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

JP APPEAL NO. 2/16
(CR NO. 738/16)

TEARORANGI AITU

v

POLICE

Date: 2 December 2016

Counsel: Mr N George for the Appellant
Ms A Mills for the Respondent

Date of Decision: 5 December 2016

DECISION OF GRICE J

[]

[1] This is an appeal against a decision of a Justice of the Peace refusing to grant suppression of the Appellant's name. The Appellant is charged with one charge of male assaulting a female pursuant to s. 214(b) of the Crimes Act 1969. This carries a maximum penalty of imprisonment of 2 years.

[2] The offending occurred on 22 October 2016. I am advised by the Crown that the assault resulted in the victim receiving medical treatment.

[3] The matter came before a Justice of the Peace at the first calling, on 22 October 2016. Mr George appeared for the Appellant. A not guilty plea was entered.

[4] Mr George applied for name suppression for the Appellant. It was refused.

[5] The transcript of the exchanges between the Justice of the Peace and counsel as well as the decision has been provided.

[6] Mr George also seeks to adduce further evidence, by way of an affidavit by the Appellant dated 1 December 2016. This is attached to counsel's submissions. No formal application to adduce this further evidence was made. However Mr George referred to the affidavit. I treat the matter as an application to adduce further evidence.

[7] The Crown oppose the appeal. It also opposes the adducing of further evidence.

[8] I propose first dealing with the further evidence application.

[9] Section 78 of the Judicature Act 1980-81 relates to the process on appeal. It provides that the evidence taken by the Justice of the Peace shall "unless the judge otherwise directs" be brought before the Court by the production of any note made by the Justices or any other material as the judge may deem expedient, in relation to evidence given orally. Evidence is to be brought before the Court by the production of the affidavits and any exhibits. Any other evidence is received by the production of a copy of that evidence or a statement.

[10] The appellate judge has a discretion to rehear the whole or any part of the evidence and must do so if he has a reason to believe that any note made by the Justice is incomplete in any material particular. The judge also has discretionary power to receive further evidence, if that further evidence could not in the circumstances "reasonably have been adduced at the hearing"[1].

[11] The transcript of the hearing and decision has been produced. It covers the submission of counsel, the exchanges with the Justice and the decision of the Justice. No issue has been taken with the transcript. I have no reason to believe that the material before me is incomplete. Therefore I am entitled to rely on the accuracy of the transcript.

[12] The Crown pointed to various New Zealand decisions dealing with the receipt of further evidence by an Appellate Court. In summary the principles adopted in New Zealand to adduce evidence not called at trial are that the evidence must demonstrate that the new evidence is:

a) Sufficiently fresh; and

[1] Section 78(3) of the Judicature Act 1980-81.

b) Sufficiently credible.

[13] If the evidence could, with reasonable diligence, have been called at trial it will not qualify as sufficiently fresh.[2]

[14] This is a two-stage process. If the further evidence does not qualify for admission then that is the end of it. If it does qualify then the Court moves to a second stage of inquiry.

[15] The *Bain* decision concerned a situation where there was an alleged miscarriage of justice. Nevertheless the principles articulated are similar to those applying in any application for new evidence to be adduced on appeal in the Cook Islands.

[16] My first consideration is whether, in terms of the statute, the further evidence "could not in the circumstances reasonably have been adduced at the hearing".

[17] A review of the hearing notes indicates that Mr George appeared for the Appellant before the Justice of the Peace. It is not clear as to whether Mr Aitu was present in Court. He did not feature in the transcript.

