Supreme Court
New South Wales

Medium Neutral Citation:	**Bradley v Senior Constable Chilby [2020] NSWSC 145**
Hearing dates:	24 February 2020
Decision date:	27 February 2020
Jurisdiction:	Common Law
Before:	Adamson J
Decision:	(1) Grant leave to the plaintiff to appeal in respect of grounds 1 and 2 in the summons filed on 7 November 2019. (2) Allow the appeal. (3) Set aside the decision of Clisdell LCM dismissing the plaintiff's notice of motion filed on or about 15 April 2019 and, in lieu thereof, order that proceedings 2018/277772 in the Local Court of New South Wales at Wollongong be stayed until the defendant or other prosecutor appointed to prosecute the matter complies with her, or his (as the case may be), duty of disclosure. (4) Otherwise remit the matter to the Local Court to be heard by a magistrate other than Clisdell LCM. (5) Order the defendant to pay the plaintiff's costs of the proceedings in this Court, such costs to be paid within 14 days of an agreement as to the amount of such costs or the issue of a certificate of assessment of any such costs, whichever is the earlier.
Catchwords:	CRIME — Appeal and review — Appeal from Local Court to Supreme Court — By person against whom an interlocutory order is made with leave on a question of law alone CRIME – stay of proceedings – alleged inadequacy of pre-trial disclosure by police prosecutor – temporary stay granted CRIME – duty of disclosure – general principles – application to summary proceedings

Legislation Cited:	Crimes (Appeal and Review) Act 2001 (NSW), ss 53 55, 72 Criminal Procedure Act 1986 (NSW), s 183 Director of Public Prosecutions Act 1986 (NSW), s 15A Evidence Act 1995 (NSW), s 165 Law Enforcement (Powers and Responsibilities) Act 2002 (NSW), s 99
Cases Cited:	Bimson, Roads and Maritime Services v Damorange Pty Ltd (No 2) [2014] NSWSC 827 Cunningham v Cunningham (No 2) [2012] NSWSC 954 Dietrich v The Queen (1992) 177 CLR 292; [1992] HCA 57 Gould v Director of Public Prosecutions (Cth) [2018] NSWCCA 109; (2018) 359 ALR 142 Grey v The Queen [2001] HCA 65; (2001) 75 ALJR 1708 Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8 Mallard v The Queen (2005) 224 CLR 125; [2005] HCA 68 Marwan v Director of Public Prosecutions [2019] NSWCCA 161 Minister for Immigration and Citizenship v Li (2013) 249 CLR 332; [2013] HCA 18 New South Wales v Robinson [2019] HCA 46; (2019) 94 ALJR 10 R v Garofalo [1999] 2 VR 625; [1998] VSCA 145 R v Jenkin (No 2) [2018] NSWSC 697 R v Lipton (2011) 82 NSWLR 123; [2011] NSWCCA 247 R v Mokbel (Ruling No 1) [2005] VSC 410 R v PL [2009] NSWCCA 256; (2009) 261 ALR 365 R v Reardon (No 2) (2004) 60 NSWLR 454; [2004] NSWCCA 197 R v Spiteri (2004) 61 NSWLR 369; [2004] NSWCCA 321 Re K [2002] NSWCCA 374 Wilson v Police [1992] 2 NZLR 533; [1991] NZCA 179
Category:	Principal judgment
Parties:	Harley Bradley (Plaintiff) Senior Constable Deborah Chilby (Defendant)
Representation:	Counsel: M Avenell (Plaintiff) K Curry (Defendant) Solicitors: Legal Aid NSW (Plaintiff) NSW Police Force (Defendant)
File Number(s):	2019/350537
Decision under appeal	**Court or tribunal:** Local Court
	Date of Decision: 28 May 2019

Before: Clisdell LCM

File Number(s): 2018/277772

JUDGMENT

Introduction

1 By summons filed on 7 November 2019, Harley Bradley, the defendant in criminal proceedings in the Local Court (the accused), seeks leave to appeal pursuant to s 53(3)(b) of the ***Crimes (Appeal and Review) Act 2001*** (NSW) (the Act) against the dismissal by Clisdell LCM of his application for a temporary stay of proceedings. The defendant in the proceedings in this Court is Senior Constable Deborah Chilby, who was the police prosecutor in the Local Court (the Prosecutor).

2 The accused's application for a stay was made by notice of motion filed on 15 April 2019, in which the following relief was claimed:

> "**ORDERS SOUGHT**
>
> In the exercise of the Court's implied power to safeguard a fair hearing and prevent injustice:
>
> 1 An order that the prosecution disclose to the defendant the following material:
>
> 1.1 Criminal history of Katie O'Connor (DOB 9/3/1982) (Ms O'Connor);
>
> 1.2 NSW Police Force Facts Sheets relating to entries on Ms O'Connor's criminal history;
>
> 1.3 NSW Police Force Facts Sheets relating to criminal proceedings against Ms O'Connor in the Local Court at Port Kembla and Wollongong (Case nos. 2019/00012050; 2019/00036031 and 2019/00061190);
>
> 1.4 All other material in the possession of NSW Police Force or available to NSW Police Force that is relevant to the credibility and/or reliability of Ms O'Connor;
>
> 1.5 All COPS entries related to H68886052 [the present charge];
>
> 1.6 Any record of the conversations between SC Chilby and Sgt Huggins; and between SC Chilby and the Lake Illawarra Prosecutors contained in the COPS entries or otherwise (see in relation to 17 June 2018, statement of SC Chilby at [27]) and in relation to 29 June 2018, statement of SC Chilby at [30]);
>
> 1.7 Custody Management Record for the defendant on 17 June 2018; and
>
> 1.8 Any other material which could reasonably be seen as capable of assisting the defence case; and
>
> 2 A temporary stay of proceedings until such time as the prosecution complies with its duty of disclosure.

The facts

3 The proceedings in the Local Court arise out of the following facts.

4 In a statement made on 8 June 2018, Katie O'Connor (the complainant) said that on 28 April 2018 she and the accused were at the home of a friend and that, at some point in the evening, the accused bit the middle finger of her left hand. She tried to extract it but, before the accused unclenched his teeth, her finger had been cut to the bone. The

complainant said that she was subsequently admitted to hospital for conditions which included depression, anxiety and bipolar disorder but discharged herself on 11 May 2018. On 19 May 2018, on the advice of her Department of Community Services caseworker, she reported the incident to police and subsequently made the statement referred to above on 8 June 2018.

