Hastings Law Journal

Volume 5 | Issue 1 Article 7

1-1953

Criminal Law: Right to a Public Trial--Exclusion of the Press

John H. Baker

CRIMINAL LAW: RIGHT TO A PUBLIC TRIAL—EXCLUSION OF THE PRESS.—Does the exclusion of the public and press from a criminal trial give the newspapers a cause of action under a statute calling for a public trial?[1]

During a recent trial in New York,[2] which attracted considerable public attention, the trial judge excluded all members of the public from the courtroom, except friends and relatives of the accused, and officers of the court. The appellants, a group of newspapers, applied for a writ of prohibition. They claimed that the trial judge had exceeded his jurisdiction in excluding the general public from the trial. The New York Supreme Court, special term, denied the application,[3] and petitioners appealed to the appellate division, which sustained the decision of the lower courts.[4]

Appellants brought this action on the theory that Judiciary Law, section 4, gave them, and other members of the general public, a right to attend all sittings of every court. The language of the statute is that "every citizen may freely attend" the sittings of "every court within the state . . . except that in all proceedings and trials in cases for divorce, seduction, abortion, rape, assault with intent to commit rape, sodomy, bastardy, or filiation, the court may, in its own discretion, exclude therefrom all persons who are not directly interested therein, excepting jurors, witnesses, and officers of the court."

The case is unique in that a person other than the accused is bringing the action under the Judiciary Law. A similar case arose in *People ex rel. Gardiner* v. *Goff*,[5] where relator sought a peremptory writ of mandamus to compel the judge of general sessions to allow him to observe all proceedings that took place in court. Relator, who was a district attorney, claimed he had a right to observe proceedings under a code section that was very similar to the one in question.[6] The defendant judge excluded all persons from the courtroom during the court's instructions to the jury, except counsel and the assistant district attorney in charge of the case. In refusing to grant the peremptory writ until questions of fact were decided, the court indicated that the relator did not have a clear-cut right of action under the statute. This case can be distinguished from the principal case in that the relator, as district attorney, had a more direct interest in the court proceedings than the general public.

In sustaining the decision of the lower court in the principal case,[7] the appellate division of the Supreme Court said that section 4 of the Judiciary Law should be read with section 8 of the Code of Criminal Procedure,[8] and section 12 of the Civil Rights Law.[9] These sections state the rights of the accused in a criminal action as including a speedy and public trial. The court said that the Judiciary Law, section 4, merely defined what was meant by a public trial as set out in the other two sections.

---

[1]N. Y. Judiciary Law, § 4: "The sittings of every court within this state shall be public, and every citizen may freely attend the same, except that in all proceedings and 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."

[2]People v. Jelke (not appealed).

[3]United Press Associations v. Valente, Judge, 203 Misc. 220, 120 N.Y.S.2d 642 (1953).

[4]United Press Associations v. Valente, Judge, 281 App.Div. 395, 120 N.Y.S.2d 174 (1953).

[5]27 Misc. 331, 57 N.Y.Supp. 1106 (1899).

[6]N. Y. Code of Civ. Proc., § 5.

[7]See note 4 *supra*.

[8]N. Y. Code of Crim. Proc., § 8. "In a criminal action the defendant is entitled to a speedy and public trial. . . ."

[9]N. Y. Civil Rights Law, § 12. "In all criminal prosecutions the accused has a right to a speedy and public trial. . . ."

However, appellants contended that this statute was enacted for the benefit of the public, as is shown by amendments[10] to the act which provide for certain exceptions to the general rule of a public trial. The exceptions gave the court discretion to exclude the public in cases where sodomy was involved, but the exceptions did not include cases of prostitution. Therefore, the appellants contended the court did not have jurisdiction to exclude them from this case, prostitution being the primary issue involved, under the theory of *expressio unius est exclusio alterius.*

There have been a great number of decisions on the question whether a judge can exercise discretion in clearing the courtroom in cases involving testimony that may be harmful to public morals. The great majority clearly allow the judge to clear the courtroom in such cases. However, the question has never before arisen whether those persons excluded have such a right or interest as would allow them to bring an action.

In *Lee* v. *Brooklyn Union Pub. Co.*,[11] the court held that there is a public interest in having proceedings of courts of justice made public for the greater security thus given for the proper administration of justice. The court, in that case, then went on to say that it was for this reason that section 4 of the Judiciary Law was provided. The proceeding was one which the public had a right to hear, and the defendant had the right, in the public interest, to report. However, in that case, defendant newspaper was being sued for libel, and its defense was a right to report the facts of trials. The court failed to discuss whether Judiciary Law, section 4, would give the newspaper or the public an enforceable right to attend proceedings of the court.