[18] A review of the transcript shows:

a) The Appellant entered a plea of not guilty;

b) The matter could not be heard until February or March 2017.

c) The Appellant is highly well known and a retired health educator and before that a long serving prison officer. He had a background of public service. His wife was also well known.

d) Mr George outlined the background. The charge arose from the Appellant's involvement in assisting the family for the last 3 years. The incident appears to have related to the management of the daughter of an elderly woman who was

[2] Bain v R (2007) 23 CRNZ 71 at para [34] (PC).

being assisted by the Appellant. Mr George submitted the Appellant intervened in a drunken dispute, things got out of control resulting in the incident which led to the charge of assault.

e) Mr George's submission was that the Appellant had been a "good Samaritan" and in recognition of that he was charged with the handling of the woman.

f) The Court then intervened and asked Mr George to focus on the issues relating to suppression of name. The Justice indicated that he was not there to decide the guilt and innocence at that time and the details were for trial.

g) Mr George reiterated that he had to demonstrate how critical it was to give name suppression.

h) The Court again asked for Mr George to go back to the main factors used to decide name suppression and commented that it was not the details of the case.

i) Mr George said he disagreed and said that he was making an application for name suppression on the basis first of the Appellant's good reputation. As far as Mr George was aware the Appellant had no previous convictions and he was trying to help the family.

j) Mr George then said it was bad judgement by the Police to arrest the Appellant and charge him when he was there to help. He said that there a very real chance that the charge would be answered in Court and that's why a guilty plea had been entered straightaway.

k) The Court again intervened and said that counsel was getting off track and it was not for the Justice to decide the merits that day.

l) Mr George pursued his submission and said that he considered interim name suppression was necessary to protect what he considered an innocent man from having his name published in the media unfairly.

m) The prosecutor indicated that he did not object to adjourning the matter to a fixture date and that open justice applied in relation to the name suppression application and that was in the Justice's discretion.

n) Mr George then made an application for bail.

o) The Justice of the Peace then went on to deliver his decision which I set out in full:

> CR 738/16 – Police v Tearorangi Aitu. Defendant entered a plea of not guilty through counsel. Defence counsel made an application for interim suppression of name. Defence counsel indicated as grants for support of the application, the circumstances surrounding the incident and the defendant's role as a provider of care for an elderly person, however the circumstances indicated by counsel will be matters for consideration at trial rather than in support of name suppression. The application is therefore denied. Defence counsel also made an application for the existing bail condition preventing the defendant from going to the house where the incident took place. Defence counsel stated that this condition prevented him from providing the care he had been providing to an elderly woman who resides there. Prosecution did not oppose this therefore this condition is removed. Police requested one bail condition that the defendant not offer up violence, this is granted. The matter is therefore adjourned to 21 February 2017 at 9.30 am for a defended hearing. The defendant is released with the condition in force.

[19] The affidavit of Mr Aitu dated 1 December 2016 referred to by Mr George on appeal notes:

a) Mr Aitu's reputation and career in the prison service and the probation service in New Zealand and here.

b) His involvement in providing women's refuges, counselling and advocacy against violence.

c) His involvement in the Church and welfare of families.

d) That the referral to grant name suppression will damage his reputation.

e) That his standing and community work means nothing to the Justice of the Peace.

[20] There is no evidence in the affidavit which is fresh. All the evidence in the affidavit could have been put before the Justice of the Peace. In fact most of it was before him by way of submissions from counsel.

[21] Mr George expressed concern that given the lack of time and busy Court schedule in the Justices of the Peace Court formal affidavits and letters of support should not be required in applications of this nature before that Court. That is a matter for counsel. However given the full workload of the Justices of the Peace Court providing them with suitable evidence upon which to assess an application is important. They have the job of assessing the application and to do so need appropriate evidence. Counsel take a risk in ignoring the evidential requirements and not putting proper material before the Court to assist it in reaching its decision.

[22] The application therefore fails at the first step of proving it was fresh and could not have been adduced at the hearing. Therefore I refuse the application for the adducing of the evidence in Mr Aitu's affidavit.

[23] In any event as will be apparent the affidavit did not lend support grounds for an order for name suppression.

Decision

[24] The grounds of appeal allege the Justice's decision was deficient in that:

a) The Justices have adopted a "near permanent refusal to grant name suppression, however legally justified, on the basis of the Crown and Police position of maintaining an open justice system";

b) The position is in breach of the Bill of Rights provisions of Article 64(1)(b) of the Constitution for the protection of equality before the law and protection under the law;

c) The Justice of the Peace stopped counsel making submissions about the background to the offence and appeared to have made up his mind to refuse name suppression.

