HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	S235/2020
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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S235 of 2020

BETWEEN:

SCOTT EDWARDS
Appellant

and

THE QUEEN
Respondent

10 **RESPONDENT'S OUTLINE OF ORAL ARGUMENT**

Part I:

1. This outline is in a form suitable for publication on the internet.

Part II:

Extent of pre-trial disclosure

2. The appeal concerns the form of disclosure by the Crown, in circumstances where the Court of Criminal Appeal (**CCA**) did not accept that it was necessary for the Crown to "do more than make available in electronic form the information extracted from the appellant's own mobile handset": CCA at [60], Core Appeal Book (**CAB**) 124; RS [2]-[3].

20 3. The existence of the Cellebrite download was disclosed multiple times between September 2017 and May 2018, via:

(a) the statements of DSC Pacey and DSC Rowe included in the brief index served at committal in September 2017 (RFM 7-13, 18, 195);

(b) brief indexes emailed to the Appellant's solicitor and counsel on 16 and 17 April 2018 (CCA at [13], [33], CAB 110, 116, RFM 182-188, AFM 274-290) including an invitation to "let me know if there are any brief items you don't have";

(c) an email of 3 May 2018 attaching an updated brief index, inviting the appellant's solicitor to advise of any outstanding items "as a matter of urgency and I will provide those items to you" (RFM 189-94); and

30 (d) a Proposed Witness/Exhibit list supplied to the Appellant's solicitor on 8 May 2018 (CCA at [14], CAB 110, AFM 294).

No steps were taken by the Appellant's solicitor to obtain a copy of the Cellebrite download until 18 May 2018, after closing addresses but prior to the summing-up: CCA [29]-[34], CAB 114-116; RS [7]-[11], [28].

4. The whole of the evidence below as to the contents of the download is set out in CCA [35], CAB 116. The Appellant did not read large portions of his solicitor's affidavit in the CCA, withdrew a number of his earlier submissions prior to the hearing of the appeal, and made multiple concessions, including that nothing on the face of the Cellebrite data "categorically" impeached Lynn Birchill's credibility: RS [12], [14], [16]. The CCA

regarded the withdrawal of submissions as to Ms Birchill's independence as "properly made": CCA [46], CAB 118-119.

5. There was no evidence concerning whether the phone that was the source of the Cellebrite download (seized upon the Appellant's arrest in 2017) was the same one he had used at the time of the offending in 2012: RS [13]. The Appellant at no stage sought an expert examination of the Cellebrite download or handset: RS [42].

Common law duty of disclosure

6. The extent or content of the prosecution's duty of disclosure at common law (derived from *R v Melvin and Dingle*, Central Criminal Court, 20 December 1993, unreported) in an individual case may be influenced by considerations of 'fairness to all sides': *R v H* [2004] 2 AC 34 at 146 (Tab 34); *Ragg v Magistrates' Court of Victoria* (2008) 18 VR 300 at [77]-[78] (Tab 28). The common law duty may be satisfied by disclosure of the existence of documents and making those documents available to the legal representatives of an accused person to inspect: *R v Reardon* [2004] NSWCCA 197 at [95]; *R v Livingstone* (2004) 150 A Crim R 117 at [55]-[58] (Tab 39). It was satisfied by disclosure of that kind in the circumstances of the present case: RS [18]-[20], [26].

7. The duty will not be satisfied in an instance where the defence is obliged to "fossick for information" in the manner described in *Grey v The Queen* (2001) 75 ALJR 1708 (***Grey***) at [23] (Tab 25), such as by alerting an astute legal representative to the existence of a document not included on a list of documents made available by the prosecution: *Livingstone* at [58]; RS [22]. In the present case, there could be no argument that the Appellant was required to "fossick" to discover the Cellebrite download: RS [23]-[25].

8. The case law relied upon by the Appellant does not provide authority for the proposition that the Crown breached its duty of disclosure. There is a meaningful difference between a complete failure to disclose a document or information of which an accused person has no knowledge (as in *Grey*, *Mallard v The Queen* (2005) 225 CLR 125 (Tab 15), *R v Brown* [1998] AC 367 (Tab 29) and *Eastman v Director of Public Prosecutions (No 13)* [2016] ACTCA 65 (Tab 23)) and disclosure that a download has been created from an accused's own mobile phone handset: RS [34]-[38]; cf Reply [10]. The CCA was correct in recognising the significance of the downloaded information having been extracted from the Appellant's own phone handset: CCA at [50], [51], [60], [61], CAB 120, 124-125.

Statutory duty of disclosure

9. The *Criminal Procedure Act* 1986 (NSW) (**CPA**) distinguishes between "disclosure" and provision, or production, of a document: ss 33, 149D(1). Section 142(1)(i) of the CPA, upon which the Appellant relies (Reply [2]), creates an exception for prior disclosure to the accused of information, documents or other things in the prosecutor's possession.

That is what occurred in the present case. The Cellebrite download was "otherwise disclosed" for the purposes of s 142(1)(i): RS [26]-[32].

10. Contrary to the Appellant's submission (Reply [3]), s 62 of the CPA (relating to disclosure required at the committal stage) had no application in the present case, having commenced after the date of his committal, which occurred on 11 October 2017. At the time of the Appellant's committal, s 75 of the CPA required service of written statements "relating to the offence" and proposed exhibits identified in those statements (or a notice relating to inspection of them).

No substantial miscarriage of justice

11. If the Court was to find there had been a breach of prosecutorial disclosure obligations, it should nevertheless conclude that there has not been any material procedural irregularity producing a miscarriage of justice because of the nature of the alleged breach and the content of the undisclosed material: cf *Grey* at [8], [9], [23], RS [39].

12. If, contrary to the above, there was any miscarriage of justice, no substantial miscarriage was occasioned as a result of the breach of disclosure obligations, such that the proviso should apply. The CCA was correct to hold that the highest the Appellant's case rose in relation to information on the Cellebrite download was the identification of another potential witness (Ms Elliott), whose evidence was "most unlikely to have affected the trial": CCA at [61]. In this Court he has not identified any stronger case in relation to the information on the Cellebrite download: RS [41]-[49], cf Reply [11]-[16].

13. The Appellant was not deprived of the possibility of a fair trial, in circumstances where:

(a) there was no evidence at trial beyond that of the complainant about the receipt of a text or SMS message from the Appellant in 2012 or 2013, it was not put to her that this message was not sent and there is no evidence to suggest that the Cellebrite download proved that the Appellant had not sent any such message: RS [42];

(b) prior to the CCA hearing, the Appellant expressly withdrew submissions suggesting that Lynn Birchill was not an independent witness (RFM 128), a withdrawal the CCA regarded as "properly made", including because even taking the evidence on which they were based (not admitted in the CCA) at its highest, the CCA found that it did not detract from Ms Birchill's independence in the relevant sense as a participant in early morning boot camps at Hudson Park, who recalled the Appellant had a key to the toilet block: CCA [46], CAB 119, RS [46]-[47].

Dated: 19 May 2021

Lloyd Babb SC **Joanna Davidson**