EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS]

NOTE: NO PUBLICATION OF A REPORT OF THIS PROCEEDING IS PERMITTED UNDER S 438 OF THE ORANGA TAMARIKI ACT 1989, EXCEPT WITH THE LEAVE OF THE COURT THAT HEARD THE PROCEEDINGS, AND WITH THE EXCEPTION OF PUBLICATIONS OF A BONA FIDE PROFESSIONAL OR TECHNICAL NATURE THAT DO NOT INCLUDE THE NAME(S) OR IDENTIFYING PARTICULARS OF ANY CHILD OR YOUNG PERSON, OR THE PARENTS OR GUARDIANS OR ANY PERSON HAVING THE CARE OF THE CHILD OR YOUNG PERSON, OR THE SCHOOL THAT THE CHILD OR YOUNG PERSON WAS OR IS ATTENDING. SEE http://www.legislation.govt.nz/act/public/1989/0024/latest/DLM155054.html

IN THE YOUTH COURT
AT AUCKLAND

I TE KŌTI TAIOHI
KI TĀMAKI MAKAURAU

CRI-2020-204-000048
[2021] NZYC 491

THE QUEEN

v

[AN]

Hearing: 28 October and 1 November 2021

Appearances: M Djurich for the Applicant
M Winterstein for the Young Person

Judgment: 12 November 2021

JUDGMENT OF JUDGE A J FITZGERALD
[An application for access to Youth Court documents]

CONTENTS

Introduction

[1] On 30 November 2020, I sentenced [AN] to six months supervision with residence, followed by 12 months supervision, for wounding [NV] with intent to cause her grievous bodily harm on [in late March] 2020. My reasons for doing so were provided in writing on 7 December 2020.[1]

[2] The background to that offence included [AN] being in a relationship with [MM] in October 2019 when he is alleged to have committed firearms and violence offences in relation to which [NV] is one of the complainants. [NV] gave a statement to the police about things [MM] is alleged to have done to her [in late October] 2019. That is what prompted [AN] to attack [NV], stabbing her in the head and throat repeatedly with a knife and calling her a "nark".

[3] [MM]'s jury trial in relation to the charges he faces was due to begin on 15 November 2021 but, due to the COVID-19 lockdown, has been adjourned to begin on 20 June 2022.

The application

[4] The Crown Solicitor at Manukau, ("the Manukau Crown"), who is prosecuting [MM], has applied to have the summary of facts that was accepted by [AN] for the purpose of her sentencing. They have also applied for the outcome of the Family Group Conference ("FGC") at which she admitted the charge. Three reasons are given for these applications:

(a) First, to disclose those documents to [MM]'s counsel. The summary of facts is said to be a document that is relevant to the proceedings concerning [MM] and therefore falls within the ambit of the prosecution's disclosure obligations but is otherwise subject to the particular access and publication restrictions of the Youth Court.[2] The outcome of the FGC at which [AN] accepted the summary of facts is said to formalise her admission of the charge she faced in the Youth

[1] *New Zealand Police v [AN]* [2020] NZYC 609.
[2] Criminal Disclosure Act 2008, ss 13(2) and (5).

Court rather than a certificate of conviction which would be available in the District Court had she been sentenced there;

(b) Secondly, to assist the parties to [MM]'s case to reach agreement about what occurred [in late October] 2019, to avoid unsubstantiated challenges to [NV]'s evidence and also to avoid witnesses being called unnecessarily;

(c) Thirdly, to use the documents during cross-examination if [AN] gives evidence for the defence at [MM]'s trial. This would primarily be to establish that she has formally accepted responsibility for the offence on the factual basis set out in the summary.

[5] A copy of that summary of facts and the reasons for my sentencing decision have already been given to the Manukau Crown by the Auckland Crown Solicitor ("the Auckland Crown") who represented the police in the prosecution of [AN] in the Youth Court. The police officer in charge of [MM]'s case has also received a copy of the summary of facts from the officer who was in charge of [AN]'s case.

[6] The Manukau Crown do not intend providing a copy of the reasons for my sentencing decision to [MM]'s lawyer because they say disclosure, in situations such as this, is usually limited to a summary of facts and certificate of conviction.

[7] The application is opposed in all respects by [AN]. In particular, she says that while she accepted the summary of facts regarding the charge, the contents regarding events [in late October] 2019 did not form the basis of that charge and were not accepted.

Which rules apply?

[8] Mr Djurich, for the Manukau Crown, argues that the District Court (Access to Court Documents) Rules 2017 ("the Access Rules") apply because the Oranga Tamariki Rules 1989 ("the Oranga Tamariki Rules") do not apply to criminal proceedings. Ms Winterstein, for [AN], argues that the Oranga Tamariki Rules apply

because they refer to parties and situations involving youth justice, and hence criminal proceedings. Therefore, the first issue to resolve, is which rules apply.

The Oranga Tamariki Rules

[9] The relevant part of r 2 of the Oranga Tamariki Rules provides:

> **2 Application of rules**
>
> (1) Subject to this rule and unless the context otherwise requires, these rules shall apply to all proceedings under the Oranga Tamariki Act 1989.
>
> (2) Subject to rule 29, these rules do not apply to—
>
> (a) criminal proceedings;
>
> …

[10] It therefore seems clear that the Oranga Tamariki Rules do not apply to criminal proceedings. However, they do not expressly say that the criminal proceedings to which they refer include those in the Youth Court.

