

AUSTRALIA / JUDGMENT

R v Bobak (No 5 – Discharge application)

[2025] NSWSC 1090**COURT**

Supreme Court

DECIDED

25 September 2025

BEFORE

Dhanji J

CASE / FILE NUMBER

2022/385458

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R v Bobak (No 5 – Discharge application) [2025] NSWSC 1090

Hearing dates:

11 September 2025

Date of orders:

11 September 2025

Decision date:

25 September 2025

Jurisdiction:

Common Law - Criminal

Before:

Dhanji J

Decision:

The application to discharge the jury is refused.

Catchwords:

CRIMINAL PROCEDURE – trial – jury – application to discharge jury – duty of disclosure – where contents of deceased’s mobile telephone disclosed in second week of trial – unsatisfactory situation – egregious breach – prejudice – further interruption to trial – sufficiency of time available to accused’s representatives to consider material – necessity – fair trial not a perfect trial – application refused
CRIME – murder

Legislation Cited:

Criminal Procedure Act 1986 (NSW), s 142
Director of Public Prosecutions Act 1986 (NSW), s 15A
Evidence Act 1995 (NSW), ss 60, 65

Cases Cited:	Crofts v The Queen (1996) 186 CLR 427; [1996] HCA 22 Director of Public Prosecutions (Cth) v Kinghorn; Kinghorn v Director of Public Prosecutions (Cth) (2020) 102 NSWLR 72; [2020] NSWCCA 48 Edwards v R [2020] NSWCCA 57 Grey v The Queen [2001] HCA 65; (2001) 75 ALJR 1708 Ilievski v R; Nolan v R (2023) 112 NSWLR 375; [2023] NSWCCA 248 Jago v The District Court of New South Wales (1989) 168 CLR 23; [1989] HCA 46 Jarvie v The Magistrates' Court of Victoria at Brunswick [1995] 1 VR 84 Mallard v The Queen (2005) 224 CLR 125; [2005] HCA 68 Marwan v Director of Public Prosecutions [2019] NSWCCA 161; (2019) 278 A Crim R 592 McNamara v The King (2023) 280 CLR 201; [2023] HCA 36 Miller v R [2015] NSWCCA 206; (2015) 252 A Crim R 486 R v Ahola (No 6) [2013] NSWSC 703 R v Bobak [2025] NSWSC 1057 R v Dickson; R v Issakidis (No 12) [2014] NSWSC 1595 R v Medich (No 6) [2016] NSWSC 1001 Younan v R [2016] NSWCCA 248; (2016) 316 FLR 122
Category:	Procedural rulings
Parties:	Rex (Crown) Trevor Mark Bobak (Accused)
Representation:	
Counsel:	S Traynor (Crown) C Wasley (Accused)
Solicitors:	Solicitor for Public Prosecutions (NSW) (Crown) Legal Aid NSW (Accused)
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JUDGMENT

On the resumption of the accused's trial at 10:00am on 11 September 2025, counsel for the accused applied for a discharge of the jury. After hearing evidence and argument, I refused the application indicating reasons would be provided later. These are my reasons for refusing to discharge the jury.

The background to the application

The accused, at the time of the application, was on trial for the murder of Nathan Strudwick which was alleged to have been committed on 17 December 2022 at Woy Woy. The accused's trial commenced before the jury on 1 September 2025. It had therefore been underway for just under two weeks when the application was made.

It was not in dispute that the accused stabbed the deceased through the neck with what has been described as a “mini sword” resulting in his death. In highly truncated terms the Crown case is that the accused, on the day of the alleged murder, attended a unit in a block called Maple Court (the Maple Court unit) not far from where he lived. He did so in order to obtain methamphetamine. He had previously obtained methamphetamine from the occupants of this unit, “Pat” and “Shelly”. On the day of the alleged murder, Pat and Shelly were not present. At the unit were Nicole Kiley, Christopher Barry, and Luke Stockdale. The accused was unsuccessful in obtaining drugs, and was angry and agitated as a result. He was involved in a scuffle with Mr Barry, at one stage using his hand to choke him. The accused left and went to another unit block nearby called The Oaks from where he obtained the weapon, described as a “sword” or “mini sword”. Meanwhile, the deceased who lived upstairs from the Maple Court unit came downstairs and met with Mr Barry and Ms Kiley. The three of them then walked in the direction the accused had taken. On Mr Barry’s evidence at least, this was with a view to fighting the accused. The deceased, Ms Kiley and Mr Barry encountered the accused shortly after he exited The Oaks with the weapon. On the Crown case, after being urged to put the weapon down, the accused stabbed the deceased through the neck.