[25] I note this is not an appeal based on lack of reasons by the Justice as was before the Court in *Rakanui*[3].

[26] The reasons for the decision of the Justice of the Peace have been set above. The Justice asked counsel to focus on the issues relevant to the name suppression application rather than go into the background of the case. The Justice was entitled to do this. The Police submitted that it objected to the application on the basis of "open justice". The Justice in his decision correctly identified counsel's submissions in support relating to the circumstances of the incident and the Appellant's role as a care provider as being the grounds advanced for the application and found them insufficient for name suppression. He said the circumstances surrounding the incident were for determination at trial not for name suppression. The Justice adequately if briefly outlined the thrust of the Applicant's submissions and the reason for refusing the application.

[27] The Justice of the Peace had asked for relevant submissions from counsel and not received them. Counsel did not seek to present any evidence. In fact the submissions made in this appeal more or less cover the same ground as were put before the Justice of the Peace.

[28] I am of the view that the Justice's of the Peace decision should stand. The Justice of the Peace did not act on a wrong principle, fail to take into account a relevant consideration or take into account an irrelevant consideration nor was he plainly wrong. These are the matters on which the appellate Court will interfere in the exercise of a discretion by the decision maker at first instance. The Crown submitted the appeal was against the exercise of a discretion in

[3] Police v Rakanui, Cook Islands High Court, JP Appeal 2/3, (9 May 2013) Potter J.

accordance with *Tepa*[4]. I have approached this appeal as if it were an appeal against the exercise of a discretion. No issue was taken with that approach. There is no evidence in the decision or exchange with counsel which indicates a predetermination of the matter. The Justice attempted to draw counsel's attention to the issues relevant to the application. The decision shows he considered the matters put before him. The Justice showed an open mind and asked for focussed submissions. There is no indication the Justice predetermined the matter.

[29] In case I am wrong I have also considered the merits of the matter.

[30] The principles governing applications for name suppression are well known. Justice Potter summarised them in *Rakanui*[5] at para 14:

> [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:
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> - 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

[4] Rarotongan Resort and Spa Ltd v Tepa [2009] CKCA 2

[5] Police v Rakanui [2013] CKHC 63

> 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.

[31] Therefore the Court starts from a presumption of reporting.

[32] In this case Mr George, in addition to his grounds of appeal, has emphasised:

a) The outcome of the trial could well be an acquittal;

b) The Appellant's good works in doing voluntary community work and assisting families;

c) The Appellant's unblemished reputation and previous careers;

d) People such as the Appellant who do voluntary and charity work will be reluctant to do so in the future if they face the possibility of being charged when trying to assist someone.

[33] The Crown submits:

a) The facts of the case are for determination at trial and largely irrelevant to the application.

b) There is nothing that would put this applicant, his work or his reputation in a special category warranting name suppression.

[34] In my view the matters relied upon in the application for name suppression do not justify suppression. First, the offence is not trivial and involves an allegation that as a result of the assault the victim required medical treatment. Secondly, determination of the facts of the case are for trial not at this stage. In any event the strength of the case has never been identified as a factor relevant in determining an application for name suppression. Thirdly, there is public interest in having the character of the person seeking name suppression. This may be even more important in a case such as this where the Appellant is involved with vulnerable people such as families in need of assistance. Finally, while publication will inevitably cause distress

and embarrassment to the Appellant and his family, this is not a case where there are special personal circumstances justifying suppression.

[35] Mr George strongly submitted the disincentive for someone like the Appellant to take on this work as there would be an ever present risk of being charged and their names being published. However the law applies equally to volunteers and charity works as to ordinary people. In *Rakanui* the Appellant was a high profile official. The Court indicated it would be cautious about seniority or privilege as a proper basis for weighing the interests public and private in a case for name suppression. The same comments apply here. It is important people in the community do voluntary work but that they do this does not automatically put them in a privileged position when it comes to name suppression.

[36] Therefore I am of the view that the merits of the application justify the dismissing of the appeal.

Conclusion

[37] The Application for the adducing of evidence on appeal is dismissed.

[38] The appeal is dismissed.

Grice J