IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CRIMINAL DIVISION)

JP APPEAL NO. 2/13

BETWEEN **COOK ISLANDS POLICE**

Appellant

AND **TUPUNA RAKANUI**

Respondent

Date: 8 May 2013

Counsel: Ms Henry for the Police
Mr George for the Respondent

Judgment: 9 May 2013

JUDGMENT OF THE HONOURABLE JUSTICE DAME JUDITH POTTER

[DSS 0835]

Introduction

[1] The Respondent faces a charge of injuring with intent to injure pursuant to s 209 (2) of the Crimes Act 1969. It appears to be common ground that the incident giving rise to the charge was a domestic one in which the alleged victim is the Respondent's wife.

[2] On 15 April 2013 Justice of the Peace Solomona recorded the entry of a Not Guilty plea, released the Respondent on bail at large and recorded "An application by counsel for Name Suppression has been granted". The case was adjourned.

[3] When the proceeding was called again on 8 May 2013 the name suppression was continued pending issue of this judgment.

[4] The Crown appeals against the continuation of interim name suppression. The Crown's application is opposed by the Respondent.

Decision of the Justice of the Peace

[5] When granting interim name suppression on 15 April 2013 the Justice of the Peace gave no reasons.

[6] In *Police v Yvonne Quarter*[1], which also concerned an appeal against an order for name suppression made by a Justice of the Peace, Hugh Williams J considered in some detail one of the grounds of appeal, that the Justice of the Peace failed to give appropriate reasons for the orders he made suppressing the appellant's name. The Court cited lengthy passage from a judgment of the New Zealand Court of Appeal in *Lewis v Wilson & Horton Limited*[2]. The relevant passage is readily available by reference to the judgment in *Police v Yvonne Quarter* at [9] and I do not need to repeat it here. The Court of Appeal referred to three main reasons why the provision of reasons by judges is desirable which may be summarised:

a) the provision of reasons by a judge is an important part of openness in the administration of justice.

b) failure to give reasons means that the lawfulness of what is done cannot be assessed by a Court exercising supervisory jurisdiction.

c) the requirement to give reasons provides a discipline for the judge exercising the discretion which is the best protection against wrong or arbitrary decisions and inconsistent delivery of justice.

[7] At [10], after citing the relevant passage from *Lewis v Wilson & Horton Ltd*, Hugh Williams J concluded that "... an almost invariable consequence of the conduct of criminal proceedings in open Court with the availability of reporting necessitates judicial officers giving reasons for their decisions". He noted as important, again referring to *Lewis v Wilson & Horton Ltd*, that the reasons may be abbreviated[3]. He considered this important in a busy Court presided over by Justices of the Peace. He noted that the Court of Appeal made clear that however brief the reasons given, persons in the Court and the

[1] *Police v Yvonne Quarter* CR 137/2009 HCCI Williams J 8 April 2011
[2] *Lewis v Wilson & Horton Ltd* [2003] NZLR 546(CA)
[3] *Lewis v Wilson & Horton Ltd* at [81]

public at large through their surrogate, the media, are entitled to know the reasons why the Court decided in its discretion, to take a particular action.

The Law

[8] Section 25 of the Criminal Justice Act 1967 governs name suppression in the Cook Islands:

> High Court may prohibit publication of name – (1) Except as otherwise expressly provided in any enactment, the High Court may in its discretion prohibit the publication, in any report relating to any proceedings in respect of any offence, of the name of the person accused or convicted of the offence, or the name of any other person connected with the proceedings;
>
> Provided that the High Court shall not prohibit the publication of the name of the person accused or convicted of the offence if that person has been previously convicted of any offence punishable by imprisonment.
>
> ...

[9] Section 76 of the Criminal Procedure Act 1980-81 provides that the Court may close the Court for the whole or part of the proceedings if it is in the interests of justice or in protection of public morality or the reputation of victims of alleged sexual offending or extortion. The Court also has a power to prohibit the publication of any report or account of the proceedings in whole or in part.

[10] Reference to comparable provisions in New Zealand law is relevant and instructive. Section 140 of the New Zealand Criminal Justice Act 1985 provides to the Court a discretion to prohibit publication of names. Section 138 of that Act contains a provision similar to s 76 of the Cook Islands Criminal Procedure Act.

[11] In New Zealand the exercise of the Court's discretion must have regard to the provisions of the New Zealand Bill of Rights Act 1990. The equivalent in the Cook Islands is the Cook Islands Constitution ("the Constitution"). Relevant provisions are:

- Article 64(1)(b) affirms a right to equality before the law and protection of the law

- Article 64(1)(e) affirms the right to freedom of speech and expression

- Article 64(2) provides that these rights may be limited as follows:

> "(2) It is hereby recognised and declared that every person has duties to others, and accordingly is subject in the exercise of his rights and freedoms to such limitations as are imposed, by any enactment or rule of law for the time being in force, for protecting the rights and freedoms of others or in the interests of public safety, order, or morals, the general welfare, or the security of the Cook Islands."

- Article 65(1)(d) provides that no enactment shall be construed or applied so as to deprive any person of the right to a fair hearing, in accordance with the principles of fundamental justice.

- Article 65(1)(e) provides that no enactment shall be construed or applied so as to deprive any person charged with an offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal.

