

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2005-404-007152

BETWEEN NOEL CLEMENT ROGERS
Applicant

AND TELEVISION NEW ZEALAND
LIMITED
Defendant

Hearing: 15 December 2005

Coram: Venning & Winkelmann JJ

Appearances: Ms Sellars & Mr Edgar for Mr Rogers
Mr Grieve for Commissioner of Police (leave to withdraw)
Mr Akel for Television New Zealand
Mr Miles QC amicus

Judgment: 22 December 2005

JUDGMENT OF THE COURT

J Miles QC Email miles@shortlandchambers.co.nz
S Grieve QC Email stuart@grieve.co.nz
M Corry Email michaelcorry@pds.govt.nz
Mr Akel Email william.akel@simpsongrierson.com

Introduction

[1] Mr Noel Rogers seeks to permanently restrain Television New Zealand Limited (TVNZ) from broadcasting an evidential videotape obtained by the Police which records Mr Rogers participating in a Police reconstruction of the killing of Ms Katherine Sheffield. The Police videotape includes a detailed account by Mr Rogers of how Ms Sheffield was alleged to have died. At the time the videotape was made Mr Rogers had already been charged with Ms Sheffield's murder.

[2] Shortly after recording, a copy of the videotape was handed to TVNZ by the officer in charge of the investigation. The videotape was later produced in evidence at depositions and Mr Rogers was remanded to stand trial on the charge of murder. Before trial, however, the Court of Appeal ruled the videotape inadmissible as having been obtained in breach of Mr Rogers' rights to silence and right to counsel.

[3] Mr Rogers was subsequently tried before a jury on a charge that he murdered Ms Sheffield and was found not guilty.

[4] TVNZ proposed including parts of the videotape in a programme about the homicide, Police investigation and trial. The programme was to have screened on 11 December 2005, some two days after the jury's verdict. Mr Rogers sought and obtained an interim injunction on that day, and the proceeding was timetabled through to an urgent hearing on 15 December 2005. Because of the urgency no statement of claim has been filed. Before us counsel for Mr Rogers articulated the grounds for the grant of a permanent injunction as follows:

- (a) That the broadcast of any content of the video would be an interference with Mr Rogers' privacy rights.
- (b) That the broadcast of any of the content of the video would be contempt of Court. Mr Rogers contends that broadcast by TVNZ would entail breach of the In-Court Media Coverage Guidelines

which it agreed to abide by when it sought and was given leave to film the trial of Mr Rogers. Further, that TVNZ should have sought leave under the Criminal Proceedings (Search of Court Records) Rules 1974 for access to the videotape but have failed to do so.

- (c) Finally, Mr Rogers says that the Court has power to deal with the issue by making an order under s 138(2) of the Criminal Justice Act 1985 forbidding publication of the videotape. Mr Rogers says that the videotape was evidence at the initial admissibility hearing in the High Court, and the Court therefore has jurisdiction under s 138 to make orders in respect of it.

[5] Mr Miles QC assisted the Court as amicus. He submitted that this is an appropriate case for the issue of an injunction restraining publication. He articulated the grounds upon which such an injunction should be granted in broadly similar terms to the applicant. In relation to the alleged contempt of Court, he also submitted that the publication would have the tendency to interfere with the due administration of justice. An additional ground identified by Mr Miles was that the broadcast of the material could amount to a breach of Mr Rogers' rights under the New Zealand Bill of Rights Act 1990. That ground was not developed by Mr Miles in argument and it was not relied upon by Mr Rogers. It is therefore not necessary to consider it further.

Background matters

Mr Rogers charged with murder

[6] The unlawful killing of Ms Sheffield in Mangonui in 1994 has been the focus of a great deal of media attention. In 1994 her body was discovered in a shallow grave on the property of Mr Lawrence Lloyd. Mr Lloyd stood trial and in 1995 was convicted of her manslaughter. He served a sentence of imprisonment. In August 2004, by consent, the Court of Appeal quashed Mr Lloyd's conviction: *R v Lloyd*, CA 72/02, 25 August 2004.

[7] Mr Rogers is the nephew of Mr Lloyd. He had been interviewed by the Police in 1994 during the original Police investigation. He was subsequently re-interviewed on a number of occasions and was finally arrested and charged with the murder of Ms Sheffield on 30 June 2004.

[8] On 13 July 2004, Mr Rogers was in custody at Auckland Central Remand Prison. He was taken from there by the Police to his uncle's property at Mangonui, where he participated in the video reconstruction.

[9] Subsequently the videotape was produced into evidence at a depositions hearing and Mr Rogers was remanded in custody to stand trial on the charge of murder.

Admissibility rulings

[10] An objection was taken by Mr Rogers to the admissibility of the videotape. The primary ground of objection was that the Police had previously agreed with Mr Rogers' counsel to inform counsel before further questioning Mr Rogers. It was argued that the Police failure to abide by that arrangement undermined critical rights conferred by the New Zealand Bill of Rights Act 1990, the right to consult and instruct a lawyer and the right to refrain from making a statement.

