ORDER PROHIBITING PUBLICATION OF H'S NAME FOR FIVE WORKING DAYS AFTER THE DATE OF THIS JUDGMENT.

IF DURING THIS PERIOD H FILES A MEMORANDUM CONFIRMING THAT LEAVE TO APPEAL WILL BE SOUGHT, THE INTERIM ORDER WILL BE FURTHER EXTENDED UNTIL THE EXPIRY OF THE PERIOD SPECIFIED IN S 291(2) FOR FILING A NOTICE OF APPLICATION FOR LEAVE TO APPEAL OR THE APPEAL IS FINALLY DETERMINED, IF THE NOTICE IS FILED WITHIN THE SPECIFIED TIME AND LEAVE IS GIVEN.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA34/2023
[2023] NZCA 240

BETWEEN	H (CA34/2023) Appellant
AND	THE KING Respondent

Hearing: 9 May 2023

Court: Miller, Woolford and Cull JJ

Counsel: D B Stevens for Appellant
Z A Fuhr for Respondent

Judgment: 15 June 2023 at 11.00 am

JUDGMENT OF THE COURT

A The appeal against refusal of name suppression is dismissed.

B Interim order made suppressing H's name and any details which may identify him until the expiry of five working days after the date of this judgment. If during this period counsel files a memorandum confirming that leave to appeal will be sought, the interim order will be further extended until the expiry of the period specified in s 291(2) for filing a notice of application

for leave to appeal or the appeal is finally determined, if the notice is filed within the specified time and leave is given.

REASONS OF THE COURT

(Given by Woolford J)

[1] On 9 September 2022, H (the appellant) was sentenced to two years and eight months' imprisonment on one charge of arson.[1] At the same time, the sentencing Judge dismissed an application for permanent suppression of his name. He now appeals against dismissal of his name suppression application.

Factual background

[2] On 28 November 2018, H started acting as an advocate for the tenant of a sushi shop in Taupō and the tenant's elderly parents. The sushi shop was facing problems on multiple fronts — from the local council on food issues, from the landlord for back rent and from a construction company who had not been paid in full for a fitout of the shop. On 29 November 2018, the construction company chained the front door and boarded up the rear of the sushi shop.

[3] On the evening of 30 November 2018, the appellant bought a bottle of methylated spirits from a service station after asking the attendant, "Does this light fires?" His partner then drove him to the sushi shop, where he walked up an alley way next to the shop, broke the rear window of the shop, poured methylated spirits on to a bench and lit it. He then discarded the methylated spirits bottle into a nearby rubbish skip and walked back to his car.

[4] The fire grew to such a scale that 55 firefighters from across the region were required to bring the fire under control. The total estimated cost of the damage to the shop and adjoining premises was $2.7 million.

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[1] *R v H* [2022] NZDC 17790.

District Court decision on name suppression

[5] The District Court decision on name suppression was as follows:[2]

> [43] I turn now to consider your application for final suppression of name. This application is based on extreme hardship to you and the danger to your safety. Dr Breen's opinion was that you had fixated on the consequences for you and your family from name suppression and that you expressed to her you would follow through with that by trying to kill yourself if your name were published. She could not exclude a manipulative component from those statements.
>
> [44] Having reached an end sentence of imprisonment, you will be living in a managed environment and the risk of suicide will be less than it would be in the community. It is likely to be better for you in the prison population if they know the reason for your imprisonment, instead of speculating on other causes such as sexual offending. In these circumstances, I am not satisfied that extreme hardship is made out and I decline the application for permanent suppression of name.

Name suppression principles

[6] Section 200(2) of the Criminal Procedure Act 2011 sets out the circumstances in which a Court may suppress the identity of a defendant. It involves a two-stage analysis.[3]

[7] The first (and threshold) stage, requires the Court to be satisfied that publication would be likely to cause "extreme hardship to the person charged with… the offence"[4] or "endanger the safety of any person".[5]

[8] If the threshold is met, the second stage requires a discretionary assessment. The Court must weigh the competing interests of the applicant and the public:[6]

> [12] … In a case turning, as this one does, on subs (2)(a) … and (e), relevant considerations accordingly include the open justice principle, the seriousness of the offending, the presumption of innocence, the public interest in knowing the applicant's character and identity, the public's right to freedom of expression, the applicant's youth and the likely impact publication will have on the applicant's prospects of rehabilitation, any other circumstances personal to the applicant, the interest of victims and the interests of other affected persons.

