In the Supreme Court

Crim.App. 8225/12
MCA (Criminal) 8239/12

Before: Her Honor Justice E. Hayut
His Honor Justice U. Vogelman
His Honor Justice Y. Amit

The Appellants in Crim.App. 8225/12

1. Jane Doe Co. Ltd
2. Jane Doe

The Applicant in MCA (Criminal) 8239/12

Jane Doe (a minor)

versus

The Respondents:

1. John Doe
2. The State of Israel

Appeal against the judgment of the Tel Aviv-Jaffa District Court (His Honor Judge Z. Kapach) in Other Appeal (OA) 46171-04-12 of November 6, 2012

Date of session: 25th Tevet 5773; January 7, 2013

Adv. Shira Brick Haimovitz; Adv. Einat Berg-Segal
on behalf of the Appellants in Crim.App. 8225/12

Adv. Shira Dorfman-Algai
on behalf of the Applicant in MCA (Criminal) 8239/12

Adv. Avi Vacnich; Adv. Uri Shenhar
on behalf of the First Respondent

Adv. Itamar Gelbfish
on behalf of the Second Respondent

Judgment

Judge U. Vogelman

1. The Respondent, a therapist by profession, was arrested on suspicion of committing an indecent act on the Applicant in MCA (Criminal) 8239/12 (hereinafter – the "Applicant"), a minor born in 2006, while he was treating her. The Magistrate Court extended his arrest by two days and granted an order prohibiting publication of any details of the case (hereinafter, "gag order"). Immediately after the arrest, a minor story was published on an Internet news site that reviewed the main suspicions without mentioning the Respondent's name. The story was removed immediately after the gag order was granted. On completion of the investigation against the Respondent, the Prosecution decided not to prosecute due to lack of sufficient evidence. The Applicant filed an appeal against this decision with the State Attorney. At the same time, the Applicant filed a petition with the Magistrate Court to remove the blanket gag order so that details of the case would be published without the Respondent's name or any other identifying detail. On April 4, 2012 the Magistrate Court (His Honor Judge T. Uziel) granted the Applicant's application. The Respondent filed an appeal against this decision. On the filing of the appeal, the District Court (His Honor Judge Z. Kapach) decided to stay implementation of the Magistrate Court's decision until otherwise decided, and from time to time granted continuances finding that the question whether or not the Respondent would be indicted was material to its decision. In the meantime, the Applicant's appeal against the decision not to prosecute t was allowed, and the investigation was reopened; a supplemental investigation took place and the Respondent was questioned again. Ultimately the District Attorney once again decided to close the case due to lack of sufficient evidence. The Applicant's appeal of the second decision is still pending before the State Attorney. On October 25, 2012 the Appellants in this case—a media company and a reporter who works for it—filed an application with the District Court to join the Respondent's appeal against the decision to allow publication, and expressed their support for the Applicant's position.

2. On November 6, 2011 the lower court heard the appeal by the Respondent (who was referred to as "appellant"). His appeal was heard together with the Appellants' application to join the proceedings. The Court reiterated the considerations outlined in the case law for granting a gag on a suspect's name or investigation detail pursuant to section 70(e1)(1) of the Courts Act [Consolidated Version], 5744-1984 (hereinafter, the "Courts Act" or the "Act"), and held that in the circumstances of this case the scale tips in favor of prohibiting publication of all the case's details. The Court emphasized that since according to the investigation and prosecution authorities there was insufficient evidence to prosecute, there was no public interest in exposing an incident that might not even occurred. The lower court also held that publicizing the incident as an example in an article written to draw attention to signs of distress displayed by children undergoing therapy, such as the Applicant, does not justify publication since an article can be prepared without detailing a concrete incident; and that the argument that publication might result in the filing of additional complaints where the State has not applied to allow publication for such purpose must be rejected. The Court added that there was concern that the motive of the Applicant's family was revenge against the Respondent and that, in view of the serious nature of the accusations against the Respondent, there was no doubt that grave and

irreversible harm would be caused him if his identity was revealed. Finally the Court held as follows:

> "We are living in the age of the Internet. The physical town square has long since disappeared, and has been replaced by a virtual square. If publication of the incident, the occurrence of which is itself in doubt, is permitted, connecting the Appellant to the incident would be easy, as the appellant works in a limited professional circle and because there are many ways to directly or indirectly circumvent the gag order prohibiting publication of a name. This can be done through anonymous comments (talkbacks), forums, Facebook, Twitter and more.
>
> After hearing what the minor's family has to say about the Appellant, as aforesaid, my concern, which I harbored from the outset, that his name will be linked to the incident *in roundabout ways*, has grown" (pages 7-8 of the judgment) [emphasis in the original].

The proceedings before us are about this decision.

The parties' arguments

3. The Appellants argue that the District Court was not authorized to grant a gag order prohibiting publication of all the details relating to the incident. According to them, section 70(e1)(1) of the Courts Act authorizes the Court to prohibit publication of a suspect's name or of another investigation detail, but not both together; and in any event it does not authorize the Court to impose a gag order on the details of the entire case. It was also argued that the Court erred in disregarding the potential harm to the Respondent that would result from publishing details of the incident without identifying details; and it erred in allowing all details to be published since the case was closed, as well as in determining that the public has no interest in publishing the incident's details. The Appellants add that the gag order goes against the principle of public hearings and proceedings and the public's right to know; that the motive for publication should not have been considered; and that even in the Internet age, publication of legitimate information should not be prevented solely because of the theoretical concern that privileged information would be exposed on-line.

   The Applicant's arguments mostly overlap with the Appellants' arguments. The Applicant adds that the Court erred in determining there was concern that the family would expose the Respondent's name on the Internet in a roundabout way. According to her, had her family wished to do this, it would have done so while the Respondent was under arrest since at that time the arrest was published as a story on the Internet, without his name.

   The State—which was not a party to the proceedings in the lower courts—joined the proceedings before us, and it supports the position of the Appellants and the Applicant.

