ORDER PROHIBITING PUBLICATION OF LF'S NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS IN RELATION TO M (SC 13/2023) v R [2024] NZSC 29 UNTIL 2.00 PM ON MONDAY 3 MARCH 2025.

NOTE: ORDER PROHIBITING PUBLICATION OF ANY REFERENCE TO MENTAL HEALTH ISSUES BEYOND THOSE MADE IN THE JUDGMENT OF M (SC 13/2023) v R [2024] NZSC 29 WHICH IS MADE PUBLICLY AVAILABLE REMAINS IN FORCE.

NOTE: ORDER REDACTING PART OF THE EXCERPT SET OUT AT [74] IN THE JUDGMENT OF M (SC 13/2023) v R [2024] NZSC 29 WHICH IS MADE PUBLICLY AVAILABLE REMAINS IN FORCE.

NOTE: ORDER PROHIBITING SEARCH OF THE FILES FOR THESE APPEALS WITHOUT THE LEAVE OF A JUDGE OF THIS COURT REMAINS IN FORCE.

NOTE: COURT OF APPEAL ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF M PURSUANT TO S 202 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360349.html

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

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF THE SECOND, THIRD AND FOURTH VICTIMS PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360352.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 14/2023
[2025] NZSC 6

BETWEEN	LUCA FAIRGRAY Appellant
AND	THE KING Respondent

Court: Winkelmann CJ, Glazebrook, O'Regan, Ellen France and Kós JJ

Counsel: S J Gray for Appellant
Z R Johnston and H G Clark for Respondent
S C Brougham for NZME Publishing Ltd as Interested Party

Judgment: 28 February 2025

JUDGMENT OF THE COURT

A The application to quash the interim order this Court prohibiting publication of the name, address, occupation or identifying particulars of the appellant is granted with effect as from 2.00 pm on Monday 3 March 2025. Suppression will lapse at that time.

B The application for extension of the interim order prohibiting publication of the appellant's name in relation to his previous offending is declined.

REASONS
(Given by Ellen France J)

Introduction

[1] In a judgment delivered on 23 April 2024 (the substantive judgment),[1] we dismissed an appeal by Luca Fairgray (the appellant) against the decision of the High Court declining to grant him name suppression following his conviction in respect of sexual offending against six victims.[2] Prior to delivery of the substantive judgment, the Court had been advised he faced trial on new charges in the District Court. As we shall explain, the appellant was granted interim name suppression until 14 June 2024 or on earlier order of the Court. That interim suppression order was subsequently extended, first to 27 June 2024, and subsequently to 31 March 2025.

[2] Following the conclusion of the trial and the entry of guilty verdicts against the appellant in the District Court on 3 February 2025, the Crown and Mr Edward Gay

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1 *M (SC 13/2023) v R* [2024] NZSC 29, [2024] 1 NZLR 83 (Winkelmann CJ, Glazebrook, O'Regan, Ellen France and Kós JJ) [substantive judgment].
2 *Fairgray v R* [2022] NZHC 2547 (Moore J) [HC judgment].

have filed memoranda which seek to have the interim suppression order lifted on the basis it is no longer required.[3] NZME Publishing Ltd (NZME) supports the applications for the interim suppression order to be lifted. The appellant opposes the interim suppression order lapsing any earlier than 31 March 2025, and also seeks an extension of the interim suppression order prohibiting publication of his name in relation to his previous offending pending determination of his appeal to the Court of Appeal against the most recent convictions.

[3] We address these applications after setting out the chronology of events and the background to the interim suppression order.

Background

[4] On 19 October 2023, this Court heard the appeals of the appellant and that of M, a connected person in terms of the Criminal Procedure Act 2011, against decisions declining the appellant name suppression. As we have said, our judgment was delivered on 23 April 2024.[4] Both appeals were dismissed. However, by the time the judgment was delivered, the Court was aware that the appellant faced new charges in the District Court relating to alleged sexual offending against a 13-year-old girl. Having invited and received submissions as to the meaning of s 199A of the Criminal Procedure Act, this Court made an initial interim suppression order until 14 June 2024 to protect the appellant's right to a fair trial in the District Court.

