HIGH COURT OF AUSTRALIA

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File Number:	S235/2020
File Title:	Edwards v. The Queen
Registry:	Sydney
Document filed:	Form 27D - Respondent's submissions
Filing party:	Respondent
Date filed:	08 Mar 2021

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S235 of 2020

Between:

Scott Edwards
Appellant

and

The Queen
Respondent

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RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION

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

PART II: ISSUES RAISED ON APPEAL

20 2. This appeal concerns the form, rather than the fact, of disclosure by the Crown in relation to a Cellebrite download of the Appellant's mobile telephone. As the Court of Criminal Appeal (**CCA**) found,[1] existence of the Cellebrite download was repeatedly disclosed well in advance of the trial.

3. The Appellant contends that the CCA was wrong to proceed on the basis that there had been sufficient disclosure of the Cellebrite download. He submits that – notwithstanding listing of the Cellebrite download (on multiple occasions) in brief indexes, as well as disclosure via a witness statement, a "Proposed Witness/Exhibit List"; and an invitation from the solicitor with carriage of the matter to the Appellant's representatives to nominate whether any items in the brief were outstanding – ss 141
30 and/or 142 of the *Criminal Procedure Act 1986* (NSW) (**Criminal Procedure Act**) was breached. Accepting that the Crown did not provide a copy of the large body of electronic information comprising the Cellebrite download to the Appellant, as the CCA found, had the defence requested access to that information, there is no reason to doubt that it would have been promptly provided, as in fact occurred. Both common law and

[1] [2020] NSWCCA 57 (**Judgment**) at [5], Core Appeal Book (**CAB**) p 107-108.

statutory obligations of prosecutorial disclosure are imposed for the purpose of fairness. An accused person's 'right' to fair disclosure[2] has been recognised as an inseparable incident of his or her right to a fair trial.[3] The Respondent accepts that, in the circumstances of the present case, the existence of the Cellebrite download was required to be disclosed. The issue raised by the appeal is whether, in the particular circumstances of this case, the still-evolving[4] content of the duty of disclosure required that a copy of the electronic data be provided to the Appellant. That is necessarily a case-by-case assessment,[5] and in this case the duty was sufficiently discharged by the repeated disclosure of the existence of the Cellebrite download, which would have been made available had the defence requested a copy.

4. It is only if the Court forms the view that there was a breach of common law or statutory disclosure obligations that the question of the effect of that breach on the Appellant's conviction arises. Should the Court conclude that there has been a miscarriage of justice, the Respondent relies upon the proviso in s 6(1) of the *Criminal Appeal Act* 1912 (NSW).

PART III: SECTION 78B OF THE JUDICIARY ACT

5. The Respondent considers that no notice is required under s 78B of the *Judiciary Act 1903* (Cth).

PART IV: MATERIAL CONTESTED FACTS

6. The Appellant's submissions omit some relevant factual matters, in particular in relation to pre-trial disclosure. The Appellant was tried on an indictment alleging seven offences contrary to s 66C(2) of the *Crimes Act 1900* (NSW) (**Crimes Act**) (six counts) and s 66M(2) (one count, as an alternative to one of the s 66C(2) counts). The charges related to two incidents occurring between 1 October and 31 December 2012, where it

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2 Noting that the reference to such a 'right' does not involve "Hohfeldian exactness": *Marwan v Director of Public Prosecutions* (2019) 278 A Crim R 592 (***Marwan***); *Director of Public Prosecutions (Cth) v Kinghorn* (2020) 102 NSWLR 72 at [127].

3 See eg *R v Brown (Winston)* [1994] 1 WLR 1599 at 1606; *R v Easterday* (2003) 143 A Crim R 154 at [194] (collecting earlier cases).

4 *R v Reardon (No 2)* (2004) 60 NSWLR 454; [2004] NSWCCA 197 (***Reardon***) at [95] (Simpson J).

5 See eg *R v Higgins* (unreported, Supreme Court of Victoria, Court of Criminal Appeal, Brooking, Byrne and Eames JJ, 2 March 1994) at 71; *R v TSR* (2002) 5 VR 627 at 650.

was alleged that he sexually assaulted the niece of his then wife, who was at the time aged 13 years. Counts 1-5 were alleged to have occurred in the applicant's ute, at Hudson Park in Kotara, which the complainant attended with the Appellant for the purposes of attending a "boot camp" training session (the Appellant conducted such sessions as part of his personal training business). Counts 6 and 7 were alleged to have occurred in the male toilets at Hudson Park one week later, during a second boot camp session. On 22 May 2018 the Appellant was found guilty by a jury on all counts (save for count 2, which was charged in the alternative to count 1).

7. The Appellant was also due to stand trial on a separate indictment of one count of break, enter and commit a serious indictable offence, contrary to s 112(1)(a) of the Crimes Act and one count of unlawful use of a listening device, contrary to s 7(1)(a) of the *Surveillance Devices Act 2007* (NSW). The CCA referred to this as the "listening device matter" and heard evidence that there was evidence served in both the sexual assault matters and the listening device matters, and that the evidence in each case substantially overlapped.[6] Brief indexes were supplied by the Crown in each prosecution on 16 and 17 April 2018 (with an updated index in the sexual assault matters provided to the Appellant's representatives on 3 May 2018), listing a hard drive containing "Phone Download Report – Scott Edwards (iphone 6 EFIMS X0002614993)"[7] and "Phone Download Report (iphone 6 EFIMS X0002614993)".[8] The Appellant's solicitor was invited on 17 April 2018 to "[P]lease let me know if there are any brief items at Annexure C [the brief index] that you don't have".[9] A Notice of the Prosecution Case was also provided by the ODPP to the Appellant's solicitor on 16 April 2018, notifying him that at that time, all the documents the prosecution proposed to rely on had been served. The notice included a brief index that included a "Hard-Drive containing … Phone Download Report (iphone 6 EFIMS X0002614993)". The Crown did not ultimately tender data obtained from the phone.[10]

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6 Judgment at [15], CAB p 110.

