

## Case Law update for prosecuting agencies

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### ***R v Waterton* [2019] QMC 6**

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August 2019

*This recent Magistrate's Court decision considers a prosecutor's duties and obligations in respect of conferring with and obtaining further evidence from witnesses who are giving evidence-in-chief.*

#### **The facts**

The applicant (defendant) was charged with three offences which proceeded to summary hearing. The hearing was part-heard, having been adjourned while a witness, Ms Crozier ('the witness'), was still giving evidence-in-chief.

During the adjournment period and prior to the hearing's resumption some months later, the prosecution (CDPP)<sup>1</sup> conferred with the witness and obtained an addendum statement from her, as well as statements from other witnesses. The defence was notified of the prosecution's intention to confer with the witness (but no objections were raised), and the statements and file note of the conference were later disclosed to the defence.

#### **The issues**

The defence applied to exclude the witness' evidence, raising the following issues in support of the application:

1. It would be unfair to allow the witness' evidence because of the ongoing investigations and gathering of evidence from her whilst she was under evidence-in-chief; and
2. The prosecution's conduct in obtaining further statements and conferring with the witness whilst under oath amounted to impropriety.

In ultimately dismissing the defence's application, the court considered each issue separately, starting with the suggested impropriety.

#### Impropriety

Having regard to several authorities<sup>2</sup> and the Queensland Bar Association Rules<sup>3</sup>, the court concluded that whilst a breach of the rules and prosecution guidelines may diminish public confidence in the criminal justice system, no such breach had occurred here. In coming to

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<sup>1</sup> Commonwealth Director of Public Prosecutions.

<sup>2</sup> *Rowell v Larter* (1986) 6 NSWLR 21, *Cannon & Anor v Tahche* [2002] VSCA 84, *R v Shepherd* [2001] 1 NZLR, *Potier v R* [2015] NSWCCA 130 and *MG v R* [2007] NSWCCA 57.

<sup>3</sup> Rules 82 and 86 (Prosecutor's duties) and rule 72 (integrity of evidence).

that conclusion, the court noted that Bar Rule 72 applied to witnesses under cross-examination; not witnesses giving evidence-in-chief. To that end, a distinction was drawn between that rule and the equivalent rule in the English and Welsh Bar Code of Conduct (which extends to the 'whole of the time a witness is giving evidence').

Moreover, the court found that although the rules concerning barristers conferring with witnesses under oath are designed to prevent the actual or perceived coaching or coaxing of witnesses, neither had occurred here.

#### Unfairness

In considering the unfairness ground, the court commented that the discovery and disclosure of further evidence by the prosecution during a trial is not uncommon, nor is an adjournment of proceedings to allow the parties to consider the evidence.

The court said that what was required was for the defendant to point to '*...some specific prejudice to him or her occasioned by the failure which has adversely affected their right to a fair trial.*'<sup>4</sup>

In the absence of any evidence from the defendant (such as an affidavit) about (a) how the proceedings were 'unfair' (b) how the proceedings impact upon her or impede her from presenting her defence and (c) how an innocent person will be convicted because of the fault of the prosecution, the court found that '*There has not been a manipulation of the prosecution of the proceedings which imposes some exceptional burden additional to the burden necessarily imposed on the defendant.*'<sup>5</sup>

#### **Comments**

Although not a superior court decision, *Waterton* is a helpful reminder about a prosecutor's ethical obligations in dealing with witnesses mid-trial. In light of the current rules in Queensland, the distinction between a witness giving evidence-in-chief, and a witness under cross-examination, remains an important one.

***For further inquiries or assistance, please contact Sarah Ford, Associate, Gilshenan & Luton Legal Practice on 3361 0248 or [sford@gnl.com.au](mailto:sford@gnl.com.au)***

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<sup>4</sup> At [40].

<sup>5</sup> At [43].

