

**IN THE DISTRICT COURT
AT NAPIER**

**CRI-2015-041-002030
[2017] NZDC 3329**

**TELEVISION NEW ZEALAND
FAIRFAX NEW ZEALAND LIMITED
NZME PUBLISHING LIMITED**
Applicants

v

ANDREW KNOX AND OTHERS
Respondents

Appearances: D Salmon for the Applicants
S W Hughes QC for the Respondents

Judgment: 1 March 2017

**JUDGMENT OF JUDGE P W COOPER
[On application for access to exhibit]**

The application

[1] The applicants seek access to taser camera footage shown to the jury as an exhibit at the trial of the respondents and the ability to copy that footage for use in reporting.

Background

[2] The defendants in the case were charged with either assault using a police taser as a weapon or assault using a police dog as a weapon. The use of the tasers and the use of the police dogs was captured by the camera on each of the two tasers that were used.

[3] The subject of the use of the police dogs and the taser was Gregory McPeake. Gregory McPeake was a morbidly obese 53 year old male with a serious heart condition. On 12 March 2014, Gregory McPeake seriously assaulted his father, aged 76, with a cosh. The assault also included blows to Gregory McPeake's elderly mother. Evidence at the trial was that Gregory McPeake had previously made statements to others that he hated his parents and wanted to kill them, and if his health became terminal, he would kill his parents and brother and then himself. The police had also received information that Gregory McPeake may be in possession of a crossbow, that he was a chronic alcoholic and had been described as "huge".

[4] The police were anxious to locate and arrest Gregory McPeake for the assault on his father and because of the threat that he posed to his parents and his brother.

[5] Later that evening, Gregory McPeake was located in a motor vehicle parked near the beach at Westshore, Napier. The defendants were some of the police members who attended at that scene. Gregory McPeake remained in his vehicle, sitting in the driver's seat, and did not comply with numerous voice appeals for him to exit the vehicle. Police officers approached the vehicle and broke the windows and deployed pepper-spray. This had little effect on Gregory McPeake who continued to remain in the vehicle. After the appropriate warnings had been given, two officers deployed their tasers and two officers deployed police dogs in an effort to take Gregory McPeake into custody. As it happened, the tasers did not work particularly well on Gregory McPeake. He was able to pull the probes out. Eventually he was able to be pulled from the vehicle. While Gregory McPeake was on the ground being secured, he died.

[6] It was an accepted fact at the trial and something that was stressed on a number of occasions to the jury that there was no causal link between the actions of the police and the death of Gregory McPeake. Gregory McPeake had a serious heart condition and had consumed alcohol and a potentially lethal quantity of Codeine.

[7] The taser camera is activated when the taser is turned on and so what is captured by the cameras is not the complete record of what happened at the scene at Westshore.

The law applicable to this application

[8] The request for access to the taser footage was made pursuant to r 6.6 Criminal Procedure Rules 2012. The matters to be taken into account in considering such an application is set out in r 6.10:

“6.10 Matters to be taken into account

- (1) A Judge may deal with any request or application that requires permission of a Judge or the court to be given on the papers or at an oral hearing, and may grant access in whole or in part and subject to any conditions the Judge thinks appropriate.
- (2) In determining a request or an application under this rule, the Judge must consider the nature of, and the reasons for, the application or request and take into account each of the following matters that is relevant to the application, request, or objection:
 - (a) the right of the defendant to a fair hearing:
 - (b) the orderly and fair administration of justice:
 - (c) the protection of confidentiality, privacy interests (including those of children and other vulnerable members of the community), and any privilege held by, or available to, any person:
 - (d) the principle of open justice, namely, encouraging fair and accurate reporting of, and comment on, trials and decisions:
 - (e) the freedom to seek, receive, and impart information:
 - (f) whether any document to which the application or request relates is subject to any restriction under rule 6.9:
 - (g) any other matter that the Judge thinks just.”

[9] The trial having ended, there are no fair trial issues or issues relating to the orderly and fair administration of justice impacting on the present application.

[10] A number of authorities have been referred to by counsel in their written submissions. Of particular relevance to this case are the guidance given by the

Supreme Court in *Television New Zealand v Rogers*¹ and the case of *TVWorks NZ Ltd v Parsons*².