The first two weeks of the trial were not smooth sailing. In addition to numerous occasions on which the jury was sent out while legal argument took place, the Court did not sit at all on Friday, 5 September 2025 as a result of health concerns relating to the accused. The following Monday and Tuesday, the trial was again unable to proceed, on this occasion due to the illness of the accused’s counsel.

On Wednesday, 10 September 2025, the trial resumed before the jury. I was advised in the course of the morning that late the previous day, the Crown and the defence had been told that the data stored on the deceased’s mobile telephone was available, having been accessed by police using computer software called Cellebrite. This material, despite its relevance to the trial, had not been disclosed to the Crown nor to the defence. As a practical matter, the material did not become available to the accused’s counsel until after court on 10 September. Counsel having considered the material in the time available overnight obtained instructions the next morning to make an application to discharge the jury. It was obvious that counsel had had, at that point, limited time to consider the material either for the purposes of the trial or indeed for the purposes of the discharge application itself.

The officer in charge, Detective Senior Constable Danielle Allen (the OIC) gave evidence on the application. From her evidence, it appeared that the contents of the deceased’s mobile phone had been extracted by police on 5 July 2023. She said she was, however, unaware of this fact until 4 or 5 September 2025. Prior to that, due to an entry on a police database, she understood that the phone was locked and could not be accessed. The police officer who had successfully performed the extraction had apparently taken extended leave without informing the OIC that it had been done, or evidently updating the record on the police database.

The OIC only came to be aware of the existence of the successful extraction as a result of an enquiry of her by the Crown Prosecutor. Aware that the technology had improved since the time of the attempted extraction, the OIC considered that there may have been a prospect of unlocking the phone and viewing its contents and that she should revisit the issue. In doing so, she learnt that the phone had already been unlocked. It is not clear why, given the understanding of the change in the technology or otherwise, the issue was not revisited at a substantially earlier time. Having become aware of its existence, the OIC downloaded the material, an apparently lengthy process, with the result that it was not provided to the Crown or the defence until 10 September 2025.

Through the OIC, a printout of downloaded messages between 9 and 17 December 2022 (Ex VD-G) was tendered. Separately tendered was a bundle comprising photographs of the deceased's phone displaying all of the messages between the deceased and the witness Mr Stockdale in the same period (Ex VD-H). This was identified in evidence as comprising 17 pages. It seems that, inadvertently included in that bundle, were a further 10 pages comprising messages between the deceased and the sister of Mr Barry. In addition, a printout of all messages for a four-month period to 17 December 2022 was tendered (Ex VD-I). It is noted Exhibit VD-G is a subset of Exhibit VD-I.

From the evidence on the application the following matters were apparent:

The total download comprised some 57,000 pages. I infer the 57,000 pages comprised the whole of a report prepared by the software. Of those 57,000 pages a large volume were “thumbnails” which were produced as a result of access to websites and photographs. Obviously, most mobile phones will contain many such records.

The relevant data on the phone for the purposes of the trial was in the form of messages sent as SMS messages and as Facebook messages. The printout of that material for the four-month period up to the deceased's death (Ex VD-I) occupied 972 pages, which, with double-sided printing, filled a single lever arch folder.

The pages referred to above were not comprised of tightly spaced text. Rather, messages were printed in the form of “bubble text”, with the content of the text or Facebook message and some associated metadata, such as the participants and the date and time of the message.

Where a message was captured as a result of being sent in the target period, the entire message thread was produced, resulting in the inclusion of messages potentially dating back as far as 2020.

Some messages were sent with photographs as an attachment. Where this occurred, the file purporting to be the attachment was empty with the consequence that the photograph could not be seen.

The messages between Mr Stockdale and the deceased in Ex VD-H were photographed directly from the deceased's phone with the result that any photographs sent as attachments could be seen.

In the event that there were other photographs that had been sent as attachments, these could have been provided within a relatively short time of any request. Given the circumstances it was assumed that the police and prosecution generally would be at pains to assist the accused's representatives with any requests.

Five pages of the larger volume of material related to Ms Kiley. These had not been photographed, but given the above, this could have been done very quickly.

There were no messages between the accused and Mr Barry in the four-month period, although there was one entry indicating a missed call.

There were no messages between the accused and the deceased.

There were messages between the deceased and the persons referred to as "Pat" and "Shelly" who were the regular occupants of the Maple Court unit and, on the evidence, appeared to have been involved in the supply of drugs from that unit. The extent of the messages with those persons was not identified. They did not provide statements and it was not proposed that they be called at the trial.