[11] Neither the Oranga Tamariki Act 1989 ("the Act"), nor the Oranga Tamariki Rules define "criminal proceedings". However, a definition was added on 14 July 2017, by clause 4 Part 3 of Schedule 1AA of the Act, which was a transitional provision related to the inclusion of 17 year olds in the Youth Court:

> **criminal proceedings—**
>
> (a) means a proceeding that has been commenced by—
>
> (i) the filing of a charging document; or
>
> (ii) the filing of a notice of hearing under, or in accordance with, section 21(8) of the Summary Proceedings Act 1957; and
>
> (b) includes an appeal against conviction or sentence

[12] Also, the Act uses those words in the Youth Justice principles at s 208:

> **208 Principles**
>
> (1) …
>
> (2) (a) that, unless the public interest requires otherwise, **criminal proceedings** should not be instituted against a child or young person if there is an alternative means of dealing with the matter:
>
> (b) that **criminal proceedings** should not be instituted against a child or young person in order to provide any assistance or services needed to advance

the well-being of the child or young person, or their family, whānau, hapū, or family group: (emphasis added).

[13] As well as that, s 209 provides:

> **209 Consideration of warning as alternative to prosecution**
>
> Where an enforcement officer is considering whether to institute **criminal proceedings** against a child ... that officer shall consider whether it would be sufficient to warn the child" (emphasis added).

[14] The fact that charging documents are filed in the Youth Court to commence proceedings against a child or young person, and use of the words "criminal proceedings" in the broader context of the Act at ss 208 and 209, adds further weight to the view that Youth Court proceedings are "criminal proceedings". As such, the Oranga Tamariki Rules do not apply to them.

[15] However, that still leaves open the issue Ms Winterstein points to: that r 9 of the Oranga Tamariki Rules includes reference to people involved in Youth Justice proceedings. The relevant parts of r 9 provide:

> (1) Subject to subclause (2), the following persons may search the records of and the documents filed in the District Court in relation to any proceedings under the Act:
>
> (a) a party to the proceedings, a solicitor for a party, or an agent for such a solicitor:
>
> (b) any barrister or solicitor or Youth Advocate representing the child or young person who is the subject of the proceedings:
>
> (c) [Revoked]
>
> (d) any lay advocate appointed to appear in support of the child or young person who is the subject of the proceedings:
>
> (e) any Care and Protection Co-ordinator:
>
> (f) any Youth Justice Co-ordinator:
>
> (g) the Commissioner for Children, or any person authorised by the Commissioner to act on the Commissioner's behalf:
>
> (h) any other person who satisfies the Registrar that the person has a proper interest in the proceedings.

[16] The inclusion of Youth Advocates in r 9(1)(b) is likely intended to enable them to search for relevant background care and protection information. It does not mean that their entitlement to search records and documents relates to criminal matters which are expressly excluded in r 2(2)(a).

[17] In relation to Youth Justice Co-ordinators in r 9(1)(f), their role is to explore alternatives to criminal proceedings with the relevant enforcement agency and to facilitate FGCs in relation to alleged offending.[3] Where criminal proceedings are being considered against a child or young person, a Youth Justice Co-ordinator can therefore access a child or young person's care and protection records. It does not mean that a Youth Justice Co-ordinator involved in subsequent criminal proceedings can access court records from prior criminal proceedings under this rule.

[18] Rule 8 may also be relevant as it defines the types of records to be kept available:

> **8 Records**
>
> (1) The Registrar of every District Court shall keep the following records:
>
> (a) Oranga Tamariki records in such form as the chief executive of the Department for Courts directs from time to time, in which shall be entered a record of each application made under the Act, and of the decision on the application; and
>
> (b) such other records as the chief executive of the Department for Courts directs from time to time.
>
> (2) A minute of the decision on each application shall be signed and dated by the Judge or Registrar making the order.

[19] The focus in r 8 is on records in relation to applications. The primary form of application under the Act is an application for care and protection. There are some applications which are made under Parts 4 and 5 of the Act, but most applications that can be made are in the civil sections of the Act.[4] This suggests that the records envisaged in rr 8 and 9 are civil records rather than criminal records.

---

[3] Oranga Tamariki Act 1989, s 426.

[4] Parts 4 and 5 of the Act are the Youth Justice provisions.

[20] In addition, a Ministry of Justice guidelines document on access to documents, suggests that the [Oranga Tamariki] Rules[5] only apply to civil proceedings:[6]

> While access to information from care and protection files is governed by Rule 9 of the Children, Young Persons and Their Families Rules 1989, these Rules do not apply to criminal proceedings in the Youth Court (r 2(2)(a)). Therefore, the same approach followed in the District Court summary jurisdiction should be taken. That is, the Criminal Proceedings (Search of Court Records) Rules 1974 are applied by analogy. This means that any request for access to Youth Court files must be referred to a Youth Court Judge for determination.

