Sasha Borissenko: Did law need to make Grace Millane's private life so painfully public?

Sasha Borrisenko
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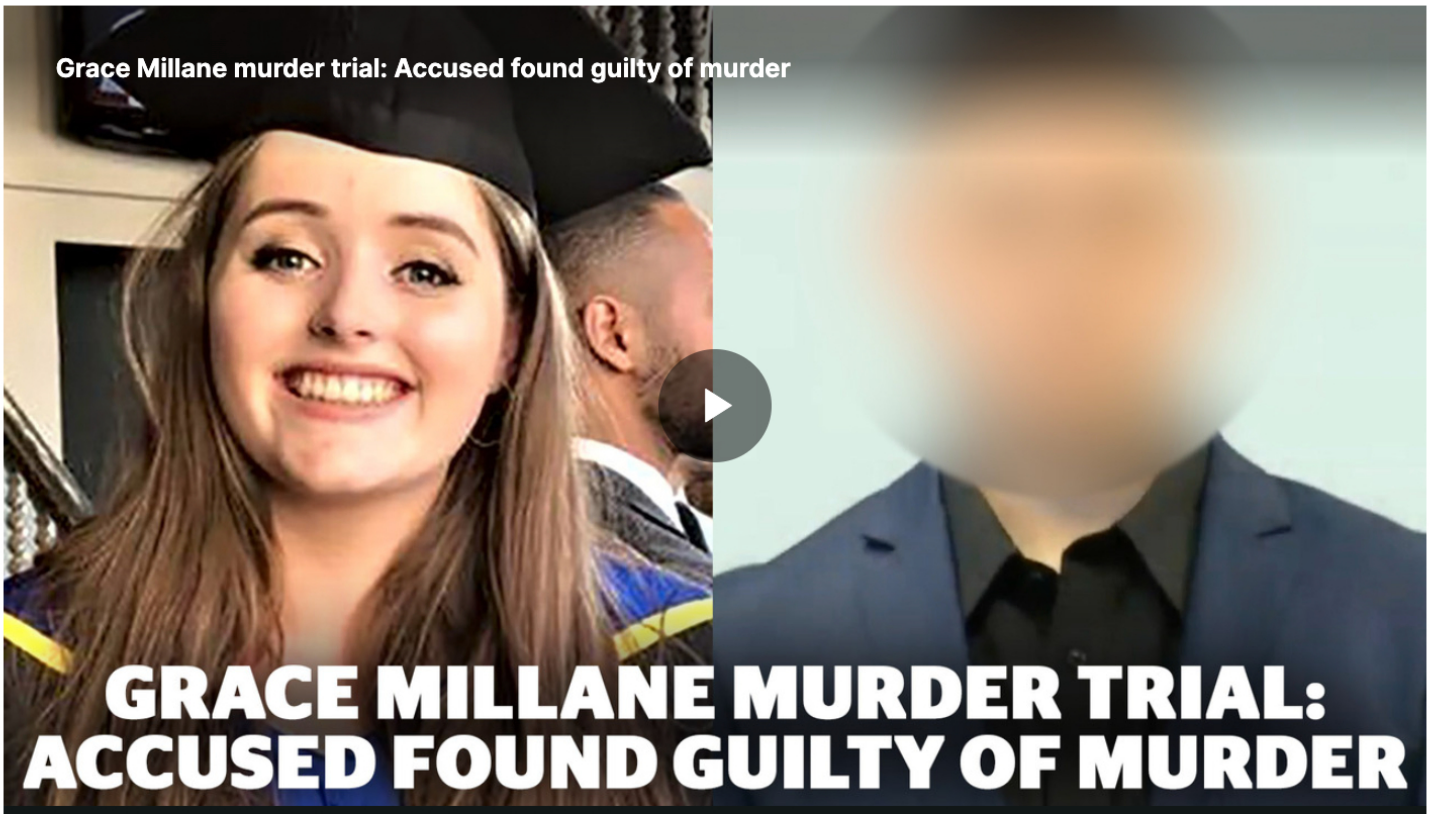

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COMMENT:

The Sexual Violence Legislation Bill's first reading may be a triumph for sexual violence survivors and advocates, but what about sexual violence cases that end in death?

For the case involving tourist Grace Millane, a natural justice argument would suggest defence counsel is not victim-blaming her, but trying to raise enough doubt to assume that the sexual act of strangulation was nothing out of the ordinary. She was an active
participant. It was a sex act gone wrong, it would have taken five whole minutes, sure, but she was inebriated!

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The problem here is that she's not alive to defend herself. We know you can't defame the dead, but perhaps this needs to change because it assumes a person - alive or dead - lives in a vacuum. I'd argue it comes down to an underlying belief that as women we are not allowed to be expressive or bold with our sexuality, and if we are, and we're killed in the process, we are at fault for putting ourselves in that position.

Meanwhile, the male perpetrator is not fully held responsible for his lack of impulse control. It is victim-blaming couched in patriarchal norms at a most fundamental level.

For Millane, whose private life has made media headlines for weeks now, one has to question whether it's truly a matter of public interest for us to know all of the private details.

Some cases are given more air-time in the media than others, but this comes
down to resourcing and the decline of court reporting generally. And then there are the financial benefits. If it bleeds, it reads. And politically, New Zealand benefits because we're making a stand by saying tourists should be safe to come here.

Does the principle of open justice and raising enough doubt have to come at the expense of the deceased, the deceased's family and friends, the former Tinder dates, and all of the women being cross-examined or for some witnesses, not cross-examined? And if it does,
shouldn't open justice extend to naming the accused?

University of Auckland law academic Dr Bill Hodge says open justice is important and vital for a democratic society with a robust and fair justice system and the "default" position is the naming of the defendant.

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"It's so bloody painful. I'm a parent. I've been a lawyer, and a teacher, and I get it that it's the price we pay for open justice," Hodge says.

"There are possible legitimate reasons for continued suppression, and while it is very frustrating, I can only believe that this is a temporary situation, a delay, and the ultimate outcome, down the track, will be publication."

We know about Millane's private life because it's a matter of open justice, yet open justice fundamentally conflicts with name suppression.

Strangely, the bar for name suppression is quite high under the Criminal Procedure Act 2011 and it's not as simple as naming the punters in the paper.

According to 2019 Ministry of Justice figures, 2129 final suppression orders were granted by the courts in 2009/10 but by 2018/19 this had fallen to 1286 - that's a 40 per cent drop.

Of these 1286 orders, 48 per cent were granted for people charged with "sexual assault and related offending" and 11.8 per cent for "acts intended to cause injury".

Three applications were granted for those charged with homicide or related offences.

Name suppression might be awarded if there are children involved; if there are mental health issues; the accused's family don't know of the offending; naming the accused might cause extreme hardship; the accused is under 17; safety is an issue; it's a sexual offending case not involving death; and the victim's name would be brought to light.

Suppression orders are seldom permanent, and contrary to popular belief, celebrity status wouldn't be a significant justification in and of itself.

The reasoning comes down to protecting surviving victims; and for the accused - who is innocent until proven guilty - has a fundamental right to a fair trial.

Under the Criminal Procedure Act 2011, once a suppression order is made no one can publish the person's name and any details that may identify them when discussing anything to do with the proceeding. Justice needs to be seen to be done.

But the act applies to publication in the New Zealand jurisdiction only, so that's why every man and his dog overseas knows exactly who the accused is in this case.

Ultimately, what we've seen is that it's tragic that the dead and their community aren't protected, name suppression is at odds with the principle of open justice - particularly in the digital age - and the patriarchy is still very much alive and well.