ORDER PROHIBITING PUBLICATION OF THE MATTERS REDACTED FROM THE RULING PURSUANT TO SS 200 AND 205 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE DISTRICT COURT
AT AUCKLAND

I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKAURAU

CRI-2021-004-006815
[2024] NZDC 25233

THE KING

v

DOWAN KIM
Defendant

Date of Hearing:	15 October 2024
Appearances:	N Flanagan for the Crown S Mount KC for the Defendant S Ladd and Ms Roger for the Other Party – L G Electronics Australia
Decision:	15 October 2024

ORAL RULING OF JUDGE B A GIBSON
[ON S 106 APPLICATION]

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[1] Mr Kim, you were the country manager for L G Electronics, which is a large Korean global entity which trades throughout the world. Its main branch in the South Pacific is in Australia, in Sydney, and the evidence I heard was that your New Zealand company was in effect a branch of the Australian business.

[2] The New Zealand branch sells a range of electronics, entertainment products, home appliances and commercial displays, and its primary retailer is Harvey Norman. In terms of reporting, technically you reported to the managing director in Australia, but in practice, in effect control over the New Zealand branch was exercised by the chief financial officer, Mr Peter Lee. He had authority over legal matters for the New Zealand business.

[3] In December 2019 the Commerce Commission began an investigation into alleged anticompetitive conduct in the supply of consumer televisions in New Zealand, and L G was subject to that investigation. The Commerce Commission was interested in the course of its investigation in obtaining details of communications between L G and retailers to examine the extent, if any, to which manufacturers were exerting unlawful pressure on retailers to price at particular levels. I should say at this point that the investigation has come to an end and no charges followed against L G, but in any event, in that investigation notice was given by the Commerce Commission to L G to supply documentation, including communications with retailers for a specified period, and those documents included documents in electronic form such as instant messaging and emails.

[4] You were aware of the investigation and the need to preserve data and your files because you were advised by the company counsel to do so at an early stage of the investigation, and you advised your employees in New Zealand. However, on 2 September 2020 the Commerce Commission wanted L G to expand its search to include texts and chat messages and email chains between L G and retailers, as it had become concerned that they had not received what they anticipated would be information that would be available, and on the morning of 3 September the chief financial officer, as I have found in a disputed facts hearing, Mr Peter Lee, phoned you and told you to instruct L G New Zealand employees to delete things that may have 'issues', or words to that effect.

[5] Later that day you instructed [redacted] and Mr Nicholas Clarke, an account manager for the Harvey Norman business, to effectively clean their phones of these messages before they were collected and cloned by the Commerce Commission.

Messages were deleted by those employees. Some were able to be reconstructed, others were not. [Redacted]

[6] You pleaded guilty [redacted]. These proceedings commenced in September 2021. The plea was advised to the Commerce Commission about two months prior to the scheduled trial date, which was in May 2023, and you entered a plea of guilty on 26 May, on the morning of the scheduled trial, although the Commerce Commission of course was well aware that the trial would not be proceeding, and so there was no disruption to witnesses or to trial schedules.

[7] You seek a discharge under s 106 of the Sentencing Act 2002 and also permanent name suppression under s 200 of the Criminal Procedure Act 2011.

[8] In terms of your personal factors, you have no previous convictions and I note that you are said to be remorseful and in fact a letter apologising and expressing your remorse was handed to me as part of your counsel's submissions this morning. You are 46 years of age and you are married with two children. They are in their late teens and they moved to Canada with your wife in January 2022. Your intention is that if you are able to you will join them when these proceedings are finally resolved, and you will apply for residence there. Your wife already has made an application for permanent residence, but if you are refused a s 106 discharge then you would be inadmissible to be admitted to Canada as a resident on the grounds of serious criminality, and an affidavit setting out the immigration consequences for you and for your family has been filed and was deposed by Mr Steven Merrins on 10 September 2024 and puts the matter very clearly. I will return to that later, but your intention is to go to Canada and you will no doubt try and find employment. You are at this point in time suspended by your Korean employer, L G, who appear to have been assisting you to live in New Zealand by providing you with a stipend to cover your necessary outgoings, but your personal circumstances are set out in full in the pre-sentence report and also in the submissions concerning various matters put before me by your counsel.

