IN THE COURT OF APPEAL, FIJI ISLANDS
APPELLATE JURISDICTION

Criminal Appeal No: ABU0037 of 2007

Between:

THE ATTORNEY-GENERAL

Appellant

And:

ALIFERETI YAYA

Respondent

Coram: Byrne JA
Powell JA
Shameem JA

Hearing: 25th March 2009

Counsel: Mr. S. Sharma & Ms S. Serulagilagi for Appellant
Mr. V. Vosarogo for Respondent

Date of Judgment: 9th April 2009

JUDGMENT OF THE COURT

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[1] Section 37 of the Constitution, provides that every person has the right to personal privacy, including the right to privacy of personal communications. This right is subject (pursuant to section 38(2)) *"to such limitations prescribed by law as are reasonable and justifiable in a free and democratic society."* This judgment addresses the scope of this right, in relation to police investigations.

[2] This is an appeal from a decision made by the High Court on a constitutional redress application seeking declarations and damages against the Commissioner of Police for broadcasting the image of the Respondent as one of the *"10 most wanted persons"* in Fiji. The Respondent made the application by letter, dated the 31st of August 2004. In that initial letter the Respondent said:

> ***"... on the evening of Wednesday 27th August 2003, a list of "10 most wanted persons" was issued by the Police Department and the list of names was shown on Fiji TV news at 6pm. The list was shown again over the next few days. This list was also published in the daily newspaper and read out in radio news bulletins on Thursday 29/08/2003 and in the days that followed."***

He further said:

> ***"Sir, my name was first on the list and the other nine persons were hardened criminals suspected for serious crimes. I was shocked to see my name associated with such notorious persons. I had no idea the Police wanted me for questioning."***

[3] With the assistance of the Human Rights Commission, the Respondent redrafted his application by way of notice of motion and affidavit. He sought, amongst other remedies, a declaration that the Commissioner of Police had been in breach of the Respondent's right to personal privacy, and damages for humiliation, loss of dignity and injury to the Respondent's feelings. The motion was dated the 5th of April 2005.

[4] In his supporting affidavit, the Respondent said that this was the first time in the history of the Police Force that such a list had been published, that at the time of publication the Respondent had not been charged with any offence, had not been in breach of any bail and that the Commissioner of Police had been in breach of the law in authorizing this publication. Annexed to his affidavit, is a newspaper cutting from the Fiji Times of the 28th

of August 2003. In the article headed *"Give yourselves up, Hughes tells suspects"*, the Commissioner of Police, Andrew Hughes is said to have urged ten suspects to surrender to his custody. The article reads, inter alia:

> ***"The ten are believed to be responsible for a spate of violent robberies around the country and were identified by two separate teams of detectives during Operation Strike Back."***

[5] The Commissioner is said to have given a guarantee of fair treatment to the suspects. The article continues in the following way:

> ***"The ten include Alifereti Yaya 31 of Lautoka ..... who are wanted for the Armourguard robbery in Lautoka on July 31."***

[6] The affidavit of Andrew Hughes, Commissioner of Police was filed in reply. Dated the 8th of June 2005, Commissioner Hughes said that between June and September 2003 the country was subjected to exceptionally high incidence of violent robberies and murder. These activities led him to launch an operation called *"Operation Strike Back"* in the interests of public safety. The operation was successful within 2 weeks with a 12% reduction in violent crime. He said the publication of the Respondent's name in the media was to protect the public interest. At paragraph 9 of his affidavit he says:

> ***"..... I respectfully wish clarify that the Applicant's contention that it was shocking for him to see that his name was associated with the names of other "hardcore criminals" is very misleading. It was the Applicant who associates himself with these persons. He did not deny his involvement with other notorious criminals in the planning and execution of the Armourguard security company office violent robbery in Lautoka on 31st July 2003. The Applicant pleaded guilty and is currently serving a sentence for this offence."***

[7] At paragraph 11, he said:

"I categorically deny the contents of paragraph 4 of the Applicant's affidavit and further wish to state that the publication of the names of suspect persons in the media is critically important and in this case, was the only option that the Fiji Police Force had available to it to get to the suspect persons and to enable criminal investigations to commence. Publication of names is only made after we have reasons to believe that the advertisement is reasonable. This is after an intensive investigation into the high profile criminal activity that is reported to the Police Force."

