

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
KEANE, EDELMAN, STEWARD AND GLEESON JJ

SCOTT EDWARDS

APPELLANT

AND

THE QUEEN

RESPONDENT

Edwards v The Queen
[2021] HCA 28
Date of Hearing: 19 May 2021
Date of Judgment: 6 October 2021
S235/2020

ORDER

Appeal dismissed.

On appeal from the Supreme Court of New South Wales

Representation

J M Morris SC with T M Ower and E M O'Neill for the appellant (instructed by Cardillo Gray Partners)

L A Babb SC with J E Davidson for the respondent (instructed by Office of the Director of Public Prosecutions (NSW))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Edwards v The Queen

Criminal practice – Appeal – Miscarriage of justice – Prosecution's duty of disclosure in ss 141 and 142 of *Criminal Procedure Act 1986* (NSW) – Where appellant's mobile phone seized by police upon arrest – Where police made copy of data on mobile phone ("Cellebrite Download") – Where prosecution informed appellant's lawyers of existence of Cellebrite Download prior to trial but did not serve copy – Whether prosecution failed to give full and proper pre-trial disclosure required by s 142 – Whether Cellebrite Download contained material falling within s 142(1)(i) or s 142(1)(k) – Whether forensic value of contents of Cellebrite Download for appellant's case rose above level of speculation – Whether non-provision of Cellebrite Download to appellant caused miscarriage of justice.

Words and phrases – "celebrite", "celebrite download", "disclosure", "good prosecutorial practice", "miscarriage of justice", "pre-trial disclosure", "prosecutorial duty of disclosure", "relevant to the reliability of a prosecution witness", "s 142 notice", "would reasonably be regarded as relevant".

Criminal Procedure Act 1986 (NSW), ss 141, 142.

1 KIEFEL CJ, KEANE AND GLEESON JJ. The appellant was convicted by a jury of six counts of aggravated sexual intercourse with a person aged above 10 and under 14 years of age, contrary to s 66C(2) of the *Crimes Act 1900* (NSW). He contends that the trial miscarried by reason of the prosecutor's failure to provide to his lawyers, in advance of the trial, a hard drive containing a copy of data stored on the appellant's mobile telephone ("the Cellebrite Download" or "the Download"). The telephone had been seized by police when the appellant was arrested. The Download comprised over 60,000 files, including over 20,000 text messages, and was capable of being searched.

2 The principal issue in this Court is whether the verdict at trial was a miscarriage of justice within the meaning of s 6(1) of the *Criminal Appeal Act 1912* (NSW) in that the prosecution did not provide "full and proper" disclosure of the Cellebrite Download to the appellant prior to trial, contrary to the requirements of s 142 of the *Criminal Procedure Act 1986* (NSW) ("the Act").

3 By s 141(1)(a) of the Act, the prosecutor was required to "give notice of the prosecution case to the accused person in accordance with section 142". Pre-trial disclosure required by s 141 is to take place before the date set for the trial in the proceedings and in accordance with a timetable determined by the court¹. Section 142(1) provides relevantly:

"For the purposes of section 141(1)(a), the prosecution's notice is to contain the following:

...

(i) a copy of any information, document or other thing provided by law enforcement officers to the prosecutor, or otherwise in the possession of the prosecutor, that would reasonably be regarded as relevant to the prosecution case or the defence case, and that has not otherwise been disclosed to the accused person,

...

(k) a copy of any information in the possession of the prosecutor that is relevant to the reliability or credibility of a prosecution witness,

..."

1 *Criminal Procedure Act 1986* (NSW), s 141(2).

4 Although the Office of the Director of Public Prosecutions ("the ODPP") had informed the appellant's lawyer of the existence of the Download prior to the trial, it did not serve a copy of the Download or otherwise provide any information from the Download. The appellant's lawyer only became cognisant of the Download after the ODPP served a statement of a witness, Ms Birchill, on the Friday before the trial was scheduled to commence. When questioned about how the prosecution had located Ms Birchill, the ODPP told the appellant's lawyer that her details had been obtained from the Download. The appellant did not seek any relief following the late disclosure of Ms Birchill's statement, such as an adjournment of the trial pursuant to s 146(3) of the Act or exclusion of Ms Birchill's evidence.

5 For the following reasons, the verdict against the appellant was not affected by a miscarriage of justice and the appeal must be dismissed.

Background facts

6 The appellant was, at all relevant times, a personal trainer. The complainant is the niece of the appellant's former wife. In late 2012, she was aged around 13 years. There were seven counts on the indictment, the second count being an alternative count of indecent assault. The Crown case was that the assaults the subject of the first five counts took place in the appellant's utility truck at Hudson Park near Newcastle before a boot camp conducted by the appellant; the assaults alleged in the sixth and seventh counts were alleged to have taken place in the male toilets at the same park, before another boot camp.

7 The ODPP repeatedly disclosed the existence of the Celebrite Download to the appellant through his lawyer. At committal, the evidence served by the ODPP included a statement of Detective Senior Constable Pacey which recorded that the appellant's mobile telephone was in the possession of the police, and a statement of Senior Constable Rowe which referred to the use of a "Celebrite phone downloading device" to obtain information stored on the appellant's telephone, which was then used to generate an electronic report.

8 On 16 April 2018, the Download was listed in a single-page brief index annexed to the prosecution's notice purportedly provided pursuant to s 142 of the Act ("the s 142 notice"). The following day, the Download was listed in a two-page brief index annexed to the s 142 notice for a separate prosecution against the appellant.

9 On 3 May 2018, the ODPP sent the appellant's lawyer an updated brief index comprising two pages, which referred to the Celebrite Download in relation to the statement of Senior Constable Rowe, and also listed a "Hard-Drive

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containing Cellbrite [sic]" under the heading "Electronic Material". The covering letter stated, relevantly:

"I have also enclosed an updated Crown brief index. If there are any outstanding items, please let me know as a matter of urgency and I will provide these items to you."

The appellant's lawyer did not respond to this request.

10 On 8 May 2018, the ODPP sent the appellant's lawyer a proposed witness/exhibit list and a request to confirm whether the witnesses marked "not required" would be required for cross-examination. One of these witnesses was identified as "Michael Rowe cellebrite download".

11 On Friday 11 May 2018, at 4.53 pm, the prosecution served a short handwritten statement taken from Ms Birchill and recorded in a police notebook. The statement was summarised by Leeming JA as follows²:

"Ms Birchill ... said that she attended boot camps conducted by the appellant in around 2012, including at Hudson Park early in the morning. In her statement, she said that people attending the class put their stuff near the toilet block, and that while she only used the toilet there once, the accused had a key to it. She said she had had a conversation with him 'where he told me he had applied to the Council for permission to use the park and that's why he had a key to the toilet block'."

