NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS K AND O PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA106/2020
[2020] NZCA 671

	BETWEEN	JESSE SHANE KEMPSON Appellant
	AND	THE QUEEN Respondent

Hearing:	17 December 2020
Court:	Kós P, Cooper and Courtney JJ
Counsel:	T M Cooper for Appellant B H Dickey and O S Klinkum for Respondent R K P Stewart for NZME Publishing Ltd, Radio New Zealand, Stuff Ltd and Television New Zealand Ltd
Judgment:	17 December 2020 at 11.50 am
Reasons:	17 December 2020 at 1.30 pm

JUDGMENT OF THE COURT

A The application for continued suppression of the appellant's name is denied.

B Name suppression will lapse at 11 am on Friday 18 December 2020.

REASONS OF THE COURT

(Given by Kós P)

[1] Mr Kempson has now been convicted of the following serious crimes:

(a) the murder of Ms Grace Millane, convicted by Moore J after a trial by jury in Auckland in November 2019;

(b) threatening to kill, two charges of assault with a weapon, three charges of male assaults female and two charges of sexual violation by unlawful sexual connection in relation to a former partner, K, convicted by Brewer J after a Judge-alone trial in October 2020;

(c) the rape of a further complainant, O, convicted by Venning J following a Judge-alone trial in November 2020.

[2] Severance of K's trial was ordered by the High Court in August 2019 and severance of O's trial was ordered by this Court in October 2019.[1] At the time this Court ordered suppression until final disposition of the three trials.[2] Mr Kempson originally elected trial by jury for the charges listed at (b) and (c) above, but withdrew that election by leave of the High Court pursuant to s 53 of the Criminal Procedure Act 2011.

[3] On 7 October 2020 Brewer J directed name suppression "will continue in respect of the two forthcoming trials or until further order of the Court". On 6 November Venning J directed suppression in all the non-murder charges to continue until delivery of our judgment in the murder charge, unless extended by us.[3]

[4] Mr Kempson's appeal to this Court against his conviction for murder was heard on 6 August 2020, and judgment is to be delivered tomorrow, 18 December. On 15 December, the Court advised counsel accordingly, and further advised the judgment would order that name suppression lapse.

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1 *R v Kempson* [2019] NZHC 2077 at [173]; and *Kempson v R* [2019] NZCA 511.

2 At [71]–[72]. That was acknowledged in a memorandum by defence counsel dated 2 March 2020. Suppression was continued for the purpose of the appeal at the appeal hearing on 6 August 2020, because of the remaining trials (which at that time were to be jury trials).

3 *R v Kempson* [2020] NZHC 2929 at [7].

[5] Yesterday, on 16 December 2020, Mr Kempson filed a memorandum "seeking continuation of suppression orders":

> … to preserve the appellant's fair trial rights, as either this Court or the Supreme Court may allow the appeal and order a retrial (by jury). The position is the same in respect of the sexual violation matters, which are being appealed to this Court.

Submissions

[6] For Mr Kempson, Ms Cooper submits continued orders are needed not because of the prospect of retrial following the present appeal, but retrials in either or both the sexual violence cases. Publication of Mr Kempson's name, and his convictions, may impair his potential fair retrial rights.

[7] Mr Dickey for the Crown opposes extension. He submits the Court's orders in 2019 were clear as to term and were reinforced by Venning J's direction of 6 November. He says the interests of open justice should now prevail over a speculative possibility of appeals being allowed and Mr Kempson also being allowed to revert to trial by jury in any retrial.

[8] For the media interests represented, Mr Stewart supports the stance taken by the Crown. He submits the time has long passed when suppression should continue. Mr Kempson no longer enjoys the presumption of innocence, and the prospects of retrial and reversion to a jury trial in either of the sexual violence cases is merely speculative.

Discussion

[9] The orders for suppression in the present appeal and the trials below were always bound to expire on delivery of this Court's judgment, as Venning J's orders made clear. Those were not appealed, and we think it is far too late to come to us now at the eleventh hour, as the Court's judgment in the primary appeal is about to be released and seek further continuation of the orders. Nor does the application have any merit.