7 Judgment at [13], [33], CAB p 110, 116, see annexure MZ1 to the Affidavit of Marley Zelinka affirmed 14 February 2020 (**Zelinka Affidavit**), Respondent's Book of Further Material (**RFM**) p 182-188.

8 Affidavit of Christopher O'Brien sworn 1 November 2019 at [8], annexures C and C1 (Appellant's Book of Additional Materials (**AFM**) p 274-290).

9 Annexure MZ1 to Zelinka Affidavit, RFM p 182-188.

10 Judgment at [14], CAB p 110.

8. On 3 May 2018, an updated Crown brief index was sent to the Appellant's solicitor, under cover of a letter stating, in relation to the index, "If there are any outstanding items, please let me know as a matter of urgency and I will provide these items to you."[11] The Appellant's solicitor replied to that invitation seeking some outstanding annexures to a witness statement, which were provided.

9. On 8 May 2018 (the week before the commencement of the trial on 14 May 2018) the ODPP supplied a Proposed Witness/Exhibit List for the sexual assault trial which included, in the section headed "not required", a Senior Constable Michael Rowe, associated with a "Cellebrite download".[12] Senior Constable Rowe's statement of 19 July 2017, describing his use of a Cellebrite downloading device to obtain information stored on the Appellant's handset (which, contrary to the Appellant's submission, was identified by reference to an exhibit number corresponding to that of the Appellant's phone, as described in the statement of Detective Senior Constable (**DSC**) Pacey[13]), was served at an earlier (committal) stage and had also previously been listed in the Crown brief index. The Appellant's solicitor was invited to confirm whether he required the witnesses marked "not required".

10. Notice of the witness, Lynn Burchill, was provided late. Her statement (in handwritten form) was provided by email to the Appellants solicitor's at 4:53pm on 11 May 2018, without an explanation of how the Crown had identified her, or why her statement was being served late.[14] There was no application to adjourn the trial or exclude her evidence for non-compliance with s 146 of the Criminal Procedure Act.[15] Ms Burchill's evidence at trial is summarised in the Judgment at [23].[16]

11. The Appellant's legal representatives did not take steps to obtain a copy of the Cellebrite download until 18 May 2018. After closing addresses, the trial adjourned on the afternoon of 17 May 2018, for summing up on 21 May 2018. The Appellant's solicitor wrote to the ODPP on the morning of 18 May 2018, asking how Ms Burchill came to the attention of the OIC. The solicitor with carriage at the ODPP replied promptly at

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11 Zelinka Affidavit at [9]-[11] and Annexure MZ2, RFM p 180, 189-194.

12 Judgment at [14], CAB p 110.

13 See statement of Alexandra Pacey at [13]-[21], RFM p 16-17.

14 Judgment at [21], CAB p 112.

15 Judgment at [22], CAB p 112.

16 CAB p 112-113, see also Part A – Summary of Trial at [120]-[141], RFM p 169-172.

9:31am, indicating that Ms Burchill's details were obtained from the Cellebrite download of the Appellant's phone. The Appellant's solicitor replied at 1:10pm the same day, stating that he did not know about the download and requesting a copy.[17] A copy was provided on 23 May 2018.[18]

12. The whole of the evidence before the CCA in relation to the files on the Cellebrite download is set out in the Judgment at [34] and [35] (the Appellant did not read large portions of his solicitor's affidavit in the CCA insofar as it related to the Cellebrite download, and the CCA also rejected much of what was pressed).[19] There was evidence that if printed, the Cellebrite download would occupy 5,948 pages.[20]

10 13. Part of the prosecution statement of facts provided on 16 April 2018 is extracted in the Judgment at [16]. The complainant's evidence was that the Appellant had sent her a text message suggesting that she delete her internet search history as a result of the discovery of a pornographic movie on her iPod. There was no evidence before the CCA on the question of whether the phone that was the source of the Cellebrite download (seized by the police from the Appellant when he was arrested in 2017) was the same phone that he had at the time of the offending in 2012. Nor was there any basis to assume, in the absence of evidence, that the data in the Cellebrite download represented all of the data on the Appellant's phone during the periods in 2012 relevant to the charges in the indictment.

20 14. The Appellant's written submissions in the CCA were originally prepared by his solicitor. On 19 February 2020, a week prior to the hearing of the appeal, his counsel filed a set of supplementary submissions/submissions in reply, stated to be intended to narrow the real issues in dispute.[21] Those submissions expressly withdrew a number of the earlier submissions and indicated that the Appellant could place only very limited reliance on the affidavits of the appellant's solicitor, Mr O'Brien, and (to an even lesser extent) Mr Pascoe, a witness called in the defence case. The submissions also conceded a number of issues, including that:

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17 Judgment at [29]-[32], CAB p 114-115.