5 On 17 June 2018, the Prosecutor arrested the accused who was transported in the rear cage of a police van to the Lake Illawarra Police Station where he was entered into the Custody Management Record. I infer that when the Prosecutor arrested the accused, she suspected, on reasonable grounds, that the accused had committed the offence of assault occasioning actual bodily harm: s 99 of the ***Law Enforcement (Powers and Responsibilities) Act 2002*** (NSW) and ***New South Wales v Robinson*** [2019] HCA 46; (2019) 94 ALJR 10 at [109]-[115] (Bell, Gageler, Gordon and Edelman JJ). The reasonable grounds presumably derived from what the complainant had said in her statement.

6 The Prosecutor, who was assisted by Senior Constable John Finch, conducted an interview with the accused as an Electronically Recorded Interview with a Suspected Person (ERISP). The accused denied the complainant's account. He admitted that he had bitten the complainant but said that he had done so in self-defence as she had put him in a headlock and refused to release him. According to the accused, the complainant had been under the influence of drugs. As a consequence of the accused's answers in the ERISP, it must have been plain to the Prosecutor that, if the accused was charged and prosecuted, the issues would be self-defence, the complainant's propensity to violence and her drug use, credibility and reliability.

7 At the conclusion of the ERISP, the accused was released pending further investigations.

8 The Prosecutor said in her statement of 5 November 2018 (which was served as part of the brief of evidence):

> "27. I had a conversation with Sergeant HUGGINS. As a result of the conversation I released the accused from custody for the purpose of further investigations.
>
> …
>
> 30. On 29 June 2018 I had a conversation with Lake Illawarra Prosecutors regarding the biting incident."

9 The Prosecutor then stated that she had tried to contact the complainant but was unsuccessful. When the Prosecutor finally made contact with the complainant she learned that the complainant had changed her telephone number. The Prosecutor asked the complainant for photographs of the injured finger which were provided on 27 August 2018.

10 On 3 September 2018 the accused was served with a court attendance notice which charged him with the offence of assault occasioning actual bodily harm.

11 On 17 October 2018, the accused appeared in the Local Court at Wollongong and entered a plea of not guilty to the charge.

12 On 29 October 2018, at the accused's request, the Local Court issued a subpoena to the Commissioner of Police to produce certain documents, including the complainant's criminal history. This item was subsequently narrowed by agreement and was confined to offences on the criminal history relating to "violence, drug use, and administration of justice offences, and any other entries on the history relevant to the mental health, credibility and reliability of [the complainant]."

13 On 21 November 2018 the Prosecutor served a brief of evidence which did not include the accused's ERISP, which was subsequently provided.

14 On 5 December 2018, the Local Court fixed the matter for hearing on 31 May 2019.

15 From October 2018, the Prosecutor and the accused's solicitor, Tim McKenzie, corresponded regarding the subpoena and the Prosecutor's disclosure obligations in the context of the proceedings.

16 On 4 April 2019 Mr McKenzie wrote to Senior Sergeant Ryan, the Senior Police Prosecutor at Wollongong Police Station. The letter was copied to the Prosecutor and to Makinson d'Apice, the lawyers who act for the Commissioner for Police on behalf of the Prosecutor in this matter. In this letter, Mr McKenzie summarised the prosecution's duty of disclosure by reference to authority and also attached an email dated 28 March 2014 from Superintendent Ian Dickson, the then Director, Police Prosecutors, which was addressed to police prosecutors throughout New South Wales and which purported to outline the nature and extent of the duty of disclosure. Of present relevance, the email summarised the relevant principles as follows:

> "Duty of Disclosure v Duty to Discover
>
> I would like to remind all Prosecutors about your duty of disclosure and the related subject of the duty to discover relevant evidence. I would also like to offer you some practical advice.
>
> Disclosure:
>
> The Police Prosecution Command SOPs (Role of the Prosecutor) makes it clear that Police Prosecutors have a duty to disclose information to the defendant in criminal proceedings that is relevant to the issues in the case they are prosecuting. Marco Carlon has previously provided very good information about that. I have attached that again to refresh your memory.
>
> In particular, the core requirement derives from the common law.
>
> In ***Mallard v R*** (2005) 224 CLR 125 Kirby J stated:
>
> > '***The applicable principles***: The foregoing review of the approach of courts, in national and international jurisdiction, indicates the growth of the insistence of the law, particularly in countries observing the accusatorial form of criminal trial, of the requirement that the prosecution may not suppress evidence in its possession, or available to it, material to the contested issues in trial. It must ordinarily provide such evidence to the defence. **Especially is this so where the material evidence may cast a significant light on the credibility or reliability of material prosecution witnesses or the acceptability and truthfulness of exculpatory evidence by or for the accused**.'
>
> The list of what material must be disclosed by the prosecutor cannot be stated exhaustively, but the disclosure obligation would certainly seem to extend to an obligation:
>
> - To provide statements of witnesses proposed to be called

> • To provide advanced notice of discrepancies between a statement and the evidence proposed to be led
>
> • To provide statements of witnesses not proposed to be called
>
> • **To provide prior convictions of prosecution witnesses and other material relevant to credit**
>
> • **To provide other material which could reasonably be seen as capable of assisting the defence case**
>
> • To provide all material relevant to mitigation of sentence
>
> This obligation of disclosure should be understood not as a stand alone obligation, but as a particular aspect of the prosecutor's broader obligations as a minister of justice playing a special and refined role in the criminal justice process."
>
> [Emphasis added.]

17 In his letter of 4 April 2019 Mr McKenzie sought disclosure of the material which was subsequently sought in prayer 1 of the notice of motion extracted above. He foreshadowed that, if the material sought was not provided, the accused would make an application for a temporary stay of the proceedings.

18 The Prosecutor responded by letter dated 11 April 2019:

> "In response to your letter:
>
> Documents to be disclosed
>
> Item 1 [item [1.1] in the notice of motion]: is being prepared via the subpoena
>
> Item 5 [item [1.5] in the notice of motion]: is being prepared via the subpoena
>
> Item 7: [item [1.7] in the notice of motion] Custody Management Records relating to the accused on 17 June 2018 – **Does not exist.**
>
> **All other items will not be supplied to the accused.**"
>
> [Emphasis added.]

