Crim.A. 126/62

ARYEH DISSENCHICK AND SHAUL HON

v.

ATTORNEY-GENERAL

In the Supreme Court sitting as a Court of Criminal Appeal
[February 20, 1963]
Before Sussman J., Landau J. and Berinson J.

Courts - Contempt of court - newspaper report on pending criminal trial - Courts Law, 1957, sec. 41(a)

The trial of one Rafael Blitz for murder stretched over a number of days. On the second day. a newspaper (of which the first appellant was the editor and the second appellant the responsible journalist) published a report which indicated that in answer to the charge defence counsel had pleaded not guilty before the accused could say anything. In the body of the article it was reported that before trial the accused had in fact admitted his guilt to a journalist, although it was noted that such admission not having been made in court was not binding. The appellants were charged with contempt of court and were convicted and fined. The appeal was against both conviction and sentence.

Held. Although the jury system does not exist in Israel, no one may try to prejudice the court, composed of professional judges, in a matter being heard by it. It was not necessary that the court should in fact have been influenced by a publication but enough that it or witnesses in the case might be. Freedom of expression is not absolute. It may not offend against the right to a fair trial and certainly not introduce matter not actually before the court. During the trial itself, only the bona fide publication of what was said or transpired in open court is permitted.

Israel cases referred to:

1. H.C. 14/51 : *Attorney-General v Z. Rotam and others* (1951) 5 P.D. 1017.
2. H.C. 73/53 *: "Kol Ha'am" Co. Ltd*. v *Minister of the Interio*r (1953) 7 P.D. 871; S.J., vol I, 90.

3. H.C. 243/62 : *Israel Film Studios Ltd*. v *Levi Geri and others* (1962) 16 P.D. 2407: S.J. vol IV, 208.
4. Cr.A. 24/50 : *Avraham Gorali v Attorney-General* (1951) 5 P.D. 1145.
5. C.A. 36/62 : *Israel Ozri v Y. Galed and others* (1962) 16 P.D. 1553; S.J., vol IV, 347.

English cases referred to:

6. *Hunt* v *Clarke* (1889) 61 L.T. 343.
7. *R.* v *Duffy* (1960) 2 Q.B. 188; (1960) 2 *All.*E.R. 891.
8. *Delbert-Evans v Davies & Watson* (1945) 2 *All.*E.R. 167.
9. *R*. v *Clarke* (1910) 103 L.T. 636.
10. *Re D.O. Dyce Sombre* (1849) 41 E.R. 1207.
11. *R*. v *Gray* (1900) 2 Q.B. 36.
12. *R*. v *Davies* (1945) 1 K.B. 435.

Australian case referred tb:

13. *Ex parte Senkovitch* (1910) S.R.N.S.W. 738.

Canadian case referred to:

14. *R*. v *Willis* & *Pople* (1913) 23 W.L.R. 702.

American cases referred to:

15. *Pennekamp and others v State of Florida* 328 U.S. 331 (1946).
16. *Bridges v State of California* 159 A.L.R. 1346 (1941).
17. *Patterson v State of Colorado* 205 U.S. 454 (1907).
18. *Schenk v* U.S. 249 U.S. 47 (1919).
19. *Cantwell and others v State of Connecticut* 310 U.S. 296 (1940).
20. *Abrams and others v* U.S. 250 U.S. 616 (1919).
21. *Schaefer v U.S.* 251 U.S. 466 (1920).

S. Levin for the appellants.

G. Bach, Deputy State Attorney, for the respondent.

SUSSMAN J. The trial of Rafael Blitz, charged with murder under sec. 214(d) of the Criminal Code Ordinance, 1936, opened in the District Court on 5 November 1958. The hearing was adjourned to the following day but was not then concluded. The case continued to be heard on 9 November, 1 December and 3 December 1958. Judgment was given on 12 January 1959. When on 5 November 1958 Blitz was asked whether he admitted or denied the charge, he replied (according to the judge's notes) "I deny the charge."

2. On 6 November, 1958, the second day of the trial, the newspaper *Ma'ariv* carried a report by the second appellant, together with a picture of Blitz. The report bore the following caption: "BLITZ (TOMMY) ASKED - DEFENCE COUNSEL REPLIES" and beneath it "I DON'T ADMIT IT." The report began

> "Rafael ("Tommy") Blitz had only to say three words yesterday when asked by the judges whether he admitted murdering Engineer Fiatelli near to the Zafon Cinema. Blitz stood tensely upright, open-mouthed - but before he could reply to the question, his counsel answered for him 'I don't admit it'."

