SUPPRESSION ORDERS EXIST IN RELATION TO ASPECTS OF THIS JUDGMENT PURSUANT TO S 205 CRIMINAL PROCEDURE ACT 2011: SEE PARAGRAPH [3]–[6] and [30].
http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360354.html

IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY

I TE KŌTI MATUA O AOTEAROA
WHAKATŪ ROHE

CRI-2019-442-2
[2019] NZHC 582

BENJAMIN PHILIP DURRANT

v

NEW ZEALAND POLICE

Hearing:	20 March 2019 (via AVL)
Appearances:	T C Lyall for Appellant A R Goodison for Respondent
Judgment:	26 March 2019

JUDGMENT OF CLARK J

Summary

[1] The appellant, Mr Durrant, faces two charges of arson under s 267(1)(a) of the Crimes Act 1961.[1] When Mr Durrant had his first court appearance on 7 March 2019, Judge Ruth declined his application for interim name suppression.[2]

[2] Mr Durrant appeals the Judge's decision and seeks leave to adduce further evidence on appeal, namely, an affidavit from his mother, Ms Black.

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1 Maximum penalty 14 years' imprisonment.
2 *New Zealand Police v Durrant* DC Nelson CRI-2019-042-000450, 7 March 2019.

Factual background

[3] While the summary of facts itself is suppressed the following events from that summary have been well publicised.

(a) The Nelson-Tasman District experienced extreme weather conditions over the 2018/2019 summer period with high temperatures and no rain for a significant period of time, leading to a heightened risk of fire and a ban on the use of machinery in the region.

(b) A number of serious fires broke out in the Nelson Bays area in February 2019. The fires resulted in mass evacuation of residents, livestock and businesses to prevent loss of life and damage to property.

(i) On 5 February 2019 a fire started on a rural block of land on Pigeon Valley Road, Wakefield, requiring a nationwide response of emergency services and fire-fighting equipment. A state of emergency lasting several weeks was declared.

(ii) On 6 February a fire broke out on Rabbit Island. A Fire and Emergency New Zealand (FENZ) investigation identified two seats of the fire and declared them to be suspicious.

(iii) On Friday 8 February a fire broke out in Atawhai, Nelson. The blaze narrowly missed residential properties in the area but was quickly brought under control. A FENZ investigation determined the origin of the fire to be suspicious.

(c) These events led to increased anxiety across the Nelson community from the ongoing risk posed by the dry conditions in the region.

[4] The summary of facts alleges that Mr Durrant and an unknown associate left his home address at 1:10 pm on Wednesday 27 February 2019. The defendant was seated in the front passenger seat. As they travelled along Moutere Highway the driver slowed down allowing the defendant to set fire to an area of vegetation on the side of

the road.[3] They drove away. Shortly after, a passing motorist discovered the fire and alerted the security guard posted at the top of the hill. By this stage, the fire had spread from the roadside into forestry nearby and continued to spread onto neighbouring properties. The Fire Service was alerted and an extensive fire-fighting operation ensued. Police cordoned the area. All residents in the Redwood Valley were evacuated until the fire was brought under control. A significant area of bush and pine plantation was destroyed.

[5] The summary of facts further alleges that, at around 2:00 pm on 6 March 2019, Mr Durrant was driving with his co-defendant along Pigeon Valley Road. The area is heavily forested and was assessed as an "extreme fire risk". They started a fire in vegetation on the side of the road then travelled away via forestry roads towards the Moutere Highway. Soon afterwards, forestry workers came across the fire and extinguished it. By this stage, forestry staff had been alerted to the presence of the car being driven by the defendants and blocked the road with their vehicles. The defendants initially came to a stop, but then attempted to escape, eventually becoming stuck when they tried to drive through a dry river bed. Forestry staff prevented them from leaving until Police arrived moments later.

[6] Mr Durrant denied all involvement and denied being in the area where the fires were started but later admitted to being in the area and suggested his vehicle exhaust may have caused the fires.

