N2hR

IN THE HIGH COURT OF NEW ZEALAND **AP No. 31/98**
PALMERSTON NORTH REGISTRY

BETWEEN

J

Appellant

AND **POLICE**

NOT RECOMMENDED

Respondent

Date of Hearing: 19 June 1998

Date of Judgment: 24 JUN 1998

Counsel: M.J. Behrens for Appellant
B.D. Vanderkolk for Respondent

JUDGMENT OF NEAZOR J

Solicitors:
M.J. Behrens, Palmerston North for Appellant
Crown Solicitor, Palmerston North for Respondent

This is an appeal against refusal to order suppression of name upon conviction. It is accepted to be an appeal against the exercise of a discretion by the sentencing Judge and therefore to be a case in which the Judge must be shown to have made an error of law which would include applying a wrong principle, failed to take into account relevant factors or taken into account irrelevant factors. Here it is argued that the Judge applied a general principle in a way which precluded giving full weight to a material factor in the particular case.

The issue turns essentially on the appellant's occupation. He is a probation officer.

The offence of which he has been convicted is assault. He was originally charged with assault with intent to injure, but the prosecution on their own initiative reduced the charge to simple assault. As soon as that happened the appellant pleaded guilty, although if he had defended the charge and his version that the single blow struck was accidental was accepted he would have been acquitted. However, he elected not to put that to the test.

The events have been shortly described. The appellant was attending a prize-giving function at a hotel. He was drinking with a small group of people. He had not been there long and due to unrelated pressures was not in a relaxed frame of mind. As he walked towards the man assaulted to speak to his own wife, he thought the man was obstructing him and struck him one blow on the head with his fist. He was holding a glass which smashed and caused extensive cuts to the face which required 12 stitches and left the victim with scars which continue to be of concern to him. The prosecution accepted that the appellant did not intend to commit an assault with the glass.

The appellant's version of events was that the whole thing happened because he lost his balance and swung his arm to correct his position striking the victim as he did so. He said that he had pleaded guilty because he felt that he could have regained his balance without striking the victim.

Because of all the circumstances the Judge imposed a fine of $2,500.00 with $1,500.00 of it to be paid to the victim. Mr Behrens submitted that that was a significant penalty for a common assault conviction. So it is, but this was an assault which had serious, if unintended, consequences, and regard is properly paid to that.

Suppression of name was sought because of possible consequences in respect of the appellant's employment if his name was published. There is a real risk because of departmental policy that the appellant's employment as a probation officer will be terminated because he has incurred a conviction. His argument for suppression is that he may have a better chance of persuading the department not to terminate his employment if the conviction is not published. If his employment is terminated the financial consequences could lead to the loss of his home because of difficulty with mortgage payments. It is submitted that the consequences of loss of job and possible loss of home are out of all proportion to the offence and that accordingly there is good ground to grant suppression.

In general terms there is competition between the requirement that Courts act openly and that the news media be free to publish what goes on in the Courts on the one hand and the right of the Court to suppress publication when there is a sufficient reason for doing that. As the Judge said there has in recent years been a reduction, in the willingness to grant suppression orders. That reduction proceeds from the decisions of the Court of Appeal in *R v Liddell* [1995] 1 NZLR 538 and *R v Proctor* [1997] 1 NZLR 295 and the emphasis in them in favour of allowing publication.

The part of the Judge's decision which is material was this:

> "The main basis for the application, as I understand it, is that the consequences in terms of your general work situation may be the worse if your name is published. Now, what we are dealing with here is an offence of violence and I must give careful consideration to whether it is appropriate to suppress your name when you have been convicted of an offence of violence, and I must give careful consideration to whether or not the reactions of

> employers to publication of your name can be something that is taken into account when determining whether suppression is to be ordered.
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> If that were to be taken into account as a strong factor in suppression applications, then that could lead to a situation in which those who are employed and those whose employers say that there will be serious consequences if the name is to be published, will enjoy an odd sort of advantage when it comes to suppression of name. I do not believe that is a factor to which I can give great weight when determining whether or not there should be suppression of name. Your employers should be able to be relied upon to judge the matter carefully and to deal with it in light of the offence itself and not in light of whether or not there is suppression of your name. I have reached the conclusion that in these circumstances, to grant suppression of name on that basis, would not be appropriate."