[21] This interpretation is strengthened when you look at the applicable alternative rules at the time the original [Oranga Tamariki] Rules came into effect. As noted by those Ministry of Justice guidelines, the relevant access rules in 1989 were the Criminal Proceedings (Search of Court Records) Rules 1974 ("the 1974 Rules"). Those rules were very broad and did not refer to legislation but merely to criminal proceedings:

> **2 Search of Court Records**
>
> (1) Any person shall on payment of the prescribed fee, be entitled during office hours to search, inspect, and take or be issued with a copy of any of the following, namely
>
> (a) The register of persons committed for trial and sentence, the register commonly known as the Return of Prisoners Tried and Sentenced, and the indexes to those registers:
>
> (b) Any **document on any file relating to criminal proceedings** in any office of the Court if—
>
> (i) A right of search or inspection of that document is given by any Act; or
>
> (ii) That document constitutes notice of its contents to the public.

[22] No distinction was made between High Court proceedings and District Court proceedings, nor between what legislation proceedings were being pursued under. Therefore, when the original [Oranga Tamariki] Rules included an express exclusion

---

[5] At the time known as The Children, Young Persons, and Their Families Rules 1989.

[6] Ministry of Justice *Guidelines for Staff: Dealing with Requests for Information about Criminal Cases or Access to Criminal Files* (29 November 2004) at 13.

in respect of criminal proceedings, it would have been very clear that the applicable alternative access rules were the 1974 Rules.

[23] The rules governing access to files have developed considerably since then, but their substance remains much the same. The 1974 rules were replaced in 2009 by the Criminal Proceedings (Access to Court Documents) Rules 2009 which were subsequently replaced by the Part 6 of the Criminal Procedure Rules 2012. They were then replaced by the Access Rules.

[24] Further support for the conclusion that the Access Rules apply, rather than the Oranga Tamariki Rules, is found in the 2006 Law Commission Report, "Access to Court Documents".[7] That report notes that there are no provisions expressly covering access to Youth Court files in criminal proceedings and that court staff are advised to apply the 1974 Rules and refer requests to a Youth Court Judge.[8]

[25] It was also noted that the access rules across jurisdictions are not always consistent, clear, or easy to locate, nor are they comprehensive.[9] Although recommendations were made to remedy those faults, that has clearly not happened so far as access to Youth Court files in criminal proceedings are concerned.

[26] Although I accept Ms Winterstein's submission that it would make good sense for the purposes, principles and other relevant provisions of the Oranga Tamariki Act to govern the decisions I must make here, unfortunately that is not the position legally at present. As Mr Djurich says, those are certainly factors that can be taken into account, but they do not govern the determination of the present application. I will return to that troubling issue later.

Conclusion

[27] In the meantime, for the reasons set out above, I find that the Oranga Tamariki Rules do not apply to the present application. The Access Rules apply.

---

[7] Law Commission, *Access to Court Records* (NZLC R93, 2006).
[8] At 22.
[9] At 9.

The Access Rules

[28] The Access Rules have very broad application. The relevant part of r 3 provides:

> **3 Application**
>
> (1) These rules apply to—
>
> (a) the District Court; and
>
> (b) documents while they are in the custody or control of the court.
>
> …

[29] Section 9 of the District Court Act 2016 defines the Youth Court as a division of the District Court. Therefore, the Access Rules can apply to Youth Court matters.

Should access be given to the summary of facts?

[30] The Manukau Crown was not a party to [AN]'s Youth Court proceeding and so has the same general rights as those that apply to the public.

[31] Relevant parts of rule 8 of the Access Rules provide:

> **8 General rights of public**
>
> ...
>
> *Criminal proceedings*
>
> (2) Every person has the right to access the following relating to a criminal proceeding, except as provided in subclause (3):
>
> (a) the permanent court record under Part 7 of the Criminal Procedure Rules 2012:
>
> (b) any published list providing notice of a hearing:
>
> (c) any judgment, order, or minute of the court given in the proceeding, including any record of the reasons given by a judicial officer:
>
> (d) any judicial officer's sentencing notes.
>
> (3) Without limiting rule 6(a), a person may access the following documents only if a Judge permits the person to do so:
>
> …
>
> (d) any document that identifies, or enables the identification of, a person if the publication of any matter relating to the person's identity (such as the person's name) is forbidden by an enactment or by an order of the court or a Registrar:

[32] A summary of facts does not fit within any of those categories and so it is necessary for the application to be dealt with under rr 11, 12 and 13:

> **11 Any person may ask to access documents**
>
> (1) This rule applies if a person is not entitled to access a document relating to a proceeding or an appeal under rule 8 or 9.
>
> ...
>
> (7) A Judge may—
>
> (a) grant a request for access under this rule in whole or in part—
>
> (i) without conditions; or
>
> (ii) subject to any conditions that the Judge thinks appropriate; or
>
> (b) refuse the request; or
>
> (c) refer the request to a Registrar for determination by that Registrar.
>
> ...
>
> **12 Matters to be considered**
>
> In determining a request for access under rule 11, the Judge must consider the nature of, and the reasons given for, the request and take into account each of the following matters that is relevant to the request or any objection to the request:
>
> (a) the orderly and fair administration of justice:
>
> (b) the right of a defendant in a criminal proceeding to a fair trial:
>
> ...
>
> (d) the protection of other confidentiality and privacy interests (including those of children and other vulnerable members of the community) and any privilege held by, or available to, any person:
>
> (e) the principle of open justice (including the encouragement of fair and accurate reporting of, and comment on, court hearings and decisions):
>
> (f) the freedom to seek, receive, and impart information:
>
> (g) whether a document to which the request relates is subject to any restriction under rule 7:
>
> (h) any other matter that the Judge thinks appropriate.
>
> **13 Approach to balancing matters considered**
>
> In applying rule 12, the Judge must have regard to the following:
>
> ...
>
> (c) after the substantive hearing, -
>
> (i) open justice has greater weight in relation to documents that have been relied on in a determination than other documents; but

(ii) the protection of confidentiality and privacy interests has greater weight than would be the case during the substantive hearing.