[5] In making the initial interim suppression order the Court expressed some doubt as to whether ongoing interim suppression was necessarily required but, at that point, the matter had not been the subject of argument before us; we had not heard from the appellant's trial counsel (who were not his counsel on the appeal); and the appellant had interim name suppression in the District Court. At that stage, we considered it was preferable for the District Court to determine whether continued name suppression was necessary. Our name suppression order was made to preserve the position in the interim so that the District Court could address the matter.[5] Due to

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3 The initial application was filed by Mr Gay, who is a journalist for Stuff. Mr Gay has standing under s 210 of the Criminal Procedure Act 2011.

4 Substantive judgment, above n 1.

5 In our substantive judgment we said that we would give reasons for our decision to make the interim suppression order at a later date: at [114].

delays in the District Court, counsel jointly sought an extension of the interim suppression order until 27 June 2024. This extension was granted.

[6] In a judgment of 21 June 2024, the District Court lifted the interim order for name suppression in that Court.[6] In that judgment, the District Court also recommended that this Court extend interim suppression of the appellant's name in the context of our substantive judgment until the jury delivered its verdict in the District Court trial.[7]

[7] The recommendation of the District Court that this Court extend the interim name suppression order was made because the District Court was concerned to ensure compliance with s 199A(1) of the Criminal Procedure Act, which applied to the appellant's trial. Section 199A(1) provides that once a proceeding has commenced for a category 3 or 4 offence, "no person may publish details of any of the defendant's previous convictions for any other offence except as permitted by or under this section". Under s 199A(2), the automatic suppression of previous convictions in s 199A(1) remains in force, unless earlier lifted by the court, until, relevantly, the jury delivers its verdict.[8]

[8] Against this background, there was a question as to whether publication of the substantive judgment, which discussed the appellant's previous convictions, would breach the prohibition in s 199A(1).

[9] The District Court in the judgment of 21 June 2024 took the view that s 199A prohibited this Court's judgment from being published in a form publicising the appellant's previous convictions. The Judge in reaching that view noted that "the law around the precise meaning of publication in s 195, as it relates to s 199A is not settled".[9] The Judge continued by noting that "[t]his is an area that likely requires further consideration by a higher Court and even legislative clarification."[10]

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6 *R v LF* [2024] NZDC 14115 (Judge Sinclair) [DC suppression judgment]. That decision was upheld on appeal: *F v R* [2024] NZHC 2259 (Harvey J).
7 DC suppression judgment, above n 6, at [45], [62]–[63] and [83].
8 Section 199A(2)(a).
9 DC suppression judgment, above n 6, at [34].
10 At [34].

[10] We did not in the end rule on the effect of the section, but rather we determined that extension of our interim name suppression order was in the interests of justice in order to protect the appellant's right to a fair trial. The suppression order was extended to 31 March 2025 to accommodate the fact that the District Court trial was given a January 2025 date.

[11] As noted above, the jury in the appellant's trial in the District Court delivered its verdict on 3 February 2025. The appellant was found guilty of three charges of sexual conduct with a young person (two of those being representative). He had earlier pleaded guilty to a single charge of supplying cannabis. The appellant is due to be sentenced on 31 March 2025.

The present application

[12] The case for the Crown, Mr Gay and NZME is captured by the reasons advanced by the Crown in support of the application that the interim suppression order is no longer required and should be quashed. The Crown's memorandum gives the following reasons:[11]

> 6.1 The order was made for the sole purpose of protecting [the appellant's] fair trial rights. The trial has now concluded.
>
> 6.2 This Court's order was effectively made to mirror the statutory suppression of previous convictions under s 199A [of the Criminal Procedure Act]. This statutory suppression expires at the delivery of verdicts.
>
> 6.3 The presumption of innocence no longer applies. Even if [the appellant] intends to appeal his recent convictions, the notional (perhaps speculative) possibility of a re-trial following an appeal does not outweigh open justice considerations.
>
> 6.4 As the Court will be aware, the victims of the offending considered in this Court's judgment support publication of [the appellant's] name.

