HIGH COURT OF AUSTRALIA

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### Details of Filing

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### Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No. S235 of 2020

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF THE SUPREME COURT OF NEW SOUTH WALES

BETWEEN: **SCOTT EDWARDS**
Appellant
and
**THE QUEEN**
Respondent

# APPELLANT'S SUBMISSIONS IN REPLY

## Part I: CERTIFICATION

1. The Appellant certifies that these reply submissions are in a form suitable for publication on the internet.

## Part II: ARGUMENT IN REPLY

### (a) Clarification of issue on appeal

2. Contrary to RS [3] the Respondent's prosecutorial duty of disclosure required that a copy of the electronic data contained in the Cellebrite download of the Appellant's mobile phone be provided. Section 142 (1) (i) of the Criminal Procedure Act, 1986 (**"CP Act"**) is quite clear on this point. It does not require any analysis of the "still evolving content of the duty of disclosure" to arrive at this conclusion. It was insufficient for the Respondent to simply provide a list that referred to the existence of the Cellebrite download.

3. For reasons explained below at [11] to [16] there has been a substantial miscarriage of justice requiring the matter to be remitted for re-trial. Given the further provisions in s.62 Criminal Procedure Act 1986 (NSW) the clear statutory objective is the provision of material to the accused person, not

the mere disclosure by the prosecution that it exists.

**(b) Factual matters**

4. The matters referred to in RS [6] to [16] are largely uncontroversial. However, a number of observations should be made. First, by simply listing the existence of the Cellebrite download and stating that it did not intend to call Senior Constable Rowe, who performed the download, the Crown conveyed the impression that this evidence was not relevant. This was reinforced by the failure of Detective Senior Constable Pacey to produce either the Appellant's or Stephanie Edwards' phone despite indications to the contrary.[1] However, it was actually instrumental in the identification of a critical lay witness, Ms Birchill. It is not apposite for the Respondent to assert at RS [7] that the "Crown did not ultimately tender data obtained from the phone". The Crown had utilised that data to find Ms Birchill; a fact not disclosed until after the trial.

5. As to RS [8], an invitation to provide "any outstanding items" is not provision of a copy of a "document, information or thing" as prescribed by s.142 (1) (i) of the CP Act. Whether the Cellebrite download was referred to in a list previously provided at the Committal stage RS [9] & [27] is similarly insufficient to satisfy the obligation imposed by the section.

**(c) Prosecutorial duty of disclosure**

6. The Appellant does not cavil with the Respondent's exposition of the authorities at RS [17] to [20]. However, RS [21] fails to take into account the statutory obligation under s.142 (1) of the CP Act. In further answer to RS [21], the Crown did not communicate that it believed, in the circumstances of this particular case, that the provision of copies of the data contained on the Cellebrite download would be "oppressive" and so decided to withhold it from the accused.

7. Re RS [23] to [25] the Respondent fails to grapple with the error made by the Court below with regard to the "interrogation" issue. The Appellant reiterates his previous submissions made on this point.

[1] RFM p 17

8. At RS [26] to [33] the Respondent attempts to develop an argument that provision of a list referring to the existence of the Cellebrite download per se, on multiple occasions including at Committal, is sufficient disclosure for the purposes of s.142 of the CP Act. This argument should be rejected. Repetition of flawed disclosure cannot cure the defect. This would be a strained construction of the words "not otherwise disclosed" in s.142 (1) (i).

9. The purpose of the statutory provisions may well be to "reduce delay" and "improve efficiency" (RS [32]) but overlying both of those concepts is the principle of fairness. Accordingly, shortcuts should not be taken that effectively abrogate the obligations imposed by s.142 (1) of the CP Act. To do so would be to introduce a discretionary factor which undermined the statutory purpose.

10. At RS [34] the Respondent seeks to distinguish the Appellant's authorities on the basis that none of the cases cited involved information that "emanated from the accused". However, assuming the Cellebrite download was of the Appellant's mobile phone, the information contained on it did not all "emanate" from him. A distinction should be drawn between the mobile phone as a repository of information and the information itself, including for example, text messages from third parties and GPS coordinates. When this distinction is appreciated, the Respondent's narrow basis for distinguishing cases like *Grey* and *Mallard* falls away. Moreover, it is common ground that the Appellant's mobile phone was seized upon his arrest following which, he no longer had access to the information stored in it. Accordingly, fairness dictated that he be provided with a copy of that information to assist him in his defence.