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2 *R v H*, above n 1.
3 *Fagan v Serious Fraud Office* [2013] NZCA 367 at [9].
4 Criminal Procedure Act 2011, s 200(2)(a).
5 Section 200(2)(e).
6 *D (CA443/2015) v Police* [2015] NZCA 541, (2015) 27 CRNZ 614 (footnotes omitted).

[9] The onus on an applicant for suppression to displace the presumption of open justice.[7]

[10] The focus on this appeal is on the first-stage threshold question, which is an evaluative conclusion amenable to general appeal.[8] This Court may reach its own conclusion on the merits.

[11] "Extreme hardship" is a "very high" threshold.[9] This Court has observed that "hardship" on its own means "severe suffering or privation", the qualifier "undue" (used in s 200(2)(c)) indicates something more, while the word "extreme" indicates something more again.[10] A contextual assessment is required, comparing the contended hardship with the consequences normally associated with publication. The appellant must show something well beyond the ordinary consequences of publication.[11]

[12] "Likely to cause" in the context of s 200(2) means "a real and appreciable possibility".[12]

[13] In *D (CA443/2015) v Police*, this Court set out the principles that apply where suppression is sought on the basis that publication will cause the defendant to self-harm or commit suicide.[13]

> (a) The possibility of self-harm or suicide always gives a court cause for anxious consideration. Suicide would be a devasting and unacceptable consequence of publication and it cannot always be assumed that an at-risk person will behave rationally. But the court cannot adopt the stance that any risk is unacceptable. Under s 200 it must be satisfied that the relevant subs (2) risk is likely; that is, a real and appreciable possibility.
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> (b) Judges know that people may experience suicidal ideation when confronted with criminal proceedings, which are immensely stressful,

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7 *Robertson v Police* [2015] NZCA 7 at [43].
8 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [16].
9 *Robertson v Police*, above n 7, at [48] citing Tony Deverson and Graeme Kennedy (eds) The New Zealand Oxford Dictionary (Oxford University Press, Melbourne, 2005) at 491.
10 At [48] citing *R v N* [2012] NZHC 2042 at [21]; *Rougeux v Police* [2014] NZHC 979 at [20]; *Jung v Police* [2014] NZHC 949 at [17]; and Law Commission *Suppressing Names and Evidence* (NZLC R109, 2009) at [3.39].
11 *Robertson v Police,* above n 7, at [49]; and *D* (*CA443/2015) v Police*, above n 6, at [11].
12 *D (CA443/2015) v Police*, above n 6, at [30(a)].
13 At [30] (footnotes omitted).

but very seldom, if ever, act upon it. The proceeding is normally the principal cause of stress, although publication identifies the proceeding with the defendant and may cause great anxiety at particular points in time.

(c) For these reasons a defendant who relies on a risk of self-harm or suicide attributable to publication of his or her name must normally point to something more than the usual feelings of anxiety and despair that may attend proceedings. It is usual to offer evidence that the defendant is psychologically troubled for other reasons and is particularly susceptible to publicity. This may be coupled with evidence that the case will attract unusually extensive or critical media publicity.

(d) The defendant's condition may be such that it also impinges on his or her ability to participate fully in the trial. If so, there is a fair trial risk to consider as well.

(e) Anything that reinforces or mitigates other risk factors may affect the likelihood that publication will precipitate self-harm or suicide.

(f) The opinions of medical professionals deserve respect, but a court need not defer to them. It is unlikely to question an uncontradicted medical diagnosis of the defendant's condition, but such opinions may assume that any risk is too much risk or (as in this case) urge suppression without adequately addressing alternative ways in which the risk might be managed.

(g) There normally are ways of managing the risk. Where possible, medical reports prepared to assist the courts should recommend and evaluate those options. For example, a brief period of suppression may reconcile the defendant to the inevitability of publicity after the initial shock of arrest and first appearance. Support structures can be identified and deployed. Sensitive information of a personal nature may be suppressed.

(h) Suppression does not follow automatically from the court being satisfied that a relevant risk exists. The court must further consider the second issue: whether an order ought to be made in the exercise of discretion.

Expert reports

[14] The Court had available a psychiatric report dated 8 May 2019 from Dr Ian Goodwin, two psychological reports dated 1 November 2019 and 20 July 2021 from Ms Sabine Visser, and a psychological report dated 18 August 2022 from Dr Tanya Breen.

