IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 136/2022
[2023] NZSC 28

BETWEEN		ISABELLA NIKI-HARPER AHLAWAT Applicant
AND		THE KING Respondent

Court: Glazebrook, O'Regan and Kós JJ

Counsel: S N B Wimsett for Applicant
N J Wynne for Respondent

Judgment: 5 April 2023

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant incited Stephen Ewart to set fire to a residential flat from which her mother had been evicted. Mr Ewart was intellectually impaired. The plan miscarried and Mr Ewart's clothing caught fire. He died at the scene. The applicant was convicted of manslaughter and arson causing danger to life. She was sentenced to eight years and three months' imprisonment.[1] An appeal against conviction was filed.

[2] At trial, the applicant's name had been suppressed for fair trial reasons because she was still to be tried on an unrelated charge of attempting to pervert the course of justice. That arose from a complaint made by her against Mr A. Mr Ewart had made

1 *R v Ahlawat* [2022] NZHC 2233 (Venning J).

a statement to the police in support of the complaint against Mr A. Mr A was charged with indecent assault, but the charge was later dismissed when it was established he could not have been present at the time and place alleged. The perversion charge against the applicant was withdrawn after she was sentenced on the manslaughter and arson charges.

[3] Once the perversion charge was withdrawn the question arose whether name suppression should continue. Continuation was sought on two grounds: (1) that the applicant was suffering post-traumatic stress (so that disclosure would cause extreme hardship) and (2) the protection of fair trial rights at retrial should her appeal succeed. In the High Court, Venning J declined to continue suppression.[2] He held that the former claim was not made out, the latter was speculative and remote, and the interests of open justice should prevail. The applicant was however granted interim suppression while appealing to the Court of Appeal.

[4] On appeal, the first ground was abandoned, the second was renewed and a third was now advanced: (3) that the applicant was also entitled to suppression under s 203 of the Criminal Procedure Act 2011 because she was a complainant in the now-dismissed indecency charge against Mr A.[3] That section provided automatically for the suppression of a complainant's name in the case of such a charge — although a court could make an order otherwise under s 203(3)(b). At trial the Crown had led evidence of Mr Ewart's statement on the basis that its demonstrable falsity was propensity evidence of a tendency by the applicant to exploit Mr Ewart to commit offences for her.

[5] The Court of Appeal dismissed the second ground for the same reasons as Venning J had.[4] As to the new, third ground, it held that despite the potential for the public to identify the applicant as a complainant in a sexual case (because of the propensity evidence):[5]

> [38] When Ms Ahlawat's interests are balanced against those of the community, and in particular the public interest in open reporting of court

2 *R v Ahlawat* [2022] NZHC 2725 (Venning J).
3 *Ahlawat v R* [2022] NZCA 615 (Miller, Collins and Palmer JJ).
4 At [24]–[25].
5 Footnote omitted.

> proceedings, the public interests greatly outweigh those of Ms Ahlawat. In the exceptional circumstances of this case, the media should be permitted to publish the details of Ms Ahlawat's offending without being restrained by s 203 of the Criminal Procedure Act.

[6] Although the Court of Appeal reasoned that the High Court did not err in denying continuation of suppression, s 203 had not been before the High Court. It may therefore be inferred that the Court of Appeal exercised the power to except in s 203(3)(b).

[7] On 12 December 2022, the Court of Appeal granted the applicant interim name suppression until leave to appeal has been heard in this Court.

Proposed appeal

[8] The proposed appeal is now confined to the third ground. The applicant argues that any details relating to the sexual assault allegation should be suppressed pursuant to s 203. However, several online articles published by major mainstream news media have already discussed in detail the facts and circumstances of the case (albeit without publishing the applicant's name). These articles include the fact that the applicant made a sexual assault complaint, the Crown's arguments that her allegations were false and the admission of this information as propensity evidence. Therefore, even if the details of the allegation were suppressed, the applicant may be identifiable as a sexual assault complainant through the material already published. If this is the case, the applicant argues that her name should be suppressed in relation to the manslaughter and arson convictions under s 203 to protect her identity as a sexual assault complainant.

[9] On appeal, the applicant would contend that the Court of Appeal (1) should not have accepted the Crown's conclusion that the complaint of sexual assault was false when the evidence of that was never adequately tested; and (2) overlooked the express legislative requirement that complainants who report alleged sexual assault are to be protected under s 203(2). In combination these grounds are said to be ones of significant public importance.[6]

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6 Senior Courts Act 2016, s 74(2)(a).

Our assessment

[10] While the scope and operation of the courts' discretion under s 203(3)(b) may involve elements of public importance, we do not consider that it is appropriate to grant leave in this case.[7] The issues here arise in an extraordinary and highly unusual set of circumstances. Any decision would reflect the particularities of the facts of the case rather than canvass broader implications of wider public importance.

[11] In the ordinary course, ss 203 and 205 would have been applied to suppress the propensity evidence so that the applicant could not be identified as a sexual assault complainant in the event of conviction on the distinct manslaughter and arson charges. That did not occur. The general details of the complaint are now in the public domain and are explicitly linked to the manslaughter and arson offending. In these circumstances, suppressing the evidence while publishing the applicant's name would be futile.

[12] The applicant wishes to contend that, instead, her name should be suppressed in connection with the manslaughter and arson convictions to protect her identity as a sexual assault complainant in the other proceedings. In dispensing with suppression under s 203(3)(b), the Court of Appeal exercised a statutory discretion. We consider the prospects of the applicant persuading this Court that, in doing so, the Court of Appeal made an error of law or principle, failed to take into account some relevant matter, took into account an irrelevant matter, or was plainly wrong are insufficient in all the circumstances of this case to justify the grant of leave.[8] In our view, prior publication of the propensity evidence cannot be used to justify such a broad suppression order where the circumstances of the offending require publication of the offender's name. This was very serious offending, involving the manipulation of a vulnerable individual with impaired intellectual capacity who died as a consequence of the applicant's actions. There is consequently no risk of a miscarriage of justice if leave to appeal is declined.[9]

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7 Senior Courts Act, s 74(2)(a).

8 *Prime Commercial Ltd v Wool Board Disestablishment Company Ltd* [2007] NZSC 9, (2007) 18 PRNZ 424 at [2]; *Hookway v R* [2008] NZSC 21 at [4]; *B (SC 18/2020) v R* [2020] NZSC 52 at [12]; and *Foster v R* [2021] NZSC 130 at [4].

9 Senior Courts Act, s 74(2)(b)

Result

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

Solicitors:
Crown Law Office, Wellington for Respondent