The trial

12 Only two aspects of the trial are germane to the issue agitated by the appellant in this Court. They may be summarised shortly. First, the prosecutor's case included a statement of facts that referred to an alleged text message to the complainant while she was at school prior to the alleged assaults. The text concerned the discovery, by the appellant's former wife, that the complainant had accessed a pornographic movie on her iPod. The complainant gave evidence, broadly consistent with the statement of facts, that the appellant had sent her a text message while she was at school stating that she should delete the video and the text message. The complainant was not cross-examined on this evidence.

13 Secondly, Ms Birchill gave unchallenged evidence that the appellant had a key to the gate that opened the toilet block at Hudson Park and was cross-examined

2 *Edwards v The Queen* [2020] NSWCCA 57 at [20].

briefly on matters not relevant to the issue in this Court³. Ms Birchill's evidence was significant because it corroborated the complainant's evidence concerning two matters: that the appellant had a key to the toilets at the park around the time of the alleged offending; and also that the appellant sometimes conducted the boot camp at an indoor car park when it was raining.

14 Notwithstanding the references to the Cellebrite Download in the brief index, ultimately the Crown did not tender any data comprised in the Download.

Provision of the Cellebrite Download to the appellant's lawyer

15 On Friday 18 May 2018, after the trial had adjourned to resume for the trial judge's summing up the following Monday, the appellant's lawyer asked the ODPP how Ms Birchill came to the attention of the officer in charge. The ODPP responded, saying that Ms Birchill's details were obtained from the Cellebrite Download. Later that day, the appellant's lawyer requested a copy of the Download. A copy was provided on Wednesday 23 May 2018, the day after the appellant's conviction.

Court of Criminal Appeal

16 In the Court of Criminal Appeal, the appellant's principal submission was that there had been a breach of the prosecutorial duty to disclose when on 11 May 2018 the Crown had disclosed the new witness statement of Ms Birchill, but had not disclosed that she had come to the Crown's attention through review of the Cellebrite Download⁴. As Leeming JA (Johnson and Harrison JJ agreeing) put it⁵:

"The gravamen of the case sought to be advanced in this appeal is that had the Crown disclosed not merely that it proposed to call Ms Birchill and the evidence she was expected to give, but also that her identity and contact details had been found on the material extracted from the appellant's handset, then the appellant would have been alerted to the fact that the handset could be mined for potentially useful information for the defence."

17 In the Court of Criminal Appeal two aspects of the information constituting the Download were identified as not having been disclosed, being: (1) the fact that

3 *Edwards v The Queen* [2020] NSWCCA 57 at [23].

4 *Edwards v The Queen* [2020] NSWCCA 57 at [40].

5 *Edwards v The Queen* [2020] NSWCCA 57 at [61].

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those records had been used to identify Ms Birchill as a potential Crown witness and to contact her; and (2) the fact that those records might lead to identifying other witnesses, who might assist the defence⁶.

18 As to (1), the Court of Criminal Appeal concluded that it was not part of the prosecution's obligation to disclose how the police or persons within the ODPP went about identifying Ms Birchill⁷. The appellant does not challenge that conclusion in this Court.

19 As to (2), the Court of Criminal Appeal did not accept that the duty of disclosure extended to require the Crown "to tell the defence (a) in general terms that the information extracted from the appellant's own handset might be of utility to the defence, or (b) specifically, that there were numerous text messages between the appellant and another witness during the period specified in the indictment, such that that witness might be of interest to the defence"⁸. Proposition (b) is also no longer part of the appellant's case.

20 Leeming JA did not accept that it was necessary for the Crown to do more than make available in electronic form the information extracted from the appellant's own mobile handset. His Honour concluded⁹:

"It cannot be the case that the Crown is obliged to hunt through what is apt to be an enormous quantity of electronic information in order to identify potentially exculpatory material, in circumstances where it has disclosed the material in its entirety, taken from the appellant's own handset. Litigation is adversarial. In criminal proceedings, the Crown must prove its case, to the criminal standard, and following a fair trial. But it is not for the Crown, at least in any ordinary case, to second-guess or anticipate the ways in which materials disclosed by it might assist the defence. There may perhaps be exceptions to the foregoing general rule (one example might perhaps be certain criminal proceedings involving an unrepresented accused), but that is not the present case."

6 *Edwards v The Queen* [2020] NSWCCA 57 at [48].

7 *Edwards v The Queen* [2020] NSWCCA 57 at [50].

8 *Edwards v The Queen* [2020] NSWCCA 57 at [51].

9 *Edwards v The Queen* [2020] NSWCCA 57 at [60].

In this Court, the appellant does not seek to challenge that conclusion.

21 Having regard to the arguments advanced in the Court of Criminal Appeal, there was no occasion for their Honours to engage in a comprehensive consideration of s 142(1)(i). Instead, Leeming JA proceeded on the basis, considered to be favourable to the appellant, that the Act does not cover the field concerning the prosecutorial duty of disclosure. The Court of Criminal Appeal held that no miscarriage of justice had been established¹⁰.

Appeal to this Court

22 In this Court, the appellant argued that s 142 required disclosure of the Cellebrite Download, by provision of the whole of the information constituting the Download on a hard drive, because the whole of its contents was of potential use to the defence. It was contended that the mere identification of the Download's existence was insufficient. The contention was not that s 142(1)(i) required the disclosure of the Download as a "thing", but that the entirety of the Download was "information" within the meaning of s 142(1)(i).

23 The proper interpretation of s 142(1) may raise a number of issues that do not fall to be determined in this case. They include the scope of the phrase "would reasonably be regarded as relevant". It is not necessary to discuss the extent of its reach. Nor is it appropriate where the proposition that all the information on the Download satisfied this requirement was not addressed in the Court of Criminal Appeal or in this Court. Argument in this Court did not proceed upon any assumption or concession by the respondent as to the correctness of such a proposition. In any event, s 142 is only one of several sources of the prosecutorial duty of disclosure, as Leeming JA correctly apprehended. In addition, there is the question of good prosecutorial practice. It is sufficient in this case to observe that when a prosecutor is in possession of a download of this kind it would accord with good prosecutorial practice to provide a copy of it to the defence.

Consideration

24 It is well settled that the prosecution's failure to disclose all relevant evidence to an accused may, in some circumstances, require the quashing of a verdict of guilty¹¹.

10 *Edwards v The Queen* [2020] NSWCCA 57 at [61].

