

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

**CRI 2012-085-009093
[2014] NZHC 1155**

THE QUEEN

v

JOHN ARCHIBALD BANKS

Hearing: 26 May 2014

Appearances: P Dacre QC and A Van Echten for the Crown
D Jones QC and K Venning for the Defendant, John Banks
C Bradley for TV3/Media Works

Judgment: 28 May 2014

REASONS FOR JUDGMENT OF WYLIE J

This judgment was delivered by Justice Wylie
on 28 May 2014 at 3.00 pm
Pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date:

Introduction

[1] On 26 May 2014, I revoked the permission I had earlier given to TV3/Media Works, to film the trial of the Honourable John Banks. I also directed that TV3/Media Works is not to use any footage captured in the courtroom in its coverage of the balance of the trial. I gave brief reasons for these orders and indicated that I would issue this judgment, recording rather more fully the reasons for my orders.

Background

[2] The Honourable John Banks is charged with one count of transmitting a return of electoral expenses, knowing it to be false in a material particular. Mr Banks has pleaded not guilty to that charge and the trial commenced on 19 May 2014.

[3] Prior to the commencement of the trial, TV3/Media Works applied for permission to cover the trial, and to film the proceedings. The application recorded that any film footage might be used in the following television programmes – Firstline, 3 News, Nightline, Campbell Live and 60 Minutes. It also noted that any film footage might be used on the following websites – 3news.co.nz, radiolive.co.nz and TV3.co.nz. The application suggested that the standard conditions should apply in the event that permission was granted.

[4] The application was forwarded to counsel for the Crown, and for Mr Banks. They did not object to the same, and in a minute issued on 27 March 2014, I granted leave to TV3/Media Works, and to a number of other applicants, permitting them to variously film, record, take still photographs at or otherwise cover the trial. I recorded that the grant of permission was in each case subject to the applicable standard conditions which form part of the In-Court Media Coverage Guidelines.

The In-Court Media Guidelines

[5] The In-Court Media Coverage Guidelines 2012 apply to this Court. They do not have legislative force, and they expressly record that they do not create rights, and that they should not be construed to create expectations.¹

[6] The guidelines note that in making decisions, and exercising the discretions under the guidelines, the court should, inter alia, have regard to the need for a fair trial, the desirability of open justice, the principle that the media have an important role in the reporting of trials as the “eyes and ears” of the public, and the importance of fair and balanced recording of trials.²

[7] The standard conditions for the film coverage of trials are found in Schedule 2 to the guidelines. Inter alia, condition 9(b) provides that an accused sitting in the dock, may only be filmed for the first 15 minutes of any sitting day. Condition 15 requires that any film taken must not be used, while the trial continues, other than in the programmes or on the websites nominated in the application form. Further, condition 16 requires that any film taken must be used having regard to the importance of the fair and balanced reporting of trials, and that it must not be published or broadcast out of context.

[8] The guidelines also record that a Judge may, at any time, revoke the authority to cover a trial, if the media applicant or somebody acting on behalf of the media applicant breaches the guidelines, or any condition of the grant of authority to cover the trial.³

[9] There is an obligation on media applicants, and those acting on behalf of media applicants, to ensure that they do not commit contempt. In particular, the guidelines record that they must ensure that media applicants do not interfere with the due administration of justice, and do nothing that may prejudice a fair trial.⁴

¹ In-Court Media Coverage Guidelines 2012, at [1(a)], [1(b)] and [1(c)].

² At [2.2].

³ At [14].

⁴ At [15].

The Footage in Issue

[10] The Court sat on Thursday, 22 May 2014. The only evidence presented on that day was an audio recording, of approximately three and a half hours' length, of an interview given by Mr Banks to the police in June 2012.

[11] Mr Banks was sitting throughout at a table immediately behind his counsel. He was sitting at that table pursuant to permission granted by me earlier in the trial. In effect, he was sitting "in the dock" as those words are used in condition 9(b) noted above.

[12] Representatives of the media were present while the interview was played. They were sitting in the jury box, again pursuant to permission granted by me. There was a television camera in Court. TVNZ also has permission to film during the trial. The standard conditions provide that only one camera may be situated in the court.⁵ There is a sharing agreement between TV3/Media Works and TVNZ, One News. They take it in turns to provide the camera operator, and footage recorded is available to both entities. I am told that on 22 May 2014, the camera was being operated by a cameraman from TVNZ.

