HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, KEANE, NETTLE, GORDON AND EDELMAN JJ

HT APPELLANT

AND

THE QUEEN & ANOR RESPONDENTS

HT v The Queen
[2019] HCA 40
Date of Hearing: 10 September 2019
Date of Judgment: 13 November 2019
S123/2019

ORDER

1. *Appeal allowed.*

2. *Set aside the two sets of orders made by the Court of Criminal Appeal of the Supreme Court of New South Wales, when reserving its judgment and when disposing of the appeal, and in lieu thereof order that the Crown appeal be dismissed.*

3. *The contents of Exhibit C be suppressed until further order of this Court pursuant to section 77RE of the* Judiciary Act 1903 *(Cth) on the grounds set out in section 77RF(1)(a), being that the order is necessary to prevent prejudice to the proper administration of justice, and section 77RF(1)(c), being that the order is necessary to protect the safety of any person.*

On appeal from the Supreme Court of New South Wales

Representation

T A Game SC with G E L Huxley for the appellant (instructed by Maria Walz Legal)

D T Kell SC with E S Jones for the first respondent (instructed by Solicitor for Public Prosecutions (NSW))

N L Sharp SC with T M Glover for the second respondent (instructed by Crown Solicitor's Office (NSW))

CATCHWORDS

HT v The Queen

Criminal practice – Appeal – Crown appeal against sentence – Procedural fairness – Where appellant provided assistance to law enforcement authorities – Where court required by statute to take assistance into account in sentencing – Where evidence of assistance kept confidential from appellant and appellant's legal representatives in sentencing proceedings – Where evidence contained highly sensitive criminal intelligence – Where appellant sought access to confidential evidence on appeal – Where Court of Criminal Appeal denied appellant access to confidential evidence on basis of public interest immunity – Where Court of Criminal Appeal exercised discretion under s 5D(1) of *Criminal Appeal Act 1912* (NSW) to re-sentence – Whether appellant denied procedural fairness – Whether Court of Criminal Appeal had power to deny appellant access to the confidential evidence – Whether Court of Criminal Appeal should have declined to exercise discretion to re-sentence.

Words and phrases – "access to evidence", "assistance to law enforcement authorities", "confidential information", "Crown appeal against sentence", "discount in sentence", "evidence of assistance", "mitigating factor", "non-disclosure", "open justice", "procedural fairness", "public interest immunity", "residual discretion", "tailored order".

Court Suppression and Non-publication Orders Act 2010 (NSW), ss 7, 8.
Crimes (Sentencing Procedure) Act 1999 (NSW), ss 21A, 23.
Criminal Appeal Act 1912 (NSW), ss 5D(1), 12.
Evidence Act 1995 (NSW), s 130.

1 KIEFEL CJ, BELL AND KEANE JJ. The appellant pleaded guilty in the District Court of New South Wales to five counts of obtaining money by deception contrary to s 178BA(1) of the *Crimes Act 1900* (NSW) and six counts of dishonestly obtaining a financial advantage by deception contrary to s 192E(1)(b) of the *Crimes Act*. The maximum penalty respectively for such offences is imprisonment for five years and ten years.

2 The sentencing judge sentenced the appellant to an aggregate sentence of three years and six months imprisonment with a non-parole period of 18 months. The Crown lodged an appeal pursuant to s 5D(1) of the *Criminal Appeal Act 1912* (NSW) ("the CA Act"), on the ground that the aggregate sentence was manifestly inadequate. The appeal was allowed by the Court of Criminal Appeal of New South Wales[1] and the appellant was re-sentenced to an aggregate sentence of six years and six months imprisonment with a non-parole period of three years and six months.

3 The sentencing judge found that the offences involved very serious criminal conduct and a high level of moral culpability. The offending occurred over a number of years and involved a substantial number of fraudulent transactions with a high total monetary value. The offending was described by his Honour as planned and sophisticated. The appellant's criminal record disentitled her to leniency. On the other hand the appellant's co-operation in repaying part of the money to the victims was accepted as evidence of her contrition.

4 A factor of significance to the appellant on sentencing in both the District Court and the Court of Criminal Appeal was the assistance, both past and anticipated, that she had rendered to a law enforcement authority. The appellant was a registered police informer.

5 Evidence relating to this assistance was placed before the sentencing judge, who specified a combined discount of 35 per cent for the appellant's assistance and guilty pleas, with 15 per cent identified for her guilty plea. His Honour considered that this acknowledgement of the level of assistance paid due regard to s 23(3) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) ("the C(SP) Act"). When re-sentencing the appellant on the Crown appeal, the Court of

---

1 The judgment of the Court of Criminal Appeal, the sentencing decision of the District Court, the transcript of the decision of the District Court and a portion of the transcript of the proceedings before the District Court are the subject of non-publication orders.

Criminal Appeal, whilst increasing the aggregate sentence, also increased the combined discount for her assistance and guilty pleas to 40 per cent.

The C(SP) Act

6 Section 21A of the C(SP) Act requires a court, in determining the appropriate sentence for an offence, to take into account certain factors. They include mitigating factors that are relevant and known to the court[2]. Section 21A(3) lists the mitigating factors that are to be taken into account. They include assistance by the offender to law enforcement authorities, as provided by s 23.

7 Section 23(1) provides that a court may impose a lesser penalty than it would otherwise impose on an offender, having regard to the degree to which that person has assisted, or undertaken to assist, law enforcement authorities in the prevention, detection or investigation of, or in proceedings relating to, the offence concerned or any other offence. Section 23(2) provides that in deciding whether to impose a lesser penalty for an offence and the nature and extent of the penalty to be imposed, the court must consider certain matters. Included amongst these matters are: the significance and usefulness of the offender's assistance to the authorities, taking into consideration any evaluation by the authorities of the assistance rendered or undertaken to be rendered[3]; the truthfulness, completeness and reliability of any information provided by the offender[4]; the nature and extent of the offender's assistance or promised assistance[5]; the timeliness of the assistance or undertaking to assist[6]; any danger or risk of injury to the offender resulting from the assistance[7]; and whether the assistance or promised assistance concerns the offence for which the offender is being sentenced or an unrelated offence[8]. Section 23(3) requires that a lesser penalty that is imposed under s 23

---

2 C(SP) Act, s 21A(1)(b).

3 s 23(2)(b).

4 s 23(2)(c).

5 s 23(2)(d).

6 s 23(2)(e).

7 s 23(2)(h).

8 s 23(2)(i).

must not be unreasonably disproportionate to the nature and circumstances of the offence.

8 Section 23(4) requires a court that imposes a lesser penalty, because the offender has assisted or undertaken to assist the authorities, to: (a) indicate to the offender and record the fact that the lesser penalty is being imposed for either or both of those reasons; (b) state the penalty that it would otherwise have imposed; and (c) where the lesser penalty is being imposed for both reasons, state the amount by which the penalty has been reduced for each reason. None of the information required to be given by s 23(4) was provided by the sentencing judge in this case. These omissions may have resulted from the procedure which was followed at sentencing.

The confidential information

9 A portion of the sentencing proceedings were held in closed court. An affidavit by a police officer, to which was annexed details of the assistance provided by the appellant to the police, was admitted into evidence and marked "Exhibit C". It contained observations as to the truthfulness, reliability and usefulness of information supplied; the risk to which the appellant had put herself on occasions in supplying information; the timeliness of the assistance; and the value to current and future police investigations. It also contained information which may be described as criminal intelligence of a highly sensitive nature. The Crown Prosecutor had seen Exhibit C but the appellant's counsel had not and did not at any point see its contents.

