

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

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA472/2018
[2019] NZCA 188**

BETWEEN DERMOT GREGORY NOTTINGHAM
Appellant

AND THE QUEEN
Respondent

CA492/2018

BETWEEN THE QUEEN
Appellant

AND DERMOT GREGORY NOTTINGHAM
Respondent

Hearing: 20 May 2019

Court: Kós P, Peters and Mander JJ

Counsel: Mr Nottingham in person
C A Brook for the Crown
J G Krebs as counsel to assist the Court

Judgment: 30 May 2019 at 11 am

JUDGMENT OF THE COURT

The application is declined.

REASONS OF THE COURT

(Given by Kós P)

[1] After a lengthy jury trial in Auckland, the appellant was found guilty of two charges of breaching non-publication orders and five charges of criminal harassment. He was sentenced to 12 months' home detention and 100 hours' community work.¹

[2] The Solicitor-General has appealed Mr Nottingham's sentence on the basis it is, she says, manifestly inadequate. Mr Nottingham has appealed both conviction and sentence. These appeals are to be heard by Criminal Appeal Division on 25 June 2019.

[3] On 13 March 2019 Mr Nottingham filed an application seeking orders for further disclosure from non-parties and the Crown pursuant to "the salient provisions of the Criminal Procedure Act 2011".

[4] The non-party disclosure application was considered by this Court and declined in a judgment dated 14 May 2019.² This judgment deals with the application against the Crown. In practical terms this is an application under the Criminal Disclosure Act 2008.

[5] The relevant provisions of that Act are ss 14 and 30:

14 Request for additional disclosure

- (1) At any time after the duty to make full disclosure has arisen under section 13, the defendant may request that the prosecutor disclose any particular information, identified by the defendant with as much particularity as possible.
- (2) The prosecutor must disclose information requested by the defendant under subsection (1) unless—
 - (a) the information is not relevant; or
 - (b) the information may be withheld under section 15, 16, 17, or 18; or
 - (c) the request appears to be frivolous or vexatious.
- (3) If a request under subsection (1) is declined by the prosecutor under subsection (2), the prosecutor must, as soon as is reasonably practicable after making the decision to decline the request, inform the defendant of that decision, together with—

¹ *R v Nottingham* [2018] NZDC 15373.

² *Nottingham v R* [2019] NZCA 154.

- (a) the reason for the decision; and
 - (b) if the defendant so requests, the grounds in support of that reason, unless the giving of those grounds would itself prejudice the interests protected by section 15, 16, 17, or 18 and (in the case of the interests protected by section 18) there is no overriding public interest.
- (4) Nothing in this section limits the duty to disclose information under section 13.

...

30 Court order for disclosure of information

- (1) The defendant may apply to the court for an order that a particular item of information or type of information in the possession or control of the prosecutor be disclosed on the grounds that—
- (a) the defendant is entitled to the information under section 12, 13, or 14, as the case may be, and—
 - (i) the prosecutor failed to disclose the information; or
 - (ii) the prosecutor refused under section 14, 16, 17, or 18 to disclose the information, and—
 - (A) none of the reasons described in section 16, 17, or 18 for which information could be withheld applies to the information; or
 - (B) in the case of a refusal under section 17, the information ought to have been disclosed under section 17(3); or
 - (C) in the case of a refusal under section 18, the information ought to have been disclosed under section 18(2); or
 - (b) even though the information may be withheld under this Act, the interests protected by the withholding of that information are outweighed by other considerations that make it desirable, in the public interest, to disclose the information.
- (2) If the court is satisfied, on an application made under this section, that the defendant is entitled to the disclosure of any particular item of information or type of information, or that any particular item of information or type of information should be disclosed to the defendant under subsection (1)(b), the court may order that the item or type of information be disclosed to the defendant.
- (3) An order made under this section may be made subject to any conditions that the court considers appropriate.

Application

[6] The application against the Crown covers 12 discrete topics some of which are extensive in nature. The nature of the topics is set out in sufficient detail below, where we record, verbatim, the Crown's response to the application.

[7] Mr Nottingham contends that this information is relevant and necessary to due consideration of the appeals on 25 June because the police did not properly investigate the complaints made against him and there was a conspiracy including police officers to "fit [him] up". The documents will assist him "build layers to show how the investigative process went awry".

Response

[8] The Crown response is substantive and substantial, and we set it out in full:

8. In summary, the Crown opposes the application in its entirety on the grounds the information sought does not exist; Mr Nottingham is not entitled to the information under ss 12 to 14 of the CDA; the information has been properly withheld; or the information has in fact been disclosed. Specifically:
 - 8.1 Information regarding fingerprinting (para 5). All information held regarding fingerprinting has been disclosed. For Mr Nottingham's reference, the relevant documents were disclosed on 3 July 2015 (at pages 50 and 51 of the material disclosed on that date, appearing in the disclosure index at line 58) and 27 May 2015 (at pages 50 to 56 of the material disclosed on that date, appearing in the disclosure index at line 51).
 - 8.2 Text message (para 6). This has been disclosed. Phone data from 2Degrees Sim card 64222030400, which included communications between [Mr J] and Dermot Nottingham, was disclosed on 22 April 2015 on a USB external hard drive containing electronic disclosure.
 - 8.3 Means of obtaining the text message (para 7). This has been disclosed. The production order for communications with [Mr J] was disclosed on 24 April 2015 at pages 2019 to 2026 and appears in the disclosure index at line 24.
 - 8.4 Requests for older communications data (para 8). The information sought does not exist. No such requests were made by the Police.

