ORDER PROHIBITING PUBLICATION OF NAME OR PARTICULARS IDENTIFYING APPELLANTS UNTIL TRIAL

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CRI-2005-485-11
CRI-2005-485-12

BETWEEN	H
	Appellant
AND	NEW ZEALAND POLICE
	Respondent
BETWEEN	M
	Appellant
AND	NEW ZEALAND POLICE
	Respondent

Hearing: 7 June 2005

Appearances: B McDonnell for appellant M
S L Baigent for appellant H
C L Mander for the Crown

Judgment: 7 June 2005

In accordance with r 540(4) I direct the Registrar to endorse this judgment with the delivery time of 4.30 p.m. on 7 June 2005.

JUDGMENT OF MACKENZIE J

---

[1] These are appeals against the refusal of name suppression. Both accused face charges of sexual offending. The complainant is the daughter of the appellant M, now aged about 18 years. The indictment which the appellants face includes a number of alleged sexual offences by the complainant's father, between June 1992

and June 1997. The appellant H faces three charges of sexual violation of the complainant between June 1992 and June 1996. He also faces two charges that between June 1993 and June 1996 he was party to the sexual violation by way of rape of the complainant by his son. On one of those counts, he is charged jointly with the appellant M. That charge, namely of being a party to the sexual violation by way of rape of the complainant by H's son, J, is the sole charge which the appellant M faces. J was born in December 1990. So, at the time of the alleged offending, he was aged between two and a half and five and a half years of age.

[2] The application for name suppression by both H and M was heard in the District Court at Wellington on 15 December 2004. The learned District Court Judge noted that she had by consent made an order for suppression of J's name, and of his relationship with H. In her ruling, the learned District Court Judge noted the presumption of innocence. She noted counsel's submission as to the stigma associated with being charged with serious offences of the kind, and counsel's submission that that stigma would not be erased by their being acquitted. Her Honour noted that it was not suggested that publication of the accused's names might uncover further offending or encourage other victims of alleged offending to come forward. Her Honour noted that H's application seemed to have been made more because of the possible effect of publication on his son, J, rather than on himself. She noted the submissions that the name is a distinctive one and that the accused and his son are well known in the area where they live. She noted that that difficulty had been partially cured by the order suppressing J's name and his relationship with H. In respect of M, she noted that M is the mother of the complainant, but that she has a different surname from her daughter. She noted a submission that publication of M's name might lead to identification of the complainant but noted that the Court was told that the complainant had no concerns about her mother's name being published or about H's name being published. Her Honour referred to the decisions in *R v Liddell* [1995] 1 NZLR 38 and *M v Police* (1991) 8 CRNZ 14. She noted that the applications had been made on the basis of very limited material with no evidence provided to the Court in support. On the information before her, she could find nothing special or out of the ordinary in either application such as would displace the presumption in favour of publication. She accordingly refused suppression, save for interim suppression to allow for an appeal.

[3] These are appeals against the exercise of a discretion. The principles applicable to such appeals are well established. An appellate court will not disturb such a decision unless the Judge has misdirected himself or herself in law, the decision is based on a wrong principle, or is otherwise shown sufficiently clearly to be wrong, in that the Judge has taken into account an irrelevant factor, overlooked a relevant factor, or there has been a material change in circumstances since the time of the decision. The process of weighing of factors in the exercise of a discretion does not involve a question of law: *Liddell* and *R v Lutomski and Mackiewicz* (CA 211 and 212/02, 28 August 2002, Keith, Blanchard and Anderson JJ).

