IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA188/2023
[2023] NZCA 305

BETWEEN	HAKYUNG LEE Appellant
AND	THE KING Respondent

Hearing: 8 May 2023

Court: Miller, Woolford and Cull JJ

Counsel: C B Wilkinson-Smith for Appellant
G R Kayes and L A Taula for Respondent
T C Goatley and S C Brougham for NZME Publishing Ltd, Stuff Ltd and Discovery NZ Ltd

Judgment: 19 July 2023 at 11.30 am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Cull J)

[1] Ms Lee is facing two charges of murder to which she has pleaded not guilty. [1] Her application for interim name suppression pending the end of trial was declined.[2] Ms Lee now appeals that decision. A trial date is set for 29 April 2024.

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1 Crimes Act 1961, ss 167 and 172. The maximum penalty is life imprisonment.
2 *L v R* [2023] NZHC 600 [Judgment under appeal] at [31].

[2] The issue on appeal is whether the Judge erred in finding that the publication of Ms Lee's name did not demonstrate a real and appreciable risk of her self-harm or suicide, such that continued name suppression was justifiable.

Background

[3] Between June and July 2018, Ms Lee is alleged to have murdered her two children by giving them an overdose of her prescription medicine. She allegedly hid the bodies in suitcases which were stored along with her other property in a storage garage. Ms Lee changed her name and flew to South Korea in July 2018, remaining there until 2022. Ms Lee made a number of suicide attempts and in between March and July 2022 was admitted to a mental health facility in South Korea for self-harm reasons.

[4] On 11 August 2022, the children's remains were located in suitcases that had been stored in the New Zealand storage facility. An arrest warrant was issued on 22 August 2022 and Ms Lee was extradited to New Zealand in November 2022.

[5] In advance of Ms Lee's first appearance, the New Zealand Police applied for and was granted suppression of Ms Lee's name and identity. At her first appearance in the District Court on 30 November 2022, suppression orders were made in respect of the identities of Ms Lee and her family members until her next appearance. A further application for name suppression, opposed by NZME Publishing Ltd and Stuff Ltd, was made until 16 February 2023.[3] In the decision under appeal, Hinton J considered the application for continued name suppression and declined it on 23 March 2023.[4]

The High Court decision

[6] The Judge first addressed whether the publication of Ms Lee's name in relation to these proceedings is likely to increase her risk of self-harm or suicide, so as to be likely to cause extreme hardship to her under s 200(2)(a) or endanger the safety of her

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3 *R v Lee* HC Auckland CRI-2022-092-6662, 14 December 2022 at [14].
4 Judgment under appeal, above n 2.

person under s 200(2)(b) of the Criminal Procedure Act 2011 (CPA).[5] The Judge noted that the two grounds were linked in this case and considered them together.

[7] In addition, the Judge gave consideration to whether publication would create a real risk of prejudice to a fair trial under s 200(2)(d) of the CPA.[6] The argument raised was not in the context of tainting the jury pool, but instead that publication would impede Ms Lee's ability to participate in her defence effectively; or in further medical examination due to deteriorated mental health flowing from publication.[7] The Judge considered there was insufficient evidence to support the proposition and declined Ms Lee's application for continued name suppression.[8]

Name suppression principles

[8] Section 200 of the CPA specifies the circumstances in which a court may suppress the identity of a defendant.

[9] There is a two-stage approach to determining applications for name suppression under s 200(2) of the CPA:[9]

> (a) first, the Court must decide whether the threshold has been crossed; i.e. that one of the grounds, (in this case "extreme hardship"), is "likely" to occur as a result of publication; and
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> (b) second, if the threshold test is met, the Court must go on to decide whether the discretion to make a suppression order ought to be exercised, having regard to such matters as the public interest in knowing the appellants' identities, the seriousness of the alleged offending, and whether the appellant has yet been convicted. In exercising its discretion, the Court must weigh the competing interests of the applicants and the public interest in open justice. In determining whether open justice should yield, the balance of considerations

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5 At [17].
6 At [25].
7 At [28].
8 At [30].
9 *Robertson v Police* [2015] NZCA 7 at [39]–[41]. See also *Fagan v Serious Fraud Office* [2013] NZCA 367 at [9]; and *D(CA443/15) v Police* [2015] NZCA 541, (2015) 27 CRNZ 614 at [10]–[12].

must "clearly favour" suppression before an order will be made.