[9] In the pre-sentence report the report writer notes that you have not been able to see your family since they moved to Canada in January 2022, and you have only spoken to them by phone. It says you miss your family, understandably, and of course

for all concerned, your wife, your children and you, the enforced separation while these proceedings have been resolved would be I accept a difficult and onerous matter, and it is clear your wife's mental health has deteriorated while she has been in Canada without effective resources, knowing few people and having to work and support your children while they are at university. In the report it is noted that you express guilt for your wife as she is currently struggling with her health, and I have seen a certificate from a psychiatrist at a medical hospital in Korea attached to her affidavit which notes that she has major depressive disorder, although it does not seem to be defined, but the psychiatrist states that she is in a vulnerable state and is psychologically exhausted by the stresses of the last few years.

[10] The Commerce Commission does not challenge that assessment, and their view of matters since your immigration position and your wife's mental health has been made known has changed, having initially sought as a starting point a sentence of imprisonment for this offending.

[11] You have been living in a flat in Hillsborough with two other flatmates for two years. The report notes you do not know them very well and you have withdrawn as a result of feeling ashamed of the allegations and your admitted part in the offending, and that has affected you in that you have been unwilling to attend church, which is important to you, because of your feelings of shame, but do so online. You are currently unemployed and you were in New Zealand for a specific purpose on a work visa, only permitted to work for L G Electronics Australia Proprietary Limited, and you have been in that position now for at least two years.

[12] I accept what is said in the report, that employment is extremely important to you. I accept also that you are unlikely to offend again and in effect this is a one-off offence. You have no previous convictions and I accept that you are otherwise a person of good character. The employees who gave evidence before me at the disputed hearing spoke highly of you and I accept their evidence, and I also accept your isolation in Auckland and your family's difficulties in Canada have been a significant burden for all of you and I do take those matters into account when I consider your personal circumstances.

[13] You found the job as country manager of the New Zealand branch particularly difficult because your employment here by L G largely covered the COVID lockdowns, and in Auckland in particular the lockdown was far worse than elsewhere in New Zealand and also in Australasia, other than the possible exception of Victoria, and that had an effect on sales. You found it difficult because of the nature of the company in having your superiors in Australia understand and accept that you were unable to achieve what they demanded as an appropriate level of sales because the COVID lockdowns meant people were unable to purchase L G items as they would otherwise have done, and I accept you were under a lot of stress at the time of this offending. I have read some of the letters of support that have been provided. You have been a generous person in supporting others and I accept that is a matter that goes in the balance in terms of your personal factors, which I am required to undertake an analysis of when I consider a discharge without conviction, in weighing the gravity of the offending.

[14] As far as the offending itself is concerned, the Commerce Commission, as I initially said, because of the seriousness of the offending sought a gaol sentence of four months' imprisonment as the starting point and emphasised the need for deterrence and denunciation as the most relevant purpose of sentencing that applied to this case. There is not a tariff decision for this type of offending, and there does not appear to be a case directly on point. Most of the cases for this type of offending involve serious criminal offending, with people trying to escape the consequences of their offending by misleading the authorities or in other ways, but as is noted in the Crown submission, that although there is no tariff decision, Powell J's comment in *R v McFarlane*, which was a purely criminal case relating to a rape, and where he said in all but the most exceptional cases this type of offence is to be met with a moderately lengthy term of imprisonment.[1]

[15] This case of course is materially different to the type of cases for which this charge is usually preferred. This was an enforcement case by the Commerce Commission. The Commerce Commission's powers are there to give effect to the enforcement of the laws which effect all New Zealanders in the sense that they relate

[1] *R v McFarlane* [2021] NZHC 1332.

to ensuring that competition and trading is fair, and that entities are not able to manipulate competition and prices to the disadvantage of New Zealanders, so the Commerce Commission has a significant and important role in the suppression of that type of behaviour, and in submissions I received earlier this week from the Commerce Commission, the Commerce Commission obviously having considered some of the material put before it relating to your hoped for emigration to Canada and the effect a conviction would have on it, and your wife's and family's position there, accepted that the matter might be dealt with by a conviction and modest fine, and also in submissions today accepted that the matter might also fall within the ambit of a s 106 application if I accepted that discretion could be exercised in your favour.