This passage was emphasised by being printed in bold type. The report went on to say (in ordinary type)

> "Blitz's gaze quickly turned from the judge to counsel. For a moment heavy silence reigned. Apart from Blitz himself, no one could know whether the negative answer was the one he had prepared to utter. Earlier, before the case began, he had given another answer to a question from a journalist. But that answer was not binding because it had not been given to the judges who judge a person on the evidence put to them. Since counsel's answer was decisive, the trial of Blitz therefore began."

3. The two appellants were charged under sec. 41 of the Courts Law, 1957, for writing and publishing this report, the second appellant as the writer and the first appellant as editor of the newspaper. They were convicted and fined IL. 200 each. They now appeal by leave of the District Court against judgment and sentence.

4. Sec. 41(a) of the Courts Law provides:

> "A person shall not publish anything concerning a matter pending in any court if the publication is calculated to influence the course or outcome of the trial; however, this prohibition shall not apply to the *bona fide* publication of a report of anything that has been said, or has occurred, in an open session of the court."

The District Court (per Judge Harpazi) found that the description of Blitz's behaviour in court along with the wonder of the writer as to what Blitz would have replied had counsel not intervened and said "I don't admit it", were protected by the end of see. 41(b), being a *bona fide* description of what occurred in an open session of the court. But the District Court found the two appellants guilty of an offence under see. 41 for that part of the report which stated that before trial Blitz had given a journalist an answer other than "I don't admit it." The court held that this information was calculated to influence the outcome of the trial both because of its effect on the judges who sat and heard the case against Blitz, and more seriously because of its effect on witnesses who had been summoned in the trial.

5. Mr. Levin for the appellants argued before us that the different answer of which the report spoke need not necessarily have been "I admit it". There was a variety of possible answers by a person standing criminal trial when asked whether he denies or admits the offence, such as "I admit the facts but not the offence".

In my view this argument is groundless. The words in the report "Blitz had only to say three words yesterday," against the background of the headline of four words "I don't admit it", by themselves indicate that the three word answer Blitz "should" have given was "I admit it". Even if that is not so, the writer goes on to say that the trial began as a result of the fact that counsel's reply is decisive ("the trial ... therefore began") and "that answer (of

Blitz himself to a journalist) was not binding." The emphasis on the causal connection between counsel's reply and commencement of the trial, in contrast to Blitz's own answer which would have made the trial superfluous had it been binding, shows clearly to the reader that the non-binding answer was "I admit it."

6. The second argument of appellants' counsel was that nothing in the report was calculated to affect the outcome of the trial. Mr. Levin directed us to the leading judgment of Witkon J. in *Attorney-General v Rotam,* (1) particularly to the observation in paragraph 16, and he emphasised the fact on which Witkon J. (in paragraph 13) and Agranat J. (at p. 1052) dwelt, that in this country where trial is before professional judges, the possible influence of newspaper publication is far less than it is in other countries where the facts are determined by a jury. Since I have reached the conclusion that the District Court was right in its decision that the report was likely to influence the witnesses, and thus also the outcome of the trial, 1 shall only derate brief words to this argument.

I also think that our mode of trial which generally does not involve lay participation - I am not concerned with exceptional procedures such as in the municipal courts or rent tribunals - warrants a more liberal approach to publications touching pending court cases. The professional judge is accustomed to sift the grain in accordance with the law of evidence and to set out his reasons in writing. He is not likely to be affected by a publication to the same extent as a juryman who returns to the court room with the general answer of "guilty" or "not guilty", the reasons for which remain locked within his breast. Although the public may properly presume that a professional judge can largely rid himself of the influence of what he reads in the newspapers, it is not free, even as regards the judge, from the obligation not to try and create prejudice about a matter pending in court. There is no justification for the illusion that the judiciary is a precision machine which will produce the right factual conclusion in exchange for and required by the admissible evidence supplied to it. It is important to recall here what Justice Frankfurter said in *Pennekamp v Florida* (15) at p. 1042:

> "Judges are also human, and we know better than did our forebears how powerful is the pull of the unconscious and how treacherous the rational process."