19 Notwithstanding what the Prosecutor had said in her letter about item 7, the Custody Management Record in respect of the accused was provided to his legal representative on 3 May 2019.

20 On 14 May 2019 the Commissioner of Police produced a redacted version of the complainant's criminal history and the Computerised Operational Policing System (COPS) entry for the present charge. The accused was granted access to this material. The Prosecutor maintained her objection to production of the balance of the documents sought.

21 The accused's notice of motion was listed for hearing on 16 May 2019. The hearing was adjourned to 28 May 2019 in order that the Prosecutor could attend to give evidence and be cross-examined.

The hearing in the Court below

22 I note that the only particular items in prayer 1 of the notice of motion which remained in issue at the hearing of the notice of motion on 28 May 2019 were [1.2], [1.3] and [1.6]. The accused accepted that documents falling within item [1.1], [1.5] and [1.7] had been provided and that [1.4] and [1.8] were generally descriptive of what the accused contended the duty of disclosure entailed but did not seek identified documents.

23 In the Court below, Ms Graham, who appeared on behalf of the accused instructed by Mr McKenzie, read an affidavit by Mr McKenzie which annexed documents including the subpoena to the Commissioner of Police and the documents produced in answer to it; the facts sheet for the charge against the accused; the complainant's statement dated 8 June 2018; the Prosecutor's statement dated 5 November 2018; the transcript of the accused's ERISP; and correspondence between the solicitors which is referred to in more detail in the factual narrative set out above. Mr McKenzie was not cross-examined. Ms Graham relied on detailed written submissions which made extensive reference to authority. These submissions, dated 16 May 2019, were provided in advance of the hearing.

24 Sergeant Casey appeared for the Prosecutor at the hearing of the motion before the Court below on 28 May 2019. He indicated that he did not intend to adduce any evidence. He informed the court that the position of NSW Police, and therefore the Prosecutor, was that the disclosure obligations had been complied with. He confirmed that both the Prosecutor and Senior Constable Bourbonnais were present outside the court but that he did not propose to call them as witnesses and, accordingly, neither could be cross-examined by Ms Graham.

25 Sergeant Casey informed the magistrate of what occurred on 16 May 2019 as follows:

> "[I]t was agreed that I would make arrangements at the police station to the operational roster to change that to make her [the Prosecutor] available to be here today as well as Officer Bourbonnais who just happened to be at court on the 16th and I said, 'Here you go, look at all this material. I know it's not your case but please go away and see if there's any material to disclose to the defence' in an effort to try and settle the matter."

26 Ms Graham confirmed that she did not propose to call either officer on her application and had not subpoenaed either of them because of correspondence between the parties in which the police represented that the officer would be called by the police and would be made available for cross-examination.

27 Sergeant Casey then said, of present relevance:

> "The underlying notice of motion [is] in relation to facts sheets about past matters. In my submission I don't think the Court would have an issue with dealing with that case with the self-defence issue without them."

28 I note that, at that stage, the substantive hearing of the charge against the accused remained listed for 31 May 2019.

29 Ms Graham identified legitimate forensic purposes for the production of the documents set out in prayer 1 of the notice of motion. First, she submitted that the facts sheets for the offences of which the complainant had been convicted were potentially relevant or could open up a line of inquiry for the defence of the accused. Ms Graham said:

> "Your Honour those matters of violence, the matters pertaining to use of drugs and the matters revealing a history of dishonesty are all types of matters that are relevant or potentially relevant to the credibility of the complainant and to her account of who initiated the violence and the accused's account of self-defence, namely that it was the complainant who attacked him and initiated violence against him resulting in a self-defence response.
>
> It is your Honour obvious that the factual circumstances relating to each of those charges are matters that should be disclosed to the accused by the prosecution--

…

> --and it is not for the accused to be faced with a situation where they are not informed of all of the matters and face asking perhaps a risky question as was referred to by the High Court in ***Grey*** in cross-examination of the complainant. They are matters that obviously should be disclosed to the accused and to put the accused to a hearing in the absence of that disclosure would be plainly unfair."

30 Secondly, she submitted that the facts sheets relating to pending proceedings against the complainant were also relevant for the same reason.

31 Ms Graham submitted that records of the conversations in item [1.6] were required to be disclosed because they could open up a line of inquiry as to why the accused, having been arrested and released from custody, was subsequently charged.

32 In response, Sergeant Casey submitted:

> "…[U]ltimately based on the evidence that the Court has for the notice of motion for the disclosure by demand or court order or the application for a stay, ultimately there is insufficient evidence to satisfy the Court that there will be unfairness to a sufficient degree to warrant that motion being made, your Honour."

The magistrate's reasons for dismissing the notice of motion

33 At the conclusion of the hearing, the magistrate proceeded to give reasons and make orders ***ex tempore***. Because of the nature and extent of the grounds of appeal it is desirable to set out the reasons of the Court below at length:

> "This is a notice of motion on behalf of the accused Harley Bradley to compel the police to produce certain documents that are listed in para 1 of the notice of motion and, failing that production, a stay of proceedings on a temporary basis until the documents are disclosed.
>
> Prosecution disclosure is a well-known part of the criminal process and there is a requirement on prosecutors to act in accordance with those requirements.
>
> What is attempted here is to expand the nature of the duty to disclose to a level which would cause the criminal justice system to break. The situation is that both the common law and statute apply to what is required to be done by the prosecution. The ***Criminal Procedure Act*** sets out the requirements that the prosecution must follow in relation to a brief of evidence. …
>
> Accordingly the duty of a prosecutor has long remained that they are required to produce all relevant information and produce statements. We often see the case where the prosecution do produce statements which are adverse to their position. What has become clear over time is that prosecutors are not required to call witnesses who are adverse to their position, merely to disclose the evidence that they would be able to give. It then falls to the defence to determine whether or not they wish to call that evidence or not.
>
> What is sought here is what might be said to be the classic fishing expedition. We already know that the complainant has a fairly lengthy criminal history and, indeed, is on conditional liberty at the moment by way of intensive correction order sentences. She has an unenviable history relating to matters of violence, particularly dishonesty and some drug matters. However, that is a matter that can be put to her in cross-examination as to what she has done.
>
> Ms Graham says we do not know what she might say about that, that is perhaps true, but merely raising the issue of her criminal antecedents and the nature of her history by getting her to confirm that criminal history has some probative value for the accused without the necessity to then go through what would be mountains, potentially, of documents going back, in this case, 20 years.

