

A joint review of the disclosure process in the case of R v Allan

Findings and recommendations for the Metropolitan Police Service and CPS London

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**METROPOLITAN
POLICE**



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Terms of Reference

For the CPS and Metropolitan Police Service (MPS) to conduct a Joint Review of the disclosure process in the case of R v Allan, focusing on the nature and handling of material recovered from the complainant's telephone handset.

The Joint Review team will publish a single report outlining its findings.

A Joint Review has now taken place between the Metropolitan Police Service (MPS) and Crown Prosecution Service (CPS) London South Area.

The Review related to the case of R v Allan which was dropped by the CPS on 14 December 2017 at Croydon Crown Court. The case involved allegations that a woman, C, was raped and sexually assaulted by the defendant, D.

This Report outlines the findings of the Review and sets out recommendations for the MPS and CPS London.

The respective roles of the police and the CPS are set out below:

Role of the police

1. The core responsibilities of the police are:
 - Prevention and detection of crime;
 - Protection of life and property;
 - Maintenance of the Queen's Peace.
2. In delivering their responsibilities to detect crime, the police have a duty to pursue all reasonable lines of enquiry, whether these point towards or away from the suspect.¹
3. The police have statutory powers to arrest persons whom they have reasonable grounds to suspect have committed a criminal offence. Persons detained under arrest may be interviewed under caution in order to gather evidence and to allow them an opportunity to provide an account of the alleged offence.
4. When the evidence obtained is deemed sufficient for a case disposal decision to be made, the case will be reviewed by a police supervisor (of Sergeant or Inspector rank) to determine whether the necessary evidential standards have been met and for a case disposal² decision to be made.

¹CPIA 1996 Code of Practice (2015)

²Case disposal options may include decisions to charge, caution or take no further action.

5. In cases of a serious nature such as suspected or alleged rape, the case must be referred to the CPS for a decision as to whether a suspect should be charged with a criminal offence and the specific details of the charge(s) to be brought.
6. When the police ask for authority to charge a suspect, they must follow the [Director's Guidance on Charging](#). They must supply to the prosecutor the key evidence and any material which has been identified by them which could reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused.
7. After the CPS authorises a charge, the police and prosecutor have a duty to work together to ensure that the case is prepared for prosecution and to discharge their responsibilities in relation to the law and rules of disclosure.

Role of the CPS

8. The CPS makes its decisions in accordance with the [Code for Crown Prosecutors](#) (The Code) which is available in full on the CPS website.
9. The Code has a Test, which has two stages which must be applied before a case may be prosecuted. The first stage of the Test is the evidential stage. Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge. They must consider what the defence case may be, and how it is likely to affect the prospects of conviction. A case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be.
10. The finding that there is a realistic prospect of conviction is based on the prosecutor's objective assessment of the evidence, including the impact of any defence, and any other information that the suspect has put forward or on which he or she might rely. It means that an objective, impartial and reasonable jury or bench of magistrates or judge hearing a case alone, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged. This is a different test from the one that the criminal courts themselves must apply. A court may only convict if it is sure that the defendant is guilty.
11. The second stage of the test only falls to be considered if the first stage is met. The second stage is the public interest stage. A case must only proceed if it is in the public interest.
12. The role of the CPS is not to determine guilt or innocence as that is a matter for the courts. The Full Code Test is an objective assessment of whether the evidence is capable of leading to a conviction.
13. Ideally, once a prosecutor makes a charging decision he/she would then maintain responsibility for the case throughout. The prosecutor is under an ongoing duty to progress the case efficiently and effectively, and ensure that it is kept under continuing review. They must work with the police to make sure that the law and rules of disclosure are complied with.
14. The CPS maintains a panel of approved advocates who are self-employed barristers or solicitors with higher courts rights of audience. If an advocate from the CPS Advocate Panel is instructed as Prosecution Counsel, then they are under a duty to follow the commitments set out in the [Advocate Panel Scheme \(2016–2020\)](#) and the [Farquharson Guidelines](#) on the role of the Prosecution Advocate. They must consider the papers sent to them, and advise the CPS whether the case is satisfactory. If they are not satisfied that they are in possession of all

relevant documentation, or feel that they have not been instructed regarding disclosure matters they must raise these issues with the prosecutor.