10 Counsel for the appellant advised the sentencing judge that he had been contacted by a representative of the Office of the Crown Solicitor and presented with two options: if he wished to be privy to the information to be provided to the Court it would have to be highly redacted and consequently would be a lot shorter; if he were not to be privy to the information, it would be a lengthy document, inferentially one more favourable to the appellant. Unsurprisingly the appellant's counsel chose the latter course – but the consequence was that he could not see Exhibit C. He was assured that the information which would be provided to the sentencing judge would be of a "high order", which, it is to be inferred, would be advantageous to the appellant's case.

11 The Crown Prosecutor accepted that the amount of co-operation disclosed was significant. The sentencing judge agreed, but indicated that the level of discount was open to argument and that his task in determining the discount was difficult given that defence counsel had no knowledge to enable him to make submissions on that issue.

12 On the hearing of the Crown appeal, counsel for the appellant (the respondent to that appeal) sought access to Exhibit C. This had been foreshadowed prior to the hearing. Counsel submitted that recourse to Exhibit C was necessary not only in the event that the Court of Criminal Appeal found error and proceeded to re-sentence the appellant, but also as relevant to the sole ground of appeal, namely whether the sentence was inadequate.

13 The Commissioner of Police opposed making the information in Exhibit C available to the appellant or her legal representatives even with the imposition of conditions. The basis given for this was public interest immunity. The Crown supported that stance. For the purpose of the claim to public interest immunity respecting Exhibit C three affidavits by police officers were before the Court. The first was an "open affidavit" by an Acting Assistant Commissioner of Police, which identified a confidential affidavit that he had made and made an objection to disclosure of that confidential affidavit to any person other than the judges of the Court of Criminal Appeal. This confidential affidavit spoke in general terms about the concerns regarding disclosure of information about assistance to the authorities and possible effects on ongoing police investigations. Despite the objection, both affidavits were made available to the appellant's counsel. A further confidential affidavit, which identified particular difficulties in the case of the appellant, was not.

14 The Court of Criminal Appeal upheld the Commissioner's objection on one of the two bases for which the Commissioner had contended, namely that the information contained in Exhibit C comes within a particular class of document to which public interest immunity attaches. As a consequence, the appellant's legal representatives did not view that Exhibit, but the Crown had already had access to it. The Court of Criminal Appeal allowed one sentence from that part of Exhibit C concerned with the evaluation by the police of the appellant's assistance to be provided in written form to the appellant's representatives. The sentence addressed matters to which s 23(2)(c) refers favourably to the appellant.

15 In the course of the hearing which followed, the appellant's counsel made a further submission concerning Exhibit C to the Court of Criminal Appeal in connection with the residual discretion provided by s 5D(1) of the CA Act. He submitted that the ruling made by the Court with respect to public interest immunity had itself created a basis for the Court refusing to intervene to vary the sentence in the exercise of its discretion. That submission was rejected and the Court of Criminal Appeal proceeded to determine for itself the extent of the discount. On this appeal the appellant repeats that submission.

16 It remains to mention that for the purposes of this appeal Exhibit C and the other affidavits mentioned above were provided to counsel for the appellant. It became evident in the course of the hearing that parts of them had been redacted.

Senior counsel for the appellant asked the Court nevertheless to proceed with the appeal but relied upon these circumstances as a further basis for the residual discretion not being exercised.

A denial of procedural fairness?

17 It is a fundamental principle of our system of justice that all courts, whether superior or inferior, are obliged to accord procedural fairness to parties to a proceeding[9]. This obligation requires not only that courts be open and judges impartial but that the person against whom a claim or charge is made be given a reasonable opportunity of being heard, which is to say appearing and presenting his or her case[10]. In an adversarial system it is assumed, as a general rule, that opposing parties will know what case an opposite party seeks to make and how that party seeks to make it[11]. 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 on which an order is sought to be made[12].

18 Whilst stated as principles or rules deriving from the more general principle of procedural fairness, these rules do not have immutably fixed content. The content of procedural fairness may vary according to the circumstances of particular cases. Procedural fairness is not an abstract concept; rather, it is essentially practical. The concern of the law is the avoidance of practical injustice[13]. It is that consideration which guides a court in deciding whether its procedures should be adapted to meet difficulties which may arise.

---

9 *Cameron v Cole* (1944) 68 CLR 571 at 589; *Commissioner of Police v Tanos* (1958) 98 CLR 383 at 395-396; *Taylor v Taylor* (1979) 143 CLR 1 at 4; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 99 [156].

10 *Cameron v Cole* (1944) 68 CLR 571 at 589; *Taylor v Taylor* (1979) 143 CLR 1 at 4.

11 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 100 [157].

12 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 359 [56]; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 348 [39]; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 105 [177], 108 [188].

13 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 14 [37]; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 99 [156].

19 The principal issue before the Court of Criminal Appeal on the Crown appeal was whether the sentence which had been imposed on the appellant was so manifestly inadequate as to constitute an affront to the administration of justice such that the discretion to vary the sentence should be exercised[14]. A question necessary to be addressed in the course of considering that wider question was whether it was open to the sentencing judge, in the exercise of the discretion given by s 23 of the C(SP) Act, to conclude that the lesser sentence imposed was not unreasonably disproportionate to the nature and circumstances of the offence[15]. The term "unreasonably" in s 23(3) has a wide operation. It includes an evaluation of the "nature and extent of the assistance provided to law enforcement authorities"[16].

20 In the event that the Court of Criminal Appeal found error in the exercise by the sentencing judge of the s 23 discretion, it was then required to consider whether to exercise the "residual discretion" under s 5D(1) of the CA Act. Section 5D(1) provides that on a Crown appeal, the Court of Criminal Appeal may in its discretion vary the sentence and impose such sentence as may seem proper to that Court. In exercising that discretion, the Court of Criminal Appeal will take into account the limited purposes of a Crown appeal, namely to state the principle to be applied in future appeals to provide guidance to sentencing judges[17].

21 Exhibit C contained the evidence relating to the appellant's assistance to the authorities and the evaluation by the police of the assistance given. In light of the issues before the Court of Criminal Appeal, Exhibit C was relevant to many of the matters to which s 23(2) refers, whether error by the sentencing judge was made out, and the exercise of the discretion in varying the sentence.

22 As a result of the appellant and her counsel being denied access to Exhibit C, the appellant did not have the opportunity of considering and testing the accuracy of evidence, or of making submissions as to the mandatory considerations in s 23(2) of the C(SP) Act, whether it was open to the sentencing

---

14 *Green v The Queen* (2011) 244 CLR 462 at 479 [42]; *CMB v Attorney-General (NSW)* (2015) 256 CLR 346 at 360 [37].

15 C(SP) Act, s 23(3).

16 *CMB v Attorney-General (NSW)* (2015) 256 CLR 346 at 361 [41].

17 *CMB v Attorney-General (NSW)* (2015) 256 CLR 346 at 366 [55], citing *Green v The Queen* (2011) 244 CLR 462 at 465-466 [1].

judge to conclude that the sentence given was not unreasonably disproportionate, whether the discount in sentence was appropriate and whether the residual discretion should be exercised in her favour.

23 On this appeal the respondents – the Crown and the Commissioner of Police – submitted that the appellant had not been denied procedural fairness on the Crown appeal. Each placed reliance on the fact that the appellant's counsel had consented to Exhibit C being dealt with as closed evidence during the sentencing proceedings. The Commissioner went so far as to say that the appellant should be held to the election made. It is in the public interest to do so, the Commissioner submitted, because the consent on the terms of there being no access to the material affected what information was provided in what became Exhibit C. The appellant for her part denied that there was a true choice made. The appellant submitted that the Crown was under a duty to provide material relevant to sentence and that material relating to the mandatory considerations in s 23(2), which is within the knowledge of the authorities and not the offender, should be placed before the court.

24 Each of the respondents pointed to the fact that the information in Exhibit C was not adverse to the appellant and indeed was wholly favourable. The Crown submitted that the appellant did not need access to Exhibit C because she knew what assistance she had given and, inferentially, she could give instructions as to these facts. Reliance was placed upon that part of the police evaluation of the appellant's assistance which was provided to the appellant's legal representatives in written form in the course of the hearing before the Court of Criminal Appeal (being material within Exhibit C which was favourable to the appellant and was also before the sentencing judge).