[4] The starting point, as correctly identified in this case, is that identified in *Liddell* as the importance of freedom of speech, open judicial proceedings, and the right of the media to report such proceedings fairly and accurately as "surrogates of the public". Orders for suppression are never to be imposed lightly. In the case of H, the essential issue is the likely effect on J if his father's name were published. On this question, the Judge noted that the applications had been made on the basis of very limited material and no evidence had been provided to the Court in support. In this Court, evidence and material in support have been adduced. There is an affidavit from J's mother. She explains her son's background in some detail. He is aged 14 years and in the fourth form at a local college. He has spent his entire life in the area. He lives with his father, but his mother sees him on a daily basis. She says that she has no doubt that J will be affected should H's name be published. She notes that it is an unusual and distinctive name and she knows of no others outside the Bay of Plenty area. J is aware of the allegations, in that his mother and father have told him that his father has been arrested and accused of having sex with a girl, but he has no knowledge beyond that, and no knowledge that he has been named as involved in the alleged offending. She says that he was deeply upset when told of H's arrest and the reason for it. She expresses the view that he will be vulnerable to teasing and perhaps even bullying at school.

[5] There is also a report from a clinical psychologist, Mr Fairley. He describes J as "an impressive young man". He notes that he has always lived with his father in the same house, his parents having separated when he was aged two and a half to three years, but that he has regular contact with his mother. He describes J as having

clearly identified his father as the most significant figure in his life. He describes J as having made positive decisions about his life. Mr Fairley says there are in his opinion two significant considerations related to J should his father's name suppression not continue. These are his likely being teased at school, and his sensitivity about his distinctive surname. He says:

> The psychological and emotional impact on J should not be underestimated, particularly given H's key role in J's life and the central relationship that J has with his father.

He expresses the opinion that the likely response is that he will withdraw, shut himself off, and no longer engage with peers and family, thus losing that stabilising influence and shifting the balance for him. He expresses the matter in this way:

> This is a young man who is doing rather well with his life at developmental tasks, and there is real and significant risk that this will be destabilised and upset if there is publication of his father's name.

[6] As to the reason why that material was not obtained in the District Court, Ms Baigent indicated that there had been a reluctance, because of the effect which it might have on J, to involve a psychologist unless a report was clearly necessary. I consider that the approach is an understandable one. The affidavit of J's mother could have been produced earlier, but in the circumstances, as it provides factual background to the psychologist's report, I consider that the interests of justice require that I have regard to it. I accordingly deal with this appeal on the basis of the material before me, and on the basis that the failure to produce such evidence before the District Court is not a matter for criticism. In those circumstances, I am more willing than otherwise to reach a different view from that of the learned District Court Judge on the likely effect on J.

[7] On the basis of the material which was before the learned District Court Judge, I would not consider it appropriate to differ from her view of the matter. On the material before me, I consider that the risk of publication of his father's name on J does outweigh the public interest in publication. Apart from the features mentioned in the report, and to which I have referred, there is the additional element that it is alleged that J, as a very young child, was involved in the alleged offending. That has been kept from him. It seems to me that there is a significant risk that that

aspect would become known to him if his relationship with H, and H's involvement, were publicly known. For these reasons, I consider that the risk of harm to J if H's name were published does in the unusual circumstances of this case outweigh the public interest in the open reporting of proceedings.

[8] As to M's position, there is no material before me which was not before the learned District Court Judge. Mr McDonnell refers to what he describes as the "bizarre" nature of the allegations. The charge against M is that she counselled or procured her son, then aged between two and a half and five and a half years, to commit sexual violation by way of rape. I consider that this is a case where the presumption of innocence must be entitled to considerable weight. Furthermore, there is force in Mr McDonnell's submission that the stigma attached to such offending would be such that a subsequent acquittal would not erase that stigma. The weight to be given to those aspects was a matter for the District Court Judge. However, reaching the view which I have, namely that H's name should be suppressed, that would lead to the outcome that if M's name were not suppressed her name would be published but that of her alleged co-offender suppressed. I consider that that is a factor which might well have led the Judge to a different conclusion, and her decision should be reviewed in the light of that.. Weighing these considerations, I consider that the justice of the case requires that M's name should likewise be suppressed.

[9] For these reasons, the appeals are allowed, and both appellants are granted name suppression, until the commencement of the trial.

"A D MacKenzie J"

Solicitors

B McDonnell, Petone, for appellant M
Crown Solicitor, Wellington, for the Crown