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IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

AP.43/89

1548

BETWEEN: GRAEME ELSTON
Appellant

A N D: THE POLICE
Respondent

Hearing: 2 October 1989

Counsel: A.D. Couchman for Appellant
G.A. Rea for Respondent

Judgment: 2 October 1939

ORAL JUDGMENT OF JEFFRIES J.

This is an appeal against sentence in the lower court and a refusal by the District Court Judge to grant suppression of name. At about 2.00 p.m. on Saturday 12 August 1989 appellant drove his motor vehicle to Onekawa Park which was then in full use by the local netball association for their weekly sporting fixtures. The car driven by appellant was parked as close as physically possible to the playing area. He remained seated in the driver's seat of the vehicle and whilst covering his genitalia with some garments he proceeded to masturbate.

A Police patrol car was in the area and obviously the activities of appellant were observed by the detective and he was there arrested. A point has been made on the appeal by counsel for appellant that his arrest was not as a result of a complaint and Mr Rea for the Crown has confirmed that. The summary of facts also mentioned that there were hundreds of women who were playing sport in the area, together with spectators, and that appellant was clearly visible by passers-by. This information detracts from the fact that it was the Police that actually apprehended, and it was not as a result of a complaint from the public who might just have chosen to ignore it rather than to complain.

Appellant came before District Court Judge Gaskell for sentence on 12 September 1989; appellant having previously pleaded guilty to the charge of wilfully doing an indecent act in a public place. Appellant is aged 39 years and was born in Palmerston North. His first marriage ended in divorce and there were no children. He remarried in 1986 to a high school teacher by occupation and there are no children of that marriage. She is at present employed at a local high school and an important aspect of this appeal centred around her welfare and the effect publication of name will have upon her and her professional status.

Appellant, apart altogether from the criminal behaviour for which he was to be sentenced, presented some confusing signals to the court. As stated he is now aged 39 years. There was a report on the file from a clinical psychologist which recorded, among other things, appellant is in the very superior range for intellectual functioning. Furthermore, there was no indication of deficits in memory. Notwithstanding his obvious intelligence and successful secondary school education, together with tertiary education at a teachers' college, he has been a persistent criminal offender both in

Australia and New Zealand over many years. His first recorded offence was for precisely the crime he was before the court on this particular occasion, namely doing an indecent act in a public place. That is 18 years ago and he would then have been aged only about 21 years. In 1976 there were offences for indecent assault on a girl and inducing a girl to do an indecent act upon him. They represent the only offences for sexual offending. However, there is a considerable list of previous offending both in Australia and New Zealand, and he has been jailed in both countries for that offending. It is fair to note, however, that whilst there is a variety of offending numerically it is not as frequent as some that come before the court.

The Probation Officer's report before the learned District Court Judge covered many of the matters mentioned in this judgment and stressed that he is an intelligent, hard-working man with one or two serious, but ill-defined, flaws in his personality and mental functioning. An important aspect of his life has been his industriousness and ability by his own actions to conduct small businesses successfully. Supervision by the office was not recommended in the report.

The learned District Court Judge by her sentencing remarks canvassed many of the matters already referred to and concluded the proper sentence to impose in these circumstances was six months' periodic detention, together with nine months' supervision. That sentence is the subject of an appeal.

Perhaps the most important aspect, in view of the fact appellant had pleaded guilty, was an application by appellant's counsel at his request made in chambers for suppression of appellant's name. The general thrust of that application and the supporting argument outlined by appellant's counsel in this appeal was to protect appellant's wife. She is a teacher at

the local high school charged with the difficult task of maintaining discipline. Mr Couchman said he informed the Judge that appellant's wife was terrified of the prospects of publication. There was support for counsel's submission in the psychologist's report who recommended suppression on account of the adverse effect it undoubtedly would have for appellant's wife.

The District Court Judge in her decision said this about the application for suppression of name:

> "In respect of the application for name suppression, I have a discretion in this matter. I am of the view that you knew what you were doing and you did it deliberately and the fact that you have previous convictions for an offences (sic) of this kind, I refuse to grant that order for suppression of name."

