IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY No. S123 of 2019

BETWEEN:

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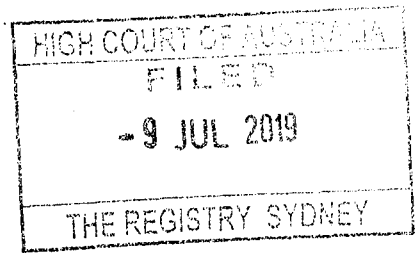
Appellant



and

The Queen

First Respondent

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New South Wales Commissioner of Police

Second Respondent

APPELLANT'S REDACTED REPLY

Part I:

1. The redacted version of this reply is in a form suitable for publication on the internet.

Part II:

2. At the time this reply was written the appellant did not have the benefit of access to the unredacted submissions of the first and second respondents nor the confidential material, namely Ex C and the "confidential affidavits".

20 **Power to make the order**

Public Interest immunity

3. The order made by the Court of Criminal Appeal ("CCA") prohibiting disclosure of Ex C to the appellant and her legal representatives did represent a significant departure from public interest immunity (cf. second respondent's submissions ("2RS") at [37], first respondent's submissions ("1RS") 1RS at [25]). There is a powerful reason why, in principle, it should not be accepted that public interest immunity has developed such that it permits the non-disclosure to a party of evidence admitted in substantive proceedings (cf. 2RS at [41]). To do so would constitute a significant departure from the requirements of procedural fairness in the exercise of judicial power (see Appellant's Submissions ("AS") at [25] and the cases cited therein).

30 Further, public interest immunity principles already have a mechanism to protect material which must be kept confidential in circumstances where disclosure of that material is necessary for the fair conduct of the proceedings, namely, abandonment of the prosecution (or in this case, the Crown appeal), or a stay of proceedings (*Alister v The Queen* (1984) 154 CLR

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404 at 431, 457). Modification of public interest immunity principles in this way would not mean that public interest immunity operates more fairly; rather this would lead to procedural unfairness for the sake of confidentiality (cf. 2RS at [40]). Such an outcome is anathema to the administration of justice in Australia.

4. Permitting a witness to give evidence under a pseudonym on the basis of public interest immunity (as occurred in *Jarvie v The Magistrates' Court of Victoria at Brunswick* [1995] 1 VR 84) is quite different from denying a party access to evidence admitted in substantive proceedings (cf. 2RS at [33]). In any event, it has been held in the UK that orders made protecting the identity of witnesses in a criminal trial (whose evidence is decisive of the accused's conviction) resulted in an unfair trial and involved a procedure which could only be authorised by statute (*R v Davis* [2008] 1 AC 1128).

5. Contrary to the first respondent's assertion it is not accepted by the appellant that it is necessary in judicial review proceedings of an administrative decision for a court to consider closed evidence (cf. 1RS at [13]). Legislation supported the procedure in *Eastman v DPP (No 2)* (2014) 9 ACTLR 178 (see AS at [45]). It is submitted that *Nicopoulos v Commissioner of Corrective Services* (2004) 148 A Crim R 74 and *Chu v Minister for Immigration* (1997) 78 FCR 314 are distinguishable or wrongly decided (see AS at [45]-[48]; cf. 1RS at [13]). Unlike *R (Haralambous) v Crown Court at St Albans* [2018] AC 236, *Nicopoulos* and *Chu* involved judicial review of an administrative decision not judicial review of a lower court proceeding (cf. 1RS at [13]).

6. In the course of determining a claim for public interest immunity courts may receive and have regard to evidence not provided to the party seeking production (2RS at [36], 1RS at [21]). This occurs, out of necessity, in interlocutory proceedings, not substantive proceedings which are determinative of rights or liabilities.

7. No reasons were given by the CCA for making the order denying the appellant access to Ex C other than identification of the basis of the order, namely a particular class or classification of public interest immunity (CAB 99). There is an absence of reasons and nothing to suggest that the CCA engaged in the balancing exercise required by public interest immunity (2RS at [32]).

Necessary incident of appellate jurisdiction

8. The fact that the Court had to consider Ex C, in the exercise of the appellate jurisdiction, was the very reason why it had to be disclosed to the appellant, so as to afford her procedural fairness in respect of the central issue raised by the Crown appeal (AS at [26], [28], [31]-[32]). Conferral of appellate jurisdiction does not provide the basis for implying a power of the CCA

to consider "closed evidence" where the court below has had regard to "closed evidence" (cf. RS at [10]-[13]).

9. There is a critical distinction between the UK cases relied upon by the first respondent and the appellant's case. The UK cases involved appellate or judicial review of proceedings where there was specific statutory authorization for the adoption of a closed procedure in the court below (even though the appeal court did not have that express statutory authorization) (see 1RS [11], [13]). There was no statutory authorization for the procedure adopted by the CCA nor the District Court. Nor was there an order in the District Court permitting the adoption of a closed procedure; [redacted]

10 [redacted] In any event, neither the District Court nor the CCA has the implied power to deny a party access to evidence admitted in the substantive proceedings (as to which see below).

