IN THE SUPREME COURT OF NEW ZEALAND SC 13/2009

DAVID CULLEN BAIN

Appellant

v

THE QUEEN

Respondent

Hearing:	11 June 2009
Coram:	Elias CJ Blanchard J McGrath J Wilson J Gault J
Appearances:	H A Cull QC with P A Morten for the Appellant C L Mander for the Respondent J S Kós QC with S L Bacon for Fairfax New Zealand Limited W Akel with H Wild for Television New Zealand Limited

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APPLICATION FOR RELEASE OF REASONS FOR JUDGMENT

MS CULL QC:

May it please Your Honours, I appear with Mr Morten for Mr Bain.

MR MANDER:

May it please the Court, Mander for the Crown.

ELIAS CJ:

Yes, thank you Mr Mander.

MR KÓS QC:

Yes, may it please Your Honours, I appear with Ms Bacon for Fairfax Media, also for APN New Zealand and Radio New Zealand.

ELIAS CJ:

Thank you Mr Kós.

MR AKEL:

Yes, may it please the Court, I appear for TVNZ with Ms Wild.

ELIAS CJ:

Thank you Mr Akel. Now, Ms Cull, we've given an indication that we think this is properly treated as your application and so we would like to hear from you as to the grounds on which you are seeking suppression post-conclusion of the trial.

MS CULL QC:

Yes may it please the Court, I want to renew and indeed pursue the application for adjournment. The application for adjournment on the part of the defence was made, not lightly. There is a need, in my respectful submission, to prepare a properly considered argument here. There are matters arising, matters of principle and constitutional importance, that, with respect, are not canvassed in *Rogers*, and the defence in the present circumstances, on barely 48 hours notice, simply returning from a trial, we're exhausted, we have no funding, no materials, they're still en route I'm afraid, between Christchurch and Wellington, and we have no –

ELIAS CJ:

Ms Cull, what's the grounds of the application? That's what we need to know. You've simply made the general assertion that it's not in the interests of justice but as you will have seen from the original form of the order, the whole

basis for the suppression order was protection of fair trial. That substratum having been removed, it's really incumbent on you if there is another ground on which you wish to apply for suppression to at least enunciate it and then we can consider whether it's necessary for you to have time to prepare when we know what it is. But at the moment, we don't.

MS CULL QC:

Well with respect Ma'am, I will give you those matters that I have dealt with it in the way of dealing with *Rogers*, and the distinctions between this case and the *Rogers* decision which –

ELIAS CJ:

Rogers doesn't seem to me to be very much – well, not directly in point. The problem that you face is that the suppression attaches to a judgment of the Court, to reasons of the Court which normally are out in the public arena immediately, and the concern of course that we have is that this touches on the whole question of the administration of justice and respect for law.

MS CULL QC:

I hear what Your Honour is saying, and this has been converted into an application for Mr Bain, and from the defence, why I am asking for an adjournment before I tell you those points is that the urgency with which this has been accorded has not been set out in my friends' applications, and the defence are simply asking for some time to properly address those issues of administration of justice, which we do think are at large here.

If I can then move to the five points, I'm in no position to argue a reasoned set of submissions before Your Honours, we simply haven't had the time, frankly, or the energy to deal with this and we certainly are here unresourced.

So the first point, and I have taken the benchmark from this Court's judgment of *Rogers*, because of course, those issues were looked at in relation to post-trial release of previously ruled inadmissible evidence. The first point is, in this judgment, the disputed passage did not even meet the threshold as

evidence under the Evidence Act 2006. It did not meet the relevance threshold and this Court was unanimous in upholding that. None of the experts could agree if the sounds were even words, and even if they were words, what they were. If I contrast that with respect to other rulings that have been made in relation to evidence, *Rogers* for instance, the video was obviously relevant, it was evidence which amplified the confession that was already adduced in evidence before the Court. Here –

ELIAS CJ:

Can you perhaps just go through the points that you want to make, just so that we have the scope of it, because that's one relating to the evidence itself.