25 It is plainly correct that the appellant's counsel was given no real choice. The fact that the information in Exhibit C was not adverse to the appellant is not to the point. The appellant had no way of knowing whether it detailed all of the assistance that she had provided and the risks she had taken in providing it. Her counsel had no way of checking any instructions she had given about her assistance against what was recorded in Exhibit C.

26 Regardless of these considerations, the appeal by the Crown overtook what had taken place at sentencing. The consent which had been given was for the purposes of sentencing in the District Court where no Crown appeal lay in prospect. Indeed it might reasonably have been considered that such an appeal was unlikely given the orders for non-publication made both in the District Court and in the Court of Criminal Appeal. The existence of those orders made it most unlikely that the limited purposes of a Crown appeal would be achieved.

27 The appellant was denied procedural fairness in the Court of Criminal Appeal. The question then is whether that denial was justified.

Public interest immunity

28 The common law recognises that there are certain documents which by their nature fall into a class of documents which should not be disclosed no matter what the documents individually contain. The law accepts that there may be a public interest in such documents being immune from disclosure[18]. Cabinet minutes and documents which concern the framing of government policy at a high level may fall within this class[19], as do documents relating to national security[20]. It was on the basis that Exhibit C fell into this class of documents that the Court of Criminal Appeal ruled in the Commissioner's favour.

29 Whether documents which detail the assistance provided by police informers can properly be said to fall within the class mentioned is not in issue on this appeal. The appellant's point is that the doctrine of public interest immunity has no application in circumstances such as these. The point is well made. True it is that a successful claim to public interest immunity means that the material need not be disclosed to the other party[21]. But the non-disclosure results from the objection to their production being upheld. The immunity provided with respect to documents by the doctrine is from their production. The doctrine has nothing to say about whether a document should be admitted into evidence or, when it is admitted, whether it should then be seen by one party and the court but kept confidential from the other party. The application of the doctrine prevents the document being admitted into evidence at all.

30 The Crown accepted that public interest immunity is a doctrine which is concerned with the exclusion of documents from evidence. It submitted that, if at the end of the traditional enquiry the court determines that a document cannot be disclosed for reasons associated with the public interest but needs to be available

---

18 *Sankey v Whitlam* (1978) 142 CLR 1 at 39.

19 *Sankey v Whitlam* (1978) 142 CLR 1 at 39.

20 *Alister v The Queen* (1984) 154 CLR 404.

21 *Sankey v Whitlam* (1978) 142 CLR 1 at 43; *The Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 616; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 556 [24], 559 [36]; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 63 [47], 97 [148].

to the court, it is open to the court to use it as confidential, or "closed", evidence. This course may be seen as at least closely connected with, or ancillary to, the public interest immunity process. In *Al Rawi v Security Service*[22], Lord Clarke of Stone-cum-Ebony JSC accepted that such a course was open to the courts and that the common law may develop by directing that some form of "closed material procedure" take place.

31 *Al Rawi* concerned a civil claim for damages by persons who had been detained at foreign locations and who alleged that the defendants had caused or contributed to their detention, ill-treatment and other suffering. A preliminary issue in that case was whether the court was entitled to adopt a closed material procedure[23]. The view of the majority was that there was no compelling reason justifying an important change to a fundamental common law right such as to open justice. If there was to be a change to the existing process for dealing with claims to public interest immunity it would be necessary for Parliament to effect the change. Lord Clarke JSC dissented from these views.

32 It is not necessary in this case to comment upon whether the latter view reflects that of the Australian common law. It is sufficient to observe that in the view of the majority in *Al Rawi*, in no way could any form of closed material procedure, by which documents are withheld from a party, properly be described as a development of the common law of public interest immunity[24]. As Lord Dyson JSC observed[25], closed material procedures and public interest immunity procedures are fundamentally different, not the least because the public interest immunity procedure respects common law principles of natural justice. If it is held that the documents should be produced, and thereby disclosed, they are available to both parties; if they are not to be produced they are not available to either and the court may not use them. There is no question of unfairness or inequality.

33 The procedure developed by the common law with respect to claims of public interest immunity in the course of litigation is of narrow compass. It

---

22 [2012] 1 AC 531 at 616 [178], 618-619 [188].

23 *Al Rawi* [2012] 1 AC 531 at 570 [1].

24 *Al Rawi* [2012] 1 AC 531 at 580 [41] per Lord Dyson JSC, 586 [71] per Lord Hope of Craighead DPSC, 592 [92] per Lord Kerr of Tonaghmore JSC, 595 [107] per Lord Mance JSC (with whom Baroness Hale of Richmond JSC agreed).

25 *Al Rawi* [2012] 1 AC 531 at 580 [41].

involves balancing competing interests: for example whether the benefit of disclosure to the forensic process outweighs the risk to national security[26]. The balance may be struck differently in civil and criminal proceedings[27]. The documents in question are viewed by the court and treated as confidential only for the purpose of determining the objection to disclosure, a process which is tailored to the demands of the public interest and fairness in litigation.

34 The withholding of evidence such as Exhibit C in a matter of sentencing cannot be regarded as a development of the common law relating to public interest immunity. It cannot be said to be the application of that doctrine by analogy. In reality it involves the creation of a new rule, a rule which would have a blanket application in cases such as the present and reduce procedural fairness to nought.

Other sources of power?

35 The Commissioner sought to identify alternative sources of a power which would permit a court to deny a party access to evidence admitted in substantive proceedings. The Commissioner pointed to ss 7 and 8 of the *Court Suppression and Non-publication Orders Act 2010* (NSW) ("the Suppression Act"). The Crown had also raised s 130 of the *Evidence Act 1995* (NSW) on the special leave application. This is despite the fact that the Court of Criminal Appeal's orders were made solely on the basis of public interest immunity. These contentions may be dealt with shortly.

36 It may be noted at the outset that the *Evidence Act* applies to a proceeding relating to sentencing only if the court so directs[28]. No such direction was sought or made in the present case with respect to s 130. It is unlikely that it would have been made in circumstances such as this. Section 130 of the *Evidence Act* permits a court to direct that the information or document to which it applies not be adduced as evidence. It is a rule relating to admissibility.

37 Section 8 of the Suppression Act permits a court to make a suppression or non-publication order on certain grounds, those set out in s 8(1). Section 3 defines a "non-publication order" as an order that prohibits or restricts the publication of information and a "suppression order" as an order that prohibits or

---

26 *Alister v The Queen* (1984) 154 CLR 404.

27 *Al Rawi* [2012] 1 AC 531 at 594 [101].

28 *Evidence Act 1995* (NSW), s 4(2).

restricts the disclosure of information. "Publish" is defined to mean to "disseminate or provide access to the public or a section of the public by any means".

38 Section 8 of the Suppression Act is not concerned with access to documents required by the parties to proceedings. So much follows from its terms. Neither s 130 of the *Evidence Act*, nor s 7 or s 8 of the Suppression Act, is expressed to refer to material which is admitted into evidence but is not disclosed to another party to substantive proceedings. Nor can this be said to arise as a matter of necessary implication.

The powers of the Court of Criminal Appeal

39 The respondents submitted that the Court of Criminal Appeal had the inherent power of the Supreme Court as a result of s 12 of the CA Act, or alternatively an implied power, to consider the contents of Exhibit C. This was said to be necessary to its function in determining the appeal. Every court possesses jurisdiction arising by implication upon the principle that a grant of power to do something carries with it a power to do everything necessary for its exercise[29]. Here it was necessary for the Court of Criminal Appeal to have regard to the confidential material because it was required to consider the evidence which was before the sentencing judge[30].

