ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES OR IDENTIFYING PARTICULARS OF APPELLANT AND CO-DEFENDANT UNTIL COMMENCEMENT OF THE TRIAL.

ORDER PROHIBITING PUBLICATION OF THE JUDGMENT AND ANY PART OF THE PROCEEDINGS (INCLUDING THE RESULT) IN NEWS MEDIA OR ON THE INTERNET OR OTHER PUBLICLY AVAILABLE DATABASE UNTIL FINAL DISPOSITION OF TRIAL. PUBLICATION IN LAW REPORT OR LAW DIGEST PERMITTED.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA284/2022
[2022] NZCA 383

BETWEEN	S (CA284/2022) Appellant
AND	THE QUEEN Respondent

Hearing:	11 July 2022
Court:	Miller, Lang and Cull JJ
Counsel:	J A Kincade QC and WJS Mohammed for Appellant Z R Johnston for Respondent
Judgment:	17 August 2022 at 3.30 pm

JUDGMENT OF THE COURT

A The appeal against refusal to continue interim name suppression is allowed.

B We make an order suppressing the name and identifying particulars of the appellant and her co-defendant from publication until the commencement of the trial.

C To protect the fair trial rights of the appellant and her co-defendant we make an order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other publicly available database until the commencement of the trial. Publication in law report or law digest permitted.

REASONS OF THE COURT

(Given by Lang J)

[1] The appellant and her partner, G, are charged with manslaughter. Their trial is scheduled to commence in the High Court at Auckland on 23 October 2023.

[2] In a judgment delivered on 8 June 2022, Jagose J dismissed an application by the appellant for interim suppression of her name and identifying particulars through until trial.[1] The appellant had also sought interim suppression of G's name on the ground that publication of his name would inevitably lead to her identity becoming known. She also sought suppression for members of her family, who she says will suffer undue hardship if her name is published.

[3] The appellant appeals against the Judge's decision. She seeks suppression of her own name on the grounds that publicity will jeopardise her fair trial rights and would be likely to cause extreme hardship to herself and her parents.

Background

[4] The charge was laid as a result of an incident that occurred in central Auckland in the early hours of 24 April 2022. On that date the appellant, G and their flatmate became involved in altercations with Mr Connor Boyd outside a bar in central Auckland. Mr Boyd had been on friendly terms with the appellant and her associates for many years but on this occasion a heated argument is said to have occurred. This resulted in the appellant allegedly pushing Mr Boyd and kicking him into a planter box on the street. Mr Boyd then walked away.

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1 *R v [S]* [2022] NZHC 1339.

[5] The Crown alleges the appellant and G got into G's car (with others) and drove a short distance down the street. Mr Boyd approached the vehicle and stood at the driver's window, speaking to the occupants of the vehicle. The appellant was seated in the rear of the vehicle behind G, who was in the driver's seat. CCTV camera footage is said to show the appellant and G assaulting Mr Boyd through the open vehicle windows. The Crown alleges that both G and the appellant then grabbed Mr Boyd and held him so he could not get away. At this point G caused the vehicle to accelerate away. Some distance down the road, Mr Boyd fell from the vehicle. His head went under the rear wheel of the vehicle, causing severe head and spinal injuries that ultimately resulted in his death.

[6] The appellant was initially granted name suppression when she appeared in the District Court. Interim suppression was also granted for G but he did not seek continuation of the interim orders once the matter reached the High Court. His name remains suppressed pending determination of the present appeal. It is common ground that, if this Court concludes suppression of the appellant's name and identifying particulars is required, it will be necessary for the same orders to be made in relation to G.

The application for interim suppression

[7] The appellant sought interim name suppression on the ground that publication of her name at this point will cause extreme hardship for herself and undue hardship for her parents and their businesses. In addition, she contended that publication of her name at this point will prejudice her fair trial rights.

[8] In an affirmation filed in support of the application the appellant described and annexed photographs of messages containing threats, abuse and harassment that she has received on her cellphone and through items posted on social media. Similar messages were also sent to her employer, which caused her to lose her job. In addition, a person who clearly holds strong views about the issue posted an online petition seeking support for the charge to be upgraded from manslaughter to murder. Funding was also sought to help support this process. The petition was evidently removed after the police spoke to the person who created it. If suppression is not continued the

appellant fears that further attempts will be made to influence the criminal justice process.