[8] He said that the Respondent pleaded guilty to the charge of robbery with violence at the Lautoka Armourguard Office. He annexed the Applicant's criminal record which includes a reference to two addresses in Suva, and to a total of 27 previous convictions dating from 1987 to 2004. He was apparently convicted of the Armourguard robbery on the 8th of September 2003 and sentenced to 3½ years imprisonment. Also annexed to the affidavit of Andrew Hughes is a daunting list of pending cases all arising from June to December 2003. They are in relation to rape, murder, robbery with violence, arson, burglary and larceny charges.

[9] In response, the Respondent said that in the Armourguard robbery, he was merely the getaway driver, that at the time the list was published he was presumed innocent, that the police duty to investigate crime had to be exercised subject to the Bill of Rights and that the publication of the list was not reasonable in all the circumstances.

[10] The High Court then heard submissions from the State, the Respondent and the Human Rights Commission as amicus curiae. Judgment was delivered on the 23rd of February 2007. Pathik J considered section 37 of the Constitution, the duties and powers of police officers under the Police Act and decisions of the New Zealand High Court, the European Court of Human Rights, the Australian High Court, and the Canadian Supreme Court, and found that there had been a breach of section 37 of the Constitution, not only by publication itself but by publication to the public as opposed to selected people who might have used it for legitimate law enforcement purposes. At page 15 of his judgment, his Lordship said:

"I find that Police Standing Orders No. 23 of April 1970 which was produced does not assist the Commissioner of Police as there was no need to advertise to the whole world so to say the name and photograph of a person who in law is regarded as innocent until found guilty; he was not arrested but was only a suspect. A limited circulation to those concerned would not have breached the Bill of Rights provision."

[11] He found that there had been a breach disproportionate to the public interest aim of the then Commissioner and awarded damages of $4000 against the Attorney-General.

This appeal

[12] The appeal to this court is limited to the question of liability. The grounds of appeal are as follows:

1. That the learned Judge erred in law and in fact in holding that the Appellant's personal privacy was breached by the Commissioner of Police on 27th August 2003.

2. That the learned Judge erred in law and in fact in when he failed to take relevant matters into considerations in his ruling in respect to the following pertinent factual circumstances:

   (a) that the Commissioner of Police in exercising his powers under the Police Standing Order 315 was acting on behalf of the public interest. The comments of the Fiji Court of Appeal about the conduct of the Respondent in ***Alifereti Yaya v. the State Criminal Appeal No. AAU 42 of 2004*** cited at paragraph 5.7 of the Appellant's submission in the High Court proceedings is relevant;

   (b) that exercise of such powers was considered prudent in order to prevent a worrying state of affairs brought about by the spate of serious crimes committed in regards to robbery with violence;

   (c) that the Respondent is a suspect in one of the major robberies in Fiji involving $1.3 million.

(d) that the Commissioner of Police had made a personal assurance that it is incumbent upon those persons wanted by the police to voluntarily report to any police station to clear their names and further undertakes that they will get all the protection enshrined in the Constitution and laws of Fiji;

(e) that as a consequence of the Commissioner of Police using the media, the Respondent voluntarily reported himself to the police;

(f) that the Respondent did not deny to the police when questioned regarding his involvement in planning and execution of the robbery;

(g) that the Respondent after the due criminal process was convicted of the charges of receiving stolen property and was subsequently sentenced to 3½ years in prison;

(h) that the Respondent is a notorious criminal with about 28 criminal records entered against his name and frequently associates with other known ex-convicts;

(i) that the Respondent's reputation, integrity and credibility could not have been affected, tarnished or questioned due to his past criminal record.

