*R v Muller* [2024] DCQR 33
PARTIES:	**THE KING** **v** **STEPHEN JOHN MULLER** (applicant/defendant)
FILE NO:	DC No 137 of 2020
DIVISION:	Criminal
PROCEEDING:	Application
ORIGINATING COURT:	District Court, Cairns
DELIVERED ON:	7 June 2024
DELIVERED AT:	Cairns
HEARING DATE:	2 & 7 May 2024.
JUDGE:	Morzone KC DCJ
ORDER:	**1. The proceeding be stayed until the Director of Public Prosecutions pays, or causes to be paid, to Stephen Muller, or at his direction, the sum of $50,000.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE - RULING - Stay of proceedings pending payment of costs (a "Mosley order") – whether crown at fault for failing to secure a material witness for the trial - whether crown at fault for failing disclose material evidence - whether unfairness and detriment to the defendant remediable by payment of costs thrown away.
LEGISLATION:	*Criminal Code Act* 1899 (Qld) ss 590AA, 590AB, 590A *Evidence Act* 1977 (Qld) s 13A
CASES:	*Jago v District Court of NSW* (1989) 168 CLR 23 *R v Bui* [2011] ACTSC 102 *R v Cannon* [2013] QCA 191 *R v Curtis* [2014] NSWSC 1582 *R v Fisher* [2003] NSWCCA 41 *R v Hargraves, Hargraves and Stoten* [2008] QSC 267 *R v Issakidis* [2015] NSWSC 834 *R v S, PD* [2017] SADC 48. *R v Schneiders* [2009] QCA 149 *R v Tran* [2017] SADC 128 *Zonneveld v The Queen (No 2)* [2018] ACTCA 31

COUNSEL:	AE Stannard for the crown MA Rawlings for the defendant
SOLICITORS:	The Office of Director of Public Prosecutions for the crown Jones + Associates for the defendant/applicant

Summary

[1] The defendant, who faces a retrial for fraud, applies to stay the proceeding pending payment of costs unfairly thrown away because of the fault of the crown to secure the attendance of the primary crown witness for trial and/or to disclose material evidence.

[2] The crown opposes the application and asserts that the witness was unavailable despite all reasonable steps being taken to secure his attendance and that it fully disclosed all evidence in the possession of the prosecution and arresting officer.

[3] The determinative questions in the application are:

(a) Is the crown at fault for failing to secure a material witness for the trial?

(b) Is the crown at fault for failing to disclose material evidence?

(c) If so, did such fault cause unfairness and detriment to the defendant remediable by payment of costs thrown away?

(d) If so, what is the assessment of those costs?

[4] I had the opportunity to hear evidence from the director of the complainant company in the context of the application as originally framed for a permanent stay (since abandoned), affidavits and written and oral submissions.

[5] I have concluded that the crown defaulted in both respects. Firstly, it failed to secure the primary material witness for the trial. The crown did not confirm the witness's commitment after initially advising him of prospective trial dates, and then failed to effectively subpoena him when he chose to prioritise work commitments over attending the trial. Consequently, the trial was unable to proceed as scheduled in the sittings. Secondly, the crown failed in its duty to disclose important evidence, consisting of email correspondence and attachments at the early stages of the prosecution, despite multiple requests and the awareness of both the arresting officer and a person appearing for the prosecution of its existence. During the course of this application, the evidence was found to be locatable without unreasonable effort and the crown volunteered to facilitate its disclosure.

[6] I conclude that those faults caused unfairness and detriment to the defendant as costs were thrown away due to the lost opportunity for the trial to proceed in the dedicated sittings and the need for this application for want of disclosure. That detriment is remediable by the payment of costs by the crown, which I assess at more than, but allow, $50,000 as sought.

[7] Consequently, I will order that the proceeding be stayed until the Director of Public Prosecutions pays, or causes to be paid, to the defendant, or at his direction, the sum of $50,000.

Stay of proceedings pending payment of costs

[8] The defendant applies under s 590AA of the *Criminal Code Act* 1899 (Qld) for a stay of proceedings until the Director of Public Prosecutions pays or causes to be paid the sum of $50,000.00 to the Defendant.

