

Trial by the Media

A violation of the presumption of innocence?

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In this article, **Dr Tonio Borg** discusses Maltese and European Court of Human Rights case-law on pre-trial publicity, and when this can threaten the eventual accused's presumption of innocence in criminal proceedings. It is a transcript of the author's keynote speech in the annual Policy Conference organised by GhSL on Friday 16 April 2021, reproduced here with his kind permission.

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The subject of today's webinar is of extreme importance in these modern times of swift and immediate communications. News broadcasts have almost become part of the daily staple. One may receive news at any moment in time in any place at the press of a button; sometimes you do not even need to press a button. At the height of the Suez Crisis, in 1956, Mrs Clarissa Eden, wife of the British Prime Minister, complained that she felt as if the waters of the Suez Canal were continuously flowing through her living room. Today, information flows and floats everywhere.

This has its advantages; famines, crimes and atrocities of wars, sufferings which require immediate aid owing to natural or man-made disasters receive immediate attention and reaction, galvanizing our opinions and consciences.

An inevitable conflict, however, is bound to occur in the reporting of criminal arraignments, prosecutions and trials; sometimes, a source of home entertainment, as we saw in the OJ Simpson trials. To what extent is this tsunami of information prejudicing the principle of presumption of innocence? Where shall we draw the line between the people's right to know and the individual's right to a fair hearing? Only a few weeks ago, in March 2021, the Court of Magistrates upheld a complaint by defence lawyers in the *Yorgen Fenech* case and prohibited the media from revealing leaked chats between their client and persons forming part of the higher echelons of the administration. They had alleged that the leaking of the chats were, and I quote, 'obscuring the character of the accused who is put in bad light in the media before those who will in the future form part of the jury which will decide his future'.

In Malta, the first case I remember where this issue was raised was in the *Formosa* case.¹ In that case, Formosa had been arraigned for the murder of his wife. Prior to arraignment, the then Commissioner of Police held a press conference announcing that the case had been solved and the offender apprehended. When Formosa complained through a human rights action that such press conference infringed his right to a fair hearing, the Constitutional Court ruled that '*the assessment has to refer to the proceeding in its entirety*'.² The incident complained of, in this case was not such as to '*likely violate the Constitution*'.³ This last sentence is controversial. The likelihood of contravention mentioned in Article 46 is related to the kind of juridical interest one needs to prove to start an action; a violation is either committed or not committed.

¹ *Emmanuel Formosa vs Commissioner of Police*, Constitutional Court 16 April 1973.

² *ibid.*

³ *ibid.*

However, the ‘entirety of proceedings’ argument has been the means by which most human rights cases relating to irregularities in criminal trials have been defeated; that one single error does not necessarily affect the fairness of the criminal proceedings as a whole.

This trend of thought, however, was not followed in the *Arrigo* case.⁴ In that case, the Prime Minister, following the arrest by the Police of two senior judges in relation to bribery, had held a press conference to inform the press of what was happening; presumably so that the sensational information would be officially communicated rather than leaked unofficially. In spite of the fact that, as in the *Formosa* case, the Prime Minister stated that the final decision was in the hands of the Court, the Constitutional Court, quoting *Butkevicius v Lithuania*⁵ found a violation since ‘*if a statement of a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before it so proven in a court of law*’⁶, then there is a violation. However, in that case the Prosecutor General had publicly stated that ‘[he had] *enough sound evidence of the guilt of A. Butkevicius*’,⁷ something which the Maltese Prime Minister in the *Arrigo* case had not said.

However, in *Lawrence Pullicino*⁸, where the accused complained of adverse publicity, the Constitutional Court in 1998 stated that in a case where a verdict of the jury may be appealed from before professional judges, the effects of adverse media publicity before a trial is less likely to amount to a breach of the presumption of innocence. This line of thinking was not followed in the *Arrigo* case.⁹

One may, therefore, say that Maltese case-law has been inconsistent in treating these adverse publicity cases. In all cases, however, the Court never annulled the criminal proceedings: either the Court found that considering the entirety of the proceedings there was no violation, or else that no specific remedy was given except the direction to the judge presiding over a jury trial to remind jurors to ignore everything which does not result from the trial itself on the basis of the time-honoured principle of *quod non est in actis non est in mundo*.

In a democratic society, severe comments by the press are sometimes inevitable in cases concerning public interest (*Viorel Burzo v Romania*, § 160¹⁰; *Akay v Turkey* (dec.))¹¹. A virulent press campaign can, however, adversely affect the fairness of a trial by influencing public opinion and,

⁴ 22/2002/1 *Il-Pulizija vs Arrigo Dr Noel LL.D. et*, Civil Court (First Hall) (Constitutional Jurisdiction) 29 October 2003.

⁵ *Butkevicius v Lithuania* App no 48297/99 (ECtHR, 26 March 2002).

