IN THE DISTRICT COURT
AT PORIRUA

CRN. 12091003780-81

NEW ZEALAND POLICE

v

PETER DOUGLAS ZOHRAB

Hearing: 29 July 2013

Appearances: Sergeant Taylor for the Informant
Mr Foster for the Defendant

Judgment: 14 August 2013

RESERVED JUDGMENT OF JUDGE I G MILL
[Application for non-party disclosure hearing]

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[1] The defendant applies for a non-party disclosure hearing in respect of a defended prosecution of him for assault (s 196 Crimes Act 1961) and disorderly behaviour (s 4(1)(a) Summary Offences Act 1981 – fineable only). A defendant may apply to the Court for such a hearing to determine whether information that is held by a person and/or agency other than the prosecutor should be disclosed (s 24(2) Criminal Disclosure Act 2008).

[2] The application must describe with as much particularity as possible the information sought, the name of the person or agency and the grounds on which the defendant relies to establish that the information is relevant. Written evidence is required indicating that the defendant has made reasonable efforts to obtain the information from the person or agency that the defendant alleges holds the information (s 24(3)). The Court may grant the application for a non-party disclosure hearing if it is satisfied:

(a) The information sought is likely to be held by the person or agency the defendant alleges holds the information (s 25(a)); and

(b) All or part of the information appears to the Court to be relevant (s 25(b)).

Background

[3] The police allege that shortly after 7am on Thursday 18 October 2012 the defendant boarded a Tranzmetro train at Paraparaumu. As the train left the station he opened the window beside him. A short time later a male passenger closed the window after being asked by another passenger to do so. It is alleged the defendant angrily pulled the window open again, yelling out that he had rights and directing obscenities towards the passenger who had closed the window.

[4] A female passenger apologised to the defendant. It is alleged that the defendant continued to verbally abuse nearby passengers. The complainant who was sitting nearby told the defendant that his language was not acceptable and the defendant called her a *"black cunt"* or words to that effect. The complainant approached the defendant and confronted him. It is alleged that he repeated the racist insult and punched her once in the chest. The defendant was restrained by other passengers when he lunged at another female passenger when she expressed disgust at his behaviour.

[5] The defendant later used his cellphone to call the police claiming he had been assaulted. Rail staff arrived and waited with the defendant until the police came.

[6] The defendant explained that the incident was a conspiracy and it was pre-planned to have him arrested.

[7] The issue at the trial will therefore be whether the police can prove an assault, that is an intentional application of force by the defendant to the complainant's body.

The Application

The information sought

[8] The defendant seeks information relating to nine persons who were interviewed by the police.

[9] Firstly, the defendant seeks information from cellphone companies Vodafone NZ, 2 degrees, Telecom, Compass, Orcon, Callplus and M2, each of whom he says offer mobile services in New Zealand. He seeks to know whether, in respect of each of these agencies, the nine persons named in his application hold an account with them. If so, he requests the cellphone numbers of those persons and subsequently details of any calls or texts between any of the named persons in the two year period ending 31 May 2013 (the defendant may be prepared to accept a lesser timeframe). The defendant requires such information to include the originating number and the receiving number, together with the time, date and duration of call.

[10] Secondly, the defendant seeks information from Vodafone NZ and Telecom in respect of landline phone services in New Zealand in respect to the same people with similar information if accounts are held.

[11] Thirdly, the defendant requests information from Internet service providers Vodafone NZ, Xtra, Orcon, Yahoo, Google, Actrix, Slingshot, and Hotmail seeking similar information in relation to emails.

[12] Fourthly, he seeks information from Skype in respect of Skype video calling.

[13] Fifthly, the defendant seeks information from Facebook and Twitter as to whether the named persons hold accounts with these agencies. If so, he requests copies of postings with sufficient detail to show date and time, along with the date, time and content of any messages sent using these websites' instant messaging services.

[14] Next the defendant seeks information from Yahoo! to identify whoever it was who posted a question on Yahoo! Answers/Gender Studies at about 8pm on 2 May

2013 asking what someone would do if he was framed, which question was deleted within five hours.

[15] Finally, the defendant seeks information from the Families Commission in respect of the New Zealand White Ribbon Campaign to establish whether any of the named persons in his application are members or supporters of the New Zealand White Ribbon Campaign.

Grounds establishing relevance

[16] The defendant believes he has been deliberately framed for political reasons by all of the persons named (although he recognises this may not be so in relation to one of the nine). He suggests that the evidence to be obtained through non-party disclosure may provide evidence that the named persons have communicated together other than whilst on the train, and may provide evidence as to whether they used these communications to organise the framing of the defendant. This alleged conspiracy is aimed, he says, at undermining his credibility to speak out on gender and racial issues by making it seem that he was physically and racially abusive towards a Maori female, whom he says is herself a racist abuser and assaulter.

[17] The defendant asserts that he is a "masculist", which he defines as an opponent of feminism. He says the White Ribbon Campaign is one of his main political opponents. He regards the campaign's members as "irrational, potentially hostile and anti-male". He noted that the Tranzmetro employee who approached him during the incident was wearing a white ribbon, and suggests this may have been given to her by one of the named persons.