[13] Footage obtained during the course of the day was broadcast by TV3/Media Works, in the TV3 news bulletin broadcast at 6.00 pm on Thursday, 22 May 2014. The footage focussed on Mr Banks. The audio of the police interview could be heard in the background, and a reporter spoke to the coverage. The footage showed Mr Banks placing one of his fingers in his ear, removing his finger from his ear, looking at his finger and anything that may have been on it, and then putting his finger in his mouth.

[14] After it was brought to my attention, I viewed the coverage. I also read an article on the "Stuff" internet website which stated that the footage was available on YouTube.

⁵ Condition 1.

The Process Followed

[15] Before the trial resumed in open court on Monday, 26 May 2014, I asked to see counsel in my chambers. I advised counsel that I had seen the coverage, and that it might be on YouTube. I asked Mr Jones QC, acting for Mr Banks, to speak to his client and find out whether Mr Banks was aware of the coverage and whether he was concerned about it. A short time later, I received advice from Mr Jones that his client was aware of the footage. I was told, however, that Mr Banks did not wish to formally complain about the same.

[16] Notwithstanding Mr Banks' stance, I was concerned that my order made on 27 March 2014 had been breached and that the In-Court Media Coverage Guidelines and the conditions for filming in court had not been complied with.

[17] When I returned to open Court, I asked the TV3/Media Works representative to identify him/herself. A Mr Shepherd identified himself. I requested him to arrange for his editor-in-chief, or the person who had made the decision to broadcast the footage, to appear in Court at 2.15 pm. I advised Mr Shepherd that TV3/Media Works had the right to be represented and that at 2.15 pm I would be considering whether to suspend or revoke TV3/Media Works' permission to film the balance of the trial.

[18] At 2.15 pm, Ms Bradley appeared on behalf of TV3/ Media Works. She is in-house counsel for TV3/Media Works. A Mr Richard Sutherland also attended. Ms Bradley explained that Mr Sutherland is the deputy head of news and current affairs.

Submissions

[19] Ms Bradley explained that the footage had been captured on Thursday, 22 May 2014. She told me that it was captured during the first 15 minutes of the afternoon sitting. That sitting had commenced at approximately 2.15 pm. She said that the footage was subsequently edited for use on the 6.00 pm news programme on TV3, and confirmed that it had been shown that evening. She also advised that it had been retained online in TV3's archives, but that it had not been posted by

TV3/Media Works, or by anybody acting for or on its behalf, onto any social media site. It was her understanding that any capture of the footage for use on YouTube or on any other social media site had been achieved either by recording the footage from the television broadcast, or by “clipping” it from the 6.00 pm TV3 news programme.

[20] Ms Bradley accepted that the footage had not been taken during the first 15 minutes of the sitting day, as required by the in-court media guidelines.

[21] When I asked Ms Bradley what news value the footage had, Ms Bradley replied by telling me that the footage featured Mr Banks listening to the audio recording of his interview, and that it showed his reaction to that recording. When I put it to her that it seemed to me that the primary purpose in broadcasting the footage must have been to expose Mr Banks to ridicule and derision, Ms Bradley accepted that there was “no getting round the fact that the use of that footage was a bad judgement call”. Ms Bradley did seek to justify the use of the footage, by asserting, first, that there were no fair trial issues raised by it and, secondly, by observing that Mr Banks has been in the public eye for a considerable number of years, that he is a robust individual, and that he could not have been impacted by the footage shown.

[22] Ms Bradley explained that, following my comment to Mr Shepherd earlier that day, the footage had been removed from TV3 archival footage on its website, and that it was no longer available for public viewing via that source.

[23] I record that Ms Bradley did apologise to the Court. Further, and following a request from Mr Jones, she tendered an apology to Mr Banks, and indicated that she would be happy to record that apology in writing. Mr Banks, in turn, sought that an apology should be broadcast by TV3/Media Works on the news programme that evening. Ms Bradley agreed that this was appropriate.