[15] H presented to Dr Goodwin as a 25-year-old Korean with previous diagnoses of Autism Spectrum Disorder (ASD), a learning disability, Post-Traumatic Stress Disorder (PTSD), anxiety and depression.

[16] When questioned about name suppression, H told Dr Goodwin that he had significant worries about the impact loss of name suppression would have on his father and brother. H stated that his brother was a law student and H being named would bring great cultural "shame" upon the family. He stated that he thought this would lead to his family no longer supporting him and being left alone.

[17] H stated to Dr Goodwin that his identity had been "outed" on a Facebook group, which had led to his developing suicidal ideation, including definite plans on how to commit suicide. He stated that following this event, his family also received calls about him. H told Dr Goodwin,"If I lost name suppression I would suicide."

[18] Dr Goodwin was of the opinion that H appeared to have a significant pre-occupation with the issue of name suppression in keeping with his background diagnosis of ASD. He noted that H did have a significant previous history of deliberate self-harm and a well-documented history of not coping well with stress. Dr Goodwin was of the opinion that H's combined disabilities formed the basis of his poor capacity to deal with stress. He considered that H's combined disabilities and subsequent lack of coping capacity was such that his risk of deliberate self-harm or suicide in the event of him losing name suppression was high.

[19] Dr Goodwin stated that in reviewing H's most recent contacts with Mental Health Services, his treating team appeared to be acutely aware of his current situation and have formulated an appropriate plan to support him through the court process. This did not, however, alter Dr Goodwin's assessment of his risk of suicide if he should lose name suppression.

[20] In her report dated 1 November 2019, Ms Visser noted that H's overall functioning was in the borderline range, creating some difficulties with verbal comprehension and working memory. In addition to this, his PTSD and ASD impacted on his ability to meaningfully participate in a Court process without additional

assistance and adjustments. Ms Visser was of the view that H was a vulnerable individual and a sentence of imprisonment may be extremely detrimental and harmful to him.

[21] Ms Visser noted that H had a history of self-harm and had expressed clearly that if he was to receive a sentence of imprisonment, he would consider suicide. The risk of self-harm within the setting was high. If H was sentenced to a period of imprisonment, Ms Visser considered that special care needed to be taken on entering the prison and special arrangements put in place on release, as those with ASD have trouble with adjustment and experience high levels of distress when routines are disrupted.

[22] Ms Visser's second report, dated 20 July 2021, was completed following an interview with H at Mt Eden Prison where he was on remand in custody. H told Ms Visser that he had asked other inmates to kill him, but most declined. One, however, had agreed, but was subsequently removed from the unit. H further indicated that he attempted to strangle himself with a cord and on another occasion was said to have assaulted a prison officer. Ms Visser again recommended measures which would allow H to cope with a trial.

[23] In her report dated 18 August 2022, Dr Breen stated that on the three occasions when she discussed name suppression with him, H maintained that he would commit suicide if it was lifted. When asked why lifting of name suppression would trigger suicide, H said it was because of the shame his family would experience. He explained that the Korean community is small and prone to gossip, and this would adversely affect the reputations, business opportunities and careers of his parents or brothers. H also thought that his partner and her daughter would experience shame.

[24] Dr Breen said it was clear that H's only plan was suicide should name suppression be lifted. H expressed great fear of returning to prison and said he had a suicide plan that, if enacted, would manipulate prison officers into killing him. He did not elaborate on the plan.

[25] Dr Breen was of the opinion that in being unable to imagine, or even consider, an alternative to suicide should name suppression be lifted, H demonstrated both behavioural and inflexibility associated with ASD, and cognitive errors often present in people with anxiety and depression (that is, maximising the likely bad outcomes).

[26] Accordingly, Dr Breen believed that H would attempt to follow through with his threat to kill himself if name suppression was ended. H has an extensive history of suicidal thinking and behaviour. H was unwilling or unable to consider that the consequences of being identified may not be as bad as he predicted. Despite the above, Dr Breen could not exclude the possibility of a manipulative component to H's threat to commit suicide should name suppression be lifted. Dr Breen tried to explore the more general reasons for and against name suppression with H, but he maintained the position that his family should not have to suffer for something that he did.

Discussion

[27] Notwithstanding the general tenor of the expert reports, we are of the opinion that publication of H's name would not cause extreme hardship to him.

[28] First, and most importantly, his position has altered since he was diagnosed with a constellation of psychological difficulties and there is no updated medical opinion assessing H's current mental state or current risk. Despite Ms Visser's opinion that a sentence of imprisonment may be extremely detrimental and harmful to him, H has now been released from prison on parole. He lives in Silverdale, Auckland, and is studying for a Bachelor of Arts (Criminology) at the Auckland University of Technology (AUT). He had a wide range of supports in the community.

