THE RIGHT TO PUBLISH TESTIMONY OF A WITNESS†

THE FREEDOM OF speech and expression guaranteed under the Indian Constitution was held to include the freedom of publication by the press also.[1] This freedom naturally includes the right to publish the testimony of a witness. A court may prohibit the testimony of a witness or any proceedings in a trial in the interests of administration of justice. This is usually done by conducting the trial *in camera*. The judiciary has been constantly maintaining that a healthy, objective and fair administration of justice is secured, chiefly, by conducting the trials in open court, where, the very presence of the public witnessing how justice is administered, serves as an effective check against "judicial caprice and vagaries." In conflict with this principle of open trial, invariably followed in the administration of justice, is the system of holding a trial *in camera*, either partly or fully, under special circumstances. Sometimes the publication of the proceedings is also prohibited.

An illustration of this is afforded by a recent Supreme Court decision in *Naresh* v. *State of Maharashtra*[2] relating to the extent to which newspapers are free to publish proceedings in court cases which are not held *in camera*, and where and by whom the line is to be drawn. True, the majority judgment dismissing the petitions was based on the technical ground that the lower court was acting within its jurisdiction and that a writ petition under article 32 did not therefore lie. In this case, a judge of the Bombay High Court, trying a libel suit, passed a judicial order prohibiting publication of the evidence of a certain witness. The alleged libel was published in the *Blitz* newsweekly under a sensational caption. This article alleged some blackmarket transactions. The editor of the newsweekly wanted to examine the witness in defence and confront him with certain of his statements made before income tax authorities. The order, prohibiting publication of the testimony, was made in pursuance of a prayer to that effect by the witness on the ground that publication of his testimony would affect his business adversely. The petitioner, aggrieved by the above order, moved the Bombay High Court under article 226 of the Constitution for an appropriate writ to quash the order.

The High Court found that it could not correct the order by exercising its writ jurisdiction. Thereupon, the petitioner and also three other journalists, who were all aggrieved by the trial judge's order (as they were also directed by the Court not to publish the evidence of the witness), moved the Supreme Court under article 32 of the Constitution for setting aside the impugned order and lifting the ban on publication. The principal contention was that the order of

†*Naresh* v. *State of Maharashtra*, A.I.R. 1967 S.C. 1.

1. *Sakal Papers (P.) Ltd.* v. *Union of India*, A.I.R. 1962 S.C. 305.
2. A.I.R. 1967 S.C. 1.

the trial judge contravened the fundamental rights of the petitioners, namely (i) the right to freedom of speech and expression[3] and (ii) the right to practise any profession or to carry on any occupation, trade or business.[4]

The majority, while holding that openness and publicity were in fact the very soul of justice, laid down that within narrow but well-defined limits the High Court had the power to withdraw the trial from the public gaze either wholly or partially if it felt satisfied that that was the only way of doing justice and that the ends of justice would otherwise be defeated. The learned trial judge's order was only oral and nowhere it is recorded in writing. The majority, deciding against the petitioners, construed the order as not imposing any permanent ban on the publication of the evidence. Mr. Justice Hidayatullah (dissenting), however, regarded the prohibition as perpetual, as the intention was to protect the business of the witness from harm.

The language of the order, it is submitted, has a material bearing on the propriety of the order. Evidently, the learned judge made the order with a view to obtaining a fearless testimony from the witness. A witness, as the one here, would give true testimony of all necessary facts only if he is fairly convinced that his statements would not be detrimental to his business interests. For such security, the witness in all probability, expects not a temporary but a permanent ban on publication. Therefore, in a trial of this kind where the court wants a frank and full testimony from the witness and it chooses to pass an order accordingly, it has to impose a permanent ban and not a temporary one. Unless the court is possessed with all the particulars of the order it cannot conclude safely as to the nature of the ban. It is, therefore, desirable that a court makes only written orders in matters affecting important rights and warranting the exceptional procedure of *in camera* trials.

The majority, speaking through Mr. Chief Justice Gajendragadkar, held that the principle of public trial is not inflexible and universal and that a High Court has inherent jurisdiction to determine the procedure of a trial. The Chief Justice remarked that the public trial is only a means to ensure fair administration of justice, but not an end. It is respectfully submitted that the crucial issue here was not about the court's inherent power to hold a trial *in camera*, but the alleged violation of the petitioners' fundamental rights as a result of the prohibitory order to publish the evidence of the protected witness. But when a trial is held in the open court all those who observe the proceedings would acquire knowledge of the witness's testimony. In this sense, is not the court itself publishing the evidence to the public present in the court? True, the body of the public is limited here, but nonetheless it is *public*. Also, the very object of avoiding the publicity of the evidence of the

3. *Ind. Const.* art. 19(1)(a).
4. *Ind. Const.* art. 19(1)(g).

witness, cannot, in this kind of trials, be substantially and properly secured. For, a person who hears the testimony in the open court, especially in a sensational matter, is very much disposed to the human tendency of disseminating his impressions. Where interests of business are the primary consideration (as in the present case) for imposing a ban on publication, even this mode of publication (*i.e.*, among individuals) is quite harmful. The remedy is, therefore, to hold the trial *in camera* to the extent the interests of justice demand.