District Court decision

[7] The appellant's first appearance in the Nelson District Court was on 7 March 2019 before Judge Ruth together with his co-defendant, who has name suppression. In support of his application for interim name suppression, Miss Lyall, counsel for Mr Durrant, submitted there was a risk to the safety of both defendants and brought screenshots from a Facebook page in support of this argument. Judge Ruth declined Mr Durrant's application for interim name suppression and gave brief reasons, but

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[3] It is unclear from the summary of facts whether the vehicle stopped and let out Mr Durrant to start the fire, or whether he somehow started the fire from the car.

granted his co-defendant's application on the basis she would be seeking a report under s 38 of the Criminal Procedure (Mentally Impaired Persons) Act 2003.

[8] When the Judge was advised of Mr Durrant's intention to appeal, he issued a minute giving his reasons for declining interim name suppression.[4]

[9] The Judge emphasised the high threshold to be met before name suppression can be granted, namely "extreme hardship".[5] Judge Ruth noted there was no extreme hardship on these facts. While social media posts reflected a backlash from the Nelson-Tasman community, this was no more than an expression of "heightened emotions" given the impact of the fires. Judge Ruth did not regard the posts as containing genuine threats.[6]

Relevant law

Approach to appeal

[10] Section 283 of the Criminal Procedure Act 2011 provides that an appeal may be brought as of right against a name suppression order decision.

[11] On appeal, different approaches apply to the different stages of the test. The first stage is a factual assessment and subject to the ordinary approach to appeals.[7] If the appellate court's opinion is different from the decision appealed, the decision is wrong even if it was a conclusion "on which minds might reasonably differ".[8] The second stage is discretionary and subject to the approach reserved for appeals against discretion, that is, the appellant must show the judge acted on a wrong principle, or took into account irrelevant matters, or failed to take into account relevant matters, or was plainly wrong.[9]

[12] Under s 287, this Court must determine the appeal by:

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4 *New Zealand Police v Durrant*, above n 2.
5 At [3].
6 At [4].
7 *Austin, Nichols and Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.
8 At [16].
9 *B v R* [2011] NZCA 331 at [9]; and *Lawrence v R* [2011] NZCA 272 at [11].

(a) confirming the decision appealed against; or

(b) varying the decision appealed against; or

(c) setting aside the decision appealed against; or

(d) making any other order it considers appropriate.

Name suppression

[13] Courts may suppress the identity of a defendant under s 200 of the Criminal Procedure Act 2011:

> **200 Court may suppress identity of defendant**
>
> (1) A court may make an order forbidding publication of the name, address, or occupation of a person who is charged with, or convicted or acquitted of, an offence.
>
> (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
>
> (b) cast suspicion on another person that may cause undue hardship to that person; or
>
> (c) cause undue hardship to any victim of the offence; or
>
> (d) create a real risk of prejudice to a fair trial; or
>
> (e) endanger the safety of any person; or
>
> (f) lead to the identification of another person whose name is suppressed by order or by law; or
>
> (g) prejudice the maintenance of the law, including the prevention, investigation, and detection of offences; or
>
> (h) prejudice the security or defence of New Zealand.
>
> (3) The fact that a defendant is well known does not, of itself, mean that publication of his or her name will result in extreme hardship for the purposes of subsection (2)(a).
>
> (4) Despite subsection (2), when a person who is charged with an offence first appears before the court the court may make an interim order

under subsection (1) if that person advances an arguable case that one of the grounds in subsection (2) applies.

(5) An interim order made in accordance with subsection (4) expires at the person's next court appearance, and may only be renewed if the court is satisfied that one of the grounds in subsection (2) applies.

(6) When determining whether to make an order or further order under subsection (1) that is to have effect permanently, a court must take into account any views of a victim of the offence conveyed in accordance with section 28 of the Victims' Rights Act 2002.

[14] The starting point for a s 200 assessment is the principle of open justice meaning "not only that judicial proceedings should be held in open court, accessible by the public, but also that media representatives should be free to provide fair and accurate reports of what occurs in court."[10] Courts consistently emphasise a prima facie presumption in favour of openness in reporting.[11] Publication is the norm. Suppression orders are only to be made in restricted circumstances and the threshold for suppression is high.[12]

[15] Section 200 contemplates a two-stage analysis, stage one involving a threshold determination. The court must be satisfied that publication would be likely to lead to one of the outcomes listed in s 200(2).[13] "Likely" is a common-sense test which should be readily understood and applied, however successive cases have used other adjectives such as "real",[14] "substantial", and "serious" to demonstrate the risk must not be fanciful or remote.[15]

[16] The court may grant an interim order when the defendant first appears if that person advances an "arguable case" that one of the threshold grounds in subsection (2) applies.[16] This lower evidential threshold recognises that first appearances:

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10 *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [2].

