SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	**R v Lehrmann (No 3)**
Citation:	**[2022] ACTSC 145**
Hearing Dates:	20 – 21 June 2022
Decision Date:	21 June 2022
Before:	McCallum CJ
Decision:	(1) Vacate the trial date of 27 June 2022; (2) Stand the matter over for mention before McCallum CJ on 23 June 2022 at 9:30am.
Catchwords:	CRIMINAL PROCEDURE – Stay of proceedings – Application for temporary stay of criminal proceedings– Significant pre-trial publicity – Whether of such a nature as to prevent a fair trial – Where application for temporary stay has been previously refused – Whether there has been a significant change in circumstances – Where pre-trial publicity concerns the character of the complainant – Whether steps able to be taken by the trial judge in the conduct of the trial to relieve against its unfair consequences - Where pre-trial publicity is of such intensity and proximity to trial, and had such capacity to obliterate distinction between untested allegation and a fact accepted by jury, that prejudice cannot be remedied CRIME – Accused facing trial for sexual intercourse without consent – Significant pre-trial publicity and commentary including speech by witness on live television endorsing the complainant's credibility and claimed status as a victim – Whether possible to empanel an impartial jury – Whether prejudice able to be addressed by directions by the trial judge
Legislation Cited:	*Court Procedures Rules 2006* (ACT), r 4750(3) *Crimes Act 1900* (ACT), s 54(1)
Cases Cited:	*R v Lehrmann (No 2)* [2022] ACTSC 92
Parties:	The Queen (Crown) Bruce Lehrmann (Accused)
Representation:	**Counsel** S Drumgold SC, S Jerome (Crown) S Whybrow, K Musgrove, B Jullienne (Accused) **Solicitors** ACT Director of Public Prosecutions (Crown) Kamy Saeedi Law (Accused)

File Number(s): SCC 264 of 2021

McCallum CJ:

1. The accused in these proceedings is charged with an offence of engaging in sexual intercourse without consent, contrary to s 54(1) of the *Crimes Act 1900* (ACT). The allegation is of a kind not unfamiliar to the courts, save for the fact that the place where the offence is alleged to have occurred is on the couch in the office of a Senator in Australian Parliament House.

2. The case has, accordingly, attracted a level of attention in the media and among prominent Australian personalities that, while not unprecedented (even within my own judicial experience), is certainly extreme. Extensive media reporting of allegations of criminal conduct is not a mischief in itself. On the contrary, it is appropriate to recognise that the media play an important role in drawing attention to allegations of criminal or other misconduct and any shortcomings in the treatment of such allegations.

3. What is a potential mischief is the capacity for media reporting of such issues to spread in such a way as to interfere with the fair and proper determination of any related matter before the Court. That danger is particularly acute in the case of pending criminal proceedings.

4. It is trite, but apparently requires restatement at this point in this case, that the constitutional process for determining whether a person is guilty or not guilty of a serious criminal offence is for the allegation to be tested in a trial conducted in open court according to law.

5. The requirement to conduct a trial according to law is one of rich and variable content according to the circumstances of the case. But the overriding principle, one that is fundamental to the very notion of a criminal trial, and so cannot be dispensed with, is the requirement that the trial be fair.

6. The entitlement to a fair trial is one enjoyed by the Crown and the accused alike. However, because the consequence of a finding of guilt is to enliven the authority of the State to punish, including by detaining a person in prison, it is rightly recognised that a trial that was unfair to the accused was no trial at all and must be held again.

7. Earlier this year, the accused in the present matter applied to have his trial either permanently or temporarily stayed because he said he could not possibly have a fair trial in light of the extensive media reporting and public commentary by prominent personalities about the complainant's allegations.

8. At that time, and in light of the evidence then brought forward, I was not persuaded of the impossibility of a fair trial then some two months away.

9. Yesterday, the accused brought forward a further application, made orally outside normal sitting hours, for a temporary stay of his trial, which is currently due to commence next Monday. His right to bring the application is circumscribed by r 4750(3) of the *Court Procedures Rules 2006* (ACT) which provides that, the previous application having been dismissed, a further application may be made only if:

    (a) There has been a significant change of circumstances; and

    (b) The application is limited to the change of circumstances.

10. That limitation does not, however, require the Court to disregard what has gone before.

11. The first application was determined in a written judgment made publicly available only in redacted form. I limited the publication of my reasons in that way because recent jurisprudence, including decisions of the High Court, commends a cautious approach to the publication of the matters alleged to have compromised the court's capacity to ensure that the trial of an accused person will be fair, lest a court's judgment itself should contribute to the prejudice.

12. In light of the events that have given rise to the present application, and the circumstances in which it is brought, I consider it appropriate to give an unexpurgated version of the basis for the accused's contention that recent publicity has temporarily prejudiced his right to a fair trial.

