SUPPRESSION ORDERS IN PLACE AS OUTLINED IN PARAGRAPHS [69] and [71] BELOW.

IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY

I TE KŌTI MATUA O AOTEAROA
WHAKATŪ ROHE

CRI-2020-442-14
[2020] NZHC 3010

STUFF LTD AND NZME PUBLISHING LTD

v

AK AND NEW ZEALAND POLICE

Hearing:	14 October 2020
Appearances:	R K B Stewart for Appellants R M Lithgow QC and L S B Acland for AK J M Webber for the Police S J Zindel for the School
Judgment:	13 November 2020

JUDGMENT OF COOKE J

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[1] Stuff and NZME appeal against the decision of the District Court dated 28 July 2020 made in criminal proceedings in the District Court in which certain suppression orders were made.[1] Those criminal proceedings involved the defendant, who I will refer to as AK, pleading guilty to a series of charges, including the unlawful possession of explosives, firearms and restricted weapons, with a sentence of intensive supervision imposed.[2]

[2] At the time of the offending AK was only 17 years of age, and it is accepted that the circumstances of the case, including AK's youth and vulnerability means that AK's identity should be permanently suppressed. It is also accepted that the identity of the school is properly so suppressed. For the reasons I outline below, I accept that it can be published that AK was a student at the school. What is in dispute is the order of the District Court "suppressing any evidential material arising from the investigation leading to charges faced by the defendant in this prosecution except to the extent it is contained within the agreed summary of facts".[3]

[3] The appeal is opposed by AK and the school. The Crown take a neutral view on the appeal, although the Crown participated in determining the scope of the agreed summary of facts which set out the facts that could be published, and it raises one additional passage that it contends should be included in the published facts. Otherwise I understood the Crown to support the suppression orders made in the District Court.

Jurisdiction for appeal

[4] A potential issue arises in relation to the jurisdiction of Stuff and NZME to appeal from the suppression decision. Under s 283 of the Criminal Procedure Act 2011 (the Act) a member of the media who has standing under s 210 has jurisdiction to appeal the decision of the Court to make or refuse to make a suppression order. In

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1 *Stuff Ltd v AK* [2020] NZDC 15150 [*Suppression decision*].
2 *New Zealand Police v AK* [2019] NZDC 24357 [*Sentencing decision*].
3 *Suppression decision*, above n 1, at [57](e).

the present case, however, the District Court not only exercised statutory powers under the Act, but it also exercised inherent powers which could be challenged by way of judicial review if not within the right of appeal.

[5] The present case does involve a challenge to the exercise of the statutory powers as well as the use of the inherent jurisdiction. In those circumstances it seems to me that I can proceed on the basis that it is within the scope of the appeal to contend that the Court has gone beyond what the statute allows in an impermissible way. To approach the scope of the appeal right in any other way would be unduly restrictive, and would not involve interpreting the scope of the statutory right of appeal in light of its purpose.

Factual background

[6] The factual background has a degree of complexity about it.

[7] AK was initially charged with offences under the Arms Act 1983 in early 2019 immediately following the execution of a search powers by the Police. AK's first appearance was that afternoon.

[8] When the charges were laid the Court made interim suppression orders supressing AK's name and "suppression of all matters and all details of the summary of facts". An online article nevertheless appeared in one of the outlets owned by Stuff the same afternoon. That online article named the particular school involved.

[9] Stuff then made an application to the Court for the relevant summary of facts. This was declined by a Judge, indicating that orders continued "suppressing the defendants name and the facts until further enquiries have been made". Police then advised Stuff that its publication breached the suppression order.

[10] I note that Mr Stewart, on behalf of Stuff, complains that this chronology of events meant that Stuff had no way of knowing what was in the summary of facts, and whether there had been a breach of the suppression order.

[11] Additional charges were laid against AK a little later. And a further version of the summary of facts accompanied the further charges.

[12] When AK's bail was considered, the Court made interim suppression orders not only suppressing AK's identity, but also the identity of the school AK attended.

[13] Further charges were then laid against AK and a further revised summary of facts was prepared.

[14] Stuff then filed an application to revoke the interim suppression orders. That application then became delayed by a series of factors — first the implications of the Christchurch terror attacks, and next the obtaining and completion of reports concerning AK. At a hearing in July 2019 Judge Ruth declined to consider the issue of suppression as psychiatric reports had not yet been made available.

[15] On 16 September 2019 Judge Ruth provided a sentencing indication in accordance with ss 61–63 of the Act. On 4 October 2019 counsel advised that AK wished to accept the indication in relation to some, but not all of the charges dealt with in the indication.

[16] On 6 December 2019 AK was sentenced by Judge Ruth to two years' intensive supervision for offences brought under the Arms Act 1983, and an offence against the Films, Videos, and Publications Classification Act 1993.[4] Remaining charges under that Act were still to be determined.

[17] A hearing was scheduled to deal with the outstanding question of suppression on 21 February 2020. At that stage counsel for AK submitted, and the Court accepted, that the outcome of those charges would need to depend on the question of classification of relevant material by the Film and Literature Board of Review. The question of suppression was accordingly delayed for that reason. It then was further delayed because of the implications of the COVID-19 lockdown.

