TRIAL BY PUBLICITY *

ARSENIO SOLIDUM **

As I understand it, the question for discussion before us this morning is whether court proceedings should be given wide publicity in the newspapers. The purpose is to seek a remedy for the alarming situation which develops when, as sometimes happens, a case is tried in the newspapers and not in the courtroom as it should be. The only place for the trial of a case is in the courtroom, and yet, how often do we see the newspapers trying the litigants on their own, independent of the court. What is printed in the press is ultimately read by the judge and the prejudicial influences which typically result from a highly-publicized trial, are sometimes brought to bear on him with such force that the conclusion is inescapable that the trial is but a legal gesture to register a verdict already dictated by the press and the public opinion which it generates.

Before I proceed to discuss the subject, I would like to state that the views that I express on this matter are entirely my own, for I am conscious that my colleagues in the Bench are far more competent and able than I to elucidate this point.

There are two fundamental rights which are essential to our liberty—the right to a fair trial and freedom of the press — both of which are guaranteed by our Constitution. After all, our liberty is based not only on freedom of the press, vital as that is, but also upon the right to a fair trial which involves the age-old struggle of the individual against all powerful government and is the most basic, the most essential of all human rights. Free trial connotes freedom of the individual from conviction on hearsay testimony and freedom from conviction after years of confinement without the filing of any formal charge. Yet, there are times when there seems to be a conflict between the right to a free trial and freedom of the press, which presents a serious problem in the administration of justice, for an irresponsible press can often make a fair trial well nigh impossible. Unquestionably, one of the demands of a democratic society is that the public should know what goes on in the courts by being informed by the press what is happening there, to the end that the public may judge whether our system of administration of justice is fair and right. Hence, it can not be denied that what takes place in the courtroom during the hearing of a case is public property, for a trial is a public event. If those who see and hear

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what transpires at a court trial can report it with impunity, there is no reason why the court should try to suppress, edit or censor events which take place in proceedings before it. But the courts must also have the power to protect the interests of litigants before them against efforts exerted to pervert judicial action, for in closely contested cases which are difficult to decide one way or another, the specific freedom of public comment should weigh heavily against the possible tendency to influence pending cases. In other words, while freedom of discussion should be given the widest range, it must be consistent with the essential requirements of a fair and orderly administration of justice, free from outside pressure and influences. While it cannot be doubted that without a free press, there cannot be a guarantee of a fair trial, it must also be recognized that all rights, including the right of free press, depend on the ability to get a judicial hearing as dispassionate and impartial as the weakness inherent in men will permit.

In the United States, the rule seems to be that the punishment for contempt for newspaper comment on a pending case is imposed only upon a showing that such comment creates a "clear and present danger" to the administration of justice. This rule favors free press over fair trial and any publication which tends to create a prejudice that might affect a person's right to a fair trial is contempt of court only if there is a clear and present danger that such a result will follow. The benefit of the doubt is given to the free press and not to the fair trial. Consequently, if what is published in the newspapers faithfully describes what has actually transpired at the trial without any attempt to coerce the court to decide a particular pending case in a desired way, such publication is perfectly allowable. But if the publication attempts to whip up public opinion against the judge in order to force him to decide the case in favor of one of the parties, such publication should not be tolerated. For certainly, the newspapers cannot properly ask of the judge, that which no one has any business to ask of a judge, except the parties and their counsel in open court, namely, that he should decide one way rather than another. Our society has set apart the court as the tribunal for determining guilt or innocence on the basis of evidence adduced in the court, so far as it is humanly possible.

Here in the Philippines, as in England, we have adopted the "reasonable or dangerous tendency" rule which favors fair trial over free press. Pursuant to this rule, any publication having a reasonable tendency to create a prejudice that might affect a person's right to a fair trial or directly or indirectly to prevent, obstruct, degrade, or embarrass the administration of justice, constitutes contempt for the courts insist on being permitted to dispose of their business in an orderly manner, free from outside interference obstructive of their functions and tending to embarrass the administration of justice.

