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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

M179/93

1703

IN THE MATTER of the Criminal Justice Act 1985

A N D

IN THE MATTER of an application by RADIO NEW ZEALAND LIMITED a duly incorporated company having its registered office at Wellington

MEDIUM PRIORITY

NO LIMIT ON PUBLICATION

Hearing 30 August 1993

Counsel J W Tizard for Applicant
C Lange for Crown
G Nation for Davidson, Buckingham, Keys and Gillespie
R Harrison for Ellis
Catherine Cull for witness X

Judgment 20 SEP 1993

JUDGMENT OF WILLIAMSON J

Radio New Zealand Limited wants the opportunity to publish and comment upon two exhibits. These were produced at the District Court preliminary hearing of charges against five Christchurch Civic Creche child workers. Both exhibits were the subject of orders forbidding publication.

The application before the Court now seeks an order discharging the orders made in the District Court at Christchurch by which publication of these exhibits is prohibited. One of the exhibits is a draft

letter prepared by a person referred to as Witness X. The name, address and occupation of that witness were also suppressed from publication. The second exhibit is a handwritten story located at the address of one of the accused. It was co-authored by Witness Y.

Counsel for the Crown said that the Crown would abide the decision of the Court. He also said that Witness Y did not wish to appear to oppose publication of the handwritten story. Counsel for Radio New Zealand said that the applicant did not wish to attack the order for suppression of the name, address and occupation of Witness X. Accordingly he said no attack was being made on the District Court order which had been made pursuant to S.140 of the Criminal Justice Act 1985.

Argument in respect of this application has involved issues as to the correct interpretation of S.138 of the Criminal Justice Act 1985; the nature of orders made during a preliminary hearing; and the relevance of the Criminal Proceedings (Search of Court Records) Rules 1974 and the Official Information Act 1982.

Facts

Relevant non-publication orders were made in the District Court at the hearing which took place between 2 November 1992 and 11 February 1993. At that stage Peter Hugh McGregor Ellis, Gaye Jocelyn Davidson, Janice Virginia Buckingham, Deborah Gillespie and Marie Keys were all charged with various offences relating to the alleged sexual abuse of children at the Christchurch Civic Creche. The depositions record that at the time when Witness X commenced to give evidence the District Court Judge made an "order suppressing publication of letter to be produced, name of this witness, his address and occupation and any reference to any child or

children in his evidence and any facts leading to the identification of the witness and children". A police sergeant produced the other exhibit and a similar order for suppression was made. No specific reasons were given for the orders. Counsel who were present at the preliminary hearing advised this Court that these orders were made in the normal manner at a preliminary hearing. Objection had been taken by defence counsel to the admissibility of the exhibits and applications made for orders preventing publication until these objections could be determined were not opposed.

Following committal of the five accused persons for trial in this court there were a series of pre-trial applications as a result of which the four accused other than Peter Ellis were discharged. The two exhibits were not tendered as evidence at the trial of Peter Ellis. They were not the subject of any pre-trial applications. Between 26 April and 5 June 1993 the trial of Peter Ellis proceeded in this Court. He was convicted of 16 offences. On 22 June 1993 he was sentenced to total terms of imprisonment of 10 years. He immediately lodged an appeal to the Court of Appeal. This appeal is to be heard later in the year. Since the trial there has been widespread publicity, part of which has been supportive of the convictions and part of it has been sympathetic to the accused and critical of the police and social workers involved in the case. According to an affidavit filed in support of this application there has been a subsequent reference to the draft letter exhibit in a reply sent by the Minister of Police to Gaye Davidson.

Grounds

The principal ground advanced in support of this application was that the orders forbidding publication of the exhibits were not required in the "interests of justice". It was submitted that the fundamental principles of open justice and freedom of expression require the Court to be

restrictive as well as explicit in relation to orders made forbidding publication. It was contended that this Court should approach the question afresh and give weight in particular to the following matters:

1. The effect of orders prohibiting publication of the exhibits is to prevent publication not only of the exhibits themselves but also of any effective comment on the nature of the material contained within them.