[9] The court is empowered to order a stay of an indictment pending payment of costs thrown away as the result of a serious fault or failure by the prosecution that resulted in substantial unfairness to the defendant,[1] which is only remediable by an award for costs thrown away or wasted.[2]

[10] The characterisation of the fault or failure has been the subject of various decisions and will depend on the circumstances of each case. In *R v Curtis*,[3] Davies J referred to the demonstration of "*some delinquency, unconscionability or unfairness*" by the crown. The court in *Zonneveld v The Queen (No 2)* considered the order should be reserved for *exceptional circumstances*[4] and affirmed *R v Fisher,*[5] where the court held that the power ought be used "*...only for the rare and extreme cases of gross unfairness on the part of the Crown*". Accordingly, mere incurrence of cost is not enough; they must be wasted costs.[6] The power has been used in cases where the crown, after stating the trial was ready, failed to produce a key witness for a second time without serving a subpoena,[7] and also failed to disclose important evidence.[8]

[11] The defendant argues that his costs have been wasted because the re-trial was aborted due to the fault of the crown of failing to secure the attendance of the primary crown witness, and/or failing to disclose material evidence.

[12] The crown opposes the application and asserts that the witness was unavailable despite all reasonable steps being taken to secure his attendance and that it made full disclosure of all evidence in the possession of the prosecution and arresting officer.

Is the crown at fault for failing to secure a material witness for the trial?

[13] The defendant argues that the crown failed to secure Mr Graeme King's attendance as the critical crown witness for the trial for one count of fraud, as a director, to the value of $30,000.00 or more, which failure caused the trial to be aborted. On the contrary, the crown argues that the adjournment of the trial was not attributable to any fault on behalf of the crown as to the availability of Mr King in circumstances where the defendant's stay application was underdetermined, and final arrangements for Mr King awaited that determination and/or the prospect of a hearing later in the sittings.

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1 *Jago v District Court of NSW* (1989) 168 CLR 23.
2 *R v Bui* [2011] ACTSC 102 at [95].
3 *R v Curtis* [2014] NSWSC 1582 at [27] per Davies J.
4 *Zonneveld v The Queen (No 2)* [2018] ACTCA 31 at [25].
5 *R v Fisher* [2003] NSWCCA at [7].
6 *R v S, PD* [2017] SADC 48.
7 *R v Tran* [2017] SADC 128.
8 *R v Issakidis* [2015] NSWSC 834 at [80].

[14] I do not accept the crown's argument and find that it is at serious fault, which resulted in the trial not proceeding as scheduled on 13 October 2023 as the first trial estimated to last five to six days in the sittings commencing on 29 April 2024.

[15] Whilst, a police officer sent an email to Mr King about the new trial listing on 16 November 2023, there is no evidence of his receipt or acknowledgement of those arrangements. This sparked a concern to issue a subpoena, but a subpoena was not with the bundle of other witness subpoenas provided to the officer for service. The subpoena directed to Mr King was not sent to the officer for service until 18 April 2024, being 11 days before the set trial date. But when the officer purported to serve the subpoena on Friday, 19 April 2024, he put it into a residential mailbox and not to Mr King in accordance with the rules and was rendered ineffective. After hours on that Friday, 19 April 2024, Mr King emailed the crown indicating difficulty in his attendance, which was clarified on the morning of Monday, 22 April 2024, being the next working day. In effect, Mr King preferred to honour his work commitments in the absence of his employer.

[16] It seems to me that the crown seriously defaulted to secure Mr King due to a series of failures. Firstly, it failed to effectively alert Mr King of the proposed trial date. Secondly, it failed to affirm his intention to attend. Thirdly, it failed to reinforce his undertaking to co-operate pursuant to s 13A of the *Evidence Act 1977* (Qld). Fourthly, it failed to issue a subpoena in a timely way. And fifthly, it failed to properly serve the subpoena.

[17] It is not an answer to that default to point to the impending hearing of the application for permanent stay, as originally framed, or to the prospect of the trial being heard out of order in the sittings list. Firstly, it transpired that the defendant was justified in pursuing disclosure of the email exchange files (as discussed below), and secondly, the prospect of deferring the trial until later in the sittings was an indulgence sought "*...without much hope of, or expectation*" and subject to the disposition of other trials on that list. Having lost the priority as the first trial in the sittings, the trial could not be accommodated in the oversubscribed criminal trial sittings, and the progress of the application evolved due to another fault of the crown to properly disclose evidence being the second ground relied upon by the defendant in this application.

[18] For these reasons, I'm bound to find that the crown seriously defaulted by failing to secure the primary material witness in time for the trial, which disabled its prospects of proceeding as the first scheduled in the sittings commencing 29 April 2023. Having lost that scheduled listing there was no other available time for reallocation in the sittings in any event.

Is the crown at fault for failing to disclose material evidence?

[19] The defendant further contends that the crown failed to disclose material evidence comprising email correspondence and attachments in Mr King's Exchange folder. The crown asserts that the documents were never in the possession of the prosecution or arresting officer but were in the possession of a third party and not subject to disclosure.