[11] In this Court, Cooper J ruled that the videotape was admissible evidence: *R v Rogers* (HC Auckland, CRI 2004-404-013121, 2 August 2005). Mr Rogers appealed that ruling and was successful on appeal: *R v Rogers*, CA 291/05, 27 October 2005. The reasoning of the Court of Appeal is relevant to assessing Mr Rogers' claim to a privacy interest in the information contained within the videotape.

[12] The Court of Appeal found that the Police conduct in taking Mr Rogers to the Mangonui property and conducting the interview reconstruction was in breach of the arrangement with Mr Rogers' counsel, and accentuated the imbalance inherent in the relative positions of Mr Rogers and the Police. It found that at no stage before the trip to Mangonui began did the Police tell Mr Rogers their reason for wishing to

undertake the trip with him. Mr Rogers' motivation for making the trip was a personal one, of returning to his family environment. The Court of Appeal found that there was a breach of Mr Rogers' right to silence and counsel. The Court then considered matters relevant to the exercise of its discretion to exclude evidence obtained in breach of an accused's rights. It said at [71]:

That requires looking at the full context. The applicant was in custody charged with murder in the context of a difficult and traumatic family background. The police knew that what they proposed was so serious that they had to get approval from Head Office of Corrections for the applicant to be handed over to them and yet they were either unwilling or unable over the period of a week to find the Public Defender who had an established office in the city. They secured the agreement of the applicant to put himself totally in their hands for three days although they had not told him what they had in mind and how they intended to use the time. He had previously exercised his right to consult Mr Corry as his lawyer; he was in receipt of current instructions and had received the implied assurance to which we have referred.

In the absence of informed waiver the failure of the police officers to advise Mr Corry of what was happening fundamentally breached the applicant's right to counsel which he had exercised earlier. The police's failure to tell Mr Corry precisely what was happening when he made the telephone call to the police cellphone when they were in the car on the way to the airport, even though they had agreed not to speak to the applicant about the murder without advising Mr Corry, must be viewed seriously.

The power imbalance between a person in custody and experienced police officers led Parliament to make its policy decision as to the right to counsel. While the law recognises that a suspect may waive rights, an assertion to that effect must be clearly proved. We are satisfied that evidence obtained in the present circumstances entails such a substantial breach of proper standards that it would be unprincipled to use *Shaheed* to justify the admission of the evidence. That is so even though the evidence, while not the sole evidence in support of the charge, was described by Mr Grieve as important.

[13] Mr Rogers stood trial on the charge of murder, and the trial proceeded over nearly five weeks. On Friday 9 December 2005, the jury returned a verdict of not guilty.

TVNZ application for in Court filming

[14] Prior to the commencement of the trial TVNZ made application for permission to film the trial. That permission was granted. There are standard conditions for television coverage of criminal proceedings. Although they do not

have statutory force, parties who make application for the right to film inside the Court usually agree to be bound by them. TVNZ so agreed. Condition 8 provides that exhibits must not be filmed without leave of the Court.

TVNZ's possession of the tape

[15] Inspector Taare, the officer in charge of the inquiry, has filed an affidavit setting out the circumstances in which the videotape came into TVNZ's possession. He says that about two weeks after the videotape was created he provided TVNZ with a copy of the videotape, but he did so on the basis that it was not to be used by TVNZ until a conviction had been secured against Mr Rogers. Mr Stephen Wells, a television field producer for TVNZ, has filed an affidavit in which he disputes that that was the basis on which the tape was provided. He also refers to recent discussions that he had with Inspector Taare towards the end of the trial regarding the tape. Inspector Taare did not refer to those discussions in his affidavit. It is not possible or necessary on this application to resolve the differences in the accounts of Inspector Taare and Mr Wells as to the basis upon which TVNZ came to be in possession of the tape.

[16] Mr Akel advises that the programme which incorporates parts of the videotape will deal with the circumstances of the unlawful killing of Ms Sheffield, the various Police inquiries, the admissibility ruling and the trial. Further, the programme will say:

- (a) The jury did not see the videotape because it was ruled inadmissible;
- (b) The videotape was ruled inadmissible because Police broke the rules by breaching an arrangement between Police and defence counsel;
- (c) The Police denied Mr Rogers his right to legal advice;
- (d) Mr Rogers was in a vulnerable position.

- (e) The reporter in the programme, by voice over, will ask the question “was the reconstruction and confession fantasy or a dream on the part of Mr Rogers?”