The second thing that is sought is perhaps prospective matters to be disclosed for which the witness has not been yet dealt with by the Court. I cannot see that that would ever be something that would fall within the duty of a prosecutor to disclose because it may well amount to a disclosure of facts that are, in fact, wrong. And that could have a detrimental effect on the witness.

The next item I had already indicated to Ms Graham I was not going to entertain and that was everything in the New South Wales Police Force relating to the credibility of Ms O'Connor. That is a classic fishing expedition as to what might be there and does not fall, in my view, within the requirement of disclosure relevant to this particular case.

Finally, we had the catchall. If there is anything we missed in our wide searching fishing net let us just cast a second net to make sure we catch any material which could reasonably be seen as capable of assisting the defence case. I guess there might be some instances where Harley Bradley has been a witness for the prosecution and has given evidence which has been accepted by a court and the police might be in possession of a statement back five or six years ago in that respect. That would be caught by that particular clause. How it is remotely relevant to this sort of case is beyond me. In any event that would be within his knowledge probably in any event. But it just shows how wide the net has been cast to put upon the prosecution what they might be asked to do. This is clearly an attempt to frustrate the prosecution of this matter by putting the police to additional work and taking up the time of the Court on an exercise which can best be described as optimistic.

I am not satisfied that it is in the interests of justice for the police to produce any of the items sought by the defence. To do so would be to put a burden on the prosecution which would bring the criminal justice system in New South Wales potentially to a grinding halt. If it turns out that a superior court decides that that is the way the criminal justice system is to be run then I am happy for them to be courageous enough to make that decision, that is not a decision that I am prepared to entertain as a matter of practicality.

Will be [sic] Mr Bradley be denied a fair trial because of my decision? The short answer is no. The evidence against Mr Bradley is contained primarily in the statement of the complainant. This is a case where, at least on the evidence that's been put in the notice of motion before me, it is one against one. It appears there may have been another person present at the house, but it is not suggested that that person saw anything.

As to the severity of the injury and the likely penalty that might be imposed upon Mr Bradley, in fairness the police have disclosed in the police facts that, in fact, the injury may have been exacerbated by the treatment the complainant received at Wollongong Hospital when she was not obviously treated well the first time and ended up with a near gangrenous injury as a result. That is the sort of disclosure that the prosecution make as a matter of fairness and have done so.

It is suggested that the prosecution bears some malice to Mr Bradley because the officer-in-charge decided to be lazy and not check on whether or not the custody record was immediately available. The custody record is hardly relevant in any way, from what I have read, to a fact in issue in this case. But in any event the disclosure in the fact sheet of the fact that the injury has been exacerbated potentially by medical problems suggests to me that there is no malice borne by the senior constable, officer-in-charge, in respect of these proceedings and it is a long bow to suggest that one denial of a document which is almost irrelevant shows some malice towards the accused.

THE NOTICE OF MOTION IS DISMISSED."

Relevant legislation

This Court's jurisdiction

34 This Court's jurisdiction arises from Part 5 of the Act. Section 53 relevantly provides:

"**53 Appeals requiring leave**

…

(3) Any person against whom:

…

(b) an interlocutory order has been made by the Local Court in relation to the person in summary proceedings,

may appeal to the Supreme Court against the order, but only on a ground that involves a question of law alone, and only by leave of the Supreme Court.

…"

35 Section 55 of the Act provides:

"**55 Determination of appeals**

…

(3) The Supreme Court may determine an appeal against an order referred to in section 53 (3) … (b):

(a) by setting aside the order and making such other order as it thinks just, or

(b) by dismissing the appeal."

36 Section 72 of the Act provides:

"**72 Orders for costs**

An appeal court that orders an appellant or respondent to pay costs:

…

(b) must state a time within which the costs or other amount must be paid."

Provisions for service of brief for summary proceedings in the Local Court

37 Section 183 of the ***Criminal Procedure Act*** provides for the service of a brief of evidence as follows:

"**183 Brief of evidence to be served on accused person where not guilty plea**

(1) If an accused person pleads not guilty to an offence, the prosecutor must, subject to section 187, serve or cause to be served on the accused person a copy of the brief of evidence relating to the offence.

(2) The brief of evidence is, unless the regulations otherwise provide, to consist of documents regarding the evidence that the prosecutor intends to adduce in order to prove the commission of the offence and is to include—

(a) written statements taken from the persons the prosecutor intends to call to give evidence in proceedings for the offence, and

(b) copies of any document or any other thing, identified in such a written statement as a proposed exhibit.

(3) The copy of the brief of evidence is to be served at least 14 days before the hearing of the evidence for the prosecution.

(4) The Magistrate may set a later date for service with the consent of the accused person or if of the opinion that the circumstances of the case require it."

Provisions relating to the statutory duty of disclosure

38 The common law duty of disclosure is reflected in s 15A(1) of the ***Director of Public Prosecutions Act 1986*** (NSW) which provides:

"Law enforcement officers investigating alleged offences have a duty to disclose to the Director all relevant information, documents or other things obtained during the investigation that might reasonably be expected to assist the case for the prosecution or the case for the accused person."

39

It is also reflected in Division 3 of Part 2 of Chapter 3 of the ***Criminal Procedure Act 1986*** (NSW) which sets out the disclosure requirements for proceedings on indictment.

40 As is evident from the terms of s 183 of the ***Criminal Procedure Act***, the service of a brief of evidence is no substitute for compliance with the duty of disclosure since it is addressed to a different process. The terms of s 15A(1) of the ***Director of Public Prosecutions Act*** do not apply to prosecutions conducted by police prosecutors in the Local Court where the Director of Public Prosecutions is not involved.

41 As there is no express statutory provision which addresses the disclosure obligations of police prosecutors who are prosecuting summary offences in the Local Court, the duty of disclosure imposed on those prosecutors is the common law duty established by the authorities which are addressed below.

