PUBLIC INTEREST IMMUNITY AND PROCEDURAL FAIRNESS

HT v The Queen [2019] HCA 40; 93 ALJR 1307*

By Ann Bonnor

In *HT v The Queen* [2019] HCA 40; 93 ALJR 1307 the High Court considered a situation where a sentencing court was required to take into account assistance provided by the offender to law enforcement authorities, yet evidence of that assistance contained highly sensitive criminal intelligence. In that context the court addressed requirements of procedural fairness, principles of natural and open justice, and limits to the doctrine of public interest immunity.

Factual background

HT pleaded guilty to counts of obtaining money by deception and dishonestly obtaining a financial advantage (ss 178BA(1) and 192E(1)(b) *Crimes Act 1900* (NSW)). The Crown appealed, alleging that the sentence imposed was manifestly inadequate. The NSW Court of Criminal Appeal (CCA) allowed the appeal and resentenced HT to a higher sentence.

HT was a registered police informer. In the District Court sentence proceedings, an affidavit by a police officer detailing HT's assistance to authorities (Exhibit C), was admitted into evidence. The sentencing judge took Exhibit C into account in discounting HT's sentence pursuant to s 23 of the *Crimes (Sentencing Procedure) Act* 1999 (*'C(SP) Act'*). The Crown Prosecutor was given access to Exhibit C, but HT's counsel was not. Rather, the Commissioner of Police had presented HT's counsel with two options: first, if counsel were to have access to the affidavit to be provided to the court, the affidavit would be highly redacted (and much shorter); alternatively, if counsel agreed not to require access to the affidavit, the affidavit would be lengthy, and inferentially more favourable to HT. Counsel chose the latter.

In the CCA, two affidavits relied upon by the Commissioner were disclosed to HT's counsel. A third, which identified particular difficulties concerning disclosure in HT's case, was not provided to HT's counsel. The Crown had access to all three affidavits. The CCA upheld the Commissioner's objection to HT's counsel having access, on public interest immunity grounds.

The CCA determined for itself the extent of the discount on sentence, taking into account all three affidavits.

The High Court's decision

The appellant appealed to the High Court on grounds including that she was denied procedural fairness, and that the CCA had no power to deny her access to Exhibit C.

The High Court (Kiefel CJ, Bell and Keane JJ; Nettle and Edelman JJ; Gordon J) allowed the appeal.

Denial of procedural fairness

Chief Justice Kiefel, Bell and Keane JJ observed that fundamentally, courts are obliged to accord procedural fairness to parties, including giving a reasonable opportunity of being heard – to appear and present one's case (at [17]). Similarly, Gordon J described procedural fairness as lying at the heart of the judicial function (at [64]).

It is a fundamental assumption of the adversarial system that parties know what case the opposite party seeks to make and how they seek to make it (at [17]). A party can only be in a position to put his or her case if the party is able to test and respond to the evidence (at [17]) (see also Gordon J at [64]). These rules do not have immutably fixed content and are essentially practical (at [17]).

All of the High Court justices agreed that HT was denied procedural fairness. Chief Justice Kiefel, Bell and Keane JJ found that denying defence counsel access to Exhibit C meant that the appellant 'did not have the opportunity to test the accuracy of the evidence' or of making submissions concerning the application of that evidence to s 23 of the *C(SP) Act*' (at [22]).

It was not to the point that the information in Exhibit C was not adverse to HT (at [25]). HT had no way of knowing if the exhibit detailed all of the assistance she had provided and the risks she had taken, and her counsel could not test the evidence (at [25]).

Justices Nettle and Edelman agreed, stating that it was 'self-evidently unacceptable for a sentencing judge to be provided with information pertinent to sentence that the prisoner may not see or upon which the prisoner may not give effective instructions to his or her counsel' (at [57]).

Gordon J found that the denial of procedural fairness arose because three different principles or sets of principles were not kept separate. First, what material was immune from production (public interest immunity); secondly, how confidential material might be produced to an opposing party before trial (confidentiality); and thirdly, how confidential evidence might be adduced but not otherwise disclosed (suppression or non-publication) (at [67]). Her Honour emphasised that these different principles applied at different stages of litigation, were intended to achieve different objectives and had different sources of power.

Public interest immunity

Chief Justice Kiefel, Bell and Keane JJ observed that while the law accepts that there may be a public interest in certain classes of documents being immune from disclosure, the non-disclosure results from the objection to their *production* being upheld (at [28]–[29]; see also Gordon J at [69]). Public interest immunity has nothing to say about whether a document should be admitted or, once *admitted*, whether or by whom it is seen (at [29]).

Chief Justice Kiefel, Bell and Keane JJ held that the 'closed material procedures', by which documents are withheld from a party, are fundamentally different from public

interest immunity procedures, not least because public interest immunity procedures respect natural justice principles (at [32]). Where a public interest immunity claim is unsuccessful, documents will be produced and thereby disclosed. Where a public interest claim is successful, the documents will not to be produced and are thereby not available to either party and the court may not use them (at [32]). 'There is no question of unfairness or inequality' (at [32]).