[20] The scope of the prosecution's disclosure obligation must be evaluated in light of the overarching duty stated in s 590AB(1), that is, to ensure the proceeding is conducted fairly with the single aim of determining and establishing truth. The obligation

extends well beyond the scope of the evidence intended to be adduced by the prosecution and is not confined by the notion of relevance. Instead, it extends to all things possessed by the prosecution that would tend to help the defendant's case, except where disclosure would be unlawful or contrary to public interest.

[21] Resolution of this issue turns on the proper construction of s 590AE(3) of the *Criminal Code Act 1899* (Qld), as to whether a thing is in the "possession of the prosecution". Section 590AE provides as follows:

> **"590AE Meaning of possession of the prosecution**
>
> (1) For a relevant proceeding, a thing is in the possession of the prosecution only if the thing is in the possession of the prosecution under subsection (2) or (3).
>
> (2) A thing is in the possession of the prosecution if it is in the possession of the arresting officer or a person appearing for the prosecution.
>
> (3) A thing is also in the possession of the prosecution if—
>
> (a) the thing is in the possession of—
>
> (i) for a prosecution conducted by the director of public prosecutions — the director; or
>
> (ii) for a prosecution conducted by the police service — the police service; and
>
> (b) the arresting officer or a person appearing for the prosecution—
>
> (i) is aware of the existence of the thing; and
>
> (ii) is, or would be, able to locate the thing without unreasonable effort."

[22] The critical issue is whether the use of 'and' in subsection (3) should be construed conjunctively, as contended by the crown, or disjunctively, as contended by the defence.

[23] In *R v Hargraves, Hargraves and Stoten*,[9] Fryberg J preferred a disjunctive constriction saying:

> "The question that is in issue between the parties is whether a thing is within the possession of the prosecution when either paragraph (a) or paragraph (b) is satisfied or only when both of those paragraphs are satisfied.

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[9] *R v Hargraves, Hargraves and Stoten* [2008] QSC 267 at 8-10.

> Putting it in the more traditional, if somewhat inaccurate way of expressing the matter, does "and" at the end of subparagraph (a) mean "or"?
>
> In support of the proposition that it did, Mr Walker SC and Mr Byrne QC for the applicants submitted that the word did mean "or". They pointed to the disclosure obligation set out in section 590AB(1) as governing the approach which should be taken to the case and to the decision of the Court of Appeal in *The Queen v. Rollason* (2008) 1 QdR 85 as supporting an interpretation of chapter division 3 generous to the accused.
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> They also referred to the point that it would make no sense to construe subsection (3) otherwise because to do so would mean that paragraph 3(a)(1) would cover virtually the same ground as part of subsection (2) and to the fact that the adding of a requirement to satisfy paragraph (b) to the requirement for the director to be in possession of the thing under paragraph (a) would serve little purpose and would leave the provisions open to abuse.
>
> ...
>
> In my judgment, Mr Walker's submissions were correct. The Act, it seems to me, clearly requires that paragraph (a) or paragraph (b) be satisfied in order for a thing to be in the possession of the prosecution but does not require both to be satisfied."

[24] The crown relies upon *R v Schneiders*,[10] which involved an application for the disclosure of information about the counselling sessions revealed in the complainant's evidence. The applicant argued that the crown knew of the counselling sessions, that the prosecuting officer and the counsellor lived in the same town, and that there would have been no difficulty in locating "the thing" without unreasonable effort. The court refused the application. Holmes JA (with whom Muir JA and McMurdo J) said:

> "That submission blithely ignores the fact that the relevant records of the counselling sessions were in the possession of a third person, the counsellor, who was under no obligation to provide access to them. It was not merely a question of the prosecution "locating" the documents; they could only have been obtained by search warrant or subpoena and there were certainly no grounds for the former. The records were in no sense in the possession of the Crown and they were as accessible to the applicant, by means of subpoena, as they were to the prosecution."

[25] The most recent consideration of the provision was *R v Cannon*,[11] where Boddice J (with whom McMurdo P and Fraser JA agreed) put the following disjunctive construction on the provision (with my underlining):

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[10] *R v Schneiders* [2009] QCA 149 at 5.
[11] *R v Cannon* [2013] QCA 191 at [67].

> "A thing is in the possession of the prosecution if: it is in the possession of the arresting officer or a person appearing for the prosecution; it is in the possession of the Director of Public Prosecution; or, the arresting officer or a person appearing for the prosecution is aware of the thing's existence and is, or would be, able to locate it without unreasonable effort."

