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IN THE YOUTH COURT
AT MANUKAU

I TE KŌTI TAIOHI
KI MANUKAU

CRI-2020-292-000306
[2021] NZYC 170

NEW ZEALAND POLICE
Prosecutor

v

[WD], [VY] and [MK]
Young Person

Hearing: 19 April 2021

Appearances: T Riley for the Police
K Leys for [WD]
S Mandeno for [VY]
V Letele for [MK]
H Cheeseman as counsel assisting
C Mutavdzic for O-T

Judgment: 27 April 2021

RESERVED DECISION OF JUDGE A M WHAREPOURI
(Section 27 Non-party disclosure ruling)

Introduction

[1] On 23 March 2021, I granted a hearing to determine whether certain information held by O-T should be disclosed to the three defendants pursuant to s 24 of the Criminal Disclosure Act 2008 (the Act). The reasons for doing so are set out in a separate ruling stating that I was satisfied that all or part of the information the defendants were seeking was likely to be held by O-T and part of the information *appeared* to be relevant.

[2] While O-T was not served with a summons requiring its attendance at the non-party hearing with a copy of the documents sought (as should have happened), O-T did appear having filed two boxes containing various documents with the court registry. I am extremely grateful to Ms Mutavdzic for arranging this.

[3] At the hearing all parties made submissions, including O-T, to assist the court in determining whether the information should be disclosed. At the conclusion of the hearing I reserved my decision. Having now considered the matter, I intend to make a limited order under s 29 of the Act for the reasons set out below.

The essential background

[4] On 18 September 2019 the complainant attended a birthday gathering for [friend A]. Later she went with several of her friends, and the defendants to a separate address. The complainant used one of the bedrooms to try and sleep but was joined in the room by the defendants in turn. One after the other the defendants sexually assaulted the complainant. The following day the complainant told her friend [friend B] what had occurred but said nothing further about the offending until [date deleted] February 2020. It was then that she told her brother about her experience, and then later in time her mother. The complainant repeated her complaint to Police two days later on [date deleted] February.

[5] The defendants have all pleaded not guilty to the charges and maintain that the alleged offending never occurred. The defence says the complainant is lying and that her allegations are in response to a separate violent attack on her brother in which they are alleged to have participated.[1] The complainant's credibility therefore will be a live issue in the trial.

[6] O-T has confirmed that it does hold information to do with the complainant and all three defendants. The information goes back several years for each individual. The information is held principally on CYRAS which is the electronic recording system used by O-T made up of notes by social workers and others to do with young people, their care arrangements and any concerns. Ms Mutavdzic has seen to the material including the relevant CYRAS notes being printed out, individually page numbered and indexed for ease of reference. A copy of her index is attached to O-T's written submissions.

Relevant legal principles

[7] In order to grant a non-party disclosure application, I must be satisfied that both requirements in s 29(1) are met, namely that firstly the information or part of it is actually relevant, and secondly the disclosure of the information or part of it is necessary in the public interest. In making this public interest assessment, I must take into account the extent to which the information will assist the defendant to properly defend the charge, the probative value of the information, the nature and extent of any reasonable expectation of privacy in the information and the effect of the non-party disclosure decision on the fairness of the trial.

[8] The defendants carry the onus of demonstrating the relevance of the information sought.[2] "Relevance" is defined by s 8 of the Act:

> "In this Act, relevant, in relation to information or an exhibit, means information or an exhibit, as the case may be, that tends to support

[1] The complainant's brother was confronted by a group of young people and a firearm was discharged on [date deleted] 2020. The complainant spoke to Police [the next day] about the alleged offending against her.

[2] *Mental Health, Addictions and Intellectual Disability Service for Wairarapa, Hutt Valley and Capital and Coast District Health Board v Hussain* [2020] NZCA 81.

> or rebut, or has a material bearing on, the case against the defendant."

[9] Relevance has a fairly low threshold and is equated with the standard for s 7(3) of the Evidence Act 2006. The determination of 'actual' relevance must be considered independently from my original decision of what *appears* to be relevant. The Court of Appeal has also recently made clear that there is no need for a Judge to examine the bundle of documents at a s 27 hearing if there is no basis advanced by the applicant to establish that the bundle may contain relevant material.[3]

Analysis

[10] The defendants have sought disclosure of information covering five broad categories.

[11] The first category is information relating to the current allegations of sexual offending made by the complainant against the three defendants. I accept this information has a bearing on the case, is clearly relevant and should be disclosed regardless of whichever O-T file it might be held on or in whatever format it might be kept. Furthermore, the disclosure of the information is in the public interest given its probative value is likely to be considerable and may assist one or other party.[4]

[12] The second category is information relating to any allegation made by the complainant (whether of a sexual nature or otherwise) against any other person established which is demonstrably false. O-T advises that it does not hold any information of this kind and for this reason I am satisfied that there is nothing under this heading to disclose.

[13] The third category of information sought is any reporting that the complainant was engaging in an inappropriate sexual relationship with another young person, [AE]. [AE] had been placed with the complainant and her family by O-T and was living in her home prior to 18 September 2019. The defence submits that this information is

[3] *Ma'atusi v R* [2021] NZCA 72.
[4] Ms Mutavdzic estimates that this information is contained within approximately 150-200 pages across the various CYRAS entries and O-T files to do with the complainant and the three defendants.

relevant because it would help contradict the complainant's statement to Police that the defendant [WD] "took her virginity".

