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

ORDER PROHIBITING PUBLICATION OF NAME(S), ADDRESS(ES), OCCUPATION(S) OR IDENTIFYING PARTICULARS OF APPELLANT(S)/RESPONDENT(S)/ACCUSED/DEFENDANT(S) PURSUANT TO S 200 CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360346.html

IN THE DISTRICT COURT
AT MANUKAU

CRI-2018-092-000683
[2018] NZDC 13987

NEW ZEALAND POLICE
Prosecutor

v

[EVAN WALL]
Defendant

Hearing:	9 July 2018
Appearances:	Mr D Kemp for defendant Ms A Cropp for NZEME Publishing Limited
Judgment:	12 July 2018

RESERVED JUDGMENT OF JUDGE D J McNAUGHTON
[Application for suppression of identity of defendant]

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[1] On 9 July 2018 the defendant was sentenced to 12 months imprisonment on one charge of theft and seven charges of using a document. Concurrent sentences of one month imprisonment were imposed on three charges of driving while disqualified third or subsequent offence, driving with excess breath alcohol, third a subsequent offence, breach of community work and breach of intensive supervision.

[2] The defendant had stopped at the scene of a crash on Cosgrove Road, Papakura. [The complainant] had sustained an injury to her arm and was unable to open her driver's door and exit the vehicle. The defendant wrapped his singlet around her injured arm and assisted her out of the vehicle. He then took the opportunity to steal the complainant's wallet and iPhone. He subsequently discarded the iPhone and the wallet and used the complainant's [bank deleted - credit] card at a number of service stations in South Auckland over the next six or seven hours.

[3] Mr Kemp had filed an application for suppression of the defendant's identity. An interim order was made on 2 February 2018 and continued on 26 March until sentencing. Prior to sentencing the New Zealand Herald had filed a media application seeking access to the summary of facts and permission to film the sentencing and to take still photographs of the defendant. Those applications were opposed by the defendant. In addition, Mr Kemp had included an application for a take down order pursuant to the Harmful Digital Communications Act 2016.

[4] In support of the defendant's applications, Mr Kemp had filed affidavits from [the defendant's close relative], and the chairperson of the [name deleted – community organisation] which employs [the defendant's close relative]. In addition Mr Kemp filed clinical notes of an assessment of the defendant on 24 November 2017 by a [consultant psychiatrist].

[5] NZEME Publishing Limited also filed a full written submission opposing the application for suppression of name and identifying particulars, opposing the take down order, and supporting the media application to access the Court file and allow in-Court media coverage. Counsel filed a substantial bundle of authorities in support.

[6] It was unrealistic to expect a Judge to digest all of this material in preparation for a sentencing list. As part of a Court and Prosecution effort to reduce sentencing backlog, 10 sentencing files were selected and placed into a sentencing list. All of the defendants were in custody. I indicated to counsel at the outset that I had only briefly skimmed the defence submission and had not read any of the material filed by the New Zealand Herald. The sentencing list concluded at 5:00pm and I then proceeded to hear oral submissions from counsel until 6:00pm and reserved my decision.

[7] Mr Kemp abandoned the application for a take down order and that application was accordingly dismissed. The remaining issues for determination are:

1) Whether publication of the defendant's identity would cause him extreme hardship.

2) Whether publication of the defendant's identity would cause extreme hardship to [his close relative], and in turn the [community organisation] which employs [them].

3) Whether the publication of the defendant's identity would endanger his safety.

4) If any one or more of the threshold grounds are established whether on a balancing exercise the private interests of the defendant or his [close relative] are outweighed by the public interests in open justice and the right to receive and impart information.

Extreme hardship to the defendant

[8] The relevant principles in consideration of name suppression are:

1) Freedom of speech, open judicial proceeding, the right of the media to report Court proceeding and a prima facie presumption in favour of reporting.

2) Seriousness of the offending is a relevant consideration and in cases of persons charged with a serious crime, only in rare cases will name suppression be ordered.

3) The Court must weigh the public interest in knowing the character of the person seeking name suppression. *Lewis v Wilson and Horton* [2003] NZLR 546 at paras [41] and [42].

[9] The power to suppress the identity of the defendant is found in s 200 of the Criminal Procedure Act 2011 together with mandatory criteria for making such an order. The section provides as follows:

> **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.

[10] In assessing whether any of the threshold grounds have been established, the Court must be satisfied that the consequences set out in s 200(2) must be "likely to occur". "Likely" means an appreciable risk[1] , a "real risk"[2] and a real and appreciable possibility[3]. Mr Kemp in his submission accepted that extreme hardship was a high threshold. He submitted that the defendant's mental health especially evidence of a suicide risk is a relevant factor and so too the defendant's prospects of rehabilitation.