18 Judgment at [34], CAB p 116.

19 See Judgment at [28], CAB p 114.

20 Judgment at [36], CAB p 116.

21 RFM p 125-143.

a. There could be no suggestion of complete non-disclosure of the Cellebrite download prior to the commencement of the trial;

b. There could be no automatic and conclusive assumption that the Cellebrite download contained all data (including user-deleted data) placed on the phone during the relevant period;

c. The applicant did not press the investigations conducted by Mr Pascoe as to the apparent "Facebook friends" status of the complainant and Lynn Birchill's daughter, and other associated relational connections;

d. The applicant did not press any conclusion as to the extent to which Ms Birchill was "well known" to either the complainant or Neva Williams;

e. There was nothing "on the face of" the Cellebrite data to "categorically" impeach Ms Burchill's credibility; and

f. It was not put to Ms Burchill in cross-examination that she was "mistaken, untruthful or otherwise specifically unreliable" on the topics on which the Crown relied upon her.

15. The CCA did not address all of these concessions in its judgment, but did refer to several of them as having been rightly made, in particular in relation to attacks on the independence of Lynn Burchill and the concession that it could not be said that there was no disclosure of the Cellebrite download.[22]

16. The only aspect of Mr Pascoe's affidavit that was ultimately sought to be read (and was admitted) in the CCA was paragraph 36 and Annexure N, setting out messages between the Appellant and Ms Libby Elliott.

PART V: ARGUMENT

The basis for the prosecutorial duty of disclosure is fairness

17. Principles of fairness are at the heart of a prosecutor's duty of disclosure.[23] Common law disclosure rules (which are of relatively recent origin)[24] have their origin in a

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22 Judgment at [46], [47], CAB p 119.

23 *Mallard v The Queen* (2005) 225 CLR 125 (***Mallard***) at [74] (Kirby J), applying *R v Brown* [1998] AC 367 at 379.

24 *Marwan* at [27], noting that the review by Kirby J in *Mallard* at [64]-[80] records no decision which is more than 50 years old; see also *Eastman v Director of Public Prosecutions (No 13)* [2016] ACTCA 65 at [330], discussing *R v Holland* (1792) 4 D & E 691; 100 ER 1248.

defendant's right not to be tried unfairly[25] and have been described as an incident of the right to a fair trial.[26] Their origins have also been traced to the requirement that a defendant have adequate notice of the case against him as an aspect of the requirements of procedural fairness,[27] the principles of open justice,[28] and the redressing of inequality of resources between the prosecution and defence.[29] The duty of disclosure has been described as "unusual"[30] and as one that is owed to the courts by those who prepare and conduct prosecutions.[31]

18. The precise scope of the duty at common law has, as Simpson J (Grove and Shaw JJ agreeing) noted in *R v Spiteri* (2004) 61 NSWLR 369 at [17], proved more difficult to define. The CCA has recently observed that this Court "has not addressed the duty's basis, scope and limits in any detail".[32] Justice Simpson explained in *R v Spiteri* that the most succinct, and commonly adopted, statement of the definition is that which was originally derived from a 1993 UK decision in *R v Melvin and Dingle* (Central Criminal Court, 20 December 1993, unreported), which was adopted by the Court of Appeal in *R v Keane* at 752 and by the House of Lords in *R v Brown* at 376-377:

> "I would judge to be material in the realm of disclosure that which can be seen on a sensible appraisal by the prosecution:
>
> (1) to be relevant or possibly relevant to an issue in the case;
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> (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use;
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> (3) to hold out a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (1) or (2)."

19. In *obiter* remarks in *R v Reardon*, Hodgson JA reviewed the principles as to prosecutorial disclosure stated in English case law, and without stating a conclusion as

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25 See *Strickland v Commonwealth Director of Public Prosecutions* (2018) 266 CLR 325 at [202] (Gordon J).

26 *R v Brown* [1998] AC 367 (**R v Brown**) at 379.

27 See *R v Brown (Winston)* [1994] 1 WLR 1599 at 1606.

28 *R v Keane* [1994] 1 WLR 746 (***R v Keane***) at 750.

29 *R v McIlkenny* (1991) 93 Cr App R 287 at 312; *Ragg v Magistrate's Court of Victoria* (2008) 18 VR 300 (***Ragg***) at [45]-[65].

30 *Marwan* at [29].

31 *R v Ward* [1993] 1 WLR 619 at 645, applying *R v Hennessy (Timothy)* (1979) 68 Cr App R 419 at 426; see also *Cannon v Tahche* (2002) 5 VR 317 at [58]; *Marwan* at [29].

32 *Director of Public Prosecutions (Cth) v Kinghorn* (2020) 102 NSWLR 72 at [124] (Bathurst CJ, Fullerton and Beech-Jones JJ).

to whether all of the views expressed in those cases should be adopted in New South Wales, he expressly adopted the test derived from *R v Melvin and Dingle* (at [54]). The CCA subsequently approved Hodgson JA's statement as correctly encapsulating, for NSW, the prosecution's duty of disclosure.[33]

20. It has also been recognised that "limits on the scope of the duty may be drawn out of the same well of fairness from which the duty itself comes".[34] The role of the right to a fair trial in the broader context of the administration of justice was recognised by Lord Steyn in *Attorney General's Reference (No 3 of 1999)* [2001] 2 AC 91 at 118:

> "The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public."

21. These countervailing considerations may properly influence the extent, or content, of the prosecutor's duty to disclose in the circumstances of individual cases.[35] Countervailing considerations of unfairness to an accused person resulting from production of large volumes of material are also relevant, given that "[i]t should not be overlooked that an extravagant supply of material may be oppressive, and as productive of unfairness as improper non-disclosure".[36] The potential for oppression led Simpson J in *Reardon* (at [95]) to posit a distinction between the prosecution's duty to provide copies of documents, as part of the prosecution brief, and its duty to disclose the existence of documents and to make them available to the legal representatives of an accused person to inspect should they choose to do so.

