EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

SUPPRESSION ORDERS EXIST IN RELATION TO ASPECTS OF THIS JUDGMENT PURSUANT TO S 205 CRIMINAL PROCEDURE ACT 2011: SEE PARAGRAPH [21]

IN THE DISTRICT COURT
AT HAMILTON

CRI-2017-019-004873
[2017] NZDC 19686

THE QUEEN

v

JAMES JOSEPH CUNNEEN

Hearing:	1 September 2017
Appearances:	D McWilliam for the Crown K Burroughs for the Defendant
Judgment:	1 September 2017

ORAL JUDGMENT OF JUDGE R L B SPEAR

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[1] The respondent is facing extradition to Australia pursuant to a warrant that has been issued out of the Parramatta Court in the state of New South Wales, Australia. The extradition is for the respondent to face charges in New South Wales of various charges of indecent acts and indecent assaults, sexual assaults and gross indecency. This extradition proceeding is to be determined under Part 4 of the Extradition Act 1999. Currently the respondent opposes extradition. Accordingly a hearing will be required to determine whether he should be surrendered in respect of that warrant of arrest for that extradition.

[2] This is the fourth hearing of this matter in this Court. The first appearance was on 31 July 2017 before Judge Cocurullo. At that stage the respondent was represented by Mr Laybourn. Judge Cocurullo dealt at that time only with the issue of bail pending final determination of the extradition proceeding but inferentially that can only occur if the warrant has been endorsed. I proceed on that basis.

[3] The remand was then on bail through to 14 August 2017 when the respondent appeared in front of Judge Clark. Mr Laybourn again was acting for the respondent and the respondent confirmed his opposition to extradition. At that stage, a date for the hearing to determine whether the respondent should be surrendered for extradition was not available and the remand was to proceed through to 27 November 2016 as a nominal date for a fixture to be set for the surrender proceedings.

[4] Judge Clark set up a timetable for the filing of documentation to assist the Court in respect of the determination required as to surrender. Judge Clark also extended the interim order as to name suppression through to 28 August 2017 on this basis, "*If no submissions are filed and served by 28 August 2017 (the interim order for name suppression) will lapse."*

[5] The case came back before this Court on 28 August 2017 as required and was heard by Judge Otene. At that stage Mr Burroughs appeared for the respondent for the first time and indicated to the Court that he had only recently been instructed. The Judge directed that the indicated application for continued name suppression was required to be filed and served by 30 August 2017. That application was set down for hearing on 1 September 2017 (today) and on the basis that the interim order as to name suppression would lapse that day if not continued to the next appearance.

[6] The hearing today is accordingly to determine whether name suppression should continue on an interim basis through to the date eventually set for the extradition hearing. However, Mr Burroughs seeks an adjournment of this hearing on the basis that the respondent has an appointment with a local psychiatrist, Dr Dean, on 7 September 2017. The apparent reason why there has been this referral as indeed found in the respondent's medical history compiled by his general practitioner that has been produced under cover of Mr Burroughs' memorandum. That medical history

details various medical issues faced by the respondent as to [medical details suppressed]:

> [*medical details suppressed*]

[7] There are certainly some medical issues faced by the respondent but there appears to be nothing in his medical history to suggest that there is anything of a psychiatric nature that would warrant an assessment by a psychiatrist. Indeed, the general practitioner's notes would suggest that this is more a grasping of straws suggested by the respondent's former lawyer.

[8] Mr Burroughs contends that name suppression should continue through until it is finally determined whether or not the respondent should be expedited to Australia. As this is a warrant for his arrest pending extradition issued by a competent Court in Australia, it is subject to a streamlined form of hearing to determine whether extradition should take place because of the close relationship between Australia and New Zealand and all as determined under Part 4 of the Extradition Act. However those are matters that will be dealt with in due course and there is already a timetable in place to have the Court fully appraised of any issue that might impact upon its decision whether or not to order surrender.

[9] The issue of name suppression, however, is to be determined under s 200(1) Criminal Procedure Act 2011 that is activated by the s 22(1)(a) Extradition Act 1999. Section 200(1) reads:

> ***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*.

[10] That requires the Court to be satisfied before making an order forbidding publication of the name, address or occupation of the defendant that one or more of the considerations under s 200(2) has been established. The only consideration that would appear to be relevant here is under 200(2)(a), that publication would be likely to cause extreme hardship to the respondent.

[11] In this respect, Mr McWilliam has helpfully provided to the Court a copy of the Court of Appeal decision of *Robertson v Police*[1], a decision given on 5 February 2015. That appeal dealt with an order of the District Court that declined name suppression and which decision was upheld on appeal. Essentially, it was an application to the Court of Appeal for leave to appeal under s 289 Criminal Procedure Act 2011. The Court of Appeal, however, dealt extensively with the consideration under s 200(2). The appellant contended that name suppression should be granted because publication would otherwise likely endanger her safety and cause extreme hardship to her, her family and her employer. Medical evidence was provided that she suffered from diabetes, had a history of depression and had suicidal thoughts. Additionally, it was at least suggested if not established that she would lose her employment should her name be published. She worked for a small accounting firm.