11 *Grey v The Queen* (2001) 75 ALJR 1708 at 1713 [23], 1714 [26]-[27] per Gleeson CJ, Gummow and Callinan JJ, 1722 [71]-[72] per Kirby J, 1724 [83] per

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25 The difficulty for the appellant is that, with the benefit of access to the
Cellebrite Download, he has been unable to identify how its contents, either as a
whole or in relation to particular data, "would reasonably be regarded as relevant
to the prosecution case or the defence case", or are "relevant to the reliability" of
the complainant, or any respect in which his entitlement to a fair trial according to
law was adversely affected by not being provided with a copy of the Download.

26 The appellant's argument as to the forensic value of the Cellebrite
Download for his case was put at the level of speculation. Whatever the precise
scope of s 142(1)(i), it plainly does not extend to all information in the possession
of the prosecutor or to information that does no more than provide a potential
avenue for inquiry¹².

27 The appellant argued that, without the Download, he had lost the chance of
a different outcome at trial on the basis of further investigations, cross-examination
and submissions to the jury that he might have made concerning two matters:
(1) the lack of any record on the Download of the text from the appellant to the
complainant relating to her use of pornography; and (2) the fact that information
contained in the Download would have identified that Ms Birchill was formerly
known by a different name (Ms Mullen). According to the appellant, with the
benefit of this information, he could have undertaken further investigations prior
to trial "regarding the opportunity of pollution of evidence due to pre-existing
relationships" and may have prevented the Crown from submitting that Ms Birchill
was an independent witness.

28 As to the first matter raised by the appellant, there is nothing to suggest that
the fact of the alleged text was or could have been in issue as part of his defence.
In the Court of Criminal Appeal, the appellant had conceded that it was not
possible to assume that the Download contained all data, including user-deleted
data, that had been placed on that phone during the relevant period. At the trial, the

Hayne J; 184 ALR 593 at 599-600, 601, 612, 615; *Mallard v The Queen* (2005)
224 CLR 125 at 133 [17], 141 [42] per Gummow, Hayne, Callinan and Heydon JJ,
156 [83]-[84], 157 [87] per Kirby J; *Eastman v Director of Public Prosecutions*
[No 13] [2016] ACTCA 65 at [336]; cf *R v Spiteri* [2004] NSWCCA 321 at [43]
(an incomplete report of the case appears at (2004) 61 NSWLR 369).

12 cf Plater and de Vreeze, "Is the 'Golden Rule' of Full Prosecution Disclosure a
Modern 'Mission Impossible'?" (2012) 14 *Flinders Law Journal* 133 at 167-169.

appellant did not even put to the complainant in cross-examination that such a text was not sent.

29 As to the second matter, to the extent that the appellant sought to suggest that there may have been information in the Cellebrite Download that might have afforded material for cross-examination of Ms Birchill challenging her "independence" as a witness, that suggestion was abandoned in the Court of Criminal Appeal¹³ and could not be supported by evidence in this Court. So far as either s 142(1)(i) or (k) may have required disclosure of information concerning Ms Birchill, it was satisfied by the provision, albeit late (and possibly in breach of s 141(2) of the Act), of Ms Birchill's witness statement concerning her dealings with the appellant at Hudson Park during the period relevant to the case. The appellant's argument, even with the benefit of hindsight, did not identify any further information in the Cellebrite Download that "would reasonably be regarded as relevant to the prosecution case or the defence case", or that is "relevant to the reliability" of Ms Birchill.

30 If there was a contravention of s 141(2) of the Act by the late delivery of Ms Birchill's statement (and the appellant makes no complaint about that), it has not been shown that the fairness of the appellant's trial was thereby prejudiced. In any event, an adjournment might have been, but was not, sought by the appellant under s 146(3) of the Act to enable inquiries to be made about Ms Birchill and her dealings with the appellant. All this being so, it cannot be said that any breach of s 141(2) gives rise to a miscarriage of justice.

31 As the appellant observed, the prosecution was able to mine the Cellebrite Download for useful information prior to the trial and ultimately the prosecution identified relevant, and arguably critical, evidence by searching the Download. On that basis, the appellant argued that there was an inequality of arms: the appellant's lawyers, who did not have a copy of the Download (although they could have asked for one), did not have the same ability. No doubt, the ODPP could have provided a copy of the Download to the appellant cheaply and easily, without waiting for any request from him and thereby obviating any perception of unfairness. On the other hand, if the appellant gave instructions suggesting inquiries that could have been pursued by searching his telephone, there was no impediment to the appellant calling for a copy of the Download, readily searchable, because its existence had been clearly identified by the ODPP.

13 *Edwards v The Queen* [2020] NSWCCA 57 at [46].

Kiefel *CJ*
Keane *J*
Gleeson *J*

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Conclusion

32 The appeal must be dismissed.

EDELMAN AND STEWARD JJ.

Equality of arms and duties of disclosure

33 An indictment is brought against an accused person for alleged sexual offences. An issue at trial is likely to be the location of the accused person at relevant times when he was conducting fitness training with clients. The accused's mobile phone is seized pursuant to a search warrant and is in the possession of the police. Like all smart phones it is likely to, and does, contain GPS coordinates of locations, calendar entries, and texts between the accused and his clients, who were reasonably likely to be witnesses (and one of whom became a witness). The prosecution obtains an electronic database of information downloaded from the accused's mobile phone. If the contents of the electronic database were printed, it would run to 5,900 pages. But it is in electronic form and it is keyword searchable. Some of the information in the database is central to the prosecution case. Amongst the considerable material provided to the accused person, contained in the pre-trial prosecution's notice, are references to the database. But unlike the other disclosures in the prosecution's notice, a copy is not provided. The solicitors for the accused do not notice the references to the database amongst the disclosures and they do not request a copy. Very shortly before the conclusion of the trial, the solicitors for the accused become aware of the existence of the database and request a copy of it. A copy is provided after the conviction of the accused.

34 In a scenario in these broad terms, the principal issue on this appeal is whether the prosecution's notice given to the appellant, Mr Edwards, was required to contain a copy of the searchable electronic database just as it was required to contain physical copies of any relevant witness statement, expert report, proposed exhibit, summary, or chart. The respondent did not dispute that s 142(1)(i) of the *Criminal Procedure Act 1986* (NSW) required the prosecution to disclose to Mr Edwards "a copy" of the searchable database in the prosecution's possession because it was "reasonably ... regarded as relevant to the prosecution case or the defence case". But, consistently with the reasoning of the Court of Criminal Appeal, the respondent's submission was effectively that, unlike other categories of physical document or thing possessed by the prosecution, it was sufficient disclosure of "a copy" of the searchable electronic database for Mr Edwards to be informed of its existence but not informed of, or provided with, its contents.