22. Justice Simpson (with Kirby and Bell JJ agreeing) gave further consideration to that distinction in *R v Livingstone*.[37] Her Honour posed four questions: (i) were the

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[33] *R v Spiteri* (2004) 61 NSWLR 369 at [20] (Simpson JA, Groves and Shaw JJ agreeing); *Cornwell v The Queen* [2010] NSWCCA 59 at [210] (McClellan CJ at CL, Johnson J agreeing); *R v Lipton* (2011) 82 NSWLR 123 (***Lipton***) at [79] (McColl JA, Hislop J agreeing).

[34] *Ragg* at [77].

[35] *R v H* [2004] 2 AC 34 at 146, 155; see also (outside the context of prosecutorial disclosure) *DPP (NSW) v Webb* (2001) 52 NSWLR 341 at [37] (Mason P, Brownie AJA and Studdert J agreeing).

[36] *Reardon* at [95]. See also the UK Attorney General's Guidelines on Disclosure (December 2020) at [55]-[57] and Annex A (https://assets.publishing.service.gov.uk/government/ uploads/system/uploads/attachment_data/ file/946082/Attorney_General_s_Guidelines_2020_FINAL_Effective_31Dec2020.pdf).

[37] (2004) 150 A Crim R 117 (***Livingstone***) at [50].

documents under consideration of a kind which come within the test derived from *R v Melvin and Dingle* and therefore required disclosure; (ii) what is involved in "disclosure", that is, the content of the duty; (iii) whether the documents were in fact adequately disclosed; and (iv) if the first and third questions were answered favourably to the appellant and unfavourably to the Crown, whether the non-disclosure resulted in a miscarriage of justice. In addressing the second of those questions, her Honour referred[38] to the statement of the majority in *Grey v The Queen*[39] that "… there was no reason why the defence in a criminal trial should be obliged to fossick for information … to which it was entitled". In her view, a "fine question" arose as to whether what it was suggested that the appellant's legal advisors should have done involved "fossicking" of this type. Her Honour noted (at [65]) the distinction she had drawn in *Reardon* between a duty to provide copies of documents and a duty to disclose the existence of documents and make them available for inspection, before explaining that she "did not intend, in that reference, to include disclosure of the existence of documents by way of disclosure of other material from which an astute legal representative might infer the existence of the document in question. Rather, what I had in mind, was the provision of a list of documents held by the prosecution". In *Livingstone*, witness statements disclosed the fact of an interview with a witness. While this may have alerted an astute legal representative to the possible existence of a record of that interview, Simpson J concluded that this came "perilously close" to requiring the defence to "fossick" for information in the manner deprecated in *Grey*.[40] It followed that the content of the duty of disclosure (Simpson J's second question outlined above) required at least an explicit statement that the record of interview with the witness was in existence and in the possession of the prosecution. This was not done in *Livingstone*, though her Honour concluded that no substantial miscarriage of justice had occurred and applied the proviso.[41]

The CCA correctly considered that the case before it concerned the extent of disclosure obligations, not the absence of disclosure

23. The Appellant's case before this Court has shifted from the one put to the CCA. It is

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38 Ibid at [55].

39 (2001) 75 ALJR 1708 (***Grey***) (Gleeson CJ, Gummow and Callinan JJ).

40 Ibid at [58].

41 Ibid at [65].

not true to say, as the Appellant does at [76], that the CCA addressed a "false issue" concerning the obligation to interrogate the Cellebrite download. The CCA was instead rejecting the Appellant's case, which was (at that stage) put by reference to the Crown's obligation to disclose how the police or persons within the Office of the Director of Public Prosecutions went about identifying Ms Burchill, or to disclose the utility of information extracted from the Appellant's handset, or specifically that there were text messages between the Appellant and another witness during the period specified in the indictment.[42]

24. As noted above, the CCA found the Appellant's concession that it could not be said that there had been no disclosure of the Cellebrite download was "rightly made".[43] That concession enabled the real issues concerning the effect of the form of disclosure of the Cellebrite download (which the CCA accepted needed to be considered in tandem with the late disclosure of Ms Birchill as a witness)[44] to be litigated before the CCA, including the issue raised by the Appellant as to the obligation to disclose the use of the handset in identifying Ms Burchill.

25. The present case did not involve an argument that a defendant had been obliged to "fossick" for disclosure of material the existence of which had not been disclosed, of the kind referred to in *Grey*. The Respondent submitted, before the CCA and here, that there had been disclosure of the existence of the Cellebrite download, rather than that its existence should have been discovered by the exercise of reasonable diligence on the part of the Appellant's legal advisors.

There was no breach of the duty of disclosure in the circumstances

26. The CCA noted that, in part, the prosecutorial duty to provide documents and information to the defence is a product of statute.[45] Their Honours proceeded on the basis (favourable to the Appellant) that statute did not cover the field.[46] In *Marwan*,[47] the CCA stated that the common law duty "must accommodate itself with statute" but

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42 Judgment at [51], CAB p 120.

43 Judgment at [47], CAB p 119.

44 Judgment at [61], CAB p 124-125.

45 Judgment at [53], CAB p 121.

46 Judgment at [57], CAB p 122-123. The Appellant's submissions at [67] suggest that he maintains that at least the *Director of Public Prosecutions Act 1986* (NSW) does not abrogate common law disclosure obligations.