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4 *Sentencing decision*, above n 2.

[18] Ultimately the hearing concerning suppression proceeded on 28 July 2020 following the end of the COVID-19 lockdown. At that stage the decision of the Board was available. This resulted in the outstanding charges being dismissed.

[19] Judge Ruth then delivered the decision in relation to suppression that is subject to this appeal on 28 July 2020.[5] The orders that he made at the end of the oral judgment were as follows:

> (a) Order for permanent suppression of the name, address and occupation of the defendant, and any details that might lead to [AK's] identification.
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> (b) Order suppressing the name of the school and limiting publication of the location of the school to "the Tasman District".
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> (c) Order that the order in [57](a) is subject to an exemption allowing police to advise those who gave statements to police to be advised, to the least extent necessary, the details and outcomes of this prosecution.
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> (d) Order that any relevant family residing in […] may be advised, to the least extent necessary so as not to be in breach of the suppression order, by police of matters relevant to their own assessment of risk of residing in that locality.
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> (e) Order suppressing any evidential material arising from the investigation leading to charges faced by the defendant in this prosecution except to the extent it is contained within the agreed summary of facts.

[20] In effect, in addition to suppression orders in relation to the AK's identity, and the identity of the school, the Judge suppressed the underlying facts of the case apart from those appearing in an agreed summary of facts.

[21] At the time of the suppression decision the agreed summary of facts was in the process of being finalised between the prosecution and defence. Counsel for Stuff was invited to join in the process of agreeing in that summary, but declined to do so. The process of completing the agreed summary of facts had not been completed at the time this appeal was lodged, and for that reason has never been finalised. I note, however,

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5 *Suppression decision*, above n 1.

that the Judge indicated that the draft summary met with his approval when releasing the decision subject to this appeal.[6]

Arguments on appeal

[22] As a consequence of a direction from the Court,[7] Stuff and NZME were directed to identify with greater clarity the scope of the challenge to suppression orders made by the District Court, and in an amended notice of appeal dated 13 August 2020 two areas of challenge were identified. The first related to the general area of the school, and the second related to suppression of the facts. As Mr Stewart submitted:

> [The] primary focus of this appeal is Judge Ruth's order suppressing any evidential material arising from the investigation leading to charges faced by the defendant except to the extent that information is contained within the agreed summary of facts.

[23] Mr Stewart argued that such suppression orders were an anathema to open justice and freedom of expression, and that here that as a consequence of the orders "… the public is compelled to accept a narrative formulated by those with a vested interest in the disclosure of some facts but not others. That is not open justice". He argued:

> In this case, there is no compelling reason why the public should be prevented from knowing that Police prosecuted a 17 year old school [student], the charges [AK] faced, the evidence on which those charges were based and how the evidence was obtained. The public is also entitled to know which charges resulted in convictions, which charges were dismissed, why, that the guilty plea followed a sentencing indication, what was said at the sentencing indication and the subsequent sentence, and sentence eventually imposed. There are no longer any fair trial rights in play. Suppressing any of these matters is contrary to the principle of openness and an unjustified and disproportionate limitation on the right of every person to freedom of expression under New Zealand law.

[24] In opposing the appeal, Mr Lithgow QC on behalf of AK emphasised the vulnerability of AK, and the obligation to consider the best interests of the child. He identified the various factors associated with publicity that would potentially undermine the efficacy of the sentence, and argued that the District Court Judge has

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6 At [56].

7 *Stuff Ltd v AK* HC Wellington CRI-2020-442-14, 12 August 2020.

sensitively balanced the considerations. Mr Zindel for the school supported the Judge's decision.

Access to underlying evidence

[25] A key aspect of the argument for Stuff and NZME is that the media should have access to, and the ability to report on the underlying events that are the subject of a criminal proceeding, including the evidence that was gathered which relates to the allegations against the defendant. For the reasons set out below I do not accept that submission.

[26] When a criminal proceeding is commenced, and even prior to it being commenced, there are a number of principles of law that operate to determine what is open to the public, what is not to be publicised, and what can be suppressed by the Court. Broadly speaking the principles fall into five main categories:

(a) Provisions under the Criminal Procedure Act that identify when and how proceedings are to take place in open court, and which regulate criminal proceedings more generally.

(b) Provisions under the Criminal Procedure Act which then regulate when matters can, and cannot be reported when they take place in open court, including provisions allowing the Court to make suppression orders.

(c) The law of contempt which prevents the proceedings of the Court being improperly compromised, including by the publication of matters.

(d) The inherent jurisdiction of the Court to suppress matters both inside and outside of the Court, including to prevent a contempt.

(e) The rules regulating the ability to obtain information on the court file, both before and after the determination of criminal proceedings under the Senior Courts (Access to Court Documents) Rules 2017 and the equivalent District Court (Access to Court Documents) Rules 2017.

Proceedings in open court

[27] Sub-part 3 of Part 5 of the Act deals with the public nature of criminal proceedings and restrictions on reporting. The general principle is captures by s 196 which provides that every court proceeding is open to the public subject to other provisions. The starting point is accordingly the principle of open justice, and the associated freedom of expression.