4. The Respondent objects to publication. First of all, he argues that the Appellants filed an appeal with this Court when they should have filed an application for leave to appeal; and that their appeal should be dismissed for this reason alone. With regard to the application for leave to appeal filed by the Applicant,, the Respondent argued that the appeal does not establish cause for granting leave to appeal to this Court as a "third round." Substantively, the Respondent argued that the Appellants and the Applicant concealed from this Court the fact that the Applicant's father serves in a managerial position in the First Appellant, and these proceedings are thus tainted by a lack of good faith; that the Applicant's parents wish to misuse the investigation material, which was sent to them for their review solely for the purpose of filing an appeal, by publishing its contents in a newspaper; and that the motive of the Applicant's parents for publication is an attempt to exert pressure on the Prosecution to allow the appeal and thereby prejudice the Respondent. The Respondent further argues that the harm he will suffer as a result of the publication is grave. According to him, the circles close to the case who have general knowledge will be able to identify him in publications about it. The publication would make the case the "talk of the town" amongst his professional community, which would want to know which male therapist is involved, and since there are few male therapists his name would shortly be leaked to the general public, or at the very least to the public interested in therapy such as he offers.

Discussion and Decision

5. We will first comment on the legislative framework relevant to our discussion. Though currently the District Attorney's position is that there is insufficient evidence to substantiate reasonable prospects of a conviction and therefore the Respondent should not be indicted, an appeal is pending against this decision. The two courts before us, as well as the litigants and the State, have all assumed section 70(e1) of the Courts Act, which refers to a "suspect" as defined in section 70(e2) of the Act as "someone against whom a criminal investigation has been commenced" applies. I accept this assumption because in appeal proceedings there is *de novo* review of the matter by the entity in charge of the administrative authority which made the decision. Within the boundary of this review, the entity hearing the appeal steps into the shoes of the entity which gave the decision subject to the appeal and exercises wide and independent discretion in its stead. Accordingly, even though we should keep in mind for the purpose of these proceedings that a decision by the District Attorney not to prosecute the Respondent because of insufficient evidence still stands, so long as the administrative proceedings have not reached a final decision; there is no impediment to seeing the Respondent as "someone against whom a criminal investigation has been commenced" and to trying his case according to the said legislative framework. I therefore do not address the conditions for a gag order regarding the details of an investigation against after a decision not to prosecute and the objection proceedings against that decision exhausted.

The procedural level: the media's appeal—by right or with leave?

6. The Appellants appealed against the District Court's judgment. Were they entitled to do so, or does their appeal require application for leave? On January 18, 2012 the Courts Act (Amendment No. 69), 5772-2012, Book of Laws 122, came into force, which addressed gag orders on investigations and legal proceedings. The beginning of section 70(e1)(1), together with sections 70A(a) and (b) of the Act, provide that a Magistrate Court may prohibit publishing the name of a suspect that has yet to be indicted, or of any other investigation detail, as long as the conditions below are met. As a rule, the Court will impose a gag order under this section pursuant to a suspect's application (hereinafter, "application for a gag order"). Once the Magistrate Court has imposed a gag order, anyone wishing it be revoked, including the media, may submit an application to the same Court (section 70C(a) of the Act) (hereinafter, "revocation application"). The Respondents in the revocation application will be the suspects, along with any person who was a party to the application for a gag order (section 70B(a)(2) of the Act). Section 70D of the Act regulates appeals against the Magistrate Court's decision on an application for a gag order or revocation application: there is a right to appeal against either to the District Court, with one judge presiding (sections 70D(a)(1) and (3) of the Act); a judgment on appeal against such decisions may be appealed with leave to the Supreme court, which will hear it before a single judge (section 70D(b) of the Act). Section 70E of the Act authorizes the Minister of Justice, with the Knesset's Constitution, Law and Justice Committee's approval, to regulate applications for a gag order or publication, as well as the procedures for appeals and applications for leave to appeal against decisions on such applications. As of this judgment, the sub-legislature has yet to regulate.

1. Thus, the proper way to revoke a gag order granted under section 70(e1)(1) of the Act is to submit an application with the Magistrats Court that granted the order. However, what is the proper procedure where the Magistrate Court has revoked the order, an appeal against the revocation is pending before the District Court, and a third party, including the media, which was not a party to the original revocation application wishes to argue regarding the order's revocation? In my view, the third party should submit a joinder application with the District Court in the pending appeal against the Magistrate Court's decision, as was done in this case. To be sure, the matter in the District Court is a first appeal. Another second appeal with this Court is a "third round" in the entire proceeding, and therefore leave [to appeal] must be granted (compare: MCA (Civil) 4511/05, Bat Yam Municipality v. Ganei Yafit Building & Investment Co. Ltd (July 17, 2005); ALA (Civil) 3385/08, Market Place Systems Ltd v. Teletel Communication Channels Ltd, paragraph 12 (September 25, 2008)). The same result is warranted under the framework that existed before the Amendment to the Act (see ALA (Criminal) 2741/96, Galanti v. State of Israel (April 17, 1996); MCA (Criminal) 424/06, Amar v. Channel 10 News Ltd (February 2, 2006)). Accordingly, contemplating whether the Amendment to the Act applies in our case (here, it should be noted that the first decision of the Magistrates Court,which placed a gag order on the details of the entire case, was given before the Amendment came into force) is unnecessary.

2. It emerges then that the Appellants filed an appeal without having the right to do so. The question therefore arises how one should treat this appeal: can it be converted into an application for leave to appeal, or should it be dismissed for having been submitted without a right to do so? The answer to this question might be influenced by another: since no regulations have been promulgated with regard to the procedure, should this appeal be governed by the Civil Procedure Rules, 5744-1984, or by the provisions of the Criminal Procedure Act [Consolidated Version], 5742-1982? Insofar as the appeal is heard as a civil proceeding, the rule is that the appeal cannot be converted into an application for leave to appeal (see, for example, Civ.App. 8154/03, Altori v. Arieh Israel Car Insurance Co. Ltd, paragraph 8 (August 15, 2005); Civ. App. 4540/04, Matach – Educational Technology Center v. Orbuch (September 14, 2006); however, see Civ.App. 2201/07, Choninsky v. Atlantis Multimedia Ltd, paragraph 14 (February 2, 2009)). Insofar as the appeal is heard as a criminal proceeding, the question whether it may be converted into an application for leave to appeal has yet to be clearly answered in our case law.