47 (2019) 278 A Crim R 592 at [31].

did not go so far as to suggest abrogation of the common law. As already noted, Simpson J in *Reardon* and the CCA in *Livingstone* posited a distinction between a duty to provide copies of documents, as part of the prosecution brief, and a duty to disclose the existence of documents and to make them available to the legal representatives, suggesting that the latter could satisfy common law disclosure obligations. That is consistent with the principle formulated by Lawton LJ and later adopted by the English Court of Appeal,[48] that those who prepare and conduct prosecutions owe a duty to ensure that all relevant evidence of help to an accused was either led by them or made available to the defence.[49]

10 27. When considering the requirements of disclosure by a prosecutor to an accused (as opposed to by police to the prosecutor under the *Director of Public Prosecutions Act 1986* (NSW) (**DPP Act**), s 142(1) of the Criminal Procedure Act (read with s 141(1)(a)) gives substantive (and more exact)[50] effect to the common law duty of disclosure. The Appellant contends (at [68], [72], [74]) that the CCA erred by failing to find a breach of s 142 of the Criminal Procedure Act, on the basis that the s 142 notice did not "contain" the Cellebrite download. He does not identify which paragraph of s 142(1) is said to have been breached. His argument fails to take into account the terms of s 142(1)(i). In the circumstances of this case, the Cellebrite download was "otherwise disclosed" to the Appellant for the purposes of that paragraph.

20 28. The statements of DSC Pacey and DSC Rowe, referring respectively to the seizure of the appellant's phone when he was arrested and the assignment of an exhibit number (DSC Pacey), and the creation of the Cellebrite download of that particular exhibit (DSC Rowe) were included in the index to the brief served at the committal stage,[51] as well as in subsequent brief indexes. A case management form, which the Appellant's then-solicitor said would have been tendered at the case management hearing in the District Court on 5 April 2018 and would ordinarily have been signed by legal representatives for both the DPP and the accused, stated that all Crown statements and exhibits had been

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48 *R v Ward* [1993] 1 WLR 619 at 642, applying *R v Hennessey* (1978) 68 Cr App R 419 at 426.

49 See *R v Gillard and Preston* (1999) 76 SASR 76 at [81] (tapes of surveillance need not automatically be provided to accused, but should be available on request), *Ragg* at [103] (discussing the defence entitlement to examine the material they had selected from that made available by the prosecution).

50 *Director of Public Prosecutions (Cth) v Kinghorn* (2020) 102 NSWLR 72 at [130].

51 See indexes to the brief of evidence at committal, RFM p 8.

served.[52] On both 16 and 17 April 2018, a solicitor from the Office of the DPP emailed a brief index to the Appellant's solicitor, listing a hard drive containing a phone download report for the relevant exhibit number for the Appellant's phone, as well as the statement of DSC Rowe. The 17 April 2018 email included an invitation to contact the ODPP solicitor if there were any brief items the Appellant's solicitor did not have. A similar invitation, again accompanying a brief index and this time inviting the Appellant's solicitor to let the ODPP know "urgently" if there were any outstanding items "and I will provide those items to you" was sent on 3 May 2018. *Clearly* the existence of the Cellebrite download was repeatedly disclosed well in advance of the trial, as the CCA concluded.

29. The obligation in s 142 to provide notice of the prosecution case arises after the indictment is presented or filed: s 141. The notice is required to contain, variously, copies of specified documents, a statement of facts (s 142(1)(b)), copies of exhibits, and various lists (s 142(1)(j) and (m)). Section 142(1)(i) requires the notice to contain "a copy of any information, document or other thing provided by law enforcement officers to the prosecutor, or otherwise in the possession of the prosecutor, that would reasonably be regarded as relevant to the prosecution case or the defence case, and that has not otherwise been disclosed to the accused person". Consistent with the timing of the provision of notice of the prosecution case, this paragraph creates an exception for prior disclosure to the accused (for example, in the committal process) of information, documents or other things in the prosecutor's possession.

30. Division 3 of Pt 3 of Ch 3[53] of the Criminal Procedure Act also creates an exemption from the requirements of a prosecutor's notice under the Division in relation to "anything that has already been included in a brief of evidence in relation to the matter served on the accused person in accordance with this or any other Act or that has otherwise been provided or disclosed to the accused person": s 149D(1). The Act thus distinguishes between "disclosure" and provision, or production, of a document.[54] Those terms are not defined in the Criminal Procedure Act, but the express terms of s 149D(1) indicate that there may be disclosure by the prosecution otherwise than by

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[52] Affidavit of Christopher O'Brien sworn 1 November 2019 at [8], annexure B (AFM at 270). The form annexed to Mr O'Brien's affidavit is not signed.

[53] Dealing with indictable procedure.

[54] See also s 33(1)(b) and (2)(b) of the Criminal Procedure Act.

means of a notice under s 142(1), and that such disclosure need not involve a document or other thing being "provided" to an accused.

31. The Appellant emphasises the requirement in the chapeau to s 142(1) that a prosecutor's notice "contain" various items, and says that on that basis the words of the statute "require provision"[55] of the information, documents or things. However, as noted above, the contents of a notice under s 142(1) are not confined to documents or exhibits, but include lists of information. The use of the word "contain" in the chapeau to that subsection does not, of itself, say anything about whether disclosing the existence of the Cellebrite download may be sufficient disclosure for the purposes of s 142(1).

10 32. The meaning of "disclose" where appearing in s 142(1)(i) falls to be considered by reference to its context in the Criminal Procedure Act as a whole, the existing state of the law when it was enacted and the mischief to which it was addressed.[56] The Appellant's submission[57] that the CCA's conclusion is inconsistent with the purpose of ss 141 and 142 of the Criminal Procedure Act should not be accepted. The purpose of Div 3 of Pt 3 of Ch 3, which is headed "Case management provisions and other provisions to reduce delays in proceedings", is stated in s 134 ("Purpose") as being "to reduce delays in proceedings on indictment by (a) requiring certain pre-trial disclosure by the prosecution and the defence, and (b) enabling the court to undertake case management …". The Division as a whole was replaced by the *Criminal Procedure*
20 *Amendment (Case Management) Act* 2009 (NSW), the second reading speech for which confirms what is apparent from s 134, namely that its purpose, like that of the predecessor provisions introduced by the *Criminal Procedure Amendment (Pre Trial Disclosure) Act* 2001 (NSW),[58] was to reduce delays and increase the efficiency of the trial process.[59] The extrinsic materials in relation to Div 3 of Pt 3 of Ch 3 do not suggest that it was intended to impose any more onerous obligations of prosecutorial disclosure to an accused than would have applied at common law.