It is highly doubtful that the court would have gone so far as to say that Judiciary Law, section 4, would give newspapers and the public a right of action in cases where testimony injurious to public morals would be given. By a careful reading of the statute, it appears very clear that the intention of the legislature was to protect the accused by giving him a public trial. The amending of the statute to include certain exceptions was for the benefit of the general public by preventing their morals from being corrupted.

Before Judiciary Law, section 4, was amended to include sodomy as an exception to the rule that all citizens are entitled to attend court sittings, the case of *People* v. *Hall*[12] was decided. In that case, the defendants were tried for conspiracy to extort money on the charge that one was guilty of sodomy. The judge cleared the courtroom of all spectators, including reporters. Defendants appealed on grounds that they did not have a public trial within the meaning of the statute, but the court held that the courtroom could be cleared on the theory that public morals should be protected. The court also said that the statute was for the benefit of the accused, but in such a case as this, expulsion of spectators did not aid nor harm the defendants, since they were still allowed to have their friends and relatives with them. The court did not discuss the rights of the newspapers, because they failed to bring an action. However, even if they had, it would be doubtful if the court would have ruled that the statute gave them an enforceable right to observe court proceedings, because, as is said in the case, the statute was for the benefit of the accused, and the court would probably have said that the right of the newspapers is no greater than that of the general public.

The court, in the *Hall* case, exercised its inherent power to exclude spectators, despite the fact that the statute did not give it express power to exclude spectators in cases of sodomy.

---

[10]N. Y. Laws 1945, c. 649, § 3.
[11]209 N.Y. 245, 103 N.E. 155 (1913).
[12]51 App.Div. 57, 64 N.Y.Supp. 433 (1900).

In *State* v. *Smith*,[13] the court also held that a public trial is for the sole benefit o the accused, so that not every person who sees fit can be permitted to attend in all case: The court went on to say that it can, at its own discretion, order spectators exclude from the courtroom, provided that the defendant is safeguarded in his right to a publi trial.

On the basis of the above cases, it is fair to conclude that courts have discretionar power to exclude spectators from the courtroom in trials that involve public morals However, this discretion is limited to excluding only the general public, and th exclusion of friends and relatives of the accused is deemed to be an abuse of th court's discretion.[14]

However, the question whether the appellants in the principal case are given a right of action under the Judiciary Law, section 4, still remains. In an oft-quotec statement, it is said that by a public trial is "not meant that every person who sees fi shall in all cases be permitted to attend criminal trials."[15] Since the statute is solely for the benefit of the accused, if the court errs in excluding the public, only the defendant may appeal, not a member of the general public.

Such a construction of the statute would not be violative of the New York constitution,[16] as was shown in the recent case of *Danziger* v. *Hearst Corp.*[17] In that case the defendant newspaper reported matters pertaining to a divorce, although information was obtained through court records of divorce proceedings, which, under the Rules of Civil Practice, Rule 278, were to be available only to the parties. The court held, in deciding against the defendant, that prohibiting newspapers and others from examining divorce proceedings is not an unconstitutional restriction on freedom of the press, since freedom of the press is limited by the police power of the state to protect the health, safety, and morals of the community.

England has also seen fit to enact statutes restricting newspapers from reporting certain proceedings.[18] As one English judge said, "The liberty of the press is no greater or no less than the liberty of every subject of the Queen."[19]

It appears, from the decision of the principal case, that appellants had very little on which to base their claim. A case such as *Davis* v. *U. S.*[20] would have been of little aid to them. There, everyone was barred from the trial except reporters, counsel, relatives, and a few friends of the court officers. The court held that this deprived the defendant of a public trial, but this case can be distinguished from the appellant's case in that public morals were not involved in the case.

The appellants might have contended that the press was denied access to the court for the protection of the morals of the general public, rather than for the purpose of promoting justice. It is submitted that the reason given by the court appears to protect morals, and thus is one of pure censorship. The court might have fortified its reasoning by saying that justice would better be served if the names of those involved did not become public property. Men might be improperly charged.

---

[13]90 Utah 482, 62 P.2d 1110 (1936).

[14]In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682, where court held petitioner's right to a public trial included friends and relatives in the courtroom with him.

[15]1 COOLEY, CONSTITUTIONAL LIMITATIONS 647 (8th ed. 1927).

[16]McKINNEY, N. Y. CONST., Art. 1, § 8, ". . . no law shall be passed to restrain or abridge the liberty of speech or the press."

[17]304 N.Y. 244, 107 N.E.2d 62 (1952).

[18]Children's and Young Persons' Act § 49(1) (1933).

[19]Rex v. Gray, [1900] 2 Q.B. 36, 40.

[20]247 Fed. 394 (8th Cir. 1917), L.R.A. 1918C, 1164.