Again, whether a discrimination between publication through the press and publication among individuals otherwise than through the press has been made in this case, does not seem to be clear from the facts in the judgment of the Supreme Court. The Constitution has conferred the right to freedom of speech and expression on all the citizens of India and this freedom includes the freedom of the press also. Thus, it has made no discrimination between the press and individual citizens. However, supposing (of course hypothetically) that such discrimination is made in a case of this type, it would perhaps give rise to a legitimate ground for alleging that the judicial order is not valid inasmuch as a discrimination between the freedom of the press and the freedom of individuals other than the press does not appear to have a reasonable nexus.

The majority judgment has referred to matrimonial cases where proceedings are held *in camera*. The reference to those trials, it is submitted, is not sound. Section 22 of the Hindu Marriage Act, 1955, enjoins that the court shall conduct the proceedings *in camera* if desired by either party to the proceedings or if it thinks fit. If a proceeding *in camera* is not urged by either party, the court may exercise its discretion and decide whether it is desirable to conduct the proceedings *in camera*. But, where a party desires for an *in camera* trial, the court has no discretion. In this respect, the present case seems to be distinguishable. Here the witness could not ask for his examination *in camera* as a matter of right. Secondly, the rationale of holding matrimonial proceedings *in camera* is based on public policy in that persons other than the spouses should have no necessity of showing curiosity in the personal affairs of husband and wife. The extension of the analogy of *in camera* proceedings in matrimonial disputes to a fact-situation like the one involved in the present case is, therefore, open to question.[5] Mr. Justice

5. Mr. Justice Hidayatullah observed :
Public hearing of cases before Courts is as fundamental to our democracy and system of justice as to any other country. That our legal system so understands it is quite easily demonstrable. We have several statutes in which there are express provisions for trials 'in camera'. Section 53 of Act 4 of 1869 dealing with matrimonial causes, S. 22 of the Hindu Marriage Act, 1955, S. 352 of the Code of Criminal Procedure, 1898, and S. 14 of the Indian Official Secrets Act, 1923, allow the Court a power to exclude the public. Where the Legislature felt the special need it provided for it.
A.I.R. 1967 S.C. at 26-27.

in a separate judgment, dismissed the petitions and observed that the freedom of speech conferred under article 19(1)(a) cannot be said to be infringed in this case, unless there is a fundamental right to hear proceedings in a court.[6] He thus linked up the freedom of speech with the availability of a fundamental right to hear. It is respectfully submitted that this is not a sound reason, for the fundamental right to freedom of speech is not dependent on any other fundamental right. Its scope cannot be curtailed by the non-existence of some other rights. What one has to examine is whether the particular procedure adopted here, namely an open trial with a prohibition against publication of proceedings, is a justifiable mode.

The majority further held that if the judicial order of a court affects the fundamental rights of a stranger to the proceeding, the remedy for him is to appeal under article 136 of the Constitution and that no writ of certiorari would lie to quash the judicial order. That the High Court is a superior court of record was taken into consideration in arriving at the result that it is entitled to determine for itself all questions concerning its own jurisdiction. Mr. Justice Hidayatullah, however, dissented from this view and held that this fact was not material, because the writ of certiorari issues to several courts of record.[7] The learned Judge also took the view that the Constitution does not exempt a High Court from the jurisdiction of the Supreme Court under article 32. He observed :

> The analogy of superior and inferior courts breaks down in England itself when we consider Ecclesiastical courts and the Privy Council hearing appeals in Ecclesiastical matters. They are superior courts but prohibition issues to them. That our High Courts are courts of record is not a fact of much significance either because prerogative writs do issue to several courts of record in England.[8]

While observing that judges are least likely to err, he however suggested that one cannot completely exclude the possibility of a judge acting contrary to the Constitution. The difficult question faced by courts in this kind of matters is whether they should take a liberal attitude in interpreting the jurisdiction of the Supreme Court (or the High Courts even, in respect of courts within their jurisdiction) under the Constitution in order to extend the same to cases of contravention of fundamental rights of persons other than the parties to a judicial proceeding. Courts may perhaps adopt this liberal approach if they can come to the conclusion that the fundamental rights are absolute and guaranteed. When this attitude is adopted, courts will be justified to exercise their writ jurisdiction to do justice where a judicial order in respect of a legal proceeding encroaches upon the enjoyment of fundamental rights of persons other than the parties to the proceeding. This

6. A.I.R. 1967 S.C. at 20.
7. *Id.* at 30, quoting 2 Halsbury, *Laws of England* 124 (3d ed. 1954).
8. A.I.R. 1967 S.C. at 32.

view gains much strength from the recent decision of the Supreme Court in *Golaknath* v. *State of Punjab*.[9] The jurisdiction of courts should never be allowed to remain a matter of conjecture.

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9. The judgment has not been reported so far. It was delivered by the Supreme Court in W.P. No. 153 of 1966.

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