[10] The first stage is an evaluative assessment and an appeal from it is a general appeal by way of re-hearing.[10] The second stage involves the exercise of a discretion, where appellate reconsideration is circumscribed.[11]

[11] This appeal concerns the first threshold question, whether extreme hardship is likely to occur as a result of publication.

The appeal

[12] Mr Wilkinson-Smith, for Ms Lee, submits that the Judge made a number of errors which led to erroneous findings on the lack of extreme hardship and publication endangering safety. In summary, he contends that the Judge:

(a) failed to give proper weight to Dr Duggal's opinion;

(b) failed to correctly apply *D (CA443/2015) v Police*; and

(c) erred in taking into account:

(i) that the lack of affidavit material from Ms Lee was material to the decision;

(ii) that the protective measures in prison were sufficient to mitigate the risk of harm; and

(iii) open justice as part of the first stage of the assessment.

[13] We consider each ground in turn.

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10 *Austin, Nichols and Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [16].
11 *Parker v R* [2020] NZCA 502 at [29]–[30].

Failure to give weight to the expert psychiatric opinion

[14] Mr Wilkinson-Smith submits that the Judge did not give proper weight to Dr Duggal's opinion that Ms Lee's vulnerability to suicide is not outweighed by her resilience if publication occurs.

[15] Dr Duggal, a forensic psychiatrist within the Auckland Regional Forensic Psychiatry Services' Mason Clinic, provided a report to Ms Lee's counsel to assess whether Ms Lee met the test in s 200 of the CPA for continued name suppression. Dr Duggal described Ms Lee's circumstances and history with mental health services. She had previously lived in New Zealand and had New Zealand citizenship with her husband. Her husband died of cancer in November 2017, when Ms Lee became the sole caregiver of their two children.

[16] Her history with mental health services began with the crisis mental health services during the terminal phase of her husband's illness in 2017. In South Korea, Ms Lee was diagnosed with a major depressive disorder with comorbid anxiety resulting in a period of inpatient psychiatric care between March and July 2022. Dr Duggal recorded that she had made numerous suicide attempts in the four years since the death of her husband. This included cutting her own throat, attempted hanging, overdose and drowning. In South Korea, Ms Lee attempted suicide while in police detention. These attempts occurred prior to her being charged with two counts of murder in New Zealand.

[17] Ms Lee's suicidal ideation has continued in New Zealand since her arrest in August 2022. Upon her extradition to New Zealand, she was reviewed by the Mason Clinic's forensic prison team and commenced on anti-depressant medications, remaining under the care of forensic services and the Department of Corrections medical team.

[18] In addressing the effect of name suppression on Ms Lee's mental health, Dr Duggal recorded that Ms Lee told him that the impact of lifting name suppression would be upsetting to her because of her innocence and that it was unfair her children's names would be in the media. Ms Lee described that she experienced a panic attack

following her first appearance in Court in November 2022 when the media took photos of her. She also described the impact of her Church and cultural community learning of the charges against her.

[19] He noted that in the event that Ms Lee's mental state deteriorated, her ability to participate in her medico-legal assessments and judicial proceedings could be impeded. He accepted that this was not necessarily directly linked to the question of "extreme hardship" under s 200 of the CPA.

[20] Dr Duggal then contrasted her vulnerability factors over her resilience factors as follows:

> Counterbalancing the possibility that lifting of name suppression would have an unduly deleterious effect on Ms Lee, however, was that she already appeared somewhat resigned to her fate such that lifting name suppression might not have a dramatic impact on her mental state. Further, she had been commenced on antidepressant medication and had previously been open to other forms of support available through the FPT [Forensic Prison Team]. It was thus possible that her resilience to the stress that lifting name suppression could pose might improve over time.