[13] Counsel for the appellant confirms that an appeal against conviction has been filed. It is noted that the two grounds of appeal concern rulings made by the trial Judge

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[11] Footnotes omitted. We add there is no suggestion that the other orders made or continued by this Court (that is, for permanent suppression of any reference to mental health issues beyond the references made in this Court's substantive judgment; the order suppressing the name, address, occupation or identifying particulars of M; the restrictions on access to the Court file; and for redaction of a passage in the publicly available substantive judgment) should not remain in force.

which it is argued, undermined the appellant's ability to present an effective defence. The appellant submits that if his convictions are quashed on appeal, it is likely that a retrial would be ordered. The submission for the appellant is that if he is named in relation to his previous offending before his conviction appeal has been determined by the Court of Appeal, his right to a fair trial will be jeopardised in the event the appeal is successful and a retrial is ordered.

[14] We are content to proceed on the basis that the applications engage s 200(2)(d) of the Criminal Procedure Act.[12] That section provides that the Court may make a suppression order only if satisfied that publication would be likely to "create a real risk of prejudice to a fair trial". The relevant principles are not in dispute and are as discussed in the substantive judgment[13] and, specifically in relation to s 200(2)(d), as set out by the Court of Appeal in *R (CA340/2015) v R*.[14] There are accordingly two questions for the Court in determining the applications. The first question is whether there is a real risk of prejudice to a fair retrial. As the authors of *Adams on Criminal Law* note, a "'real' risk is one that might well eventuate".[15] The second question is whether, if the first — threshold — question is answered "yes", the interests of the appellant outweigh the public interests, particularly, that of open justice.

[15] On both questions, we see the present case as having similarities to *R (CA340/2015) v R*, albeit the facts of the latter were more extreme.[16] We can accordingly follow the analysis adopted in that case.

[16] We first note that it is not possible at this point to form any view as to whether the appeal will be successful. If it is, there is a further issue as to whether there is

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12 That was the approach adopted in a similar situation in *R (CA340/2015) v R* [2015] NZCA 287. Leave to appeal in that case was declined by this Court: *Robertson v R* [2015] NZSC 114. See also *Kempson v R* [2020] NZSC 158 at [13] and [15] citing *R (CA340/2015) v R*.

13 Substantive judgment, above n 1, at [35]–[44].

14 *R (CA340/2015) v R*, above n 12.

15 Mathew Downs (ed) *Adams on Criminal Law – Procedure* (looseleaf ed, Thomson Reuters) [*Adams*] at [CPA200.02A(d)].

16 The appellant in that case was convicted, following a trial, of murder and rape on 22 May 2015. He had name suppression for the duration of the trial to protect jurors from learning of his previous convictions, which included the abduction of a child and sexual offending against that child. He had unsuccessfully sought ongoing name suppression pending his appeal against his most recent convictions, arguing it was necessary as a safeguard to his fair trial rights in the event of a successful appeal and subsequent retrial. The Court of Appeal dismissed his appeal.

likely to be a retrial. As the Court of Appeal said in *R (CA340/2015) v R*, the lack of certainty is a matter to be weighed at the second stage of the inquiry.

[17] Turning then to the first stage of the inquiry, we accept the appellant's submission that the information which would be published about his previous convictions is prejudicial and we do not understand it would be admissible at any retrial. The coverage of this material is likely to be such that it may well "reach a significant proportion of those who would be eligible jurors in the case of a retrial".[17] However, we consider that the pattern of reporting would be likely, as the Court said in *R (CA340/2015) v R*, to involve an initial outburst which would subsequently fall away. But, like the Court in *R (CA340/2015) v R*, we proceed on the basis that it will not completely dissipate.

