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Abstracts of Recent Cases

lated by the exclusion order.[43] Editors realize that a scandalous or salacious trial, especially one involving a wealthy or famous personage, makes good copy. In their bid to increase circulation[44] they often delve into minute and lurid detail, even reproducing the testimony verbatim. Since newspapers are readily available to all classes of citizens, including the young and immature, the question of what restraint, if any, should be placed on such press coverage requires serious study. It is a problem in the legislative rather than the judicial sphere since it involves social and cultural factors outside the scope of judicial cognizance.[45] The majority in *People v. Jelke* recognized this but were reluctant to accept Section 4 as a legislative sanction.

Conclusion

It is a basic tenent of our judicial system that an accused shall have the right to a public trial.[46] This right, however, has never been considered so inflexible that it cannot be restricted for good cause. Protecting the innocent and immature from lurid accounts of depravity is a worthy reason for barring spectators and the press. The benefits resulting from a public trial are not lost when publicity is withheld from such a small number of cases. The rights of the accused are adequately secured in these instances by allowing friends and relatives of the accused to be present if he requests it. While Section 4 of the judiciary law is not a study in exemplary draftsmanship, it is certainly indicative of a legislative intent to vest in the trial judge the power to curtail the publicity attendant to cases of a salacious nature. Since the evidence which convicted Jelke was sufficient, his conviction should have been allowed to stand unless other errors committed during the trial were serious enough to require a reversal.[47]

ABSTRACTS OF RECENT CASES

Highest Maryland Court Liberalizes Requirement for Admission of Physical Evidence —Defendant shot and killed X; plea of self-defense. Defendant testified that X came at him with a waxer handle and struck him with it several times. At this time, defendant was wearing a red shirt. An eye witness to the shooting, produced by the state, testified that X had not struck defendant with the waxer handle. The defendant offered the waxer handle as evidence, but it was rejected by the trial court. Defendant was convicted of first degree murder and appealed on the ground that the rejection of the offered evidence was reversible error.

Defendant's witness, a biochemist and micro-biologist, testified that an examination

[43] *Id.* at 226, 120 N.Y.S. 2d at 648.

[44] See White, *Newspaper and Radio Coverage of Criminal Trials: A Modern Dilemma*, 41 *J. Crim. L. & Criminology* 306 (1950).

[45] A passage from the majority opinion in the *Jelke* case effectively expressed this idea. "We conceive it to be no part of the work of the judiciary upon the facts here presented to decide what a newspaper prints or to what portion of the people it caters to sell its papers. A judge may have his personal opinion as to the good taste of what may appear in public print, but when serving as a judicial officer he has no right, in a situation such as this, to restrain or dictate what portion of court proceedings shall be made available for reading by the public. If abuses exist, they are the proper subject for correction by the people through constitutional amendment or by statutory enactment by their duly elected representatives in the Legislature. People v. Jelke, 284 App. Div. 211, 230, 130 N.Y.S. 2d 662, 681 (1st Dep't 1954).

[46] If an accused has neither had nor waived a public trial, it is, in most jurisdictions, reversible error without any affirmative showing of prejudice. Tanksley v. United States, 145 F. 2d 58 (9th Cir. 1944); People v. Murray, 89 Mich. 276, 50 N.W. 995 (1891); *contra:* Reagan v. United States, 202 Fed. 488 (9th Cir. 1913).

[47] Excluding the press and public from only the People's case had no foundation in logic since the testimony during the defense's case was equally salacious. The natural tendency here would be to make the witnesses testify for the prosecution where they would be shielded from publicity. The court considered this prejudicial enough in itself to require a new trial.

of the waxer handle revealed that there was on the handle waxing material in which was embedded red fibers, identical with the fibers of the defendant's red shirt, and that there was waxing material embedded in the fabric of the defendant's shirt.

At the trial the evidence further showed that the handle was picked up by an officer of the criminal investigation department who placed identifying marks on it. The handle then stayed in this officer's car for three days. It was then taken from the officer's car and placed under the porch of his mother-in-law's home. The handle was delivered, nineteen days after the date of the shooting, to the defense attorney, who delivered it to the above mentioned biochemist. The red shirt was delivered to the biochemist five days after the shooting. The trial court ruled out the waxer handle on the theory that no person had testified that the handle was in the same condition when it was turned over to the biochemist as when it was first picked up.

The conviction was reversed and the Maryland Court held that the waxer handle should have been admitted, for the probability that third parties may have had access to the handle while in the officer's car or under the house is extremely slight and the possibility that red fibers other than those of the defendant's shirt could have become embedded in the waxer handle is so remote that there is no danger in admitting the handle. *Nixon v. State*, 105 A.2d 243 (Md. 1954). (Case note submitted by Barnard T. Welsh, Attorney of Law, Rockville, Maryland.)

The Plea of Suicide as a Defense to Homocide—In a prosecution for homocide, the state produced a confession of the defendant stating that in the course of a scuffle the decedent fell back against a window and hit her head; that defendant thinking her dead pulled her out the window and rolled her over the roof. The defendant, contending that decedent committed suicide, repudiated the confession and sought to introduce testimony to the effect that decedent applied for a job at a restaurant a week before her death; that she was refused the job; that she talked about her past life, about her being no good, and of her intention of doing away with herself. This testimony was excluded by the trial court and the defendant was convicted of voluntary manslaughter. The Supreme Court of Pennsylvania, in affirming, held the exclusion proper "because even from the viewpoint most favorable to the defendant, the proffered statement was too remotely or unreasonably connected with the events which actually or allegedly occurred." *Commonwealth v. Donough*, 377 Pa. 46, 103 A.2d 694 (1954).