Rule 12

[33] I must therefore take into account each of the factors in r 12 while bearing in mind the nature of the request made by the Manukau Crown and the reasons for it which are set out in paragraph [4] (a), (b) and (c) above. It is a balancing exercise. In carrying out that exercise, r 13 requires that greater weight apply both to open justice and to the protection of confidentiality and privacy interests. There is no presumption in favour of disclosure, nor is there a hierarchy between the r 12 factors.[10]

The orderly and fair administration of justice

[34] The Manukau Crown say it would be an affront to this principle for parties to related but separate criminal proceedings to challenge the already determined factual findings by the Court without proper foundation. [AN] accepted the summary of facts for the sentencing in the Youth Court, and therefore access should be made available to that summary which should be disclosed to [MM] and his counsel for the reasons set out earlier.[11]

[35] Ms Winterstein explains that it was a long road before [AN] accepted the charge of wounding with intent and the summary of facts relating to it. When eventually she did so, it was on the basis that the prior incident [in late October] 2019, referred to in the summary, does not form the basis of the charge of wounding which [AN] admitted. The written submissions provided for the sentencing mentioned this to make [AN]'s position clear on that issue;

> "The police have included a "prior incident" in the summary of facts as part of the factual matrix for the offending, however, it is a matter that is still before the court awaiting a jury trial fixture. As such, the facts referred to therein have not been proven".

[10] *Crimson Consulting Ltd v Berry* [2018] NZCA 460, [2019] NZAR 30 at [32].
[11] See [4](a)(b) and (c) above.

[36] Concern is therefore raised about the summary, including reference to the prior incident being provided to [MM] and his counsel for the purpose of trying to resolve what happened [in late October] 2019 when [AN] has never expressly accepted the description of the events that day as they are portrayed in the summary. For the summary of facts to be presented in that way, and thereby appear to corroborate [NV]'s version of events, "could at best jeopardise the progress that [AN] has made thus far or at worst expose her to a real likelihood of harm."

[37] In response to that concern, Mr Djurich says the Manukau Crown accept that it may only be the fact that [AN] was present [in late October] 2019 that is accepted, even if other facts about events that day are not. However, that in itself is reason enough to pursue the application in the event that [MM] might consider calling [AN] to give evidence and say she was not there. The Manukau Crown do not intend calling her to give evidence.

[38] It is important to emphasise that all facts that were essential to [AN]'s admission of guilt had to be accepted as proved at sentencing.[12] It was not essential to [AN]'s admission of the charge she faced, nor for the purpose of sentencing, to accept as proved the description of events [in late October] 2019 as set out in the summary of facts.[13] It was made clear at the time by Ms Winterstein that those facts were not accepted by [AN]. Therefore, I did not accept them as proved for the purpose of sentencing.

The right of a defendant in a criminal proceeding to a fair trial

[39] The Manukau Crown understands the central issue at trial will be whether the alleged offending by [MM] occurred, and so the credibility of the complainants, including [NV], will be squarely in issue. Mr Djurich therefore says it is important that [MM] and his counsel know that [AN] was present [in late October] in case he intends calling her as a witness to say she was not there, even if there is not agreement about anything else that happened that day. To withhold that information from him could prejudice his fair-trial rights.

---

[12] Sentencing Act 2002, s 24(1)(b).
[13] Section 24(1)(a).

[40] However, Ms Winterstein's concern is that the summary, if it is viewed without explanation, would wrongly make it look as though [AN] had accepted the events of [late October] 2019 as set out.

The protection of confidentiality and privacy interests

[41] One of Ms Winterstein's grounds for arguing that the Oranga Tamariki Rules should govern the determination of the application was that it is important and appropriate for the decision to be made by applying the purposes and principles that govern proceedings in the Youth Court including the priority that must be placed on the well-being and best interests of children and young people.

[42] Section 4 provides that the overarching purpose of the Act is promoting the well-being of children and young people and also their families, whānau, hapū, and iwi. Well-being and best interests are again emphasised in s 4A. It was submitted that the closed nature of Youth Court proceedings and the strict limits on publication in s 438 of the Act should apply in this context too.

[43] In addition, the principles in s 5 of the Act include the requirement that [AN]'s rights under the UN Convention of the Rights of the Child ("the CRC") must be respected and upheld.[14] Articles 16 and 40 are relevant in this situation.

[44] Article 16 provides:

> **Article 16**
>
> 1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family home, or correspondence, nor to unlawful attacks on his or her honour and reputation.
>
> 2. The child has the right to the protection of the law against such interferences or attacks.

[14] United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990).

[45] The relevant parts of article 40 provide:

> **Article 40**
>
> 1. States Parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
>
> 2. To this end…
>
> (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
>
> (vii) To have his or her privacy fully respected at all stages of the proceedings.