40 Each of the respondents relied upon the exercise of the power as justified by what were said to be the "exceptional" circumstances of this case. The circumstances were said to be exceptional because: the District Court was obliged by s 23 of the C(SP) Act to consider the assistance the appellant had provided to the authorities; the material had been before the sentencing judge; the public interest against disclosure of Exhibit C to the appellant and her legal representatives was "extremely high"; the appellant had consented to non-disclosure; the affidavit which was prepared benefitted her; and the factual nature of the assistance was known to her.

41 It may be doubted whether the circumstances of this case are truly exceptional. It would hardly be the first time that a police informer has been the subject of a sentencing process, hence the need for s 23 of the C(SP) Act. But neither that provision nor any other provision of the C(SP) Act purports to

---

29 *Grassby v The Queen* (1989) 168 CLR 1 at 16.

30 *Mickelberg v The Queen* (1989) 167 CLR 259 at 267, 274, 298; *Betts v The Queen* (2016) 258 CLR 420 at 425 [10].

prevent an informer who is to be sentenced, or his or her legal advisers, from accessing in any way the information relevant to the mandatory considerations in s 23.

42 The respondents' arguments on this appeal had as their focus the source of the Court of Criminal Appeal's power to vary its procedures to take account of a need for confidentiality of sensitive material. They tended to direct attention away from the real question which arose in this case. The question is not whether there is such a power. It may be accepted that a superior court may vary its procedures to meet the exigencies of a particular case and on occasions have done so even with respect to matters such as open justice and procedural fairness. The real question which arose before the Court of Criminal Appeal was how to provide a sufficient level of procedural fairness whilst at the same time maintaining a sufficient level of confidentiality of the sensitive information. This question was not addressed.

Tailoring orders

43 There is a distinction to be drawn between a court having jurisdiction and the exercise of that jurisdiction. The question in cases of this kind is how power should be exercised[31]. It should not be assumed that procedural fairness should altogether be denied in order that sensitive information be kept confidential. Just as the principle of open justice has been held to yield to the need to do justice in a particular case[32], so must the requirements of natural justice in a particular case yield to some extent. Although there have been statements that the variable nature of procedural fairness means that it may in some circumstances be reduced to nothingness[33], it is difficult to conceive of a case such as the present where orders could not be tailored to meet the competing demands.

44 It is well known that the courts have modified and adapted the content of the general rules of open justice and procedural fairness in particular kinds of cases. Orders for non-publication are an example of the former. The non-

---

31 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 100 [157].

32 *Scott v Scott* [1913] AC 417 at 437-438, applied in *Dickason v Dickason* (1913) 17 CLR 50. See also, eg, *Hogan v Hinch* (2011) 243 CLR 506 at 531 [21].

33 *Kioa v West* (1985) 159 CLR 550 at 615-616; cf *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 105 [177].

disclosure of evidence in wardship cases is an example of the latter[34]. More relevant for present purposes is litigation concerning trade secrets where disclosure is sometimes limited, for example with "confidentiality rings" being placed around disclosure and the persons who are permitted to see the confidential material[35]. In *Roussel Uclaf v Imperial Chemical Industries Plc*[36], Aldous J observed that each case has to be decided on its own facts and on the broad principle that the court has the task of deciding how justice can be achieved taking into account the rights and needs of the parties. The relevant party should have as full a depth of disclosure as would be consistent with the adequate protection of the secret.

45 In such cases, arrangements are often made to allow access to a person who represents the party from whom it is necessary to maintain confidentiality. And as Brereton J observed in *Portal Software v Bodsworth*[37], protective limitations may be introduced at the time of production or inspection. Orders can be made for inspection by an independent solicitor reporting directly to the court[38]. This is similar to the position of an amicus curiae, which was referred to in the course of argument on the appeal. Orders for inspection might be limited to the party's lawyers or experts and not extended to the party itself[39]. In such a circumstance the order has permitted to be conveyed to the party in some way such information as is necessary[40] for the purpose of giving instructions. In cases such as the present it is difficult to accept that orders could not have been tailored to meet the concerns of the Commissioner, for example by providing the

---

34 *Secretary of State for the Home Department v MB* [2008] AC 440 at 486 [58], cited in *Al Rawi* [2012] 1 AC 531 at 584 [63].

35 *Al Rawi* [2012] 1 AC 531 at 585 [64] per Lord Dyson JSC. See also *Roussel Uclaf v Imperial Chemical Industries Plc* [1990] FSR 25 at 29-30.

36 [1990] FSR 25 at 29-30.

37 [2005] NSWSC 1115 at [41]-[43].

38 *Colley v Hart* (1890) 7 RPC 101 at 104.

39 *Swain v Edlin-Sinclair Tyre Co* [1903] RPC 435; *British Xylonite Co Ltd v Fibrenyle Ltd* [1959] RPC 252; *Ex parte Fielder Gillespie Ltd* [1984] 2 Qd R 339 at 341 per McPherson J.

40 *British Xylonite Co Ltd v Fibrenyle Ltd* [1959] RPC 252; *Lenark Pty Ltd v TheChairmen1 Pty Ltd [No 2]* [2012] NSWSC 415.

appellant's counsel with access to Exhibit C on terms which would have enabled him meaningfully to take instructions and make submissions.

46 True it is that orders of the kind referred to, excepting disclosure from the general rule of the common law, are made for identifiable purposes: in the case of wards because the object of the proceedings is to protect and promote the best interests of the child; in the case of trade secrets because the very subject of the litigation may be destroyed. Clearly a case such as the present does not fall into either of those categories. But once it is accepted that there are certain classes of cases where a departure from the general rule may be justified for good reason, it makes it difficult to suggest that the court lacks jurisdiction to vary the basic principles of open and natural justice[41] or to say that the proper administration of justice may not require it. The trade secrets cases in particular show that the general rule is not absolute[42]. Consistently with the general rule of the common law regarding fairness in the conduct of proceedings, the concern of the courts is to avoid practical injustice[43].

The position in the District Court

47 This appeal concerns the ruling made by the Court of Criminal Appeal on the subject of non-disclosure. Nevertheless something should be said respecting what occurred at and prior to sentencing in the District Court.

48 There was some dispute between the parties as to whether what occurred between the Crown and the appellant's counsel reflected something approaching a common practice. Senior counsel for the Crown informed the Court that those persons instructing him were not aware of a practice whereby the legal representative of an offender is confronted with a choice between a fuller, beneficial but confidential account and a shorter, less beneficial non-confidential account of the offender's assistance given to authorities. This is not supported by a statement in *T v The Queen*[44]. In that case, referring to the evidence before the sentencing judge of the appellant's assistance to the authorities, the Court of Criminal Appeal said that "[the appellant's] legal representatives do not have a

---

41 *Al Rawi* [2012] 1 AC 531 at 597 [114] per Lord Mance JSC (with whom Baroness Hale of Richmond JSC agreed).

42 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 100 [157].

43 *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 99 [156].

44 [2015] NSWCCA 28 at [15].

copy of these documents (as is the usual practice) but apparently understand that the assistance was 'extensive'".

49 Plainly enough the Commissioner should put before a sentencing judge such evidence as is necessary to enable the judge fully to comprehend the assistance provided by the offender and an evaluation of that assistance from the perspective of the police. Section 23 mandates that the court must have regard to this material and to the authority's evaluation of the assistance. The evidence as to these matters must be such as to enable the sentencing judge comprehensively and fairly to assess the matters referred to in s 23. 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 with a view to making orders of the kind referred to above.

50 It may be that a case where a tailored order is not possible will be rare. Such a circumstance may raise the question whether a consent to confidentiality can be effective, whether it may in effect be waived[45]. In *Al Rawi* two members of the Supreme Court considered that a party should be able to consent to a closed material procedure[46]. Other members of the Court took the view that it was a matter of importance which had not been argued and therefore left the question open[47]. No concluded view need be expressed in this case. The parties did not argue this question. The respondents' argument proceeded upon the assumption that consent could be effective. In any event the question is not an issue in this appeal.

