EXISTING INTERIM SUPPRESSION ORDERS EXTENDED AS INDICATED BELOW.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA695/2010
[2010] NZCA 511

BETWEEN	MALCOLM DUNCAN MAYER Applicant
AND	SERIOUS FRAUD OFFICE Respondent

Hearing: 8 November 2010

Court: Ellen France, Gendall and Cooper JJ

Counsel: G C Gotlieb for Applicant
N P Chisnall for Respondent

Judgment: 12 November 2010 at 11.30 am

JUDGMENT OF THE COURT

A The application for special leave to appeal is declined.

B The existing interim order for suppression of the applicant's name is extended until 5 pm on 19 November 2010. If by that time the applicant has filed an application for leave to appeal to the Supreme Court, the existing order will be further extended until the Supreme Court makes a determination in the matter.

REASONS OF THE COURT

(Given by Ellen France J)

Introduction

[1] The applicant seeks special leave under s 144(3) of the Summary Proceedings Act 1957 to appeal from the decision of Venning J allowing the respondent's appeal against the granting of name suppression to the applicant pending trial.[1]

[2] The applicant is to face trial on 62 counts of fraud relating to property transactions.[2] Prior to his arrest on these charges,[3] the applicant spoke to a reporter at the Sunday Star Times on a confessional basis about his alleged offending. That interview formed the basis of an article published in the Sunday Star Times on 6 September 2009. An application under s 344A of the Crimes Act 1961 has been filed to determine the admissibility of the interview at trial.

[3] The applicant was successful in obtaining interim name suppression in the District Court.[4] After the respondent's successful appeal against that decision, on 28 October 2010 Venning J declined the applicant's application to the High Court for leave to appeal to this Court.[5] Venning J continued the interim name suppression order until 12 November 2010 pending this application.

Basis of proposed appeal

[4] The application raises the following question for decision:

> Whether the decision of the High Court to refuse to prohibit the publication of the name of the applicant prior to the determination of the admissibility of the applicant's interview with the Sunday Star Times reporter was plainly wrong.[6]

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1 *Serious Fraud Office v Mayer* HC Auckland CRI-2010-404-338, 19 October 2010.
2 The background is set out in more detail in the judgment of Venning J of 19 October at [2].
3 The applicant was arrested and charged on 19 May 2010.
4 *Serious Fraud Office v Mayer* DC Auckland CRI-2010-004-8862, 31 May 2010.
5 *MDM v Serious Fraud Office* HC Auckland CRI-2010-404-338, 28 October 2010.
6 A refinement of the questions originally posed by the applicant.

Submissions

[5] The principal submission for the applicant is that name suppression is necessary to protect his right to a fair trial. The applicant says there is a particular risk if the question of name suppression is decided prematurely, that is, before the question of admissibility of the interview has been determined. The Judge was therefore plainly wrong not to maintain name suppression, at least in the interim.

[6] The Crown opposes the grant of leave essentially for the reasons given by Venning J in declining leave.

Discussion

[7] In terms of s 144(3) of the Summary Proceedings Act, special leave to appeal may only be granted where the appeal raises a question of law which "by reason of its general or public importance or for any other reason" ought to be submitted to the Court of Appeal. In declining leave to appeal, Venning J concluded that the proposed question of law was not of the requisite importance because the answer is essentially fact dependant. We agree.

[8] There can be no complaint about the principles applied by the Judge. Venning J treated the right to a fair trial as absolute but, applying well-settled principles, concluded that the right would not be prejudiced by publication of the applicant's name in relation to the present charges.

[9] That approach is apparent in the Judge's response to the particular concern raised by the applicant, namely, that the reporting would be linked to the earlier article and so revive the associated sensationalism (particularly the headline). Of this concern, Venning J said that the right to a fair trial can be ensured by:

> [18] ...
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> - firm directions to a jury by the trial judge about the prohibition on referring to earlier media reports and the obligation to determine the case on the evidence given in Court;

- the passage of time between any such "revival" and trial. The trial will be at least eight to nine months away.

[10] Further, as Venning J observed, there is an artificiality in granting name suppression now given the applicant's name is already in the public domain in respect of the offending. In addition to the initial article, there have been a number of references in the news media to the applicant's involvement in various aspects of the transactions that we understand will be in issue at trial, in particular:

> [20] ... subsequent reports on 13 September, 1 November and 3 January, all in the Sunday Star Times. Further, ..., there was a report in the NBR on 11 August 2010 of a commercial case involving the [the applicant which] ... referred to the previous report in September last year.

[11] The proposed question of law as now framed adopts a similar formulation to that in issue in *R v B (CA459/06)*[7] which involved a refusal to grant name suppression pending an application for severance. However, in granting leave this Court noted that the case raised a difficult question of policy and the potential impact of the severance determination was of a different order given at least two trials were possible.[8]

[12] Mr Gotlieb argues that the concerns raised by this case about the impact of inaccurate reporting on the ability to get a fair trial mean the proposed question of law has the requisite public importance. It is not suggested, however, that the test should alter but, rather, that the particular circumstances alter the evaluative exercise being undertaken. That does not give rise to any broader question.

[13] In terms of other circumstances particularly relied on by the applicant, the applicant disputes that the interview was given voluntarily. For present purposes, we need only note that in the applicant's affidavit filed in support of name suppression in the District Court, he said he had participated reluctantly, although he "now realise[d he] was manipulated into doing so."[9]

[14] For these reasons, we do not consider the proposed appeal raises a question of law of the requisite importance.

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7 *R v B (CA459/06)* [2008] NZCA 130, [2009] 1 NZLR 293.
8 *R v B (CA459/06)*, 13 December 2006.
9 The latter is a reference to advice he received from an associate.

Disposition

[15] Accordingly, the application for special leave to appeal is declined.

[16] To protect the position in the interim should the applicant seek leave to bring a leapfrog appeal to the Supreme Court, the existing interim order for suppression of the applicant's name is extended until 5 pm on 19 November 2010. If by that time the applicant has filed an application for leave to appeal to the Supreme Court, the existing order will be further extended until the Supreme Court makes a determination in the matter.

Solicitors:
Crown Law Office, Wellington for Respondent