[46] The latest UN General Comment ("the UNGC") on child justice provides clear and strong guidance on how those articles should be understood and applied.[15] It is important to set out the relevant parts in full because of the emphasis on protecting privacy and confidentiality rights on a lifelong basis and the reasons for that:

> **Full respect of privacy (arts. 16 and 40 (2) (b) (vii))**
>
> 66. The right of a child to have his or her privacy fully respected during all stages of the proceedings, set out in article 40 (2) (b) (vii), should be read with articles 16 and 40 (1).
>
> 67. States parties should respect the rule that child justice hearings are to be conducted behind closed doors. Exceptions should be very limited and clearly stated in the law. If the verdict and/or sentence is pronounced in public at a court session, the identity of the child should not be revealed. Furthermore, the right to privacy also means that the court files and records of children should be kept strictly confidential and closed to third

[15] Committee on the Rights of the Child *General comment No. 24 (2019) on children's rights in the child justice system* UN Doc CRC/C/GC/24 (18 September 2019).

parties except for those directly involved in the investigation and adjudication of, and the ruling on, the case.

68. Case-law reports relating to children should be anonymous, and such reports placed online should adhere to this rule.

69. The Committee recommends that States refrain from listing the details of any child, or person who was a child at the time of the commission of the offence, in any public register of offenders. The inclusion of such details in other registers that are not public but impede access to opportunities for reintegration should be avoided.

70. In the Committee's view, there should be lifelong protection from publication regarding crimes committed by children. The rationale for the non-publication rule, and for its continuation after the child reaches the age of 18, is that publication causes ongoing stigmatization, which is likely to have a negative impact on access to education, work, housing or safety. This impedes the child's reintegration and assumption of a constructive role in society. States parties should thus ensure that the general rule is lifelong privacy protection pertaining to all types of media, including social media.

71. Furthermore, the Committee recommends that States parties introduce rules permitting the removal of children's criminal records when they reach the age of 18, automatically or, in exceptional cases, following independent review.

[47] The Beijing Rules also outline the need for a child's right to privacy to be respected at all stages of the criminal justice process, "in order to avoid harm being caused … by undue publicity or by the process of labelling" and to ensure that "no information that may lead to the identification of a juvenile offender is published".[16]

[48] The types of concern raised in the UNGC are borne out in scholarly research in this area which draws attention to the lifelong harm that can be caused to children and young people as a result of breaches of their rights to strictly enforced privacy and confidentiality.[17]

---

[16] The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) 1985, rr 8.1 and 8.2.

[17] Faith Gordon *Children, Young People and the Press in a Transitioning Society: Representations, Reactions and Criminalisation* (Palgrave Macmillan, London, 2018).

[49] Obviously, many of the issues and concerns raised in the CRC, UNGC and in the research will not arise in this case given the narrow scope of the application and the people to whom the information would be provided. However, the force of those provisions and the issues covered in the research, high-light just how strong the privacy and confidentiality rights of children are and why they need to be protected. I will return to this issue later.

The Principle of Open Justice

[50] The principle of open justice carries less weight in the present context than would be the case in District Court proceedings. This is because of the closed nature of the Youth Court and the provisions of the Act, already mentioned, regarding confidentiality and privacy and the strict limits imposed on publication and reports of proceedings.

[51] However, the narrow scope of the application, and those to whom documents would be made available, is an important consideration.

The Freedom to Seek, Receive and Impart Information

[52] This is not a significant factor in this case.

Is the Document Subject to Restrictions under Rule 7?

[53] The Act is not one of the statutes in r 7, so this is not triggered.

Any Other Matter the Judge Thinks Appropriate

[54] Other matters were raised in submissions, and I think it appropriate to mention the following:

- Duty to disclose

[55] The first of the three reasons why the Manukau Crown have made this application is because they say that the documents they seek access to must be

disclosed to [MM] and his counsel under s 13 of the Criminal Disclosure Act 2008 which provides:

> **13 Full disclosure**
>
> (1) The prosecutor must disclose to the defendant the information described in subsection (2) as soon as is reasonably practicable after a defendant has pleaded not guilty.
>
> (2) The information referred to in subsection (1) is—
>
> (a) any relevant information, including, without limitation, the information (standard information) described in subsection (3); and
>
> (b) a list of any relevant information that the prosecutor refuses under section 15, 16, 17, or 18 to disclose to the defendant together with—
>
> (i) the reason for the refusal; and
>
> (ii) 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 16, 17, or 18 and (in the case of the interests protected by section 18) there is no overriding public interest.
>
> ...
>
> (5) If information referred to in subsection (2) comes into the possession or control of the accordance with subsection (1) and before the hearing or trial is completed, the prosecutor must disclose the information to the defendant as soon as is reasonably practicable.

[56] However, s 16 of that Act sets out a number of reasons why a prosecutor can withhold information:

> **16 Reasons for withholding information**
>
> (1) A prosecutor may withhold any information to which the defendant would otherwise be entitled under this Act if—
>
> ...
>
> (b) disclosure of the information is likely to endanger the safety of any person; or
>
> ...
>
> (i) disclosure of the information would constitute contempt of court or contempt of the House of Representatives; or

...

(k) disclosure of the information would be contrary to the provisions of any other enactment; or

...

(o) the information—

(i) reflects on the credibility of a witness who is not to be called by the prosecutor to give evidence but who may be called by the defendant to give evidence; and

(ii) is not for any other reason relevant.

[57] Each of the exceptions outlined above in s 16 are relevant here. Risk to the safety of [AN] is an issue. She is not to be called by the prosecutor to give evidence at [MM]'s trial but might be called by the defence. If disclosure is made without permission from the Youth Court, that disclosure would be in contempt of court and in breach of s 438 of the Act. The documents may have limited relevance to the proceedings.