[29] A student adviser from Disability Support Services at AUT has written a letter of support for H. He is being supported in his studies by Disability Support Services through an Academic Accommodation Plan, which includes technology support with notetaking and using a laptop, as well as having extra time and a separate room for exams.

[30] In recognition of his ASD, H has also been receiving support from CCS Disability Action, a disability support and advocacy organisation, for academic

guidance, personal development, social stress, and study skills while at university. He has "regular counselling sessions … to discuss different methods to handle challenging life events and in effort to build coping strategies."

[31] The expert reports noted H's concern about the impact the loss of name suppression may have on his family and partner. There is, however, no evidence of shame or lack of support that would lead to him being left alone as he feared. H's brother is working as a lawyer and provided a statement of support to the Court. He notes that following receipt of support in the form of counselling and other services, H has started to take on better coping mechanisms and seems to be on a road to recovery. H's partner states in another letter of support submitted at sentencing that H is currently doing well with support from his family, herself, and his community support worker. He has regular counselling and is engaged in the community.

[32] H's ACC counsellor says that H continues to be well engaged and motivated, that he is making good progress and full use of his ACC counselling sessions to deal with his PTSD. H also self-referred to The Psychology Group, a private therapy practice, in 2022. That treatment was informed by Cognitive Behavioural and Acceptance and Commitment therapies with a particular focus on anxiety management.

[33] In a letter to the sentencing Judge dated 7 September 2022, H himself said he was managing with the help of CCS Disability Action, his partner, counsellor, and his family. He said, "I am and will be improving more and doing better in good way". In an affidavit dated 20 March 2023 and submitted for the appeal, H confirms that he has changed and does not want to lose his potential or enthusiasm to be better.

[34] Second, H has received a number of other convictions for offending in respect of which his name has not been suppressed. In 2012, he was convicted of two charges of theft, one of obtaining by deception and one of possessing a knife in a public place. H, then only 18 years old, was ordered to pay $555 reparation and ordered to come up for sentence if called upon for nine months. He was also convicted of theft in 2017, for which he was ordered to pay $290 reparation and sentenced to 70 hours community

work.[14] Then in 2022, H pleaded guilty to five charges of dishonesty. We are advised, however, that counsel has instructions from H to make an application to vacate his guilty pleas.

[35] Counsel advises that name suppression was only sought for the arson charge because it was seen as more serious than the dishonesty offending. Although the arson charge did result in a sentence of imprisonment, a series of dishonesty offences over a number of years is also serious and may reasonably attract the same fears about shaming his family and partner.

[36] Third, this is not a case that will attract unusually extensive or critical media publicity. In fact, there is no indication of any media interest in naming H as the offender in an arson which occurred in Taupō five years ago, in respect of which H has served his time and been released on parole.

[37] H has also advised that he had already been "outed" on a Facebook group, which caused him some stress at the time. He said it led to him developing suicidal ideation. Such publicity was, however, more than four years ago. H also no longer lives in the community where the arson occurred so any effect on him of media coverage in the community will be diminished.

[38] In conclusion, while reliance can no longer be placed on the managed environment of prison, which the Judge did in refusing name suppression, the letters of support and other material submitted at sentence suggest there are a number of protective factors which should help H manage any mental distress resulting from the lifting of suppression.

[39] We acknowledge the difficulties faced by H. We also acknowledge that there may be some negative impact on his mental health should there be any publicity. However, the evidence and in particular the expert reports relied upon by H is now somewhat dated. He has failed to establish that there is a current and appreciable risk of suicide satisfying the extreme hardship threshold in s 200(2)(a) or in the endangerment of his safety threshold in s 200(2)(e).

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14 *Police v [H]* [2017] NZDC 12372.

[40] The appeal is dismissed. H may, however, appeal, with leave, under ss 289 and 291 of the Criminal Procedure Act 2011, against our decision. In order to preserve H's position, we make an interim order suppressing H's name and any details which may identify him until the expiry of five working days after the date of this judgment. If during this period counsel files a memorandum confirming that leave to appeal will be sought, the interim order will be further extended until the expiry of the period specified in s 291(2) for filing a notice of application for leave to appeal or the appeal is finally determined, if the notice is filed within the specified time and leave is given.

Solicitors:
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