⁶ *Il-Pulizija vs Arrigo* (n 4).

⁷ *Butkevicius v Lithuania* (n 5).

⁸ *Dr Lawrence Pullicino vs Onor Prim Ministru u L-Avukat Ġenerali Tar-Repubblika*, Constitutional Court (18 August 1998) *Kollezz.* Vol. LXXXIII.158.

⁹ *Il-Pulizija vs Arrigo* (n 4).

¹⁰ *Viorel Burzo v Romania* App no 75109/01, 12639/02 (ECtHR, 30 June 2009).

¹¹ *Akay v Turkey* App no 58539/00 (ECtHR (dec.), 24 October 2006).

consequently, jurors called upon to decide the guilt of an accused (*Kuzmin v Russia*, § 62)¹². In *Craxi v Italy*¹³ the Court stated that in certain cases a virulent press campaign can adversely affect the fairness of a trial by influencing public opinion and consequently the jurors called upon to decide the guilt of an accused. It was in this case that the Court ruled that when trials are decided by professional judges rather than a jury, there is less likelihood of a breach of Article 6. What is decisive is not the subjective apprehensions of the suspect concerning the absence of prejudice required of the trial courts, however understandable, but whether, in the particular circumstances of the case, his fears can be held to be objectively justified (*Wloch v Poland* (dec.)¹⁴; *Daktaras v Lithuania* (dec.)¹⁵; *Priebke v Italy* (dec.)¹⁶; *Mustafa (Abu Hamza) v the United Kingdom*¹⁷(dec.), §§ 37-40, concerning the effect of press coverage on the impartiality of the trial court).

In the *Mustafa* case the Court said in most cases the trial process and the directions of a judge can cure problems related to adverse publicity; and that a national court is better placed to decide if it is unfair. The court emphasised how experienced the UK was at addressing issues of jury prejudice:

In England and Wales, the courts enjoy wide powers to prevent adverse media reporting during trial and can, if necessary, stay proceedings on grounds of an abuse of process. As was noted in Montgomery, this approach reflects not only the experience of the United Kingdom courts, but that of criminal justice systems throughout the common law world. In the Court's view, that experience should be respected.

National courts which are entirely composed of professional judges generally possess, unlike members of a jury, appropriate experience and training enabling them to resist any outside influence (*Craxi v Italy* (no. 1), § 104¹⁸; *Mircea v Romania*, § 75).¹⁹ The publication of photographs of suspects does not in itself breach the presumption of innocence (*Y.B. and Others v Turkey*, §47).²⁰ Broadcasting of the suspect's images on television may in certain circumstances raise an issue under Article 6 § 2 (*Rupa v Romania* (no. 1), § 232).²¹

Conclusion

Before one draws the line between what is permissible or not, one has to

¹² *Kuzmin and Others v Russia* App no 12100/05, 5744/07, 28425/07 (ECtHR, 14 June 2006).

¹³ *Craxi v Italy* App no 34896/97 (ECtHR, 05 December 2002).

¹⁴ *Wloch v Poland* App no 33475/08 (ECtHR, 10 May 2011).

¹⁵ *Daktaras v Lithuania* App no 43154/10 (ECtHR, 26 March 2019).

¹⁶ *Priebke v Italy* (ECtHR, 7 March 2002).

¹⁷ *Mustafa (Abu Hamza) v The United Kingdom* App no 4694/03 (ECtHR, 6 April 2010).

¹⁸ *Craxi v Italy* (n 13).

¹⁹ *Mircea v Romania* App no 17274/13 (ECtHR, 03 March 2020).

²⁰ *Y.B and Others v Turkey* App no 48173/99, 48319/99 (ECtHR, 28 October 2010).

²¹ *Rupa v Romania* App no 58478/00 (ECtHR, 16 December 2008).

adopt these criteria. (a) The absolute prohibition of any publicity is not acceptable in a democratic society. The freedom of the press is a corner stone of any democracy and should be restricted only for the most serious reasons. (b) Certainly everything depends on the circumstances of the case; a trial by a judge alone is different from a trial by jury. Perhaps in certain cases the publicity is so adverse that not even a warning by the presiding judge to the jurors is enough. (c) Even where the adverse publicity affects the trial, the remedy should be postponement of the trial to a time or place where such publicity would be less, rather than an annulment of the proceedings. (d) The issue of adverse publicity has to be raised at the start of the trial; if one awaits the outcome of the trial and then when a judgment is *res iudicata*, raises the constitutional issue, this can be rejected owing to lack of exhaustion of ordinary remedies (see *Vincent Spiteri*).²² The matter, however can be raised on appeal from a judgment of the Court of first instance, and the court can squash the judgment and order a new trial in case of trials by jury.

²² *Vincent Spiteri vs Onorevoli Prim Ministru et*, Constitutional Court 31 August 1977.

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