NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html

NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF ANY COMPLAINANT UNDER THE AGE OF 18 YEARS PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360352.html

NOTE: DISTRICT COURT ORDER PROHIBITING PUBLICATION OF THE NAME OF THE SCHOOL PURSUANT TO S 202 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360349.html

NOTE: DISTRICT COURT ORDER PROHIBITING PUBLICATION OF THE OCCUPATION AND SPORT OF THE APPLICANT PURSUANT TO S 200 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360346.html

NOTE: DISTRICT COURT ORDER PROHIBITING PUBLICATION OF EVIDENCE AND SUBMISSIONS CONTAINED IN DISTRICT COURT AND HIGH COURT DECISIONS PURSUANT TO S 205 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360354.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 79/2023
[2023] NZSC 160

BETWEEN	CONNOR SEAN CLAYTON NEVIN Applicant
AND	THE KING Respondent

Court: Glazebrook and Kós JJ

Counsel: I M Brookie and R A van Boheemen for Applicant
H G Clark for Respondent

Judgment: 7 December 2023

JUDGMENT OF THE COURT

A The application for an extension of time to apply for leave to appeal is allowed.

B The application for leave to appeal is dismissed.

C The interim suppression order dated 21 July 2023 is lifted.

REASONS

Background

[1] The applicant, Mr Nevin, was convicted after a jury trial of sexual offending against a teenager. He was sentenced in the District Court to six years and six months' imprisonment.[1] A conviction and sentence appeal to the Court of Appeal was dismissed.[2]

[2] This judgment deals with the applicant's application to bring a second appeal against Palmer J's refusal in the High Court[3] to overturn the District Court's dismissal of his application for permanent name suppression.[4] He initially sought leave to appeal in the Court of Appeal but abandoned that application in favour of a "leapfrog" application to this Court on discovering that leave to this Court had been granted in relation to *LF (CA596/2022) v R*.[5]

[3] The applicant's application for leave to appeal against the Court of Appeal judgment relating to his conviction and sentence is dealt with in a judgment released at the same time as this judgment.[6]

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1 *R v Nevin* [2022] NZDC 23920 (Judge Northwood).
2 *N (CA28/2023) v R* [2023] NZCA 378 (Collins, Lang and Woolford JJ).
3 *Nevin v R* [2022] NZHC 3585 (Palmer J) [HC judgment].
4 *R v Nevin* [2022] NZDC 23942 (Judge Northwood) [DC suppression decision].
5 *LF (CA596/2022) v R* [2022] NZCA 656. This Court granted leave to appeal: *E (SC 13/2012) v R* [2023] NZSC 61. The appeal has been heard but the judgment has not yet been issued.
6 *Nevin v R* [2023] NZSC 161.

The legislation

[4] The proposed name suppression appeal raises a question about the relationship between s 200(2)(a) and (f) of the Criminal Procedure Act 2011. Section 200(1) provides that the identity of the defendant may be permanently suppressed. Subsection (2) governs when a court may make such an order; it relevantly provides as follows:

> (2) The court may make an order under subsection (1) only if the court is satisfied that publication would be likely to—
>
> (a) cause extreme hardship to the person charged with, or convicted of, or acquitted of the offence, or any person connected with that person; or
>
> …
>
> (f) lead to the identification of another person whose name is suppressed by order or by law; or
>
> …

The application for name suppression

[5] The applicant applied in the District Court for permanent suppression of his name on the basis that its publication would cause extreme hardship to a relative, that the publication of his name would lead to identification of a school (assuming the application for suppression of the identity of the school was granted) and that it would lead to identification of the victim.

[6] He was arrested at the school, and it appears to be common ground that his arrest was noticed by students and the subject of considerable speculation on the part of the school community about whether the activity that led to the arrest was school-related. In fact, the offending did not occur at the school and had nothing to do with the applicant's involvement with the school.

District Court

[7] In the District Court, the Judge rejected the argument that publication of the applicant's name would cause extreme hardship to his relative.[7]

[8] Suppression of the school's name was granted under s 202 of the Criminal Procedure Act on the basis that some degree of hardship would be suffered and only a minimal degree of hardship is necessary for hardship to be undue for unconnected parties.[8]

[9] The application to suppress the applicant's name on the basis that it would lead to identification of the school was, however, refused. Suppression of the applicant's connection to the school would limit the identification of the school to those who already knew him.[9] Some limited risk of identification of the school within the school community was "tolerable and manageable".[10]

[10] The Court also rejected the submission that publication of the applicant's name would lead to identification of the victim. The Judge considered that there was a small risk of identification and that it could be mitigated by suppressing certain details about the circumstances of the offending.[11]

High Court judgment

[11] The applicant appealed to the High Court on the grounds that the refusal of name suppression would cause extreme hardship to his relative and that it would lead to identification of the school.

[12] The High Court found that the likely effect fell "well short"[12] of causing the relative extreme hardship in terms of the relevant case law, referring in particular to

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7 DC suppression decision, above n 4, at [30]–[37]. The affidavit of the relative and its annexures were, however, suppressed: at [49].
8 At [41], [47] and [49]. The Judge relied on *Sacred Heart College v Police* [2018] NZHC 3089.
9 At [42].
10 At [43]. Mr Nevin's occupation at the time of conviction was also suppressed: at [49].
11 At [38], [40] and [49].
12 HC judgment, above n 3, at [17].