   Since in this case the Applicant filed an application for leave to appeal and since in any event we believe the matter's importance justifies considering the application as though there was notice of appeal so that the issue will be determined on merits, we also saw no need to decide these questions, and we will leave them for future consideration.

3. To conclude the procedural issues, we would emphasize that though the Applicant's application for leave to appeal was considered by a panel of three, only one justice of this Court need rule on an appeal against a judgment of the District Court regarding the Magistrate Court's decision to impose or revoke a gag order (section 70D(b) of the Courts Law)).

We now turn to discuss the appeal on its merits.

A gag order prohibiting publication of a suspect's name or other investigation details

4. The issue of a gag order prohibiting publication of identifying details of crime suspects calls for balancing opposing basic principles and constitutional rights. On the one hand, there is the fundamental principle of public hearings and proceedings, a principle enshrined in section 3 of the Basic Law: The Judiciary, and in section 68 of the Courts Act. This principle dictates that as a rule, the details of judicial proceedings, as well as the identity of the litigants, shall be available to the public. This principle is consistent with the broad view that freedom of expression and the public's right to know are basic principles in a democratic regime, designed to guarantee transparency and serving as a check on the integrity and adequacy of proceedings, so as to strengthen the public's confidence in the judicial system (MCA (Criminal) 5759/04, Turgeman v. State of Israel, PD 58 (6) 658, 662-664 (2004) (hereinafter, "in re Turgeman"); MCA (Criminal) 5153/04, John Doe v. Yedioth Ahronoth, PD 58 (6) 933, 938 (2004); MCA (Criminal) 1071/10, John Doe v. State of Israel, paragraphs 6-9 (February 25, 2010); MCA (Criminal) 1770/10, John Doe v. State of Israel, paragraph 6 (March 5, 2010)). On the other hand, there are the rights to dignity, reputation and privacy; these too are basic rights in our system and are enshrined in sections 2, 4 and 7 of the Basic

Law: Human Dignity and Freedom (MCA (Criminal) 1659/11, Stenger v. State of Israel, paragraph 6 (April 26, 2011); Civ.App. 1697/11, A. Gutman Architects Ltd v. Vardi, paragraph 12 (January 23, 2013) (hereinafter, "in re Vardi"); Civ.App. 751/10, John Doe v. Dayan-Orbach, paragraphs 75-79 of the judgment of Deputy President E. Rivlin, paragraphs 3-4 of the judgment of Justice Y. Amit (February 8, 2012) (hereinafter, "in re Dayan")). A derivative of liberty rights is that unless prosecuted and convicted, everyone is presumed innocent (MCA (Criminal) 8698/05, Azulai v. State of Israel, PD 60 (3) 168, 174 (2005)). There is no doubt that identifying a person as a crime suspect affects his reputation and privacy and might cause great and irreversible harm. "The publication of a suspect's name during a criminal investigation, and before an indictment, might be extremely injurious, especially if at the end of the day the investigation concludes without an indictment. The negative image that sticks to a person once his name is published as a crime suspect might last a lifetime, even if at the end of the day the investigation did mature into prosecution" (the words of Justice Ayelet Procatzia in MCA (Criminal) 1071/10, paragraph 8; see also in re Turgeman, on page 670; Civ.App. 214/89, Avneri v. Shapira, PD 43 (3) 856-957 (1989); Yuval Karniel – "Publication of Suspects' Names – Freedom of Expression versus a Person's Reputation", Human and Civil Rights in Israel – page 392 (Tali Ben-Gal *et al* Editors, 1992)).

5. The legislature instructed on the appropriate balance to strike between these opposing rights, holding that the principle of public hearings and proceedings and the public's right to know are the rule, and that they shall yield to the need to protect a suspect's reputation and privacy when exceptional circumstances exist (MCA (Criminal) 1071/10, paragraph 9; in re Turgeman, on page 663). Section 70(e1)(1) of the Courts Act, which details one of the circumstances, provides:

> The court may prohibit publishing of the name of a suspect who has yet to be indicted or other investigation details if it believes that publication might cause the suspect grave harm and that preventing that harm is preferable to the public interest in publication; if the court imposes a gag order prohibiting publication of the name of a suspect who has yet to be indicted, the order shall expire upon the suspect's indictment, unless the court has determined otherwise.

7. This section confers on the court discretion to prevent identification of a person who is suspected of criminal offences when the interest in protecting his reputation outweighs freedom of expression and the public interest in knowing. A court shall prohibit publication when two aggregate conditions are met. First, the suspect must show the publication might result in "grave harm" to the suspect. It should be emphasized that "ordinary harm" to the suspect is insufficient for the section's protection to apply. "Publication that is not exceptionally harmful does not trigger the exception" (MCA (Criminal) 1071/10, paragraph 9; see also Civ.App. 2430/06, Yedioth Ahronoth Ltd v. Goldberg (June 4, 2006)). Regarding the question whether a publication might cause "grave harm," a court will consider, *inter alia*, the following factors: the suspect's personal circumstances, his physical and mental state, the nature of the suspect's occupation and whether it involves contact with people, whether

the suspect is a public figure (in which case the harm that publication would cause is greater), whether the suspect has small children who will be harmed by the publication, thereby increasing harm to the suspect, whether the suspect has a relevant criminal history (in which case the harm is diminished), the type and gravity of the offence, and the weight of the evidence gathered in the investigation (in re Turgeman, on pages 670-671).

The second condition is that preventing grave harm to the suspect should outweigh the public interest in publication. There are two levels to this public interest: the general and the particular. The general level concerns the fundamental principles of freedom of expression, public hearings and proceedings and the public's right to know. According to (former) Justice M. Cheshin: "This aspect of public interest in publication requires neither proof nor argument. It is self-evident, a starting point for the journey of interpretation. It is a conclusive presumption—let us say, an axiom—that the public has an interest in the publication of court proceedings; court proceedings are in and of themselves interesting to the public and this interest exists in all proceedings" (in re Turgeman, on page 667). In order to determine the extent of the public interest in publication on the particular level – the Court will consider, *inter alia*, the nature of the acts that the suspect is suspected of committing; the extent to which the publication of the suspect's name or details of the case might put the public on guard and influence its conduct (and satisfaction of a mere need for gossip does not fall within the scope thereof); whether a public figure is implicated, in which case the public has a greater interest in the case, if the publication can advance the investigation and uncover the truth (for example, if the publication might encourage other victims to come forward), the weight of the evidence gathered against the suspect, the anticipated date of indictment, and the extent to which details of the case were published prior to submitting an application for a gag order (ibid, on pages 667-668).