Inherent jurisdiction and implied power

10. Section 12 of the *Criminal Appeal Act 1912* (NSW) sets out the supplemental powers of the CCA; they are procedural in nature (*Weiss v The Queen* (2005) 244 CLR 300 at [23], *R v Burns* (1920) 20 SR (NSW) 351 at 358-9). It does not expand the jurisdiction of the CCA nor does it pick up s23 of the *Supreme Court Act 1970* (NSW) (cf. 1RS at [15], [20], 2RS at [42]). The CCA does not have inherent jurisdiction of the kind referred to in s23 of the *Supreme Court Act*. A conclusion that the CCA has the inherent jurisdiction of the Supreme Court
20 involves a radical recasting of the CCA's jurisdiction. If that were the case the CCA would be able to exercise powers such as those given by ss69 (common law writs) and 75 (declaratory relief) of the *Supreme Court Act* and the full range of equitable remedies.

11. The proper administration of justice in Australia does not accommodate a procedure whereby a party is denied access to evidence admitted in substantive proceedings (cf. 2RS at [43]-[48], 1RS at [15], [20], [26]). Such a procedure is not only not necessary to secure the proper administration of justice but contrary to the proper administration of justice.

12. The orders referred to by the second respondent as falling within a court's inherent jurisdiction or implied power are of a very different kind to an order that would deny a party access to evidence admitted in the substantive proceedings (2RS at [43], [46], [48]). Similarly the orders
30 made in *Cyclopet Pty Ltd v Australian Nuclear Science and Technology Org* [2012] FCA 1326 and *R v Quami (No 9)* [2016] NSWSC 171 (2RS at [51]) are of a different kind to that involved in this case. None of the orders referred to by the second respondent infringe the requirements of procedural fairness in the way that occurred here. None of the procedures identified by the first respondent to alleviate unfairness were adopted in the appellant's case (1RS at [27]-[28]).

13. The appellant's reliance on *Al-Rawi v Security Service* [2012] 1 AC 531 is not misplaced (cf. 2RS at [38]). The circumstances are not relevantly distinguishable (cf. 2RS at [38]). There was a further level of protection in *Al Rawi*, namely the use of special advocates.

Court Suppression and Non-Publication Orders Act 2010 (NSW)

14. The *Court Suppression and Non-Publication Orders Act* does not permit non-disclosure of evidence *to a party* (cf. 2RS at [51]). Under that Act, the Court may make a non-publication order, which prohibits publication of material to the public or a section of the public. The Court may also make a suppression order which prohibits disclosure of material; this prohibits disclosures of material that do not involve publication. It does not extend to denying a party access to evidence in the proceedings (cf. 2RS at [51], [52]; see AS at [41]-[42]). This is in contrast to statutes which do expressly provide for such a procedure, for example, the legislation considered in *Assistant Commissioner Condon v Pompano* (2013) 252 CLR 38.

Exceptional circumstances of the case and the denial of procedural fairness

15. The respondents submit that, in the circumstances of the case the CCA had the power to make the order and there was no procedural unfairness (1RS at [17], [32], 2RS at [37], [55]).

16. Both respondents rely on the circumstance that the appellant is said [redacted] at first instance (1RS at [17](c), 2RS at [37](d), [54]). This appeal is concerned with the denial of procedural fairness at the hearing of the Crown appeal, where access to Ex C was sought but denied. Further, the [redacted] was given in circumstances where counsel had no real choice. Had he taken the other "choice" on offer then a different unfairness would have occurred, namely deprivation of evidence relevant to the appellant's case.

17. Both respondents rely on the circumstance that Ex C was provided to the sentencing judge for the appellant's benefit (1RS at [17](a), [37](e)). However, the executive also in this case had a real interest in ensuring [redacted] Further, that evidence was critical to the question at the very heart of the Crown Appeal. Denying her access to that evidence deprived her of the opportunity to defend herself against the imposition of an increased sentence (see AS at [26]-[29]).

18. The first respondent relies on the circumstance that the evidence was necessary for the proper and fair determination of the issues in the proceedings (1RS at [17](a)). Similarly, the second respondent relies on the circumstance that the District Court and the CCA were statutorily obliged to take the matters in Ex C into account and the CCA was required to consider it on

the appeal (2RS at [37](a), (b)). Contrary to the way the respondents put their argument, these circumstances actually serve to reinforce the proposition that the appellant was denied procedural fairness, not to diminish it.

19. Both respondents rely on the posited circumstances that the factual nature of the appellant's [redacted] was known to her and the CCA disclosed the evaluative component to her (1RS at [34], [37], 2RS at [37](f)). Even if this were the case (which is not conceded), given that the appellant was denied access to Ex C, there was no way of knowing whether Ex C accurately recorded the factual component [redacted] (cf. 2RS at [37](f)). The evaluative component [redacted] (see AS at [35]).

20. Both respondents point to the fact that [redacted] (1RS at [35], 2RS at [24]). [redacted]

Residual discretion

21. The respondents' cannot rely on their respective and different roles to excuse or justify the resulting unfairness to the appellant (1RS at [40]), 2RS at [56]-[58]). Such a distinction is of little moment to an individual the subject of criminal proceedings brought by the State.

22. [redacted] This misapprehended the appellate task on a Crown appeal under s5D of the *Criminal Appeal Act* (see AS at [34]). It could not said that no practical injustice was occasioned (cf. 1RS at [39]).

23. Finally, the first respondent's submissions in respect of the inadequacy of the sentence ignore [redacted]

Dated: 5 July 2019

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