[18] The defendant's request in relation to the Yahoo! Answers website is grounded in his assertion that the Gender Studies section of this site "has become a debating chamber between feminists and masculists". He suggests that the person asking the question on that site on 2 May 2013 is probably linked to the conspiracy.

[19] The defendant's application then refers to his rights under the New Zealand Bill of Rights Act 1990, including his right to present a defence (s 25(e)), his right to adequate facilities to prepare a defence (s 24(d)), and his right to be presumed

innocent until proven guilty (s 25(c)). The defendant contends that the police refused to investigate his conspiracy claims, and instead treated him as guilty from the start of their investigation. He says that the non-party disclosure he requests is necessary not only to clear him of the charges laid against him, but to oblige the police to investigate the conspiracy he alleges.

Relevance

[20] On the question of relevance (s 25(b)) the defendant submits this arises in the following ways:

(a) He believes he has been deliberately framed for political reasons by all of the persons named with the exception possibly of Renwick Lyall Wright.

(b) The formal statements of these people are at variance in important ways and he does not believe this is explicable other than by a conspiracy to commit perjury.

(c) He saw a group of women holding what seemed to be a meeting on the platform before the train left and one of the named persons Christopher Vertongen joined that group.

(d) The nearest entrance to the train to that group was the entrance that the defendant used. The apparent leader of the group stood on the platform and glared at him as he entered the train.

(e) One person (Stephen Eckett) claimed that someone had stopped the train. It was impossible for this person to know that firsthand and the defendant surmises that he acquired his version of events from another witness and that Mr Eckett's statement cannot be in good faith.

(f) Next, three of the persons named claimed that a Tranzmetro employee had tried to calm him down whereas the recording of his 111 call shows he was clearly calm.

(g) Most of the people appeared to know each other better than would be expected by simply commuting together.

(h) The evidence to be gained from the non-party disclosure is relevant as it may provide evidence that these people have communicated together other than whilst on the train.

(i) The evidence may provide evidence as to whether they used these communications to organise *"the framing of"* the defendant.

[21] In respect of the Yahoo site he submits that this is a debating chamber between feminists and masculists (opponents of feminism such as the defendant) and he feels it is sometimes used to find out personal information that can be used against him. He believes that the person asking the question is probably linked to the conspiracy.

[22] Mr Foster on the defendant's behalf submitted that the information sought must be relevant. In other words if the defendant can point to evidence of a conspiracy amongst the passengers on the train to somehow set him up and frame him for an assault then this would affect the Judge's assessment of their evidence and its reliability and truthfulness. It would therefore be relevant to this prosecution. Having satisfied the conditions of s 25 he submits I should order a non-party disclosure hearing and have all the agencies served with a copy of the application requiring the attendance of that agency or representative of that agency pursuant to s 26.

[23] Mr Foster submits that I cannot and should not embark at this point on an examination of the application for non-party disclosure itself. This must take place at the hearing under s 27 to s 29 inclusive.

Efforts to obtain the information

[24] The defendant says that he has sent email of web-form messages to all of the organisations named in his application requesting provision of the information detailed above. He says that every organisation has either refused the requests for privacy reasons or failed to respond at all.

Analysis of the Application

Particularity of information sought

[25] In respect of Yahoo! and the Families Commission the defendant's requests are adequately particularised.

[26] The defendant's other requests are much more broadly defined. He does not identify with any degree of specificity the communications he seeks to discover through this application, either in terms of time, participation or content.

[27] The reality is that the defendant has not been able to describe the information with any real degree of particularity because he does not know whether any such information exists. If it does exist, he does not know who has it or would be likely to have it. He has therefore cast his net as wide as he can. In my view the bulk of the defendant's application is in the nature of a speculative fishing expedition, embarked upon not to bolster the substance of his case but to investigate whether his case has any substance at all. Such an approach tends to undermine the objectives of fairness, effectiveness and efficiency as stated in s 3.

Identification of the agency alleged to be holding the information

[28] Section 24(3)(a) is clear that an application for non-party disclosure must state the name of the person or agency alleged to be holding the information. In respect of the information relating to cellular phone, landline and email communications, Mr Zohrab suggests multiple different agencies as possible holders of the information. In my view such an approach is not contemplated by s 24. Again, such an approach tends to undermine the stated objectives of fairness,

effectiveness and efficiency. It is neither fair, effective nor efficient to burden multiple independent parties with no interest in the outcome of these proceedings with requirements firstly to investigate whether such information is in fact in their possession at all, and then potentially to appear at a non-party disclosure hearing to provide views as to the appropriateness of providing such information.

Should the Application be Granted?

Likelihood that specified agency holds information

[29] As noted above, in respect of the information relating to cellular phone, landline and email communications the defendant has identified multiple parties which may or may not hold the information he seeks. This is an unusual approach – typically applications for non-party disclosure are able to identify the alleged holder with significantly greater specificity.