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55 Appellant's submissions at [68].

56 See eg *AB v State of Western Australia; AH v State of Western Australia* (2011) 244 CLR 390 at [10] (French CJ, Gummow, Hayne, Kiefel and Bell JJ).

57 Appellant's submissions at [74].

58 The second reading speech for which appears in NSW Legislative Assembly, *Hansard*, 16 August 2000, p 8288.

59 NSW Legislative Assembly, *Hansard*, 28 October 2009, p 18869, 18871.

33. While the CCA in *Lipton* found[60] that "disclose" in the context of s 15A of the DPP Act meant "produce", the statutory context was quite different to that of s 142 of the Criminal Procedure Act. Both McColl JA and RS Hulme J, in his concurring remarks, accorded weight to the requirement in s 15A to disclose "all relevant information [etc] … that might reasonably be expected to assist the case for the prosecution or the case for the accused person". Without disclosure of the actual information so described by the police, the prosecution could not sensibly perform the critical appraisal of whether it should be disclosed to an accused.[61] The DPP simply could not discharge his or her role without "actual access to all information relevant to an issue in the case".[62] Justice Hulme accepted that, by contrast, as a general matter "it is possible to disclose a document, that is, its existence, without revealing all the detail of its contents."[63]

The Appellant's position is not supported by case law

34. Contrary to the Appellant's submission, the case law on which he relies[64] does not provide authority for the proposition that the Crown breached its duty of disclosure. None of *Grey*, *Mallard*, *R v Brown* or *Eastman v Director of Public Prosecutions (No 13)* involved circumstances in which the material which it was claimed should have been disclosed emanated from the accused (as with the phone handset that was the source of the Cellebrite download in the present case). Nor did they involve the extent, if any, to which the prosecution is obliged to take steps to explain how witnesses were identified. The applicant has not identified any authority for an obligation to take such steps.

35. *Grey* involved what the CCA accurately described as a "clear case of an (inadvertent) failure to disclose a particular document" (a letter of comfort to a key Crown witness from the officer in charge of the investigation to the appellant).[65] The appellant in *Grey* was deprived of a full opportunity to discredit that key witness, who had been presented by the Crown as a reliable witness.[66] The reference in the judgment of Gleeson CJ,

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60 (2011) 82 NSWLR 123 at [104].

61 Ibid at [105], [124].

62 Ibid at [106].

63 Ibid at [124].

64 Appellant's submissions at [61], [62].

65 Judgment at [59], CAB p 124.

66 *Grey* at at [16]-[18].

Gummow and Callinan JJ[67] to there being no obligation on the defence to "fossick" for information of this kind was in the context of the information not being able to be obtained by reasonable diligence, and being information to which the defence was entitled (while the obligation in *Grey* was imposed at common law, a statutory obligation is now imposed to disclose such material, by operation of s 142(k) of the Criminal Procedure Act). The "fossicking" in question, which the defence was not obliged to do, was not reviewing a body of electronic information the existence of which had been disclosed but rather asking an "extremely risky" question in cross-examination seeking information about a witness.

1036. The non-disclosure in issue in *Mallard* concerned a considerable body of evidence relating to the alleged murder weapon, which as Gummow, Hayne, Callinan and Heydon JJ explained[68] was "potentially highly significant" in at least two respects: its capacity to refute a central plank of the prosecution case with respect to that weapon and also to discredit the credibility of the prosecution case.[69] The respondent did not contest its failure to provide relevant information to the appellant, with Kirby J commenting that it could "scarcely do so".[70]

37. *Lipton* likewise was concerned with non-disclosure per se. While McColl JA made an *obiter* observation[71] that the prosecutorial duty to disclose includes an obligation to make inquiries "in an appropriate case", as Leeming JA (RA Hulme J agreeing) pointed
20 out in *Marwan*,[72] this statement concerned an issue which did not arise in *Lipton,* was unelaborated, and the Victorian decision cited in support (*AJ v R* (2011) 32 VR 614) is of the same character, with the result that "neither decision provides any assistance as to what is an 'appropriate case'." As recognised in *Marwan*,[73] the main example in the authorities of the duty extending to investigation or making further inquiries concerns the disclosure of criminal convictions, proof of which might be capable of affecting a witness's credibility, which are of limited assistance where what is asserted is a duty to make another type of inquiry (or, as here, to draw the accused's attention to particular

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67 *Grey* at [23].

68 *Mallard* at [23].

69 See also *Mallard* at [56] per Kirby J (cited by the CCA in the present case, Judgment at [61], CAB p 124-125).

70 *Mallard* at [66].

71 *Lipton* at [81].

72 [2019] NSWCCA 161 at [47].

73 Ibid at [48].

content in a body of electronic material). No such duty to make inquiries was established in *Marwan*.