[10] In this case, Mr Kempson relies generally on s 200(2)(d): "create a real risk of prejudice to a fair trial". No other basis for suppression is identifiable. We are not persuaded that further suppression is justifiable, such that this Court's discretion to extend the orders should be exercised.

[11] First, the potential for fair trial being affected does not concern the *present* proceeding, despite the application originally being cast in that way. Should either this Court or the Supreme Court order retrial, and retrial proceeds before a jury, that jury will know the identity of Mr Kempson.

[12] Secondly, we turn then to fair trial interests in relation to the sexual violation and related charges. These have been heard and resolved. Convictions have been entered. Appeals have been filed in this Court. Ms Cooper raises the spectre of appellate reversal and retrial. There are a number of difficulties with that submission:

(a) Retrials occur regularly where there has been prior publicity given to the index or other charges. Strong judicial directions are devised and delivered to deal with that. In this case however it is extremely unlikely any jury retrial would occur.

(b) Mr Kempson had elected trial by jury, but had withdrawn that election by leave given under s 53(2). Without commenting on the likelihood of it occurring, in the event of retrial being ordered we would expect that retrial to be conducted in accordance with the pretrial orders already made, including as to mode of trial. Mr Kempson would therefore need to seek leave to reinstate his original choice of mode of trial, presumably under s 51(2). The prospects of that being granted appear low. Ms Cooper was unable to identify any requisite change of circumstance for the purposes of s 51(2). Plainly, if mode of retrial remained Judge-alone, no issue of impairment of fair trial rights arises.

(c) Even if Mr Kempson were granted leave and allowed to reverse track again on mode of trial, jurors would almost certainly need to be informed of Mr Kempson's conviction for the murder of Ms Millane.

> While the New Zealand media deserves great credit for its obedience to the suppression orders made in the High Court and this Court, these orders have not been effective in overseas jurisdictions. Mr Kempson's name has been widely published in association with the death of Ms Millane. It would not be sufficient to rely on generalised directions as to circumspection from internet searching for the defendant's name. Any such search instantly produces his association with Ms Millane. As a result, Brewer J advised counsel before the change of election that he considered the best way to ensure Mr Kempson's fair trial rights was to confirm the Millane link to the jury panel, empanel a jury which believed it could be impartial, and give strong, tailored directions to reinforce the need for impartiality.

[13] Thirdly, it is time now for a dose of reality. Regardless of his culpability for murder, Mr Kempson admits he killed Ms Millane and disposed of her body. There was no issue as to identity at this trial, and nor could there be. This all occurred more than two years ago. Mr Kempson has been convicted at all three trials and no longer enjoys the presumption of innocence. In the ordinary way, there is a genuine and proper public interest in his identity being disclosed.[4] Suppression occurred only because of the severance of charges and the separate trials he was facing. As events played out, that step was futile, given both the degree of publicity given to Mr Kempson's association with Ms Millane on the internet, and his election of trial by Judge alone. Be that as it may, with the conclusion of those trials, if not of the whole legal process, it is time for the curtains of suppression to be drawn back and the light of open justice allowed back in.

[14] Finally, we note Ms Cooper's belated attempt to invoke s 286, in her reply submissions, a provision not addressed in her written memorandum or primary oral submissions. She suggests this Court is bound to now make an interim order because Mr Kempson would wish to seek leave to appeal to the Supreme Court if we decline the application heard today. We do not consider the provision is available in the circumstances of this case where: (1) the orders defining the duration of suppression

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4 *R (CA340/2015) v R* [2015] NZCA 287 at [35].

are made at an earlier time, (2) no appeal was filed within time against those orders, and (3) what instead is done is a last-gasp application for continuation. If we are wrong in taking that view, it will be for the Supreme Court to tells us that. There is time available to apply for leave to the Supreme Court prior to the lapsing of the order.

[15] We therefore advised counsel at 11.50 am that the application would be declined.

Result

[16] The application for continued suppression of the appellant's name is denied.

[17] Name suppression will lapse at 11 am on Friday 18 December 2020.

Solicitors:
Crown Solicitor, Auckland for Respondent