3. That the learned Judge erred in law and in fact in holding that the right to privacy of the Respondent is absolute and failed to properly adopt a balancing exercise as to the reasonable and justifiable limitations of the right to privacy as practised in other free and democratic societies as mandated by section 32(2) of the 1997 Constitution.

4. That the learned Judge erred in law and in fact in distinguishing ***Hellewell v. Chief Constable of Derbyshire [1995] 1 WLR*** from the facts of this present case in regards public interest defence concerning the role of the police as articulated in Section 5 of the Police Act.

5. That the learned Judge erred in law and in fact in failing to properly consider the need to balance conflicting rights in the public interest as established by case law.

6. That the learned Judge erred in law failed to analyze and make findings into the merits or otherwise of the Appellants evidence and exposition of the law but placed heavy reliance on the written submissions of the Fiji Human Rights Commission on behalf of the Respondent as demonstrated in the

direct quotation, basically word for word, of pages 3 - 7 of the FHRC submission which is repeated in pages 6 – 13 of the judgment.

7. That the learned Judge erred in law and in fact when he took into consideration irrelevant and erroneous matters in his ruling, namely:

   (a) failing to take judicial notice that Commissioner of Police is appointed under Section 111 of the 1997 Constitution and not under Section 146(1)(f) as articulated by the Fiji Human Rights Commission in its submission and cited at page 16 of the judgment;

   (b) reliance on Section 27(1)(f) of the Constitution as a basis of the breach of Respondent's right as an arrested or detained person when pages 14 - 15 of the judgment made references that he was "free man" and that "he was not arrested but was only a suspect";

   (c) at page 15 of the judgment made references to the undignified manner in which the Respondent was defamed in the media without taking into account the fact that the Respondent had pleaded guilty to the charges of receiving stolen property and was subsequently convicted and sentenced to 3½ years in prison;

   (d) failing to consider and weigh the implications of the defence in law to defamation of truth, fair comment and public interest;

   (e) quoting local authorities namely ***Audie Pickering, Taito Rarasea and Sailasa Naba*** as cited in the Legal Aid submission on behalf of the Respondent without making meaningful references to its effect and relevant to the facts requiring determination.

8. That the learned Judge erred in law and awarding damages based on the peculiar facts of the case under appeal.

[13] These grounds can be summarized in this way. Firstly that the information that the police wanted the Respondent as a suspect in a criminal investigation was not private information. Secondly, that if it was private, there was no breach because the furtherance of a criminal investigation was a legitimate aim and publication of his name was a proportionate step in furtherance of that aim. And thirdly, that in any event the Respondent's right to privacy was not absolute and had to be balanced with the public interest in ensuring that offenders were brought to justice. The last ground (8) was abandoned.

[14] Counsel for both Appellant and Respondent filed and made comprehensive and informative authorities in the course of this appeal. The Respondent in opposing this appeal relied on the House of Lords decision in ***Campbell v. MGN Limited [2004] UKHL 22*** to define the right to privacy as including protection from the wrongful disclosure of private information even where the *"information"* was revealed in a public capacity. The Respondent submits that the disclosure in this case, in the way it was done and without evidence of other steps taken to locate the Respondent was unreasonable and in breach of section 37 of the Constitution in that it did not constitute action reasonable in a democratic society.

Privacy

[15] What does *"personal privacy"* mean, in the context of section 37(1) of the Constitution? The common law protected individuals from the wrongful use of private information, through the development of a cause of action frequently referred to as *"breach of confidence."* Before a claimant could rely on this form of protection he or she had first to show that the disclosure of information created an obligation of confidence. (***Coco v. A.N. Clark (Engineers) Ltd. [1969] RPC 41*** cited in ***Campbell v. MGN Limited*** (supra) per Lord Nicholls of Birkenhead at page 5). This requirement became redundant, and in ***Attorney-General v. Guardian Newspapers (No. 2) [1990] 1 AC 109, 281***, the law required only evidence that a person had received the information knowing (or that the person ought to have known) that it was regarded as confidential.

