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Right to a Public Trial vs. The Protection of Public Morals, The

CRIMINAL LAW CASE NOTES AND COMMENTS

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THE RIGHT TO A PUBLIC TRIAL vs. THE PROTECTION OF PUBLIC MORALS

In *People v. Jelke*,[1] the defendant was convicted of two crimes of compulsory prostitution in violation of the New York Penal Law.[2] Members of the press and public were excluded from the courtroom during the People's case except for such friends as the defendant requested.[3] In his exclusion order the trial judge stated that in the interest of public decency he was compelled to draw the curtain on the offensive obscenity of the highly publicized trial.[4] On appeal, Jelke's conviction was reversed on the ground that his statutory right to a public trial had been violated although there was sufficient evidence to sustain the verdict of the jury.[5]

The right of an accused to a public trial is thought to be of ancient English origin and emanates from an Anglo-American distrust for secret proceedings.[6] Various definitions have been given a public trial, ranging from a trial which is not completely secret[7] to one where all who wish to attend may do so.[8] While the right to a public trial exists primarily for the benefit of the accused,[9] some courts have thought that this right belongs to the public as well.[10]

The Federal Constitution[11] and the constitu-

[1] 284 App. Div. 211, 130 N.Y.S. 2d 662 (1st Dep't 1954).

[2] Section 2460. The original indictment contained nine counts.

[3] During the People's case, which comprised nine trial days, seventeen different friends of Jelke or his attorney attended the trial. No more than twelve and always at least one were present each day.

[4] Counsel for Pat Ward, the State's principal witness, originally made application to have the public excluded during her testimony. After granting this request the trial judge recalled its ruling until arguments could be heard. Upon completion of the arguments, the trial judge issued the exclusion order on his own motion.

[5] The majority considered the judge's interrogation of two jurors concerning their impartiality as serious error although basing the reversal on the fact that Jelke was denied a public trial. The court also held that the trial judge compounded his original error by excluding the press and public only during the People's case.

[6] For a discussion of the development of the public trial concept see Radin, *The Right to a Public Trial*, 6 *Temple L. Q.* 381 (1932).

[7] People v. Miller, 257 N.Y. 54, 177 N.E. 306 (1931). Keddington v. State, 19 Ariz. 457, 459, 112 Pac. 273, 274 (1918).

[8] Davis v. United States 247 Fed. 394 (8th Cir. 1917). People v. Byrnes, 190 P. 2d 290 (Cal. App. 1948). These courts, of course, acknowledge that valid limitations on admission are imposed by the physical capacity of the courtroom and certain administrative necessities.

[9] *1 Cooley, Constitutional Limitations* 647 (8th ed. 1927).

[10] State v. Keller, 52 Mont. 205, 156 Pac. 1080 (1916); State v. Bonza, 72 Utah 177, 269 Pac. 480 (1928); People v. Hartman, 103 Cal. 242, 37 Pac. 153 (1894).

[11] *U.S. Const. Amend.* VI.

tion of 41 states[12] specifically require a public trial. However, the Sixth Amendment is only applicable in the federal courts and does not apply to criminal prosecutions by a State.[13] Any protection of the right to a public trial under the Federal Constitution in a state criminal proceeding is derived from the due process clause of the Fourteenth Amendment[14] and as yet the elements necessary to constitute a public trial under the due process concept are but loosely defined.[15] Extreme cases, such as the summary punishment of a witness for contempt in a secret one-judge grand jury proceeding have, of course, been held invalid.[16]

While New York's constitution contains no provision guaranteeing a public trial, it has been provided for by legislative enactment.[17] Much of the difficulty in the Jelke case revolved around the construction of one of these statutes, Section 4 of the Judiciary Law which reads as follows:[18]

> The sittings of every court within this state shall be public and every citizen may freely attend the same, except trials in cases for divorce, seduction, abortion, rape, assault with intent to commit rape, sodomy, bastardy or filiation, the court may, in its discretion, exclude therefrom all persons who are not directly interested therein, excepting jurors, witnesses, and officers of the court.

Where the formal charge in a case of a salacious nature is not one enumerated in Section 4, a question is raised as to the intended scope of the statute. The court in *People v. Jelke*, by adopting a strict construction, held that the discretion in the trial judge to exclude all persons not essential to the proceedings is limited to cases where the formal charge is so enumerated. By its strict construction, the majority overruled the only New York decision construing the scope of Section 4, *People v. Hall*.[19] There a general exclusionary order was issued barring the press and public from a trial where the accused was charged with extortion but where the testimony was largely concerned with an alleged act of sodomy. On appeal, Section 4 was broadly construed, the court holding that the salacious nature of the case rather than the formal charge determined the trial court's power to exclude the press and public.[20]

In 1945, Section 4 was amended by adding the word "sodomy."[21] This was the basis given in the Jelke case for a strict construction of Section 4. The majority felt that the legislature would have used broader language if they intended to vest in the trial court the discretion which *People v. Hall* would permit.[22] However, such an interpretation of Section 4 does not appear to be consonant with established rules of statutory construction. "If a term or clause used in the original statute has been judicially

[12] For collection of state constitutional provisions see Note, *The Accused's Right to a Public Trial*, 49 *Calif. L. Rev.* 110 n. 2 (1949).

