IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA646/2017
[2018] NZCA 212

BETWEEN	ARTHUR WILLIAM TAYLOR Appellant
AND	ROBERTO CONCHIE HARRIS (WITNESS C) Respondent

Hearing:	12 February 2018 (further submissions received 8 May 2018)
Court:	Asher, Brown and Clifford JJ
Counsel:	R K Francois for Appellant H B Vaughn and A M Simperingham for Respondent
Judgment:	22 June 2018 at 10 am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Asher J)

Introduction

[1] The appellant, Arthur William Taylor, successfully prosecuted the respondent, Roberto Harris (Witness C), on eight charges of perjury in 2017. Mr Taylor is a serving prisoner and this was a private prosecution. Mr Taylor charged Mr Harris with perjury in relation to evidence given by Mr Harris at the 1990 trial of David Tamihere for murder. Mr Harris was found guilty of giving perjured evidence at Mr Tamihere's trial. Mr Harris then appealed his perjury convictions to this Court.

[2] Mr Harris had had the benefit of permanent name suppression since he gave evidence at Mr Tamihere's trial. Whata J revoked that permanent suppression following Mr Harris's conviction for perjury.[1] The Judge nevertheless made an interim order suppressing Mr Harris's name and identifying details pending the determination of his appeal against the perjury convictions.[2] That order was made presumably so that if Mr Harris's appeal was successful, and he was ultimately acquitted, he would still have the benefit of effective name suppression. Neither party contends that Whata J erred by revoking permanent suppression in light of Mr Harris's perjury conviction. However, in this appeal Mr Taylor challenges the making of the interim suppression order. Mr Taylor submits that interim suppression was not appropriate in the circumstances.

Mootness

[3] Since this Court heard the suppression appeal, Mr Harris's appeal against conviction has been abandoned. Following that, there was no reason to maintain the suppression. The interim suppression order that was the subject of this appeal was revoked by Whata J on 26 April 2018.[3] No party opposed the revocation of the interim order. As a consequence, Mr Harris's name has now been published.

[4] Therefore the issue to be determined is now moot. The practical outcome sought on appeal, namely the publication of Mr Harris's name, has been achieved.

[5] Following the publication of Mr Harris's name, we sought submissions as to the way forward, inviting comment on whether the appeal should be dismissed because the point at issue is moot.

[6] Mr Harris filed a memorandum to the effect that the appeal is now moot and should be abandoned. However, Mr Taylor, through his counsel Mr Francois, strongly opposed that course. He submitted that the issue, while practically moot in terms of the publication of Mr Harris's name, is of public importance. It having been fully argued, a judgment should be issued.

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1 *Taylor v Witness C* [2017] NZHC 2615 at [17].
2 At [18].
3 *Taylor v Witness C* [2018] NZHC 810 at [1].

[7] The Supreme Court's general approach to mootness was set out by McGrath J in *R v Gordon-Smith*:[4]

> [18] The main reasons for the general policy of restraint by appellate courts in addressing moot questions are helpfully identified by the Supreme Court of Canada in *Borowski v Canada (Attorney-General)*. They are, first, the importance of the adversarial nature of the appellate process in the determination of appeals, secondly, the need for economy in the use of limited resources of the appellate courts and, thirdly, the responsibility of the courts to show proper sensitivity to their role in our system of government. In general advisory opinions are not appropriate.

[8] Nevertheless, on occasions courts will issue decisions when the issue is moot. This will generally be when the issue is of general or public importance. Therefore the issue to be determined is whether the appeal is of sufficient public importance to outweigh the general reluctance of courts to issue opinions on moot issues.

[9] Mr Francois submits that there is more economy in delivering a judgment in this case after a hearing, because of the resources, time and expense that have already been committed to this appeal. In addition he submits that the same or similar legal issues may arise in the future leaving another court to hear the same arguments again.

[10] While there have been a number of cases where decisions have been delivered when mootness has arisen because of events after a hearing, the requirement of general or public importance remains.[5] In *Zurich Australian Insurance Ltd v Cognition Education Ltd*, where the case settled after the hearing, it was observed:[6]

> Where a case raises issues that are of public importance (as opposed to being of significance only to the parties), and full argument has been heard, the Court may decide to deliver judgment notwithstanding any settlement. In this case, the issue is clearly important and of general significance, and we have heard full argument on it.

[11] In general it is true to say that the issue of the suppression of the names of police informants is of importance. There is an issue as to the maintenance of the law,

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4 *R v Gordon-Smith* [2008] NZSC 56, [2009] 1 NZLR 721 (footnote omitted).

5 *Osborne v Auckland Council* [2014] NZSC 67, [2014] 1 NZLR 766 at [39]–[44]. See also *Clayton v Clayton* [2016] NZSC 29, [2016] 1 NZLR 551 at [3]; and *Zurich Australian Insurance Ltd v Cognition Education Ltd* [2014] NZSC 188, [2015] 1 NZLR 383 at [2].

6 At [2].

including the prevention, investigation and detection of offences, referred to in s 200(2)(g) of the Criminal Procedure Act 2011.

[12] However that issue itself is not the subject of this appeal. The issue in this appeal is narrow, challenging as it does an interim suppression order made in unusual circumstances. Mr Harris was granted interim suppression because he had been convicted of perjury, had suppression revoked, but was nevertheless appealing his convictions. It was because there was a prospect that the convictions might be finally overturned that an interim suppression issue arose. This is an unusual circumstance that will rarely arise.

[13] Mr Francois on behalf of Mr Taylor made the point that Mr Taylor is bringing other proceedings against jailhouse informants with permanent suppression, including two secret witnesses in the Tamihere case. It is suggested the issue could come up again, if they were charged, tried and convicted.

[14] However any such case will turn very much on its own particular facts and circumstances. In this case there were particular circumstances relating to Mr Harris, including the fact that he was known in the prison to be an informant, and the fact that he did not raise personal danger to him and his family as a reason for suppression. Importantly, Mr Harris did not seek interim suppression in the High Court. Nor did he defend the appeal on the basis that he is a prison informant and should therefore receive interim suppression under s 200(2)(g). Rather, Mr Harris argued on appeal that the making of the interim order was necessary to protect his fair trial rights in any retrial that might follow a successful appeal against his perjury convictions. For these reasons, the facts of Mr Harris's appeal are unique and do not raise issues of general or public importance.

[15] The general principle that police informants should be protected from publicity is clear. It was recently discussed and determined in *Taylor v C* when this Court declined an earlier application for revocation.[7]

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7 *Taylor v C* [2017] NZCA 372.

[16] Therefore, in these particular circumstances we do not consider that the issue to be determined in the appeal is of sufficient general or public importance to outweigh the reluctance of courts to issue opinions on matters that are moot.

Result

[17] The appeal is dismissed.

Solicitors:
Amicus Law, Auckland for Appellant
Woodward Chrisp, Gisborne for Respondent
Bell Gully, Auckland for NZME Publishing Ltd, Fairfax New Zealand Ltd, MediaWorks TV Ltd and Radio New Zealand Ltd as Interveners
Crown Law Office, Wellington for Solicitor-General as Intervener