Grounds of appeal

42 The accused seeks leave to appeal on the following grounds:

> "1. Magistrate Clisdell erred in finding that the items identified in paragraph 1.2, 1.3, 1.4, 1.6 and 1.8 of the notice of motion were not items required to be produced by the prosecution in compliance with its duty of disclosure.
>
> 2. Magistrate Clisdell erred in finding that Mr Bradley's attempt to obtain the items identified in 1.2, 1.3, 1.4, 1.6 and 1.8 of the notice of motion was: (a) a fishing expedition; and (b) for the improper purposes of frustrating the prosecution by putting the prosecution to additional work and taking up the time of the Court.
>
> 3. Magistrate Clisdell erred in taking into account irrelevant considerations - perceived resource and timing considerations - in the determination of whether the prosecution was required to produce items in compliance with its duty of disclosure."

43 Ms Curry, who appeared on behalf of the Prosecutor in this Court, accepted that grounds 1 and 3 raised a question of law alone but contended that ground 2 raised a question of mixed fact and law.

Consideration

44 The grounds of appeal are related. Ground 1 turns on the extent of the duty of disclosure owed by a prosecutor to an accused person. Ground 2 arises from the reasons given by the magistrate for dismissing the notice of motion. Ground 3 relates to the matters germane to the decision whether certain documents were disclosable.

General principles

45 Before coming to the Prosecutor's duty of disclosure in the present case, I propose to summarise the relevant principles.

The prosecutor's duty of disclosure

46 The accusatorial system in criminal proceedings imposes a duty on a prosecutor to disclose material which, first, is or might be relevant to an issue in the case; secondly, raises a new issue, the existence of which is not apparent from the prosecution case; or, thirdly, holds out a real prospect of providing a lead on evidence in the first two

categories: ***R v Reardon (No 2)*** (2004) 60 NSWLR 454; [2004] NSWCCA 197 (***Reardon***) at [46]-[54] (Hodgson JA), which was approved in ***R v Spiteri*** (2004) 61 NSWLR 369; [2004] NSWCCA 321.

47 The obligation requires the prosecutor to take a "broad view of relevance". Hodgson JA said in ***Reardon*** at [58]:

> "It was accepted for the Crown that there is no onus on the defence to demonstrate a forensic purpose in relation to material said to be subject to the Crown's duty of disclosure. This is clearly correct: the defence is simply not in a position to know what this material is. It seems to me that **the correct view is that a decision by the Crown concerning what to disclose should take a broad view of relevance and of what are the issues in the case**. The Crown has all the material available to it, and one basis of the rule about disclosure is that it is to ameliorate the inequality of resources as between the Crown and the accused. In those circumstances, it would seem inappropriate for the prosecution authorities to take a narrow view as to what the defence might be or as to what might prove useful to the defence, as to what might open up useful lines of enquiry to the defence…."
>
> [Emphasis added.]

48 In ***Gould v Director of Public Prosecutions (Cth)*** [2018] NSWCCA 109; (2018) 359 ALR 142 (***Gould***), which followed ***Reardon***, Basten JA (Johnson and Adamson JJ agreeing) said at [65]:

> "[T]he duty of disclosure extends to material which might open up useful lines of inquiry to the defence, without any narrow view being taken of what might be relevant".

49 There is scant basis in the authorities to distinguish between the duty of disclosure for summary offences and that applicable to indictable offences. In ***R v Garofalo*** [1999] 2 VR 625; [1998] VSCA 145, Ormiston JA (Tadgell and Charles JJA agreeing) at [67] found it necessary to decide only that, in a trial on indictment, there is a duty to disclose prior relevant convictions of a prosecution witness. The extent of disclosure in summary proceedings did not arise. His Honour referred to ***Wilson v Police*** [1992] 2 NZLR 533; [1991] NZCA 179 in which the New Zealand Court of Appeal (Cooke P, Casey and Hardie Boys JJ) found that there may be a distinction and considered that prior relevant convictions of prosecution witnesses ought be provided as a matter of course in trials on indictment and, if requested, for summary offences.

50 The generality of the principles and their application to police prosecutors was correctly recognised in the email dated 28 March 2014 sent by Superintendent Ian Dickson which has been extracted above.

Enforcement of the duty of disclosure

When breach is alleged pre-trial

51 The prosecutor's duty of disclosure is not enforceable directly. Thus, an accused is not entitled to an order requiring the prosecution to produce particular documents covered by the duty or to an order for stay of the proceedings pending provision of particular documents: Gould at [60]-[62]. As Basten JA explained in Gould at [63]-[64], the basis of a court's jurisdiction to order a stay is its jurisdiction to prevent an unfair trial: see also ***R v Lipton*** (2011) 82 NSWLR 123; [2011] NSWCCA 247 at [120] (McColl JA, R S Hulme and Hislop JJ agreeing). Thus the Court has power to grant a stay until the duty

is complied with if the substantive hearing, absent production of the documents, would be likely to be unfair (***Dietrich v The Queen*** (1992) 177 CLR 292 at 311 (Mason CJ and McHugh); [1992] HCA 57) or if there is a tangible risk that it would be unfair (***Re K*** [2002] NSWCCA 374 at [9]-[10] (Beazley JA, Sully and Simpson JJ)).

52 An accused who alleges that disclosure is inadequate is, however, entitled to request that subpoenas be issued to obtain the documents said to fall within the ambit of the duty: ***Gould*** at [14], [18] and [19]. As long as the subpoena is not set aside, the subpoena is enforceable.