The residual discretion

51 As has been mentioned earlier in these reasons[48], the limited purpose of Crown appeals under s 5D(1) is relevant to the exercise of the residual discretion it provides. There may be circumstances where the guidance provided to

---

45 See, eg, the discussion in Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability*, 6th ed (2017) at 492-496 and the cases there referred to.

46 *Al Rawi* [2012] 1 AC 531 at 597 [113] per Lord Mance JSC (with whom Baroness Hale of Richmond JSC agreed).

47 *Al Rawi* [2012] 1 AC 531 at 581 [46] per Lord Dyson JSC, 587 [75] per Lord Hope of Craighead DPSC.

48 See [20] above.

sentencing judges will be limited, in which case it may be appropriate for the appeal to be dismissed in the exercise of the residual discretion[49]. This was such a case. Because of the existence of non-publication orders no such guidance could be provided by a court exercising its powers under s 5D(1).

52 Moreover there was the fundamental difficulty which counsel for the appellant advanced at the hearing before the Court of Criminal Appeal. The objection of the Crown, which the Court upheld, to making Exhibit C available on any conditions meant that the appellant was denied procedural fairness. She could not have her case properly presented. In the absence of an order tailored to ensure that basic procedural fairness was accorded to the appellant, the Court of Criminal Appeal should have declined to exercise its discretion on this basis alone.

Orders

53 The two sets of orders made by the Court of Criminal Appeal in this matter, when reserving its judgment and when disposing of the appeal, should be set aside and in lieu thereof the Crown appeal be dismissed.

54 The orders made by the Court of Criminal Appeal on the first occasion, when reserving its judgment, contained an order suppressing the publication of Exhibit C. The appellant seeks an order that the contents of Exhibit C remain suppressed. There should be a further order that the contents of Exhibit C be suppressed until further order of the Court. This order is made pursuant to s 77RE of the *Judiciary Act 1903* (Cth) on the grounds set out in s 77RF(1)(a), being that the order is necessary to prevent prejudice to the proper administration of justice, and s 77RF(1)(c), being that the order is necessary to protect the safety of any person.

---

49 *Green v The Queen* (2011) 244 CLR 462 at 466 [2].

55 NETTLE AND EDELMAN JJ. We agree with Kiefel CJ, Bell and Keane JJ, for the reasons their Honours give, that, in the circumstances of this matter, proper exercise of the residual discretion should have led the Court of Criminal Appeal to dismiss the Crown's appeal against sentence. We also agree with their Honours regarding public interest immunity. The Court of Criminal Appeal's invocation of that doctrine as a basis for keeping secret from a prisoner information supplied to a sentencing judge for the purpose of imposing sentence is misconceived.

56 In the absence of statutory authorisation, however, we are less sanguine than their Honours as to how far courts may go to protect the confidentiality of sensitive information provided to a sentencing judge to equip the judge to undertake the sentencing exercise mandated by s 23 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) ("the C(SP) Act"). Plainly enough, as this matter demonstrates, the competing needs of ensuring that sentencing judges are fully informed of the matters prescribed by s 23(2) of the C(SP) Act and ensuring that the confidentiality of sensitive information is not compromised calls for a detailed legislative solution. But until and unless such a solution is enacted, we consider that there are several aspects of the existing situation which should be regarded as clear.

57 First, it is fundamental to the Anglo-Australian criminal justice system that no-one is to be sentenced for a criminal offence without first being apprised of the basis on which he or she stands to be sentenced and being afforded the opportunity to be heard on it[50]. It is, therefore, 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[51].

---

50 *Pantorno v The Queen* (1989) 166 CLR 466 at 473-474 per Mason CJ and Brennan J, 482-483 per Deane, Toohey and Gaudron JJ; *Burrell v The Queen* (2008) 238 CLR 218 at 226 [28] per Gummow A-CJ, Hayne, Heydon, Crennan and Kiefel JJ; *Moss v The Queen* [2013] 1 WLR 3884 at 3887 [5] per Lord Hughes JSC for the Privy Council; *DL v The Queen* (2018) 92 ALJR 764 at 772 [39] per Bell, Keane, Nettle, Gordon and Edelman JJ; 358 ALR 666 at 675.

51 See *Eastman v Director of Public Prosecutions (ACT)* (2003) 214 CLR 318 at 359 [117] per Heydon J. See also *Al Rawi v Security Service* [2012] 1 AC 531 at 578 [36], 580 [42] per Lord Dyson JSC, 589 [83] per Lord Brown of Eaton-under-Heywood JSC; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 69 [62] per French CJ.

58 Secondly, and consequently, in our view, it is not open in a criminal sentencing proceeding in which evidence of assistance is provided to the sentencing judge to order that the prisoner be denied access to all or some of that evidence. Such orders cannot be justified in the same way as orders restricting parties' access to trade secrets and other confidential information in civil proceedings, or restricting the access of parties to information tendered by a guardian in wardship proceedings, where disclosure would undermine the core purpose of the proceedings such as protecting information from trade rivals or ensuring the best interests of the child[52].

59 Thirdly, the practice that appears until now to have been followed of offering a prisoner a "choice" between the tender of a truncated, presumably less favourable statement of assistance, to which the prisoner will be afforded access, and the tender of a complete, presumably more favourable statement of assistance, to which he or she will be denied access, should cease. Whatever the sentencing judge sees, the prisoner must be able to see, and must be able to give instructions on to his or her counsel. Whether or not a prisoner may waive obligations of procedural fairness in sentencing, and whatever the consequence of any purported waiver, he or she cannot waive the Crown's "duty to the court to assist it in the task of passing sentence by an adequate presentation of the facts"[53]. Nor can a Crown prosecutor abrogate the "lonely" responsibility[54] which accompanies that duty, to determine what evidence is led. That duty and responsibility owed by a Crown prosecutor, who appears not just as counsel but as a "minister of justice"[55], is an aspect of "the general obligation ... imposed upon a Crown Prosecutor to act fairly in the discharge of the function which he [or she] performs in a criminal trial [which] is ultimately to assist in the attainment of justice between the Crown and the accused"[56].

---

52 See and compare *Al Rawi* [2012] 1 AC 531 at 584-585 [63]-[65] per Lord Dyson JSC, 590-591 [85] per Lord Brown of Eaton-under-Heywood JSC.

53 *R v Tait* (1979) 24 ALR 473 at 477 per Brennan, Deane and Gallop JJ.

54 *R v Apostilides* (1984) 154 CLR 563 at 575 per Gibbs CJ, Mason, Murphy, Wilson and Dawson JJ.

55 *Libke v The Queen* (2007) 230 CLR 559 at 586 [71] per Hayne J, citing *Randall v The Queen* [2002] 1 WLR 2237 at 2241 [10] per Lord Bingham of Cornhill for the Privy Council, citing in turn *R v Puddick* (1865) 4 F & F 497 at 499 per Crompton J [176 ER 662 at 663] and *R v Banks* [1916] 2 KB 621 at 623 per Avory J.

56 *Whitehorn v The Queen* (1983) 152 CLR 657 at 675 per Dawson J.

60 Fourthly, although not inconceivable, the occasions should be rare when it is impossible so to draft a statement of assistance that it fully and completely conveys the nature, extent and utility of assistance given or to be given and yet eschews mention of names and precise details which might put persons or operations at risk. It could be that to do so requires more effort and takes more time than merely truncating statements of assistance in the way apparently done until now. But, if so, it is incumbent on the Crown to ensure that the police and others involved in the preparation of such statements make that greater effort and take such greater amount of time as is required. Section 23 of the C(SP) Act leaves no doubt that it is Parliament's intention that sentencing judges be fully informed of the factors identified in s 23(2) and that they sentence accordingly with explicit reference to the weight they accord to those factors.