Neither the defence nor the prosecution had been able to use the Cellebrite reader that was provided with the portable hard drive on which the data was stored. The OIC was able to use that reader, the means by which she was able to produce the printed documents.

There was a suggestion in some of the messages that the deceased was at least aware of drug supply activity taking place within the milieu connected with the Maple Court unit.

As observed above, the disclosed material included communications, or at least an attempt at communication, between the deceased and Mr Barry, and communications with Ms Kiley and Mr Stockdale. By the time the parties became aware of the material, Ms Kiley had completed her evidence while Mr Stockdale and Mr Barry were yet to be called. The latter two witnesses were present and gave evidence on Wednesday, 10 September 2025, as had been scheduled. As a result of the recently disclosed material, however, it was agreed that their evidence-in-chief would not be completed until after the parties had had the opportunity to consider the material. In relation to Ms Kiley it was agreed that she would need to be recalled in the event that there was anything arising from the disclosed material on which the accused wished to cross-examine her.

Disclosure

The principles in relation to disclosure are well known. The imbalance between the resources of the State and those of the individual together with the investigative powers given to various officers of the State, including police, require that, in order to ensure a fair trial for an accused, the police and prosecution comply with their duties of disclosure. The obligation is well

established at common law and is now enshrined in statute, both with respect to the prosecution (see s 142 Criminal Procedure Act 1986 (NSW)) and police (see s 15A Director of Public Prosecutions Act 1986 (NSW)).

At common law the prosecution must disclose all relevant evidence to an accused, and a failure to do so may warrant the quashing of a conviction as a miscarriage of justice: *Grey v The Queen* [2001] HCA 65; (2001) 75 ALJR 1708, affirmed in *Mallard v The Queen* (2005) 224 CLR 125; [2005] HCA 68. Recently, in *Director of Public Prosecutions (Cth) v Kinghorn; Kinghorn v Director of Public Prosecutions (Cth)* (2020) 102 NSWLR 72; [2020] NSWCCA 48, the Court (Bathurst CJ, Fullerton and Beech-Jones JJ) summarised the content of the duty of disclosure as follows (at [125]-[128]):

125 In *R v Spiteri* (2004) 61 NSWLR 369; [2004] NSWCCA 321 (at [20]) this Court endorsed an obiter statement by Hodgson JA in *R v Reardon (No 2)* (2004) 60 NSWLR 454; [2004] NSWCCA 197 at [54] (“*Reardon*”) that the principles stated in two English decisions, *R v Keane* [1994] 1 WLR 746 and *R v Brown (Winston)* [1998] AC 367, should be taken as applying in New South Wales. In *Reardon* at [48] to [49], Hodgson JA described the effect of those decisions as follows:

‘In *R v Keane* [1994] 2 All ER 478, the Court of Appeal held that, subject to the question of public interest, the prosecution must disclose documents which are material; and it said that documents are material if they can be seen, on a sensible appraisal by the prosecution, (a) to be relevant or possibly relevant to an issue in the case, (b) to raise or possibly raise a new issue the existence of which is not apparent from the prosecution case, or (c) to hold out a real (as opposed to a fanciful) prospect of providing a lead on evidence going to either (a) or (b). This view was approved by the House of Lords in *R v Brown (Winston)* [1998] AC 367 at 376-7, with the comment that ‘an issue in the case’ must be given a broad interpretation. Category (c) makes it clear that the duty is not limited to matters that would be admissible in evidence.

However, in *Brown* it was also held that the duty did not extend to disclosing material relevant only to the credibility of defence (as opposed to prosecution) witnesses.’

126 In *Marwan v Director of Public Prosecutions* [2019] NSWCCA 161 at [29], Leeming JA (with whom R A Hulme and Adamson JJ agreed) described the nature of the “duty” of disclosure as follows:

‘It is also to be borne in mind that the so-called ‘duty’ is unusual. So too is what may loosely be described as the “right” of the accused to disclosure (both illustrate the way in which legal usage commonly departs from Hohfeldian exactness). For it is quite plain that the ‘duty’ to disclose is not owed directly to an accused, so as to enforce the production of documents as might occur in civil litigation through discovery and interrogatories, or pursuant to freedom of information legislation. To the contrary, an accused person cannot ordinarily obtain an order that the prosecution disclose documents which have been withheld. Rather, the accused is entitled to a fair trial, and can insist that the trial be stayed, permanently or temporarily, if it can be established that that will not occur, absent adherence by the prosecution to that duty.” (emphasis added)’

...

128 An important qualification to this description of the scope and nature of the ‘duty’ was acknowledged by Leeming JA in *Marwan* (at [31]), namely, that the duty ‘must accommodate itself with statute’. ...”

