

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

**SC 22/2020
[2020] NZSC 76**

BETWEEN GARY DONALD MILLS
 Applicant

AND THE QUEEN
 Respondent

Court: Glazebrook, Ellen France and Williams JJ

Counsel: A M S Williams and S M H McManus for Applicant
 B F Fenton for Respondent

Judgment: 31 July 2020

JUDGMENT OF THE COURT

The applications for third-party disclosure are dismissed.

REASONS

[1] Mr Mills has applied for leave to appeal to this Court against the Court of Appeal's decision dismissing his appeal against convictions entered in 2009 for arson and the murder of his partner, Ms Delzoppo. He is yet to provide particulars of the proposed grounds of appeal. Instead he seeks orders under s 389(a) of the Crimes Act 1961 for the disclosure of documents in relation to the deceased which are currently held by two non-parties. They are:

- (a) Ms Delzoppo's medical records, held by Ranolf Street Medical; and
- (b) police photographs of Ms Delzoppo and her autopsy records, held by the Coronial Services Unit of the Ministry of Justice.

[2] He intends to use the documents to support his application for leave.

Background

[3] On the night of 1 May 2008, there was a fire at Mr Mills and Ms Delzoppo's house. During the fire, a neighbour found Ms Delzoppo lying on the ground outside the house, her lower body badly burned. When asked what had happened, Ms Delzoppo said repeatedly that Mr Mills had poured petrol on her and the house, and set her and the house alight. She also told the neighbour that Mr Mills had run away. Ms Delzoppo died in hospital four weeks later without having spoken again.

[4] The forensic evidence showed that petrol had been poured on Ms Delzoppo while she was on her bed. It also showed that petrol had been poured on the floor in the bedroom and other areas of the house. Someone had then ignited the petrol.

[5] Mr Mills did not give evidence at trial, but in a statement to police the day after the fire, he said that he was sleeping when the fire started and that when he awoke, he put out the fire on Ms Delzoppo, took her outside, and went to the bar to get assistance. He initially suggested that Ms Delzoppo may have accidentally started the fire with a cigarette or candle. But when the neighbour's account of what Ms Delzoppo said was put to him, he suggested her death was attributable to suicide by self-immolation. He also added that there had been difficulties between him and Ms Delzoppo, and that she had previously stabbed herself in the leg and claimed it was him.

Court of Appeal

[6] In the Court of Appeal, Mr Mills argued that the neighbour's evidence of Ms Delzoppo's statements, which were hearsay, should not have been admitted.¹ The Court dismissed the appeal on the ground that the circumstances around Ms Delzoppo's statements provided a reasonable assurance of their reliability under s 18 of the Evidence Act 2006.² The Court accepted that Ms Delzoppo was an alcoholic, had been drinking on the day of the fire, and had in the past self-harmed,

¹ *Mills v R* [2010] NZCA 286 (William Young P, O'Regan and Randerson JJ).

² At [11]–[25].

taken drug overdoses and threatened suicide.³ But the Court placed emphasis on the fact that her last engagement with the mental health system was in 2003, five years before her death.⁴ It was also significant that aspects of Ms Delzoppo's statements were plainly correct (that petrol had been poured on her and in the house, and that Mr Mills had left the scene).⁵

[7] Mr Mills also argued that Ms Delzoppo fabricated the claim that Mr Mills set her alight. The Court noted that this was not consistent with the way the defence was run at trial,⁶ but in any case, the only indication that Ms Delzoppo had a tendency to lie about self-harm was Mr Mills' own claim in his statement to police that Ms Delzoppo had stabbed herself and blamed him. Mr Mills did not provide independent evidence of this alleged incident.⁷ There was therefore nothing to suggest the evidence of Ms Delzoppo's statement was unreliable. On the contrary, the Court said, her statement was given spontaneously while the "horrific" events of the evening continued around her, and despite suffering from serious injuries. These factors, the Court said, "tell strongly against any concoction theory".⁸

Section 389(a)

[8] Mr Mills' application is made under s 389(a) of the Crimes Act, which has since been repealed.⁹ It provided relevantly that for the purpose of any application for leave to appeal against conviction, this Court may order the production of any document connected with the proceedings which appears to the Court to be "necessary for the determination of the case", if the Court thinks production is "necessary or expedient in the interests of justice".

³ At [15].

⁴ At [15].

⁵ At [16].

⁶ At [18]–[19].

⁷ At [23].

⁸ At [11](b).

⁹ The section has been replaced by s 335 of the Criminal Procedure Act 2011, but was in force at the time of Mr Mills' prosecution.