**(d) Substantial miscarriage of justice**

11. Contrary to RS [41] the appellant's submissions at AS [81] to [84] should not be discounted as "sweeping assertions" without evidentiary bases. Rather, they point to the potential importance of the information had a copy of the Cellebrite download data been provided in accordance with the prosecutorial duty of disclosure. Once it is accepted that disclosure was insufficient, the potential impact on the accused in conducting the trial

should be considered including constraints on investigation of the charges or lines of inquiry, cross examination, the taking of objections and pre-trial evidential rulings and the calling of evidence.

12. The argument raised by the Respondent at RS [42] would possibly have some merit but for the fact that the prosecution did, in fact, use information from the Cellebrite download to identify the lay witness, Ms Birchill. In doing so, it opened up a number of areas of potential enquiry, including the possibility of expert evidence regarding whether data had been deleted and historical satellite navigation data. Contrary to the Respondent's submission, what must be "steadily recalled" is the fact that the Appellant, after his arrest, had no access to his mobile phone and the data stored in it.

13. Further to RS[42]:

    i. it is an accepted fact that the Cellebrite download of the Appellant's mobile did not record any SMS text from the Appellant to the complainant. The SMS text was a piece of powerful evidence that was likely to have a considerable effect on the jury.

    ii. to suggest that it may have been a different phone to send the text is flawed- the Cellebrite download demonstrates this is the phone that was used by the Appellant and there was no evidence adduced by the Respondent he had another mobile telephone;

    iii. to inferentially suggest the text could have been deleted and was not recoverable or its deletion not recorded introduces other salient points:

        i. The prosecution could adduce no contemporaneous copy of the SMS text from the complainant's phone;

        ii. The oral evidence by the complainant of the text could have been the subject of *voire dire*, and if admitted, the subject of warning or direction[2] on the issue in the absence of the text itself;

[2] A modification of the direction in *Mahmood v Western Australia* (2008) 232 CLR 397 at [27]

iii. The cross examiner was constrained in his cross examination on the topic not knowing there was no record of the SMS on the Cellebrite download; and

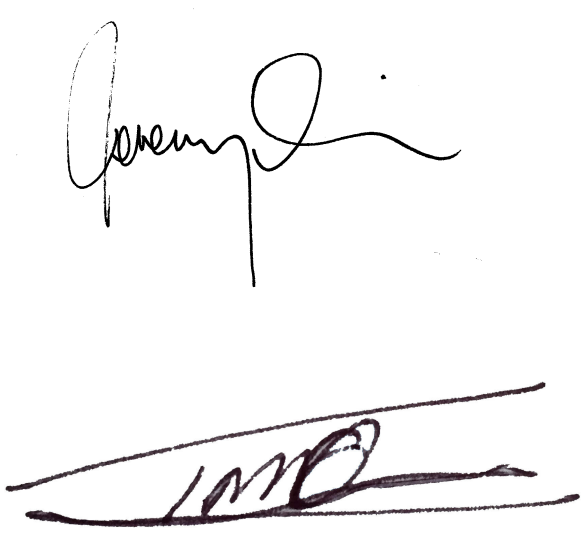
iv. There was no expert forensic interrogation of the mobile telephone by the prosecution to clarify the issue and the Appellant was deprived of that opportunity. .

14. As to RS [46]-[47] the Appellant's solicitor did not know that Lyn Birchill was Lyn Mullen until after he was provided with a copy of the Cellebrite download material. Accordingly, he could not have carried out the social media searches to examine the relationships between witnesses suggested by the Respondent before Ms Birchill was called to give evidence. In terms of being able to properly prepare for Ms Birchill's cross-examination, the Appellant was hindered in his defence.

15. Re RS [48], in circumstances where much of the affidavit evidence before the CCA was rejected, it is unsafe for the Respondent to assert that there was no exculpatory material on the Cellebrite download. At the very least, the possibility of exculpatory data on the Cellebrite download and further potential helpful avenues of enquiry for the defence arising from such data could not be excluded. Accordingly, there has been a substantial miscarriage of justice.

16. As to RS [49] there was no "lying" as alleged. A proper analysis of the ERISP discloses obvious confusion in the questions and answers regarding Hudson Park and Alder Park. To rely upon that confusion to establish guilt beyond reasonable doubt is untenable.

Dated: 31 March 2020



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