See also *Marwan v Director of Public Prosecutions* [2019] NSWCCA 161; (2019) 278 A Crim R 592 at [27]-[28] (Leeming JA, R A Hulme and Adamson JJ agreeing) and *Edwards v R* [2020] NSWCCA 57 at [57]-[60] (Leeming JA, Johnson and Harrison JJ agreeing).

Principles in relation to the discharge of a jury

There is no rigid rule to be applied to an application to discharge a jury: *Miller v R* [2015] NSWCCA 206; (2015) 252 A Crim R 486 at [126]. The criterion for the exercise of the discretion is the maintenance of the fairness of the trial and the test is one of necessity: *Crofts v The Queen* (1996) 186 CLR 427 at 440; [1996] HCA 22. A test of necessity of course begs the question as to when the discharge is necessary. That question is answered by reference to the accused’s entitlement to a fair trial. This of course simply shifts the question to what is required to maintain that entitlement. Key considerations relevant to the determination in the context of the jury hearing inadmissible and unfairly prejudicial material were discussed in *Miller v R* (at [126]) and *R v Ahola* (No 6) [2013] NSWSC 703 at [17]-[18], approved in *Younan v R* [2016] NSWCCA 248; (2016) 316 FLR 122. See also *Ilievski v R*; *Nolan v R* (2023) 112 NSWLR 375; [2023] NSWCCA 248 at [89].

Relevant to the present application, in *R v Dickson*; *R v Issakidis* (No 12) [2014] NSWSC 1595, Beech-Jones J, with respect to a discharge application in the context of late disclosure of material by the Crown, said that “the later the provision of documents ... the more difficult it becomes to address the prejudice thereby occasioned to the accused” but that a discharge application should be nevertheless approached on the basis that it not be acceded to unless the Court is “positively satisfied that a fair trial ... is no longer possible”. A key consideration identified in *R v Medich* (No 6) [2016] NSWSC 1001 by Bellew J was the further investigations needed to be undertaken by counsel for the accused as a consequence of the late disclosure of material. His Honour described these investigations as “legitimate forensic steps” which were identified following analysis of the material received.

The argument as to prejudice

It was accepted that if the trial was to continue it would be necessary to allow at least some time for the defence to consider and determine what, if any, use should be made of the material. In these circumstances it was contended that the prejudice to the accused arose from both the necessary interruption to the trial and the insufficiency of time available to the accused to deal with the material. In the event, it was agreed that the jury should be sent home at lunchtime on Thursday with the trial to resume on Monday, 15 September 2025. While the court did sit on the afternoon of Thursday, 11 September, it was to deal with an issue concerning the issue of a warrant for the arrest of a Crown witness: *R v Bobak* [2025] NSWSC 1057. The accused was not

relevantly interested in this process and both he and Ms Wasley were excused.

The accused's arguments as to prejudice could not be considered in a vacuum. Also relevant to the question of necessity was the interest in bringing the accused to trial and the resolution of that process. The accused had been in custody since his arrest in December 2022. His detention was approaching three years with no charge having been proved against him. This concern was ameliorated to some extent by his plea of guilty to manslaughter before the jury. Nonetheless there is a community interest in the determination of the charge of murder. In the event that the jury was to be discharged it was uncertain as to when the accused's trial might proceed. Defence counsel was advised that it may be possible to start a trial with a new jury as early as Monday, however she was unable to commit to that proposal, either as to her availability or readiness. It was not suggested commencement later in the week would alter the position. As a result, it appeared that any further trial following the discharge of the jury was likely to occur sometime next year.

Further interruption of the trial

As observed above, there had been a number of unanticipated interruptions to the trial. In these circumstances, a concern inevitably arose with respect to the potential frustration of the jury or jurors, and the potential that such frustration may have negatively impacted the accused. Despite the interruptions, the Crown was, at the time of my decision, nearing the end of its case. The trial remained on track to finish within the four-week estimate.

With respect to the potential frustration felt by jurors, the Crown accepted that, should the trial proceed, it would be appropriate to direct the jury advising them of the reason for the delay, making clear that it was in no way the fault of the accused. The availability of a direction to the jury to cure potential prejudice was a relevant consideration in determining the question of discharge. In the circumstances of the present case, I formed the view that an appropriately forceful and clear direction could be given as to the importance of disclosure to a fair trial, the failure in this case to provide that disclosure in a timely way, the consequent need to provide time to the accused's representatives, and the importance of not, as a result, visiting any frustration that may have resulted on the accused. It was my view that such a direction would be sufficient to overcome the accused's concern in this regard.