11 *R v Liddell* [1995] 1 NZLR 538 at 546. See also *Proctor v R* [1997] 1 NZLR 295 (CA); *Robertson v Police* [2015] NZCA 7; and *Re Victim X* [2003] 3 NZLR 220 (CA).

12 *Robertson v Police*, above n 11, at [44].

13 *Fagan v Serious Fraud Office* [2013] NZCA 367, at [39]–[40].

14 *Beacon Media Group Ltd v Waititi* [2014] NZHC 281 at [17]; *Peglar v Police* [2014] NZHC 1184 at [23]; and *JM v R* [2015] NZHC 426 at [35]–[36].

15 *Huang v Serious Fraud Office* [2017] NZCA 187 at [10].

16 The duration of interim orders is usually from the first appearance until the defendant enters a plea, or until the conclusion of a trial. If the court does not specify a term in the order, the order has permanent effect in terms of subsection (2). See Criminal Procedure Act 2011, s 208; and Simon France (ed) *Adams on Criminal Law – Procedure* (online ed, Thomson Reuters) at [CPA208.01].

"[G]enerally occur soon after arrest; that defendants have often had no opportunity to seek legal advice beyond that provided by the duty solicitor at court; and that they are likely to have had little or no ability to assemble material in support of an application".[17]

[17] Stage two is reached only when one of the threshold grounds is established. At stage two, the court must determine whether to exercise its discretion to suppress the defendant's name.[18] While the principle of open justice underlies the existence of the statutory threshold requirement for suppression, practically speaking the presumption becomes relevant when exercising the second stage discretion.[19] Delivering the judgment of the Court of Appeal in *Fagan v Serious Fraud Office*, Simon France J described the structure of s 200 in the following way:[20]

> [9] The structure of the section is plain and need not be made complex. Subsection (2) sets out the preconditions to a Court having jurisdiction to suppress the name of a defendant. One of the consequences listed in paras (a)–(h) must be established to the satisfaction of the Court as being likely to follow if no suppression order is made, before any discretion to forbid publication of a defendant's name arises. Obviously if none of (a)–(h) is established, necessarily the matter ends there.

[18] Essentially, in exercising discretion the judge must weigh up the competing interests of the applicant and the public. There is a high threshold to be reached before publication is justified,[21] and the balance must "come down clearly in favour of suppression".[22] Relevant factors (for present purposes) include: whether the applicant has been convicted; the seriousness of the offending; any other circumstances personal to the applicant; the stage of the proceedings and the presumption of innocence; and the interests of other affected persons.[23] The significance of the qualifying s 200(2) ground in this exercise is just one factor to weigh in the balance. As noted by the Court of Appeal in *A v R*:[24]

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17 *Adams*, above n 16 at [CPA200.06].
18 At [9]; and *Robertson v Police*, above n 11, at [39] and [41].
19 At [46].
20 *Fagan v Serious Fraud Office*, above n 13.
21 *Robertson v Police*, above n 11, at [41]–[44].
22 *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 at [43]; recently followed in *D (CA443/2015) v Police* [2015] NZCA 541, (2015) 27 CRNZ 614 at [12].
23 *Robertson v Police*, above n 11 at [41], citing *Lewis v Wilson & Horton Ltd*, above n 22, at [42]; and *Fagan v Serious Fraud Office*, above n 13, at [13].
24 *A v R* [2017] NZCA 49 at [19].

> [The High Court] recognised that the nature of the qualifying ground may be taken into account in the discretionary assessment. The interests of third parties will be relevant to the discretionary assessment if the qualifying ground is s 200(2)(f). But those interests are not determinative of the assessment as a matter of course. As Duffy J said, care must be taken as to the weight to be attributed to those interests in any particular case. It is possible that public interest in publication will prevail, as Duffy J considered it did in this instance.