[16] International human rights law transformed the principles of a breach of privacy tort considerably. Although Article 8 of the European Convention on Human Rights differs from the wording of section 37 of the Fiji Constitution, the limits of the right, and the way the courts in England and in the Strasbourg court have interpreted the right to privacy are helpful. This is especially because section 43(2) of the Fiji Constitution requires the courts

to have regard to public international law in interpreting any provision of the Bill of Rights. Article 8 of the European Convention on Human Rights provides:

> ***"(1) Everyone has the right to respect for his private and family life, his home and his correspondence;***
>
> ***(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."***

[17] The balancing exercise applicable in considering what is *"reasonable and justifiable in a democratic society"* is relevant to the second part of this judgment, that is, to the question of the proportionality of the means in relation to the legitimacy of the ends. For the purposes of deciding what is *"private"* in the context of section 37(1) of the Fiji Constitution, a fuller explanation of the ambit of the protection in Article 8(1) of the European Convention is helpful. Counsel for the Appellant referred us to the useful decision of the English Court of Appeal in ***A v. B (a company) and Another EWCA Civ. 337***, a case about the imminent publication of the details of the extra-marital affairs of a well-known married footballer. An injunction was granted to prevent publication, and an attempt to set the injunction aside was unsuccessful, the judge holding that the footballer had a right to respect for his private life and there was no public interest consideration to justify publication. The news media agency appealed to the Court of Appeal. The appeal was allowed. In the course of the judgment (delivered by Lord Woolf CJ), the court held that a duty of confidence arose when the party subject to the duty either knew or ought to have known that the other person could reasonably expect his privacy to be protected. The court held that the disclosure of an extra-marital relationship by a party to the relationship was not necessarily *"private"* such that the courts *"should be astute to protect."* It was therefore erroneous to assume that the information was protected, the onus being on the newspaper to prove a legitimate public interest in publishing. The court cited with

approval, the judgment of Gleeson CJ in ***Australian Broadcasting Corp. v. Lenah Game Meats Pty Ltd. (2001) 185 ALR 1***, which included the following definition at paragraph 42:

> ***"There is no bright line which can be drawn between what is private and what is not. Use of the term "public" is often a convenient method of contrast, but there is a large area in between what is necessarily public and what is necessarily private. An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford. Certain kinds of information about a person, such as information relating to health, personal relationships or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behavior, would understand to be meant to be unobserved. The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private."***

[18] In the context of police investigations, pre-Human Rights Act 1998 jurisprudence in England, indicated that a duty of confidence arose in relation to police photographs of a suspect, but that the publication of such photographs could be permitted where the police acted in good faith and for the investigation of crime or the apprehension of suspects at large. In ***Hellewell v. Chief Constable of Derbyshire [1995] 2WLR 804***, the Queen's Bench Division (per Laws LJ) held that there was no doubt that the disclosure of a photograph could be actionable as a breach of confidence where the photograph was taken without the person's consent and knowledge. However, if the police could show that the publication **and the extent of publication** were justifiable in the public interest, there was no breach. At page 810 of his judgment, Laws LJ said:

> ***"The key is that they must have these and only these purposes in mind and must as I have said, make no more than reasonable use of the picture in seeking to accomplish them."***

[19] The issue of the consent of the subject of the publication, was considered central to the question of privacy by the Canadian Supreme Court in ***Les Editions Vice-versa Inc. and Another v. Aubry 5BHRC 437***. That was a case about the unauthorized publication of a photograph taken of a teenager in a public place and used by an arts magazine. The Supreme Court held that the right to privacy, guaranteed by section 5 of the Quebec Charter of Human Rights and Freedoms, was *"to protect a sphere of individual autonomy."* The right to privacy included the ability to control the use made of one's own photograph because every person must be assumed to have control over his/her own identity. The right to privacy was therefore infringed as soon as a photograph was published **without the consent of the subject**. Freedom of information, and the public's right to information did not include the right to infringe the privacy rights of others without justification.

