SUPREME COURT OF QUEENSLAND

CITATION:	*GJT v Director of Public Prosecutions & Anor* [2022] QSC 253
PARTIES:	**GJT** (applicant) **v** **DIRECTOR OF PUBLIC PROSECUTIONS** (first respondent) **COMMISSIONER OF QUEENSLAND POLICE** (second respondent)
FILE NO/S:	Originating application filed by leave on 3 November 2022
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	18 November 2022
DELIVERED AT:	Brisbane
HEARING DATE:	3 November 2022
JUDGE:	Davis J
ORDER:	**1. The application is dismissed.** **2. The application, all material filed in the application, all written outlines of argument and the transcript of the proceedings be sealed in an envelope marked, "Not to be opened except by order of the Court" and placed on the file.** **3. The envelope is not to be opened except by order of the Court.**
CATCHWORDS:	CRIMINAL LAW - PROCEDURE - DISCLOSURE OBLIGATIONS - where the applicant made statements of evidence in a criminal proceeding - where the applicant sought to rely on s 13A of the *Penalties and Sentences Act* 1992 - where the prosecutor has elected to call the applicant as a witness - where the prosecutor intends to make

disclosure of the statements - whether the statements were disclosed so as to give rise to a duty of confidentiality - whether the prosecutor is obliged not to disclose the statements

STATUTES - ACTS OF PARLIAMENT - INTERPRETATION - where the applicant made statements of evidence in a criminal proceeding - where the applicant sought to rely on s 13A of the *Penalties and Sentences Act* 1992 - where the prosecutor has elected to call the applicant as a witness - where the applicant asserted that the statements should not be disclosed - whether ss 590AB and 590AH of the *Criminal Code* require disclosure - whether s 13A of the *Penalties and Sentences Act* 1992 obviates any disclosure obligation

Acts Interpretation Act 1954
Criminal Code, s 590AB, s 590AH
Criminal Law Amendment Act 1894, s 10
Criminal Law Amendment Act 1997
Criminal Law Amendment Act 2014
Criminal Law Amendment Bill 2014
Penalties and Sentences Act 1992, s 13A, s 13B, s 188

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT) (2009) 239 CLR 27, followed
CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384, followed
Fractionated Cane Technology Ltd v O'Sullivan & Ors (unreported) Ambrose J, Supreme Court of Queensland, 17 September 1986, cited
Grey v The Queen (2001) 75 ALJR 1708, cited
J v L & A Services Pty Ltd (No 2) [1995] 2 Qd R 10, cited
K&S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd (1985) 157 CLR 309, followed
Mallard v The Queen (2005) 224 CLR 125, followed
McDermott v The King (1948) 76 CLR 501, cited
Nguyen v The Queen (2020) 269 CLR 299, cited
Pollitt v The Queen (1992) 174 CLR 558, cited
Potter v Minahan (1908) 7 CLR 277, followed
R v A2; R v Magennis; R v Vaziri (2019) 269 CLR 507, followed
R v Apostilides (1984) 154 CLR 563, cited
R v Falzon [1990] 2 Qd R 436, cited
R v Hau [2009] QCA 165, cited
R v Healy [2016] QCA 334, cited
R (a solicitor) v Lewis [1987] 2 Qd R 710, cited

R v Rollason & Jenkins; ex parte A-G (Qld) [2008] 1 Qd R 85, cited
R v Spizzirri [2001] 2 Qd R 686, cited
Richardson v The Queen (1974) 131 CLR 116, cited
Rozenes & Anor v Beljajev & Ors [1995] 1 VR 533, cited
SZTAL v Minister for Immigration and Border Protection (2017) 262 CLR 362, followed
Whitehorn v The Queen (1983) 152 CLR 657, cited
X7 v Australian Crime Commission (2013) 248 CLR 92, followed

COUNSEL: G Radcliffe for the applicant
T Fuller KC for the first respondent
C J Capper for the second respondent

SOLICITORS: Senior Legal Pty Ltd for the applicant
Director of Public Prosecutions for the first respondent
Queensland Police Service, Legal Unit for the second respondent

[1] The applicant seeks declaratory relief and orders restraining the respondents from dealing with written statements made by him.

