NOTE: PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE ACT 1985.

NOTE: PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF WITNESSES UNDER 17 YEARS OF AGE PROHIBITED BY S 139A OF THE CRIMINAL JUSTICE ACT 1985.

ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF THE COMPLAINANT, HER FAMILY MEMBERS AND HER BOYFRIEND.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 49/2019
[2020] NZSC 137

BETWEEN	PETER HUGH MCGREGOR ELLIS Appellant
AND	THE QUEEN Respondent

Hearing:	11 November 2020
Court:	Winkelmann CJ, Glazebrook, O'Regan, Williams and Arnold JJ
Counsel:	R A Harrison, S J Gray and B L Irvine for Appellant J R Billington QC and A D H Colley for Respondent
Order:	13 November 2020
Reasons:	7 December 2020

JUDGMENT OF THE COURT

We make an order rescinding the existing suppression orders and, in their place, suppressing the name and identity of the complainant, all members of her family, of her boyfriend, and any other identifying particular.

REASONS
(Given by Winkelmann CJ)

[1] In July 2019, Mr Peter Ellis was granted leave to appeal against the decision of the Court of Appeal,[1] dismissing the appeal against his 1993 conviction for sexual offending against children.[2] Although Mr Ellis died in September 2019, this Court subsequently decided that the appeal could continue.[3]

[2] The Crown has now applied to admit additional evidence on appeal. The proposed evidence is that of a complainant who details offending by Mr Ellis against her which is of a similar nature, but earlier in time, to the conduct that formed the basis of Mr Ellis' convictions, now the subject of this appeal. If admissible, the evidence from this witness will be admitted as propensity evidence.[4] At issue is whether and what suppression orders should continue in respect of the proposed evidence.

[3] This is the second time the Crown has applied to admit the evidence of this witness. It initially sought to have the evidence admitted as relevant to the issue of whether the appeal should continue after Mr Ellis' death. However, this Court determined that the evidence was irrelevant to that issue and, having so determined, made an order suppressing the evidence, and its judgment concerning that evidence, until further order of the Court.[5]

[4] The Court having determined the appeal could continue, the Crown then applied to have the evidence in question admitted as relevant to the issues at the hearing of the substantive appeal. A hearing date was set for that application to admit the evidence. The Crown applied for the suppression orders to be lifted. On 6 November 2020, the Court suppressed the reasons for and subject matter of that hearing, in order to give effect to the suppression of the evidence that was already in place.[6] It directed that the Court would address the issue of suppression at the hearing.

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1 *R v Ellis* [2000] 1 NZLR 513 (CA) (Richardson P, Gault, Henry, Thomas and Tipping JJ) [CA judgment].
2 *Ellis v R* [2019] NZSC 83 [Leave judgment].
3 *Ellis v R* [2020] NZSC 89.
4 Evidence Act 2006, ss 40 and 43.
5 *Ellis v R* [2019] NZSC 122 at [9] [First suppression order].
6 *Ellis v R* SC 49/2019, 6 November 2020 at [2] [Second suppression order].

[5] On 11 November 2020, we heard argument in relation to the issue of suppression, after which we decided to rescind the existing suppression orders. In their place, we made an order suppressing the names and identities of the complainant, all members of her family, of her boyfriend, and any other identifying particular.[7] We now give our reasons for that order.

[6] It is necessary context to the issue of continued suppression that the appeal raises issues as to the reliability of the evidence given by child complainants in interviews and in court. Both counsel for the appellant and the Crown propose to call expert evidence on the working of human memory and the conducting of interviews with children.

[7] The Crown submits that it is in the interests of justice to admit the proposed evidence, so that all relevant information is before the Court in determining the safety of the appellant's convictions. The Crown argues that the propensity evidence is relevant because, if accepted, it may corroborate the reliability of the evidence of the child complainants. The Crown says that the evidence has the appearance of credibility, was not previously available, and is truly fresh. Mr Billington QC also indicated that he may put forward another basis for the application at the substantive hearing, beyond that set out in the Crown's written submissions.