Disclosure

15. The disclosure process requires prosecutors to provide the defence with any material which could reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused. This process is designed to ensure that every defendant has a fair trial.
16. The police and the prosecutor each have clear duties to make sure that disclosure is conducted properly.
17. When the police request a charging decision from the CPS, they must supply to the prosecutor any material which has been identified by them which could reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused. If an officer is unsure, he/she must seek advice from the prosecutor.
18. After a defendant has been charged, the police must then record all relevant unused material on a schedule (The Disclosure Schedule). "Relevant" in this context is a broad concept and includes any material related to the case unless it is incapable of having any impact on the case. "Unused material" is material which is not going to be relied on as evidence for the prosecution. The material must be properly described, and the description must be accurate and contain enough detail for the prosecutor to decide what must be disclosed to the defence.
19. The police are also obliged to identify material listed on the Disclosure Schedule which has been identified by them which could reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused.
20. Prosecutors must review disclosure schedules prepared by officers and must be alert to the possibility that relevant material may exist which has not been revealed to them. They are to advise when necessary and to probe the actions of police. If material appears to be missing or descriptions are not adequate then the prosecutor should take action to address that. To make sure that disclosure decisions are adequately recorded they should all be listed on a CPS Disclosure Record Sheet.
21. When Initial Disclosure takes place in a case, the Disclosure Schedule should be sent to the defence and the defence given a copy of (or access to) any material which could reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused.
22. Once a Disclosure Schedule is received by the defence, in Crown Court cases they respond by sending a Defence Statement to the CPS. This outlines their defence, and may request disclosure of material that they think will assist their case.
23. The CPS and the police have a duty to keep disclosure under review throughout the life of a case. The CPS and police are responsible for disclosure whether or not the defence make any requests for disclosure or for specific items or categories of material.
24. The [Attorney General's Guidelines on Disclosure](#) note that the increase in the use of technology in recent years means that large quantities of digital material will routinely form part of Crown Court cases. It is not expected that every item of digital material should be examined

individually. The police should consult with the prosecution as appropriate and determine what their approach should be, and decide how best to pursue a reasonable line of enquiry given the specific issues in any individual case.

25. Where there is a large volume of material, the police can search the material by sample, key words, or other appropriate search tools or analytical techniques to locate relevant passages, phrases and identifiers. If used, the method and words used should be recorded and the prosecution and defence informed. When a mobile phone is downloaded the content can amount to hundreds of thousands of pages containing vast amounts of individual lines of digital data. Using search tools is, therefore, common practice by police officers and is included in police disclosure training.

Chronology of the investigation and prosecution process

26. In January 2016, C alleged that she had been sexually assaulted and raped by D on a number of occasions. As part of the police investigation, C's phone was handed to the police. In police interview, D said that their sexual relationship was consensual and that the allegations were untrue.
27. The officer in the case (OIC) decided to submit C's phone for examination by the MPS digital forensic laboratory in order to recover deleted messages. The phone contained over 57,000 lines of message data. He conducted a search of the phone download in an effort to identify relevant material. He did not record the method he used to conduct this search.
28. A Police Inspector submitted this case to CPS London South Rape and Serious Sexual Offences Unit in September 2016, confirming that the police considered there to be a case against D. She requested that the CPS make a decision whether D should be charged with any offences. The police had not identified that there was any material which could reasonably be considered capable of undermining the prosecution case or of assisting the case for D. The OIC recorded on the Police Crime Reporting Information System (CRIS) in February 2016 that no relevant data was recovered from C's phone download. A copy of the CRIS Report was sent electronically to the CPS with the other case material when the case was submitted.
29. The case was first submitted to the CPS in September 2016 for a charging decision. The prosecutor requested further information (not related to phones) before the decision could be made. The police then resubmitted the case on 19 January 2017, when they provided a response to the request from the prosecutor for further information. The prosecutor authorised that D be charged on 23 February 2017. The prosecutor did not ask the OIC about the phone download described on the CRIS Report.
30. The Disclosure Schedule was provided to the CPS on 3 March 2017. Only three items were listed and the phone download was not included. The only reference to the phone and phone download was on the CRIS Report. A second prosecutor had by this time taken responsibility for the case. This prosecutor did not rectify the fact that the phone was mentioned on the CRIS Report but was not listed on the Disclosure Schedule, or request further information from the police about the phone download. There is no record of when or how the prosecutor became aware of the phone and the phone download. Initial disclosure was served by the CPS on the defence on 23 May 2017.
31. A Defence Statement was received by the CPS on 22 June 2017. The defence requested anything inconsistent with the prosecution case, and some specific further material. Of relevance to this review was their request for all text messages between D and C during and after the relationship,

disclosure of C's social media sites, and all communications from C on social media relating to the parties' relationship. The OIC considered the Defence Statement and responded on 13 July 2017 stating that there were some limited snapchat messages between C and D. A wider check of social media was not done; the OIC informed the prosecutor that he thought that to respond to that part of the defence request was not "proportionate or necessary."

32. CPS made further disclosure in July 2017 including the CRIS Report and the snapchat messages. When serving this material, the prosecutor informed the defence that the wider checks had not been done by the OIC because he had confirmed that they had not been identified as being "supportive or undermining."
33. There is only one entry on the Disclosure Record Sheet dated 23 May 2017. The prosecutor recorded that they had *"reviewed the unused material and there is no undermining evidence that can be disclosed to the defence."*
34. A case conference with the OIC, prosecution counsel and the CPS prosecutor was held by telephone on 26 October 2017. Disclosure was considered and the OIC was asked to provide text messages between C and her friend. (A case conference had been arranged for 8 June 2017 but was cancelled at short notice because the OIC was unable to attend due to operational commitments). This is the first time that disclosure was probed.
35. On 2 November Prosecution Counsel asked whether the full phone download was available and whether it had been looked at. Some messages between C and her friend were served as evidence by the CPS on 3 November. On 10 and 11 November there was an interchange of emails between Prosecution Counsel and the OIC and it was agreed that the phone download did not need to be served on defence, as the OIC said there was nothing relevant on it. The CPS prosecutor was copied into these emails.
36. On 17 November chambers indicated that trial counsel was no longer available due to a delay in another case. They asked to transfer the case to a second Prosecution Counsel.
37. The trial had been fixed for 27 November 2017. At the beginning of the trial, Defence counsel asked the newly briefed Prosecution Counsel for the full phone download. The OIC assured Prosecution Counsel that there was nothing relevant on the phone download, (as he had done with the first Prosecution Counsel). There was discussion about the phone download in court involving the Judge. Prosecution Counsel was going to view the phone download overnight but in the event was not able to do so.
38. On 28 November C gave evidence. There was further discussion before the court and Prosecution Counsel handed a copy of the phone download to the defence to examine.
39. On 29 November Defence Counsel asked for further time to examine the phone download because of the amount of material on it. Prosecution Counsel requested a (retrospective) Court Order for service of the phone download. That Order was made by the Judge. The phone download was further reviewed overnight by Defence Counsel and the undermining material came to light.
40. The Jury was discharged on 30 November and the case adjourned for the prosecution to review it, with an Order from the Judge for an explanation.
41. The prosecutor became aware of what had happened at Court. The prosecutor had never viewed the phone download. The OIC sent an email dated 4 December where the OIC stated "I

had always made clear that there was a download but had told CPS and original prosecution counsel (named) that I had looked through it and identified everything that was relevant. I can only read from this that because of the volume of analysis of phone downloads I deal with, I had wrongly assured myself that I had looked through this entire download.”

42. The CPS, having received advice from the second Prosecution Counsel decided that there was no longer a realistic prospect of conviction and the case was listed at court on 14 December 2017 so that it could be stopped.