For completeness, I note that the delay in the cross-examination of Mr Stockdale, Mr Barry and the potential recall of Ms Kiley was not suggested to give rise to any prejudice.

Sufficiency of time available to the accused's representatives to consider material

At the time of the discharge application both parties had had very little time to consider the material. As I have said, it was effectively limited to the period between court concluding in the afternoon and recommencing the next morning. I accepted that, in the circumstances of the discharge application, counsel for the accused was still grappling with an assessment of the significance of the material. That, of course, was the essence of the problem, the question being

not so much the material's significance, but rather the ability of counsel to analyse the material, consider what other inquiries it may lead to, make those inquiries, and deploy either the disclosed material, or such other material to which it had led, to the accused's forensic advantage.

The trial, in terms of the issues involved, was a relatively simple one. It concerned the ability of the prosecution to prove an intention to kill or inflict grievous bodily harm or, potentially, to exclude self-defence (or from a practical perspective given the plea to manslaughter, to exclude excessive self-defence). Those issues arose in the context of events which took place within a reasonably short time frame. In that context, it might have been thought that there was little prospect of anything contained in the messages between the deceased and others having any real capacity to shed light on the accused's state of mind. Against that, the deceased, while not a close associate of the accused, was not a stranger to him either. I accepted that the accused's knowledge of the deceased was relevant. It is possible that proof of any subjective state of mind held by the accused may be impacted either by objective evidence, or by what was known of the deceased generally.

The material was most obviously relevant to the cross-examination of witnesses whose messages with the deceased had been produced. The most significant of these, in terms of the number of messages, was Mr Stockdale. As noted above, the bundle concerning him, which included messages and attached photos (produced by photographing the telephone screen) covering a one month period, occupied 17 pages. The only other witness involved in messages with the deceased, Ms Kiley, had significantly less communication with him.

The messages referred to above, relevant to the cross-examination of the civilian witnesses, can be digested relatively quickly. Nor, assuming the number of messages in the one-month period was representative, would the messages between the deceased and the witnesses over the previous four months have taken any substantial time to consider.

The disclosed material is not, however, relevant solely to the cross-examination of the civilian witnesses. I accepted the defence had an interest in the entirety of the messages over the four-month period prior to the deceased's death. That material had the potential to shed light on the deceased and his activities more generally around the relevant time, with potential forensic significance to the accused.

Further, in this regard, I did not accept the Crown submission that issues with respect to admissibility would have the result that messages with persons other than witnesses were of limited consequence as they would likely be inadmissible. Such messages could potentially, if relevant, be adduced through the OIC. Such messages might be relevant for the fact that the representation was made rather than as to the truth of the representation; that is, for a non-hearsay purpose, in which case the representation would be admissible pursuant to s 60 of the Evidence Act 1995 (NSW). Alternatively, if the messages are relevant as to the truth of the representation, that is for a non-hearsay purpose, subject to the representation being a first-hand account of the fact, the representation may be admissible pursuant to s 65(8) of the Evidence Act.

Accepting the accused's interest in the material more generally did not, however, mean that the situation could not be dealt with by an adjournment without the need to discharge the jury. My assessment was that consideration of that material would take well under a day such that an adjournment was an available remedy.

Clearly, the situation was not ideal. I accept the Crown was not at fault. For the accused, however, it is immaterial whether the failing was the fault of the police or the Crown. From the accused's perspective, the State put him on trial for murder; those involved in his prosecution have egregiously failed to provide him with material he should have had access to long ago; and despite their failing, made the submission that a limited interruption would be sufficient to deal with the material.

I accept, given the above, that the accused may have felt a sense of unfairness. That is not the test. The Crown's opposition to the discharge was not to be dismissed as some form of punishment for the entirely unsatisfactory situation that arose. The question was, as discussed above, whether the discharge of the jury was necessary to secure a fair trial for the accused. A fair trial is not synonymous with a perfect trial: *Jarvie v The Magistrates' Court of Victoria* at Brunswick [1995] 1 VR 84 at 90 (Brooking J), citing *Jago v The District Court of New South Wales* (1989) 168 CLR 23; [1989] HCA 46 and see, more recently, *McNamara v The King* (2023) 280 CLR 201; [2023] HCA 36 at [42] (Gageler CJ, Gleeson and Jagot JJ). My assessment of the material in the context of the submissions as to the use to which it might have been put was such that, with the benefit of the time from lunchtime on Thursday to a resumption of the trial the following Monday, there was sufficient time for the accused's representatives to consider the material and make decisions as to what, if any, use should be made of it.

Orders

For the above reasons, I made the following order:

The application to discharge the jury is refused.

Amendments

29 May 2026

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Unrestricted.

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