To weigh the evidence, to determine the credibility of witnesses, their powers of observation and their memory are among the most difficult of judicial tasks. They are more difficult than deciding the law, with our law faculties and teachers to instruct a person in the wisdom of the law before he becomes a judge. No one can teach the work of elucidating and establishing the facts. Each one of us learns that from his experience during his lifetime.

7. I shall therefore assume that the appellants are right in saying that the report was unlikely to influence the judges who sat in the case, that reading it the judges could avert their minds from it as they normally do from inadmissible evidence. Before I pass to the matter of the possible influence on witnesses, I must deal with a preliminary argument put by appellants' counsel. The hearing of Blitz's case began, as I have said, on 5 November 1958 and continued on the morning of 6 November, before the newspaper came out. Blitz had already admitted to the police ... that he had been at the scene of the crime and had even fired shots. At the trial, however, his counsel urged that also the police had fired shots when pursuing Blitz; it is possible therefore that Fiatelli was killed not by Blitz's shots but by one fired by the police. The question was, whose shot caused Fiatelli's death. In this regard, Mr. Levin argues the evidence of the prosecution was completely in by the time the paper came out at noon on 6 November.

I cannot accept this argument. Blitz's trial did not end until 12 January 1959. Even after 6 November 1958 evidence was being taken. Whether or not the publication amounts to an offence does not depend whether it in fact influenced the outcome of the trial. Under see. 41 it is sufficient that it "is calculated to influence", that it could influence. That is the law not only in England: *Hunt* v *Clarke* (6), but also in the U.S.A. where the courts, in consequence of the First and Fourteenth Amendments (free speech and due process), tend to construe restrictively the rules of contempt of court: see Frankfurter J. in *Bridges* v *California* (16) at p. 1371.

Generally it cannot even be said whether a publication has really influenced matters, and for this reason alone the guilt of the publisher is not to be made dependent on the outcome of the trial. The possibility of such influence is enough to cause injury to the integrity of judicial hearings and render doubtful whether justice has been done. The

decision in a trial must rest on the foundation of the evidence adduced and taken openly. A trial influenced by invalid "external" hidden factors is not a judicial trial.

In Patterson v Colorado (17) Justice Holmes dealt with the question of whether a newspaper publication proclaiming a witness a liar should be treated as contempt of court. I will return to the observations of the Justice in another connection. Here I am content to quote one sentence of his which explains the idea of the prohibition embodied in our see. 41:

> "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court; and not by any outside influence, whether by public talk or public print."

Furthermore, even after the appearance of the newspaper evidence was taken to prove that it was Blitz's bullet which caused Fiatelli's death, after Counsel had previously suggested the possibility of Fiatelli having been shot by a policeman. Inspector Zelinger who happened to be at the scene of the murder testified at the trial that he heard "about six shots" ... He was cross-examined by counsel for the defence and asked whether he was armed. He answered, no. He also denied that on leaving the cinema he fired warning shots. On 9 November 1958 the prosecution called three witnesses ... to controvert the argument of the defence, as above. Blitz admitted in the box to firing five shots. According to Zelinger's evidence there was only one other shot that might have killed. Defence counsel based his argument in summation on this fact: "Is there another possibility that one of the policemen who was on the spot wanted to harm Blitz." Hence the danger of adverse influence had not yet passed when the newspaper came out on 6 November.

8. As regards the question whether publication of the report was "calculated to influence the outcome of the trial" as provided in see. 41, Mr. Levin suggested putting the matter to the "clear and present danger" test, first adopted by this court in the *"Kol Ha'am"* case (2). His argument was that it is not enough that publication is likely to influence the outcome of the trial but that what is required is the probability that immediate damage will be caused.

I find no foundation in the argument. In *"Kol Ha'am"* the question before the Court was in what circumstances the Minister of the Interior may exercise his powers under sec.

