IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CRI 2009-409-000062
CRI 2009-409-000063

BRENDON DOUGLAS FORREST
Appellant

v

A AND B
Respondents

Hearing: 19 August 2009

Appearances: Appellant in Person
C M Ruane for Respondents

Judgment: 18 September 2009

JUDGMENT OF FOGARTY J

Introduction

[1] Mr Forrest is a prison inmate. He has alleged he was assaulted by corrections officer A on 2 December 2001 at Christchurch Prison. He was being removed from a cell. During the course of a struggle his arm was broken. The incident was investigated by the police and no action was taken. Mr Forrest brought civil proceedings against the Attorney-General on behalf of the Department for Corrections which were filed in the North Shore District Court. These proceedings were dismissed as being statute-barred pursuant to s 4(7) of the Limitation Act 1950

by Judge D M Wilson QC on 3 December 2008. The appellant then swore an information indictably of assault in breach of s 196 of the Crimes Act 1961, on 11 November 2008.

[2] On 14 December 2006 Mr Forrest was appearing at an internal prison disciplinary proceeding before a visiting Justice. The corrections officers say that during the course of these proceedings he produced a plastic ruler which he had broken and sharpened into an improvised weapon. He presented the weapon in the room. He was disarmed. The plaintiff alleges that he was assaulted by B and another officer. The incident was investigated by the police and no action was taken.

[3] Mr Forrest swore a second information indictably of assault in breach of s 191 of the Crimes Act against corrections officer B, on the same aforesaid date of 11 November 2008, which was filed in the Christchurch District Court on 19 November 2008.

[4] A and B were summoned to appear in the Christchurch District Court on 22 January 2009. Judge P Moran made an interim order suppressing their names. Mr Forrest did not oppose that application.

[5] The informations against A and B then went to separate deposition hearings before Justices of the Peace on 13 March 2009. These hearings were conducted separately. The Justices heard witnesses and in each case the charge sheets record they were dismissed because there was insufficient evidence (to justify a trial). The tape recordings of these proceedings have been wiped.

[6] Mr Ruane advises that during the course of those hearings there was argument before the Justices of the Peace as to suppression of name. Counsel for the officers submitted that the prosecutions were without merit. Counsel also relied upon a letter from a manager of Canterbury Prison Services, which is set out and discussed later in this judgment. The Justices did not formally call on the appellant for submissions. (In these proceedings he has complained that he did not have an opportunity to be heard.) The Justices of the Peace imposed final suppression orders.

[7] Mr Forrest appeals now against the final orders for suppression of name of these two officers. He relies on the Court of Appeal decision in *R v Liddell* [1995] 1 NZLR 538, later decisions of the Court of Appeal, and of the full Court. In *Abbott v Wallace* [2002] NZAR 95, Salmon and Potter JJ dismissed a refusal of a District Court Judge to grant suppression of the name of Constable Abbott pending a private prosecution for murder following a fatal shooting in Waitara. That decision proceeded by applying the principles in *Liddell* and in the Court of Appeal decision: *Lewis v Wilson and Horton Ltd* [2000] 3 NZLR 546. Earlier, in May 2000, Mr Abbott had applied unsuccessfully for an interim injunction to prevent the New Zealand Herald from publishing details of his identity: *A v Wilson and Horton Ltd* [2000] NZAR 428.

[8] Mr Ruane appeared on behalf of the respondents. After referring to *Liddell*, *Lewis*, and *Abbott* Mr Ruane marshalled a number of factors.

1. That the appeal was against an exercise of discretion by the Justices.

2. That these private prosecutions were entirely without merit, and laid after the police elected to take no action.

3. There is no public interest in publishing the names of the respondents.

4. Weight should be given to the matters set out in a letter from a Mr Ian Bourke, Assistant Regional Manager, Canterbury Prison Services, who said:

> If the nature of the allegations made against these officers was to become common knowledge amongst the prison population the experience is that other prisoners will attempt to take advantage of the situation. This would place a great deal of pressure on the officers, as well as invite further allegations from opportunist prisoners.
>
> Consequently if the officers' names are published it will compromise their ability to perform their duties within the prison environment. Should that occur, the Department of Corrections may regrettably have no option but to stand down the officers from their duties.