[8] Counsel for the appellant resists the admission of the evidence on the ground that the Crown has not shown it to be sufficiently credible to be admissible as propensity evidence. Even if the evidence were sufficiently credible, it is argued that it is not relevant to the issue on appeal. It is further submitted that any probative value of the evidence is far outweighed by unfair prejudice, as it would be necessary to call a number of witnesses to rebut the assertions made by the complainant. Finally, it is argued for the appellant that fairness requires its exclusion – although the Crown was aware of this proposed evidence several months before Mr Ellis' death, it did not provide him with an opportunity to respond.

[9] As to the issue of suppression, the Crown, relying on the principle of open justice, submitted that the public must have the opportunity to understand the issues

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7 *Ellis v R* SC 49/2019, 13 November 2020.

to be determined concerning the suppression of the evidence, and to know of the general nature of that evidence. The Crown submitted that s 205 of the Criminal Procedure Act 2011 governs suppression in this case, and that none of the grounds in that provision apply to justify continued suppression of the proposed evidence or the reason for and subject matter of the hearing.

[10] For Mr Ellis, Mr Harrison submitted that pending a determination as to whether the evidence was sufficiently credible to justify admission, the suppression of the evidence and the subject matter of the hearing should continue. He argued that the death of Mr Ellis did not diminish the requirement for fairness of the proceedings, and the interests of justice entail that Mr Ellis' reputation not be further damaged by the public airing of evidence which has not yet been determined to be sufficiently cogent and reliable to be admitted, and upon which Mr Ellis did not have an opportunity to comment.

Analysis

[11] This proceeding is subject to the law as set out in the Criminal Justice Act 1985 (now repealed), rather than the Criminal Procedure Act.[8]

[12] Section 138 of the Criminal Justice Act provides in material part:

> **138 Power to clear Court and forbid report of proceedings**
>
> (1) Subject to the provisions of subsections (2) and (3) of this section and of any other enactment, every sitting of any court dealing with any proceedings in respect of an offence shall be open to the public.
>
> (2) Where a court is of the opinion that the interests of justice, or of public morality, or of the reputation of any victim of any alleged sexual offence or offence of extortion, or of the security or defence of New Zealand so require, it may make any one or more of the following orders:
>
> (a) An order forbidding publication of any report or account of the whole or any part of—

[8] Counsel made submissions at the hearing on the suppression provisions of the Criminal Procedure Act 2011. However, s 397 of the Criminal Procedure Act provides that proceedings commenced before the commencement date and not finally determined before that date must continue in accordance with the law as it was before the commencement date. The commencement date is 1 July 2013. The present case is an appeal from a 1999 Court of Appeal decision, so these proceedings were clearly commenced before the commencement date.

(i) The evidence adduced; or

(ii) The submissions made:

(b) An order forbidding the publication of the name of any witness or witnesses, or any name or particulars likely to lead to the identification of the witness or witnesses:

(c) Subject to subsection (3) of this section, an order excluding all or any persons other than the informant, any member of the Police, the defendant, any counsel engaged in the proceedings, and any officer of the court from the whole or any part of the proceedings.

[13] Section 138(5) provides that the power to make orders of the kind described in subs (2) are in substitution for "any such powers that a court may have had under any inherent jurisdiction or any rule of law" and that "no court shall have power to make any order of any such kind except in accordance with this section or any other enactment".

[14] In *Siemer v Solicitor-General*, this Court discussed the relationship between s 138(5) and the inherent power of the court to make suppression orders.[9] The majority (comprising McGrath, William Young and Glazebrook JJ) found that s 138(5) was intended to repudiate the view that judges had "power under the inherent jurisdiction of the court to make orders of the kind provided for by statute which could operate free of the constraints imposed on the statutory power".[10] The majority held that because s 138 did not provide for the making of an order suppressing publication of a judgment, such orders were still within the inherent power of the court.[11]

[15] The Court also discussed whether s 138(5) excludes the inherent power of the court to make orders suppressing evidence ruled inadmissible. The majority held that because the statutory powers to make suppression orders did not extend to "evidence which one party wishes to adduce but which is held to be inadmissible", the s 138(5) exclusion did not apply to that power – the majority interpreted "evidence adduced" in s 138(2)(a)(i) to mean "evidence that is in fact admitted".[12] Thus, these orders were also still within the inherent power of the court.

