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Does a Free Press Allow a Fair Trial?

Supreme Court Again Given Problem Of News About Crime Prejudicing A Defendant's Right to Justice

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"MURDER AND MYSTERY, society, sex and suspense . . ." Corruption in the police department of a large city . . . The disappearance of a family from the face of the earth . . .

These things make news. They make news because they arouse strong feelings in people, feelings of legitimate public concern and sometimes of community passion.

When these elements exist in a criminal prosecution, the prosecution makes news and frequently a new problem is raised: how to reconcile the public's legitimate interest in the workings of its courts and the right of the accused to a fair trial.

The Supreme Court has examined this problem with increasing frequency in recent years and the issue is raised again in its docket for the coming term.

Three petitions on that docket seek review of criminal convictions because of allegedly prejudicial news accounts of the proceedings. Each petition touches a different aspect of trial coverage by newspapers, radio and television.

The Sheppard Case

THE "MURDER and mystery" case —the phrase is the Ohio Supreme Court's—is that of Dr. Sam Sheppard, socialite surgeon who was given a life term for bludgeoning his wife to death in 1954.

From Virginia comes the case of Melvin D. Rees Jr., condemned to death in the abduction-slaying of a family that disappeared while on a country drive in 1959. And from Chicago comes the petition of five policemen to review their convictions for conspiring with hoodlums to protect systematic burglarizing of a residential area.

With varying force to their arguments, the petitions charge that juries were influenced by publicity about the case on trial. Each petition contends that whatever the news coverage, the trial judge should have and could have done more to insure an unbiased jury.

The Supreme Court has complete discretion to grant or deny review to any or all of the petitions. As the late Justice Felix Frankfurter pointedly observed when the Court rejected an earlier plea from Dr. Sheppard, denial of review would signify neither approval nor disapproval of the way state courts handled the trials. Refusal to review simply means that fewer than four justices found the case significant enough to hear arguments about it.

But Court decisions in this decade, capped by its ruling in the Billie Sol Estes television case in June, have demonstrated the Court's increased concern about the impact of news coverage on trials. And because of the variety of circumstances in the three cases, the Court can't help stir speculation on its policy no matter how it handles them.

A Judicial Broadside

IN A WAY, the celebrated Sheppard case is the simplest one for the Court. By contrast to the Rees case—where the reporting was never attacked on grounds of falsity or newspaper malice—the Sheppard reporting is assailed as an outright newspaper campaign of prosecution.

An Ohio court said that Sheppard was tried in a "Roman carnival" atmosphere. A Federal judge who ordered Sheppard released in July said the trial was "a mockery of justice." The Sixth Circuit Court of Appeals, though it reversed the lower Federal judge and upheld the conduct of the original trial, called the trial coverage "shabby reporting."

The Cleveland Press was able to boast that important steps leading to the trial of Dr. Sheppard followed quickly on the heels of "hard-hitting" editorials. One editorial demanded an inquest at which Sheppard could be questioned. Another, headlined "Stop Stalling—Bring Him In," insisted that police should take Sheppard to headquarters and question him as they would any other murder suspect.

The Press made much of Sheppard's availing himself of legal advice and his refusal, partly on scientific grounds, to submit to a lie detector test.

Phoned From Jury Room

AT THE TRIAL, 11 of the 12 jurors finally selected said they had read stories about the case but would not be

influenced by them. The jurors were photographed many times during the trial and two jurors heard a Walter Winchell broadcast about a woman who claimed to have been Sheppard's mistress.

Although the jurors were forbidden to read news accounts of the trial, their families were not, and while they were deliberating Sheppard's fate, some jurors made unauthorized outside telephone calls. Defense counsel contended that this alone raised a presumption of prejudice and required a new trial.

The Sixth Circuit Court of Appeals, over a vigorous dissent, ruled that all the presumptions run the other way. Courts should not presume that the jurors violated their oaths and ignored the judge's repeated admonitions not to read the papers, the Court said.

Most of these matters were considered by the Ohio Supreme Court about ten years ago and the conviction was affirmed. Now the case is in the Federal courts on habeas corpus petitions in a judicial climate more congenial to Sheppard.

Since 1959, the Supreme Court has reversed several convictions because of pretrial publicity—so flagrant in one case of a televised confession that the Court ruled that specific prejudice to the defendant did not need proof. At the same time, the Court has increasingly held state trials up to the standards previously reserved for the Federal courts.

Sheppard, who married a pen-pal sweetheart after his release, is free on $10,000 bail following a brief return to prison ordered by the Circuit Court. His lawyers say that if he were retried, chemical evidence turned up in the interim would destroy the prosecution's circumstantial case.