[12] The Court of Appeal referred to an earlier decision as confirming that the s 200(2) consideration was a two-stage analysis.[2] Stage 1 is a threshold determination and stage 2 is a discretionary assessment. The Court of Appeal[3] considered that the threshold assessment required the Court to be satisfied that one of the threshold grounds in s 200(2) had been established. That is a prerequisite to the Court then having jurisdiction to suppress the name of a defendant. The Court noted, *"It is 'only if,' one of the threshold grounds has been established that the Judge is able to go to the second stage."* The Court of Appeal continued further at paragraph 44:

> *The wording of the section itself also reinforces the presumption, using the language "only if" as well as expressions such as "extreme" and "undue". The intention is clear. Publication is the norm. Suppression orders are only to be made in restricted circumstances and the threshold is high. The onus is on the applicant to satisfy the judge that suppression should be ordered.*

[13] The Court of Appeal accepted that the intention of the legislature in respect of s 200 was clear and that publication was the norm. Suppression orders were only to be made in restrictive circumstances and that the threshold was high. The onus was on the applicant to satisfy the Judge that suppression should be ordered.

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[1] *Robertson v Police* [2015] NZCA 7
[2] Para [39]
[3] Para [40]

[14] When dealing with what was the phrase, "*extreme hardship*," the Court of Appeal determined that it connotes a very high level of hardship. Furthermore, that, "*hardship*," on its own means, "*severe suffering or privation*," and the qualification by the adjective, "*extreme*," indicated something more again.[4]

[15] It is abundantly clear, having regard to the medical history of the respondent, that neither his personal circumstances nor his medical presentation comes close to those of the appellant in the *Robertson* case and those considerations were not considered sufficient to warrant the displacement of the principle of open justice.

[16] So, as matters stand today, the respondent has not made out a case that comes close to satisfying the Court that publication would cause him extreme hardship; which is the only basis upon which the Court understands his application for continued name suppression can be based.

[17] Mr Burroughs, as mentioned, seeks an adjournment so that the respondent can see Dr Dean but I can see no justification for such further delay as it would appear to be a relatively fruitless exercise considering that even his general practitioner acknowledges in his medical notes [details deleted].

[18] To continue interim suppression on such a basis would be effectively to provide name suppression by adjournment rather than by consideration and determination. The defendant is not unduly prejudiced in this respect. As mentioned, he has been before the Courts now for just over a month and this is the fourth time the Court has had to deal with this issue as to name suppression. I appreciate there has been a recent change of counsel but, in the time available, counsel would surely have been able to identify any significant feature to the respondent's personal circumstances that could have justified further time being given to him to present evidence to support a case for extreme hardship. Mr Burroughs has clearly been unable to do so.

[19] Accordingly, the application for adjournment is declined. Furthermore, the respondent has not satisfied me that there is a case for a continuation of name suppression.

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[4] Para [48]

[20] An issue remains as to where there should be suppression of the defendant's occupation or more exactly the name of his employer. This is a matter that can be considered more liberally and on the basis as to whether it would cause undue hardship, in this case, to the employer. Certainly, on an interim basis, a case such as this that will attract some publicity is likely to cause difficulty for the defendant continuing his employment. More exactly, the employer is likely to find it difficult to continue with the respondent.

[21] In all the circumstances, and without opposition from the Crown in this respect (the Crown indicates that it is neutral on this point), the name of the respondent's employer is suppressed from publication until this case in New Zealand is finally concluded. I do, however, direct that there be no publication of those parts of this decision that details the medical condition of the respondent. That notwithstanding, there is now no restriction on the publication of the respondent's name and his address pending final determination of this extradition proceeding.

[22] I have asked the Registrar to find an early date for this extradition hearing. That is a matter that will now be looked at as, at the present time, there is no definite date set for that hearing; only a nominal date of 27 November.

[23] What is important is that any material that the respondent intends to rely upon to oppose extradition needs to be filed and served as soon as reasonably possible. I do not truncate the timetable made by Judge Clark but I do ask that the Registrar now find a firm date for the hearing of this extradition application in November 2017 rather than leave it as a nominal date for a date to be set.

[24] Mr McWilliam has indicated that the date for the Crown to file a response to any material filed by the respondent is 24 November 2017. Mr McWilliam indicates that he is happy to accept an earlier date on the basis that if any material is required that will require further time than the end of October, then he will come back to the Court to seek an extension. However at the present time the notice of opposition should have been filed by now and all affidavits and submissions for the opposition are required to be filed by 16 October 2017. The timetable is now amended to say that all material in opposition is to be filed and served by 30 October 2017.

Judge RLB Spear
District Court Judge

Date of authentication: 13/09/2017
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.