Background

[2] A prisoner, who I will call Smith, is on remand on a charge of murdering a person, who I will call Jones. The applicant was also held on remand for criminal charges. Both the applicant and Smith were held in the same correctional facility.

[3] The applicant has made two written statements to police. In those statements, he speaks of conversations he had in prison with Smith. According to the applicant, during those conversations, Smith made statements explaining his role in the murder of Jones.

[4] Jailhouse confessions, being oral statements by an accused who is in custody to another prisoner, are notoriously unreliable and a trial judge must be alert to the necessity to properly warn and direct a jury as to the dangers in acting upon such evidence.[1]

[5] The Crown prosecutor handling the case for the Crown must decide what evidence is led and what is not. That decision is not reviewable.[2] The prosecution of Smith

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1 *Pollitt v The Queen* (1992) 174 CLR 558.

2 *R v Apostilides* (1984) 154 CLR 563, *Whitehorn v The Queen* (1983) 152 CLR 657, *Richardson v The Queen* (1974) 131 CLR 116 at 119, followed in *Nguyen v The Queen* (2020) 269 CLR 299 at [33]-[35].

and others has not yet reached committal. However, the Crown prosecutor has decided that the applicant will be called as a witness in the case. Having regards to the contents of the applicant's two statements, that decision is hardly surprising. The applicant supplies significant detail of the conversations and also identifies other prisoners who heard, or may have heard, the conversations or part of them.

[6] Nothing in the statements inculpate the applicant. They are not confessionary in nature. There is no suggestion that the applicant is involved in any way with the murder of Jones. It is not sought to lead the statements against the applicant.[3]

[7] There is no suggestion:

1. that the statements were not voluntarily made by the applicant; or
2. that they were otherwise made in circumstances which adversely affects their reliability.[4]

[8] Each of the applicant's two statements begin with seven paragraphs in these terms:

> "1. I give this statement pursuant to an undertaking given under s.13A of the Penalties and Sentences Act 1992.
>
> 2. This statement is a proof of the evidence which I would be prepared to give in court in relation to this matter.
>
> 3. I understand that this statement will be presented to the Judge who sentences me in relation to the charges that I am facing. I have given an undertaking that I will give evidence consistently with the content of this statement.
>
> 4. I have agreed to give this evidence on the understanding that I will receive a lesser sentence for the offence for which I am being sentenced than I would without the benefit of that undertaking.
>
> 5. I am aware that, should the evidence that I give differ materially from that contained in my statement or if I do not give evidence at all, I am liable to have the sentence I receive in consideration of my undertaking to give this evidence, re-opened.
>
> 6. Should that be the case, then I am liable to have imposed upon me, a sentence which does not afford me the benefit of the

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3 *Criminal Law Amendment Act* 1894 and the principles in *McDermott v The King* (1948) 76 CLR 501 therefore have no application.

4 *R v Falzon* [1990] 2 Qd R 436, *Rozenes & Anor v Beljajev & Ors* [1995] 1 VR 533 and *R v Healy* [2016] QCA 334.

cooperation I have undertaken to give law enforcement authorities.

7. I understand that this statement has three purposes. 1. To provide a summary of the evidence that I am prepared to give in relation to these proceedings against others who were involved. 2. To give the Judge who sentences me the ability to assess the extent and degree of the cooperation I have given to law enforcement agencies. 3. To provide a basis for assessing whether my evidence conforms to my undertaking to cooperate."