[26] I'm bound by that preponderance of authority to construe 'and' in subsection (3) disjunctively, and 'or', as reframed in *R v Cannon.*[12] This is consistent with the reasoning of Fryberg J in *R v Hargraves, Hargraves and Stoten.*[13]

[27] I proceed on this basis.

[28] In her statement, Ms Borzi explains her effort to investigate and curate the data after receiving an anonymous 'tip-off' letter alleging fraudulent conduct of her co-director, Mr King, including:

> "*23. On the 9th of August 2017 I requested our IT provider Brilliant Technologies make a copy of Graeme KINGS Airfirst email exchange folder available to me.*
>
> *I AM ABLE TO PRODUCE DISC OF KINGS AIRFIRST EMAIL EXCHANGE FOLDER (BMB2)*
>
> *24. I began to sift through this folder extracting items I felt were relevant to the allegation. I found a folder named "KINGY'S" with a subfolder named "house" which contained items associated with the construction of his dwelling at 17 Apollo Quay, Trinity Park in mid-2012 to February or March 2013. Some of these emails indicated that he had engaged subcontractors to carry out works on his house build who at his request had then invoiced Airfirst for these works. The invoices were raised to appear as if they referred to works carried out on Telstra sites.*
>
> *25. In September 2017 Jim and I engaged a forensic IT service to image the hard drive of Graeme King's company owned laptop. The results returned from this process did not unearth anything more In the way of evidence than what I had already found.*
>
> *26. On the 22nd of September 2017 I requested Peter VALE of Brilliant Technologies take another copy of Graeme King's Airfirst Outlook Exchange email folder for me to view. The first one was only to a certain point and I wanted to capture all emails since the first copy.*
>
> *I AM ABLE TO PRODUCE THE SECOND DISC OF KINGS AIRFIRST EMAIL EXCHANGE FOLDER (BMB3)*"

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[12] *R v Cannon* [2013] QCA 191 at [67].
[13] *R v Hargraves, Hargraves and Stoten* [2008] QSC 2 at 8-10.

[29] At that stage, the prosecution was conducted by the police service, which was represented by its Brief of Evidence dated 17 August 2018. This Brief of Evidence identified material that was in the possession of the police service. Both the first disc of the email exchange folder (BMB2) and the second disc of the email exchange folder (BMB3) were expressly listed in section 5 in the index of the Brief of Evidence as follows:

5. Original evidence on which the prosecution intends to rely [s. 590AH(2)(b)]
Copies of anything on which the prosecution intends to rely [s. 590AH(2)(b)]
Copy of report of test or forensic procedure (or description if not available) [s. 590AH(2)(b)]
Anything else in possession of the prosecution prescribed under a regulation [s. 590AH(2)(b)]

No	Description	FORMAT (LINK)	Witness
	EXHIBITS LISTED ON ORDER OF WITNESS STATEMENTS		

...

	DISCLOSURE		
BMB2	Disc 1 – Kings Air First Email Exchange Folder [Relevant entries provided by BORZI]		BORZI
BMB3	Disc 2 – Kings Air First Email Exchange Folder [Relevant entries provided by BORZI]		BORZI

[30] These documents show that, as at 17 August 2018, the email exchange files were apparently in the possession of the prosecution as being "a thing" in the possession of the police service, and the arresting officer or a person appearing for the prosecution was aware of its existence; and it was, or would be, able to locate the thing without unreasonable effort. Despite this apparent situation, the crown maintains that Ms Borzi never provided the folders to the police.

[31] In my view, at that point the prosecution failed to secure and disclose the email exchange files in accordance with s 590AE(3) despite being aware of their existence and in circumstances where they were able to be located without unreasonable effort. The failure then continued despite multiple requests by the defence for proper disclosure.

[32] On 27 July 2021 the defence expressly requested "*any material, including exhibits, relevant to the police investigation.*" However, there was no disclosure of the email change files because, the crown submits, "*The material was deemed not relevant by Ms Borzi. It was not sourced by the police during their investigation, it was not requested by the Crown as relevant information.*" That rather stunning submission suggests that the investigating police and/or the prosecution deferred to, or effectively delegated their responsibility to, Ms Borzi to investigate, audit, collate, and undertake a lay assessment of relevant evidence for the criminal proceeding. This is also consistent with the evidence of Ms Borzi of 2 May 2024.