19(2)(a) of the Press Ordinance to suspend the publication of a newspaper. Sec. 19(2)(a) conditions that power on the publication of matter "likely to endanger the public peace." Agranat J. speaking for the Court, set a number of different grounds. One of them was the term "likely" used by the legislator, which is synonymous with "probable" or "that may reasonably be expected" (at p. 188). Another was the need to balance freedom of speech - and freedom of the press which is only a projection of that - as a fundamental right in a democratic regime against the duty of the government to safeguard public security, in face of which the right of the citizen may retreat only in exceptional cases; such exceptional cases are those in which "a clear and present danger" of a breach of the peace is manifested, according to Justice Holmes in the well-known case of *Schenck v U.S.* (18). Employing the same test, this Court recently decided whether the Film Censorship Board had lawfully used its power to forbid the exhibition of a film *(Israel Film Studios Ltd*. v *Geri* (3)).

9. I would think that this test is not appropriate in the case before us. There what was involved was the restriction of a right in the interest of public necessity, here it is the reconciliation of an interest which the public is concerned in preserving with another with which it is equally concerned. The invasion of freedom of speech because of the danger of a breach of public order, which is a sore evil only to be effected to the extent that it is essential, is unlike delimiting that freedom in order to do justice. The public interest in justice being done is no less a value than its interest in maintaining freedom of speech. In balancing the two, it is no less wrong to repress the one than it is to repress the other. In the one case future publication is prevented because of a "faulty" report published in the past, when future publication may well be faultless. In the other case, punishment is imposed for an offence committed by a past publication. In *Attorney-General v Rotam* (1) Agranat J. (at p. 1054) and Witkon J.(at p. 1029) drew attention to the fact that the U.S. Supreme Court applies the said test also to contempt of court, and in view of such authority the question calls for more basic examination.

10. The leading case in which the Court laid down "the clear and present danger" principle as a guide in determining whether a publication amounts to contempt of court was *Bridges v California* (16). Justice Black at the beginning of his judgment (speaking for the majority of five justices) stressed that the offence charged against the appellant was undefined by enacted law and that he was found guilty on the basis of a common law rule which in view

of the trial court remained over from the time of British rule. Justice Black continued (at p. 1355):

> "It is to be noted at once that we have no direction by the legislature of California that publications outside the court room which comment upon a pending case in a specified manner should be punishable. As we said in *Cantwell v Connecticut* (19), such 'declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations.' But as we also said there, the problem is different where 'the judgment is based on a common law concept of the most general and undefined nature'."

I am not stating anything new in observing that freedom of expression is not an absolute right but is likely to come into conflict with other rights, and in such a conflict, there are occasions when the latter will prevail. As was said in *Gorali v Attorney-General* (4): "Everyone has the right of freedom of speech and freedom of expression, but exercise of the right is subject to restriction by law."

Freedom of expression is not freedom to ridicule or licence to defame a person and commit an offence under sec. 202 of the Criminal Code Ordinance, 1936, or to do the injurious acts mentioned in see. 16 of the Civil Wrongs Ordinance, 1944: *Ozri* v *Galed* (5), neither can it justify the commission of any other wrong. In the present case, we are dealing with the charge of an offence against a Law recently enacted by the Knesset, that is, the matter has come before us, as Justice Black put it in *Bridges* (16) "encased in the armor wrought by prior legislative deliberation."

The first question which presents itself when treating of a contemporary enactment is what is the situation involved. I cannot attach decisive importance to the fact that the offence of contempt of court emerged under absolute monarchy under which contempt of court is considered to be equivalent to contempt of the monarch himself. (See Nelles & King, "Contempt by Publication in the United States", (1928) 28 Col.L.R. 401, 525). We are not concerned here with a charge of offending the honour of the judges who heard the case and for this reason I shall not dwell on the question in what circumstances a publication of such a kind should be punishable. We are concerned with the publication of

the admission of a crime uttered in the presence of a journalist, concealed by a denial in court of the charge. That constitutes interference with a case pending in court, an equivalent to passing the hearing of the charge from the court properly dealing with it to the public at large, invited to adjudicate on it according to information presented in a newspaper. A free democratic regime is also entitled to safeguard the integrity of judicial hearings, otherwise freedom and anarchy become synonymous. By literally prohibiting publication which "is calculated to influence the course or outcome of the trial", the Knesset has said that no one shall publish anything capable of influencing the course of a pending case. The term "calculated to " means only that the publication becomes "a special publication", as stated in the marginal title of see. 41, if it is of sufficiency to influence the case.

11. The course normally taken to establish the significance of some legal prohibition is to ask what is the mischief which it is sought to suppress. That is the key to correct interpretation. In the present case the answer is that the Law is intended to avoid, *inter alia,* the presentation of matters touching upon a case then being conducted which were not raised before the court dealing with it.