[9] The undertaking referred to in paragraph 1 of the affidavits is as follows:

"**THE QUEEN**

V

[the applicant]

UNDERTAKING PURSUANT TO SECTION 13A

OF THE *PENALTIES AND SENTENCES ACT 1992* (QLD)

I, [the applicant], hereby undertake to co-operate with the law enforcement agencies in any proceedings against [Smith].

In this regard, I acknowledge the truthfulness of the statement marked 'A' and attached hereto. My co-operation pursuant to this undertaking will extend to attending in Court and giving evidence wherever and whenever required by a prosecuting authority in proceedings in which any information set out in the documentation marked 'A' is relevant.

Further, I hereby undertake to keep the investigating police officers, [officers named] both of the Queensland Police Service, informed of my residential address and any changes to that address in order to facilitate the giving of evidence.

I am aware that if I fail to co-operate pursuant to the undertaking here given, the Crown may apply to have my sentence proceeding re-opened pursuant to Section 188 Penalties and Sentences Act 1992."

[10] Subject to the arguments raised here, the Crown prosecutor, having made the decision to call the applicant to give evidence, was compelled by s 590AH of the *Criminal Code* to disclose the statements to the defence.

[11] A couple of months ago, the applicant received an Australia Post post pack envelope which contained a threat which stated, "Tick Tock Times Up!". Enclosed in the envelope was a bullet. The police were unable to identify who made the

threat. An officer of the first respondent told the applicant's solicitors that police investigations had revealed that the threat was unrelated to the prosecution in which the statements had been given.

[12] Correspondence passed between the applicant's solicitors and the first respondent, the effect of which was that the first respondent expressed an intention to disclose the statements to the defendants in the criminal prosecution, including Smith. The applicant's solicitors urged that not to occur as to do so would endanger the life and safety of persons, in particular, the applicant.

[13] Having not extracted an undertaking not to disclose the statements, the applicant brought an application seeking the following relief:

> "1. A declaration that the contents of the Statements of Evidence which are tendered and marked 'A' and any source documents and/or recordings of any conversations between any person, servant or agent of the First and or Second Respondent relating to the creation of the said Statements of Evidence are or remain the sole property of the Applicant save that such Statements of Evidence are to be used by the First and or Second Respondent or its or their agents for the purposes of section 13A of the Penalties and Sentences Act in relation to the Applicant.
>
> 2. A declaration that the proposed conduct of the First and or Second Respondent of delivering copies of the said Statements of Evidence to, and any other communication with, any other person firm or corporation concerning the contents of the Statements of Evidence would constitute a breach of confidence in respect of the Applicant's ownership of the intellectual property comprised in the said Statements of Evidence.
>
> 3. That the First and or Second Respondent, by themselves or each of them, their servants, agents, officers or otherwise be restrained from disclosing or publishing an identifying information about the contents of the Statements of Evidence or any other source documents relating to the creation of same by communicating, transcribing, copying or otherwise save for the express purposes of section 13A of the Penalties and Sentences Act in relation to the Applicant.
>
> 4. An order that the First and or Second Respondent deliver up forthwith to the Applicant all transcripts and notes of all and any conversations relating to the creation of the Statements of Evidence and any other material in their or either of their agent's possession or control concerning the existence of the Statements of Evidence, and that compliance with this order

shall be effected by delivery of the said materials to the Registrar of the Supreme Court."

[14] In addition, orders were sought maintaining the confidentiality of these proceedings. There was no objection to those orders and I will make them. The applicant claims his costs of the application. The respondents do not seek costs.

