**NOTE: DISTRICT COURT ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF THE CRIMINAL HARASSMENT COMPLAINANTS REMAINS IN FORCE.**

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA472/2018**
**[2019] NZCA 154**

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| BETWEEN | DERMOT GREGORY NOTTINGHAM<br>Appellant |
| AND | THE QUEEN<br>Respondent |

**CA492/2018**

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| BETWEEN | THE QUEEN<br>Appellant |
| AND | DERMOT GREGORY NOTTINGHAM<br>Respondent |

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| Court: | Kós P, Brown and Clifford JJ |
| Counsel: | D G Nottingham in Person<br>C A Brook for The Queen<br>J G Krebs as counsel to assist the Court |
| Judgment:<br>(On the papers) | 14 May 2019 at 4 pm |
| Reissued: | 31 May 2019: see Minute of 31 May 2019 |

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**JUDGMENT OF THE COURT**

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**The application for a non-party disclosure hearing is declined.**

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**REASONS OF THE COURT**

(Given by Clifford J)

## Introduction

[1] Following a jury trial in the District Court at Auckland that lasted for over a month, Dermot Nottingham was found guilty on two charges of breaching non-publication orders and five charges of criminal harassment.

[2] At the trial Mr Nottingham represented himself and Mr Krebs acted as counsel assisting the Court. Those arrangements continue. Mr Nottingham was subsequently sentenced to a total of 12 months' home detention and 100 hours' community work, various conditions also being imposed.[1]

[3] Subsequently:

(a) The Solicitor-General appealed Mr Nottingham's sentence as being manifestly inadequate; and

(b) Mr Nottingham appealed both his convictions and his sentence.

[4] Those appeals were set down to be heard on 20 May 2019. On 13 March, and shortly before a telephone conference convened by Clifford J that same day to discuss the case management of those appeals, Mr Nottingham filed an application to seek orders for further disclosure from non-parties and the Crown pursuant to the "salient provisions of the Criminal Procedure Act 2011".

[5] Clifford J was not able to deal with that matter that day. In a minute of 3 April, he acknowledged receipt of memoranda from Mr Krebs and Ms Brook relating to that application. Those memoranda focused on the substance of Mr Nottingham's application, which both Mr Krebs and the Crown agreed should be taken as applications under the Criminal Disclosure Act 2008: first, and as regards the non-parties, as an application under s 24 for an order granting a hearing to determine whether information held should be disclosed and, secondly, as regards the Crown, for an order under s 30 for further disclosure by the prosecutor. Both Mr Krebs and Ms Brook also commented in those memoranda on the procedural basis for the determination of those applications.

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1 *R v Nottingham* [2018] NZDC 15373 at [61]–[64].

[6] Clifford J then held a telephone conference with the parties on 5 April to discuss the way forward. On 12 April he released a minute which recorded:

> [1] I refer to my minute of 3 April 2019. The telephone conference referred to in that minute was held on Friday 5 April.
>
> [2] At that conference it was accepted that there was not a jurisdictional basis [as the Crown had suggested there was] upon which the Court could hear what has been called the "section 30" application on the papers, nor of hearing the matter without having a bench of three.
>
> [3] Whilst all parties were keen to keep the appeal date, unless Mr Nottingham withdraws his s 30 application, there will need to be a hearing.
>
> [4] By the same token, I recognise the obvious interest everyone has in having Mr Nottingham's appeal heard just as soon as possible.
>
> [5] I have enquired of the Registrar as to when there might be another opportunity to hear that appeal. I am advised that time is available before a Divisional Court in Auckland on 25 June 2019.
>
> [6] On that basis I propose, subject to Mr Nottingham confirming he does [not] withdraw his "section 30 application" that:
>
> (a) the s 30 disclosure applications will be heard on the date previously allocated for the hearing of the appeal, namely 20 May 2019; and
>
> (b) the Crown and Mr Nottingham's appeals against sentence and conviction and sentence respectively will be heard on 25 June 2019.
>
> [7] Both of those hearings will be in Auckland. I will consider the non-party disclosure application on the papers and make my decision available in good time for the 20 May hearing.

[7] Mr Nottingham has not withdrawn his "s 30" application. That application will therefore be heard on 20 May 2019 and the Crown's and his substantive appeals on 25 June 2019.

[8] In this judgment we consider and determine Mr Nottingham's application for a non-party disclosure hearing relating to material he says is held by Ms C and Ms B, two of Mr Nottingham's victims of criminal harassment, and Mr C, a Crown witness at Mr Nottingham's trial.[2]

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[2] At the 5 April teleconference, and as reflected in Clifford J's minute of 12 April, all participating assumed that one Judge alone could determine the s 24 application on the papers. The Criminal Disclosure Act refers to such applications being made to "the Court". As this is an appeal, the reference to "the Court" suggests that in those circumstances such an application

[9] We do so, on the papers, in accordance with Clifford J's minute of 12 April 2019. We have before us the Case on Appeal for the substantive appeals, the transcript of evidence (running to some 1,133 pages) from Mr Nottingham's trial, and the relevant memoranda of Mr Nottingham and those of Mr Krebs and Ms Brook in response to Mr Nottingham's application for non-party disclosure, together with the affidavits Mr Nottingham has filed in support of his applications.

**Factual context**

[10] In August and December 2014, the photographs and names of two persons whose identities were suppressed by the High Court were published on the blog Laudafinem.com. The suppression order had been in connection with criminal charges those two persons faced for assaulting a young rugby player, who subsequently died. The police investigation that followed resulted in the two charges of breach of name suppression that Mr Nottingham faced at his trial.