[9] The power to order third-party disclosure is “not lightly to be exercised”.¹⁰ In considering whether production is in the interests of justice, an appellate court should consider:¹¹

- (a) the importance of finality in litigation, which is recognised by the fact that generally evidence will not be permitted to be adduced on appeal unless fresh, cogent and credible;
- (b) the need to ensure that only inquiries that are truly necessary to the fair disposal of the appeal are undertaken;
- (c) the need to protect confidentiality and prevent harassment of victims;
and
- (d) the need for the efficient dispatch of the Court’s business.

[10] The applicant must usually lay a “realistic evidentiary foundation” that the documents sought are likely to contain cogent information in relation to whether a miscarriage of justice has occurred.¹² It must be noted that Mr Mills’ application is not assisted by the lack of particularised grounds of appeal or an explanation for the 10-year delay in bringing it.

Ms Delzoppo’s medical records

[11] Mr Mills submits that access to Ms Delzoppo’s medical records is necessary for the determination of his case because they are likely to provide more relevant information about her mental and physical health up until the time of the fire. This will enable Mr Mills to argue that it is plausible Ms Delzoppo’s death in 2008 was suicide. In his affidavit, Mr Mills exhibits documents from the Lakes District Health Board (DHB). Included is a summary of Ms Delzoppo’s contact with the DHB’s Mental Health Services and correspondence between her GP and gynaecologist up until 2008.

[12] As the Crown submits, the medical documents sought are not fresh. They could have been produced at trial. Mr Mills now challenges trial counsel’s conduct of the defence, but did not do so in the Court of Appeal and provides no particulars now. Mr Mills suggests that the suicide of Ms Delzoppo’s daughter in the early 2000s and

¹⁰ *Polyblank v R* [2013] NZCA 208 at [10], citing *R v Nepia* CA32/00, 3 October 2000 at [11].

¹¹ *Polyblank*, above n 10, at [10].

¹² *R v Nepia*, above n 10, at [11], citing *R v D* CA371/95, 17 April 1996; and [18].

an adverse medical test result could have caused Ms Delzoppo to attempt suicide. But as the Court of Appeal noted, the documents show that Ms Delzoppo's last contact with Mental Health Services was in 2003, five years before her death. Further, the exhibits to Mr Mills' affidavit indicate Ms Delzoppo received the adverse medical test result as early as June 2005. Although she was under half-yearly observation for abnormal results in 2008, there was no suggestion of an adverse diagnosis at that point in time.

[13] There is therefore no "realistic evidentiary foundation" for the suggestion that disclosure of more of Ms Delzoppo's medical records is necessary in the interests of justice. On the contrary, this aspect of the application is really a belated fishing expedition.

Photographs and autopsy

[14] The police photographs of Ms Delzoppo and her autopsy reports are retained by the Coronial Services Unit. The police have misplaced their files. Coronial Services advised that they will release the information with police approval or if there is a legal requirement to do so. Police approval has not been forthcoming, so the present application was made.

[15] Disclosure of these documents is necessary, Mr Mills submits, because he intends to instruct a forensic pathologist to determine Ms Delzoppo's likely physical position at the time the fire began. Mr Mills has a report from an expert fire investigator which suggests Ms Delzoppo was seated at the bottom of her bed when petrol was poured over her legs and ignited. Mr Mills submits that his account is rendered more plausible if it can be confirmed that Ms Delzoppo was sitting up at the relevant time.

[16] This material was disclosed to the defence pre-trial and was referred to in cross-examination of the prosecution's pathologist. It is assumed that in the 12 years since trial, and the decade since the appeal to the Court of Appeal, these files have been lost to the defence and the police, but no details are provided of attempts by the applicant to obtain them from trial counsel or through Crown counsel.

[17] In any event, disclosure is sought because it is felt that if a pathologist were able to view and interpret the material, they might then be in a position to confirm the theory advanced by the fire investigator. But the Crown case was not dependant on Ms Delzoppo's position on the bed. Further, as the Crown rightly points out, the fire investigator's report on which Mr Mills relies is not particularly helpful to him. It casts significant doubt on the veracity of Mr Mills' narrative that he had tried to save Ms Delzoppo by hugging her to smother the flames.

[18] It is not necessary in the interests of justice to direct disclosure of the autopsy report and police photographs.

[19] Since the parties have indicated that they will file a joint proposed timetabling memorandum, there is no need for further directions at this stage.

Result

[20] The applications for third-party disclosure are dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent