

IN THE SUPREME COURT OF NEW ZEALAND

**SC 72/2015
[2015] NZSC 114**

BETWEEN TONY DOUGLAS ROBERTSON
 Applicant

AND THE QUEEN
 Respondent

Court: Glazebrook, Arnold and O'Regan JJ

Counsel: C B Wilkinson-Smith for the Applicant
 M J Lillico for the Respondent
 T C Goatley for NZME. Publishing Limited, Fairfax New
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 Zealand Limited and Television New Zealand Limited

Judgment: 28 July 2015

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was convicted of the murder and rape of Mrs Blesilda Gotingco after a jury trial at the High Court in Auckland. He has yet to be sentenced.

[2] The trial Judge, Brewer J, suppressed the applicant's name before the trial and later extended the suppression order for the duration of the trial.¹ The order did not, however, prevent images of the applicant being shown on television and in print media. The reason for the suppression order was that the applicant had prior convictions for sexual offending against children. The fact he had those convictions was not admissible evidence at the trial.

¹ *R v R* [2015] NZHC 817.

[3] After the applicant was convicted for the murder and rape of Mrs Gotingco, he applied for continuing suppression pending the outcome of an appeal against conviction that he said he intended to pursue. This was said to be necessary to ensure a fair retrial, in the event that the appeal was pursued, was successful and resulted in an order for a retrial.

[4] Brewer J refused to extend the suppression order, but granted an interim suppression order to give the applicant a chance to appeal against that refusal.² The applicant did so. The Court of Appeal dismissed that appeal.³ But it also granted interim suppression to give the applicant the chance to seek leave to appeal to this Court.⁴

[5] The applicant seeks leave to appeal against the first Court of Appeal decision. His counsel, Mr Wilkinson-Smith, argues that a miscarriage of justice will occur if leave is not given because, he says, publication of the applicant's name with the consequent publication of his prior convictions, will prevent a fair retrial.

[6] He also argues that the proposed appeal involves a matter of general importance because there is limited and divergent case law on the issue of suppression and the Court of Appeal's decision (especially its comment at [21]) may affect cases involving pre-trial suppression and suppression during a trial.

[7] We do not consider the proposed appeal involves a matter of general importance. The Court of Appeal determined that publication would not create a real risk of prejudice to a fair retrial, in the event that there was one. And, given that a retrial was no more than a possibility, it concluded that the balancing of the possibility of a retrial and the possibility of unfairness were outweighed by the principles of open justice. This was an orthodox application of the law as articulated in *R v Burns (Travis)*⁵ and other cases.

² *R v R* HC Auckland, CRI-2014-044-2080, 22 May 2015 [Minute No 10].

³ *R v R* [2015] NZCA 287 [R v R (CA 1)].

⁴ *R v R* [2015] NZCA 305 [R v R (CA 2)].

⁵ *R v Burns (Travis)* [2002] 1 NZLR 387 (CA).

[8] Nor do we consider that the observation at [21] of the Court of Appeal's judgment, to the effect that any prejudice could be addressed by directions to the jury, creates any precedent in relation to pre-trial suppression and suppression during a trial. It was an assessment made in relation to a possible retrial in the present case, taking account of the facts of the case. It was not a general observation about fair trial rights.

[9] The concurrent findings of the High Court and Court of Appeal are orthodox and we see no appearance of a miscarriage of justice. We therefore dismiss the application for leave to appeal. The consequence of the application being dismissed is that:

- (a) the order made by the Court of Appeal continuing the interim name suppression granted by the High Court lapses;⁶
- (b) the interim order made by the Court of Appeal prohibiting publication of the name, address and identifying particulars of the applicant lapses;⁷ and
- (c) the orders made by the Court of Appeal prohibiting publication of its judgments also lapse.⁸

Solicitors:
Crown Law Office, Wellington for Respondent
Bell Gully, Auckland for media

⁶ *R v R* (CA 1), above n 3, order B.

⁷ *R v R* (CA 2), above n 4, order A.

⁸ *R v R* (CA 1), above n 3, order C and *R v R* (CA 2), above n 4, order B.