[28] When proceedings take place in open court there are a series of legislative provisions that control the question of publicity. For example the Court has a power to clear the Court under s 197 if the statutory prerequisite for doing so arises. Even if the Court has been cleared the announcement of the verdict or the passing of the sentence must take place in public, but if exceptional circumstances exist the Court may decline to make public any facts, reasons or other considerations relevant to the verdict or sentence (s 197(3)). More common are orders under s 202 to suppress the identity of witnesses, victims or connected persons, or orders under s 200 to suppress the identity of the defendant. There are other carefully constructed provisions in other contexts. For example, under s 62 a sentencing indication must be given in open court, but under s 63 it is an offence for any person to publish any information about a sentencing indication or a request for a sentencing indication before sentence is ultimately passed.

[29] Accredited media organisations are recognised as having a special place within this regime. Such accredited organisations will be given access to information that is not disclosed in open court and available to be published. Such representatives can, for example, be allowed to attend chambers hearings at which matters, including matters that it is decided the jury should not hear, are discussed. For example when the Court decides to clear the Court under s 197, there are exceptions that operate for accredited members of the media under s 198.[8] The media may also participate in decisions on suppression orders. That right is expressly conferred by s 210 of the Act.

[30] There is much that occurs during the course of a criminal proceeding that does not take place in open court. Investigations by the police will have occurred, and can

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[8] See *Re Victim X* [2003] 3 NZLR 220 (CA).

be continuing. The prosecution prepares its case, including by preparing witness statements, summaries of fact, and associated documents. Those documents are exchanged during the course of the proceeding. But unless and until evidence is called at a trial or another hearing, it is not provided in open court. That evidence is accordingly not subject to the open justice principles set out in the Act.

Publication and the law of contempt

[31] Media organisations, just like everybody else, cannot engage in activity that would amount to a contempt of court. For example, a media organisation cannot engage in publication that undermines a criminal proceeding before the courts.[9] That principle applies whether or not there has been a suppression order made. In *Gisborne Herald Co Ltd v Solicitor-General* a full court of the Court of Appeal upheld findings of contempt against media organisations notwithstanding that no suppression orders had been made.[10] Richardson J explained the balancing exercise inherent in the decision of the Court:[11]

> The common law of contempt is based on public policy. It requires the balancing of public interest factors. Freedom of the press as a vehicle of comment on public issues is basic to our democratic system. The assurance of a fair trial by an impartial Court is essential for the preservation of an effective system of justice. Both values have been affirmed by the Bill of Rights. The public interest in the functioning of the Courts invokes both these values. It calls for free expression of information and opinions as to the performance of those public responsibilities. It also calls for determination of disputes by Courts which are free from bias and which make their decisions solely on the evidence judicially brought before them. Full recognition of both these indispensable elements can present difficult problems for the Courts to resolve. The issue is how best those values can be accommodated under the New Zealand Bill of Rights Act 1990.

[32] For this reason Mr Stewart's submission that the media can publish anything except that which is suppressed is not correct. It is always possible for media organisations to gain access to information concerning a matter that is before the courts. For example it would be possible for persons associated with the prosecution, or for the defence to provide the media organisation with information. But in those circumstances it would be inappropriate for the media to publish that information in a

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9 See for example Contempt of Court Act 2019, ss 7, 8 and 22.
10 *Gisborne Herald Co Ltd v Solicitor-General* [1995] 3 NZLR 563 (CA).
11 At 571.

manner that would undermine the criminal proceedings. For example, if a media organisation obtained access to witness statements prepared by the prosecution, or a draft summary of facts, but that information had not been given in open court, to publicise that material could compromise the criminal proceedings, and may accordingly amount to a contempt.

The inherent power to suppress

[33] Courts have powers to make suppression orders preventing conduct that would amount to an undermining of the criminal proceedings as part of the inherent jurisdiction. That extends to making orders for non-publication of matters that would lead to a contempt. The power to make such suppression orders in the inherent jurisdiction was addressed in detail by the Supreme Court in *Siemer v Solicitor-General*.[12] After analysing the various legislative provisions controlling publication the Court concluded that Parliament had not intended to codify the extent of the power to make orders by the provisions in the Act. It had not done so following the previous decisions of the courts in *Taylor v Attorney-General* and *Broadcasting Corporation of New Zealand v Attorney-General* which had identified the courts inherent powers.[13] As the Supreme Court said "the limited nature of the legislative responses is telling".[14]

[34] It is noteworthy that the legislative provisions have been further amended following the decision of the Supreme Court in *Siemer v Solicitor-General*. The Criminal Procedure Act 2011 now applies, although the Supreme Court referred to its provisions notwithstanding that the Criminal Justice Act 1985 provisions were applicable in that case. The Contempt of Court Act 2019 has also been enacted, and came into effect on 26 August 2020 (after the decision of the District Court under appeal in the present case). It amended the Act by introducing a statutory power for the Court to temporarily suppress trial related information.[15] But once again it is apparent that this is not intended to exclude the inherent power of the Court to make orders protecting the due administration of justice in the inherent jurisdiction. There

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12 *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441.

