Sex, Texts and Disclosure

Jessica Parker writes on the issues of electronic data disclosures in cases

On December 15, 2017, the papers were filled with articles explaining the collapse of the rape case in which a student, Liam Allan, was a defendant. Thereafter the floodgates opened, the Metropolitan Police conducted an urgent review of disclosure in rape cases and further cases collapsed pre-trial. For the time being, defence solicitors are in the unfamiliar position of having public support for their work.

The issue of electronic data is now at the forefront of the debate about fairness in the criminal justice system. Almost every suspect in a criminal investigation has one or more phones or other electronic device, as do many important witnesses (including complainants in rape cases). Each device may contain thousands of critical messages, emails, photos and geographic data. In January 2018, Alison Saunders (the DPP) gave an interview to Radio 4 in which she said that she did not think that anyone was wrongfully convicted due to disclosure failure. The CPIA does not oblige the police to trawl through every byte of data and there are sufficient procedural safeguards in place.

While it is true that it is settled law that the legislative scheme does not require comprehensive review, it is obviously wrong that there have been no miscarriages of justice. A few days after the *Allan* case hit the headlines, on December 21, the Court of Appeal quashed the conviction of a man known only as DSK who had been convicted of rape (*DSK v. R* [2017] EWCA Crim 2214). DSK's appeal was only heard following his release from his sentence of four years six months. The Court of Appeal considered fresh evidence in the form of Facebook messages, which undermined the complainant's evidence and supported that of DSK. The messages had been archived on his account and he had initially been unaware of how to retrieve them. He had notified the prosecution at the time of the trial that the Facebook exchange would be pertinent. The police had a copy of his home laptop, and could have accessed his Facebook account including the archived messages. It was not until sometime later that his family gained access to his account and retrieved the relevant message.

The issue highlighted in DSK was the efficacy of the investigator's interrogation of the electronic data. If the complainant or defendant's phone had been properly analysed, the original trial may have had a different outcome. The complainant provided a partial copy of the relevant messages to the police. The Court of Appeal found this partial message chain to be misleading. At trial she had conceded

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that she had deleted some messages, but it appears from the case transcript that no steps were taken by officers to independently interrogate the Facebook account from either the defendant or the complainant's device.

In practice, the problems relating to digital disclosure start before disclosure to the defence is considered, at the very outset of an investigation. Digital devices, including mobile phones, must be forensically imaged before inspection, to avoid any of the data being altered by the reviewing officer. There are insufficient resources nationwide to perform this function, causing delays in the imaging process. In cases where electronic devices are seized, suspects are told that the images will be available for the investigator to review in anything from a few weeks to six or more months. This is as unwelcome to the investigator as it is to the suspect.

In order to avoid these problems, there is a concerning trend for the police not to retain phones and other electronic devices belonging to suspects, as well as crucial witnesses and complainants. The police deliberately deprive themselves of evidence which may exculpate the suspect, rather than pursuing all reasonable lines of enquiry which might point towards guilt or innocence.

Even assuming the device has been properly retained and the police have the technical capability of reviewing it effectively, the issue remains as to how to meaningfully disclose the contents of a digital device. The Attorney General's *2011 Supplementary Guidelines on Digitally Stored Material* provides guidance as to how the task should be conducted. One proposal is that an investigator

could use search terms, which should then be shared with the defendant. In practice, this guidance is inconsistently applied and there is no uniformity between police areas and investigative agencies.

The problem is not confined to rape cases. In *R. v. R* [2015] EWCA, the Court of Appeal examined the issue of electronic disclosure in a large scale tax fraud prosecution. In this case, 77 electronic devices were seized resulting in the retention of seven terabytes (approximately 600 million pages) of data. There was no prospect that their contents could ever reasonably be reviewed. The defence and prosecution had spent the best part of four years grappling with the most appropriate way to achieve fair disclosure before the case was stayed by the trial Judge in 2015. The Court of Appeal delivered a Practice Note judgment, in which Leveson P surveyed the plethora of guidance and case law on the issue and drew the following conclusions:

- The prosecution is and must be in the driving seat at the stage of initial disclosure;
- the prosecution must then encourage dialogue and prompt engagement with the defence;
- the law is prescriptive of the result, not the method;
- the process of disclosure should be subject to robust case management by the Judge, utilising the full range of case management powers; and
- flexibility is critical.

The essence of the conclusions drawn by the Court was that there cannot be a "one size fits all" method of approaching the disclosure task in each case. The special challenge of ensuring that the system of disclosure is fair and proportionate when liberty is at stake cannot be underestimated. If the legislative scheme under the CPIA is to remain the standard by which disclosure is judged, changes in practice are required.

First, there must be an increase in transparency at all stages of the investigative and disclosure process. The Court of Appeal in *R. v. R* underlined the need for defence engagement. Such engagement can only take place with transparency and a clear understanding of what approach the investigator and prosecutor have taken.

Secondly, investigators must be provided with sufficient resources to conduct their task efficiently, effectively and speedily. The capabilities of technology designed to review electronic data must evolve as quickly as the devices on which that data is stored. There is no alternative but continued investment in order to keep imaging and reviewing software up to date with the market leading mobile phones and computers.

Thirdly, if the system is to remain flexible and not prescriptive, its success or failure rests on the integrity of those within it. Institutional independence between investigator and prosecutor and the use of independent Counsel can be an important check.

All of the proposals above require resources and the cupboard is bare. It is paramount for those on all sides of the criminal justice process to keep this issue in the public eye.

About the author

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