Relevant statutory provisions

[15] Sections 13A, 13B and 188 of the *Penalties and Sentences Act* 1992 provide as follows:

> "**13A Cooperation with law enforcement authorities to be taken into account—undertaking to cooperate**
>
> (1) This section applies for a sentence that is to be reduced by the sentencing court because the offender has undertaken to cooperate with law enforcement agencies in a proceeding about an offence, including a confiscation proceeding.
>
> (2) Before the sentencing proceeding starts, a party to the proceeding—
>
> (a) must advise the relevant officer—
>
> (i) that the offender has undertaken to cooperate with law enforcement agencies; and
>
> (ii) that written or oral submissions or evidence will be made or brought before the court relevant on that account to the reduction of sentence; and
>
> (b) may give to the relevant officer copies of any proposed written submissions mentioned in paragraph (a)(ii).
>
> (3) After the offender is invited to address the court—
>
> (a) the offender's written undertaking to cooperate with law enforcement agencies must be handed up to the court; and
>
> (b) any party may hand up to the court written submissions relevant to the reduction of sentence.
>
> (4) The undertaking must be in an unsealed envelope addressed to the sentencing judge or magistrate.

(5) If oral submissions are to be made to, or evidence is to be brought before, the court relevant to the reduction of sentence, the court must be closed for that purpose.

(6) The penalty imposed on the offender must be stated in open court.

(7) After the imposition of the penalty, the sentencing judge or magistrate must—

(a) close the court; and

(b) state in closed court—

(i) that the sentence is being reduced under this section; and

(ii) the sentence it would otherwise have imposed; and

(c) cause the following to be sealed and placed on the court file with an order that it may be opened only by an order of the court, including on an application to reopen the sentencing proceedings under section 188(2)—

(i) the written undertaking;

(ii) a record of evidence or submissions made relevant to the reduction of sentence and the sentencing remarks made under paragraph (b).

(8) The sentencing judge or magistrate may make an order prohibiting publication of all or part of the proceeding or the name and address of any witness on his or her own initiative or on application.

(9) In deciding whether to make an order under subsection (8), the judge or magistrate may have regard to—

(a) the safety of any person; and

(b) the extent to which the detection of offences of a similar nature may be affected; and

(c) the need to guarantee the confidentiality of information given by an informer.

(10) A person who contravenes an order made under subsection (8) commits an offence.

Maximum penalty—

(a) for an order made by a judge—5 years imprisonment; or

(b) for an order made by a magistrate—3 years imprisonment.

(11) In this section—

relevant officer means—

(a) for a proceeding before the Supreme or District Court—the sentencing judge's associate; or

(b) for a proceeding before a Magistrates Court—the relevant clerk of the court.

13B Cooperation with law enforcement authorities to be taken into account—cooperation given

(1) This section applies for a sentence if—

(a) the sentence is to be reduced by the sentencing court because the offender has significantly cooperated with a law enforcement agency in its investigations about an offence or a confiscation proceeding; and

(b) section 13A does not apply for the sentence.

(2) For subsection (1), an offender has not significantly cooperated with a law enforcement agency in its investigations about an offence only because the offender has admitted guilt for the offence.

(3) Before the sentencing proceeding starts, a party to the proceeding—

(a) must advise the relevant officer—

(i) that the offender has significantly cooperated with a law enforcement agency; and

(ii) that written or oral submissions or evidence will be made or brought before the court relevant on that account to the reduction of sentence; and

(b) may give the relevant officer copies of any proposed written submissions mentioned in paragraph (a)(ii).

(4) After the offender is invited to address the court—

(a) an affidavit, provided by a person representing the law enforcement agency, must be handed up to the court; and

(b) any party may hand up to the court written submissions relevant to the reduction of sentence.

(5) The affidavit must—

(a) state the nature, extent and usefulness of the cooperation given to the law enforcement agency by the offender; and

(b) be in an unsealed envelope addressed to the sentencing judge or magistrate.

(6) If oral submissions are to be made to, or evidence is to be brought before, the court about the cooperation or the reduction of sentence, the court must be closed for that purpose.

(7) The penalty imposed on the offender must be stated in open court.

(8) After the imposition of the penalty, the sentencing judge or magistrate must cause the following to be sealed and placed on the court file with an order that it may be opened only by an order of the court—

(a) the affidavit;

(b) a record of evidence or submissions made relevant to the reduction of sentence;

(c) a record of the sentencing remarks relevant to the reduction of sentence, as opposed to the sentence imposed.