Breach of privacy rights

[17] Mr Rogers alleges that the proposed broadcast by TVNZ of the videotape or portions of it will be an illegitimate interference with his privacy rights because it will be giving publicity to private facts of which publicity would be considered highly offensive to an objective, reasonable person. Mr Rogers points to the fact that the videotape was obtained from him in circumstances involving misconduct on the part of the Police and fundamental breaches of his rights under the New Zealand Bill of Rights Act. Further, the Court of Appeal has ruled the videotape inadmissible on these grounds and the videotape was not presented in evidence before the jury at his trial. He says that he did not consent to the taking of the videotape and that he had a reasonable expectation that the videotape would remain confidential to the Police until it was dealt with through the Court processes. He has filed an affidavit in support of his application in which he states:

I trusted that the Police were following correct procedures. I never imagined that the video statement would be used in any way other than in relation to the Police case against me. I understood that I could request a copy at a later date. I assumed that it would only be used in relation to the Police case.

Tort of interference with privacy

[18] The tort of interference with privacy was articulated by the Court of Appeal in *Hosking v Runting* [2005] 1 NZLR 1. Gault P said (for himself and Blanchard J) that there are two fundamental requirements for a successful claim for interference with privacy (at [117]):

1. The existence of facts in respect of which there was a reasonable expectation of privacy; and
2. Publicity given to those private facts that would be considered highly offensive to an objective reasonable person

[19] The Court made clear that the tort is concerned with the disclosure of private facts. It is not sufficient that the circumstances surrounding the recording of the material sought to be published is considered intrusive by the subject: at [165].

[20] As to the second limb of the test, Gault P said that the inquiry for the Court was whether the applicant had shown objectively that the publicity, by reference to its extent and nature, would be offensive by causing real hurt or harm. He continued:

[127] We consider that the test of *highly offensive to the reasonable person* is appropriate. It relates, of course, to the publicity and is not part of the test of whether the information is private.

[128] We do not see personal injury or economic loss as necessary elements of the action. The harm to be protected against is in the nature of humiliation and distress.

[21] Gault P acknowledged however that there should be available in cases of interference with privacy a defence enabling publication to be justified by a legitimate public concern in the information, but that it is for the defendant to provide the evidence of the concern. He said at [130]:

... the scope of privacy protection should not exceed such limits on the freedom of expression as is justified in a free and democratic society. A defence of legitimate public concern will ensure this. The significant value to be accorded freedom of expression requires that the tort of privacy must necessarily be tightly confined.

[22] As to the word “concern” Gault P said that it was necessary to distinguish between matters that are merely of general interest or curiosity to the public, and matters which are of legitimate public concern. He went on to state:

[134] A matter of general interest or curiosity would not, in our view, be enough to outweigh the substantial breach of privacy harm the tort presupposes. The level of legitimate public concern would have to be such as outweighs the level of harm likely to be caused.

[23] The Court in *Hosking* was concerned that the principle of freedom of the media not be unjustifiably eroded by the recognition of the tort. That principle is also a central consideration in this case.

Open justice/freedom of expression

[24] The importance of the freedom of expression is reflected in s 14 of the New Zealand Bill of Rights Act 1990 which provides:

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.

[25] It is because of the recognition of the importance of a free media and freedom of expression that the Courts have traditionally set the threshold very high for prior restraint of publication. In the area of defamation for example, the plaintiff must show clear and compelling reasons for the restraint (*Auckland Area Health Board v Television New Zealand Ltd* [1992] 3 NZLR 406).

[26] Gault P in *Hosking* also described the threshold for prior restraint in reliance on an inference with privacy rights as follows (at [158]):

The general position ... is that usually an injunction to restrain publication in the face of an alleged interference with privacy will only be available where there is compelling evidence of most highly offensive intended publicising of private information and there is little legitimate public concern in the information. In most cases, damages will be considered an adequate remedy.

[27] The principle of freedom of expression is therefore not absolute. It does abate in some circumstances to accommodate societal values such as the due administration of justice (*Police v O'Connor* [1992] 1 NZLR 87), or in cases where publication would entail a clear and compelling case of breach of an individual's rights (*Auckland Area Health Board*). However, it abates no more than is necessary to accommodate those rights. Section 5 of the New Zealand Bill of Rights Act provides:

Subject to section 4 of this Bill of Rights, 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.

[28] In this case the principle of open justice is also of importance. That principle is reflected in Section 25 of the New Zealand Bill of Rights Act which provides in part:

Minimum standards of criminal procedure

Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:

- (a) The right to a fair and public hearing by an independent and impartial court:

[29] In *R v Mahanga* [2001] 1 NZLR 641 the Court of Appeal expressed the values underpinning the principle of open justice as it operates in our society:

- [18] Openness in the operation of the criminal justice process provides critical safeguards against injustice. It provides a form of judicial accountability to informed public opinion and an incentive to the sound and principled exercise of judicial power. Open justice is also widely regarded as improving the quality of Court testimony, disinclining witnesses to tell other than the truth: *Edmonton Journal v Attorney-General of Alberta* (1989) 64 DLR (4th) 577 at pp 585–588 per Wilson J. The value of open justice is of particular importance in the context of a criminal trial where the liberty of the subject is affected. Protection of the individual is a major purpose of open justice in all trial contexts. A further purpose is the maintenance of public confidence in the judicial system which flows from making it more transparent and comprehensible to the public. This is important in reassuring those associated with both accused and victims that a trial has been conducted fairly and the accused treated justly. The principles and attributes of open justice have been recognised and applied by this Court in such decisions as *Broadcasting Corporation of New Zealand v Attorney-General* [1982] 1 NZLR 120 at pp 122–123, 127–'128 and at p 132, and *Television New Zealand Ltd v R* [1996] 3 NZLR 393 at pp 396-397. In the latter case the important support given the principle of open justice by the right to freedom of expression as declared by s 14 of the Bill of Rights Act was also acknowledged at p 398.

