IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2017-404-000473
[2018] NZHC 581

BETWEEN	ARTHUR WILLIAM TAYLOR Applicant
AND	THE QUEEN Respondent

Hearing: 22 March 2018

Appearances: Applicant in person
M Harborow and L Fraser for the Respondent

Judgment: 29 March 2018

JUDGMENT OF WOOLFORD J

This judgment was delivered by me on Thursday, 29 March 2018 at 1:00 pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Meredith Connell (Office of the Crown Solicitor), Auckland

Copy to:
Applicant

Introduction

[1] Tompkins J granted name suppression to a number of witnesses including Witness B in David Tamihere's murder trial on 20 November 1990. Witness B died on 18 February 1995. Arthur Taylor applies to revoke the order for name suppression in relation to Witness B. The application is opposed by the Crown. Two questions arise. First, does Mr Taylor have standing to bring the current application? Second, should the order suppressing Witness B's name and identifying particulars be revoked?

Background

[2] Mr Tamihere was convicted of the murder of two Swedish tourists in December 1990. The circumstances of that trial, and subsequent events, are set out in the Court of Appeal's judgment of 28 August 2017.[1] For present purposes, it is sufficient to note Witness B was one of three prisoners who gave evidence against Mr Tamihere. The prisoners gave evidence Mr Tamihere had, at different times, spoken to them while in custody, describing how he had sexually assaulted and killed the victims.

[3] On 20 November 1990, Tompkins J made the following order:

> THERE WILL BE ORDERS PROHIBITING THE PUBLICATION OF THE NAMES OF THE WITNESSES [A] [B] & [C] OR OF [THEIR] PRESENT [WHEREABOUTS] OR OF ANY OTHER INFORMATION LIKELY TO LEAD TO [THEIR] IDENTIFICATION.

[4] This order was primarily made to protect the witnesses from retribution in the prison community for giving evidence for the Crown.[2]

[5] On 31 August 2017, Witness C was convicted on eight charges of perjury following a private prosecution brought by Mr Taylor. These charges related to Witness C's evidence at Mr Tamihere's trial. On 26 October 2017, Whata J revoked Witness C's name suppression, but made interim orders pending Witness C's conviction appeal.[3]

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1 *Taylor v C* [2017] NZCA 372.
2 At [2].
3 *Taylor v Witness C* [2017] NZHC 2615.

[6] In his submissions dated 27 November 2017, Mr Taylor said he was going to participate in a TV interview with Ms Lisa Owen, a report for The Nation television programme, then scheduled for February 2018. This did not occur, but Mr Taylor advises the Court that the interview is to proceed on a later date as he has only just received permission from prison authorities to participate in the interview. The subject will be the use of in-custody informers in criminal trials. Mr Taylor says that he wishes to advise Ms Owen of statements made by Witness B to family and friends before he died about the testimony he gave in Mr Tamihere's trial. He also says that he feels constrained to do so because of the order suppressing Witness B's name and any identifying particulars.

Standing

[7] Tompkins J made the order under either ss 138 or 140 of the Criminal Justice Act 1985. The distinction is immaterial. The order continues as if made under the Criminal Procedure Act 2011.[4] Section 208(1)(c) and (3) of the Criminal Procedure Act provide this Court with the power to review, and vary or revoke, a suppression order. Any third party with a proper interest may invoke the Court's jurisdiction.[5]

[8] The Crown says Mr Taylor does not have a proper interest. It points out, unlike Witness C, Mr Taylor is not prosecuting Witness B and has never done so. It says, in any event, there is no need for Mr Taylor to publish Witness B's name for the public to understand his involvement and the evidence he gave at trial.