38. In *R v Brown*, the appellant had not been aware that the police had spoken to either of two defence alibi witnesses. The case did not involve consideration of whether disclosure of the existence of notes of their police interviews would have been sufficient (in any event, the House of Lords did not identify a duty to disclose material going only to the credibility of defence witnesses). The same may be said of *Eastman v Director of Public Prosecutions (No 13)*: a stay was sought on the basis of an argument that a failure by Victoria Police to disclose information relevant to an expert consultant's credit could be attributed to the Australian Federal Police. That argument was rejected by the ACT Court of Appeal, even on the assumption that the failure to disclosure could be visited upon "the prosecution" generally, given the expert would not be called to give evidence at a retrial.[74]

Any breach of the duty of disclosure did not lead to a substantial miscarriage

39. It is accepted that there are circumstances where a breach of prosecutorial disclosure obligations may give rise to a material procedural irregularity producing a miscarriage of justice.[75] That is not inevitably the case[76] but rather should depend on the nature of the failure to disclose and the undisclosed material,[77] for the purpose of considering whether there has in any meaningful sense been an irregularity.[78]

40. Even if – contrary to the above submissions – the Court were to form the view that there had been a breach of s 142(1)(i) of the Criminal Procedure Act, or of common law disclosure requirements and that this gave rise to a miscarriage of justice, no substantial miscarriage of justice was occasioned as a result of that breach, such that the proviso should apply.

41. The Appellant is wrong to suggest that he was deprived of the possibility of a fair trial. He makes a number of sweeping assertions in support of that claim[79] that are not borne

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74 [2016] ACTCA 65 at [347], [349], characterising any non-disclosure (other than by Victoria Police) as "inadvertent".

75 *Lipton* at [80], citing *Mallard* at [17].

76 See *Grey* at [8], [9], [23] (Gleeson CJ, Gummow and Callinan JJ); *Potier v R* [2015] NSWCCA 130 at [553].

77 See *R v Forrest* (2016) 125 SASR 319 at [67].

78 In relation to which a miscarriage will be assumed: *GBF v The Queen* [2020] HCA 40 at [24].

79 Appellant's submissions at [81]-[84].

out by any evidence before the CCA (or this Court). The CCA correctly held that "nothing like a miscarriage of justice ha[d] been established", in circumstances where all that the Appellant had done was to identify another potential witness (Ms Elliott), whose evidence was most unlikely to have affected the trial had it been adduced. That is because those text messages (which were before the CCA)[80] did not contain any suggestion of training in the mornings.

42. No expert has examined the Cellebrite download or handset to assess what, if any, deleted material it may contain (a point the Appellant appears to accept).[81] As noted above, there was no basis to assume, in the absence of evidence, that the data in the Cellebrite download represented all of the data on the Appellant's phone during the periods in 2012 relevant to the charges (or indeed that he had been using the same phone throughout that period). The Cellebrite download did not "demonstrate" that the Appellant had not sent any text or SMS message to the complainant in 2012 or 2013.[82] It was never put to the complainant that the text message from the Appellant was not sent.[83] In any event, there was no evidence as to the phone number on which the complainant said she received the message about the material on her iPod, nor the phone number used by the Appellant to send it. The Appellant's submission that further information "may have been revealed" by the use of an alternative computer program to examine his phone[84] remains in the realm of speculation, as is the posited constraint on cross-examination[85] and restriction on identifying other potential witnesses,[86] the contents of whose evidence is entirely unknown. It must be steadily recalled that the entirety of the Cellebrite download was extracted from the Appellant's own phone handset.[87]

43. The Appellant is also wrong to suggest that the Cellebrite download indicated that the

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80 See Judgment at [35], CAB p 116.

81 Appellant's submissions at [82(c), (d)], [84].

82 Cf Appellant's submissions at [81(b)], [82(b)].

83 Cf transcript, 16 May 2018, AFM p 85, line 45, where it was put that the "shaving" discussion did not occur; see also closing address transcript (17 May 2018), AFM p 164, lines 20-39.

84 Appellant's submissions at [82(d)].

85 Appellant's submissions at [82(e)].

86 Appellant's submissions at [82(i)].

87 See Judgment at [60], [61], CAB p 124-125.

complainant trained with the Appellant in July 2013.[88] An annexure to Mr Pascoe's affidavit (not read in the CCA) indicated that there were various messages on the Appellant's phone with persons with the same first name as the complainant, using different telephone numbers.[89] The relevant calendar entry, however, clearly does not relate to the complainant. There is no entry in the calendar relating a person with that name in July 2013, as the Appellant claims. Whilst the calendar does refer to training a person with the same first name as the complainant at 1pm on 21 June 2013, the Appellant's text messages confirm that the person had *different* last name to that of the complainant.[90] Moreover, on both the complainant's evidence[91] and the Appellant's ERISP,[92] the calendar entry must refer to someone other than the complainant.

44. As to the asserted generation of a "contact" for the complainant's number in 2014,[93] the Appellant is wrong to claim that this indicates "ongoing communication" between them, in light of his failure to identify any communication that actually occurred. No such communication could be established by means of the generation of the contact.

45. The claim that the Appellant was deprived of identifying other clients in the relevant period who could give evidence of training in Alder Park[94] is of no relevance. The complainant was not challenged on her evidence that she never attended Alder Park with the Appellant for training sessions. It was not otherwise in dispute that the Appellant otherwise had conducted training sessions at Alder Park, as well as various other locations. Furthermore, in an annexure to the Appellant's solicitor's affidavit (not read in the CCA), there is a message dated 25 February 2013 at 5:32am saying "training at Hudson Park this morning",[95] demonstrating that the Appellant was conducting morning training sessions at Hudson Park, and supporting the evidence at trial from the

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88 Appellant's submissions at [81(c)], [82(h)].