[16] The consequences for you would be that you would not be able to join your family in Canada.[Redacted]

[17] But in any event, in terms of the assessment I am required to undertake under s 106 before I can consider whether the consequences, both direct or indirect, are out of all proportion to the gravity of the offending, I am required on the authority of cases such as *Z v R*, to initially consider the gravity of the offending, taking all matters into account including your own personal circumstances, which I have outlined, and also matters in relation to the charge itself or the offending itself, and then assess whether the direct or indirect consequences are out of all proportion to the gravity of the offending.[2]

[18] As I have said, you are plainly a decent and responsible man, but on this occasion you, knowing that a Commerce Commission investigation was underway, accepted a direction to remove material from the Commerce Commission if it existed by issuing the instruction you did [redacted], and although I accept that was at the instigation of the chief financial officer, nevertheless, you must have known that it was an unlawful instruction, and you passed it on. Mr Mount said for you that this was in effect a momentary lapse of judgment, but having heard the evidence in relation to the nature of the hierarchal basis on which the company was run, I am not sure the outcome would have been any different if you had had time to consider it. The fact is

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[2] *Z v R* [2012] NZCA 599.

that your view of life was that when you were told to do something by the chief financial officer you simply did it, and that is consistent with what I was told about the way companies operated in Korea, through a hierarchal form of management.

[19] Nevertheless, this was a serious matter in that the Commerce Commission to some extent were obstructed in the investigation, and of course there is the overall policy that the Court has to have regard to, that this type of offending impacts on New Zealanders as a whole, but I also take into account that nothing was revealed through the reconstituted material that led to any charges. [Redacted] [It is a] consequential charge[] rather than charges in relation to anticompetitive conduct. So I would put your conduct somewhere in the midrange of offending in terms of an assessment of gravity.

[20] In terms of consequences, the immigration consequences for you are outlined very clearly in Mr Merrins' affidavit and they include consequences for your family as well. At paragraph [38] of his affidavit he deposes that if you receive a conviction for the perversion of justice charge you will be inadmissible to Canada on the grounds of serious criminality and your wife's application for permanent residence will likely be refused, and she will be unable to apply for and obtain permanent residence for the period that you are inadmissible to Canada, which will be at least five years unless she can demonstrate significant humanitarian and compassionate factors that would warrant an exemption from a prohibition which would follow from a conviction, but he also says that in the event you receive a discharge without conviction it is unlikely you would be regarded as inadmissible to enter Canada and the charge would be unlikely to pose a barrier to the approval of your wife's permanent residence application.

[21] The consequences for your wife and your children if you are not granted a s 106 discharge are also significant. Your children hope to attend university in Canada. One already is and another one is about to start. They have been educated in English-speaking schools for most of their life. Your wife in her affidavit and you also, express the view that they would struggle to find admission to a good university in South Korea if the family, including you, return there, simply because their Korean is not good enough and the consequences of not obtaining a university education in Korea can be

significant in terms of their future conduct. Your wife also expresses concern that your children will be eligible for conscription. I do not take that into account. That is simply a matter that any Korean male resident in Korea would have to face, but I do take into account the disruption to their education, the impact that a refusal of a s 106 application is likely to have on your wife's depression, which is understandable given the difficulties she has had in coping since you have been apart, and the impossibility of you gaining admission to Canada if a conviction is entered and the effect that will have on your wife's hopes of admission to Canada, and I am obliged to take immigration consequences into account. The most recent decision referred to me was a Supreme Court decision of *Bolea v R.*[3]

[22] So overall, I accept that those consequences would be out of all proportion to the gravity of the offending if I entered a conviction, and because of that I grant the application to discharge you under s 106 of the Sentencing Act, which is deemed in law to be an acquittal, so you will not have a conviction for the offence.

Name Suppression

[23] Earlier this morning I granted a discharge under s 106 of the Sentencing Act 2002 to Mr Kim in respect of the charge of obstructing the course of justice which had been prosecuted by the Commerce Commission.