[9] The Crown and Mr Boyd's family oppose continuation of name suppression. They point to the need for open justice and to protect the public.

The High Court judgment

[10] Having reviewed the messages sent to the appellant and the material posted on social media the Judge observed:[2]

> [27] Unlike the case before the Court of Appeal [*X (CA226/2020) v R* [2020] NZCA 387], [the appellant] was identified on social media with Mr Boyd's death before any charges were filed and her name ordered suppressed, and I am given nothing to think revocation of her name suppression would bring her identity within the active (let alone vengeful) consideration of any materially wider group of people. I comprehend more and continuing hurtful or damaging social media commentary is not likely to be caused by publication of accounts and reports relating to this proceeding, but instead by [the appellant's] prior alleged involvement as comprehended by a relatively small section of the community (if then unconstrained by revocation of the suppression order). Even if not, detrimental consequences including those of adverse commentary may well accompany publication identifying defendants in the context of reports and accounts of criminal proceedings. That is the nature of much social media commentary. [The appellant's] case is not of the 'nature' or 'magnitude' incentivising the Court of Appeal.
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> [28] This Court generally is not the arbiter of social media discourse. Courts generally only become so engaged if such discourse is alleged to breach relevant standards — for example, by making "an untrue statement that has a tendency to lessen the subject's reputation in the estimation of right thinking members of society generally";[3] or by posting harmful digital communications;[4] or by creating "a real risk of prejudice" to fair trial rights[5] — or, as contended here, if publication in the context of accounts and reports relating to the particular proceeding risks the requisite criteria. Social media commentary on facts open to being relied on for [the appellant's] later charges is not of itself enough to constitute the necessary relationship with the proceeding. Such anticipatory engagement by the Court would risk

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2 *R v [S]*, above n 1 (footnotes in original).

3 Defamation Act 1992; and *Fourth Estate Holdings (2012) Ltd v Joyce* [2020] NZCA 479, [2021] 2 NZLR 758 at [33].

4 Harmful Digital Communications Act 2015, s 22, punishable by up to two years' imprisonment or a $50,000 fine. Section 6 sets out principles for such communications, including they should not: "be threatening, intimidating, or menacing"; "be used to harass an individual"; "make a false allegation"; or to incite or encourage others to do so.

5 Contempt of Court Act 2019, s 7, punishable by up to six months' imprisonment or a $25,000 fine. Notably, risk of such offending arises "from the time of the arrest or charge (whichever happens first) until the delivery of the verdict".

> unjustifiably chilling rights to freedom of thought and belief, "including the right to adopt and hold opinions without interference", and freedom of expression, "including the freedom to seek, receive, and impart information and opinions of any kind in any form".[6]
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> [29] 'Of any kind in any form' is "as wide as human thought and imagination",[7] but does not give "licence irresponsibly to ignore or discount other rights and freedoms".[8] I thus condemn outright, as denying [the appellant's] presumed innocence, the intimidating and judgemental direct and social media communications made to and about her and those associated with her. Claims to such vigilante 'justice' are intolerable. Mr Boyd's family's plea to enable others to avoid her skirts the presumption, while they are right the seriousness of the charges engages a greater expectation of public scrutiny.[9]
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> [30] But my condemnation alone is not enough to render the consequence of those communications 'extreme' or 'undue'. In the present social media climate, they are instead — while deplorable, undesirable and unwarranted — the regrettably 'normal' and 'ordinary' consequences of such ignorant, repugnant and entirely unjustified communications irrespective of any proceeding. That 'normality' is illustrated by [the appellant's] and her parents' evidence of the fear, loss and pain occasioned by such communications unconnected to any account or report relating to this proceeding.
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> [31] I acknowledge such communications are likely to continue to be made — perhaps in some increased volume if commentary has been constrained by the present order, although I have no reason to think any more materially substantial portion of the community then may become engaged — on revocation of [the appellant's] ordered name suppression and maybe also then relating to accounts and reports of this proceeding. Again — in the present vindictive social media climate, of which I take judicial notice as abundantly substantiated even without this proceeding — that is to be expected.