[11] In *Television New Zealand v Rogers*, Tipping J said at para [67]:

“The rules relating to the search of court records envisage the balancing of competing interests. It is difficult to posit a case in which the principle of open justice will not, to a greater or lesser extent, be a factor in favour of release. It is therefore generally appropriate to administer the rules on the basis that unless there is some good reason for withholding the material concerned, members of the public, or at least those with a bona fide purpose in obtaining the information, should be entitled to it. The freedom of information culture which exists in New Zealand, and its counterpart, the right to freedom of expression, both justify this general approach. In practical terms the effect of this approach is that if the balance of competing factors is even, the material in question should be released.”

[12] In *Television New Zealand v Rogers*, at paras [73] and [74], Tipping J said:

“[73] Concerns were also expressed that TVNZ might wish to present the video or selected aspects of it in a ‘sensationalist’ rather than a dispassionate and balanced way. That argument invites the Court both to speculate and to enter into the murky waters of presentational censorship and editorial control. I would decline the invitation. The videotape should either be made available to TVNZ or it should not. Matters of presentational and editorial judgment should be left where they belong. If it transpires that there are concerns about how the videotape has been used, they can be addressed by recognised causes of action or by reference to the Broadcasting Standards Authority.

[74] One final point should be mentioned. The courts must be careful in cases such as the present lest, by denying access to their records, they give the impression they are seeking to prevent public scrutiny of their processes and what has happened in a particular case. Any public perception that the courts are adopting a defensive attitude by limiting or preventing access to court records would tend to undermine confidence in the judicial system. There will of course be cases when a sufficient reason for withholding information is made out. If that is so, the public will or should understand why access has been denied. But unless the case for denial is clear, individual interests must give way to the public interest in maintaining confidence in the administration of justice through the principle of openness.”

¹ *Television New Zealand v Rogers* [2008] 2 NZLR 277 (SC)

² *TVWorks NZ Ltd v Parsons* [2009] NZAR 198 (HC)

Applicants' position

[13] Stated briefly, the applicants' position is that having regard to the matters in r 6.10(2) and the guidance provided by *Television New Zealand v Rogers* and other authorities, the application should be granted.

The Crown position

[14] The Crown has ascertained the views of family members of Gregory McPeake. His parents (the victims of his assaults) are strongly of the view that the taser camera footage should not be released and to do so would be a major setback to their ability to recover from the incident and the death of their son. Gregory McPeake's daughter wishes the taser camera footage to be made available to the applicants. The Crown submit that the public interest factors in this case should give way to the very high privacy interests, particularly of the parents of Gregory McPeake.

[15] The Crown also notes that the defendants and another officer face Independent Police Conduct Authority and employment inquiries and the release of the footage at this time may "unfairly pre-empt any findings of either investigation". The Crown also submit that release of the footage may impact on police operational matters. In particular, the footage demonstrates that taser probes do not significantly impact on some large individuals; that the probes can be removed from the body by the subject. The footage also shows that a police dog was able to be neutralised by being grabbed forcibly by the muzzle and by the contamination of OC spray on the hands of Gregory McPeake. It is submitted that if these matters became public knowledge, it may impact on the operational effectiveness of the tasers and police dogs.

The respondents' position

[16] In summary, Ms Hughes, on behalf of the respondents, submits that the taser footage should not be published because:

“It wrongly leads to an assumption, that the actions of the officers caused the death of Mr McPeake.

It represents only a fraction of the interaction between the officers and Mr McPeake.

The officers will be subject to the opprobrium of the public in circumstances which are unjustified.

It brings the respondents into contempt which will impact on the officers’ ability to perform their duties, particularly as three of the four remain resident in the Hawkes Bay.

It will undermine the confidence that the public have in the police because there will inevitably be a connection between the actions of the officers as recorded on the taser footage and the death of Mr McPeake.”

Discussion

[17] The matters in r 6.10(2) that are particularly relevant to the present application are:

- (a) The privacy interests of Gregory McPeake’s parents, who are now aged in their 80s and who were the victims of his offending (r 6.10(2)(c));
- (b) The privacy interests of the respondents who were acquitted of the charges against them (r 6.10(2)(c));
- (c) The principle of open justice (r 6.10(2)(d));
- (d) The freedom to seek, receive and impart information (r 6.10(2)(e)).”