(9) <u>The sentencing judge or magistrate may make an order prohibiting publication of all or part of the proceeding or the name and address of any witness on his or her own initiative or on application</u>.

(10) In deciding whether to make an order under subsection (9), the judge or magistrate may have regard to—

(a) the safety of any person; and

(b) the extent to which the detection of offences of a similar nature may be affected; and

(c) the need to guarantee the confidentiality of information given by an informer.

(11) A person who contravenes an order made under subsection (9) commits an offence.

Maximum penalty—

(a) for an order made by a judge—5 years imprisonment; or

(b) for an order made by a magistrate—3 years imprisonment.

(12) In this section—

relevant officer means—

(a) for a proceeding before the Supreme or District Court—the sentencing judge's associate; or

(b) for a proceeding before a Magistrates Court—the relevant clerk of the court. …

188 Court may reopen sentencing proceedings

(1) If a court has in, or in connection with, a criminal proceeding, including a proceeding on appeal—

(a) imposed a sentence that is not in accordance with the law; or

(b) failed to impose a sentence that the court legally should have imposed; or

(c) imposed a sentence decided on a clear factual error of substance; or

(d) failed to fix a date for the offender to be released on parole as required under part 9, division 3;

the court, whether or not differently constituted, may reopen the proceeding.

(2) Also, if—

(a) a court has in, or in connection with, a criminal proceeding reduced a sentence because the offender has undertaken in a written declaration to cooperate with law enforcement agencies in a proceeding about an offence, including a confiscation proceeding; and

(b) the offender, without reasonable excuse, does not cooperate under the undertaking;

the court, whether or not differently constituted, may reopen the proceeding.

(3) If a court reopens a proceeding, it—

(a) must give the parties an opportunity to be heard; and

(b) may resentence the offender—

(i) for a reopening under subsection (1)(a)—to a sentence in accordance with law; or

(ii) for a reopening under subsection (1)(b)—to a sentence the court legally should have imposed; or

(iii) for a reopening under subsection (1)(c)—to a sentence that takes into account the factual error; or

(iv) for a reopening under subsection (2)—to a sentence under subsection (4); and

(c) may amend any relevant conviction or order to the extent necessary to take into account the sentence imposed under paragraph (b).

(4) On an application under subsection (2)—

(a) if the court is satisfied that the offender has completely failed to cooperate, the court must resentence the offender having regard to the sentence that would otherwise have been imposed if an undertaking under section 13A had not been given; or

(b) if the court is satisfied that the offender has partly failed to cooperate, the court may substitute for the reduced sentence the sentence it considers appropriate, not greater than the sentence that would have been imposed if the undertaking had not been given.

(5) The court may reopen the proceeding—

(a) on its own initiative at any time; or

(b) for a reopening under subsection (1)—on the application of a party to the proceeding made within—

(i) 28 days after the day the sentence was imposed; or

(ii) any further time the court may allow on application at any time; or

(c) for a reopening under subsection (1)(d)—on the application of the chief executive (corrective services); or

(d) for a reopening under subsection (2)—on the application of the prosecution made at any time, whether or not the appeal period under the Criminal Code, section 671(2) has expired.

(6) Subject to subsection (7), this section does not affect any right of appeal.

(7) For an appeal under any Act against a sentence imposed under subsection (3) or (4), the time within which the appeal must be made starts from the day the sentence is imposed under subsection (3) or (4).

(8) This section applies to a sentence imposed, or required to be imposed, whether before or after the commencement of this section."

[16] Sections 590AB, 590AH of the *Criminal Code* provide:

"**590AB Disclosure obligation**

(1) This chapter division acknowledges that it is a fundamental obligation of the prosecution to ensure criminal proceedings are conducted fairly with the single aim of determining and establishing truth.