2. Such orders prohibiting publication may prevent the exploration of wider issues.

3. Persons, involved with the exhibits and opposing this application, would still have their civil rights for improper publication including a claim for defamation or a complaint under S.4 of the Broadcasting Act 1989.

4. Matters affecting the management and ethos of the Christchurch Civic Creche are matters of public interest and there should be strong reasons to prohibit publication of any material relevant to such matters.

Jurisdiction

Counsel for Witness X and for all of the original accused submitted that since the orders for forbidding publication were made by the District Court this Court did not have jurisdiction to review the orders. It was contended that the terms of S.138 limited review of such orders to the Court which had imposed the prohibition. In reply counsel for Radio New Zealand submitted that the High Court was entitled to review such a

decision pursuant to S.4 of the Judicature Amendment Act 1972, or alternatively, that since the case had been transmitted and the accused committed to the High Court the jurisdiction now rested in the High Court which was seized of the matter.

The power to forbid a report of proceedings or any part of proceedings is contained in S.138 of the Criminal Justice Act 1985. This power is expressed to be in substitution for any such powers that a Court may have had under any inherent jurisdiction or any rule of law. It continues on to state: "No Court shall have power to make any order of any such kind except in accordance with this section or any other enactment". The power of a trial Court is specifically preserved in cases of a sexual nature by S.185E of the Summary Proceedings Act 1957. The relevant portions of S.138 are as follows:

> (1) ...
>
> (2) Where a court is of the opinion that the interests of justice, or of public morality, or of the reputation of any victim of any alleged sexual offence or offence of extortion, or of the security or defence of New Zealand so require, it may make any one or more of the following orders:
> (a) An order forbidding publication of any report or account of the whole or any part of -
> (i) The evidence adduced; or
> (ii) The submissions made:
> (b) An order forbidding the publication of the name of any witness or witnesses, or any name or particulars likely to lead to the identification of the witness or witnesses: ...
>
> 3. ...
>
> 4. An order made under paragraph (a) or paragraph (b) of subsection (2) of this section -
> (a) May be made for a limited period or permanently; and
> (b) If it is made for a limited period may be renewed for a further period or periods by the court; and
> (c) If it is made permanently, may be reviewed by the court at any time."

It will be seen that subsection 2 of S.138 refers to "a court", whereas subsection 4(b) refers to "the court". In this case the argument for those opposing the application is that the use of the definite article in subsection 4 must mean that the court which is to review the order is the same court which has made it. For the applicant it was submitted that such a construction of subsections 2 and 4 of S.138 would lead to an absurdity where evidence was presented not only at a preliminary hearing but also at trial.

Section 2 of the Criminal Justice Act 1985 defines "Court" in this way:

> "Court means any Court exercising jurisdiction in criminal cases".

After weighing the submissions made by counsel I have concluded that this Court does have jurisdiction to consider the application by Radio New Zealand. There are two reasons for my opinion. First the District Court orders did not state whether they were for a limited period or permanently. The circumstances in which the orders were made, without argument and after objection to the admissibility of evidence during a preliminary hearing, establish the orders as ones designed to temporarily preserve the position until a further order of the trial Court. Consequently it is implicit that they were orders for a limited period. I determine that the orders of the District Court cease upon the making of any further order by this Court. Secondly, since this Court is exercising jurisdiction in criminal cases and is now properly seized of the proceedings in which the orders were made it is this Court which may renew or review such orders. A similar approach was adopted by the Court of Appeal in the case of R v

Kaitamaki [1981] 1NZLR 527 at 528 although that decision related to different provisions under the Offenders' Legal Aid Act 1954.

In view of the clear opinion I have reached in relation to jurisdiction it is not necessary to continue on to consider the submissions made as to the application of S.4 of the Judicature Amendment Act 1972.