The withholding of evidence such as Exhibit C could not be said to be the application of public interest immunity by analogy. In reality, it involved the creation of a new rule, which would have blanket application to cases such as HT's and which would reduce procedural fairness to nought (at [34], see also at [55], per Nettle and Edelman JJ).

Sensitive information – tailoring orders

Chief Justice Kiefel, Bell and Keane JJ held that it should not be assumed that procedural fairness should altogether be denied in order that sensitive information be kept confidential (at [43]). Consistently with the general rule of the common law regarding fairness in the conduct of proceedings, the concern of the court is to avoid practical injustice (at [46]).

Their Honours acknowledged that courts have modified and adapted the content of the general rules of open justice and procedural fairness in particular cases. Examples include orders for non-publication; non-disclosure of evidence; orders made in trade secrets litigation such as placing 'confidentiality rings' around disclosure or ordering protective limitations (at [43]). While HT was not within a well-known class such as wardship or trade secrets, acceptance of these cases made it difficult to suggest that the court lacks jurisdiction to vary the basic principles of open and natural justice, or to hold that the proper administration of justice may not require it (at [46]). A case where a tailored order is not possible may be rare (at [50]). While it was not necessary to decide the question, such a case may raise whether a confidentiality to a closed material procedure can be effective (at [50]).

Justice Gordon observed that, if a case for production is made, then a party should have as full a degree of appropriate disclosure as is consistent with adequate protection of any confidential information. A court is to balance these interests in a fashion that, to the extent possible, meets each of them (at [76]). This may be achieved by, for instance, regulating the taking and safeguarding of copies of documents; limiting their circulation; restricting disclosure; and restricting inspection (at [77]). Once material is admitted into evidence, courts have implied powers to limit the application of the open justice principle where necessary to secure the proper administration of justice. Any prohibition, such as by suppression or non-publication order, must do no more than is reasonably necessary to achieve the due administration of justice (at [82] and [85]).

Practices in sentencing proceedings

Section 23(2) of the *C(SP) Act* requires a sentencing court to have regard to assistance provided by the offender and the authority's evaluation of the assistance. The Commissioner of Police should put before a sentencing judge such evidence as is necessary to enable the sentencing judge comprehensively and fairly to assess these matters (at [49]; see also Gordon J at [87]). Indeed, Nettle and Edelman JJ identified this as part of the Crown's duty to the court (at [59]).

Chief Justice Kiefel, Bell and Keane JJ made clear that if such evidence gives rise to issues of confidentiality, the judge should be approached with a view to making tailored orders (at [87] and [88]).

Justices Nettle and Edelman emphasised that the competing needs of ensuring that sentencing judges are fully informed of matters prescribed by s 23(2) of the *C(SP) Act* and ensuring that confidentiality of sensitive information is not compromised, calls for a detailed legislative solution (at [56]). Denying a prisoner access to all or some of evidence of assistance could not be justified – if secrecy demands it, a plea hearing may be conducted *in camera*, or where necessary, orders may be made prohibiting or restricting disclosure (at [58] and [61]).

There was some dispute in *HT* as to whether what had occurred reflected common practice. However, in *T v The Queen* [2015] NSWCCA 28 at [15], the CCA had made reference to the offender's legal representatives not having a copy of 'assistance' documents being 'the usual practice' (at [48]). Justices Nettle and Edelman held that the practice of offering a 'choice' of the kind given HT's counsel, should cease – whatever the sentencing judge sees, the prisoner must also be able to see so that he or she can give full instructions to counsel (at [59]). This practice involves no real choice (see Kiefel CJ, Bell and Keane JJ at [25]). BN

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HT V THE QUEEN - POINTS OF PRINCIPLE

- An understanding of *HT* is critical where evidence of a sensitive or confidential nature is put before a sentencing court.
- Public interest immunity provides an immunity from *production* of relevant and otherwise admissible evidence in the course of litigation. If an objection on these grounds is upheld, the document cannot be admitted into evidence at all.
- However, enforcement authorities should put before a sentencing judge such evidence as is necessary to enable the judge to fully comprehend the assistance provided by the offender and an evaluation of that assistance from the perspective of the authority.
- If a question arises as to the need to keep some of that information confidential from the other party, the sentencing judge should be approached to make appropriate orders. Further orders may be fashioned, as necessary, if such information is admitted into evidence.
- In cases such as *HT*, it is difficult to conceive of orders not being able to be tailored to meet the competing demands. Occasions on which an appropriate order is impossible, or evidence of assistance cannot be drafted to completely convey the assistance without compromising persons' safety or operations' integrity, should be rare.
- Where evidence of assistance is provided to a sentencing judge in a criminal proceeding, any confidentiality, prohibition or suppression orders – orders which vary or modify the basic principles of open and natural justice – should not do more than what is reasonably necessary for the purposes of securing the administration of justice. Further, Nettle and Edelman JJ stated that it should be regarded as clear that, absent statutory intervention, it is not open – nor justifiable – to order that an offender be denied access to that evidence (at [58]).