[13] Gaines v. Washington, 277 U.S. 81 (1927).

[14] In re Oliver, 333 U.S. 257 (1947).

[15] Comment, 52 *Mich. L. Rev.* 128, 134 (1953).

[16] See note 14 *supra*.

[17] Civil Rights Law §12; Code of Criminal Procedure §8; and Section 4 of the Judiciary Law.

[18] This section has long been construed as being in pari materia with those cited in note 17.

[19] 51 App. Div. 57, 64 N.Y.S. 433 (4th Dep't 1900).

[20] "If a literal interpretation is to be given to these provisions, then the trial judge is utterly without any discretion whatever aside from the excepted cases. Whoever desires to come into court, however revolting may be the evidence adduced, the doors must swing inward to him. School children, the street urchins, girls of immature years, may drink in and become poisoned by the lustful details wormed from the witnesses. That the protection of a public trial must be given to every defendant charged with a crime is obvious. No court in this nation has ever held otherwise, so far as I am able to ascertain. That principle must be upheld unimpaired, but its retention does not entirely wrest from the trial judge the discretion to conduct the trial in such wise as to be consonant with good morals and common decency and in an orderly manner." *Id.* at 61, 64 N.Y.S. at 435.

[21] Laws of 1945, Ch. 649, § 3. "It is further recommended to include sodomy in this section in conformity with the dictum in People v. Hall . . ." *Tenth Annual Report And Studies Of The Judicial Council*, p. 176 (1944).

[22] See note 1 *supra*.

construed, the retention of such term or clause in a subsequent amendatory act generally requires that it shall receive the same construction."[23] Since legislative history shows an intent to make Section 4 conform with the *Hall* case, the latter's liberal construction of the statute was apparently endorsed, although the addition of the single word "sodomy" would seem inept for the purpose.

Assuming, however, that both the original section and its subsequent amendment are sufficiently vague to permit of two diverse interpretations, it would seem that the court was primarily concerned with protecting the public trial concept. The deleterious effect on public morals and decency, which the publicity attendant to this notorious trial could have, apparently was relegated to a position of secondary importance.[24]

No public trial provision has ever been held to deprive a judge of his power to regulate attendance to the extent necessary to assure the security and orderly progress of a trial.[25] Instances where a judge has invoked this inherent power are numerous.[26] However, these are cases where the necessity of such procedure is readily apparent.

The decisions are in conflict where there has been a general exclusionary order in a trial of a salacious nature. The controversy ostensibly centers around the scope of "public trial."[27] Where only members of the bar,[27] representatives of the press,[28] those "having business in the court,"[29] or friends and relatives of the accused,[30] as in the instant case, have been admitted some courts have reversed the conviction because the trial was not open to all.[31] Other courts have considered the trial public where any of these special classes have been present.[32] Admitting the propriety of certain exceptions, however, the more fundamental problem would seem to be that of deciding whether protection of public morals merits inclusion in these exceptions.

The benefits commonly ascribed to a trial being public permit of division into two categories, those accruing to the public and those which protect the accused.[33] Among the first class are said to be: permitting the public to observe the functioning of the judicial process, fulfilling their desire to see justice properly administered and, to a certain class, financial benefit from reproducing accounts of the proceedings. Since a member of the public, suing as such, has never been held to have a legally enforceable right to admittance where he has been excluded,[34] it would appear that the public's interest is limited to the benefits resulting from their unrestricted admission to

[23] *McKinney's Consolidated Laws, Construction And Interpretation of Statutes*, §193, p. 268 (1st ed. 1942).

[24] The rationale for this apparent shift in emphasis during the period between the *Hall* and *Jelke* decisions might be that a free press and public trials have become more highly valued when appraised in the light of the totalitarian abuses witnessed in much of the world during the last half century. Also society's prohibitions against discussions of anything of a sexual nature are now less stringent.

[25] *Bower, Judicial Discretion of Trial Courts.* §262 pp. 296–297 (1st ed. 1931).

[26] State v. Genese, 102 N.J.L. 134, 130 Atl. 642 (1925) (to preserve courtroom decorum), Bishop v. State, 19 Ala. App. 326, 97 So. 169 (1923) (to halt commotion caused by spectators entering and leaving); People v. Buck, 46 Cal.App.2d 558, 116 P. 2d (1941) (to quell disturbance during charge to jury); Commonwealth v. Principatti, 260 Pa. 587, 104 Atl. 53 (1918), (to prevent violence against witness); Beauchamp v. Cahill, 297 Ky. 505, 180 S.W.2d 423 (1944) (to spare young witness from embarrassment).