13 *Taylor v Attorney-General* [1975] 2 NZLR 675 (CA); and *Broadcasting Corporation of New Zealand v Attorney-General* [1982] 1 NZLR 120 (CA).

14 *Siemer v Solicitor-General*, above n 12, at [147](b).

15 Criminal Procedure Act 2011, s 199C, inserted by s 29 of the Contempt of Court Act 2019.

is nothing in the statutory language to suggest that that was intended. The reasoning of the Supreme Court in *Siemer v Solicitor-General* still holds true.

[35] The inherent power to make suppression orders to protect the criminal proceedings can arise even before the criminal proceedings have been filed. If proceedings are imminent, and publicity would undermine the criminal justice processes — for example by making public the names of persons whose identifies would likely be suppressed once proceedings were filed — this gives rise for the potential for a contempt, and the ability of the Court to make suppression orders.[16]

[36] It is usually not necessary for the Court to make such suppression orders in relation to accredited media organisations, however. That is because of an expectation that those organisations will act responsibly in relation to matters that are, or are about to be before the Court. Accredited media organisations play their own part in the criminal justice processes as the eyes and ears of the general public.[17] Their accreditation means there are certain expectations in terms of acting responsibly in fulfilling these functions.[18] That is reflected by the privileged status that accredited media organisations are given in the legislative provisions. It is also recognised by the courts through matters such as in-court media applications to film, record and take photographic during the course of proceedings. Those expectations are usually followed without disagreement. The system breaks down if an approach is adopted that suggests that media organisations will publicise anything unless there is a suppression order in place.

Obtaining information on the court file

[37] There are also legislative rules that control access to information contained on the court file, including by media organisations, both before and after the proceedings have been determined. For example a regime is set out in the Senior Courts (Access to Court Documents) Rules 2017. Rules 12 and 13 are significant as they outline the

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16 *Television New Zealand Ltd v Solicitor-General* [1989] 1 NZLR 1 (CA); and *Teacher v Stuff Ltd* [2019] NZHC 1170, [2019] NZAR 902.

17 For an analysis of the respective, and complementary role of the Courts and the media see *Police v O'Connor* [1992] 1 NZLR 87 (HC).

18 See *Driver v Radio New Zealand Ltd* [2019] NZHC 3275 at [106] for a recent reference to the approach usually adopted by accredited media organisations.

approach to the balancing of the relevant considerations, both before and after a proceeding has been determined. Relevantly, the considerations include the right of a defendant in a criminal proceeding to a fair trial, and the principle of open justice.[19] There are similar provisions applicable in the District Court.[20] Again, however, suppression orders under other statutory provisions, or under the inherent jurisdiction may also apply in relation to such information.

General approach

[38] When courts make decisions under the statutory provisions, or the inherent jurisdiction, it is important for them to pay close regard to, and then balance the competing interests between freedom of expression and open justice on the one hand, and the interests of justice on the other. In the context of how publicity may interfere with fair trial rights the Supreme Court described the balancing in the following way in *Siemer v Solicitor-General*:[21]

> [158] A suppression order can be made consistently with the New Zealand Bill of Rights Act where that represents the appropriate resolution of the tension between freedom of expression and fair trial rights. New Zealand courts have recognised that the right of freedom of expression supports contemporaneous discussion of events in the criminal justice process and must be taken into account along with the right of an accused person to a fair and public hearing by an independent court. Both values must be given serious consideration and, so far as possible, fair trial rights and freedom of expression should each be accommodated. But, where publication of certain information would give rise to a real risk of prejudice to a fair trial right, freedom of expression may be temporarily limited by a suppression order in order to avoid that risk. In our view, this approach properly recognises the special importance of fair trial rights.

[39] I accept Mr Stewart's argument that the grounds for suppression may become less potent after a criminal proceeding has been determined. That is because fair trial concerns will not usually remain. But there may still be good reason for suppression after the end of the determination of a criminal proceeding. Suppression orders on the identity of a defendant, witnesses or victims can continue under ss 200 and 202 of the Act, for example. Moreover the regime allowing inspection of material on the court file recognises that, whilst the principles of open justice have greater weight after the

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19 Rule 12(b) and (e).
20 District Court (Access to Court Documents) Rules 2017.
21 *Siemer v Solicitor-General*, above n 12 (footnotes omitted).

conclusion of the substantive hearing in relation to documents that have been relied upon in open court, permission to have access may nevertheless be declined.[22] So the position is not absolute. The principles of open justice have greater weight after the conclusion of criminal proceedings before the court, but there can remain good reason for suppression orders both under statutory provisions, and under the inherent jurisdiction.

[40] Given the overall regime described above I do not accept two of Mr Stewart's primary submissions. First he argued that the media was free to publish matters associated with a criminal proceeding unless there was a suppression order. The position is more elaborate than that, including because of the law of contempt. Second, the media is not free to report upon the underlying events, or evidence associated with a criminal proceeding. As I have indicated, the ability to report on a criminal proceeding during the course of a case is generally confined to what has taken place in open court.