(2) Without limiting the scope of the obligation, in relation to disclosure in a relevant proceeding, the obligation includes an ongoing obligation for the prosecution to give an accused person full and early disclosure of—

(a) all evidence the prosecution proposes to rely on in the proceeding; and

(b) all things in the possession of the prosecution, other than things the disclosure of which would be unlawful or contrary to public interest, that would tend to help the case for the accused person. …

590AH Disclosure that must always be made

(1) This section applies—

(a) without limiting the prosecution's obligation mentioned in section 590AB(1); and

(b) subject to section 590AC(1)(a)[5] and chapter subdivision D.

(2) For a relevant proceeding, the prosecution must give the accused person each of the following—

(a) …

(e) for each proposed witness for the prosecution other than a proposed witness mentioned in paragraph (d)—

(i) a copy of any statement of the witness in the possession of the prosecution; or

Example—

a statement made by a proposed witness for the prosecution in an audio recording of an interview

(ii) if there is no statement of the witness in the possession of the prosecution—a written notice naming the witness …" (emphasis added)

The applicant's submissions

[17] It is submitted by the applicant that the statements were produced to the respondents conditionally, namely for the purposes of the applicant obtaining a benefit under s 13A of the *Penalties and Sentences Act*. It follows, so submits the applicant, that equity would enjoin the respondents from use of the statements beyond the purpose for which they were produced. Reliance is made upon *J v L & A Services Pty Ltd (No 2)*,[6] *Fractionated Cane Technology Ltd v O'Sullivan & Ors*[7] and *R (a solicitor) v Lewis*.[8]

[18] The applicant's submission is:

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5 Which exempts from disclosure documents whose production is unlawful.

6 [1995] 2 Qd R 10.

7 (unreported) Ambrose J, Supreme Court of Queensland, 17 September 1986.

8 [1987] 2 Qd R 710.

1. The undertaking[9] makes clear that the statement is produced for the purposes of proceedings under s 13A of the *Penalties and Sentences Act*.

2. Therefore, the statements are "… statement(s) made to a police officer of a future intention to say certain things in a court made to a police officer at a point in time in a case about another person or persons".[10] This is said to be supported by s 13A(1).

3. The only effect of the statements is for the purposes of s 13A. So, if, after having obtained the benefit, the evidence is given by the applicant consistently with the statements, then he retains the benefit on sentence. If not, then he is re-sentenced.

4. If the confidentiality of the statements is not preserved, then the discretion in s 13A(8) and (9) of the *Penalties and Sentences Act* is effectively destroyed.

Consideration

[19] The arguments raise questions as to the proper construction of provisions of the *Criminal Code* and the *Penalties and Sentences Act*.

[20] Subject to provisions in statutory interpretation legislation,[11] the construction exercise involves the determination of the intention of the legislature expressed through the actual words used in the text of the relevant provision,[12] but having regard to context and purpose.[13]

[21] The principles were recently authoritatively restated in *R v A2; R v Magennis; R v Vaziri*[14] in the following terms:

> "32 The method to be applied in construing a statute to ascertain the intended meaning of the words used is well settled. It commences with a consideration of the words of the provision itself, but it does not end there. A literal approach to construction, which requires the courts to obey the ordinary meaning or usage of the words of a provision, even if the result is improbable, has long been eschewed by this Court. It is now accepted that even words having an apparently clear ordinary

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9 See paragraph [9] of these reasons.

10 Applicant's written outline, paragraph 14.

11 In Queensland, the *Acts Interpretation Act* 1954.

12 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 at [47].

13 *K&S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 312 and 315, followed in *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 and *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at [36].

14 (2019) 269 CLR 507.

or grammatical meaning may be ascribed a different legal meaning after the process of construction is complete. This is because consideration of the context for the provision may point to factors that tend against the ordinary usage of the words of the provision.