[9] I am satisfied Mr Taylor has standing to pursue the present application. While the Crown is correct in saying Mr Taylor is not prosecuting Witness B, that is most likely because Witness B died more than 20 years ago. Mr Taylor, however, still argues Witness B lied at the trial and will seek to make that argument in his future endeavours. Mr Taylor maintains that Witness B never met Mr Tamihere, let alone on three separate occasions and therefore must have lied about his discussions with Mr Tamihere. This is refuted by the Crown, which points to the evidence of a Mt Eden prison officer who gave evidence at the trial about physical arrangements at Mt Eden prison at the time,

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4 *Taylor v C* [2017] NZCA 372 at [23].
5 At [24].

which meant that it was possible for Witness B to have met Mr Tamihere in the south wing between 7 and 11 July 1989. The suppression order therefore affects Mr Taylor's right to freedom of expression in a practical way, in that he credibly claims he wants to name the witness.

[10] At a high level, Mr Taylor's involvement with events following on from the Tamihere trial, including his successful prosecution of Witness C, show he has an interest in the matter, which has attracted media attention. Further, I consider whether Mr Taylor needs to name Witness B to inform the public goes to the merits of the application, not standing as submitted by the Crown. The Court should at least consider the application.

The application

[11] A suppression order will only be varied or revoked in exceptional circumstances.[6] In *R v Burns (No 2)* the Court of Appeal said:[7]

> We should also note that both the trial Judge, Chambers J, in his ruling as to suppression, and the judgment of this Court of 1 September 2000 recognised the concern expressed by the Crown that its ability to persuade witnesses to give evidence against criminal associates would be compromised if ostensibly permanent suppression orders might routinely be revisited where the witnesses later committed serious offences of their own. Chambers J saw the circumstances of the present proceeding as "truly unique" and Thomas J confirmed that it would always be most difficult to persuade a Court that the name of a secret witness should be divulged in the absence of "truly exceptional circumstances" which, in terms of their judgments, they must have considered to be present in this case.
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> …
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> We are satisfied on the balancing of legitimate privacy and fair trial values against countervailing freedom of expression and open justice considerations that there is no justification in the public interest for continuing the suppression orders. Mr Burns' application is dismissed and the four orders are accordingly discharged.

[12] In *Taylor v C*, the Court of Appeal said:[8]

> First, we are not persuaded that we should differ from the earlier decision of this Court in *Burns* that only in exceptional circumstances will a final

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6 *R v Burns* [2002] 1 NZLR 387 (CA).
7 *R v Burns (No 2)* [2002] 1 NZLR 410 (CA) at [5] and [14].
8 *Taylor v C* [2017] NZCA 372 at [36].

> suppression order be varied. The reasons for that constraint are obvious: those who give evidence (and those others involved, such as complainants and defendants) are entitled to a due degree of permanence and finality in relation to suppression orders. Such orders are not made lightly in the first place, but only for very good reason. It would be inimical to the criminal justice system if such orders were then able to be discharged readily and without a very significant persuasive threshold first being met. As Fogarty J noted, there are sound policy reasons why courts grant incarcerated Crown witnesses suppression, in particular the prevention of retribution to the witness or his or her family. Evidence of such witnesses in Court is usually accompanied by strong judicial directions, as was the case here. But the granting of suppression is normal, and such a suppression order will only be altered in exceptional circumstances.

Submissions

[13] Mr Taylor says the application should be granted for the following reasons:

(a) No reasons were given for making the suppression order. He says it is unlikely the circumstances of each witness were considered, as the order appears to be generic.

(b) Witness B died on 18 February 1995. He says whatever basis the order was made on, the reasons justifying it cannot have survived the death of Witness B.

(c) The suppression order is preventing him from exercising his right to freedom of expression.

(d) The public should be informed about the character and previous convictions of informant witnesses. He says the public "may well consider it abhorrent to justice that the prosecution puts forward as witnesses of truth people with the backgrounds and character of Witness B and Witness C".

(e) Witness B was not truthful in his evidence. He says it would present a serious risk to the integrity of the justice system if "perjurers think that they will be protected with name suppression notwithstanding their having given false evidence".