Application in the present case

The "blanket" suppression orders

[41] In the present case matters did not start well. As a consequence of the Police exercising search and seizure powers at the school Stuff became aware of the underlying investigation and incident. It would have been apparent that serious charges were likely and that the conduct involved school students. Charges were laid at the District Court that day. But notwithstanding this, a Stuff outlet released an online article describing the steps the Police had taken, and identifying the relevant school. That not only prejudiced the ability of the Court to make effective suppression orders in relation to the identity of an apparent victim of the offending — the school itself — but also compromised the Court's ability to make effective suppression orders in relation to any individual school students who may have been victims, and the defendant as a student of that school.

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[22] Senior Courts (Access to Court Documents) Rules 2017, r 13. See also, for example, *Cullen Group Ltd v Commissioner of Inland Revenue* [2018] NZHC 3238; and *Stan Semenoff Logging Ltd v New Zealand Transport Agency* [2019] NZHC 1133, (2019) 24 PRNZ 513.

[42] The article may not have been consistent with the expectations that exist in relation to accredited media organisations. In those circumstances it was not surprising that the reaction of the District Court was then to make a suppression order over all details in the summary of facts, or that the Police advised Stuff that their article amounted to a contempt.

[43] The criticisms of the "blanket" order made in Mr Stewart's submissions do not seem to me to be justified in those circumstances. Apart from anything else, the only matter that had taken place as a matter of public record was the laying of charges. In addition a suppression order had been made. Mr Stewart argued that it was unreasonable for Stuff not to be provided with information from the Court file at that point so they could see whether or not their article could be said to be a contempt. It is not surprising that the District Court did not think it appropriate to release further information to Stuff at that time, none of which had been disclosed in open court. In my view the Court's orders were justified, and resort to the inherent jurisdiction appropriate.

The summary of facts

[44] As indicated the primary focus of the appeal concerns the criticism of the suppression order covering any evidential material arising from the investigation other than as set out in an agreed summary of facts.[23]

[45] The starting point is to identify what proceedings took place in open court. In the present case comparatively little took place at such hearings. When charges are laid, the charging documents are publicly available, and in that sense they are open to the public. So the various charges that were laid by the prosecution, and subsequently amended by the prosecution, were part of the public record.

[46] The summary of facts document prepared by the prosecution is not a public document, however. It was no more, or less, than the prosecution's summary of its allegations against the defendant which is provided as part of fair disclosure to the defendant. Such summaries are not publicly available. Neither is the evidence

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[23] *Suppression decision*, above n 1, at [57](e).

gathered by the prosecution before it is called at trial. The only reference to summary of facts in the Act is in s 61(3)(a) in relation to a sentencing indication, which by s 63 is not to be published.[24] Mr Webber referred to the Solicitor-General's *Media Protocol for Prosecutors* which state:[25]

> 19. Occasionally, requests are received from the media for copies of the summaries of fact prepared by the Crown and provided to the court. Summaries of fact should not be made available to the media before the prosecution presents its submissions in open Court. Where there is a contest over the accuracy of the summary it should not be made available in that form until the contest has been resolved.

[47] Summaries of fact can become part of the proceedings in open court, however. If guilty pleas are entered to charges, the facts upon which sentencing takes place can be agreed between prosecution and defence under s 24(1) of the Sentencing Act 2002, and are usually set out in an agreed summary of facts. Often these are negotiated before they become part of the public record to which the defendant enters a plea.[26] The sentencing decision will then reflect what the summary of facts record. Prior to that time the summary is no more than the Crown's contentions. At trial a summary might be released as a record of what is alleged by the prosecution, for example following the prosecution opening, but only when those factual contentions have been so outlined at such a hearing.[27]

[48] Contrary to Mr Stewart's submissions there is no media entitlement to disclosure of the prosecution's evidence, or a summary of that evidence in the summary of facts, if there has been no trial. There were various versions of the Crown's summary of facts during the course of the proceedings summarising its allegations at particular points in time. Mr Stewart, as counsel for the relevant media organisations, was given copies of the summary on the basis that it was not to be made available for publication. This is in accordance with the recognised role of the media in the criminal justice system.

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24 Note also the reference in r 5A.1 of the Criminal Procedure Rules 2012.

25 Crown Law Office *Media Protocol for Prosecutors* (1 July 2013); and Crown Law, *Solicitor-General's Prosecution Guidelines* (1 July 2013).

26 Criminal Procedure Rules 2012, r 5A(2).

27 Although releasing the summary would only be appropriate if the summary and the opening are the same. It would also usually be advisable for a prosecutor to check with the Court before releasing the summary of facts.

[49] In his submissions Mr Stewart contended that the public is being "compelled to accept a narrative formulated by those with a vested interest in the disclosure of some facts but not others". I do not accept that submission. The version of the summary of facts being agreed on by the prosecution, defence, and the court is not a narrative formulated by those with such a vested interest. Moreover counsel for the media organisations were invited to participate in the process, and had participation rights under s 210 of the Act. The media would have been able to have counsel then argue before the Court why particular matters could, or could not be subject to publication. There is also nothing untoward in the prosecution and defence agreeing on a summary of facts. Indeed, they are required to do so for a sentencing indication under s 61(3)(a) of the Act, and for a sentence under s 24(1) of the Sentencing Act. Under r 5A.1(2)(b) of the Criminal Procedure Rules 2012 the prosecutor and defendant are obliged to try to resolve any dispute in relation to the summary of facts.