- 8.5 Crown/Police Guidelines (para 9). Mr Nottingham is not entitled to this information under ss 12 to 14 of the CDA. It is not relevant, particularly as evidence was given (by way of cross examination, and not in dispute) about the limitations on obtaining historical data. Whether there are Police Guidelines to that effect, and whether they are accurate or not, is irrelevant.
- 8.6 Communications with [Mr B] (para 10). Some of the information sought does not exist; that which does exist has been disclosed. Detective Sergeant gave evidence at trial (repeating evidence given at a pretrial hearing) that his only contact with [Mr B] was receiving a phone call from him to advise he had commenced civil proceedings against Lauda Finem. There has been no contact with [Mr B]'s lawyer but DS Litherland did have contact with a lawyer appointed by the Court in civil proceedings involving [Mr B], Andrew Gilchrist, at Mr Nottingham's request. Those communications were disclosed by the Crown on 22 December 2017.
- 8.7 Communications with named persons (para 11). In respect of [Mr H] and [Mr G], there have been no communications and the information sought therefore does not exist. [Ms H] is one of the victims of Mr Nottingham's offending. Daniel Grove is her lawyer. There were obviously a number of communications between the Police, Crown prosecutor, [Ms H] and her lawyer, as the Police and Crown were required to keep all victims updated with the progress of the prosecution. Mr Nottingham is not entitled to non-evidential communications between the Police/Crown and victims. All evidential material in respect of [Ms H] has been disclosed and of course she gave evidence at trial. The Police also served a production order on Mr Grove and received information from him as a consequence. The production order was disclosed on 22 April 2015 (at pages 2052 – 2085, line 26 of the disclosure index). The material received under the production order was disclosed on 27 May 2015 (at pages 9 – 33, line 45 of the disclosure index).
- 8.8 Communications with [Mr R] and [R Ltd] ([Mr R]'s employer) (paras 12(a)(i)-(v)). Mr Nottingham is not entitled to the information sought. [Mr R] was not a witness at trial (although he had made a statement and was at one stage anticipated to be called). Information about his communications with Police is not relevant. By way of context, Mr Philip Nottingham (Mr Nottingham's brother) unlawfully, and in breach of a direction by the court, provided [R Ltd] with information about [Mr R]'s criminal convictions. Mr Philip Nottingham also made complaints to the South African authorities complaining about [Mr R]'s ongoing employment. That is what prompted the communications between [R Ltd] and the Police, it had no relevance to the charges against Mr Nottingham.

- 8.9 Communications with the South African Real Estate Agents Authority Board and [Ms K] (paras 12(a)(vi)-(ix)). There have been no such communications and the information sought therefore does not exist.
- 8.10 Statements of [Mr J] (para 13). [Mr J] has made two statements to the Police. The first was made in the course of a separate investigation, unrelated to the current charges. Mr Nottingham is not entitled to that statement as it is not relevant. The second statement was made in the course of the investigation of the current charges and it was disclosed on 17 December 2015 (at pages 51-55, line 81 of the disclosure index). There are no “notes” relating to either statement. [Mr J] was not a witness at trial.
- 8.11 Disclosure of a separate police file (para 14). This file relates to the other investigation in which [Mr J] made a statement. Mr Nottingham is not entitled to disclosure of that file as it is not relevant to this proceeding.
- 8.12 Privileged communications (para 15). Mr Nottingham appears to accept this information is privileged. It has therefore been properly withheld under s 16(1)(j) of the CDA.

(footnotes omitted)

Discussion

[9] As noted earlier, the Crown submission is substantive and substantial. It is also compelling. If the material now sought was relevant to culpability, it should have been sought and obtained before or at trial. If relevant to penalty, it should have been sought and obtained before sentencing. Be that as it may, what matters most here is its utility (if any) to the appeals pending in this Court.

[10] As to that, Mr Nottingham has entirely failed to persuade us that any of the material now sought is necessary for the due conduct of the appeals:

- (a) No case for further disclosure can be made in relation to items that either do not exist or have already been disclosed. Those are items 5, 6, 7, 8, 10, some of 11, some of 12, and some of 13.³
- (b) Mr Nottingham has neither established the relevance of the remaining items 9, 11, 12, 13 and 14, nor the necessity for their disclosure for the

³ The numbering is the paragraph numbers in the quotation at [8].

due conduct of the appeals. In particular we note that neither Messrs J and R gave evidence at all. Ms H did, but any evidential communications with her have been disclosed.

[11] We are satisfied, also, that item 15 has been duly withheld under s 16(1)(j) of the Act. We did not understand Mr Nottingham to contend otherwise.

[12] This application is, therefore, an ill-assessed distraction from the issues on appeal. These must focus on the admissibility of the evidence adduced, the inferences properly to be drawn from that evidence and the directions given by the trial Judge, rather than on evidence neither before nor capable of being before the Court, or the background motives of those who did or did not give evidence, to the extent that was not already put in evidence. There is a limit. It has long since been crossed in this application.

Result

[13] The application is declined.

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