[21] Critically, Dr Duggal then formed his conclusion of the possibility that publication could increase Ms Lee's risk of suicide as a result of her mental state deteriorating with the worsening of her depressive symptoms and suicidal thoughts. He said:

> I formed the view that, on balance, Ms Lee's vulnerability factors predominated over her resilience factors at this point in time. It was thus possible that if name suppression was lifted, Ms Lee's mental state could deteriorate with a worsening of her already severe depressive symptoms and suicidal thoughts, increasing her risk of suicide.

[22] The Judge gave particular consideration to Dr Duggal's opinion and acknowledged that Ms L had been in a state of severe mental distress, has major depressive disorder, and has a history of suicidality.[12] She found, however, that the evidence lacked a link between Ms Lee's mental state and the effect of publication on it.[13]

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12 Judgment under appeal, above n 2, at [19].
13 At [21].

[23] The Judge said:[14]

> Dr Duggal's evidence is tentative and the statements he reports by Ms Lee suggest a generally depressive state of mind but do not establish a real and appreciable risk under s 200(2) of the Act in relation to the specific issue of publication. I consider it material that there is no direct evidence from Ms Lee who, despite her considerable difficulties, appears able to express a view. Dr Duggal reports Ms Lee saying to him it is "unfair that [her] name and face is on TV".[15] The panic and shock she expressed to him seemed to relate more to her experience in the courtroom than to publication.
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> I note further that Ms Lee is in custody and under the care of Waitemata DHB mental health services. She has been prescribed medication to lessen her depression and suicidality. I consider, as did Dr Duggal in his report, that these are protective factors mitigating the risk of harm. He states expressly that any deterioration in Ms Lee's mental state would be attended to by the prison service, Intervention and Support Project Team and by the Forensic Prison Team.

[24] The Judge contrasted Ms Lee's position with that of Ms C's in *C (CA123/2022) v R*, where the Court of Appeal considered Ms C's mental health and suicidality were sufficient to show that publication presented an appreciable risk to her health.[16] The Court in that case had evidence that Ms C's suicidality was materially connected to her fear of publication.[17]

[25] The Judge found that Ms Lee failed to meet the evidential test of extreme hardship in s 200(2)(a) or (e) and therefore did not need to address the second stage of the test.[18]

[26] We do not accept the appellant's submission that the Judge "discounted" Dr Duggal's assessment. Although Dr Duggal concluded that Ms Lee's vulnerability factors predominated her resilience factors on balance, the highest he could assess Ms Lee's risk was a possibility that if name suppression was lifted, her mental state could deteriorate and her severe depressive symptoms and suicidal thoughts worsen. In that event, he said, it would increase her risk of suicide but it was not possible to

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14 At [22]–[23] (footnote omitted).

15 It could be inferred from this statement that Ms Lee believes her name has been published and I am advised it has been at least in South Korea. It also seems that members of the South Korean community in Auckland, with whom Ms Lee is familiar, are aware that she is the defendant in these proceedings. It is clear from the evidence that those close to Ms Lee also already know she is the defendant.

16 At [20]–[21]; and *C (CA123/2022) v R* [2022] NZCA 566.

17 At [29]–[31].

18 Judgment under appeal, above n 2, at [24].

predict the extent and duration of any such deterioration. He concluded that any deterioration in Ms Lee's mental state would be attended to by the prison health service, the Intervention and Support Practice Team (ISPT) and the forensic prison team.

[27] We agree with the Judge's assessment that Dr Duggal's conclusion was tentative and did not establish a real and appreciable risk of suicide if suppression was lifted. In addressing any resulting risk of Ms Lee's mental state deteriorating, the Judge noted that Ms Lee is in custody and under the care of Waitemata DHB Mental Health Services, just as Dr Duggal had described in his conclusion, mitigating the risk of harm.

[28] In undertaking this Court's own evaluative assessment on the material before us, we have the benefit of considering Dr Duggal's opinion afresh. No additional evidence was placed before us. The first threshold test requires that the Court needs to be satisfied that publication would be likely to cause extreme hardship or endanger a person. "Likely" means a real and appreciable possibility.[19] At its highest, Dr Duggal's conclusion is framed as a possibility that publication "could" have a deteriorating effect on Ms Lee's mental health.