53 In ***R v Mokbel (Ruling No 1)*** [2005] VSC 410, Gillard J was required to rule on a subpoena issued at the request of an accused in a criminal trial. The subpoena sought documents relating to the credibility of former members of the Drug Squad who had been charged with offences committed while they were police officers. The Crown claimed privilege on the basis of public interest immunity. Gillard J considered the relationship between the principles relating to a fair trial and those relating to access to documents produced on subpoena. His Honour said of an accused's rights in this context:

> "[74] An accused man must have the opportunity to inspect any document which may provide an opportunity to cross-examine. In ***R v Saleam***, Hunt J, speaking for the Court, said after quoting with approval what Samuels JA said in ***Maddison v Goldrick***:
>
> > As Samuels JA suggested an accused is prima facie entitled to inspect any document which may give him the opportunity to pursue a proper and fruitful course in cross-examination.
>
> [75] De Jersey CJ discussed the issue in ***R v Spizzirri***:
>
> > … and it did not matter that the contents of files raising those things may not have been, in form, themselves admissible as evidence. It would have been sufficient that they armed the defence with information it might fairly have pursued with the complainant towards that potentially significant forensic goal, **the erosion of his credit**.
> >
> > (Emphasis added [by Gillard J].)
>
> I respectfully agree.
>
> [76] Pincus JA, in the same case, stated the basis for the conclusion when he said:
>
> > All of the documents were of such a character as to be likely to contain information about the principal Crown witness, which might have been of use in cross-examination of him. Of course, it could have turned out that no information would have been gained, from the inspection of the documents, of any substantial value to the defence; **but it was for counsel for the defence, and not the judge, to determine that**.
> >
> > (Emphasis added [by Gillard J]).
>
> [Footnotes omitted.]

54 Hamill J adopted these principles and applied them in ***R v Jenkin (No 2)*** [2018] NSWSC 697 at [21] in the context of a subpoena seeking production of criminal histories of Crown witnesses. I note that the Prosecutor in the present case accepted that she was obliged to disclose the complainant's criminal history, which was produced by her in answer to the subpoena issued at the accused's request.

When breach is discovered after conviction

55 A breach of the duty of disclosure can also lead to the quashing of a conviction entered as a consequence of a trial that was, or might have been, unfair by reason of the breach.

56 In ***Grey v The Queen*** [2001] HCA 65; (2001) 75 ALJR 1708 (***Grey***), the issue was whether a criminal trial miscarried because the accused, Grey, had not been provided with a copy of a "letter of comfort" which had been given by an investigating police officer to Reynolds, a key prosecution witness who was involved in the events giving rise to the charges. The defence case at trial was that Reynolds, and not Grey, was responsible for rebranding stolen car parts. Thus, Reynolds' credibility was a significant issue in the trial. Grey's legal advisers knew that Reynolds had previously been convicted of similar offences for which he had been sentenced to a term of periodic detention. They were not, however, aware that, when Reynolds was sentenced for those offences, the sentencing court took into account assistance he had given to the police in relation to the investigation into such rebranding by others which was contained in the letter of comfort tendered at Reynolds' sentencing hearing. An available inference was that it was Reynolds' assistance that led to the charges against Grey. It was accepted that, but for the assistance Reynolds had given to the authorities, a custodial sentence would have been imposed on him.

57 The police informant in relation to Grey was aware of the letter. However, the prosecutor who conducted the trial against Grey was not. He said that, had he been aware of the letter, he would have disclosed it to Grey's counsel. Grey was convicted. Grey's legal representatives later learned that Reynolds had been given the letter of comfort prior to giving evidence at the trial. The letter of comfort recorded as follows:

> "At the present time the prisoner is assisting us with our inquiries in relation to the activities of a group in the Central West of this State, involving the theft and conversion of Ford motor vehicles, on a widespread basis.
>
> …
>
> There is no evidence to indicate that the prisoner is an active participant in this current inquiry."

58 Grey appealed against his conviction on the basis of the non-disclosure of the letter of comfort. His appeal was dismissed by majority (Grove and Sully JJ, Simpson J dissenting). Grey appealed to the High Court.

59 In the High Court the Crown conceded that the letter ought to have been disclosed. A plurality of the High Court (Gleeson CJ, Gummow and Callinan JJ) rejected the Crown's submission that, notwithstanding the prosecutor's inadvertent failure to disclose the letter of comfort, Grey had not been deprived of the opportunity to discredit Reynolds on the basis of the material available to him at the time. The plurality said, at [18]:

> "It is not difficult to imagine a fertile area of cross-examination that could have been tilled by the appellant on the basis of this false statement to whose makers Mr Reynolds was patently beholden. The letter should have been provided to the appellant, as is correctly conceded in this Court by the respondent. Its revelation and admission into evidence could have put a quite different complexion on the case for the appellant and the way in which it was conducted."

60 Their Honours also found that, had the letter of comfort been disclosed, the trial judge would have probably been obliged to give a direction to the jury about Reynolds' potential unreliability in terms of s 165(1)(d) and (2) of the ***Evidence Act 1995*** (NSW). The plurality said, at [23], of the argument that the defence could have discovered Reynolds' role in the investigation:

> "…It is one thing to say that the defence knew or could have found out about various aspects of unsavoury behaviour on the part of Mr Reynolds but an altogether different thing to say that it knew of the special relationship between Mr Reynolds and the police. **And although it might also be possible to say that a lucky (if extremely risky) question of him might have elicited an answer which revealed the existence of the letter of comfort and perhaps even its contents, there was no reason why the defence in a criminal trial should be obliged to fossick for information of this kind and to which it was entitled**…."
>
> [Emphasis added.]

61 The High Court unanimously found that Grey had lost a fair chance of acquittal and that, accordingly, it could not be said that no substantial miscarriage of justice had occurred. His conviction was quashed and a re-trial ordered.

62 ***Grey*** was considered and applied in ***Mallard v The Queen*** (2005) 224 CLR 125; [2005] HCA 68 (***Mallard***). In that case, material, which had not been disclosed prior to, or during, the trial, came to light in response to Mallard's plea for clemency. It was the Crown case at trial that the deceased had been killed with a wrench. The material disclosed included the only one of Mallard's interviews to have been recorded. In this interview, Mallard had said that the assailant (who on the Crown case was Mallard) had a wrench. In the undisclosed interviews, Mallard had made incredible assertions as well as confessional statements. The non-disclosed material also included records relating to experiments conducted by police forensic experts to try to reproduce the manner of the deceased's death. The results of such experiments tended to show that the deceased could not have been killed with a wrench.