MS CULL QC:

Yes, we're saying that it's not evidence, it's nonsense and unlike any of the other rulings, you actually have disputed passages or a passage which nobody can agree are even words, and it lends itself then to speculation.

BLANCHARD J:

A point, of course, made in the reasons.

ELIAS CJ:

In the judgment.

MS CULL QC:

Of course.

BLANCHARD J:

Not in the way you've expressed it, but to somewhat similar effect.

MS CULL QC:

Yes. The second point is the ruling was made under the Evidence Act 2006, not so in *Rogers*, but of course under the Evidence Act, under section 6, the purpose and principles, the first three, section 6(a) to (c), with respect, are relevant here. That is providing for facts to be established by the application

of logical rules, providing rules of evidence that recognise the importance of the rights affirmed by the New Zealand Bill of Rights Act, and importantly, promoting fairness to parties and witnesses. Now, in my respectful submission, those principles need to be factored in to a ruling such as this unanimous Court decision, that if something doesn't meet the logical rules and if it does not become relevant evidence, then all the more reason to carefully examine the tension of rights under the New Zealand Bill of Rights Act.

If I can move then to my third point. There are issues –

ELIAS CJ:

I just also think that, my recollection, or my understanding, is that the majority in fact did hold the evidence to be relevant, and it was an issue as to whether it would be –

BLANCHARD J:

No, no that's not right. The majority –

ELIAS CJ:

Oh, the majority held it was, yes, that's right, I'm sorry.

MS CULL QC:

Yes, so I remake that point, that it wasn't relevant.

McGRATH J:

Sorry, which is the provision in the Bill of Rights Act you're referring to Ms Cull?

MS CULL QC:

Section 25(c) for a start, there are issues, in my respectful submission, arising under section 25(c), and that is the right to be presumed innocent until proved guilty according to law. And section 27, the principles of natural justice, which of course, incorporate rules of fairness. Now, in my respectful submission, the right to be presumed innocent is touched on briefly in *Rogers*, it's in

Justice Tipping's decision, but no reference is actually made to the presumption. Of course an acquittal does not mean that the person is innocent, but the presumption of innocence underpins our system of justice. Now, in my respectful submission, there's real tension between the section 14 interests upon which my friends rely, and the rights of David Bain.

BLANCHARD J:

What is in the reasons for judgment that suggests that Mr Bain is not being presumed innocent?

MS CULL QC:

No Sir, that's not what I'm saying. What I am saying is, the Court, in addressing whether this decision and reasons of judgment should be released, is releasing, of course, details of what this disputed passage may or may not mean. And in doing so, in my respectful submission, it is giving rise to a media speculation, that this was not the proper verdict, that this verdict can't be sustained –

BLANCHARD J:

Any fair and reasonable account of the reasons for judgment would have to make it very clear that the Court did not regard the evidence as relevant, and certainly didn't regard it as reliable.

MS CULL QC:

Well, in my respectful submission Sir, obviously that's a matter for the Court, but –

BLANCHARD J:

Well it's not a matter for the Court, it's a matter of what is a fair and reasonable account of the reasons for judgment.

MS CULL QC:

The tension that I'm referring to here Sir is that the information or opinions released under section 14 of the New Zealand Bill of Rights Act, which of

course, is one of the strands of the applications before you for release, needs to be measured against the other rights, which sees an accused, such as David Bain, being constantly pursued in the media with words which I'm not sure the media are ever going to say were necessarily disputed, but be that as it may, becomes a question then of whether that –

ELIAS CJ:

This proves much too much, Ms Cull. I mean, I'm not sure that it's really directed at the issue before the Court, which is really what Justice Blanchard is putting to you, which is about whether this Court's reasons for judgment should be suppressed. But in any event, even in its own terms, looking at the evidence, your argument would mean that in the event of an acquittal, all evidence should be suppressed. All evidence at trial should be suppressed.