Balance to be struck between privacy and open justice/freedom of expression principles

[30] Although in a different context, there are two other decisions which are particularly relevant to the present application and in which the Courts were faced post trial with the competing imperatives of a individual's right to privacy and the requirements of open justice.

[31] The first is a decision of the Supreme Court of Canada, *Vickery v Nova Scotia Supreme Court* [1991] 1 SCR 671. The issue for the Court in that case was whether the appellant, a journalist, was entitled to have access to and copy electronic tapes filed as exhibits in a criminal trial of the respondent, Nugent.

[32] The tapes included a video of an alleged re-enactment by Nugent of the killing with which Nugent had been charged. The tapes became the basis of the Crown's case against Nugent and ultimately the basis of his conviction. The tapes, although admitted at trial, were held to be inadmissible. Nugent's conviction was quashed and an acquittal entered. The appellant made application for access to the tapes for the purposes of creating a documentary. That access was initially granted, and Nugent appealed that decision to the Supreme Court.

[33] Stevenson J delivered the majority decision. His Honour said the Court, having custody of records and other materials, has a responsibility to exercise an informed discretion when deciding applications for access. Referring to the decision of the United States Supreme Court in *Nixon v Warner Communications Inc* 435 US 589 (1978) he endorsed that Court's view that the discretion had to be exercised "with a sensitive appreciation of the circumstances that led to [the tapes] production". In considering the exercise of the discretion, Stevenson J said that the imperatives of open justice and the privacy interests of Nugent were both relevant. The Court found open justice requirements were met as the exhibits were produced at trial which was open to public scrutiny and discussion.

[34] As to Nugent's privacy rights, Stevenson J said they were necessarily surrendered to the judicial process which was the "price" that he and any accused pays in the interests of ensuring the accountability of those engaged in the administration of justice. He said however: (at 684)

Fair, accurate, contemporaneous reports are likely to be balanced, to display the full context, and to expose the arguments on both sides. The subsequent releasing and publication of selected exhibits is fraught with risk of partiality with a lack of fairness. Those policy considerations which form our attitude towards the openness of the administration of justice are relevant to an application such as this. Nugent cannot escape from proceedings in which he was involved, nor from a fair and accurate reporting of them, but the Courts must be careful not to become unwitting parties to his harassment by facilitating the broadcasting of material which was found to have been obtained in violation of his human rights.

[35] Allowing the appeal, Stevenson J commented that:

Someone who has been accused and convicted of a serious crime on the basis of self-incriminating evidence obtained in violation of his Charter

rights should not be made to bear the stigma resulting from unrestricted repetition of the very same illegally obtained evidence.

[36] The dissenting minority, upon which TVNZ placed much emphasis in its submissions before us, gave greater weight to the requirement of open justice and would have allowed access to the tape.

[37] *Vickery* was considered by the New Zealand Court of Appeal in *Mahanga*. Again the Court was considering an application for access to an exhibit. In that case Mahanga had been convicted of murder. His trial was filmed by TVNZ. In the course of filming the trial, TVNZ filmed a videotape of an interview of the accused by the Police which was being played to the jury. However, because of poor resolution in that recording TVNZ, through one of its producers present in Court, sought access to the exhibit. Access was refused by the trial Judge, Rodney Hansen J, who also ordered the suppression of the in-Court recording by TVNZ of the videotape. A further formal application to copy the videotape of the interview was made on behalf of TVNZ by its solicitors. This application was again declined, this time by Anderson J. TVNZ appealed to the Court of Appeal.

[38] The Court of Appeal said the judicial discretion to allow access to exhibits under the Criminal Proceedings (Search of Court Records) Rules 1974 involved a weighing of competing interests. The legitimate privacy concern raised by an accused person is obviously one interest. Other relevant matters are the purpose for which access is sought, the principle of open justice, the interests of administration of justice and the right to a fair trial. As to the value of open justice and freedom of expression, the Court of Appeal accepted Hansen J's view that the interests of open justice and freedom of speech had been fulfilled during the course of the trial. As to the privacy interests of the accused person, the Court of Appeal acknowledged that once a trial had concluded, there was more room to recognise individual privacy interests in an application such as the present. It said (at [41]):

At this stage it is open to a Judge to be sensitive to the circumstances in which the videotape was created and played to the Court. While we have not accepted that protection of individual privacy is the principal purpose of the Criminal Proceedings (Search of Court Records) Rules it is a legitimate factor to take into account in the balancing process.

