CITATION: R. v. Sert, 2024 ONSC 2952
COURT FILE NO.: YC-21-50000001-0000
DATE: 20240527

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
	)	
HIS MAJESTY THE KING	)	*A. Pashuk and L. Matthews*, for the Crown
	)	
	)	
– and –	)	
	)	
	)	
OZUGHAN SERT	)	*M. Mattis and M. MacGregor*, for Mr. Sert
	)	
	)	*R. Gilliland and M. Robson*, for the Respondents
	)	
	)	
	)	

S.A.Q. AKHTAR J.

FACTUAL BACKGROUND AND OVERVIEW

Introduction

[1] Ozughan Sert pleaded guilty to first degree murder under ss. 235(1) and 231(2) and attempted murder under s. 239(1)(b) of the *Criminal Code*, R.S.C., 1985, c. C-46. The Crown successfully applied to have his actions legally defined to be terrorism within the meaning of s.83.01 of the *Criminal Code*

[2] On 29 November 2023, I sentenced Mr. Sert as an adult offender and imposed the maximum sentence of life imprisonment with a parole ineligibility period of 10 years.

[3] The Crown applies to have several exhibits sealed and subject to a permanent publication ban. This request is supported by counsel for Mr. Sert. However, the respondents comprising of the print and broadcast media oppose this application. .

Background Facts

[4] On 24 February 2020, Mr. Sert entered the Crown Spa (the "Spa") massage parlour in North York and was welcomed by A.A., the Spa receptionist. Mr. Sert was not interested in availing himself of any of the services provided by the Spa. He had come to kill its female employees.

[5] Mr. Sert drew a sword concealed under his coat and, without warning, stabbed A.A. causing her to fall to the ground. As she lay defenceless, Mr. Sert continued to flail away at her, inflicting over 40 stab wounds and killing her.

[6] A second employee, J.C., heard sounds of the attack and made her way to the reception area. Mr. Sert turned his attention to her stabbing her in the chest and calling her a "stupid whore" and "fucking bitch". He told J.C. he was going to kill her. He was wrong. J.C. managed to turn Mr. Sert's sword against him stabbing him in the back. After he had fallen to the ground J.C. successfully escaped.

[7] Police and paramedics arrived at the scene within minutes, and Mr. Sert was arrested. The sword was also seized and found to have the letters THOT, an acronym for "That Hoe Over There", inscribed upon it. A note containing the words "Long live the incel rebellion" was found in his pocket.

[8] When the police executed a warrant at Mr. Sert's address, they seized his laptop which contained various web-related search fragments of incel-related material. His 'Steam' gaming profile described him as an incel, an involuntary celibate. Police also found images of two notorious incel killers on the computer: Alek Minassian and Elliott Rodger.

[9] Post-sentence, the Crown and Mr. Sert seek the permanent publication ban on different exhibits. The respondents, the media, oppose their application. They submit that all of the exhibits tendered at Mr. Sert's trial should be accessible for public viewing.

LEGAL PRINCIPLES

The Test

[10] The test for ordering a publication ban has evolved in recent years. In the seminal case of *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835, 20 OR (3d) 816, the Supreme Court of Canada held that ss. 2(*b*) and 11 of the *Charter of Rights and Freedoms* interacted to order a publication ban "when (a) such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and (b) the salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban" (emphasis added): at p. 839.

[11] In *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442, the *Dagenais* test was broadened, at para. 32, to prevent a "serious risk to the proper administration of justice". The test expanded

further in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522, where the Supreme Court of Canada, at para. 53, reformulated the test to include any serious risk to an "important interest, including a commercial interest, in the context of litigation".

[12] The most recent incarnation of the test came in the case of *Sherman Estate v. Donovan*, 2021 SCC 25, 458 D.L.R. (4th) 361, at para. 38, where the Supreme Court of Canada held that the party seeking the publication ban would be required to show that:

> (1) court openness poses a serious risk to an important public interest;
>
> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
>
> (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

See also *R. v. Jackson*, [2023] OJ No 2909, at para. 19.

[13] In *Sherman Estate*, the Supreme Court of Canada emphasised the value of court openness as essential to the proper functioning of democracy as court reporting and "the media serve as the ears and eyes of the wider public" (citations omitted): at para. 30. Moreover, Kasirer J., writing for a unanimous court, made it clear that neither mere personal discomfort associated with participating in judicial proceedings nor individual sensibilities justify denying the public's right to know what is happening in our courts.