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9 *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441.
10 At [145].
11 At [146]–[149]. Contrast the reasons of Elias CJ on this point at [46].
12 At [146], n 177 and [141], n 173. Contrast the reasons of Elias CJ on this point at [41].

[16] In this case, when the initial order was made suppressing the evidence,[13] the evidence clearly fell within that category identified in *Siemer* in respect of which the court has inherent power to suppress. The initial suppression of the evidence, and of the judgment concerning that evidence, were therefore made in the exercise of the inherent power of the court.

[17] The issue of suppression arose again when the Crown renewed its application to admit the evidence. The question for the Court then was whether the initial order should be continued pending determination of the admissibility of the evidence. Pending determination of that issue, the Court made the second order, suppressing the reason for and subject matter of the hearing.[14] This order was also made under the inherent power of the court, as it was a by-product of the initial order suppressing the evidence.

[18] As submitted by the Crown, issues of suppression are determined with reference to the principle of open justice, a common law principle but one which finds statutory expression in s 138(1) of the Criminal Justice Act, and now in s 196 of the Criminal Procedure Act. That principle reflects that in a free and democratic society, justice depends upon its open administration.[15] But the principle allows that sometimes the interests of justice will require restricting the publication of reports of criminal proceedings. The need to suppress may arise for a multiplicity of reasons, including preserving the right of the defendant to a fair trial, and protecting the interests of victims and third parties. As Richardson J said in *Broadcasting Corp of New Zealand v Attorney-General*:[16]

> Where the ends of justice require some restriction on the publication of reports of criminal proceedings the particular circumstances of the case will dictate the extent of the restraint. Any departure from the principle of open justice in this regard must be no greater than is required in the overall interests of justice.

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13 First suppression order, above n 5.
14 Second suppression order, above n 6.
15 *Broadcasting Corp of New Zealand v Attorney-General* [1982] 1 NZLR 120 (CA) at 122 per Woodhouse P.
16 At 135.

[19] Section 14 of the New Zealand Bill of Rights Act 1990 is also relevant to the issue of suppression. Section 14 protects freedom of expression in the following terms:

> **14 Freedom of expression**
>
> Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

[20] However, the right to freedom of expression is not absolute, as recognised by s 5 of the Bill of Rights:[17]

> **5 Justified limitations**
>
> Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[21] In considering whether to continue the suppression orders in the present case, it is therefore necessary to begin with the principles of open justice and freedom of expression, and then to identify any countervailing interest or value that might justify suppression.[18]

[22] The principles of open justice and the right to freedom of expression are especially weighty considerations in this proceeding. There is a high level of public interest in this appeal due to the gravity and number of the initial convictions, the nature of the issues raised on appeal, and the circumstances in which this appeal proceeds. The appeal concerns events that occurred over 29 years ago. The convictions have been the subject of a six-week trial in the High Court in 1993,[19] an initial appeal to the Court of Appeal in 1994,[20] and then two applications to the

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17 See this Court's discussion of these principles in *Siemer*, above n 9, at [156]–[159] per McGrath, William Young and Glazebrook JJ.

18 *Broadcasting Corp*, above n 15, at 127–128 per Cooke J, citing *Attorney-General v Leveller Magazine Ltd* [1979] AC 440 (HL) at 449–450 per Lord Diplock.

19 The trial commenced on 26 April 1993 and on 5 June 1993 Mr Ellis was convicted on 16 of the 28 counts alleging sexual offences against a number of young children. On 22 September he was sentenced to an effective term of 10 years imprisonment: *R v Ellis* HC Christchurch T9/93, 22 June 1993 (Williamson J).

20 *R v Ellis* (1994) 12 CRNZ 172 (CA) (Cooke P, Casey and Gault JJ). The Court of Appeal quashed three of the counts of sexual offending against one complainant due to her retraction of her evidence. A verdict of acquittal was entered on these three counts but otherwise the appeal was dismissed: at 195.