Analysis

[24] The history of in-court media coverage, including the use of cameras in courts, is helpfully summarised in the consultation paper prepared by the committee

set up by the Chief Justice to review such coverage.⁶ In short, prior to 1991, cameras were not allowed in courts. A consultative committee was then set up to consider the position and various arguments for and against the filming of court proceedings were considered. In the event, a pilot scheme was established. It allowed limited television recording for delayed broadcast. In 1995, a further working party was established to further consider the issues raised by the television coverage of court proceedings, and also of the conduct of the pilot. Draft rules were prepared to govern filming in courtrooms. The issue was debated at a Higher Court Judges' conference in 1999, and various recommendations made by the consultative committee were adopted. Inter alia, the rules which had applied to the pilot programme were incorporated, with some modifications into new guidelines, together with a voluntary code of conduct for the media.

[25] Some concerns about the operation of the guidelines arose in the following years, and in 2003, new guidelines were adopted. The new guidelines provided a more detailed formulation of the procedures that were to apply, and dispensed with the voluntary code of conduct.

[26] In 2012, there were a number of amendments to the 2003 guidelines. The In-Court Media Coverage Guidelines 2012 were adopted as a result, and as I have noted, they apply to all proceedings in this Court.

[27] There are a number of competing interests when in-court media coverage is being considered. I cite from the consultation paper.

[35] There are two dominating principles that must be considered when the issue of in-court media coverage is considered, both recognised by the New Zealand Bill of Rights Act 1990. The first is the principle of open justice; the concept that the fullest access of the public and the media to court proceedings is in the interests of the community.⁷ Related to this is the often expressed concept that the media is the surrogate of the public; its eyes and ears, and that it is through media publications that the public has access to and can gain knowledge of what happens in courts. The right of the media to attend and report on court proceedings is long established and now recognised by statute.

⁶ In-Court Media Coverage – A Consultation Paper at [7]–[22].

⁷ As found in the New Zealand Bill of Rights Act 1990 in s 25(a)'s entitlement for those charged to a "public hearing".

[36] The second is the right of a defendant to a fair trial, a right identified and protected by s 25(a) of the New Zealand Bill of Rights Act 1990. That right dictates that there must be no potential interference with the fair trial rights of those accused of crime in New Zealand. For that reason, it is sometimes said that the right to a fair trial trumps open justice.⁸ The interaction between the two competing rights was described by the United States Supreme Court in 1980 as being “as old as the Republic”.⁹

[37] In New Zealand in 2014 there are other related and overlapping concepts relevant to media coverage of court proceedings; that of freedom of information, the capacity for better coverage of the courts to further the community’s understanding of their work, the protection of confidentiality, privacy interests (including those of children, victims and other exposed members of the community), and the orderly and fair administration of justice. There is also the principle that vulnerable people like children and victims should be protected from the damaging glare of publicity.

[28] Against this background, I turn to consider the footage which was broadcast by TV3/Media Works.

[29] I start by considering Mr Banks’ position. He is a defendant in criminal proceedings. He is presumed to be innocent until he is proven guilty. He is entitled to be treated with dignity and respect, notwithstanding that he is charged with an offence. He is also entitled to expect that the Court’s direction requiring those filming the trial to comply with the standard conditions for in-Court film coverage will be complied with.

[30] Secondly, I observe that the media have no right as such to film court proceedings. They do so at the discretion of the Judge running the trial. A Judge will always be alive to the fair trial rights of a defendant, and also to the media’s role as the “eyes and ears” of the general public. Media applicants can expect that the discretion whether or not to allow the filming of a trial will be exercised by reference to the exigencies of each case, but subject to the overarching principle that the fair trial rights of the defendant must not be put at risk.

[31] Thirdly, I note that where permission to film is accorded to a media applicant, and the court directs that the standard conditions are to apply, it is a breach of the court’s order, and therefore a contempt of court, if the conditions are then ignored. Further, the court is entitled to expect that any permission granted will be exercised

⁸ *R v B* [2008] NZCA 130, [2009] 1 NZLR 293 at [62] and [80].

⁹ *Richmond Newspapers Inc v Virginia* 448 US 555 (1980) at 564.

responsibly, with restraint, and with due respect for the dignity of the court and its processes. The Court expects, and the standard conditions for filming require, that film taken will be used having regard to the importance of the fair and balanced reporting of trials, and that it will not be published or broadcast out of context.