[14] Whether the interest is at serious risk is a "fact specific inquiry": *Sherman Estate*, at para. 76. In seeking to satisfy the test that an interest is at serious risk, the applicant may call direct evidence or ask the court to draw the risk from inferences grounded in objective circumstantial facts: *P1 v. XYZ School*, 2022 ONCA 571, at para. 34. The probability of harm and the gravity of that harm are factors to be taken into account: *Sherman Estate*, at para. 98.

[15] As applicant in this case, the Crown recognises that demonstrating that there is an important interest at stake and that court openness represents a serious risk to that important public interest is a "high bar". Both must be demonstrated for a discretionary confidentiality order to be granted by the court. That is, if the applicant demonstrates a serious risk, they must further show that there are no available reasonable alternative measures that could be used to prevent that risk. In *P1 v. XYZ School*, at para. 46, the Court of Appeal indicated that the focus of this part of the test rests on the minimal impairment of the open court principle.

[16] If the Crown convinces this Court that the first two limbs of the *Dagenais/Mentuck/Sherman Estate* test have been met, it must go on to show that the benefits of the order outweigh any deleterious effects. The test mirrors the *Oakes* test and requires an order derogating from the open court principle to:

(1) be necessary in order to prevent a serious risk to the proper administration of justice. There must not be reasonably alternative measures that could address the risk.
(2) have salutary effects that outweigh the deleterious effects on the rights and interests of the parties and the public.

[17] Mirroring *Oakes*, even where a limitation is considered justified, it needs to be carefully tailored to minimize interference with court openness. As part of this evaluation, the court should also consider whether the proposed information is central or peripheral to the judicial process: *P1 v. XYZ School*, at para. 66.

[18] Finally, in *R. v. B.M.D.*, 2022 ONCA 580, at para. 6, the Court of Appeal determined that the *Dagenais/Mentuck/Sherman Estate* test applies to "all discretionary judicial orders limiting the openness of judicial proceedings" (citations omitted). Similarly, in my view, as is the case with placing a permanent sealing order and publication ban on select items of evidence in this application.

Privacy as a Public Interest

[19] Both the Crown and Mr. Sert rely heavily on the necessity of privacy as a basis for a sealing order and publication ban.

[20] It is worth recalling Kasirer J.'s comments in *Sherman Estate* about the relevance of privacy interests and the threshold required to qualify those interests as being a serious risk to an important public interest.

[21] In defining the test, Kasirer J. held that the disturbance of offence to an individual's sensibilities would be insufficient to amount to an important public interest. However, where personal concerns related to public interests in confidentiality that might constitute a public interest under the *Sierra Club* principles: at para. 48.

[22] Kasirer J. equated violations of privacy to the impairment of dignity. In *Sherman Estate*, at paras. 71-73, he explained:

> Violations of privacy that cause a loss of control over fundamental personal information about oneself are damaging to dignity because they erode one's ability to present aspects of oneself to others in a selective manner (D. Matheson, "*Dignity and Selective Self-Presentation*", in I. Kerr, V. Steeves and C. Lucock, eds., *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (2009), 319, at pp. 327-28; L. M. Austin, "Re-reading Westin" (2019), 20 Theor. Inq. L. 53, at pp. 66-68; Eltis (2016), at p. 13). Dignity, used in this context, is a social concept that involves presenting core aspects of oneself to others in a considered and controlled manner (see generally Matheson, at pp. 327-28; Austin, at pp. 66-68). Dignity is eroded where individuals lose control over this core identity-giving information about themselves, because a highly sensitive aspect of who they are that they did not consciously decide to share is now available to others

> and may shape how they are seen in public. This was even alluded to by La Forest J., dissenting but not on this point, in *Dagg*, where he referred to privacy as "[a]n expression of an individual's unique personality or personhood" (para. 65).
>
> Where dignity is impaired, the impact on the individual is not theoretical but could engender real human consequences, including psychological distress (see generally *Bragg*, at para. 23). La Forest J., concurring, observed in *Dyment* that privacy is essential to the well-being of individuals (p. 427). Viewed in this way, a privacy interest, where it shields the core information associated with dignity necessary to individual well-being, begins to look much like the physical safety interest also raised in this case, the important and public nature of which is neither debated, nor, in my view, seriously debatable. The administration of justice suffers when the operation of courts threatens physical well-being because a responsible court system is attuned to the physical harm it inflicts on individuals and works to avoid such effects. Similarly, in my view, a responsible court must be attuned and responsive to the harm it causes to other core elements of individual well-being, including individual dignity. This parallel helps to understand dignity as a more limited dimension of privacy relevant as an important public interest in the open court context.
>
> I am accordingly of the view that protecting individuals from the threat to their dignity that arises when information revealing core aspects of their private lives is disseminated through open court proceedings is an important public interest for the purposes of the test.