[33] Sometime later, on 6 April 2023, the co-defendant, who shared common legal representation requested the files. In response, the crown says that it "*made enquiries with Ms Borzi about obtaining the balance of the contents of the email*

exchange folder. At that point in time, Ms Borzi indicated that the balance of the contents included Intellectual Property and she was concerned with any legal issues that could arise." I have been unable to discern any proper basis for the intellectual property claim or the asserted concern of legal issues.

[34] The defence again requested the disclosure on 25 October 2023. By this time, now asserted by the crown, "*the email exchange provided to Ms Borzi on a hard-drive was lost (the hard-drive having failed) and the copy she had made on her computer had been lost. Brilliant Technologies did not retain a copy of the email exchange that was provided to Ms Borzi in 2018.*" As it transpires, this latter assertion was not accurate.

[35] After a further request on 4 March 2024, the crown provided the applicant with an additional statement by Ms Borzi on 12 March 2024 wherein she states: "*I am not able to supply the Source Documents*" because the "*original external hard drive failed*".

[36] The defence then filed this application on 15 April 2024, cognisant that the trial was doomed in Mr King's absence. The defendant sought orders that the indictment be permanently stayed or stayed until the crown can disclose the Email Exchange Files referred to in the statement of Ms Borzi dated 18 April 2018.

[37] On the application's first hearing on 2 May 2024, the crown agreed to clarify Brilliant Technologies' ability to replicate the initial email exchange download described in paragraphs 23 and 26 of Ms Borzi's statement. That inquiry was fruitful. It was revealed that the complainant company's content of the email exchange folder had been migrated to a 'cloud' and that 30 gigabytes of that sought-after data is readily retrievable by a mere request made of the company's information technology provider, Brilliant Technologies. The application was then adjourned to facilitate that production. Because of this anticipated disclosure of the email exchange folder, the defendant abandoned its application for a permanent stay but amended its application to include an order that the proceeding be stayed until the Director of Public Prosecutions pays, or causes to be paid, to Mr Stephen Muller, or at his direction, the sum of $50,000.

[38] The application was adjourned to 7 May 2024 for further hearing focused on the amended relief.

[39] In my view, the email exchange folder was in the prosecution's possession from the outset of the proceeding. Initially, the prosecution defaulted in its disclosure of the email exchange files because it was in the possession of the police service, the arresting officer was aware of their existence and they were able to be located without unreasonable effort. The default in disclosure in accordance with s 590AE(3) was perpetuated after the Office of the Director of Public Prosecutions took the conduct of the prosecution, despite multiple requests, in circumstances where the arresting officer and a person appearing for the prosecution was aware of the files, and they were locatable without unreasonable effort, as it played out in the end.

[40] However, since the trial proceeding in the sittings was already doomed due to the crown's failure to secure a material witness, I am not satisfied that the failure to make disclosure impacted the outcome of the trial. Nevertheless, it vexed the defendant, who had to apply for disclosure rendered necessary by the serious default to disclose despite repeated requests.

Did such fault cause unfairness and detriment to the defendant remediable by payment of costs thrown away?

[41] The defendant has incurred costs for preparation by his counsel and solicitors for his trial. The preparation for the trial was in vain, as a complex trial was aborted just days before it was set to commence. The financial impact of this aborted trial, including the application, amounts to $62,693.00. These costs will need to be incurred again for the rescheduled trial. Further, the outcome has significantly stressed the defendant due to the financial obligations linked to the prosecution. He faces the prospect of spending an additional $119,000 if the trial is re-listed.

[42] Without a costs order and stay of proceeding pending payment of those costs, I accept that the defendant will find himself in a precarious financial situation. A retrial would jeopardise his ability to defend himself, threatening his family's future and his retirement.

[43] It seems to me that both faults have caused unfairness and detriment to the defendant in relation to the trial, and this application is only remediable by payment of costs thrown away.

What is the assessment of those costs?

[44] The defendant claims costs of $50,000 reduced from the $62,693.00 incurred as follows:

(a) $22,000 in counsel fees for 10 days work shared by trial counsel and counsel for the pre-trial argument. That figure is not further broken down.

(b) $37,980 in solicitors' fees.

(c) $3,013 in disbursements.

[45] A party's estimate should be carefully formulated and realistic, supported by sufficient detailed explanation to facilitate the court's broad examination to fix costs that are reasonably incurred and for a reasonable amount. It seems to me that the reduction to $50,000 accounts for the necessary or proper costs for attaining justice in the proceeding.

Orders

[46] I will order that the proceeding be stayed until the Director of Public Prosecutions pays, or causes to be paid, to Stephen Muller, or at his discretion, the sum of **$50,000.**

Judge Dean P Morzone KC