61 Finally, as Kiefel CJ, Bell and Keane JJ in effect observe, there is no reason why, if the need for secrecy demands it, a plea hearing may not be conducted in camera[57], or orders may not be made to prohibit or restrict disclosure of sensitive information by the prisoner and his or her counsel[58], or suppression or non-publication orders may not be made to the extent necessary to ensure the preservation of confidence[59]. If, however, those qualifications on the principle of open justice are thought to be inadequate, and impingement of the prisoner's entitlement to see, and give instructions on, evidence is regarded as necessary, it is for Parliament so to provide, by legislation clearly expressed[60].

---

57 See, eg, *R v Ealing Justices; Ex parte Weafer* (1981) 74 Cr App R 204 at 205-206 per Donaldson LJ (Skinner J agreeing at 207).

58 *Hogan v Hinch* (2011) 243 CLR 506 at 531-532 [21], 534 [26] per French CJ.

59 See, eg, *Court Suppression and Non-publication Orders Act 2010* (NSW). See also *Smith* (1996) 86 A Crim R 308.

60 See *Hogan v Hinch* (2011) 243 CLR 506 at 526 [5] per French CJ; *Al Rawi* [2012] 1 AC 531 at 574-575 [21]-[22] per Lord Dyson JSC.

62 GORDON J. The appellant, who was convicted and sentenced in the District Court of New South Wales, was a registered police informer who had provided assistance to law enforcement authorities and remained a registered informer. The sentencing judge was required, by statute, to take that assistance into account as a mitigating factor[61]. Confidential evidence of the appellant's assistance was given to the sentencing judge and had been seen by the Crown Prosecutor. It was not given to the appellant's counsel. That was an error.

63 The appellant received an aggregate sentence of three years and six months' imprisonment, with a non-parole period of 18 months. The Crown appealed to the Court of Criminal Appeal of the Supreme Court of New South Wales on the ground that the appellant's sentence was manifestly inadequate[62]. That appeal was allowed and the appellant's sentence was increased to six years and six months' imprisonment, with a non-parole period of three years and six months. Updated confidential evidence of the appellant's assistance to law enforcement authorities was provided to the Court of Criminal Appeal and had been seen by the Crown Prosecutor. It was not given to the appellant's counsel on the grounds of public interest immunity. That was also an error.

64 Procedural fairness lies at the heart of the judicial function[63]. It requires a court, making an order that finally alters or determines a right or legally protected interest, to afford to the parties a fair opportunity to test and respond to evidence upon which the order might be made[64]. In other words, a court must provide *each* party before it an opportunity to be heard, and to tender evidence and advance arguments relating to its own case and to answer the case put against it[65].

---

61 *Crimes (Sentencing Procedure) Act 1999* (NSW), ss 21A(1)(b) and (3)(m), 23.

62 Pursuant to s 5D(1) of the *Criminal Appeal Act 1912* (NSW).

63 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 354 [54]. See also *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 359 [56]; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 520 [48]; *South Australia v Totani* (2010) 242 CLR 1 at 43 [62], 47 [69]; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38 at 46 [1], 105 [177], 106-108 [184]-[188].

64 *Condon* (2013) 252 CLR 38 at 105 [177], 106-108 [184]-[188], citing *Leeth v The Commonwealth* (1992) 174 CLR 455 at 470, *Bass* (1999) 198 CLR 334 at 359 [56] and *International Finance Trust* (2009) 240 CLR 319 at 352 [50], 354 [54], 363-364 [88], 367 [98], 379 [140], 386-387 [161].

65 *International Finance Trust* (2009) 240 CLR 319 at 354 [54], 363-364 [88], quoting *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 594 [175], in turn quoting *Bass* (1999) 198 CLR 334 at 359 [56].

The justifications for the requirements of procedural fairness are numerous and of such force that exceptions are narrow[66]. However, the content of the requirements of procedural fairness is not fixed; it varies according to the circumstances of each case[67]. Procedural fairness is essentially practical – the concern is to avoid practical injustice[68].

65 The circumstances in issue in this appeal are set out in the reasons of Kiefel CJ, Bell and Keane JJ[69]. It is unnecessary to repeat them here except to the extent necessary to explain these reasons.

66 Confidential evidence of the appellant's assistance to law enforcement authorities was relevant in the District Court and the Court of Criminal Appeal. It was relevant in the District Court because the sentencing statute required it to be taken into account as a mitigating factor in the sentencing process[70]. It was relevant in the Court of Criminal Appeal because, in assessing whether the appellant's sentence was manifestly inadequate such that the discretion to vary the sentence should be exercised, the sentencing statute continued to require that the nature and extent of the assistance provided to law enforcement authorities be assessed[71]. The appellant, having been denied access to the confidential evidence, and thus an opportunity to test and respond to it, was denied procedural fairness.

67 The denial of procedural fairness arose because three different principles or sets of principles, each applicable at different stages of litigation, intended to achieve different objectives, with different sources of power, were not kept separate: what material was immune from production in litigation (*public interest immunity*); how confidential material might be produced to an opposing party before trial, irrespective of its subsequent admission or receipt into evidence (*confidentiality orders*); and how confidential evidence might be adduced at trial but not otherwise disclosed (*suppression or non-publication orders*).

---

66 *International Finance Trust* (2009) 240 CLR 319 at 379-380 [141].

67 *International Finance Trust* (2009) 240 CLR 319 at 354 [54].

68 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 14 [37]; *Condon* (2013) 252 CLR 38 at 99 [156].

69 See reasons of Kiefel CJ, Bell and Keane JJ at [1]-[5], [9]-[16].

70 *Crimes (Sentencing Procedure) Act 1999* (NSW), ss 21A(1)(b) and (3)(m), 23.

71 *CMB v Attorney-General (NSW)* (2015) 256 CLR 346 at 360 [37], 373-374 [78]. See also *Crimes (Sentencing Procedure) Act 1999* (NSW), s 23(2)(d).

68 It is necessary to address each of these in turn.

Public interest immunity

69 Public interest immunity is a basis for objecting to production by the executive of relevant and otherwise admissible evidence in the course of litigation[72]. It provides an immunity from production of such evidence where it would be against the public interest to disclose the contents of a document, or where the document "belongs to a class of documents which in the public interest ought not to be produced, whether or not it would be harmful to disclose the contents of the particular document"[73].

70 It is "the duty of the court, and not the privilege of the executive government"[74], to decide whether the public interest which requires that evidence should not be produced outweighs the competing public interest that a court should not be denied access to relevant and otherwise admissible evidence[75]. The objection to production of relevant evidence on the grounds of public interest immunity is an objection taken by an arm of the executive. And, as occurred in this matter, that arm of the executive is often not a party to the litigation. The role of the executive is limited to objecting to production; the executive does not undertake the balancing exercise or decide whether the evidence will be produced or withheld. Thus, it is for the court to consider the evidence and undertake the exercise of balancing the public interest in the evidence not being produced and the public interest in the administration of justice[76].

71 If an objection to production on the grounds of public interest immunity is upheld by a court, then that evidence is immune from production and, in the case of documentary evidence, immune from inspection. It is not disclosed to any of

---

72 *Sankey v Whitlam* (1978) 142 CLR 1 at 38.

73 *Sankey* (1978) 142 CLR 1 at 39; *The Commonwealth v Northern Land Council* (1993) 176 CLR 604 at 616.

74 *Sankey* (1978) 142 CLR 1 at 38.

75 *Sankey* (1978) 142 CLR 1 at 38-39; *Northern Land Council* (1993) 176 CLR 604 at 616.

76 *Sankey* (1978) 142 CLR 1 at 38-39.

the parties and it is not adduced in evidence in the litigation[77]. In a criminal proceeding, a successful claim of public interest immunity can have the consequence of a prosecuting authority not being able to prefer a particular charge or the case not proceeding on the charge that had been preferred[78].