She then went on to give an indication in these remarks that she knew an appeal would be lodged against her refusal and then granted interim suppression of name to protect the integrity of the appeal process.

I deal first with the appeal against the exercise of the discretion by the Judge not to grant suppression. In doing so she mentioned that appellant knew what he was doing, that he did it deliberately and that he had previous convictions. It is a point made on this appeal that those remarks did not reflect the argument placed before the District Court Judge that it was not for the benefit of appellant himself but for that of his wife.

Before this court there have been placed a doctor's certificate from appellant's wife's medical practitioner, a letter from appellant's accountant (that relates to the second ground of appeal being severity of the sentence), a letter from an inspector of secondary schools and a letter from appellant's wife which was undated. I am informed by counsel this morning

that the three letters pertinent to the appeal for suppression were not before the District Court Judge at the hearing, but counsel stressed that the thrust of the contents of those letters were made by him in argument.

The grounds of appeal are that the learned District Court Judge in her refusal to grant final suppression of the publication of name failed to give due and proper consideration and weight to all of the circumstances and factors which were raised in support of such an application, and that if she had such an order would have been in the interest of justice. Counsel's submissions in this court seemed to have been a representation of the submissions he made to the Judge in the lower court and have now been supported by the documents which have previously been mentioned.

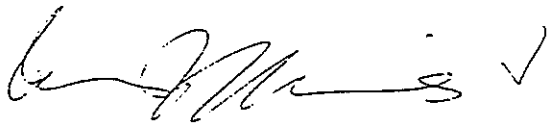
In dealing with appeals against refusal by the District Court to grant suppression of name this court faces issues of great anxiety because almost always the applications are advanced not to protect the offender but to protect innocent persons, and there is no doubt that is the principal reason in this court. Such applications are made most frequently for sexual offending, usually of a deviant variety. There is also tendency for name suppression to be sought in circumstances where the actual offender receives community based sentences, or is otherwise leniently treated by the courts. The facts of this case bear out many of the general remarks just made by me. There could not possibly be a suppression order for an offender with the record of this one, notwithstanding argument by counsel that distinctions can be made and that he has in fact only one previous offence for the particular crime. However, as mentioned earlier, he does have quite an extensive list for a variety of other offending. Counsel have not avoided submitting directly to the court that the application is on behalf of offender's wife who, by virtue of her marriage

and bearing his name, will suffer a very real constructive punishment. She has written a moving plea to the court. It is accepted it will be extremely difficult for her to fulfil her professional duties as a high school teacher if there is publication, and if that proposition needed any corroboration it has been supplied by the secondary school inspector in her letter to the court. The court is fully aware of the suffering in human terms that publicity of this kind brings.

Having made the foregoing comments it is true also that competing with that desire to prevent individualised suffering and unhappiness is a very great principle that freedom of speech and freedom to publish be protected. It is not possible always to reach solutions that do not harm one or other of the ends mentioned. Suppression orders can only be made for strongly persuasive reasons when measured against a principle which is universally regarded as one of the fundamental freedoms which governs our form of society. By statute the power is given to the courts and on occasions it is used.

As stated this is an appeal against the exercise of a Judge's discretion to decline the application. Mr Rea in his submissions on behalf of the Crown freely acknowledged that the District Court Judge had not addressed the grounds upon which the application had been made and seemed to indicate to the court this might be a suitable case for the court to allow suppression. I have reached the conclusion that notwithstanding the matters just mentioned the District Court Judge correctly exercised her discretion in this case to decline suppression of name. Furthermore, the latest information placed before the court does not demonstrate that decision was wrong. That appeal is dismissed.

I turn to the appeal on the ground that the sentence of six months' periodic detention was manifestly excessive. The information before the court is from appellant's counsel that he will suffer financial hardship if he is to serve periodic detention. In my view appellant was treated with extraordinary leniency considering his list and the nature of the offence iteself. The appeal against sentence is dismissed.



Solicitors for Appellant: Quilliam & Co., Napier
Solicitor for Respondent: Crown Solicitor, Napier

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