[11] During the course of that investigation the police also became aware of the circumstances which form the basis for the charges of criminal harassment by Mr Nottingham of five individuals: Ms C; Ms T; Ms H; Mr M; and Ms B.

[12] At sentencing, Judge Down described the background to those charges in the following way:[3]

> (a) [Ms C], in 2011, separated from her partner … and made a complaint to police of assault against him. Mr Nottingham was an associate of [the partner] and began, in his capacity as an advocate, to work on his behalf. This resulted in an extended course of conduct towards [Ms C] characterised as criminal harassment.
>
> (b) The second complainant is [Ms T]. … Between 2011 and 2013 the defendant adopted a course of conduct towards [Ms T] characterised as criminal harassment.
>
> (c) The third complainant [was Ms H] … Between 2011 and 2015, the defendant embarked on a course of conduct which has been characterised as harassing [Ms H].

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may not be able to be dealt with by one Judge alone. Given that uncertainty, this application is being dealt with by a Court of three.

3 *R v Nottingham*, above n 1, at [15].

(d) The fourth complainant was [Mr M]. … Between November 2011 and February 2015, Mr Nottingham embarked on a course of conduct amounting to criminal harassment of [Mr M].

(e) The final complainant was [Ms B]. … Between November 2011 and June 2014, the defendant embarked on a course of conduct amounting to criminal harassment of [Ms B].

[13] From Ms C, Mr Nottingham seeks disclosure of mobile telephone account records for the last six months: he says the purpose of that would be to corroborate that Ms C committed perjury under oath at his trial. That is, that she lied when she indicated she did not use vulgar language or abbreviated texting when stating that texts read to her by Mr Krebs could not be hers because they contained vulgar language and abbreviated texting.

[14] From Ms B, Mr Nottingham seeks disclosure of email records sent and received by her regarding Mr Nottingham. Again, this further disclosure is sought to prove Ms B lied in her evidence at trial.

[15] From Mr C, Mr Nottingham seeks all his medical records again to show Mr C lied at trial. Mr Nottingham also seeks non-party disclosure of "all emails of [Mr C] to others, wherein he reported his safety concerns to his parents and others" between late December 2011 and September 2013. Mr Nottingham says he believes no such emails exist because no such calls were made. That fact will corroborate his assertion — made at trial — that the police had created evidence to "fit him up".

**Analysis**

[16] Section 24 of the Criminal Disclosure Act provides that a defendant, including one appealing their conviction, may apply to the Court "for an order granting a hearing to determine whether information that is held by a person or agency other than the prosecutor should be disclosed to the defendant".[4]

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4 Section 24(2).

[17] Subsection (3) provides:

> (3) The application must—
>
> (a) describe with as much particularity as possible the information that the defendant seeks to have disclosed, and state the name of the person or agency that the defendant alleges holds the information; and
>
> (b) set out the grounds on which the defendant relies to establish that the information is relevant; and
>
> (c) contain written evidence indicating that the defendant has made reasonable efforts to obtain the information from the person or agency that the defendant alleges holds the information.

[18] Mr Nottingham's application of 13 March did not comply with the requirements of s 24(3). Given all parties' interests in progressing this matter with reasonable alacrity, it was agreed that we would determine this application notwithstanding.

[19] Section 24(5) says we may seek and consider written submissions from the persons the defendant alleges holds the information sought. We have not considered it necessary to do so here.

[20] Section 25 provides:

> **25 Determination of application for non-party disclosure hearing**
>
> If a defendant makes an application in accordance with section 24, the court may grant the application if—
>
> (a) it is satisfied that all or part of the information that the defendant seeks—
>
> (i) is likely to be held by the person or agency that the defendant alleges holds the information; or
>
> (ii) is likely to be held by another person or agency; and
>
> (b) all or part of the information appears to the court to be relevant.

[21] As can be seen, there are three parts to the decision to be made under s 25. First the Court must be satisfied that all or part of the information sought is (here)

likely to be held by Ms C, Ms B and Mr C; secondly that all or part of that information appears to be relevant; and thirdly that it is appropriate to grant the application.

[22] We are neither satisfied that those persons are likely to hold the information Mr Nottingham seeks nor, even if we thought that was likely, that all or part of it appears to be relevant. The open-ended and speculative nature of the reasons on which Mr Nottingham based his application reflect the almost inevitability of that conclusion. The application is, in reality, a fishing expedition and, being made in the context of an appeal, has even less justification than might have been the case if it was made pre-trial.

[23] Moreover, and most importantly, each of Ms C, Ms B and Mr C gave evidence at Mr Nottingham's trial and were cross-examined at considerable length: Ms C and Ms B by Mr Krebs, and Mr C by Mr Nottingham himself. That cross-examination was an opportunity to test their evidence, both as to its credibility and its reliability. Mr Krebs is a very experienced trial counsel. He was well placed to do just that. Mr Nottingham, who then as now had a very clear focus on his contention of what was, in effect, a "false case" against him, was also able to cross-examine Mr C as relevant.

[24] That Ms C and Ms B were, as the jury's verdicts establish, victims of Mr Nottingham's criminal harassment, is a further reason not to put them through the invasive process that a hearing of this application would occasion. The same could be said for Mr C, acknowledging that he was not in the position of being a victim as were Ms C and Ms B.

[25] We therefore decline Mr Nottingham's application for a non-party disclosure hearing.

Solicitors:
Crown Law Office, Wellington for Respondent in CA472/2018 and Appellant in CA492/2018