NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS K AND O PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 111/2020
[2020] NZSC 158

BETWEEN	JESSE SHANE KEMPSON Applicant
AND	THE QUEEN Respondent

Court:	Winkelmann CJ, William Young and O'Regan JJ
Counsel:	T M Cooper for Applicant B H Dickey, R M A McCoubrey and O S Klinkum for Respondent R K P Stewart for Discovery NZ Ltd, NZME Publishing Ltd, Radio New Zealand Ltd, Stuff Ltd and Television New Zealand Ltd
Judgment:	22 December 2020

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was convicted of the murder of Ms Grace Millane after a jury trial in November 2019. His name was suppressed because he faced two other trials. At the time, it was anticipated those other trials would be jury trials. As it transpired, the applicant elected trial by judge alone on those other matters. Both trials have now taken place. After the first of those trials in October 2020, the applicant was convicted of threatening to kill, assault with a weapon (two charges), male assaults female (three charges) and sexual violation by unlawful sexual connection (two charges). The

victim was a former partner, K. After the second trial in November 2020, he was convicted of the rape of O, a woman he met on the dating app, Tinder.

[2] The applicant's appeal against his murder conviction and sentence was dismissed by the Court of Appeal on 18 December 2020.[1] Prior to the issue of its decision, the Court of Appeal advised counsel that the judgment would order that his name suppression in relation to all matters would lapse when that judgment was delivered.

[3] The applicant then applied to the Court of Appeal for an order continuing the suppression of his name after the release of that Court's judgment on the murder appeal. In a judgment issued on 17 December 2020, the Court of Appeal refused to make an order continuing the suppression of the applicant's name.[2] We will call this the suppression decision.

[4] The applicant then sought leave to appeal to this Court against the suppression decision and also sought an interim order suppressing his name until that application for leave to appeal was dealt with.

[5] The applicant's counsel, Ms Cooper, has informed the Court that the applicant also intends to apply to this Court for leave to appeal against the decision of the Court of Appeal dismissing his appeal to that Court against his conviction for the murder of Ms Millane. He has appealed to the Court of Appeal against his October and November convictions and sentences.

[6] We dealt with the applicant's application for an interim order suppressing his name pending determination of his application for leave to appeal against the suppression decision in a judgment issued on 18 December 2020. In that judgment, we ordered that name suppression continue until further order of the Court so that we

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1 *K (CA106/2020) v R* [2020] NZCA 656.
2 *Kempson v R* [2020] NZCA 671.

could address the application for leave to appeal.[3] We also set a timetable for the making of submissions in relation to that application for leave to appeal.

[7] We have now received and considered those submissions and, in this judgment, we deal with the application for leave to appeal against the suppression decision.

[8] The application for leave to appeal to this Court is made under s 285(1)(b) of the Criminal Procedure Act 2011, which applies when this Court is the first appeal court under s 284 of that Act.[4] The criteria for leave to appeal to this Court are set out in s 74 of the Senior Courts Act 2016. The relevant provisions of that section are s 74(1) and (2), which provide:

> **74 Criteria for leave to appeal**
>
> (1) The Supreme Court must not give leave to appeal to it unless it is satisfied that it is necessary in the interests of justice for the court to hear and determine the appeal.
>
> (2) It is necessary in the interests of justice for the Supreme Court to hear and determine a proposed appeal if—
>
> (a) the appeal involves a matter of general or public importance; or
>
> (b) a substantial miscarriage of justice may have occurred, or may occur unless the appeal is heard; or
>
> (c) the appeal involves a matter of general commercial significance.

[9] The applicant argues that leave should be granted because the criteria in s 74(2)(a) and (b) are met.

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3 *K (SC 111/2020) v R* [2020] NZSC 154. The applicant raises the Court of Appeal's refusal to make an interim order under s 286 of the Criminal Procedure Act 2011 as a ground of appeal. There is certainly room for argument that the Court of Appeal should have made an interim order under s 286. That section is expressed in mandatory terms: "[t]he court must make an interim order". But the issue became moot when this Court made its interim order, which was to the same effect as a s 286 order would have been.

4 Section 283 of the Criminal Procedure Act gives a defendant seeking a suppression order (or the renewal of an existing order, as in this case) a right of appeal to "the first appeal court". This Court is the first appeal court in this case, because the decision refusing to renew the suppression order was made by the Court of Appeal.

[10] In relation to s 74(2)(a), the applicant argues that a matter of general or public importance arises because a failure to extend the suppression order would amount to an erosion of fair trial rights for defendants seeking retrial.

[11] In relation to s 74(2)(b), the applicant argues that a substantial miscarriage may occur if leave is not given because, if he succeeds in obtaining leave to appeal to this Court against his murder conviction and the appeal is successful, a retrial would be ordered. At that retrial, jurors will be aware of his other convictions if name suppression is not continued. It is argued a similar concern would arise if either or both of his appeals against the October and November convictions are allowed and a retrial ordered. However, such a concern would arise only if the applicant was tried by a jury and, as noted above, he chose to be tried by judge alone at the October and November trials. He would need leave to elect trial by jury for a retrial on those charges.

[12] We do not consider that any point of general or public importance arises in this case. Rather, it is a matter of applying the law to the specific facts of the present case. Nor are we satisfied that any substantial miscarriage of justice will occur if leave is not granted. The argument that the applicant wishes to make confronts significant authority to the contrary, in particular the decisions of the Court of Appeal in *R v Burns*[5] and *R (CA340/2015) v R*.[6]

[13] In *R (CA340/2015)*, the Court of Appeal observed, in a case having many similarities to the present, that:

> [32] Although the fairness of a trial is non-negotiable the appellant has had his trial. We are now addressing the potential impact of publicity on a retrial that remains no more than a possibility. The Court must consider whether the possibility of a retrial and the possibility of unfairness from publication outweigh the principles of open justice. Different considerations apply where name suppression is sought pending appeal. We take into account that the appellant is now a convicted man. He no longer has the benefit of the presumption of innocence. …

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5 *R v Burns* [2002] 1 NZLR 387 (CA) at [16].
6 *R (CA340/2015) v R* [2015] NZCA 287 at [30] and [32]–[36].

> [33] Also a matter to be weighed is the speculative nature of that which is sought to be protected. Suppression is sought to protect the right to a fair retrial which at the present time remains only a possibility.
>
> (footnote omitted)

[14] This Court declined an application for leave to appeal against the Court of Appeal's decision in *R (CA340/2015)*.[7]

[15] In light of those authorities, we are satisfied that no substantial miscarriage of justice will arise if leave to appeal is declined. We consider that the arguments that the applicant wishes to make to challenge the suppression decision have insufficient prospects of success to justify an appeal to this Court.

[16] We therefore dismiss the application for leave to appeal.

[17] As a consequence, the orders suppressing the name of the applicant in relation to his conviction for the murder of Ms Millane and his October and November convictions now lapse.

Solicitors:
Meredith Connell, Auckland for Respondent

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7 *Robertson v R* [2015] NZSC 114.