[23] At para. 75, Kasirer J. described the information sought to be protected as a person's dignity to be information consisting of "intimate or personal details about an individual — what this Court has described in its jurisprudence on s. 8 of the *Charter* as the "biographical core"".

[24] At para. 85, the Court summarised the principles regarding privacy as a serious public interest:

> […] the important public interest in privacy, as understood in the context of the limits on court openness, is aimed at allowing individuals to preserve control over their core identity in the public sphere to the extent necessary to preserve their dignity. The public has a stake in openness, to be sure, but it also has an interest in the preservation of dignity: the administration of justice requires that where dignity is threatened in this way, measures be taken to accommodate this privacy concern. Although measured by reference to the facts of each case, the risk to this interest will be serious only where the information that would be disseminated as a result of court openness is sufficiently sensitive such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity. Recognizing this interest is consistent with this Court's emphasis on the importance of privacy and the underlying value of individual dignity, but is also tailored to preserve the strong presumption of openness.

[25] I now turn to put these principles into application.

WHAT SHOULD BE BANNED FROM PUBLICATION?

The Section 34 Report

[26] The Crown seeks an order redacting the contents of s. 34 report to protect the names of third parties who participated in its creation. The Crown argues that if this information was published it would lead to the risk of discouraging full participation in the court ordered assessment process necessary to produce accurate reports of this nature.

[27] In addition, both the Crown and defence ask that Mr. Sert's "irrelevant personal medical information" be removed as there is no public interest in divulging that information. They argue that release of this material would intrude into the privacy and dignity of Mr. Sert and the third parties. Mr. Sert also seeks the removal of any information relating to his parents.

[28] Mr. Sert's counsel has also provided a list of redactions to the s. 34 report which they submits should be subject to a permanent ban. These include:

1. Names of all the persons interviewed in the gathering of information, including Mr. Sert's mother and father.
2. Any reference to Mr. Sert's mother and or father or personal information.
3. Allegations of discreditable conduct by another person other than Mr. Sert.
4. Developmental history from birth to age 2 years old.
5. Personal medical information and comments relating to Mr. Sert.
6. Allegations of discreditable conduct by another person other than Mr. Sert. Mr. Sert's relationship with a third party.
7. Page 27 – Mental health information of a third party.
8. Any personal medical and dignity issues.
9. Page 31 Security – being targeted at institution.
10. Comments made by Mr. Sert relating to sexuality and hygiene.
11. The risk assessment.

[29] For the following reasons, I disagree.

[30] First, the Crown has not produced any evidence to demonstrate that publication of the report would serve to deter participation in the process. As made clear in *Sherman Estate* and *P1 v. XYZ School,* inferences may be drawn from circumstantial evidence if it exists. I see no such evidence in this case.

[31] Second, it is hard to understand how biographical evidence relating to the third parties, including Mr. Sert's parents,) impairs his dignity. Put differently, the mere fact that these persons are referenced in the report is not of itself a matter which engages a serious risk to a privacy interest framed as an important public interest. Any embarrassment and/or discomfort which may be caused is insufficient to justify the withholding of the information under the open court principle. This, as explained by Kasirer J. at para. 42 of *Sherman Estate*, is an example where "the identified

interests, regardless of whether they are at serious risk, do not have the requisite important public character as a matter of general principle".

[32] Third, the s. 34 report was a critical document — relied upon by both the Crown and the defence — in the hearing to determine whether Mr. Sert should be sentenced as an adult. The public is entitled to know what was placed before this when I concluded that Mr. Sert would face an adult sentence. I see no harm of any substance in permitting it to do so.

The Exhibits

[33] The Crown in its materials provides details of what it says does not require a publication ban and what parts of the exhibits should be sealed and banned permanently.