New evidence on appeal

[19] I deal first with the application to adduce new evidence on appeal.

[20] The High Court retains an inherent jurisdiction to admit further evidence on appeal. The discretion should be exercised sparingly and "only be admitted where it can properly be said that the interests of justice require the admission, and the proposed evidence satisfies the principles for admission of fresh evidence".[25] The evidence should be sufficiently fresh and credible.[26]

[21] Mr Durrant's mother has sworn an affidavit in which she describes her father's health issues and her concerns about the impact on his health should the appellant's name be published.[27] She deposes to her fragile relationship with her father and the further damage publication is likely to cause not only to that relationship, but also to the appellant, his brother and herself. Counsel for Mr Durrant, Ms Lyall, submits it is in the interests of justice for the Court to receive this evidence.[28]

[22] Ms Lyall argued the lower threshold standard under s 200(4) for obtaining an interim name suppression order recognises it is unrealistic for a defendant to provide detailed material at a first appearance. The defendant only had a brief opportunity to meet with counsel before his appearance and did not have sufficient time to obtain the evidence.

[23] I accept the difficulty inherent in placing detailed evidence before the Court at the first appearance on 7 March. I am satisfied it is in the interests of justice to admit

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25 *R v Ratu*, above n 28, at [24].
26 *R v Bain* [2004] 1 NZLR 638 (CA), approved by *Bain v R* [2007] UKPC 33, (2007) 23 CRNZ 71 at [34]; and *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273.
27 A discharge summary from Nelson hospital dated 21 February 2018 is exhibited to the affidavit.
28 Citing *R v Ratu* [2013] NZHC 3085 at [24].

the further evidence. The evidence is sufficiently fresh and there is nothing before me to suggest it lacks credibility.

Did District Court Judge correctly apply the s 200(4) test?

[24] Mr Durrant seeks to have the decision of the District Court set aside and to be granted interim name suppression until final resolution of his case. Mr Durrant must satisfy the Court that one of the outcomes listed in s 200(2) would be *likely* to follow if no order were made.

[25] Mr Durrant's case is that Judge Ruth erred in considering Mr Durrant was required to show extreme hardship, because the Judge "applied the substantive assessment rather than the lower standard required at a first appearance". Mr Durrant was only required to demonstrate an "arguable case" that one of the s 200(2) factors was met and there was evidence before the District Court demonstrating an arguable case for at least two of the factors under s 200(2): that Mr Durrant's safety was endangered given the threats online;[29] and there was a risk that his co-defendant would be identified.[30]

[26] The respondent argues the Judge did not err. Either expressly, or by clear implication, the Judge was not satisfied there was an arguable case that publication would be likely to endanger Mr Durrant's safety, or would be likely to identify his co-defendant.

[27] On my reading of Judge Ruth's minute, he considered there was no arguable case. Judge Ruth acknowledged the social media entries "express some antipathy" towards the perpetrator of the fires, but held the nature of the entries were:[31]

> …no more than the sort of venting of spleen one might expect from those living in this area when it comes to notice that somebody who has in fact allegedly deliberately lit fires in this area is brought to justice.

[28] Noting the high threshold to be met before a court can be satisfied one of the s 200(2) preconditions is met, the Judge said:

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29 Criminal Procedure Act 2011, s 200(2)(e).
30 Section 200(2)(f).
31 *New Zealand Police v Durrant*, above n 2, at [2].

> [3] … There has to be shown a degree of extreme hardship. The Courts have held that hardship by itself means something out of the ordinary, undue hardship more again, and extreme hardship more than that again.
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> [4] I do not see extreme hardship here … I do not regard these as genuine threats, insofar as they are threats. …

[29] I see no error in the Judge's approach. I am not convinced there is a "real risk of vigilantism or retributive offending against the defendants or even their families". I am inclined to agree with Judge Ruth. The Facebook comments, the more extreme of which included comments such as "get dads shotgun out" and "they need a fucken curb stomping", are more akin to venting frustration rather than posing a genuine threat to personal safety.

