

JUSTICES ALLOW RULING BY POSTEL

DEC 2 1971

Say Public Has No Right
to an Open Persico Trial

NYTimes

By LESLEY OELSNER

The Appellate Division refused by a 4-to-1 vote yesterday to order State Supreme Court Justice George Postel to reopen the extortion trial of Carmine J. Persico to the public.

It bypassed the question whether Justice Postel had acted properly in excluding the press and the public from the Persico trial, ruling only that the newsmen who had asked that it be reopened had no right of their own to insist it be public.

The right to an open trial, the majority said, is one that belongs essentially to the defendant, and, as the court noted, Justice Postel had excluded the public at the request of Persico.

And the question whether Justice Postel was correct in granting the defendant's request, the majority held, was "foreclosed" by a 1954 decision of the New York Court of Appeals, which found that "members of the public at large, including the press, possessed no enforceable right or privilege of their own to insist that trials

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RULING FOR POSTEL ALLOWED TO STAND

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be open to the public."

The majority opinion, written by Justice Theodore R. Kupferman, said that whether the Postel action "was an abuse of discretion can be tested on appeal."

However, Justice Francis T. Murphy Jr. said in his dissent: "If the public and the press are foreclosed from raising this issue in this way, the issue cannot be decided on appeal."

For Persico had asked that the public be excluded, Justice Murphy said, and in so asking had waived his right to a public trial. If he was then convicted and decided to appeal, the judge reasoned, he would not then be able to argue that he had been denied a public trial. And if he was acquitted, Justice Murphy said, "then the issue will also be academic."

Appeal Not Clear

The majority opinion did not specify how the matter could be appealed. Lawyers said last night that if the extortion case against Persico was dismissed by the judge, the prosecutor could appeal the dismissal, but that if Persico was acquitted by a jury, the prosecution could not appeal.

The suit had been brought against Justice Postel by five local reporters — members of the Committee of 100 Reporters formed to challenge Justice Postel's action—and last night both the committee and the lawyer for the five reporters insisted that their fight was not over.

"We'll apply to the Court of Appeals tomorrow for a stay of the trial and for an immediate hearing," said Jacob D. Fuchsberg, the lawyer. He added that yesterday's Appellate Division decision in no way injured the case that five other members of the reporters' committee had brought in Federal Court here, also asking that the Persico trial be reopened to the public.

The Federal case is still pending.

The newsmen's committee, for its part, said that the Appellate Division had used "the

same logic as the military officer in Vietnam who says he was forced to destroy a village in order to save it." The court's ruling, the committee said, was "like saying that in order to preserve our system of criminal justice, they felt obliged to usurp and destroy it."

Both Mr. Fuchsberg and Martin McLoughlin—a Daily News reporter who helped found the reporters' committee and who issued its statement last night—said they were encouraged by the fact that two of the five Appellate justices had sympathized with their views—Justice Murphy, the dissenter, and Justice George Tiltzer.

Felt 'Compelled'

Justice Tiltzer concurred with the majority opinion but said, in a separate opinion that he concurred only because he felt "compelled" to do so by the Court of Appeals decision of 1954. In fact, he said, he was in agreement of "much" of Justice Murphy's dissent and believed that the time had come for the Court of Appeals to review the matter anew.

In his dissent Justice Murphy made many of the arguments the reporters had presented. He said for example, that the Sixth Amendment's guarantee of a public trial belonged to the public as well as the defendant.

And, he said, the exclusion of the press from the Persico trial violated the First Amendment free-press guarantee. He contended, too, that the 1954 Court of Appeals decision was irrelevant because it had been decided before the United States Supreme Court ruled that the Sixth Amendment was applicable in state as well as Federal trials.

The Appellate majority opinion, in effect, ruled only on the first of these issues, that of the Sixth Amendment. But it noted also that a judge was responsible for insuring that publicity does not deny a defendant a fair trial.

Also though it declined to decide whether Justice Postel had "abused his discretion" it implied that his discretion was broad.

The majority said, speaking of Justice Postel, "in the trial judge's discretion, this was necessary to protect the defendant's right to a fair trial, so that there would be no basis, in the event of conviction, for reversal."