72 There is no basis in principle for public interest immunity to be used to permit evidence to be tendered in litigation but withheld from one party to that litigation[79]. If an objection on the grounds of public interest immunity is upheld, the evidence is immune from production in the litigation and may not be used by any party[80]. If an objection is not upheld, the evidence is produced and disclosed to the parties and then, if relevant and admissible, adduced in evidence to the court. And a court, in deciding a claim for public interest immunity, may consider the evidence over which public interest immunity is claimed only to determine whether the public interest lies in the evidence being produced or withheld[81]. It cannot be used by the court for any other purpose.

73 The second respondent, the New South Wales Commissioner of Police, contended that public interest immunity could be invoked in exceptional circumstances to justify the admission into evidence of information that had not been seen by a party or their legal advisers. That contention should be rejected. The cases cited by the Commissioner of Police[82] are, in that respect, either distinguishable or wrongly decided.

---

77 *Sankey* (1978) 142 CLR 1 at 43; *Northern Land Council* (1993) 176 CLR 604 at 616; *Gypsy Jokers* (2008) 234 CLR 532 at 556 [24]; *Condon* (2013) 252 CLR 38 at 97 [148].

78 *Al Rawi v Security Service* [2012] 1 AC 531 at 595 [107]. See also *Gypsy Jokers* (2008) 234 CLR 532 at 556 [24]; *Strickland v Director of Public Prosecutions (Cth)* (2018) 93 ALJR 1 at 32 [146]-[147]; 361 ALR 23 at 60-61.

79 *Al Rawi* [2012] 1 AC 531 at 580 [41], 586 [71], 592 [92], 595 [107].

80 *Sankey* (1978) 142 CLR 1 at 43; *Northern Land Council* (1993) 176 CLR 604 at 616; *Gypsy Jokers* (2008) 234 CLR 532 at 556 [24]; *Condon* (2013) 252 CLR 38 at 97 [148].

81 *Sankey* (1978) 142 CLR 1 at 46; *Condon* (2013) 252 CLR 38 at 97 [148].

82 *Chu v Minister for Immigration and Ethnic Affairs* (1997) 78 FCR 314; *R v Ngo* (2003) 57 NSWLR 55; *Nicopoulos v Commissioner for Corrective Services* (2004) 148 A Crim R 74; *Hussain v Minister for Foreign Affairs* (2008) 169 FCR 241; *Eastman v Director of Public Prosecutions (ACT) [No 2]* (2014) 9 ACTLR 178; *Ibrahimi v The Commonwealth [No 8]* [2016] NSWSC 1539.

74 Public interest immunity is an exclusionary principle[83] and, as the reasons of Kiefel CJ, Bell and Keane JJ explain, neither s 130 of the *Evidence Act 1995* (NSW) nor the *Court Suppression and Non-publication Orders Act 2010* (NSW) ("the Suppression Act") permits the admission of evidence excluded on the grounds of public interest immunity[84].

Confidential material

75 Nothing that has been said so far detracts from the proposition that production and disclosure of confidential material might, in appropriate circumstances and on appropriate terms, be restricted. In this matter, those issues were required to be addressed at two distinct times in the litigation: production and disclosure of the confidential material prior to the hearing, and then suppression or non-publication of what transpired at the hearing. The circumstances are distinct but the orders that may be made often overlap.

Confidentiality orders

76 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[85]. A court must therefore balance these competing interests in a fashion that, to the extent possible, meets each of them[86].

77 The appropriate balance is case specific. It may be achieved by regulating the taking and safeguarding of copies of documents containing confidential information, or by limiting the circulation of copies and restricting disclosure of

---

83 *Condon* (2013) 252 CLR 38 at 97 [148]; *Al Rawi* [2012] 1 AC 531 at 610 [154].

84 See reasons of Kiefel CJ, Bell and Keane JJ at [35]-[38].

85 *Warner-Lambert Co v Glaxo Laboratories Ltd* [1975] RPC 354 at 358; *Mobil Oil Australia Ltd v Guina Developments Pty Ltd* [1996] 2 VR 34 at 40; *Mackay Sugar Co-operative Association Ltd v CSR Ltd* (1996) 63 FCR 408 at 414-415; *Conor Medsystems Inc v The University of British Columbia [No 4]* [2007] FCA 324 at [7], [9]; *Cargill Australia Ltd v Viterra Malt Pty Ltd* [2018] VSCA 260 at [122], [126].

86 *Warner-Lambert* [1975] RPC 354 at 358; *Church of Scientology of California v Department of Health and Social Security* [1979] 1 WLR 723 at 746; [1979] 3 All ER 97 at 115-116; *Roussel Uclaf v Imperial Chemical Industries Plc* [1990] FSR 25 at 29-30; *Portal Software v Bodsworth* [2005] NSWSC 1115 at [41]-[45]; *Lenark Pty Ltd v TheChairmen1 Pty Ltd [No 2]* [2012] NSWSC 415 at [11]-[13].

not only the contents of the documents but, in appropriate cases, the nature or even the existence of the documents[87]. A court could restrict inspection of confidential information to a specified person or persons – for example, a nominated member or members of a party's legal team – on an express restriction on the further communication and use of the information obtained[88]. Such a restriction could, in an appropriate case, be achieved through a direction or order that the material be disclosed only to one or more of a party's legal representatives and not to the party. In exceptional circumstances, in addition to the implied undertaking that documents produced will not be used for a purpose other than the conduct of the legal proceeding on foot[89], an express undertaking might be necessary to "bring explicitly home to the minds of those giving it how important it is that the documents [and the information] only be used for the purpose of [the] proceedings"[90], or to reinforce that the disclosure or use of the particular confidential information is restrained even for the purposes of the litigation itself[91].

78 Whether information is relevant depends on the nature of the proceeding[92] and the issues. As it is for the court to provide *each* party before it an opportunity to be heard, and to tender evidence and advance arguments relating to its own case and to answer the case put against it[93], it is for the court to ensure that each

---

87 See Dal Pont, *Law of Confidentiality* (2015) at 358 [17.31].

88 See, eg, *Swain v Edlin-Sinclair Tyre Co* [1903] RPC 435; *British Xylonite Co Ltd v Fibrenyle Ltd* [1959] RPC 252; *Warner-Lambert* [1975] RPC 354 at 361-362; *Ex parte Fielder Gillespie Ltd* [1984] 2 Qd R 339 at 341; *Mackay Sugar* (1996) 63 FCR 408; *Mobil Oil* [1996] 2 VR 34 at 40.

89 *Hearne v Street* (2008) 235 CLR 125 at 130 [1].

90 *Hearne* (2008) 235 CLR 125 at 162 [116].

91 See Dal Pont, *Law of Confidentiality* (2015) at 359 [17.32].

92 For example, prosecutors have a common law obligation to disclose all relevant evidence to an accused: see *Grey v The Queen* (2001) 75 ALJR 1708; 184 ALR 593; *Mallard v The Queen* (2005) 224 CLR 125 at 133 [17]. Similar obligations are contained in prosecutorial guidelines: see, eg, New South Wales, Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007), guideline 18.

93 *International Finance Trust* (2009) 240 CLR 319 at 354 [54], 363-364 [88], quoting *Gypsy Jokers* (2008) 234 CLR 532 at 594 [175], in turn quoting *Bass* (1999) 198 CLR 334 at 359 [56].

party has, so far as is practicable, access to information on which the court is asked to act.

79 There are limits[94]. As Lord Dyson JSC said in *Al Rawi v Security Service*[95]:

> "[T]he court's power to regulate its own procedures is subject to certain limitations. The basic rule is that (subject to certain established and limited exceptions) the court cannot exercise its power to regulate its own procedures in such a way as will deny parties their fundamental common law right to participate in the proceedings in accordance with the common law principles of natural justice and open justice."