[58] Arguably therefore, the Manukau Crown has legitimate grounds to withhold the information they seek to disclose but would need to inform [MM]'s counsel that they are doing so as required by s 13(2)(b) of the Criminal Disclosure Act. However, in this case, they believe the orderly and fair administration of justice and fair trial rights of [MM] in particular justify bringing the application.

- <u>An alternative approach</u>

[59] Ms Winterstein made a suggestion that the application, so far as it relates to putting the summary to [AN] if she gives evidence at the trial, should not be granted at this time. Instead it could be revisited if [AN] is called as a witness at [MM]'s trial, which is believed to be highly unlikely. To allow the disclosure on the off chance of [AN] being a witness is said to be presumptuous at best and disastrous at worst.

[60] In response, Mr Djurich says that option is impracticable and does not allow for the realities of how a jury trial progresses. It would not be possible to renew the application during a trial and obtain a decision within the necessary time frame.

- Sharing of documents by the Crown

[61] Ms Winterstein also questioned whether it was appropriate for the Auckland Crown to share sensitive Youth Court documents with the Manukau Crown without first getting leave of the Court to do so. Both counsel made submissions on that point. However, it is not necessary to make a finding in that respect. If there was anything inappropriate about the sharing of the documents, it was remedied by the present application which was responsibly made by the Manukau Crown.

Rule 13

[62] In carrying out the balancing exercise required under rule 12, I had regard to the competing priorities of open justice on the one hand and protection of confidentiality and privacy interests on the other.

[63] Both need to be given weight. However, that which attaches to open justice in this case is less than that attached to protection of confidentiality and privacy interests. That is because of the closed and confidential nature of Youth Court proceedings, and because the restrictions on publication limit the weight to be assigned to open justice. For the reasons explained already, the protection of confidentiality and privacy interests of children and young people will always be a very weighty consideration.

Conclusions

[64] The following are my conclusions and in giving them I note that r 11 of the Access Rules allows access to documents to be granted subject to any conditions I think appropriate.[18]

The first reason for the application

[65] In relation to first reason for the application, being the prosecution's disclosure obligations, I find there to be some justification for applying to the court instead of withholding the information from [MM] and his counsel.

[18] Set out above at [32].

[66] The primary justification concerns [MM]'s right to a fair trial and, in particular, to ensure he and his counsel are aware of relevant factors in the event that they consider calling [AN] to give evidence at his trial.

[67] There is a sense in which allowing limited disclosure here is in the best interests of [AN] as well. If disclosure is refused and [MM] calls [AN] to say she was not present during the incident [in late October] 2019, unaware of the evidence to the contrary, she would likely be discredited under cross-examination. That would place her in a difficult and potentially risky situation because it would not be favourable to [MM]'s position.

The second reason

[68] The Manukau Crown submit that it would be an affront to the principle of the orderly and fair administration of justice for parties to related but separate criminal proceedings to challenge already determined factual findings by the court without proper foundation.

[69] However, in this case, a proper foundation has been established. Disclosure of the summary of facts, without qualification or explanation, would be inappropriate and could expose [AN] to risk because it could appear as though she had accepted [NV]'s version of events [in late October] 2019 when she has not.

[70] Therefore, the second reason for the application, which is to help the parties reach agreement about what happened [in late October] 2019, avoid unsubstantiated challenges to [NV]'s evidence, and avoid witnesses being called unnecessarily, must be considered with great care.

[71] As I have said in relation to the first ground, there is some justification for providing the summary to [MM] and his counsel in terms of his right to a fair trial and also a sense in which allowing limited disclosure is likely to be in the interests of [AN] as well.

[72] It is essential however that [MM]'s counsel knows that the contents of the summary in relation to the incident [in late October] 2019 were not accepted by [AN] when she admitted the charge in the Youth Court and were not treated by the court as proved at the sentencing. However, she was present.

[73] Having balanced the various factors referred to above, I will allow the summary to be disclosed on the conditions set out later in this judgment.[19] That will include a copy of this decision being provided to [MM]'s counsel so that there is clarity and transparency surrounding the reasons the disclosure was sought and granted and the conditions attaching to it. Ms Winterstein can also explain the decision to [AN].

[74] In coming to this conclusion I also take into account the limited number of people to whom the documents will be provided, that those people are likely to already have some knowledge of [AN]'s Youth Court proceedings, and that the restrictions on publication of any of the disclosed documents can be managed to protect privacy and confidentiality considerations.

The third reason

[75] The third reason the Manukau Crown give for the application is to be able to put the summary of facts to [AN] in the event she gives evidence at [MM]'s trial that is inconsistent with the summary's contents.

[76] I have already referred to the alternative approach suggested on this issue and the practical problems with it.[20] I accept those concerns are valid. However, they can be addressed by making a conditional order.

[77] If [AN] does give evidence, the only people who are likely to see the summary of facts apart from her are the lawyers and the trial Judge. In the event that she does give evidence a copy of this judgement shall be provided to the trial Judge so that he or she is aware of the situation concerning the prior incident referred to in the summary and will be able to make such directions as necessary and appropriate after taking into account the issues I have outlined here.

---

[19] Set out below at [96].
[20] Set out above at [59] and [60].