33 Consideration of the context for the provision is undertaken at the first stage of the process of construction. Context is to be understood in its widest sense. It includes surrounding statutory provisions, what may be drawn from other aspects of the statute and the statute as a whole. It extends to the mischief which it may be seen that the statute is intended to remedy. 'Mischief' is an old expression. It may be understood to refer to a state of affairs which to date the law has not addressed. It is in that sense a defect in the law which is now sought to be remedied. The mischief may point most clearly to what it is that the statute seeks to achieve.

34 This is not to suggest that a very general purpose of a statute will necessarily provide much context for a particular provision or that the words of the provision should be lost sight of in the process of construction. These considerations were emphasised in the decisions of this Court upon which the Court of Criminal Appeal placed some weight.

35 The joint judgment in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* rejected an approach which paid no regard to the words of the provision and sought to apply the general purpose of the statute, to raise revenue, to derive a very different meaning from that which could be drawn from the terms of the provision. The general purpose said nothing meaningful about the provision, the text of which clearly enough conveyed its intended operation. Similarly, in *Saeed v Minister for Immigration and Citizenship* the court below was held to have failed to consider the actual terms of the section. A general purpose of the statute, to address shortcomings identified in an earlier decision of this Court, was not as useful as the intention revealed by the terms of the statute itself. In *Baini v The Queen*, it was necessary to reiterate that the question of whether there had been a 'substantial miscarriage of justice' within the meaning of the relevant provision required consideration of the text of the provision, not resort to paraphrases of the statutory language in extrinsic materials, other cases and different legislation.

36 These cases serve to remind that the text of a statute is important, for it contains the words being construed, and that a very general purpose may not detract from the meaning of

> those words. As always with statutory construction, much depends upon the terms of the particular statute and what may be drawn from the context for and purpose of the provision.
>
> 37 None of these cases suggest a return to a literal approach to construction. They do not suggest that the text should not be read in context and by reference to the mischief to which the provision is directed. They do not deny the possibility, adverted to in *CIC Insurance Ltd v Bankstown Football Club Ltd*, that in a particular case, 'if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance'. When a literal meaning of words in a statute does not conform to the evident purpose or policy of the particular provision, it is entirely appropriate for the courts to depart from the literal meaning. A construction which promotes the purpose of a statute is to be preferred." (footnotes omitted)

[22] Sections 590AB and 590AH form part of Chapter Division 3 of Chapter 62 of the Code. Chapter Division 3 concerns "disclosure by the prosecution".

[23] At common law, the prosecution bears the obligation to disclose all relevant evidence to an accused.[15] Chapter Division 3 is a modification of the common law obligations.[16] A failure to observe the duty of disclosure may result in a conviction being overturned where the failure to disclose has caused a miscarriage of justice.[17]

[24] Section 13A of the *Penalties and Sentences Act* was introduced by the *Criminal Law Amendment Act* 1997. Section 13A concerns the credit to be given to an offender on sentence for evidence yet to be given by him or her in the prosecution of some other person.

[25] Section 13B was introduced by the *Criminal Law Amendment Act* 2014. The explanatory memorandum to the *Criminal Law Amendment Bill* 2014 provides amendment to:

> "• the *Penalties and Sentences Act 1992* to:
>
> – insert new section 13B to provide a regime aimed at ensuring the protection and confidentiality of informants who significantly assist law enforcement agencies with

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15 *Grey v The Queen* (2001) 75 ALJR 1708, followed in *Mallard v The Queen* (2005) 224 CLR 125 at [17].

16 See generally *R v Rollason & Jenkins; ex parte A-G (Qld)* [2008] 1 Qd R 85.

17 *Grey v The Queen* (2001) 75 ALJR 1708, followed in *Mallard v The Queen* (2005) 224 CLR 125 and see *R v Spizzirri* [2001] 2 Qd R 686 and *R v Hau* [2009] QCA 165.