[11] [The consultant psychiatrist] notes record a history of severe substance abuse and dependence and a history of trauma. The defendant had been abusing alcohol and also methamphetamine. He presented at the Emergency Department after [details deleted] and had expressed ongoing suicidal ideation. The psychiatrist noted the defendant as being very streetwise and aware that threatening suicide could gain him access to services.

[12] He was discharged and returned [medical details deleted].

[13] Amongst other stressors, the defendant described to the psychiatrist a concern regarding the charges and social stigma from being identified stealing a woman's purse from a scene of an accident while she was acutely injured. Family members described the defendant pacing all night creating disturbances. They were worried for the welfare of children living in the home and their own safety. The defendant showed signs of paranoia and feeling threatened and was sleeping one hour a night.

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[1] *News v R* [2015] NZHC1501 at [18] *NM v Police* [2015] HZHC 589 at [21] and *R v W* [1998] 1 NZLR 35 CA at [39].
[2] *Beacon Media Group Limited v Waiti* [2014] NZHC 281 at [17], *Peglar v Police* [2014] 1184 at [23].
[3] *Q v NZ Customs* [2014] NZHC 2398 at [54]. *Huang v Serious Fraud Office* [2017] NZCA 187 at [9]

[14] The defendant described intrusive thoughts to continuously self harm, talking to himself about his death and imagining his funeral. He denied active thoughts of suicide at the time of the interview and agreed not to self harm while in the Emergency Department.

[15] At that stage no respite or rehabilitation options were immediately available. In the psychiatrist's view there was no need to admit the defendant to Tiaho Mai and the defendant was clearly using the threat of suicide to secure support and accommodation as well as possibly avoid a Court hearing. The psychiatrist's greatest concern was for the defendant's family. When it was explained to the defendant that efforts would be made to admit him for respite care for 48 hours, to be arranged by a probation officer, he left the hospital.

[16] The psychiatrist's notes record a previous admission to Tiaho Mai in [year deleted] [details deleted]. The defendant described these incidents as "cry for help".

[17] [The defendant's close relative's] affidavit refers to the defendant's mental health issues. [The close relative] mentions the defendant's [details of learning disabilities and mental health diagnosis deleted]. [The close relative] describes the defendant growing up in an environment of acute family violence [details - including assaults on the defendant and witnessing verbal and physical abuse in multiple relationships - deleted]. [The close relative] described mental health and substance abuse issues arising for the defendant as a teenager and continuing through his adult life.

[18] From after the motor vehicle accident on 2 November the complainant's partner posted photographs of the defendant presenting the stolen [credit] card at a service station and gave a brief account of the incident describing the accident, his partner's injuries and the subsequent use of her credit card and disposal of the iPhone. The post referred to the offender as *"a piece of shit"* and *"a heartless piece of crap*". In reference to use of the credit card the writer commented

> *"yous sons (sic) of a bitch were spending her money before she even made it to the hospital!!!!!!"*

[19] And then in relation to the iPhone

> *"If I had lost that phone and lost [name deleted] that day you would have stolen more from us that you ever could ever comprehend – the sentimental value of the messages, photos to us are priceless and you took them from her when your human instinct that you had any should have been one of help – how can you justify such an action!*
>
> *"So I am reaching out to anyone willing to share and assist me in bringing these guys to answer for what they have done.*
>
> *"If you are reading this post let me assure you that you will be found, it is just a matter of time, and I will make sure your face is plastered wherever I can until you either turn yourself in … or the police who now have all of the footage of your little shopping spree catch up with you …!!!!!!!!!!"*

[20] The post has been shared 15,300 times. Comments attached to this post include

> *"Good to hear this worthless piece of so and so has now been detained by the police.*
>
> *"He was supposed to be in Court today … but he did a runner. He can't be a man and own up to what he did … whimp!"*
>
> *"I sure hope they get this prick and nail him to a wall".*
>
> *"I hope by him doing a runner makes him get a hefty sentence".*
>
> *"I hope they die, all the best for the future".*
>
> *"Arsehole and dickhead".*

[21] Mr Kemp submitted there was a real and appreciable risk that the defendant may commit suicide given his history of serious mental health issues and substance abuse. He submitted that the suicide risk would be exacerbated by publication of the defendant's identity and that risk was already present given the extent of the publication of the original Facebook post and the CCTV still photographs.