Should Access be given to the record of the FGC?

[78] The purpose for which the Manukau Crown seek to have the record of the FGC is to "formalise [AN]'s admission to the charge". However, the FGC record does not do that. The correct position regarding the issue of proving the admission of a charge in the Youth Court has been accurately explained as follows:[21]

> [4] At the Family Group Conference it is a requirement under the Children, Young Persons and Their Families Act, under s 259, for the Family Group Conference to seek to ascertain whether a young person admits any offence alleged to have been committed. The authority for a Family Group Conference to explore and arrive at a plan for disposition arises out of the conference ascertaining that the young person admits an offence or offences. So, an indication of an admission at a Family Group Conference, while giving the conference the authority to continue, cannot be regarded as a formal plea, in the sense of a plea entered in court in the ordinary summary jurisdiction.
>
> [5] For that reason, before a charge can be regarded as proved it is conventional for the admission at the Family Group Conference to be noted, and for that admission to be confirmed in Court. Generally, that does not occur in that formal sense where there is a plan leading to disposition short of an order. There is significance to be given to the opening words of s 283, which provides for orders of the Court, and which provides where a charge against a young person is "proved before a Youth Court" the Court may, subject to various sections, make one or more of the orders contained in s 283.
>
> [6] "Proved" before a Youth Court is not a term or phrase which is defined in the Act, but it means something more than an admission given in the context of a Family Group Conference. It requires, in my view, at least an admission in court with all the formality that attends that.

[79] Therefore, the record of the FGC is not the document that proves [AN]'s admission of the charge. Proof of that occurred when the admission [AN] made to the charge at the FGC on 24 August 2020 was confirmed in court on 3 September 2020.

FGC records

[80] In any event, the application for access to the FGC record could not succeed for the following reasons. Rule 6 of the Access Rules states:

> **6 General qualifications on all rights of access under rules**
>
> Any right or permission given by or under these rules to access a document, a court file, or any part of the formal court record is subject to—
>
> (a) any enactment, court order, or direction limiting or prohibiting access or publication; ...

[21] *New Zealand Police v BH* YC Lower Hutt CRI-2008-232-000018, 18 June 2008.

[81] Section 37 of the Act provides that the proceedings of an FGC are privileged and no evidence shall be admissible in any court of any information, statement, or admission disclosed or made in the course of an FGC. Section 38 prohibits the publication of the proceedings of any FGC. Section 271 makes it clear that those provisions apply to FGCs under the Youth Justice provisions.

Conclusion

[82] For those reasons, the application for access to the FGC record is declined.

Proof of the admission of a charge in the Youth Court

[83] As explained above, the charge [AN] admitted was proved when the admission she had made to the charge at the FGC on 24 August 2020 was confirmed in court on 3 September 2020.

The permanent court record

[84] The document that should provide proof of that would be a certified copy of the permanent court record.[22] This can be provided by the Registrar[23] but only if I permit that because the document would identify, or enable identification of [AN] which is forbidden by the Act.[24]

[85] Rule 8(2) of the Access Rules allows every person to have access to the permanent court record under Part 7 of the Criminal Procedure Rules 2012.[25] However, that is subject to the restrictions in rr 6 and 8(3)(d) of the Access Rules given the limits and prohibitions that apply to publication in the Youth Court.

[86] A problem with the permanent court record however is that it does not specifically cater for the Youth Court. The language and concepts used are not those that apply in the Youth Court.

---

[22] Criminal Procedure Rules 2012, rr 7.1 and 7.2.
[23] Rule 7.1(9)
[24] The Access Rules, r 8(3)(d); set out above at [31].
[25] Set out above at [31].

[87] Relevant parts of Part 7 of the Criminal Procedure Rules 2012 which describes the permanent court record, are;

Part 7

Permanent court record

7.1 Permanent court record to be kept for each court

(1) For the purposes of the Act, a Registrar of a court at any place must keep a record called the permanent court record.

…

7.2 Details of permanent court record

The permanent court record for a court at any place must record such of the following particulars relating to each charge filed in the court as are applicable:

(1) the name and place of the court

…

(7) a description of the charge…

…

(12) pleas entered...

…

(20) determination of the charge, including –

(a) verdict (guilty or not guilty):

…

(h) deemed conviction under section 376.[26]

[88] However, in the Youth Court a plea is not entered to a charge. When a young person appears in the Youth Court and denies a charge, the Act describes what is to happen and then goes on to say that in any other case:[27]

> "…**the court shall not enter a plea to the charge** but shall direct a youth justice co-ordinator to convene a family group conference in relation to the matter; (emphasis added).

[89] Recording on a charging document that a charge is "Not Denied" therefore, is specifically not a plea. It is essentially recording the jurisdiction for directing an FGC because a denial has not been entered to a charge.

---

[26] Section 376 of the Criminal Procedure Act 2011 is relevant here because if provides that if a court proceeds to sentence a defendant but does not make an order convicting the defendant, the defendant is deemed to be convicted.

[27] Oranga Tamariki Act, s 246.