Wilson v R[13] and *R v New Zealand Police.*[14] The High Court Judge said that, even if the threshold of extreme hardship had been met, he would have not exercised the discretion to suppress the applicant's name. The principle of open justice, the public interest in knowing the offender's identity and the views of the victim outweighed the consequences for the relative.[15]

[13] The Judge then turned to the potential impact on the school. He accepted that publication of the applicant's name was likely to mean the school community or catchment would identify the school. But the Judge found that the principle of open justice, freedom of information and the victim's views outweighed any adverse effect on the reputation of the school.[16] The hardship faced by the school would not be particularly severe and the objective of protecting the school's reputation would not be significantly impeded by the publication of the applicant's name and identification of the school within the school community.[17] The school had no connection to the offending.[18]

[14] The Judge commented:[19]

> Allowing the concerns reflected in [s] 200(2)(f) to displace the principle of open justice and other factors favouring publication as a general rule would be inconsistent with the explicit statement in [s] 202(4) and the two-step approach to suppression under s 200. Even where the statutory threshold is reached, the Court must still carefully consider whether suppression should follow on a case-by-case basis.

Submissions

[15] The applicant submits that this is a matter of general or public importance and that a substantial miscarriage of justice will occur unless the appeal is heard.[20] The applicant has abandoned his argument in respect of his relative and focuses on the interests of the school in terms of s 200(2)(f). He challenges the High Court's reliance

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13 At [7(a)] and [18]; and *Wilson v R* [2018] NZHC 1778.
14 At [7(b)] and [18]; and *R v New Zealand Police* [2019] NZHC 2901.
15 At [19].
16 At [23].
17 At [24]. The High Court referred to the comments of the Court of Appeal in *LF (CA596/2022)*, above n 5, at [47] that the Court is unlikely to exercise its discretion absent extreme hardship to the connected person.
18 At [25]. It was, however, acknowledged that the circumstances of the arrest were unfortunate.
19 At [22].
20 Senior Courts Act 2016, s 74(2)(a)–(b).

on *LF (CA596/2022) v R*. He argues the holding in that decision, that the discretion under s 200(2)(f) is likely to require proof of extreme hardship to the connected person, is wrong. He submits that the Court of Appeal has effectively used the discretion at stage two of the s 200 analysis to "rewrite" the more permissive threshold in subs (2)(f).

[16] Secondly, the applicant argues that the High Court erroneously relied on s 202(4) to impose a presumption against suppression where s 200(2)(f) is in play. Section 202(4) provides that suppressing the identity of a connected person does not prevent publication of the defendant's identity. He argues s 202(4) says nothing about the way s 200(2)(f) should be construed.

[17] Finally, the applicant argues that Palmer J simply listed generic factors weighing against suppression without adequately analysing the competing interests in the present case, and that the High Court ignored the relevant fact that the defendant was automatically placed on the Child Sex Offender Register.

[18] The Crown submits that no grounds for granting leave are made out. It Crown submits that *LF (CA596/2022) v R* is correct and that the Court of Appeal in that case did not close the door on suppression of a defendant's identity where there is no likelihood of extreme hardship to the connected person. It simply said this was "unlikely".[21] Secondly, the Crown submits that Palmer J did not misapply s 202(4). Rather he (correctly) noted that the principle of open justice is the starting point in applications under s 200 and, in light of s 202(4), there can be no general rule that suppression of a defendant's identity will follow as a matter of course where a connected person's identity has been suppressed. Further, it submits that the High Court did not conflate the threshold and discretionary stages of s 200(2)(f).

Application for an extension of time

[19] The applicant takes the position that, as his application raises the same issue as *LF (CA596/2022) v R*, the two appeals should be heard together and leave to bring a leapfrog appeal granted accordingly. The application is out of time due to Mr Nevin's

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[21] *LF (CA596/2022) v R*, above n 5, at [44].

abandonment of his leave application in the Court of Appeal. The Crown does not oppose extending time. In these circumstances, it is appropriate to do so.

Application for leave to appeal

[20] Even setting aside the higher threshold for direct appeals from the High Court,[22] we are unable to accept the applicant's starting premise. The main question of principle to be addressed in relation to *LF (CA596/2022) v R* related to young persons and name suppression, an issue that does not arise in this case.[23]

[21] Further, while the High Court referred to the comments of the Court of Appeal in *LF (CA596/2022) v R* that suppression would be extremely unlikely unless the threshold for extreme hardship was met, both the District Court and the High Court held that, while the hardship to the school was undue, it was not severe and that any risk to its reputation could be adequately mitigated, in particular by suppressing Mr Nevin's connection to the school. As this was the case, the conclusion that the other factors identified outweighed the risk of identification of the school is unsurprising.

[22] We also see no error in the High Court's reference to s 202(4). The High Court was merely confirming that name suppression does not arise as a matter of course if the criteria in s 202(2)(f) are met. There is still an overall discretion to be exercised taking account of all relevant factors.

[23] For all the above reasons, we do not consider that any question of principle arises.[24] The decision in the High Court was just a matter of applying settled law to the facts of the applicant's case. Nor is there any risk of a miscarriage of justice.[25] This means that, even if this were not a leapfrog appeal, the application would not have been granted.

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22 Senior Courts Act, s 75.
23 *E (SC 13/2023) v R*, above n 5, at [4].
24 Senior Courts Act, s 74(2)(a). There is therefore no point of general or public importance.
25 Section 74(2)(b).

Result

[24] The application to for an extension of time to apply for leave to appeal is allowed.

[25] The application for leave to appeal is dismissed.

[26] This Court's interim suppression order dated 21 July 2023 is now lifted.[26]

Solicitors:
Crown Law Office | Te Tari Ture o te Karauna, Wellington for Respondent

[26] An application for interim name suppression was granted by minute of Williams J on 21 July 2023 until further order of the Court.