35 For the reasons below, the prosecution was obliged to provide a copy of the searchable electronic database of information to the defence. Ultimately, however, the Court of Criminal Appeal was correct to conclude that there was no miscarriage of justice. Although the searchable electronic database should have been provided to the defence, Mr Edwards did not establish that there was any information in that database which was capable of providing the defence with any advantage at trial.

Factual background

36 Mr Edwards was convicted after trial before a judge and jury of six counts of sexual intercourse with a child aged between ten and 14 years in circumstances of aggravation contrary to s 66C(2) of the *Crimes Act 1900* (NSW). The offences occurred between 1 October 2012 and 31 December 2012. The complainant was 13 years old at the time of the offences. She is the niece of Mr Edwards' former wife. She was living with Mr Edwards and his former wife at the time of the offences. The circumstance of aggravation was that the complainant was a child under the authority of Mr Edwards.

37 Mr Edwards conducted a business involving "boot camps", which consisted of fitness circuit training sessions. The complainant attended three of these boot camps between 1 October 2012 and 31 December 2012 when she was 13 years old. Two of them were at Hudson Park, Kotara and the third, when it was raining, was at the car park of Westfield Kotara. The charges all concerned the two boot camps at Hudson Park.

38 Four of the charges (counts 1, 3, 4, and 5)¹⁴ related to the first boot camp that the complainant attended at Hudson Park. The complainant's evidence was as follows. On the first occasion that she attended a boot camp, she went to Hudson Park with Mr Edwards sometime after 4 am. Mr Edwards parked his car, unbuckled both seatbelts, then put his hand down the complainant's pants and started rubbing her clitoris (count 1). Mr Edwards then pulled the complainant's legs over the console between the seats, pulled her pants down and started licking her vagina (count 3) and put his finger in her vagina (count 4). He then got out of the car, opened the passenger door and put his penis in the complainant's mouth. She refused but he persisted (count 5). Mr Edwards and the complainant then set up the circuit for the attendees of the boot camp.

39 The remaining two charges (counts 6 and 7) concerned a second boot camp, about a week later, that the complainant attended again at Hudson Park. The complainant's evidence was that she went to the boot camp with Mr Edwards in his car, again arriving at Hudson Park sometime after 4 am. Mr Edwards told the complainant to follow him to the canteen area. He had a key for the men's toilet. He took the complainant into a cubicle and sat her on the toilet seat. He put his hand into her pants and started to put his middle finger into her vagina before she told him to stop (count 6). He then put his penis into her mouth. She refused but he persisted (count 7). Subsequently, Mr Edwards and the complainant set up the circuit for the attendees at the boot camp.

14 Count 2 was an alternative count of indecent assault.

40 Around 2013 or 2014, on two occasions, which were some time apart, the complainant told her cousin about the sexual assault committed by Mr Edwards. In 2016, in the presence of her father's partner at the time (who did not give evidence), the complainant told her father about the sexual assault. The complainant's father took her to the police to make a complaint.

41 On 6 March 2017, Mr Edwards was arrested. He has remained in custody since his arrest. On the same day as his arrest, Mr Edwards participated in a record of interview with police. In the course of his interview, Mr Edwards admitted that he held boot camps for "a group of friends" who paid for the sessions and admitted that the complainant had attended "a few" of the boot camp sessions. Mr Edwards said that he did not have any records of his training sessions back then and he said that his training sessions were all conducted at Alder Park or "down the beach occasionally". When asked if he had ever held a boot camp at Hudson Park, Mr Edwards replied that he did not think that he had and then asked the police: "Where's Hudson Park?" After he was told that Hudson Park was in Kotara, he denied having held boot camps there. He denied having a key to the toilet block at Hudson Park.

42 The conducting of boot camps by Mr Edwards at Hudson Park, and the evidence of witnesses who attended at Hudson Park, was plainly a matter that would reasonably be expected to become, and did become, a central issue at trial. In the very brief opening statement by counsel for Mr Edwards, counsel said that "[w]here it is said this occurred is an important factor in this case".

43 At the time of Mr Edwards' arrest, the police seized his mobile phone handset. Amongst the data contained on that phone were many thousands of text messages which had been sent and received. The police downloaded the content of the phone using a "Cellebrite phone downloading device". The electronic copy of the information extracted, the "Cellebrite download", was capable of being searched and was stored on a hard drive. Amongst the variety of information in the Cellebrite download, which included telephone contacts, GPS information, text messages, and calendar entries, there were text messages during the period of offending between Mr Edwards and clients of his boot camps. One person, Ms Elliott, who was not called as a witness by the prosecution and whose name did not appear on any prosecution witness list, exchanged 29 separate text messages with Mr Edwards during the relevant period, including text messages containing details about locations of fitness training sessions. Another, Ms Birchill, was identified by the prosecution from the Cellebrite download.

44 On 11 May 2018, Ms Birchill gave a written statement to police. That statement formed the basis of her evidence. She said that for a couple of years she had attended boot camps with Mr Edwards. Ms Birchill first began attending the boot camps in 2012. Initially, the boot camps were at Hudson Park, although when it was raining the boot camps were conducted at the car park at Westfield in Kotara.

The training started at 6 am or 6.15 am and it would last for about an hour. Approximately six to eight people would attend. Ms Birchill said that on one occasion she used the toilets at Hudson Park after Mr Edwards had provided her with a key to the toilet block. She said that Mr Edwards told her that he had applied to the Council to use the park and had been given a key to the toilets.

45 Ms Birchill's written statement was provided to the defence at around 5 pm on the day it was obtained, Friday, 11 May 2018. The trial began on Monday, 14 May 2018. No application was made either¹⁵ (i) to exclude the proposed evidence of Ms Birchill for failure to disclose in a timely fashion under s 142¹⁶, or (ii) to adjourn the trial.

46 Ms Birchill gave oral evidence at the trial on 17 May 2018. Her oral evidence largely corresponded with her written statement. At 6.04 am the next day, Friday, 18 May 2018, Mr Edwards' solicitor emailed a solicitor at the Office of the Director of Public Prosecutions ("the OPP") asking how Ms Birchill had come to the attention of the OPP and expressing some incredulity at the coincidence in the discovery of, and the detail of, her evidence shortly before trial. The OPP solicitor responded at 9.31 am, explaining that Ms Birchill's details "were obtained from the Cellebrite download of Mr Edwards' phone". Mr Edwards' solicitor responded that afternoon saying, "I did not know about the download" and requested a copy. The OPP solicitor replied saying that inquiries would be made about providing a copy. He also observed that "the Cellebrite download was on the brief index sent to you as part of the notice of prosecution case and also in my email dated 03 May 2018".

47 The trial resumed after the weekend, on Monday, 21 May 2018, with directions from the trial judge to the jury. No application was made by counsel for Mr Edwards for an adjournment. The jury returned verdicts of guilty on 22 May 2018. A copy of the contents of the Cellebrite download was provided by the OPP to the solicitors for Mr Edwards on 23 May 2018.