Under Article 354 of the Revised Penal Code, a fair and true report made in good faith without any comment or remark on any

judicial proceedings which are not of confidential nature or of any statement, report or speech delivered at said proceedings, is a privileged communication which overcomes the presumption of malice. This privilege, however, is limited by Article 357 of the same code to the effect that "no reporter, editor or manager of any newspaper, daily or magazine, can publish facts in connection with the private life of another and offensive to the honor, virtue and reputation of said person, even though said publication be made in connection with or under the pretext that it is necessary in the narration of any judicial or administrative proceeding wherein such facts have been mentioned." It should be noted that this limitation refers only to the publication of facts connected with the private life of a person and offensive to his honor, virtue and reputation and does not include the publication of facts related to the public life of another even if offensive to his honor, virtue and reputation. Obviously, the reason behind this limitation is that the private life of a person is entirely his own in which the public can possibly have no interest whatsoever.

Subject to this limitation, I am in favor of giving the widest publicity to anything that transpires in the courtroom during the hearing of a case. For one thing, some people, especially those who are occupying high positions in society and in the government, are afraid of having their names printed in the newspapers when they have pending cases in court. So at least as a deterrent against the commission of prohibited acts by our prominent citizens and officials, should anyone of them have a case in court, unless it involves a crime which is purely private in nature and which cannot be prosecuted *de oficio*, the newspapers should give it wide publicity. It is regrettable, however, to say that cases involving some of our prominent citizens and officials are not given the publicity in some newspapers that they deserve.

Of course, at this juncture, it becomes necessary for us to recognize as a limitation upon publicity the exclusion of anything that would tend to corrupt the judgment of the courts by introducing prejudice or substituting somebody else's uninformed judgment for the deliberate and supported judgment which they are expected to render. While a newspaper may publish facts given in open court, it is generally agreed that it should not publish extraneous information derogatory to a party especially in a criminal case which may cause prejudice against him, for newspapers, in the enjoyment of their constitutional rights, should not deprive accused persons and other litigants of their right to a fair trial. And while every one should recognize the tremendous service of our enterprising free press in vigilantly exposing wrong-doing and corruption, in aiding the detection of the guilty and in throwing the limelight of publicity on matters affecting the government and its administration, in its enthusiasm, it should not attempt to deprive a man of a fair trial which is a dangerous and deadly thing to do.

If the fear is that publication of court proceedings in the newspapers may affect the judge in his decision, insofar as my humble self is concerned, I can truly say that up to this moment, I have never been swayed by what is published in the newspapers regarding a case pending in my court as to how it should be decided. In fact, in one instance, in a famous murder case that I decided about five years ago, I stated in my decision that "the courts cannot convict persons accused of crimes merely on rumors or what is published in the newspapers. Judges under their oath must comply with the law and base their decisions only on facts clearly proved in the record." Without any idea of exalting myself, I have already reached an age when my only obsession is to do the right thing, although I cannot guarantee that what I do is necessarily right for after all I am human. But in the discharge of my judicial functions, I have tried to follow the wise saying of Thomas A. Kempis that "He who seeketh not to please men, nor feareth to displease, shall enjoy abundant peace. From inordinate love and vain fear ariseth all disquietude of heart and all distraction of the senses."

As regards the apprehension in some quarters that a judge may be afraid of being criticized in the newspapers for his judicial actuations, I agree with the Supreme Court when it said, in the case of In Re: Vicente Sotto, 46 O.G., 2570, that "Mere criticism or comment on the correctness or wrongness, soundness or unsoundness of a decision of the court in a pending case made in good faith may be tolerated because if well founded, it may enlighten the court and contribute to the correction of an error if committed; but if it is not well taken and obviously erroneous, it should in no way influence the court in reversing or modifying its decision." Constructive criticism is healthful for judges as it is for anyone else. But as stated by Justice Douglas, "A judge may not hold in contempt one who ventures to publish anything that tends to make him unpopular or to belittle him. x x x x. The law of contempt is not made for the protection of judges who may be sensitive to the whims of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate." Justice Frankfurter has likewise added that "Comment on what a judge had done — criticism of the judicial process in a particular case after it has exhausted itself — no matter how ill-informed or irresponsible or misrepresentative, is part of the precious right of the free play of opinion. Whatever violence there may be to truth in such utterances must be left to the correction of truth."

Finally, I refuse to believe that our judges can be subjected to pressure. However, they should rarely invoke penalties for such pressure. They should resolve any doubt in favor of the free press and let the penalty emanate from public opinion rather than the court. After all, any judge so weak in moral fiber as to require insulation from pressure is not fit to sit in the Bench. If criticism goes beyond the bounds of decency and fairness and constitutes malicious falsehood, a judge can sue for slander or libel.

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