Justice Holmes who coined the phrase "clear and present danger" in *Schenck* (18) died in 1935 and was not a member of the court that sat in *Bridges* (16) in 1941. But what he himself said in *Patterson v Colorado* (17) in 1907 can here be cited in support:

> "A publication likely to reach the eyes of the jury, declaring a witness in a pending case a perjurer, would be none the less a contempt that it was true. It would tend to obstruct the administration of justice, because even a correct conclusion is not to be reached or helped in that way, if our system of trials is to be maintained ... What is true with reference to a jury is true also with reference to a court."

12. The notion of freedom of expression or "free trade in ideas" as was said in *Abrams v U.S.* (20) is based on the consideration that in the course of expressing views without limit or restriction "the power of the thought" will eventually succeed "to get itself accepted in the competition of the market." Hence, to circumscribe competition is only justified in exceptional instances.

Yet the doing of justice is no less important than freedom of expression and, as has already been explained, a fair judicial hearing necessitates that one should disregard the thoughts that have currency in the street. The facts are determined in court not by the competition in the market of views but by the evidence adduced in court in accordance with the law. Where the notion of "free trade in ideas" itself does not obtain with reference to a matter being judicially heard, why should the right of freedom of expression be honoured to the extent of it becoming a clear and present danger as it trespasses on to an area not its own and concerns itself with matters in which silence is best? (See Frankfurter). in *Bridges* (16) at p. 1367).

Publicly to mention things concerning a case is restricted neither before the case opens nor after it is closed. Only during the hearing itself is a kind of moratorium placed upon public debate. The public may know what was said and what occurred in the court room, again without restriction under see. 41. But what public interest is served by publication of information that some defendant admitted a crime to a journalist? That is only liable to increase tension and satisfy sensation-seeking. Freedom of the press does not exist for this purpose. I have said that freedom of expression is not freedom to ridicule a person. I now add that neither is it freedom to trespass on the courts and deal with a person's guilt.

13. It is not superfluous to note that Agranat J. raised the question of the American test in *Attorney-General v Rocam* (1) in the special context of sec. 4 of the Contempt of Court Ordinance, and he emphasised the fact that notwithstanding the criminal nature of the act, the court did not deal with it under normal criminal procedure. The hearing was "summary". Being required "to show cause" the accused did not have the traditional right to remain silent and the court itself, and not only the Attorney-General, could commence proceedings. The said sec. 4 has been repealed and replaced by sec. 41 of the Courts Law, 1957, under which the proceedings follow the normal pattern; the accused is not required to show cause and the court does not act of its own motion. Even the term "contempt of Court" has been entirely abandoned.

14. Mr. Levin for the appellants relied on *R*. v *Duffy* (7) where Lord Parker posed the question whether a real risk had been created and not only a remote possibility of prejudicing a fair trial. I also agree that "a remote possibility" is not enough, since if the

possibility of prejudice is too remote, then the publication is not "calculated to influence", it does not possess a sufficiency of influence on the trial. In *Duffy* a newspaper published an article about a man who was sentenced to five years' imprisonment on a charge of assault. Notwithstanding conviction, the case was still pending on account of an appeal having been lodged. Apart from the fact that the appearance of the defendant did not please the writer, the article itself only mentioned one thing, that a year before a detective had pointed a finger at him in a public house and had said that he would end up in the dock. What influence could that have had on the judgment of the Court of Appeal?

Appellants' counsel here stressed the reservations of the court in *Duffy* as to the observations in *Delbert-Evans v Davies* (8) about the need to avoid publications which embarrassed the judge. I see no need to enter into the dispute between the judges in these cases, since I have already said that I shall deal with the matter before us on the basis that the judges were not influenced here but I take liberty to point out that *Delbert-Evans* was approved by Justice Frankfurter in *Pennekamp.* (15).

15. What difference is there between "clear and present danger" and "sufficiency" of influence as to the outcome of a trial? To clarify the difference, only some points of difference need be noted. The test of "clear and present danger", it was said in *"Kol Ha'am"* (2), is that of "probability". In Abrams (20) Justice Holmes spoke of "imminent threat", and in *Schaefer* (21) Justice Brandeis said (at 266) that "the test to be applied ... is not the remote or possible effect." For sec. 41 as well "remote effect" is not enough but "possible effect" is, since it is one whether the publication operated to influence the trial or only could so influence. The influence on the outcome of the trial need only be a reasonable possibility and not "probable" or "imminent."