In my view, the two conditions listed in section 70(e1)(1) are inter-related and there is a reciprocal between them: the greater the public interest in publication, the more the applicant-suspect will be required to prove that the harm to him, both in terms of likelihood and in terms of extent, is greater. Once a likelihood of "grave harm" and its extent are proven to be very great, a greater public interest is necessary to dismiss the application for a gag order.

Preventing the suspect's identification

6. As discussed above, the purpose of section 70(e1) of the Act is to prevent the result of grave harm to a person identified as a crime suspect. The section authorizes a Court to reach this purpose in two alternative ways: one is by imposing a gag order prohibiting publication of the suspect's name. This prevents identification if, as a result, a reasonable person is unable to connect the published information to a specific person (in re Vardi, paragraph 18). However, this will not prevent identification if the publication includes other details that make it possible to identify the suspect (ibid, paragraph 21; Civ.App. 8345/08, Ben Natan v. Bakhri, paragraph 34 (July 27,2011)). Accordingly, the legislature expressly defined: "a suspect's name . . . including any other detail that might identify the suspect" (section 70(e2) of

the Act). Hence, insofar as a court finds that the suspect's identification can only be prevented by imposing a gag order on publishing details of the whole case, it may do so. The second way to reach the section's purpose is to impose a gag order against publishing other investigation details, without prohibiting publication of the suspect's name. This is intended for situations in which publication of the suspect's name together with certain investigation details would not cause the suspect grave harm, but the publication of a specific detail—for example, suspicion of committing a particular offence among several offences—might cause the suspect grave harm.

7. "Another detail that might identify the suspect" is a detail that passes the "de-anonymization" test. According to this test, "if anyone has key details enabling them to perform 'reverse engineering', i.e. to attribute the published information to a particular person, these details must be considered to be identifying information" (in re Vardi, paragraph 22). The information that might lead to identification of a suspect can be divided into two types. One is information that could enable identifying an anonymous suspect. This means information that includes public, distinguishable and unique characteristics that make it possible for a reasonable person made aware of the case's details for the first time through the publication to identify the suspect involved. The publication of such information might have similar consequences to publishing the actual name. A second type is information that could enable identification of a well-known suspect. This means information that enables a specific person, who has prior knowledge of the suspect or the case, to connect the publication to that information, and identify the suspect. The type of identifying detail, the first or second type, has implications for the extent of the harm the publication could cause the suspect. The premise is that publication that enables any person to identify the suspect (publication of the first type) might cause greater harm than publication that enables identification of the suspect by a more limited number of people (publication of the second type). However, this is only a starting point.

A gag order, the Internet and everything in between

8. The Internet has generated extensive changes in our world. Alongside its many advantages, the Internet poses significant legal challenges. There is no denying that the anonymity characterizing cyberspace somewhat facilitates the commission of torts, and sometimes the commission of criminal offences as well. Against this background, there are those who argue that the digital age has eroded the efficacy of gag orders; after all, the ways to violate it are many and simple. According to this approach, the reason for granting gag orders that permit publication of cases' details without publishing the suspect's name has weakened, because the order may be easily violated and the suspect's identity would become common knowledge. This position must be rejected. The premise is that a court order is not merely a recommendation. Every person is obligated to strictly comply with an order—any order. Public order requires that court orders be complied with, and public interest mandates that the public should know that a court order is followed effectively and that court proceedings were not in vain (ALA (Civil) 3888/04, Sharvat v. Sharvat, PD 59

(4) 49, 58 (2005); the words of His Honor Judge S. Joubran in HCJ 8707/10, Hess v. Minister of Defense (February 3, 2011)).

9. We are not blind to virtual reality and the difficulties of enforcing the law in cyberspace. As is known, there are sometimes real technological challenges to identifying a wrongdoer operating in the shadow of the Internet, especially when that same wrongdoer makes intentional efforts to avoid detection (ALA (Civil) 4447/07, Mor v. Barak E.T.C. (1995) International Telecommunication Services Ltd, paragraph 10 of the opinion of Deputy President E. Rivlin (March 25, 2010) (hereinafter, "in re Mor")). However, even given this, the concern that gag orders will be routinely violated should not be exaggerated. Contrary to widespread opinion, freedom of expression on the Internet is not absolute. Although the cyber community engages in many and varied activities, such as chat rooms and forums, blogs and content sites, users' attention is focused primarily on central content providers. As a rule, these providers supervise the content published on their platforms. Moreover, communities that operate under the auspices of official content providers have trained managers who actually serve as regulators and make sure, *inter alia*, that the content complies with legal requirements. In fact, members of the community themselves might also act as regulators for the purpose of maintaining order. These are all important self-regulatory mechanisms, which might help ensure gag orders are followed on the Internet (see and compare: Karine Barzilai-Nahon and Gad Barzilai, "Actual and Imagined Freedom of Expression on the Internet: On the Abolishment and Rebirth of Censorship", Quiet, Speaking! 483, 485, 491-497 (Michael Birnhack, Editor, 2006)).

One should not overlook that when a case is earth-shattering or expected to have a particularly wide impact that extends beyond the borders of the State, it is possible that in the Internet age an order will not prevent information about the affair from quickly becoming common knowledge. Accordingly, in those exceptional cases a different position might be necessary. Since, and as detailed below, this case is not one of those cases there is no need for me to lay down hard and fast rules about this category. The discussion below will not refer to it, and it shall remain open for future consideration.