[20] A decision of more direct relevance to the facts of this appeal (but made pre-Human Rights Act 1998) is ***R v. Chief Constable of the North Wales Police and Others, ex parte AB and another [1997] 4 ALL ER 691***. In that case, convicted paedophiles, who had served their sentences, tried to settle in two parts of England and Wales. In each part, their names, offences and locations were published in the local press, leading both to fear reprisals. They then moved to North Wales in a caravan. The local police disclosed their convictions to the owner of the caravan site, purportedly to protect the children living there. The owner of the caravan site, told the two paedophiles to move away. They did so but they also applied for a judicial review of the police policy of disclosure. It was held by the Queen's Bench Division (per Lord Bingham CJ) on the question of whether such disclosure was in breach of Article 8 of the European Convention on Human Rights that:

> ***"We were referred to no authority on the application or interpretation of art 8, but I am prepared to accept (without deciding) that disclosure by the North Wales Police (NWP) of personal details concerning the applicants which they wished to keep to themselves could in principle amount to an interference by a public authority with the applicant's exercise of the right protected by that article. It would however, seem to me plain that the disclosure which the NWP made was within the exception specified in the***

article, provided that the disclosure was made in good faith and in the exercise of a careful professional judgment, and provided that the disclosure was limited to that reasonably judged necessary for the public purpose which the NWP sought to protect."

[21] Buxton J in his judgment (at p.703) said that the restrictions on the publication of police information, did not arise from the law on confidence, or on privacy but from the law of public administration. At paragraph b, c and d, he said:

"I accept that the police's knowledge that the persons AB and CD, had committed serious crimes was not something that the police were free to impart to others without restraint. It does not however follow that the restraint springs from the law on confidence. In this particular case the police did not acquire the information in any of the circumstances that are normally thought to impart a duty of confidence ....."

[22] He found that the limitations on the police right to publish came instead from their public law duties.

[23] Subsequent decisions post-1998, show that privacy rights under the Act have broader perimeters than the law on breach of confidence under the common law. Indeed Buxton J conceded in ***R v. Chief Constable*** that the fact that the paedophiles had been convicted, and that their convictions were publicly known, did not deprive the information of its private nature. He said at page 704 – *"I do however consider that a wish that certain facts in one's past, however notorious at the time, should remain in that past, is an aspect of the person's private life sufficient at least to raise questions under art 8 of the Convention...."*

[24] In ***R v. Local Authority in the Midlands Ex parte LM [2000] UKHRR 143***, the applicant applied for judicial review of the decision of the police and a local authority to disclose to a county council with which he had a contract to supply school transport, that allegations had been made against him of the sexual abuse of his daughter and a child in his care. No charges had ever been laid against him. The allegations had been made 10 years

previously. It was held by the Queen's Bench Division (per Dyson J) that disclosure was a breach of article 8 of the Convention, that the information was *"private"* and that the local authority had failed to show a *"pressing need to warrant disclosure."*

[25] In ***Wood v. Chief Constable of the West Midlands Police [2004] EWCA Civ 1638*** a police officer wrote to three persons in the insurance industry telling them that a person had been arrested for stealing motor vehicles, that he was awaiting trial and that he was involved in criminal activities under the guise of a legitimate business. Eventually the suspect was acquitted at his trial. He issued defamation proceedings against the police officer. He succeeded. On appeal, on a consideration of the defence of qualified privilege, the court held that:

> ***"The duty imposed on the police, as a public body, was that the police ought not generally to disclose information which came into their possession relating to a member of the public, being information not generally available and potentially damaging to that member of the public, except for the purpose of and to the extent necessary for the performance of their public duty. The principle rested on a fundamental rule of good public administration."***

[26] But in ***Campbell*** (supra) the test was said to be (per Baroness Hale at p41) whether there was *"a reasonable expectation of privacy"* a test broader than that of Gleeson CJ in ***Lenah Game Meats Pty Ltd*** (supra). What is clear from the ***Campbell*** decision is that what is private and what is not depends to a significant extent on the type of information being imparted. It may not be *"private"* to say that a celebrity is getting married again. It might be, if a newspaper wished to publish that the celebrity had a broken leg.