13. It is appropriate to place the relevant facts in their chronological context. The offence with which the accused is charged is alleged to have been committed in the early hours of 23 March 2019. The complainant made a statement to police shortly thereafter, on 1 April 2019. However, following the announcement of a federal election, the complainant informed police that, in light of her workplace demands, she did not wish to proceed further with the complaint. The Crown case at trial will be that the decision not to proceed with the complaint at that time was prompted by the complainant's consideration of her duties to her employer in the delicate period leading up to the federal election.

14. In early January 2021, almost two years having passed, the complainant decided that she wished to proceed with the complaint. To that end she considered it appropriate to resign from her employment, then with Michaelia Cash, and proffered her resignation. The Crown case will be that, with a view to forestalling the mudslinging she anticipated would flow from that decision, she also decided to go public with her allegation against the accused and, separately, with her concerns as to the manner in which her initial complaint had been handled within Parliament House.

15. To that end, the complainant participated in a preliminary interview with Ms Lisa Wilkinson, a well-known journalist, on 27 January 2021. On 2 February 2021, Ms Wilkinson recorded an interview with the complainant which, in due course, became the basis for a program hosted by her. On 4 February 2021, the complainant contacted police to communicate her resumed interest in proceeding with a criminal complaint. On 15 February 2021, the program prepared by Ms Wilkinson was broadcast on The Project.

16. Some days after that, the complainant participated in a recorded interview with police (that is, after the airing of the program on The Project). As noted by Mr Whybrow, who appears for the accused, had those events occurred in reverse order, it is possible that the commencement of criminal proceedings would have intervened, with the result that the interview could not have been published without attracting the risk of contempt proceedings against the journalists. In any event, in due course, on 5 August 2021 the accused was summonsed to appear in Court in September 2021 to face the present charge.

17. The circumstances which gave rise to the first stay application and the reasons for refusing that application are published in *R v Lehrmann* (No 2) [2022] ACTSC 92. As already indicated, that judgment is presently available only in redacted form.

18. The changed circumstances giving rise to the further application are as follows. Last Sunday, 19 June 2022, the Australian television industry held what until the interference of the COVID-19 pandemic were its annual awards for excellence in Australian television, known as The Logie Awards. The name of those awards evidently comes from the name of John Logie Baird, a Scottish electrical engineer and inventor credited with demonstrating the world's first live working television (that is not a matter in evidence in the proceedings, but comes from my own research).

19. Ms Wilkinson received a silver Logie for her interview broadcast on The Project. This was not entirely unexpected by her, nor did the award come at a time when she was unaware of the pending trial of the accused. Indeed, Ms Wilkinson may be taken to be aware that she is to be called as a Crown witness in the trial.

20. That is the inference that can be drawn from the content of a file note in evidence before me which records that, on 15 June 2022, some days before the Logie awards, Ms Wilkinson participated in a conference with the Director of Public Prosecutions and those appearing with him and instructing him in the trial to discuss the evidence she would give.

21. Ms Wilkinson's anticipated evidence concerns her interviews with the complainant and may be admissible in the trial as evidence of complaint. A note of the meeting tendered by the accused, without objection on the present application, concludes as follows:

> "At conclusion Lisa was asked if she had any questions:
>
> - I am nominated for a Gold Logie for the Brittany Higgins interview
> - I don't think I will get it because it is managed by a rival network
> - I have, however, prepared a speech in case
> - Lisa read the first line and stopped by the director who said
>   - We are not speech editors
>   - We have no power to approve or prohibit any public comment that is the role of the court
>   - Can advise, however, that defence can reinstitute a stay application in the event of publicity"

22. Notwithstanding that clear and appropriate warning, upon receiving the award, Ms Wilkinson gave a speech in which she openly referred to and praised the complainant in the present trial. Unsurprisingly, the award and the content of the speech have been the subject of extensive further commentary.

23. The recent commentary includes remarks made on the popular morning radio program, "Jonesy and Amanda". The relevant segment from that program in evidence on the present application opened as follows:

> "Amanda: But there were some really lovely moments last night. One of which was the award that Lisa Wilkinson and The Project picked up for the story they did on Brittany Higgins. They just – it was a phone call that came to Lisa. She answered Brittany Higgins' phone call. Brittany had – the back story here, I'm sure you remember, was raped in Parliament House."

24. The transcript attributes to "Jonesy" his assent to that recollection. He later refers to the fact that, "…the whole story was dreadful. Absolutely dreadful", adding, "[j]ust the very fact that she had to have a meeting in the very room that she was raped with her superiors and then her career was virtually finished." And so on.