Findings

1. There is no evidence that the phone download was withheld deliberately by the OIC or CPS prosecutors. The disclosure problems in this case were caused by a combination of error, lack of challenge, and lack of knowledge.
2. The OIC took the view that taking the phone and downloading its contents was a reasonable line of enquiry. He did not record the method he used or inform the CPS. He did not find the messages that led to the case being stopped.
3. The Detective Inspector who decided to refer the case to the CPS for a charging decision was unaware of the undermining messages in C’s phone. She was reliant on information from the OIC that no relevant data was uncovered. Had she known there was undermining material she may not have authorised referral to the CPS for a charging decision.
4. The prosecutor involved at the charging stage did not enquire about the phones. Phone evidence can play a vital part in cases of this nature so the prosecutor should have asked about the phone downloads and their contents. This was not done.
5. After D had been charged, the OIC did not list the phone or phone download on the Disclosure Schedule. He should have done so, as the phone download met the definition of relevant material.
6. There was undermining material in the phone download and though the phone download’s existence had been revealed to the prosecutor on the CRIS Report it should also have been included on the Disclosure Schedule by the OIC and brought to the prosecutor’s attention.
7. The prosecutor should have probed the OIC about the phone download mentioned on the CRIS Report and should have asked for it to be scheduled.
8. The prosecutor did not record disclosure decisions on the Disclosure Record Sheet.
9. Prosecution Counsel and the prosecutor relied on the OIC mistakenly stating that the only messages retrieved were some limited snapchat messages and that the other data in the phone download was personal data not impacting on the case. The prosecutor should have probed and challenged the OIC and should not have relied upon Prosecuting Counsel making the enquiries. Disclosure should have been considered earlier by the prosecution team.
10. It was unfortunate that more than one prosecutor had responsibility for this case, and that two prosecution counsel had to be instructed. It is not clear if this had an impact on the outcome of the case.

Recommendations

- Develop by February 2018 a joint CPS/Police Disclosure Improvement Plan reflecting local issues and national agreed priorities. This Plan will include actions to improve systems and processes in the CPS and MPS, as well as how better to work together with Prosecution Counsel on disclosure matters.
- Implement the nationally agreed joint CPS/Police protocol (to be agreed by March 2018) and process for the examination of digital media in each case. The Disclosure Officer and Prosecutor will agree and document reasonable lines of enquiry to be followed that are proportionate to an investigation.
- Provide disclosure training to all police officers, led by suitably trained and experienced staff, in line with nationally agreed timetable. Deliver additional mandatory disclosure training through the Chief Crown Prosecutor (CCP) by September 2018.
- Develop a cadre of accredited police specialist disclosure experts in each Metropolitan Police Borough, trained to a higher level, available to conduct sampling, local training and assistance in complex cases in line with nationally agreed disclosure priorities by September 2018.
- Appoint Disclosure Champions in the CPS for the magistrates' court, the Crown Court, and for Rape and Serious Sexual Offences to work with those already appointed for Complex Casework in each Area by February 2018.
- Appoint a Metropolitan Police Disclosure lead at Chief Officer level by March 2018 and an Tactical Disclosure lead at Chief Superintendent/Superintendent level.
- Implement performance assurance meetings, jointly led by CCP and the Metropolitan Police Chief Officer (with responsibility for disclosure), to review progress against these recommendations and those in the joint Disclosure Improvement Plan each quarter.
- Ensure that all Borough Police/CPS meetings have Disclosure compliance as a standing item to discuss and agree local themes and joint solutions.
- Implement pre-charge case assurance discussions led by Senior CPS Legal Managers with prosecutors where there are likely to be significant disclosure complexities from February 2018.

Further reading

1. The Director of Public Prosecutions Guidelines on Charging can be found [here](#).
2. The Code for Crown Prosecutors is available on the CPS website [here](#).
3. [Advocate Panel Scheme \(2016–2020\)](#).
4. The statutory framework for criminal investigations and disclosure is contained in the [Criminal Procedure and Investigations Act 1996](#) (the CPIA) and the [CPIA Code of Practice](#).
5. HMCPSP conducted an inspection into the handling of disclosure: [Making it fair: A joint Inspection of the disclosure of unused material in volume crown court cases](#).
6. The [Attorney General's Guidelines on Disclosure](#) set out the roles for investigators, prosecutors, defence and courts in ensuring that disclosure is conducted properly.