> There are further concerns for the families of these two officers. These allegations are serious and publicity concerning these proceedings would be most distressing to the officers' families.

[9] Mr Ruane could not sustain Mr Bourke's arguments in the first two paragraphs. Mr Ruane had to agree that within the prison community the fact that Mr Forrest had brought private prosecutions against four Department of Corrections officers for assault would be well known. It is likely well known within the prison community who those officers are, and that the prosecutions failed.

[10] It seems to me that Mr Bourke's argument in the third paragraph is one which appeals to being protected from and having to defend meritless accusations in society. Mr Forrest disputed the proposition. I agree, however, that any publicity concerning those proceedings naturally for those reasons is likely to be to a degree distressing to the officers and families, disturbing their private life. This is an appeal to privacy.

[11] Reduced to its essentials, Mr Ruane is arguing that these were private prosecutions without merit which warrant name suppression because in the circumstances naming the officers is an unjustified interference with the right of corrections officers and their families to enjoy a private life, outside of their jobs, this private life being disturbed by the consequential embarrassment by being named publicly as a defendant in charges of assault.

[12] The suppression orders were made pursuant to s 140(1) of the Criminal Justice Act 1985 which provides:

> **140 Court may prohibit publication of names**
>
> (1) Except as otherwise expressly provided in any enactment, a court may make an order prohibiting the publication, in any report or account relating to any proceedings in respect of an offence, of the name, address, or occupation of the person accused or convicted of the offence, or of any other person connected with the proceedings, or any particulars likely to lead to any such person's identification.

[13] Section 140 has to be interpreted so far as possible consistently with the New Zealand Bill of Rights Act 1990. Section 6 provides:

> **6 Interpretation consistent with Bill of Rights to be preferred**
>
> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

Section 14 provides:

> **14 Freedom of expression**
>
> Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

[14] The discretion in s 140, whether or not to suppress the name of an accused, has to be exercised according to law, that is, in a principled manner. The manner of exercise of this power is now settled by the authorities.

[15] The starting point of analysis is to first consider the application of the requirements of open justice and freedom of expression recognised by s 14 of the New Zealand Bill of Rights Act. The two principles have different origins and purposes: open justice - transparency to discipline judging; freedom of expression - as a fundamental right in a free society. But in our New Zealand jurisprudence the two principles tend to be merged in application, because the ability to report and discuss judging protects open justice. The merging of the two principles is captured in a passage in the judgment of McGrath J in *Television New Zealand Ltd v Rogers* [2008] 2 NZLR 277 at [118]-[121]. In paragraph [120] McGrath J said:

> [120] There are statutory provisions permitting exceptions to openness which allow, and at times require, the courts to suppress reports of certain evidence and to prohibit identification of offenders and witnesses in certain circumstances. These exceptions are, however, all administered from a starting point that emphasises the importance of open justice and freedom of expression. Orders prohibiting publication of evidence, submissions or even a court's judgment will also be made where that is necessary to protect prejudicial material from affecting the fairness of a trial. Those reasons generally disappear once a trial has concluded. Thereafter a strong onus lies on any person seeking to continue a prohibition on publication to show grounds that justify that course.

[16] The Court of Appeal in *Lewis* has usefully collected some factors as usual to take into account when applying s 140.