25. In case it is not clear, my purpose in quoting those remarks is the fact that each of the radio presenters assumed the guilt of the accused. The evidence before me on the present application also includes other social commentary including a copy of the complainant's own post effectively repeating remarks made by Ms Wilkinson in her speech. In other words, as was put in argument before me this morning, the combination of the speech and the posts amounted to Ms Wilkinson endorsing the credibility of the complainant who, in turn, celebrated Ms Wilkinson's endorsement of the complainant's credibility.

26. Then, this morning, there was a further spate of comments on social media reacting to the fact of the application made yesterday. Two were anodyne: one under the assumed tag “Sociable Socialist” remarks that, “[p]eople in the public sphere need to refrain from making comments about this case.” I can only agree and thought I had made that tolerably clear to a broader audience on a number of occasions during these proceedings.

27. The other appearing under what I understand to be his real name, “Jeremy Gans” is sensibly confined to a bland but accurate specification of the circumstance in which the present application is brought. But today’s comments otherwise almost universally assume the guilt of the accused and speculate, without any foundation, that his motives for bringing the application are improper.

28. I do not, of course, make the mistake of assuming that individual comments on social media reflect the views or mindset of the broader public, still less, of the likely pool of ACT jurors. But they do exemplify possible responses to the recent publicity. When the same assumption of guilt as is being made widely on social media is made and widely broadcast by popular breakfast radio hosts such as Amanda Keller and Brendan Jones, it may safely be inferred that the impact of the recent publicity is large and that its full impact cannot be known.

29. What can be known is that, somewhere in this debate, the distinction between an untested allegation and the fact of guilt has been lost. The Crown accepted that the Logie awards acceptance speech was unfortunate for that reason. He also accepted that Ms Wilkinson’s status as a respected journalist is such as to lend credence to the representation of the complainant as a woman of courage whose story must be believed.

30. The prejudice of such representations so widely reported so close to the date of empanelment of the jury cannot be overstated. The trial of the allegation against the accused has occurred, not in the constitutionally established forum in which it must, as a matter of law, but in the media. The law of contempt, which has as its object the protection of the integrity of the court but which, incidentally, operates to protect freedom of speech and freedom of the press, has proved ineffective in this case. The public at large has been given to believe that guilt is established. The importance of the rule of law has been set at nil.

31. The Crown submitted that the vaccine for the vice of pre-judgment is to empower the jury by giving appropriate directions reminding them that they are uniquely placed to

determine the case and directing them to disregard the views of others, who will not have heard all of the evidence.

32. No doubt that can be done in many cases. The present case is different because the author of the impugned remarks will be a key witness in the trial. The central issue in the trial, it is now clear, will be the credibility of the complainant and whether her allegation of sexual assault can be believed. It is not uncommon in such matters for the defence to explore in cross-examination the way in which a complaint unfolded as the central basis for making submissions to the jury as to whether the complaint should be believed.

33. The irony in all of this is that the important debate as to whether there are shortcomings in the way in which the courts are able to deliver justice in sexual assault cases, to complainants and accused persons alike, has evolved into a form of discussion which, at this moment in time, is the single biggest impediment to achieving just that.

34. The delay of the present trial will not serve the interests of anyone. Contrary to popular assumption, it does not serve the interests of the accused, for whom the prospect of conviction and sentence must weigh heavily as an immobilising force in his life. He has said through his lawyer in the present application that he has no interest in delaying the trial but he wants it to be a fair trial, and I accept that that is the case.

35. Nor does delay serve the interests of the Crown or the complainant. Delay has a corrosive effect on evidence. It is expensive. No doubt significant costs funded both publicly and privately have been incurred in preparation to date in the present trial, including in the bringing of the present application.

36. Delay of the trial at this stage wastes the valuable resources of the Court, not least among which in the horrifying prospect that a judge of the Court should find herself idle for four weeks during the time set aside for this trial at the expense of other accused persons. A new jury panel would have to be summoned if the trial is delayed.

37. Unfortunately, however, the recent publicity does, in my view, change the landscape because of its immediacy, its intensity and its capacity to obliterate the important distinction between an allegation that remains untested at law and one that has been accepted by a jury giving a true verdict according to the evidence in accordance with their respective oaths or affirmations.

38. I am not satisfied that any directions to the jury panel prior to empanelment or, in due course, to the jury can adequately address that prejudice. For those reasons, regrettably and with gritted teeth, I have concluded that the trial date of 27 June towards which the parties have been carefully steering must be vacated.

39. I make the following orders:

(1) Vacate the trial date of 27 June 2022;

(2) Stand the matter over for mention before McCallum CJ on 23 June 2022 at 9:30am.

I certify that the preceding thirty-nine [39] numbered paragraphs are a true copy of the Reasons for Judgment of her Honour Chief Justice McCallum

Associate:

Date: 22 June 2022