[14] The Crown, on the other hand, says:

(a) Witness B's death is not an exceptional circumstance. Witness B had an expectation, prior to his death, that the order was permanent. If orders were rescinded upon death, that would have a "potent impact on the willingness of jailhouse informants to come forward". The interests of Witness B's family are also highly relevant.

(b) Witness B did not necessarily give false evidence, and it cannot be shown that he intentionally misled the Court. It emphasises Witness B has not been convicted of any dishonesty offences relating to his evidence.

(c) Publication of Witness B's name is likely to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences as witnesses may be dissuaded from providing useful information in the future.

(d) In any event, the TV reporter, Ms Owen, probably already knows the name of Witness B and is able to talk to his family and friends about what he may have said before his death without the need for Mr Taylor to be involved.

(e) Finally, Mr Taylor would be unlikely to be prosecuted for breaching the suppression orders if he did tell Ms Owen the name of Witness B because the order does not apply to the dissemination of information to persons with a genuine need to know where the genuineness of the need is objectively established.[9]

Discussion

[15] I accept there are sound policy reasons for Crown witnesses who are prisoners to normally receive name suppression.[10] This is primarily to protect their safety in

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9 *ASG v Hayne* [2017] NZSC 59, [2017] 1 NZLR 777.
10 *Taylor v C* [2017] NZCA 372 at [36].

prison, but it could also be to protect the safety of their families. Name suppression in such circumstances also serves as an incentive for other prisoners to come forward and give evidence, when they are in a position to do so.

[16] In the present case, Witness B died more than 20 years ago. Needless to say, Witness B no longer needs to be protected by a suppression order. Revocation of the suppression order in these circumstances does not undermine the ability of suppression orders to protect prisoners who gave evidence.

[17] I accept the interests of witnesses' families will also be relevant. If a witness has died, but suppression is needed to protect their family, that would most likely constitute a good reason for suppression to remain in place. However, in the present case, the risk to Witness B's family is speculative only. No specific threat or danger has been identified.[11] No family members, said to be at risk, have been identified. In any event, if there is a risk, it will be mitigated by the fact that Witness B died more than 20 years ago.

[18] I do not accept revocation in these circumstances would discourage potential informants from giving evidence. Informants would still be protected. I do not consider witnesses would be less likely to come forward because their name suppression might be revoked after they die.

[19] In my view, the strongest point for the Crown is Mr Taylor does not need to name Witness B in order to discuss the Tamihere trial. He is only prevented from publishing Witness B's identifying particulars.[12]

[20] On the other hand, the uncertainty about the scope of the order is unsatisfactory. Mr Taylor and Ms Owen should not have to rely on the discretion of authorities not to prosecute if they use Witness B's name when they talk to others in the course of the production of the television programme.

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11 *R v Vaki* [2003] NZAR 605 (HC) at [23] and *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA).

12 *Taylor v C* [2017] NZCA 372 at [39].

[21] Weighing all factors in the balance, I am satisfied the order in respect of Witness B should be revoked. I am not purporting to set out a rule to the effect that name suppression will lapse after a witness dies. Rather, in the circumstances of this case, both of the primary reasons underpinning the suppression order no longer apply in relation to Witness B. The events that followed from the Tamihere trial, including Witness C's convictions for perjury, also take this case outside the norm. The public interest now requires a free exchange of information and opinions. The principle of open justice should prevail.

[22] The Crown submits, even if there are exceptional circumstances, the suppression should remain in place as publication would be likely to prejudice the maintenance of law, including the prevention, investigation and detection of offences. As I said above, I do not consider the fact that a witness's name suppression may be revoked after their death will have a significant impact on these matters.

Conclusion

[23] The order of Tompkins J suppressing the name and identifying particulars of Witness B dated 20 November 1990 is revoked with effect from 1 May 2018. This is to give the Crown the opportunity to consider its options.

Woolford J