[30] [Redacted]

Risk to safety of grandfather

[31] Ms Lyall then submitted there is a risk to the safety of Mr Durrant's grandfather who is 86 years old and suffered a stroke two years ago. He has secondary cancer and heart disease and is in palliative care. Mr Durrant's mother deposes to being "terrified" also of the impact of publication of her son's name on her relationship with her father, stating that he disinherited her recently because of her son.

[32] Ms Lyall cites *Q v New Zealand Customs* where the threshold ground was satisfied due to the possibility of fatal consequences following publication.[32] The appellant's wife, Mrs Q, had an existing serious heart condition. It was argued that her condition would be worsened by the stress caused by publication. Cardiologist evidence reported that Mrs Q suffered from a heart condition in which episodes of irregular heartbeat can cause fainting or sudden death. These episodes were triggered by stress or exercise.

[33] There is no such evidence before this Court. Mr Durrant's mother describes her fear that publication might lead to the worsening of her father's health condition but, without evidence to support them, her fears are speculative.

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[32] *Q v New Zealand Customs* [2014] NZHC 2398, at [34] and [56].

[34] This threshold ground is not established.

Likely risk of extreme hardship to any person connected with defendant?

[35] Ms Lyall submits there is a risk of extreme hardship to Mr Durrant's brother and mother. As noted above, Mr Durrant's mother already has a fragile relationship with her father and publication would likely lead to irreparable damage to their relationship. Counsel also argued Ms Black would suffer in terms of her employment. She works in healthcare in different clinics throughout the Nelson Tasman region, seeing a minimum of 60–70 people a day. She says she has lived in Nelson her whole life, and "everyone knows that [Mr Durrant] is my son". She worries publication of her son's name will impede her ability to work, negatively impact her relationship with her partner, and her family and friends. Mr Durrant's brother shares his surname and works in forestry, and the publication of his surname is "likely to have a negative impact on him".

[36] Hardship means "severe suffering or privation". Mr Durrant's brother and mother are undoubtedly confronted by stress and anxiety but their circumstances do not meet the threshold requirement of extreme hardship. Typically, families experience stress and anxiety when a family member is charged with serious offending. I accept Mr Durrant's brother and mother will be negatively impacted, but not "well beyond" the ordinary associated consequences.[33] Even for Mr Durrant's mother and her family, the negative impact is not equated with extreme hardship.

Exercise of discretion

[37] In light of my conclusion that the preconditions for an interim suppression order are not met, it is not necessary to engage in the balancing exercise. Nevertheless, I indicate the views I reach as a result of weighing the competing interests of the appellant and the public.

[38] The constitutionally important principle of open justice and transparency of court proceedings exists in the public interest. As well, there is a genuine public

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[33] *Robertson v Police*, above n 11, at [48]–[49].

interest in knowing the identity of the person, or persons, charged with responsibility for lighting fires in Nelson. It is also possible that the vacuum created by the existence of the suppression orders will be filled with rumour and speculation. Such speculation is not in the interests of justice.[34]

[39] On the other hand, Mr Durrant is entitled to the presumption of innocence. No plea was entered when Mr Durrant first appeared his counsel advised at the hearing of the appeal that Mr Durrant will enter not guilty pleas. His right to a fair trial is a relevant consideration, as are the interests of Mr Durrant and family members, particularly his mother, who will be negatively impacted by publication.

[40] I do not consider, however, the balance comes down clearly in favour of suppression. In fact, it is much the opposite given my findings that publication would be unlikely to lead to identification of his co-defendant, that there is insufficient evidence as to its impact on his grandfather's health and that the negative impact on his mother and brother does not reach the level of extreme hardship.

Result

[41] The appellant has not demonstrated error on the part of the District Court Judge. Even having regard to the further evidence adduced on appeal, I am not satisfied the statutory threshold is reached.

[42] The appeal is dismissed.

[43] This judgment is embargoed until 2 pm Wednesday, 27 March 2018, to enable Mr Durrant's mother to inform her father of the imminent publication of the charges against Mr Durrant.

Karen Clark J

[34] See *R (CA340/2015) v R* [2015] NZCA 287 at [35]; and *Television New Zealand v R* [1996] 3 NZLR 393 (CA) at 397.

Solicitors:
Zindels, Nelson for Appellant
Crown Solicitor, Nelson for Respondent