The legislative provisions

The patchwork of obligations and guidelines prior to 2001

48 Prior to 2001, prosecution disclosure in New South Wales was governed by a patchwork of common law obligations, prosecution guidelines, and statutory and ethical rules. The common law required, and still requires, disclosure of all

15 *Edwards v The Queen* [2020] NSWCCA 57 at [22].

16 See *Criminal Procedure Act 1986* (NSW), s 146(1).

material that, on a sensible appraisal by the prosecution¹⁷: (i) is relevant or possibly relevant to an issue in the case; (ii) raises or possibly raises a new issue that was not apparent from the prosecution case; and (iii) holds out a real (as opposed to fanciful) prospect of providing a lead in relation to evidence concerning (i) or (ii). Further, since the disclosure can occur prior to any crystallisation of the defence case, or any refinement of the prosecution case, expressions in relation to common law disclosure rules, such as "an issue in the case" or "all relevant evidence of help to the accused", must be given a broad interpretation¹⁸.

49 The non-legally binding¹⁹ prosecution guidelines concerning disclosure had been promulgated by the Director of Public Prosecutions under s 13 of the *Director of Public Prosecutions Act 1986* (NSW). The 1998 Guidelines required prosecutors to make full disclosure to the accused of "all facts and circumstances and the identity of all witnesses reasonably to be regarded as relevant to any issue likely to arise at trial"²⁰. This generalised guideline was expanded in 2003, in terms still existing today, modelled on the common law duty²¹.

The amendments in 2001

50 In 2001, against the background of a patchwork of these common law disclosure obligations and non-binding guidelines and ethical rules, together with some statutory provisions²², the New South Wales Parliament enacted the *Criminal Procedure Amendment (Pre-trial Disclosure) Act 2001* (NSW). That Act inserted Div 2A ("Pre-trial disclosure – case management") into Pt 3 of the *Criminal Procedure Act*, which had the purposes of creating a "case management model"

17 *R v Keane* [1994] 1 WLR 746 at 752; [1994] 2 All ER 478 at 484; *R v Brown (Winston)* [1998] AC 367 at 376-377. See also *R v Reardon [No 2]* (2004) 60 NSWLR 454 at 468 [48]; *R v Spiteri* (2004) 61 NSWLR 369 at 373-374 [17]-[20]; *R v Livingstone* (2004) 150 A Crim R 117 at 126-127 [44]-[45]; *R v Lipton* (2011) 82 NSWLR 123 at 145-147 [77].

18 *R v Brown (Winston)* [1998] AC 367 at 377.

19 See *Grey* (2000) 111 A Crim R 314 at 321-322 [32]. Not doubted on this point on appeal: *Grey v The Queen* (2001) 75 ALJR 1708; 184 ALR 593.

20 New South Wales, Office of the Director of Public Prosecutions, *Prosecution Policy and Guidelines* (March 1998) at 17.

21 See *R v Lipton* (2011) 82 NSWLR 123 at 146 [77].

22 For instance, *Evidence Act 1995* (NSW), ss 67, 97 and 98.

and "improv[ing] upon and formalis[ing]" the combination of common law rules, legislation, and prosecution guidelines in relation to pre-trial disclosure²³.

51 Division 2A as enacted required pre-trial disclosure by both the prosecution and the defence. A prosecuting authority was required to give an accused person a "notice of the case for the prosecution"²⁴. Amongst the matters that the prosecution notice was to "contain" was, by the newly inserted s 47E(g) of the *Criminal Procedure Act*:

"a copy of any information, document or other thing provided by police officers to the prosecuting authority, or otherwise in the possession of the prosecuting authority, that may be relevant to the case of the prosecuting authority or the accused person, and that has not otherwise been disclosed to the accused person."

52 This obligation was cognate with another amendment made by the same amending Act, which inserted s 15A into the *Director of Public Prosecutions Act*²⁵. Section 15A(1) provided that "[p]olice officers investigating alleged indictable 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". As the author of a contemporaneous parliamentary briefing paper observed²⁶, these legislative reforms were intended to introduce "a general duty of disclosure upon police officers involved in the investigation of an offence" and a corresponding obligation upon the prosecution to disclose to the defence "copies of any relevant information provided by the police to the prosecution".

23 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 16 August 2000 at 8288.

24 *Criminal Procedure Act*, s 47D.

25 *Criminal Procedure Amendment (Pre-trial Disclosure) Act 2001* (NSW), Sch 2.

26 Griffith, *Pre-Trial Defence Disclosure: Background to the Criminal Procedure Amendment (Pre-trial Disclosure) Bill 2000*, New South Wales Parliamentary Library Research Service, Briefing Paper No 12/2000 (2000) at 31-32.

The current provisions

53 The current provisions relevant to this appeal, ss 141 and 142 of the *Criminal Procedure Act*, derive from further amendments in 2013²⁷ to "expand[] the scope of mandatory disclosure requirements in criminal trials"²⁸. The disclosure provisions, as amended, now form part of Div 3 of Pt 3 in Ch 3, "Case management provisions and other provisions to reduce delays in proceedings". The purpose of Div 3 is to reduce delays in proceedings on indictment by requiring certain pre-trial disclosure by the prosecution and the defence, and enabling the court to undertake case management²⁹.

54 The relevant parts of s 141, and the heading to that section³⁰, are as follows:

"Mandatory pre-trial disclosure

- (1) After the indictment is presented or filed in proceedings, the following pre-trial disclosure is required:
 - (a) the prosecutor is to give notice of the prosecution case to the accused person in accordance with section 142,
 - (b) the accused person is to give notice of the defence response to the prosecution's notice in accordance with section 143,
 - (c) the prosecution is to give notice of the prosecution response to the defence response in accordance with section 144.
- (2) Pre-trial disclosure required by this section is to take place before the date set for the trial in the proceedings and in accordance with a timetable determined by the court."

27 *Criminal Procedure Amendment (Mandatory Pre-trial Defence Disclosure) Act 2013* (NSW), Sch 1.

28 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 13 March 2013 at 18578. See also New South Wales, Legislative Assembly, *Criminal Procedure Amendment (Mandatory Pre-trial Defence Disclosure) Bill 2013*, Explanatory Note.

29 *Criminal Procedure Act*, s 134.

30 *Interpretation Act 1987* (NSW), ss 34, 35(5).

55 Section 142 concerns the "Prosecution's notice", which must be in writing³¹.
The section relevantly provides:

"(1) For the purposes of section 141(1)(a), the prosecution's notice is to contain the following:

...

