Disclosure Failings – The enemy of criminal justice

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The recent collapse of rape trials due to non disclosure is in the spotlight. If police officers, disclosure officers, reviewing lawyers and crown prosecutors fail to meticulously review and disclose relevant unused material, then public confidence in the criminal justice system is undermined. This neither serves genuine victims or defendants. In an attempt to restore public confidence, the Director of Public Prosecutions Alison Saunders has announced that all rape and serious sexual assault cases in England and Wales will be reviewed by the Crown Prosecution Service. This is welcome but arguably the review should extend to all cases

Under the Criminal Procedure Investigations Act 1996, the crown have a duty to disclose any material that is capable of undermining the prosecution case or that assists the defence.

The only safe guard available to a defendant accused of any allegation, let alone one which carries a social stigma, is for legal teams across the board to ensure that there is proper disclosure.

The miscarriages of justice that have undoubtedly occurred or that potentially occur because evidence, which could be a game changer in terms of a jury's verdict, is withheld, is chilling. One can appeal a conviction if a verdict is "unsafe', but only if the material comes to light.

A joint report published on 18th July 2017 from Her Majesty's Crown Prosecution Inspectorate & Her Majesty's Inspectorate of the Constabulary, identified issues which are contributing to widespread failures across the board by both police and prosecutors:

"Police scheduling (the process of recording details of sensitive and non-sensitive material) is poor and this, in turn, is not being challenged by prosecutors. 22% of schedules were found to be wholly inadequate, with the most common failing being a poor description of items, with officers often just compiling lists rather than explaining their contents to help the prosecutor.

Police are routinely failing to comply with guidance and requirements when completing and recording data, such as the non-sensitive disclosure schedule (known as MG6C). Many officers submitted schedules that had missing or deficient data and were often ignorant of processes behind sensitive material, such as information for warrants. The inspection found that in 33% of cases the Disclosure Officer's Report, the MG6E, was either not supplied at all or was wholly inadequate. In 54% of cases, prosecutors simply endorsed schedules without recording their reasoning. This lack of input to the police and a failure to manage disclosure can lead to chaotic scenes outside the courtroom. Judges expressed a lack of confidence in the prosecution's ability to manage the disclosure process".

If material is not identified on a police schedule of unused material (MG6C), how would one know of its existence. Experience has taught me never to take an unused schedule at face value and to know what to ask for by way of disclosure whether it is on the MG6C or not.

The Attorney General Jeremy Wright QC in his recent comments has acknowledged that there exists a "substantial problem with how the disclosure protocol is being conducted and that the failings in these cases have not been because there wasn't a police officer and there wasn't a prosecutor, it's because they didn't appear to be applying the regime they are expected to apply in conducting disclosure properly."

The Liam Allan case resulted in the trial of a student facing multiple counts of rape and sexual assault at Croydon Crown Court. The trial was underway but collapsed as a result of the late disclosure of the complainant's phone which revealed text messages from the complainant to third parties which blew apart the prosecution case. The officer in the case had previously told prosecution counsel that there was nothing to disclose. Fortunately a miscarriage of justice was avoided. The Metropolitan Police and the CPS have since apologised for this mistake.

I recently represented one of two defendants facing two counts of rape. The case was put on a joint enterprise basis.

The extracts of messages from the complainant's phone to friends were disclosed a few days before trial. The text messages were very damaging to the prosecution case and clearly assisted the defence.

The defence sought full disclosure of the complainant's phone downloads since her credibility was in issue. 24 hours before meeting the men, the complainant was boasting about her sexual prowess with two men in one night and she had also blamed a male friend for the rape. There were also lies told to third parties.