[24] He has up to this point had the benefit of an interim order for suppression of his name and now seeks that order to be made permanent. The grounds for granting such an order are set out in s 200 of the Criminal Procedure Act 2011. Section 200(1) allows a Court to make an order forbidding publication of the name, address or occupation of a person who is acquitted of an offence as a discharge under s 106 of the Sentencing Act is deemed to be.

[25] The order may be made on the grounds set out in s 200(2) and for the defendant the first subparagraph applies, namely that it would cause extreme hardship to him if his name was published.

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[3] *Bolea v R* [2024] NZSC 46.

[26] Counsel submits through submissions that because of his role as the Company Manager of LG in New Zealand, if his name is not suppressed, then because of the prominence of that company there is likely to be at least some reporting, possibly a news release from the Commerce Commission which will draw undue attention to him and would cause him extreme hardship because of the matters that I referred to in my earlier decision in granting the s 106 application, namely, the effect on his family, his wife's depressive disorder that has occurred over the two years that the family has been split apart and also, and in particular, his inability or likely inability to obtain appropriate employment when he emigrates to Canada.

[27] It is accepted that it is unlikely that he will go to South Korea, and he will not remain in New Zealand and publication other than by the worldwide web is likely to be only here.

[28] The concern expressed is that any prospective employer especially for the positions the defendant is qualified to obtain in management is very likely to undertake an internet search and the fact that he had been prosecuted for obstructing the course of justice by the New Zealand Commerce Commission may be a matter that prevents him finding appropriate employment in Canada.

[29] At this point there is nothing in the way of evidence before me that would confirm that in the sense there is no affidavit from anyone who specialises in the placement of persons of the defendant's seniority in companies and the submission seems to me to be somewhat speculative.

[30] It is also said that he is likely to find his friends and acquaintances within the Korean community in Canada and I accept that, and that there is among the Korean community and in South Korea itself a widespread feeling of shame if anyone is convicted of a criminal offence and that publication of the defendant's name in association with a criminal offence, even though in law he is deemed to be acquitted, will nevertheless cause some difficulty for him and his family among Korean communities wherever he settles.

[31] The approach to considering an application is the two-step approach set out in *Robertson v Police*.[4] Firstly, I need to determine the threshold determination as to whether the grounds listed in s 200(2) of the Act are established and secondly if they are, then there is a discretionary assessment taking into account the interests of the applicant and the public interest in the free expression and the right of the media to report proceedings.

[32] The Court must of course always start with the position that open justice and the right of the media to report proceedings as surrogates of the public is the starting point. I am not satisfied that the foreshadowed employment consequences will necessarily come about. To some extent they are speculative. There is possibility that publication will lead to the defendant having to narrow his employment options in Canada but that is only a possibility, and I am not convinced that he would otherwise be unable to find appropriate employment in Canada if his name is not suppressed.

[33] I accept that his wife will have suffered a considerable amount of stress as a result of the family being split and the defendant being detained in New Zealand, effectively by these proceedings, but that will shortly come to an end and the family will be reunited. They are clearly a close family so that is likely to be of considerable assistance to her.

[34] Overall, I am not satisfied that the consequences of publication are any more than would be suffered from anyone else who appeared in court on a criminal charge, and I do not accept that the initial step of meeting the threshold of extreme hardship is necessarily passed. There are many cases which note that employment consequences are not to be elevated to the point of extreme hardship.

[35] Even if I am wrong in that and the threshold determination is passed, I would not in the exercise of my discretion grant suppression of name simply because the public interest in publication of name in a matter of this type is significant.

[36] As Mr Flanagan submitted to suppress the defendant's name might have a chilling effect on commerce and the ability of the Commerce Commission to properly

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[4] *Robertson v Police* [2015] NZCA 7.

investigate suspected offences involving breaches of the Competition and Fair Trading Act laws if persons so investigated accept that their names might necessarily be suppressed.

[37] It does not mean that a well-founded application for suppression of name would not pass muster, but the effect on the Commerce Commission's investigatory functions has to be considered and he has drawn my attention to the recent decision of the Supreme Court in *Farish v R* at paragraphs [34]-[36] and I accept his submission.[5]

[38] Consequently, the interim order for suppression of name now lapses and there will not be an order for permanent suppression of the defendant's name.

B A Gibson
District Court Judge

[5] *Farish v R* [2024] NZSC 65.