> [42] Factors it is usual to take into account in deciding whether the prima facie presumption should be displaced in the case include:

- whether the person whose name is suppressed is acquitted or convicted. If acquitted, the Court may more readily apply the power to prohibit publication, although in *R v Liddell* the Court recognised (in adoption of *R v D (G)* (1991) 63 CCC (3d) 134) that the public has an interest in acquittals also;

- the seriousness of the offending. Where a person is convicted of a serious crime it will only be in rare cases that name suppression will be ordered. Where the charge is "truly trivial", particular damage caused by publicity may outweigh any real public interest (*R v Liddell* at p 547);

- adverse impact upon the prospects for rehabilitation of a person convicted: see, for example, *B v B* (High Court, Auckland, HC 4/92, 6 April 1993, Blanchard J);

- the public interest in knowing the character of the person seeking name suppression, an interest which has been acknowledged in cases involving sexual offending, dishonesty, and drug use (see, for example, *R v Liddell*; *M v Police* (1991) 8 CRNZ 14; *Roberts v Police* (1989) 4 CRNZ 429); and

- circumstances personal to the person appearing before the Court, his family, or those who work with him and impact upon financial and professional interests. As it is usual for distress, embarrassment, and adverse personal and financial consequences to attend criminal proceedings, some damage out of the ordinary and disproportionate to the public interest in open justice in the particular case is required to displace the presumption in favour of reporting.

> [43] The Judge must identify and weigh the interests, public and private, which are relevant in the particular case. It will be necessary to confront the principle of open justice and on what basis it should yield. And since the Judge is required by s 3 to apply the New Zealand Bill of Rights Act 1990, it will be necessary for the Judge to consider whether in the circumstances the order prohibiting publication under s 140 is a reasonable limitation upon the s 14 right to receive and impart information such as can be demonstrably justified in a free and democratic society (the test provided by s 5). Given the congruence of these important considerations, the balance must come down clearly in favour of suppression if the prima facie presumption in favour of open reporting is to be overcome.
>
> (at 558-559)

[17] There is no doubt that all the Court proceedings so far have been conducted in public, the first and principal requirement of the principle of open justice. As noted, the tapes of the depositions have been wiped. In the absence of recorded reasons it is necessary now to examine whether those decisions are justified.

[18] It is particularly important to ensure that the law is applied without fear or favour. Name suppression could not be justified simply because a prisoner has brought charges against a corrections officer. Such a reason runs the risk of having one law for corrections officers and another for other people.

[19] Mr Ruane's argument appeals to the factors set out in paragraph [42] of *Lewis*. But there is some difficulty in applying these factors. Normally there would be a public interest in discussing publicly allegations of criminal conduct against corrections officers. Further, as the last bullet point demonstrates the Court accepts it is usual for there to be some distress, embarrassment and adverse consequences. It goes on to say that some damage out of the ordinary and disproportionate to the public interest in open justice in the public case is required to displace the presumption in favour of reporting.

[20] However, the Court of Appeal said in *Liddell* at 547, per Cooke P for the Court:

> 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. …

[21] In ordinary criminal proceedings, those brought by the police or on an indictment prosecuted by Crown counsel, the Court presumes that they are being brought against a detached competent assessment that they are likely to succeed. In the case of charges laid by indictment the Crown prosecutors are obliged to follow the Crown Law Office guidelines of 1992 which define clearly that the individual prosecutor must be personally of the view that it is more likely than not that the charge will be proved.

[22] No such restraint impedes the right of a private individual to initiate a private prosecution. A wholly unmeritorious prosecution can be brought solely for the purpose of embarrassing an accused by reason of the publicity that would ensure. I am not finding that this was Mr Forrest's motive. In Court proceedings informants and any other persons have an absolute privilege to say what they like about the

accused or the defendant. This conduct can impose a punishment on the accused or the defendant whether or not they have done any wrong.

[23] Mr Forrest's principal argument, which he reiterated in supplementary submissions, is that the respondents have no right of privacy as public officials. He submitted:

> There is no right of privacy for the respondents taking into account that it is a public prison …
>
> That it remains the appellant's view that he considers that it remains relevant that the respondents' alleged actions was that of Corrections officers (Public officers) in the course of their public duties in a public institution and that the appellant does not consider that such circumstances can justify suppression of name … .

[24] There will be many occasions in which the names of officials will warrant no suppression on the grounds of privacy. But it would grossly oversimplify the considerations that have to be balanced under s 140 of the Criminal Justice Act to adopt a simple policy that there is no entitlement for a suppression order if the applicant is a public official and the subject matter involves the discharge of their duties.

