

IN THE SUPREME COURT OF NEW ZEALAND

**SC 13/2009
[2009] NZSC 59**

DAVID CULLEN BAIN

v

THE QUEEN

Court: Elias CJ, Blanchard, McGrath, Wilson and Gault JJ

Counsel: H A Cull QC and P A Morten for Appellant
C L Mander for Crown
J S Kós QC and S L Bacon for Fairfax New Zealand Limited
W Akel and H Wild for Television New Zealand

Judgment: 11 June 2009

ORAL JUDGMENT OF THE COURT

[1] In the formal judgment of the Court delivered on 6 March 2009, orders were made prohibiting publication of any part of the proceeding. In the reasons delivered on 18 March the Court continued suppression of any part of the proceedings (including the reasons for judgment) and made a further order that “until completion of the re-trial” the reasons for judgment were not to be distributed except to the appellant and his counsel and counsel for the respondents, without leave of the Court. By recall judgment of 25 May this order was varied by prohibiting distribution of the reasons for judgment not “until completion of the re-trial”, as had originally been the case, but “until further order of the Court”.

[2] The suppression orders made were in accordance with the general practice of appellate courts where evidence is excluded, because publication of such evidence before verdict could undermine the exclusion of evidence and could risk trial unfairness. That this was the purpose of the suppression orders made on 6 March and 18 March is made clear by their terms, which lasted only until the completion of the re-trial. The amendment to provide for suppression until further order of the Court was not to meet any purpose other than the fair trial one because of the possibility that the re-trial then in progress would not finally dispose of the charges. In such circumstances it would have been appropriate to hear the parties and others affected before releasing the reasons for judgment and permitting report of the proceedings in this court. The verdict of 'not guilty' removes any such risk.

[3] Fairfax New Zealand Limited and Television New Zealand have applied to set aside the suppression orders. Mr Bain has indicated that he opposes that course. The sole ground identified in the notice of opposition is the general one that release of the material is not in the interests of justice. No basis for that contention was identified on the papers filed. The Court considered that the purpose for which the suppression orders were made is spent and those orders should, in principle, be lifted. We have not considered it necessary to hear the media applicants in support of their application. We treated however the notice of opposition filed by Mr Bain as a new application for suppression orders. It must of course be based on grounds distinct from those of fair trial which were the basis of the original orders.

[4] At the hearing today the only grounds put forward for what would be an exceptional course, were the private interests of Mr Bain. They are said to outweigh the public interest in publication. We are satisfied these grounds are not reasonably arguable and therefore there is no reason to grant time for preparation of further argument. The application for adjournment is therefore declined.

[5] It would an extraordinary step to suppress the reasons for judgment of a court, particularly this Court which is not subject to correction on further appeal. Any fair and accurate report of the Court's reasons will have to make it clear that the material was not considered to be relevant and was not considered to be reliable. The courts operate in public and must justify the decisions they reach in reasons

available to all. That is essential to confidence in the system of justice. As the court of Appeal said in the case of *Lewis v Wilson and Horton Limited*¹:

The principle of open justice serves a wider purpose than the interests represented in the particular case. It is critical to the maintenance of public confidence in the system of justice. Without reasons, it may not be possible to understand why judicial authority has been used in a particular way. The public is excluded from decision making in the Courts. Judicial accountability, which is maintained primarily through the requirement that justice be administered in public, is undermined.

[6] For these reasons orders (c) and (d) in the judgments are rescinded, with the consequence that all publication restrictions imposed by this Court are lifted. There will be no order for costs.

Solicitors:

Duncan Cotterill, Auckland for Appellant

Crown Law Office, Wellington for Crown

Izard Weston, Wellington, for Fairfax New Zealand Limited

Simpson Grierson, Auckland, for Television New Zealand

¹ [2000] 3 NZLR 546 at paragraphs [75] – [79].