63 Mallard's appeal against conviction was dismissed by the Court of Criminal Appeal. The High Court allowed Mallard's appeal. The plurality (Gummow, Hayne, Callinan and Heydon JJ) said at [23]:

> "**It was not for the Court of Criminal Appeal to seek out possibilities, obvious or otherwise, to explain away troublesome inconsistencies which an accused has been denied an opportunity to explore and exploit forensically**. The body of unpresented evidence so far mentioned was potentially highly significant in two respects. The first lay in its capacity to refute a central plank of the prosecution case with respect to the wrench. The second was its capacity to discredit, perhaps explosively so, the credibility of the prosecution case, for the strength of that case was heavily dependent on the reliability of the confessional evidence, some of which was inexplicably not recorded, although it should have been recorded."
>
> [Emphasis added.]

64 As the High Court was not satisfied that no substantial miscarriage of justice had occurred, the conviction was quashed and a new trial ordered.

The relevance of the documents sought and the accused's legitimate forensic purpose

65

In the present case the complainant's credibility and whether she has a propensity for violence, drug-taking and falsehoods are important issues in determining the charge against the accused.

66 The facts sheets for the offences of which the complainant had been convicted and with which she stood charged could, if they indicated that the complainant had, while under the influence of drugs, a propensity to be aggressive without any provocation, tend to support the accused's case that he bit her finger in self-defence. Thus, they would appear to fall into the first category in ***Reardon***: namely, that they are potentially relevant to an issue in the substantive proceedings. Further, they might hold a real prospect of providing a lead on evidence that might be relevant, thus falling into the third category in ***Reardon***.

67 Any record of the conversations between the Prosecutor and Sergeant Huggins would appear to fall within one or more of the three categories in ***Reardon***. The content of the conversation would be likely to provide an indication of why the police, having arrested the accused, taken him into custody and questioned him in an ERISP, then released him without charge. Any record of the conversation between the Prosecutor and the Lake Illawarra prosecutors which occurred on 29 June 2018 (before contact was renewed with the complainant and before the accused was charged) is also likely to be relevant or open up a line of inquiry for the accused.

68 The Prosecutor's position in the Local Court, as is evident from the summary of the submissions above, was that if a hearing ***could*** be conducted without the material in respect of which disclosure was sought, there was no obligation on the Prosecutor to disclose such material. This submission was adopted by the Court below. This proposition finds no support in the authorities. The magistrate's finding that the accused could have a "fair" hearing without access to such documents was legally unreasonable (in the sense referred to in ***Minister for Immigration and Citizenship v Li*** (2013) 249 CLR 332; [2013] HCA 18 at [76] (Hayne, Kiefel and Bell JJ)) and was based on the erroneous premise engendered by the Prosecutor, which reflected the flawed approach taken by NSW Police to its duty of disclosure in the present case.

69 The magistrate's concern for the resources of NSW Police was misplaced. Even on the assumption that questions of resources could be relevant, there was no evidence to suggest that there was any particular difficulty in locating the documents sought by the accused. Neither the Prosecutor, nor Senior Constable Bourbonnais gave evidence, although both were available to be called by Sergeant Casey. In these circumstances, the inference can be drawn that their evidence would not have assisted the Prosecutor in her opposition to the accused's notice of motion: ***Jones v Dunkel*** (1959) 101 CLR 298; [1959] HCA 8.

70 Further, the allegation that the accused's solicitor had sought the disclosure for the improper purpose of diverting police resources was without foundation. The material sought in [1.2], [1.3] and [1.6] plainly fell within at least one of the three categories in

Reardon referred to above and, as such, was required to be disclosed. The descriptions in items [1.4] and [1.8] merely paraphrase the accepted formulations of the prosecutor's duty of disclosure reflected in the authorities.

71 I note that the accused did not seek any documents which were not in the possession of NSW Police. Thus, it is not necessary to address the question whether a prosecutor might, in some circumstances, have a duty to make inquiries: cf. ***Marwan v Director of Public Prosecutions*** [2019] NSWCCA 161.

Ground 1: alleged error in finding that documents were not required to be disclosed

72 As referred to above, Ms Curry accepted that ground 1 raised a question of law alone. For the reasons given above, the documents described in [1.2], [1.3] and [1.6] were required to be disclosed. The basis on which the magistrate found to the contrary was that his Honour misapprehended the nature and extent of the obligation which has been authoritatively established by the cases referred to above. His Honour's reasons reveal this misapprehension. His Honour's appreciation of the nature and extent of the duty of disclosure constituted a "discrete starting point for his subsequent analysis": see ***R v PL*** [2009] NSWCCA 256; (2009) 261 ALR 365 at [72] (Spigelman CJ, McClellan CJ at CL and R A Hulme J agreeing). On this basis, I accept that ground 1 involves a question of law alone.

73 In substance, his Honour considered that the facts sheets did not need to be disclosed for the following four reasons, none of which provided any basis for non-disclosure. His Honour's reasons were: first, because the facts sheets could potentially be incorrect; secondly, because the accused could cross-examine about the complainant's prior convictions based on her criminal history which had been disclosed; thirdly, it would be oppressive to require a police prosecutor to locate and provide such documents; and, fourthly, the request was invalid because it was made for the improper purpose of frustrating the prosecution of the accused by putting the Prosecutor to additional work. Thus, his Honour's errors proceed from a legally erroneous starting point.

74 For the reasons given above, there was no evidence of oppression and no reasonably available inference of improper purpose. It is clear from the dicta in ***Grey*** set out above that the prosecution is not absolved from discharging its duty of disclosure by the circumstance that the matter could be explored by the accused in cross-examination. The possibility that a facts sheet could contain incorrect or unreliable information is not to the point, since, whether correct or otherwise, it may lead to an inquiry which might assist the defence. The dicta extracted by Gillard J in ***R v Mokbel (Ruling No 1)*** (set out above) explain why such material may be useful in the accused's defence.

75 The magistrate's misapprehension of the content of the duty of disclosure was erroneous in the several respects set out above. For these reasons, ground 1 has been made out.

Ground 2: alleged error in finding of improper purpose

76 Ms Curry contended that I had no jurisdiction to consider this ground as it was not a question of law alone.

77 I do not accept the submission that ground 2 does not involve a question of law alone. It appears to me that, as with ground 1, the magistrate misapprehended the nature and extent as a matter of law of the duty of disclosure. This misapprehension led his Honour into error and caused him to mischaracterise the defence's evident purpose in seeking the documents described in the notice of motion. Had his Honour correctly appreciated the nature and extent of the duty of disclosure, his Honour would have understood that there was no evidence of any improper purpose. For these reasons, ground 2 has been made out.