16. Was the article which was published calculated to influence the outcome of the trial? I agree with the District Court that it involved a reasonable possibility of influencing witnesses. The central question in Blitz's trial, as will be recalled, was whether some person in addition to Blitz had fired a shot, and if so, whose shot killed Fiatelli? All are agreed that the. identification of a person is an inexhaustible source of error, error which has led to tragic instances of perversion of justice: see Wigmore, *The Principles of Judicial Proof,* (2nd ed.) paragraph 206, and the examples at paragraph 209. The appellants added to the difficulty. For a witness who was not certain whether Blitz had hit the victim, the

latter's admission was likely to strengthen his belief that Blitz had done so. A witness who thought otherwise might be deterred from giving evidence in favour of Blitz, after reading that the latter was ready to confess the crime. I said that the appellants added to the difficulty of giving evidence since a person appearing as a witness can only testify to what he believed he saw or heard and the process of impressions which create in a man's mind the belief that he saw or heard something is at times very complex. In this regard, Wigmore says at paragraph 206

> "Belief is purely mental ... thence the approximation of our belief to a correct representation of the actual fact will depend upon how fully the data for that fact have entered into the mental formation of our belief."

And a little later, in paragraph 207:

> "Suppose that a man has lost a valuable scarf pin. His wife suggests that a particular servant, whose reputation does not stand too high, has stolen it. When he afterwards recalls the loss, the chances are that he will confuse the fact with the conjecture attached to it, and say that he remembers that this particular servant did steal the pin."

In *R*. v *Clarke* (9) the court decided that publication of the confession of a murderer in prison before trial was a contempt of court. *A fortiori* is it so in the case before us. Blitz had denied the charge and the publication only served to add unnecessary tension to the trial and to show that his denial was not true. It is the right of an accused person to deny the charge. He is presumed to be innocent until his guilt is proved. The publication by the appellants tended to prejudice that right and it was only made to reduce the force of the denial of the charge, thereby affecting the defence adversely.

In conclusion, I would like to add one thing. I am astonished why the police in this as in other instances allowed a journalist to interview the defendant. When a case is pending, nothing that may influence it is to be published. What reason is there for the police to enable the defendant at this stage to have contact with someone whose job is to gather and publish news? A journalist has no interest in news that may not be published. Conversation

with a person charged with a serious crime can arouse a feeling of sensation, but there is no benefit to the public in such an interview and it is better that it should not take place.

I have found no basis for the appeal against sentence. I would dismiss the appeal.

BERINSON J. I concur with everything said in the judgment of my learned colleague. I only wish to add something to the brief remarks about the possible influence upon judges of the newspaper publication of matters affecting a trial being heard by them.

I agree entirely with the District Court judges that what the appellants published was calculated to influence the course of the trial going on at the time against the defendant Blitz, not only as regards the witnesses but also as regards the judges who sat.

Every defendant has a right to an unimputably fair trial. unaffected whilst it is pending in court by anything not lawfully part of the trial, It is vital that the trial of a person should be conducted and decided on the foundation solely of evidence and argument presented in court in the manner laid down by the law and not influenced by matter from without which has not passed through the crucible of the tests current in the courts and directed to ensuring a fair trial of the defendant, including full capacity to defend himself. In *Patterson v Colorado* Justice Holmes said:

> "...if our system of trial is to be maintained. The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print. What is true with reference to a jury is true also with reference to a court."

As my learned friend explained, the information published by the appellants cannot be understood otherwise than that the defendant here admitted his guilt to the journalist before standing trial. It is difficult to imagine anything more serious than the publication in the course of a trial that a person has confessed his guilt outside court. I accept the view of the District Court judges that publication of such information, even if only by clear hint, is always calculated to influence the course or outcome of the trial. Even if done without evil intent to influence the judges or witnesses, the character of the publication and its possible

harm of the defendant's interests is unchanged. What is decisive is not the intent but the act and its possible consequence.