[30] The fact that multiple holders have been alleged implicitly recognises that none of the alleged holders, when considered in isolation from the others, is likely to hold the information sought. While it is accepted that in today's society most people hold cellphone, landline and email accounts, and that the logical consequence of this is that *one* of the named service providers is likely to hold an account in the case of each named person, it does not follow that each named service provider is *itself* likely to hold an account of a particular named person. In fact, it is inherently *unlikely* that a particular service provider, considered in isolation, is the one that holds the particular account in question.

[31] It is not legitimate to view the defendant's application as alleging a likely location for the information – as noted above, he has cast his net as wide as he can, identifying multiple agencies and relying on the fact that one of them will have the information he seeks. In reality this amounts to a fishing expedition, and I cannot be satisfied that any of the named agencies, when considered in isolation, is likely to hold the information the defendant seeks.

[32] I note that s 25 also permits the Court to grant an application where although unsatisfied that the information sought is held by the agency *alleged*, the Court is

satisfied nevertheless that the information is held by *another* person or agency. This provision does not assist the defendant either. The words "another person or agency" refer, in my view, to another *identified* person or agency – it is not enough to meet the test that the Court is satisfied the information is held by some other unspecified person or agency.

[33] In respect of the information sought regarding Skype communications I am not satisfied that the information sought is held by the agency alleged. Judicial notice can be taken of the fact that Skype is one of a number of enterprises offering what are known as "Voice over IP" services. Skype is perhaps the best known of these. The defendant has not supplied any material or made any submissions tending to suggest that any of the named persons hold accounts with Skype or any other Voice over IP provider, or that any of those persons communicate using Voice over IP. Nor am I satisfied that any of the information requested is likely to be held by another person or agency.

[34] In respect of the information sought regarding the Yahoo! Answers question post I am not satisfied that the information sought is held by the agency alleged. Nothing in the material supplied suggests to me that a person submitting material to this particular internet forum would be required to supply details of their identity.

[35] In respect of the information sought from the Families Commission I am satisfied that that agency is likely to hold that material.

[36] With the exception of the material sought from the Family Commission, I cannot be satisfied that the first limb of the test in s 25 is met, and therefore a non-party disclosure hearing cannot be granted in respect of that material.

Relevance

[37] Even if the first limb of the test were met, the Court must still be satisfied that all or part of the information sought appears to be relevant: s 25(b). Information is relevant if tends to support or rebut, or has a material bearing on, the case against the defendant: s 8.

[38] Mr Foster submits that I cannot and should not embark at this point on an examination of the merits of the application for non-party disclosure. This must take place at the hearing under ss 27 to 29 inclusive.

[39] I agree that the substance of an application for non-party disclosure is to be dealt with at a non-party disclosure hearing, which is a step in the process further down the line from the present application: *R v R* [2013] NZCA 299 at [27]. However s 25(b) is clear that in order to reach that step the Court must first be satisfied that the information sought appears to be relevant. Some analysis of relevance is therefore necessary for present purposes.

[40] I accept that if the defendant's requests reveal evidence of prior communications between the passengers on the train via cellphone, email, or social media, then that could be relevant to the defendant's claimed defence. However the availability of such information is predicated on an affirmative answer to the defendant's initial question – whether the named person holds an account with the relevant agency. That information is not in itself material to the case against the defendant, which again calls into question the appropriateness of naming a number of agencies any one of whom may hold the information the defendant seeks.

[41] In sum, I must accept that some of the information sought by the defendant is potentially relevant, but for the reasons given above I am of the view that a non-party disclosure hearing should not be directed.

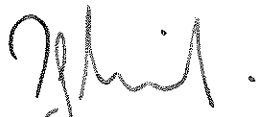
[42] In respect of the information sought regarding the Yahoo! Answers question post I am not satisfied that this is relevant, even if the information were held by Yahoo! and revealed the author to be one of the nine named persons. The defendant's application relies on a claimed conspiracy between a number of people holding a particular political position – the comment of a single contributor on an online debating forum has no bearing on whether or not such a conspiracy exists.

[43] Likewise, I am not satisfied that membership of the White Ribbon Campaign is relevant to the defendant's conspiracy claims. The only matters relied upon by the defendant in asserting the relevance of this information was that one of the

individuals he encountered on the day of the incident wore a white ribbon, and that he has an antagonistic relationship with that organisation. It is notable that the individual identified as wearing the white ribbon does not appear to be one of the nine named individuals in the application. In my view, therefore, information about the membership or otherwise of the White Ribbon Campaign cannot have a material bearing on whether or not a conspiracy against the defendant exists.

Conclusion

[44] In my view the Court cannot be satisfied that the bulk of the information sought in this application for a non-party disclosure hearing is held by the person or agency alleged or by another identifiable person or agency. In respect of the balance of the information sought the Court cannot be satisfied that it is relevant to the case against the defendant. The requirements for granting an application for a non-party disclosure hearing are therefore not met, and the application is declined.



I G Mill
District Court Judge