[29] We are not satisfied that there is sufficient evidence before the Court, demonstrating that Ms Lee's condition would be materially impacted by publication, sufficient to meet the threshold that publication is likely to cause extreme hardship or endanger the safety of Ms Lee.

[30] We conclude that the Judge gave appropriate weight to Dr Duggal's opinion. In reaching this conclusion, we are cognisant of the submission of Mr Wilkinson-Smith that the fitness to plead is an "active issue" which is under review pending a reassessment of Ms Lee's mental health state later this year, as recommended by Dr Duggal. We deal with this issue below.

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[19] *D (CA443/2015)* v *New Zealand Police* [2015] NZCA 541 at [30(a)]; and *Stuff Ltd v R* [2021] NZCA 86 at [17].

Failure to correctly apply *D (CA443/2015) v Police*

[31] Mr Wilkinson-Smith submits that the Judge failed to consider the following principles from *D (CA443/2015) v Police*, which he says support Ms Lee's application for suppression. They are:[20]

(a) a defendant must point to more than the usual feelings of anxiety and despair that may attend proceedings;

(b) it is usual to offer evidence that the defendant is psychologically troubled for other reasons and is particularly susceptible to publicity; and

(c) there may be evidence that the case will attract unusually extensive or critical media publicity.

[32] 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:[21]

> (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, 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.
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> (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

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[20] *D (CA443/2015) v New Zealand Police*, above n 25, at [30].

[21] At [30] (footnotes omitted).

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.

[33] The Judge clearly appreciated that Ms Lee's mental condition amounted to more than the usual feelings of anxiety and despair that may attend proceedings. But it was also open to the Judge, applying *D (CA443/2015) v Police*, to conclude that the evidence from Dr Duggal did not demonstrate that Ms Lee was "particularly susceptible" to publicity, nor did it demonstrate that publication would increase Ms Lee's risk of suicide to be real and appreciable.

[34] On the available evidence, it was open to the Judge to find that the extreme hardship threshold was not met, even taking into account the submission that the case will attract unusually extensive and critical media attention.

Fitness to plead and fair trial considerations

[35] In the course of argument before us, Mr Wilkinson-Smith advised the Court that the defence has given notice in a trial callover memorandum that fitness to plead is an active issue in the context of Ms Lee's fair trial rights. Fair trial considerations

and the issue of fitness to plead were not raised nor addressed in the appellant's submissions. Dr Duggal had recommended to trial counsel that Ms Lee's current mental health state is "quite acute" but it could improve and it would be better to assess Ms Lee's mental health status again before the end of this year or closer to the trial, as there have already been difficulties in engaging Ms Lee with medical or legal matters. Because those assessments have not yet been undertaken, no further psychiatric or mental health assessment was placed before the Court.

[36] In raising the possibility that Ms Lee may be found unfit to plead and how that might affect permanent name suppression, Mr Kayes, for the Crown, responded that this was not a factor advanced by the appellant at this stage and that the Court must consider the position on the available evidence on appeal. Mr Wilkinson-Smith was unable to take the matter further, without Dr Duggal's updated assessment. On the current indications, it appears that Ms Lee's current medication if continued and successful, may result in an improvement in her mental health status. Whether Ms Lee will be capable of engaging with her legal advisors before trial, still remains uncertain.

[37] In the circumstances, we consider that we must determine this appeal on the evidence and argument before us.

Other considerations

The lack of affidavit material

[38] Mr Wilkinson-Smith submits that the fact that Ms Lee did not provide sworn affidavit evidence should not have been considered material by the Judge, as Dr Duggal's report established her views. He submits that the factual question of extreme hardship and endangering safety is independent from Ms Lee's wavering views regarding publication.

[39] The Judge said: "I consider it material that there is no direct evidence from Ms [Lee] who, despite her considerable difficulties, appears able to express a view."[22]

[22] Judgment under appeal, above n 2, at [22].

