The uncertain boundaries of prosecutorial disclosure

Troy Anderson SC reports on *Edwards v The Queen* [2021] HCA 28

The High Court has considered the Prosecution's duty of disclosure under s 141 of the *Criminal Procedure Act 1986* (NSW) (CPA) and the contents of a Prosecution Notice under s 142 in the context of a large amount of data recovered from a phone. The Court expressed differing views as to whether the provisions required that such material be disclosed.

The appellant had been convicted in the District Court of six counts of aggravated sexual intercourse with a person aged above 10 and under 14 years of age, contrary to s 66C(2) of the *Crimes Act 1900* (NSW). The argument on appeal was that the trial miscarried by reason of the Prosecution's failure to provide to the appellant's lawyers in advance of the trial, a hard drive containing a copy of data stored on the appellant's mobile telephone (the Cellebrite Download). The appellant's mobile phone had been seized by police when the appellant was arrested. The download comprised over 60,000 files, including over 20,000 text messages, the equivalent to 5,900 pages if printed. Importantly, the data was capable of being searched.

The existence of the Cellebrite Download had been referred to in the witness statements of two police officers served as part of the brief of evidence, the Prosecution Notice filed under s 142 of the CPA and two 'Brief index' documents which the Prosecution had provided to the appellant's legal team. However, the Cellebrite Download itself was never provided, nor was it requested by the appellant until after the trial had adjourned, pending the trial judge's summing up. At that point the appellant's lawyer asked the Prosecution how a certain witness came to the attention of the officer in charge. The Prosecution responded that details were obtained from the Cellebrite Download. Later that day, the appellant's lawyer requested a copy of the Cellebrite Download and a copy was provided – the day after the appellant's conviction.

Consideration was given by the Court to s 141(1) of the CPA which required the Prosecution Notice to contain, among other

things, ' …*(i) 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.*'

The issue on appeal was whether the appellant had lost the chance of a different outcome at the trial through a miscarriage of justice occasioned by the Prosecution's failure to provide the appellant with a complete copy of the Cellebrite Download prior to the trial.

The High Court (Kiefel CJ, Keane, Edelman, Steward and Gleeson JJ) unanimously held that the verdict was not affected by a miscarriage of justice and dismissed the appeal, but the Court was not unanimous as to whether the Cellebrite Download should have been served on the appellant as part of its duty of disclosure.

The joint judgment of Kiefel CJ, Keane and Gleeson JJ reaffirmed that the Prosecution's failure to disclose all relevant evidence to an accused may, in some circumstances, require the quashing of a verdict of guilty. However, in this instance, their Honours stated that with the benefit of access to the Cellebrite Download, the appellant was unable to identify how its contents, either as a whole or in relation to particular data, 'would reasonably be regarded as relevant to the prosecution case or the defence case', or are 'relevant to the reliability' of the complainant, or any respect in which his entitlement to a fair trial according to law was adversely affected by not being provided with a copy of the Cellebrite Download. Further, that the appellant's argument as to the forensic value of the Cellebrite Download for his case was put at the level of speculation. The joint judgment held that whatever the precise scope of s 142(1)(i), the provision does not extend to all information in the possession of the prosecutor or to information that does no more than provide a potential avenue for inquiry (at [24], [25] and [26]). Their Honours' comment in the latter respect is assumed to be limited to the application of s 142(1)(i), otherwise it is a narrowing of the prosecution's common law duty to disclose referred to in cases such as *Gould v DPP (Cth)* [2018] NSWCCA 109 at [65].

It was for similar reasons that Edelman and Steward JJ rejected the appeal but their Honours took a different approach to the scope of the Prosecution's duty of disclosure (at [35]). Their Honours considered the meaning of 'disclosure' as required by the CPA and held that the meaning of 'disclosure' in Division 3 of the CPA, is a default requirement whereby something should be provided unless the thing has no physical existence (at [57]). Further, that a 'download' was definitely a document (at [62]). The term '*would reasonably be regarded as relevant*' which appears at s 141(1)(i) was of a high level of generality and required assessing fairly the inherent likelihood that an item is going to be relevant, excluding anything that is only possibly or remotely relevant (at [63] and [64]).

Their Honours also held (at [68] – [72]) that reference to documents '*not otherwise disclosed*' in s 142(1)(i) refers to documents disclosed otherwise than by Prosecutor Notice, but it does not permit the Prosecution to only disclose the existence of physical documents. BN