[18] That said, we do not consider that the existence of this knowledge is likely to create a real risk of prejudice to a fair trial which could not be adequately managed by the usual mechanisms available to a trial judge. We acknowledge the similarities in the offending in that both sets of convictions involve sexual offending. There are, however, some differences, the principal one being that the earlier offending involved non-consensual activity. In any event, and importantly, if the trial judge forms the view that it is appropriate to do so, in light of the material that remains available, they can deal with any risk by way of direction. Directions about the irrelevance of the earlier convictions to the matter the jury has to decide, and an explanation as to why it would be unfair to take that material into account, in our view would be sufficient to meet the prejudice identified. In addition, the court on any retrial could exercise the power to make a takedown order[18] or to make an order to temporarily suppress trial-related information.[19]

[19] As was the case in *R (CA340/2015) v R*, we consider that continued suppression is likely to encourage speculation and conjecture about what is not being disclosed, for example, in the context of the sentencing on 31 March because information about the appellant's previous offending would need to be suppressed. There is already, as

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17 *R (CA340/2015) v R*, above n 12, at [18].
18 Criminal Procedure Act, s 199B.
19 Sections 199C–199D.

the appellant notes, material available on social media in relation to the appellant and his earlier offending.[20]

[20] In these circumstances, we do not consider the appellant has established a real risk of prejudice to a fair retrial. Like the Court in *R (CA340/2015) v R*, we take the view a fair retrial in this case is better protected by judicial direction to the jury about the risk of illegitimate reasoning based upon this information, not by ongoing attempts to suppress it. We add that it will not always be the case that a court is aware that s 199A is in play as a result of further charges having been laid. Against that possibility, the approach to be taken is one that should avoid creating an undesirable precedent where different approaches to name suppression emerge solely depending on that awareness and on whether or not the timing is such that all of the offending is dealt with in a single trial.

[21] We also consider the appellant fails at the second stage of the inquiry. The appellant has had his trial. At issue now is the potential impact of publicity on a retrial that is still no more than a possibility. As the authors of *Adams* state:[21]

> The weight to be attributed to each of the competing values is different where name suppression is sought when an appeal against conviction is pending. The impact of publicity on a retrial is no more than a possibility and the presumption of innocence will not be taken into account until at least it is clear there will be a retrial.

[22] In our view the possibility of a retrial and associated unfairness from publication do not outweigh the principles of open justice where that prospect is speculative and other safeguards are available. Further, there is considerable public interest in knowing about the appellant's previous history. This Court in the substantive judgment made the following comment:

> [97] Several themes emerge from the victims' evidence. First, it is said that ongoing name suppression for the [appellant] means their recovery is incomplete. That is linked to the desire for [the appellant] to be held accountable for the offending by experiencing both penal and social consequences. Second, reference is made to practical problems experienced

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20 Similar issues arose in *R (CA340/2015) v R* although on a greater scale. The Court of Appeal in that case considered "that over … time the information available online in connection with the appellant would become widely known": *R (CA340/2015) v R*, above n 12, at [29].

21 *Adams*, above n 15, at [CPA200.02A(d)] citing, *R v Burns (Travis)* [2002] 1 NZLR 387 (CA) at [17], *R (CA340/15) v R*, above n 12, at [32] and *Kempson v R*, above n 12.

> by the victims in complying with the existing name suppression order and that their concerns cannot be adequately addressed. Certainly, there is an interest in the victims being able to order their lives without these concerns. The youth and associated vulnerability of the victims at the time of the offending is also a factor. Finally, there is the prospect there may be other victims who might come forward if [the appellant] is named. The victims are also concerned about the potential there will be other complainants in the future, absent any ability to warn young women about [the appellant's] previous offending.

[23] Finally, the delay in publication if suppression was continued until the appeal process has concluded could well be significant against the background where there has already been delay, albeit some of that explicable.

[24] For these reasons, we quash the current interim suppression order. In order to allow the appellant a brief period to consider the decision and advise others if necessary, we will delay publication and any reporting of this judgment until 2.00 pm on Monday 3 March 2025.

[25] We are, at the same time as publishing this judgment, reissuing our substantive judgment to name the appellant.

Result

[26] The application to quash the interim order of this Court prohibiting publication of the name, address, occupation or identifying particulars of the appellant is granted with effect as from 2.00 pm on Monday 3 March 2025. Suppression will lapse at that time.

[27] The application for extension of the interim order prohibiting publication of the appellant's name in relation to his previous offending is declined.

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