[32] Fourthly, it can be argued that the broadcasting of film and the publication of photographs of a defendant at trial is a form of public humiliation.¹⁰

[33] In the present case, I am in no doubt that the footage of Mr Banks broadcast by TV3/Media Works in the 6 o'clock news bulletin on 22 May 2014 was neither fair, nor balanced. It did not respect Mr Banks' rights. It was gratuitous and tasteless. The justifications advanced by Ms Bradley were, in my view, disingenuous. The footage broadcast did not show Mr Banks' reaction to the interview being played in court. Rather, it was a sideshow broadcast seemingly to entertain. It is difficult to escape the conclusion that the broadcast was intended to expose Mr Banks to ridicule and/or derision. There was, in my judgment, no news value in the footage at all, and no public interest was served by broadcasting it. In my judgment, TV3/Media Works' decision to broadcast the footage was irresponsible and it reflects no credit on the organisation.

[34] Condition 16 of the standard conditions for the filming of a trial has been breached.

[35] Further, condition 9(b) has been breached.

[36] The film was taken during the afternoon session, and not during the first 15 minutes of the sitting day. The court sitting started at 10.00 am on 22 May 2014. The camera should have been turned off at 10.15 am. That did not happen. Rather, the camera was pointed at Mr Banks. It was left on.

[37] I am told that the camera was being operated by a TVNZ/One News cameraman. A Ms Wynn-Williams, who is a journalist employed by TVNZ, asked to address me during the hearing. She confirmed that the camera was being operated

¹⁰ *R v Sila (Media Coverage)* [2008] NZAR 294 (HC); Consultation Paper, above n 6, at [72].

by a TVNZ camera operator. She told me, however, that TVNZ/One News did not “record” the footage. I am not sure that I altogether understand the process and I am directing the Registrar to write to the Editor-in-Chief of TVNZ/One News to find out why the camera was filming and what processes were being followed at the time. It may be that TVNZ/One News has also breached condition 9(b). I do note, however, that it did not broadcast the offending footage. TV3 clearly made its own decision to record the footage, and then to run that footage on its news programme.

[38] I was initially concerned that condition 15 may have been breached.

[39] It seems that the film taken has been used other than on the programmes or on the websites nominated by TV3/Media Works in the application form. As I understand it, the footage is now available on YouTube. I accept Ms Bradley’s assurance that nobody at TV3 has put the footage on YouTube, or actively facilitated the footage being placed in the social media. I accept her explanation that a digital recording can be made from a television broadcast, and that it can then be put on YouTube.

[40] In my view, the apparent ease with which publicly broadcast material can be disseminated on the internet reinforces the need for the media to act responsibly, with due regard for the rights of defendants, for the administration of justice, and for the integrity of the court's processes generally. If I thought that TV3/Media Works had put the footage on YouTube or used it on some programme or website other than those nominated in the application, I would have taken a very dim view of this matter.

[41] I do acknowledge that Mr Banks’ fair trial rights have not been put at risk in this case. The trial is proceeding before me sitting as a Judge alone. I also acknowledge that TV3/Media Works did act responsibly in promptly removing the footage from its archives accessible through its website, and that it has publically apologised to the court and to Mr Banks. Nevertheless, the breaches of the media guidelines are serious, and they require a sanction. The standard conditions have been drawn up for good reason. My order imposing the standard conditions was also

made for good reason. TV3/Media Works has breached my order and the standard conditions.

[42] It was for these reasons, that I revoked TV3/Media Works' right to continue to film the balance of the trial, the delivery of the verdict, the reasons for that verdict, and any sentencing, in the event that Mr Banks is found guilty. Given the sharing agreement I have referred to above at [12], it was also necessary to order that TV3/Media Works does not use any footage captured in the courtroom for the balance of the trial.

Further Matters

[43] I record that I have issued my reasons as a judgment, to ensure that they are put in the public domain, and so that they will be readily available to other media organisations and to Judges faced with applications to film court proceedings.

[44] I also direct that a copy of this judgment be forwarded to the Chair of the Chief Justice's Review Committee currently considering in-court media coverage.

[45] The Registrar is to write to the Editor-in-Chief of TVNZ/One News. The Registrar is to ask the Editor-in-Chief:

- (a) whether the in-court camera was being operated by a TVNZ/One News camera operator on 22 May 2014;
- (b) if so, why was the camera left on outside the 15-minute window allowed by condition 9(b) of the standard conditions for filming in courtrooms; and
- (c) how filming in courts takes place. In particular, when a camera is left running, is the film recorded, if so, where, and how can it later be accessed for editing purposes.

The reply from the Editor-in-Chief is to be referred to me. If I consider that any further action is necessary, I will convene a further hearing into the matter so that TVNZ/One News can be heard.

Wylie J