10. In addition to the self-regulatory mechanisms on the Internet detailed above, there are State law enforcement mechanisms. Law enforcement authorities must make a constant effort to keep up with technological developments so that offenders can be brought to justice, for which purpose they may use the tools the legislature has put at their disposal. We live in a law-abiding country and violating a court order has consequences in the real world. Thus, violating a gag order might carry various sanctions: anyone harmed by the violation may recover from the wrongdoer for breach of a statutory duty under section 63 of the Torts Ordinance [New Version]; the order's violation might constitute a criminal offence under section 70(f) of the Courts Act; and violation can be considered contempt of court under section 6 of the Contempt of Court Ordinance, a section that authorizes a court to compel one to comply with an order through a fine or arrest.

11. Indeed, one should not overlook the fact that publication of the details of an investigation in which there is public interest, even in general terms and

without noting the suspect's name, will garner greater and faster exposure than in the past. Deputy President E. Rivlin addressed this as follows:

> "The Internet is the new "town square" where everything is shared. The new medium – cyberspace – is everywhere and is open to all. The tools it offers, including 'chat rooms', e-mail, surfing the World Wide Web (browsing) and social networks – make it possible to obtain and pass on information, 'listen in' on others' opinions and voice one's own. It is therefore a quintessential democratic means to advance the principle of equality and protect against government intrusion on freedom of speech through legislation. The keyboard is available to every writer, and tapping a 'mouse' takes the written word to all four corners of the Earth. The public does not need, as it did in the past, a platform provided by others . . . [a]ny member of the public may and can create a 'newspaper' of his or her own and say his or her piece in a blog" (in re Mor, paragraph 14; see also Asaf Harduf, "Online Crime" 134-135 (2010)).

The more interesting a case is and theof more individuals' interests that may be impacted, the more reasonable it is to assume that a wider public will discuss it online. In the case of a publication that attributes to a person an offence that involves particular revulsion and disgust, the publication might rumors about the identity of those involved and raise suspicions against specific people.

12. We would again mention that an important and central characteristic of publication on the Internet is the possibility of anonymity. "The distinctiveness of talkbacks is in their anonymity, in the fact that they are posted in response to articles written by others and in the use of available platforms for voicing individual opinions. Involved therefore is an accessible and instant way [of communicating] that is free of geographical borders and frequently free of filtering and editing, not to mention—also anonymous" (in re Mor, ibid). It is undisputed that in today's reality a person wishing to publish something online and remain anonymous may do so without any real difficulty, and that there are many people who exploit this anonymity and break the law under the assumption that it will be impossible to identify them and bring them to justice (See and compare: in re Mor, paragraphs 10-17; Civ.App. 9183/09, The Football Association Premier League Limited v. Peloni (May 13, 2012); the explanatory notes on the Draft Exposing the Identity of a Publisher of Online Content Act, 5772-2012, Government Bills 1376; Michael Birnhack "Exposure of Anonymous Online Browsers", "Laws" on 51 (2010); Michael Birnhack, "Private Space – The Right to Privacy between Law and Technology" 299-300 (5771); Amal Jabarin and Yitzhak Cohen, "Importance of the Identity of Anonymous Internet Users – Institutional Viewpoint," Law Research 28 7, 8-10 (2012)). Although the premise is that the online press in Israel, as well as anyone notified of a gag order, will comply with the order, one should not overlook the fact that there are many Internet sites—including blogs, social networks and forums—that do not employ routine supervision, in real time, of everything published on them. Given this reality, it indeed is impossible to guarantee that a suspect's identity will not be exposed on the

Internet. Although it is possible to retroactively remove a prohibited publication published in Israel on the application of the suspect to the site after the fact, until the publication is removed from the site it might garner varying degrees of exposure.

13. In sum, the exposure of an investigation with potential for public interest, together with the possibility of anonymously publishing information on the Internet, increases the concern that the suspect's identity will be revealed despite a gag order. The greater the interest to the public, the greater the likelihood of the suspect's identity being revealed and that the suspect will be caused "grave harm" as a result. That said, assessing this likelihood involves a great degree of uncertainty. *Inter alia*, it is difficult to assess whether the suspect's name would indeed be leaked on the Internet and, as discussed, the presumption is that this would not necessarily happen. Factors to be considered are the period of time that would be required for a name to be removed, the extent and pace of exposure until removal, and the expected harm to the suspect (i.e. the likelihood that the suspect's identity is exposed coupled with the harm that might be caused if the identity is exposed).

14. When considering whether or not to prohibit publication of additional details, should a court take into account, *inter* alia, the possibility that a gag order will be violated, to the extent of imposing a gag order on the details of the entire case? In my view, this question should be answered in the affirmative. The object of section 70(e1)(1) of the Act is to enable a court to properly balance opposing interests—freedom of expression and the public's right to know, and protecting the suspects' reputation, privacy and presumption of innocence. An *a priori* finding that one should not include in the balancing equation the possibility that a gag order will be infringed—even when proved that this is a real possibility—will undermine the purpose of the section and the court's role in its realization. In my opinion, it is incumbent on the Court to also consider the likelihood that publishing the details of a case under investigation even without mentioning the suspect's name would lead to the suspect's identification and cause "grave harm." This likelihood and the consequent harm expectancy will in any event be considered on the merits and according to the circumstances, although one can point to, without exhaustion, the following guiding considerations: the extent of the interest the case might generate, the extent of the impact and exposure resulting from this interest, possible motivations of those who know the suspect's identity to reveal it and whether the suspect has specified a concrete person with such motivation, and possible motivations of those who do not know the suspect's identity to learn it.

15. To be sure, in the circumstances described above, it cannot be presumed that the identity of the person whose name and any identifying detail has been prohibited for publication will be exposed. Vague arguments regarding possible future violation of a gag order are not a good reason for refusing to grant the order to begin with. As emphasized, the argument that possible future violation of a gag order makes granting it superfluous must fail because the practical implications of accepting such an argument are that granting the order is futile, and that those applying for orders must cease making

applications to the court—even if there their application is with merit. Possibility of infringement does not justify rejecting applications for orders where prohibition is warranted. If this is done in a democracy— "freedom and anarchy will become synonymous" (compare: Crim.App. 126/62, Dissenchick v. The Attorney-General, PD 17 169, 179 (1963)).