Despite the service of a Defence Statement requesting the crime report, 999 calls, SOIT Logs, phone downloads, results of forensics, items submitted for examination, S.O.C.O notes, whether she had made any false allegations of a sexual nature before, counselling notes, there had been a failure to disclosure the bulk of this material until the morning of the trial. The defence had requested that the case be listed for mention in advance of trial and for no witnesses to be called on the first day. Unfortunately the case was not listed and much of the issues had to be resolved on the first day of trial. Despite claims by the prosecution that this material had previously been served, neither defence teams for the defendants had received the material. On my review of the material overnight, the SOIT log made reference to the complainant being asked to provide a further statement in August for clarification in relation to suspect two (my client). I immediately requested disclosure of this further statement. This statement pre-dated the charge of my client and was post her video recorded interviews. This statement was never uploaded, was not referred to in the crime report and was not on the MG6C. In short, the complainant completely exonerated my client and expressed a view that he should not be charged. She was also expressing her gratitude to my client for being there and coming to her assistance. Her report to the police was not because male two had done anything wrong.

How this statement was never identified on an unused schedule, not served and not uploaded has shattered the little confidence I had in the disclosure process. This was clearly

material that undermined the prosecution case and assisted the defence. He should never have been charged let alone be standing trial.

The statement came with an accompanying letter dated the 6th October 2017 and was addressed to the co-defendant's solicitor who had never received it. It was acknowledged that it had never reached my Instructing Solicitor and the reason put forward was an error in the email sending process. Had this statement been disclosed, representations would have been made on behalf of my client before charge as to discontinuance, an application to dismiss would have been made and probably not resisted. The crown's failure to disclose this statement in advance of the Pre Trial Preparation Hearing meant that my client had since been arraigned. By way of contrast, the officer in the case had taken a further statement from the complainant post video recorded interview and days before trial in anticipation of cross examination, she was asked to clarify what she meant in these damaging text messages. This statement was uploaded.

The officer in the case did not transcribe a significant part of the complainant's video recorded Interview in which the complainant talked about lies she had told to third parties about the incident. Did the officer in the case seriously think that the defence would not spot this? The defence had no confidence in the officer in the case who is often tasked with disclosure and we made that position clear in court.

Following the disclosure of this statement and despite strong representations by myself as well as judicial encouragement in the clearest terms, prosecution counsel took instructions and wished to proceed against my client. This decision was not made by the reviewing lawyer but a substitute. This decision demonstrated a clear lack of judgement and a flagrant disregard for the codes for Crown Prosecutor particularly in the current climate. My client had no place being in the dock and reading between the lines the decision may have been tactical in the hope of a "cut throat" defence between defendants.

I drafted a skeleton argument to vacate the plea to enable me to apply to dismiss both counts. I was determined to stop the case immediately and not risk waiting for half time submissions. I also invited the court to stay proceedings on grounds of abuse of process and I uploaded the CPS code for crown prosecutors (a must read for every lawyer).

Fortunately, the crown offered no evidence. The trial continues against the co-defendant. It was made clear on behalf of the co-defendant that there was no confidence in the disclosure process and that a new officer in the case should take over. It was also successfully argued that the disclosure process must now be undertaken independently and at the highest level and not at the current level.

There should be an inquiry into this case. It concerns me that any prosecutor or reviewing lawyer worth their salt allowed a charge. The decision until the crown offered no evidence was to proceed to trial and to secure a conviction.

It has since transpired that prosecution counsel was aware of this statement yet advised that my client should be charged.

The judge described the case as "shambolic", disclosure chaotic. I can think of many more adjectives but disgraceful and shocking immediately come to mind.

This was a happy ending for my client because justice prevailed. For many defendants, the ending is a wrongful conviction, substantial prison terms and being subject to notification requirements.

As defence lawyers justice demands that we robustly request proper disclosure on behalf of our clients no matter what the allegation. If we are not satisfied that there has been proper disclosure then we must not hesitate to make a s8 application. If there is any doubt about the integrity of a disclosure officer we should demand a different disclosure officer or that a review takes place at the highest level.

The July Report has recommended better training of all involved in the disclosure process. Let's hope that the reviews will mean that lessons are learned and that there is a renewed confidence in the criminal justice process.

This simply cannot continue. For many defendants full disclosure could be the difference between a miscarriage of justice or justice being served.