- (i) a copy of any information, document or other thing provided by law enforcement officers to the prosecutor, or otherwise in the possession of the prosecutor, that would reasonably be regarded as relevant to the prosecution case or the defence case, and that has not otherwise been disclosed to the accused person".

56 Section 146 provides for sanctions for failures to disclose evidence, including powers for the court to refuse to admit evidence (s 146(1), (2)) or to adjourn the proceedings (s 146(3)).

57 Central to this appeal is the meaning of the references to "disclosure" in the pre-trial "disclosure" provisions of Div 3. For four reasons outlined below, the numerous references to disclosure in Div 3 use that undefined term in a sense which, subject to exceptions, requires physical provision of documents and other things, or copies of them, if they are in physical form or can be reproduced in physical form. Again, subject to exceptions, only if the things cannot be physically or legally reproduced by the prosecution is it sufficient for the prosecution merely to inform or "list" for the defence the identity of the information, document or thing and the place where it is situated. In short, the meaning of "disclosure", in Div 3, including ss 141 and 142, is a default requirement of *providing* something unless the thing has no physical existence.

58 First, s 142 requires that the core of the prosecution's disclosure obligations – the prosecution's notice – "contain" numerous things: a copy of the indictment; a statement of facts; and copies of witness statements of witnesses whose evidence the prosecution proposes to adduce at trial. It must also contain all of the following if the prosecution proposes to adduce evidence contained in it at trial: copies of any "recorded statement", document, summary, exhibit, chart or explanatory material, and expert report; and, critically, copies of "any information, document or other thing" that would reasonably be regarded as relevant to either the prosecution or defence case. The copies of all these things could only be

31 *Criminal Procedure Act*, s 149(1).

"contained" in the prosecution's notice if they were physically reproduced in the prosecution's notice.

59 Secondly, in contrast with the requirement for the prosecution's notice to "contain" a copy of various things, if the information, document or thing is not in the possession of the prosecutor or the accused then s 142(1)(j) requires only that the prosecution's notice contain a *list* which *identifies* any "information, document or other thing of which the prosecutor is aware and that would reasonably be regarded as being of relevance to the case" and which identifies the place at which the prosecutor believes the information, document, or other thing is situated. In other words, the lesser obligation upon the prosecution to provide only a list containing the prescribed information applies only where the prosecution does not possess the information, document, or other thing which could be copied.

60 Thirdly, s 142 is subject to an exception contained in s 149A, which provides that a copy of a proposed "exhibit, document or thing" is not required to be included in a notice under Div 3 if "it is impossible or impractical to provide a copy". In that event, the party required to give the notice is required (i) to specify in the notice a reasonable time and place at which the proposed exhibit, document, or thing may be inspected, and (ii) to allow the other party to the proceedings a reasonable opportunity to inspect the proposed exhibit, document, or thing referred to in the notice. This exception further highlights the operation of the rule of disclosure. The rule is a default requirement of *providing* things which have a physical existence, not merely informing the other party of their existence and making them available for inspection, unless the specific exception is satisfied.

61 Fourthly, the meaning of "disclosure" in s 141 is also plain from the cognate provision in s 15A of the *Director of Public Prosecutions Act*. The requirement in s 15A(1) for the police to "disclose" to the Director "all relevant information, documents or other things" is subject to exemptions in s 15A(6), such as privilege and statutory publication restrictions, from the requirement to "*provide* to the Director any information, documents, or other things". If one of those exemptions is satisfied, then unless the Director requests that the information, document, or thing be provided, the police need only *inform* the Director of the existence and nature of the information, document, or thing, and the claim or publication restriction relating to it³². In s 15A, in relation to any relevant physical document or thing in the possession of the police, "disclose" means "produce"³³.

32 *Director of Public Prosecutions Act 1986* (NSW), s 15A(7).

33 See also *R v Lipton* (2011) 82 NSWLR 123 at 152 [104].

Breach of the prosecution's obligation of disclosure

The common assumptions

62 A common assumption underlying the submissions in this Court was that the Cellebrite download was "any information, document or other thing" within the terms of s 142(1)(i). The respondent did not make any submission about whether the Cellebrite download, as a searchable database, fell within the category of information, document, or other thing, or whether it fell within more than one of those categories. Whether or not it also fell within other categories, Mr Edwards correctly submitted that the contents of the Cellebrite download fell within the category of "document" as defined in the Dictionary to the *Evidence Act 1995* (NSW), which, like the *Interpretation Act 1987* (NSW)³⁴, defines a "document" as meaning "any record of information" and relevantly includes "anything from which sounds, images or writings can be reproduced with or without the aid of anything else". Clause 8 of Pt 2 of the Dictionary to the *Evidence Act* also provides that a reference in the Act to a "document" includes a reference to "any part of the document".

63 A further common assumption underlying the submissions in this Court was that, at the time of pre-trial disclosure, the duty in s 142(1)(i) was engaged because the contents of the Cellebrite download "would reasonably be regarded as relevant to the prosecution case or the defence case". The whole of the respondent's argument concerning the scope of the exception in s 142(1)(i), which we consider below, was premised upon an assumption that the duty in s 142(1)(i) was engaged. This assumption was also correctly made. Like the approach taken by the common law to expressions such as "an issue in the case" or "all relevant evidence of help to the accused", the expression "would reasonably be regarded as relevant" must be applied at a high level of generality. This is particularly so because the prosecution might be required to assess relevance to the defence case for the purposes of the prosecution's notice before receiving the defence response³⁵ and possibly even without the benefit of any substantial comments in a video record of interview.

64 Ascertaining what "would reasonably be regarded as relevant" for the purpose of s 142(1)(i) does not mandate an adjudication about the actual relevance of the information, document, or thing. Rather, it imposes a requirement to assess fairly the inherent likelihood that an item of evidence is going to be relevant to either the prosecution or defence case. The phrase "be regarded" directs attention to the potentiality of evidence to be relevant, and the phrase "would reasonably"

34 *Interpretation Act 1987* (NSW), s 21(1).

35 See *Criminal Procedure Act*, s 143.

excludes any necessity to disclose material that is only possibly or remotely relevant.

65 In this case, at the time the prosecution's notice was given, and subsequently, the record of information contained in the Cellebrite download would reasonably have been regarded as relevant to the prosecution case or the defence case. It included, and should reasonably have been regarded as including, telephone contacts, GPS information, calendar entries, and text messages between Mr Edwards and clients of his boot camps. Some of that information proved to be very significant to the prosecution case.