[22] Alternatively, he submitted that any prospects of the defendant's rehabilitation would be severely compromised by publication. The defendant has been assessed as suitable for the Odyssey House programme and a bed would be available by 20 July. Mr Kemp submitted that if the defendant were admitted to Odyssey House other residents may react in a similar fashion to those who have already responded on Facebook. He submitted that publication of the defendant's identity would

"demonise" him in the eyes of the community and significantly compromise his capacity to rehabilitate.

NZME Submission

[23] Ms Cropp submitted that extreme hardship should be interpreted consistently with the high threshold necessary to displace the presumption of publication which would require compelling reasons or very special circumstances. *Re Victim X* [2003] 3 NZLR 220 CA at paragraph [45]. She submitted that in each case an objective assessment of the circumstances of the offence was required including the seriousness and of the defendant and in determining whether or not the threshold was reached to consider whether hardship to the defendant arising from publication would be out of all proportion to the public interests in the application of the open justice principle. But with respect that seems to conflate the two step process into one.

[24] She noted the comments in the Court of Appeal in *Lewis* regarding the impact on personal financial and professional interests of the defendant and family at para [42

> "It is usual for distress, embarrassment, adverse personal and financial consequences to attend criminal proceedings. Some damage out of the ordinary in disproportionate to the public interest and open justice in the particular case was required to displace the presumption in favour of reporting."

[25] Ms Cropp submitted that the medical evidence did not establish that publication of the defendant's name would exacerbate a real risk of suicidal intent and she noted that at the time of the examination the defendant did not require critical care. She submitted that the defendant's history of prior attempts at suicide needed to be viewed in the light of the psychiatrist's assessment that the defendant was streetwise and using the threat of suicide to gain access to services. She submitted that any risk of suicide was greatly reduced while the defendant was subject to a sentence of imprisonment and similarly if the defendant were to engage in a rehabilitative programme such as Odyssey House. She submitted that embarrassment and damage to the defendant's reputation were an inevitable result of conviction and sentence and insufficient to displace the presumption of open justice.

Discussion

[26] In *R v W* [2016] NZHC 2923 a severe negative but likely temporary impact on the defendant's mental wellbeing was insufficient to justify name suppression because it did not constitute extreme hardship. However, in *B L v R* [2013] NZHC 2878 the defendant was determined to have been a real risk of suicide prior to the laying of charges. There was evidence from a doctor that publication of the defendant's name was likely to exacerbate the risk of suicide which outweighed the public interest in open justice.

[27] At the outset it has to be noted that the psychiatric assessment carried out by [the consultant psychiatrist] was eight months ago and the defendant has been in custody since mid January following a number of failures to appear in Court. There is no current assessment of the defendant's mental health. Mr Kemp declined an opportunity to adjourn the hearing in order to obtain a current psychiatric assessment of the defendant and elected to proceed on the basis of the medical information such as it was.

[28] At the time of assessment [the consultant psychiatrist] was of the view that there was no immediate risk of the defendant committing suicide and he received some assurances from the defendant in that regard. I have no reason to doubt his assessment that the defendant was attempting to gain access to services by threatening suicide. Although he appeared to be injured [details deleted], there is no evidence that the defendant was in any real danger. The same might be said of the earlier suicide attempts [year deleted] which the defendant acknowledged were a cry for help. I am not persuaded that there is a current suicide risk or that publication of the defendant's identity would cause a real and appreciable risk of suicide.

[29] While the defendant has been in a supervised and controlled environment for the past six months, the imposition of a sentence of 12 months imprisonment is effectively a time served sentence. He is due for release on 19 July. He will be subject to standard release conditions for six months. Whether there will be any additional community support other than reporting in to a probation officer several times a month is doubtful. Whether the defendant is able or willing to maintain a medication regime

out of custody, is also an issue and so to the extent of any available family support. He will be in a vulnerable position on release into the community. His best opportunity for rehabilitation would be to enter and complete the Odyssey House programme to deal with his chronic substance abuse issues which have plagued him for many years.

[30] Clearly the widely shared Facebook posts were a contributing factor to the defendant's disordered mental state when he was assessed in November last year. Publication of the defendant's identity at this point, in my view, is likely to have a similar effect and may well compromise the defendant's willingness and motivation to undertake the treatment programme which is now available to him. There is a severe shortage of residential treatment placements in Auckland. The waiting lists for all of the recognised programmes are long and the supply far outweighs the demand. If the opportunity to enter and complete the programme is lost due to publication of the defendant's identity, I consider that would amount to extreme hardship to the defendant and likely to lead to further repetition of the cycle of substance abuse, mental health issues and criminal offending.