[27] In ***Hosking and Hosking v. Simon Runting & Anor [2004] NZCA 34*** a decision of the New Zealand Court of Appeal, a photograph of 18 month old babies was taken for publication in the New Idea magazine. The parent of the babies sought to restrain publication. The issue was the privacy rights of the children. In New Zealand there is a Bill of Rights Act. It

is not part of any written constitution. The claim was for breach of a tort of privacy. It was accepted that because the photographs were taken in a public place, there could be no claim for breach of the common law tort of confidence. The New Zealand Bill of Rights Act includes no specific guarantee of a right to privacy. The court of first instance held that there was no separate privacy tort in New Zealand. The Court of Appeal held (per Gault and Blanchard JJ) that the scope of such a tort *"should be left to incremental development by future courts"*, but that there were two fundamental requirements for a successful claim for interference with privacy. One was the existence of facts in respect of which there is a reasonable expectation of privacy and the second is that the publicity given to those private facts would be considered highly offensive to an objective reasonable person (at p32). A defence to the tort is that the publication is justified *"by a legitimate public concern in the information."*

[28] These principles are very similar to those of the English courts, and in particular to the principles adopted by the House of Lords in ***Campbell***, and to the decision, for example of ***Douglas and Other v. Hello Ltd [2001] QB 967***. In this latter decision, the law of privacy post-human rights jurisprudence, is no longer dependent on the existence of a confidential relationship. All it requires is evidence of the loss of personal autonomy as the result of a breach of the reasonable expectation of privacy.

[29] In considering what is private, and what is not this court adopts these principles. Private information which is protected by section 37 of the Constitution is information in respect of which there is a reasonable expectation of privacy. The purposive approach to interpreting this right involves an inquiry into whether there has been an intrusion into the private affairs of an individual. There is no exemption for information obtained by public bodies such as the police. Where the police, in the course of investigations, obtain information which the subject reasonably expects will be kept private, there is a duty not to disclose that information to the public unless it is for a purpose which is justifiable in a democratic society.

[30] To turn therefore to the facts in issue in this appeal, the information that the Respondent was a suspect in a violent robbery was information which any reasonable person would expect would not be disclosed to the public. The duty not to disclose goes beyond the good public administration duty. It is a duty to respect the privacy of the suspect until and unless there is a legitimate public interest in disclosing.

Breach

[31] Was the Police Commissioner in breach of this right? The Respondent had a right to expect that the police would not disclose publicly the information that he was a suspect, at least until he had been questioned and charged. Section 37(2) of the Constitution says that the right to personal privacy may be subject to such limitations *"prescribed by law as are reasonable and justifiable in a free and democratic society."* Counsel for the Appellant submits that such limitations can be prescribed, not only by written law but by the common law. We accept that. The law includes both statute and judicial authority.

[32] In any event, there are statutory powers given to the Commissioner of Police to maintain law and order, to preserve the peace, to protect life and property and to prevent and detect crime (the Police Act section 5). Section 17(3) of the Police Act provides:

> ***"It shall be the duty of every police officer promptly to obey and execute all orders and warrants lawfully issued to him by any competent authority, to collect and communicate intelligence affecting the public peace, to prevent the commission of offences and public nuisances, to detect and bring offenders to justice, and to apprehend all persons whom he is legally authorized to apprehend and for whose apprehension sufficient ground exists."***

[33] We accept that there was evidence before the trial judge that Commissioner Hughes was purporting to exercise his powers under this section, when he authorized the publication of the Respondent's name as a wanted suspect.