[90] The only place in the Act which refers to a young person pleading guilty is in s 276 in two contexts;

(a) First, if they are facing a category 3 or 4 offence, have elected trial by jury, but "indicate to the court they wish to plead guilty" instead of going to a trial call-over,[28] or otherwise;

(b) in relation to 17-year-olds facing schedule 1A offences and related charges in respect of which they must be transferred to the District or High Court.[29]

[91] With one notable exception, young people who are sentenced to an order under the Act are not "convicted"; instead orders are made in respect of them. The only exception arises when the Youth Court makes an order that a young person be brought before the District Court for sentence or decision. Before sending the young person to the District Court, the Youth Court may enter a conviction.[30]

[92] Therefore, matters dealt with in the Youth Court do not normally give rise to convictions for offences and to that extent the Youth Court is not a court of criminal record. However, orders made in the Youth Court form part of a young person's behavioural history, and although that does not amount to prior convictions, such history can have some relevance in determining, for example, an appropriate sentence later in the District Court of High Court.[31]

Should a certified copy of the permanent court record be provided?

[93] Despite the absence of words and concepts that accord with the law and process in the Youth Court, a certified copy of the permanent court record can be provided, subject to conditions if necessary, using the broadly analogous terminology.

[94] In this case the Manukau Crown seek a document that formalises [AN]'s admission to the charge. For the reasons given, that is the entry on the charging document on 3 September 2020 recording that the admission she made to the charge at the FGC on 24 August 2020 was confirmed in court.

---

[28] Section 276(3)
[29] Section 276AC
[30] Section 283 (o)
[31] *Kohere v Police* (1994) 11 CRNZ 442 at 444.

Conclusion

[95] Access can be granted to a certified copy of the permanent court record confirming [AN]'s admission to the charge she was sentenced for in the Youth Court.

Result

[96] The application is granted on the following conditions:

(a) The Manukau Crown is granted access to a copy of the summary of facts and a certified copy of the permanent court record showing that on 3 September 2020 [AN] confirmed in the Youth Court that she admitted the charge of wounding with intent to cause grievous bodily harm.

(b) Copies of those documents may be disclosed by the Manukau Crown to [MM]'s counsel on the following conditions:

(i) A copy of this judgement must also be provided to [MM]'s counsel drawing attention to the restriction on publication under s 438 of the Act which is recorded at the top of the front page.

(ii) [MM]'s counsel may discuss those documents with [MM] but not give them or a copy of them to him or any other person without the court's prior approval.

(iii) If [MM] changes counsel, or decides to represent himself in the proceedings, these documents must be returned to the court by his present counsel. Fresh applications would then need to be made if access to the documents is sought, setting out the reasons why.

(iv) If [AN] gives evidence at [MM]'s trial, a copy of the summary and the certified copy of the permanent court record may be shown to her if a foundation for doing so is established.

(v) Also, if she gives evidence, a copy of this judgement must be given to the trial judge so that he or she is aware of the situation as set out in this judgement and can make such orders or

directions as necessary and appropriate in the context of the trial.

Access to Youth Court records

[97] For reasons that will be clear from this Judgement, it is completely unsatisfactory that there are not access rules in relation to court records that cater specifically for the Youth Court.

[98] Parliament has recognised the need for the law to cater specifically for the various interests, needs, rights and vulnerabilities of children and young people who come before the Youth Court which is a specialist court governed by legislation that sets it completely apart in many qualitative ways from the District Court.

[99] However, when it comes to the all-important issue of access to court records, the rules that apply do not adequately recognise those special features. Instead the rules that govern access to records are the same rules that apply to proceedings in the District Court.

[100] Although the Access Rules allow the purposes and principles of the Act and other important features of it to be taken into account, including the requirement to respect and uphold the rights of children and young people under the CRC, those factors do not govern the decision. They are simply included with a variety of factors that must be balanced. There is no hierarchy of factors and so the well-being of children and young people is not prioritised and nor are other important purposes, principles and features of the Act.

[101] The latest UNGC and the writings of Dr Faith Gordon set out in clear and strong terms the various reasons for these rights needing to be the subject of rigorous long-lasting protection. Although many of those concerns did not arise in this particular case they will in many cases when access is sought to Youth Court records.

[102] Dr Gordon's research shows that the negative consequences of publication of Youth Court involvement for a young person can be many, varied and enduring. These include stigmatisation, threats of violence, impact on family life and

employment prospects and impact on rehabilitation.[32] The contemporary context adds significant complexities. In particular the current digital age with social media causes further issues due to inadequacies in the current media regulatory framework.[33] Given such concerns, the safeguards provided for children and young people in all other aspects of their involvement in Youth Justice should surely extend to this area.

[103] Those issues aside, it is completely unsatisfactory that the current law regarding access to court records does not even recognise or use the scheme and language of the Act. The Access Rules and contents of the permanent court record for example are not fit for purpose in the Youth Court.

[104] Concerns of this nature were raised 15 years ago by the Law Commission, so it is difficult to understand why nothing has been done to fix these problems. The urgent need to remedy this deficiency cannot be overstated.

Acknowledgment

[105] I am very grateful to Mr Djurich and Ms Winterstein for the outstanding way they both handled this difficult case. It could not possibly have been presented and argued any better than it was.

Judge AJ Fitzgerald
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 12/11/2021

[32] See above at [48].
[33] Faith Gordon "Children's Rights and Media Wrongs' in the Digital Age: Australian Youth Justice Contexts" (2020) 14 Court of Conscience 75; and Faith Gordon "Preserving lifelong anonymity orders into adulthood: new challenges for the courts in the age of social media" (2019) 41 Journal of Social Welfare and Family Law 491.