ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF VICTIMS PURSUANT TO S 202 CRIMINAL PROCEDURE ACT 2011.

ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF SECOND RESPONDENT PURSUANT TO S 200 CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA699/2020
[2021] NZCA 86

BETWEEN	STUFF LIMITED Appellant
AND	THE QUEEN First Respondent
	L Second Respondent

Hearing:	18 February 2021
Court:	Courtney, Wylie and Katz JJ
Counsel:	RKP Stewart for Appellant Z R Hamill for First Respondent E A Hall and R E O'Hagan for Second Respondent
Judgment:	24 March 2021 at 3.30 pm

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Katz J)

Introduction

[1] On 13 November 2018, L was caring for his infant daughter in a sleepout while his partner rested in the main house. While he was alone with his daughter, he fatally injured her. At the time, L was facing a number of family violence charges in respect of assaults on his partner and another child.

[2] Following a sentencing indication, L pleaded guilty to all charges. He was convicted and sentenced to four years and five months' imprisonment.

[3] Prior to conviction, L was granted interim name suppression in respect of all charges, to protect his fair trial rights. At sentencing, Cooke J made a permanent name suppression order. Stuff Ltd appeals the decision to grant L permanent name suppression but does not challenge the name suppression orders made in favour of the victims.[1] Both the Crown and L oppose the appeal.

Procedural background

[4] Name suppression was granted in the High Court to ensure L's fair trial rights in relation to separate District Court charges.[2] Suppression continued in the High Court prior to sentencing by agreement between the parties.[3] This was to enable issues in relation to the victim and family to be addressed, rather than to preserve fair trial rights, given that L had already entered guilty pleas to the charges.[4]

[5] On 3 November 2020, Cooke J issued a minute in response to media applications, including from Stuff, seeking to film, take photos and record sound at the sentencing. The Judge declined the applications, explaining his reasoning as follows:[5]

> The primary reason for this is a concern for the mother of the three-month-old victim. The mother is also a victim, and she has suppression. She has

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1 Stuff has standing to initiate an application to revoke a suppression order as a member of the media within the meaning of s 210 of the Criminal Procedure Act 2011.

2 *R v [L]* HC Wellington CRI-2020-085-1531, 10 August 2020 [Minute of Simon France J] at [4].

3 *R v [L]* HC Wellington CRI-2020-085-1531, 8 September 2020 [Minute of Cooke J dated 8 September 2020] at [3].

4 At [3].

5 *R v [L]* HC Wellington CRI-2020-085-1531, 3 November 2020 [Minute of Cooke J dated 3 November 2020] at [2].

> expressed concern about the publicity surrounding this sentencing, and the adverse impacts of it on her situation. In my view those particular circumstances mean that there should be no film, sound or photographic coverage of the sentencing. The need for open justice is still satisfied by the remaining means of reporting.

[6] The reasons for declining the applications were suppressed.[6]

[7] At sentencing on 5 November 2020, Cooke J made an order permanently suppressing L's name. No written reasons were given at the time.

[8] On 3 December 2020, Stuff filed an appeal against the permanent suppression order. Cooke J then issued a minute, on 18 December 2020, setting out the relevant background and stating that his reason for suppressing L's name was to protect the identities of the victims — namely, L's deceased child, former partner and L's surviving child.[7]

Did the Judge err in failing to give reasons for making the order permanently suppressing L's name?

[9] Mr Stewart, counsel for Stuff, submitted that the Judge had erred in failing to give reasons for making on order permanently suppressing L's name.

[10] Section 207 of the Criminal Procedure Act 2011 requires the court to give reasons for making, varying or revoking a suppression order, absent exceptional circumstances. In *Lewis v Wilson & Horton Ltd*, Elias CJ explained that it is important for Judges to provide reasons for their decisions:[8]

(a) to promote openness in the administration of justice;[9]

(b) to provide a means for the lawfulness of what is done to be assessed by a court exercising supervisory jurisdiction;[10] and

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6 At [3].
7 *R v [L]* HC Wellington CRI-2020-085-1531, 18 December 2020 [Minute of Cooke J dated 18 December 2020] at [10]–[15].
8 *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA).
9 At [76].
10 At [80].