[34] However it is not enough, for the purposes of section 37(2) of the Constitution to say that you have a legitimate aim in publishing. It must be shown that the publication was proportionate to that aim. In simple terms, was it necessary, was it justifiable, was it a proportionate step to publish in this manner? The test of proportionality must be narrowly construed once an intrusion into privacy has been established.

[35] The affidavit of Andrew Hughes fails to explain why the publication of the Respondent's name, and the details of their suspicion, was necessary in the interests of crime prevention and detection. The evidence was that the Respondent's name was published as one of Fiji's "most wanted" on the Fiji TV news, on the radio and in the Fiji Times over several days. At paragraph 11 of his affidavit the Commissioner said that publication *"was the only option that the Fiji Police Force had available to it to get to the suspect persons and to enable criminal investigations to commence."* He did not explain why it was the only option. The police had two addresses for the Respondent. Did they go to those addresses to try to find the Respondent? Did they speak to his relatives? If he was in Lautoka, did they contact the Lautoka Police Station to see if he could be located there? Why was publication of his name in the media the only option?

[36] It is not disputed by the Respondent that he did commit the robbery in Lautoka. However at the time of publication, he was only a suspect. The police duty to detect crimes is unarguable. If the affidavit of Andrew Hughes had explained all the alternative and non-public ways the police had exhausted in trying to find the Applicant in order to investigate, we have no doubt that the Respondent would have had no claim. But no explanation was offered. Nor was it explained why it was necessary to publish to the public as opposed to police stations or police informers. As the trial judge found at page 17 of his judgment:

> ***"The manner in which the Commissioner of Police publicized the name with a photograph in the media has condemned the applicant already and convicted him without him having been arrested and charged."***

And earlier at page 15:

> ***"..... there was no need to advertise to the whole world so to say the name and photograph of a person who in law is regarded as innocent until found guilty; he was not arrested but was only a suspect. A limited circulation to those concerned would not have breached the Bill of Rights provision."***

[37] We agree. We find not only that there was a breach of the Respondent's right to personal privacy, but also that the means employed by the police to apprehend him or to persuade him to surrender, were disproportionate to their aim. The fact that the breach caused the Respondent distress and would have caused distress to a reasonable person, is not a requirement under section 37 of the Constitution. We do not adopt the second part of the test of the New Zealand Court of Appeal in ***Hosking v. Runting*** (supra) that is that there must be evidence that publication is *"highly offensive to the reasonable person."* That requirement was rejected by the Canadian Supreme Court in ***Vice-Versa Inc*** (supra) and it is not consistent with the development of the human rights jurisprudence generally. The evidence of distress is relevant only to the question of remedies.

[38] Nevertheless, if it had been a requirement, we would find that it is highly offensive and distressing to be the subject of pre-investigation publicity, generated by the police, and before there is a chance to clear one's name as it were, in the course of fair police investigation.

[39] In this case we find that the learned trial judge was correct to find that there was a breach disproportionate to the aim of effective policing.

The public interest

[40] Counsel for the Appellant asks us also to consider the balancing of the rights to privacy with the right to life given to ordinary citizens. We consider that the rights of society to live without crime, without fear of harassment and violence are amply protected in the consideration of what is a proportionate means under section 37(2). After all, once we accept that effective policing, the apprehension of offenders and the prevention and detection of crime are legitimate aims which justify in principle encroachments into privacy rights, it is obvious that we must balance the right to life of the public with individual rights to privacy. The right to live without fear of violence is a right to life issue, and is equal in status to the right to privacy. However in balancing these rights, the question of what proportionate steps can be taken in the interests of protecting the right to life, to limit privacy rights, is necessarily addressed.