MS CULL QC:

No Ma'am, with respect, that is not the position. What I'm arguing here is, that when you have a trial, you have properly adduced evidence, of course it was available and it's been publicly available. This, however, didn't even meet the threshold of evidence and that is the distinction. And if such nonsense, if I can call it that, disputed passage sounds with a contention for which the Crown was holding that it was an admission of some sort, is then going to be released even with the reasons of the Court, then it fuels speculation within the media and is not in the public interest, which is my next –

BLANCHARD J:

Are you effectively arguing that this Court's reasons will never be able to be reported in the New Zealand Law Reports?

MS CULL QC:

What I'm submitting, and that's why I want further time to actually develop this submission, but the Court's reasons are so enmeshed with the disputed passage and the sounds, that the fuelling of further speculation in the media, which has already attempted to undermine the verdict, is an issue of public importance, constitutional importance –

BLANCHARD J:
So we will have a forever secret judgment of this Court?

MS CULL QC:
Well, I'm not suggesting that it's forever secret, but I am suggesting that the reasons, as given in the judgment, have become so integrated with the disputed passage that it –

BLANCHARD J:
Well accepting that might be so, are you going to suggest that the judgment shall never be published, not even in law reports, and not withstanding that it's an important precedent?

MS CULL QC:
In my respectful submission, what I am submitting Sir is that it makes serious inroads into the jury verdict that has been delivered after this time, and raises –

BLANCHARD J:
Well we've got a balancing exercise on our hands here.

MS CULL QC:
I agree.

BLANCHARD J:
And there's a pretty important factor going the other way.

MS CULL QC:
Well could I just deal with the last three points and then obviously I'll raise that, come back to that.

The fourth point was, what is the public interest here? Are we dealing with public interest or are we dealing with media interests? Speculation, which this

Court was concerned that the jury should not engage in, is now going to be open for the media, and in my respectful submission, one has to bear in mind that speculation, in nonsense, in matters that weren't even evidence, serves to undermine the jury verdict and subject David Bain to further intense media scrutiny, and in my respectful submission, after 15 years, two very public trials, one miscarriage of justice and a jury who has heard all the evidence for three months, that should be an end of the matter.

GAULT J:

Could you just help me, what the principle behind this point is, are you saying it is not a matter of public interest or are you saying the public interest is outweighed by the private interest?

MS CULL QC:

I'm saying Sir that one has to be careful about measuring what the public interest is here.

GAULT J:

I understand that point, but I'm just trying to get what your point is.

MS CULL QC:

Well I am saying that the private interest here must also be factored in and with the greatest of respect, I think there is a danger that that is going to be completely overlooked. Speculation within the media on matters that didn't even reach the threshold must be taken into account when one looks at this as Professor French and all others who deal with this case describes as an unusual case. It is not simply a blanket application of a policy that should be in place here, it is a careful consideration of the acquitted. What rights can he still hold onto after withstanding public scrutiny for 15 years and two very public trials?

GAULT J:

What sort of speculation will be aroused by an order for further suppression?

MS CULL QC:

Well sir, there is already speculation within the media, obviously, but where something doesn't even pass –

GAULT J:

Well you've said a lot of times, I disagree with that, personally, I said so in the judgment. But that aside, it seems to me that you are really advancing argument that where there is an acquittal, all evidence that by prior ruling has been excluded, should be suppressed, and that seems to be a very broad submission.

MS CULL QC:

Well I thought I had tailored that, and that's why I'm asking for further time to develop this. It is not a matter of evidence here, and that's where you and I perhaps depart. Where you have something that doesn't even reach that threshold, then we are not dealing with the normal *Rogers* situation where there was relevant evidence but it was excluded because of the breach –

GAULT J:

You're talking about publishing a report of a decision of the Court which says the evidence was not relevant.

MS CULL QC:

What I'm asking the Court to consider, however, is what this does to public confidence in the system by fuelling a debate that is already raging in the media.