MERITS

All counsel accepted that the applicable test in S.138(2) was "the interests of justice". This test is helpfully and fully explored in a recent decision of Thomas J in Police v O'Connor [1992]1NZLR 87. In that decision His Honour repeated and re-emphasised the importance of a system of open justice. He referred to the full exposition of these matters in the case of Broadcasting Corporation v Attorney General [1982] 1 NZLR 120 in which Richardson J summarised the position as follows:

> "One of the essential qualities of a Court of justice is that it conducts its proceedings in public. There are evidentiary advantages in that course for access of the public and the news media to the Courts tends to enhance the quality of testimony and at times, too, to secure the testimony of those who realise from what they learn of the particular case, usually through news media reporting of proceedings, that they have a contribution to make. However, the constitutional reasons go far deeper. Their concern is with the administration of justice both in the particular case and in the generality of cases, and the associated basic need to preserve confidence in the judicial system. Open justice imposes a certain self-discipline on all who are engaged in the adjudicatory process - parties, witnesses, counsel, Court officers and Judges. This is particularly so in the criminal processes: where individual liberty is at stake the knowledge that trials are subject to contemporaneous review in the forum of public opinion is a restraint on the conduct of all who are involved. The regular conduct of trials in open Court also provides an assurance to the wider public that justice is being administered openly and under public scrutiny.

> There have been numerous discussions of these matters both in the cases and legal texts and in the writings of political philosophers over the centuries. The underlying principles are well settled and are today reflected in the written constitutions of many states as well as in the International Covenant on Civil and Political Rights adopted by the General Assembly of the United Nations in 1966 and ratified by New Zealand in 1978 (see Article 14(1)."

The judgments of Cooke J and Richardson J in the case of Broadcasting Corporation v Attorney General and the judgment of Thomas J in Police v O'Connor state that there may be departures from the overall principle of open justice. Richardson J said (at page 138),

> "Where the ends of justice require some restriction on the publication of reports of criminal proceedings the particular circumstances of the case will dictate the extent of the restraint. Any departure from the principle of open justice in this regard must be no greater than is required in the overall interests of justice."

Thomas J said (at page 96):

> "Nevertheless the principle that justice must be administered openly and publicly is not absolute. If that were so true justice would at times be defeated. It is therefore axiomatic that the principle of open justice must be balanced against the objective of doing justice."

In my view, the proper course on this application is to consider afresh the question of forbidding publication of these two exhibits. The burden is on those contending for the prohibition and the orders should be no wider than is necessary in the interests of justice. The circumstances of this case are rare and unusual according to the submissions of counsel opposing the application. The Court's attention was drawn to the fact that the two exhibits which are the subject of the application were not even tendered for production at the trial. In effect, it is claimed the exhibits are in

no different category than other material seized by the police which is ultimately not used in the prosecution of any offenders.

Counsel for Peter Ellis submitted that the two exhibits were not public information but were of a private nature. He submitted that publication and discussion of these items at this stage may have a detrimental effect upon any possible retrial of Ellis following an appeal to the Court of Appeal. He contended that since the convictions for Ellis were under appeal and the exhibits affected potential defence witnesses the Court should preserve the present position by renewing orders for prohibition of publication. He also submitted that if the exhibits were to become relevant to any other civil proceedings or enquiry then they could still be used for this purpose or, if necessary, leave obtained for such use. Counsel for the accused creche workers other than Ellis submitted that the effect of publication of the two exhibits and any comment on them would be to prejudice the creche workers. He accepted that the draft letter was found in the creche records and said that consequently the former creche workers were prepared to abide the decision of the Court in that regard. But he contended that the handwritten document was a private one of an intensely personal nature found in the home of one person. Counsel drew attention to the manner in which this Court had dealt with applications under the Criminal Proceedings (Search of Court Record) Rules 1974 in the cases of Amery and Marfart [1988] 2 NZLR 747 and [1988] 2 NZLR 754.