[18] The applicants submit:

“The circumstances of this proceeding raise issues of considerable public import relating to the resourcing of the New Zealand Police, and the use of deadly force and weapons when dealing with threatening situations and/or violent offenders. These are matters relevant to all New Zealanders, and informed public debate through responsible media outlets benefits New Zealand society as a whole.”

That is a legitimate basis to make the application.

[19] The Supreme Court in *Television New Zealand v Rogers* makes it clear that this application should be granted “unless there is some good reason for withholding the material concerned”.

[20] The issues raised by the respondents that the taser footage represents only a fraction of the interaction between the officers and Gregory McPeake; that the release of the taser footage may lead wrongly to an assumption that the actions of the officers caused the death of Gregory McPeake; and as a result, the officers may be subject to public opprobrium are all interrelated. It is not the privacy interests of the officers per se that are being advanced (they are of less relevance for police officers performing a public duty.) The concern is that there may be an adverse impact on the officers because the taser footage by itself does not give the complete picture of what they had to deal with at night.

[21] All of this really comes down to a question of balance and fairness and accuracy in the way in which the media deal with the taser footage.

[22] Similar considerations arose in *TVWorks NZ Ltd v Parson* referred to earlier. At paragraph [27] of that judgment, Harrison J said:

“[27] ... The Court cannot deny a media request because of doubts that the video will be played or presented in a balanced or fair way. As [counsel] submits, ... those questions are for the media which are subject to the Broadcasting Code. Balanced presentation of current affairs in factual programmes, accuracy on all points of fact, and fair and just dealing with any persons who may be affected are required. Anybody who is dissatisfied has civil rights in defamation and is entitled to complain to the Broadcasting Standards Authority. The Court cannot exercise a censorship or editorial function in an area outside its control: *Rogers* per Tipping J at [73].”

[23] That comment really is a complete answer to the respondents’ submission. To report this matter accurately, the media will need to provide a context which, to be fair, balanced and accurate, would no doubt include matters leading up to the use of the tasers and the police dogs and the fact that Gregory McPeake’s death, if referred to at all, was not caused by the officers’ actions. Having presided over the trial, I can say that it is incontrovertible that the officers acted in good faith and any suggestion otherwise would be highly actionable.

[24] I note the views of those members of Gregory McPeake's family who do not wish to see the taser footage released. The taser footage has already been played in public at the trial of the officers and it has been seen in private by Gregory McPeake's parents and brother. As Justice Tipping observed in *Television New Zealand v Rogers*:

“ ... unless the case for denial is clear, individual interests must give way to the public interest in maintaining confidence in the administration of justice through the principle of openness.”

I agree with the observation made in the submissions of the applicants that it remains open for those family members who oppose release not to access further reporting. This is a case where the individual interest of those family members who oppose the release of the taser footage must give way to the public interest.

[25] In relation to the independent Police Conduct Authority proceedings and any employment inquiries faced by the officers, I am unable to see how the release of the taser footage at this time may “unfairly pre-empt any findings of either investigation”.

[26] I do not accept the submission that release of the taser footage would adversely impact police operational effectiveness. The taser footage has already been played in open Court and has been reported in the media. This includes the fact that Gregory McPeake pulled the taser probes out. The fact that a police dog's operational effectiveness may be compromised by being grabbed by the muzzle by someone whose hands are contaminated with pepper-spray would hardly be surprising.

Conclusion

[27] I have come to the conclusion that having regard to the matters in r 6.10 Criminal Procedure Rules and the matters already referred to, the application for access to the taser footage should be granted subject to the following conditions:

- (a) The applicants may view the footage at the Court premises;

- (b) The applicants may seek a copy of the footage which will be arranged by Court staff at the expense of the applicant;
- (c) The original exhibit and any copies held by the Court at present is to remain in custody of the Court at all times;
- (d) The footage, still photographs or excerpts taken from it may be used by the applicants in any news publication either in print or online but not otherwise without the leave of a Judge;
- (e) The faces of all persons shown in the footage are to be pixelated or otherwise obscured so they cannot be identified;
- (f) Any copy of the footage provided to the applicants is to remain in the custody and control of that applicant and is not to be provided or made available to any other person or body without the leave of a Judge.
- (g) Access is limited to only that taser footage produced as exhibits at the trial of the respondents.

P W Cooper
District Court Judge