The reference to an "odd sort of advantage" may well have arisen from cautionary words used in the decision appealed from in *R v Proctor*. It is accepted that the Judge did not put aside the consideration affecting employment, as is clear from his references to "a strong factor" and a "factor to which ... great weight" could be given. The argument is that reliance on a general principle against favouring those employed has led to reducing the weight of the factor in the particular case.

Liddell itself was a case of serious sexual offending on a number of boys over a period of years, involving breaches of trust. The general principles stated by the Court were (p 547):

> "The present case is one of conviction of offences including very serious criminality, as the sentence demonstrates. The jurisdiction does extend to a name suppression order for the person convicted in such a case, but when a conviction is for serious crime it can only be very rarely that the interests of the offender's family will justify an order suppressing disclosure of his identity. We have already expressed the opinion that this is not one of those rare cases. Indeed there are positive reasons of public interest pointing to disclosure.
>
> A case of acquittal, or even conviction, of a truly trivial charge, where the damage caused to the accused by publicity would plainly outweigh any genuine public interest, is an instance when, depending on all the circumstances, the jurisdiction could properly be exercised. But a decision of Williamson J on

> appeal in the High court at Timaru, *Golightly v Police* (High Court, Timaru, AP 63/93, 28 July 1993) is a useful contrasting example. The defendant was a first offender. He had pleaded guilty and been fined $1500. He was prominent in the local community and had two young daughters. The conviction was for assault, but it was described by the High Court Judge as a very serious assault. The refusal of a District Court Judge to grant suppression was upheld.
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> The room that the legislature has left for judicial discretion in this field means that it would be inappropriate for this Court to lay down any fettering code. What has to be stressed is that the prima facie presumption as to reporting is always in favour of openness."

Mr Vanderkolk has drawn particular attention to the example referred to by the Court where suppression was refused. It plainly has similarities with this case, although it is not clear what consequences were sought to be avoided by suppression in that case.

The Judge did not approach the matter on the basis that employment considerations could not be taken into account in the suppression decision, but did say that it could not be a strong factor. With respect in my view that approach is neither wholly wrong nor wholly right because there may be cases where the nature of the offending is relatively minor and the consequences of loss of employment brought about by publicity out of all proportion to the events which have been the subject of criminal charge, so that the adverse affect of publicity on future employment may be a significant factor in the particular case.

Mr Behrens argued that what matters is that the approach is wrong *in this case* because the offence was not major and the consequences may be. His submission was that:

> "17. A proper consideration would have been that the appellant is a first offender, of otherwise good character, who has shown remorse for what he did, who has been appropriately punished for his crime and who in the circumstances of his family and his employment should be given the opportunity to try to save his employment because the

consequences of losing his job will be out of all proportion to the crime committed and the punishment otherwise received."

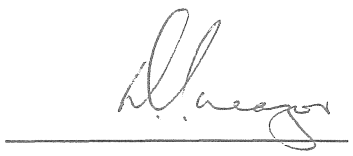
Even accepting that Mr Behrens is right that the factor is one which ought to have been given significant weight in this case (which as an issue makes the case a borderline one when it is an appeal against a discretionary decision), I am not persuaded that the Judge's final decision was wrong. There are three factors to be weighed:

(1) a probation officer's job involves assessing and reporting on offenders and supervising and guiding people who have been convicted. There is a public interest, beyond mere curiosity, in knowledge of convictions of the people who carry out such functions just as there is in respect of Police officers and Judges, so that the weight against suppression is not insignificant;

(2) the offence was not minor in its consequences even if they were unintended;

(3) the consequences in respect of employment may be major but if the conviction and its circumstances are such that it ought not, whether known publicly or not, to lead to disqualification of the appellant from his work (and I express no view about that) the department, as the Judge said, should be prepared to face up to that and make a decision accordingly.

Accordingly in my view the appeal must be dismissed.



D.P. Neazor J