[25] Police and Corrections officers and their families also have private lives, and are entitled to "*the comforts of society*". *Entick v Carrington* (1765) 19 State Tr 1029; 95 ER 807, [1588-1744] All ER Rep. 41 at 45. The right of freedom of expression has to be balanced with other fundamental rights and freedoms: see s 28 NZBORA and see also Elias CJ in *TVNZ v Rogers* [2008] 2 NZLR 277 at [36]. Corrections officers and their families are entitled to the same benefits that name suppression gives to other persons in a similar situation. For the law applies without fear or favour to all persons. To be sure, the fact that they are public officials may make it more likely that there will be a legitimate public interest in any Court case over their conduct.

[26] There have been a number of decisions in which the Courts have considered suppression of the names of police officers in prosecutions. I have already referred to *Abbott*. That involved a case which generated enormous public interest. A police officer had shot a man. In that particular case two separate full Courts were

impressed by the fact that the shooting was in the course of a public duty and in a public place.

[27] The *Abbott* decisions were naturally relied upon by Mr Forrest. *Abbott* was also a case of a private prosecution. The name of the police officer in that case was already known to the local community. He had been relocated. He was seeking suppression of name to protect his private life and that of his family in his new home environment. But it was not granted – see [9].

[28] In *R v Police* HC Wellington Registry AP256/02 19 November 2002 Wild J considered an appeal against a refusal of a District Court Judge to continue interim suppression of name of a police constable facing police charges of causing grievous bodily harm to a teenager and assaulting that young man using his torch as a weapon. He was charged indictably. There was considerable media interest in the case. The police officer was seeking suppression of his name to protect himself and his family, not only from being the subject of public discussion but also from attack. In the past there had been a number of attacks on his home. The Judge granted interim name suppression pending the outcome of the trial.

[29] The case of *T v Police* HC Timaru AP31/94 1 December 1994 Tipping J considered an appeal against the refusal of two Justices of the Peace to continue an interim order for suppression of a police officer's name. He faced seven charges of assault of varying degrees of seriousness. They involved seven different complainants. The seven charges were unrelated. Tipping J pointed out the police officers are entitled to the same application of the law as anybody else. He also pointed out there can be no suggestion that a police officer's name is going to be suppressed simply because he or she is a police officer. The Justices had expressed some misgiving that the police officer had already had five months' medical treatment for stress and was requiring additional treatment. But Tipping J had an updated medical report suggesting a deterioration in that condition. For this and other reasons the Judge granted an interim suppression of name.

[30] In the case of *Heyrick v Ministry of Transport* (1989) 5 CRNZ 32, Holland J heard an appeal against a refusal of a District Court Judge to decline to continue an

order of interim suppression against a police officer charged by the Ministry of Transport with dangerous driving causing death of three persons. The Judge declined to grant an order suppressing his name. He emphasised the importance of maintaining public confidence that the Courts would not favour treatment for a policeman in the Courts.

[31] To my mind, however, there is a distinction between a public prosecution of a police officer or a corrections officer on a criminal charge, which the Courts will approach as being brought responsibly, on a basis that is more likely than not to succeed, on the one hand, from a private prosecution against a police officer where the case did not get past depositions.

[32] In the latter instance I consider that police officers and corrections officers are entitled to the same treatment as would be extended any persons in a similar situation. Consider for example two neighbours who get into a fight. One of the neighbours brings a meritless charge of assault by indictment against the other, where the defendant has in fact been responding to physical contact from the informant. The charge is summarily dismissed at depositions. There would in that instance be a significant case that the defendant and his family should not have to suffer the social consequences of publicity. That consequence invokes the interests of justice criterion implicit in s 140 of the Criminal Justice Act.

[33] I am left in no doubt that this appeal should be dismissed. Accordingly, it is. There will be no order for costs.

Solicitors:
C M Ruane, Christchurch, for Respondents

cc: B D Forrest