The sentencing decision

[50] There were, however, procedural complications with the present case. Partly because of those complications, and the concern of the Court in relation to publicity, the proceedings did not take place in accordance with the statutory requirements.

[51] The sentencing decision made by the Court following the entry of guilty pleas amounted to the determination of the criminal proceedings in open court.[28] In my view the sentencing decision here did not comply with the relevant requirements. It did not record the relevant facts concerning the offending, or that had formed the basis for the sentence that the Court imposed. Indeed the relevant facts were not set out at all in the decision. That breached the requirement for the determination of criminal proceedings in open court. In *Lewis v Wilson & Horton Ltd* a full Court of the Court of Appeal said of what had happened in that case:[29]

> [78] It was a breach of the principles of open justice that the submissions on disposition in a criminal case were received in private *and the summary of facts was taken as read in circumstances where the Judge did not then refer to them in reasons delivered in open Court.* Submissions on disposition may be received in writing and on a confidential basis only in exceptional

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28 See Sentencing Act 2002, s 31(1); and Criminal Procedure Act 2011, s 196.

29 *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) (emphasis added).

> circumstances … As a result of the way the matter was handled, the exercise of judicial function was effectively withheld from public scrutiny.
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> [79] 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.

[52] For the same reasons the sentencing decision here should have set out the relevant facts in relation to the offending to which guilty pleas were entered. Subject to suppression orders the relevant facts needed to be set out in the judgment of the Court that determined the criminal proceeding in open court.

[53] Moreover it would appear that the prosecution and defence had not agreed upon a revised version of the summary of facts for the purpose of sentencing. It was appropriate for them to do so under s 24(1) of the Sentencing Act — there being no trial or other hearing at which the Court could have made findings. There needed to be agreement on the relevant facts for the purposes of the guilty pleas.

[54] There had been a sentencing indication that had addressed the facts of case, but it had addressed additional charges to which guilty pleas had not been entered. Under s 63 the statutory suppression of the sentencing indication will only last through to the final sentence being imposed. In the normal course the ultimate sentence will largely repeat what has been put in a sentencing indication. If the sentence decision was only going to be in relation to some of the charges, where more confined facts were relevant, the position needed to be addressed by the Court, and suppression orders potentially entered in relation to the matters not subject to the guilty plea if that was appropriate.

[55] In this case the fate of the remaining charges depended on decisions to be made by the Film and Literature Board. At the time of the sentence that should have been dealt with by not referring to those charges or the allegations/evidence relevant of those charges. When it was subsequently determined that those charges could not be sustained given the decision of the Board, those charges were then dismissed at a further hearing of the Court.

[56] The above points were not the focus of the submissions advanced by Stuff and NZME on this appeal. But they arise indirectly from the criticisms of the process advanced by them on the appeal. In particular Mr Stewart challenged the process under which the parties have subsequently been required to agree on a summary of facts for the purpose of publication. The process of dealing with a summary of facts over seven months after the sentencing decision itself did not comply with the Act. The prosecution and defence needed to have agreed on a revised agreed summary of facts for the purpose of sentencing under s 24, which then would form the basis of the sentence delivered by the court in public. That sentencing decision would then have been open to publication subject to any suppression orders.

What should happen now?

[57] It is appropriate to ensure that the position has now been regularised. The starting point is the sentencing indication, as this sets out the relevant facts which were taken into account by the Judge in determining the sentence. They can be taken to be the facts relevant to the sentence itself notwithstanding they were not outlined when the sentence was given.

[58] It is appropriate to remove from the facts set out in the sentencing indication any facts that related to the charges to which guilty pleas were not entered, being the charges that were later dismissed. Suppression orders can then be made in relation to the facts set out in the sentencing indication, or otherwise arising during the proceedings, to which guilty pleas were not entered, particularly as the charges were recognised as not well founded.

[59] I have reviewed the facts set out in the sentencing indication, together with the more recently formulated and approved agreed summary of facts for the purposes of publication. There does not appear to be a great deal of difference between them. That being the case, there has not been any material suppression in this case in relation to the facts required to be addressed in open court, other than suppression of the defendant's identity and the identity of the school. In effect the way the District Court proceeded involves a failure to follow the statutory requirements, and then a delay between the sentencing decision and the release of the facts taken into account by the

Court in reaching that decision. Given the comprehensive statement of the facts subsequently approved by the District Court, this is not a case where facts relevant to the determination of the proceeding have otherwise been suppressed.

[60] For the avoidance of doubt I attach as Appendix A to this judgment the facts relevant to the determination of the proceeding, which may be taken as the facts taken into account by the Court for the purposes of the sentence, and which can be read alongside the sentencing decision itself. These facts may be published.

[61] In formulating this Appendix I have started with the facts as set out in the sentencing indication, which I have reviewed against the agreed summary more recently formulated and approved by the Court. I have also addressed certain matters that were the subject of specific argument in this Court.