[41] In ***Osman v. United Kingdom*** ***(European Court of Human Rights) 5 BHRC 293*** a teacher shot and killed the father of a former pupil, and wounded the former pupil. He was convicted of manslaughter and was detained in a mental hospital. Prior to the shooting, there had been a history of conduct on the part of the teacher, known to the police, which might have suggested a vendetta against the pupil. The pupil and his mother brought a negligence action against the police alleging that the police had failed to act to protect the pupil's family. Before the European Court of Human Rights, the family alleged a breach to the right to life, to a fair trial and to family life. The court held by a majority, that the right to life included an obligation on the authorities to do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they had or ought to have had knowledge. In this case, the police did not know, nor could they have known, that there was a real and immediate risk to the life of the pupil's family from the former teacher. There had been no violation to the right to life.

[42] The right therefore includes a right to be protected from violent crime. We accept that. We find however that the affidavit of Commissioner Hughes fails to set out the reasons for his conclusion that the publication of the Respondent's name was necessary to protect the lives of other citizens. The crime he was alleged to have committed had already been committed. There is no evidence that any one person was, or other persons were, to use the words of the European Court of Human Rights, *"at real or immediate risk of the loss of life."*

[43] Counsel for the Appellant referred us to the decision of the United States Court of Appeals (6th Circuit) of ***Bailey v. City of Port Huron and Others (unreported) File Name 07 a043 p06 November 1, 2007.*** The appellant was charged with a drink driving offence, and the police disclosed her name, home address, photograph and telephone number in the local media. Her husband was an undercover deputy sheriff. His name was also disclosed. It was later revealed that she had not been the driver of the car. Her husband was then charged with the drink driving offence. She was charged with obstructing a police officer on the basis that she had lied to the officer. The police then issued a second press release identifying the appellant, her husband and their hometown. She brought a claim against the police alleging a breach of her right to privacy, and to her right to substantive due process. She claimed that *"an individual charged with a crime has a right to prevent the public from obtaining access to her mug shot, the information contained in the police report and the occupation of her spouse."* Previous decisions of the court had found that the United States Constitution did not guarantee a right to privacy in relation to a criminal record and in ***Paul v. Davis 424 U.S. 693 (1976)*** the same court, differently constituted, held that privacy rights and their protection should be left to the legislative process.

[44] That case did not consider the development of human rights cases in relation to privacy in other jurisdictions, and in relation to a constitutional right to privacy. Nevertheless, it differentiated between the release of information not acquired in the course of a criminal

investigation (and which was *"private"*) and information acquired as a result of a criminal investigation. Any official act, such as an arrest, could not be protected by privacy rights.

[45] We do not dispute the ability of the police to publish information, even about the identity of a suspect, where it is in the public interest to do so. The apprehension of offenders and the prevention of crime are two legitimate public interest aims. However, in each such case, the publication must be shown to be acceptable in a free and democratic society, and to be proportionate to the public interest aim.

[46] In each case, there must be a balancing of the means with the end, and necessarily with the rights and freedoms of others. Is it acceptable to limit due process rights to enforce the rights of many to life without crime? What of the rights of suspects in custody? What is proportionate to a legitimate aim requires a careful balancing of the values and ideologies in a society. In the context of section 37 of the Constitution, it requires an assessment of what inroads can be made, in the public interest, into the rights of an individual to a private life. And this assessment must be done by judges in a world of regular covert surveillance, intrusive computer technology and greater legislative police powers.

[47] In this case, we find that the action of the Police Commissioner to be a disproportionate and unreasonable intrusion into the rights of privacy of the Respondent. Had the Police Commissioner explained why the intrusion was the only reasonable step in the circumstances, and that he had attempted other means of locating the Respondent without intruding into his rights to privacy, his acts may have been held to be a proportionate step taken to further the legitimate aim of protecting the public from crime. He did not so explain and we find that the learned trial judge did not err in coming to the conclusion he did.

Result

[48] This appeal is dismissed.

Hon. Justice John Byrne
Judge of Appeal

Hon. Justice Randall Powell
Judge of Appeal

Hon. Justice Nazhat Shameem
Judge of Appeal

Solicitors:

Attorney-General's Chambers for Appellant
Legal Aid Commission for the Respondent