I approach the question of forbidding publication of these two exhibits bearing in mind the principles expressed fully in the cases already referred to. I am conscious of the right for the news media to have public information and the right for the public to receive that information as part and parcel of the right to freedom of expression. (New Zealand Bill of Rights

Act 1990 S.5). As is so often the case with decisions to be made in this Court a balance has to be struck. In this case the balance is between the right to freedom of expression in an open system of justice and the rights and interests of private individuals which are necessary to preserve the integrity and administration of justice.

The two exhibits involved in this application did not provide any proof of the charges against the persons accused in the District Court. They dealt with collateral matters. No steps were taken to tender them as evidence in the trial in this Court. They are, however, properly part of the records of this Court since they were sent to this Court pursuant to S.182 of the Summary Proceedings Act 1957. As part of the records of this Court they are subject to the provisions of the Criminal Proceedings (Search of Court Record) Rules 1974. As Thorp J said in the case of Amery v Marfart [1988] 2NZLR 747 at 749:

> "In essence the rules prescribe that only a very limited part of the criminal record (the nature of the charge, the verdict of the jury, and the sentence imposed in the event of a conviction) is available for public search, that every party to a criminal proceedings is to have access to the record of those proceedings so far as they concern him or her personally, but that otherwise the criminal record is only open to search, inspection or copy by leave of a Judge, and this subject to such conditions as he shall impose."

In the latter decision of Amery v Marfart No 2 [1988] 2NZLR 745 at 759 Gault J endorsed the approach of Thorp J. Both Judges referred to the importance of reconciling any need that can be shown for access to information with the invasion of privacy that may be involved.

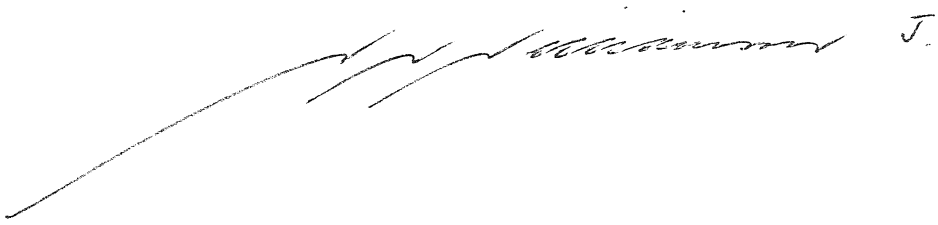
In this case counsel for the applicant says that the applicant already has the information and accordingly does not need to make any application under the Rules. He also said that since the tests under the Rules were more difficult so far as the applicant was concerned he considered it appropriate to make an application in relation to the order forbidding publication. The Official Information Act 1982 does not apply to Courts and their records. (S.2(6)(a))

Both of the exhibits concerned in this application relate to former creche workers who were discharged. The arguments in relation to those discharge applications and the Court's reasons for the discharges were available for publication after the trial of Peter Ellis was completed. Those reasons have since been published and commented upon. The two exhibits are personal in that they are referable specifically to two of the former accused. They do not deal with the matters which were the subject of charges. They are part of the Court records and subject to the usual restrictions in the Rules already referred to. The purpose and affect of those Rules must be weighed at this stage in considering whether an order forbidding publication is in the interests of justice. While it is true that some distinction can be made between the two documents since one was found at the creche itself and the other in a private dwelling there is little doubt that publication of the documents would be viewed as personal and would prompt further calls for explanations with consequent invasions of the privacy of the persons concerned. There is a possibility that the draft letter may be relevant and admissible in litigation relating to the creche workers' employment or to other civil claims in that it does reflect upon the management of the creche. If it is produced in any such proceedings or otherwise becomes the subject of particular attention then the degree of

public interest may outweigh the privacy protected. At that stage an application for review could be made pursuant to S.138(4)(c).

For the reasons that are set out above and after giving fresh consideration to the issues I make an order forbidding publication of any report or account of the whole of the evidence adduced at the preliminary hearing concerning the draft letter (exhibit 10133) and the handwritten story (exhibit 1003).

The application by Radio New Zealand Limited is dismissed. The applicant is ordered to pay costs of $750.00 to each of the four parties who appeared on the application.



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