The premise is therefore that an order will be followed and that it is sufficient to prevent identification. A suspect applying to prevent publication of additional details to the point of a blanket gag order covering the details of the entire case must show that in their specific circumstances, there is a real concern—that is, not a vague concern—that the order will be infringed, that the publication will result in identification, that the identification will cause "grave harm", and that the public interest in preventing this harm outweighs the public interest in publication.

From the general to the particular

16. The Magistrate Court set aside the blanket gag order that was initially imposed on the entire case, and instead granted a gag order prohibiting publication of the suspect's name, place of residence, the location of his clinic, and any other detail that might result in his identification. In doing so the Magistrate Court assumed that publication of any of these details might result in identification of the Respondent, that he would be caused grave harm as a result, and that preventing the harm outweighs the public interest in publication. The Applicant and the Appellants did not object to this decision, and rightly so. In my opinion, the circumstances of the case fulfill the conditions tipping the scale in favor of prohibiting the Respondent's identification. With regard to the first condition, there is no doubt that publishing the Respondent's name would have caused him "grave harm." "The disgrace that follows sexual offences against minors is very powerful, and it is one of the lowest offences that carry such disgrace" (in re Turgeman, on page 672). The potential harm to the Respondent's reputation and to his privacy should he be identified is significant and obvious. This harm is intensified in light of the Respondent's occupation and the harm that publication would cause to his livelihood. The Respondent has children who are not aware of the suspicions against him and the publication would also harm them thus increase the harm to him. The Respondent has no criminal history. Currently, the District Attorney believes there is insufficient evidence to establish reasonable prospects of a conviction and that the Respondent should not be prosecuted, even though this decision is subject to appeal before the State Attorney and thus is not final (and it should be emphasized that we are not expressing any position regarding the appeal's prospects).

As to the second condition, concerning the public interest in publication, here too, the scales tip in favor of preventing the revealing of Respondent's identity, as opposed to imposing a blanket gag order on the entire case. Although the act that the Respondent is suspected of committing is indeed serious, at this stage, the Prosecution believes that the weight of the evidence against him is not sufficient to warrant prosecution. The State did not argue that the publication of his name might encourage additional complaints against him. It did not try to suspend his license and he is continuing to work in his

field. Nor was it argued that the publication of the Respondent's name would advance the investigation and discovery of the truth. The Respondent is not a public figure. In these circumstances, the main argument for publishing details of the case is freedom of expression, public hearings and proceedings and the public's right to know, as well as the public as a check on the investigating authority and the Prosecution. For such purposes, publishing the name is not essential.

17. Should a blanket gag order have been imposed on the details of the entire case? The premise is that the Respondent's identity should not be exposed. In order to prohibit publishing additional details—to the point of imposing a blanket gag order (as ordered by the District Court)—the Respondent should have shown that had publication of other details not been prohibited, he would be occasioned "grave harm"; and that the interest in protecting his reputation and privacy in the circumstances of the case takes precedence over the public interest in knowing the details of the affair. I will now turn to review these conditions.

Did the Respondent meet his burden to show he would be caused "grave harm"? It is undisputed that since publishing the Respondent's name (including any identifying detail) falls under the gag order, the likelihood that a reasonable person who is not acquainted with the Respondent would link him to the crimes of which he is suspected and identify him is inherently diminished. The likelihood that he will be caused "grave harm" is therefore considerably low. However, the Magistrate Court's gag order does not eliminate the possibility of identifying the Respondent. The Respondent argues there is a real concern his name would be leaked on the Internet or that the rumor mill would point to him and cause him "grave harm." As noted above, there is an inherent difficulty in predicting how matters will develop and one cannot avoid an assessment that is based on life experience, logic and common sense, with assistance from the guiding considerations delineated above.

18. Given the nature of the case—suspicion that a therapist who treats young children committed sexual offenses on a patient—it is reasonable to assume that its publication will generate interest among parents whose children are treated by a male therapist. It is possible that parents who learn of the case will try and find out who is involved and to make sure that the person treating their child is not the Respondent. It is also possible that therapists—who are not necessarily aware that a gag order has been granted—will be interested in who is involved; and hence the publication will garner exposure and create an impact. This discourse will somewhat increase the likelihood Respondent will be identified or suspected. It should also be noted that the District Court expressed concern that the Applicant's family will expose the Respondent's identity "in roundabout ways."

19. Even though one cannot rule out the possibility that the Respondent's identity will be revealed despite a gag order prohibiting the publication of his identity, it appears that the expectancy of grave harm that might be caused to the Respondent is low. I will clarify. Firstly, I am aware that the District Court believed that the statements of the Applicant's family vis-à-vis the Respondent

increase the concern "that his name will, in roundabout ways, be linked to the event." However, I believe that this finding is insufficient to establish a real concern that the order would be violated. The reality is that until now the family has not violated the order, directly or indirectly. Secondly, the Respondent's arrest and the nature of the suspicions against him were published in mainstream media for a short period of time until they were removed, but his identity, he agrees, remained confidential, and the publication did not result in the "violating" publications he fears. This shows that this case is not one of those "special and exceptional" cases I discussed above, and attests to the proper weight that should be given to concerns regarding violations of the order and harm expectancy. Thirdly and primarily, while a gag order prohibiting publication of any identifying detail stands, without identifying publication by any credible media outlet these publications would amount to nothing more than rumors or suspicions, even if there were violating "leaks." It goes without saying that the harm that might be caused as a result is infinitely less than the harm caused by an identifying publication in the central media in the absence of a gag order.

20. Against the expectancy of grave harm, which is not high, one should weigh the public interest in publication. This balance leads to the conclusion that publication of the case's details should be permitted, without the Respondent's name or any detail that could lead to his identification. We discussed above the importance of public hearings and proceedings and the public's right to know generally, and there is no need to repeat this. On the level of the particular, the following should be considered:

Firstly, publishing the suspicions against the Respondent and the symptoms that the Applicant displayed might increase parents' awareness and vigilance about the type of harm that the Respondent is suspected of causing, draw parents' and other therapeutic bodies' attention to signs of distress minors display, and encourage parents to take reasonable precautions. Such publication might even facilitate public discussion on the issue. It is important and appropriate to respect the public's right to know and to give the public the power to choose whether and how to respond.