(c) to provide a discipline for the Judge, which is the best protection against wrong or arbitrary decisions and inconsistent delivery of justice.[11]

[11] Here, Cooke J did not give written reasons for his decision to suppress L's name at the time the suppression order was made. In his subsequent minute of 18 December 2020, however, the Judge recounts (when referring to the sentencing hearing) that:[12]

> [14] I then indicated that I had decided to suppress the identity of the victims, being [L's partner], the deceased child and their other child. I further advised that I would also suppress the identity of the defendant and that the reason for suppressing his identity was to protect the identity of the victims, and to prevent their identity being disclosed.
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> [15] I did not record those suppression orders in writing other than recording that such orders had been made under ss 200 and 202 on the banner of the sentencing notes. But the matters described … above took place in open court, including my decisions on suppression and the reasons for them.

[12] The Judge therefore gave oral reasons for the suppression order at the time it was made. These were later confirmed in writing, after the appeal had been filed, in the Judge's minute of 18 December 2020. There has therefore been no breach of the requirement to give reasons. Nevertheless, the process followed fell short of best practice. Ideally, the Judge's name suppression decision (including the reasons for his decision) should have been transcribed and provided to both counsel and the media in writing shortly after the sentencing hearing. No prejudice has arisen, however, from the failure to do so, particularly given that the Judge later provided a detailed minute setting out the background to the suppression issue.

Should L's name have been suppressed?

[13] The substantive issue in this appeal is whether the Judge erred in permanently suppressing L's name.

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11 At [82].

12 Minute of Cooke J dated 18 December 2020, above n 7.

Legal principles

[14] Determining whether the identity of a defendant should be suppressed requires a two-stage approach:[13]

> [40] At the first stage, the judge must consider whether he or she is satisfied that any of the threshold grounds listed in [s] 200(2) has been established. That is to say, whether publication would be likely to lead to one of the outcomes listed in subs (2). The listed outcomes are prerequisites to a court having jurisdiction to suppress the name of a defendant. It is "only if" one of the threshold grounds has been established that the judge is able to go on to the second stage.
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> [41] At the second stage, the judge weighs the competing interests of the applicant and the public, taking into account such matters as whether the applicant has been convicted, the seriousness of the offending, the views of the victims and the public interest in knowing the character of the offender.
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> (Footnote omitted.)

[15] The court is required to take into account any views of a victim of the offending when determining whether to permanently suppress a defendant's name.[14]

Was one of the threshold requirements in s 200(2) met?

[16] The relevant s 200(2) threshold requirements in this case required that the Judge be satisfied that publication of L's name would be likely to either:

(a) cause undue hardship to any victim of the offence;[15] or

(b) lead to the identification of another person whose name is suppressed by order or by law.[16]

[17] "[L]ikely" in this context means "a real and appreciable possibility".[17] Undue hardship requires something more than the hardship that would normally be expected

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13 *Robertson v Police* [2015] NZCA 7. See also *D v Police* [2015] NZCA 541, (2015) 27 CRNZ 614 at [10]; and *Fagan v Serious Fraud Office* [2013] NZCA 367 at [9].

14 Criminal Procedure Act, s 200(6).

15 Section 200(2)(c).

16 Section 200(2)(f).

17 *W (CA639/2016) v R* [2017] NZCA 580 at [18]. See also *D v Police*, above n 13, at [30(a)].

to occur through publication. It connotes "excessive or greater hardship than the circumstances [warrant]".[18]

[18] Stuff submitted that neither threshold requirement set out in [16] above was met. In our view, however, both alternatives were met.

[19] Dealing first with [16(b)], Stuff submitted that publication of L's name would not be likely to lead to the identification of the victims, as they do not share his last name.