[11] The Judge also found that the material will not create a real risk of prejudice to a fair trial. In reaching this conclusion the Judge noted that juries are firmly directed to come to their verdicts solely on the basis of the evidence given in the courtroom and must disregard anything they may have heard or read about before the trial.[10] The Judge therefore considered there was no principled basis on which the interim orders should continue.[11]

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6 New Zealand Bill of Rights Act 1990, ss 13 and 14.
7 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA) at [15].
8 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [231].
9 *Parker v R* [2020] NZCA 502 at [46].
10 *R v [S]*, above n 1, at [33].
11 At [34].

Jurisdiction

[12] It is now well established that an application for suppression must be determined on a two-stage basis.[12] First, the Court must determine whether any of the threshold requirements set out in s 200(2) of the Criminal Procedure Act 2011 have been made out. If that is the case, the Court must go on to consider how it should exercise its discretion by balancing the identified threshold interests against the need for transparency in criminal proceedings.[13]

Decision

[13] We decide the present case on the basis of the likely risk of prejudice to the appellant's fair trial rights.[14] We are satisfied the protection of fair trial rights requires interim suppression to continue until trial and can state our reasons shortly.

[14] We do not propose to determine whether the appellant and those with whom she is connected will suffer extreme or undue hardship if suppression is not granted. Those issues may again become relevant at the commencement or conclusion of the trial and will need to be determined having regard to the evidence then available. We observe that the appellant's parents are not parties to this appeal, though they have filed affidavits deposing to what they say is undue hardship they will experience. Pending trial they will benefit from the interim order we intend to make, because publication of their names in connection with the proceeding would tend to identify the appellant.

[15] As the Judge pointed out, abusive and threatening messages to the appellant and G, as well as commentary on social media, began before charges were laid.[15] This extended also to the appellant's employer and parents. Many of these referred to the fact that the appellant was a murderer and would be going to prison. The messages and posts would have been distressing for the appellant and her family and plainly ignored her right to the presumption of innocence. Without more, however, we do not

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12 *Fagan v Serious Fraud Office* [2013] NZCA 367 at [9].
13 *R v Liddell* [1995] 1 NZLR 538 (CA) at 546.
14 Criminal Procedure Act 2011, s 200(2)(d).
15 *R v [S]*, above n 1, at [27].

consider they jeopardised her fair trial rights. Furthermore, it is likely that those who were privy to the online posts already knew the appellant's identity.

[16] The concerning issue in the present case flows from the creation of the online petition seeking to persuade the Crown to charge the appellant and G with murder rather than manslaughter, and to seek "crowd funding" to assist Mr Boyd's family. We also regard with concern the fact that, a few days before the present appeal was heard, the person who created the petition posted further material on Instagram that included a photograph of the appellant. Counsel for the appellant advised us that this apparent breach of the existing suppression orders has been referred to the police for investigation.

[17] We agree with the Judge that the Court is not the arbiter of social media standards.[16] However, the Court is the arbiter of measures necessary to guard against the erosion of fair trial rights. We see the creation of the online petition as being an attempt to directly influence the criminal justice process.

[18] We accept that, to date, dissemination of material has been confined to persons who know Mr Boyd, the appellant and G. However, we consider this is likely to change as the trial approaches, particularly if the Crown declines to reconsider its decision to lay charges of manslaughter rather than murder. We also consider it likely that the existing interim orders have kept matters largely in check to date. If these were to be lifted there is a significant risk that the campaign against G and the appellant will immediately escalate.

[19] Online activity is likely to increase in both intensity and scope, and the number of persons who are privy to it online is likely to grow in number. If such material finds its way into the mainstream news media it will attract a much wider audience, including the jury pool. It is entirely conceivable that there will be widespread dissemination of material that seeks to persuade recipients that the appellant and G are guilty of Mr Boyd's murder, and that this was the appropriate charge for the Crown to lay.

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16 At [28].

[20] We are satisfied these factors constitute a sufficient threat to the fair trial rights of both the appellant and G to satisfy the requirements of s 200(2)(d) of the Act.

[21] Turning to the second step, we are also satisfied that the need to protect fair trial rights outweighs the general principle that Court proceedings should be transparent.

Result

[22] The appeal is allowed. We make an order suppressing the name and identifying particulars of the appellant and G from publication until the commencement of the trial. The issue of suppression thereafter is to be determined by the trial Judge.

[23] To protect the fair trial rights of the appellant and G we make an order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other publicly available database until the commencement of the trial. Publication in law report of law digest permitted.

Solicitors:
Crown Law Office, Wellington for Respondent