[34] This consists of the following:

a. The following appendices to Exhibit 1 (Agreed Statement of Facts):

i. Appendix "C" – Photos of J.C.'s injuries;
ii. Appendix "D" – CCTV and dash cam video (clips 11, 12, 13 and 14);
iii. Appendix "G" – Scene of crime (SOCO) and exhibit photos (PDF, at pp. 92-100; 104; 111-112; 119-120; and 134-144);
iv. Appendix "H" – Transcript of Mr. Sert's statement to the police;
v. Appendix "I" – Video of Mr. Sert's statement to the police;

b. Exhibit 4 – The curriculum vitae of T.E., the incel expert (pursuant to this Court's decision in *R. v O.S.*, 2022 ONSC 4128);

c. Exhibit 8 – The s. 34 *Youth Criminal Justice Act*, SC 2002, c. 1 ("YCJA") mental health report.

Mr. Sert's Statement, Note and Sword

[35] The Crown argues that the publication of the video and transcript of Mr. Sert's statement would create a serious risk to public safety. It relies upon the affidavit of Dan Peel and T.E.'s evidence on incel activity adduced in the *voir dire* to determine whether T.E. could give expert opinion. It argues that publication of this material; images of the sword used by Mr. Sert to kill A.A., contained in Appendix "G" to Exhibit 1; and the note found after he was arrested would result in the glorification of Mr. Sert's attack within the incel community and encourage copycat attacks.

[36] For the following reasons, I disagree.

[37] First, whilst T.E. and Mr. Peel have provided evidence of how the incel community praises acts of violence committed as a result of incel ideology, it is unclear how the publication of this material would encourage further violence. Mr. Peel refers to the fact that other incels had been

inspired by reading manifestos written by Elliot Rodger, who killed six people in 2014 in an incel motivated attack but provides no basis for concluding the materials sought to be suppressed would incite others.

[38] For the same reason I find that it is unclear how Mr. Sert's statement to the police explaining his motivations would inspire others to commit similar acts. It may be the act itself may encourage copycats but A.A.'s murder has already been reported in great detail in the media and to the public. The Crown has not shown how the publication of Mr. Sert's statement and its contents would become the source of inspiration for other incels to commit violence particularly when Mr. Sert's conduct in the murder is public knowledge.

[39] I take the same view with respect to the images of the sword and the note found on Mr. Sert when he arrested. Both items were described by news outlets in their reports of the incidents. The Crown has not shown how the publication of the images showing the sword and the note would now create or substantially change the risk of serious harm to the public when the details are already known. This is similar to the approach taken by my colleague Molloy J. in *R. v. Minassian*, 2020 ONSC 7167, at para. 29, and Pomerance J. in *R. v. Veltman*, 2023 ONSC 5063, at para. 33.

[40] In *Sherman Estate*, Kasirer J. recognised the fact that it was important to consider whether the information sought to be protected was already in the public domain. At para. 81, he said:

> If court openness will simply make available what is already broadly and easily accessible, it will be difficult to show that revealing the information in open court will actually result in a meaningful loss of that aspect of privacy relating to the dignity interest to which I refer here. However, just because information is already accessible to some segment of the public does not mean that making it available through the court process will not exacerbate the risk to privacy. Privacy is not a binary concept, that is, information is not simply either private or public, especially because, by reason of technology in particular, absolute confidentiality is best thought of as elusive (see generally *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390, at para. 37; *UFCW*, at para. 27). The fact that certain information is already available somewhere in the public sphere does not preclude further harm to the privacy interest by additional dissemination, particularly if the feared dissemination of highly sensitive information is broader or more easily accessible (citations omitted).

[41] In the circumstances of this case, however, the Crown has not shown how the publication of these items would cause further harm to public safety or any privacy interests.

The Photographs

[42] The Crown also seeks a sealing order and publication ban on images 92-100 of Appendix "G" to Exhibit 1.

[43] These photos depict A.A.'s legs when found by the police on their arrival and images of the bloody imprint left when A.A.'s body was removed. They also include J.C.'s injuries and blood spilt after she was attacked by Mr. Sert.

[44] The Crown makes its application on the basis that A.A. and J.C.'s family would be re-traumatized. It further argues that publication of these photos would pose a serious risk to the victims' dignity and be used to inspire others in the incel community to commit similar violent acts.

[45] Whilst I have no doubt that family members would find discomfort in viewing these images, their understandable grief cannot justify a publication ban. Moreover, the Crown has produced no evidence that the mere viewing of these images would inspire other incel violence. Accordingly, the Crown's request is denied.

[46] With respect to the images displaying Mr. Sert's banking information, passport, health card, SIN and school record, I agree that any personal and confidential information should be redacted.

The Video Evidence

[47] The Crown seeks the permanent ban of the video evidence showing Mr. Sert's attack on both A.A. and J.C. as the dissemination of the material would re-traumatize the victims' families and J.C. herself.