Sec. 41(a) of the Courts Law defines the limit of publication with regard to a matter pending in court. It is formulated as a general prohibition of any publication which "is calculated to influence the course or outcome of the trial" and it only excludes "the bona fide publication of a report of anything that has been said, or has occurred, in an open session of the court." Accordingly, anything said or occurring outside court, calculated to influence the trial, is prohibited from publication. Journalists and newspaper proprietors who presume to publish such things cannot plead that it was done in the public interest. The Law lays down what is prohibited and what is allowed in publication from the viewpoint of the public interest, and once the legislature has spoken every plea that the public interest requires otherwise is debarred.

Should a person penetrate the private domain of a judge in order to whisper to him things affecting the guilt or innocence of a person standing criminal trial before him, is that person free of wrong doing? Will he not be punished for an attempt to influence unproperly the judge and the outcome of the trial? I would think-so, as emerges clearly from the remarks of Lord Cottenham over a century ago in *Dyne Sombre* (10):

> "Every private communication to a judge, for the purpose of influencing his decision upon a matter publicly before him, always is, and ought to be, reprobated; it is a cause calculated, if tolerated, to diverb the course of justice, and is considered, and ought more frequently than it is to be treated as, what it really is, a high contempt of court."

In this respect, the right of a newspaper is no greater than that of any other person in the country (*R.* v *Gray* (11)). On the contrary. A newspaper fulfils a public task and information published in it is normally entitled to the trust of the public which usually attaches importance to newspaper publications. A newspaper which publishes a report that a person has in it more conferred is a crime outside court inculcates belief in that person's guilt in the mind of every reader, including a judge. Willingly or not, he can be influenced consciously or subconsciously. The words of Humphreys J. in *R*. v *Davies* (12) at p. 443,

that "It is a fallacy to say or to assume that the ... judge is a person who cannot be affected by outside information", express a simple and well-known truth. A judge is but a human being and we cannot penetrate the recesses of his soul and affirm that he has indeed succeeded in freeing himself entirely from things he has come across which have penetrated his mind even unknowingly. The judge's task of conducting a just trial is a difficult and delicate matter even when everything is as it should be. Be the judge as cautious and as strong as he can, things should not be made even more difficult for him by irresponsible publication of matters which it is not his concern to know. In this regard, the observations of the District Court Judges, themselves judges of long standing, capacity and experience, are worthy to be recalled:

> "An effort is required of a judge, even when he is used and trained to do so, to rid his mind of outside information which reaches him not in the course of the regular trial, and that is likely to be felt at least when the judge has to decide his stand regarding the credibility of witnesses."

Further on in their judgment they go on to say:

> "And if it be asked, what about those instances in which a judge reads (as often occurs...) of the confession of the accused which is subsequently disqualified as evidence, or in which, after admitting the charge in open court, the accused applies for and obtains leave to withdraw his admission - indeed such instances are not to be welcomed: they are liable to exert an undesirable influence but there is no possibility of avoiding them since these possibilities exist only to prevent new serious dangers.

Freedom of expression does not embrace the right to set at naught the usual assurances for the conduct of an unimputably fair trial. The press is free to deal generally with everything touching the judges and the courts, even to level criticism at them so as to enlighten the public about the problems involved in judicial matters in this country. Judges as human beings, said Justice Frankfurter, or courts as institutions are not entitled to great immunity from criticism than are other persons or institutions: *Bridges* (16) at p. 259. That refers to criticism of a general nature that does not impinge upon a particular case as long

as it is going on in court. This limitation was repeatedly emphasised by Justice Frankfurter in his judgment. Interference in the course of a trial by publication of matter which may impress its mark on those who take part in the trial as judges, witnesses, experts and the like is liable to destroy the character of our legal system, requiring as it does that a defendant's fate shall be decided solely upon the evidence properly adduced in court in the manner fixed by the law and not by any outside influence.

Justice Frankfurter in *Bridges* (16), after referring to the notion advanced by Justice Holmes in *Abrams* (20) that a trial is not "free trade in ideas" and that the best test to adopt in court is not "the power of the thought to get itself accepted in the competition of the market", goes on to explain it at greater length (at 203):

> "A court is a forum with strictly defined limits for discussion. It is circumscribed in the range of its inquiry and in its methods by the Constitution, by laws, and by age-old traditions. Its judges are restrained in their freedom of expression by historic compulsions resting on no other officials of government. They are so circumscribed precisely because judges have in their keeping the enforcement of rights and the protection of liberties which, according to the wisdom of the ages, can only be enforced and protected by observing such methods and traditions."