Ground 3: alleged error in taking into account resource and timing considerations

78 Although Ms Curry accepted that this ground raised a question of law alone, I consider there is a difficulty with this ground having regard to this Court's narrow jurisdiction. There was no evidence of any burden, in terms of time and costs, which the disclosure sought by the accused would place on the Prosecutor. For this reason alone, it was erroneous for the magistrate to take it into account. As it was a finding in respect of which there was no evidence, the finding was erroneous. I consider, for the reasons given above, that the matters germane to this ground are subsumed in ground 1 since his Honour's errors reflect an incorrect legal appreciation of the nature and extent of the duty. I am not persuaded that ground 3 falls within this Court's jurisdiction under s 53(3)(b) of the Act.

Whether there should be a grant of leave

79 Section 53(3)(b) imposes two hurdles on the accused in the present case: first, the ground must involve a "question of law alone"; and, secondly, leave of this Court is required. The first hurdle has been addressed above. I turn now to whether leave ought be granted.

80 It is evident from the review of the authorities set out above that the question raised by the summons is one of considerable importance to the interests of justice in the present case and also to the administration of justice in New South Wales generally. The disclosure sought is particularly pertinent to the reliability of prosecution witnesses, which is a matter of general relevance. For the reasons given above, I consider that the document emailed to police prosecutors throughout New South Wales accurately summarises the authorities. However, the conduct of the Prosecutor in the present case falls far short of the duty required of her. It is also of significance that Ms Curry, who appeared for the Prosecutor in this Court, was not instructed to make appropriate concessions but defended the magistrate's approach notwithstanding his Honour's evident non-compliance with the law. The Prosecutor's cavalier approach to her duty of disclosure fell far short of what the law requires.

81

Ms Curry endeavoured to gain support from Sergeant Casey's conduct in asking Officer Bourbonnais, who was in court for another matter on 16 May 2019, to look at the material and see whether there was anything to disclose. It is not sufficient for a police officer who has no familiarity with the case to be asked to work out whether material is disclosable. The performance of the duty requires attention to be given to the issues in the case and to all the material within the possession of the NSW Police. It can only be performed by someone who has knowledge of, and familiarity with, the case and who has access to databases, documents and other records held by NSW Police.

82 Were the accused to be required to defend himself against the pending charge without access to the material he seeks, he would not receive a fair hearing in accordance with the law. In particular it would not be fair for his representative to be deprived of material which would be likely to assist in identifying the conduct that amounted to the previous assaults, offences of dishonesty and drug offences of which the complainant had been convicted or charged. To deprive the accused of that material would put him at the mercy of the complainant who might choose to lie about such matters in cross-examination or simply not recall the details. Each of the two thresholds referred to above – that the substantive hearing of the charge is ***likely*** to be unfair or that there is a ***tangible risk*** that the hearing will be unfair – has been comfortably satisfied in the present case.

83 In these circumstances, I am satisfied that a grant of leave is warranted.

Form of the order

84 Ms Avenell accepted, on the basis of ***Gould***, that neither the Court below, nor this Court, could make an order in terms of prayer 1 of the notice of motion. She submitted that I could make an order in terms of prayer 2. Ms Curry submitted that, if I were persuaded that the appeal ought be allowed, I ought make no additional order other than that the matter be remitted to the Local Court for determination in accordance with law. Ms Curry accepted that the matter ought not be remitted to Clisdell LCM. Ultimately, Ms Curry accepted that I could make a substantive order before remitting the matter to the Local Court.

85 The form of the order is affected by the nature of the duty. As Leeming JA (R A Hulme and Adamson JJ agreeing) said in ***Marwan v Director of Public Prosecutions*** at [29]:

> "It is also to be borne in mind that the so-called 'duty' is unusual. So too is what may loosely be described as the 'right' of the accused to disclosure (both illustrate the way in which legal usage commonly departs from Hohfeldian exactness). For it is quite plain that the 'duty' to disclose is not owed directly to an accused, so as to enforce the production of documents as might occur in civil litigation through discovery and interrogatories, or pursuant to freedom of information legislation. **To the contrary, an accused person cannot ordinarily obtain an order that the prosecution disclose documents which have been withheld. Rather, the accused is entitled to a fair trial, and can insist that the trial be stayed, permanently or temporarily, if it can be established that that will not occur, absent adherence by the prosecution to that duty**."
>
> [Emphasis added.]

86

I consider that the accused has made out his claim for relief and that this result follows from the reasons set out above. Section 55(3)(a) of the Act confers power on this Court to determine an appeal against, relevantly, an interlocutory order, by setting aside the order and making such order as it thinks just. It is necessary to stay the proceedings until the Prosecutor has complied with her duty of disclosure.

87 Ultimately, the performance of the duty of disclosure is a matter for the Prosecutor, subject to this Court's supervision in granting or continuing a stay until the duty has been complied with in order to ensure that the hearing of the charge against the accused is fair.

Costs

88 Both parties agreed that costs ought follow the event and that I have jurisdiction to make such an order for costs in an appeal under Part 5 of the Act: see ***Cunningham v Cunningham (No 2)*** [2012] NSWSC 954 at [12]-[18] (Button J) and ***Bimson, Roads and Maritime Services v Damorange Pty Ltd (No 2)*** [2014] NSWSC 827 at [34] (Beech-Jones J).

Orders

89 For the reasons given above, I make the following orders:

(1) Grant leave to the plaintiff to appeal in respect of grounds 1 and 2 in the summons filed on 7 November 2019.

(2) Allow the appeal.

(3) Set aside the decision of Clisdell LCM dismissing the plaintiff's notice of motion filed on or about 15 April 2019 and, in lieu thereof, order that proceedings 2018/277772 in the Local Court of New South Wales at Wollongong be stayed until the defendant or other prosecutor appointed to prosecute the matter complies with her, or his (as the case may be), duty of disclosure.

(4) Otherwise remit the matter to the Local Court to be heard by a magistrate other than Clisdell LCM.

(5) Order the defendant to pay the plaintiff's costs of the proceedings in this Court, such costs to be paid within 14 days of an agreement as to the amount of such costs or the issue of a certificate of assessment of any such costs, whichever is the earlier.

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Decision last updated: 27 February 2020