[48] Starting with the attack on J.C., I repeat my comments that the fact that may be difficult to view, the fact that J.C. and members of her family might be distressed if the video was released does not justify its suppression. Moreover, the attack on J.C. does not show her as Mr. Sert exits the reception area of the Spa and follows J.C. into an ante room which is obscured by opaque windows. J.C. cannot be seen as the video captures only a shadowed Mr. Sert flailing his arms in an attacking motion. I do not find J.C.'s dignity to be impaired in any way by this portion of the video.

[49] I take a different view with respect to the capture of the attack on A.A. She is seen on screen greeting Mr. Sert and his murderous attack upon her is captured in graphic detail. I find that this recording does immense damage to A.A.'s dignity in life depicting her death in a gruesome manner notwithstanding her attempts to defend herself. Mr. Sert is seen to momentarily stop, turn away and return to A.A. when he realizes that she is still moving.

[50] However, my concern is not based simply on the fact that the attack captured is so graphic. As Mr. Gilliland rightly points out, the media would be very unlikely to broadcast such a video. I also agree that if this was the only concern every case of a recorded murder would potentially be subject to a publication ban which clearly cannot be the case.

[51] Here, the difficulty arises because of the ideological motivation behind the murder.

[52] The release of this video and its contents into the public domain would cause a serious risk of further harm because of its availability to the incel community. Both Mr. Adkins and T.E., the expert who testified prior to Mr. Sert's plea of guilt, told the court about the incel culture. They specifically identified one of the key pieces of its culture: the glorification of the violence carried out in their ideological name and the lionization of the perpetrators. This group would have access to this recording and the ability to distribute it amongst its various groups and sub-groups for viewing. The method of dissimilation in the age of the internet and social media would mean that if no publication ban or sealing order were granted, the recording would be widespread amongst the incel community, a community which has no international boundaries according to T.E..

[53] This use coupled with the damage to A.A.'s personal dignity and that of her family because of the graphic nature of her death would pose a serious risk to the public interest under the *Dagenais/Mentuck/Sherman Estate* test.

[54] The question then becomes what reasonable alternative measures exist to prevent this risk? I find there are none that would prevent the risk of disseminating this video evidence.

[55] Turning to the third prong of the test, the preservation of dignity in this instance and the prevention of an abuse — not by the media but by the very ideological group that inspired this terrible murder — outweighs the negative effects of depriving the public access to the video.

[56] However, in order to minimize the restriction on court openness, I order that the video segment showing Mr. Sert entering the Crown Spa should not be subject to a publication ban. Specifically, the ban would start at the moment that Mr. Sert goes to draw his sword. That portion of the video and the entire attack on A.A. which follows is subject to a sealing order and a permanent ban. For the reasons set out previously, I find that the Crown has shown that this video segment meets the test set out in *Sherman Estate*. I note that this video footage segmentation method was also used in *Veltman* by Pomerance J. See *R. v. Veltman*, 2023 ONSC 5063, at para. 41.

T.E.'s Curriculum Vitae

[57] I have already ordered that T.E.'s curriculum vitae be subject to a publication ban as I found the revelation of the expert's identity would constitute a real and serious risk to the administration of justice: see *R. v. O.S.*, 2022 ONSC 4128.

[58] As I noted in that decision, the potential threat posed by the incel community to those involved in the research, investigation and exposure of that ideology and those that subscribe to its beliefs is real. Publication of their identities would act as a significant deterrent to any expert from providing information to the authorities or testifying at trials. There is no reasonable alternative measure to protect T.E.'s identity: a sealing order and publication ban is a proportionate measure to take in this case, as the benefits outweigh the negative effects.

CONCLUSION

[59] For these reasons, the applications for a permanent publication ban and sealing order are dismissed save for the following items:

- The video recording of Mr. Sert's murder of A.A. in accordance with the parameters set out above;
- The C.V. of the expert T.E.; and
- The redaction of Mr. Sert's personal information on his driving licence, SIN card, passport, school record and health card.

[60] The items enumerated above will be subject to a permanent sealing order and publication ban. If there is anything unclear about this order, the parties shall make efforts to appear before me to clarify matters.

S.A.Q. Akhtar J.

Released: 27 May 2024

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SUPERIOR COURT OF JUSTICE

BETWEEN:

HIS MAJESTY THE KING

– and –

OZUGHAN SERT

REASONS FOR JUDGMENT

S.A.Q. Akhtar J.