The problem here is how to achieve a proper balance between protection of freedom of expression on the one side and the maintenance of a just trial on the other. In other words, what is the right place of each in the hierarchy of primary social and public values vital for the existence of true and free democracy. The District Court Judges put their mind to the problem and I think we can be satisfied by citing the incisive observations of Judge Harpazi with which the other two judges who sat agreed and which also reflect my own view of the matter:

> "The problem with which we are dealing here is not a new problem nor peculiar to this century. It occurs wherever there are courts, wherever people seek to ensure fair and just trial on the one hand and newspapers exist on the other. The problem arises and has at times been considered

by the courts of the two great countries where a democratic political regime exists and where the legal system is similar to our own: Great Britain and the United States of America. I see no need to cite here precedents from these two countries but it is common knowledge that in Britain jealous watch is kept against publications concerning matters *sub judice,* whilst in America the press is far freer in publishing such matters. Were it for me to decide which is desirable, I would choose the British approach and avoid loosening the rein, the end of which is "trial by the press" before a person is adjudged by the court.

Our approach, however, has been laid down by the Israeli legislature, having regard to the fact that severity was prescribed (in Britain) at a time when most cases were decided by a jury. Thus I think that in sec. 41 of the Courts Law the Israeli legislature followed the British approach.

I do not overlook the fact that freedom of the press is affected, which is not only the right of individuals and public groups to free expression but also embraces a vital concern of the public generally. But I think that no one in this country, including pressmen themselves, would urge the right of the press to influence the course and outcome of a trial. When a person stands trial, his fate must be decreed by the court in the courtroom closed to any voice or influence from outside. The right and the task of the press is to inform the public what has occurred in court and it may thereafter also criticize what the Court has done, but it may not interfere in the course of the trial."

The case of *R.* v *Clarke* (9) is similar to the one before us. There also information was published in a newspaper of the confession of a person suspected of murder, after being detained in Canada under a warrant of arrest issued in England. The editor of the London "Daily Chronicle", in which the information was published, was charged with contempt of court and convicted. Darling J. speaking for Court had the following to say (at p. 637):

> "It is most important that the administration of justice in this country should not be hampered as it is hampered in some other countries, and it is not enlarging the jurisdiction of this court - it is refusing to narrow the jurisdiction of this court - when we say that we are determined while we are here to do nothing to substitute in this country trial by newspaper for trial by jury; and those who attempt to introduce that system in this country, even in its first beginnings, must be prepared to suffer for it."

See also the like judgments in Canada, *R.* v *Willis and Pople* (14) and in Australia, *Ex parte Senkovitch* (13) set out in the *English and Empire Digest,* vol. 16, p. 20, nos. 169 p. & q.

To the credit of Israeli newspapers it may be said that in general they proceed with restraint and moderation with regard to anything concerning pending cases and with respect and esteem for the judge. But precisely for this reason it is proper that in the present case, the first of its kind to come before this Court under sec. 41 of the Courts Law, 1957, we should make patent our views and say clearly that the courts of this country will not tolerate the interference of newspapers in pending cases, which may stultify the doing of justice. So that newspapers should know what to expect when an attempt is made to reproduce among us trial by newspaper; the courts must repress any tendency in that direction in its infancy, before it acquires any place or hold in our judicial and social life.

LANDAU J. I concur in the judgment of my friend Sussman J., as well as in the additional observations of Berinson J. as to the dangers which lurk in trial by newspaper. I take liberty to repeat what I said in the same spirit in *Ozri* v *Galed* (5):

> "The advice to be given to newspapers is to abstain from running after sensations in the preliminary publication of court proceedings which are to be conducted in the future and to be satisfied with exact and "dry" reports of these proceedings themselves when taken, without adding details not mentioned in court. Newspapers will thereby safeguard themselves from mishap in this connection as well as take an important step towards raising their professional standard and clear the

> atmosphere darkened by a multiplicity of publications which tend to injure the good repute of the individual" (at p. 1560).

These observations apply even more cogently to anything published about a pending trial which is calculated to prejudice its fair conduct.

Appeal dismissed.

Judgment given on February 20, 1963.