Secondly, there is no need to elaborate on the fact that media scrutiny is a cornerstones of any democracy and that enforcement authorities are not immune to this, including in this case. In such context and as a matter of principle, timing should also factor. As a rule, one should aspire to enable the press to publish in real time concrete information about newsworthy cases on the public agenda, since "the democratic system of governance is sustained, and even dependent on a free flow of information about the central subjects influencing public life and private life" (HCJ 1/81, Shiran v. The Broadcasting Authority, PD 35 (3) 365, 378 (1981)).

8. To be sure, when considering the weight of the public interest one must consider that a decision to prosecute has yet to be made and that the District Attorney's position is that there is insufficient evidence to do so. This information somewhat reduces public interest in publication, although it does not eliminate it (compare: Crim.App. (Tel Aviv District) 989/79, Borochov v. Yafet, DJ 5743 (B) 521 (1983); Uri Shenhar, The Law of Defamation 243

(1997); Eitan Levontin "The Authority to Limit the Publication of Suspects' Names", "Mishpatim" 30 249, 253-255 (5760); Raphael Bashan "The Journalist and the Public, Interview with the President of the Israel Press Council, Mr. Yitzhak Olshan", Journalists' Yearbook 7, 11 (5726)). One should also take into account that a decision on the State Attorney's appeal is still pending, such that this result might change (of course without taking a stand). Accordingly, though the public interest is intertwined, *inter alia*, with the question whether the Respondent did in fact commit the acts of which he is suspected, the status of decisions regarding possible prosecution does not lead to the conclusion that at this time this case is of no interest to the public.

Before closing it should be emphasized that all this does not amount to taking any stand on the question of the proper balance should the Applicant's appeal be dismissed, and the decision not to prosecute the Respondent becomes final.

Conclusion

21. From all the above, I believe that when balancing between the expectancy of "grave harm" that might be caused to the Respondent from a limited publication, which is, as clarified, not high, and the public interest in publication, publication of the case should be permitted, while omitting the name of the Respondent and any identifying detail. I therefore propose to my colleagues that the appeal be upheld and that the Magistrate Court's order be reinstated.

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Judge Y. Amit

I agree with the judgment of my colleague Justice U. Vogelman, and would briefly add and remark as follows.

1. As noted by my colleague at the beginning of his remarks (paragraph 5 of his judgment), the parties assumed that the Respondent qualifies as a "suspect" under section 70(e2) of the Courts Act [Consolidated Version], 5744-1984 (hereinafter, "the Courts Act") as "someone against whom a criminal investigation has been commenced." *Ex facie*, it seems that section 70(e) refers to a "suspect" before a decision regarding prosecution is made, as emerges from the provision that a gag order will expire "on the filing of charges." However, the Respondent in this case is not the usual "suspect" to whom the section refers; his status is that of a "former suspect" in that the investigation into his actions has been completed, a decision not to prosecute has been made, an appeal against the decision has been dismissed, and an appeal before the State Attorney against that decision is still pending. Nonetheless, since the parties referred to the Respondent as a "suspect" and since section 70(e) is the section most applicable to this case, I see no impediment to treating that section as the relevant statutory framework. In any event, and as noted by my colleague, this decision does not relate to the state of affairs after exhaustion

of appeal proceedings against the decision to end the investigation without prosecution.

2. Section 68(b)(5) of the Courts Act authorizes a court to hold a closed and confidential hearing "in order to protect the interest of someone complaining or who has been accused of a sexual offence " and section 70(a) of the Act provides that "a person shall not publish any information about a discussion that took place in a closed hearing without the court's permission." Hence, the Respondent is wondering how it is possible that had he been prosecuted and his status was that of "defendant," the court would have been authorized to hold a closed hearing and grant a gag order, but the court has no authority to grant such order to protect a suspect, let alone a "former suspect."

   To this I would reply that the question is not one of authority but one of discretion. A closed hearing is not the final word and cannot be considered an "automatic" gag order; rather, a court must find that the conditions for a full or partial gag order exist (Civ.App. 2800/97, Lifson v. Gahel, PD 43 (3) 714 (1999); HCJ 6005/93, Eliash v Judge Shmuel Tzur, PD 49 (1) 159 (1995); ALA (Civil) 3007/02, Yoav Yitzhak V. Moses, PD 56 (6) 592 (2002); MCA (Criminal) 8698/05, Azulai v. State of Israel (October 19, 2005)).

3. I do not deny that the likelihood the Respondent's identity will be exposed is considerable. His family and close friends are aware of the case and, as argued, it should be assumed that the publication would create a "buzz" about his work in therapy. Neither do I make light of the Respondent's argument that the investigation and brief arrest were traumatic for him, and that the mere fact of publication will exacerbate his emotional injuries.

   Additionally, I found it hard to see the great public interest in the case (the use of the word "case" relates to the proceedings in their entirety and does not derogate from the Respondent's argument that so far as he is concerned there was no offence to create a case to begin with). Regrettably, sexual offences garner almost daily reports in the media, sometimes even sensationalist coverage at the beginning of news edition and in bold newspaper headings, such that I doubt publication of this case would increase public awareness and vigilance. I also wonder how the public might be disadvantaged if publication is delayed until the State Attorney's decision on the Applicant's appeal, if only to alleviate the Respondent's concern that the publication is designed to pressure the Prosecution.

4. Nonetheless, I believe publication should be permitted within the limits the Magistrate Court has established, such as being motivated by the following.

   Firstly, the Respondent's case has already been reviewed and considered by two mechanisms, and both decided there was no room to prosecute. Actually, given his current status of "former suspect," someone who enjoys a somewhat "greater" presumption of innocence, the harm that might be caused because of the publication is less than that which would be caused to an ordinary "suspect," whose case has only been brought before a court, for example, in the process of requesting an arrest warrant.

Secondly, the argument that as long as the appeal is pending with the State Attorney there is no case, and in any event there is no public interest, should be rejected. The public has an interest in reviewing reasons for the investigation and prosecution authorities' decisions, and the public's right to know does not necessarily depend on the result these authorities reach.