[62] [Redacted]

[63] Second there was a question over whether it would be permissible to identify that the defendant was a student at the school. That is not recorded as being the subject of argument in the District Court. The current order in paragraph [57](a) suppresses the defendant's occupation, which suppresses AK's identity as a student of a school. It seems to me that the fact that the defendant was a student at the school was necessarily relevant to the sentencing for this offending, and it was accordingly part of the public determination of the charges which should not be suppressed. Given both the identity of the defendant, and the identity of the school are suppressed I accept that disclosing the defendant was a student of the school should be available for publication. That can be seen as part of the disposition of the charges in public.

[64] A final issue emerges from additional passages of the summary of the facts that the Crown suggest should have been included within it. Those additional paragraphs more directly relate to the charges that did not proceed. Mr Webber contended that they remained relevant as circumstances associated with the offending to which guilty pleas were entered. The fact that this question is being raised at all demonstrates that the statutory provisions have not been followed, as s 24(1) of the Act required

agreement on such matters. I note that the Crown did not appeal the suppression decision.

[65] As Mr Lithgow submitted the District Court Judge indicated that the summary presented to him met his approval, and he also determined that it would be quite wrong for details of the charges that were dismissed to be published.[30] Those matters do not appear to be matters agreed upon by the prosecution and defence for the purpose of sentencing in accordance with s 24 of the Sentencing Act. Neither do they appear to be matters that were relevant to the sentence the Court imposed. For these reasons I agree with the Judge that they did not need to be set out.

[66] For similar reasons I do not accept Mr Stewart's submission that the public was entitled to know the facts surrounding charges improperly brought, or for which there was no legal basis. The media is entitled to report that charges have been dismissed or withdrawn, but in the absence of those matters being disposed of in open court at a trial, or at a sentencing hearing, the underlying factual matters are not part of proceedings open to the public. Neither was there a requirement for those facts to be set out in the summary of facts for the offending that was subject to the sentence. I accordingly do not accept Mr Stewart's submission.

Outcome

[67] For the above reasons, whilst there are minor changes to the summary of the facts to be released with the Court's sentencing decision, those facts are essentially the same as those approved by the District Court Judge, and earlier recorded in the sentencing indication.

[68] Whilst it is not usually necessary to formerly suppress any other evidential material referred to during the proceeding that has not been disclosed in open court, that seems to me to be appropriate in the present case given the reasons for suppression orders and the extent of other disclosure. Those orders encompass the facts in relation to other allegations where it was accepted that the charges were not well-founded. Those facts had been set out in the sentencing indication, and earlier versions of the

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30 *Suppression decision*, above n 1, at [52] and [56].

summary of facts referred to during the proceedings. In addition counsel for Stuff and NZME has had access to such material.

[69] I accept there can also be criticism of the way the District Court Judge formulated that order by referring to "evidential material arising from the investigation leading to charges". It would only be appropriate for the Court to suppress information that has been disclosed during the Court proceedings, and that is how the suppression order should be formulated. To avoid any ambiguity I confirm that the suppression order over all evidential material disclosed during the proceeding other than as outlined in the summary of facts should remain in effect. In doing so I am satisfied that the principles of open justice are not being compromised as the facts that have been approved are a comprehensive set of facts concerning the criminal proceeding. I also confirm that the suppression orders made by the District Court at the earlier stages of the proceeding no longer have effect. To avoid doubt:

(a) The order under the Court's inherent jurisdiction suppressing any evidential material on the Court file, or disclosed during the proceeding other than set out in the summary of facts annexed to this judgment remains in effect.

(b) The order under s 202 of the Act suppressing the name and any identifying particulars of the school continues, but publication of the location of the school as in "the Tasman area" is permitted.

(c) The order for permanent suppression of the name, address and any details that might lead to the identification of the defendant under s 200 of the Act continues, but publication of their occupation as a student of the school is permitted.

[70] For these reasons, and with the exception of the minor alterations I have made, the appeal is dismissed.

[71] In addition to protect the efficacy of the suppression orders that have been made, and may be made, paragraph [62] of this judgment is suppressed. A redacted form of the judgment will be issued for public distribution.

Cooke J

Solicitors:
R B Stewart, Auckland for the Appellants
R M Lithgow QC, Wellington for AK
Rout Milner Fitchett, Nelson for AK
O'Donoghue Webber, Nelson for the Police
Zindels, Nelson for the School

Appendix A

The defendant was a school pupil living with their parents. In 2018 the defendant was in year 12. The school is in the Tasman area. The defendant was at that time the holder of a New Zealand Firearms license obtained in February 2018. The firearms license was endorsed Type A default standard. This entitled the defendant to purchase and have possession of recreational firearms and ammunition. There were no other firearms license endorsements for any other type of firearm.

The defendant's bedroom had a locked firearms cabinet in which a 12 gauge shotgun that was purchased at the time of a 17th birthday was located.

Police had received complaints from members of the public raising concerns about confrontational postings that the defendant had placed upon social media. Those comments referred to blowing up a school and executing a shooting. A number of people spoken to during the police enquiry described concerns regarding the defendant's behaviour. The defendant also had made comments to some peers about blowing up the school stage and shooting people in assembly.