Can I move to my next point, public confidence in the criminal justice system of course needs to be maintained. Openness, as this Court noted, obviously had regard to in *Rogers*, needed to be balanced against other interests. Your Honour Chief Justice, and indeed the other two judgments in *Rogers*, referred to the need to have regard to *Vickery* and *Ex Parte AB*, Lord Bingham's decision, that integration and reintegration of an acquitted person is a key factor, and in my respectful submission, that is a key factor here in weighing

the public interest against the private interest, and the warning by the Supreme Court of Canada in *Vickery* that this Court must not become unwitting parties to the continued harassment of a person acquitted, and that couldn't be more germane to the plight of David Bain here.

ELIAS CJ:

What do you say is the private interest that he has in non-publication of the Court decision? Because *Rogers* is different, that was a Bill of Rights Act breach, so his rights were affected. What private right does Mr Bain have that's in issue here?

MS CULL QC:

The presumption of innocence.

ELIAS CJ:

Well then, as has been put to you, that would mean that all evidence in cases where an accused has been acquitted, would have to be suppressed.

MS CULL QC:

No, I'm sorry, and that's where I don't make, I'm at odds with the Bench on this. If the evidence is adduced, obviously evidence is published. There are rulings that have ruled out, there are two other matters where there has been rulings in relation to propensity and confidentiality. Put those to one side, this issue is one where it didn't even get to the benchmark, so it's not evidence, and that is, in my respectful submission, important. The other matter in relation to this is that the authenticity issue which was not before this Court and was still left open for the trial Judge, has not been dealt with obviously, so in your judgment and in the judgments below, the question about why there were missing words from that tape, the chain of custody of that tape, and the proof of its authenticity was in issue at large. In releasing this judgment and in releasing, obviously, the reasons and what's involved here, is inviting further speculation about whether that tape is authentic or not, and that is a matter that obviously, as a result of the Court's decision, was not needed to be

traversed at trial. But here we are opening up allegations on both sides for a matter that has already been well traversed over 15 years.

Just to deal with the private interest, and obviously you're going to refer me to the laws of defamation, but even today, Fairfax Media published this, "No tomorrows for the victims", and one of those victims is Robin Bain. If that isn't a media accepting a jury verdict and what that means, after all they had representatives there for most of the hearing of that trial, then that is a non-acceptance of the verdict.

ELIAS CJ:

What's the rule that says the media have to accept the jury verdict? There's no rule that the news media have to accept rulings of the Court, for example, they can criticise them.

MS CULL QC:

They can criticise them. They can criticise them, but I would have thought that the question about openness, about our criminal justice system, about our constitutional framework is that when we have a trial by peers, that is a jury that stays there for three months and listens to all the evidence and comes out with a verdict, it is not then appropriate to release matters into the media to fuel further speculation on matters that this Court thought were unreliable and not relevant.

Now, I'm in a position Ma'am, that if you proceed and the adjournment is not granted, I can be of no further assistance to this Court and I would seek leave to withdraw.

WILSON J:

Ms Cull, it seems to me that, given the current public interest in the outcome of the trial to which you have referred, immediacy of publication of the judgment is an important consideration. Would you wish to address that question?

MS CULL QC:

Well the immediacy, if the public interest is seen to be – sorry, can I address that again? I have difficulty in understanding about the immediacy when, if there are important issues of principle here, that this Court and the defence are not given time to actually consider those. If however, it is a matter that has already been determined, then clearly, Your Honours observations about immediacy then take precedence. But I would have thought if there were serious issues to be considered here, in light of the points raised, then a week or two weeks to resolve those would not matter in the general scheme of things. I do urge this Court to give consideration to the other issues arising and if Your Honours are minded to allow the defence at least time to prepare a properly reasoned argument.

ELIAS CJ:

So just to summarise, the main interest you say is adversely affected, is the presumption of innocence and what release of the Court's judgment would do to that, is that –

MS CULL QC:

It is, well it's one of the points that I have raised. I think it is but one of them.

McGRATH J:

Well you raised a privacy interest issue too, which is really about Mr Bain being able to get about re-establishing his life, don't you, without undue intrusion, and that would be facilitated, if the orders were continued.