Governor-General for the royal prerogative of mercy, the second of which resulted in the Governor-General referring to case back to the Court of Appeal for a second appeal in 1999.[21] This appeal was also dismissed.[22] Added to the protracted nature of the proceedings is the fact that this appeal is continuing after Mr Ellis' death. For these reasons, there is heightened public interest in the case, and an accompanying need for the public to have access to information about this significant procedural step and be able to debate the issues.

[23] The evidence which is the subject of the application contains an allegation that Mr Ellis sexually offended against another child a few years prior to the charged offending. Within the context in which this appeal proceeds, to suppress not only the content of that allegation, but also the fact of it, would be a substantial incursion upon the principle of open justice and the right to freedom of expression.

[24] We also weighed that continuing suppression would curtail not only the right of the media to cover the issues, but also the rights of the many victims to be informed of, and to discuss the issues engaged in, the application.[23]

[25] Mr Harrison pointed to Mr Ellis' reputation and the impact of that reputation on his family as the only justification for such suppression – with the associated proposition that it is not fair that his reputation be damaged by the publication of an allegation that is yet to be shown to be sufficiently reliable to reach the threshold for admission.

[26] We saw this consideration as carrying insufficient weight to counter the powerful considerations of freedom of expression and open justice. And in any case, we consider that Mr Ellis' reputation is better served by allowing this process to play out in full view of the public, rather than to risk public suspicion that something is being kept from their view.

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21 "Reference to the Court of Appeal of the Question of the Convictions of Peter Hugh McGregor Ellis for Sexual Offences Against Children (No 2)" (13 May 1999) 54 *New Zealand Gazette* 1263 at 1296.

22 CA judgment, above n 1, at [95].

23 The views of the victims in respect of the issue of continuing suppression were not before us.

[27] To conclude, then, we saw no justification for continuation of the suppression orders. We were therefore satisfied that the existing suppression orders should not continue in circumstances where the Crown has renewed its application to admit the complainant's statement as evidence relevant to the appeal.

[28] That did not dispose of suppression entirely. The Crown submitted that the name of the new complainant and any identifying particulars should be suppressed, given that the allegation is of sexual offending.

[29] Section 139(1) of the Criminal Justice Act states that in relation to specified sexual offences, no person shall publish the name of any person upon or with whom the offence has been or is alleged to have been committed, or any name or particulars likely to lead to the identification of that person. Although the proposed witness is not one of the victims against whom the charged offences were committed, it is arguable this automatic name suppression applies to her.[24] But the Court did not hear argument on this point, and it is unnecessary to decide it because s 140(1) of the Criminal Justice Act provides a more general power:

> **140 Court may prohibit publication of names**
>
> (1) Except as otherwise expressly provided in any enactment, a court may make an order prohibiting the publication, in any report or account relating to any proceedings in respect of an offence, of the name, address, or occupation of the person accused or convicted of the offence, or of any other person connected with the proceedings, or any particulars likely to lead to any such person's identification.

[30] We are satisfied that it is appropriate to make a suppression order under s 140 here. Name suppression protects the proposed witness against the risk of harm caused by the publication of her identity. At a system level, protecting the identity of witnesses who would give evidence of sexual assault will encourage others to feel able to come forward.[25]

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[24] See the discussion of the meaning of "complainant" in relation to s 203 of the Criminal Procedure Act (the re-enactment of s 139) in *R v McDonald* [2015] NZHC 511, (2015) 10 HRNZ 479 at [37]–[48].

[25] *McDonald*, above n 24, at [52].

[31] These countervailing interests outweigh the principle of open justice and the right to freedom of expression. They justify suppression of the proposed witness' name and any identifying particulars. Accordingly, we made the order rescinding the existing suppression orders and, in their place, suppressing the names and identities of the complainant, all members of her family, of her boyfriend, and any other identifying particular, under s 140 of the Criminal Justice Act.

Solicitors:
Crown Law Office, Wellington for Respondent