[20] We do not accept that submission. On the contrary, we accept the respondents' submission that publicising L's name would make it likely that the victims would be identified. First, although L's former partner does not share his last name, both of his children have his name included as part of their surnames. Publication of a parent's name (particularly where that parent is actively involved in their child's life) will often be likely to identify their child, even if they do not share the same name. *W(CA639/2016) v R* is an example of such a case.[19] In that case this Court held that publication of the defendant's name would be likely to lead to identification of her child, most notably in their local community, notwithstanding their differing last names.[20]

[21] In this case, the connection between L and the victims, as immediate family members, is very close. His relationship with his former partner was not a fleeting one. They had two children together and appear to have operated as a family unit for an extended period. The child victims share L's name as part of their own names. We think there is a high likelihood that the victims will be identified, particularly within their own community (including any relevant school, church or ethnic community) if L's name is published. The threshold requirement set out in [16(b)] above is therefore met.

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18 *Dalton & Porter v Auckland City* [1971] NZLR 548 (SC) at 550, cited in *R v Ratu* [2013] NZHC 3085 at [39].

19 *W (CA639/2016) v R*, above n 17.

20 At [19].

[22] One of the threshold requirements in s 200 is therefore met. Although it is only necessary to establish one threshold requirement, we will also briefly consider the other relevant threshold requirement set out at [16(a)], namely whether publication of L's name would be likely to cause undue hardship to any victim of the offending. If undue hardship to the victims is likely to arise, then that is a factor that could be relevant to the exercise of the Court's discretion as to whether to grant L permanent name suppression.

[23] L's former partner is clearly grief stricken by the loss of her much-loved child. She says that she has already been harassed and abused on social media by people in her community who are aware of her connection to L. That abuse has included people blaming her for the offending, and for failing to protect her child. This experience has been deeply traumatic for her.

[24] As we have explained above, if L's name is published, his former partner's identity is likely to become known to a much wider group of people, both within her community and potentially more broadly. As a result, any abuse and/or bullying (both online and offline) she has experienced to date is likely to escalate, as a much wider circle of people will be able to connect her to the offending. In our view, the very real risk of L's former partner being further abused and blamed for offending that she is in fact a victim of constitutes undue hardship.

[25] Similarly, although L's surviving child victim is still young, in a couple of years she will be starting school and if L's name is publicised there is a real prospect that her link to L (and the details of his offending) could become widely known in her school community. This would be a very significant burden for a young child to bear. This also, in our view, constitutes undue hardship.

[26] For these reasons, the threshold requirement in s 200(2)(c) is also met.

The exercise of the Court's discretion

[27] The next step in the s 200 analysis is to consider whether Cooke J correctly exercised his discretion to grant L name suppression. Given that this aspect of the appeal involves an appeal against the exercise of a discretion, the appellant is required

to persuade this Court that the Judge erred in law or principle, failed to take into account some relevant matter, took into account some irrelevant matter, or was plainly wrong.[21]

[28] Stuff submitted that the Judge had insufficient regard to the principle of open justice, given the seriousness of the offending, and that those interests outweigh the interests of the victims in suppression. Stuff referred to *R v Liddell*, where this Court did not suppress the name of a convicted sex offender notwithstanding the submission that it would detrimentally affect the offender's wife.[22] *Liddell* is distinguishable as no immediate family members were direct victims of the offending in that case. More importantly, here it is not just family members requesting L's name be suppressed, but his victims. The views of victims are afforded special significance under s 200(6).

[29] We are satisfied that, in all the circumstances of this case, the Judge was correct to prioritise the interests of the victims over the principle of open justice. The interests of open justice were sufficiently promoted by the widespread publication of the facts of the offending and the fact that the (unnamed) father had admitted to killing his baby, together with the reporting of the sentence that was imposed.

Result

[30] The appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for First Respondent

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21 *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32], citing *May v May* (1982) 1 NZFLR 165 (CA) at 170. See also *Lawrence v R* [2011] NZCA 272 at [11]; *Saggers v R* [2012] NZCA 560 at [25]; and *R v M (CA93/2017)* [2017] NZCA 72 at [21] where this approach was phrased as making "a fundamental error, requiring correction, in exercising that discretion".

22 *R v Liddell* [1995] 1 NZLR 538 (CA) at 544.