MS CULL QC:

Yes. And I'm referring there to *Ex Parte AB*, which is Lord Bingham's decision and the *Vickery* decision referred to at paragraph 40 of this Court's decision, and various of Your Honours have referred to that decision in your respective judgments.

ELIAS CJ:

All right, we'll take a short adjournment and consider how we'll proceed.

MS CULL QC:

As Your Honour pleases.

COURT ADJOURNS: 10.25 AM

COURT RESUMES: 10.53 AM

ELIAS CJ:

In the formal judgment of the Court delivered on 2 March 2009, orders were made prohibiting publication of any part of the proceeding. In the reasons delivered on 18 March, the Court continued suppression of any part of the proceedings including the reasons for judgment and made a further order that until completion of the retrial, the reasons for judgment were not to be distributed except to the appellant and his counsel, and counsel for the respondents, without leave of the Court.

By recall judgment of 25 May, this order was varied by prohibiting distribution of the reasons for judgment, not pending completion of the retrial as had originally been the case, but until further order of the Court.

The suppression orders made were in accordance with the general practice of appellate Courts where evidence is excluded, because publication of such evidence before verdict could undermine the exclusion of evidence and could risk trial unfairness. That this was the purpose of the suppression orders made on 1 March and 18 March is made clear by their terms, which lasted only until completion of the retrial.

The amendment to provide for suppression until further order of the Court was not to meet any purpose other than the fair trial one. It was to meet the possibility that the retrial then in progress would not finally dispose of the charges. In such circumstances, it would have been appropriate to hear the parties and others affected before releasing the reasons for judgment and

permitting report of the proceedings in this Court. The verdict of not guilty removes any such risk.

Fairfax New Zealand Limited and Television New Zealand have applied to set aside the suppression orders. Mr Bain has indicated that he opposes that course. The sole ground identified in the notice of opposition is the general one, that release of the material is not in the interests of justice. No basis for that contention was identified on the papers filed. The Court considered that the purpose for which the suppression orders were made was spent, and those orders should, in principle, be lifted.

We did not consider it necessary to hear the media applicants in support of their application. We treated, however, the notice of opposition filed by Mr Bain as a new application for suppression order. It must, of course, be based on grounds distinct from those of fair trial which were the basis of the original orders.

At the hearing today, the only grounds put forward for what would be an exceptional course were the private interests of Mr Bain. They are said to outweigh the public interest in publication. We are satisfied these grounds are not reasonably arguable, and therefore there is no reason to grant time for preparation of further argument. The application for adjournment is therefore declined.

It would be an extraordinary step to suppress the reasons for judgment of a Court, particularly this Court which is not subject to correction on further appeal. Any fair and accurate report of the Court's reasons will have to make it clear that the material is not considered to be relevant and was not considered to be reliable.

Courts operate in public and must justify the decisions they reach in reasons available to all. This is essential to confidence in the system of justice. As the Court of Appeal said in the case of *Lewis v Wilson & Horton Ltd*, the principle of open justice serves a wider purpose than the interests represented in the

particular case. It is critical to the maintenance of public confidence in the system of justice. Without reasons, it may not be possible to understand why judicial authority has been used in a particular way. The public is excluded from decision making in the Courts, judicial accountability which is maintained primarily through the requirement that justice be administered in public is undermined.

For these reasons, orders C and D in the judgments are rescinded with the consequence that all publication restrictions imposed by this Court are rescinded. There will be no order for costs.

MR KÓS QC:

If Your Honour pleases, may I raise one matter, that is whether the effect of Your Honour's order today discharges also the suppression orders from the Courts below.

ELIAS CJ:

No, it doesn't have that effect because the form of the order made in the Court of Appeal is different and deals with some additional matters. I think the Court of Appeal has indicated in a minute that it is waiting for the decision of this Court.

MR KÓS QC:

Well we'll proceed down the staircase, thank you, Your Honour.

ELIAS CJ:

Thank you counsel.

COURT ADJOURNS: 11.00 AM