66 No party to this appeal suggested that the prosecution's disclosure obligation extended only to some subset of the record of information in the Cellebrite download. Such a suggestion was also rightly rejected by Leeming JA in the Court of Criminal Appeal, who observed that it is not uncommon for the prosecution to possess enormous quantities of electronic information including sound recordings and that there would be a "panoply of problems" if the prosecution were required to interrogate the database to determine which particular items of information would reasonably be regarded as relevant to the defence case: "One person who spends an hour interrogating a database might conclude there was nothing useful, another who conducts different searches might reach a different conclusion, and a third who spends a day might conclude that in truth there was nothing that assisted either side."³⁶ Most fundamentally, it is no part of the duty of a prosecutor to "conduct the case for the defence"³⁷.

The Cellebrite download was not otherwise disclosed

67 The respondent submitted that the prosecution was not required by s 142(1)(i) to *provide* Mr Edwards with a copy of the Cellebrite download because a copy of that download had "otherwise been disclosed" to him within the exception to the duty in s 142(1)(i). The respondent pointed out that the prosecution informed the defence of the existence of the Cellebrite download on numerous occasions prior to trial and that the Court of Criminal Appeal had treated this as sufficient disclosure³⁸:

- (1) On 16 April 2018, the prosecution provided Mr Edwards' solicitor with a "notice of prosecution case", which included a brief index and cover page saying that "[a]ll statements and documents proposed to be relied upon at

³⁶ *Edwards v The Queen* [2020] NSWCCA 57 at [58].

³⁷ *R v Brown (Winston)* [1998] AC 367 at 379.

³⁸ *Edwards v The Queen* [2020] NSWCCA 57 at [60].

this time by the prosecution have been served as part of the brief of evidence". The index contained 27 items. One of those was "Hard-Drive containing: a) Phone Download Report – Scott Edwards (iphone 6 EFIMS X0002614993)". The hard drive itself had not been provided. In an email dated 17 April 2018, a solicitor at the OPP asked Mr Edwards' solicitor to "Please let me know if there are any brief items at Annexure C that you don't have". An updated brief was provided to Mr Edwards' solicitor on 3 May 2018, which also contained a reference to the hard drive.

- (2) One of the statements contained in the prosecution brief was from Senior Constable Rowe, who referred to Mr Edwards' phone in his statement and said: "I utilised a Cellebrite phone downloading device to obtain information stored on this phone. This download was then created into an electronic report. I now produce download report". No download report was contained in the brief.
- (3) On 8 May 2018, the prosecution supplied a "proposed witness/exhibit list" to Mr Edwards' solicitor and asked Mr Edwards' solicitor to confirm whether any of the witnesses marked "not required" by the prosecution were required by Mr Edwards. Senior Constable Rowe was listed as "not required".

68 The respondent's submission was effectively that by informing Mr Edwards of the existence of the Cellebrite download on these occasions it had "otherwise ... disclosed" a copy of the Cellebrite download. In effect, the respondent's submission in this Court was that the words "has not otherwise been disclosed to the accused person" in s 142(1)(i) meant that a copy of a "document" (being a record of information) need not be provided to the accused person so long as the accused person is told of the existence, but not the contents, of the document.

69 This submission is contrary to the text, context, and purpose of s 142(1)(i). As to the text, it would treat disclosure of an electronic record of information stored in a physical form such as a hard drive in a fundamentally different way from any other record of information in physical form such as any other document, summary, exhibit, chart, explanatory material, or expert report. The meaning of "otherwise ... disclosed" textually connotes a circumstance where disclosure, in the sense of provision of any type of physical document or thing, has occurred otherwise than in the prosecution's notice.

70 The only possible textual indication to the contrary, upon which the respondent relied, is that s 149D exempts the prosecution from including in a notice anything that "has otherwise been provided or disclosed to the accused person". The respondent submitted that the use of "disclosed" as an alternative to "provided" meant that disclosure was more limited than "providing". That submission is not correct. The mandatory pre-trial "disclosure" required by ss 141

and 142 cannot possibly be understood as requiring anything less than physical provision of documents including a copy of the indictment, a statement of facts, or a copy of the statement of each witness whose evidence the prosecutor proposes to adduce at trial. The expression "provided or disclosed" in s 149D uses "disclosed" in the same sense as its meaning in ss 141 and 142, overlapping with "provided" when a physical document or thing in the possession of the prosecution is concerned, but otherwise extending to merely providing the defence with information.

71 The respondent's submission is also inconsistent with the context and history of the concept of "disclosure" in s 142(1)(i), and the cognate provision in s 15A of the *Director of Public Prosecutions Act*. As explained above, disclosure in the *Director of Public Prosecutions Act* requires a physical document or thing to be provided. It is notable that the respondent eschewed any submission that the police had not been required to provide the Cellebrite download to the Director.

72 As to purpose, if the respondent's submission were correct then the functions of s 142(1)(i) concerning case management and reduction of delays would be substantially impaired. The prosecution would be obliged to inform an accused person of the existence of a large database repository of electronic information but not obliged to provide any of that information to the defence prior to trial. Since the prosecution is not required to interrogate any database in order to ascertain which items within it are relevant to the defence case, the consequence of the respondent's submission would be that the larger the field of potential disclosure, the more uncertainty would exist and the greater the potential for injustice for an accused person. In other words, in situations where the most clarity is required in the course of case management, s 142(1)(i) would provide the least clarity.

73 For these reasons, the failure of the prosecution to provide Mr Edwards with a copy of the Cellebrite download was a breach of the duty in s 141(1)(a) by reason of a failure to comply with s 142(1)(i) of the *Criminal Procedure Act*.

No miscarriage of justice

Miscarriage of justice requires practical injustice

74 In *Weiss v The Queen*³⁹, this Court said that "a 'miscarriage of justice', under the old Exchequer rule, was *any* departure from trial according to law, regardless of the nature or importance of that departure". A departure from a trial according

39 (2005) 224 CLR 300 at 308 [18] (emphasis in original).

to law requires some erroneous occurrence with "the capacity for practical injustice"⁴⁰ or which is "*capable* of affecting the result of the trial"⁴¹. This question of the capacity for practical injustice is anterior to the question, in the common form proviso, of whether the prosecution can establish that any legal error or miscarriage of justice was insubstantial including in the sense that it could not "actually"⁴² have affected the result or in the sense that the result was nevertheless "inevitable"⁴³.

75 The need for practical injustice means that whether a miscarriage of justice arises as a result of a failure by the prosecution to call a particular person as a witness at trial will be assessed "against the conduct of the trial taken as a whole"⁴⁴. So too, all the circumstances of the trial must be assessed when considering whether a miscarriage of justice arises as a result of the failure of the prosecution to make a required disclosure under s 141(1)(a) read with s 142(1).