[27] State v. Hensley, 75 Ohio St. 225, 79 N.E. 462 (1906).

[28] State v. Keeler, 52 Mont. 205, 156 Pac. 108 (1918); State v. Hensley, *supra* note 27.

[29] People v. Byrnes, 190 P.2d 290 (Cal. App. 1948).

[30] People v. Yeager, 113 Mich. 228, 71 N.W. 491 (1897).

[31] For discussion of courts reaction to admittance of special classes and collection of cases see Comment, 39 *Calif. L. Rev.* 110, 113 (1951).

[32] Reagan v. United States, 202 Fed. 488 (9th cir. 1913); State v. Smith, 90 Utah 482, 62 P.2d 1110 (1936).

[33] For an enumeration and discussion of the benefits of a public trial see 6 *Wigmore, Evidence* § 1834 (3rd ed. 1940).

[34] United Press Ass'ns v. Valenti, 281 App. Div. 395, 120 N.Y.S. 2d 174, 179 (1st Dep't 1953).

most trials. Moreover, in most jurisdictions, an accused may waive his right to a public trial and thereby effectively curtail any benefits to the public from observation of that particular trial.[35]

The principal benefits afforded the accused by a public trial[36] are said to be: limiting the temptation of witnesses to testify falsely and increasing the possibility that those who do so will be detected, enabling persons with additional information to learn of the proceeding and come forward, and insuring a more conscientious performance of their duties by judge, jury, and counsel.

Today it would appear that the realization of these benefits is largely dependent on widespread press coverage since personal courtroom attendance is no longer a common pastime with the public.[37] The practical result is that an accused in a newsworthy case is the recipient of a disproportionate amount of publicity while the bulk of criminal prosecutions are conducted in comparative anonymity. Hence the question of whether the public is freely admitted or only special classes are allowed to be present would appear to be of decreasing significance in cases which are little publicized. However, the true value of a public trial is not predicated upon the protection it affords an accused in a particular case but stems rather from a conviction that justice will be ultimately better served if the judicial process is performed openly rather than in secret.[38] Certainly the efforts of an able counsel and the operation of our system of appeals offer an accused more concrete protection than does the presence of a segment of the public at his trial. Many states[39] and noted text writers[40] have considered the interest of public decency a worthy motive for curtailing publicity where a trial is largely concerned with salacious detail. From the nature of the protection afforded by a public trial, its benefits would not appear to be lost by allowing such exceptions.

In the *Jelke* case, the trial judge's exclusion order was primarily intended to curtail the extensive and sensational press coverage accorded Jelke's[41] arrest and trial. In an independent collateral proceeding,[42] the newspapers attempted to gain admittance to the court room by petitioning for a writ of prohibition against the trial judge. However, the Appellate Division held that the petitioners had no standing to demand admittance to a criminal proceeding to which they were not a party. Freedom of the press was held not to be vio-

[35] People v. Miller, 257 N.Y. 54, 60, 177 N.E. 306, 308 (1931); United States v. Kobli, 172 F. 2d 919, (3rd Cir. 1949); State v. Smith, 179 La. 614, 154 So. 625 (1934).

[36] See note 22 *supra*.

[37] Originally, it was the custom for an accused's neighbors to be present at his trial and those having information would be asked to volunteer it. See *Maitland And Montague, A Sketch Of English Legal History*, p. 56–58 (1915).

[38] "All the reasons for requiring publicity are of a contingent and abstract nature. In the long run certain general advantages are secured by a usual practice. No tangible and positive advantage is gained for a party in a given case by publicity or lost by privacy. Moreover, since the whole community cannot enter, the exclusion of some only who might have entered does no definite harm. Finally, in certain conditions, the advantages may be overbalanced by disadvantages. The rule therefore need not be absolute and invariable. Exceptions may properly be recognized. It is an excess of sentimental obstinacy to deny the propriety of allowing exceptions. *Wigmore, Evidence* § 1835.

[39] The statutes are collected in *Wigmore, Evidence*, §1836.

[40] Both Wigmore and Cooley have recognized the protection of public morals as a valid reason for making an exception to the public trial requirement. See notes 39, 9 *supra*.

[41] "As early as last August the publicity in this case reached a ship's newspaper in the Mediterranean. It has now skyrocketed to the point where we find it competing with the President's message on the State of the Union. It is reported that the press of three continents are reporting this trial. It is the opinion of this court that such extensive press coverage to a case of this kind is catering to vulgar sensationalism, if not actual depravity." Excerpt from the exclusion order, Brief for Appellees, p. 64. Prior to the exclusion order, 64 seats had been reserved for the press, leaving 56 for the general public.

[42] United Press Ass'ns v. Valenti; 203 Misc. 220, 120 N.Y.S. 2d 642, *aff'd*, 281 App. Div. 395, 120 N.Y.S. 2d 174 (1st Dep't 1953).