[39] In exercising its discretion the Court declined the application and said at [45]:

The appellant's interest was in presenting information already in its hands with greater impact. That was an entirely legitimate interest but in the circumstances the applicant was not able to show that interests of open justice or freedom of expression gave it additional weight. On the other hand Anderson J was entitled to regard protection of privacy interests of Mr Mahanga after the trial as of importance, which he did.

Application of principles to this case

Private facts

[40] TVNZ submits that the tort of interference with privacy is not made out because there is no information contained within the videotape which could be said to contain private facts and further because there is a legitimate public concern in the contents of the videotape.

[41] Mr Akel submits that the private facts at issue are now in the public domain through the Court of Appeal judgment and subsequent reporting in the media of the fact of a confession. The Court of Appeal in describing the background to the application to the appeal before the Court said of the video (at [32]):

The applicant was then advised of his rights and given a caution that was captured on video. There followed a full reconstruction of the events at Mangonui including a detailed account of the manner in which the applicant had killed Ms Sheffield.

[42] The Court of Appeal judgment was embargoed until final disposition of the trial. Once these facts were in the public domain, TVNZ argues that there were no relevant private facts. Accordingly, the videotape was free to be reported upon after Friday 9 December 2005. Mr Akel submits the facts conceptually capable of being private are those recorded on the video and that the medium recording those facts cannot of itself be a private fact.

[43] As to Mr Akel's reference to subsequent reporting in the media of the fact of a confession, there is no evidence before the Court of any such subsequent reporting.

If that reporting was undertaken by TVNZ and occurred after the interim Court order of 11 December 2005, that in itself would be a contempt of Court.

[44] We have no hesitation in rejecting the submission that there are no private facts contained within the videotape. There can be no doubt that the video will record more than is encapsulated within two sentences in the Court of Appeal judgment, and in a one word description of the tape in advance publicity for the TVNZ programme. The particular detail of the reconstruction depicted and Mr Rogers' involvement in it will inevitably reveal facts which are not already in the public domain.

Reasonable expectation of privacy

[45] TVNZ submits that Mr Rogers had no reasonable expectation of privacy in the facts recorded in the tape because the tape was intended for Court use, a quintessentially public occasion.

[46] We are satisfied for a number of reasons that Mr Rogers would have had a reasonable expectation of privacy in respect of the facts recorded in the videotape.

[47] Mr Rogers' consent to participate in the videotaping of the reconstruction was flawed. His consent was obtained in breach of his right to counsel.

[48] The videotape was recorded as part of an evidential process. As such, it would have been Mr Rogers' reasonable expectation that the videotape was recorded for use in the trial process and further, that the access of the media to that material would be regulated through the Court, and that any reporting of context would have been a part of the reporting of trial. It would not be within the contemplation of any reasonable New Zealander that Police would shortly after obtaining an evidential videotape and before trial, release that tape to the media. As we discuss below, there is good reason why the Police are not permitted to, and do not usually behave in such a manner.

[49] Further, as the Court of Appeal observed in *Mahanga* at [41]:

There is a significant difference in the impact on privacy between playing a videotape of a police interview in open Court, where the media can observe and report what was said, and the playing of it, or excerpts, on national television.

[50] Finally, it is a weighty matter that the videotape was obtained in breach of Mr Rogers' right to silence and right to counsel and was ruled inadmissible by the Court of Appeal. These were not technical breaches. The Court of Appeal was of the view that they entailed a substantial breach of proper standards by the Police. Once the tape was ruled inadmissible as evidence at trial it cannot be seriously contended that Mr Rogers did not have a reasonable expectation that the tape and its contents would remain private.

[51] We therefore conclude that Mr Rogers had a reasonable expectation of privacy in the tape.

[52] We wish to make some observations about the Police conduct in releasing the videotape to the media in this case. The piecemeal release of evidence before trial is highly undesirable. The early release of evidential videotapes in particular has the potential to impact seriously upon an accused's fair trial rights. It also removes the evidence from the control of the Court, as in this case. It is difficult to conceive of any proper purpose being served by such an action.

[53] Although we have not heard full submissions on the point, it may also be a breach of the Police Regulations 1992. Regulation 7 of the Police Regulations 1992 provides that every member of the Police shall observe the strictest secrecy in relation to Police business and any information coming into the member's possession by virtue of his office. Regulation 7(2) provides that the member shall release information only to the extent of satisfying the provisions of any Act, general instructions, the authority of the Commissioner and the extent necessary to do his duty. Regulation 9 provides that a wilful violation of the Regulations, including Regulation 7, constitutes a disciplinary offence.

Publicity highly offensive to an objective, reasonable person

[54] The second limb of the tort formulates an objective test. In considering whether the material would be highly offensive to an objective, reasonable person it is necessary to consider the context of the publication and its likely impact.

[55] Mr Rogers has already withstood a trial under public scrutiny and was acquitted by a jury.