The nature of other concerns were that the defendant was posting increasingly inflammatory and extreme views in commentary on social media. This involved pictures of the defendant posing with a military style tactical vest, military style gloves, wearing a holster that was capable of holding a shotgun and indeed in some pictures with the defendant holding the shotgun.

The shotgun which the defendant owned had been modified by removing the original stock and replacing it with a custom pistol grip that had been purchased. This allowed the firearm to be capable of being fired one-handed in the manner of a pistol.

A search warrant was executed at the defendant's address. Located at the address were three improvised explosive devices or IED's the defendant had made that were hidden in the defendant's bedroom. The defendant admitted ownership. New Zealand Army disposal experts made those safe and performed an initial examination of them. They were described as capable of initiating an explosion causing damage. If those items

were set off they would have sufficient explosive force to blow a person's hand off or cause other serious injury.

The defendant admitted making them and previously setting one off in an old disused building in Nelson.

Of concern to the police was that during the search warrant, located in a drawer of the study was a folded piece of A4 paper marked "Top Secret". When examined this revealed a sketch map of part of the defendant's school building, including offices, staff and other rooms. A number of offices were marked with a blue X noted as "prime targets" and arrowed movements or routes between offices and corridors were also marked in.

The defendant's shotgun was seized along with a Colt AR 15-A2 military style semi-automatic rifle. Both the firearms were located in the bedroom in a locked gun cabinet for which the defendant had the key. The AR15 semi-automatic rifle is a military semi-automatic weapon with a flash suppressor on the muzzle and bayonet line which cause this weapon to be classified as a NSSA weapon. In order to have possession of such a firearm, a license holder must have a particular endorsement, and the defendant had no such endorsement.

In the writings located on the defendant's home computer were a number of references to using the shotgun in an attack at the school. A number of electronic devices including a laptop computer, an iPad, gaming consoles, iPhone and other cellphones were seized pursuant to the search warrant. These items were located within the defendant's bedroom and office.

A single document titled "Note to investigator" was located. The document was headed with an introduction which included the defendant's full name, address and date of birth and is a letter to police investigators explaining the defendant's actions with the defendant declaring themselves as a terrorist.

The defendant described the course of action the defendant believed the police would take following the terrorist attack and described some of the defendant's preparation including collection of ammunition.

Of concern to the police is that the equipment necessary to carry out the plans had been obtained by the defendant and located at the address, and this included firearms, ammunition, explosives, clothing, knives and sketches and plans of the school.

A forensic examination of the iPhone and iPad seized from the defendant's bedroom resulted in the preservation of 8060 digital images stored within these devices. Among those images were 446 images that due to their content were assessed regarding their potential objectionable status under s 3 of the Films, Videos, and Publications Classification Act 1993. The main theme of these 446 images was pre-pubescent female children, some clothes in bikinis, some in bikinis that they had appeared to have urinated in, some either partially or completely naked and some involving a sexualised posing or sexual activities with adult males. Of the 446 identified images, 328 have been categorised as objectionable images.

In identifying the material located police applied the 2014 UK Guidelines which identifies three categories of activity for seriousness when considering objectionable publications. The three categories were as follows:

(a) First, images involving penetrative sexual activity or images involving sexual activity with an animal or sadism.

(b) Secondly, images of videos involving non-penetrative sexual activity.

(c) Thirdly, indecent images not falling within categories (a) or (b).

Under these guidelines 19 images or publications were identified that are considered to fall into one of the three categories (a), (b) or (c).

The prosecution for a representative sample of identified objectionable publications has been authorised by the Tasman District Crime Manager, Detective Scott. Electronic images entitled "IMG00295" and "IMG00296" both show a naked pre-

pubescent female child involved in penetrative sexual activity with an adult male and had been assessed as category (a) images.

Electronic image "IMG00297" shows a naked pre-pubescent female child involved in a non-penetrative sexual activity with an adult male and has been assessed as a category (b) image.

Electronic image "TXH00245" shows a naked pre-pubescent female child involved in non-penetrative sexual activity and has been assessed as a category (b) image.

Electronic images titled "IMG00254, 255, 314, 430, 459, 461 and 447" all involve a variety of naked pre-pubescent female children involved in sexualised posing and have been assessed as (c) images.

Electronic image entitled "IMG00362" is a computer generated image depicting a female child and adult male involved in non-penetrative sexual activity has been assessed as a category (c) image.

Electronic image entitled "IMG00363" is a computer generated image depicting a pre-pubescent female child and three adult males involved in non-penetrative sexual activity has been assessed as a category (c) image.

Electronic image entitled "IMG00433, 434, 435, 436, 437 and 438" are all images of a typed narrative describing in graphic detail various penetrative and non-penetrative sexual acts between a female child and an adult male from a document entitled "How to practice child love". Those images have been assessed as category (c) images.

At the time of the preparation of the summary of facts the defendant was 17 years of age, a year 13 student. The defendant has never previously appeared before any court. The defendant declined to make any statement or comment following consultation with a lawyer in accordance with the defendant's rights.

An order is sought for the destruction of the explosive devices, the Colt AR15 A2 rifle, the shotgun and the objectionable publications. The defendant's firearms license has been revoked.