> their investigations but fall outside the ambit of the existing section 13A as the informant is not willing to give the type of undertaking required under section 13A (for example, a person whose co-operation is reflected in an affidavit by a law enforcement agency; colloquially known as a 'letter of comfort')"

[26] Sections 13A and 13B compliment each other. Both deal with persons who are criminally charged but who wish to cooperate with authorities in the investigation of, or proceedings against, others. Section 13A concerns future assistance, and s 13B concerns past assistance.

[27] Section 13A of the *Penalties and Sentences Act* presupposes that an offender who has provided a statement will give evidence at the trial of an accused. This is clear from ss 13A(1), (3) and (4) and by s 188. Therefore, at some point an accused will become aware:

1. of the identity of the witness taking advantage of s 13A;
2. of the fact that the witness has taken advantage of s 13A and obtained a benefit in exchange for the undertaking to give the evidence;[18]
3. that the witness will give evidence adverse to the accused's interests.

[28] Section 13B operates differently. There, it is not contemplated that the person taking advantage of s 13B will give evidence in an accused's trial. The cooperation by the witness is in the past.

[29] Against that background, it should be observed that s 13A(8) and (9) grant discretionary powers. The sentencing court may, or may not, take steps to preserve the anonymity of the proposed witness. Those powers are discretionary because, depending on whether the sentencing of the witness occurs before or after the trial of the accused about whom the s 13A statement is made, it may not be necessary to maintain the anonymity of the witness. There is nothing in the *Penalties and Sentences Act* to suggest that a witness who has given a statement pursuant to s 13A may not be sentenced after the trial of the accused. If that occurs, s 13B may also be relevant.

[30] Section 13A provides a procedure whereby:

1. the court hears and handles the submissions in mitigation based on the undertaking of future cooperation;
2. the benefit which is actually given to the witness is quantified; and
3. the consequences of failure to comply with the undertaking are prescribed, namely a reopening of the sentence.

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[18] *Grey v The Queen* (2001) 75 ALJR 1708.

[31] Chapter Division 3 provides a statutory right to disclosure which has historical roots in the common law right of an accused to a fair trial. The compromise of such rights would, in my view, require clear language.[19] There is no such clear indication in s 13A or otherwise.

[32] There is a necessity for witnesses, whose evidence, or potential evidence, may place them in danger to be protected. That is a matter for the police once the concern arises.

[33] There is nothing in any of the relevant statutory provisions which restricts the use by the prosecution of the applicant's statements or allows their disclosure to the defence to be delayed.

[34] Further, the alleged duty of confidentiality is not supported factually in the present case. The applicant:

1. agrees that the statements show the evidence which he would "be prepared to give in court";[20]
2. has "agreed to give this evidence";[21] and
3. undertakes to give the evidence "wherever and whenever required by a prosecuting authority".[22]

[35] While the statements have been given with the intention to obtain the benefit under s 13A, it is obvious that the statements have been given in contemplation of the applicant giving evidence. Consistently with that purpose, the Crown should disclose the statements to the defence.

[36] Further still, ss 590AB and 590AH(2)(e) place a legal obligation upon the prosecution to disclose the statements. The relief sought by the applicant, if given, would place the prosecution in breach of those statutory obligations. The relief therefore cannot be given in the absence of some statutory exception to the obligations of disclosure of which there are none.

Conclusions

[37] The application should be dismissed.

[38] It is though in the public interest for the materials which were before me to remain confidential. I will make the appropriate orders.

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19 *Potter v Minahan* (1908) 7 CLR 277 at 304 and *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [86] and [158].

20 Statements, paragraph 2.

21 Statements, paragraphs 4 and 7.

22 The undertaking.

[39] It is ordered that:

1. The application is dismissed.

2. The application, all material filed in the application, all written outlines of argument and the transcript of the proceedings be sealed in an envelope marked, “Not to be opened except by order of the Court” and placed on the file.

3. The envelope is not to be opened except by order of the Court.