89 See Annexure R to the Affidavit of Trevour Pascoe affirmed 4 November 2019, AFM p 384, 385.

90 See RFM p 259, 260 (calendar entries 199 and 207), 288 (text messages)

91 The complainant's evidence was that by January 2013 she had moved out of the Appellant's house, and did not see him again until 2016 when she was working at a Chinese restaurant in Adamstown: Transcript, 16 May 2018, p 101 (AFM p 62).

92 The Appellant said in his ERISP (MFI 11 at trial) that after the complainant moved out of his house he never saw her again, save at the Adamstown United Sports Club where she worked: Q107-113, RFM p 36-37.

93 Appellant's submissions at [81(d)].

94 Appellant's submissions at [82(a)].

95 Annexure P to the Affidavit of Christopher O'Brien sworn 1 November 2019, AFM p 351.

complainant, her father and Lynn Burchill as to training at that venue.[96]

46. Finally, the Appellant says he lost a real opportunity to cross-examine on the independence of Lynn Burchill.[97] The basis for that submission is unclear, given he was at no stage precluded from making his own inquiries via social media about Ms Burchill (as Mr Pascoe later did) simply because he did not have the Cellebrite download. There was no evidence before the CCA (and the Appellant does not now point to any evidence) suggesting that the Cellebrite download included information undermining the "independence" of Ms Burchill. The Appellant expressly withdrew submissions to that effect in advance of the CCA hearing.[98] The CCA considered that withdrawal was proper, but went on to address the material relied on in support of the submissions that had been withdrawn.

47. Even taking the results of Mr Pascoe's investigations (evidence which was not admitted in the CCA and was gathered from Facebook, rather than the Cellebrite download)[99] at their highest, the CCA correctly held (at [46]) that this material did not detract from Ms Burchill's independence in the only relevant sense – as a participant in early morning boot camps in Hudson Park who recalled that the Appellant had a key to the toilet block. No warning under s 165 of the *Evidence Act 1995* could have been warranted.[100]

48. The case against the Appellant was strong. The complainant's evidence was clear, with appropriate and convincing attention to the details of the events in question, including surrounding circumstances and subsequent events and conversations[101]. Her credit was not adversely affected by cross-examination. She was supported by complaint evidence in relation to what she had told Neva Williams, initially in 2013 or 2014[102] and by Ms Williams's evidence of two conversations with the complainant.[103] The complainant's

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96 Together with the inference available from exhibit D (the unsigned licence relating to Hudson Park, RFM p 20-25).

97 Appellant's submissions at [82(f), (g)].

98 Judgment at [46], citing the Appellant's supplementary submissions below at [9(c) and (d)], RFM p 128.

99 Affidavit of Trevour Pascoe sworn 4 November 2019 at [13]-[35] and Annexures A-M (AFM p 354-355, 361-373).

100 Cf Appellant's submissions at [83].

101 See eg her evidence in relation to the digital penetration of her vagina by the Appellant (count 4), transcript 16 May 2018, AFM p 51; and the subsequent conversation with the Appellant on the way home (AFM p 54); and her description of the events comprising count 7 (AFM p 56).

102 AFM p 100-101.

103 Transcript, 16 May 2018, AFM p 89-90.

evidence was further supported by the evidence of Lynn Burchill that the Appellant conducted boot camps at Hudson Park, and that he had a key to the toilets.[104] It was not put to Ms Burchill in cross-examination that there was no training at Hudson Park, or that the Appellant did not have a key to the toilets. This evidence clearly contradicted the Appellant's version of events (as put to the complainant in cross-examination), but no aspect of the CCA appeal questioned the competence of trial counsel. As a practical matter, Ms Burchill's credit was never in issue, and the Appellant remains unable to point to any evidence of a relationship between Ms Burchill and the complainant, or any communication between them. The Cellebrite download did not contain any information capable of contradicting the evidence of the complainant and Ms Burchill that the Appellant had been in possession of a key to the male toilets at Hudson Park.

49. Furthermore, in one significant respect, evidence of the contents of the Cellebrite download would have had the tendency to strengthen the Crown case, because it was capable of showing that the Appellant lied to police in his ERISP when he feigned a lack of knowledge of Hudson Park[105] (a lie which could be relied on as demonstrating a consciousness of guilt, but which at least would reflect adversely on his credit). No conclusion could be drawn that the Appellant's guilt was not established beyond reasonable doubt, such that the verdict cannot be allowed to stand. The appeal should be dismissed, with no order for costs (as are sought in the notice of appeal).

PART VII: ESTIMATE OF TIME

50. The Respondent estimates that it will require one and a half hours for its oral argument.

Dated 8 March 2021

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[104] Transcript, 17 May 2018, AFM p 133-139.

[105] See Annexure P to the Affidavit of Christopher O'Brien sworn 1 November 2019, AFM p 351; ERISP transcript Q78-82, RFM p 34.

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S235 of 2020

Between:

Scott Edwards
Appellant

and

The Queen
Respondent

ANNEXURE

RESPONDENT'S LIST OF RELEVANT STATUTORY PROVISIONS

1. *Crimes Act 1900* (NSW), ss 66C, 66M (version as in force 5 October 2012 – 30 June 2013)

2. *Criminal Procedure Act 1986* (NSW), ss 33, 134, 141, 142 (version as in force 30 April 2018 – 14 June 2018)

3. *Criminal Appeal Act 1912* (NSW), s 6 (version as in force 22 November 2019 – 26 November 2020)

4. *Director of Public Prosecutions Act 1986* (NSW) s 15A (version as in force 30 April – 27 November 2018)

5. *Evidence Act 1995* (NSW) s 165 (version as in force 1 July 2015 – 14 June 2018)