The generalised nature of Mr Edwards' submissions

76 Mr Edwards' submissions concerning the manner in which the non-disclosure amounted to practical injustice that could constitute a miscarriage of justice generally consisted of vague and unspecified allegations. Despite Mr Edwards having had the opportunity to consider, and to have carefully examined, the information in the Cellebrite download after trial and before his appeal to the Court of Criminal Appeal, his allegations of how the information might have affected the trial did not generally descend to any specifics. For instance, he claimed that he was:

- (i) deprived of the ability to identify other clients who could give evidence that training in the relevant period was held at Alder Park, and to identify other witnesses from his telephone contact list – but only one specific client was identified (discussed below);

40 *MZAPC v Minister for Immigration and Border Protection* (2021) 95 ALJR 441 at 477-478 [162], see also at 462-463 [85]; 390 ALR 590 at 631, see also at 610-611.

41 *R v Matenga* [2009] 3 NZLR 145 at 158 [31] (emphasis in original). See also *Cesan v The Queen* (2008) 236 CLR 358 at 392-393 [116]-[122], 393-396 [123]-[132].

42 *Weiss v The Queen* (2005) 224 CLR 300 at 308 [18].

43 For instance, *R v Dickman* (2017) 261 CLR 601 at 605 [4]-[5], 620 [63].

44 *R v Apostilides* (1984) 154 CLR 563 at 575.

24.

- (ii) unable to obtain expert evidence, or alternative expert examination, with respect to what was demonstrated on the Cellebrite download – but no submission was made about how that expert evidence might have assisted;
- (iii) constrained in his defence because he was unaware of electronic records that might have established a "particular defensive position" – but no defensive position was specified;
- (iv) unable to seek a warning under s 165 of the *Evidence Act* at trial as to unreliability of evidence – but the evidence said to be unreliable was not identified; and
- (v) unable to cross-examine the complainant about her training with him in July 2013, said to be revealed by a calendar entry – but he did not explain how the complainant attending a training session with him more than six months after the last set of offences was capable of affecting the reasoning of the jury as to whether the offences occurred.

77 In three respects, Mr Edwards' claims were more specific. However, the first claim, and a claim in response by the respondent, relied upon inadmissible evidence. And the second and third claims did not establish any practical injustice.

Reliance on inadmissible evidence

78 In this Court, both parties relied upon various content of the Cellebrite download to make submissions concerning whether a miscarriage of justice arose from the erroneous failure by the prosecution to provide the Cellebrite download to the defence. Both parties relied upon material that had been excluded as inadmissible by the Court of Criminal Appeal in rulings which were not challenged in this Court.

79 Mr Edwards relied upon evidence from a private investigator that a Facebook search conducted by the investigator had revealed that Ms Birchill had a daughter who attended the same school as the cousin of the complainant. Mr Edwards relied upon this evidence to submit that he had lost an opportunity to challenge the complainant and Ms Birchill on any relationship or knowledge that they had of each other prior to trial. Mr Edwards' submission cannot be accepted for the simple reason that, before the Court of Criminal Appeal, objection was taken to this part of the proposed evidence from the private investigator and it was not relied upon by Mr Edwards.

80 The respondent also relied upon inadmissible material in response. The respondent relied upon a text message sent from Mr Edwards to a boot camp client on 25 February 2013 saying "[t]raining at Hudson Park this morning". That message might have provided significant support to the prosecution case, since in Mr Edwards' video record of interview he had denied knowing the location of

Hudson Park and he had denied having conducted boot camps at Hudson Park. But no evidence of that text was given at trial and it was not admitted as evidence in the Court of Criminal Appeal. It cannot be relied upon in this Court.

Alleged absence of a text message on his mobile phone

81 Part of the prosecution case was that prior to the offences the relationship between the complainant and Mr Edwards had become "sexualised". The complainant gave evidence that towards the end of 2012 she had accessed heterosexual pornography on her iPod. Her aunt gave evidence that she found a pornographic video on the complainant's iPod. The complainant's aunt said that she informed Mr Edwards about it and that Mr Edwards spoke with the complainant about it. The complainant also gave evidence that Mr Edwards sent her a text message saying that she should delete the video or the history and that Mr Edwards subsequently had a private conversation with her about it. She also gave evidence that, subsequently, in 2012, Mr Edwards had asked her whether she shaved her pubic hair.

82 Mr Edwards submitted that due to the prosecution's failure to disclose the contents of the Cellebrite download, he was unable to lead evidence to demonstrate that he did not send the alleged text message instructing the complainant to delete the video or history from her iPod. One significant obstacle to this submission by Mr Edwards is that the Court of Criminal Appeal excluded as inadmissible evidence, without an established basis, the statements in the private investigator's affidavit that the Cellebrite download did not contain any message from Mr Edwards telling the complainant to delete the video or history from her iPod. But even if this evidence had been admitted in support of a conclusion that no text existed on Mr Edwards' phone, it is difficult to see how this could have assisted his case at trial. It was not suggested to the complainant in cross-examination that the text had not been sent. And, perhaps more fundamentally, whether Mr Edwards told the complainant to delete the video in a text message or in a conversation, and indeed the content of any such exchange, was immaterial to any issue at trial. Pertinently, although it was put to the complainant in cross-examination that Mr Edwards had not asked her about shaving her pubic hair, there was no cross-examination of the complainant or of her aunt to cast any doubt on their evidence that Mr Edwards had a conversation about the pornographic video.

A new witness who might have been called?

83 Before the Court of Criminal Appeal, Mr Edwards relied upon evidence that the Cellebrite download contained 29 separate text messages between Mr Edwards and Ms Elliott during the period of alleged offending in which they communicated about matters including the boot camps. The Court of Criminal Appeal concluded that the highest Mr Edwards' case could be put was that Ms Elliott was a witness whose evidence, if it had been adduced, was "most unlikely to have affected the

trial"⁴⁵. It would, however, be enough to establish a miscarriage of justice if there was a basis to say that the evidence of Ms Elliott was *capable* of affecting the result of the trial, irrespective of how unlikely it was that it would do so.

84 The evidence of Ms Elliott's text messages could not have had any impact upon the trial at all. Her messages concerned boxing training sessions that Mr Edwards would conduct for her and sometimes for her children. It appears from the texts that all the sessions were in the afternoon and most, if not all, were held at Mr Edwards' home. On the evidence before this Court, the only fact that Ms Elliott could have established was that Mr Edwards had clients, whom he generally trained at his home, separately from the boot camp sessions that he said in his video record of interview were conducted at Alder Park or the beach at 6 am. The existence of other clients of Mr Edwards who were trained at a different place from the boot camps was not capable of having any effect upon the case.

Conclusion

85 The appeal must be dismissed.

45 *Edwards v The Queen* [2020] NSWCCA 57 at [61].