In essence, non-publication of identifying or other details should be distinguished from non-publication of the case's existence itself. The Respondent referred to the matter of The News Company (Crim.App. 11793/05, The Israeli News Company Ltd v. State of Israel (April 5, 2006)), but that case also involved the blurring of identifying details only, and not a gag order on the entire matter, despite the concern that blurring would be ineffective in the complainant's close circle. The legislation and the case law primarily deal with publishing identifying details of a suspect, an accused or complainant of sexual offences. Thus, section 70A of the Courts Act deals with an "application regarding publication of a suspect's name" and section 70B deals with "parties to an application regarding publication of a suspect's name." The Draft Courts Act (Amendment No. 31) (Prohibition of Publication), 5761-2001, DL 496, states it aims to expand the Court's authority [and] ". . . prohibit publication of a suspect's name, even where [the court] found the publication could cause the suspect grave harm, while balancing the suspect's interest against the public interest in publication [.]"

To be sure, the emphasis is on publishing identifying details about the suspect, as opposed to publishing the existence of the case or the proceedings. Thus, in In re Turgeman, in the context of a gag order prohibiting publication of a suspect's name, Justice Cheshin left the question "what is the fate of a gag order where it has been decided not to prosecute John Doe" undecided. A blanket gag order prohibiting publication of the fact that the events even occurred constitutes a case in the shadows. This result is difficult to accept both considering normative outcomes for the public's right to know and considering the practical possibility of losing information in the bustling Internet world.

And from another angle: ordinarily, when the police and the courts are not involved, there is no impediment to the media in publishing news about one's claim that they or their relative was a victim of a sexual offence. It is difficult to accept that the Respondent should find himself in a "better" position than any other person merely because investigation and arrest proceedings were instituted against him, by a gag order prohibiting publication of news about the very existence of the proceedings.

5. Against this background, I concur with the outcome of my colleague.

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Justice E. Hayut

I concur with the opinion of my colleague Justice U. Vogelman and her outcome. Nonetheless, I wish to make several comments.

1. As noted by my colleagues, the parties' premise was that the Respondent is still presumed a "suspect" as defined in section 70(e2) of the Courts Act [Consolidated Version], 5744-1984 (hereinafter, "Courts Act" or the "Act") and that section 70(e1)(1), which authorizes the court to grant a gag order against publishing the name of a suspect who has yet to be prosecuted, or of another investigation detail applies. This was indeed the focus of the decisions in the appeal and consequently of the parties' arguments. And rightfully so, as my colleague Justice U. Vogelman clarifies, since at this stage an appeal is still pending. Nonetheless, the Respondent's status is closer to that of a "former suspect" (subject to the decision on the pending appeal). Hence, the question: what is the fate of someone who was presumed a "suspect" after a decision not to prosecute was made and the appeal proceedings were exhausted? In such a case, is a court still authorized, under section 70(e1)(1), to issue a gag order in respect to the Respondent and, under such circumstances, what is the status of a gag order granted while he was still a suspect? This issue was not raised and thus was not clarified in the decisions and submissions before us. Hence, I will not elaborate on this and will settle for mere preliminary thoughts.

2. The end of section 70(e1)(1) of the Courts Act provides that if a court grants a gag order against publishing the name of a suspect who has yet to be prosecuted "the gag order will expire upon the suspect's prosecution." A possible interpretation of this provision is that "from the positive follows the negative" and therefore when a decision is made not to prosecute a suspect and the investigation is closed, the gag order remains in force. This approach is consistent *prima facie* with the view that once a decision not to prosecute is made, the former suspect's interest in protecting his reputation grows stronger, because, unlike a suspect who enjoys a strong presumption of innocence during the investigation stage, we are now dealing with someone whom law enforcement authorities have already decided should not be prosecuted. Accordingly, it can be said that once the investigation into a suspect has been closed, the balance between the public interest in public hearings and proceedings and the private interest of the former suspect whose details shall not be published shifts toward the private interest (for comparison regarding shifting the balance where there was prosecution: MCA (Criminal) 10731/08, Mitzkin v. State of Israel, paragraph 17 (January 4, 2009)). And indeed, in this context one cannot dismiss the approach that retroactive publication of a criminal investigation that ended might also harm the reputation of the former suspect and establish his negative reputation in the eyes of those who believe that "where there is smoke there is fire" (see and compare: MCA (Criminal) 1071/10, Moshe v. State of Israel, paragraph 8 (February 25, 2010); MCA (Criminal) 5759/04, Turgeman v. State of Israel, Piskei Din [Judgments] 58 (6) 658, 570 (2004)).

3. On the other hand, a gag order prohibiting publication is the exception to the rule regarding public hearings and proceedings and precedent instructs that exceptions are only permitted under circumstances expressly listed in the Act

(see MCA (Criminal) 8698/05, Azulai v. State of Israel, PD 60 (3) 168, 174 (2005)). Accordingly, and in the absence of express authorization to the Court under the Act to prohibit publication of the name or investigation details concerning a former suspect, there is merit to the argument that a gag order granted during investigation under section 70(e1)(1) of the Act expires not only upon prosecution (according to the end of the section), but also when a decision not to prosecute is made and the investigation closed. Then the general rule is restored and the principle of public hearings and proceedings applies in full. That publication after a decision not to prosecute alleviates harm to the former suspect's reputation because it is accompanied, naturally, by publishing the decision against prosecution supports this view (see Eitan Levontin "On the Authority to Limit Publication of Suspects' Names", Mishpatim 30, 249, 313-314 (5760)). In other words, contrary to publishing details about a suspect in the course of a criminal investigation where the suspect generally has limited tools to combat published suspicions, the mere decision not to prosecute provides the former suspect with a significant tool to protect his reputation from negative impact resulting from publication of an investigation that has ended. Since the gravity of potential harm to a former suspect's reputation diminishes as a result of publication, the balance shifts toward the public interest in maintaining pubic hearings and proceedings and publication about an investigation and its details once closed should not be prevented. It goes without saying that according to this approach, the former suspect is still able to object by bringing defamation suits against any publication of distorted, partial, or misleading information about the investigation (see ibid).

Thus, this issue cuts both ways and though my opinion sways in favor of the second approach, I am not required to decide here and the statements that I have made in a nutshell do not exhaust the issue.

Decided in accordance with the judgment of Justice U. Vogelman.

Given today, February 24, 2013.