Although the burden of proof is on the prosecution to establish the existence of the crime, evidence of suicide may be persuasive with the jury in the formation of a reasonable doubt. The court vests wide discretion with the trial judge to refuse declarations of intended suicide (such statements are not hearsay) if he considers them too remote. It would seem that objections of remoteness should be relevant to the weight to be accorded the testimony rather than to its admissibility.

Prosecution May Not Eavesdrop on Attorney-Client Conversations during Trial.—Defendants were convicted of murder in the first degree. They claim that a police officer was stationed in the courtroom, a few feet from the counsel table at which they were sitting, to listen to and report privileged conversations carried on in Yiddish between them and their several lawyers. As evidence of this claim, defendants pointed out that the officer attended the trial in plain clothes and was the only individual on the police force who understood Yiddish. The Court of Appeals of New York held that defendants had not sustained the burden of proof on these allegations since the hearing held after the trial revealed the officer was present for security purposes only. *People v. Cooper*, 307 N. Y. 253, 120 N.E. 2d 813 (1954). The court, however, said that the right to counsel is inherent in the concept of a fair trial and includes the right to consult in private. "If the defendants, upon whom the burden rested, had proved that Rubin (the officer) was planted in court with instructions

to eavesdrop . . . a new trial would have been required." "If the defendant, knowing third persons to be nearby, speaks in such a way as to indicate that he is not interested in keeping private what he says . . . he will be deemed to have renounced his right to privacy of consultation. Not so, however, in a case such as the present. . . ."

In a separate concurring opinion two justices took the position that no privileged communications are recognized between attorney and client which are made in the presence of third persons who stand in no confidential relationship.

Husband and Wife May be Convicted of Conspiring with Each Other—In a case of first impression in Illinois, the supreme court ruled that the present statutory law permits a husband and wife to be convicted for criminal conspiracy. *State v. Martin*, 23 U.S.L. Week 2174 (October 19, 1954). The common law concepts that a wife could not own property separate from her husband and that neither spouse was a "person" separate and apart from the other, formerly prevented such an action. The court declared that under present legislation husband and wife may now sue and be sued in their own rights; each may own and dispose of property; each may testify against one another; and that there is no longer a presumption of coercion of the wife by her husband. Therefore, "no relevant reason which might have supported the common-law rule exists today."

Supreme Court Admits Illegally Obtained Evidence to Impeach Credibility of a Witness—In 1950, an indictment against petitioner for purchasing and possessing one grain of heroin was dismissed because the capsule had been obtained through an unlawful search and seizure. Two years later petitioner was tried for other narcotic violations; upon direct examination he denied ever having any dealings in narcotics. In rebuttal, the government introduced testimony of the officer who had participated in the 1950 seizure and the chemist who had analyzed the seized capsule. Defendant's conviction was upheld by the Supreme Court of the United States. *Walder v. United States*, 74 Sup. Ct. 354 (1954). It has long been established in the federal courts that illegally obtained evidence is not admissible into evidence. Justice Frankfurter, speaking for a 5–2 Court, concluded that "It is quite another (thing) to say that the defendant can turn the existence of such evidence to his own advantage by using it as a shield against contradiction of untruth."

The Court distinguished *Agnello v. United States*, 209 U. S. 20 (1925), where the government was denied the use of illegally obtained evidence on cross-examination. There, however, the defendant had made no reference to the evidence upon direct examination.

Discharge from Military Service Does Not Terminate Jurisdiction of Military Court—Toth was honorably discharged from the United States Air Force in 1952 after service in Korea. A year later he was formally charged, pursuant to the Uniform Code of Military Justice, with a premeditated murder allegedly committed in Korea during his term in the military service. Thereupon he was apprehended by military personnel and taken to Korea to await investigation and trial. The district court ordered his release after a hearing initiated by a writ of habeas corpus. The United States Court of Appeals for the District of Columbia reversed this determination, holding that the situation was governed by Article 3(a) of the Uniform Code which provides that any person subject to military jurisdiction charged with having committed a crime punishable by confinement of at least five years shall not be relieved from trial by court-martial because of termination of military status. *Talbott v. United States*, 215 F.2d 22 (D.C. Cir. 1954). That a man is answerable for a crime at the place and under the law applicable at the time of the offense, the court declared to be a familiar concept of the law. Moreover, since the substance of Article 3(a) has been in force for some eighty-five years, "it is now too late for any federal court short of the Supreme Court to do other than accept the provision as valid." The court

further held that due process does not require a preliminary hearing before removal, and that any such procedure would have to be instituted by Congress. The Supreme Court has granted certiorari.

Right to a Speedy Trial—Defendant was indicted for bribing an alderman and released on bail. His trial did not begin until two years after the indictment had been returned. On appeal, he contended that he had been denied the right to a speedy trial as guaranteed by the United States and Wisconsin constitutions. The Supreme Court of Wisconsin affirmed the conviction holding in effect that the right had been waived by inaction. *State v. Sawyer*, 266 Wisc. 494, 63 N.W. 2d 749 (1954). "While there is some authority to the contrary, the general rule is that a demand for trial, resistance to postponement, or some other effort to secure a speedy trial must be made by accused to entitle him to discharge on the ground of delay, at least when the accused has been admitted to bail, or is not within the custody of the court."

Adversary Not Entitled to Examine Trial Notes—In *Witaker v. Blackburn*, 23 U.S.L. Week 2158 (October 12, 1954), the Supreme Court of Florida held that the prosecution is not entitled to examine defense counsel's transcript of an interview with prosecuting witness even thought the transcript had been consulted during cross-examination. The court ruled the transcript to be "simply a private memorandum of counsel" and "not affected with a public character". A majority of the courts have adopted this view.