[56] The videotape will be contained within a programme focusing upon the murder of Ms Sheffield and the trial of Mr Rogers. The proposed programme is to be shown on the state broadcaster channel, TVNZ on one of its premier current event programmes. It will undoubtedly receive a widespread audience.

[57] The screening of parts of the videotape will be accompanied by a statement “was the reconstruction and confession fantasy or a dream on the part of Mr Rogers?” At trial the Crown produced evidence that Mr Rogers had made various admissions. Part of Mr Rogers’ defence at trial was that the details of those admissions had come to him in a dream, and that he had confused the elements of the dream with reality, leading him to make a false confession. The significance of the voiceover in relation to dreams described by Mr Akel is to be considered against this background.

[58] It is a natural inference to be drawn from the proposed use of this evidence as outlined by Mr Akel that the public is either expressly or implicitly being asked to question whether the jury might have reached a different view if the videotape material had been placed before it. The problematic nature of non-contemporaneous reporting of evidence identified in *Vickery* is particularly acute in this case because the media will be highlighting the contents of an evidential videotape which Mr Rogers did not deal with as part of his defence case, the videotape having been ruled inadmissible. He therefore has not had the opportunity to “meet” at trial the material contained within the videotape.

[59] It is also relevant that the videotape is of a reconstruction obtained following serious breaches of Mr Rogers' rights by the police. The Police then facilitated the release of the videotape to TVNZ.

[60] We are of the view that in these circumstances the broadcast of the videotape would be considered highly offensive to an objective reasonable person. It could, as the court in *Vickery* described it, amount to the harassment of an innocent man.

[61] Counsel for Mr Rogers also raised in connection with the second limb the evidence of Ms Marie Dyhrberg, a prominent barrister specialising in criminal law who appears regularly before the Courts. She states that it would be of concern if videotaped statements of accused persons were released to the media. She says that the videotaping of statements are generally seen as desirable both for the prosecution and for the defence. So far as the defence is concerned, she says that the video is of assistance so far as it may be played in the subsequent trial and allows the jury to view the accused at the time of the alleged offence. It makes the process and procedure clear and unequivocal.

[62] In relation to the Police, she notes that videotaping is seen as desirable because it minimises the possibility of Police impropriety. She says that were it to become permissible or common practice for the Police to hand over such videotaped interviews to the media, she would be obliged to advise that possibility to clients and that this would undoubtedly effect their decision whether to make a statement or video, or indeed whether to make a statement at all.

[63] These matters raised by Ms Dyhrberg are of the nature of public policy or societal reasons why such publication should not be permitted. As such we do not consider they bear directly upon the question of whether the publication will violate Mr Rogers' right to privacy. The tort of invasion of privacy is concerned with the protection of private rights.

[64] Nevertheless, for the reasons given earlier we are of the view that both elements of the tort of invasion of privacy are made out. It is therefore necessary for TVNZ to establish the defence of legitimate public concern in the information.

Legitimate public concern

[65] The focus of Mr Akel's argument was that any privacy interest requiring protection is trumped by the overwhelming imperatives in this case of freedom of expression and open justice. He says the threshold test for prior restraint in response to threatened interference with privacy is not met since there is legitimate public concern in the information.

[66] Mr Akel submits that open justice is a fundamental and material consideration in this case, notwithstanding that the confession was ruled inadmissible and thus not heard by the jury. This is because the principle applies to the ability of the media to report the High Court and Court of Appeal judgments on admissibility to enable public understanding and debate as to the reasons why the jury did not learn of the confessions.

[67] Mr Akel gave the following as the purposes for which TVNZ wish to publish the interview:

- (a) To illustrate that which is already in the public domain;
- (b) To show what the jury did not see when they reached the verdict of not guilty;
- (c) To show how the system works;
- (d) To show what went wrong with the investigation.

[68] TVNZ says that the case does raise matters of legitimate public concern. There have been two men charged with the murder of Ms Sheffield. The conviction of the first man was quashed, and the second man has been acquitted of the murder. In these circumstances the public has a legitimate concern in the course of the investigation, the Court of Appeal decision as to the admissibility of evidence, and the jury trial.

[69] Mr Akel placed great reliance upon the dissenting judgment of Cory J in *Vickery* although it was the reasoning of the majority judgment which the Court of Appeal applied in *Mahanga*. Cory J gave two reasons why access to the inadmissible material should have been allowed in that case (at 673). Firstly, to prohibit access to all evidence which has been ruled inadmissible would permit the Courts to operate in secret. Secondly, the differing views as to admissibility between the trial Judge, the majority of the Court of Appeal, and the dissenting member of the Court of Appeal. Cory J said that the public is entitled to know the actual evidence that was the subject of differing judicial opinion.

[70] Mr Akel submits that this case is distinguishable from *Vickery* and *Mahanga*, because in those cases the tapes had been played at trial, the press had an opportunity to attend and report upon the contents. Therefore the principles of open justice were met in those cases.