[31] Defendants undertaking intensive residential drug and alcohol treatment programmes are in a vulnerable position and I have had direct experience of this. In March 2017 I was monitoring a defendant through a treatment programme at Odyssey House. He and his partner, posing as hospital staff and school visitors had stolen credit cards from medical staff and teachers over a period of months and used the stolen credit cards to spend in excess of $50,000 on clothing, jewellery, appliances and computers. The defendant's partner had been sentenced to imprisonment but his sentencing had been adjourned to enable him to undertake a long course of treatment at Odyssey House.

[32] Two days after sentencing was adjourned, a front page article describing the defendant's offending appeared together with his photograph. There was no reference to the defendant undertaking treatment. The reason for adjourning the sentencing was not mentioned. As a direct result of publication of the article, and the photograph, he immediately left the programme. He was in breach of his bail and on the run from the police for some time. During that period he committed a serious armed robbery and other offences and was subsequently sentenced to a lengthy term of imprisonment.

[33] I am concerned that publication of the defendant's identity could have a similar impact in this case given the nature of the defendant's offending which the New Zealand Herald have highlighted more than once and no doubt will do so again if the application to suppress the defendant's identity is declined. I am satisfied that there is a real and appreciable risk that the defendant's treatment will be jeopardised if his name is published. I am satisfied that the loss of this opportunity to engage in treatment would amount to extreme hardship.

Extreme hardship to [the defendant's close relative] or the [community organisation]

[34] [Name deleted] is the chairperson of the [community organisation]. He has been involved with the [community organisation] for [over 3 decades] years and has been chairperson for [over a decade]. [Details regarding the community organisation deleted].

[35] [The defendants close relative] is the only paid employee of the [community organisation] and the first contact for all organisations. [The close relative] is a liaison person between clients, contracted staff members and partners and the first person that everyone coming [into the organisation] speaks to.

[36] According to [the chairperson], [the defendant's close relatives's name] name is synonymous with the [community organisation] and [the close relative] is effectively the figurehead. The [community organisation] is intimately connected with the [defendants] family. [details deleted] He deposes that if the defendant's name is published many of the clients which the [community organisation] provides services to will be hesitant to return and in particular, parents may not trust their children into the care of the [community organisation], if [the defendant's close relative] is associated with the behaviour of [the close relative, the defendant]. It is [the chairperson's] view that the impact on the [community organisation's] reputation and income would be devastating. The [community organisation] is totally dependent on [the defendant's close relative] as the figurehead and if [they] were forced to resign the [community organisation] would collapse. [The chairperson] deposes that the reputation of the [community organisation] is paramount and without a good reputation there is no [community organisation].

[37] [The defendant's close relative] in [their] affidavit records that [the close relative's] name is all over the [community organisation's] website and is often reported in local newspapers when [the close relative] represents the [community organisation] in media publications or advertisements for its services. [The close relative] confirms that reputation of the [community organisation] is synonymous with [the close relative's] name, following on from r [relationship deleted] who built the [community organisation]. [The close relative] deposes that [their] personal reputation has been built on a narrative of pulling [themself] out of a lifetime of acute depression, poverty and physical and emotional abuse. If the defendant's name were published it will be suggested to the community that this is not the case and publication of the defendant's acts will result in a public perception which will negatively affect [the close relative's] own reputation, [their] work in the community and [wider community – details deleted] in general.

[38] Mr Kemp submitted that irrecoverable financial loss and collapse of the [community organisation] would meet the standard of extreme hardship.

NZEME submission

[39] Ms Cropp accepted that [the defendant's close relative] was a connected person to the defendant but submitted that the defendant's connection to the [community organisation] was somewhat more remote. She submitted that [the defendant's close relative] and the [community organisation] already enjoy a good reputation in the community and that this has been the case for many years. She submitted that whilst there may be a remote possibility that the defendant's offending be connected to his [close relative], it was an even more remote possibility that this would cause significant loss of reputation or business to the [community organisation].

[40] She submitted that the evidence of [the defendant's close relative] and [the chairperson] was speculative and should not be given significant weight. [The close relative] submitted that any news item containing publication of the defendant's identity would not as a matter of good conscience refer to the defendant's [close relative] or [their] position at the [community organisation], that those issues were not relevant in reporting the defendant's case. She submitted that any discomfort on the

part of [the defendant's close relative] or the [community organisation] was not sufficient to displace the presumption of open justice and did not meet the test of a real and appreciable risk of extreme hardship.