80 But, within the confines of those limits and the particular circumstances of the case, the court's task of ensuring that each party has, so far as is practicable, access to information on which the court is asked to act remains essentially practical.

Suppression or non-publication orders

81 The position at trial is different. Material that is *admitted* into evidence is part of the court record[96]. The principle of open justice requires that this evidence ordinarily be open and available to the public[97]. It says nothing about material not in fact admitted into evidence[98].

82 Superior courts have an inherent power to suppress the publication or dissemination of material that is on the court record[99]. Any exercise of the

---

94 See, eg, *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

95 [2012] 1 AC 531 at 575 [22].

96 *P v Australian Crime Commission* (2008) 250 ALR 66 at 70 [18]-[19].

97 See *Scott v Scott* [1913] AC 417 at 441, 445; *Russell v Russell* (1976) 134 CLR 495 at 520; *Alcan (NT) Alumina Pty Ltd v Commissioner of Taxes* (2007) 67 ATR 82 at 85 [10].

98 *Alcan (NT) Alumina* (2007) 67 ATR 82 at 85 [10]; *P* (2008) 250 ALR 66 at 70 [19].

99 *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465 at 476-477; *John Fairfax Publications Pty Ltd v District Court of New South*

Footnote continues

discretion to make a suppression or non-publication order starts from the premise of open justice[100]. The court's discretion is not unbounded. As Lord Diplock said in *Attorney-General v Leveller Magazine Ltd*[101], "[a]part from statutory exceptions ... where a court in the exercise of its inherent power to control the conduct of proceedings before it departs in any way from the general rule [of open justice], the departure is justified to the extent and to no more than the extent that the court reasonably believes it to be necessary in order to serve the ends of justice". Thus, except for doing what is reasonably necessary for the purposes of securing the administration of justice, there is no inherent power to prohibit a person from publishing or otherwise disclosing the evidence in a proceeding. Any such prohibition must do no more than is reasonably necessary to achieve the due administration of justice, based on the material before the court.

83 Every court, including a court with limited jurisdiction, has power arising from the implication that a grant of power carries with it everything necessary for its exercise[102]. Thus, both the Court of Criminal Appeal[103] and the District Court have implied powers in the exercise of their jurisdiction to limit the application of the open justice principle where doing so is necessary to secure the proper

---

Wales (2004) 61 NSWLR 344 at 356 [39]-[40]; *Hogan v Hinch* (2011) 243 CLR 506 at 531 [21].

100 See *Scott* [1913] AC 417 at 435, 441, 445; *Russell* (1976) 134 CLR 495 at 520; *Attorney-General v Leveller Magazine Ltd* [1979] AC 440 at 449-450.

101 [1979] AC 440 at 450. See also *Ex parte The Queensland Law Society Incorporated* [1984] 1 Qd R 166 at 170; *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465 at 476-477; *Nine Network Australia Pty Ltd v McGregor SM* (2004) 14 NTLR 24 at 30-31 [19]; *Hogan* (2011) 243 CLR 506 at 534 [26]; *Rinehart v Welker* (2011) 93 NSWLR 311 at 320-321 [27]-[31]; *Deputy Commissioner of Taxation v Karas* (2011) 83 ATR 879 at 881 [4].

102 *Grassby v The Queen* (1989) 168 CLR 1 at 16.

103 *R v JS [No 2]* (2007) 179 A Crim R 10 at 12 [3]. There is also a view that the Court of Criminal Appeal has inherent jurisdiction. See *Burrell v The Queen* (2008) 238 CLR 218 at 243-244 [103]; *Criminal Appeal Act 1912* (NSW), ss 3(1), 12(1). It is not necessary to decide whether this view is correct for the purposes of this appeal.

administration of justice[104]. The limitations identified by Lord Dyson JSC in *Al Rawi*[105] apply with equal force here.

84 The orders that a court might make must specify precisely how information should be treated and who is bound by the orders. The particular content of each order will depend on the facts of each case.

85 What is described as an "*in camera* order", or a closed court order, which excludes the public from proceedings, is a different kind of order. By itself, it does not restrain the publication or disclosure of evidence in the proceedings by persons permitted to attend the hearing. A suppression or non-publication order may stand without an *in camera* order. The distinction between the two types of order is important. Unlike an *in camera* order, a suppression or non-publication order binds persons in the courtroom and, depending on its terms, third parties, who may be found to be in contempt if they intentionally interfere with the proper administration of justice by deliberately frustrating the effect of the order[106].

86 In New South Wales, the common law position has been modified by the Suppression Act. A court may make a suppression order[107] or a non-publication order[108] on certain grounds to prohibit or restrict the publication or other disclosure of, among other matters, "information that comprises evidence, or information about evidence, given in proceedings before the court"[109]. The grounds on which a court may make a suppression or non-publication order are specified and include, among others, that "the order is necessary to prevent

---

104 *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465 at 476-477; *John Fairfax Publications Pty Ltd v District Court of New South Wales* (2004) 61 NSWLR 344 at 356 [39]-[40]; *Hogan* (2011) 243 CLR 506 at 531 [21].

105 See [79] above.

106 *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465 at 477.

107 Section 3 of the Suppression Act defines a "suppression order" as "an order that prohibits or restricts the disclosure of information (by publication or otherwise)".

108 Section 3 of the Suppression Act defines a "non-publication order" as "an order that prohibits or restricts the publication of information (but that does not otherwise prohibit or restrict the disclosure of information)".

109 Suppression Act, s 7(b).

prejudice to the proper administration of justice"[110] or that "it is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice"[111]. A suppression or non-publication order may be made on more than one ground[112].

Orders regarding confidential material

District Court

87 In the District Court, the Commissioner of Police should have put before the sentencing judge such evidence as was necessary to enable the sentencing judge fully to comprehend the assistance provided by the appellant and the evaluation of that assistance from the perspective of law enforcement authorities. So much was required by ss 21A(1)(b) and (3)(m) and 23 of the *Crimes (Sentencing Procedure) Act 1999* (NSW). Given the apparent need to keep some of that information confidential from the appellant, that Court should have been approached before the sentencing hearing with a view to seeking orders restricting disclosure of the confidential material, and those orders should have been made. For example, disclosure of the confidential material could have been restricted to a nominated legal representative of the appellant (and not disclosed to the appellant herself), on terms that would have permitted the legal representative to take instructions and make submissions[113].

88 At the sentencing hearing, when the confidential material was tendered in evidence, the sentencing judge would then have needed to consider and make appropriate suppression and non-publication orders to restrict both the disclosure and publication of the confidential evidence. As has been explained, those orders would need to have considered and addressed any confidentiality orders made before the sentencing hearing.

Court of Criminal Appeal

89 In the Court of Criminal Appeal, where access was again sought by the appellant's counsel to confidential material, it was necessary for that Court, prior to the hearing of the appeal, to address restrictions on the disclosure of the material on terms that would have permitted a nominated legal representative of

---

110 Suppression Act, s 8(1)(a).

111 Suppression Act, s 8(1)(e).

112 Suppression Act, s 8(1).

113 See also reasons of Kiefel CJ, Bell and Keane JJ at [49].

the appellant to take instructions from the appellant and make submissions (without disclosing the confidential material to the appellant)[114]. And, at the hearing, when the confidential material was tendered in evidence, that Court again needed to consider and make appropriate suppression and non-publication orders to restrict both the disclosure and publication of the confidential evidence.

Discretion

90 For the reasons given by Kiefel CJ, Bell and Keane JJ[115], the Court of Criminal Appeal should have declined to exercise the discretion.

Orders

91 I agree with the orders proposed by Kiefel CJ, Bell and Keane JJ.

---

114 See also reasons of Kiefel CJ, Bell and Keane JJ at [45].

115 Reasons of Kiefel CJ, Bell and Keane JJ at [51]-[52].