The principle of open justice

[12] In *Police v Yvonne Quarter* which the Court noted was in the nature of a test case, Hugh Williams J comprehensively considered the authorities which have developed and applied the principle of open justice. It is unnecessary that I repeat the same detailed analysis. In that judgment the Court referred extensively to the judgment of the New Zealand Court of Appeal in *Lewis v Wilson & Horton Ltd* which summarised the current applicable law from [40] to [43]. The general principle is (other than in special circumstances) that criminal prosecutions are conducted in Courts which are open to the public and to the public surrogate, the media. Therefore whether a defendant's name or other details of the case are published starts from the standpoint that publication should be permitted unless circumstances show that it is inappropriate.

[13] This principle was succinctly stated in *R v Liddell*[4]: "...the starting point must always be the importance in a democracy of freedom of speech, open judicial proceedings, and the right of the media to report the latter fairly and accurately as 'surrogates of the public'."

[14] In *Lewis v Wilson & Horton Ltd* the Court of Appeal noted that it had declined to lay down any code to govern the exercise of a discretion but recognised that the starting point must always be the importance of freedom of speech, the importance of open judicial proceedings, and the right of the media to report Court proceedings. The Court stressed that the prima facie presumption as to reporting is always in favour of openness. The Court then referred to factors that it is usual to take into account in deciding whether the prima facie presumption should be displaced in the particular case. They include:

- whether the person whose name is suppressed is acquitted or convicted (this factor does not apply in this case. The Respondent has yet to be tried.)

- the seriousness of the offending. Where the charge is "truly trivial", particular damage caused by publicity may outweigh any real public interest.

- adverse impact upon the prospects of rehabilitation of a person convicted (there is no conviction in this case)

- the public interest in knowing the character of the person seeking name suppression, particularly in cases involving sexual offending, dishonesty and drug use (not directly applicable in this case)

- circumstances personal to the person appearing before the Court, his family, all 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.

[4] *R v Liddell* [1995] 1NZLR 538 at 546

[15] The Court continued at [43] that 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... the balance must come down clearly in favour of suppression if the prima facie presumption in favour of open reporting is to be overcome."

Submissions

[16] The Crown acknowledged that it is usual for some distress, embarrassment and adverse personal circumstances to result from criminal proceedings. It noted that the Respondent is a high profile government official and referred to the submission made on his behalf, that the resulting publicity if name suppression were discontinued, would have a negative impact on his job. The Crown submitted that these factors are not such as to be disproportionate to the public interest in open justice so as to displace the presumption in favour of open justice.

[17] The Crown also submitted that the circumstances in which the alleged offending arose, and the Respondent's submissions that because his wife will decline to give evidence the Crown would not be able to prove the charge, are not factors that are relevant in considering the issue of name suppression.

[18] The Crown further submitted that any potential risk to the Respondent's right to a fair trial can be sufficiently mitigated by a direction from the judge to the jury.

[19] For the Respondent, Mr George placed considerable significance on his submission that the prosecution is unlikely to succeed. He noted that the Respondent's wife is not a compellable witness for the prosecution under s 6 of the Evidence Act 1968 and advised that the couple have reconciled and she would not give evidence at the trial.

[20] He submitted that the charge arises from a domestic dispute and that if the name of the Respondent were to be published, his wife would inevitably be identified and both she and the Respondent would become "victims". He referred to the Respondent's previous good record and that he and his wife are both senior members of the Avarua Church. He noted the high profile position of the Respondent and submitted that in that situation and

given the circumstances surrounding the offending, publication would impose an acute additional punishment on the appellant which would be disproportionate to the public's right to know what is going on in the Courts.

[21] He emphasised the serious potential damage to the defendant's reputation in the small community of Rarotonga in circumstances where, in his submission, the charge is unlikely to be able to be proved at trial.

[22] He submitted that this is a case where very special circumstances exist which give rise to compelling reasons to displace the principle of open justice.

Evaluation

[23] The appellant is charged with serious criminal offending. The charge of injuring with intent to injure certainly cannot be described as "truly trivial".

[24] Whether the charge can ultimately be proved is not a matter for this Court. That can only be determined by the jury, or the judge in a judge alone trial, after hearing all the evidence placed before the Court by the prosecution and the defence, if the accused elects to give or call evidence. I note, somewhat unnecessarily, that the strength of the Crown's case has never been identified in the authorities as a factor relevant in determining the issue of name suppression prior to trial.

[25] I accept that the impact of publication of the Respondent's name will inevitably cause distress and embarrassment for him and his family. Such distress and embarrassment is likely to be greater for a person in a high profile position such as that held by the Respondent, but the Court will always be extremely cautious about recognising positions of seniority or privilege within the community as a proper basis in weighing the interests, public and private, in a case concerning name suppression.

[26] In weighing those interests in this case, I do not accept that there are special circumstances or compelling reasons relating to the Respondent and his personal and public circumstances, which outweigh the interests of the public in open justice.

[27] I consider the right of the Respondent to a fair trial can be sufficiently protected by a clear direction by the judge to the jury in the case, that they must put from their minds and considerations, any prior knowledge of the accused, the alleged victim, or the circumstances of the case. The judge will firmly direct the jury, as in all criminal trials, that their duty is to reach their decision only on the evidence given in Court on oath or affirmation, and that any matters of prejudice for or against the accused or anyone else involved in the case, must be put entirely from their minds.

Result

[28] The order for interim name suppression which I continued by Minute dated 8 May 2013, is now discharged.

Potter, J

Judith Potter, J