

Case Law update for prosecuting agencies

A reminder of the importance of proper prosecution disclosure

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The Court of Appeal's recent judgment in the matter of *R v Colagrande*¹ emphasises the importance of appropriate and timely disclosure by prosecutors, and the consequences that can result from inadequate disclosure.

In *Colagrande*, the appellant was a doctor charged with the sexual assault of a patient. There were no other witnesses to the alleged offence. A central issue in the trial was therefore the credit of the complainant and the accused. In particular, the complainant's motivation for complaining was in issue; the defendant's case being that she had attempted to obtain a refund, or free further surgery from him, and had only complained after those attempts were rebuffed.

Prior to trial the complainant had formally withdrawn her complaint, and had provided the prosecution with a written statement to that effect. That statement was only disclosed to the defence at the end of the trial however.

In considering the matter, the Court of Appeal reviewed past authorities dealing with prosecution disclosure, and the principles emerging from those cases, namely:

- Where a document potentially relevant to the credit of a prosecution witness has not been disclosed, the strength of the prosecution case was irrelevant to the issues raised by the non-disclosure, because the appellant had been deprived "of a full opportunity to discredit" the witness;²
- Where there has been a departure from the requirements of a properly conducted trial, it cannot be said that there has been no substantial miscarriage of justice if the applicant has thereby lost "a chance which was fairly open to him of being acquitted" (or "a real chance of acquittal");³
- Unless it can be said that there had been no blemish in the trial, an appropriately instructed jury, acting reasonably on the evidence properly

¹ [2018] QCA 108, delivered 5 June 2018.

² *Grey v The Queen* (2001) 75 ALJR 1708.

³ *Wilde v The Queen* (1988) 164 CLR 365 at 371-2.

before them and applying the correct onus and standard of proof, would inevitably have convicted the accused, the conviction must be set aside⁴, and

- Where documents are not disclosed in breach of the prosecution's obligation, the court cannot ignore "even a relatively slim possibility that the defence has been forensically disadvantaged".⁵

Considering these principles, the court in *Colegrande* noted that "the hurdle for the defence raised by non-disclosure is, therefore, a low one".⁶ The appeal was allowed and a retrial ordered.

The case highlights the importance of complete and timely prosecution disclosure, and the care needed in responding not only to defence requests for disclosure, but in proactively disclosing relevant documents to the defence that may be otherwise unknown to them.

For further inquiries or assistance, please contact Glen Cranny, Managing Director, Gilshenan & Luton Legal Practice on 3361 0240 or gcranny@gnl.com.au

⁴ Ibid.

⁵ *R v HAU* [2009] QCA 165.

⁶ At [22].