In sharp contrast to Sheppard's protestations of innocence, Melvin Rees recently told his court-appointed lawyer that he is ready to give up the fight for his life. The lawyer has told the Supreme Court that Rees's resignation so defies natural instincts of self-preservation that he will have the prisoner examined before agreeing to withdraw his petition.

It is possible that the Court will delay decision on the Rees petition until the prisoner's mental condition is cleared up. Rees already is serving a life sentence, from which he took no appeal, for kidnaping two members of the Carroll Jackson family of Louisa County, Va. That sentence was imposed by a Federal judge in Maryland, where the bodies of Mildred Jackson and her 5-year-old daughter Susan were found three months after their disappearance.

After the Maryland trial, Rees was tried in Spotsylvania County, Va., for the murder of Jackson, a 29-year-old feed store deliveryman, whose body was found alongside that of his 18-month-old daughter Janet in a crude grave near Fredericksburg. The jury took ten minutes and returned a verdict of guilty with the death penalty.

Discovery of the bodies climaxed weeks of suspense and anxiety in the central Virginia farm country. The mystery of how an entire family could vanish had puzzled many persons and terrified others. Lawyers for Rees contend that strong community feelings, fed by publicity—some of which spilled over from the Maryland trial—denied Rees a fair trial in Virginia.

Virginia prosecutors denied that any strong feeling ran against Rees in Spotsylvania, which adjoins Louisa County. They said a searching examination of prospective jurors failed to turn up evidence that news stories had biased the panel.

Lawyers for Rees countered that after defense attorneys had exhausted their challenges, two jurors remained who had admitted having formed opinions that Rees was guilty.

The lawyers said that the press coverage included more than 400 pretrial references to Rees's earlier Maryland conviction in newspapers and on radio and television. They said also that the stories were deeply prejudicial, especially accounts of a paper handwritten by Rees purporting to describe the crime. The document was ruled inadmissible at both trials.

Accuracy Unchallenged

THE REES attack focuses on stories by three newspapers serving Spotsylvania—The Washington Post, Richmond Times-Dispatch and Fredericksburg Free Lance-Star—and several radio and TV stations. The attack does not challenge the accuracy of the news accounts.

According to the record in the lower courts, the circulation of The Washington Post in Spotsylvania County at the time of the trial was 165 copies daily and 657 Sunday out of a county population of 13,800.

Lawyers for Rees contend that the trial should have been moved to another rural Virginia county or to a metropolitan area where there was more news to compete for the jury's attention.

The Rees petition, supported by a brief by the American Civil Liberties Union, is strongest in showing the damaging character of the factual news accounts if read by the jury. However, lower courts have found no indication that the accounts had any significant impact on the jury.

The Chicago case of the five policemen centers on news stories appearing during the trial. Defense lawyers contend that the trial judge had power to order city newspapers to confine their trial stories to events occuring in open court. They claim that the judge should have examined jurors individually and searchingly to make sure they did not see such banner headlines as "2 Cops Offer Guilty Plea" and an accompanying story that an Illinois court called "apparently erroneous."

As with the Sheppard and Rees cases, however, lower courts have discounted defense claims that the news accounts must have influenced the jury. The lower courts have placed on the defense the burden of showing actual prejudice. They have accepted at face value the statements by prospective jurors that they had not seen the stories, would not be influenced by them if they had or could put them out of their minds.

Many lawyers attacking the fairness of publicized trials are plumbing the six opinions in the Supreme Court's Billie Sol Estes decision in June. The Court found that televised coverage of Estes' fraud trial was an unfair denial of the serenity demanded of judicial trials. The Court explicitly declined to consider the effect of pretrial publicity, but lawyers are seeking analogies in the alleged disruption caused by other forms of coverage.

Collision of Rights

SUCH CHALLENGES run into the strong free speech traditions of the American people, so firmly embedded in the Constitution that thought-

The Maurice Stern mural "Crime, the Law and Its Restraint" in the Justice Department law library.

ful authorities are loath to choose between the First Amendment's free speech guarantee and the Sixth Amendment's right to a fair trial.

Somewhere in the middle is an argument that not enough has been done to keep the two rights from colliding. Some news stories have been wantonly prejudicial; some prosecutors have been too willing to poison the judicial process with unfair publicity.

On the other hand, not all judges have fully utilized their devices for keeping the jury insulated during trials and too many judges have stopped short of finding the best time, place and jury to afford the fairest trial.

Whatever the Supreme Court does with these cases, it will not be handling them in a vacuum. Ever since Dallas and the controversy over the right of Lee Harvey Oswald to a fair trial had he lived to stand trial, the issue has assumed growing importance. More and more, the "fair trial-free press" question seems to be something everyone has an opinion about.