[71] We accept that the situation in this case is different to *Mahanga* and *Vickery* because here the videotape was not played in open Court, the issue concerning the admissibility having been resolved prior to trial. However, we are not satisfied that the principles of open justice dictate that the public should be able to view the evidence ruled inadmissible. This is not a case of the Courts operating in secret as observed by Cory J. The process has been open and transparent throughout. The decision of the Court of Appeal is now available for discussion and debate. The videotape in issue was ruled inadmissible and so was never part of the evidence lead at trial. Mr Akel could point to nothing in the content of the videotape which would add in any way to the debate and scrutiny of the Court of Appeal decision in keeping with the principles of open justice.

[72] As to the second limb of Cory J's reasoning, we accept Mr Miles' submission that the reasons for the differing views between the Judge who dealt with the pre-trial and the Court of Appeal are set out clearly in the decisions. Both the decision of Cooper J and the Court of Appeal contain detail of the factual background, the factual findings and reasoning. It is also relevant that the Police conduct leading to the ruling of inadmissibility occurred prior to the events captured on the tape so that

a viewing of the videotape will add nothing to an understanding of the diversity of judicial views.

[73] As to the need for media access to the inadmissible evidence to enable proper debate of the admissibility rulings we note the comments of Cooke J in *Re Wellington Newspapers Ltd's Application* [1982] 1 NZLR 118 where the Court was asked to review its own order permanently prohibiting publication of evidence ordered inadmissible, where the ruling had led to the quashing of a conviction of murder of the accused, Mr Wilson. Cooke J said at 119:

The judgment in *Wilson's* case, like many others of many Courts over many years, is concerned with the problem of balancing competing public interests: endeavouring to ensure both that criminals are brought to justice yet that confessions are not obtained by the police by oppressive methods. The relevant principles are extensively dealt with in standard textbooks. Obviously they also warrant serious discussion in the media. In this case it is hard to see that discussion of that kind would be helped by publishing details of the inadmissible evidence. So we have some concern that the main result of removal of the order might be opportunities for sensationalism.

[74] In that case the order suppressing publication was quashed. The Court regarded it as decisive that the details of the confession were contained in a book shortly to be published which would be unaffected by the order, and had also been described in the media at the time of the first trial.

[75] For these reasons we do not accept TVNZ's submission that the principles of open justice require public access to this evidence, or that refusing access to the videotape would permit the Court to operate in secret.

[76] We do not doubt that there would be general interest in the content of the tape but that is not sufficient to make out the legitimate public concern defence given the nature of the privacy interest at stake.

Threshold for restraint

[77] Mr Miles noted that the threshold for restraint articulated in the judgment of Gault P & Blanchard J was set higher than the threshold described in the other minority judgment of Tipping J, who preferred the qualifier of a "substantial" level

of offence rather than a “high” level of offence. However, we do not need to resolve that difference, as we are satisfied both standards are met in this case.

[78] We accept that in this case damages would not be an adequate remedy. As Mr Miles put it, this is not the same as a defamation case, where damage to reputation by a defamatory publication can be rectified by the vindication of the plaintiff’s character represented by an award of damages. Mr Rogers should not have to be subjected to the unrestricted repetition of a videotape obtained in fundamental breach of his rights.

[79] We also take into account the evidence of Mr Rogers. He says that he is currently receiving treatment for depression. He says that now that his trial has concluded and he has been acquitted he needs to rebuild his life. He deposes:

I was very concerned to see an interview of my uncle Borrie [Lawrence] Lloyd on Television One news last night. He indicated that I was not welcome to return to my home at Mangonui and stated something like ‘there are a lot of angry people’. I understood this as a threat to my safety. It also seemed to me to be saying that I was guilty and that he was innocent. That is not what the jury verdict decided.

If excerpts of my video statement are broadcast by TVNZ I believe that this will only make matters worse for me up north. Throughout my trial I understand that there has been a lot of contact between TVNZ and my uncle Borrie and aunt Mrs Lydia Lloyd. Certainly all the TVNZ reports that I have seen seem to follow the views of my uncle and aunt. They have both made it very clear that they are upset by my acquittal and want to make trouble for me. It seems to me that broadcasting the video statement will help them to do this. This will prevent me from starting life again and rejoining the community now that I am out of custody.

[80] TVNZ’s proposal to accompany the playing of the videotape together with a statement about the admissibility ruling would not be adequate to alleviate the likely damage to Mr Rogers.

[81] Having regard to these matters we are satisfied that an injunction should issue to permanently restrain publication of the videotape. Mr Akel submitted that in the event the Court issued an injunction it was unnecessary to make an order for TVNZ to deliver up the copies of the videotape held by it. While we accept Mr Akel’s submission that TVNZ would act responsibly in the face of a Court order injuncting it from the use of the videotape, given the circumstances in which the videotape

came to be in the possession of TVNZ in the first place we consider the videotape and any copies of it should be surrendered to the control of the Court.

[82] Because the application concerns matters of some public importance, we also propose to consider the alternative grounds advanced by Mr Rogers.

