



The greater public interest in maintaining the integrity of the criminal justice system

Ann Bonnor reports on
AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym) [2018] HCA 58

On 5 November 2018, the High Court unanimously revoked special leave to appeal in two proceedings, brought by the Chief Commissioner of Victoria Police (AB) and a police informer (EF¹) against a decision of the Victorian Court of Appeal. The revocation enabled the Victorian Director of Public Prosecutions (CD) to disclose information contained in a report prepared by the Victorian Independent Broad-based Anti-corruption Commission (IBAC) to a number of convicted persons. The information concerned the way in which Victoria Police had deployed EF in obtaining those persons' convictions.

The reasons given by the Court for revok-



ing special leave explain why the public interest against disclosure of EF's identity to the convicted persons needed to be subordinated to the prosecution's duty of disclosure and the integrity of the criminal justice system.

The Court's reasons were made public on 3 December 2018. On the same day, the Victorian Premier announced a Royal Commission to inquire into Victoria Police's recruitment and management of EF.

Background

While purporting to act as counsel for convicted persons (identified as Atonios Mokbel and six associates), EF provided information to Victoria Police that had the potential to undermine those persons' defences to criminal charges of which they were later convicted. EF also provided information to police

about other persons for whom she had acted as counsel and who later made statements against the convicted persons.

Information concerning the relationship between EF and Victoria police was contained in an IBAC report, which was provided to the Director of Public Prosecutions. The Director concluded that he was under a duty to disclose information from the report to the convicted persons. Victoria Police determined that if this occurred, the risk of death to EF would become 'almost certain'.

The Chief Commissioner and EF sought declarations in the Victorian Supreme Court that the information was subject to public interest immunity, such that the Director was not permitted by law to make the proposed disclosures. The proceedings were heard in camera (including in the High Court), without notice to the convicted persons but with their interests represented by amici curiae, and publication was suppressed until 3 December 2018.

On 19 June 2017, Ginnane J dismissed the public interest immunity claim, deciding that whilst there was a clear public interest in preserving the anonymity of EF, there was a competing and more powerful public interest in favour of disclosure. This lay in the assistance that the information might afford the convicted persons in having their convictions overturned and, more fundamentally, in order to maintain public confidence in the integrity of the criminal justice system. The Court of Appeal dismissed appeals brought by the Chief Commissioner and EF against this decision.

The High Court's decision

Special leave was granted to the Chief Commissioner and EF to appeal against the decision of the Court of Appeal.

It was clear from written submissions that the only arguable issue was whether it was no longer possible to adequately protect the safety of EF and her children in the event of disclosure. The Court sought and was provided with further evidence, the effect of which was that protection of EF and her children may be adequate provided that EF agreed to enter into a witness protection programme.

Given this evidence, and after further

argument, the Court revoked special leave. In so doing, the Court explained that it was essential in the public interest for the information to be disclosed to the convicted persons notwithstanding the countervailing public interest in non-disclosure.

The Court acknowledged the clear public

*'It is greatly to be hoped that
it will never be repeated'*

interest in maintaining the anonymity of a police informer. The situation in this case, however, was 'very different, if not unique, and it is greatly to be hoped that it will never be repeated'.

First, EF's actions in purporting to act as counsel for the convicted persons, while covertly informing against those persons, were 'fundamental and appalling breaches' of EF's obligations as counsel to her clients and her duties to the court. Second, Victoria Police were guilty of 'reprehensible conduct' in knowingly encouraging EF to do as she did. Police were involved in 'sanctioning atrocious breaches' of their sworn duties.

As a result, the prosecution of each convicted person was corrupted in a manner which debased the fundamental premises of the criminal justice system. The public interest favouring disclosure was compelling: the maintenance of the integrity of the criminal justice system demanded that the information be disclosed and that the propriety of each convicted person's conviction be re-examined in light of the information.

In these circumstances, the public interest in preserving EF's anonymity had to be subordinated to the integrity of the criminal justice system. This was despite evidence that EF and her children would be at grave risk of harm unless EF agreed to enter into the witness protection programme, that she had declined to enter the programme, and that Victoria Police may have borne a large measure of responsibility for putting EF in the position in which she found herself.

The Court acknowledged the importance of honouring assurances of anonymity of

the kind that were given to EF. However, 'where, as in this case, the agency of police informer has been so abused as to corrupt the criminal justice system, there arises a greater public interest in disclosure to which the public interest in informer anonymity must yield'.

On 4 December 2018, the President of the NSW Bar Association, Tim Game SC, circulated a message to members, drawing attention to the decision and reminding barristers of the longstanding position that barristers' paramount duty is to the administration of justice.

Attention was also drawn to the words 'by all proper and lawful means' in the professional rule which obliges barristers to promote a client's best interest, and to the fact that that the *Legal Profession Uniform Conduct (Barristers) Rules 2015* do not provide any means by which a barrister could ever be complicit in criminal conduct – to the contrary, this is precluded by ethical responsibilities and compliance with the law.

ENDNOTES

- 1 On 28 February 2019, Nettle J made orders protecting the identity of EF's children: AB (*a pseudonym*) v CD (*a pseudonym*); EF (*a pseudonym*) v CD (*a pseudonym*) [2019] HCA 6. Non-publication orders over EF's name expired on 1 March 2019.