[40] We accept Mr Wilkinson-Smith's submission that no weight should be placed on the omission of Ms Lee to provide an affidavit. She has been diagnosed with a major depressive order and her responses are consistent with the variable mood swings, which show at times her lack of concern for her own wellbeing and at other times her ability to express her concerns about publication and her desire to prevent it.

[41] In the circumstances of her current depressive illness, we consider that her lack of affidavit evidence does not materially affect the stage one determination. In our view, the critical consideration is Dr Duggal's opinion, which we have addressed above. The Judge's reference to the absence of direct evidence is not determinative here.

Mitigation of risk of harm

[42] Mr Wilkinson-Smith submits that the Judge erred in finding that the risk of harm was mitigated by safeguards and protective systems at prison. He refers to an article in Practice: The New Zealand Corrections Journal[23] and terms of reference by the Chief Inspector of the Department of Corrections Office of the Inspectorate[24] explaining that suicide is all too common in prison despite best endeavours.

[43] Dr Duggal specifically noted that Ms Lee's mental health continues to be managed jointly by the prison health service and the Intervention and Support Practice Team. In the event that Ms Lee's state deteriorates, she will be referred back to the forensic team for review.

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[23] Robert Jones "Suicide in New Zealand Prisons — 1 July 2010 to 30 June 2016" (2017) 5(2) Practice: The New Zealand Corrections Journal 26.

[24] Office of the Inspectorate *Terms of Reference: Enhancing the taha hinengaro of those in the care of Ara Poutama Aotearoa — An analysis of apparent suicides and self-harm threat to life incidents in New Zealand prisons 2016-2021* (Department of Corrections, July 2021).

[44] This Court in *Wedgewood v R* stated, "the Courts are entitled to have some confidence in the ability of the prison authorities to identify, monitor and manage the risk of self-harm in their institutions."[25] This Court has made similar observations in *MS v R,* and affirmed them in *O'Reilly v R*,[26] that:[27]

> The courts proceed on the basis that the Department of Corrections will comply with its statutory obligations to ensure the safe custody and welfare of prisoners, absent evidence that it is failing to do so.

[45] There is no evidence before the Court that Corrections' protective measures are inadequate in this case. We consider Dr Duggal's opinion that "any deterioration in [Ms Lee's] mental state would be attended to by the prison health service, ISPT and by the FPT" instils the confidence that the courts are required to have in relation to prison management of health risks. We consider the Judge did not err in reaching the same conclusion.

Open justice considerations

[46] Mr Wilkinson-Smith submits that the Judge erred in referring to the counterbalancing of open justice in the first stage of the assessment, as the first stage/threshold test does not involve a balancing exercise.

[47] In discussing the s 200 threshold, the Judge said "I note that this threshold is high and is counter-balanced against the presumption of open justice."[28] The Judge's reference to the principle of open justice, was explanatory of the justification for the *high* standard that s 200 sets. This Court, in *Robertson v Police*, noted that while "it will only be pertinent for judges to consider the presumption in the exercise of the second stage discretion", the presumption of open justice "underlies the fact of the existence of a threshold requirement" in s 200. [29]

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[25] *Wedgewood v R* [2022] NZCA 42 at [42], citing *O'Reilly v R* [2019] NZCA 254 at [4]; and *MS (CA405/2016) v R* [2016] NZCA 544 at [11].
[26] *O'Reilly v R*, above n32, at [4].
[27] *MS (CA405/2016) v R*, above n 32, at [11] (footnote omitted); referring to s 8(1)(b) of the Corrections Act 2004.
[28] Judgment under appeal, above n 2, at [19].
[29] *Robertson v Police*, above n 9, at [46].

[48] The Judge is not to be taken as saying that step one *involves* a counterbalancing of the presumption. Accordingly we consider the Judge did not undertake such a "balancing exercise" in the first stage assessment.

Conclusion

[49] The Judge did not err in concluding that the threshold required to establish that publication would cause Ms Lee extreme hardship or otherwise endanger her safety was not met on the evidence.

Result

[50] The appeal is dismissed.

Solicitors:
Crown Law Office, Wellington, for Respondent
Bell Gully, Auckland, for NZME Publishing Ltd, Stuff Ltd and Discovery NZ Ltd