Section 138 Criminal Justice Act

[83] Mr Rogers seeks an order under s 138(2) of the Criminal Justice Act 1985 forbidding publication of the videotape, or any report or account of it on the grounds that it was evidence adduced at the admissibility hearing and that it is in the interests of justice that such an order be made. The relevant provisions of s 138 are:

(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 -

(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.

[84] On a restrictive, literal reading the section may be seen to apply only to evidence adduced at trial. However, we are satisfied it can also apply to evidence, such as the tape, adduced during the course of preliminary hearings including the admissibility hearing and that orders under s 138 can properly be made after trial. Section 138 (5) confirms that the powers in s 138 replace the Court's inherent

jurisdiction. Section 138 provides a code for the circumstances in which orders forbidding reports of proceedings may be made. We are satisfied s 138 is applicable in the present situation.

[85] The present issue is whether it is in the interests of justice that such an order be made. In *Police v O'Connor*, Thomas J said that the phrase “interests of justice” can be properly construed to include the administration of justice as well as any particular interest which may require protection. The onus when such an order is sought, is a heavy one, and rests upon the person seeking the order: *O'Connor*, at 96.

[86] Ms Sellars submits that this matter should have come before the Court as an application under the Criminal Proceedings (Search of Court Records) Rules 1974 as occurred in *Mahanga*. However, because of the wrongful actions of the Police in handing over the videotape, TVNZ has not been required to make such application and the onus has been on Mr Rogers to satisfy the Court an injunction should issue. Ms Sellars submits that TVNZ is well versed in procedures concerning such video statements and any attempt to characterise it as a naïve receiver of the video statement should be viewed with scepticism.

[87] If it had been necessary we would have been prepared to make an order under s 138. The videotape was evidence adduced at the admissibility hearing before Cooper J. For the reasons traversed above, its publication would infringe Mr Rogers’ privacy rights and cause considerable damage to him in the form of humiliation, and also to his prospects of reintegration into society following his acquittal. It is material that the evidence was obtained following a serious breach of his rights. As we have held, there is no sufficient justification for the publication. We also see force in Ms Sellars’ submission that TVNZ cannot be characterised as a naïve receiver. TVNZ would have known that evidential videotapes are subject to the strictest control and that such tapes, should not be and are not usually released by the Police to the media prior to trial, and are to be accessed through the Criminal Proceedings (Search of Court Records) Rules.

Contempt of Court

[88] Mr Rogers alleges the broadcast of the video by TVNZ would be in contempt of Court. He relies upon Guideline 8 of the Standard Conditions for in-Court media coverage, which TVNZ agreed to be bound by. His counsel submits the videotape was an exhibit at the admissibility hearing. By using the videotape in a broadcast, TVNZ is therefore in breach of Guideline 8, or at least its spirit or intent. Secondly, his counsel submits that TVNZ should have sought the Court's leave to have access to the videotape under the Criminal Proceedings (Search of Court Records) Rules. The Court is the custodian of the evidence contained within the Court file, and is entitled to control access to it. The fact that TVNZ illegitimately obtained a copy of the evidential videotape should not permit it to side-step the provisions of those.

[89] Mr Miles also submits that the broadcast would be in contempt of Court, but formulates the nature of the contempt somewhat differently to counsel for Mr Rogers. He submits that the broadcast would have the tendency to undermine public confidence in the due administration of justice. He points to the impact the improper Police leak of the videotape and consequent broadcast of it would have on the manner in which Police interviews are conducted. Secondly, he submits that publication of extracts will tend to lead to unfair criticism of the jurors and the Court of Appeal.

[90] We see some difficulties with the arguments advanced in support of contempt in the particular circumstances of this case. TVNZ did not come into possession of the videotape through the application of the standard conditions for in-Court media coverage. Nor is its proposed use in breach of any existing order of the Court. We also see some difficulty with Mr Miles' submission that a combination of the factors he referred to could amount to contempt. Mr Miles' submissions were primarily based on *Solicitor-General v Radio NZ Ltd* [1994] 1 NZLR 48. That case is quite different factually. As a matter of principle, it noted that the object of the law of contempt was not to protect the decision of the jury in an individual case from appropriate comment (at 53) and nothing in the law of contempt inhibits appropriate criticism or discussion of jury verdicts, rather the concern in that case was the investigation into the reasoning process of individual jurors (at 58). However, it is

unnecessary for us to rule formally on this alternative ground as we are satisfied grounds exist for the issue of an injunction on the basis of an interference with Mr Roger's privacy rights and, in the alternative, an order under s 138 would be appropriate in any event.

Conclusion/Orders

[91] There will be orders that the respondent TVNZ:

- a) be permanently restrained from broadcasting the whole or any part of the video statement taken by the New Zealand Police of Mr Rogers on 13 July 2004.
- b) forthwith deliver up to the Court all copies of the video statement held by it.

Costs

[92] Costs are reserved to be dealt with by way of memorandum in the event counsel are unable to agree.

Venning J

Winkelmann J