[14] Ms Mutavdzic advised that she was only able to locate two CYRAS entries (being the equivalent of five printed A4 pages) which contained information about [the complainant's mother] having a suspicion that [AE] and her daughter were involved in an inappropriate relationship. This reporting was made in February 2020. The relationship was denied by both the complainant and [AE]. As no evidence could be found that substantiated [the complainant's mother]'s suspicion, the matter was eventually closed. O-T determined however that it would be better to remove [AE] from the complainant's home.

[15] In my view the information held by O-T under this category is not relevant. Supposition does not help contradict the complainant's evidence about losing her virginity to [WD]. The fact that the complainant's mother may reported her belief that her daughter was in an inappropriate sexual relationship to O-T proves nothing. It certainly cannot be used to impeach the complainant's assertion that she was a virgin at the relevant time especially given the statutory protection offered under s 44 of the Evidence Act. Thus, in my view, this information held by O-T need not be disclosed because it lacks real probative value.

[16] The fourth category of information sought concerns the complainant's school attendance when she was at [school deleted]. According to the defence the relevance of this information relates to the anticipated evidence from [the complainant's mother]. It is expected that she will give evidence about what the complainant told her about the offending, and her observations of the complainant's changed behaviour a short time after the offending. Based on her Police statement her evidence will be:

> "[The complainant's] behaviour changed after [friend A]'s birthday. She kept talking back to me and swearing which she never used to do. [The complainant] would fight with [name deleted] which she would never do. I remember a time where she had kicked [name deleted]'s door open and had a full on fight with him and I had to break them apart. *[The complainant's] change in attitude and behaviour was immediate. [She] started wagging school with [friend A].*"
>
> (Emphasis added)

[17] The defence submits that this potential evidence, if unchallenged, could be used to support the contention that the complainant's change in behaviour and truancy was consistent with her being the victim of serious offending. Therefore, the information as to the complainant's school attendance in late 2019 and early 2020 could help to undermine the reliability of this evidence from [the complainant's mother].

[18] Under the second part of the mandated test for relevance I must also be satisfied that the disclosure of the material sought, or part of it, is necessary in the public interests. This involves the considerations such as fair trial rights, the probative value of the information, privacy expectations and the extent to which the information will assist the defendant to defend the charge (s 29(3) of the Act).[5]

[19] Ms Mutavdzic advised that the complainant was enrolled at [school deleted] from Term 1 in 2020 and that O-T does have limited information about her school attendance from this time. I have read this evidence. It comprises several CYRAS entries, an email chain between social workers from early 2020 and a Tuituia Report dated 11 June 2020.[6]

[20] The information held by O-T under this heading confirms the complainant's school attendance in Term 1 was poor and supports [the complainant's mother]'s general observation of her daughter 'wagging'. Thus, in relation to fair trial considerations the information has low probative value and is relatively unhelpful to the defence. In fact, the information would support the prosecution case that the complainant's school attendance did cease around the time of the offending. But perhaps more telling is that the broad information in the Tuituia Report contains private and intensely personal information about the complainant. And there is a reasonable expectation that this information should be kept confidential. Disclosure of the same could cause some distress, distrust and disengagement on the part of the

[5] See *R v Medcalf* [2013] NZCA 333 at para [29].
[6] A Tuituia Report is a written report following a holistic assessment of the care and protection needs of a young person, their whanau, parents and caregivers. It covers a broad range of information domains including education, past or current interactions with youth justice, Police, cultural identity and physical and mental health issues.

complainant, her whanau in the future. Taking into account all of these factors my view is that there is a strong public interest in keeping this information confidential.

[21] The fifth and last category of information sought is the O-T file for each of the defendants in its entirety covering any noting or occurrence involving the criminal justice sphere. At the hearing defence counsel clarified that the information they were interested in under this heading was much wider than the current allegations. Ms Mandeno and Ms Leys submitted that this information was requested in anticipation that the Crown might make an Official Information Act request for the same, and they did not wish to be disadvantaged by not having the same. To ensure they had access to the same information defence counsel chose to avail themselves of the non-party disclosure provisions. The Crown advised they had made no such OIA request to do with any defendant. However, even if the Crown had acted in the way feared by defence, my view is that using the non-party disclosure provisions to match this step is highly inappropriate. The defence should have utilised the provisions of the OIA or Privacy Act to obtain this information. I am satisfied therefore that the defence request amounts to a fishing expedition. Without knowing anything more about this information, I am of the view that it cannot possibly have any tendency to support or rebut any matter in dispute in this proceeding, which in this case appears whether the conduct in question happened.

Conclusion

[22] My ruling is that there is only one category of information that meets both the relevance test and the public interest test favouring disclosure. That is information pertaining to the current allegations of sexual offending made by the complainant against the three defendants.

[23] To assist the court identify the information which falls into this limited class, counsel assisting Ms Cheeseman has been appointed to read the documents supplied to the court by O-T and make an appropriate recommendation as to what should be disclosed. That recommendation should include a table identifying the relevant documents by page reference. Once the court is in receipt of Ms Cheeseman's

recommendation a final ruling can be issued by the Court and O-T will be directed to make disclosure of the noted pages accordingly.

[24] I request that Ms Cheeseman will file her report with the court as soon as possible following release of this decision.

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Judge M Wharepouri
District Court Judge

Date of authentication: 26/04/2021
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.