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IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

AP.41/97

BETWEEN HUGEL

Appellant

AND THE QUEEN

Respondent

LOW PRIORITY

Hearing: 2 October 1997

Counsel: L.H. Atkins Q.C. for appellant
J. McDonald for respondent

Judgment: 2 October 1997

(ORAL) JUDGMENT OF POTTER J

Solicitors: Rainey Collins Wright & Co, DX SP 20010, Wellington
Crown Solicitor, Rotorua

This is a appeal under s.115C of the Summary Proceedings Act 1957 against refusal for name suppression of the accused, Hugel.

The appellant faces a charge of manslaughter under the Crimes Act 1961 arising from the death of a 13 year old boy in the Tauranga Hospital following his admission on 13 October 1996 and his re-admission on 2 November 1996. The appellant was the anaesthetist who attended the operation. Following the operation the boy died. The appellant was arrested and charged on 5 June 1997. There was interim suppression of name which was confirmed in a decision of District Court Judge Thomas on 17 June 1997. However, at the conclusion of depositions on 25 September 1997, the Justices of the Peace declined continuation of the interim name suppression and ordered the expiration of the suppression at 4.p.m. on 3 October 1997, allowing time for the appellant to lodge an appeal, which she has done and which is before the Court today.

Mr Atkins, for the appellant, points to two medical reports submitted on her behalf. I shall return to them briefly in a minute. The essence of his submission is that the appellant's mental and psychological situation as evidenced by those reports is such that it lifts her out of the ordinary realm of the accused person facing trial, such that she should receive the unusual treatment of an order of the Court suppressing her name.

The Crown on the other hand takes as the starting point that publication should take place; that presumption is removed only by exceptional circumstances; and in the present situation the appellant's position is no different from most accused persons facing the very serious charge of manslaughter.

I can do no better than revert to the principles applicable, as set forth by Williamson J in **O'Malley v Police** (AP.40/93, judgment 12 February 1993, Christchurch Registry). I shall deal with the five principles one by one -

1. In general the healthy winds of publicity should blow through the workings of the Courts. Neither counsel disputes that.
2. It is only in an exceptional case where name suppression is granted. Special considerations need to be made out. Neither counsel disputes that.
3. The presumption of innocence and the risk of substantial harm to a presumed innocent defendant (and any other innocent person) should be articulated. Mr Atkins stresses on behalf of the appellant that this is a pre-trial application and that the presumption of innocence is relevant.
4. A real inquiry should be made as to the consequences of publication in the circumstances of any particular case.
5. A balance must be struck between the interests of the defendant, his or her family, and others and the public interest of open and equal justice.

So in any situation there is a balancing act which must consider the position of the appellant, others affected by the charges against her and the public interest in open and equal justice.

Perhaps the extreme edge of recognition of the presumption of innocence in cases such as this are the comments of Fisher J in **M v Police** (1991) 8 CRNZ 14 where His Honour referred to -

> A crucial difference between the approach which is appropriate where the defendant is merely charged with an offence and the approach where he or she has been convicted.

Adams on Criminal Law follows the quotation which is lengthier than the sentence I have quoted, with the statement -

> Notwithstanding the strong wording, it is clear that even before conviction, the presumption in favour of publication remains.

I believe that is the appropriate approach to the matter, always in the balancing act taking into account that this is a pre-trial application.

I also refer to the words of Doogue J in the unreported decision of **Yogasakarn v Police** (AP.132/88, judgment 29 August 1988, Hamilton Registry) where the facts were very similar in many ways to those before us. Yogasakarn was also an anaesthetist charged following the death of a patient. Doogue J stated -

> When the personal position of the appellant is considered then, on the face of the matter, he is in no different position from anyone else who is likely to stand trial in respect of criminal proceedings in that he is involved in considerable stress because of the death of a person flowing from actions in which he was a participant, leaving aside entirely whether he is criminally responsible in respect of those actions.

The medical reports filed on behalf of the appellant indeed point to a highly stressed situation and this is not surprising. The appellant, as Mr Atkins has described, is somewhat isolated, at the end of her medical career, the last 16 of which she has completed in New Zealand. She faces a highly charged situation which she could hardly have anticipated in the course of a long and no doubt dedicated professional life. The report of Dr Thorpe to which Mr Atkins particularly refers, states that she is in a very severe state of post traumatic stress disorder. The submission is that this is likely to impair a fair trial for the appellant because in her psychological state there is the potential that she will not be able to deal adequately in appropriately assisting in her own defence.

I am drawn to a further quotation referred to me by counsel for the Crown in "**A Defendant" v Police** (AP.44/97, 4 March 1997, Wellington Registry) another decision of Doogue J where he quoted with approval the statement of the Court of Appeal in **Proctor v R** [1997] 1 NZLR 295 -

> One must be careful to avoid creating a special echelon of privileged persons in the community who will enjoy suppression where their less unfortunate compatriots would not.

I have no doubt that Dr Hugel is highly stressed, even disorientated and in a very serious situation as a result of the charges against her. Nevertheless, I am drawn to the conclusion that her situation is probably, while at the serious end of trauma for those who face serious charges under the Crimes Act, a situation of trauma that most must face and falls short of persuading me that in balancing the matter as the principles clearly require, I should grant continuing suppression of name. I take into account that everyone in New Zealand is entitled to a fair trial under the Bill of Rights Act but I am unpersuaded that continuing suppression of name of the appellant is necessary and essential to achieve this situation.

The application is accordingly declined

I make a further order that this decision is to take effect as from 4.p.m. on 8 October 1997. The current order for interim suppression of name is continued to that time.

Judith Potter, J.