Discussion

[41] I have no reason to doubt the evidence of [the defendant's close relative or the chairperson] who are both clearly hard working and dedicated servants of their community. Their commitment to their community is long standing and they are in the best position to judge the impact of publication of the defendant's name on [the defendant's close relative and the community organisation] itself. [The defendant's close relative] is in a somewhat unique position as the figurehead and principal point of contact for the [community organisation]. [The close relative] is the personification of the [community organisation] in many ways by reason of [their] role and also as the [relationship deleted] of the founder of the [community organisation]. Assessing the impact of publication on the reputation and financial position of the [community organisation] is a totally different exercise to assessing financial loss of a company associated to a defendant or his wife. Engaging with a [community organisation] is not a business decision it is dependent on the nature of the relationship and that means a relationship with [the defendant's close relative] as the front person and there is a strong element of trust given that many of these programmes involve children.

[42] [The defendant's close relative's] struggle through [number deleted] abusive relationships, drugs, gang membership and family violence is well known in the wider community and there is real force in the suggestion that [the close relative's] reputation may be completely undone if [the close relative's] offending were widely publicised. This case has received considerable publicity already. In excess of 60,000 people have read the online New Zealand Herald article and more than 15,000 people have shared the Facebook posts. In my assessment the possibility that the defendant's offending will be connected to his [close relative] is not at all remote and neither is the possibility that this in turn will damage [the close relative's] reputation and that of the [community organisation]. I am satisfied on the evidence that there is a real and appreciable risk that will occur, that there will be a loss of confidence in [the defendant's close relative] and the [community organisation], that [the close relative]

may well be forced to resign and that the [community organisation] itself could then collapse.

Danger and safety of the defendant

[43] Essentially this is a repetition of the grounds set out under extreme hardship to the defendant on the basis that safety would include physical or psychological harm relying on *R v Shaileri* [2015] NZHC 26/7/16 at para [18]. It is submitted that the risk of suicide is exacerbated by the wide sharing of the Facebook post and the outrage expressed by a number of the commentators. However, as stated previously there is no evidence of any current risk of suicide based on any current psychiatric assessment. In any event I am not satisfied there was a real and appreciable risk in the first place and this ground is not made out.

Whether public interest outweighs likely harm to the defendant or likely extreme harm to the defendant or connected person

[44] Mr Kemp's submissions did not address this second stage of the two step test outlined in *Robertson v New Zealand Police* [2015] NZCA 7 at paras [39] to [41]. Ms Cropp submitted there is a high level of public interest in this case already given the 67,000 people who have read the online New Zealand Herald reports which have described the offending and sentencing without naming the defendant. She submitted that the particularly callous actions of the defendant had captured public interest due to the vulnerability of the victim.

[45] She submitted the offending was serious given that the theft and using a document charges are punishable by a maximum sentence of seven years imprisonment and the offences under the Land Transport Act carry a maximum penalty of two years imprisonment and in counsel's submission there was an element of recidivist offending. She submitted that in dishonesty cases there is also a strong presumption that the offender's name will be published *Robertson v Police* [2014] NZHC 1302. Ms Cropp submitted that whilst publication would be uncomfortable for the defendant and his [close relative], any media coverage would be fair, balanced and factually accurate and the legitimate interests of the public outweighed the private interests of the defendant and his [close relative].

[46] With respect to the offending itself, I would not categorise this as particularly serious offending. At sentencing I said the starting point in relation to the theft and credit card offences would be nine months and I uplifted that by three months to take into account the particularly aggravating factor of the victim's vulnerability immediately after the accident. Theft and use of credit cards is an every day occurrence in Auckland and in itself of no particular public interest. The only newsworthy aspect of this story is the vulnerability of the victim. But that in itself does not elevate this into a category of serious offending in my view. As I said in my sentencing decision, the offending was amoral and shockingly callous, but in itself that does not elevate the offending from moderately serious to serious.

[47] Undeniably there is a strong public interest in this story given the attention that the online Herald articles have received and also the Facebook posts. Displacement of the presumption of publication requires compelling reasons or very special circumstances and I am satisfied that those exist here. It is in the community's long term best interests and the defendant's own interests that he address his long standing substance abuse issues. His future rehabilitation is a compelling reason which outweighs any remaining public interest in who the offender actually was, as opposed to the circumstances of the offending. Secondly, the defendant's [close relative], in my assessment, is in a unique position as the figurehead of a [community organisation] with a family history and a back story of overcoming [number deleted] abusive violent relationships. Again, I would regard the impact on the reputation of [the defendant's close relative] and the [community organisation] as very special circumstances sufficient to displace the presumption of open justice and the application is granted.

[48] It follows that the New Zealand Herald's application for in Court filming and still photography is declined.

D J McNaughton
District Court Judges